Chapter 10. Anti-terrorism in North America: Is There Convergence or Divergence in Canadian and US Legislative Responses to 9/11 and the US-Canada Border?

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1 In early October 2005 members of the Minutemen Civil Defense [sic] Corps began patrolling the Canada-US border in Whatcom County, Washington State. Mirroring similar efforts on the borders of Arizona and California with Mexico in April 2005, they said that their mission was to ensure that illegal immigrants, drug smugglers, and terrorists did not enter the United States “because the government ... [were] not doing their job” (Turnbull and Tu 2005). The group’s initiative had begun in mid-July 2005, following the discovery of a major drug-running tunnel between Langley, British Columbia, and Whatcom County, and the subsequent arrest of drug dealers (Lewis 2005; see also Gallagher 2005; Millage 2005; Ritter 2005).

2 At the same time the Fifteenth Annual Summit of the Pacific Northwest Economic Region (PNWER) was being held in Seattle. Its participants included Christine Gregoire, governor of Washington State, and Anne McLellan, then deputy prime minister and security and emergency preparedness minister of Canada (Pacific Northwest Economic Region 2005). The PNWER Summit involved three policy tours, one of which was at Blaine, Washington, at the British Columbia-Washington State border crossing, part of the PNWER Border Issues Working Group’s mandate “to get people and goods across the US-Canadian border faster and with less hassle, without jeopardizing homeland security” (Virgin 2005).

3 The juxtaposition of these efforts alternatively to squeeze and to ease cross-border flows in “Cascadia,” the cross-border region encompassing British Columbia, Washington State, and several of their neighbours (Smith 2002), highlighted some of the policy challenges facing cross-border enthusiasts and governmental agencies in the fifth year after the
terrorist attacks against the United States on September 11, 2001. Central to a resolution of the issues of security and open access was the question of converging or diverging security responses to the matter of the US-Canada border, as when, for example, proposals to fence and guard the border resurfaced in late 2006, albeit their timing was too close to the US mid-term elections to be able to weigh their short-term significance (Alberts 2006).

This chapter underlines arguments for increasing the legislative and policy convergence that exists between Canada and the United States in the area of security, particularly border security, a stance enhanced since the election in 2006 of the Conservative government in Canada under Prime Minister Stephen Harper. A focus on two primary analytical lenses – market forces and trade flows; and the policy activities of multiple levels of government – leads to the suggestion that increased security results from growing government interactions across the border in matters of governance and security.

Several questions currently dominate debates about national security legislation in Canada and the United States after September 11, 2001. However, two questions on how such legislation has affected their common border stand out. Has there been policy divergence or convergence in Canadian and US legislative responses to 9/11 and its aftermath? Have security concerns led to the potential for greater cross-border integration? The basic premise of this chapter is that there are three current outcomes of debates around the still relatively new antiterrorism legislation in Canada and the United States: (1) an increased degree of collective security, with considerably more tools for security intelligence agencies in both countries; (2) an increased convergence on security policy, at least in comparative legislative language; and (3) an ongoing question about whether such conclusions represent greater potential for increased “continentalist” responses to security across the Canada-US border in the name of anti-terrorism, public safety, homeland security, and patriotism, or whether there remains an identifiable divergence on matters of defence and security.

CANADIAN GOVERNMENTS AND RELATIONS WITH THE UNITED STATES, 1984-2006

For many observers the foreign and domestic policies of the Conservative governments of Brian Mulroney, prime minister from 1984 to 1993, gave impetus to the view that Canada was becoming increasingly subordinate to US imperialism (Nossal 1997, 62). The policy record of the Mulroney years – the Canada-US Free Trade Agreement (FTA), the pursuit of deregulation, the elimination of some elements of the welfare state, and the embrace of a more hawkish foreign policy – illustrated, according, for example, to Martin (1993, 272-73), that Mulroney had “closed down the Canadian dream” of autonomy and independence.

Following four months in which Kim Campbell was Conservative prime minister, the Liberal governments of Jean Chrétien, prime minister from 1993 to 2003, were also characterized by the concerted pursuit of neoliberal trade policy that was considerably in step with that of the United States, particularly with respect to hemispheric free trade in the Americas. However, clashes over such issues as softwood lumber and energy came to plague the cross-border relationships between US President George W. Bush and
Chrétien, and between Bush and Chretien’s fellow-Liberal successor, Paul Martin. This found expression at the Asia-Pacific Economic Cooperation (APEC) summit in Busan, South Korea, in mid-November 2005, where Prime Minister Martin complained to Bush, President Vicente Fox of Mexico, and President Alejandro Toledo of Peru that “you cannot have free trade where one partner – when a decision goes against it – simply says, we’re going to ignore it” (Laghi 2005, A7).

8 In contrast, when Prime Minister Stephen Harper’s Conservative government, which took office in February 2006, announced its policies in the Throne Speech in April, it envisioned swift resolution of the softwood lumber issue (achieved in September) and stated its commitment to being part of the war on terrorism, indicating a shift in the Canada-US working relationship toward more convergent goals. Harper’s speech to the UN General Assembly in September 2006 also clearly emphasized a shared Canada-US vision on the war on terrorism (Edwards 2006).

9 Nevertheless, under Conservative and Liberal governments alike, some aspects of Canadian foreign policy in the early years of the twenty-first century deviated from the “US-friendly” version initially articulated by Brian Mulroney. Most notable were Canada’s refusal to contribute troops to the US-led war in Iraq, the adoption of a “human security agenda” that espoused the virtues of multilateralism and the use of “soft power,” the decision in 2005 not to join the US Missile Defense Initiative, and continuing Canadian objections to the US “mandatory passport,” or PASS card system, which is to take effect in 2008 (see, for example, Bissett 2006 and Kane 2006).

10 For some the lack of balance in the Canada-US economic relationship in the early twenty-first century created vulnerability for Canada, especially with US security concerns appearing to trump trade concerns (see Smith and McBride 2004). Exports to the United States account for approximately 85 percent of Canada’s total exports, while exports from the United States to Canada represent only 25 percent of US exports (Cohn 2002, 38). A report issued by the Standing Committee on Foreign Affairs and International Trade (House of Commons 2002, 14) noted that Gordon Mace, director of Inter-American Studies at the Institut québécois des hautes études internationales, had told the committee that the FTA and NAFTA trade deals have fundamentally and inescapably altered the foreign policy landscape. Canada’s increased economic vulnerability within the “new economic management framework” ... has “greatly decreased” Canada’s leeway in bilateral relations with the United States.

11 This has been due, to some extent, to the unilateralism of US foreign policy, as exemplified by the Bush Administration’s doctrine set out in The National Security Strategy of the United States of America (White House 2002). Its four main components are (1) to follow a policy of preemptive war if the United States is threatened by terrorists or states; (2) to pursue pre-emptive unilateral military action where a multilateral agreement is not apparent; (3) to keep military predominance beyond challenge and allow no rival to emerge; and (4) to promote democracy and freedom around the world. Teeple (2004, 183-91) has traced the deep roots of this strategy, which had been in preparation for at least ten years and for which, he argues, the events of September 11, 2001, provided a launchpad into official US policy.

12 Immediately after September 11 there was widespread sympathy for the United States, but President Bush’s foreign policy clearly contributed to a waning of this sympathy, both in Canada and elsewhere, and it was replaced by anxiety about, and sometimes hostility to, US security policies.
In this context the assertion of an autonomous role for Canada in relation to the war in Iraq showed an impressive degree of fortitude. In May 2003 Condoleezza Rice, then US national security adviser (and now secretary of state) was reported as saying “I think there was disappointment in the United States that a friend like Canada was unable to support the United States in what we considered to be an extremely important issue for our security.” Ms. Rice went on to say that the United States expected Canada, as a friend, to respond to the Iraq situation by saying, “Well, how can we help?” (Appleby 2003). That Canada was also opposed to participating in a nuclear missile defence system or in North American ballistic missile defence suggested some residual Canadian preference for alternatives, although when the missile defence issue came up again, in mid-2006, albeit in respect of Europe, Stephen Harper’s Conservative government expressed renewed interest (Blanchfield 2006).

However, some have argued that Canada has more influence in Washington than is commonly believed because of the degree of Canada-US economic integration. Christopher Sands, director of the Canada Project at the Center for Security and International Studies in Washington, DC (2003, 71-74), considers that, “thanks to deepening interdependence through economic integration, Canada is not a fading power in the United States. It is instead a rising power, more important to Americans and their prosperity today than ever before in US history.” However, Sands maintains, in order to be a “rising power” Canada must adopt a “strong state strategy” that includes “improving Canadian domestic security and implementing a creative counter-terrorism effort,” since a “weak state strategy” would treat “the threat of international terrorism largely [as] a US concern, and [seek] to placate US pressure with minimum efforts while husbanding Canadian sovereignty and avoiding commitments to undertake new responsibilities with regard to the defence of North America.” Canada’s adoption of either strategy, Sands claims, would have a “decisive impact on its relationship with the United States,” but the United States will view a weak state strategy as “an obstacle to progress towards greater security.”

Thus, while Canada may stand to gain some leverage due to its significant trade relationship, this leverage is contingent upon greater cross-border cooperation, if not integration, with the United States on security policy. At a minimum, Canada must be seen to be mirroring US security policy in language and intent, which leaves the question of whether it has the capacity to do so and still maintain enough divergence to be identifiably Canadian.

According to the former Liberal deputy prime minister Anne McLellan, “a government’s most important duty is to ensure the safety and security of its citizens.” Her government’s statement on national security policy, issued in April 2004 (Prime Minister’s Office 2004a) identified three core national security interests: (1) protecting Canada and Canadians at home and abroad; (2) ensuring that Canada is not a base for threats to its allies; and (3) contributing to international security. It also provided a blueprint for action in six key areas: intelligence, emergency management, public health, transportation, border security, and international security. Canada’s financial investment in national security under Paul Martin’s Liberal government was CA$ 690 million, comprising CA$ 308 million for marine security, CA$ 137 million for “enhancing intelligence capabilities,” CA$ 100 million for fingerprinting systems to be used by the Royal Canadian Mounted Police (RCMP), CA$ 85 million for governmental information systems, CA$ 30 million for an “Integrated Threat Assessment Centre,” CA$ 10.31 million
for face-recognition biometric passport technology, and smaller amounts (under CA$ 19.69 million in total) for a government operations centre, cybersecurity, health emergency response teams, and a critical infrastructure protection strategy (Prime Minister’s Office 2004a and 2004b). The national security policy contained several other measures that expanded the policy tent and reflected some important Canadian differences: the establishment of a permanent federal-provincial/territorial forum on emergencies, to allow for regular strategic discussion of emergency management among key national players; the establishment of a National Security Advisory Council, made up of security experts external to government; and the creation of a Cross-Cultural Roundtable, comprising members of Canada’s ethnocultural and religious communities (Department of National Defence 2004).

17 This divergent perspective appears to have continued under Harper’s Conservative government. In May 2006, for example, when Public Safety and Emergency Preparedness Minister Stockwell Day announced a new set of federal emergency preparedness initiatives, he was joined by senior officials of the Canadian Red Cross, the St. John Ambulance, and the Salvation Army, not the police or security agency representatives (Department of Public Safety and Emergency Preparedness 2006).

18 In 2004 some media coverage assumed that “more spying” and “more secrecy” would be the likely by-products of federal elections in both Canada and the United States (MacCharles 2004). In November 2005 the Liberal government introduced Bill C-74 (the Modernization of Investigative Techniques Act), an initiative to standardize Canadian security practice on broadened access to cellphone and Internet use and users to reflect existing law in the United States (and also in the United Kingdom, Australia, and New Zealand). This too was seen by some commentators as simply the latest example of Canada-US policy convergence (Clark 2005). The official “Overview” of Bill C-74 noted the need for global cooperation to ensure security (Department of Public Safety and Emergency Preparedness 2005). Indeed, many have argued that the events of September 11, 2001, necessitate greater integration with the United States and that Canadian foreign policy must be articulated more within a North American context.

19 Questions surrounding how far this integration should go, within what areas it should be implemented, what its consequences might be, whether further integration is necessary, and if it is happening at all are all the subject of some debate within the current landscape of Canadian politics. A report on national security by a group of parliamentarians (Privy Council Office 2004, 14) suggested that Canada must conduct a cost-benefit analysis in order to determine in which areas “more integrated policies make sense, as well as where Canadian policies – on foreign, defence, security, and trade issues, and in affected domestic fields – ought to be different from, or even at odds with, those of its North American partners.” However, the report went on to say that “this analysis must take into account cross-border effects, given how costly disruptions to established continental connections could be, potentially, raising the ‘price of difference’ to unacceptable levels.” A seemingly key question for Canada is whether the government can walk a line that acknowledges US security concerns but also reflects the clear differences of opinion that underlie security policy-making in domestic terms. The latter part of the report’s recommendation was very much in keeping with various Canadian governments’ trade-focused and pro-liberalization foreign policy trajectory, which either views the trade-off of some degree of sovereignty as an acceptable cost for securing open
markets and unrestricted borders, or insists, as this report does, that these trade-offs are an "expression of sovereignty."

**TRADING SECURITY FOR MARKET ACCESS**

20 In a report for the C. D. Howe Institute, Wendy Dobson (2002) advanced the proposition that, as a result of the events of September 11, 2001, the United States was open to its friends and allies, and that Canada should take advantage of this by securing better access to the US market. Dobson argued that this was essential to Canadian economic performance but was less assured than formerly because of the US preoccupation with border security and defence. She argued that only a “big idea” would capture the attention of US decision-makers and make it possible to address US objectives while creating better economic opportunities for Canada. Having noted that “we are now deeply integrated with our large neighbour to the south through market forces and through policies of openness, such as those reflected in the Canada-US Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA),” she went on to argue that 9/11 illustrated that openness can create vulnerability and that US reactions to those events could damage Canada economically. She concluded that “today, even more than in the past, removing barriers to deeper bilateral integration should be high on Canada’s list of interests,” but achieving this would require generating US interest in a North American economic security pact, that is, in “cooperation between neighbours to produce the public goods of homeland security and economic stability that neither country can produce on its own.” This must be achieved on Canadian terms, “without sacrificing political independence or distinctive institutions,” and “Canada’s goal should be to achieve customs-union and common-market-like integration without full-scale harmonization and the resulting erosion of political independence.”

21 In another report for the C. D. Howe Institute, J. L. Granatstein (2002) noted that because Canada is inextricably linked to the United States economically, refusing support for US ventures such as the war on terrorism would have major costs, not all of them economic. Granatstein proposed that Canadian sovereignty would be seriously diminished if the United States acted to protect itself from attack without working with the Canadian government and the Canadian armed forces. However, since the United States will defend itself whether or not Canada cooperates fully, supports a nuclear missile defence scheme, and/or backs an expanded war on terrorism, the only question is how best to protect Canadian sovereignty: by joining in or by hanging back. Granatstein argued that there is no choice at all: “Canada must cooperate with the United States in its own interest.” He went on to reinforce the notion that Canadian sovereignty consists of recognizing the inevitable by observing that “Canada’s links with the United States are key to our survival as an independent and sovereign state ... Washington’s capacity to inflict pain and enforce compliance on Canada is boundless. Canadian policy must be devoted to keeping the elephant well-fed and happy.” However, in retrospect it seems that the Bush Administration’s responses to 9/11 have somewhat cooled the ardour of Canada’s business elite, which funds the C. D. Howe Institute, for closer integration with the United States.

22 Indeed, the push for a grand bargain or a “big idea” approach to Canada-US relations has given way, in the face of US indifference and some Canadian second thoughts, to a more incremental approach. One aspect of this approach was the move to a “smart border,”
with greater collaboration on security and immigration issues. This was mainly due to the lack of US interest in either a “big deal” with Canada or a common security perimeter. The Canadian Liberal governments of Jean Chrétien and Paul Martin did not evince much enthusiasm for either of these approaches, and thus incrementalism was the more political strategy (Clarkson and Banda 2004, 22-24).

Despite occasional criticisms that Canada was not cooperating enough with the United States, rapid progress was made on certain border issues. On December 12, 2001, a Smart Border Declaration was signed by Deputy Prime Minister John Manley and US Homeland Security Director Tom Ridge (Department of Foreign Affairs and International Trade 2001). The Action Plan for Creating a Secure and Smart Border, more commonly referred to as the 30-Point Action Plan, was also signed by Manley and Ridge. The plan has four pillars: (1) the secure flow of people; (2) the secure flow of goods; (3) secure infrastructure and coordination; and (4) information-sharing in the enforcement of these objectives. The plan’s progress was indicated by the expansion of FAST, a program for pre-approved, low-risk commercial traffic, and NEXUS, a program for pre-approved low-risk travellers (Customs and Revenue Agency 2003b). Another sign of its progress was Canadian participation in TOPOFF 2, an operation of the US Department of Homeland Security (DHS) and the US Department of State, in cooperation with federal, state, local, and Canadian partners, comprising a full-scale exercise and simulation, lasting five days, of how the United States (and Canada) would respond in the event of an attack on Seattle and Chicago involving weapons of mass destruction. This fulfilled Canada’s commitment to conduct joint exercises (point 30 of the plan) (Department of Public Safety and Emergency Preparedness 2003). In addition, CANPASS-Air was launched at the Vancouver International Airport, making it the first airport in North America to implement iris-recognition technology (Customs and Revenue Agency 2003a; Blain 2003).

The new border system was tested when the United States went to its orange security level at the beginning of the war in Iraq in 2003. Both the FAST and NEXUS programs remained in place throughout the security alert. Strengthening anti-terrorism legislation can be viewed through the same lens. During the security alert Canada identified American priorities and sought to provide northern-border responses that were similar, at least in tone.

In the United States the USA PATRIOT Act (an acronym for its official title, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) contained, according to some commentators, “all the fundamentals of a police state” (Teeple 2004, 203). It was also passed with considerable dispatch. As described by the American Civil Liberties Union (2004)

> The Senate version of the Patriot [sic] Act ... was sent straight to the floor with no discussion, debate or hearings. Many Senators complained that they had little chance to read it, much less analyze it, before having to vote. In the House hearings were held, and a carefully constructed compromise Bill emerged from the Judiciary Committee. But then, with no debate or consultation with rank-and-file members, the House leadership threw out the compromise Bill and replaced it with legislation that mirrored the Senate version. Neither discussion nor amendments were permitted, and once again members barely had time to read the thick Bill before they were forced to cast an up-or-down vote on it. The Bush Administration implied that members who voted against it would be blamed for any further attacks – a powerful threat at a time when the nation was expecting a second set of attacks to come any moment and when reports of new anthrax letters were appearing daily.
Canada moved swiftly to change its legislation to reflect the new US priorities (see Roach 2003). Two pieces of legislation were central: the Anti-Terrorism Act and the Public Safety Act. Like its US counterpart, the Anti-Terrorism Act was passed with impressive speed. It adopted a broad definition of terrorism, although, importantly, it was subsequently amended to respond to concerns that illegal political or industrial protests or expressions of political or religious belief could be defined as terrorism. It enabled the cabinet to designate groups as “terrorist” with only a limited possibility of judicial review of its decision (Roach 2003, 37), created a range of new offences (Roach 2003, 38-46), expanded police powers, and provided for preventative arrest. A range of opposition from civil society groups and from critics inside the government produced some important changes to the legislation, suggesting more nuanced differences in the Canadian response while mirroring US concerns and its expeditious response (Roach 2003, 37).

Initial reaction to the Public Safety Act focused on the power it gave to the minister of national defence to designate certain areas as “military security zones,” thus preventing demonstrations or protests from occurring. This provision was withdrawn after considerable negative response from Canadians, and an amended version of the act concentrated on airline security measures and the manufacture and transport of biological, chemical, and hazardous materials. Although some concerns over civil liberties remained, many were addressed as the legislation was progressively modified (Roach 2003, 174).

This difference between Canadian and US approaches is not insignificant. The pattern of the Canadian government’s approach was for legislative proposals to mirror, to a large extent, the legislative language prevailing in the United States. When this produced considerable negative response from Canadians, amendments were made within the original legislation to take into account their opposition (a topic to which this discussion returns later).

Thus the state of Canada-US relations has partially shaped Canadian security policy. Although the issues of prioritizing security, asserting the primacy of individual rights, and achieving a satisfactory balance between these positions have long been part of the Canadian political discourse, the immediate priority had certainly shifted to dealing with international terrorism. When it became apparent that the Bush Administration was committed to the invasion of Iraq, efforts that had formerly gone into the struggle against neoliberal globalization focused instead on preventing Canadian involvement in the war. Canadian participation with the United Nations in Afghanistan preserved Canada’s multilateral inclinations and, for potential critics in the United States, softened its decision not to become involved in Iraq.

Despite the apparent policy convergence on anti-terrorism, a decipherable policy divergence between Canada and the United States remains, a divergence that speaks to the continuing significance of borders and what separates each country as much as what holds them together. The legislative responses of various western democracies in the aftermath of 9/11 have included numerous similarities and some differences.

Historically Canada has tended to mirror various US security statutes and actions, including the work of the House Un-American Activities Committee in the 1950s, culminating in the USA PATRIOT Act and the Homeland Security Act. It has also mirrored British security statutes. The War Measures Act, passed in 1914, replicated the United Kingdom’s Defence of the Realm Act passed the same year (De Brou and Waiser 1992,
Following the use of powers under the War Measures Act in 1970, in the “October crisis” over the Front de Libération du Québec, the Canadian Parliament subsequently amended, then repealed, the act, replacing it with the Emergencies Act, 1988, which, interestingly, takes a much broader view of the concept of “emergency” to include, for example, natural disasters (De Brou and Waiser 1992, 644-56).

The war on terrorism has now spawned a whole new set of security legislation. The remaining sections of this chapter examine the legislative responses of the United States and compare them with key components of recent Canadian anti-terrorism and security laws. They are both strikingly similar and profoundly different.

SEPTEMBER 11, 2001, AS A POLICY WINDOW: 
RESETTING THE CANADA-US SECURITY AGENDAS

John Kingdon (1984) suggested that the confluence of particular events (policy streams) provides opportunities (windows) where dramatic policy change may occur. Few events in recent years have been more dramatic than the events of September 11, 2001. The policy determinants afforded by these events have significantly affected the political agendas of many countries, but nowhere more obviously than in liberal democracies such as the United States and Canada.

There is an ongoing tension in liberal democracies across the policy spectrum between those who, at one extreme, might be termed strict “constructionists” with regard to the constitutional and legislative protection of human rights, and those who, at the other extreme, often see such rights as impediments to collective security and public order and who might be termed strict “securitivists.” The events of 9/11 provided a significant policy window for resetting national policy agendas more in the direction favoured by the strict securitivists. The resultant rebalancing of security versus rights in countries such as the United States and Canada has not only illustrated how certain interests and values can be marginalized in the process of agenda-setting but also demonstrated the implications of problem redefinition for subsequent stages of the policy process. As Orwell (1946) noted, whoever determines the language of policy discourse appropriates a significant advantage in any subsequent decision-making.

The responses of the United States and Canada have also revealed a great deal about their convergence and divergence. Certainly their legislative responses to the 9/11 tragedies have been dominated by language that eschews much consideration of the long-term human-rights implications of action to bolster national security. On that issue there has been cross-border convergence. However, this is not to downplay the significance of the threat represented by perpetrators of international terrorist acts. Rather, it is to seek to answer the concerns of those who argue for constitutionally and legislatively established rights in such liberal democracies. Each society must find and maintain its own balance, but all nations must also consider the longer term implications of allowing short-term exigencies to determine answers to the question of security versus rights. Truncating the debate by trying to exclude dissonant voices does not serve the interests of any democracy. Indeed, ensuring, even encouraging, such voices is the very expression of a rights culture in a true democracy. In a full examination of US and Canadian legislative responses to the new war on terrorism there is room for identifying important differences across the border.
Krane and Blair (1999, 13-14) have suggested that when scholars are describing the capabilities of political actors (in their study, local governments) to influence policy agendas and policy formulation, excessive reliance on legal documents may lead to the mistaken assumption “that the legal language of constitutions and statutes accurately reflects actual practice.” They describe this phenomenon, which creates several important problems in trying to unravel the scope of governmental powers and intergovernmental relations, as the “LexisNexis Fallacy.” Avoiding the LexisNexis fallacy and focusing on what might actually be occurring on the ground is one place to start.

**ANTI-TERRORISM LEGISLATION: US LESSONS AND QUESTIONS**

The experience of the United States in finding the delicate balance between human rights and security needs has not differed much from that of Canada. Although the issue of constitutionally protected rights is of great significance in the United States, imbalances between rights and considerations of security and public order have existed. For example, notwithstanding its original powerful Bill of Rights, it took the passage of the thirteenth, fourteenth, and fifteenth Amendments after the Civil War, as well as Supreme Court decisions under the leadership of Chief Justice Earl Warren almost one hundred years later, to achieve effective “equal protection” rights. It also took some time for Americans to rebalance their rights after the excesses of the McCarthy era, when the House Un-American Activities Committee and other anti-Communist institutions secured the domination of perceived security needs in policy-making during the early years of the Cold War, although some balance was achieved.

**The USA PATRIOT Act 2001**

On October 24, 2001, just five weeks after the terrorist attacks on the United States, the US Congress passed the USA PATRIOT Act. The act involved changes, some small, some large, to fifteen previous acts and ran 342 pages. According to the Electronic Frontier Foundation (2001), a non-profit organization concerned with citizens’ “digital” rights, the new act gave sweeping new powers to both domestic law enforcement and international intelligence agencies and ... eliminated the checks and balances that previously gave courts the opportunity to ensure that these powers were not abused. Most of these checks and balances were put into place after previous misuse of surveillance powers by these agencies, including the revelation in 1974 that the FBI and foreign intelligence agencies had spied on over 10,000 US citizens, including Martin Luther King Jr.

Furthermore, the PATRIOT Act was a “rush job” and even just considering the surveillance and online provisions ... it is a large and complex law that had over four different names and several versions in the five weeks between the introduction of its first predecessor and its final passage into law. While containing some sections that seem appropriate – providing for victims of the September 11 attacks, increasing translation facilities, and increasing forensic cybercrime capabilities – it seems clear that the vast majority of the sections included have not been carefully studied by Congress, nor was sufficient time taken to debate it or to hear testimony from experts outside of law enforcement in the fields where it makes major changes. This concern is amplified...
because several of the key procedural processes applicable to any other proposed laws, including inter-agency review, the normal committee and hearing processes and thorough voting, were suspended for this Bill.

40 The response of Americans to the PATRIOT Act was more mixed than this critique might suggest. For those who were traumatized by the events of 9/11, the act contained measures that were prudent and deliberate. However, the question for members of the Electronic Frontier Foundation, and others, was, “Were our freedoms the problem?” Their answer was that the provisions of the PATRIOT Act (abbreviated as “USAPA” in their text) represented a victory for those who would alter the American way of life:

The civil liberties of ordinary Americans have taken a tremendous blow with this law, especially the right to privacy in our online communications and activities. Yet there is no evidence that our previous civil liberties posed a barrier to the effective tracking or prosecution of terrorists. In fact, in asking for these broad new powers, the government made no showing that the previous powers of law enforcement and intelligence agencies to spy on US citizens were insufficient to allow them to investigate and prosecute acts of terrorism. The process leading to the passage of the Bill did little to ease these concerns. To the contrary, they are amplified by the inclusion of so many provisions that, instead of [being] aimed at terrorism, are aimed at non-violent, domestic computer crime. In addition, although many of the provisions facially appear aimed at terrorism, the Government made no showing that the reasons they failed to detect the planning of the recent attacks or any other terrorist attacks were the civil liberties compromised with the passage of USAPA.

41 The foundation’s chief concerns about the act included the following:

1. Expanded Surveillance With Reduced Checks and Balances. USAPA expands all four traditional tools of surveillance – wiretaps, search warrants, pen/trap orders, and subpoenas. Their counterparts under the Foreign Intelligence Surveillance Act (FISA) that allow spying in the US by foreign intelligence agencies have similarly been expanded. This means:
   a. Be careful what you put in that Google search. The government may now spy on web surfing of innocent Americans, including terms entered into search engines, by merely telling a judge anywhere in the US that the spying could lead to information that is “relevant” to an ongoing criminal investigation. The person spied on does not have to be the target of the investigation. This application must be granted and the government is not obligated to report to the court or tell the person spied upon what it has done.
   b. Nationwide roving wiretaps. [The] FBI and [the] CIA can now go from phone to phone, computer to computer, without demonstrating that each is even being used by a suspect or target of an order. The government may now serve a single wiretap, FISA wiretap or pen/trap order on any person or entity nationwide, regardless of whether that person or entity is named in the order. The government need not make any showing to a court that the particular information or communication to be acquired is relevant to a criminal investigation.
   c. ISPs hand over more user information.
   d. New definitions of terrorism expand scope of surveillance. One new definition of terrorism and three expansions of previous terms also expand the scope of surveillance. They are § 802 definition of “domestic terrorism” (amending 18 USC §2331), which raises concerns about legitimate protest activity resulting in conviction on terrorism charges, especially if violence erupts, [and] adds to three
existing definitions of terrorism (international terrorism per 18 USC §2331, terrorism transcending national borders per 18 USC §2332b, and federal terrorism per amended 18 USC §2332b(g)(5)(B)). These new definitions also expose more people to surveillance (and potential “harboring” and “material support” liability, §§ 803, 805).

2. Overbreadth with a lack of focus on terrorism. Several provisions of the USAPA have no apparent connection to preventing terrorism. These include:
   a. Government spying on suspected computer trespassers with no need for court order. Sec. 217.
   b. Adding samples to DNA database for those convicted of “any crime of violence.” Sec. 503. The provision adds collection of DNA for terrorists, but then inexplicably also adds collection for the broad, non-terrorist category of “any crime of violence.”
   c. Wiretaps now allowed for suspected violations of the Computer Fraud and Abuse Act. This includes anyone suspected of “exceeding the authority” of a computer used in interstate commerce, causing over $5000 worth of combined damage.
   d. Dramatic increases to the scope and penalties of the Computer Fraud and Abuse Act.

3. Allows Americans to be More Easily Spied Upon by US Foreign Intelligence Agencies. Just as the domestic law enforcement surveillance powers have expanded, the corollary powers under the Foreign Intelligence Surveillance Act have also been greatly expanded, including:
   a. General Expansion of FISA Authority. FISA authority to spy on Americans or foreign persons in the US (and those who communicate with them) increased from situations where the suspicion that the person is the agent of a foreign government is “the” purpose of the surveillance to anytime that this is “a significant purpose” of the surveillance.
   b. Increased information-sharing between domestic law enforcement and intelligence. This is a partial repeal of the wall put up in the 1970s after the discovery that the FBI and [the] CIA had been conducting investigations on over half a million Americans during the McCarthy era and afterwards, including the pervasive surveillance of Martin Luther King[, Jr.,] in the 1960s. It allows wiretap results and grand jury information and other information collected in a criminal case to be disclosed to the intelligence agencies when the information constitutes foreign intelligence or foreign intelligence information, the latter being a broad new category created by this law.
   c. FISA detour around federal domestic surveillance limitations; domestic detour around FISA limitations. Domestic surveillance limits can be skirted by the Attorney General, for instance, by obtaining a FISA wiretap against a US person where “probable cause” does not exist, but when the person is suspected to be an agent of a foreign government. The information can then be shared with the FBI. The reverse is also true.

This analysis supported the conclusion that the PATRIOT Act, like antiterrorism legislation in Canada, the United Kingdom, and elsewhere, was cut from the same “security over rights” cloth, representing a loss or curtailment of basic human rights, and
that many of the new measures had little to do with making borders more secure or fighting terrorism.

**The Homeland Security Act 2002**

Little in the subsequent Homeland Security Act of 2002 altered the views of “constructionist” and other critics of US anti-terrorism policy (see Herman 2002). The Homeland Security Bill was introduced in the US Congress in January 2002, only to be immediately bogged down in partisan fighting between Republicans and Democrats, largely over the powers it afforded the president. The Democrats had considerable support from a range of civil liberty, professional, and media entities, but after the Democrats lost seats in the mid-term elections in November 2002, Republican control of both houses of Congress convinced Democrats to support the legislation. Its passage in late November 2002 included a favourable vote in the Senate of ninety senators to nine. The new act (Herman 2002, 7) defined terrorism as

any activity that involves an act that is dangerous to human life or potentially destructive of critical infrastructure or key resources; and is a violation of the criminal code of the US or any state...; and appears to be intended to intimidate or coerce a civilian population; or to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination or kidnapping.

The act also created the DHS, which took over several existing agencies, such as the Immigration and Naturalization Service (INS), the Coast Guard, Customs and Border Patrol, the Federal Emergency Management Agency, the Secret Service, the Transportation Security Administration, and the border inspection authority of the Animal and Plant Health Inspection Service. In addition, homeland security intelligence analyses from such sources as the Central Intelligence Agency (CIA), the National Security Agency (NSA), the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration, the Department of Energy, the Customs Service, and the Department of Transportation have come under the control of the DHS.

Critics of this second piece of US anti-terrorism legislation mirrored complaints made in many other liberal democracies about the scope of such laws. Chaddock (2002) summarized these concerns:

The Homeland Security Act ... is sweeping in scope and will have big consequences, intended and unintended, on everything from civil liberties of Americans to due process for immigrants. Some have little to do with homeland security, but emerged out of the intensive, last-minute bargaining that shaped this effort to refocus the nation’s resources to defeat terrorism.

According to the DHS itself (Department of Homeland Security 2006b) the implications of the act go considerably beyond specific antiterrorism threats to include

- new authority for agencies to collect and mine data on individuals and groups, including databases that combine personal, governmental, and corporate records, including e-mails and websites viewed;
- limits on the information citizens can request under the Freedom of Information Act, and criminal penalties for government employees who leak information;
- more latitude for government advisory committees to meet in secret, not subject to the requirements of the open meeting laws;
• limits on liability for those who manufacture “antiterrorism technologies,” including vaccines, gas masks, and baggage-screening equipment; and
• new powers to government officials to declare national health emergencies, including quarantines and forced vaccination.

As a successful strategy for gathering legislative approval and co-opting opposition, the introduction and passage of the Homeland Security Act were instructive. Many US civil liberties groups, for example, welcomed the withdrawal of a proposal by US Attorney General John Ashcroft for a “Terrorism Information and Prevention System” or “TIPS” to centralize all the surveillance activities allowed under the PATRIOT Act. Nevertheless, Lisa Dean, Director of the Free Congress Foundation, declared that Americans eventually “may find that their conversations have been monitored or [that they have been] caught walking past a surveillance camera and be outraged, but find they have no legal recourse” (Chaddock 2002). The fact that centralized information-gathering and analysis would initially fall under the aegis of retired admiral John Poindexter, who had been convicted of wrongdoing in the Iran-Contra Affair (Liman 1998), offered more fuel to critics wondering whether abuses might occur beyond the task of fighting terrorist threats to the United States.

The Domestic Security Enhancement Act 2003

A third piece of anti-terrorist legislation, the Domestic Security Enhancement Act, quickly came to be known as “USA PATRIOT Act II” (or “USAPA II” for short). The Electronic Frontier Foundation (2003) asserted that the new law was, like its predecessor, ... a grab bag of provisions spread throughout the legal landscape. One clear difference exists, however. Unlike USAPA, USAPA II had no provisions that “sunset” after a certain time. All of its changes were to be permanent.

The foundation noted that the Domestic Security Enhancement Act includes

Privacy Invasions. USAPA II dramatically widens the powers of government to invade the privacy of Americans and others living here.

More “End Runs” Around Limitations on Surveillance and Information Sharing. Federal, state and local officials can now freely share information, regardless of the original reason for gathering it. Gag Orders and Increased Governmental Secrecy. The “sunshine of public review” is a key check on abuses of governmental power. But USAPA II makes it even harder for the public to evaluate what the government is doing with its broad new powers.

Expanded Reach of Powers under the Control of Secret Courts.

Not Targeted to Terrorism. As with its predecessor, USAPA II contains many provisions that appear to be nothing more than an opportunistic attempt to increase governmental powers in areas unrelated to terrorism.

Prevalence of the “Securitivist” Approach

In the years since the passage of the PATRIOT Act, the Homeland Security Act, and the Domestic Security Enhancement Act, the “securitivist” approach to anti-terrorism has continued to influence public debate and government action in the United States. For the fiscal year 2006 Congress allocated US$ 41.1 billion to the DHS (Department of Homeland Security 2006a), an amount that was due to increase by 6 percent to US$ 42.7 billion for fiscal 2007 (Department of Homeland Security 2006b). These funds were to be divided
among four major areas: border and transportation security; emergency preparedness and response; chemical, biological, radiological, and nuclear countermeasures; and information analysis and infrastructure protection.

However, the “constructionists” have maintained their opposition to these measures. In 2006, for example, the disclosure of centralized monitoring produced some headaches for President Bush in his relations with Congress (Freeze 2006; Koring 2006). The revelation that a database of all US telephone calls had been assembled at the NSA under General Michael Hayden, prior to his nomination as director of the CIA, also added credence to earlier criticisms (see, for example, Associated Press 2006).

Finally, issues such as the use of torture in the war on terrorism have come to represent a major human rights and public relations fiasco. According to former US President Jimmy Carter, for example, the US use of torture, in settings unavailable to bodies such as the (former) UN Human Rights Commission, is, simply, “an abomination” (Carter 2005). However, US Vice President Dick Cheney’s reluctance in late 2005 to accept efforts in Congress to ban torture, and to bring US practice into line with international agreements on human rights and treatment of enemy combatants, only underscored the continuing influence of the “securitivist” approach.

OFF BALANCE? MAINTAINING DIFFERENCE?
SECURITY, ANTI-TERRORISM, AND PUBLIC SAFETY IN CANADA AFTER 9/11

Within a few weeks of the events of September 11, 2001, and before the Canadian government had introduced any anti-terrorism legislation, civil libertarians were already anticipating a “trampling of civil rights” in the war on terrorism. Sixteen days after the attacks, for example, John Dixon, president of the British Columbia Civil Liberties Association, reminded Canadians of the McCarthy-era attack on “civil rights – presumptions of innocence, privacy, and freedoms of conscience, association and speech.” According to Dixon, overriding privacy rights in order to gather intelligence was likely to alter “the balance to be struck between principle and need... that depends both upon the importance of the principle and the likelihood that some sacrifice of it will yield significant results.” He concluded that “trampling on civil rights will not lead to a genuine victory against terrorism” (Dixon 2001).

Some journalists came to the same conclusion. Less than four weeks after the attacks David Beers (2001), for example, writing, like Dixon, in the Vancouver Sun, bemoaned what he saw as attacks on free speech and declared that assertions that “you’re either with us or you’re against us” made him wonder “whether any of it served to bring us closer to defeating the enemy out there, or whether it really was about manufacturing an enemy within.”

The Anti-Terrorism Act, 2001

On October 15, 2001, the government introduced Bill C-36 (An Act to Amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime [Money Laundering] Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism), better known as the Anti-Terrorism Act. Bill C-36
had four central objectives: (1) to stop terrorists from getting into Canada and to protect citizens from terrorist acts; (2) to design and implement tools to identify, prosecute, convict, and punish terrorists; (3) to prevent terrorists taking control of the Canada-US border and affecting the Canadian economy; and (4) to work with the international community to bring terrorists to justice and to address the root causes of their hatred (Department of Justice 2001a).

56 Safety and security, rather than the concern for a balance between security and rights that was evident in the early 1980s, was the order of the day. As noted by some government ministers, the bill would “give law enforcement and national security agencies new investigative tools to gather knowledge about and prosecute terrorists and terrorist groups, as well as protect Canadians from terrorist attacks.” To counter anticipated criticisms, “the scope of the Criminal Code provisions [were] clearly defined to ensure they only apply to terrorists and terrorist groups,” and a “three-year parliamentary review” of the legislation was added, producing further extensions of security powers (Canada. Department of Justice 2001a).

57 Within days there were widespread calls for amendments to this speedily drafted legislation. The definition of terrorism in Bill C-36 was one of the biggest issues, as it seemed to include both illegal strikes and acts of civil disobedience within its terms: “an act or omission... intended to endanger a person’s life... [and] to cause serious interference with or serious disruption of an essential service,” or an unlawful act committed for an “ideological purpose” that causes “serious disruption of an essential service, facility or system.” Moreover, the inclusion of “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents” gave it a far wider compass than the US definition of terrorism. Beyond this, critics objected to other powers and controls outlined in Bill C-36, specifically: the power to detain a suspect without charge, with judicial approval, for seventy-two hours; the power to detain a suspect without charge, with judicial approval, for up to one year if the person did not agree to reasonable restrictions on his or her behaviour as a condition of release; the possibility of up to ten years’ imprisonment for “legally participating or contributing” to the activities of a known terrorist group; the requirement to testify at “investigative hearings”; and the new power given to the solicitor general to create a list of terrorists on “reasonable grounds” without any requirement to notify individuals or groups that they were on the list.

58 A positive governmental response to some of these concerns was largely predicated on the recommendation of the Canadian Senate that a five-year “sunset clause” be included in the legislation. In a unanimous report a bipartisan Senate committee noted that “Bill C-36 gives powers that, if abused by the executive or security establishments of this country, could have severe implications for democracy in Canada,” and recommended that “new police powers of detention, investigation, and surveillance be rescinded in five years unless specifically extended by Parliament” (LeBlanc 2001). This view was supported by civil libertarians and groups such as the Canadian Bar Association, while the Globe and Mail (2001) editorialized

There are provisions in this Bill that should be accepted only in the context of an emergency... Those who value the liberties enshrined in the [Canadian] Charter [of Rights and Freedoms], and championed in earlier laws, are unwilling to see their curtailment become the status quo, an accepted part of the legislative scenery.
In the context of weighing convergence or divergence in security and anti-terrorism legislation across the border, Bill C-36 was amended due to the extensive opposition to it. The key amendments introduced on November 20, 2001, included the following responses to criticisms. (1) In addition to the three-year parliamentary review, the government agreed to add a “sunset” provision to the provisions on preventive arrest and investigative hearings, which would expire after five years unless renewed by Parliament. (2) A new provision required the federal attorney general and solicitor general, and their provincial equivalents, to report annually to Parliament on any use of either preventive arrest or investigative hearings. (3) A separate interpretative clause was added for greater clarity regarding the protection of political, religious, or ideological beliefs/expression, “to ensure that protest activity, whether lawful or unlawful, would not be considered a terrorist activity unless it was intended to cause death, serious bodily harm, endangerment of life or serious risk to public health or safety.” (4) Rather than being issued “at any time,” attorney general’s certificates could be issued only after an order by the Federal Court in a proceeding, they were to be published in the Canadian Gazette, and they could last for no more than fifteen years. Freedom of information provisions were to be the rule rather than the exception. (5) Offences related to “facilitating” terrorism were to be clarified by an interpretative section on such activity. (Canada, Department of Justice 2001b). Bill C-36 was passed by the House of Commons in November 2001 (Canadian Press 2001) and, as the Anti-Terrorism Act, received Royal Assent on December 18, 2001.

Bill C-42

Overlapping this initial Canadian anti-terrorism legislation was another important piece of the anti-terrorism plans of Jean Chretien’s Liberal government: Bill C-42, the Public Security Act. This second anti-terrorism statute was introduced in November 2001, before final approval had been given to Bill C-36. From the government’s perspective the Public Security Act was “an appropriate continuation of the legislative amendments tabled in Bill C-36 and introduce[d] new amendments to the National Defence Act (NDA), etc.” (see Smith 2003).

Bill C-36 had garnered criticism for the range of its provisions, but Bill C-42 was seen as unsupportable on narrower grounds. Criticisms from Liberal backbenchers, opposition politicians, and of rights-centred entities all suggested that one of its central purposes was to allow the minister of national defence to declare the site of the G-8 Summit of June 2002, at Kananaskis, Alberta, “a military zone” in order to prevent protests. Substantial internal dissent and extensive external criticism led the government to withdraw Bill C-42 on April 24, 2002.

Bills C-55 and C-17

On April 29, 2002, five days after the withdrawal of Bill C-42, the Chrétien government introduced Bill C-55, titled the Public Safety Act, which it termed “an improved package of public safety initiatives in support of its Anti-Terrorism Plan.” This single integrated bill, amending twenty-one Acts of the Canadian Parliament, retained key elements of the tarnished Bill C-42 and was seen by the government as the next step in its plan, addressing what it called “gaps in the federal legislative framework for public safety and
protection.” It was bolstered by a provision of CA$ 7.7 billion in the federal budget of December 2001. According to David Collenette (2002), minister of transport at the time, “This legislation ... respond[ed] to the need for enhanced security while respecting the rights of Canadians.” Not everyone agreed and the bill garnered mostly negative responses.

One of the measures that caused concern was the set of powers given to the new Canadian Air Transport Security Authority, which had been allocated CA$ 2.2 billion in the federal budget and been given responsibility for aviation security services in Canada. Bill C-55 made changes to the Aeronautics Act to allow security or police agents access to passenger data if it was required in the interest of transportation security. George Radwanski, privacy commissioner of Canada at the time, considered this an unnecessary intrusion on the privacy rights of Canadians. In a letter to Collenette Radwanski expressed “serious concerns” about Bill C-55, noting that it “raised very, very serious privacy issues” (Bronskill 2002a), a view supported by the privacy commissioners of several provinces. These concerns were also expressed within the Liberal caucus, and Irwin Cotler, Liberal Member of Parliament for Mount Royal, publicly criticized the bill (Bronskill 2002a). The Canadian branch of Amnesty International raised concerns about the capacity of cabinet ministers to designate “controlled access military zones” in ways that, it said, might “effectively restrict the peaceful exercise of the rights to free expression and free assembly” (Amnesty International Canada 2002).

Bill C-55 died on the Order Paper when the parliamentary session ended. A successor, Bill C-17, also titled the Public Safety Act, was somewhat different. The changes accepted by the government and tabled on October 31, 2002, prevented the RCMP from combing airline passenger manifests, as Bill C-55 had proposed, but RCMP officers would be able to screen passenger lists on grounds of transportation security and the Canadian Security Intelligence Service (CSIS) would be able to do likewise on grounds of either transportation security or national security. The revised bill would also provide some limits on designating security zones, now limited to established military areas or “on a case-by-case” basis (Bronskill 2002a). Despite these small concessions, many commentators repeated their criticism that the thrust of Canada’s most recent anti-terrorism response appeared to be significantly dictated by its closest neighbour in North America (Bronskill 2002b).

The Modernization of Investigative Techniques Initiative

The Modernization of Investigative Techniques Act (Bill C-74) was given its first reading in the House of Commons on November 15, 2005. This bill was almost entirely premised on cross-border pressures to ensure policy convergence on governmental access to newer electronic services (cellphone and Internet) for Canada’s security services. Several of its provisions, which would have expanded surveillance while reducing checks and balances, were copied from the USA PATRIOT Act, although Deputy Prime Minister Anne McLellan described it as “simply an update of Canada’s 30-year-old telephone wiretap bill” (CBC News 2005, November 16).

Critics argued at the time the bill was introduced that, in effect, the government was acknowledging the need to conform to the new “western standard” on such matters. However, the bill died on the order paper when Parliament was dissolved pending the
general election of January 2006 and the Conservative government of Stephen Harper has not attempted to reintroduce it.

“Racial Profiling” and Security Intelligence

In October 2002 the introduction by the US government of “racial profiling” led the Canadian government to issue a travel advisory for Canadians of Arab origin, suggesting that they should avoid visiting the United States (Canadian Press 2002). Although Canadian pressure and the prospect of domestic constitutional challenges produced an alteration to the US policy, so that photographing and fingerprinting would “no longer be automatic by place of birth,” the policy continued where it was deemed useful by INS officials (Trickey 2002).

Four years later the report of the inquiry into the treatment of Maher Arar, a dual Canadian-Syrian citizen who was deported to Syria based on incorrect information provided to the United States by RCMP security officials, identified a range of related issues where security has trumped rights, not the least of which is the relative unaccountability of virtually all of Canada’s security-intelligence agencies, especially the RCMP (O’Connor 2006). Warren Allmand, counsel for the International Civil Liberties Monitoring Group, had made this point in front of the inquiry (Allmand 2005).

CONCLUSION

The vernacular of the policy discourse of 200-02 around anti-terrorism (Bill C-36) and public safety (Bills C-42, C-55, C-17, and C-74) was not dramatically different from that of the debates in the early 1980s over Bills C-157 and C-9, and the creation of the CSIS. The government of the day tended to exaggerate threats and overemphasize security needs, and, in both cases, critics were able either to force the withdrawal of legislation (C-157 and C-42) or to wring concessions from the government, as with the Public Safety Act. However, despite those successes, ground was lost in terms of the balance between rights and security, which represented a significant divergence from the US experience with its PATRIOT, Homeland Security, and Domestic Security Enhancement acts. More importantly, the content of the criticisms in Canada was remarkably similar, emphasizing the need to move toward a closer balance between security needs and protection of rights. Again, this was much less the case in the United States.

In 2002, as mentioned above, Privacy Commissioner George Radwanski criticized Bill C-55, saying that it “raise[d] the spectre of a ‘police state’” (Bronskill 2002c). Radwanski (2002) also issued a statement about the bill in which he said,

In Canada it is well-established that we are not required to identify ourselves to police unless we are being arrested or we are carrying out a licensed activity such as driving. The right to anonymity with regard to the state is a crucial privacy right. Since we are required to identify ourselves to airlines as a condition of air travel and since section 4.82 [of the Bill] would give the RCMP unrestricted access to the passenger information obtained by airlines, this would set the extraordinarily privacy-invasive precedent of effectively requiring compulsory self-identification to the police ... If the police were able to carry out their regular Criminal Code law enforcement duties without this new power before September 11, they should likewise be able to do so now. The events of September 11 were a great tragedy and a great crime; they should not be manipulated into becoming an opportunity – an
opportunity to expand privacy-invasive police powers for purposes that have nothing to do with anti-terrorism.

The following year, speaking at a conference in Victoria, British Columbia, on privacy and security issues, Radwanski (2003) asserted, “We must guard against falling prey to the illusion that wholesale erosion of privacy is a reasonable, necessary or effective way to enhance security.” This once again reflects an important divergence from the US experience. On the matter of a possible national identity card as one way to ensure greater security, Radwanski noted that “the creation of a national identity card is ... an idea totally without merit. [It] would radically change Canadian society by drastically infringing on the right to anonymity that is part of our fundamental right of privacy. [It] is unthinkably invasive.” He went on to argue that “one of the clearest lessons of history is that the greatest threats to liberty come not when times are tranquil and all is well, but in times of turmoil, when fidelity to values and principle seems an extravagance we cannot afford.”

In 1999 Canada’s Security Intelligence Review Committee recognized that “in any democratic society security intelligence activities are among the most serious a government can undertake. They warrant the constant and meticulous attention of all who cherish democratic values and civil discourse in a turbulent and dangerous world” (Security Intelligence Review Committee 1999). However, George Radwanski offered the most telling test: “If we react to terrorism by excessively and unreasonably depriving ourselves of privacy and the freedoms that flow from it, then terrorism will have won a great and terrible victory” (Office of the Privacy Commissioner 2001, 4). The deletion of significant data-gathering and analysis from the Public Safety Act allowed Radwanski to conclude that “a precedent-setting and extraordinarily grave intrusion on privacy rights has been averted in Canada” (Bronskill 2003).

Thus US and Canadian security responses continue both to converge and to diverge. On the one hand, there is evidence that successive Canadian governments have recognized that US security concerns need legislative reflection, even though the significant rebalancing of security versus rights in the name of anti-terrorism in the United States, and elsewhere, is, as the International Helsinki Federation for Human Rights concluded, “severely curtailing human rights and civil liberties in much of the world,” and new measures “often threaten freedoms because they are too broad, too vague, and applied too arbitrarily” (News Services 2003). On the other hand, there is clear evidence that, beyond the broad legislative language in such “equivalent” legislative responses, the Canadian response to matters of security since September 11, 2001, has been significantly different. This continuing cross-border divergence is a product of the legislative and non-governmental responses and opposition to initial Canadian legislative drafting, which initially more closely mirrored US security concerns. The ongoing Canadian responses on required travel documents for North American travel throughout early 2007 continues to reflect such an approach.” The Canadian balancing act has come to consist not only of legislative language that reflects such US concerns but also of security policy that reflects Canadian differences. This negotiated convergence points to new forms of continental governance that straddle the Canada-US border and strengthen border security in North America.
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