North American emergencies: The use of emergency powers in Canada and the United States

Kim Lane Scheppele*

Although the United States and Canada have had quite different constitutional frameworks, their uses of emergency powers through most of the nineteenth and twentieth centuries were very similar. In the nineteenth century, national troops were used to put down local rebellions in both countries, often at the request of local governors. With World War I, however, both moved to a statute-based system of regulating emergencies. In Canada, the War Powers Act provided broad delegations of power from the parliament to the executive. In the U.S., delegations were also broad, but accomplished through a series of smaller statutes. These frameworks lasted until abuses of emergency powers were exposed in both countries in the 1970s. And there the parallel history ended. Canada adopted a comprehensive constitutional revision that brought all emergency powers within constitutional understandings. The U.S., on the other hand, continued its use of statutory patches to regulate the relationship between the executive and legislature in times of crisis. As a result, the reactions of the two countries to the events of 9/11 were quite different. Canada responded with a moderate use of exceptional powers, while the US plunged into more extreme uses of emergency powers.

When war, rebellions, and dangers erupt, most constitutional governments step outside their usual procedures to deal with regime-threatening conflicts. In this article, I argue that Canada and the United States used extraordinarily similar means for coping with war, rebellion, and danger from their colonial times until the 1970s. After that, however, the two countries followed very different paths. In the 1970s, both Canada and the U.S. came to grips with the use of emergency powers that had spun out of control, but they reacted with different solutions. Canada changed its conception of what constitutionalism required because it saw the excesses as structural. The U.S., by contrast, reacted in a more limited fashion, adding statutory patches rather than

* Laurance S. Rockefeller Professor of Public Affairs in the Woodrow Wilson School and the University Center for Human Values; Director, Program in Law and Public Affairs, Princeton University; Faculty fellow, University of Pennsylvania Law School. I would like to thank both Princeton University and the University of Pennsylvania Law School for providing moral and material support for this research. I am grateful to Kent Roach, who has been unstintingly generous in teaching me about Canadian antiterrorism law, and to the participants in two wonderful comparative constitutional law conferences at the University of Toronto in fall 2004. I am always, as ever, indebted to Serguei Oushakine for more than I can say. Email: kimlane@princeton.edu

© The Author 2006. Oxford University Press and New York University School of Law. All rights reserved. For Permissions, please email: journals.permissions@oxfordjournals.org I·CON, Volume 4, Number 2, 2006, pp. 213–243 doi:10.1093/icon/mol003
generating a new constitutional understanding. As a result of these different responses, Canada and the U.S. now have different legal strategies for handling emergencies, with Canada’s more fully constitutionalized than those of the U.S.

These diverging approaches to emergency powers encapsulate some of the differences between the two countries, differences that are particularly apparent in national responses to 9/11. Although the U.S. and Canada had been moving on different constitutional trajectories for some time, the current differences with respect to emergency powers are noteworthy, as I will show in this article, because this was an area in which the two countries had followed parallel tracks, at least until the last few decades.

The similarities between the initial U.S. and Canadian approaches to emergency powers had two primary causes:

1. Both faced similar substantive threats through most of their respective histories. In the nineteenth century, local rebellions were put down by expanding national governments; in the twentieth, emergencies were declared primarily as the domestic face of international conflicts from World War I and World War II through the Cold War.
2. The two countries started with English common law history as a shared point of origin and influence. Even though American and Canadian constitutional history from the late eighteenth to the late twentieth century were quite different, emergency powers were generally exercised in similar ways because both were understood and justified as common law rather than constitutional functions.

In the 1970s, in both countries, criticism of the governments’ use of emergency powers led to reform efforts. The Constitution Act adopted in 1982 in Canada contrasted with a less ambitious wave of reform statutes that the U.S. adopted in the 1970s to deal with emergency powers. As the two countries pursued different paths to rein in governmental overreaching, the histories of the U.S. and Canada on the question of emergency powers ceased to be in parallel. Since that time, particularly since 9/11, the U.S. and Canada no longer share a common legal response to crises.

“North American emergencies,” thus, once referred to a relatively common approach to political crises, but it does so no longer. To show how the parallel development and subsequent divergence occurred, I will proceed chronologically, first examining the English common law heritage of the U.S. and Canada and showing how, until the early decades of the twentieth century, this heritage proved stronger than the provisions of written constitutions when it came to shaping emergency powers. Then I will examine the ways in which the U.S. and Canada changed their uses of emergency powers from World War I through the Cold War. Finally, I will look at the exposure of abuses of emergency powers and at the subsequent reforms
that caused the U.S. and Canadian strategies to follow separate paths when dealing with emergencies, with the post-9/11 reactions as my primary illustration.

1. Martial law and common law

Canada and the U.S. share a common English legal heritage regarding the limits of martial law. From the late eighteenth to the late twentieth centuries, debates in North America about emergency powers recalled English struggles over the appropriate use of martial law. By the time of William Blackstone (and, if Blackstone is to be believed, even from the time of Matthew Hale), the king’s authority to invoke martial law was regarded as suspect by scholars and its peacetime use was clearly condemned:

For martial law, which is built upon no settled principles, but which is entirely arbitrary in its definitions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged, rather than allowed as a law . . . and therefore it ought not to be permitted in a time of peace, when the king’s courts are open for all persons to receive justice according to the laws of the land.¹

Martial law was the illegitimate cousin of military law, and even the king’s courts did not generally support his ability to declare it.² When an emergency threatened, however, kings invoked martial law anyway.

This was the law inherited by both Canada and the U.S. Of course, the United States made a political break from Great Britain with the Revolution, but, in this area of law, the break was not a dramatic one. The text of the U.S. Constitution implicitly lodges authority for the use of martial law in the Congress. Congress has the power to suspend the writ of habeas corpus in times of domestic insurrection or foreign invasion,³ and to call forth the militia to execute federal laws as well as to “suppress insurrections and repel invasion.”⁴ The legislative branch is clearly allocated the responsibility of responding to crises. Nonetheless, as I will show, presidents have taken the lead in this regard.

Canada, meanwhile, operated under successive British Mutiny Acts until Confederation in 1867. At the time of Confederation, the British

¹ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–1769), Book I, Ch. 7 at 400.
North America Act gave the new Dominion of Canada the authority to raise and maintain its own military during peacetime and also provided Canadian military law with a constitutional footing by lodging the power to regulate the military with the Parliament. The newly constituted Dominion Parliament passed its own Militia Act in 1868. As in the U.S., however, Canada’s martial law tended to be a matter of executive declaration.

In the United States, despite the constitutional framework for both war and emergency powers that clearly gave Congress the leading role, martial law grew up largely outside those federal constitutional foundations. For example, when Aaron Burr launched an apparent plot to separate the Louisiana Purchase and the Western states from the Union, President Thomas Jefferson sent General James Wilkinson to put down the rebellion. Acting under the president’s authority, General Wilkinson summarily arrested suspected rebels and refused to honor habeas writs from local courts. Eventually, Supreme Court Chief Justice John Marshall ordered the release of Wilkinson’s prisoners, noting that only Congress had the power to suspend the writ of habeas corpus. Absent such a suspension, Marshall proclaimed, any court was otherwise competent to issue such a writ. However well this boded for the constraint of martial law by the Constitution, Jefferson toyed with notions of greater powers:

> There are extreme cases where the laws become inadequate even to their own preservation, and where the universal recourse is a dictator or martial law... On great occasions, every good officer must be ready to risk himself in going beyond the strict lines of the law, where the public preservation requires it.

As it turned out, throughout the nineteenth century, martial law was repeatedly declared by state governors in cases of local insurrection. The

5 British North America Act 1867, s. 91. This may be an anachronistic understanding of the Constitution of Canada, because the Privy Council, which had the last word on interpretation of the document, did not treat the BNA Act any differently from an ordinary statute until much later.


7 Dennison, supra note 2, at 56–58.

8 Ex Parte Bollman and Swartwout, 4 Cranch 75, 8 U.S. 75; 2 L. Ed. 554 (1807). See also Dennison, supra note 2, at 57.

9 Jefferson letter to Claiborne, quoted in Dennison, supra note 2, at 58.

10 Perhaps the most famous instance occurred during the Dorr War in Rhode Island, when the governor elected under Rhode Island’s pre-Revolutionary British charter declared martial law and used local troops against those who sought to oust him on the basis of a new constitution. The U.S. Supreme Court rejected the argument of the new constitutionalists that the Charter governor had no power to declare martial law. Luther v. Borden. 48 U.S. 1, 45 (1849). This decision served to justify other governors in their declarations of martial law.
U.S. Supreme Court found no constitutional difficulties with this, even when federal troops were deployed to assist in putting down rebellions. After all, the federal Constitution also explicitly allowed local governors or legislatures to call upon the federal government to protect the state from “domestic violence.”

When could martial law be declared by governors? The constraints the Court placed upon the states in the exercise of this power were few indeed, as the U.S. Supreme Court noted in *Luther v. Borden*:

[U]nquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands . . . [in the case,] the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition . . . Without [this] power . . . martial law and the military array of the government would be mere parade, and rather encourage attack than repel it.

In Canada, too, the predominant use of the military to put down domestic rebellions must also be understood within the framework of federalism, because Dominion legislation gave the responsibility for maintenance of law and order to the provinces. As a result, local mayors, magistrates, or governors were generally the ones to call in the militia after a proclamation of martial law. Before Confederation, during the Patriote Rebellion of 1837–38, the Privy Council ruled on the limits of emergency powers in

During Reconstruction, local declarations of martial law were used to suppress resistance by the Ku Klux Klan. See, e.g., *Ex parte Moore*, 64 N.C. 802, 808–11 (1870) (North Carolina governor’s declaration of martial law in two counties was upheld by the North Carolina Supreme Court).


11 U.S. CONST. art. IV, § 4.
Canada when the governor of Lower Canada put down the rebellion with force:

... in our opinion, the Governor... has the power of proclaiming, in any district in which large bodies of the inhabitants are in open rebellion, that the Executive Government will proceed to enforce martial law.\(^{14}\)

After Confederation, substantial national military forces were deployed to put down the North-West Rebellion of 1885. It is, of course, an inherently controversial exercise forcibly to retain dominion over a potentially seceding region, especially when the exercise also raises questions about toleration of ethnic pluralism. Constitutional questions about emergency powers did not arise explicitly, however, during the North-West Rebellion. The North-West Mounted Police (later the Royal Canadian Mounted Police) had their first substantial assignment quelling this uprising. The main leader of the rebellion, Louis Riel, was tried and convicted of treason in the regular courts and executed after a duly passed sentence. Riel remains a controversial figure in Canada—a convicted "traitor" who nonetheless has schools and public buildings named after him.

The leading examples of the use of federal emergency powers in the nineteenth century United States were, of course, the instances when they were invoked by President Abraham Lincoln during the Civil War. When Lincoln became president on March 4, 1861, he faced declarations of secession by seven Southern states that had taken advantage of the gap between his election and his oath of office.\(^{15}\) He quickly decreed a series of emergency orders to contain the crisis. Congress was not meeting at the time, and Lincoln called it into special session. However, he set the date for the Congressional special session in July, four months away, which gave him plenty of time to invoke executive powers without legislative constraint.

Lincoln called out the militias of the states and issued a proclamation blockading Southern ports without benefit of a declaration of war by Congress; ordered nineteen vessels to be added to the navy without benefit of Congressional appropriation; enlarged the size of the federal army despite the clear constitutional language that only Congress can raise the military; and suspended the writ of habeas corpus against the clear constitutional specification that only Congress has this power.\(^{16}\) When Congress reconvened,

\(^{14}\) Quoted in William Forsythe, Cases and Opinions on Constitutional Law, and Various Points of English Jurisprudence (Stevens & Haynes 1869).

\(^{15}\) South Carolina passed a secession ordinance on December 20, 1860; Mississippi on January 9, 1861; Florida on January 10; Alabama on January 11; Georgia on January 19, and Texas on February 1, 1861.

it retroactively approved Lincoln’s actions, with the exception of the habeas suspension, proclaiming that Lincoln’s actions “are . . . in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”17 Later, after much debate, Congress authorized a statement that validated even Lincoln’s suspension of the Great Writ whenever “the public safety may require it” during “the present rebellion.”18 Such ratification of unconstitutional actions after the fact hardly constitutes serious constitutional constraint. In fact, the sole constitutional impediment to the Union war effort was posed by the Supreme Court, in a decision that came down only after the war was over. Ruling on an attempt to try a civilian by military tribunal in a part of the country where the normal civil authorities were still in control, the Court confirmed the old English precedent that military law could not apply to civilians where the ordinary courts were open.19

Despite its general acquiescence during the Civil War, Congress reasserted itself as President Andrew Johnson attempted to step into the enlarged presidency that Lincoln had left. Postwar presidential attempts to govern by proclamation were resisted, and Congress passed a series of statutes that made presidential emergency powers contingent on congressional permission. Sometimes the permission was quite expansive, as in the 1870 Force Act20 and the 1871 Ku Klux Klan Act,21 which delegated to the president the power to suppress disturbances by force and to suspend habeas “when in his judgment the public safety shall require it.” And sometimes the president seized additional powers in the context of federalism when being asked by various governors for assistance in putting down labor strikes.22

As we have seen, then, martial law, sprinkled with occasional statutory delegations of power to the executive, was the primary legal framework for the exercise of emergency powers in both the U.S. and Canada until the First World War.

2. Legislative delegation and abdication: Twentieth century emergencies

In both the U.S. and Canada, the First World War marked a change in the balance of power between the executive and the legislative branches of

---

17 Quoted in id. at 13.
18 Quoted in id. at 17.
19 Ex Parte Milligan, 71 U.S. (4 Wall) 2 (1866).
20 Act of May 31, 1870, 16 Stat. 140 (1870).
government in the exercise of emergency powers. It also marked a change in
the formal legal framework that was dominant in states of emergency.

In Canada, the War Measures Act 191423 gave sweeping powers to
the executive through parliamentary delegation. The king, or the Governor-
in-Council, was authorized to issue a proclamation that "shall be conclusive
evidence that war, invasion, or insurrection, real or apprehended, exists."24
Moreover, upon such proclamation, the Governor-in-Council was allowed
to act however he "deems necessary or advisable for the security, defence,
peace, order and welfare of Canada."25 The Governor-in-Council was expli-
citly given the power, under such circumstances, to censor the media; arrest,
detain or exclude persons; control ports and transportation; control com-
merce of all kinds; and appropriate, control, forfeit, and dispose of property.26
In the case of seized property, compensation was to be given, but the law con-
tained no other references to the rights or liberties of persons that might
restrict or moderate the exercise of powers under this law. Since at this time
the defense of liberty and the property of individuals rested with the provinces
and not with the national government, the key constitutional question raised
by federal emergency powers was whether the powers seized were properly
within the range of federal power.

In the United States, in response to the challenges of World War I, President
Woodrow Wilson insisted that Congress give him broad delegations of
power. In fact, Wilson was given very nearly the same list of broad powers
outlined in the Canadian War Powers Act, but by means of a series of separate,
smaller, congressional delegations by statute.27

The War Measures Act was invoked in Canada during World War I.28 Its
first constitutional challenge came in an appeal to the Supreme Court of Can-
da from a denial of habeas in In Re Gray.29 The Court upheld the constitu-
tionality of the law with a few limitations. According to Justice Francis
Alexander Anglin:

The exercise of legislative functions such as those here in question by
the Governor-in-council rather than by Parliament is no doubt
something to be avoided as far as possible. But we are living in
extraordinary times which necessitate the taking of extraordinary
measures. At all events all we, as a court of justice, are concerned

23 War Measures Act, Statutes of Canada (1914), ch. 2 (Can.).
24 Id. at s. 2.
25 Id.
26 Id. at s. 3.
27 REYLEA, supra note 16, at 40–47.
28 Id. at 14–15.
29 57 S.C.R. 150 (1918).
with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them.\textsuperscript{30}

With the judicial approval of the War Measures Act, the Canadian government proceeded to make the most of its wartime powers. More than 80,000 Canadians were classified as “enemy aliens” because they had family ties to the countries with which Canada was at war. During the course of the war, nearly 8,600 of these enemy aliens were interned and their property seized. Most were civilians imprisoned for “acting in a suspicious manner” or being “undesirable,” as only about 2,300 of those interned were actually in the military of enemy states. Internment continued for two years after the war ended.\textsuperscript{31}

In the United States, too, enemy aliens were monitored, their movements circumscribed, and their rights of speech and association severely curtailed under the authority of the Alien Enemy Act.\textsuperscript{32} There were also a number of prosecutions under the Espionage Act of 1917\textsuperscript{33} that raised questions about the selective prosecution of dissenters to the war. But the United States did not engage in the practice of mass internment during the war. When the war was over, however, the new Bureau of Information within the U.S. Justice Department carried out the Palmer Raids of 1920, which rounded up and deported thousands of aliens suspected of being communists or anarchists.

The ending of emergency measures in both the U.S. and Canada after World War I turned out to be more complicated than their initiation. Where statutes did not have explicit sunset clauses, the U.S. Congress acted to take back its grants of power. But Wilson resisted. When Congress passed a bill by a vote of 343 to 3 in the summer of 1920 repealing Wilson’s emergency powers, Wilson killed it with a pocket veto. Finally, on March 21, 1921, the remaining emergency measures were repealed,\textsuperscript{34} but only after Wilson left office.

In Canada, too, it was unclear when the term of the emergency powers had ended. The 1923 judgment of the Privy Council in \textit{Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.}\textsuperscript{35} approved the contours of the War Measures Act and indicated that extraordinary deference would be accorded the government in determining the scope of an emergency. Examining whether

\textsuperscript{30}57 S.C.R. 150, 181–182.

\textsuperscript{31}A summary of these developments can be found at www.educ.sfu.ca/cels/past_art28.html.

\textsuperscript{32}Alien Enemy Act, 1 Stat. 577 (1798).


\textsuperscript{34}Public Law: Appropriations, Legislative, Executive and Judicial Expenses, 41 Stat. 1259–1260 (1921).

\textsuperscript{35}[1923] 3 D.L.R. 629, 1923 D.L.R. LEXIS 980 (pagination starts from 1).
wartime restrictions on the price and distribution of newsprint were still warranted after German surrender, the Privy Council gave the Canadian government broad leeway in determining when the emergency was over:

[V]ery clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in over-ruling the decision of the Government that exceptional measures were still requisite. . . . It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence.36

Through these lingering emergency powers, it quickly became clear in Canada, as indeed it had in the United States, that, as a practical matter, the executive’s acquiescence was required before the use of emergency powers would end, even though as a matter of law, the emergency powers rested with the legislature.

The economic crisis of the 1930s brought about invocations of emergency government to deal with economic emergency rather than war or insurrection. The Great Depression in the United States and the Dirty Thirties in Canada produced great expansions in the role of government in the economy and changed the balance of power between the state/provincial governments and the center. Emergencies were declared in both countries. President Franklin D. Roosevelt declared a state of emergency in 1933, directly invoking his article II powers under the Constitution rather than relying on congressional delegation of power. He made extensive use of executive orders to change the contours of the executive branch, though he later sought—and received—retrospective approval from the Congress.37

The government of Prime Minister Richard Bennett in Canada and the Roosevelt administration in the United States created a variety of new federal-level agencies to regulate the economy in more detail and pushed forward much legislation to cope with the deepening economic crisis. Since some of this regulation changed the balance of power both between the individual and the state as well as between the states/provinces and the center, it was challenged in the courts. In the Reference [on] . . . the Natural Products Marketing Act,38 the Supreme Court of Canada struck down the new commission created by the act as well as its newly assumed federal powers as exceeding the

36 1923 D.L.R. LEXIS 980 at 15–16.
37 RELVEA, supra note 16, at 51–68.
powers of the federal government. The Court’s decision was similar in spirit to the decisions of the U.S. Supreme Court that struck down the National Industrial Recovery Act in *Schechter Poultry Co. v. U.S.* and the Agricultural Adjustment Act in *U.S. v. Butler,* the first on separation-of-powers grounds and the second on the basis of federalism. But though the Great Depression in the United States abounded with the language of emergency powers, the courts did not always accord the respect customarily forthcoming for the executive in a time of crisis. The Dirty Thirties in Canada saw no deference by the courts to the executive either, even though Canada was arguably hit harder by the depression than was the United States. Though some emergency powers were invoked, the economic emergency, such as it was, was only partial and of uncertain scope.

The economic crisis was not yet clearly over before World War II began. And both Canada and the U.S. returned to a more conventional sense of emergency powers without ever going through a period of clear normality.


40 297 U.S. 1 (1936).

41 Roosevelt’s papers from the time indicate that he had no doubt that the economic crisis called for emergency powers: “... the full meaning of the word ‘emergency’... covered the whole economic and therefore the whole social structure of the country. ... It was an emergency that went to the roots of our agriculture, our commerce and our industry: it was an emergency that had existed for a whole generation in its underlying causes and for three and one-half years in its visible effects. ... It could be cured only by a complete reorganization and a measured control of the economic structure.” *III Public Papers and Addresses of Franklin D. Roosevelt* 17 (1938–50).

42 As Justice Hughes’s opinion for the majority noted in *Schechter Poultry:* “Extraordinary conditions do not create or enlarge constitutional power.” 295 U.S. 495, 528 (1935). And Justice Roberts’s opinion for the court in *Butler* maintained the view that national emergencies do not change the basic constitutional framework: “The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states.” 297 U.S. 1, 74–75. Justice Stone disagreed and would have granted increased legislative rather than executive power to cope with the crisis: “As the present depressed state of agriculture is nation wide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not within the specifically granted power of Congress to levy taxes to ‘provide for the ... general welfare.’” 297 U.S. 1, 79 (Stone, dissenting).

43 In the Products Marking Act reference case. Sir Lyman Duff, writing for the Supreme Court of Canada, seemed deferential at first:

No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. Such cases may be dealt with under the words at the commencement of s. 91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for. But instances of this ... are highly exceptional. [1936] 3 D.L.R. 622, 642.

And the Court went on to find that the economic crisis did not rise to that level.
between crises. The Canadian government invoked the War Measures Act as a basis for the exercise of controversial federal powers beginning in 1939, and it continued these measures even beyond the end of formal fighting.44 All in all, 6,414 separate special orders were declared under the authority of the War Measures Act during World War II.45 In the United States, the American president proclaimed a “limited” national emergency on September 8, 1939, but this was converted in 1941 to an “unlimited” national emergency even before the U.S. officially entered the war.46 The declarations of emergency allowed the president to invoke special statutory provisions that increased his powers upon such a declaration rather than, as in Canada, invoking a general grant of emergency power given under one expansive and unspecific law. As in Canada, however, emergency measures in the U.S. continued beyond the end of the war, and it was not until mid-1947 that Congress formally ended the use of emergency government.

In Canada, the most controversial Orders in Council, passed under the authority of the War Measures Act, dealt with enemy aliens. As in World War I, enemy aliens were forced to register and were monitored during the war. In 1940, German and Italian nationals resident in Canada, as well as anyone of German or Italian descent naturalized after 1922, were categorized as enemy aliens. After Pearl Harbor, 22,000 Japanese-Canadians were added to the list and given less than twenty-four hours to pack before being interned. Their property was seized and sold to pay for their internment.

One might have thought that the end of the war would have ended emergency measures. Instead, actions against those of Japanese descent living in Canada intensified, with three Orders in Council passed under the authority of the War Measures Act in December 1945, four months after the bombs were dropped at Hiroshima and Nagasaki, bringing about a Japanese surrender. These three orders: (a) mandated the deportation to Japan of Japanese nationals resident in Canada; (b) ordered deportations of naturalized British subjects of Japanese descent who had made requests for repatriation to Japan

44 The National Emergency Powers Act, 1945, Statutes of Canada, 1945, c. 25 and amendment, 1946, c. 60; The Continuation of Transitional Measures Act, 1947, Statutes of Canada, 1947, c. 16 and amendments, 1948, c. 5 and 1949, c. 3. As at the end of World War II, the Supreme Court of Canada was again reluctant to second-guess the other branches’ judgment that the emergency outlasted the war. Reference As To the Validity of the Wartime Leasehold Regulations, [1950] S.C.R. 124.


46 RELYE, supra note 16, at 73.
before or during the war; and (c) began investigations into the status of naturalized ethnically Japanese citizens of Canada to determine whether they should be deported as well. Family members might be included along with the identified targets in each of these deportation proceedings. The orders were challenged in Reference as to the Validity of Orders in Council of the 15th Day of December 1945 in Relation to Persons of the Japanese Race. But the Supreme Court of Canada affirmed all of the orders as within the scope of the Governor-in-Council’s authority to promulgate under the War Measures Act, even though the war was over. Raised again before the Privy Council in Cooperative Committee on Japanese-Canadians v. Attorney General of Canada, all three orders were deemed again to be valid exercises of power under the War Measures Act. What allowed the government to go on issuing emergency orders after the end of the war? The Canadian Parliament had approved the Emergency Transitional Powers Act, which explicitly extended emergency powers after the war had officially ended. With this authority, neither the Supreme Court of Canada nor the Privy Council would say that the War Measures Act was not still legitimately in force. And under the War Measures Act, the Governor-in-Council could take virtually any action he deemed necessary.

In the United States, emergency powers were invoked in plentiful measure during the war. But rather than having a general-purpose emergency statute in the U.S. equivalent to the War Measures Act in Canada, congressional grants of emergency powers to the president were given in piecemeal fashion. President Roosevelt’s declaration of a “limited” national emergency in 1939 was made in order to take advantage of certain emergency powers he had been given by statute. Before Pearl Harbor brought America into the war, Roosevelt used his emergency powers to restore the Council of National Defense, resuscitate the Office of Emergency Management, and seize several factories to ensure the continued production of munitions that might be used in a coming war. He secretly negotiated a deal with Canada that permitted the U.S. to patrol the Canadian coastline, freeing up Canadian ships to join the European war on the side of Britain, and made similar secret deals with other allies. The Lend-Lease Act of March 1941 all but disowned America’s official neutrality even before it formally entered the war.

Generally speaking, Congress ceded powers to Roosevelt throughout the war, often after the president, in impassioned public addresses, threatened to seize the power even without congressional authorization. Once the war

49 [1945] (Can.) c. 25.
50 REYLEA, supra note 16, at 69.
broke out, the delegations of power flew fast and furious and also became broader and more vague.\(^{51}\) Both the declaration of martial law in Hawaii, after the Pearl Harbor bombings, and its ongoing extension were permitted, even though the use of military tribunals to try civilians there was struck down by the U.S. Supreme Court.\(^{52}\) By executive order, Roosevelt ordered the internment of residents of Japanese descent on the west coast of the United States, as was done in Canada as well. In *Hirabayashi v. United States*\(^{53}\) and *Korematsu v. United States*,\(^{54}\) the Supreme Court refused to challenge Roosevelt’s orders, though the Court, without directly raising the constitutional issues, eventually ordered the release from internment of a Japanese-American who had proven her loyalty.\(^{55}\)

As in Canada, American emergency powers were renewed after the war was over. Congress extended the Second War Powers Act and its associated grants of presidential powers to cover postwar reconstruction and also passed the Emergency Powers Interim Continuation Act. Though the former lapsed at the end of 1946, the latter remained in force until mid-1953,\(^{56}\) by which time the United States was already well launched into its next emergency.

Anticommunist concern had been whipped up in both Canada and the U.S. as the Soviet Union consolidated its hold over the parts of Europe that its troops had liberated during the war. In 1947, the House Un-American Activities Committee (HUAC) launched its investigation of the Hollywood film industry at the instigation of Senator Joseph McCarthy. By 1954, when McCarthyism had largely run its course, the army and even the president had been threatened with accusations of disloyalty. In the meantime, on June 25, 1950, North Korea invaded South Korea and, two days later, President Truman ordered U.S. troops into action. On December 16, Truman declared a state of emergency under his inherent article II constitutional powers. He was then able to use all of the emergency provisions that Congress had written into various statutes over the years, as well as additional powers he claimed were conferred on him directly by the Constitution.

---

51 See, for example, First War Powers Act, Dec. 18, 1941, 55 Stat. 838 (codified as 50 U.S.C. App. § 611 (repealed 1966)), and Second War Powers Act, Mar. 27, 1942, 56 Stat. 176 (expired by its own terms on Dec. 31, 1946 following amendment by Act of Dec. 20, 1944, Pub. L. 78-509, 58 Stat. 827). The War Powers Acts were passed in a big rush. The First War Powers Act, of 1941, for example, was signed on December 18, 1941, just ten days after it had been first introduced in Congress.


55 Ex parte Endo, 323 U.S. 283 (1944).

56 RELYEY, supra note 16, at 120.
But Congress kept delegating. In 1950, it passed the Internal Security Act\textsuperscript{57} to give the president power to declare an “internal security emergency” and to trigger special police powers of the federal government. Under the authority of the Emergency Detention Act,\textsuperscript{58} the attorney general was given the power to seize anyone he had “a reasonable ground to believe” was engaged in espionage or sabotage, and authorization was given for detention centers to be set up around the country to house them.\textsuperscript{59} But while Truman was quite reluctant to use some of the powers delegated to him (for example, he never embarked on the mass detentions for which Congress had provided the budget and J. Edgar Hoover’s FBI had compiled the list of suspects), he was also willing to use supposedly inherent presidential powers to act to defend America’s security with respect to the war effort. When he eventually seized the steel mills during a labor dispute to keep war production going, the Supreme Court had other ideas about the extent of his inherent powers.\textsuperscript{60}

But the emergency powers that successive presidents exercised during the Cold War generally went unchallenged, either by the Court or by Congress.\textsuperscript{61}

In Canada, the overt emergency powers of the War Measures Act faded after World War II in favor of the vaguer powers of the more usual foreign-threat-based emergency that was the Cold War. The opening salvo of the Cold War in Canada was the secretly authorized arrest in 1946 of more than a dozen people accused of spying on behalf of the Soviet Union.\textsuperscript{62}

The spying charges were clearly part of the newly gathering Cold War rather than of World War II. But the order that authorized the arrests was made under the War Measures Act, still in effect by extension after World War II had ended. As it turned out, then, the arrests of accused Soviet spies were authorized under an order given pursuant to a declaration of emergency powers for the war years—when the Soviet Union had been Canada’s ally. A commission of inquiry provided the evidence against the spies; they were

\textsuperscript{57} 64 Stat. 987 (1950).


\textsuperscript{59} This law was finally repealed in 1968.

\textsuperscript{60} Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952). There had been thirty-three prior executive orders to seize businesses issued between 1945 and Truman’s fatal order of 1952.

\textsuperscript{61} For a review of the expansion of presidential powers during the Cold War, see Jill Elaine Hasday, \textit{The Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War}, 5 KAN. J.L. & PUB. POL’Y 129, 129 (1996) (“In the Cold War, as in the Civil War, the government expanded its power and reach dramatically. On the assumption that the executive was best suited to act quickly and decisively, Lincoln and the Cold War Presidents concentrated this power in themselves. Congress and the courts both accepted executive supremacy in wartime and re geared their own operations to meet the demands of national emergency.”).

charged primarily under the Official Secrets Act. Not all those accused were found guilty; in fact, the ordinary Canadian courts that heard the cases were quite skeptical of the government’s claims.63 Though the government proceeded under the banner of emergency powers, the courts refused to defer.

The War Measures Act was never invoked to deal with the Cold War in Canada, but executive powers to handle the always implicit Soviet threat were increased all the same. Though much quieter, when compared with the flamboyant American anticommunist hunts, Canada had its own domestic McCarthyism, which affected cultural institutions, bent immigration procedures, and resulted in a large number of Canadians being caught up in the new national security state. In both Canada and the U.S., the Cold War normalized the use of emergency powers to cope with the ever-present (or so they thought) communist threat.

3. Turning points: Emergency’s excesses

By the 1970s, both Canada and the U.S. were using emergency powers so routinely that they had become part of ordinary governance. Foreign threats were met with domestic surveillance of dissenters; domestic protests were treated as foreign threats. The political, social, and cultural upheaval that came to be called the Sixties was addressed in both countries with extensive emergency powers.

The growth of the domestic national security apparatus during the Cold War in the United States generally was justified under the banner of state necessity. Large-scale surveillance of Americans suspected of subversion or sympathy with the enemy was conducted, and huge collections of dossiers on individual Americans and groups were amassed. When the Church Committee, constituted by the Senate to investigate such matters, finally inquired into the extent of domestic surveillance in the mid-1970s, it found that hundreds of thousands of individuals were the subject of intelligence agencies’ files. Over 25,000 individuals had been put on lists to be rounded up in the event of a national emergency.64

About the same time in Canada, the McDonald Commission of Inquiry65 found that the security services had amassed files on more than 800,000 individuals and organizations in Canada during the Cold War. On a per capita basis, this surveillance dwarfed even the massive operation that had been

63 “Despite what appeared to be a stacked deck, only about half of the two dozen eventually charged with criminal offences as a result of the inquiry were ever convicted. Those who had incriminated themselves before the [investigatory] Commission were in all cases found guilty in court. Those who had resisted were mainly acquitted.” Id. at 244.

64 S. REP. No. 94-755, bk. 2, at pp. 6–7 (1976), microformed on CIS No. 76-S963-2 (Cong. Info. Serv.).

carried out in the United States. Shortly after this discovery, the Counter-
Subversion Branch of the Canadian Security and Intelligence Service (CSIS) was closed.\textsuperscript{66}

The revelations of a massive surveillance operation in the U.S. caused Congress to adopt a number of measures designed to rein in the use of emergency powers. The Privacy Act of 1974 was intended to protect individuals from secret government data collection; the Freedom of Information Act gave individuals access to their records and to information about the government itself; the Foreign Intelligence Surveillance Act of 1978 required that warrants be obtained for foreign intelligence gathering operations conducted inside the United States. The Central Intelligence Agency was returned to its original mandate as it was banned from conducting domestic surveillance and investigations. And, crucially, a special committee of the United States Senate spearheaded an investigation into the use and abuse of emergency powers. Its findings—that by the mid-1970s more than 470 statutes delegated “significant” emergency powers to the president\textsuperscript{67} and that at least four states of emergency declared under the Constitution’s article II were still in force\textsuperscript{68}—resulted in the passage of the National Emergencies Act.\textsuperscript{69} This statute both terminated all outstanding emergencies declared pursuant to congressional delegation of powers, and established new procedures for declaring emergencies with automatic sunset provisions. Now the United States just has many tiny and unnoticeable emergencies. Between 1976 and 2004, for example, fully thirty-seven national emergencies were declared.

Though Canada also initially started on the path of statutory reform to cope with abuses of emergency powers, it then experienced a major threat without real parallel in the United States, one that resulted in the War Measures Act being invoked for the third time in its history.\textsuperscript{70} The October Crisis of 1970 began when a cell of Le Front de Liberation du Québec

\textsuperscript{66} Whitaker, \emph{supra} note 62, at 248.

\textsuperscript{67} Frank Church, \textit{Foreword}, to \textit{Relyea, supra} note 16, at v.

\textsuperscript{68} The emergency proclamations of 1933 (Roosevelt), 1950 (Truman), and 1970 (Nixon) and 1971 (Nixon) were still in force in 1974. All had been declared under inherent presidential powers in article II of the Constitution so the Congress felt it did not have the jurisdiction to repeal them. Nonetheless, Congress did modify all of the statutes that the declarations of emergency had triggered, thereby rendering the declarations of no substantial current force. Harold Relyea, \textit{National Emergency Powers, Congressional Research Service Report for Congress}, Updated 28 June 2001 at 12. Hereinafter Relyea II. \textit{Available at} www.law.umaryland.edu/marshall/crsreports/crsdocuments/98–505\_GOV\_06282001.pdf.

\textsuperscript{69} Public Law 94-412, 94th Congress; National Emergencies Act, 50 U.S.C. 1601, 1621, 1622, 1631, and 1641.

\textsuperscript{70} The account that follows draws from Michael Freeman, \textit{Freedom or Security: The Consequences for Democracies of Using Emergency Powers to Fight Terror} (Praeger 2003) and Whitaker, \emph{supra} note 62.
(FLQ) kidnapped the British trade commissioner James Cross in order to publicize their demands for a separate state and to demand that their comrades be released from prison. Later, another only loosely connected cell of the FLQ kidnapped the Québec minister of labour, Pierre Laporte. Very public negotiations attempted to secure the release of the two officials. On October 15, federal army troops were deployed to bases around Montréal and Québec City. Nearly 20,000 federal troops occupied Québec, including 7,500 in Montréal alone. In response, the FLQ cell killed Laporte. With this, public opinion in Canada was galvanized behind tough action.

The Parliament voted to invoke the War Measures Act on October 16, supporting measures that included outlawing the FLQ and criminalizing membership in the group, authorizing arrests and searches without warrants, permitting detention of suspected persons for up to twenty-one days without charges, and denying bail to anyone so detained. The police searched 3,000 separate properties without warrants and arrested 468 people without warrants, 435 of whom were eventually released without charge. In the end, ordinary policing without benefit of emergency shortcuts uprooted the cell that had murdered Laporte. And the kidnappers holding Cross were given safe passage to Cuba in exchange for his safe release. The army withdrew from Québec on January 4, 1971, and the War Measures Act provisions were allowed to expire on April 30. When the crisis was over, a number of critics argued that the whole matter could have been settled, as indeed it was in the end, as a matter of conventional policing without the use of emergency orders.71

At least in part in reaction to the October Crisis, there were calls to change the constitutional framework altogether. With the adoption of the Canadian Charter of Rights and Freedoms in 1982, an event of momentous constitutional significance in Canada, Canada’s Constitution was fully patriated and featured human rights at its core. Given the extraordinary powers authorized under the War Measures Act, powers that would be hard to reconcile with the Charter, it should not be surprising that Canada repealed the War Measures Act in 1985, replacing it with a more measured and balanced Emergencies Act.72 In fact, excesses in the use of the War Measures Act throughout its history were cited repeatedly in debate over the adoption of the Charter as a leading reason why the Charter was necessary.73

71 Whitaker, id. at 251.
72 R.S.C., 1985, c. 22 (4th Supp.).
Under the new Emergencies Act, various sorts of national emergency are defined for the first time (rather than being left to the vagaries of the governor’s determination) and, while the Governor-in-Council is given the power to proclaim an emergency, the Parliament has the power to revoke such a declaration. Parliament is given the power to “supervise” the emergency as well. Governmental powers under an emergency are more clearly delineated; consultation with provincial leaders is required where an emergency touches their territory. Perhaps most crucially, the Emergencies Act’s preamble references the Canadian Charter, which itself has no provisions for derogation from rights in a time of emergency. The Emergencies Act has never in its nearly two decades of existence been invoked.

With these changes in place by the mid-1980s, Canada and the U.S. thus had different sorts of legal frameworks with which to regulate emergencies for the first time in their parallel histories. Canada brought the exercise of emergency powers under constitutional control, while the U.S. left the regulation of emergencies to piecemeal statutory reform without regularizing its constitutional status.

4. The challenge of terrorism after 9/11

After 9/11, the U.S. reacted with a far greater use of emergency powers than has Canada. This might, at first, be attributed to the fact that the U.S. was the country attacked. But both countries had strong reactions that were channeled in different ways. This, I will argue, shows that the differing reform paths of the 1970s and 1980s have produced real divergence now in North American emergencies.

When the hijacked planes crashed into their tragic targets on 9/11, there was what seemed like a long pause (in fact, only three days) before President George W. Bush declared a national emergency in the United States.74 But his formal declaration was very limited in scope. He acted under statutory authority and indicated an intent to invoke only a limited number of his potential emergency powers. Outsized emergency powers were to come later; some under authority of legislation, but most by assertion of extraordinary executive license.

The best known element of the post-9/11 response in the United States was the USA PATRIOT Act, adopted by the Congress in October 2001.75 The great bulk of the PATRIOT Act is devoted to authorizing enhanced surveillance procedures,76 cracking down on terrorism financing,77 and making changes

76 U.S.A. PATRIOT Act, §§ 201–225.
to immigration law and strategies of border protection. Some provisions of the PATRIOT Act consolidated a series of defendant-unfriendly decisions that had already been issued by the federal courts in nonterrorism matters. Though the PATRIOT Act was raced through the Congress in record time, a number of softening changes were made to improve the accountability of the executive branch with regard to the new powers, and the worst of the new provisions were attached to a sunset clause. As I write, the extension of the PATRIOT Act, once thought to be automatic, has been stalled over new revelations of a massive program of domestic spying carried out by executive order since 9/11.

There are many elements of the PATRIOT Act that are controversial. For example, the highly visible Section 215 allows the government to seize “any tangible things (including books, records, papers, documents and other items)” that might be useful in a terrorism investigation, even if the object or record itself does not belong or pertain directly to a terrorism suspect. Such a seizure requires getting a warrant from the Foreign Intelligence Surveillance Court. But it is probably far easier for the government to acquire such records with a “national security letter,” a type of administrative subpoena that does not require the approval of a judge. The range of documents that may be accessed with a national security letter was broadened in a little-noticed provision of the PATRIOT Act that permitted the government to access telephone, financial, and consumer records. The scope of national security letters was further increased by a stealth amendment tucked away in an intelligence services financing bill in fall 2003. The sweeping quality of national security letters—issued with such secrecy that their recipients are barred from talking to anyone about even the fact that they have received

79 For example, the circuits were divided on the issue of “sneak and peek” searches, which allow police to conduct a search without immediately notifying the target, until Congress wrote the U.S.A. PATRIOT Act including this provision. U.S.A. PATRIOT Act, § 213. The Fourth Circuit had already ruled that delayed notification of searches and seizures of intangible evidence were not violations of the Fourth Amendment. United States v. Simons, 206 F.3d 392 (4th Cir. 2000). But the Ninth Circuit had said that they were unconstitutional. United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986).
80 U.S.A. PATRIOT Act § 224.
81 Peter Baker, President Says He Ordered NSA Domestic Spying, WASH. POST, Dec. 18, 2005 at A01.
82 U.S.A. PATRIOT Act, § 215.
84 U.S.A. PATRIOT Act, § 505.
come in for judicial criticism when a federal district judge in the Southern District of New York held that the gag rule attached to national security letters violated the Fourth Amendment as it effectively barred the recipient from ever seeking judicial review of such a request.86 The PATRIOT Act also amended the Foreign Intelligence Surveillance Act (FISA)87 to make it easier for the government to use the streamlined warrant process available under this law to put under electronic surveillance or to conduct searches of the premises of anyone suspected in an international terrorism investigation.88 Now, it is FISA warrants, rather than the more usual “Title III” warrants89 routinely used in criminal investigations, that are deployed almost exclusively in the war on terrorism. But FISA warrants, unlike Title III warrants, do not meet the requirement of the U.S. Constitution’s Fourth Amendment that “no Warrants shall issue, but upon probable cause.”90

The PATRIOT Act, while getting the lion’s share of popular attention, was not the source of the most extreme examples of emergency powers after 9/11, however. Without benefit of specific legislation, the executive branch claimed the powers to detain within the U.S. anyone suspected of being a terrorist—including American citizens, permanent resident aliens, and visa-holding visitors—on a variety of extreme interpretations of previously granted powers. Some detainees were held as material witnesses in grand jury proceedings;91 others were held for months on minor visa violations before being deported;92 still others were held on a variety of pretexts, in rotation among


88 U.S.A. PATRIOT Act, § 218.

89 These warrants are so named for the provision of the statute that authorized them. Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. §§ 2510-2520 (1994).

90 U.S. CONST. amend. IV. Title III warrants require probable cause that the person to be put under surveillance has committed or will soon commit a crime. FISA warrants require probable cause that the person to be put under surveillance is an agent of a foreign power. For the argument that FISA warrants do not meet the constitutional standard, see Kim Lane Schepple, Law in a Time of Emergency: States of Exception and the Temptations of 9/11. 6 U. PA. J. CONST. LAW. 1001, 1037–1038 (2004).


the different legal justifications, so that a series of limited if differing detentions were strung together to hold a particular suspect for a very long time.\footnote{For one particularly extreme case, see United States v. Oulai, No. 02-00046-CR-J-20-TE (M.D. Fla. 2002) (unreported decision), aff'd, 88 Fed. Appx. 384 (11th Cir. 2003) (unpublished table decision).} Moreover, detainees were often rotated in their physical location as well, making access by counsel or families practically impossible even while officials were claiming that detainees had access to both.\footnote{OIG Report, supra note 92, at 130–142.} Though it took awhile to determine it, the Department of Justice has documented that a number of those early detainees were beaten and abused in prisons around New York City.\footnote{Supplemental Report on September 11 Detainees’ Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (2003), available at www.usdoj.gov/oig/special/0312/index.htm.} Later, the government claimed the authority to hold even American citizens indefinitely and without charges as “enemy combatants.”\footnote{For a review of the legal bases and controversies surrounding this designation, see Jason Binimow, Designation as Unlawful or Enemy Combatant, 185 A.L.R. Fed. 475 (2005).} The government has also aggressively used a pre-9/11 statute that allows the prosecution of terrorism suspects for contributing “material support”\footnote{18 U.S.C. §§ 2339A and 2339B.} to a terrorist organization, even though federal courts have twice declared elements of the concept of “material support” unconstitutional because they are too vague to be the basis for a criminal prosecution.\footnote{Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 (C.D. Cal. 2004) (holding that amendment in U.S.A. PATRIOT Act that criminalized providing “expert advice or assistance” to a foreign terrorist organization was impermissibly vague); Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000) (holding that the criminalization of provision of “training” and “personnel” to a terrorist organization was impermissibly vague).}

Most of the powers that the U.S. president has asserted in domestic affairs to cope with the threat of terrorism have not been enacted by statute since 9/11 but have resulted, instead, from new uses of old laws and edgy, aggressive interpretations of “plenary” constitutional executive powers. Novel constitutional and statutory interpretation, rather than new lawmaking, has been the source of much of the legal framework used by the Bush Administration in the post-9/11 struggle against terrorism.

Since 9/11, the Bush Administration has asserted extraordinary constitutional powers by claiming that the country is at war and then invoking an all-powerful commander-in-chief clause of the U.S. Constitution for justification of these powers. This has become most evident in the remarkable series of memos leaked from the Office of Legal Counsel (OLC), the office within the Justice Department that provides legal advice for the executive branch. OLC
lawyers advised the president that it was unconstitutional for Congress to have passed the War Crimes Act\(^99\) and the Torture Act,\(^100\) criminalizing in American federal law grave breaches of the Geneva convention or torture committed abroad when done by U.S. nationals, because the president has complete control over the conduct of war.\(^101\) Not only would Congress be unable to intervene in the conduct of the war, according to the arguments of the administration’s lawyers, but the courts also would be limited in their ability to find any government official guilty of having committed war-on-terrorism-related criminal offenses. The OLC “torture” memo went on to indicate that a U.S. national who engaged in torture abroad and was arrested for it upon his return to the U.S. could avail himself of a commander-in-chief defense to such a charge:

[T]he defendant could claim that he was fulfilling the Executive Branch’s authority to protect the federal government, and the nation, from attack. The September 11 attacks have already triggered that authority. . . . If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate [the Torture Act], he would be doing so in order to prevent a further attack on the United States by the al Qaeda network. In that case, we believe that he could argue that his actions were justified by the executive branch’s constitutional authority to protect the nation from attack.\(^102\)

Any attempt by Congress to constrain the president, then, could be avoided either by a constitutional finding that Congress could not legislate in the anti-terrorism campaign or by an executive-branch-based defense to any concrete criminal charge. In other words, the official legal view of the executive branch is that the president has sole and absolute power to do whatever is necessary to protect the country.

American courts, with only a few exceptions, have largely approved the Bush administration’s legal strategy. For example, the use of material witness warrants as a sort of preventive detention was eventually upheld.\(^103\) The government’s abandonment of Fourth Amendment standards for searches and surveillance was approved by the special-jurisdiction Foreign

---


\(^100\) 18 U.S.C. § 2340A.


\(^102\) Id. at 45–46.

\(^103\) United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003).
Intelligence Surveillance Court of Review.\textsuperscript{104} And even the extreme claims to detain American citizens as enemy combatants were approved by the Fourth Circuit, before being qualified (but not wholly rejected), by the U.S. Supreme Court.\textsuperscript{105} While the Supreme Court’s judgment in the Hamdi case is probably best known for the quotation, “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens,”\textsuperscript{106} the actual effect of the two Supreme Court decisions in the citizen-enemy-combatant cases was to leave both men in detention pending further, potentially lengthy proceedings.

In Canada, by contrast, no official emergency was declared after 9/11.\textsuperscript{107} The legal landscape of Canada was altered, first, with the introduction of Bill C-36 into the Canadian Parliament. Much of what the bill included was determined by the requirements of UN Security Council Resolution 1373.\textsuperscript{108} In fact, Bill C-36 was defended by the Canadian government precisely as an attempt to fulfill its international obligations under this resolution.\textsuperscript{109} But Bill C-36 (also called the Anti-Terrorism Act, or ATA) generated a great deal of criticism.\textsuperscript{110}

One of the most reviled parts of the law\textsuperscript{111} criminalized terrorism under a sweeping definition that made having a “political, religious or ideological

\textsuperscript{104} In re Sealed Case, 310 F.3d 717, 734 (Foreign Int. Surv. Ct. Rev. 2002).
\textsuperscript{105} Hamdi v. Rumsfeld, 316 F.3d 450, 460 (4th Cir. 2003), vacated and remanded by 124 S. Ct. 2633; 159 L. Ed. 2d 578. Rumsfeld v. Padilla, 159 L. Ed. 2d 513, 124 S. Ct. 2711 (2004).
\textsuperscript{106} Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004).
\textsuperscript{107} According to the Standing National Committee on National Security and Defense of the Canadian Senate: “Perhaps Canada’s low-key, laid-back approach is part of our survival strategy. Americans tend to feel lost without a threat at hand. Our neighbours are nothing if not dramatic. We’re a quieter crowd.” NATIONAL EMERGENCIES: CANADA’S FRAGILE FRONT LINES (March 2004), available at www.parl.gc.ca/37/3/parlbus/commbus/senate/com-e/defe-e/rep-e/rep03vol1-e.htm (last visited March 8, 2006).
\textsuperscript{111} Roach, September 11, supra note 110, at ch. 2; David Schneiderman, Political Association and the Anti-Terrorism Bill, In The Security of Freedom, supra note 73; Martha Shaffer, Effectiveness of Anti-Terrorism Legislation: Does Bill C-36 Give Us What We Need?, in id. at 195; Don Stuart, The Dangers of Quick Fix Legislation in the Criminal Law: The Anti-Terrorism Bill C-36 Should be Withdrawn, in id. at 205.
purpose, objective or cause” an element of the offense and criminalized a number of ancillary actions as well.112 But only one case seems to have been brought so far113 under the new definition of terrorism in Canada.114 Other rumored cases under the new terrorism definition of the ATA were dropped quietly without charges or with more information forthcoming.115 In short, the powers authorized under the new law were rarely, if ever, used.

Two other controversial institutions created by the Bill C-36 (the investigative hearing116 and “preventive arrests”117) have also been rarely, if ever, been used.

In the investigative hearing, a police officer (upon approval of the attorney general) may ask a judge to call a person in for questioning and the person thus called may not refuse to answer questions or refuse to produce “any thing in their possession or control” on grounds of self-incrimination. The information obtained through investigative hearings may not be used against the person in a criminal proceeding, though it may be used for national security investigations.

In the first and only use of the procedure, a case was brought on reference of the hearing judge before the Supreme Court of Canada.118 The Court upheld the investigative hearing provision of the ATA against a general Charter challenge but required that the witness have access to counsel in all appearances. The Court also ruled that the questions asked of the witness had to be narrowly relevant to a terrorism investigation. The investigative hearings provision of the ATA was deemed not to be in violation of section 7 of the Charter because both absolute use and derivative use immunity were provided to the witness. According to the Court, the rule against testimonial compulsion was, as a result, not infringed. This ruling, however, generated three dissenters. In the companion case brought by media

---

112 Bill C-36, Anti-Terrorism Act (ATA), S.C. 2001, c. 41, definition of terrorist activity in s. 83.01; criminalization of participation in terrorist activity in s. 83.18, of facilitation of terrorist activity in s. 83.19, of committing an indictable offense at the direction of a terrorist group in s. 83.2, and instructing someone to carry out terrorist activity in s. 83.22.

113 Canada’s 2004 report to the CTC, filed in December, reported that no criminal charges had been brought under the ATA’s new terrorism provisions to date. CTC Report, Canada, 2004 at p. 33. But see Steven Frank, A Raid in the Suburbs; The Arrest of a Canadian in Connection with Terrorism Shocks the Nation and Adds to Muslims’ Unease, TIME CANADA, Apr. 12, 2004.

114 For an explanation of this case, see Kent Roach, Canada’s Response to Terrorism, in GLOBAL ANTI-TERROREISM LAW (Michael Hor, Victor Ramraj & Kent Roach eds., Cambridge Univ. Press 2005).

115 Id.

116 ATA at s. 83.28.

117 ATA at s. 83.3.

organizations seeking access to the investigative hearings,\textsuperscript{119} the Court tilted in favor of the media claims for access to the proceedings. These two decisions, taken together, are far from sweeping rejections of one of the most controversial provisions of the ATA. Instead, the judges opted to uphold the statute and provide a more rights-friendly interpretation than the government might have been inclined to provide. But the plurality opinion explicitly noted that legal constraints were still in force in the crisis: “Although terrorism necessarily changes the context within which the rule of law must operate, it does not call for the abdication of law.”\textsuperscript{120}

As it turns out, these cases appear to spring from the only time that the investigative hearing procedure has been used since it went into effect. The ATA required the Department of Justice of Canada to report on the number of investigative hearings conducted each year, and in the first three years of the statute’s operation, only this one case was reported.\textsuperscript{121}

The other controversial new procedure under the ATA, the preventive arrest, permits a “peace officer” to arrest a person without a warrant if “the peace officer reasonably suspects that the detention of the person in custody is necessary in order to prevent a terrorist attack.”\textsuperscript{122} A person so arrested must be brought before a judge, typically within twenty-four hours, and can be held no more than seventy-two hours without formal charge. To permit continued detention beyond the twenty-four hours, the judge both must be convinced that the officer’s suspicions were reasonable and must find a substantial risk either that the suspect would flee or that the suspect would cause harm to the public. While this provision generated a great deal of criticism upon passage, government reports indicate that there have been no arrests without warrant in the first three years after the law was passed.\textsuperscript{123} Both investigative hearings and preventive arrests are subject to a five-year sunset clause in the ATA,\textsuperscript{124} which means that the law may well expire without these provisions ever being used for 9/11-related terrorism.

The ATA sparked a far-reaching discussion both within the Parliament and among members of the broader society about what Canada could and should be willing to do to fight terrorism.\textsuperscript{125} Many hearings were held on


\textsuperscript{120} In the Matter of an Application under Section 83.28 of the Criminal Code, [2004] S.C.C. 42.


\textsuperscript{122} Bill C-36, Anti-Terrorism Act (ATA), S.C. 2001, c. 41. at s. 83.3 (4) (b).

\textsuperscript{123} See reports cited, supra note 113.

\textsuperscript{124} ATA § 83.32.

\textsuperscript{125} ROACH, SEPTEMBER 11, supra note 110, at 56–84.
the bill; Parliament softened a number of the measures to respond to pointed complaints. In the midst of the tremendous amount of popular agitation over the Anti-Terrorism Act and its passage, the government had to withdraw another of its bills proposed in fall 2001, the Public Safety Act. Critics claimed that the bill gave ordinary ministers dangerous new powers.126 It, too, was eventually passed, although it was softened to respond to criticism.127 This bill, in its final version, tightens up protection of dangerous materials and vulnerable sites, rather than going after potentially dangerous persons. As a result, it poses far fewer challenges to civil liberties.

As in the U.S., however, the formal laws passed since 9/11 do not tell the whole story of what is being done to combat terrorism. As Kent Roach has shown, Canadian immigration law, already short on procedural guarantees for those unlucky enough to be caught within its purview, has been used instead of the criminal law, to detain and eventually deport noncitizens who are suspected of terrorism-related activity.128 The Immigration and Refugee Protection Act (IRPA)129 has been used more often than the ATA against terrorism suspects since 9/11 “because it allows procedural shortcuts and a degree of secrecy that would not be tolerated under even an expanded criminal law.”130 In fact, the Supreme Court of Canada recently agreed to review the practice of issuing “security certificates” that allow aliens to be detained indefinitely without charges pending deportation,131 a practice in increased use since 9/11.

The Supreme Court of Canada has already reviewed decisions made under IRPA, particularly in a post-9/11 case that arose on pre-9/11 facts. Suresh v. Canada132 concerned a convention refugee from Sri Lanka whose involvement with the Tamil Tigers prompted the Canadian government to declare him a danger to the security of Canada and to undertake to deport him. Suresh, the immigrant, argued that he would be subjected to torture if sent back to his home country. The minister of citizenship and immigration made an adverse decision in his case, from which he appealed to the Supreme Court of Canada, claiming Charter violations under section 7 (protecting life, liberty, and security against deprivation unless in accord with the principles of fundamental justice) and section 2 (freedom of thought and association). The Supreme Court upheld the immigration law under

126 Id. at 9.
128 See Roach, supra note 114.
129 S.C. 2001, c. 27.
130 Roach, supra note 114, at 12.
132 2002 S.C.C. 1
which the judgment against Suresh was made but indicated that the minister had to conduct the deportation hearing differently and had to consider a wider range of legal norms and factual evidence in her judgment. Deporting a person to torture, the Court ruled, would violate both Canadian law and international norms. But the threat of torture had to be "serious" and "based on evidence," which, the Court further ruled, Suresh had a right to provide.

The other notable security measures taken in Canada since 9/11 are controversial precisely because they appear to back up U.S. measures taken to combat terrorism. So, for example, criticism of the United States has subjected outspoken protesters to police investigation. Criticism of Canada's complicity with U.S. policy in Guantánamo, seen as Canada has visibly handed captives over to the U.S., has combined with allegations of Canadian participation in (or at least a failure to object to) the deportation of one of its own nationals to Syria where he was tortured. In both cases, serious questions have been raised in Canada about whether Canada has been too willing to follow the United States into international activities that violate human rights. Meanwhile, Canada has been pressured by the U.S.—with the criticism that Canada has not done enough to stop terrorism—into increasing border security, tightening its own immigration policies, and generally cracking down on terrorism. In December 2003, Canada created a new Department of Public Safety and Emergency Preparedness, complete with its own minister, to coordinate security and emergency policy in a move reminiscent of the drive to create the U.S. Department of Homeland Security.

In spring 2004, Canada produced a white paper outlining its plans for a new National Security Policy, dealing not only with the threat of international terrorism but also with health emergencies like SARs, natural disasters, and other disruptive events. The proposal outlined a new institutional infrastructure for Canadian security policy, one that proposed better coordination of counterterrorism efforts. But, significantly, the plan

---

133 ROACH, SEPTEMBER 11, supra note 110, at 12.

134 Id. at 13.


also included increased democratic accountability of counterterrorism efforts by including a Cross-Cultural Roundtable on Security to involve Canada’s affected minorities as well as a new panel of experts outside government and a new oversight committee of the Parliament. The general thrust of the plan was to bring more parties into the overall planning of security policy, to ensure greater coordination of effort, and to put out in the open the structures and rules for handling threats from terrorism, among other potential dangers.

While the U.S. and Canada both reacted with new laws and new policies to the heightened threat of terrorist attacks after 9/11, the U.S.’s policies have been far more draconian, far less likely to be based on statutory enactment, more likely to concentrate powers in the executive branch, and, in general, far more aggressive than Canada’s. In Canada, post-9/11 legislation was “Charter proofed” before enactment, which meant that all legislation was vetted in the Department of Justice to ensure it complied with the government’s understanding of what the new Canadian Charter of Rights and Freedoms required. While Charter proofing has its critics, it is surely far better for a government to attempt to comply with the Constitution than either to ignore it or to claim that executive powers swallow the rest in a time of crisis.

5. Conclusions

Despite the many similarities between the U.S. and Canada, the history of emergency powers shows that the previously common ground has eroded. In times of crisis, the U.S. government has shown itself willing and able to take extraordinary measures to meet the threat. Canada showed the same pattern throughout most of its history, but post-Charter actions have diverged from this path. The U.S. and Canada had previously evinced similar reactions in international crises before 9/11, but they are taking different paths now.

While it is always impossible to know just what causes differences between two cases confronted with a single common episode, I believe that the Canadian constitutional revolution of the 1980s has produced a very different sensibility about the rule of law, the possibility of exception from it, and the extent to which all governmental power in Canada is to be held accountable to constitutional principles. The U.S. has had no comparable constitutional revolution around its uses of emergency powers. Instead, the U.S. approach is to control excesses in emergency powers through statute, largely after the fact, which has invited the executive to claim the superior ground of the president’s article II powers, as, in fact, presidents from Lincoln to

Roosevelt to Nixon have done before the present post-9/11 moment. And, as President Bush is doing now.

But some have argued that the U.S., in fact, has improved at responding to crises—that the emergency measures taken after 9/11 are less extreme than those taken in response to earlier threats. One such argument can be found in Geoffrey Stone’s recent book Perilous Times.139 Stone traces assaults on dissent and free speech through U.S. history and claims that the general trajectory of U.S. reaction has been toward increasing tolerance of dissent and decreasing restrictions of speech in crises, including after 9/11. Jack Goldsmith and Cass Sunstein have argued much the same with respect to military tribunals140—that the public criticism of the Bush military tribunals, when they are compared with those established during World War II by President Roosevelt, shows an increased national sensitivity to deviations from normal forms of justice. If Stone and Goldsmith and Sunstein are right, then that would point to an improvement in America’s constitutional sensibility, something that would be visible after 9/11. If that were the case, then perhaps the U.S. would be closer to Canada than my review would make it appear.

A closer review of these arguments, however, shows that they are not fundamentally inconsistent with mine. It may well be that the U.S. government no longer punishes critical speech and principled dissent as it used to; my arguments about 9/11 concern the other strategies that the government is using, such as bypassing Fourth Amendment warrant requirements, avoiding trying people suspected of terrorism in ordinary courts, and finding ways to hold them indefinitely without legal process. Restrictions on speech and dissent may have improved in crises, but that does not mean that other restrictions have not remained the same or possibly become worse. Similarly, Goldsmith and Sunstein argue on the facts of reaction exactly as I do—that American strategies for coping with crises have not changed. Both Roosevelt and Bush resorted to military tribunals. It is only the changed reactions of the public that Goldsmith and Sunstein highlight as a difference between the World War II measures and those of today. But the current criticisms have not stopped the assertion of plenary executive power.

Similarly, on the Canadian side, official reactions to 9/11 have been greeted with a sense that Canadian values have been sacrificed to fight the war on terrorism. Kent Roach, writing shortly after 9/11 and the passage of the ATA, observed, “My fear is that September 11 is driving us towards Americanized criminal justice and foreign policies that depart from Canadian

values and traditions.141 The ATA, taken alone, may have caused many rights-defending Canadians to believe that their newfound constitutional progress had been sacrificed. Several years later, however, it has become clear that the draconian new laws were barely used and that they might be allowed to sunset peacefully without ever having been invoked in the light of day.

To assess whether the U.S. and Canada are following along their previous paths or deviating from them, we need to examine not only individual strands of constitutional concern and not only public outcry but we also need to look and to see where the action is in the invocation of draconian practices. If one scans across the horizon of actions that the U.S. and Canada have taken after 9/11, something profound has changed in Canada since the October crisis of 1970, when the Canadian government called out the military in Québec, while much less has changed in the U.S. since the reforms of the 1970s, after the disclosure of abuses under FBI Director J. Edgar Hoover and President Richard M. Nixon. This should not be surprising. Canada entrenched its reform ideas in a new Constitution while the U.S. patched up its old Constitution with reform statutes that have been easily diluted by disuse or overcome by article II constitutional trumps.

As a result, the U.S. is still fundamentally operating under the old martial law framework inherited from Britain. Martial law is not considered proper law, and yet the executive has always felt free to use it when crisis strikes. Canada, with its longer and deeper ties to Britain, has managed with its recent constitutional revolution to throw off this martial law heritage and has attempted to bring the use of emergency powers more firmly within constitutional control. Of course, American presidents have often behaved better than this, and some Canadian governments have pushed Charter challenges to the limit. There will still be variation on each side of the 49th parallel. In the main, however, we can now say that what used to be a common framework for North American emergencies no longer exists.