The Real New World Order

Anne-Marie Slaughter

THE STATE STRIKES BACK

MANY THOUGHT that the new world order proclaimed by George Bush was the promise of 1945 fulfilled, a world in which international institutions, led by the United Nations, guaranteed international peace and security with the active support of the world's major powers. That world order is a chimera. Even as a liberal internationalist ideal, it is infeasible at best and dangerous at worst. It requires a centralized rule-making authority, a hierarchy of institutions, and universal membership. Equally to the point, efforts to create such an order have failed. The United Nations cannot function effectively independent of the major powers that compose it, nor will those nations cede their power and sovereignty to an international institution. Efforts to expand supranational authority, whether by the U.N. secretary-general's office, the European Commission, or the World Trade Organization (WTO), have consistently produced a backlash among member states.

The leading alternative to liberal internationalism is "the new medievalism," a back-to-the-future model of the 21st century. Where liberal internationalists see a need for international rules and institutions to solve states' problems, the new medievalists proclaim the end of the nation-state. Less hyperbolically, in her article, "Power Shift," in the January/February 1997 *Foreign Affairs*, Jessica T. Mathews describes a shift away from the state—up, down, and sideways—to supra-state, sub-state, and, above all, nonstate actors. These new players have multiple allegiances and global reach.

ANNE-MARIE SLAUGHTER is the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School.

Mathews attributes this power shift to a change in the structure of organizations: from hierarchies to networks, from centralized compulsion to voluntary association. The engine of this transformation is the information technology revolution, a radically expanded communications capacity that empowers individuals and groups while diminishing traditional authority. The result is not world government, but global governance. If government denotes the formal exercise of power by established institutions, governance denotes cooperative problem-solving by a changing and often uncertain cast. The result is a world order in which global governance networks link Microsoft, the Roman Catholic Church, and Amnesty International to the European Union, the United Nations, and Catalonia.

The new medievalists miss two central points. First, private power is still no substitute for state power. Consumer boycotts of transnational corporations destroying rain forests or exploiting child labor may have an impact on the margin, but most environmentalists or labor activists would prefer national legislation mandating control of foreign subsidiaries. Second, the power shift is not a zero-sum game. A gain in power by nonstate actors does not necessarily translate into a loss of power for the state. On the contrary, many of these nongovernmental organizations (NGOs) network with their foreign counterparts to apply additional pressure on the traditional levers of domestic politics.

A new world order is emerging, with less fanfare but more substance than either the liberal internationalist or new medievalist visions. The state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order. Today's international problems—terrorism, organized crime, environmental degradation, money laundering, bank failure, and securities fraud—created and sustain these relations. Government institutions have formed networks of their own, ranging from the Basle Committee of Central Bankers to informal ties between law enforcement agencies to legal networks that make foreign judicial decisions more and more familiar. While political scientists Robert Keohane and Joseph Nye first observed its emergence in the 1970s, today

transgovernmentalism is rapidly becoming the most widespread and effective mode of international governance.

Compared to the lofty ideals of liberal internationalism and the exuberant possibilities of the new medievalism, transgovernmentalism seems mundane. Meetings between securities regulators, antitrust or environmental officials, judges, or legislators lack the drama of high politics. But for the internationalists of the 1990s—bankers, lawyers, businesspeople, public-interest activists, and criminals—transnational government networks are a reality. Wall Street looks to the Basle Committee rather than the World Bank. Human rights lawyers are more likely to develop transnational litigation strategies for domestic courts than to petition the U.N. Committee on Human Rights.

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Moreover, transgovernmentalism has many virtues. It is a key element of a bipartisan foreign policy, simultaneously assuaging conservative fears of a loss of sovereignty to international institutions and liberal fears of a loss of regulatory power in a globalized economy. While presidential candidate Pat Buchanan and Senator Jesse Helms (R-N.C.) demonize the U.N. and the WTO as supranational bureaucracies that seek to dictate to national governments, Senators Ted Kennedy (D-Mass.) and Paul Wellstone (D-Mich.) inveigh against international capital mobility as the catalyst of a global "race to the bottom" in regulatory standards. Networks of bureaucrats responding to international crises and planning to prevent future problems are more flexible than international institutions and expand the regulatory reach of all participating nations. This combination of flexibility and effectiveness offers something for both sides of the aisle.

Transgovernmentalism also offers promising new mechanisms for the Clinton administration's "enlargement" policy, aiming to expand the community of liberal democracies. Contrary to Samuel Huntington's gloomy predictions in *The Clash of Civilizations and the New World Order* (1996), existing government networks span civilizations, drawing in courts from Argentina to Zimbabwe and financial regulators from Japan to Saudi Arabia. The dominant institutions in these networks remain concentrated in North America and Western Europe, but their

impact can be felt in every corner of the globe. Moreover, disaggregating the state makes it possible to assess the quality of specific judicial, administrative, and legislative institutions, whether or not the governments are liberal democracies. Regular interaction with foreign colleagues offers new channels for spreading democratic accountability, governmental integrity, and the rule of law.

An offspring of an increasingly borderless world, transgovernmentalism is a world order ideal in its own right, one that is more effective and potentially more accountable than either of the current alternatives. Liberal internationalism poses the prospect of a supranational bureaucracy answerable to no one. The new medievalist vision appeals equally to states' rights enthusiasts and supranationalists, but could easily reflect the worst of both worlds. Transgovernmentalism, by contrast, leaves the control of government institutions in the hands of national citizens, who must hold their governments as accountable for their transnational activities as for their domestic duties.

JUDICIAL FOREIGN POLICY

JUDGES ARE building a global community of law. They share values and interests based on their belief in the law as distinct but not divorced from politics and their view of themselves as professionals who must be insulated from direct political influence. At its best, this global community reminds each participant that his or her professional performance is being monitored and supported by a larger audience.

National and international judges are networking, becoming increasingly aware of one another and of their stake in a common enterprise. The most informal level of transnational judicial contact is knowledge of foreign and international judicial decisions and a corresponding willingness to cite them. The Israeli Supreme Court and the German and Canadian constitutional courts have long researched U.S. Supreme Court precedents in reaching their own conclusions on questions like freedom of speech, privacy rights, and due process. Fledgling constitutional courts in Central and Eastern Europe and in Russia are eagerly following suit. In 1995, the South African Supreme Court, finding the death penalty unconstitutional under the national constitution, referred to decisions from national and supranational courts around the world,

including ones in Hungary, India, Tanzania, Canada, and Germany and the European Court of Human Rights. The U.S. Supreme Court has typically been more of a giver than a receiver in this exchange, but Justice Sandra Day O'Connor recently chided American lawyers and judges for their insularity in ignoring foreign law and predicted that she and her fellow justices would find themselves "looking more frequently to the decisions of other constitutional courts."

National and international judges are networking, creating new global relationships.

Why should a court in Israel or South Africa cite a decision by the U. S. Supreme Court in reaching its own conclusion? Decisions rendered by outside courts can have no authoritative value. They carry weight only because of their intrinsic logical power or because the court invoking them seeks to gain legitimacy by linking itself to a larger community of courts considering similar issues. National courts have become increasingly aware that they and their foreign counterparts are often engaged in a common effort to delimit the boundaries of individual rights in the face of an apparently overriding public interest. Thus, the British House of Lords recently rebuked the U.S. Supreme Court for its decision to uphold the kidnapping of a Mexican doctor by U.S. officials determined to bring him to trial in the United States.

Judges also cooperate in resolving transnational or international disputes. In cases involving citizens of two different states, courts have long been willing to acknowledge each other's potential interest and to defer to one another when such deference is not too costly. U.S. courts now recognize that they may become involved in a sustained dialogue with a foreign court. For instance, Judge Guido Calabresi of the Second Circuit recently allowed a French litigant to invoke U.S. discovery provisions without exhausting discovery options in France, reasoning that it was up to the French courts to identify and protest any infringements of French sovereignty. U.S. courts would then respond to such protests.

Judicial communication is not always harmonious, as in a recent squabble between a U.S. judge and a Hong Kong judge over an insider trading case. The U.S. judge refused to decline jurisdiction in favor of the Hong Kong court on grounds that "in Hong Kong they practically give you a medal for doing this sort of thing [insider trading]." In

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Let's keep talking: judicial networking is born

response, the Hong Kong judge stiffly defended the adequacy of Hong Kong law and asserted his willingness to apply it. He also chided his American counterpart, pointing out that any conflict "should be approached in the spirit of judicial comity rather than judicial competitiveness." Such conflict is to be expected among diplomats, but what is striking here is the two courts' view of themselves as quasi-autonomous foreign policy actors doing battle against international securities fraud.

The most advanced form of judicial cooperation is a partnership between national courts and a supranational tribunal. In the European Union (EU), the European Court of Justice works with national courts when questions of European law overlap national law. National courts refer cases up to the European Court, which issues an opinion and sends the case back to national courts; the supranational recommendation guides the national court's decision. This cooperation marshals the power of domestic courts behind the judgment of a supranational tribunal. While the Treaty of Rome provides for

this reference procedure, it is the courts that have transformed it into a judicial partnership.

Finally, judges are talking face to face. The judges of the supreme courts of Western Europe began meeting every three years in 1978. Since then they have become more aware of one another's decisions, particularly with regard to each other's willingness to accept the decisions handed down by the European Court of Justice. Meetings between U.S. Supreme Court justices and their counterparts on the European Court have been sponsored by private groups, as have meetings of U.S. judges with judges from the supreme courts of Central and Eastern Europe and Russia.

The most formal initiative aimed at bringing judges together is the recently inaugurated Organization of the Supreme Courts of the Americas. Twenty-five supreme court justices or their designees met in Washington in October 1995 and drafted the OCSA charter, dedicating the organization to "promot[ing] and strengthen[ing] judicial independence and the rule of law among the members, as well as the proper constitutional treatment of the judiciary as a fundamental branch of the state." The charter calls for triennial meetings and envisages a permanent secretariat. It required ratification by 15 supreme courts, achieved in spring 1996. An initiative by judges, for judges, it is not a stretch to say that OCSA is the product of judicial foreign policy.

Champions of a global rule of law have most frequently envisioned one rule for all, a unified legal system topped by a world court. The global community of law emerging from judicial networks will more likely encompass many rules of law, each established in a specific state or region. No high court would hand down definitive global rules. National courts would interact with one another and with supranational tribunals in ways that would accommodate differences but acknowledge and reinforce common values.

THE REGULATORY WEB

THE DENSEST area of transgovernmental activity is among national regulators. Bureaucrats charged with the administration of antitrust policy, securities regulation, environmental policy, criminal law enforcement, banking and insurance supervision—in short, all the

agents of the modern regulatory state—regularly collaborate with their foreign counterparts.

National regulators track their quarry through cooperation. While frequently ad hoc, such cooperation is increasingly cemented by bilateral and multilateral agreements. The most formal of these are mutual legal assistance treaties, whereby two states lay out a protocol governing cooperation between their law enforcement agencies and courts. However, the preferred instrument of cooperation is the memorandum of understanding, in which two or more regulatory agencies set forth and initial terms for an ongoing relationship. Such memorandums are not treaties; they do not engage the executive or the legislature in negotiations, deliberation, or signature. Rather, they are good-faith agreements, affirming ties between regulatory agencies based on their like-minded commitment to getting results.

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"Positive comity," a concept developed by the U.S. Department of Justice, epitomizes the changing nature of transgovernmental relations. Comity of nations, an archaic and notoriously vague term beloved by diplomats and international lawyers, has traditionally signified the deference one nation grants another in recognition of their mutual sovereignty. For instance, a state will recognize another state's laws or judicial judgments based on comity. Positive comity requires more active cooperation. As worked out by the Antitrust Division of the U.S. Department of Justice and the EU's European Commission, the regulatory authorities of both states alert one another to violations within their jurisdiction, with the understanding that the responsible authority will take action. Positive comity is a principle of enduring cooperation between government agencies.

In 1988 the central bankers of the world's major financial powers adopted capital adequacy requirements for all banks under their supervision—a significant reform of the international banking system. It was not the World Bank, the International Monetary Fund, or even the Group of Seven that took this step. Rather, the forum was the Basle Committee on Banking Supervision, an organization composed of 12 central bank governors. The Basle Committee was created by a simple agreement among the governors themselves. Its members meet

four times a year and follow their own rules. Decisions are made by consensus and are not formally binding; however, members do implement these decisions within their own systems. The Basle Committee's authority is often cited as an argument for taking domestic action.

National securities commissioners and insurance regulators have followed the Basle Committee's example. Incorporated by a private bill of the Quebec National Assembly, the International Organization of Securities Commissioners has no formal charter or founding treaty. Its primary purpose is to solve problems affecting international securities markets by creating a consensus for enactment of national legislation. Its members have also entered into information-sharing agreements on their own initiative. The International Association of Insurance Supervisors follows a similar model, as does the newly created Tripartite Group, an international coalition of banking, insurance, and securities regulators the Basle Committee created to improve the supervision of financial conglomerates.

Pat Buchanan would have had a field day with the Tripartite Group, denouncing it as a prime example of bureaucrats taking power out of the hands of American voters. In fact, unlike the international bogeymen of demagogic fantasy, transnational regulatory organizations do not aspire to exercise power in the international system independent of their members. Indeed, their main purpose is to help regulators apprehend those who would harm the interests of American voters. Transgovernmental networks often promulgate their own rules, but the purpose of those rules is to enhance the enforcement of national law.

Traditional international law requires states to implement the international obligations they incur through their own law. Thus, if states agree to a 12-mile territorial sea, they must change their domestic legislation concerning the interdiction of vessels in territorial waters accordingly. But this legislation is unlikely to overlap with domestic law, as national legislatures do not usually seek to regulate global commons issues and interstate relations.

Transgovernmental regulation, by contrast, produces rules concerning issues that each nation already regulates within its borders: crime, securities fraud, pollution, tax evasion. The advances in technology and transportation that have fueled globalization have made it more

difficult to enforce national law. Regulators benefit from coordinating their enforcement efforts with those of their foreign counterparts and from ensuring that other nations adopt similar approaches.

The result is the nationalization of international law. Regulatory agreements between states are pledges of good faith that are self-enforcing, in the sense that each nation will be better able to enforce its national law by implementing the agreement if other nations do likewise. Laws are binding or coercive only at the national level. Uniformity of result and diversity of means go hand in hand, and the makers and enforcers of rules are national leaders who are accountable to the people.

BIPARTISAN GLOBALIZATION

SECRETARY OF STATE Madeleine Albright seeks to revive the bipartisan foreign policy consensus of the late 1940s. Deputy Secretary of State Strobe Talbott argues that promoting democracy worldwide satisfies the American need for idealpolitik as well as realpolitik. President Clinton, in his second inaugural address, called for a "new government for a new century," abroad as well as at home. But bipartisanship is threatened by divergent responses to globalization, democratization is a tricky business, and Vice President Al Gore's efforts to "reinvent government" have focused on domestic rather than international institutions. Transgovernmentalism can address all these problems.

Globalization implies the erosion of national boundaries. Consequently, regulators' power to implement national regulations within those boundaries declines both because people can easily flee their jurisdiction and because the flows of capital, pollution, pathogens, and weapons are too great and sudden for any one regulator to control. The liberal internationalist response to these assaults on state regulatory power is to build a larger international apparatus. Globalization thus leads to internationalization, or the transfer of regulatory authority from the national level to an international institution. The best example is not the WTO itself, but rather the stream of proposals to expand the WTO's jurisdiction to global competition policy, intellectual property regulation, and

other trade-related issues. Liberals are likely to support expanding the power of international institutions to guard against the global dismantling of the regulatory state.

Here's the rub. Conservatives are more likely to favor the expansion of globalized markets without the internationalization that goes with it, since internationalization, from their perspective, equals a loss of sovereignty. According to Buchanan, the U.S. foreign policy establishment "want[s] to move America into a New World Order where the World Court decides quarrels between nations; the WTO writes the rules for trade and settles all disputes; the IMF and World Bank order wealth transfers from continent to continent and country to country; the Law of the Sea Treaty tells us what we may and may not do on the high seas and ocean floor, and the United Nations decides where U.S. military forces may and may not intervene." The rhetoric is deliberately inflammatory, but echoes resound across the Republican spectrum.

Transgovernmental initiatives are a compromise that could command bipartisan support. Regulatory loopholes caused by global forces require a coordinated response beyond the reach of any one country. But this coordination need not come from building more international institutions. It can be achieved through transgovernmental cooperation, involving the same officials who make and implement policy at the national level. The transgovernmental alternative is fast, flexible, and effective.

A leading example of transgovernmentalism in action that demonstrates its bipartisan appeal is a State Department initiative christened the New Transatlantic Agenda. Launched in 1991 under the Bush administration and reinvigorated by Secretary of State Warren Christopher in 1995, the initiative structures the relationship between the United States and the EU, fostering cooperation in areas ranging from opening markets to fighting terrorism, drug trafficking, and infectious disease. It is an umbrella for ongoing projects between U.S. officials and their European counterparts. It reaches ordinary citizens, embracing efforts like the Transatlantic Business Dialogue and engaging individuals through people-to-people exchanges and expanded communication through the Internet.

DEMOCRATIZATION, STEP BY STEP

TRANSGOVERNMENTAL NETWORKS are concentrated among liberal democracies but are not limited to them. Some nondemocratic states have institutions capable of cooperating with their foreign counterparts, such as committed and effective regulatory agencies or relatively independent judiciaries. Transgovernmental ties can strengthen institutions in ways that will help them resist political domination, corruption, and incompetence and build democratic institutions in their countries, step by step. The Organization of Supreme Courts of the Americas, for instance, actively seeks to strengthen norms of judicial independence among its members, many of whom must fend off powerful political forces.

Individuals and groups in nondemocratic countries may also "borrow" government institutions of democratic states to achieve a measure of justice they cannot obtain in their own countries. The court or regulatory agency of one state may be able to perform judicial or regulatory functions for the people of another. Victims of human rights violations, for example, in countries such as Argentina, Ethiopia, Haiti, and the Philippines have sued for redress in the courts of the United States. U.S. courts accepted these cases, often over the objections of the executive branch, using a broad interpretation of a moribund statute dating back to 1789. Under this interpretation, aliens may sue in U.S. courts to seek damages from foreign government officials accused of torture, even if the torture allegedly took place in the foreign country. More generally, a nongovernmental organization seeking to prevent human rights violations can often circumvent their own government's corrupt legislature and politicized court by publicizing the plight of victims abroad and mobilizing a foreign court, legislature, or executive to take action.

Responding to calls for a coherent U.S. foreign policy and seeking to strengthen the community of democratic nations, President Clinton substituted the concept of "enlargement" for the Cold War principle of "containment." Expanding transgovernmental outreach to include institutions from nondemocratic states would help expand the circle of democracies one institution at a time.

A NEW WORLD ORDER IDEAL

TRANSGOVERNMENTALISM OFFERS its own world order ideal, less dramatic but more compelling than either liberal internationalism or the new medievalism. It harnesses the state's power to find and implement solutions to global problems. International institutions have a lackluster record on such problem-solving; indeed, NGOs exist largely to compensate for their inadequacies. Doing away with the state, however, is hardly the answer. The new medievalist mantra of global governance is "governance without government." But governance without government is governance without power, and government without power rarely works. Many pressing international and domestic problems result from states' insufficient power to establish order, build infrastructure, and provide minimum social services. Private actors may take up some slack, but there is no substitute for the state.

Transgovernmental networks allow governments to benefit from the flexibility and decentralization of nonstate actors. Jessica T. Mathews argues that "businesses, citizens' organizations, ethnic groups, and crime cartels have all readily adopted the network model," while governments "are quintessential hierarchies, wedded to an organizational form incompatible with all that the new technologies make possible." Not so. Disaggregating the state into its functional components makes it possible to create networks of institutions engaged in a common enterprise even as they represent distinct national interests. Moreover, they can work with their subnational and supranational counterparts, creating a genuinely new world order in which networked institutions perform the functions of a world government—legislation, administration, and adjudication—without the form.

These globe-spanning networks will strengthen the state as the primary player in the international system. The state's defining attribute has traditionally been sovereignty, conceived as absolute power in domestic affairs and autonomy in relations with other states. But as Abram and Antonia Chayes observe in *The New Sovereignty* (1995), sovereignty is actually "status—the vindication of the state's existence in the international system." More importantly, they demonstrate that in contemporary international relations, sovereignty has been redefined to mean "membership . . . in the regimes that make

up the substance of international life." Disaggregating the state permits the disaggregation of sovereignty as well, ensuring that specific state institutions derive strength and status from participation in a transgovernmental order.

Transgovernmental networks will increasingly provide an important anchor for international organizations and nonstate actors alike. U.N. officials have already learned a lesson about the limits of supranational authority; mandated cuts in the international bureaucracy will further tip the balance of power toward national regulators. The next generation of international institutions is also likely to look more like the Basle Committee, or, more formally, the Organization of Economic Cooperation and Development, dedicated to providing a forum for transnational problem-solving and the harmonization of national law. The disaggregation of the state creates opportunities for domestic institutions, particularly courts, to make common cause with their supranational counterparts against their fellow branches of government. Nonstate actors will lobby and litigate wherever they think they will have the most effect. Many already realize that corporate self-regulation and states' promises to comply with vague international agreements are no substitute for national law.

Globe-spanning networks will strengthen the state in the international system.

The spread of transgovernmental networks will depend more on political and professional convergence than on civilizational boundaries. Trust and awareness of a common enterprise are more vulnerable to differing political ideologies and corruption than to cultural differences. Government networks transcend the traditional divide between high and low politics. National militaries, for instance, network as extensively as central bankers with their counterparts in friendly states. Judicial and regulatory networks can help achieve gradual political convergence, but are unlikely to be of much help in the face of a serious economic or military threat. If the coming conflict with China is indeed coming, transgovernmentalism will not stop it.

The strength of transgovernmental networks and of transgovernmentalism as a world order ideal will ultimately depend on their accountability to the world's peoples. To many, the prospect of

transnational government by judges and bureaucrats looks more like technocracy than democracy. Critics contend that government institutions engaged in policy coordination with their foreign counterparts will be barely visible, much less accountable, to voters still largely tied to national territory.

Citizens of liberal democracies will not accept any form of international regulation they cannot control. But checking unelected officials is a familiar problem in domestic politics. As national legislators become increasingly aware of transgovernmental networks, they will expand their oversight capacities and develop networks of their own. Transnational NGO networks will develop a similar monitoring capacity. It will be harder to monitor themselves.

Transgovernmentalism offers answers to the most important challenges facing advanced industrial countries: loss of regulatory power with economic globalization, perceptions of a "democratic deficit" as international institutions step in to fill the regulatory gap, and the difficulties of engaging nondemocratic states. Moreover, it provides a powerful alternative to a liberal internationalism that has reached its limits and to a new medievalism that, like the old Marxism, sees the state slowly fading away. The new medievalists are right to emphasize the dawn of a new era, in which information technology will transform the globe. But government networks are government for the information age. They offer the world a blueprint for the international architecture of the 21st century.