

The Legal & Technological Advantage of a North American Perimeter in the War against Terrorism: How the implementation of a *Schengen*-type system will best serve the security interests of the United States and Canada.

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INTRODUCTION

You must be aware the events of 2001 changed everything at the border. The events that occurred in this country in September of that year sent ripples that reached even to the northern part of Maine. It will never be the same.

- U.S. District Court Judge George Singal issuing a stern warning to Michel Jalbert after finding him guilty - March 10, 2003.¹

On October 11, 2002 Michel Jalbert, a francophone-Canadian from the village of Pohenegamook, which straddles the Quebec-Maine border, stopped into the local gas station to fill up his truck. Thirty-five days later he was released from an American jail. The pumps at the gas station are in Maine, but the entrance to the station is in Quebec. The station is separated from the rest of the state by miles of dense brush. Years ago the District Director of U.S. Customs in the area had permitted Canadians to buy gas at this station without formally crossing the border.² Despite this history, Mr. Jalbert was charged with entry into the United States without inspection, possession of a firearm by an illegal alien and possession of a firearm by an

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¹ Allison Hanes & Levon Sevunts, *Hunter Cops Plea, Goes Free* MONTREAL GAZETTE, Mar. 11, 2003 at A12.

² United States of America v. Michel Jalbert, No. 02-CR-79-B-S, 242 F.Supp.2d 44,45 (D. Me. Feb. 4, 2003) (in his motion to dismiss Jalbert cites to a letter from Emery W. Ignalls, District Director of the Customs Service which excused customers of the GazBar gas station from inspection upon entering the United States).

individual convicted of a crime.³ He had intended to use the shotgun to go duck hunting after what he thought would be a routine fill-up.⁴

Although many Americans may not be surprised by the actions of the US Customs authorities in arresting Mr. Jalbert, those in the logger's hometown and throughout Canada were outraged by this incident.⁵ In fact, for those living in any town along the vast and diverse U.S.-Canada border, the only thing odd about Mr. Jalbert's border-crossing story is that anyone noticed. His actions were indicative of the casual perception local residents have of America's northern border. The fact of the matter is that informal crossings are an activity that has been going on for years.⁶

The seemingly arbitrary arrest of Mr. Jalbert provides an excellent example of the type of legal action that could become more frequent as America attempts to stem the threat of terrorists entering the country from her northern front. The question is whether such arrests are necessary or whether there is a better way for the United States government to secure the country from attack without antagonizing its closest ally and largest trading partner.

The September 11 terrorist attacks on the United States signaled the beginning of the greatest focus this country has ever taken toward securing its border with Canada. Initial reports that some of the men responsible for those devastating attacks might have entered the United States through Canada were a wake-up call to many Americans that the often-ignored border

³ United States of America v. Michel Jalbert, *supra* note 2, at 44.

⁴ Anne McIlroy, *Harsh Customs*, GUARDIAN UNLIMITED available at <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,842560,00.html> (last visited Jan. 30, 2003).

⁵ *Canadians Angry over U.S. Border Screening*, CNN.com, at <http://www.cnn.com/2002/WORLD/americas/11/13/canada.border.woes.ap> (last visited Nov. 13, 2002).

⁶ *Id.*

could prove to be the Achilles heel of America's security efforts against terrorism.⁷ While the average American may have just become aware of this problem for the first time after 9/11, many of those who work at the northern border have known of this security gap for a long time. In fact, they have sent urgent requests to the government for more personnel and better technology to combat the drug-trafficking, people-smuggling and terrorist threats that occurred there.⁸ Efforts have been made to address their concerns, but the focus has traditionally been on the southern border.⁹ Most available resources were initially funneled toward dealing with the Mexican perimeter.¹⁰

While our southern border still remains a concern, much of the effort now has shifted to Canada and the terrorist threat that may originate from the north. In addressing this issue, the United States and Canada will encounter disputes that will test the strength of the bond between these two long-time allies, disputes which could initiate questions of both international and constitutional law. It is logical for the United States to balance the rights of its citizens and its relations with other countries against the terrorist threat it faces; however, the US has a greater chance for success in keeping terrorists out of their country by enhancing cooperation with their northern neighbor so that all North Americans can be protected. This makes far more sense than

⁷ See Deneen L. Brown and Ceci Connelly, *Suspects Entered Easily from Canada, Officials Scrutinize Border Areas in Maine*, WASH. POST (Sept. 14, 2001) (shortly after the attacks it was reported that two terrorists "crossed the border from Canada with no known difficulty at a small border entry in Coburn Gore, Maine which is usually staffed by only one border inspection officer, while another suspect probably came in at a border crossing in Jackman, Maine and one or more may have ridden a ferry from Nova Scotia docking at a port in Maine." Other groups have reported that these claims are totally unfounded); see Tova Andrea Wong, *The Century Foundation: The Debate over a North American Security Perimeter*, available at <http://www.tcf.org>.

⁸. See generally, *Law Enforcement Problems at the Between the United States and Canada: Drug Smuggling, Illegal Immigration, and Terrorism: Hearing Before the Subcommittee on Immigration and Claims of the Committee on the Judiciary*, 1999 1st Sess. 106th Cong. (Apr. 14, 1999).

⁹ *Id.*

¹⁰ *Id.*

focusing protective efforts on only one of two ideologically similar and geographically adjacent groups. Tom Ridge, the director of Homeland Security, has indicated that “U.S.-Canadian cooperation in implementing these public-security initiatives is a model for the world.”¹¹ This note will address these initiatives, specifically as they arise in respect to the technology that is being used to scrutinize those individuals crossing the border and entering North America from abroad. It is an investigation to determine how Canada and the United States can create a model for the world to follow in establishing a secure but efficient and economically manageable border.

There have been a number of congressional initiatives to make the border stronger in the last decade; Part I of this note will examine the results of those ideas and the effectiveness of the proposals that were made both before and after September 11, 2001. Part II will investigate the National Security Entry-Exit Registration System (NSEERS), a controversial screening system implemented following September 11th. The case of Maher Arar is used to illustrate the negative legal implications of the NSEERS system and the harassment that Canadians born in a targeted country have faced. Part III examines the legal implications of the use of American border checkpoints in Canada and the violations of the rights and freedoms of Canadians and Canadian law that have arisen out of this arrangement. The case of Abdul-Rehman Malik, a Canadian citizen flying to an Islamic meeting in Washington, is a good illustration of the types of abuses that could continue to occur by American authorities on Canadian soil. Part IV of this note will support the proposition that calls for a North American security perimeter instead of a more militarized border between the two nations. This proposal is supported by past cooperation agreements by U.S. and Canadian officials and by the ability to easily accomplish this goal

¹¹ Barry Zellen, *Technology, Strategy and Innovation: Border Security and The War on Terror*, TECH. REP. (Fall 2002), at http://www.technologyreports.net/nextinnovator/?articleID=515_ (last visited Nov. 23, 2002).

through the sharing of an innovative database system already in limited operation. Part V examines the advantages of harmonizing the immigration policies of the United States and Canada to achieve the same security goals and investigates why this has not been done in the past. Finally, Part VI analyzes the possible success of the technology needed for an effective, shared North American perimeter and how it can be compared to the Schengen system that is currently in place in the European Union. The conclusion reached is that despite serious and valid concerns on both sides of the border, a North American perimeter would be the most effective solution not only against the threat from terrorists but also in the effort to continue the strong alliance and cooperation that the United States and Canada have had throughout most of their history as neighbors. It would also work to ensure that the individual rights of citizens of both of these nations are not violated by the security policies of the other.

I. HISTORY OF NORTH AMERICAN BORDER SECURITY

In 1999, the Congressional Subcommittee on Immigration and Claims held its first ever hearing specifically addressing security problems at the northern border.¹² In the hearing, Congress was informed that between 1995 and 1999 there were at least 14 reported cases of terrorists successfully crossing the border between the two nations.¹³ These numbers included the case of Gazi Ibrahim Abu Merzer, who subsequently attempted to blow up the New York subway system but was shot before he was able to carry out his mission.¹⁴

¹² *Law Enforcement Problems at the Border*, *supra* note 8, at 1.

¹³ *Id.*

¹⁴ *Id.* at 2.

On December 14, 1999, just days before millennium celebrations were about to take place across the United States, an Algerian named Ahmed Ressay was arrested at Port Angeles, Washington, while attempting to cross the border from Victoria, British Columbia.¹⁵ Mr. Ressay's car was loaded with highly volatile bomb-making equipment. It was later determined that his intended target was Los Angeles International Airport.¹⁶ The fact that thousands of lives might have been saved due to the suspicions of a few border guards in a small town in Washington State was enough for the government to take a closer look at the threat from the north. The idea of fortifying the northern border took on increased importance following this event, but real and significant change would not start to occur until 20 months later when foreign terrorists were finally successful in their planned attacks on America.¹⁷

There is still some debate as to whether some of those who hijacked planes and flew them into the World Trade Center, the Pentagon and a field in rural Pennsylvania did or did not come from Canada, but the question does not matter so much as the fact that if they had wanted to, the terrorists probably could have come from Canada without ever even going through a border checkpoint.¹⁸

Following the attacks, the Senate began to hold hearings regarding the porous northern border.¹⁹ Many Senators had no idea that in some places between the United States and Canada the only technology that existed to stop someone from crossing was an orange cone or a rusted

¹⁵ Hal Bernton, Mike Carter, David Heath & James Neff, *The Terrorist Within: Chapter 12*, SEATTLE TIMES (June 23-July 7, 2002), available at seattletimes.nwsourc.com/news/nation-world/terroristwithin/ (last visited Feb. 2, 2003).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Brown and Connelly, *supra* note 7.

gate with a stop sign.²⁰ They also learned that along the 2000 mile border with Mexico there were 8000 customs agents, while monitors at the 4000-mile-long northern border numbered only 1773 on duty.²¹

These deficiencies at the northern border were addressed with the passage of the USA PATRIOT Act on October 24, 2001 shortly after the 9/11 attacks.²² An entire section of the act is dedicated primarily to strengthening the U.S.-Canada border.²³ Some of these provisions include a pledge of \$50 million for northern border security technology and increased manpower.²⁴ Much of the proposed technology will be going towards the establishment of an entry-exit system by the United States. Such a system would collect entry and departure information and would alert customs officials as to those who have overstayed their visas.²⁵ It is this system the National Security Entry-Exit Registration System that presented the first real disagreement between the Canadian and American governments and challenge to the cooperation which could ensure a safer North America.

¹⁹ *Northern Border Security: Hearings before a Subcommittee of the Committee on Appropriations*, (2001) 107th CONG. S. HRG. 107-341 (Oct. 3 & Dec. 5, 2001).

²⁰ *Id.*

²¹ *Id.*

²² USA PATRIOT Act H.R. 3162 1st Sess. 107th Cong. (Oct. 24, 2001) available at <http://www.law.cornell.edu/background/warpower/3162.html> (last visited Jan. 25, 2003).

²³ *Id.*

²⁴ *Id.* at s. 402(4); see also Austin T. Fragomen, Jr. & Howard W. Gordon, *Practicing Law Institute: Managing Change: Recent Legislation and Current Immigration Topics*, 1340 PLI/Corp 173, 178 (2002).

²⁵ Austin T. Fragomen, Jr. & Howard W. Gordon, *Practicing Law Institute: Managing Change: Recent Legislation and Current Immigration Topics*, 1340 PLI/Corp 173, 179 (2002).

II. THE IMPLEMENTATION OF THE NATIONAL SECURITY ENTRY-EXIT REGISTRATION SYSTEM (NSEERS)

NSEERS is the most controversial of all of the new technology that has been implemented at America's borders.²⁶ The purpose of this program, as stated by Attorney General John Ashcroft, is to "identify and apprehend individuals while maintaining the free flow of goods and people across the border that is so important to us and to our neighbors."²⁷ NSEERS involves three important steps, and while the steps themselves do not raise any real legal questions, the Canadian government, as well as many American citizens, question whether any equal protection rights are being violated by choosing to further inspect the citizens of one country over those of another for no reason other than that they were born in, or are citizens of, that country.²⁸

Using state of the art computer technology, a border guard could first run the print of a visitor's index finger against "a digital database of tens of thousands of individuals who are wanted for committing felonies in the United States and a database of thousands of known terrorists. The fingerprints can also be run against a database of 'latent' or unidentified fingerprints that our military has collected from terrorist training camps in Afghanistan and

²⁶ *Canadians Angry over U.S. Border Screening*, *supra* note 5.

²⁷ Attorney General John Ashcroft, *Implementation of NSEERS*, Niagara Falls, New York (Nov. 7, 2002) available at www.usdoj.gov/ag/speeches/2002/110702agremarksnseers_niagara_falls.htm (last visited March 23, 2003) [hereinafter Attorney General's Remarks].

²⁸ CTV News Staff, *U.S. Softens Border Fingerprinting Criteria*, (Nov. 7, 2002), (in response to complaints by Canadians including Foreign Affairs Minister Bill Graham stating that "focusing on place of birth amounts to discrimination" US officials softened their position with Canadians and U.S. Attorney General John Ashcroft reported in Nov. 2002 that "the birth country of Canadians visiting the U.S. will no longer trigger automatic fingerprinting by customs officials, but it's still a secondary factor" and this creates a fear by landed immigrants in Canada "that they are unfairly lumped together with terrorism suspects, because of their place of birth") available at www.ctv.ca/servlet/ArticleNews/story/CTVNews/1036685775239_26/ (last visited Feb. 6, 2003).

elsewhere.”²⁹ The system used is the Integrated Automated Fingerprint Identification System, maintained by the FBI. It is the world’s largest biometric database.³⁰ Next, visitors could be told that they must make periodic check-ins at an INS office so that their activities can be confirmed. Finally, “visitors who are enrolled in the program must complete a departure check when they leave the country so the INS can know if a high-risk alien overstays his visa.”³¹

The legal problem exists with those who will automatically be chosen to be subjected to the NSEERS program. This includes citizens of five of the seven countries that President Bush has called the “Axis of Evil:” Libya, Sudan, Syria, Iran, and Iraq.³² Attorney General John Ashcroft has promised that simply being born in one of these nations and now residing elsewhere does not mean that those people will be put through the system, but many in the Muslim community disagree.³³ Mohamed Elsmary is president of the Canadian Islamic Congress. He has stated that “Muslims are being humiliated, intimidated and treated as criminals at American border crossings – and this is all because of their religion, appearances, dress, names or where they were born.”³⁴ The case of Maher Arar illustrates the fears that Canadian-Muslims have about crossing the border into the United States are not unfounded.

Maher Arar was subjected to NSEERS screening on September 26, 2002 at John F. Kennedy Airport in New York City, despite the fact that he was a dual citizen of both Syria and

²⁹ Attorney General’s Remarks, *supra* note 27.

³⁰ Thomas Ginsberg, *U.S. to Fingerprint Selected Foreign Travelers*, PHILA. INQUIRER, (Sept. 11, 2002), *available at* <http://www.philly.com/mlid/inquirer/news/nation/4046727.htm> (last visited Jan. 20, 2003).

³¹ Attorney General’s Remarks, *supra* note 27.

³² President George W. Bush, State of the union Address (Jan. 29, 2002), (the term “Axis of Evil” and some of the nations that formed it were introduced by President Bush), *available at* <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (last visited Jan. 19, 2004).

³³ Attorney General’s Remarks, *supra* note 27.

³⁴ *Canadians angry over U.S. Border screening*, *supra* note 5.

Canada and was carrying a Canadian passport.³⁵ Mr. Arar had left Syria fifteen years ago and now lives and works in Ottawa. He was stopped on his way to Montreal from Tunisia where he had been on a vacation with his family.³⁶ “U.S. officials claim that Mr. Arar is a member of Al Qaeda, but Canadian authorities do not agree.”³⁷ Mr. Arar was taken away by the FBI and interrogated for hours, denied counsel and when he refused to sign a form authorizing his return to Syria was locked up in a Metropolitan Correction Center in Brooklyn.³⁸ No Canadian official was informed that Mr. Arar had been detained until October 4, 2002 nor was there any indication made to Canadian authorities that American officials were going to send Mr. Arar back to Syria.³⁹ Mr. Arar was deported from the United States on October 7, 2002.⁴⁰ Canadian officials were not informed of the deportation until October 10, 2002 and were not certain of his whereabouts until October 21, 2002.⁴¹ Mr. Arar was held in captivity in Syria for 375 days where he was mentally and physically tortured and forced to say that he had visited Afghanistan when he had actually never been there.⁴² Canadian diplomats were given the opportunity to visit him in Syria but were unable to assist him.⁴³ Despite whatever fears agents at JFK might have had

³⁵ Bruce Zagaris, *Tensions Occur Between Canada and the U.S. Over U.S. Scrutiny of Canadians of Middle Eastern Descent*, 19 INT’L ENFORCEMENT L. REP. 17 (2003); see also <http://www.cbc.ca/news/background/arar> (provides a complete timeline of the events of Mr. Arar’s ordeal).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Zagaris, *supra* note 35.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Press Conference by Mr. Arar (November 4, 2003), available at http://www.cbc.ca/news/background/arar/arar_statement.html (last visited Jan. 19, 2004).

concerning Mr. Arar, his treatment was a categorical violation of numerous aspects of international law and equal protection rights concerning racial profiling.⁴⁴

According to Amnesty International, the United States violated the Vienna Convention on Consular Relations and Optional Protocols⁴⁵ by not reporting Mr. Arar's detention to Canadian officials.⁴⁶ By sending Mr. Arar to Syria where he could face severe punishment for not fulfilling military duties in that country,⁴⁷ they violated articles of the Vienna Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁸ Article 3 (1) of this convention, to which the United States is a signatory and therefore obliged to follow under article 18⁴⁹ of the Vienna Convention on the Law of Treaties, states that:

⁴⁴ On Tuesday January 13, 2004 "Canada and the United States agreed on a new deportation procedure aimed at ensuring that the Maher Arar Scandal is never repeated. Under the new agreement, the White House has formally pledged to 'formal notification and expeditious consultation' with Canadian authorities immediately whenever a Canadian national is detained in the United States for security reasons. Canada is now the only country that has such an understanding with the U.S." Darren Yourk and Drew Fagan, *U.S., Canada Confirm Deal Resulting from Arar Case*, GLOBE AND MAIL, Jan. 13, 2004.

⁴⁵ Vienna Convention on Consular Relations and Optional Protocols, Apr. 24, 1969, 596 U.N.T.S. Nos. 8638-8640.

⁴⁶ *Id* at Article 36(1)(b) ("if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph").

⁴⁷ Amnesty International, *Possible "Disappearance"/ Forcible Return UA 314/02* (Oct. 21, 2002) available at www.amnestyusa.org/abolish/actions/ua31402.pdf (last visited Mar. 20, 2003).

⁴⁸ *Vienna Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A139151 (1984).

⁴⁹ *Vienna Convention of the Law of Treaties*, UN GAOR, 1st Sess., Supp. 1155, at 331 (1969) (a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed), available at <http://www.un.org/law/ild/texts/treaties.htm>.

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁵⁰

The purpose behind NSEERS, that is, the protection of Americans from terrorist threats is legitimate and commendable; however the way that the technology of the system is currently being utilized invokes too many legal challenges for it to be an efficient security measure. To get around these legal challenges, though, it is not necessary to stop fingerprinting, photographing and compiling a database: Instead, the technology must be used on all travelers, not just a selected few, and the capability to implement such a practice without slowing border checkpoints substantially is in fact available and recently the US Government has made steps in this direction.⁵¹

Such efficiency is the ultimate goal for any technology used at the border. In their report to Congress on border security options and issues, William J. Krouse and Raphael F. Perl stated that "the challenge for policy makers is to provide for a level of border security that is commensurate with threats from abroad, while facilitating legitimate cross-border travel and commerce, as well as, protecting civil liberties."⁵² The technology that already exists for NSEERS enables each fingerprint to be run through the Integrated Automatic Fingerprint

⁵⁰ *Vienna Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 48.

⁵¹ Anthony Kujawa, *U.S. Terminates Re-registration Requirements for Visitors*, U.S. Dept. of State, (in response to the many complaints that NSEERS discriminates in its application the United States began the US-VISIT program on Jan. 5, 2004. Under this program all visa-holders who enter the United States by plane or cruise ship are fingerprinted twice using a digital scanner and a digital photograph of them is taken), *available at* <http://usinfo.state.gov/gi/Archive/2003/Dec/02-97029.html> (last visited Jan. 16, 2004).

⁵² William J. Krouse & Raphael F. Perl, *Terrorism: Automated Lookout Systems and Border Security Options and Issues* (June 18, 2001) (Congressional Research Service report for Congress), (on file with the Library of Congress), *available at* www.fas.org/irp/crs/RL31019.pdf (last visited Mar. 20, 2003).

Identification System in a matter of seconds.⁵³ While the time to take a fingerprint varies depending on the technology at the border, tests show that the added time to subject a person to fingerprint recognition is only about eight seconds.⁵⁴

NSEERS is one form of biometric technology that was proposed and used for border security. Many more, and perhaps even more efficient systems are being introduced and are under development, but they too could promote their own legal concerns.⁵⁵ Biometric technologies measure and analyze human psychological and behavioral characteristics, this is based on “direct measurement of a part of the body (including) fingertips, hand geometry, and facial, retina and iris recognition. Behavioral characteristics include data derived from actions, such as speech and signature.”⁵⁶ The U.S. government believes such technology combined with well-trained border personnel offers the best solution to stop terrorists from entering the country.⁵⁷

Biometric technology does not address the problem of those who enter the United States between checkpoints on the northern or southern border. Nor does it affect actual Canadian or Mexican citizens who are not required to carry a visa when entering the United States.⁵⁸ Currently, Canadian citizens only require a piece of identification that establishes their Canadian

⁵³ United States General Accounting Office, *Technology Assessment: Using Biometrics for Border Security* (Nov. 11, 2002), available at <http://www.gao.gov/atext/d03174.txt> (last visited Feb. 1, 2003).

⁵⁴ *Id.*

⁵⁵ See Press Conference by Mr. Arar, *supra* note 43.

⁵⁶ United States General Accounting Office, *supra* note 53, at chp. 3.

⁵⁷ *Id.*

⁵⁸ United States General Accounting Office, *supra* note 53, at Overview.

citizenship and photo identification.⁵⁹ Additionally, if they wish to expedite their crossing, the current requirement is a border card with biometric identifiers through the NEXUS/CANPASS system. However, such a system does not address the problem with those who overstay their visa if they are not chosen to go through the NSEERS system or new US-VISIT system.⁶⁰

III. THE PRE-CLEARANCE SYSTEM AND ITS EFFECTS ON THE RIGHTS OF CANADIANS

Greater than the fear the Canadian government has concerning the rights of citizens like Maher Arar abroad, there should be concern for the citizens who could face the extra-territorial effects of US law in Canada itself. Such human rights violations could occur and arguably have already occurred at U.S. Customs pre-clearance checkpoints at Canadian airports and near Canadian border crossings. “The Preclearance Act provides U.S. customs, immigration and agricultural inspection officers with appropriate authority to determine, at designated airport areas in Canada, what people and what goods are allowed to enter the USA.”⁶¹ To avoid the extra-territorial application of US laws at these preclearance sites, “the Act provides full protection under Canadian law and the Canadian Charter of Rights and Freedoms.”⁶²

These rights, however, were apparently not sufficient to protect Addul-Rehman Malik, a Canadian of Pakistani descent, from being detained and interrogated for hours by U.S. Customs

⁵⁹ U.S. Dept. of Homeland Security, *Documentary Requirements for United States Citizens and Foreign Visitors Entering the United States from Canada and Mexico*, at http://www.customs.gov/xp/cgov/travel/leavingarrivinginUS/how_do_i/documentary_requirements.xml (last visited Feb. 10, 2004).

⁶⁰ See Kujawa, *supra* note 51.

⁶¹ The Preclearance Act, Bill S-22 (1999) (Can.) available at <http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/S-22/S-22-3/90022bE.html> (last visited Apr. 29, 2004)

⁶² *Id.*

agents because he stated that his destination in the United States was a conference of the Islamic Society of North America in Washington.⁶³

Section 15(1) of the Canadian Charter of Rights and Freedoms which governs any U.S. Customs authority on Canadian territory states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁶⁴

If it is discovered that the only reason that U.S. authorities interrogated Mr. Malik was because he stated that he was attending a legitimate Islamic event, then the rights guaranteed to Mr. Malik under the Canadian Charter of Rights and Freedoms were not extended to him.

Canadians and the Canadian government might accept these differences in approach at customs checkpoints when the US government institutes such policies at its own borders; but the smaller, weaker Canada might feel its sovereignty threatened by any extra-territorial attempt by the American government to implement its own security policies abroad. In addition to the possible violation of Charter rights to which Mr. Malik was subjected, Canada has had other disagreements with the United States over the actions of U.S. Customs agents in the country. Prior to the signing of the Smart Border Declaration in December 2001, a rift developed between the two nations over whether American agents would be allowed to carry guns in Canadian airports and at the joint border facilities proposed for low-traffic border crossings.⁶⁵ Canadian

⁶³ Zagaris, *supra* note 35, at 17.

⁶⁴ CAN. CONST. (Constitutional Act, 1982) pt. I (Canadian Charter of Human Rights and Freedoms), §15(1).

⁶⁵ See generally Sheldon Alberts, *Accord Called Step Toward North American Perimeter*, NATIONAL POST (Canada) (Dec. 13, 2001), available at <http://usbc.org/info/everything2001naperimeter.htm> (last visited Mar. 20, 2003); see also The Smart Border Declaration (Dec. 12, 2001) available at

customs agents are not armed and they insist that all agents at such joint facilities should not carry weapons. Canada offered a solution that would assign armed police officers to protect U.S. Agents. This has been the policy at U.S. pre-clearance checkpoints at Canadian airports since September 11th.⁶⁶

IV. THE ADVANTAGE OF A NORTH AMERICAN SECURITY PERIMETER

The easiest solution to the problems that arise from the cases of Mr. Jalbert, Mr. Arar and Mr. Malik, apart from the United States assuming a more lenient attitude towards Canadian citizens, would be to identify any possible threat before it arrives in Canada or the United States, and in doing so, relax or even dissolve the border between the two countries. I propose, as have others, that this would be the most efficient method to expedite travel between the two nations. Still, there would be inherent problems of technology and cooperation.⁶⁷ In promoting the Smart Border Declaration former Prime Minister Chretien stated that “we are neighbors that share a

<http://www.cme-mec.ca/coalition/documents/declaration.pdf> (last visited Mar. 23, 2003); *see also* Prime Minister Chretien, President Bush release joint statement on Canada-U.S. Border Cooperation (Sept. 9, 2002), at http://www.pm.gc.ca/default.asp?Language=E&Page=newsroom&Sub=newsreleases&Doc=can-u.s.border20020909_e.htm (last visited Nov. 23, 2003) (the goal of this declaration as stated in the preamble is that “by working together to develop a zone of confidence against terrorist activity, we create a unique opportunity to build a smart border for the 21st century; a border that securely facilitates the free flow of people and commerce; a border that reflects the largest trading relationship in the world.” The declaration consists of four pillars including: 1) the secure flow of people 2) the secure flow of goods 3) Secure infrastructure and 4) coordination of information sharing in the enforcement of these objectives).

⁶⁶ Sheldon Alberts, *Accord Called Step toward North American Perimeter*, NATIONAL POST (Canada) (Dec. 13, 2001), available at <http://www.usbc.org/info/everything2001/1201naperimeter.htm> (last visited Mar. 20, 2003).

⁶⁷ *See* Demetrios G. Papademetriou & Deborah Waller Meyers, Migration Institute: *Of Poetry and Plumbing: The North American Integration “Project,”* available at <http://www.aims.ca/Atlantica/Poetry.pdf> (last visited Mar. 20, 2003) (“If the decision is to proceed, bilateral negotiations should be pursued with an aim to agreeing on the kind of border relationship each pair of countries wish to see by an arbitrarily set target date”) *see also* Stephen Handelman, *A Mighty Fine Line*, TIME available at <http://www.timecanada.com/columnist.adp?storyid=34> (March 17, 2003); *see also* Sheldon Alberts, *Accord called step toward North American Perimeter*, NAT'L POST (Dec. 13, 2001) available at <http://www.usbc.org/info/everything2001/1201naperimeter.htm> (last visited Mar. 20, 2003) (believes smart border accord is a step towards the North American perimeter); *see also* Tova Andrea Wang, The Century Foundation: *The Debate over a North American Security Perimeter*, available at <http://www.tcf.org>.

common border, but more importantly we are neighbors bound together by common values: freedom, democracy, the rule of law, the inherent dignity and rights of every human being.”⁶⁸ If this is truly the case, then the two countries should work to overcome their divisiveness for the protection of these stated values. Biometrics is an efficient form of technology for those legitimate travelers who choose to go through the process of registering for such a program, submitting their biometric data, whether it be a fingerprint or an iris scan, and then waiting for approval. But what about those who choose not to check in at any point between the United States and Canada? No matter how many resources are dedicated to the northern border, it will never be enough to secure all 4000 miles. For this reason the funding for technology should go to a North American perimeter, where it would be better spent on a long-term solution.

The Kingston Dispensation is based on speeches given by President Franklin Roosevelt and Prime Minister Mackenzie King in August 1938. The essence of the Dispensation is that “each country understood that it had a ‘neighbourly’ obligation to the other, not only to refrain from any activities that might imperil the security of the other, but also to demonstrate nearly as much solicitude for the other’s physical security needs as for its own.”⁶⁹ In their article on the effects of September 11th on the Kingston Dispensation, Dr. Michel Fortmann and Dr. David Haglund, two Canadian professors, reach the conclusion that while this dispensation never entailed a common security perimeter it does seem to imply that the border between the two nations should not be a difficult barrier. They contend that “if the border stays relatively hardened – if it remains ‘Mexicanized’ – for too long a period, this will have to be taken as

⁶⁸ Prime Minister Chretien, President Bush Release Joint Statement on Canada-U.S. Border Cooperation, *available at* http://www.pm.gc.ca/default.asp?Language=E&Page=newsroom&Sub=newsreleases&Doc=can-u.s.border20020909_e.htm (last visited Nov. 23, 2002).

⁶⁹ Dr. Michel Fortmann and Dr. David Haglund, *Canada and the Issue of Homeland Security: Does the ‘Kingston Dispensation’ still hold?* Spr. 2002, CAN. MIL. J. 18.

prima facie evidence that the normative basis of Canada-U.S. security cooperation has eroded, with all that this must signal to governments on either side of the line.”⁷⁰ This is an end neither nation should seek. If there is a willingness to maintain the spirit of the Kingston Dispensation, a cooperative perimeter rather than a controversial internal border should be the objective of future security planning.

The US Enhanced Border Security and Visa Reform Act of 2002 proposes a number of key initiatives to increase border security, one of which is a feasibility study of a North American National Security Program⁷¹. Section 401 of the Act states: “the President shall conduct a study of the feasibility of a North American National Security Program to enhance the mutual security and safety of the United States, Canada and Mexico.”⁷² According to the Act the initial steps of establishing such a security program would include the pre-clearance of foreign nationals traveling to Canada and to Mexico, the feasibility of expanding pre-inspections to foreign nationals on flights destined for Canada or Mexico and the cross training of and funding of inspectors from Canada and Mexico.⁷³ The Act calls for the President to submit a report of his findings to Congress one year after the date of this Act’s enactment.⁷⁴ Besides studying the feasibility of the pre-clearance of all visitors to North America, the Enhanced Border Security and Visa Entry Reform Act also asks that a study be conducted into the increase in cooperation in the sharing of information between the three North American nations. Section 603 of the Act

⁷⁰ Fortmann, *supra* note 69, at 22.

⁷¹ Enhanced Border Security and Visa Reform Act of 2002, H. Res. 365, H800 *available at* http://www.fas.org/irp/congress/2002_cr/h031202.html (last visited Feb. 15, 2004).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at H800.

seeks the development of an intergovernmental network of interoperable electronic data systems that “facilitates real-time access to that country’s law enforcement and intelligence information that is needed by the Department of State and the Immigration and Naturalization service to screen visa applicants and applicants for admission into the United States.”⁷⁵

The key to an effective North American security perimeter rests in this technological cooperation between the two nations rather than just an ideological meeting of the minds. In issuing visas, processing refugee claims and implementing biometric identifiers prior to a claimant’s arrival in North America, real cooperation can be realized.

Section 403 (c) of the PATRIOT Act states:

The Attorney General and the Secretary of State jointly, through the National Institute of Standards and Technology (NIST) and in consultation with the Secretary of the Treasury and other Federal law enforcement and intelligence agencies the Attorney General or Secretary of State deems appropriate and in consultation with Congress, shall within 2 years after the date of the enactment of this section, develop and certify a technology standard that can be used to verify the identity of persons applying for a United States visa or such persons seeking to enter the United States pursuant to a visa for the purposes of conducting background checks, confirming identity, and ensuring that a person has not received a visa under a different name or such person seeking to enter the United States pursuant to a visa.⁷⁶

While there are many similarities between the American and Canadian systems of issuing visas to foreign nationals, there are also some major differences that would need to be negotiated before an effective, efficient and integrated system could be implemented. The primary difference is that Canada’s screening system for visa applicants is not nearly as stringent and the number of nationals that they allow into the country without a visa is double that of the United

⁷⁵ H.R. 365, *supra* note 71, at H802.

⁷⁶ PATRIOT Act, *supra* note 22.

States. Canada requires no visa for citizens of nearly 60 countries. The U.S requires no visa for just 29.⁷⁷

To enter the United States on a visa, an individual must go through a number of steps, all of which involve some form of computerized database entry and analysis.⁷⁸ The first step takes place at the overseas consular posts where the applicant's name and other biographical information is submitted into a database called the Consular Lookout and Support System (CLASS).⁷⁹ Next, a consular officer must certify in writing that a CLASS check has been done on the applicant.⁸⁰ The CLASS database is composed of approximately 4 million records and includes information on terrorists, narco-traffickers, and international criminals.⁸¹

Simply passing this CLASS check does not insure that an applicant will be admitted to the United States. Upon arrival, an applicant must go to a designated international port of entry where his or her information is subjected to another database check. At these ports "INS and Customs inspectors use the Interagency Border Inspection System (IBIS) to quickly verify that applicants for admission are not known to be inadmissible and to check that they are not wanted by federal law enforcement officials."⁸² Information is fed into IBIS through many agencies including the Department of State, FBI, the Office of Special Investigations (OSI), the International Crime Police Organization (INTERPOL) and the Department of Agriculture and

⁷⁷ James H. Johnson, Jr. *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001*, 27 N.C. J. INT'L L. & COM. REG. 419, 447 (2002).

⁷⁸ Krouse & Perl, *supra* note 52, at 5.

⁷⁹ *Id.*

⁸⁰ *Id.* see also Section 140(c) of P.L. 103-326 §140(c).

⁸¹ Krouse & Perl, *supra* note 52, at 5.

⁸² *Id.* at 2.

the Drug Enforcement Agency (DEA).⁸³ This “dual screen formula is an important protection that enables inspectors to act decisively if, for example, the lookout database contains new information not available when the visa was granted” at the overseas consular office.⁸⁴ If this dual screen formula is not enough the new biometric technology that the United States has proposed for visa security will make abuse of the visa system almost impossible.

V. THE NEED TO INTEGRATE THE IMMIGRATION POLICIES OF THE UNITED STATES AND CANADA

A shared system of granting visas and of accepting refugees would benefit both the United States and Canada in their attempts to keep terrorists from entering North America. The continuing use of different policies only serves to foster uncomfortable relations between the two nations and to perpetuate a weakness of which terrorists can take advantage. On a number of occasions the United States has criticized what they see as a lenient immigration policy on the part of Canada.⁸⁵ After the attacks on September 11th, Canada was condemned by American government reports and by Washington officials for its “...generous political asylum rules, a shortage of law enforcement resources and difficulties tracking aliens who enter the country and then disappear.” These factors, the report stated, are why “Canada [is] a haven for terrorists.”⁸⁶ Canada has long had an open-door refugee policy in order to protect individuals from human

⁸³ Krouse & Perl, *supra* note 52, at 6.

⁸⁴ Doris Meissner, *After the Attacks: Protecting Borders and Liberties*, Carnegie Endowment for International Peace 3 (Nov. 8, 2001) (policy brief) available at <http://911digitalarchive.org/objects/49.pdf> (last visited Mar. 20, 2003).

⁸⁵ See generally, James Bissett, *Canada's Asylum System: A Threat to American Security?*, Center for Immigration Studies, 1-7 (May 2002).

⁸⁶ Steve Fainaru, Gilbert M. Gaul & James V. Grimaldi, *Losing Track of Illegal Immigrants*, WASH. POST, Oct. 7, 2001, at A01.

rights abuses abroad. This policy is according to the stipulation set out in Article 31 of the 1951 Geneva Convention on the Status of Refugees.

1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.⁸⁷

However, this strict adherence to the Geneva Convention is not the only reason why Canada's refugee control system is seen as lax and is criticized both by American and Canadian security experts.⁸⁸

The rights granted to refugees are not as broad in the United States. In a report about global human rights following the September 11th attacks, Amnesty International Canada focused on the problem of the potential for the assimilation of U.S. and Canadian immigration policies that would establish a North American security perimeter. Amnesty International wrote: "we are especially concerned that many asylum-seekers and refugees are routinely and arbitrarily detained in the United States in conditions which fall short of international standards. Canada must continue to apply refugee laws and policies which conform to international standards and

⁸⁷ 1951 Convention Relating to the Status of Refugees, July 18, 1951, art. 31(1-2), *see also* Mark Krikorian, *The U.S.-Canada Safe Third Country Agreement: A Vital First Step*, Center for Immigration Studies (Oct. 16, 2002) (testimony prepared for the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Border Security and Claims), *available at* <http://www.cis.org/articles/2002/msktestimony1016.html> (last visited Mar. 20, 2003).

⁸⁸ Neil Seeman, *The Canadian Connection*, NATIONAL REVIEW ONLINE (Sept. 26, 2001), *available at* <http://www.nationalreview.com/comment/comment-seeman092601.shtml> (last visited Jan. 18, 2004).

our charter of human rights.”⁸⁹ (emphasis added) Bill Frelick, director of Amnesty International’s refugee program has stated “the United States generally has a narrower interpretation of refugee law than Canada, for example, on gender-based persecution claims, raising the prospect that it might return a claimant to persecution that Canada would have protected.”⁹⁰

The Supreme Court of Canada ruling in the 1985 case of *Singh v. Canada*⁹¹ is another reason why Canada’s immigration policy is more lenient than it needs to or should be in the modern world. In this case the court granted refugees the same legal rights as those granted to citizens. This decision paved the way for a large backlog in the number of claims that the courts were required to hear. The fundamental result of the *Singh* decision is “that every alien, regardless of origin, personal history or criminal record, once having set foot on Canadian soil has the right under the *Canadian Charter of Rights and Freedoms* to claim refugee status. Having done so, the claimant has all the privileges of citizenship except the right to vote.”⁹² These rights can still be achieved in the face of North America’s security crisis but they must be more effectively controlled.

The asylum seekers have frequently abused this commendable policy and the Canadian government ends up losing track of them. The case of Ahmed Ressam, the millennium bomber, is a clear example. Ressam entered Canada under a false passport. The inspector at Montreal’s

⁸⁹ Amnesty International Canada, *September 11: A Global Human Rights Agenda, Frequently Asked Questions*, at <http://www.amnesty.ca/sept11/faq1.php> (last visited Mar. 23, 2003).

⁹⁰ Alyson Springer, *Canada, United States Near Agreement on Returning Asylum Seekers*, 23 REFUGEE REPORTS Sept./Oct. 2002.

⁹¹ *Singh v. Canada (Minister of Employment & Immigration)* 12 Admin. L.R. 137, [1985] 1 S.C.R. 177, 14 C.R.R. 13, 58 n.r. 1, 17 D.L.R. (4th) 422.

⁹² CHARLES M. CAMPBELL, *BETRAYAL & DECEIT: THE POLITICS OF CANADIAN IMMIGRATION* 163 (Jasmine Books, 2000). *See also* *Singh v. Canada*, *supra* note 91.

Mirabel Airport knew that the passport was fake and pulled Ressam aside. Ressam admitted that the passport was indeed counterfeit and he was jailed but he was never sent back to Algeria.⁹³ According to the director of Canada's intelligence agency "once someone sets foot in Canada, then it is very hard and takes a very long time to get them out."⁹⁴ This is why stronger security measures like those that the United States has proposed and implemented would be beneficial to Canada as well. The goal of these systems would be to stop a terrorist before he could reach Canadian soil and take advantage of the ruling in *Singh* while allowing legitimate refugees to rely on the rights granted by the Supreme Court.

Following the September 11th attacks, the Canadian government has attempted to make its immigration system more secure and in doing so has succeeded not only in cooperating with the security goals of the United States but doing so in a manner that attempts to avoid any human rights violations. On June 28, 2002 the Canadian Immigration and Refugee Protection Act was implemented.⁹⁵ Section 3(2)(h) of this act allows Canada to deny access to refugee claimants who are security risks or serious criminals.⁹⁶ Canada has thus maintained its strong respect for human rights. The act states that: "Decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination..."⁹⁷

⁹³ Bernton, Carter, Heath & Neff, *supra* note 15, at ch. 4.

⁹⁴ *Id.*

⁹⁵ Immigration and Refugee Protection Act, available at <http://laws.justice.gc.ca/en/I-2.5/text.html> (last visited Mar. 20, 2003).

⁹⁶ *Id.* at §3(2)(h) ("[T]o promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals").

⁹⁷ *Id.* at §3(3)(d).

In signing the *U.S.-Canada Safe Third Country Agreement* Canada has agreed with the United States to no longer aid refugees who attempt to “asylum shop.” Under the Immigration and Refugee Protection Act “a claim is ineligible to be referred to the Refugee Protection Division if...the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence.”⁹⁸ Here again Canada managed to cooperate with the United States by changing its policy while not violating its human rights agreements. The provision of the 1951 Geneva Convention on the Status of Refugees Article 31 specifically stipulates that the refugee must come *directly* from a territory where their life or freedom was threatened.⁹⁹ Canada has demonstrated that it is possible to increase immigration security while maintaining human rights. This is the policy both nations should adhere to in joining together to establish a North American security perimeter.

VI. Implementation of a North American Perimeter based on the European Schengen Model

This note has proposed that combining the technological resources of the United States and Canada outside of the North American perimeter, rather than at their common border, will best insure that civil liberties will be maintained and that costs will be minimized. While business people in Canada, speaking economically, favor this notion of an external rather than an internal border, many in the Canadian government are adamantly opposed to this notion. Many ordinary Canadian citizens are opposed as well.¹⁰⁰ Not only is their fear of a loss of sovereignty

⁹⁸ See Mark Krikorian, *The U.S.-Canada Safe Third Country Agreement: A Vital First Step* (Oct. 16, 2002) (testimony prepared for the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Border Security, and Claims).

⁹⁹ *Id.*

¹⁰⁰ See Stephen Handelman, *A Mighty Fine Line*, TIME, *supra* note 67.

unfounded, in the long run this divisive security policy will prove more detrimental to the freedoms of Canadians. This is clearly evidenced by the cases of Mr. Jalbert, Mr. Arar and Mr. Malik.

The fear of a loss of sovereignty by Canadians might be more comprehensible if there were no model to compare what the future would look like. But the European Union, with its open border policy under the Schengen Agreement, is a demonstration to both the United States and Canada of the benefits and disadvantages of open borders.¹⁰¹

The Schengen Agreements began in 1985 with the implementation of no internal borders between France, Germany, Belgium, Luxembourg and the Netherlands. This agreement expanded to 13 countries in 1997 with the Treaty of Amsterdam.¹⁰² At the time that the concerned European governments were negotiating the implementation of the Schengen agreement, they expressed similar apprehensions regarding a balance between freedom of movement and their ability to provide adequate security against terrorist threats and other international crimes.¹⁰³ The way they achieved their goal was through technology and the implementation of “a complex information system known as the Schengen Information System (SIS).”¹⁰⁴ This is essentially the type of coordinated system of information exchange between the

¹⁰¹ See Papademetriou & Meyers, *supra* note 67; see also Stephen Handelman, *supra* note 67.

¹⁰² Europa, *The Schengen Acquis and Its Integration Into the Union*, available at <http://europa.eu.int/scadplus/leg/en/lvb/l33020.htm> (last visited Mar. 21, 2003) (the Schengen countries are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain and Sweden).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

police, customs and the judiciary that the PATRIOT Act as well as other legislation in both Canada and the United States is calling for.¹⁰⁵

The SIS system is “the heart of the Schengen system, (as) it allows all police stations and consular agents from Schengen group member states to access data on specific individuals, or vehicles and objects which are lost or stolen.”¹⁰⁶ The network is supplied through national networks called N-SIS which are connected to a central system called C-SIS; this is supplemented by an additional network called the European Information System which replaced its predecessor SISNET in August 2001.¹⁰⁷ There are two European Union members who are not part of the Schengen Agreement, the UK and Ireland, but they have the option of joining at any time. Despite some of its concerns about terrorists infiltrating Europe at the Spanish coast, England has conceded the advantage of Schengen and implemented some of its procedures including “police and legal cooperation in criminal matters, the fight against drugs and the Schengen Information System (SIS).”¹⁰⁸ With the expansion of the European Union, the SIS

¹⁰⁵ See PATRIOT Act, *supra* note 22, at §413 Multilateral Cooperation Against Terrorists: (2) the Secretary of State, in the Secretary’s discretion and on the basis of reciprocity, may provide to a foreign government information in the Department of State’s computerized visa lookout database and, when necessary and appropriate, other records covered by this section related to information in the database—

- (A) with regard to individual aliens, at any time on a case-by-case basis for the purpose of preventing, investigating, or punishing acts that would constitute a crime in the United States, including, but not limited to, terrorism or trafficking in controlled substances, persons or illicit weapons; or
- (B) with regard to any or all aliens in the database, pursuant to such conditions as the Secretary of State shall establish in an agreement with the foreign government in which the government agrees to use such information and records for the purposes described in subparagraph (A) or to deny visas to persons who would be inadmissible to the United States.

See also Enhanced Border Security and Visa Reform Act *supra* note 71, at 603 (requires the Department and the INS, in consultation with the Assistant to the President for Homeland Security, to conduct a study of alternatives for encouraging or requiring Canada, Mexico and Visa Waiver Program (VWP) countries to join in the development of an intergovernmental network of interoperable electronic data systems which would facilitate access to each country’s law enforcement and intelligence information.

¹⁰⁶ Europa, *supra* note 102.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

network will expand as well. SIS II will be developed to enable the future member states to use this system and the new SIS will also be updated with all the latest developments in information technology.

As is the case with America's automated lookout system, the Consular Lookout and Support System (CLASS) at its consular offices abroad, all persons applying for a visa or a residence permit in the European Union are checked against the SIS system.¹⁰⁹ People who are found to be on the list are usually refused entry; however, there is an opportunity for individuals to be granted reprieve from such a refusal as their case will go to a Migration Board. This board can only grant such an application following consultation with the country that entered the person on the list.¹¹⁰ It does not seem that it would be impossible for a similar system to work for people applying to get into North America. It is quite conceivable that each country could make concessions in order to get the system to work. The ultimate goal of security that could arise from such a practical system offers compensation for any loss of ideological immigration control.

Demetrios Papademetriou, director of Washington's Migration Policy Institute believes that it will be about 10 to 15 more years before Canada and the United States reach the point where they are ready for the type of integration of Immigration policies that the European Union has now, but he does believe that greater integration is currently possible.¹¹¹ A potential disruption in the evolution of such a system of coordination may occur, however, if there are continued instances of Canadian citizens harassed at the border. Such incidents could perpetuate

¹⁰⁹ Migrationsverket, *Schengen Information System* (March 2001).

¹¹⁰ *Id.*

¹¹¹ See Papademetriou & Meyers, *supra* note 67. See also Handelman, *supra* note 67.

the Canadian reaction that they are being bullied by the US and asked to cooperate only when it is expeditious for the Americans.¹¹²

CONCLUSION

The concerns that many Canadians have regarding the possible dominance of United States policy if the immigration systems are combined is understandable. Canada has always felt its sovereignty threatened by its much bigger brother to the south. Despite this, the two countries have always shared a level of cooperation that should be envied throughout the world. They have disagreed but they have always managed to recover close to the level of cooperation that President Roosevelt and Prime Minister Mackenzie King outlined in their Kingston Dispensation back in 1938. Today the two nations face the greatest challenge to their shared border that they have encountered since the newly independent United States and a British-controlled Canada were at war. They must balance their fear of a ruthless enemy, terror, against the independent freedoms and civil rights of their citizens, and of those who desire to become citizens. Michel Jalbert, Maher Arar and Addul-Rehman Malik were each, although in different ways, denied the rights that are supposed to be granted to Canadian citizens when traveling in the United States or being questioned by US Customs officers. Simply put, such abuses would not occur if citizens of North America were allowed freedom of movement between countries within the continent. Security need not be compromised. Enhancing the security initiatives the United States already has in place abroad to monitor those who are applying for visas, as well as better coordination of the exchange of information with Canadian and even Mexican authorities, could mark a significant improvement.

¹¹² See Papademetriou & Meyers, *supra* note 67 (as with the early stages of any new large initiative, there will be winners and loser – and each NAFTA partner will have to address policies to address the concerns of the likely losers up front).

On March 30, 2003 Michel Jalbert plead guilty to possession of a firearm by an illegal alien and was sentenced to time served. The other two charges were dropped.¹¹³ The practice of citizens of Pohenegamook entering the United States to get gas without a formal border inspection had been an authorized custom up until the time of Mr. Jalbert's arbitrary arrest.¹¹⁴ Such an ambiguous policy toward border security does not serve the U.S. interest in protecting themselves from terrorist attacks; rather, it only serves to make cooperation with Canada difficult in a time when the Kingston Dispensation is more important than ever. Therefore, a clear and unified North American Security policy is needed to best serve and protect the citizens of both countries.

¹¹³ Hanes & Sevunts, *supra* note 1.

¹¹⁴ United States of America v. Michel Jalbert, *supra* note 2.