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From Marco Polo to Anthony Bourdain, people “crossing borders” is hardly a new phenomenon. In fact, throughout history, border crossings have influenced traditions, spawned innovations, and, for some, nurtured new beginnings. The International Organization for Migration estimated that there are 214 million international migrants (including 27.5 million refugees) in the world today. Moreover, according to the World Bank’s World Tourism Barometer, a record 1.09 billion people crossed borders as they traveled to other countries over the past year. Suffice it to say that people are crossing borders frequently and throughout the world.

This issue of Insights explores the role of law and its impact on international migration and travel. The opening article by Craig Robertson (Northeastern University) leads us through the fascinating history of travel documents and how they serve to identify us as individuals and as citizens. Next, Jeffrey Kahn (Southern Methodist University Dedman School of Law) explores changes in travel since 9/11, including the “No Fly List” and its impact on everyday travelers. Our third feature article is by Jennifer Chacón (University of California, Irvine School of Law). She helps us to understand the complex interactions among local, state, and federal authorities when enforcing U.S. immigration policies.

To help connect this rich content to your classroom, our Learning Gateways features provide engaging instructional strategies examining the right to travel and the challenge in balancing liberty and security. Teaching Legal Docs takes a close look at the U.S. passport, one common tangible symbol of our border-crossing culture. In Viewpoint Hilary French, an environmental analyst, shares a thought-provoking commentary on the effects of globalization on our notion of “borders.” Law Review, coauthored by Mariam Traore Chazalnoël and Daria Mokhnacheva from the International Organization for Migration, outlines some of the current human rights and legal issues facing environmental migrants. Rounding out the issue is a Profile of German photographer Kai Wiedenhöfer, who has photographed borders around the world.

Remember that the magazine doesn’t stop with these pages. Check out the rich roundup of resources online at www.insightsmagazine.org. The website offers teachers additional instructional supports, including ready-to-use handouts, articles, and opportunities for continued discussion. And be sure to take note of our “mark your calendar” reminder on page 31 for Constitution Day, September 17, or visit www.abaconstititution.org.

We continue to benefit from your feedback and ideas for the magazine, so keep them coming to our editor or me. Let us know about topics that you would like to see us tackle in future issues and innovative classroom strategies that you have initiated to bring content alive for your students.

Have a great summer.

Mabel McKinney-Browning
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By Craig Robertson

The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection.

This request appears in the current U.S. passport. The request to facilitate movement and provide protection has appeared in passports since the Continental Congress authorized the then Department of Foreign Affairs to issue passports in 1782. Its appearance in a 21st-century passport usually goes unremarked, especially in contrast to discussion about attempts to make the document more secure and the identification of individuals more reliable. However, when the request is noted, it tends to be an acknowledgment of its somewhat incongruous appearance in an identification document. In an important sense, the request is anachronistic. It belongs to a different historical period, when the passport served a very different function.

The early history of the U.S. passport is a history of a document that in 150 years changed from something akin to a letter of introduction to a certificate of citizenship, before emerging in World War I as a modern identification document. Only during World War I did it become a required document for travelers. In this period, a passport transformed from a single sheet of paper to the booklet we think of today. Before it could take on its modern form and function as an identification document, the “identity” in the document had to change from something established by an individual’s word and affirmed (if necessary) by his or her local community, to an “identity” determined by the state, proven by standardized forms and processes, and verified by authorized officials.

Letter of Introduction
The modern passport has its roots in the medieval “safe conduct” documents that provided safe passage to visiting diplomats and the “king’s license” that granted permission to leave a territory. The U.S. passport’s origin in diplomatic correspondence is evident in its initial form and its limited use as an optional travel document. A single sheet of paper, usually about 18 inches x 12 inches (its size did not go unnoticed, and at least one recorded remark compared it to a breastplate!), early U.S. passports only named the bearer. There was no description or signature to identify the person presenting the document. The U.S. Secretary of State signed the passport, for it was in form and intention a letter from the secretary of state to support a person in his travels (until the 1860s, the secretary of state signed passports by hand).

In the early decades of the 19th century, the State Department issued a few hundred passports a year. While the document was not necessarily a priority for the State Department, the format of the document regularly changed from the 1820s. Ornamentation (usually an eagle) adorned the head of the document and a list of physical features was added on the left side of the paper to...
provide the basis for a description of the bearer; the main text still had the format of a letter addressed to foreign officials.

Although it acquired some aspects of an official identification document, passports were still thought of as travel documents. Applications were usually a letter to the secretary of state, most of which was devoted to a description of the planned itinerary. Occasionally it might include a description of the applicant and a statement that he was a citizen. At times a passport was more specifically defined as a letter of protection. In this context, a secretary of state or U.S. official abroad occasionally issued passports to noncitizens. (Examples of this include passports issued by Benjamin Franklin while he was in Paris as U.S. Ambassador to France.) Often these applicants were men who under naturalization law had declared their intention to become U.S. citizens when they had completed their two years of residence. The text of the passport stated the bearer was a citizen. In the absence of any passport laws, however, a passport could be knowingly issued to a noncitizen.

In 1835, the Supreme Court, in _Urtetiqui v. D'Arcy_, noted the lack of any regulations regarding the issuance of passports. This was part of a decision that held that the passport, although identifying its holder as a U.S. citizen, did not constitute legal evidence of citizenship. Acknowledging its origin in diplomatic correspondence, the court characterized the passport as a political document “addressed to foreign powers” purporting only to be a request that the bearer of it may pass safely and freely.

**Certificate of Citizenship**

In 1856, Congress passed the first law that directly addressed passport policy. This specified that passports could only be issued to U.S. citizens and gave the secretary of state the sole authority to issue passports (it also introduced the first passport fee); passports, however, remained optional documents. Coming two decades after the Supreme Court decision, it was not a response to that decision. In fact, it was an attempt to strengthen the status of a passport as a certificate of citizenship—a document the Supreme Court had declared the passport to not legally be.

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Social and legal debates about citizenship brought into sharp relief the importance of the passport as evidence of citizenship, albeit prima facie evidence. Immigrants who had declared their intention to be citizens and free blacks who applied for passports were two important groups of passport applicants whose existence challenged legal definitions of citizenship. Applications from both these groups located passport issuance in the midst of tensions between individual states and the federal government.

The citizenship status of so-called “declarants” tended to arise when they traveled back to their former country. Often declarants applied for passports to avoid military service for themselves or their sons when they returned to their former homeland. They often supported their right to a passport by citing their ability to vote in local elections in the United States; some states and territories allowed declarants to vote in an attempt to attract immigrants. On a handful of occasions in the two decades before ratification of the 14th Amendment, passport applications from free blacks were used in debates over the right of free blacks to become citizens. These passport applications were partly intended to contrast the ease with which free blacks could get forms of citizenship from some northern states with the lack of recognition from the federal government. Correspondence between the applicant and the secretary of state was published in antislavery newspapers. In cases when it was revealed passports had been issued to noncitizen free blacks, federal officials tended to blame bureaucratic error. In the case of Robert Purvis from Philadelphia, it was argued that he had been issued a passport but “not as a colored man.” The secretary of state clarified that Purvis was “a gentleman,
a man of property, of scarcely perceptible African descent."

The secretary of state could refuse a passport application from a U.S. citizen. The 1856 act stated the secretary of state "may" issue a passport. This was interpreted to give the federal government discretion in the issuance of passports. In specific situations in the 19th century, secretaries of state did exercise this discretion. The citizenship verified in a passport was therefore not determined solely through claims to birth in the U.S. or naturalization, but also through the behavior of citizens. Officials primarily defined this "full" citizenship through the reciprocal relationship between the promise of official assistance and, if necessary, protection abroad and the loyalty expected from citizens. The most frequent example of this was the rejection of passport applications from citizens who appeared to be permanently living abroad. Passport policy, therefore, created an informal definition of expatriation.

Outside of expatriation, the State Department deployed its policy of discretionary issuance to implicitly and explicitly promote good behavior and to discourage behavior that could be considered inappropriate. This involved "dubious citizens" who in some way deviated from the acceptable Anglo-Saxon, Protestant foundations of responsible republican citizenship. The idealized citizen remained a white property-owning male, a husband and father, the head of a household. Throughout the 19th century, passport policy implicitly encouraged this ideal through the issuance of one passport per family or household that traveled abroad. A man's family was included on his passport but not named. Standard practice meant that a passport identified married women by the phrase "and accompanied by his wife." A more explicit attempt to promote a particular vision of the ideal family is evident in an 1886 decision not to grant U.S. passports to Mormons traveling abroad to recruit people to their faith. This refusal was explained on the grounds that polygamy was a statutory crime.

**Identification Document**

Parallel with concerns about the role of the passport in policing the intent of citizenship laws, the late 19th century saw the beginnings of a response to concerns that the passport did not reliably connect the document to the passport holder. This began with attempts to standardize the somewhat casual way in which the State Department processed applications. These attempts included enforcing a policy to only accept applications on preprinted forms. This attempt to standardize applications occurred even at the micro-level of the applicant's name. In the 1880s, the State Department introduced a requirement that an applicant's name be spelled consistently across the documents used to support an application. In the old world, where identity was based on personal knowledge, the spelling of a name was unimportant. But the more distant federal bureaucracy demanded consistent spelling to assist in the accurate identification of citizens.

These ad hoc 19th-century attempts became more systematic during World War I and in the 1920s when the U.S. introduced immigration restrictions. In this period, the passport changed from a document intended to protect the individual to one that offered the state protection from individuals. The passport grew in importance as the acquisition of knowledge about individuals became fundamental to an official understanding of national security and border control. The state now had to know and remember each individual who crossed its borders. One consequence of this saw the State Department stop issuing "joint passports" to husbands and wives.

This new role initially took the form of wartime "passport control." Although Congress did not pass legislation requiring passports until July 1918, the State Department, with the assistance of steamship companies, had ensured the passport was a necessary document for people leaving and arriving at U.S. seaports. Through passport control, the document became associated with a new regime of international travel and bureaucracy in which the passport was recognized more as a border document and less as the travel letter of the 19th century.

Significantly, the passport's new role as a modern identification document did not disappear after the war. Along with visas and departure permits, it was used to enforce immigration restriction laws based on national origin. A passport solved the problem of verifying an individual's national
Do You Have a Right to Travel?

This lesson explores expressions of the freedom to travel in America’s founding documents, Supreme Court jurisprudence, and international law.

Materials
Copies of Right to Travel quotes

1. Ask students to discuss any trips that they may have taken within the United States:
   - Have you traveled to another state?
   - How did you travel—car, train, plane, etc.?
   - If you drove, did you notice when you crossed a border into a new state? What indicators told you that you had entered a new state? What was different?
   - Were you required to stop at the state border or present any identification upon entering the new state?

2. Ask students to compare their travel within the United States to travel outside of the United States:
   - Have you, or someone you know, traveled to another country?
   - How was that different from traveling to another state within the United States?

3. Next, ask students to consider their freedom to travel:
   - Do you think that you are free to travel? Why?
   - Do you think that you have a right to travel? Do you think this right is protected by the law?

4. Explain to students that they will examine several quotes about the freedom to travel from a variety of legal sources. Divide students into five small groups, and distribute one Right to Travel quote to each group. Ask each group to read their quote and discuss the following questions:
   - Where does this quote come from—i.e., name and type of document or court case?
   - What does this quote say about the right to travel? Why is it a “right”?
   - What significant statements are being made about the right to travel? What are the key words and concepts in the quote? What do they mean?

Right to Travel Quotes

Quote 1
Articles of Confederation (1781):
… the free inhabitants of each of these states … shall be entitled to privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, …

Quote 2
Chief Justice Melville Fuller, in Williams v. Fears (1900):
… Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution. …

Quote 3
Justice Robert Jackson, concurring opinion in Edward v. California (1941):
… The right of the citizen to migrate from state to state … is not, however, an unlimited one. In addition to being subject to all constitutional limitations imposed by the federal government, such citizen is subject to some control by state governments. He may not, if a fugitive from justice, claim freedom to migrate unmolested, nor may he endanger others by carrying contagion about. These causes, and perhaps others that do not occur to me now, warrant any public authority in stopping a man where it finds him and arresting his progress across a state line quite as much as from place to place within the state.

Quote 4
Universal Declaration of Human Rights (1948):
Article 13
(1) Everyone has the right to freedom of movement and residence within the borders of each state.
(2) Everyone has the right to leave any country, including his own, and to return to his country.

Quote 5
… The right to travel is a part of the “liberty” of which the citizen cannot be deprived without due process of law under the Fifth Amendment. … Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. …

5. Wrap up discussion by asking students to answer the lesson’s initial question: Do you have a right to travel? Why might a right to travel be important to citizens of a country?
identity required by the immigration acts passed in 1921 and 1924. The increased value of U.S. citizenship as a way to avoid nationality quotas resulted in an increase in passport fraud and the emergence of so-called “passport mills” and “passport factories” in European countries to create fake U.S. passports. It also saw the State Department attempting to counter passport fraud. This included the introduction and enforcement of new application requirements, changing the production of passports to make it harder for people to tamper with the document (e.g., changing the name or substituting a photograph), and making it difficult to accurately replicate a passport.

The need to carry a passport abroad and the more rigorous application created what became known as the “passport nuisance.” This was the label newspapers and magazines gave to the negative response of middle-class and upper-class Americans to passport requirements. Although the State Department issued over 2 million passports in the 1920s, the passport was not a document most Americans regularly encountered. More broadly, however, through the “passport nuisance,” it became the poster child for concerns about the pervasive demand for documents that many people encountered for the first time in various aspects of their lives, particularly in financial transactions and interactions with the government. The demand for documents to prove identity or record an agreement was seen as a rejection of a person’s word (and appearance). Therefore, many people understood the passport (and its accompanying application process) as a sign that the government considered its citizens dishonest and untrustworthy—a response grounded in the association of identification documents with suspect individuals such as criminals.

The passport photograph became a focal point for these concerns. The State Department introduced passport photographs in 1914, presenting them as a more reliable way to connect the passport to the correct person. However, the clashing of different photographic styles meant that people regularly complained that they did not look like their passport because of the “distortion of passport photographs.” The requirement that a person directly face the camera, with no hat, in front of a light background resulted in passport photographs that looked more like mug shots than a professional photographic portrait that relied on the skill of a photographer. This requirement for a passport photograph indicated the proper target of identification documents—people who could afford travel and meet these requirements, and thus be trusted. Others, including criminals and the insane, who could not meet these passport requirements, were people who could not be trusted.

In this manner, the passport changed from something like a letter of introduction and protection into an identification document in a very public way. The benevolent state offering protection in the form of a letter addressed to foreign officials became a signal of a nation-state practicing surveillance to gain knowledge about its citizens. The official processes of acquiring facts through documents made it clear to some applicants that they had lost control of one aspect of the public representation of their identity. A passport application turned citizens into objects of inquiry for an intrusive government.

By the 1930s, the “passport nuisance” had disappeared from the pages of newspapers and magazines and the correspondence files of the State Department. It is tempting to speculate that the “passport nuisance” disappeared as people quickly became used to the demand for documentary proof of identity and more familiar with the passport’s application process. In practice this acceptance meant that government officials saw the passport as a reliable way to identify people, and people became accustomed to the government claiming the right to demand documents to prove identity, in this case, if a person wanted to travel abroad.

The replacement of a single sheet of paper with a passport booklet in 1926 is a useful sign of the arrival of the passport as the document we tend to think of in this case, if a person wanted to travel abroad.

Discussion Questions

1. Why do you think countries issue passports to their citizens? What purposes do they serve?
2. Why do countries require foreign visitors to present passports to enter? Should they?
3. Can you imagine international travel without passports? What would such a world look like?

Suggested Resources

Taking a Closer Look at the U.S. Passport

The U.S. passport is perhaps the most common travel document in the United States today. In 2013, there were 117 million U.S. passports in circulation among U.S. citizens and certain noncitizen nationals, including 13 million new passports issued by the U.S. Department of State that year alone. Generally, it is unlawful to leave or enter the United States without a passport or approved passport replacement document. Frequent international travelers might take the passport for granted, while others encountering it for the first time might be curious about its format and components. Here, Teaching Legal Docs hopes to explore the U.S. passport more carefully in order to understand what information it contains and how it functions as an official travel document.

The Passport Document
There are several types of U.S. passports. The most common U.S. passport, and the focus of this Teaching Legal Docs, is the regular passport, which currently has a blue cover and is issued to individual American citizens. Other U.S. passports include the official passport (brown cover), which is issued to citizen employees of the United States, such as members of Congress traveling overseas; the diplomatic passport (black cover), which is issued to American diplomats and their families; and the “refugee passport” (blue-green cover), which is an official travel document issued to noncitizens who have been classified as refugees or granted asylum by the United States. All U.S. passports are booklets, typically 32 pages (with space to add more pages), and measure approximately 4 inches wide by 5 inches long.

U.S. passports are issued by the U.S. Department of State and are obtained through an application process. There is an application fee of $110 for new adult applicants, and all applications need to be submitted in person at an approved passport facility, such as a U.S. post office, court, or consulate office. An additional $25 handling fee must be paid to the facility processing the application. American passports are valid for 10 years and, with a few exceptions, are valid for travel to any country in the world.

On the cover of the regular U.S. passport, the coat of arms of the United States appears, along with the words “PASSPORT” and “United States of America.” Below these, a rectangular-looking shape appears. This is an internationally recognized symbol noting the presence of biometric data. All U.S. passports issued after October 26, 2006, include biometric data, which is stored on an embedded chip that uses radio frequencies to verify data when the passport is opened in a designated customs area within a country. Biometric data includes all of the information on the data and signature pages of the passport document, and, in some cases, additional information.

Data and Signature Pages
The inside cover of the passport booklet contains a design, currently a bald eagle with the text of the Preamble to the U.S. Constitution. Below the design is a signature line, which should contain the signature of the bearer, or, if the bearer is a minor, a parent or guardian. This is the signature page. A regular U.S. passport is not valid unless it is signed.

Immediately following the signature page is the data page. The data page contains two types of data: visual and machine-read. The top portion of the page contains the visual data, including the words “United States of America” and a photograph of the bearer. Passport photos are 2 inches square, and should feature the bearer looking straight into the camera. Additional visual data is straightforward and reads like a completed form:

Across the top:
- Type—this stands for “type of document,” and will show a code, generally “P” for “passport”
- Code—this stands for “code of issuing country,” and will show “USA”
- Passport Number—each passport has a unique identification number, printed here

Right of the photo in a column:
- Surname—bearer’s last name
- Given Names—bearer’s first, and any other legal, names
- Nationality—on U.S. passports, this always says “United States of America”
- Date of birth—bearer’s date of birth
- Place of birth—bearer’s U.S. state of birth, followed by “USA,” or nation of birth
- Date of issue—when the passport was issued
- Date of expiration—generally 10 years from the date of issue
- Endorsements—this will refer to the “Endorsements” page, later in the passport booklet
To the right of the information listed on the previous page, in a second column:

- Sex—sex of the bearer
- Authority—this stands for “issuing authority,” and will say “USA”

Across the bottom of the data page, machine-read data appears. This data is always reflected across two lines, each containing 44 characters. The machine-read data is a copy of the visual data above it. Generally, it appears as the following:

**Line 1:** P<USA[SURNAME]<<[GIVEN NAME(s)]<<<<<<<<<<
**Line 2:** [PASSPORT NUMBER + 1 DIGIT]USA[DATE OF BIRTH + 1 DIGIT + SEX + EXPIRATION DATE + 10 DIGITS]<[6 DIGITS]

### Request Page

U.S. passports include the following formal request from the U.S. Secretary of State to the representatives of the country inspecting the passport:

*The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection.*

This request has appeared on all U.S. passports throughout American history. At one time, the passport simply served as a diplomatic “note” from the secretary of state to another country on behalf of the bearer. As the U.S. passport has come to act as more of an identification document, some people believe this statement is anachronistic. Regardless of what one thinks about this statement, it reflects the document’s role in international travel in a clear way.

### Visas, Endorsements, and Amendments Pages

The remaining pages in the passport are for visas, endorsements, and amendments. Visa pages are used by other countries during international travel. Each country has a stamp and will stamp a visa page upon the bearer’s entry and departure. Some countries require blank pages for their stamps, which is one reason that frequent international travelers sometimes need to add pages to their booklet, which one can do for a fee. Endorsements, however, are a bit more complicated. The term “endorsement” is part of a larger legal understanding, in that passports are valid for all countries “unless otherwise endorsed.” If, for some reason, the bearer is not welcome to a particular country, that country will stamp an endorsement on the appropriate page. Finally, the Amendments page is used by the Department of State to note changes to the passport, such as name changes, since its initial issuance.

### Part of a Global Community

Today’s U.S. passport booklet format can be traced back to 1926, an immediate result of the Passport Act. Prior to the modern booklet, U.S. passports took a variety of forms, including large single page documents (12 inches x 18 inches!) during the 18th and 19th centuries. The U.S. Department of State, with the U.S. Congress, worked throughout the 19th and early 20th centuries to standardize the look of, and information contained in, the U.S. passport.

In addition, the international community has worked to standardize the look of, and information contained in, all national passports. As countries developed their individual passports, including formats, information, and languages, representatives from around the world recognized the potential for confusion. As early as 1920, the League of Nations discussed uniform standards for national passports. Today, international passport standards are controlled by the International Civil Aviation Organization (ICAO), now an entity of the United Nations that also regulates international air travel and airspace.

The ICAO has issued a variety of recommendations for passports, including the booklet format and size, that all passports show the issuing country’s coat of arms on the cover, and that all passports be issued in English or French, or in the native language of the issuing country and English or French. Since 1980, the ICAO has advocated machine-read information in passports and has mandated that all member nations implement some form of machine-reading by November 2015. All ICAO member nations, which include all but three of the United Nations member states, issue passports that meet the ICAO standards. This means that not only is the U.S. passport compliant with ICAO standards, but also passports from the other 190 ICAO member countries follow a similar format and include the same basic information. Establishing international standards for passports helps to ensure smooth travel for everyone around the world and places the U.S. passport in a much more global context, part of an international system.
Imagine waiting in a distant, foreign airport for the final leg of a long journey home to the United States. You and your family are bone tired. When you reach the front of a long line at the ticket counter, the agent looks nervous: “I’m sorry, I can’t print your boarding pass. Your name appears on a United States terrorism watchlist.”

You are stunned. Obviously someone, somewhere, has made a mistake. A simple misspelling, perhaps. You ask to speak to a supervisor, but she shrugs helplessly as you show her your U.S. passport, tickets from your previous flight, even your driver’s license. “There is nothing I can do. It’s not our list. But we cannot board you. You’ll have to contact the Department of Homeland Security.” As you are escorted from your place in line, you are stung by the nervous glances of travelers who overheard your exchange.

A slow sense of dread begins to overwhelm you. This is not going to be resolved with a simple phone call. What is this “watchlist”? Who put your name on it? How can an American citizen be kept from returning home? Your thoughts turn to more immediate, practical concerns. You are thousands of miles from home. Your family received their boarding passes; should they travel without you? Can you stay here? Fly to Canada? Take a boat? Do you need a lawyer?

This hypothetical is drawn from the experience of an American family split in half by the United States Government’s “No Fly List” in 2006. Half the family was allowed to return to their home in California. But the father, a naturalized U.S. citizen, and his American-born son were stranded for five months, thousands of miles away in Pakistan, as their attorney fought against a remote and classified government program.1 The No Fly List has grown from a sharply honed tool for protecting the security of commercial aircraft to a broad and blunt instrument to pursue all kinds of government interests.

The logic behind watchlists makes the urge to expand their use practically irresistible. What should dictate the limits of expansion? The federal government’s first watchlist devoted to identifying suspected terrorists and keeping them out of the country was the creation of one State Department employee, John Arriza. His first attempt at that list in 1987 was a shoebox of 3 x 5 index cards. Roughly twenty years later, a list he started with an eye toward evaluating visa applications had grown to become the seed for a sophisticated system of records containing information about approximately 400,000 unique individuals. Both Arriza’s first watchlist—which the State Department calls “TIPOFF”—and this larger system, the Terrorist Screening Database (TSDB), still operate today. But the TSDB—a card catalog of sorts
administered by the FBI’s Terrorist Screening Center—is now the central repository for information used to spin-off many other lists for use by different federal, state, and local government agencies.

The No Fly List is among the best known of these spin-offs, created by this FBI office for use by the Transportation Security Administration. For decades before the terrorist attacks of September 11, 2001, the Federal Aviation Administration maintained a system of issuing to airlines what it called “security directives.” These security directives were used to deny boarding to individuals deemed to present a “specific and credible threat” to an aircraft. These directives identified only a handful of people year to year. Now, the federal government may prevent the travel of “known or suspected terrorist[s]” who “present a threat to civil aviation or national security.” With three small words, this disjunctive phrase now justifies adding a person to the No Fly List who does not pose a threat to civil aviation. And the size of this list has grown exponentially. In early 2011, the No Fly List prohibited over 10,000 people from flying, up to 1,000 of them being U.S. citizens. A year later, while the number of Americans reportedly decreased to around 500 people, the list doubled in size to 21,000 names.

So what? After September 11, who could object to a policy that denied known and suspected terrorists access to anything? Wouldn’t it be foolish to be too open about the details of this list? Known and suspected terrorists could escape detection. Some might say that they should not be treated as criminals entitled to the rights that police and prosecutors must respect, and courts protect.

There lies the problem. Who “they” are is left to the watchlisters, officials at the FBI’s Terrorist Screening Center who review with various degrees of attention the submissions of myriad government agents with the power to nominate someone for watchlisting. No judge or jury decides that these people are terrorists, or even suspected terrorists, or that they threaten national security, or that their liberty should be restricted. The watchlisters are prosecutor, judge, and jury. Their decisions are made in secret and their rules for decision—like their evidence for deciding—are subject to various levels of restricted access. And the pressure to
watchlist someone is great. The FBI’s inspector general has criticized the practice of overclassifying matters as domestic terrorism cases. It is only human nature that those who are daily confronted by a thick and terrifying threat matrix should inevitably prefer to err on the side of watchlisting.

Of course, that is the rationale for requiring that the judgment of even the most experienced police and prosecutors be evaluated by a neutral and dispassionate magistrate. But there is no such person involved in the watchlisting program. There is an internal appeals process, of course, but the burden is on the individual to prove that he or she is not a terrorist or some other security threat. And this must be done without access to the information that led to the watchlisting in the first place or even access to the decision maker.

What if someone made a mistake? Or the judgment is based on evidence that is of unknown provenance or weak credibility or susceptible to multiple interpretations? In the absence of legal standards that are routinely enforced by neutral third parties (as courts routinely enforce the legal standards that govern searches, arrests, and other invasions of an individual’s liberty), what institutional incentives exist that would lead an anonymous analyst to resolve ambiguous evidence in any way other than in favor of watchlisting? Who wants to be the official who erred in favor of a terrorist? As a former director of the government’s watchlisting program put it, “The problem I’ve got is if I allow that person to get on a plane and something happens, what do I say to those victims that go on the plane?” But what if the person barred from air travel were you?

Today, all travelers now require the federal government’s express prior permission to board any aircraft (or maritime vessel) that will enter, leave, or travel within the United States. Of course, no one realizes that such permission is required—or has even been sought—until it has been refused. A federal regulation establishing a program called “Secure Flight” requires every person who wishes to buy an airplane ticket to submit his full name, date of birth, and gender to the airline at the time of purchase. Although the government permits the airline to sell the ticket right away, that reservation cannot be redeemed for a boarding pass without the government’s assent. This Secure Flight data is sent to analysts who determine whether the information matches entries on a number of different watchlists and databases.
Challenging the No Fly List in Court

**Latif et al. v. Holder et al.** *(pending)*

This case was filed in 2010 in the U.S. District Court for the District of Oregon by the American Civil Liberties Union (ACLU) on behalf of thirteen U.S. citizens and permanent residents whose names were included on the No Fly List and is still pending. Several of the plaintiffs are U.S. military veterans, including Ayman Latif, a disabled Marine whose name leads the case. The plaintiffs challenged their names being added to the list, and the federal government’s redress procedure, as a violation of their Fifth Amendment rights to due process under the law. In a 2013 ruling to defer judgment on portions of the case pending additional information, U.S. District Court Judge Anna J. Brown wrote:

“Although there are perhaps viable alternatives to flying for domestic travel within the continental United States such as traveling by car or train, the Court disagrees with [the United States government’s] contention that international air travel is a mere convenience in light of the realities of our modern world. Such an argument ignores the numerous reasons an individual may have for wanting or needing to travel overseas quickly such as for the birth of a child, the death of a loved one, a business opportunity, or a religious obligation… the Court concludes on this record that Plaintiffs have a constitutionally-protected liberty interest in traveling internationally by air, which is affected by being placed on the list.”

**Mohamed v. Holder** *(pending)*

Another case, pending in the U.S. District Court for the Eastern District of Virginia, concerns Gulet Mohamed, a U.S. citizen who was detained by authorities in Kuwait in 2011 after he was determined to be on the No Fly List. He had left the United States in 2009 “to learn Arabic and connect with members of his family living abroad.” Mohamed claims that his placement on the list constitutes violations of his right as a U.S. citizen to reside in the United States and reenter it from abroad, his Fourteenth Amendment right to return to the United States, and his Fifth Amendment liberty interests “in traveling by air and being free from false governmental stigmatization as a terrorist,” and his right to procedural due process, including his right to pre- or post-deprivation notice and a hearing. The federal government pushed for dismissal of the case, arguing that a redress system is in place and is available for Mr. Mohamed’s exhaustion. In a 2014 order allowing the case to proceed, U.S. District Court Judge Anthony Trenga noted:

“While the government no doubt has a significant and even compelling interest, an American citizen placed on the No Fly List has countervailing liberty interests and is entitled to a meaningful opportunity to challenge that placement. And, while judicial review of some sort is available pursuant [through DHS TRIP], it is not at all clear that such review will effectively address the constitutional issues presented by a citizen’s inclusion on the No Fly List.”

**Ibrahim v. Department of Homeland Security et al.** *(2014)*

Rahinah Ibrahim is a Malaysian national and a dean at Universiti Putra Malaysia. In 2000, she was granted a student visa to study architecture at Stanford University. In 2005, while visiting Malaysia, she was mistakenly watchlisted and then her student visa was revoked, rendering her unable to return to her studies. She filed suit against multiple state and federal agencies, citing violations of the right to due process. Testimony during the trial in the U.S. District Court for the Northern District of California revealed that Ms. Ibrahim’s name was added to the No Fly List erroneously, following a federal agent’s mistake in filing paperwork. Judge William Alsup acknowledged that the “private interests at stake in her 2005 deprivations were the right to travel …, and the right to be free from incarceration …, and from the stigma and humiliation of a public denial of boarding and incarceration …” He ordered the government to:

“[S]earch and trace all of its terrorist watchlists and records, including the … no-fly and selectee lists, for entries identifying Dr. Ibrahim. The government shall remove all references to the mistaken designations … and/or add a correction in the same paragraph that said designations were erroneous and should not be relied upon for any purpose. Declarations signed under oath by appropriate government officials shall be filed … declarations shall certify that the government has searched, cleansed, and/or corrected in the same paragraph all entries identifying Dr. Ibrahim and the mistaken 2004 designations. Each declaration shall specifically detail the steps and actions taken with respect to each watchlist.”

— Tiffany Middleton
Long before the traveler arrives at the airport, these analysts can now arrive at the decision that the traveler will not receive a boarding pass. In other words, each time you travel by airplane in American airspace, it is by the grace of the U.S. government.

Why stop at the hazards of air travel? If a person is too dangerous to fly, isn’t he too dangerous to drive a truck laden with dangerous chemicals? If a No Fly List, and a No Hazmat List, why not a No Gun List? Who would want to give a terrorist easy access to a gun or a truck full of dangerous materials?

New terrorist watchlists are constantly proposed and developed, since the logic of watchlisting can be used for any number of security purposes. And yet this protection comes with a price. The secrecy that shrouds watchlists—indeed, the secrecy necessary to make them useful in the first place—conflicts with our most basic instincts for an open government accountable to its citizens and checked in its excesses by a watchful, neutral judiciary.

Some would say the risks inherent in using terrorist watchlists to police America’s borders and transportation networks (if not access to guns or dangerous materials) are worth taking. Citizens of the United States enjoy a freedom of movement at home and abroad that others have long envied. But that freedom, like so many freedoms, is not absolute. In a world in which airplanes have been transformed into guided missiles, some argue that travelers should accept new limitations on their right to travel. Among those new rules: every time a citizen wishes to fly somewhere, the state must approve the itinerary.

This argument is not new. In fact, it was made, and ultimately rejected, the last time the nation’s intelligence community perceived that the country faced an existential threat. Sixty years ago, communists were feared just as terrorists are feared today: they were international, ideologically driven enemies, sometimes hidden in plain sight, intent on destroying the American way of life. Restricting their travel was not just about dampening the ardor with which they spread their pro-communist sympathies. Back then, the fear was not that terrorists in league with religious extremists would kill thousands by flying jets into skyscrapers. The fear was that this international conspiracy in league with the Soviet Union would overthrow the U.S. government, even if it meant vaporizing American cities in a nuclear Armageddon that could extinguish all life on earth.

The watchlisting technology of that day was crueler, but its purpose and effect were the same. Americans whose loyalties were questioned or who were perceived as threats to the state’s interests were denied passports and kept at home. Their names were put on secret lists and kept in secret files. Others were allowed to travel, but on restricted itineraries that were monitored by requiring their passports to be renewed at embassies and consulates spread throughout the world, as if the citizen were a prisoner on parole from America for good behavior, but still under suspicion.
What system—akin to today’s Secure Flight and No Fly List—controlled travel back then? Wrong question. Not what, but who?

The first person to fully exploit the power to control travel in pursuit of national security was one of the most powerful women in government in her day. Surprisingly, her name has been all but lost to history. Ruth B. Shipley was the chief of the U.S. Department of State Passport Office from 1928 to 1955. Shipley was not a politician or even a political appointee. She was a civil servant who rose from the ranks of World War I era file clerks to become a force in Washington praised by presidents and senators alike. Franklin Delano Roosevelt called her “a wonderful ogre,” which he intended as a compliment.

At first glance, Mrs. Shipley may seem an unlikely person to link to the difficult national security issues of our time. Ruth Shipley never heard the phrase “No Fly List” or saw the Twin Towers of the World Trade Center; these did not exist when she was a government official. But this extraordinary civil servant is the intellectual ancestor of the No Fly List and of the anonymous government officials who use it to decide who flies and who is grounded. She invented the first government system to identify people whose travel was—in the idiom of her day—“not in the interests of the United States.”

In fact, the seeming or even strongly professed innocence of frustrated travelers was sometimes considered further evidence of their dangerousness. Mrs. Shipley controlled travel by issuing, or not, what became a license for their travel: a passport. It was her job to decide who could go where, for how long, and under what conditions. The people whose travel she deemed outside the interests of the United States were not criminals or even clearly identified enemies of the state. They included playwright Arthur Miller, chemist Linus Pauling, actor Paul Robeson, professor and then State Department official Eleanor Dulles, Supreme Court Justice William O. Douglas, and many more everyday Americans without famous names at all. On the day she retired in 1955, Mrs. Shipley’s office had amassed files on twelve million people.

Today’s No Fly List is no better, and perhaps worse, than Mrs. Shipley’s passport regime. Her system was eventually discredited and disassembled by a federal judiciary that slowly awoke to the extraordinary power (and unchecked discretion to use it) that fear for our national security had given to a small collection of government officials. But while she reigned over the Passport Office, her word was final. As the New York Times reported, “[W]hen she has once said ‘no,’ the disappointed applicant might as well save himself further conversation.” As the courts began to press her office for a meaningful system of appeals from her decisions, Mrs. Shipley and her office fought every step of the way to the Supreme Court. At the peak of her power, but with lawsuits beginning to mount, Mrs. Shipley retired—and took a lengthy European vacation. (No one doubted she would get a passport.)

It is Mrs. Shipley’s ghost that inhabits today’s computer systems and watchlisting databases. The idea that a citizen travels only with the government’s permission is an idea that she perfected. Her insistence that the absolute discretion of her office be unabridged by any meaningful check of the judiciary is the same argument that the watchlisters make today. And the asserted need for state secrecy that infuses today’s No Fly List decisions—both with regard to the evidence the watchlisters use and the self-imposed standards they employ to evaluate it—are echoes of her own insistence on the unabridged power of her office.

The No Fly List has been subjected to increasingly successful lawsuits in the federal courts, much as Mrs. Shipley’s passport system was challenged years ago. Late last year, a federal judge...
Learning Gateways

The No Fly List

Recent court challenges to the federal government’s managing of the No Fly List have been in the media and raise questions about the program’s relationship with Americans and their civil liberties. This lesson uses three contemporary sources to discuss the No Fly List and the legal issues around it facing courts today. The sources include an online comic that illustrates what the No Fly List is and its effect on Americans who appear on the list, excerpts from a press release regarding a recent case in federal court, and excerpts from Senate testimony about how the No Fly List is managed by the government’s Terrorist Screening Center.

Time: 60–90 minutes

Materials
Copies of, or links to, the following:
• Statement Before Committee on Homeland Security and Government Affairs
• “Grounded: Life on the No Fly List” comic
• “Federal Court Sides with ACLU in No Fly List Lawsuit” press release

Download all materials at www.insightsmagazine.org.

1. Ask students if they have heard of the No Fly List and what they know about it. Explain that you are going to look at three documents that try to explain the list in more detail, and highlight some of the legal issues surrounding it.

2. Distribute copies of the Statement Before Committee on Homeland Security and Government Affairs, ask students to read it, and then discuss the following questions:
   • What does this document tell you about what the No Fly List is and why it exists?
   • What does this document tell you about how someone’s name gets added to the No Fly List?
   • Do you think that people can be added to the list by mistake? What might happen to the person if his or her name is added to the list by mistake? What does this document tell you about what a person should do if this happens? Do you think this seems adequate?
   • From this document, what is the relationship between the No Fly List and civil liberties? Why do you think “safeguarding civil liberties” might be a concern?

3. Next, ask students to read the “Grounded: Life on the No Fly List” comic, and then discuss the following questions:
   • What story does the comic tell? What details does the comic highlight about how the No Fly List works?
   • From the comic, how does the No Fly List affect someone whose name appears on the list? Do you think this scenario is fair? Why?
   • How does the scenario in the comic compare with what you read in the Statement Before Committee on Homeland Security and Government Affairs? Which do you think is the most accurate scenario? Why?
   • Do you think that the cartoonist who drew the comic thinks this scenario is fair? Why? What do you think the cartoonist would say in response to the Statement Before Committee on Homeland Security and Government Affairs?

4. Next, distribute copies of the “Federal Court Sides with ACLU in No Fly List Lawsuit” press release, ask students to read it, and then discuss the following questions:
   • What story does the press release tell? How does it relate to the comic?
   • What is the issue in the case noted in the press release? How does this relate to what you read in the Statement Before Committee on Homeland Security and Government Affairs?

5. Draw students’ attention to the quote from Judge Anna Brown in the press release:

   Although there are perhaps viable alternatives to flying for domestic travel within the continental United States such as traveling by car or train, the Court disagrees with [the United States government’s] contention that international air travel is a mere convenience in light of the realities of our modern world. Such an argument ignores the numerous reasons an individual may have for wanting or needing to travel overseas quickly such as for the birth of a child, the death of a loved one, a business opportunity, or a religious obligation… the Court concludes on this record that Plaintiffs have a constitutionally-protected liberty interest in traveling internationally by air, which is affected by being placed on the list.

   Ask students to discuss the judge’s ruling:
   • Do you agree with the judge that people have a “constitutionally-protected liberty interest in traveling internationally by air”? Why?

6. Wrap up discussion by discussing ways that the No Fly List’s redress procedures might be improved to preserve national security, but still protect civil liberties.

—Tiffany Middleton
in San Francisco presided over the first actual trial to be allowed in a U.S. court challenging the government’s watchlisting system. Finding for the plaintiff, Rahinah Ibrahim, on procedural due process grounds, the court ordered a host of federal agencies to clean up their databases.² (Full disclosure: I testified as an expert for the plaintiff.) Other cases are progressing through the federal courts in Oregon, New York, and elsewhere.³

The U.S. government’s legal arguments, claims, and defenses of executive authority to exercise this power, especially in a time of war or national emergency, can all be traced to the arguments, claims, and defenses raised by Mrs. Shipley. In the end, the courts in her day concluded that the free movement of citizens could not be constrained on just the say-so of a government official. This was a conclusion that, even at the height of the Cold War, the American people realized was the right one. Such an attitude about the balance between liberty and security can’t be taken for granted. As lawyers and judges grapple with the technical details of the No Fly List, citizens must ask themselves in what sort of country they wish to live and how much freedom of movement they deserve.

1. This family’s story is told in Chapter 2 of the author’s book, Mrs. Shipley’s Ghost: The Right to Travel and Terrorist Watchlists.


Who controls the nation's immigration laws? Although the question seems straightforward, the historical picture is mixed, and the text of the U.S. Constitution does not point clearly to the answer. While the Constitution's text and the various Supreme Court cases interpreting this text suggest that the federal government has the exclusive power to enact and enforce the nation's immigration laws, state and local authorities still play an important role in the regulation of immigration because they shape the conditions of daily life for immigrants in their jurisdictions.

Federal Immigration Power

Article I, Section 8, clause 4 of the Constitution entrusts the federal legislative branch with the power to "establish an uniform Rule of Naturalization." This clear textual command for uniformity establishes that the federal government, specifically Congress, is responsible for crafting the laws that determine how and when noncitizens can become naturalized citizens of the United States. But control over naturalization does not necessarily require full control over immigration. And indeed, for the first century of the United States' existence, many states enacted laws regulating and controlling immigration into their own borders. Various states passed laws aimed at preventing a variety of populations from entering the borders of their states, including individuals with criminal records, people reliant on public assistance, slaves, and free blacks.

It was not until the late 19th century that Congress began to actively regulate immigration, in particular, with measures designed to restrict Chinese immigration. By this time, the Supreme Court had begun to articulate clear limits on state immigration powers. In 1849, with the Passenger Cases, the Supreme Court struck down efforts by New York and Massachusetts to impose a head tax on incoming immigrants. Four justices concluded that such taxes usurped congressional power to regulate commerce under Article I, Section 8, clause 3 of the Constitution. A unanimous court applied the same rationale in 1876, striking down a New York state statute taxing immigrants on incoming vessels in Henderson v. Mayor of New York. A few years later, in 1884, with a decision in the Head Money Cases, the Court for the first time upheld a federal regulation of immigration, also on Commerce Clause grounds.

From that time on, the Court upheld federal immigration regulations against constitutional challenges, although the underlying rationale shifted. With the Chinese Exclusion Case in 1889, the Court began issuing a series
of decisions in which it treated congressional power over the regulation of immigration as a virtually unreviewable, plenary power. The Court upheld congressional immigration laws and executive enforcement of those laws against a series of challenges, in spite of their patently discriminatory nature and lack of due process guarantees for non-citizens. The Court repeatedly suggested that this federal power flowed from the federal government’s prerogative to control foreign affairs.

From the late 19th century through the present day, the Supreme Court has upheld almost every federal immigration regulation against constitutional challenge, citing Congress’s plenary power in this area. As Justice Kennedy wrote in the 2012 decision in Arizona v. United States:

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. … This authority rests, in part, on the National Government’s constitutional power to “establish an uniform Rule of Naturalization,” U. S. Const., Art. I, §8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.

State and Local Immigration Regulation

The Passenger Cases established that states cannot tax immigrants without running afoul of the Commerce Clause. But what about laws that regulate the lives of immigrants in other ways? The Supreme Court has explored limits of the power of state and local governments in a series of immigration-related cases decided over the past century. One of the earliest and clearest decisions in this regard appeared in 1941 with the case of Hines v. Davidowitz, which involved a challenge to a Pennsylvania law that would have required non-citizens to register with the state government and carry a state-issued registration card. At the time the law was passed, there was no comparable federal regulation, although the federal government soon afterward did pass a comprehensive national law governing the registration requirements for non-citizens in the United States. Even after the passage of the federal law, the Pennsylvania law did not conflict with the federal law; it merely would have required non-citizens to comply with Pennsylvania’s registration provisions as well as those of the federal government. The state of Pennsylvania argued that because their regulation could co-exist with the federal scheme, it was constitutional. The Supreme Court disagreed. Reasoning that the power to regulate non-citizens goes to the heart of the federal government’s power over foreign affairs, the Court struck down Pennsylvania’s alien registration scheme.

The Court wrote:

[W]here the federal government, in the exercise of its superior authority in this field [of immigration], has enacted a complete scheme of regulation and has therein provided a standard for

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the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulation.

The lesson here was clear: the regulation of immigration was a matter for the federal government. Any efforts to regulate immigrants where Congress had regulated—even complementary efforts—were unconstitutional.

In later cases, the Court made clear that there is room for state and local involvement in the regulation of the lives of immigrants, albeit not necessarily in the regulation and enforcement of laws controlling the flow of immigration itself. In *DeCanas v. Bica* (1976), the question before the Court was whether a California law that imposed sanctions on employers who hired noncitizens unauthorized to work in the United States infringed on federal immigration powers. The Court rejected the challenge to the California law, concluding that, in the absence of a comprehensive federal scheme to regulate the employment of unauthorized workers, California’s law was not preempted by federal immigration law. *DeCanas* acknowledged the power of states to regulate immigration-related matters that fall under the states’ traditional police powers, provided the states’ laws do not conflict with federal immigration law.

Between 1976 and 2011, the Supreme Court did not take up the question of sub-federal regulations of immigration again. This did not mean, however, that states and localities were staying out of the business of regulating immigrants. In 1994, a majority of California voters passed Proposition 187, an initiative designed to prevent noncitizens living in the state without legal authorization from accessing a variety of benefits, including state-funded health care and education programs. A federal district court in California enjoined the Proposition in the case of *LULAC v. Wilson* (1995), concluding that the state had no authority to regulate immigration in this way because this was a federal prerogative.

As the unauthorized immigrant population grew in the United States, and as Congress continued to stalemate on efforts to enact comprehensive federal legislation to reform the nation’s immigration laws, some states and localities took more matters into their own hands. Monica Varsanyi traces the increase of legislation in her book *Taking Local Control: Immigration Policy Activism in U.S. Cities and States* (Stanford: 2010):

In 2005, according to the Immigration Policy Project of the National Conference of State Legislators, state legislatures considered approximately 300 immigration and immigration-related bills and passed around 50. In 2006, 500 bills were considered, 84 of which became law. In 2007, 1,562 immigration and immigrant-related pieces of legislation were introduced and 240 became law. And… in 2009, approximately 1,500 laws and resolutions were considered in all 50 state legislatures, and 353 were enacted.

The laws in question included restrictionist provisions such as measures designed to bar unauthorized noncitizens from housing and employment, as well as integrationist measures increasing immigrant eligibility for state benefits such as health insurance and English language education. The spate of state and local regulations on this wide range of immigration-related issues prompted the Supreme Court to again attempt to delineate the power of sub-federal entities to regulate immigration in two recent cases. In both of these cases, the Court acknowledged that states can play some role in regulating the lives of immigrants, even as it reaffirmed federal primacy in the regulation of immigration.

The first case, which the Court ruled on in 2011, *Chamber of Commerce v. Whiting*, involved a challenge to an Arizona state law, the Legal Arizona Workers Act (LAWA), which allows the superior courts of Arizona to suspend or revoke the business licenses of employers who knowingly hire unauthorized noncitizen workers. The Chamber of Commerce of the United States and various business and civil rights organizations sued to prohibit the law on the grounds that it was expressly preempted by federal immigration regulations. They cited the provisions of the Immigration Reform and Control Act of 1986 (IRCA), which created a fairly comprehensive federal statutory scheme requiring employers to maintain records of employees’ work eligibility, penalizing employers who hire unauthorized workers, and protecting authorized workers from discriminatory hiring practices.

The Supreme Court disagreed. Instead, the Court noted that IRCA includes a clause that expressly allows for state regulation of the employment of unauthorized workers through “licensing and similar laws.” The Court found that LAWA was a state licensing law expressly permitted by Congress in the text of IRCA. So while states cannot impose civil or criminal penalties on individuals or entities that hire immigrant workers lacking federal work authorization, they can use their licensing powers to address the same problem.

**Federal, State, and Local Relationships**

Amid all of this, the federal government has historically involved state and local officials in enforcement of the nation’s immigration laws, especially when public opposition to immigration grows. In the 1930s, during the height of the Great Depression, a number of city and state governments became actively involved in rounding up and removing Mexicans, and Mexican Americans, to Mexico. In
recent years, the federal government has increasingly sought to develop relationships with state and local officials, sometimes against the will of officials in some jurisdictions. Some state and county governments have entered into voluntary agreements with the federal government, known as 287(g) agreements, which allow their agents to investigate the immigration status of individuals in their jurisdiction and to enforce immigration laws under the supervision of federal authorities. The federal government has also attempted to actively engage all state and local law enforcement indirectly, through a program called Secure Communities. As described by Immigration and Customs Enforcement (ICE):

For decades, local jurisdictions have shared the fingerprints of individuals who are arrested or booked into custody with the FBI to see if they have a criminal record. Under Secure Communities, the FBI automatically sends the fingerprints to DHS to check against its immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable due to a criminal conviction, ICE takes enforcement action....

This program thus attempts to leverage the policing powers of states and localities to federal law enforcement ends. Some communities have attempted to resist participation in the Secure Communities program, raising questions about the federal government’s power to require the participation of states and localities in these initiatives.

Immigration Enforcement at the Supreme Court Again

The Supreme Court’s most recent foray into immigration enforcement came with the case of Arizona v. United States, which involved a challenge to Arizona’s S.B. 1070, a 2010 law that was expressly intended “to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” The law created or amended four sections of Arizona state law so as to effectively create criminal liability for being present in the United States without authorization. Although proponents of the law argued that it merely “mirrored” federal immigration law, the law criminalized conduct that is not criminalized under federal law, and it created more severe penalties for some conduct penalized already under federal law.

S.B. 1070 generated a media firestorm, a maelstrom of public criticism and protest, as well as an outpouring of vocal support. It also became the focal point for broader discussions of the validity of state and local immigration regulation and enforcement, as a number of states and cities enacted provisions that copied and even expanded upon the Arizona law.

The Court struck down three provisions of the law in 2012, including a provision that would have required noncitizens to face state penalties for failing to carry proof of their lawful status. The majority cited Hines v. Davidowitz, and noted that Congress had already enacted comprehensive regulations in the area of noncitizens’ registration requirements. The Court also struck down a provision that would have criminalized individuals for working without
immigration officers do not necessarily have the authority to arrest someone upon having such probable cause, and that this provision of S.B. 1070 gave Arizona’s officials “greater authority to arrest aliens on the basis of possible removability than Congress has given to trained immigration officers.” The Court concluded that the result would be “unnecessary harassment of some aliens … whom federal officials determine should not be removed.”

The Court did not strike down the entire Arizona law, however. The Court upheld the provision that allows state and local law enforcement to check an individual’s immigration status by contacting the federal government whenever that individual is already detained lawfully (on nonimmigration grounds) by law enforcement and the officer has reason to believe that the individual is unlawfully present in the United States. Consequently, if a state or local officer in Arizona makes a lawful stop in the course of their ordinary duties, and develops reasonable suspicion about a person’s immigration status, they are now required by Arizona law to contact the federal government to ascertain immigration status whenever practicable. However, the Supreme Court was very clear that these immigration checks could not prolong a stop beyond the time for which it would otherwise be authorized absent the immigration check, and that the ultimate power to determine immigration status rested with the federal government.

**Federal Primacy, Local Power**

In the wake of the Court’s decision in Arizona, lower courts declared a number of other state and local statutes, including laws in South Carolina and Georgia and local ordinances in Hazelton, Pennsylvania, and Farmer’s Branch, Texas, unconstitutional. But these rulings have not ended state or local involvement in regulating the lives of immigrants. Since 1996, states have been authorized by federal law to deny noncitizens present without legal authorization many forms of state benefits. Consequently, many states now deny all but the most basic emergency services to undocumented residents. State and local law enforcement officials also have broad discretion in how they enforce laws. In some jurisdictions, general criminal law provisions are enforced in ways that target noncitizens, thereby operating as a form of indirect immigration policing.

Finally, various states and localities resist particular federal immigration directives. For example, in 2012, the Department of Homeland Security began a program known as Deferred Action for Childhood Arrivals (DACA). DACA not only defers any formal removal proceedings against certain eligible noncitizens, but it also allows those noncitizens to receive federal work authorization and apply for driver’s licenses. However, it is the states, not the federal government, that issue driver’s licenses, and at least two states, Nebraska and Arizona, have resisted providing DACA recipients with driver’s licenses. On the other side of the equation, several states and localities have indicated their unwillingness to participate in the federal Secure Communities program, and have declined to comply with ICE requests to prolong the detention of certain noncitizens pending transfer to federal authorities.

In short, although there is a uniform federal immigration law, and although the Supreme Court has declared unequivocally for over a century that the federal government has the exclusive power to make and enforce that law, the policies and practices of state and local governments throughout the country continue to shape the lived experience of the immigrants within their jurisdiction. Notwithstanding the letter of the law, federal immigration law is always mediated by powerful intervening forces at the state and local level.

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**Discussion Questions**

1. Which level of government—federal, state, or local—legislates immigration policy in the United States?
2. How have federal courts ruled on the constitutionality of federal and state authority to regulate matters of immigration policy?
3. What did the U.S. Supreme Court decide in Arizona v. United States in 2012?

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**Suggested Resources**

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VIEWPOINT

Globalization Blurs Borders

Do we live in a borderless world?

By Hilary French

Part of the conflict over "globalization" stems from the fact that the term means vastly different things to different people. To some, globalization is synonymous with the growth of global corporations whose far-flung operations transcend national borders and allegiances. To others, it signals a broader cultural and social coming together, spurred by mass communications and the Internet. The term can also refer to the growing permeability of international borders to pollution, microbes, refugees, and other forces. Taken as a whole, globalization can be seen as a broad process of societal transformation that encompasses all of the above, including growth in trade, investment, travel, computer networking, and transboundary pollution.

Today's integrated world is the result of a process that can be traced back tens of thousands of years, when early humans first migrated out of Africa throughout Eurasia and eventually to the Americas. It was not until the 1500s, however, that people living several continents apart came into contact as a result of the European Age of Exploration. The late 19th century brought the development of steam-powered ships and railroads, which dramatically expanded international commerce and exchange. Two World Wars and the Great Depression slowed globalization dramatically in the first half of the 20th century. But the second half brought globalization back with abandon, as trade rebounded and widespread international air travel and the use of personal computers revolutionized links between countries and cultures.

The globalization of commerce in recent decades has had the effect of internationalizing environmental issues. Trade in natural resources such as timber and fish is soaring. Common trappings of daily life—a teak coffee table, for instance, or a salmon dinner—can affect the well-being of both people and ecosystems on the other side of the world. And international investments are giving millions of people an influence, albeit often an unwitting one, on environmental developments in distant corners of the planet.

A biotic intermingling of unprecedented proportions is also taking place as species and microbes that were once neatly contained within geographic boundaries are now let loose by trade and travel. And wind and ocean currents, rainfall, rivers, and streams carry contaminants hundreds or even thousands of miles from their sources. DDT and PCBs, for instance, have been found throughout the Inuit food chain in the Arctic, from the snow and edible berries to fish and bears. On an even larger scale, ozone depletion, climate change, and oceanic pollution threaten all nations.

Globalization in its many guises poses enormous challenges to traditional governance structures. National governments must work together to manage problems that transcend borders, whether via air and water currents or through global commerce. Yet international governance is still in its infancy. While nation-states are losing ground in the face of globalization, other actors are moving to the fore, particularly international corporations and nongovernmental organizations. New information and communications technologies are facilitating international networking, and activist groups, businesses, and international institutions are forging innovative partnerships. The time is now ripe to build the innovative governance structures needed to ensure that the world economy of the 21st century meets peoples' aspirations for a better future without destroying the natural fabric that underpins life itself.

Hilary French is the author of Vanishing Borders: Protecting the Planet in the Age of Globalization, on which this article is based. She wrote Vanishing Borders while on the staff of the Worldwatch Institute in Washington, D.C. For further information, see http://www.worldwatch.org/bookstore/publication/vanishing-borders-protecting-planet-age-globalization.
Introduction
Environmental factors have always had an impact on the movements of people, whether they seek to flee sudden natural disasters or are looking for other opportunities to sustain their livelihoods when faced with harsh and deteriorating environmental conditions. However, it is only relatively recently that increased attention is being paid at the global policy level to the question of human mobility in the context of environmental and climatic changes.

Looking into this complex issue brings to light a number of challenges, notably at the legal level, but also opportunities, as migration is increasingly considered as a potential adaptation strategy allowing populations to cope with the pressure of environmental factors, moving away from a traditional alarmist view of migration.

This article will first offer an overview of the nature of environmental migration, and then explore some of the legal and protection issues connected to environmentally induced migration.

What Is Environmental Migration?
Migration movements induced by sudden natural disasters or slow-onset environmental degradation due to climate change may take different forms: internal, cross-border, rural to urban, temporary, and permanent to quote but a few. The International Organization for Migration (IOM) considers that most migration scenarios involve a range of factors; it can therefore be difficult to separate environmental and climate change triggers from political, social, economic, and other aspects.

Yet environmental and climate change drivers play a significant and increasingly determinative role in shaping human mobility. For instance, the greater frequency and intensity of sudden and slow-onset weather-related natural disasters lead to greater population movements and increased numbers of humanitarian emergencies. The adverse consequences of climate warming, climate variability and other effects of climate change on livelihoods, public health, food security, and water availability, among others, also exacerbate preexisting vulnerabilities and contributes to migration. Rising sea levels may make coastal areas and low-lying islands uninhabitable whilst the competition over shrinking natural resources may lead to tensions and conflict and, in turn, to forced migration.

However, environmentally induced migration can also be seen as a positive adaptation strategy, insofar as it helps people cope with environmental changes and diversify their livelihoods. Income can also be generated through temporary labor migration or remittances, which can in turn help communities of origin become more resilient in the face of disasters and better adapt to climate change.

Estimating the number of people displaced by environmental causes is an arduous task. Experts agree that there is a clear need to collect more detailed and comprehensive data on existing movements and patterns, but also to improve methodologies and models aimed at predicting the potential implications of climate change on future migratory movements. Furthermore, relying on dependable data is a critical policy tool to support the development of appropriate policies and programs that span across a number of policy areas: migration, environment, development, land, adaptation, and so forth.

In 2012, it was estimated that 32.4 million people in 82 countries were newly displaced by natural disasters; since 2008, it is estimated that the cumulative number of disaster-induced displaced is 144 million people. This number can be put in perspective with the estimated 28.8 million displaced by conflict and violence in 2012. However, these figures remain incomplete as they do not take into account people displaced in relation to slow-onset events for instance.

Who Is Affected and Where?
Evidence suggests that environmental migration is mostly an internal phenomenon, with smaller numbers of people crossing borders. Various groups are and will continue to be affected by environmental factors; notably populations dependent on agriculture and other natural resources in least developed countries and inhabitants of low-lying islands and coastal areas who are among the most vulnerable to the consequences of climate change. However, the poorest and most marginalized groups,
who are likely to be most affected, are often least able to move out of harm’s way. The term “trapped population” is sometimes employed to refer to this category of people for whom migration is not an option.

Defining Environmental Migrants—the Terminology Challenge

A major issue when studying the migration, environment, and climate change linkages is to first determine who is an environmental migrant as this has implications at the legal and protection level.

The terminology used when discussing migration in relation to the environment and climate change is constantly evolving in response to political and legal developments and the production of new data. Some might refer to “environmental” or “climate” “migrants,” while others will employ expressions such as “climate” or “environmental” “refugees” or “exiles.” The lack of a commonly agreed upon definition reflects the complexity of the debate, at the crossroads of science and policy areas.

However, at the global policy level, we are currently moving toward a consensus not to use terms borrowed from the international refugee regime, such as “climate refugees” or “environmental refugees,” as the legal definition of a “refugee” in most cases does not apply to the situation of those displaced by environmental factors, and also because this could potentially undermine the existing international legal framework governing the protection of refugees.

In light of the challenges outlined above, the IOM has decided to adopt an operational definition, without normative implications, but that still captures the complexity of the issue.

“Environmental migrants are persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.”

The fact remains that a sizeable number of people are displaced by natural disasters and environmental degradation and are in need of legal protection, whether they are crossing borders or remaining within their own country.

Which Protection Tools for Environmental Migrants?

There is no internationally accepted legal definition describing environmen-
migration and migrants, as well as no specific legal instruments that can be applied to all environmental migrants.

However, environmental migrants are protected under the international human rights law regime. As mentioned above, natural disasters and environmental hazards do not constitute ground for applying for and being granted refugee status. Nevertheless, the 1951 Convention Relating to the Status of Refugees (Geneva Convention) can be applied in particular cases where environmental and political factors are intertwined, “fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion”; even if the refugee status will not be granted specifically because of environmental factors.

As regards people displaced within their own borders, the definition offered in the 1998 UN Guiding Principles on Internal Displacement refers to “persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of [...]

natural or human-made disasters, and who have not crossed an internationally recognized State border” (UN Guiding Principles on Internal Displacement, 1998). Even if the Guiding Principles offer a framework inclusive of environmental migrants, they are a nonbinding instrument and only apply to those who have not crossed international borders.

In the absence of a clear normative framework, the complexity of the dynamics at play in situations of mobility related to environmental factors makes it challenging to categorize environmental migrants in order to identify applicable instruments that could meet the protection needs of affected individuals.

Indeed, migration at large and environmental migration specifically is a multicausal, fluid phenomenon that takes various forms and is driven by a multitude of factors. When determining why people move, it is difficult to isolate the environmental drivers in comparison to structural and individual aspects, such as conflict and economic reasons. Similarly, it is hard to distinguish between forced and voluntary movements.

In the case of environmentally induced migration, efforts at categorization are difficult, yet some distinctions may be made. For instance, it is possible to determine whether a displacement is internal or across borders. It is also important to consider which type of migration movement is being discussed: displacement linked to natural and human-made sudden disasters, slow-onset events and climate-related hazards that are greatly different in their forms and patterns, affected individuals having different needs and requiring different protection measures.

The issue of categorization represents one of the main challenges when it comes to clarifying and defining a legal status for environmental migrants, which will in turn confer specific rights to these individuals and guarantee adequate protection.

Framing a Protection Agenda

Considering the absence of a specific mechanism to protect the rights of environmental migrants and the dispersion of applicable legal instruments under existing international law, many see a gap in the current normative framework to effectively protect people displaced by environmental causes.

Taking into account the various issues outlined, it can be argued that the search for legal solutions should be needs based. Rather than focusing on the causes of displacement—often not sufficiently clear-cut to be considered under the different legal fields—attention should be directed to the specific needs and vulnerabilities of affected individuals. This approach would allow providing adequate protection and assistance.

In parallel, some legal solutions can also be found by differentiating between different types of environmental triggers. Indeed, determining the best existing legal instruments will differ whether we talk about providing immediate relief to those displaced by natural and man-made disasters, supporting long-term planned relocation due to slow-onset environmental degradation and so on.

However, it is worth bearing in mind that, if the concept of protection was initially rooted in a humanitarian perspective, it has now acquired a broader meaning to encompass rights found in all relevant legal instruments, including international, regional, and national legislation. Many agencies, including IOM, now refer to the definition of protection as described in the
UN Inter-Agency Standing Committee (IASC): “the concept of protection encompasses all activities aimed at obtaining full respect of the rights of the individual in accordance with the letter and spirit of the relevant bodies of law.”

Such an understanding of protection—anchored in a universally applicable and all-inclusive human rights framework applicable to all individuals at all times—already allows covering some of the existing legal gaps.

1. Internal Displacement Monitoring Centre (IDMC), Global Estimates 2012, People displaced by disasters.
2. 94th IOM Council in 2007

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German photographer Kai Wiedenhöfer has photographed borders—walled barriers—around the world. Beginning with the Berlin Wall, which he witnessed the collapse of in 1989, Kai has photographed many of the world’s most famous barriers, including the Peace Lines in Belfast, the controversial fence in the West Bank separating Israel and Palestine, the Korean Demilitarized Zone between North and South Korea, and the U.S.–Mexico border. He’s had no shortage of subjects to shoot, since 22 new border walls have been erected since the fall of the Berlin Wall.

Q: How did you become interested in photographing borders? How did this begin?

In 1989, as a first-year university student, I photographed the fall of the Berlin Wall in my hometown. It became the very symbol for the downfall of the USSR as a superpower and the end of a world order that had shaped our planet and lives for almost half a century. It was the most exciting and positive political event I’ve witnessed in my life. It was a firsthand experience of history in the making, which deeply moved me. During that time, I believed that this would be the end of walls as a political instrument—put them on the garbage heap of history as an anachronistic tool. Twenty years later, I have been proven wrong. On the contrary, walls have made a big renaissance. Border barriers went up again in the United States, in Europe and the Middle East as the aftermath of political, economic, religious, and ethnic conflicts.

Q: What are some observations that you’ve made after photographing many borders?

People have to arrange their lives around them. Walls and fences of borders are not solutions to today’s global political and economic problems. The Berlin Wall was the best proof for this. Peace begins where walls fall, not where they are erected.

Q: What do you think walled borders symbolize? How do they shape their surroundings?

A barrier is proof of human weaknesses and errors, the inability of human beings to communicate with each other. Where all communication is contracted, a solution of conflicts becomes impossible. Behind walls the clichés and concepts of “enemy” mushroom with hardly any relation to reality. You can see it in Belfast, for example, where the more the people don’t know each other and don’t communicate with each other, the more people just get an image of the other side that has nothing to do with reality. The simplest reaction to perceived problems is to build a barrier, to cut oneself off from the others, to separate oneself.

Man-made borders run between ideologies, rich and poor, religion and race. Their significance is not just geographic, but operates principally in
our minds. Their architecture disfigures landscapes as well as thoughts. This is the worst aspect of a barrier, which is that most people develop an attitude of border defenders: Those on the outside are bad; those on the inside are good. One can be far away from the border. It is enough to have the picture of the border internalized and to follow the logic and rules that the border imposes.

**Q: How do people generally respond to this project, and seeing some of these borders in photographs?**

Everyone has their own opinion. We made a life-size test print of one of my photos from the Mexican-American wall and put it on the Berlin Wall. A group of Americans walked by and told us how we can’t compare the wall in the United States to the Berlin Wall. In every place you go, someone will explain to you that a certain wall was needed and it’s different from the other ones.

**Q: How easy is it to approach a border for a photograph? Are you ever questioned by authorities?**

Approaching a border fills me with apprehension. You can’t stay long in a place before you have to go. You drive around and you see something and then you photograph 10, maybe 15, 20 minutes tops, then you go off.

Human beings are not made for a life in border situations. We avoid them or try to leave them behind as fast as we can, though we constantly run up against them, see and feel them. Borders mean stress, even fear. ‘I’m here you are there’—borders allocate us to places, warn us to stay away. They remind me of jeweller shops with their electronically protected display windows that show us enticing riches, which for most of us are beyond our reach.

**Q: Do you think it is significant that more borders have gone up in the 25 years since the Berlin Wall’s fall, especially amid trends toward globalization?**

Globalization promised us an ending, a dissolution of borders. What does reality look like? The trappings of globalization are deceptive: It enlarges markets but also insecurity in the world. While capital moves freely and in seconds, people do not. Many have been unable to participate in the benefits of economic globalization, and the gap between rich and poor is deepening.

**Q: What do you want to make viewers of this project understand?**

I want to show the conflict that is inherent in borders: On the one hand, we long for unconditional, absolute boundlessness, perhaps because the major world religions describe paradise this way, perhaps because economic globalization (our de facto religion) demands it. On the other, we feel lost in the boundlessness and want to separate, distinguish ourselves, our culture, our community. While we may admire charity, we are not ready to share our wealth.

While fundamentally documentary in character, the project aims to illuminate the psychologies of borders, to raise questions and reveal our experiences. Many of us feel that we are but mere spectators. This project intends to reveal us as participants, sometimes unwilling, but participants nonetheless. While barriers are a protection, they are also a cage, and while being shields, they are also traps.

Kai Wiedenhöfer’s barrier photography project is chronicled in his book, Confrontiers, which was published by Steidl in 2013. Learn more, and see more photos, at [www.insightsmagazine.org](http://www.insightsmagazine.org).
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