

5 *International organization control under conditions of dual delegation: a transgovernmental politics approach*

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Domestic officials increasingly play a decisive role in international affairs. States routinely appoint oversight committees (for example, comitology, congressional supervision, or regulators groups) to monitor the behavior of international organizations (IOs) (Pollack 1997 and 2003). While such committees are frequently studied as mechanisms that track delegated authority, this chapter examines how and why the introduction of such actors may open up the possibility for new governors to emerge, altering the very terms of global governance.

Existing research tends to take two dominant views of these committees. From the principal–agent perspective, they serve as a “police patrol” that represents state interests. They report to national executives on excessive international organization activism, reining in such behavior. Research from the constructivist strain has argued, by contrast, that international cooperation socializes participants, undermining ties to national interests (Joerges and Neyer 1997; Wessels 1998). Over time, then, oversight committees come to reflect the preferences of international bureaucracies. Empirically, there is evidence to support both claims. In some cases, oversight committees have dutifully fulfilled their delegated role. But in others, they have become loyal defenders of their international organizations. Neither argument has developed a theoretical framework that satisfactorily explains variation in oversight outcomes.

Building on the insights of transgovernmental theory (Keohane and Nye 1974; Slaughter 2004), I argue that this variation can be understood by making two additional assumptions: states are not unitary actors but are composed of multiple sub-state units and these sub-state units have their own preferences distinct from national executives. International oversight, then, takes place in an environment of dual

delegation, whereby states have simultaneously delegated to international organizations and to sub-state actors. Using transgovernmental politics as an alternative starting point, I construct a deductive model that generates clear hypotheses as to when oversight bodies should act to rein in IO activism and when they should encourage it. Using delegated, expert, and principled authority, oversight bodies can carve out a place in potential coalitions with states, IOs, or other sub-state or nonstate actors. Rather than being an appendage of states or IOs, these transgovernmental actors can reinvent their governing role, becoming an important global governor. This chapter, then, highlights the agency of global governors. Significantly, governors may actively build authority-based coalitions that can increase their independence and influence.

In addition to explaining variation in international oversight effectiveness, the chapter builds on a long-dormant line of transgovernmental theory emphasizing the coalitional interaction of international organizations and sub-state actors. In their seminal work, Keohane and Nye (1974) speculated about such interactions, specifically the ability of transgovernmental actors to form alliances that could shape international organization politics. Recent work, however, has stressed the capacity of transgovernmental actors to work through policy coordination to conduct global governance. Acting through informal networks, sub-state actors have the ability to harmonize standards, share information, and cooperate on enforcement, creating a fast and flexible solution to cumbersome global governance problems (Slaughter 2000; Raustiala 2002). This chapter complements this work by focusing on transgovernmental coalitions – the political interdependencies, tensions, and synergies between transgovernmental networks and international organizations (Newman 2008b; Eberlein and Newman 2008; Alter 1998; Thurner *et al.* 2005).

More generally, it digs into complex issues of delegation that emerge in global governance and underscores the unexpected and unintended alliances that can form as multiple global governors interact. In contrast to principal–agent arguments, which follow a clear instrumental logic of implementation oversight, the transgovernmental perspective blurs the arbitrary distinctions between agenda setting, rulemaking, and implementation. At the same time, it underscores the importance of preexisting domestic institutional bargains for global governance, challenging a purely functionalist explanation for the dynamics of dual

delegation. These dynamics are then highly dependent on the varying levels of authority enjoyed by the web of international organizations and transgovernmental actors as they engage with the demands of national executives.

The chapter is organized around four sections. First, I present the control dilemma that states face as they delegate to international organizations. This section presents in more detail the oversight mechanisms that states deploy to rein in international organization activism. The second section builds the deductive model that explains variation in oversight committee outcomes. After presenting the logic behind the model, I offer a set of empirical expectations. The third section scrutinizes the argument in the case of data privacy in the European Union. Starting in 1997, the member states of the European Union agreed to create a cooperative body comprising national data privacy regulators to monitor supranational policymaking. The case offers a least likely case for a monitoring failure under the existing principal-agent perspective as data privacy is grounded in long-fought national civil liberties traditions. Additionally, because the group regularly publishes its revealed policy preferences, an empirical record exists to scrutinize the chapter's claim. The fourth and final section of the chapter examines the more general implications of the argument for questions of IO cooperation and transgovernmental politics.

International organization autonomy and state control

Since the end of World War II, states have turned to international organizations as a cornerstone of global governance. National governments have agreed to create centralized and independent bureaucracies working to resolve conflict and promote cooperation at the international level. Such delegation has accelerated in the past twenty years across a broad range of issue areas including financial regulation, security cooperation, and health and safety preparedness. Research on international cooperation has identified a range of justifications for such delegation including globalization, deregulation, new technology, and the end of the bipolar world order (Avant, Finnemore, and Sell, this volume). Despite the diversity of justifications, no one doubts the explosion of these global governance institutions.

The delegation of authority to international organizations by states poses an important control challenge (Nielson and Tierney 2003).

As international organizations evolve, the threat of bureaucratic drift emerges. That is to say, these organizations develop independent preferences from the governments that created them, and they assert these preferences in international debates. The ability of these institutions to achieve their goals is then a function of a number of factors, including the extent of delegated power, their rational-legal foundations, moral authority, and expertise (Barnett and Finnemore 2004). Confronted by international organizations endowed with a range of power resources, states may lose control of the agenda-setting process or the monitoring and oversight of international agreements.

Given the possibility that international organizations may deviate from their original mandate, scholars in the rational institutional tradition have focused on the design mechanisms available to states to minimize bureaucratic drift (Hawkins *et al.* 2006). Borrowing from principal-agent theory, research has demonstrated that when states (i.e., the principal) delegate authority to international organizations (i.e., the agent) they have an incentive to construct monitoring mechanisms to alert them if their agents go astray (Pollack 2002; Dogan 1997; Franchino 2000). The major dilemma facing most principals is that, while they want their agents to follow their original mandates, the cost of monitoring is quite high. Principals often lack the expertise necessary to identify bureaucratic drift, and direct oversight presents high costs in terms of time and resources.

According to instrumental theories, principals devise institutional mechanisms that reduce the cost of monitoring and rein in bureaucratic drift. One of the most common forms of this arm's-length oversight are "police patrols" (McCubbins and Schwartz 1987; Shipan 2004). Principals may appoint committees to oversee agent activities and then report back to a broader set of principals. These "police patrols" develop expertise in their particular monitoring area and reduce the burden of oversight. Nations often construct committees of national representatives to oversee the activities of international organizations, creating police patrols for this international setting.

While this literature has made an important contribution to our understanding of state control within the context of delegation to international organizations, considerable empirical evidence casts doubt on the argument. Within the context of European Union governance, where the most detailed studies on the topic have been conducted, empirical findings demonstrate that police patrol committees have

often failed to identify bureaucratic drift (Joerges and Neyer 1997). In fact, committees of national representatives have frequently sided with the European Commission, which is the ultimate example of an international agent. Some researchers suggest that this monitoring failure results from a socialization process, whereby the members of such oversight committees adapt their preferences through their interactions with international organizations (Wessels 1998; Egeberg 1999; Jachtenfuchs 2001). This explanation, however, is still unsatisfying as it cannot account for variation in oversight. The theory would expect that, given a similar level of interaction, representatives would uniformly move toward the preferences of the international agents over time. Additionally, empirical work has cast considerable doubt on the ability of the socialization hypothesis to explain this behavior (Hooghe 2005).

Dual delegation and transgovernmental politics

This chapter builds a model that addresses the outstanding empirical concerns by complicating the control relationship. In short, the model recognizes the fact that the monitoring mechanisms employed by states to check international bureaucratic discretion rely on the work of additional agents. While international relations literature has increasingly examined the role that multiple principals play in altering the dynamics of global governance (Nielson and Tierney 2003), it too has often assumed that oversight institutions share the preferences of state executives.

The model therefore makes two additional assumptions derived from the transgovernmental politics literature, which produce a set of testable expectations. First, states are not unitary actors. They comprise multiple sub-state actors including ministry bureaucrats, independent regulatory agencies, judges, and parliamentarians. While early international relations theories assumed away such complexity, changes in technology, organizational behavior, and levels of interdependence challenge the credibility of such a position. Large literatures on global governance and transgovernmental actors highlight the need to integrate sub-state actors into theories of international affairs (Milner 1998; Slaughter 2004; Risse-Kaplan 1995). Additionally, as states have moved from Keynesian demand management to arm's-length regulatory oversight, the number of sub-state officials has proliferated.

The institutional complement of the domestic regulatory state is a host of agencies, administrative bodies, and ombudsmen (Gilardi 2005).

Second, I assume that these sub-state actors develop independent preferences from their national principals. Extensive work from the fields of American and comparative politics has demonstrated that executive agencies (i.e., agents) forge preferences distinct from national parliaments (i.e., the principals) (Carpenter 2001; Goodman 1991; Wood 1988). No reason exists to assume such preference development would be less likely to occur in a policy space dominated by international concerns. In fact, there are a number of reasons why this preference differential should be accentuated in the foreign policy realm. As many of these agencies were created primarily with domestic concerns in mind, national executives often have fewer monitoring tools to examine the behavior of transgovernmental actors. The US federal government, for example, could not have predicted the extensive international activities of the Securities and Exchange Commission when it was founded in response to the Great Depression. Additionally, appointments to sub-state agencies often reflect left–right domestic cleavages, while transgovernmental activities typically reflect other political dimensions. At the same time, sub-state actors are independent and autonomous from international organizations and thus their preferences will not automatically converge. After working on transgovernmental politics, sub-state actors become potential coalition partners for international organizations but hold no strict loyalty to them (Trondal and Veggeland 2003; Alter 1998).

The model then raises two logical questions: what do sub-state units want and when can they assert themselves? Drawing on work from organizational theory that has been applied in both national and international contexts, I argue that these actors derive their preferences from their bureaucratic culture (Carpenter 2001; Barnett and Finnemore 2004). The organization’s mission, standard operating procedures, and professional staffing help shape the set of policy goals (both intentional and unintentional) that it pursues. The environment in which bureaucrats work affects what they want. Such bureaucratic culture is the product of ongoing institutional reproduction, which is typically quite resistant to change. It is important to note that these preferences do not necessarily reflect the goals of national executives at the time, as bureaucratic interests develop through long-term historical interactions (Skowronek 1982; Pierson 2004).

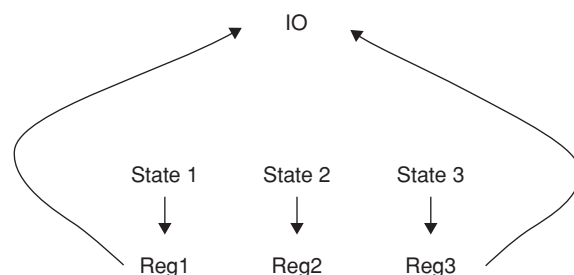


Figure 5.1 Dual delegation in global governance

Just because such actors have developed their own preferences does not mean that they will be able to assert them in international control debates. Sub-state actors have a number of potential power resources at their disposal, including expertise, authority delegated at the national level, and network ties to other regulators and constituents (Newman 2008a). In contrast to national executives, these sub-state units often have a far greater technical grasp of the activities being conducted by international organizations. They also have a variety of delegated authorities over national markets, ranging from public shaming to control over market access. Finally, they gain legitimacy through their interconnections with parallel sub-units from other countries and regulated groups. A statement by the securities and exchange commissioners of the world has far more legitimacy than one by those of Spain. Combined, these power resources transform transgovernmental actors into additional players in the control equation. As with the case of preferences development, the availability of such resources is frequently historically determined by the state-building process and is adjustable to momentary circumstances (Pierson 2004). The expertise-based or delegated authority of an institution is largely determined by its institutional design and previous day-to-day operations. Variation in these authority resources, then, conditions its ability to play an independent role.

State oversight of international organizations occurs within the context of dual delegation. States simultaneously cede authority to institutions above and below the nation-state, each of which has unique preferences and resources to achieve its goals. The monitoring of international agents is conducted not by the principal but by committees comprising subnational agents (see Figure 5.1).

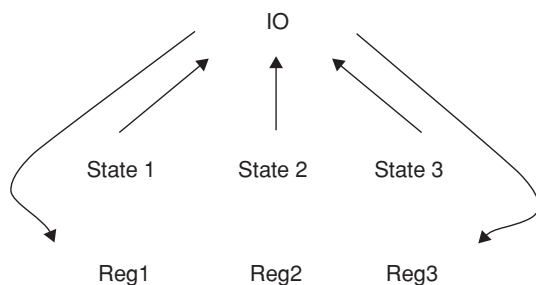


Figure 5.2 Daisy-chain delegation in global governance

Further complicating actor allegiances, sub-state actors (e.g., Reg1, Reg2, Reg3 in the figures) who monitor international organizations often implement policy for international organizations. In this daisy-chain of delegation, states not only delegate up to international organizations and down to sub-state officials but international organizations then delegate again to sub-state officials. This form of daisy-chain delegation is depicted in Figure 5.2.

Integrating these assumptions into existing models of international organization control, I shift the focus of the debate from institutional monitoring mechanisms to the preferences and capacities of the monitoring agent. The relative preference alignment between the international organization (IO), the national executive (NE), and the monitoring agent (MA) will influence the degree of autonomy enjoyed by the international organization. To simplify the model, I assume only one monitoring agent with the resources to assert its interests and a unidimensional preference array.¹

I then construct a set of three preference arrays. I intentionally chose three extreme possibilities to accentuate the implications of the model's assumptions. The first case exists when the monitoring agent's preferences are identical to those of the national executive. This is also identical to the status quo assumption made by those who employ rational institutional theory to understand control in the international setting. Here, the monitoring agent will serve as a police patrol,

¹ Both of these conditions will be problematized in future work. The goal of this chapter, however, is to amend current theory first before moving too stridently into untested theoretical ground.

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Figure 5.3 Preference array for police patrol



Figure 5.4 Preference array for IO ally



Figure 5.5 Preference array for tattle tale

warning national executives of excessive bureaucratic drift by international organizations.

In a second case, the monitoring agent's preferences fall nearer to those of the international organization than to those of the national executive. Monitoring agents will have a weak incentive to report on international organizations and may even report the activity of national executives to international organizations. In short, the information stream may be reversed by monitoring agencies, creating a blowback for national principals. In such cases, the sub-state actor serves to facilitate international organization autonomy. In an important difference from socialization models, the monitoring agent may share a policy preference with an IO for different underlying reasons.

Finally, in a third set of cases, the preferences of national executives and international organizations may align while monitoring agencies may have divergent preferences. In these cases, the monitoring agency serves as a "tattle tale," alerting third parties, the news media, and other political organizations to the activities of the national executive

and the international organization. As a result, international organizations and national executives become constrained by the behavior of sub-state actors.

The transgovernmental approach offers expectations that explain variation in monitoring outcomes. In addition to the two primary outcomes identified in existing literature (police patrol and international organization ally), the model predicts a third outcome, tattle tale. The amended model then provides an explanation for considerable descriptive work that has identified links between sub-state actors and third parties such as nongovernmental organizations, multinational corporations, and other international organizations.

In the following section, I use two analytic narratives to demonstrate the importance of integrating the dual delegation assumptions into explanations of international organization control. In each, I take the police patrol hypothesis as the null and then test it against the expectations generated in the transgovernmental politics model. The narratives scrutinize the competing hypotheses within two politically charged policy decisions involving the regulation of data privacy by the European Union. I chose the European Union as the site for the exploration as it has been used in a number of leading studies examining the issue in question. I therefore hold constant, with previous studies, many institutional and environmental factors that affect questions of international organizational control. The chapter focuses on the area of data privacy as it offers the empirical evidence necessary to test the derived expectations. Many committees in the European Union are quite opaque. While national voting patterns are often discernible, few records indicate the actual participants and their institutional affiliation. In the case of data privacy, the Article 29 Working Party is composed of national regulatory agencies with considerable independence from their national executives. Additionally, the regulation of data privacy creates shifting and cross-cutting cleavages in the multilevel governance setting. There is no clear “national” vs “supranational” position or clear left–right partisanship. The narratives allow for considerable variation in the preferences of the actors involved, permitting an evaluation of the dual delegation hypotheses. The narrative begins by presenting a brief introduction to the field of data privacy regulation in the European Union, which is then followed by an examination of specific committee oversight over telecommunications data retention and airline passenger data records.

Shifting institutional alliances in the field of data privacy

Background and institutional map

Before analyzing the politics of control, it is important to introduce the policy domain of data privacy. The regulation of the collection and use of personal information started in the 1970s, when national governments first implemented computer technology. To prevent the abuse of new databanks, legislatures in many European countries passed rules that require public and private organizations to follow a basic set of fair information practice principles concerning personal data (Bennett 1992; Hondius 1975). These data privacy laws created new regulatory institutions – data privacy authorities – that monitor the implementation and enforcement of such legislation. Data privacy authorities are independent agencies that enjoy considerable autonomy from their national executives. While the exact institutional designs differ, they often have separate budgets, extended leadership tenure, and discretion over personnel. Data privacy authorities conduct a diverse set of functions: they receive and investigate citizen complaints, advise the government and parliament on emerging data privacy issues, and regulate the cross-border exchange of personal data (Flaherty 1989).

In 1995, the European Union adopted a data privacy directive, which elevated the issue of data privacy to the supranational level. Divergent rules across the member states had created serious frictions. Prior to the adoption of the directive, a third of the member states had no privacy regulations in place. Data privacy authorities from high-regulatory countries began to block the transmission to other member states, threatening the emerging internal market (Newman 2008a). The directive harmonized rules across the member states and created an extraterritorial provision, which bans the transfer of personal data from Europe to countries that fail to maintain “adequate” privacy regulations (Farrell 2003).

Institutionally, the 1995 directive created two oversight committees that monitor the implementation and enforcement of the directive. The Article 31 Committee comprises national member-state government representatives and oversees the Commission’s implementation of the directive. Reflecting daisy-chain delegation, most of the directive is implemented at the national level by domestic data protection supervisors and therefore the Article 31 Committee has a rather

limited mandate. It is most active in international negotiations between the Commission and other countries.

The second committee, and the focus of this investigation, is the Article 29 Working Party. The Working Party comprises representatives from national data privacy authorities. It has a secretariat that is funded by the European Commission and is located in Brussels. The Working Party has a broad mandate to advise the Commission on emerging data privacy concerns facing the EU, make recommendations regarding the implementation and enforcement of the directive, and evaluate the adequacy of levels of protection in countries outside the EU (Newman 2008b). The Working Party regularly releases opinions and recommendations that make its preferences on European data privacy policy quite transparent.

From a principal-agent perspective, the Article 29 Working Party contains those national representatives with the proper expertise to advise the Commission and monitor its behavior. This perspective assumes that the Article 29 Working Party would serve as a police patrol, reporting back on Commission behavior to national executives. Research suggests that the creation of the Working Party was a result of member-state concerns that the Commission would garner too much power under the new regulations (Bignami 2005).

Forcing the unitary state assumption, which is often used in international relations literature, on to the principal-agent model, which is derived in the American and comparative subfields, however, obscures several critical features of the relationship. First, the Working Party may derive preferences distinct from national governments. National data privacy agencies are often staffed by politically active lawyers who want to check the expansion of power and surveillance in society. Their mission is to balance the interests of organizations that hope to exploit data with the privacy concerns of citizens. Generally, they see themselves as filling an important advocacy void for citizens who would not otherwise be able to defend their privacy interests. Since data privacy agencies often defy their national governments domestically, it is logical that the same independent streak might emerge at the international level.

Second, data privacy authorities enjoy considerable authority. They are independent agencies that have been delegated the authority to monitor the collection and use of personal information. Many agencies

have the power to sanction inappropriate cross-border transfers of data. Since their inception in the 1970s, these agencies have built considerable expertise in the domain. Staffed by activist lawyers, they are among the few technical resources for governments and businesses seeking to understand the policy domain. As a transgovernmental network, the Article 29 Working Party has come to enjoy considerable institutional authority. Increasingly, international business, media, and government officials refer to the Working Party as the European data privacy regulator.²

Third, the Working Party is an example of daisy-chain delegation, complicating traditional notions of delegation. The members of the Working Party have been delegated the authority to oversee national regulation by their national executives. At the same time, the directive delegates to the Working Party the authority to monitor and harmonize supranational implementation. The following narratives demonstrate the implications of adopting the dual delegation assumption for the politics of global governance.

The data retention debate: monitoring communication

The surveillance of telecommunications is a highly sensitive issue touching upon cross-cutting concerns of national security, economic competitiveness, and civil liberties. Starting at the turn of the twenty-first century, this issue was elevated to the supranational level as member states began calling for data retention legislation at the European level. Data retention legislation requires communications firms to store all customer data for a given period of time. The intent of these regulations is to guarantee access to such archived data for police and security organizations. It differs from a data preservation regime, wherein police authorities can request data records for an individual once that individual has been identified as a criminal suspect. With the explosion of digital networks, national security organizations pressed for

² For example, a recent article in the *International Herald Tribune* discussing an Article 29 Working Party investigation, titled “EU Panel to Question US Spying on Banks” (September 26, 2006, p. 4). Similarly, an article in the *Washington Post* discussing a recent opinion of the Working Party, reads “IP Addresses are Personal Data, EU Regulator Says” (January 22, 2008, p. D1).

data retention legislation as a mechanism to bolster their criminal investigations (Schwartz 2003).

The debate over data retention offers an important window into a discussion of global governance, highlighting the multiple players involved, their diverging preferences, and the interaction of complicated delegation chains. National executives, most vocally represented by their national security apparatus and their ministries of the interior, feared that existing data privacy legislation would hamper their ability to guarantee security in a world marked by digital networks and transnational terrorism. Supranational cooperation was important for two reasons. First, many of the strongest advocates of data retention from the security community feared that other member states would not pass legislation. This risked incomplete data trails for criminals who increasingly operate across national boundaries. Second, even some of the most vocal national executive supporters of data retention faced strong opposition at home to their proposals. In the United Kingdom, prior to the European initiative, the government was forced to compromise and enact a voluntary system. A coalition of member-state governments thus looked to supranational cooperation as a mechanism to harmonize retention standards across the member states and to overcome domestic opposition. Belgium offered an initial proposal for four years of data retention in 2002 that was circulated among the member states. It was not until 2004 that an official draft was submitted to the Council of Ministers, which called for mandatory retention of up to three years.³

The European Commission greeted such proposals with caution.⁴ As its central mission had long focused on the integration of internal markets, the Commission did not want to enact rules that might weaken the competitive position of companies within the European Union. The communications industry was strongly opposed to retention rules, as they imposed new storage requirements. Preexisting data privacy rules limited the ability of telecommunications firms to

³ See Council of the European Union, *Draft Framework Decision on the retention of data processed and stored in connection with the provision of public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism* (Brussels: European Union, 2004).

⁴ See Tatum Anderson, "Major European Institutions Divided on Data Retention," *Telecom Markets*, February 22, 2005: online.

use such data for their own purposes; thus retention implied a set of new responsibilities without new business opportunities.⁵ Trade associations estimated that the cost of such legislation would reach hundreds of millions of euros.⁶ Additionally, the Commission was ultimately responsible for overseeing the privacy directive, which guaranteed a high level of protection. The Commission, then, entered the debate concerned with how such legislation might affect competitiveness and civil liberties within the Union. The first draft legislation written by the Commission reflected these concerns and proposed a year of mandatory retention, including a number of data privacy provisions.

Far from monitoring and reporting on the behavior of the Commission to national executives, the Article 29 Working Party lobbied the Commission extensively to restrain the proposal of the member states. As early as 2002, as national executives began discreetly to circulate retention proposals, the Working Party condemned such an effort. The Working Party released a set of opinions arguing that retention should be for no longer than six months and that such data should still fall under protections guaranteed under data privacy legislation.⁷ The Working Party called on the Commission to respect data privacy rights within the Union. Drawing on its legal expertise in data privacy issues, the Working Party argued that the Council's initiative violated the European Charter of Human Rights and required

⁵ See International Chamber of Commerce, *Common Industry Statement on Storage of Traffic Data for Law Enforcement Purposes* (Brussels, 2003).

⁶ The German Telecommunications Association (BITKOM) conducted a study that forecast this cost of retention. See *Frankfurter Allgemeine Zeitung*, "Telekom-Branche gegen Datensammler," September 23, 2004, p. 13.

⁷ The Commissioners released a statement at the International Conference of Data Protection Commissioners that concluded, "Where traffic data are to be retained in specific cases, there must therefore be a demonstrable need, the period of retention must be as short as possible and the practice must be clearly regulated by law, in a way that provides sufficient safeguards against unlawful access and any other abuse. Systematic retention of all kinds of traffic data for a period of one year or more would be clearly disproportionate and therefore unacceptable in any case." See Article 29 Data Protection Working Party, *Opinion 5/2002 on the Statement of the European Data Protection Commissioners at the International Conference in Cardiff on mandatory systematic retention of telecommunications traffic data* (Brussels: European Union, 2002), p. 3.

a disproportionate level of data retention. Not only did this governor actively lobby at the supranational level, but the national regulatory agencies also expressed their opposition in national parliaments. The German data privacy commissioners, for example, called on the national legislature to resist the German government's support for the EU proposal.⁸ After the terrorist attacks in the United Kingdom and Spain, the Working Party moderated its position slightly but still argued that retention should not exceed one year, once again citing the basic privacy principles enshrined in the directive.⁹ The arguments developed by the Working Party were taken up by many players in the policy debate, including the European Parliament and the Commission.

As the legislation entered its final phase of negotiation, the national executives found no support from the Working Party. In fact, the Working Party position, which had been developed over the course of several years, more closely resembled that of the Commission. Despite the convergence in policy goals, this was no simple case of socialization in so far as the justifications of the two bodies differed dramatically. The Working Party argued for the protection of civil liberties while the Commission argued for ensuring economic competitiveness. Thus instead of an international socialization process, the two parties came to the negotiations with distinct reasons derived from their unique bureaucratic cultures. The final bill struck a delicate compromise, which required all member states to enact retention legislation. The period of retention could range between six months and two years. While potentially longer than the one-year maximum advocated by the Working Party and the Commission, the final rule reflects important concessions from the security establishment, represented by the national executives.

⁸ In June, the data protection commissioners of Germany called on the federal government to reject the EU data retention proposal; see Datenschutzbeauftragte Deutschlands, Presseinformation (June 25, 2004). The Federal Data Protection Commissioner's warning to Minister Schily was reported in *Die Stern*, "Schily weist Datenschuetzer-Kritik zurueck," April 20, 2005; online.

⁹ See Article 29 Data Protection Working Party, *Opinion 9/2004 on a draft Framework Decision on the storage of data processed and retained for the purpose of providing electronic public communications networks with a view to the prevention, investigation, detection, and prosecution of criminal acts, including terrorism* (Brussels: European Union, 2004).

International conflict over airline passenger data

Moving from a regional to an international governance debate, the area of air transportation safety offers a second important case demonstrating the complexity of global governance in a world of dual delegation. After the terrorist attacks in the United States, the US government enacted a set of terrorism protection measures, many of which had international ramifications. One of the fiercest transatlantic debates centered on US demands that foreign air carriers provide detailed airline passenger records to US Customs. The Aviation and Transportation Security Act of 2001 authorizes US Customs and the Immigration and Naturalization Service to levy fines of thousands of dollars for every plane that lands without transferring passenger data. The European privacy directive, however, prevented the transfer of personal data to countries lacking adequate data privacy standards. And given the limited nature of privacy rules in the United States, the European Union did not grant it adequacy status. European airlines then faced a double bind – transferring data to US authorities risked sanction by European data privacy authorities, and failing to transfer data risked sanction by US authorities.

Given the importance of air transport to transatlantic tourism, member states and the European Commission hoped to resolve the conflict quickly. The Commission, supported by the Council, began talks with the US Homeland Security Department that would permit the transfer of data and secure air transport. These talks produced a Joint Statement in February 2003, whereby the Commission agreed as a stopgap measure to delay enforcement of European privacy laws and permit data transfers while a more robust agreement could be negotiated. The Joint Statement detailed that the United States would limit the exchange of sensitive data and the scope of agencies with access to it.¹⁰

Prior to the conclusion of the agreement, however, the Article 29 Working Party actively lobbied to guarantee data privacy protection in the area of air transport. The Working Party offered a recommendation in October 2002, claiming that such transfers of traveler information were in direct violation of the 1995 privacy directive and breached Community law. The Working Party was particularly concerned with

¹⁰ See European Commission (2003).

direct access of US agencies to the databases of European firms, the sharing of sensitive data such as meal choices that might indicate religious affiliation, the extended retention period, the vague standard for collecting and transferring the information to other agencies, and the lack of a formal monitoring mechanism.¹¹ In March 2003, just after the release of the Joint Statement, the chair of the Working Party, Stefano Rodota, warned the European Parliament that continued transfers threatened to result in regulatory or judicial intervention. Given the requirements of the European privacy directive, he asserted, data privacy authorities might be forced to sanction carriers that transferred data under the Joint Statement. This, in turn, could further escalate the conflict.¹² The Working Party used its monitoring capacity and expertise to serve as a fire alarm but not for the national executives. Rather, the Working Party used its information advantage to alert the European Parliament to its concerns surrounding the legality of the negotiations.

The Parliament concurred and argued that the demands placed by the United States were unacceptable, especially the request for direct access to carrier databases. European Parliamentarian Sarah Ludford (UK-Liberal), citing the argumentation of the Article 29 Working Party Chair Rodota, summarized the dispute: “This is a stunning rebuff to the Commission. He [Chairman Rodota] said in essence that National Data Protection Commissioners and courts were not free to suspend application of relevant laws just on the say-so of the Commission. That must be right. It is a reminder to the Commission that if it will not be the guardian of Community law, then others have to be” (quoted in *Statewatch* 2003).

The ability of the Working Party to complicate the global governance of the issue further rested on the daisy-chain of delegation. Not only had the EU created the Working Party to oversee implementation of the directive but its members also acted individually as national regulators. After the release of the Working Party Opinion, national regulators began to enforce their national legislation. The Italian data privacy

¹¹ See Article 29 Data Protection Working Party (2002).

¹² See the letter from Chairman of the Article 29 Working Party Stefano Rodota to Jorge Salvador Hernander Mollar, Chairman of the Committee on Citizens’ freedoms and Rights of the European Parliament. Brussels, March 3, 2003. Available at www.statewatch.org/news/2003/mar/art29ch.pdf.

commissioner, for example, limited data transfers from Alitalia to the United States to information contained in a passport. Similarly, the Belgian authority ruled in late 2003 that US–EU transfers violated data privacy laws.

The Working Party’s position, then, forced the Commission to renegotiate the agreement with the United States.¹³ The constraint placed by the Working Party on the Commission can be seen in a letter sent from Frits Bolkestein, the EU’s Internal Market and Services Commissioner, to Tom Ridge, head of the US Homeland Security Department: “Data protection authorities here take the view that PNR [Passenger Name Record] data is flowing to the US in breach of our Data Privacy Directive. It is thus urgent to establish a framework which is more legally secure . . . The centerpiece would be a decision by the Commission finding that the protection provided for PNR data in the US meets our ‘adequacy’ requirements.”¹⁴

After extensive negotiations with the United States, the Commission agreed in December 2003 to a new agreement. This would not include access to carrier databases, and the information transferred would be filtered. The compromise solution included: reduction of the categories of data collected from thirty-nine to thirty-four; deletion of sensitive data; limits on information collection to terrorism and transnational crime; a retention period of three and a half years; a sunset clause that forces renegotiation after three and a half years; and annual joint audits of the program.

Despite these concessions, however, the Working Party and the European Parliament did not believe that the agreement went far enough. The European Parliament eventually took the Commission before the European Court of Justice, arguing that the Commission did not have the jurisdiction to negotiate the agreement and that the

¹³ The Working Party detailed its concerns in June 2003. They focused on the “pull” system, which allowed direct US access into European databases, the lack of an enforcement or audit system, the possibility that data would be shared with other agencies, the collection of sensitive data, the retention period, and lack of correction rights for passengers (Article 29 Data Protection Working Party 2003 Opinion 4/2003 on the Level of Protection Ensured in the US for the Transfer of Passengers’ Data Brussels).

¹⁴ Letter from European Commissioner Frits Bolkestein to US Secretary of Homeland Security Tom Ridge, June 12, 2003. Available at www.statewatch.org/news/2003/sep/Bolkestein-12JUN2003.html.

agreement violated basic privacy principles along the lines of the argumentation offered by the Working Party. The Court ruled in favor of the European Parliament but only on the issue of jurisdiction. As a result, the Council of Ministers was forced to renegotiate the agreement.

Demonstrating that national executives and the Commission shared a fundamentally similar position, the final agreement negotiated between the Council and the Department of Homeland Security removed many of the privacy protections inserted by Working Party lobbying. Returning to a compromise similar to the Joint Statement, the final agreement reflected the national executives' interests in guaranteeing security and tourism. Ironically, the European Court of Justice effectively removed the European Parliament and the Working Party from the negotiations. As authority shifted to the Council, neither the European Parliament nor the Working Party had delegated authority to oversee the process.

The narrative, then, demonstrates the complex role that transgovernmental actors play in global governance. Far from serving as an oversight mechanism of an international organization, the Working Party "police patrol" warned a third party – the European Parliament – of actions taken by the Commission and the member states. The case underscores the importance of delegated authority as a power resource for global governors. As the Lisbon Treaty of the European Union will reduce the distinction between the various policy pillars, the Working Party and the Parliament could be in a much stronger position in domestic and justice affairs in the future.

Conclusion

A central question concerning global governance deals with how states maintain control over the behavior of international organizations. In order to address this question, scholars of international relations have borrowed extensively from principal-agent theory developed in the context of American and comparative politics. Principals generate mechanisms to monitor and police the activity of agents. In instances when agents drift from their original mandate, principals may then employ a set of punishments to rein in autonomous actors.

In the national context, authors have examined a diverse number of formal relationships among political actors, including legislative

committees, executive agencies, and civic organizations. At the international level, these models have also progressed in their complexity and richness, incorporating the possibility of multiple principals (for example, several nations delegating to an international organization) and private actors monitoring international organization activity. The persistent assumption within the international relations literature of the unitary state, however, has missed an important development in delegation relationships within global governance.

At the same time that states have looked to a widening number of international organizations to manage complex international issues, the same states have delegated domestic decisionmaking to a host of sub-state officials. Regulatory agencies, ombudsmen, and administrative courts now oversee day-to-day operations in many economic and social areas. This dual delegation alters the control dynamic, injecting transgovernmental actors into the mix. These transgovernmental actors are often appointed by national executives to monitor the behavior of international organizations, and they are simultaneously appointed by international organizations to implement and oversee the policies of the international organization.

Far from being only a control mechanism, these transgovernmental actors may alternatively serve as an important ally to international organizations or other global governors. As the simple model illustrates, sub-state actors' role varies depending on their preferences relative to the other major players involved. Often the product of long-term state-building processes, these preferences and resources reflect the context of domestic institutional design and evolution and not necessarily the optimal configuration for monitoring and reporting on international organizations. The two cases discussed above offer an initial illustration of the argument. In the area of data retention, the Article 29 Working Party allied with the European Commission to rein in national executive demands for sweeping surveillance powers. In the area of airline passenger data, the Article 29 Working Party alerted the European Parliament to the activity of the European Commission and the national executives. In neither case did transgovernmental actors serve the simple police patrol role predicted by the standard principal-agent model but rather they acted as allies of various other international actors. Data privacy authorities injected civil liberties concerns into the security-dominated debate. While research has questioned the democratic legitimacy of transgovernmental activity (Slaughter 2001),

this chapter suggests that such “bureaucratic” actors may inject under-represented views into international policymaking, serving to destabilize a politics based on concentrated interests (Sabel and Zeitlin 2007).

Importantly, the cases suggest that varying levels of authority across sectors and time significantly shape the dynamics of global governance. The airline passenger data case illustrates this point. The decision of the European Court of Justice to shift the debate from the first pillar of the EU concerned with the internal market to the third pillar concerned with police cooperation undermined the delegated authority of the Working Party. It weakened the Working Party’s ability to affect the later round of negotiations. Transgovernmental actors are not universally positioned to alter global governance dynamics but are dependent on shifting sources of authority.

Transgovernmental actors come to global governance with their own preferences and authority resources, which they enact in their relationship with both national executives and international organizations. In considering these preferences and power resources, this chapter has attempted to reignite a debate about transgovernmental coalitions and how they may transform global governance. In so doing, it challenges purely functional accounts of oversight and implementation and seeks to highlight the highly contentious political nature of dual delegation.