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NEGOTIATING WITH THE EUROPEAN UNION – A U.S. PERSPECTIVE

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Introduction

The United States and the European Union conduct relations pursuant to an extensive network of international agreements, more than 35 in all (U.S. Department of State 2020, pp. 140–141). Many address trade and other commercial issues, as befits the EU's origins as an economic entity. The United States maintains as many international agreements with the EU and its components as it does with many sizeable EU member states. Indeed, the Washington-Brussels legal relationship is arguably of greater weight, since in areas like trade the EU acts exclusively for its member states.

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A significant number of the more recent agreements relate to transatlantic dimensions of newer, shared competences acquired by Brussels, notably justice and home affairs. Over the past two decades, accords with Washington have been concluded on extradition, police and judicial cooperation, and transfers of personal data relating to airline passengers and to financial transactions.[1] High-profile negotiating failures like the planned Transatlantic Trade and Investment Partnership have sometimes overshadowed these practical achievements in the Justice and Home Affairs realm, however.

EU officials who have negotiated these agreements can attest that the United States is no easy international partner. It is often rigid, wedded to negotiating texts developed in Washington, and loath to make changes that might require legislative action by the U.S. Congress. An EU veteran once confessed to me that the Commission had resorted to organizing simulated negotiating sessions in order to train its officials on how to deal with the recalcitrant Americans.

The converse, of course, is also true. For the U.S. government, negotiating with Brussels poses unique legal and political challenges. Washington is not so systematic, however, in training its negotiators in the mysteries of Brussels in which they regularly become tangled. This chapter therefore is intended as a brief guide to the numerous

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ways in which the EU is no ordinary international partner for the United States (or, for that matter, other third countries). It does so by tracing lessons learned – rewards, pitfalls, and surprises – through a series of transatlantic JHA negotiations.

Three sets of issues illustrate the uniqueness of the European Union as a negotiating partner for third countries such as the United States. One is the identification of the European negotiator when the subject-matter implicates both Union and member state competences. In addition, even when it is clear that competence lies with Brussels, there have been occasions – at least before the advent of the Lisbon Treaty –when questions have arisen about which EU institution properly served as negotiating agent. Finally, a foreign country must be cognizant of the activist roles of the European Parliament and the Court of Justice in evaluating EU international agreements.

These topics often are entangled with the EU's doctrine of "mixity." "Mixity is a hallmark of the EU's external relations," a leading scholar has observed (Eeckhout 2011, p. 212). The EU pursues mixed agreements – those to which member states as well as the Union become party – not only where the EU treaties so require but "also where the substance of the agreement falls partly within the competence of the Union and partly within the competence of the Member States" (Chalmers et al. 2010, p. 648). As a result, "conclusion of the agreement therefore requires joint action by the EU and its Member States, the latter complementing, as it were, the otherwise insufficient power of the EU" (Eeckhout 2011, p. 213). As a U.S. observer has explained, "mixity allows the reassembling of divided sovereignty" (Olson 2011, p. 333).

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The EU pursues mixed agreements for a variety of reasons. Including member states as parties enables them to remain visible actors internationally, thus avoiding tension between the Council and Commission. Substantively, resort to a mixed agreement avoids the complex task of exactly delimiting the scope of EU and member states' powers. Mixed agreements have the further advantage that they reflect unanimity among members, since they must be approved domestically in each member state (Eeckhout 2011, p. 221).

Whatever their virtues from an EU perspective, the reality of mixed agreements is often quite different for third countries. From the perspective of the U.S. government, "mixity is experienced … as a seemingly endless series of practical problems" (Olson 2011, p. 331). The United States first confronted mixity in multilateral negotiations, but, more recently, JHA agreements have amply illustrated the challenges.

Who negotiates – EU or member states?

A basic question asked by a third country is who sits on the other side of the negotiating table. The United States traditionally concluded law enforcement and security agreements with individual European countries, but over the past two decades, it has begun to regard the European Union instead as the preferred negotiating partner. The first major – though not complete – step in that direction came with the 2003 Extradition and Mutual Legal Assistance Agreements.

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Agreements with the EU on transfers of personal data relating to airline passengers and to financial transactions soon followed. The United States does not necessarily see the EU as its exclusive treaty partner in the JHA area, however. It chose to conclude agreements on Preventing and Combating Serious Crime with member states, despite the existence of an EU negotiating mandate, and it may consider a similar stance for projected agreements on access to electronic evidence in criminal matters.

EU-US extradition and mutual legal assistance agreements

Before the September 11, 2001, attacks on the United States, the U.S. government had never considered the European Union an important partner for law enforcement and security matters. In the immediate aftermath, however, that perception changed radically – and was reciprocated in Brussels.

Following the attacks, Congress enacted the PATRIOT Act,[2] granting the Executive widespread new powers in the intelligence and security realms. Officials from the U.S. Department of Justice and the Council Secretariat began to consider whether transatlantic cooperation against terrorism could be expanded beyond traditional bilateral law enforcement channels to include the European Union as well.[3]

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Council representatives first suggested negotiating an agreement with the United States on counter-terrorism cooperation, but discussions later evolved towards consideration of possible extradition and mutual legal assistance agreements. In Washington, there was initial skepticism. The EU had no investigators or prosecutors, and little operative criminal justice responsibility, so what would be the point of the United States entering into formal legal assistance relationships with the Union itself? The United States already had mutual legal assistance treaties (MLATs) with the major EU member states where evidence needed for criminal matters tended to be located, as well as a comprehensive network of bilateral extradition treaties.

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The United States, however, soon realized potential benefits in regulating transatlantic judicial assistance matters with the European Union. It recognized that "by concluding agreements with the European Union, the United States could achieve uniform improvements and expansions in coverage across much of Europe,"[4] not only under existing bilateral MLATs but also by creating legal assistance relationships with newer members with which it had no existing relations.[5]

The agreements had novel dimensions under EU and U.S. external relations law, as well as international law. The EU chose to base the extradition and mutual legal assistance agreements on the authority of Articles 24 and 38 of the Treaty on European Union, which empowered the Presidency to negotiate "third pillar" (i.e., justice and home affairs) international agreements with binding effect on the Union and all member states, pursuant to mandates granted by the Council of the European Union. Indeed, the resulting agreements, completed in 2003, constituted the EU's first use of Articles 24 and 38 legal authority.

For the United States, these negotiations were an even deeper venture into legal *terra incognita*. Never previously had it concluded a law enforcement agreement with

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the European Union as an entity.[6] The overwhelming majority of previous U.S. agreements with European institutions had been with the Community or the Commission, even in the law enforcement area.[7] Nor did the European Union at the time enjoy international legal personality, a defect that would not be remedied until the advent of the Treaty of Lisbon.[8] However, Council lawyers identified several international agreements that the Union had concluded with the successor states of ex-Yugoslavia in the late 1990s as evidence of its already-extant "effective" legal personality. Ultimately, State Department treaty lawyers accepted this argument, and concluded that the Union was an appropriate actor under international law.

There was also, for the United States, the delicate question of assuring itself that the European Union in fact enjoyed substantive external competence to conclude these agreements. At that time, the EU lacked an express competence for this purpose. Ultimately, the United States accepted the Council's view that it could act on the basis of the doctrine of implied external competence resulting from the Court of Justice's landmark 1970 *ERTA* judgment.[9]

At the same time, U.S. negotiators insisted that since the effect of the new EU-US agreements on mutual legal assistance and extradition would be to make changes in existing treaties that the United States maintained not with the European Union itself but rather with individual EU member states, each member state should provide its sovereign consent to those changes.[10] EU negotiators contended that member state approval of the EU-level agreement would suffice to manifest for this purpose, but the United States was not content to rely on the effect of internal EU law. Consequently, it was agreed that each member state would conclude separate bilateral instruments with the United States acknowledging the manner in which the new EU-level extradition and mutual legal assistance obligations would apply to their existing bilateral treaties.[11] The bilateral instruments, while time-consuming to negotiate,[12] have had the practical advantage of being easier for U.S. judges to interpret in often-contentious extradition and mutual assistance proceedings.

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The U.S.-EU Extradition and Mutual Legal Assistance Agreements thus represented a hybrid approach. The United States accepted the value of the EU as a treaty partner in the JHA area. As the U.S. president explained to the Senate, "the U.S.-EU Agreements will enable the strengthening of an emerging institutional relationship on law enforcement matters between the United States and the European Union, during a period when the EU is actively harmonizing national criminal law procedures and methods of international cooperation."[13] Yet the United States also sought additional certainty for international law and domestic criminal law purposes by insisting on maintaining direct extradition and mutual legal assistance relationships with individual member states.

The EU-US extradition agreement[14] contained several significant substantive innovations. It replaced outdated exhaustive lists of extraditable offenses with a dual criminality approach that covers significant newer offenses such as those relating to terrorism, cybercrime, money-laundering, and sexual exploitation.[15] The United States secured a provision establishing that a U.S. extradition request to an EU member state would not be disadvantaged in relation to a further request for the

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same individual received from another member state pursuant to the European Arrest Warrant.[16] A corresponding achievement, from the EU perspective, was allowing a member state to decline to extradite to the United States a person facing a criminal charge for which the death penalty could be imposed.[17] Previously, such a provision was not universal in member state extradition treaties with the United States. Questions about the comprehensiveness of this provision have been noted by a leading European scholar, however (Mitsilegas 2003, p. 526).

The EU-US mutual legal assistance agreement[18] also had practical law enforcement value. It enabled criminal investigators and prosecutors better to obtain information on criminal bank accounts located in the territory of the other party.[19] It also facilitated the use of video transmission technology, so that a prosecutor could remotely take the statement of a witness or expert located in the territory of the other party and have the testimony admitted in the prosecutor's home state courts. Remote video depositions became especially important during the COVID-19 pandemic.

Preventing and combating serious crime agreements

The United States has chosen not to negotiate with the European Union in law enforcement-related contexts where member states retain principal authority, however. A prime example is police information-sharing, governed instead by a network of bilateral Agreements Enhancing Cooperation in Preventing and Combating Serious Crime (PCSC Agreements).

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Under U.S. law,[20] foreign countries whose residents enjoy visa-free travel to the United States must execute a PCSC agreement. The agreement allows U.S. border agencies to query the other country's biometric fingerprint database in respect of an individual seeking to enter the United States. If a match is found, additional information on persons suspected of involvement in terrorist or other serious criminal offenses may be conveyed, resulting in the person's exclusion or arrest at the U.S. border.

When the United States in 2008 began its PCSC negotiating initiative, EU member states including Germany asked the Council of the European Union to issue a negotiating directive authorizing the Commission to pursue such an agreement with the United States (Brand 2007). The U.S. Department of Homeland Security, the lead agency, was reluctant to engage with the EU on this subject, however, since authority over visa issuance and the relevant fingerprint databases rested with member states, not Brussels. DHS also believed that it could achieve a result closer to its model negotiating text if it pursued member states one by one. The Commission objected strenuously to U.S. approaches to individual member states on a subject it wished to negotiate collectively with the United States.

The United States nevertheless persevered, stressing to member states that their status as Visa Waiver Program beneficiaries could be endangered absent a bilateral agreement. In November, 2008, the conservative Czech government of President Vaclav Klaus was the first to break ranks with EU brethren and sign a PCSC agreement with the United States.[21] In the years since, the other EU member states that are part of the Visa Waiver Program also have done so.

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CLOUD Act agreements

Mutual legal assistance treaties enable prosecutors to make requests to foreign governments for information located in their territory that is needed for a domestic criminal proceeding; a foreign central authority and its courts are responsible for obtaining and transferring the requested information. This system respects foreign judicial sovereignty, but it was devised at a time when requests for foreign-located evidence were relatively rare. Today, however, communications relevant to the most local of criminal prosecutions are often stored by a cloud service provider in another country (Christakis et al. 2018). The volume of MLAT requests, correspondingly, has expanded exponentially. A 2018 report by the European Commission found that "more than half of all investigations involve a cross-border request to access [electronic] evidence" (European Commission 2018). Long delays in fulfilling requests have been the result, to prosecutors' great frustration.

In 2018, the United States became the first government to respond systematically to the problem, enacting the Clarifying Lawful Overseas Use of Data Act (CLOUD Act).[22] One provision authorizes the U.S. executive branch to conclude agreements with "foreign governments" that would enable prosecutors to obtain foreign-located electronic data, in cases involving serious crimes, directly from cloud service providers without outgoing requests first being subject to individualized government review.[23] Absent such an agreement, the Electronic Communications Privacy Act (ECPA) prohibits U.S.-based companies from disclosing communications content directly to a foreign government.[24]

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The U.S. government thus far has concluded two CLOUD Act agreements, with the UK[25] and Australia.[26] Additionally, in September 2019, the United States announced that it would pursue such an agreement with the European Union, noting that the Council of the European Union had adopted a negotiating mandate authorizing the negotiations.[27]

U.S. negotiations with the EU soon stalled, however, over a variety of issues. One difficulty reportedly is the Commission's insistence that the United States renounce the possibility of resorting to unilateral criminal process in deference to CLOUD Act-based requests (Christakis and Propp 2020). A second problem is that the EU, unlike the United States, has yet to adopt a law like the CLOUD Act regulating foreign access to electronic evidence.[28] Commission negotiators reportedly are unwilling to continue negotiations with the United States until the EU's own legislation on e-evidence is completed. Some U.S. officials even privately question whether the EU satisfied the "foreign government" criterion in the CLOUD Act, notwithstanding the formal Department of Justice announcement committing to work with the EU.

If U.S.-EU negotiations remain stalled, the United States eventually may be tempted instead to pursue CLOUD Act agreements with individual EU member states, as it did previously with PCSC Agreements. The EU doubtless would strongly resist such a U.S. effort to circumvent its competence for data protection matters. The current standstill over electronic evidence thus illustrates that the United States, at least in the law enforcement and security area, still approaches certain decisions on its European negotiating partner as tactical and pragmatic ones.

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Who negotiates for the EU – commission or council?

In an ordinary international negotiation, the United States finds itself across the table from the foreign government's executive branch officials. In seeking an agreement with the European Union, however, the question of who occupies the opposing chair is not necessarily simple to answer, since the executive power is dispersed among Brussels institutions. Even where the Commission presents itself as the counterpart, however, there may be legal uncertainty about this role – as the United States learned to its surprise and consternation in the case of the 2004 Passenger Name Record (PNR) agreement. The Lisbon Treaty, however, has served to clarify the question. Under Article 218 of the Treaty on the Functioning of the European Union (TFEU), the Commission typically acts as negotiator for the EU, subject to negotiating mandates developed in the Council of Ministers with input from the European Parliament.

Passenger name record agreement

The impetus for the first U.S. PNR agreement with the European Union was the September 11, 2001, terrorist attacks in the United States. One provision of the PATRIOT Act requires airlines systematically to collect passenger name record (PNR) data on all international flights to and from the United States, and to provide the data to the U.S Department of Homeland Security.[29]

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PNR consists of the data an individual provides to an airline electronic reservation system, including address, telephone, and credit card numbers, as well as potentially sensitive information such as meal preferences or special needs. DHS reviews this data before departure of an international flight to assess whether anyone on board might be involved in terrorist or other criminal activity, and in that case to deny them permission to travel or arrange for detention upon arrival.

Airlines flying from Europe to the United States welcomed this additional U.S. security measure but also realized that complying with it could put them in violation of European data protection law. Civil libertarians objected that the U.S. programme required transfer of data on large numbers of innocent travelers, with the goal of finding a few previously unidentified criminals. Airlines therefore urgently petitioned the Brussels to address this potential conflict of laws with the United States.

Negotiating an international accord reconciling the security benefits of PNR transfer to the United States with privacy protections meeting EU standards proved complex. Beginning in 2002, the European Commission, acting pursuant to Council authorization, took up the task. In 2004, a deal was struck: the United States issued a set of unilateral undertakings to accord specific protections to transferred EU-origin PNR,[30] and, in return, the Commission, utilizing its implementing powers, issued a decision under Article 25(6) of Directive 95/46[31] finding these protections "adequate" for European data protection purposes. The Commission then submitted both documents to the European Parliament. The Parliament, however, expressed doubts that the agreement fulfilled fundamental rights requirements and, in April 2004, sought the opinion of the Court of Justice.

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Two years later, in May 2006, the CJEU issued its opinion.[32] The Court never reached the merits of the Parliament's application, however. Instead, it focused on the choice of Article 95 of the then-operative Treaty Establishing the European Community[33] as the legal basis for the Commission's adequacy finding pursuant to Directive 95/46. The Commission contended that reliance on this legal basis was appropriate since PNR data was collected by airlines for commercial purposes and utilized within the scope of the internal market. The Court disagreed. It noted that "Article 3(2) excludes from the Directive's scope the processing of personal data … concerning public security, defence, State security and the activities of the State in areas of criminal law."[34] The purpose of the agreement with the United States is "to make lawful processing of personal data that is required by United States legislation"[35] relating to counterterrorism. As a result, the Commission had acted *ultra vires* in negotiating with the United States, and the Court accordingly annulled the Agreement.

The European Commission was duly embarrassed by having misjudged the legal basis under the TEC. The U.S. government was surprised and dismayed to discover that its erstwhile negotiating partner in Brussels in fact lacked competence for that task. The Parliament, for its part, was disappointed that the Court of Justice had failed to issue a ringing declaration of fundamental rights. The result was unsatisfactory to all – except perhaps the Council of the European Union. Early in 2007, it authorized the Council Presidency – not the Commission – to open new negotiations with the United States, relying on member states' national competences for security and law enforcement. A successor agreement – largely similar in content – was hastily concluded later that year.[36]

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Approval issues

The advent of the Lisbon Treaty in 2009 expanded the European Parliament's powers in relation to EU international agreements. Under Article 218(6) TFEU, the Council now may conclude many types of international agreements only after obtaining the consent of the Parliament. The Parliament has wielded this power effectively to influence the content and progress of EU data transfer agreements with the United States. The Court of Justice also may play a significant role in the ultimate validation of EU international agreements, through its power to issue opinions, at the request of an EU institution or member state, on compatibility with EU law.[37]

Role of the European Parliament

The Court's rejection of the Commission's chosen legal basis for the 2004 EU-US PNR Agreement, discussed earlier, was one early manifestation of this institutional interplay experienced by the United States. The successor 2007 PNR agreement never entered into force definitively, as the Parliament continued to object to the sufficiency of its data protection provisions. The EU applied it provisionally for several years, but eventually persuaded the United States that it required revision.

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A durable PNR agreement with the United States was concluded only in 2012. The Parliament consented to it, and the agreement continues in force a decade later.[38]

Parliament's earliest – and perhaps most dramatic – exercise of its power to withhold consent to an international agreement involved another data transfer agreement with the United States, the Terrorist Finance Tracking Program (TFTP) Agreement. TFTP, conducted by the Department of Treasury, analyses the global flow of banking transactions believed to be connected to the financing of terrorism. It relies on data collected by the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a Belgium-based company that enjoys a near-monopoly on messaging services for international financial transactions.

Late in 2009, the Council reached an agreement with the United States permitting transfer of SWIFT data located within the EU to the U.S. Treasury for counter-terrorism analysis purposes, in return for U.S. commitments to afford a set of privacy protections modelled on EU law. A Council attempt hurriedly to adopt the agreement in the final days before the Treaty of Lisbon took effect met with disaster, however, when several member state parliaments balked at ratification. The Parliament perceived an end-run around its incipient consent power. Consequently, early in 2010, the European Parliament formally refused consent to the EU-US TFTP agreement, in a defiant first exercise of its new power under Article 218 TFEU. Later that year, the Commission and the United States concluded an adjusted second agreement.[39]

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The EU assumed an unusual dual role in implementing the TFTP agreement. Each Treasury request to SWIFT for data is first reviewed by Europol to verify that it properly falls within the counter-terrorism scope of the agreement.[40] In addition, the EU as party to the agreement undertook to "ensure" that SWIFT complies with Treasury requests, lending its sovereign weight to compliance by a private company.[41] Treasury in turn agreed to put its analytical capabilities at the disposal of European law enforcement agencies seeking analysis of data that had been transferred to the United States, and to cooperate with any future TFTP of its own that the EU might devise.[42] Despite these additions to the failed 2009 agreement, the 2010 TFTP Agreement proved controversial in the European Parliament, and received consent only by a narrow margin.

Since then, the agreement has proved its worth for both sides. Indeed, more than 40% of the database searches performed by Treasury during the last three-year period examined by the Council were on behalf of EU member states or Europol. The EU and its members accounted for nearly 75% of all TFTP leads disseminated to foreign governments. In effect, then, TFTP, in addition to benefitting U.S. counter-terrorism analytical efforts, "resembles an outsourcing arrangement, with the US Treasury Department effectively serving as an offshore service provider for the EU and European governments," as Adam Klein, the former chairman of the U.S. Privacy and Civil Liberties Oversight Board, has observed (2020).

The European Parliament's power to give or withhold consent to a broad swathe of EU international agreements contrasts markedly with the more limited counterpart role played by the U.S. legislature for U.S. international agreements. The U.S. Constitution grants to the president the "Power, by and with the Advice and

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Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[43] The United States chose to conclude the Extradition and Mutual Legal Assistance Agreements with the EU as treaties, because they served to modify corresponding treaties that the United States maintained with member states.

Today, however, most U.S. international agreements are not denominated as treaties subject to Senate advice and consent. Instead, the vast majority – more than 90% – are categorized by the U.S. Department of State as executive agreements rather than treaties (2013, p. 544). The president concludes executive agreements on the basis of his own, constitutionally assigned powers. Congress is not formally consulted, although in practice the executive branch consults with it informally, as it did in the cases of the PNR, TFTP, and "umbrella" law enforcement data protection agreements.[44] In most cases, therefore, U.S. executive branch negotiators enjoy greater discretion than their EU counterparts, who are aware that every choice they make could become a reason for the European Parliament subsequently to refuse consent.

Role of the Court of Justice of the European Union

We have already seen, in the case of the 2004 EU-US PNR agreement, how the European Parliament invoked its power under TFEU 218(11) to obtain the opinion of the CJEU on the agreement's conformity to EU fundamental rights law. Although the Parliament did not seek the CJEU's view before approving the 2011 PNR Agreement with the United States, in 2015, it did challenge a similar agreement that the Commission had struck with Canada. Two years later, the court ruled that portions of the draft Canada agreement were incompatible[45] with EU fundamental rights law.

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The Commission recently conceded that the U.S.-EU PNR Agreement is "not fully in line" with the court ruling in the Canada PNR case (European Commission 2021). Topics addressed in the U.S.-EU agreement and cited by the Commission as problematic include "the retention of PNR data, the processing of sensitive data, notification to passengers, prior independent review of the use of PNR data, rules for domestic sharing and onward transfers, [and] independency of oversight" (European Commission 2021). The Commission has yet to ask the United States to renegotiate the 2011 PNR Agreement, which continues in force. Instead, it decided first to renegotiate its draft PNR agreement with Canada along the lines required by the CJEU – a process that is still ongoing – before essaying a new one with the United States. Nonetheless, the 2011 U.S.-EU PNR agreement eventually will have to be renegotiated, an indirect casualty of the CJEU *Canada PNR* opinion.

The CJEU's not infrequent scrutiny of EU international agreements contrasts with the rarity of U.S. Supreme Court review for U.S. ones. There is a long tradition in the United States of judicial deference to executive action in the foreign affairs area, best expressed in the "political question" doctrine. When presented with a case raising a foreign affairs issue, the U.S. Supreme Court, relying on longstanding precedent, first asks whether the U.S. Constitution commits the issue to executive decision and whether prudential considerations counsel against judicial intervention.[46] The result is almost always judicial abstention.

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The CJEU, on the other hand, must issue opinions on draft EU international agreements when requested to do so. It has not hesitated to examine the details of a text and sometimes to demand substantial revisions. EU negotiators of JHA agreements thus must reckon with the likelihood of judicial scrutiny by the Luxembourg court.

Conclusion

Relations between the United States and the European Union on law enforcement and security matters have come to be grounded in a series of binding international agreements. U.S. negotiators remain frustrated by the obscurity of mixed competence, but they have persevered where the practical benefits of proceeding with Brussels are clear. The Extradition and Mutual Legal Assistance Agreements, for example, were the most efficient means to achieve uniform improvements in existing bilateral treaties and to establish new relations with smaller member states. Nonetheless, the U.S. government insisted on the reinforcing step of implementing those improvements bilaterally with member states. A lingering U.S. preference for bilateralism nevertheless sometimes comes to the fore. Washington chose to ignore an EU negotiating mandate for a PCSC Agreement, successfully inviting member states to defy Brussels, and conceivably could attempt the same in the e-evidence area.

The United States also has had to reckon regularly with the impact on negotiations that complex EU -inter-institutional relations can have. The Commission may present itself as the EU negotiating partner, only to be told by the Court of Justice that it has erred in its assertion of competence, as happened with the 2004 PNR Agreement. The Parliament has not hesitated to wield its consent power, forcing renegotiation of two data transfer agreements, the 2007 PNR Agreement, and the 2009 TFTP Agreement. The United States also has felt the effects of the Court of Justice's activism on the fundamental rights implications of JHA agreements. Washington may be an especially difficult partner for Brussels in reaching international agreements, but the EU also is no ordinary sovereign for the United States to face across the table.

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Notes

1 Agreement on Extradition between the European Union and the United States, O.J. L181, 19.07.2003, p. 27; Agreement on Mutual Legal Assistance between the European Union and the United States, O.J. L 181, 19.07.2003, p. 34; Agreement between the European Union and the United States of America on the use and transfer of passenger name records to the United States Department of Homeland Security, O.J. 2012 L 215, 11.08.2012 (hereinafter "2012 PNR Agreement"); Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the terrorist Finance Tracking Program, O.J. L 195, 27.07.2010, p. 5 (hereinafter "2010 TFTP Agreement").

2 USA Patriot Act, Public Law 107-56, 115 Stat. 272, 26 October 2001.

3 Message from the President of the United States transmitting the Mutual Legal Assistance Agreement with the European Union, Senate Treaty Doc. 109-13, letter of submittal, p. VI, 28 September 2006.

4 *Id.*, p. V.

5 *Id.*

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6 A US agreement with the European Police Office (Europol), a specialized EU law enforcement entity, was already in place. Agreement to Enhance Cooperation in Preventing, Detecting, Suppressing, and Investigating Serious Forms of International Crime, with Annex, TIAS 01-1207, 6 December 2001; Supplemental Agreement on the Exchange of Personal Data and Related Information, with Exchange of Letters, TIAS 01-1207, 20 December 2002.
7 See, *e.g.,* Agreement with the European Community on Customs Cooperation and Mutual Assistance in Customs Matters, 1997 O.J. L 222, 12.08.1997, p. 17.
8 This provision is now codified as Article 47 of the Treaty on European Union (TEU).
9 Case 22/70, *Commission* v. *Council (European Road Transport Agreement*), [1971] ECR 263.
10 Message from the President of the United States transmitting the Mutual Legal Assistance Agreement with the European Union, Senate Treaty Doc. 109-13, letter of submittal, p. VII, 28 September 2006.
11 Message from the President of the United States transmitting the Mutual Legal Assistance Agreement with the European Union, *supra*, p. II.
12 As a result of this decision, the United States eventually concluded 56 bilateral instruments with the (then-)28 EU member states, all of which had to be approved through national constitutional processes before the entire package, including the EU-US Agreements, could take effect in 2010.
13 Message from the President of the United States transmitting the Mutual Legal Assistance Agreement with the European Union, *supra*, p. II.
14 Agreement on Extradition between the European Union and the United States, *supra.*
15 *Id.*, Art. 4.
16 *Id.*, Art. 10.
17 *Id.*, Art. 13.
18 Agreement on Mutual Legal Assistance between the European Union and the United States, *supra.*
19 *Id.*, Art. 4.
20 Section 217, Immigration and Nationality Act, 8 U.S.C. 1187(c)(2)(F).
21 Agreement between the Government of the United States of America and the Government of the Czech Republic on Enhancing Cooperation in Preventing and Combating Serious Crime, TIAS 10-501, 12 November 2008.
22 The Clarifying Lawful Overseas Use of Data Act [hereinafter CLOUD Act], contained in Consolidated Appropriations Act, 2018, P.L. 115–141, div. V. Available from: https://www.crossborderdataforum.org/wp-content/uploads/2018/07/Cloud-Act-final-text.pdf [Accessed 30 April 2022], codified at 18 U.S.C. 2713 *et seq*.
23 18 U.S.C. 2523(b).
24 Section 104 of the CLOUD Act amends ECPA to permit such disclosures pursuant to a CLOUD Act agreement.
25 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime, October 3, 2019. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836969/CS_USA_6.2019_Agreement_between_the_United_Kingdom_and_the_USA_on_Access_to_Electronic_Data_for_the_Purpose_of_Countering_Serious_Crime.pdf [Accessed 30 April 2022].
26 Agreement between the Government of the United States of America and the Government of Australia on Access to Electronic Data for the Purpose of Countering Serious Crime, December 15, 2021. Available from: https://www.justice.gov/dag/cloud-act-agreement-between-governments-us-and-australia [Accessed 30 April 2022].
27 Joint US-EU Statement on Electronic Evidence Sharing Negotiations, September 26, 2019. Press Release. Available from: https://www.justice.gov/opa/pr/joint-us-eu-statement-electronic-evidence-sharing-negotiations [Accessed 30 April 2022]. The EU was acting pursuant to a Recommendation for a Council Decision proposed by the

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Commission on May 2, 2019. See Recommendation for a Council Decision authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters, COM (2019)70, final.
28 For a fuller discussion of the European law difficulties presented by CLOUD Act agreements, see Christakis 2019.
29 USA Patriot Act, *supra*. Implementing regulations are found at 19 Code of Federal Regulations § 122.49d.
30 Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs, 2004 O.J. L 183, 20.05.2004, p. 84 (no longer in force).
31 Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data, 1995 O.J. L 281, 24.10.1995, p. 31 (no longer in force).
32 Joined Cases C-317 & 318/04, *European Parliament v. Council and Commission*, EU:C:2006:346.
33 This provision now is Article 114 of the Treaty on the Functioning of the European Union.
34 Joined Cases C-317 & 318/04, *supra*, at I-4830.
35 *Id*.
36 Agreement between the European Union and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, 2007 O.J. L 2004, 26.07.2007, p. 18 (no longer in force).
37 Art. 218(11), Treaty on the Functioning of the European Union.
38 2012 PNR Agreement,*supra*.
39 2010 TFTP Agreement, *supra*.
40 *Id*., Art. 4.
41 *Id*., Art. 3.
42 *Id*., Arts. 10, 11. The European Commission developed options for a counterpart EU TFTP analysis but never introduced a legislative proposal.
43 Constitution of the United States, Article II, Section 2(2).
44 Agreement on the Protection of Personal Information Relating to the Prevention, Investigation, Detection and Prosecution of Criminal Offenses 2016 O.J. L 336, 12 October 2016, p. 3. Article 19 grants citizens of the other party the right to judicial review of government handling of their personal information. This provision required the United States Congress to amend the Privacy Act, which previously had extended such redress only to US citizens.
45 Opinion 1/15, *Draft Agreement between Canada and the European Union on Transfer of Passenger Name Record Data, Opinion of the Court (Grand Chamber),* EU:C:2017:592.
46 *See, e.g.*, *Goldwater v. Carter*, 444 U.S.996, 998 (1979).

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