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LINES AND FLOWS: THE BEGINNING AND END OF BORDERS*

*Alan D. Bersin***

Border Lines

The purpose and function of borders in world history has been and remains to delineate and demarcate—that is, to differentiate—one sovereignty from another. They are the juridical lines on a map, indicating the geographical place where imperial and/or national dominion begins and ends. These shift over time as a result of political and military developments, usually followed by legal recognition or acknowledgment expressed in one form or another. History tells the tale of these developments and shifts. Like laws, borders embody and reflect history's results with the narrative left out.

The spaces of borders, corresponding to their map lines, are marked by ports of entry and exit. It is here where cross-border transactions of people and goods are processed through the exercise of immigration and customs authorities. Typically, the scope of these border inspection authorities is quite broad regardless of the legal system under which they operate. Sovereignty asserts itself aggressively at the border threshold to determine who and what has the right or privilege of entrance (inbound) and exit (outbound). The levying of customs fees and duties has generated critical revenue streams for governments since biblical times. It was no accident that one of the earliest acts of the First Congress during the Washington Administration was to establish the U.S. Customs Service in 1789.¹

Borders define a homeland. They are the primary reference points for national defense strategy and homeland security policy. Throughout history, borders have been the site of fortification, intended variously to shut in or keep out people or things. China's Great Wall in the second century BCE, France's Maginot Line pre-World War II, the Soviets' Ber-

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1. The U.S. Customs Service was established by the Fifth Act of the First Congress on July 31, 1789. *About 1600-1799*, U.S. DEP'T OF TREAS., <http://www.treasury.gov/about/history/Pages/1600-1799.aspx> (last updated Nov. 13, 2010).

lin Wall in the twentieth century, and America's Southwest border fence in the twenty-first century all serve to illustrate the point. It was made more poetic and timeless by Robert Frost in "Mending Wall" where he wrote "good fences make good neighbors."²

So, we see, borders are lines with real result and consequence. When we walk to the riverfront in El Paso and wade into the Rio Grande, at midstream it becomes the Rio Bravo and Juarez, Mexico begins. Without more, one crosses the line (*la línea*) from one of the safest cities in the Western Hemisphere (five homicides in 2010) to its most dangerous (3,400 homicides in 2010).³ Border lines matter but rarely account by themselves for the changes they embody.

Borders as Flows

More than a generation ago, in *The Structure of Scientific Revolutions*, Thomas Kuhn introduced the notion of "paradigm" to refer to a distinctive manner of viewing the world, a characteristic sense, which is shaped by the larger forces at work in an era.⁴ This way of seeing organizes all of the data that is around us—all surrounding sensations—into patterns that we can interpret and understand, and then act on to effect. Epochal shifts in paradigm catalyze enormous alterations in how we conduct operations and do business at a particular point in time.⁵ The balance of this lecture addresses the massive paradigm change that has taken place since 9/11 in our perception of borders not only as lines, but also as movements—flows of people and goods on a global scale both legally and illegally.

Global flows are not new. These have occurred since ancient times and are chronicled in the ages of discovery and exploration as seafaring matters, and much earlier in the movement of goods and people along the

2. Robert Frost, *Mending Wall*, in *THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED* 33 (Edward Connery Lathem ed., 1969).

3. Monica Ortiz Uribe, *El Paso, San Diego Among Safest Cities*, KPBS.ORG (Nov. 22, 2010), <http://www.kpbs.org/news/2010/nov/22/el-paso-san-diego-among-safest-cities/>.

4. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10–13 (2d ed. 1962).

5. In Kuhn's context these shifts marked the transition from a Ptolemaic or pretentious way of seeing—the earth anchors the universe—to the materially more modest Copernican one—the sun centers the solar system—and so on through a mechanical Newtonian model to the uncertainties inherent in the relativist paradigm captured by Einstein. *Id.* at 66–91.

Silk and Tea Horse Roads into China and the caravan paths across Arabia.⁶

Nor is the contemporary scale of the flows itself a distinguishing factor. These have increased exponentially century after century, spurred by colonial empires and trading companies, activities multiplied throughout by the growing logic of comparative advantage. The intensity, volume and speed of commercial and migratory flows accelerated mightily with the Industrial Revolution,⁷ and then massively again more recently by the invention of the jet engine and the Internet. The cumulative effect of these trends is what we refer to as globalization—extraordinary cross-border flows of capital, goods, people, ideas, and images occurring routinely on a daily basis, facilitated by a digitalization of data that has created instantaneous communication and transaction.

Security as the Organizing Principle: The Searing Impact of 9/11

The vast volumes and growing speed in the movement of people and goods toward and across U.S. border lines from a globalized world is staggering. Each and every day in 2010, an average of 965,167 passengers and pedestrians, 47,293 truck, rail, and sea containers,⁸ and 257,990 privately owned vehicles entered the United States.⁹ Roughly \$2 trillion in imports and \$1.8 trillion in exports crossed our borders that same year.¹⁰

The trauma of 9/11, inflicted by al Qaida on the world through the United States, assured that we would never view cross-border movements in quite the same way. Transnational terrorism exploited the relative openness of our borders and laxness of our border regulatory regimes to invade the continental United States for the first time since the

6. See Mark Jenkins, *Tea Horse Road: The Forgotten Road*, NAT'L GEOGRAPHIC MAG. (May 2010), <http://ngm.nationalgeographic.com/2010/05/tea-horse-road/jenkins-text>.

7. Charles Hirschman & Elizabeth Mogford, *Immigration and the American Industrial Revolution from 1880 to 1920*, 38 SOC. SCI. RES. 897 (2009).

8. *On a Typical Day in Fiscal Year 2010*, CPB..., CBP.GOV (Feb. 25, 2011), http://www.cbp.gov/xp/cgov/about/accomplish/previous_year/fy10_stats/typical_day_fy2010.xml.

9. U.S. CUSTOMS & BORDER PROT., IMPORT TRADE TRENDS: FISCAL YEAR 2010 YEAR-END REPORT 18 (2010) [hereinafter IMPORT TRADE 2010 REPORT], available at http://www.cbp.gov/linkhandler/cgov/trade/trade_programs/trade_trends/itt.ctt/itt.pdf.

10. *Securing America's Borders: CBP Fiscal Year 2010 in Review Fact Sheet*, CBP.GOV (Mar. 15, 2011), http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/cbp_overview/fy2010_factsheet.xml [hereinafter *CBP 2010 in Review Fact Sheet*].

British burned government buildings in Washington during the War of 1812.¹¹ In one fell vicious swoop that was actual and deadly, and unlike the potential threat we had grown accustomed to during the Cold War, the events of 9/11 altered America's view of security forever.

The resulting sense of insecurity stemmed from the fact that our borders had been violated. The reflexive response was to hunker down behind traditional concepts of borders as lines of defense. All planes were grounded and our maritime and aviation borders were closed in the immediate aftermath of 9/11. Similarly, our land borders virtually shut down as each entering vehicle from Mexico and Canada was inspected thoroughly. In other less visible ways, America closed its borders through restrictions on the issuance of visas and other immigration benefits. As Edward Alden has documented, many of these restrictions—pertaining particularly to the grant of visas—persist today.¹²

But all the emergency measures taken immediately after 9/11 collided head-on with the realities of global travel and commerce through transit zones and supply chains. They also directly challenged our self-image as an open, free, and welcoming society. The unacceptable economic and political consequences of shutting down the border, coupled with the new security imperative, forced a fundamental shift in our perspective. We began to understand that our borders begin not where our ports of entry are located, but rather, where passengers board air carriers and freight is loaded on maritime vessels bound for those ports of entry. In order to forge practical arrangements to take both travel and trade security into account, borders needed to be viewed and managed as flows of people and goods as much as lines in the sand, on the water, or through the air.

In the ten years since 9/11, three terrorist plots targeting the United States involved cross border movements of people or goods.¹³ Each event

11. American territory, of course, was again invaded in 1941 by Japan's sneak attack at Pearl Harbor.

12. Edward Alden, *Companies Take Action as Visa Curbs Hurt Trade*, FIN. TIMES, Jan. 29, 2003, at 7. See generally EDWARD ALDEN, *THE CLOSING OF THE AMERICAN BORDER: TERROISM, IMMIGRATION AND SECURITY SINCE 9/11* (Harper Collins Publishers 2008).

13. In addition, we have been subject to "home-grown" terrorist events such as that carried out at Fort Hood by Maj. Nidal Hasan, the attack on the New York subway system planned by Najibullah Zazi and the murder of a military recruiter in Arkansas. Robert D. McFadden, *Army Doctor Held in Ft. Hood Rampage*, N.Y. TIMES (Nov. 6, 2009), <http://www.nytimes.com/2009/11/06/us/06forthood.html?ref=nidalmalikhasan>.

makes the case powerfully for the new border paradigm that links jurisdictional lines to flows toward them.

The first involved the so-called underwear bomber, Nigerian citizen Umar Farouk Abdulmutallab, who boarded a plane in the Netherlands intending to ignite PETN explosive material and blow up a Northwest Airlines flight over Detroit.¹⁴ Based on its targeting capabilities, Customs and Border Protection (“CBP”) identified Abdulmutallab as a person of interest after the flight departed.¹⁵ When the plane arrived in the United States and he presented himself for admission, officers would have referred him to secondary inspection for significant interrogation. This obviously would have been too late, because had he succeeded, he would have blown up the plane before it landed. Border security in this context requires that Abdulmutallab be prevented from boarding the plane in the first place. For these purposes, the border became Schipol Airport in Amsterdam, and the goal changed to the identification and preemption of high risk individuals in the flow of passengers at their last point of departure toward the United States.

The second case was Faisal Shahzad, the Times Square Bomber, a naturalized U.S. citizen born in Pakistan, who went abroad to receive training from the Taliban in the tribal borderlands between Afghanistan and Pakistan.¹⁶ Shahzad received support and resources in the New York metropolitan area from abroad to construct an explosive device he intended to detonate in Times Square. Foiled by an alert guard, Shahzad attempted to flee the country on board an Emirates Airlines plane. Advance passenger manifest information received by CBP regarding the outbound flight, coupled with significant travel history data available concerning Shahzad, facilitated his identification and apprehension on the tarmac at JFK seconds before takeoff.

14. Kenneth Chang, *Explosive on Flight 253 is Among Most Powerful*, N.Y. TIMES (Dec. 7, 2009), <http://www.nytimes.com/2009/12/28/us/28explosives.html>.

15. *Ten Years after 9/11: Can Terrorists Still Exploit Our Visa System?: Hearing Before the H. Comm. on Homeland Sec. Subcomm. on Border & Mar. Sec.*, 112th Cong. 2 (2011) (statement of Edward J. Ramotowski, Acting Assistant Sec’y for Visa Services, Dep’t of State), available at <http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Ramotowski.pdf>.

16. Mark Mazzetti & Scott Shane, *Evidence Mounts for Taliban Role in Bomb Plot*, N.Y. TIMES (May 5, 2010), <http://www.nytimes.com/2010/05/06/nyregion/06bomb.html>.

The third terrorist plot was the shipment of parcel bombs by al Qaida operatives in the Arabian Peninsula via UPS and Federal Express.¹⁷ Sent from Yemen, addressed to locations in Chicago, the improvised explosive devices passed through airports in London and Dubai, after having been concealed in printer cartridges and timed to detonate over the United States. As a result of intelligence-sharing by Saudi authorities, we were able to deploy public and private sector resources to locate the packages before they reached their intended destinations. As in the other cases, the key lay in the collection, analysis, and sharing of data regarding the transnational origin, route, and flow, in this instance, of express carrier packages.

We understand our mission at CBP, within the Department of Homeland Security ("DHS"), from this perspective: keeping dangerous people and dangerous things away from the American homeland. We strive to accomplish this mission by exercising our authorities and utilizing our resources in a way that enlists both time and space as allies. The earlier that we can identify, intercept, and neutralize threats to the homeland, the safer our people will be. The further away geographically from the physical line that we can achieve these ends, the safer our country will be. The job for DHS, in short, is to secure flows of people and goods moving toward, and intending to enter, the United States. This altered paradigm regarding our mission has fundamental implications for DHS's strategic and tactical approach to organization and function, as well as to relationships with other agencies within and outside the government.

Joint Border Management

The terrorist invasion of 9/11 gave rise to a preoccupation with the safety of the American homeland. The concept of homeland itself was novel, even uncomfortable for many in the U.S. context. It differed strikingly from our earlier emphasis on new frontiers in Frederick Jackson Turner's thesis,¹⁸ or the "manifest destiny" that drove an aggressive ex-

17. Erika Solomon & Phil Stewart, *Al Qaeda Yemen Wing Claims Parcel Plot, UPS Crash*, REUTERS (Nov. 5, 2010), <http://www.reuters.com/article/2010/11/05/us-usa-yemen-bomb-idUSTRE6A44PU20101105>.

18. Frederick Jackson Turner, *The Significance of the Frontier in American History*, in *FREDERICK JACKSON TURNER: WISCONSIN'S HISTORIAN OF THE FRONTIER* 26-47 (Martin Ridge ed., 1986).

pansion of both northern and southern borders in the United States during the nineteenth century.¹⁹

This new focus generated creation of DHS, a merger by legislative fiat in 2003, of twenty-two agencies spread previously across the landscape of American government.²⁰ CBP itself was formed through the merger of four separate organizations from three separate cabinet departments into one new agency—the U.S. Border Patrol and Immigration and Naturalization Service from the Department of Justice, dealing with people seeking to enter the country legally and illegally; the U.S. Customs Service from the Treasury Department, dealing with cargo and goods; and the Agriculture Inspection Service from the Department of Agriculture, dealing with agricultural pests and potential infestation of our crop lands.²¹

Our previous scheme of divided border management, in place since the nineteenth century, was not efficient to say the least. But it was responsive to history. As John Barth, borrowing a bit from Oliver Wendell Holmes, noted in *The End of the Road*, “There’s no reason in the long run why Italy shouldn’t be shaped like a sausage instead of a boot, but that doesn’t happen to be the case. The world is everything that is the case, and what the case is is not a matter of logic.”²² I learned this first hand in the 1990s as the U.S. Attorney for the Southern District of California. Appointed the so-called Border Czar in the Clinton Administration, and tasked to “coordinate” federal law enforcement from southern California to South Texas, success in the position was limited by the existing structure of separate stove pipes zealously maintained by bureaucratic rivalry and an unending competition for resources.

These tensions were swept aside in the crucible of 9/11 and unified border management was created for the first time in American history; and, it happens, for the first time across the globe in the world’s history. Immigration, customs, and agricultural inspection authorities²³ exercised by the same officer working for a single agency defined by an overarch-

19. See generally ALBERT KATZ WEINBERG, *MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY* (Quadrangle Books 1963) (1935).

20. *History: Who Became Part of the Department?*, DEP’T OF HOMELAND SEC., http://www.dhs.gov/xabout/history/editorial_0133.shtm (last visited Feb. 26, 2012).

21. See *The Future is Now*, U.S. CUSTOMS TODAY (Feb. 2003), <http://www.cbp.gov/xp/CustomsToday/2003/February/future.xml>.

22. JOHN BARTH, *THE END OF THE ROAD* 76 (rev. ed. 1967) (emphasis omitted).

23. CBP also serves as the single executive agent for forty other federal agencies charged with administrative or regulatory duties regarding incoming and outgoing people and things. These include, notably, the Food and Drug Administration, the Environmental Protection Agency, the Consumer Products Safety Commission, and the Department of Transportation.

ing security mission, invented the institution of joint border management and the science and art of modern border protection. It sounds so sensible, and in practice it has turned out to be so. But it would not have come to pass in the absence of crisis, and we remain virtually alone in implementing it comprehensively.²⁴ I venture to project that over the next generation most nations will turn to joint border management and wonder in retrospect, as we do, how they could have functioned otherwise. As Arthur Schopenhauer, the philosopher, aptly noted: "Every truth passes through three stages . . . [F]irst, it is ridiculed[;]. . . [S]econd, it is [violently] opposed [;] . . . [and T]hird, it is regarded as self-evident."²⁵

Toward An Integrated National and Homeland Security Enterprise

The Homeland Security Act of 2002,²⁶ establishing DHS, involved the largest reorganization of executive branch operations since formation of the National Military Establishment in 1947, subsequently renamed as the Department of Defense ("DOD") in 1949.²⁷ Composed of 240,000 employees,²⁸ DHS is the third largest cabinet agency after DOD and the Department of Veterans Affairs.²⁹ Although the corporate mergers within DHS and CBP are complete, the development and realization of an integrated mission—in terms of both homeland security and border protection—remain very much a work in process. The experience of DOD is instructive.

Established after World War II, the DOD was formed by breaking the Army/Air Force into separate components, then combining them with the

24. Canada, the United Kingdom, and Australia are among a handful of countries which have taken steps, large and small, toward unification. Each, however, has stopped short of a full merger of responsibilities. The Canadian Border Services Agency for example, regulates the ports of entry while the Royal Canadian Mounted Police, separately governed, acts between the ports of entry and elsewhere through the interior of the country. The Australian Customs and Border Protection Services shares border-related responsibilities with the Department of Immigration and Citizenship. The United Kingdom Border Agency, authorized to enforce immigration laws and collect customs duties, is not charged with counter-terrorist responsibilities.

25. THE HARPER BOOK OF QUOTATIONS 451 (Robert I. Fitzhenry ed., 3d ed. 1993) (quoting Arthur Schopenhauer) [hereinafter HARPER BOOK OF QUOTATIONS].

26. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

27. *About the Department of Defense (DOD)*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/> (last visited Feb. 26, 2012) [hereinafter *About the DOD*].

28. *About*, DEP'T OF HOMELAND SEC., <http://www.dhs.gov/xabout/> (last updated Feb. 13, 2012).

29. *The Executive Branch*, WHITE HOUSE, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Feb. 26, 2012).

Navy and Marines,³⁰ and affiliating the Coast Guard, at that time in the Treasury Department.³¹ While the Office of the Secretary of Defense worked from the outset toward new mechanisms of coordination, the proud legacies of the individual branches were retained—even fiercely maintained—and the process was slow-going. The lack of a genuinely integrated mission with corresponding joint operations was conspicuous by its absence. When the centrifugal forces at work became tragically apparent in the aborted Iranian hostage rescue mission in 1980 (and the fractured and uneven operation in Grenada to protect U.S. citizens a few years later), Congress stepped in and enacted the Goldwater-Nichols Act,³² requiring purposeful integration and “jointness” in operational planning and execution.³³ DOD has been working toward successful integration ever since, resulting in impressive military results. The latest evidence to convince remaining doubters, not few and far between among some admirals and generals, was the flawless, U.S. casualty-free, operation in Abbottabad, Pakistan, to eliminate Osama bin Laden.³⁴

We remain at a very early stage of institutional evolution within DHS and CBP with such integrated operations. It likely will take a generation or more to achieve, as was the case with DOD. Hopefully, history will spare us many devastating, precipitating, and accelerating events.

There remains a second compelling requirement for mission integration within the realm of border protection and homeland security. I refer to the larger relationship between the military and law enforcement. The intellectual—largely legal—engineering necessary to create a revised theory that properly aligns these functions and clearly delineates homeland security as a species of national security remains in its infancy. The consequences show up in a variety of places. We struggle to determine whether to try terrorists as criminals in federal court or as enemy com-

30. *About the DOD*, *supra* note 27.

31. The Coast Guard became part of the Department of Homeland Security in 2003. *Coast Guard History: When Was the Coast Guard Established?*, U.S. COAST GUARD, <http://www.uscg.mil/history/faqs/when.asp> (last modified Jan. 31, 2012).

32. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified at 10 U.S.C. § 101 *et seq.* (2006)).

33. Bruce Berkowitz, *Intelligence Reform: Less Is More*, HOOVER DIGEST (Apr. 30, 2004), <http://www.hoover.org/publications/hoover-digest/article/6809>.

34. Peter Baker, Helene Cooper & Mark Mazzetti, *Bin Laden is Dead, Obama Says*, N.Y. TIMES (May 1, 2011), http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?_r=1&hp.

batants before military tribunals.³⁵ We cling to *posse comitatus* as a constitutional bulwark, yet at the same time many fear it may be an anachronism in an environment of transnational crime and terror.³⁶

In short, the old dichotomies, and our historic American reconciliation of them, no longer serve unquestionably as certain stars by which we can reliably navigate. The current military activities in Afghanistan seem less connected with obtaining classical geopolitical advantage than with assuring that country, or any other country, will not provide a base from which dangerous people and dangerous things can be launched against the United States. Although means and methods differ, this focus is identical to our border protection mission of securing flows of people and goods toward the homeland. There are distinctions here with a real difference to be sure. However, I submit, they need to be re-examined and re-analyzed carefully in a borderless world marked by continuums and flows rather than bright lines alone.

Making Data Into Useable Information

If borders are flows of people and goods, then those charged with securing and regulating those flows must confront the reality that ninety-seven to ninety-eight percent of the traffic is composed of lawful and compliant trade and travel.³⁷ The goal to identify and interdict dangerous passengers and cargo from among this otherwise legitimate mass generates a requirement to distinguish between high-risk and low-risk subjects.

Risk assessment thereby emerges as the keystone of border management. Information, in turn, becomes central to the evaluation of risk while data are the building blocks of timely and actionable information.

To fulfill its mission CBP has developed the U.S. government's largest collection, storage, and dissemination functions with respect to unclassified data. On a typical day, CBP exchanges 1.35 billion electronic messages with other government agencies, transportation carriers, customs brokers, and the plethora of additional participants in global travel networks and supply chains. These analytical communications are managed by CBP's National Targeting Centers for Passengers and Cargo, located in Virginia. They permit access, respectively, to records of each traveler

35. See *Civilian, Military Trials Prosecute Terrorism Suspects Differently*, USA TODAY (Nov. 22, 2009, 11:58 PM), http://www.usatoday.com/news/washington/2009-11-22-civilian-vs-military-trials_N.htm.

36. See Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99, 99-144 (2003).

37. IMPORT TRADE 2010 REPORT, *supra* note 9, at 18.

and every cargo shipment—land, sea, and air—that have crossed a U.S. border through a port of entry during the past eight years, legally or illegally. Sophisticated rule searches, utilizing complex algorithms, scan this data for both known and unknown threats based on potential risks identified by DHS and the intelligence community. Targeting in this fashion enhances our capacity to find the dangerous people and dangerous things for which we are on the lookout at the border. Each border-related transaction is scrutinized in this way.

The logic in this environment of information data sharing and access is highlighted. In the modern age, what we learned as children remains true as ever: information *is* power. However, the traditional moral has been upended entirely. Those who hoard information today, expecting their power to grow by forcing others to ask for it, soon find themselves isolated and, over time, ignored. The abundance of data and the proliferation online of alternative sources of information place a premium on sharing; one's information becomes more valuable, i.e., useful and actionable, by leveraging it off of other information and data embodying and reflecting additional reference points that facilitate a connecting of dots.

The implications for bureaucracy are significant as are the tensions with conventional “silo” or “stove-piped” organizational arrangements. As Lawrence Wright makes clear in *The Looming Tower*, the CIA and the FBI discovered in the immediate aftermath of 9/11 that information unshared in their separate files contained much of what, had it been combined, would have revealed the al Qaida conspiracy.³⁸ To the credit of these agencies, the data and information sharing between them, while not perfect, has increased exponentially during the past decade. This shared counter-terrorist intelligence and information, together with foreign travel-related data supplied by CBP, has proven its worth to homeland security time and time again.³⁹

38. See LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2006).

39. Two notable cases involve the arrest and conviction of U.S. lawful permanent resident Najibullah Zazi and U.S. born citizen David Coleman Headley, formerly known as Daood Sayed Gilani. See *United States v. Zazi*, No. 09-CR-663, 2010 WL 2710605 (E.D.N.Y. June 30, 2010); *United States v. Kashmiri*, No. 09 CR 830-4, 2011 WL 1326373, at *1–5 (N.D. Ill. Apr. 1, 2011). Zazi was recruited by al Qaida to conduct suicide attacks using explosives against the New York City subway system. See *Zazi*, 2010 WL 2710605, at *1. Headley helped plan the November 2008 attacks in Mumbai in concert with al Qaida and Pakistan-based terrorist organization Lashkar-e-Taiba. See *Kashmiri*, 2011 WL 1326373, at *1–2; Sebastian Rotella, *The American Behind India's 9/11—*

The obstacles to this happening quickly outside of the counter-terrorist context should not be underestimated. On the international front, border-related data sharing, even among the closest of allies, remains in a primitive stage. Old-fashioned limited views of national interest and reflexive notions of privacy and civil liberties restrict willingness to share and reinforce parochial and myopic concerns of long duration.

Similar influences operate in the domestic sphere where deep-seated bureaucratic divisions persist. This is particularly true when different perspectives on mission are brought to a crime scene. For investigators, guided by the criminal justice model, information is maintained on close hold in case files and evaluated for its potential as “admissible evidence” in a prosecution. For the cop on the beat, this same information may be crucial intelligence key to crime prevention activity at the moment. Failure to act on the information in deference to its subsequent use in the courtroom is the current rule rather than the exception. Over time, this cultural habit of mind will give way to the logic and compelling benefits of intelligence and information sharing. Hopefully, again, catastrophic consequence need not be the mid-wife of inevitable change.

Expediting Legitimate Trade and Travel as a Security Regime

The long-held view posits that security and trade are independent variables competing in a zero sum game. According to conventional wisdom, trade facilitation, the expedited movement of commerce, and security (ensuring the safety of that commerce) must be balanced to an optimal equilibrium. The concept of “so much security” in exchange for “so much delay” in the processing of trade has governed port of entry operations for generations. Risk management, however, comprehensively applied, leaves this notion not only theoretically false but also practically counter-productive and self-defeating.

Short of examining every piece of straw separately, there are only two ways one can find the proverbial needle in a haystack. The first is to have very specific intelligence about where the needle is so that you can reach into the middle of the haystack and pluck it out. Every once in a while, but with increasing frequency, we have access to that kind of granulated intelligence. That is what occurred in the case of the UPS and FedEx parcels from Yemen. We received very concrete information and were able to reach into the global flow of millions of packages then in transit and ferret out the precise two packages laden with explosives.

But we cannot always count on that kind of actionable intelligence. So the only other way to find the needle in the haystack is to make the haystack smaller. And the way to make the stack smaller is to differentiate routinely between high- and low-risk subjects, and expedite movement of the latter through the global system.

In fact, segmenting traffic flows according to risk is a necessary condition of heightening border security at any level of resource allocation. We expedite lawful trade and travel through border controls so that we may focus our scarce regulatory and inspectional resources on that traffic about which we have derogatory information, or about which we lack sufficient information to make a sound judgment regarding its legitimacy. Moving ordinary travelers and regular cargo quickly through ports of entry, therefore, is not only good for the economy, but given the volumes we confront, it is essential to the security function itself.

Expediting trade and heightened security, accordingly, are neither antithetical to one another nor are they mutually exclusive matters requiring balance. To the contrary, they are part and parcel of a single process. This approach to managing flows has become the cornerstone of our system of border management in the United States.

CBP is re-engineering its internal trade functions and field inspection protocols to embody this regulatory model. *Trusted Traveler* and *Trusted Shipper* initiatives are central elements key to the strategy.⁴⁰ *Global Entry* is a security program that extends expedited clearance to pre-approved low-risk air travelers entering the United States.⁴¹ The *NEXUS* and *SENTRI* programs operate similarly to expedite passage through our land border crossings with Canada and Mexico respectively.⁴² Comparable benefits in the cargo context are conferred on members of the *Customs/Trade Partnership against Terrorism* (“C-TPAT”) program.⁴³

These *trusted partner* programs offer the same “grand bargain”: in exchange for sharing information with the government that permits it to vet the security status and background of participating persons and entities,

40. *Budget Hearing Before the H. Appropriations Comm., Subcomm. on Homeland Sec.*, 112th Cong. 181–87 (2011) (testimony of Comm’r Alan Bersin, U.S. Customs & Border Prot.), *available at* http://www.dhs.gov/ynews/testimony/testimony_1300738129469.shtm.

41. *Id.*

42. *See Trusted Traveler Programs*, U.S. CUSTOMS & BORDER PROT., http://www.cbp.gov/xp/cgov/travel/trusted_traveler/ (last visited Feb. 26, 2012).

43. *See C-TPAT: Overview*, CBP.GOV, http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/what_ctpat/ctpat_overview.xml (last visited Feb. 26, 2012).

the government commits itself to two reciprocal obligations.⁴⁴ First, it will maintain the information received in confidence and utilize it solely for the purpose it was given. Second, the traveler, importer, or shipper, once vetted and deemed trusted, will receive the benefit of expedited movement into the country.

The dynamic here highlights the crucial importance of genuine partnerships with the public and private sectors as well as with other countries. What is required here is not only the intensification of partnership but a change in the quality and nature of the interaction. Yesterday's prevailing mode—government mandate and private sector compliance—must give way to the model of a *co-created* regulatory regime that embodies the “grand bargain” from the outset in reacting to evolving terrorist/transnational crime threats. The joint public-private response in the aftermath of the Yemen cargo plots, *Air Cargo Advance Screening* (“ACAS”),⁴⁵ captures the requirement and best illustrates the optimal way forward. Through advance information and early decision-making by all participants in the air cargo supply chain, to include CBP, the Transportation Security Administration, air carriers, freight forwarders, and international postal administrations, we are able to co-create a process to reduce the “haystack” and take action on the “needles” as early in the process as possible. Ultimately, the goal is to establish global requirements for advance information and ensure that high risk cargo identified by ACAS is physically screened under the appropriate regulatory framework and protocols.⁴⁶

Absent authentic collaboration of this kind, we cannot surmount the challenge of scaling up these programs of trust and confidence such that they will yield at once satisfactory material effect on both our security profile and our economic competitiveness.⁴⁷ Less is not more here, and Malcolm Gladwell's “tipping point” is the goal.⁴⁸

44. IMPORT TRADE 2010 REPORT, *supra* note 9, at 1–18.

45. *Cargo Security: Advance Electronic Information & Screening*, IATA (Oct. 2011), <http://www.iata.org/whatwedo/cargo/tracker/october-2011/pages/security.aspx>.

46. An analogous approach to the regulation of passengers in the context of international partnerships exists in the Visa Waiver Program (“VWP”). VWP travelers must use secure, machine-readable travel documents and obtain pre-travel authorization from the Electronic System for Travel Authorization before embarking for the United States. Countries participating in the program, currently thirty-six in number, must meet heightened security standards that are periodically verified and offer visa-free travel to U.S. citizens and nationals. See 8 U.S.C. § 1187 (2006); 8 U.S.C. § 1732(c) (2006).

47. Commencing in December 2010, CBP has integrated its trusted traveler programs by extending Global Entry benefits to NEXUS and SENTRI members and vice-versa. *Global Entry Expansion Federal Notice Published*, CBP.GOV (Dec. 29, 2010),

United States, Mexico, and Canada: An Intermestic North America

The new border paradigm has special implications—and holds out special promise—for our land border neighbors to the north and south.

The situation is unique, first because of the physical proximity of our geography. We share 1,900 border miles with Mexico and 5,400 miles of border with Canada (including those between Alaska and the Yukon). A second dimension of uniqueness stems from history. Following armed conflicts with each of our neighbors in the nineteenth century, treaties and subsequent peaceful territorial adjustments have blessed us with the longest demilitarized land borders in the world.⁴⁹

These developments in space and over time have created a relationship between the United States and each of Mexico and Canada that is equally unique. It is a relationship that is neither international in the classical sense nor is it domestic—of course, given the existence of separate sovereignties. Instead, to use a phrase coined by Bayless Manning in the 1970s, the relationship is “intermestic.”⁵⁰

Notwithstanding all of this, the fact remains that our borders with Mexico and Canada have been and remain largely inefficient from the standpoint of managing flows of people and cargo. The reason for this is

http://www.cbp.gov/xp/cgov/travel/travel_news/global_published.xml. Nearly one million persons presently participate. *CBP 2010 in Review Fact Sheet*, *supra* note 10. More than ten-thousand companies are validated in the C-TPAT Cargo security program. *C-TPAT Reaches 10,000 Members*, 4 *FRONTLINE MAG.*, no. 1, Winter 2011, at 5, available at http://nemo.cbp.gov/opa/frontline/winter_frontline2011.pdf. On the international front, CBP has developed and continues to strengthen supply chain security through “mutual recognition agreements” with trusted partners in cargo, including New Zealand, Canada, Jordan, Japan, Korea, and the European Union. CBP has non-binding trusted traveler agreements with Canada, Mexico, the Netherlands, the United Kingdom, Korea, Germany, Brazil, and Qatar. See Susan Holliday, *Global Entry Takes Off: Private-Sector Support Fuels Boost in Frequent Flier Program*, 4 *FRONTLINE MAG.*, no. 1, Winter 2011, at 11, available at http://nemo.cbp.gov/opa/frontline/winter_frontline2011.pdf.

48. MALCOLM GLADWELL, *THE TIPPING POINT* (2000).

49. The Rush-Bagot Treaty in 1817 with Canada (through Britain following the War of 1812) and the Treaty of Guadalupe Hidalgo in 1848, concluding the U.S.-Mexico War, established lasting peace. Additional boundary agreements were reached amicably: with Canada (British North America) through the Webster-Ashburton Treaty (1842) and the Oregon Treaty (1846), and with Mexico through the Gadsden Purchase (1853). See *Milestones*, OFF. OF THE HISTORIAN, <http://history.state.gov/milestones> (follow “1801-1829” or “1830-1860” hyperlink; then select border agreement name) (last visited Feb. 26, 2012).

50. Bayless Manning, *The Congress, The Executive and Intermestic Affairs: Three Proposals*, 55 *FOREIGN AFF.* 306, 309 (1977).

the asymmetry between us and our neighbors.⁵¹ Only at the border line are we equal as a matter of juridical power as nowhere else in the bilateral relationship. At the border, our neighbors have jealously guarded the prerogatives of sovereignty to reinforce their national pride and identity and to avoid political, economic, and cultural domination by the “colossus” on their threshold. Porfirio Díaz, Mexico’s ruler between 1877 and 1880 and again between 1884 and 1911, summarized the sentiment: “Poor Mexico, so far from God and so near to the United States.”⁵² Particularly pronounced in Mexico, the same sense has existed among Canadians, albeit expressed on different issues and in different ways.⁵³ Reimagining and then reinventing our borders with Mexico and Canada in the context of trade flows and the flows of people has become crucial on both security and economic grounds.

Regarding commerce, the emergence of global trading blocs highlights the imperative of viewing U.S. economic prosperity increasingly from the perspective of enhancing North American competitiveness. To compete successfully over the next half century with East Asia, the Indian subcontinent, and Brazil, we must take the North American Free Trade Agreement (“NAFTA”) to the next level.⁵⁴ The critical path to this end is increasing significantly the efficiency of our borders in order to reduce

51. The populations of the United States, Canada, and Mexico are 313 million, 34 million and 113 million, respectively. *Country Comparison: Population*, in CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (July 2011) [hereinafter WORLD FACTBOOK], available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html>. Economically, their gross domestic products are \$15.04 trillion (U.S.), \$1.39 trillion (Canada), and \$1.657 trillion. *Field Listing: GDP (Purchasing Power Parity)*, in WORLD FACTBOOK, *supra*, available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2001.html>.

52. HARPER BOOK OF QUOTATIONS, *supra* note 25, at 31; *Chronology of Leading Historical Events in Mexico*, in RANDOLPH WELLFORD SMITH, BENIGHTED MEXICO 383 (1916).

53. See, e.g., Meg Bortin, *Global Poll Shows Wide Distrust of United States*, N.Y. TIMES (June 27, 2007), <http://www.nytimes.com/2007/06/27/news/27iht-pew.4.6365578.html?pagewanted=all>.

54. Known as *Tratado de Libre Comercio* (“TLC”) in Mexico, NAFTA dramatically expanded annual U.S. trade flows (imports and exports) with Canada (\$525.3 billion in 2010) and Mexico (\$393 billion in 2010), making them our first and third largest commercial partners. *Top Trading Partners*, FOREIGN TRADE STATISTICS, <http://www.census.gov/foreign-trade/statistics/highlights/top/top1012yr.html> (last updated July 12, 2011). The second, fourth and fifth rankings belong respectively, to China (\$456.8 billion in 2010), Japan (\$180.9 billion in 2010) and Germany (\$130.9 billion in 2010). *Id.*

current cross-border transactional costs by ten to twenty percent or more on the “NAFTA Highway.”

With respect to security, the focus must shift from an exclusive one on land border lines, north and south, to one concerned with the necessity for “continental perimeter security.”⁵⁵ This approach would have Canada, the United States, and Mexico jointly identifying and intercepting dangerous people and things as they move in global flows toward the North American continent. The length of our land borders, coupled with the economic need to avoid “thickening” them (in the Canadian phrase), commends this course. The model here is the North American Air Defense (“NORAD”) command that enables Canada and the United States to jointly track and defend the northern continental airspace from aviation threats to it.⁵⁶

Under President Obama’s leadership, there is considerable progress to report on both the economic and security fronts with both Mexico and Canada. In May 2010, the President, together with Mexican President Felipe Calderon, issued the Twenty-First Century Border Management declaration.⁵⁷ Substantially recasting the strategic relationship, the declaration decisively moved the bilateral relationship away from the accusatory conversations of the past over migration and narcotics. Acknowledging the U.S. national security stake in Mexico’s historic struggle against organized crime, the two presidents adopted a doctrine of “co-responsibility” for both legal and illegal flows across the border. Viewing drugs and alien smuggling coming north and guns and bulk cash going south as a single vicious cycle of criminality has created the conditions for bi-national law enforcement cooperation that was unthinkable even five years ago.

The Beyond the Border: A Shared Vision of Perimeter Security and Economic Competitiveness declaration (“Beyond the Border declaration”), created in February 2011 by President Obama and Canadian

55. See, e.g., John Noble, *Fortress America or Fortress North America*, 11 L. & BUS. REV. AM. 461 (2005).

56. Canadian and U.S. military forces rotate NORAD command responsibilities. On 9/11, for example, General Ralph Eberhart of the USAF was the military officer in charge of leading NORAD’s response to the terrorist attack and his Deputy Commander was Lieutenant-General Kenneth Pennie of the Canadian Forces Air Command. See Adam J. Hebert, *The Return of NORAD*, 85 AIR FORCE MAG., no. 2., Feb. 2002, at 50.

57. Twenty-First Century Border Management, U.S.-Mex., May 19, 2010 (declaration of U.S. Pres. Obama & Mex. Pres. Calderon), available at <http://www.whitehouse.gov/the-press-office/declaration-government-united-states-america-and-government-united-mexican-states-c>.

Prime Minister Stephen Harper, represents an equally stunning departure in the context of United States-Canadian relations.⁵⁸ Building upon a longer standing and deeper foundation of trust, the Beyond the Border declaration has generated a staggeringly ambitious action plan that encompasses the entire breadth of the United States-Canada security and economic competitiveness agendas. It forthrightly addresses matters that had been deferred politely in the past, ranging from information sharing to the pre-inspection of cargo and the reciprocal carrying of weapons by law enforcement personnel stationed in each other's country.

These course corrections and strides in U.S. policy have been navigated in parallel process with our neighbors, respecting sensitivities of sovereignty on both ends, as well as the differences and the difficulties inherent in the negotiations. Nonetheless, the stage has been set for an increasingly trilateral discussion over the next generation that holds out enormous promise for the three countries and the North America they share.

Conclusion

The French poet Paul Valéry has observed: "The [challenge of] our times is that the future is not what it used to be."⁵⁹ The themes explored here will remain the subjects of security and economic developments over the next decades as we experience their domestic, international, and intermestic effects. Through the lens of lines and flows, we see both an old end and the new beginning of borders.

58. Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness, U.S.-Can., Feb. 4, 2011 (declaration of U.S. Pres. Obama. & Can. Prime Minister Harper), *available at* <http://www.dhs.gov/xlibrary/assets/wh/us-canada-btb-action-plan.pdf>.

59. *See* THE GREATEST QUOTATIONS OF ALL TIME 264 (Anthony St. Peter ed., 2010).