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STRENGTHENING NORTH AMERICAN PERIMETER SECURITY: AN ANALYSIS OF UNITED STATES AND CANADIAN IMMIGRATION AND REFUGEE LAWS AND THE COLLABORATION REQUIRED TO HARMONIZE THOSE LAWS

By: Adam Centner

"If long-term enemies like France and Germany can establish a common perimeter around Europe, surely long-term friends like Canada and the United States can establish one in North America.”
— Fred McMahon

I. INTRODUCTION

The United States and Canada are the largest trading partners in the world. Every day, almost two billion dollars worth of goods and services cross the United States-Canada border. Yet, in the decade since September 11, the flow of trade across the border has been restricted by tighter and tighter security controls, imposed primarily by the United States.

The North American perimeter security concept aims to facilitate trade across the border while maintaining the necessary national...
security measures to keep both countries safe. This concept would essentially eliminate barriers to the movement of people and goods across the shared border by relocating inspections and enforcement activities to continental ports of entry. Implementing such a concept would require a great deal of coordination and collaboration between American and Canadian officials in a number of areas, including immigration and refugee laws. The United States and Canada have a history of working together successfully on issues ranging from trade and travel to national security.\(^5\) They have also experienced failed attempts to negotiate and compromise.\(^6\) Disagreement is inevitable, but differences must be overcome to implement the North American perimeter security concept.

This article will analyze the various immigration and refugee laws of the United States and Canada identifying areas where they diverge and could thus be problematic when implementing the North American perimeter security concept. For example, the United States and Canada have drastically different rules governing how refugee claimants are treated upon entry into the country.\(^7\) Whereas the United States focuses on security before acceptance,\(^8\) Canada does the opposite, allowing claimants to travel freely pending their court date.\(^9\) Divergent views on balancing security versus personal rights is a common theme when comparing the immigration and refugee laws of both countries.

The American and Canadian laws have significant differences not only regarding refugees, but visitor visas\(^10\) and travel documentation

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6. Id.


requirements, too. However, the challenges these differences present are not insurmountable. In order to effectively open the border and facilitate the flow of trade, each country must compromise in an effort to soothe the other's concerns. For the United States, this means giving more consideration to humanitarian and individual rights, and for Canada this means respecting the United States' security concerns. Again, there have been past successes, but this article discusses a recent failure that may demonstrate unwillingness, on the part of both countries, to bend far enough for the other. In sum, complete coordination and harmonization of U.S. and Canada immigration and refugee laws is possible, but unlikely.

This article has two main sections. Part III discusses the immigration and refugee laws of both countries, provides examples of prior United States-Canada collaboration, and analyzes the areas of immigration and refugee laws where harmonization is needed. Part IV discusses potential problems in harmonizing said laws then examines a recent failed attempt at collaboration between the two countries and summarizes the lessons learned from that experience.

II. FACTUAL BACKGROUND

In October 2000, United States Ambassador to Canada, Gordon Giffin, noted that border management policies were becoming outdated and could not keep up with the rapid trade growth. He suggested a perimeter approach to border management, which would require the United States and Canada to harmonize many of their policies to create a continental perimeter around the two countries. Then came September 11, 2001. Overnight, the goal shifted from facilitating trade by creating an open border to creating the open


11. Id.
15. Id.
border only if the national security concerns of both countries were met first.

In the days and weeks following September 11, the United States and Canada were still in shock. For many Americans, there could not be too much protection. In the wake of the attacks, both countries intensified security measures and put national security interests ahead of everything else. Because of the increased security, traffic wait times at the United States-Canadian border often exceeded fifteen hours.

Within days of the attacks, both Daimler-Chrysler and Ford announced that they would have to temporarily shut down several U.S. assembly lines because parts made in Canada were stuck in traffic at the border.

Fast forward to 2012. Each minute, nearly one million dollars in goods and services cross the 5,525-mile United States-Canada border. Every day, this means that more than 300,000 people and $1.6 billion of goods and services make the trek from Canada to the United States, and vice versa. The United States and Canada operate what is often described as the “largest open border in the world.” More than seventy million people and thirty-five million vehicles cross the border each year. The United States consumes more than 70% of Canadian exports and Canada is the largest export market for at least thirty-six of the fifty U.S. states. In 2009, the services trade between the United States and Canada reached $64 billion.


19. *Id.* at 529.


billion, and in 2010, the two countries traded $525 billion in goods.\textsuperscript{25} Clearly, this is an important relationship for both countries, economically and otherwise.

The North American perimeter security concept will aim to expedite the flow of traffic across the border in an effort to facilitate trade and travel while maintaining national security interests. Unfortunately, the current border system is slow and costly, thus hindering the movement of people and goods. The perimeter security concept would essentially remove barriers at the shared border and instead focus on enforcement and prevention at continental points of entry.\textsuperscript{26} If implemented, a person could land at Calgary International Airport, go through the necessary immigration and travel checks, and then travel freely throughout Canada and the United States. If that person is a trucker for Ford Motor Company or a tourist from London, this is advantageous. With the open border, they can easily travel around the United States and Canada without long delays and extensive scrutiny by border control agents. But if that person is an al-Qaeda operative from Swaziland, such freedom of movement is a nightmare for United States and Canadian national security officials.

While the economic interests of both countries favor an open border, the security interests favor a closed border.\textsuperscript{27} To be effective, the North American perimeter security concept must accommodate both. This would require many American and Canadian laws and policies to be harmonized, including those that concern immigration and refugees.

\section*{III. Immigration and Refugee Laws of the United States and Canada}

Immigration is central to the composition and identity of both the United States and Canada. Both countries have immigration policies that seek to enhance and expand their populations, geographical frontiers, and labor markets; reunite families; protect the persecuted and displaced; and admit temporary workers to supplement their labor force during shortages.\textsuperscript{28} However, these policies differ slightly in


\textsuperscript{26} Koslowski, \textit{supra} note 18, at 527 (stating that internal border controls would be lifted and would be replaced by external controls).


their goals and outcomes. In 2010, the United States admitted 66.3% of immigrants under family sponsorships and only 14.2% for employment-based purposes. In the same year, Canada admitted only 18.2% of immigrants under family sponsorships and 69.3% for economic purposes.

U.S. immigration law stems from a number of sources. Article I, Section 8, Clause 4 of the United States Constitution provides Congress the power to "establish a uniform rule of naturalization." Today's basic body of immigration law is the Immigration and Nationality Act of 1952, which has undergone significant and routine amendments. The 1986 Immigration Reform and Control Act regulates employers and cracks down on the use of illegal labor. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 strengthens border control, creates stiffer penalties for immigration violations, improves enforcement, and allows for better apprehension and removal of illegal aliens. After September 11, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, more commonly known as the USA PATRIOT ACT. This Act provides for more thorough background investigations, of immigrants and non-immigrants, and improves the government's ability to track foreign nationals within the United States. Finally, the Homeland Security Act of 2002 created the Department of Homeland Security, which serves as an umbrella organization to protect the United States by responding to terrorism, accidents, and natural disasters. Though

35. See section 1357(f) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (providing for fingerprinting and photographing of all aliens age fourteen or older against whom "a proceeding is commenced under section 240").
spread across many different acts and regulations, regulating immigration is solely a function of the federal government. In Fiallo v. Bell, the Supreme Court stated, “Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”

Canada derives its immigration law from multiple sources as well, including the two documents that comprise Canada’s Constitution: the British North America Act and the Canadian Charter of Rights and Freedoms. The British North America Act grants Parliament power over “naturalization and aliens,” while the Charter establishes fundamental rights and freedoms. Interestingly, the Charter grants “[e]veryone . . . the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.” In Singh v. Minister of Employment and Immigration, the Canadian Supreme Court held that “everyone” applies to all persons on Canadian soil, including illegal aliens. Canada’s primary immigration law is the Immigrant and Refugee Protection Act (“IRPA”), which was passed in 2002. IRPA provides the legal framework for all of Canada’s immigration policies, including entry, refugees, enforcement, and documentation. Its top-listed objective is to “permit Canada to pursue the maximum social, cultural, and economic benefits of immigration.”

A. Prior Successful Coordination and Collaboration Between the United States and Canada

In a 1938 speech at Queen’s University in Ontario, United States President Franklin D. Roosevelt stated, “The Dominion of Canada is part of the British Empire. I give to you assurance that the people of the United States will not stand idly by if domination of Canadian

39. See de Eyre, supra note 38.
40. Id.
41. Part I of the Constitution Act (Can.).
43. Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).
44. Id.
45. Id. § 3(1)(a).
soil is threatened by any other empire.\textsuperscript{46} Canadian Prime Minister William Lyon Mackenzie King responded, "We too have obligations as a good and friendly neighbor and that enemy forces should not be able to pursue their way either by land, sea, or air to the United States cross Canadian territory."\textsuperscript{47}

In the almost seventy-five years since Roosevelt's speech, the United States-Canada relationship is still strong and committed. The two countries have worked together on many defense-related initiatives, including the North Atlantic Treaty Organization, or NATO,\textsuperscript{48} and the North American Aerospace Defense Command, or NORAD.\textsuperscript{49} Additionally, during the Cold War they created the Canada-U.S. Defense Production Sharing Arrangement of 1956 in which Canadian firms could compete with American companies in the production of sensitive technologies without export controls between the two countries, despite the controls still applying to all other countries.\textsuperscript{50} More recently, Integrated Border Enforcement Teams were created in 1996 to facilitate the daily cooperation and information sharing of law enforcement and intelligence agencies.\textsuperscript{51}

The United States and Canada have also collaborated with regard to immigration in recent years. In 2002, the countries instituted the NEXUS program.\textsuperscript{52} This program allows low-risk, prescreened border residents and frequent cross-border travelers to access NEXUS lanes and expedited processing with minimal inspection at airports,

\textsuperscript{46} Franklin Delano Roosevelt, President of the United States, Address at Queen's University Kingston, Ontario, Canada (Aug. 18, 1938), available at http://www26.us.archive.org/download/representativeam009708mbp/representativeam009708mbp.pdf; see also Noble supra note 14, at 466 (quoting President Franklin D. Roosevelt in the course of describing historic United States-Canada relations).

\textsuperscript{47} Noble, supra note 14, at 466 – 67.

\textsuperscript{48} Id. at 463.

\textsuperscript{49} Id.


\textsuperscript{51} Noble, supra note 14, at 471 ("There are six core partner agencies involved with the IBET: RCMP, Canada Customs and Revenue Agency, Citizenship and Immigration Canada, U.S. Border Patrol, U.S. Customs Service, and U.S. Coast Guard.").

\textsuperscript{52} 8 C.F.R. § 212.1(a)(1)(i); see generally U.S. CUSTOMS & BORDER PRO & U.S. DEP’T OF HOMELAND SEC., FACTSHEET: NEXUS (2012).
waterways, and land crossings. After being approved, new NEXUS travelers are issued a radio-frequency identification, or RFID tag, which is a wireless device that uses electromagnetic fields to transfer data for the purpose of identification or tracking. When the tag is scanned, the traveler's background information and picture appear on a computer screen for an inspector, who verifies the identity of that person and allows him or her to pass. Even one criminal conviction, warrant, or customs violation will result in disqualification. The process is simple but effective, a quintessential example of the smart borders approach.

The NEXUS program demonstrates a mutual commitment both countries have to facilitating the movement of people and goods while maintaining security. Both countries recognized the benefits of expediting border crossings for frequent travelers and were able to agree on the degree of scrutiny applicants must submit to. As of March 2012, 650,000 people are enrolled in the NEXUS program, and the program is in place at nineteen border crossing locations. Though NEXUS is often hailed as a successful program, physical infrastructure problems sometimes prevent its goals from being realized. For example, traffic congestion on the Ambassador Bridge often blocks NEXUS lanes, forcing approved travelers to sit in traffic with everyone else until reaching the NEXUS lane. The same level of cooperation is required for the United States and Canada to harmonize immigration laws and further open the border.

In further response to September 11, the two governments also worked together to create the Canada-United States Smart Border

53. U.S. Gov’t Accountability Office, supra note 13. A similar program is also in place for commercial goods and truck drivers; Smart Border Declaration and Action Plan, Gov’t of Can., http://www.publicsafety.gc.ca/prg/le/bs/sbdap-eng.aspx (last modified Mar. 5, 2008). Known as Free and Secure Trade (FAST), the program allows low-risk commercial items and drivers to cross the border more efficiently because of pre-approval and streamlined documentation. ABA Immigration & Nationality Comm., supra note 16, at 226.

54. Koslowski, supra note 18, at 530.

55. Id.

56. ABA Immigration & Nationality Comm., supra note 16, at 228.


58. Koslowski, supra note 18, at 531.

59. Id. In fact, despite a significantly larger population in and around the Detroit-Windsor region, there are actually more NEXUS participants at the Blaine, Washington crossing, as traffic is just too congested near Detroit.
Declaration ("Declaration"). The Declaration was signed with the intent of intensifying collaboration and coordination between the two countries in an effort to develop new approaches to protect the public and bolster economic security. It contains an action plan with four pillars to combat cross-border threats and develop a "zone of confidence" against terrorism: (1) the secure flow of people; (2) the secure flow of goods; (3) secure infrastructure; and (4) coordination and information sharing in the enforcement of these objectives. By the time representatives met to review each country's progress only months later, the four pillars had extended into a thirty-point action plan.

While the revised Smart Border Declaration is a good vehicle for opening conversation on cross-border cooperation between the two countries, it is not always regarded as a success. This is due, in part, to provisions calling for reviews or negotiations, which are frequently postponed or ultimately accomplish little. However, these types of arguments often sell the Declaration short. First, it is successful in that it keeps important issues on the table and affirms each country's commitment to working with the other. Second, there are a number of recent developments arising out of the Declaration, including two action plans signed by U.S. President Barack Obama and Canadian Prime Minister Stephen Harper in December 2011. Several of the

60. See also id. at 530.


63. Id.

64. Rudolph, supra note 27, at 443 (describing both countries' lack of effort to harmonize policies).

65. Deborah Waller Meyers, Does "Smarter" Lead to Safer? An Assessment of the US Border Accords with Canada and Mexico, 41 INT'L MIGRATION 5, 16 (2003) ("... the agreement lacks a component detailing an overall future vision of the border and the steps needed to get there.").

66. GOV'T OF CAN., PERIMETER SECURITY AND ECONOMIC COMPETITIVENESS ACTION PLAN 34-38 (2011); GOV'T OF CAN., REGULATORY COOPERATION COUNCIL JOINT ACTION PLAN 27-28 (2011). These action initiatives include the Action Plan on Perimeter Security and Economic Competitiveness, which focuses on addressing threats, economic growth,
other Declaration points relate directly to immigration policy, and they will be discussed in the sections below.

B. Refugee and Asylum Policies

When it comes to harmonizing immigration laws, no area may be more affected by ideology and political consideration than refugee and asylum policies. In 2010, the United States received 55,000 refugee and asylum claimants, making it the largest single recipient of refugee claims in the world. Canada was fifth with 23,200 claimants despite the United States having a population nine times that of Canada.

There is often a perception in the United States, if not an observation, that Canada’s immigration laws are relatively lax. For U.S. officials, this creates great concern. Canada’s immigration and refugee policies appear to be based on four ideals, in order of

integrated law enforcement, and protecting infrastructure and cybersecurity, and the Action Plan on Regulatory Cooperation, which aims to reduce barriers to trade and lower costs for consumers and businesses.

67. Rudolph, supra note 27, at 444 (“At issue is whether or not Canada is “soft” on refugee and asylees, and both the ideational and political obstacles to policy change in this area to conform to American desires for increased security.”). The Refugee Convention forbids member nations from returning to his or her country of nationality any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” G.A. Res. 2198 (XXI) U.N. GAOR, 21st Sess., U.N. Doc. A/2198, at 14 (Dec. 16, 1966). Canada and the U.S. accept refugees from U.N.-designated countries as well as those who have already arrived in North America. Both countries have complained that because of recent case law, the definition of “refugee” has broadened and the line between those seeking refugee status due to persecution and those who are simply seeking economic rewards has blurred significantly; Rekai, supra note 28, at 12-13.


69. Id. Whereas the U.S. saw its applications increase by 13% from 2009, Canada’s refugee claimant applications decreased by 30%. Id. at 6. In July 2012, the United States will have a population of roughly 313 million, whereas Canada will have a population of just thirty-four million. The World Factbook: North America, https://www.cia.gov/library/publications/the-world-factbook/wfbExt/region_noa.html (last updated Nov. 14, 2012) (estimating Canada’s population at 34,300,083 and the U.S. population at 313,847,465 as of July 2012).

70. Rekai, supra note 28, at 13.
importance: (1) maximizing the economic gains from migration; (2) upholding Canada’s liberal humanitarian tradition; (3) facilitating the social integration of new immigrants; and (4) border control as a component of national security.\textsuperscript{71} In 2003, a report authored by the U.S. Federal Research Division named Canada a nation “hospitable to organized crime and terrorism.”\textsuperscript{72} The report even stated that “Canada has played a significant role as a base for both transnational criminal activity and terrorist activity.”\textsuperscript{73} This perception may stem from its refugee and asylum policies, which were specifically discussed in the Report.\textsuperscript{74} Aspects of Canadian refugee policy that are frequently criticized include its high rates of approval, generous social welfare system, infrequent prosecution, and lagging deportation procedures.\textsuperscript{75}

In both countries, each refugee claimant is subject to interviews, photographs, fingerprints, hearings, background checks, and possible lengthy detention.\textsuperscript{76} The Refugee Convention incorporates the concept of non-refoulement, which allows member states to return refugees who pose a threat to national security. This provision relieves countries from having to weigh their obligations under the Convention against their national security objectives.\textsuperscript{77} However, much to the chagrin of the United States, these provisions are about as far as Canada’s policies go in putting national security interests above humanitarian interests.

Despite having a similar refugee acceptance rate to the United States, Canada has several policies that stand in stark contrast to traditional national security-oriented goals.\textsuperscript{78} Most concerning of these

\textsuperscript{71} Rudolph, \textit{supra} note 27, at 448.


\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.} at 147.

\textsuperscript{75} See Rudolph, \textit{supra} note 27, at 444-445.

\textsuperscript{76} Rekai, \textit{supra} note 28, at 15.


\textsuperscript{78} See Noble, \textit{supra} note 14, at 510-11. There appears to be some disagreement as to the accuracy of various sources reporting on the refugee acceptance rates of the U.S. and Canada. Noble claims that the U.S. accepts 37% of applicants and Canada has a 41% acceptance rate, but he also notes that the U.N. High Commission on Refugees has placed the U.S. acceptance rate at 34.9% and the Canadian acceptance rate at 57.8%. Another source, Noble notes, has argued that the U.S. rate is closer to 60% when second stage applicants are accepted. The Canadian government claims that the acceptance rates are identical. \textit{Id.}
policies, from a U.S. perspective, is Canada's reluctance to detain refugee applicants pending adjudication.79 Fred McMahon of the Fraser Institute, a Canadian public policy think tank, put it bluntly, "Illegitimate refugees—or terrorists—can destroy their identification papers on a flight to Canada, arrive at customs without papers, claim refugee status, and be out on the streets a few hours later." Canadian law does permit the interim detention of refugee claimants who are considered threats to the public or a flight risk, but the lack of intelligence and suitable detention facilities have limited the actual number of detentions.81 For these reasons, only five percent of refugee claimants are detained once they arrive on Canadian soil and the remainder are released into Canadian society.82 Unsurprisingly, thousands fail to appear for their court dates each year and the government has little ability to track them.83 Further, refugee claimants have full access to employment and social entitlement programs while their claims are pending.84 A landmark 1985 Canadian Supreme Court case held that the Canadian Charter of Rights and Freedoms grants every person, including refugee claimants, all the privileges of citizenship except the right to vote.85 Joe Bissett, former executive director of the Canadian Immigration Service, criticized his country's own laws stating, "We have the most generous refugee system in the world. Much too generous."86

79. See generally Rudolph, supra note 27, at 444.

80. McMahon, supra note 1, at 1. A Fraser Institute Study suggested that "Canada's refugee-determination system and migration-control policies are out of step with what appears to be a clear convergence of policies and practices in the developed world." Stephen Gallagher, Canada's Dysfunctional Refugee System, 78 PUB. POL'Y SOURCES 1, 5 (2003).


82. Canada Detention Profile, GLOBAL DET. PROJECT, (last updated July 2012), http://www.globaldetentionproject.org/countries/americas/canada/introduction.html ("According to CBSA statistics, on 22 April 2010 there were 510 people in detention [. . . ], representing a fraction of the nearly 9,500 people detained during FY 2009-2010.")

83. Rekai, supra note 28, at 13. One 2005 estimate stated that only about 9,000 people are removed from Canada each year, and the government has lost track of some 36,000 refugee claimants that were to be deported in the prior six years. James Bissett, CTR. FOR IMMIGRATION STUDIES, Canada's Asylum System: A Threat to American Security?, Backgrounder May 2002, at 5; BERRY supra note 72, at 148; see also Rudolph, supra note 27, at 445.

84. de Eyre, supra note 38, at 190.


86. 1 HOMELAND SECURITY: PROTECTING AMERICA'S TARGETS 65 (James J. F. Forest ed. 2006).
In the wake of September 11, Canada did tighten some of its refugee and asylum laws through IRPA.87 Amongst the reforms therein is a provision mandating screening of refugee claimants by the Canadian Security Intelligence Service upon arrival, the creation of nine factors as grounds for immediate deportation, and greater penalties for immigration offenses.88 However, some have noted that even in the title of these reforms, the Immigrant and Refugee Protection Act, protection and wellbeing of refugees takes priority over the security concerns.89 In the eight objectives of the refugee system listed in IRPA, the first six concern solely the wellbeing of the refugee. Only the final two deal with the security of the Canadian people.90 Observers argue that this mirrors Canada’s priorities in putting individual rights over collective security.91

In contrast to the Canadian refugee system, U.S. refugee and asylum policies are much stricter, placing priority on homeland security. Upon entering the United States, the refugee claimant is detained pending adjudication.92 The 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA") bars refugee claimants from seeking employment for six months following their application.93 Additionally, unlike Canada, the United States has instituted an expedited removal system that facilitates the rapid detention and/or removal of persons who lack the proper immigration or travel documentation.94

In the Smart Border Declaration, the United States and Canada pledged to "review refugee/asylum practices and procedures to ensure that applicants are thoroughly screened for security risks and take necessary steps to share information on refugee and asylum claimants."95 In addition, the United States and Canada have signed a Statement of Mutual Understanding ("SMU") on Information

87. See Immigration and Refugee Protection Act (Can.).
88. Id.
89. Rudolph, supra note 27, at 447.
90. See Immigration and Refugee Protection Act, §2(a)-(h) (Can.).
91. Rudolph, supra note 27, at 448.
92. Id. at 444.
93. Id. at 444-445.
94. Id.

Sharing.96 This is a critical instrument in the effort to ensure safe travel between the countries. Though the SMU on Information Sharing does not change the law of either country, it does allow one country to share information with the other if: (1) there are reasonable grounds to believe that the information would be relevant to the administration or enforcement of immigration laws; (2) there are reasonable grounds to believe the information would be relevant to the prevention, investigation, or punishment of criminal conduct; and (3) the information is to be used for statistical or research purposes.97 The SMU on Information Sharing is a broad approach, as it allows a wide scope of information to be shared, including the traveler’s name, description, birth date, work history, addresses, education, relevant criminal and security information, and itinerary.98

The Safe Third Country Agreement is another collaborative effort between the United States and Canada in the realm of refugee reform. The Agreement took effect in late 2004 and requires refugee claimants to make a claim in the first country they arrive in, unless an exception applies.99 Its purpose was four-fold:

(1) enhance the orderly handling of refugee claims;
(2) strengthen public confidence in the integrity of the refugee systems;
(3) reduce abuse of both countries’ refugee and asylum programs; and
(4) share the responsibility of providing protection to those in need.100

Because the flow of refugees entering Canada from the United States is significant, but the flow from Canada to the United States is quite small, the Safe Third Country Agreement was an important measure for Canada.101 During a U.S. House of Representatives Judiciary Committee hearing, a Department of State representative

97. Id.
98. Id.
99. de Eyre, supra note 38, at 191.
101. Rudolph, supra note 27, at 448.
commented that the Agreement is something “... Canada wants and that we are willing to agree to as a trade-off for other important counterterrorism measures.”

Though there is a history of collaboration between the United States and Canada on immigration and refugee laws, completely harmonizing these laws will not be easy. The Canadian government has explicitly stated that humanitarian concerns are at the core of its refugee program. Though it is unlikely that the United States government would contest the notion that persecuted individuals deserve a fair opportunity to seek refuge, the United States will probably take issue with Canada’s policy of releasing refugee claimants pending adjudication. Given that anyone could theoretically enter Canadian soil, claim refugee status, and then travel as they please pending their court date, it will probably not agree to an open border until Canada restricts this freedom.

Because neither country appears willing to completely appease the other, both will have compromise. This could be accomplished by implementing an assortment of the following:

(1) Canada could:

(a) institute more rigid security checks on claimants;
(b) exercise with more frequency its ability to detain claimants who are deemed a potential threat because of personal history, native country, known associations, etc.;
(c) develop a system to track claimants and institute harsher penalties for those who fail to appear;
(d) shorten the period between a refugee’s entry and his or her court date.

(2) The United States and Canada could develop a better information sharing system through which each would share information the entry, whereabouts, and known history of claimants.

Though none of the above are certain to eliminate threats to national security, and each impinges upon a refugee claimant’s freedom, these suggestions do provide a start at finding a compromise in the refugee laws. Suggesting that one country completely acquiesce to the interests of the other is unrealistic, but working together to

102. Id.
find middle ground will increase the likelihood of the North American perimeter security concept being implemented.

C. Visitors, Temporary Entrants, and Visa Waiver Countries

Depart Sydney and land in New York City. Step off the airplane, walk down the jet bridge, briefly speak to the customs agent, pick up your baggage, and welcome to the United States of America.

The interview and entry process for a tourist from a visa-exempt country to the United States or Canada can be measured in minutes.\textsuperscript{104} If there is a weak link in North American border security, this is it. In 2000, the United States admitted almost 30 million visitors \textit{excluding Canadians and Mexicans}, roughly thirty times the number of new permanent residents and refugee or asylum claimants combined.\textsuperscript{105} In the same year, Canada admitted 4.4 million visitors, excluding Americans, twenty times its intake of permanent residents and 100 times the number of refugee claimants.\textsuperscript{106} Not only do majority of foreign nationals come to North America as visitors or temporary entrants, but they are allowed to do so with very little scrutiny.

To gain admission into the United States or Canada from a country not enrolled in the U.S. Visa Waiver Program or Canada's Visitor Visa Exemption, a foreign national must obtain a formal visitor visa from a U.S. or Canadian consular post abroad. This process takes minutes once the application is completed.\textsuperscript{107} To gain admission from a visa-exempt country, a foreign national need only board an airplane and present themselves to the customs agent in their destination country.\textsuperscript{108} There are two distinct differences between the requirements imposed upon nationals from exempt countries and non-exempt countries who wish to enter North America. Non-exempt nationals must: (1) identify themselves at an American or Canadian consular officials in their home country prior to arrival and (2) fill out visa application forms prior to departure from their home country.

To qualify for participation in the U.S. Visitor Waiver Program, a country must meet various security requirements, such as enhanced

\textsuperscript{104} Rekai, \textit{supra} note 28, at 15.

\textsuperscript{105} Id. Including Canadians and Mexicans, the U.S. admitted 59,745 million visitors; see also \textit{Trends in International Arrivals to the U.S., POWER OF TRAVEL}, \textit{available at} \url{http://www.poweroftravel.org/international/trends_arrivals.htm} (last visited Mar. 26, 2012).

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id.
law enforcement and data sharing.\textsuperscript{109} Simply put, the United States Visa Waiver Program exists to facilitate travel from trusted allies, but only after security precautions are met.

While the United States and Canada have similar requirements for participation in their respective visa exemption programs, the problem lies in the number of admitted countries. Canada has granted visitor visa exemptions to sixty-four countries,\textsuperscript{110} but there are only thirty-six countries participating in the U.S. Visa Waiver Program.\textsuperscript{111} Clearly, this is an area where much energy will need be focused to achieve harmonization. Unfortunately, there is no room for disagreement on this issue; the United States and Canada must agree on each and every country that is granted visa exemption. For example, Canada has granted a visitor visa exemption to Swaziland, but the United States has not. With an open border and no harmonization, a Swazi national could enter Canada without presenting a visa and then freely enter the United States. Because the United States has not granted a visa exemption to Swaziland, it does not want Swazi nationals entering the country without first filling out a visa application and speaking to a consular official abroad. Therefore, the United States will not want Canada to allow Swazi nationals to enter without a visa, either. Like other differences in American versus Canadian immigration and refugee law, the United States bases admission to its visa exemption program on safety concerns, admitting only countries that have sufficient security and counterterrorism measures. Conversely, Canada bases admission on other characteristics, namely historical ties and strong trading relationships.

In the Smart Border Declaration the United States and Canada pledged to “initiate joint review of respective visa waiver lists and share look-out lists at visa issuing offices.”\textsuperscript{112} While acknowledging the discrepancy is a start, the two nations have moved no closer to compromising on this issue than they were when the Declaration was signed, as competing concerns have hindered negotiations. Reconciling these lists will be quite a task, to say the least. In 2002, the United States actually considered doing away with the visa exemption altogether, so doubling the number of visa-exempt countries seems

\begin{itemize}
\item \textsuperscript{110} \textit{Countries and territories whose citizens require visas in order to enter Canada as visitors}, CITIZENSHIP & IMMIGRATION CAN., \textit{available at} http://www.cic.gc.ca/english/visit/visas.asp\#exemptions (last updated Sept. 11, 2011).
\item \textsuperscript{111} U.S. DEP'T OF STATE, \textit{supra} note 109.
\item \textsuperscript{112} THE WHITE HOUSE, \textit{supra} note 95.
\end{itemize}
improbable.\textsuperscript{113} Canada, on the other hand, would likely have difficulty reducing its list, as the reasons it admitted of many countries are not trivial. While some were admitted because of Canada's historical ties to the British Commonwealth, others were admitted for their economic value based on major tourist flows and strong business relationships.\textsuperscript{114} Still, if the border is to be removed and completely open to the free flow of people and goods, the visa exemptions will need to be identical for the United States and Canada.

To facilitate the harmonization process, the United States should begin to work with the twenty-eight countries admitted to Canada's visa exemption program to bring their security and counterterrorism measures up to U.S. standards. While this process will likely take a significant amount of time and ultimately result in more visitors to the United States, it will also allow the United States to use the Visa Waiver Program as a carrot to encourage those countries to remain vigilant law enforcement and counterterrorism allies. For its part, Canada will likely have to make some hard decisions by removing countries from its Visitor Visa Exemption list. However, if successful, both the United States and Canada will benefit greatly from harmonization on this issue.

\textit{D. Travel Documentation}

A final area of immigration and refugee law that requires harmonization is travel documentation. The United States and Canada would have to agree on what documentation foreigners and returning nationals need present to enter or re-enter their destination country, a far simpler task than the aforementioned challenges.

Currently, the United States allows American and Canadian citizens to present a NEXUS card or passport for entry or re-entry.\textsuperscript{115} Foreign nationals entering the United States must present a passport and a valid visa, unless they are entering from a visa exempt country, in which case a passport alone is acceptable.\textsuperscript{116} Lawful permanent residents are required to present their permanent residence card or other evidence of permanent residence.\textsuperscript{117} For entry or re-entry into

\begin{itemize}
  \item \textit{See} U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-38, IMPLICATIONS OF ELIMINATING THE VISISTA WAIVER PROGRAM (2002).
  \item de Eyre, supra note 38, at 195; Koslowski, supra note 18, at 543.
  \item \textit{Western Hemisphere Travel Initiative, U.S. CUSTOMS & BORDER PROTECTION}, http://www.getyouhome.gov (last visited Mar. 26, 2012) (applies to citizens entering or re-entering the U.S. from overseas, as the border with Canada would, for all intents and purposes, not exist).
  \item Id.
\end{itemize}
Canada, an American or Canadian need only present a valid form of identification, such as a NEXUS card, passport or even an enhanced driver's license.\textsuperscript{118} Similarly, before entering Canada, non-Canadian and non-American travelers must present a passport and a visa, if necessary, and permanent residents of the United States or Canada must present a permanent residence card.\textsuperscript{119}

For the most part, the United States and Canada have already harmonized their travel documentation requirements. For example, both agree that NEXUS cards and passports are acceptable documents for American and Canadian citizens to enter or re-enter either country.\textsuperscript{120} Only minor differences, such as the United States' resistance to accepting enhanced driver's licenses, remain. Unlike their refugee and asylum policies or visa exemption programs, American and Canadian travel documentation requirements can be harmonized with ease. Only minor revisions to current laws and process will be required, chiefly because there are so few discrepancies. For this same reason, the costs associated with modifying documentation requirements would be relatively low. Finally, no ideological concessions need be made. Contrary to the aforementioned areas of immigration and refugee law where Canada prioritizes personal rights over security and the United States tends to do the opposite, there are no additional personal rights at stake here. Even privacy concerns are moot, as the NEXUS card or passport is seen by American officials as more secure, but does not require further encroachments into private information. With such minor differences and the lack of ideological or political considerations, it should be relatively easy for the United States and Canada to harmonize their travel documentation requirements.

IV. LIKELY CHALLENGES AHEAD FOR HARMONIZATION OF LAWS

A. United States as the Hegemon

Though the United States and Canada have worked together on many issues for many years, there are a number of areas of concern regarding harmonizing any laws, much less immigration and refugee laws. In this particular relationship, one universal challenge is the United States status as a regional hegemon. Without question, the


\textsuperscript{119} Id.

United States is the power player in the United States-Canada relationship. During the buildup to the Iraq War, the United States pressured both Canada and Mexico into pledging support. In some cases, September 11 for example, Canada’s support of the United States is not just an extension of good will, it is also a means of preserving Canada’s national interest. Though there might not always be an expectation to follow the United States’ demands on the part of American officials, Canadian officials may be extra weary of appearing to acquiesce to United States interests. Agreeing with the United States is not always advantageous. Canadian officials are cautious not to create the perception, among its citizens or American officials, that they can or have been bullied into compliance. Disagreeing with the Americans, particularly as the United States continues the War on Terrorism, is often a good thing in Canada. In October 2001, just weeks after September 11, Canadian Immigration Minister Elinor Caplan recognized this sentiment stating, “Let there not be any misunderstanding. Canadian laws will be made right here in the Canadian parliament.” Former Deputy Canadian Prime Minister John Manley remarked, “Working closely with the United States does not mean turning over to them the keys to Canadian sovereignty.” Still, there may be some degree of expectation on the part of American officials that Canada will do more than its fair share of compromising, particularly on terrorism or national security issues. As their relationship moves forward, the United States will likely demand that Canada take increasingly dramatic steps to avoid threats to national security and Canada will remain hesitant to abide, thereby perpetuating a dynamic that will make harmonization more difficult.

B. Ceding Sovereignty

Reluctance to cede state sovereignty may also hinder harmonization. Control over who may enter and remain in a country is one of the great privileges of being an independent state. No country would willingly give away the power to create its own laws. Further, Canada does not want to appear as if it is the United States’ puppet by accepting America’s unilaterally conceived border policies. Harmonizing laws as impactful as those regulating

121. Rudolph, supra note 27, at 439.
122. Id. at 439 (“[Former U.S. Secretary of Homeland Security Tom Ridge] stated, ‘By working together we can better reach our common goals of ensuring the security and prosperity of our citizens.’”).
123. Id. at 447.
124. Id. at 448.
125. Id. at 440.
immigration will require both countries to cede some of their sovereignty by changing their laws to achieve mutually acceptable solutions.

C. Shared Border Negotiations Case Study

From 2005 to 2007, the United States and Canada engaged in negotiations for a pilot shared border management project.126 After two years of negotiations, the U.S. Department of Homeland Security ("DHS") terminated the talks because an agreeable shared management plan could not be reached.127 The project would have relocated the U.S. border inspection facility from the Buffalo, New York side of the Peace Bridge to the Fort Erie, Ontario side, at which point all Customs and Border Protection operations would take place before travelers and cargo entered the United States.128

During the negotiations, the two Countries did agree on two issues: (1) all authorizations sought by Canada for its preclearance area on United States soil could be approved with minimal changes to United States law; and (2) Customs and Border Protection officers could remain armed on Canadian soil.129 Despite these two agreements, however, there were several more disagreements. The overarching issue was the subordination of U.S. authorities to Canadian law. The United States Government Accountability Office report noted, "DHS officials stated that for shared border management to meet their requirements, U.S. border inspection personnel would require full legal authority, comparable to that provided under U.S. law, to replicate the inspection and enforcement activities DHS engages in today. DHS officials stated that operating under Canadian law would have limited DHS's ability to manage and secure the border."130 In addition, the two governments could not agree on the following:

(1) arrest authority;

126. TERMINATED PILOT PROJECT, supra note 53 (explaining that the Buffalo location was chosen because of an outdated facility and insufficient space; Fort Erie location would have allowed the U.S. port to sit on 70 acres, as opposed to the 17 it currently sits on).

127. Id.

128. Id. (according to the report, the Peace Bridge is the third busiest truck crossing port, with approximately $700 million in goods crossing the bridge weekly; the project also would have moved the Canadian inspection facility to the U.S. side, allowing Canadian authorities to inspect all Canadian-bound persons and goods before reaching Canada).

129. Id. at 9.

130. Id.

https://scholarlycommons.law.case.edu/cuslj/vol37/iss2/14
(2) the right of individuals to withdraw an application to enter the United States while at the preclearance site;

(3) a fingerprinting processes;

(4) an appropriate level of information sharing; and

(5) whether future interpretations of the Canadian Charter would hamper U.S. authority.\textsuperscript{131}

The stalling points are broad and they are telling. First, they indicate that the United States is not willing to bend on issues of security, and Canada is not willing to adapt its laws to accommodate those issues. The fact that the United States was fully willing and able to approve Canadian authorities, but not vice versa, shows that the United States has the stricter provisions. Equally telling is the fact that neither country is willing to go far enough to meet the other. If the United States is unwilling to move on issues related to just one border crossing location, albeit a large one, it is inconceivable that the United States would be willing to nearly double its list of visa exempt countries or release refugee claimants pending adjudication. The same goes for Canada; if it shows an inability to bend on these Peace Bridge issues, there is even less chance that it would be willing to make dramatic changes to its immigration and refugee laws.

With regard to the disagreement over allowing individuals to withdraw an application, the United States is concerned that some may “probe for weaknesses” in the system and then withdraw before the destination country can find out who they are. To gather intelligence and deter such behavior, the United States wanted the right to inspect and fingerprint a person who requests withdrawal, but Canada objected. Unlike Canada’s refusal to grant full arrest authority to the United States, which could be considered an encroachment on sovereignty, Canada’s reasoning is purely humanitarian and ideological. This issue could be easily accomplished through a change in laws. Moreover, America would be solely responsible for implementation. Yet, Canada refuses to facilitate such encroachment upon individual rights and freedoms. Because Canada has taken this position, it will not concede to the American methods, and so continues the standoff.

Even information sharing, which the United States and Canada have successfully accomplished in the past and continue to accomplish today, was a sticking point. American Customs & Border Protection officers wanted to share the information with other U.S. law enforcement and intelligence agencies, but Canada disagreed. Canada wanted information sharing to be guided by Canadian law, and thus

\textsuperscript{131} Id. at 10–11.
protected by the gathering agency. Neither country was willing to accommodate the other and after two years of fruitless negotiations, the process ended without a shared border management agreement. If there is to ever be a successful North American perimeter security concept, this project has demonstrated the huge need for compromise. Until one country is willing to do so, the failed reports will greatly outnumber the successful collaborations.

V. Conclusion

The United States and Canada have a long history of partnership and friendship. Without question, they need each other. In the ideal world, they would have an open border and only check those who enter from third-party countries. But this is not an ideal world; this is a post-September 11 world. Despite the many collaborations, past and ongoing, the United States and Canada have immigration and refugee policies with some extreme differences. Reconciling those policies will require both countries to compromise their sovereignty and values. Canada’s focus is, and has been for many years, one based on economic and humanitarian concerns. While the United States also considers these issues, security concerns often take precedence. Until one country is willing to give up its current priorities and yield to the other, harmonization of any laws, especially immigration and refugee laws, will be very difficult.