

Background

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How the EU's Lisbon Treaty Affects U.S. National Security

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Abstract: *Yet another EU treaty has gone into effect. This time, it is the Treaty of Lisbon. All sorts of tedious rule changes will result, adding yet more layers of bureaucracy and confusion to the behemoth that is the European Union. Why should Americans care? Because embedded in all the bureaucratized and muddled of regulations is the more insidious element of anti-Americanism—which is leading the European Parliament to dispose of policies that have been essential in fighting terrorism around the world. One of those policies, the Terrorist Finance Tracking Program, was a highly successful data-sharing agreement between the EU and the U.S. The European Parliament's first act under Lisbon was to reject that agreement, effectively turning the EU into a safe haven for terror-supporting bankers. More disastrous decisions may well follow—many of which will have a damaging effect on U.S. national security.*

December 1, 2009, was an unremarkable day in America: Congress was mired in a protracted health care debate; the Christmas Day bomb plot was still 24 days away; and the most pressing foreign policy issues faced by the Obama Administration were those connected to the war in Afghanistan.

Few, then, would think of December 1 as a problematic day for American security. But it was. One of the most significant events affecting American security passed, almost without notice, on the other side of the Atlantic when the Treaty of Lisbon entered into force.¹

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Talking Points

- The Lisbon Treaty creates new institutions in the EU, changes voting rules to eliminate the requirement for unanimity among the member states, and gives a powerful role to the European Parliament in security matters.
- Many of these changes were anticipated. What is *unanticipated* is how much this latest EU treaty will affect U.S. national security.
- The European Parliament rejected the Terrorist Finance Tracking Program, the highly successful data-sharing agreement between the EU and the U.S.
- The U.S. Treasury Department has already stopped receiving information on terrorist finances, and the European Union is now, in effect, a safe haven for terrorist bankers.
- The U.S. should work with the European Parliament when—and only when—it is truly useful. But until Brussels proves itself a suitable partner for counterterrorism collaboration, Washington cannot permit the EU to challenge the United States' long-standing individual relationships with the sovereign countries of the EU.

This paper, in its entirety, can be found at:
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requirement for unanimity among the European member states, and shifts the allocation of power among European institutions, giving a powerful role to the European Parliament in security matters. Lisbon will create a sea change in the operation of the EU, a development that Europeans have long anticipated. What is *unanticipated*, however, is how much this latest EU treaty will affect the United States of America.

An early example: For the eight years since 9/11, the United States has been exchanging financial and banking data with European countries under the Terrorist Finance Tracking Program (TFTP). This data has let the U.S. government track down

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terrorist finances and has played a role in disrupting terrorist attacks on both sides of the Atlantic. According to the U.S. Department of Treasury, more than 1,500 different terror cases were opened thanks to leads from this EU–U.S. data-sharing program.²

In February, in its first act under the new treaty, the European Parliament (which until now never had a role in security matters) rejected this information-sharing agreement. The Treasury Department has already stopped receiving information about terrorist finances, and the European Union is now, in effect, a safe haven for terrorist bankers.³

“Justice and Home Affairs” Before Lisbon

From its small beginnings in 1957, the European Union has grown into a powerful colossus. The EU now has 27 member states, and spans the distance from Ireland to Bulgaria. As it has grown, the ability for building consensus has diminished. Where once it was comparatively easy to find agreement among six or 10 states with a common heritage, the EU’s 27 actors have so many cultural and political histories, that consensus is becoming ever more elusive.

As the European Union approached the 21st century, it sported a veneer that looked almost like a federalist system to an American observer. Some powers (mostly in the economic arena) were exercised principally by a centralized executive (the European Commission) in Brussels. Other powers, mostly those relating to foreign and defense policy and to law enforcement, were mostly exercised at the state level, except when the states let Brussels take the lead. From the American perspective that is a skewed form of federalism—akin to Washington having no foreign or defense policy role, but a paramount economic authority. More and more, European federalism means centralization of power, while American federalism means devolvement of authority. But the contours were similar—a debate between a central government striving for control and constituent states resisting that impulse.

Justice and Home Affairs (JHA) is the European Union’s name for areas of law and policy that Americans think of as law enforcement, homeland security (“internal security” in the EU), and counterterrorism. Pre-Lisbon, JHA issues were, presumptively, the responsibility of each independent

1. Lisbon Treaty, December 13, 2007, at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML> (March 15, 2010).
2. Ellen Nakashima, “U.S. Criticizes EU Rejection of Agreement that Would Help Track Suspected Terrorists,” *The Washington Post*, February 12, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/11/AR2010021102139.html> (March 15, 2010). The *Post* has editorialized against the parliament’s effective shutdown of the TFTP: “Swift Rebuke,” *The Washington Post*, March 1, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/28/AR2010022803429.html> (March 15, 2010). Besides being shortsighted, the parliament’s vote was also a calculated anti-American slap, coming immediately after a direct appeal from Secretary of State Hillary Clinton and Treasury Secretary Timothy Geithner: Letter from Clinton and Geithner to Jerzy Buzek, president of the European Parliament, February 5, 2010, at http://www.europolitics.info/pdf/gratuit_en/266006-en.pdf (March 15, 2010).
3. In a separate paper my colleague Sally McNamara has detailed how the new treaty has also created confusion and problems in the area of foreign affairs: “EU Foreign Policymaking Post-Lisbon: Confused and Contrived,” Heritage Foundation *Background* No. 2388, March 16, 2010, at <http://www.heritage.org/Research/Reports/2010/03/EU-Foreign-Policymaking-Post-Lisbon-Confused-and-Contrived>.

sovereign nation that is a member of the EU. The United Kingdom set British police policy; Germany set police policy for its own citizens. That presumption of individual state action could be overcome only with the unanimous agreement of all 27 members of the union. What this meant is that collective action did occur, but only when there was a manifest reason for it. Examples include supranational organizations like Europol (a Europe-wide police agency), Eurojust (a Europe-wide prosecutorial organization), and Frontex (the European border security coordination agency). These organizations have addressed areas where a common European policy would be useful—adopting common rules for warrants and extradition, for instance. Because of the unanimity requirement, Europe-wide action was often slow and incremental, and America, more frequently, relied on cooperation with individual—sovereign—countries to achieve U.S. law enforcement and counterterrorism objectives.

Whatever its motivation, the effects of Lisbon are clear: The treaty is a further step on the road to more centralization of power in Brussels.

In part to resolve its own federalism concerns over member-state independence and to increase efficiency, the EU has now adopted the Treaty of Lisbon. The treaty was also motivated by a desire to enforce pan-European discipline on “external matters” (what the EU calls its foreign policy) and to create more supranational coordination. The skeptical observer might say that the Lisbon Treaty is about centralizing power in Brussels and limiting dissent from decisions made by the ruling elites.

Whatever its motivation, the effects of Lisbon are clear: The treaty is a further step on the road to more centralization of power in Brussels, particularly in the area of Justice and Home Affairs. How far the *de*

jure changes will be followed by significant *de facto* changes remains to be seen, but there can be little doubt that Lisbon is intended to make collective action at the European level easier—with a concomitant reduction in the authority of individual sovereign nations.

The Treaty of Lisbon

Under the Lisbon Treaty, the European Union’s approach to security issues will change in at least two significant ways. First, the European Council (the body in which each member nation has a single vote) will be authorized to act under a more majoritarian rule (not a simple majority system but one with weighted voting) and unanimity will no longer be required. Second, the council, which used to act alone, will now share decision-making power with the members of the European Parliament (composed of elected representatives from the 27 EU members).⁴ In the near term, the changes are likely to be relatively modest; in the long run they are likely to be profound, with significant effects on the trans-Atlantic relationship.

The changes mean that the legislative process for Justice and Home Affairs issues will be completely revised. Before Lisbon, unanimity was required in the European Council to adopt an EU-wide measure relating to Justice and Home Affairs. Now, matters will proceed differently, through two processes known as qualified voting majority (QVM) and co-decision—which are part of the EU’s normal legislative process for economic affairs.

Qualified voting majority, as its name implies, means that unanimity of all 27 countries within the European Council will no longer be required for the EU to act collectively on JHA matters. Instead, each member country will cast a ballot that is “weighted” roughly in proportion to its population. The majority requirement (to achieve a majority of the weighted votes) is further “qualified” by a distribu-

4. As a matter of form, the Lisbon Treaty does not serve as a stand-alone separate treaty. Rather, its provisions are in the nature of amendments to the existing treaties of Rome and Maastricht that form the basis of the European Union’s structure. These Lisbon amendments have been consolidated with the old treaties into a single new, unified treaty, The Treaty on the Functioning of the European Union (TFEU), and citations to provisions implementing changes called for in the Lisbon Treaty are commonly made to the new consolidated TFEU (for simplicity’s sake, “Lisbon Treaty” will be used for the citations). Thus, Justice and Home Affairs matters are now covered in Arts. 67–89 of the Lisbon Treaty (freedom, security and justice) and Art. 196 of the Lisbon Treaty (civil protection).

tion requirement: In order to pass, a proposal must be approved by 55 percent of the 27 individual countries (that is, 15 of them). Furthermore, those 15 countries combined must be home to at least 65 percent of the total European population.⁵ Despite the complexity of the voting system (which makes America's senatorial filibuster seem like a kindergarten exercise), the end result is clear: A working majority of the EU member states is now authorized to create supranational policy on matters of law enforcement and homeland security in situations where, previously, unanimity was required. Minority states that do not agree will now be bound to follow the EU lead.⁶

Before Lisbon, the European Parliament had little authority in areas of Justice and Home Affairs. The parliament's pronouncements were mostly viewed as advisory and hortatory. As a consequence, many American observers perceived the parliament as irrelevant and it often acted irresponsibly (much as with the U.S. Congress when its votes do not matter, such as when it votes to condemn a foreign country for belligerent acts, or institutes a ban that the President has the power to waive).

Now, the rules of co-decision will greatly increase the power of the European Parliament. Where, previously, the council was merely obliged to "consult" with the parliament, initiatives proposed by the council must now be affirmatively adopted by the legislature. Without parliament's review and approval, no new European initiative can proceed. In effect, the parliament has gained a great deal of new power to control the Justice and Home Affairs operations of the EU.

These changes in decision-making authority will apply to a broad range of EU activities. The new non-unanimity and co-decision procedures will apply to visa regulations, immigration law and pol-

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icy, judicial cooperation in criminal matters, the operation of Eurojust and Europol, and cross-border police cooperation. Asylum policy and illegal immigration will remain areas where qualified majority and co-decision apply.⁷

In addition to these changes in decision-making powers, the Lisbon Treaty also affects judicial review. Pre-Lisbon, Justice and Home Affairs matters were generally considered questions of domestic law, subject to review by the courts of each member state. Now, to the extent that these JHA matters become the subject of EU legislation, they will also be subject to review by the European Court of Justice (ECJ)—adding yet another centralizing layer of authority to domestic practices. Indeed, the ECJ has a mandate to foster an "ever closer union," so its rulings inevitably favor increased centralization. Like the U.S. Supreme Court, the ECJ has not historically proven shy about exercising its powers of review.

Finally, Lisbon establishes a new standing committee within the European Council on issues relating to internal security, as the Committee on Internal Security (COSI).⁸ The new committee will attempt to strengthen coordination among the member states on issues of police and customs cooperation, border security, and judicial cooperation in criminal matters. While COSI will not make legislative proposals directly, it seems likely that it

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5. The QVM system is extremely complex, requiring a special "voting calculator." See "Voting Calculator: Use it to Simulate Council Voting," Council of the European Union, at <http://www.consilium.europa.eu/App/calcullette/default.aspx?lang=en&cmsid=1690> (March 15, 2010).
 6. Minority states have a right of resistance. They can exercise a "qualified veto" on EU proposals. If a proposal passed by the council and the parliament is subsequently rejected by one-third of the parliaments of the member states, the council must reconsider the proposition.
 7. Lisbon Treaty, Arts. 77–88.
 8. Lisbon Treaty, Art. 71.

will influence the European Council in developing more pan-European approaches to law enforcement and homeland security.

The Changing EU

What does all this mean for the European Union? The procedural changes that are a result of the Lisbon Treaty are immense. It will take a great deal of time simply to create and staff the new institutions called for in the treaty. Symbolizing the difficulty in transitioning to a new legal regime, the provisions of the treaty that give the commission and the Court of Justice authority over police matters and judicial cooperation in criminal matters will not take effect until December 2014.⁹

Even after the new treaty institutions are created and staffed, it remains to be seen how much true authority they will have. Though the intention of the treaty is clearly to centralize more decision-making authority in Brussels, the ability to exercise that authority will take time to develop. The promise of a greater, more active European Union with the capacity to be a full partner in counterterrorism looks likely to be delayed for quite some time.

It is often said that in Europe very little is accomplished unless the “big” countries—Germany, France, Italy, Spain, and the U.K.—want it done. It seems unlikely that the QVM voting system will change that. What will change—what already *has* changed—is the enhanced role of the European Parliament. In the past the parliament’s strident anti-American tone and aversion to necessary security measures has been an annoyance, causing little real damage. The lack of an effective vote fostered a fairly strong

mindset in opposition to EU-wide security matters within the parliament. Often this opposition was couched as an objection to the growing EU security state, and several members of the European Parliament have gained a small following as “defenders of freedom.” But it does not appear that granting greater authority to the parliament will cause it to moderate its sometimes overbearing tone. On the contrary, if the terrorist-financing debacle is any measure, it appears that the EU parliamentarians will now interpose their objections to increased security measures with greater success.

If the terrorist-financing debacle is any measure, EU parliamentarians will now likely interpose their objections to increased security measures with greater success.

The real test of the European Parliament’s seriousness will come soon. In 2007, the United States and the EU entered into the Passenger Name Record (PNR) agreement on sharing airline passenger information.¹⁰ The U.S. has used passenger names to stop terrorists from entering the U.S.,¹¹ and, most recently, used PNR data as a factor in the arrest of Najibullah Zazi in September 2009 for his part in the New York subway bombing plot—Zazi travelled frequently to Pakistan.¹² It is safe to say that these PNR records form one of the lynchpins of U.S. national security.

Even though the PNR agreement was signed long before the Lisbon Treaty took effect, under pre-Lisbon law, the agreement had to be ratified by the

9. Lisbon Treaty, Art. 10 of Protocol 36. The United Kingdom has reserved the right to opt out of these provisions completely. For those who wish to understand the many political compromises that were necessary to bring the Lisbon Treaty to fruition, see the 37 separate protocols (each modifying a treaty element in some way): “Protocols,” Official Journal of the European Union, May 9, 2008, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0201:0328:EN:PDF> (March 15, 2010).
10. Council of the European Union, “Agreement Between the European Union and the United States of America on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the United States Department of Homeland Security (DHS),” June 28, 2007, at <http://www.statewatch.org/news/2007/jul/eu-usa-pnr-agreement-2007.pdf> (March 12, 2010).
11. A study of one case, involving a man named Ra’ed al-Banna, can be found in Stewart A. Baker and Nathan Alexander Sales, “Homeland Security, Information Policy, and the Transatlantic Alliance,” George Mason University Law and Economics Research Paper No. 09–20, March 17, 2009, at <http://ssrn.com/abstract=1361943> (March 15, 2010). See also *The Man Turned Away*, PBS *Frontline*, October 10, 2006.

national legislatures of all 27 countries. As the clock struck midnight on November 30, 2007, only 24 of the 27 countries had ratified the agreement (despite having two years to do so) and under the new Lisbon-based law, the agreement must be considered by the European Parliament.

The same legislators who killed the TFTP were vociferous opponents of the PNR agreement—and will now have a say in whether the agreement is formally adopted. If, as seems possible, these legislators reject the considered judgment of the European Commission and 24 national parliaments in favor of their own idiosyncratic views, it is fair to say that a trans-Atlantic crisis over counterterrorism cooperation and information-sharing may result. The Obama Administration would be wise to prepare for the worst and develop policy options for continuing the vital flow of information from the EU to American security agencies even in the face of European resistance.

Protecting America

What does all this mean for the trans-Atlantic relationship? Only time will tell. But some of the contours of the steps America will need to take are becoming clearer. The Administration should:

- **Work with Brussels to the extent it aids American interests.** It is possible that the new EU power structure may make the EU a more effective partner for the U.S. in the long run. If the QVM process energizes European action and the parliamentary co-decision rule does not become an obstacle, the strengthening of Brussels may work in America's favor by providing America with a strong counterterrorism partner capable of acting on behalf of Europe. If—and only if—it does, the U.S. should welcome that development.
- **Maintain traditional relationships.** Until Brussels proves itself a suitable partner for counterterrorism collaboration, the U.S. cannot permit

the strengthening of the EU to challenge the United States' long-standing bilateral relationships with the sovereign countries of the EU. As it stands today (given the sentiment in parliament), the U.S. is more likely to achieve its political objectives with the assistance of traditional friends than by working with the new EU institutions. As Henry Kissinger said: "When the United States deals with the nations of Europe individually, it has the possibility of consulting at many levels and to have its view heard well before a decision is taken. In dealing with the European Union, by contrast, the United States is excluded from the decision-making process and interacts only after the event.... Growing estrangement between America and Europe is thus being institutionally fostered."¹³

- **Focus efforts on those EU countries that have the capacity to work effectively with the U.S.** Europe will never develop a coherent supranational police force or a supranational intelligence community with whom their American equivalents can interact. Nor is it likely that the U.S. would welcome that sort of development. Thus, for practical reasons, the U.S. should continue the exchange of information and operational assistance with EU member states and their justice and home affairs services.
- **Insist on American interests.** It will be tempting to try to avoid a fight over European complaints about information-sharing and counterterrorism collaboration. Those instincts might cause America's policymakers to compromise and accept restrictions on American counterterrorism efforts that place American interests at risk. They should resist that impulse. The anti-security members of the European Parliament cannot be appeased. The U.S. should insist on defining its own interests, and its diplomacy should reflect those security concerns.

12. For example, the Department of Justice's Motion for a Permanent Order of Detention cites Customs and Border Protection records of trips to Pakistan. Memorandum of Law in Support of the Government's Motion for a Permanent Order of Detention at 3–4, *United States v. Najibullah Zazi*, No. 09-CR-663, September 24, 2009, at <http://www.justice.gov/opa/documents/zazi-detention-memo.pdf> (March 15, 2010).

13. Henry Kissinger, *Does America Need a Foreign Policy?* (New York: Free Press, 2001), p. 57.

In the longer term, the Treaty of Lisbon signals a clear commitment by the EU to increased Europeanization of issues traditionally thought of as state and local powers. The first steps on that road have been rough, and the prospects for improved U.S.–EU cooperation on counterterrorism measures are uncertain. America will have to pay attention to

these trends, or risk letting changes in Europe adversely affect America's own national security.

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