

“GOOD FENCES MAKE GOOD NEIGHBORS.”¹ NATIONAL SECURITY AND TERRORISM— TIME TO FENCE IN OUR SOUTHERN BORDER

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I. INTRODUCTION

“In this age of terror, the security of our borders is more important than ever . . .”²

The events of September 11, 2001, led to what many government officials are calling an “Age of Terror”³ where individuals dedicated to acquiring weapons of mass destruction (WMD)⁴ purposefully violate all legal restraint⁵ and deliberately murder civilians in order to advance their anti-

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1. ROBERT FROST, *Mending Wall*, in NORTH OF BOSTON (1914).

2. Press Release, White House, President Bush, Mexican President Fox Reaffirm Commitment to Security (Mar. 6, 2004), <http://www.whitehouse.gov/news/releases/2004/03/20040306-3.html> (last visited Mar. 3, 2005) (quoting President George W. Bush). President Bush also stated:

I will continue to speak about the effects of 9/11 on our country and my presidency. I will continue to mourn the loss of life on that day, but I'll never forget the lessons. The terrorists declared war on us on that day, and I will continue to pursue this war. I have an obligation to those who died; I have an obligation to those who were heroic in their attempts to rescue. And I won't forget that obligation.

Id.

3. Terrorism, as defined by the FBI, is the “unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” *Terrorism in the United States: Counterterrorism Threat Assessment and Warning Unit, Counterterrorism Division*, Federal Bureau of Investigations, 1999 (quoting 28 C.F.R. § 0.85).

4. The phrase Weapon of Mass Destruction is generally “synonymous with nuclear, biological, or chemical weapons.” See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 188 (10th ed. 2004). However, of growing use is the Department of Defense’s classification of weapons – “chemical, biological, radiological, nuclear materials, or high-yield explosive – which includes radiological or ‘dirty’ bombs and conventional explosives.” IntellibrIDGE, *The Evolving Nature of “Weapons of Mass Destruction”*, HOMELAND SECURITY MONITOR, <http://www.homelandsecuritymonitor.com/Docs/Evolving.pdf> (last updated Aug. 29, 2004) (last visited Mar. 20, 2005).

5. John Yoo, *The Rules of War: Sept. 11 Has Changed the Rules*, UC BERKELEY NEWS,

democratic goals.⁶ The Bush Administration has taken a dramatically different stance on national security in light of the ever-present threat that terrorists may use biological, chemical, or even nuclear weapons against the civilian population of the United States.⁷ The centerpiece of President Bush's national security strategy is to address threats immediately in order to prevent even the possibility of another attack like September 11th.⁸ While much has been done to counter "transnational terrorists" and "rogue states," including the use of preemptive military force,⁹ little has been done to remedy the admittedly weak and porous international border separating the United States from Mexico to the south.¹⁰ Although there have been proposals for increased cooperation among

June 15, 2004, at 1.

Al Qaeda is an organization with covert cells of operatives who hide among civilians. It has no territory to defend, no population to protect, no infrastructure or armies in the field to attack. Its primary goal—to target and kill large numbers of civilians—violates the very core purpose of the laws of war to spare civilian life and limit combat to armies.

Id.

6. William C. Bradford, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?*, 79 NOTRE DAME L. REV. 1365, 1367-70 (2004); see also Interview by Maria Bartiromo with Colin L. Powell, Secretary of State, *The Wall Street Journal Report with Maria Bartiromo*, at U.S. Department of State, Washington, D.C. (Nov. 12, 2004), <http://www.state.gov/secretary/former/powell/remarks/38165.htm> (last visited Mar. 3, 2005).

7. Dalia Sussman, *Terrorists Will Strike Again: Public Supports Bush, But Doubts Government Can Prevent Another Attack*, ABCNews Poll, July 16, 2002, http://www.abcnews.go.com/sections/us/DailyNews/terror_poll020716.html (last visited Mar. 3, 2005). "There continues to be an increase in public apprehension about the possibility of future terrorism and doubts that the government is able to prevent any such attack from occurring. These perceptions of future attack have affected the public and policymakers much since September 11." *Id.*

8. Bob Woodward, *Bush at War*, Remarks during an online discussion forum moderated by the Washington Post (Nov. 19, 2002) (transcript available at http://www.washingtonpost.com/wp-srv/liveonline/02/special/nation/sp_nation_woodward111902.htm (last visited Mar. 18, 2005)).

9. Bradford, *supra* note 6, at 1367-70.

Immediately upon its promulgation the Bush Doctrine sparked a legal debate over whether the use of military force to prevent megaterrorism on the order of September 11 constituted one of the permissible exceptions to a general prohibition on the use of force in international relations, and whether the substantive and procedural obligations concerning resolution of international disputes incumbent upon member states of the United Nations could countenance the resort to self-help under such circumstances. Although the U.S.-led intervention against and deposition of the Hussein regime in Iraq in March and April 2003 was predicated not upon an argument in favor of preventive war, but upon far less controversial legal justifications, the characterization of the grounds for intervention for domestic political consumption by the Bush Administration as a preventive war, along with a widespread perception that intervention could not be legally justified on any other basis, has thrust the contentious assertion of the right of states to engage in preventive war to the forefront of international legal discourse.

Id.

10. JIM TURNER, HOUSE SELECT COMMITTEE ON HOMELAND SECURITY, *TRANSFORMING THE SOUTHERN BORDER: PROVIDING SECURITY & PROSPERITY IN THE POST 9/11 WORLD* ii (2004).

the different administrative and protective agencies,¹¹ more federally authorized law enforcement officers,¹² implementation of new communication tools and other technologies,¹³ larger and more accessible detention centers,¹⁴ and for far-reaching intelligence gathering devices,¹⁵ these provisions are not enough to secure the Southern Border and prevent individuals of national security concern from entering the country.

We have very major security gaps on our Southern Border that are not being addressed. Just last week, I visited Brownsville and Harlingen and learned that thousands of illegal immigrants, from countries other than Mexico, are coming across the border, being arrested by the Border Patrol and then being released into the community because we have no available detention space. We have places on our border where there is nothing – no fencing, no electronic monitoring, and no effective law enforcement presence – to stop people from coming across the border. Our ports-of-entry are so congested, that at times, cars are just waived through the border, with hardly any inspection. All of these security gaps could provide the pathway for a terrorist to enter the United States and do grave harm. This country is fighting a war against terror, but nowhere is the gap between rhetoric and reality greater than on our Southern Border.

Id.

11. *Id.* "It is critical that the Department of Homeland Security coordinate plans and carry out missions with Department of Interior, Department of Agriculture and Tribal Nations." *Id.* at 96.

12. *Id.* "To better protect America from terrorism . . . we must identify the personnel level necessary to staff our myriad of consular, interdiction, enforcement, prosecutorial, judicial, and detention agencies." *Id.* at 123.

13. *Id.*

A layered approach to border security necessarily involves a variety of monitoring and detection technologies. Yet DHS [Department of Homeland Security] has failed to consistently and evenly deploy technology along our Southern Border and at the ports-of-entry. In fact, hundreds of miles of our border go unmonitored by personnel or technology every day, despite the fact that technology currently exists to close this gap to terrorists and illicit cargo.

Id.

14. *Id.*

The "catch-and-release" cycle must be broken. For the United States to have a coherent border security strategy, there must be some consequence for trying to illegally enter our country. Due to increased apprehensions and security concerns, detention facilities need to be built or expanded to meet the need for additional bed space. Penalties need to be enhanced and resources need to be provided to the Department of Justice to prosecute and imprison those illegal immigrants who routinely flaunt our immigration laws by repeatedly crossing the borders illegally.

Id. at 126.

15. *Id.* at 123.

Intelligence is a critical tool in the arsenal used by our border agencies to combat potential terrorists from crossing the border. Currently, intelligence is not being used effectively on the Southern Border. CBP inspectors, Border Patrol agents and ICE [Immigration and Customs Enforcement] special agents, complained about the utility of the intelligence information currently received. It is neither enough nor timely. Unless it is improved, they cannot be expected to accurately and efficiently "connect the dots" and identify the terrorist threat on the Southern Border in a timely manner.

Id. at 124.

Part I of this Note will analyze the history of the United States's Southern Border policies with Mexico and what has been done to prevent the rise in illegal immigration over the past 140 years. Primary focus will be placed on national security concerns that arise from such illegal immigration rather than any arguable economic or criminal effects. Part II will examine the need for increased border security after September 11th and explain why illegal immigration is a problem worthy of the utmost attention. Part III of this note will provide a legal basis for the right to protect our Southern Border through security fencing operations by analyzing state sovereignty, plenary power, natural law, inherent rights to self-defense, federal war-making powers, and the "Invasion Clause" of the Constitution. The focus will be on the creation of a security fence that spans the entire southwestern border, allowing for international trade and commerce, entry and exit, and legal immigration only through specified ports in order to defend the nation's vital interests against external threats. Underlying the proposal to construct a security fence will be an examination of criticisms surrounding such policies, specifically analyzing the threat to Federal Indian lands, destruction of environmental protection policies, and possible human right abuses. Finally, Part IV will offer some recommendations and conclusions for the construction of a security fence on the Southern Border, reviewing the legal justifications and the national security interests that must be given primary attention in the post-September 11th world.

II. HISTORY OF THE SOUTHERN BORDER

"Our inability to control our borders is America's Trojan horse."¹⁶

Immigration across the Southern Border has been one of the most important issues between the United States and Mexico over the past 140 years. During this period, the United States implemented a number of policies to deal with its most pressing concern, illegal immigration.¹⁷ The following historical analysis demonstrates how these policies and prevention techniques have completely and utterly failed, both in preventing illegal immigration across the Southern Border and in protecting America's national security.¹⁸

16. Michael Giorgino, *Border Fence is Vital to National Security*, The League of Women Voters California, at http://www.smartvoter.org/2004/11/02/ca/state/vote/giorgino_m/paper3.html (last visited Mar. 20, 2005). "Illegal immigration overwhelms our social services and diminishes respect for our laws. Far more dangerous is the threat of more 9/11-type terrorists crossing the border—waiting for another chance to strike." *Id.*

17. TURNER, *supra* note 10, at 97.

18. *Id.*

A. *Early Immigration 1850-1930*¹⁹

In the late 1800s, the key immigration issue between the United States and Mexico was the creation of a cheap labor base for American agriculture and industry.²⁰ The expansion of cattle ranches, primarily in Texas, and growth of fruit production in California, led to the heavy recruitment of Mexican workers by American employers.²¹ The immigration of these workers was not prohibited, but was in fact encouraged in order to fully meet the production needs of America's industries.²² Between 1850 and 1880, over 50,000 Mexican workers immigrated to the United States, and by 1900, a large Mexican workforce was well established in the American southwest.²³

The Mexican Revolution in 1910 led to a drastic increase in immigration to the United States.²⁴ The Mexican government was unable and unwilling to provide basic necessities to its citizens, forcing many of them to look for a better life in the United States.²⁵ World War I also caused a marked increase in Mexican immigration.²⁶ Immigrant laborers had little difficulty gaining employment in the United States while American workers were fighting in the war overseas.²⁷ Mexican workers excelled in a number of key industries, often finding employment as machinists, mechanics, painters, farmers and plumbers.²⁸

As Mexican immigration increased, so did the demand for border security and immigration restrictions.²⁹ On May 28, 1924, Congress passed the Labor Appropriation Act of 1924, officially establishing the U.S. Border Patrol for the purpose of securing the border between inspection stations and for stemming the flow of illegal immigration.³⁰ The Act of 1924 created the requirement that "all prospective immigrants to the United States obtain a visa from a consular official of the U.S. Department of State in their own homeland" prior to

19. For a well-written and detailed history of the Southern Border, see JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601 (2002).

20. *Id.* at 603.

21. Public Broadcasting Station, *The Border: Mexican Immigrant Labor History*, at <http://www.pbs.org/kpbs/theborder/history/timeline/17.html> (last visited Mar. 18, 2005) [hereinafter PBS].

22. Spotts, *supra* note 19, at 604.

23. PBS, *supra* note 21.

24. *Id.*

25. Cindy Baxman, *Border Revolution: History of the Mexican Revolution, 1910-1920*, at <http://history.acusd.edu/gen/projects/border/page03.html> (May 15, 1998) (last visited Mar. 20, 2005).

26. *Id.*

27. *Id.*

28. PBS, *supra* note 21.

29. U.S. Customs and Border Protection, U.S. Border Patrol History, at http://www.cbp.gov/xp/cgov/border_security/border_patrol/history.xml (July 15, 2003) (last visited Feb. 21, 2005).

30. *Id.*

admittance.³¹ For many Mexican laborers, the requirement of obtaining a visa was a significant burden and thus was often ignored.³² Instead, most Mexican immigrants continued to cross the border informally, but “what had once been legal, [and even encouraged], was now considered illegal by the U.S. government.”³³ Additional restrictions were placed on immigration during the Great Depression.³⁴ Mexicans who were unable to prove that they had secured employment within the United States were summarily denied visas.³⁵ Mexican immigrants already within the country who failed to obtain a visa prior to entry were deported and warned not to return to the country.³⁶ Despite these restrictive policies, immigration continued to increase.³⁷ By 1930, there were over 1.5 million Mexican immigrants living within the United States, with more than 700,000 living within the state of Texas alone.³⁸

*B. 1930-1965: Mexican Immigration Fluctuates*³⁹

Toward the end of the Great Depression, and with the start of the New Deal,⁴⁰ immigration from Mexico began to increase once again.⁴¹ In 1942, the United States entered World War II against the Axis Powers of Europe and Asia.⁴² Migrant workers were welcomed into America to fill labor shortages throughout the country.⁴³ It was at this time that Congress passed a number of laws allowing for the legal importation of temporary Mexican workers.⁴⁴ Under the Bracero Program, for example, more than four million Mexican laborers came to the United States to work, primarily as farmhands.⁴⁵

31. Spotts, *supra* note 19, at 604.

32. *Id.*

33. *Id.* See also ROGER DANIELS & OTIS L. GRAHAM, *DEBATING AMERICAN IMMIGRATION, 1882-PRESENT* 42-45 (Rowman & Littlefield 2001).

34. PBS, *supra* note 21.

35. *Id.*

36. *Id.*

37. The Library of Congress, *Depression and Struggle for Survival*, at <http://www.memory.loc.gov/learn/features/immig/mexican6.html> (Sept. 11, 2003) (last visited Feb. 23, 2005).

38. Spotts, *supra* note 19, at 604-05; see also Red River Authority of Texas, *Mexican Americans—The Handbook of Texas*, at http://www.rra.dst.tx.us/c_t/History1/MEXICAN%20AMERICANS.cfm (Dec. 4, 2002) (last visited Feb. 24, 2005).

39. Spotts, *supra* note 19, at 605.

40. *Id.*

41. *Id.*

42. PBS, *supra* note 21.

43. DANIELS & GRAHAM, *supra* note 33, at 49-52.

44. *Id.*

45. PBS, *supra* note 21.

The Bracero Program of 1942-64, first negotiated by the United States and Mexico as an emergency measure during World War II, encouraged large migrations of Mexican workers to the United States. Under the terms of the program, American agricultural enterprises could legally bring Mexican contract laborers for seasonal work. In the off-season, many did not return home and

While there was growth in the legal importation of laborers, illegal immigration also continued to rise.⁴⁶ In 1949, over 280,000 illegal immigrants were seized by the United States Border Patrol, while in 1953, the number of those seized grew to over 860,000.⁴⁷ Feeling pressure to address this flood of illegal immigration, Congress passed the Wetback Act, which allowed Border Patrol agents to enter both public and private lands in order to seek out and detain illegal immigrants.⁴⁸ The focus of this intense border enforcement statute was capturing “illegal aliens,” but often agents operating under the act targeted, and apprehended, lawfully admitted Mexicans as well.⁴⁹ In the first year of the Wetback Act, over one million illegal immigrants were detected and over 300,000 of them were deported.⁵⁰ In 1964, the temporary worker programs came to an end with the assumption that the laborers would leave the United States and return to their homeland.⁵¹ Most laborers did return to Mexico, but “many remained and were instantly transformed from legal to illegal status.”⁵²

C. 1965-1980: Increased Immigration⁵³

In 1965, President Lyndon Johnson signed the Immigration Act of 1965, which drastically changed America’s immigration law.⁵⁴ The Immigration Act was primarily a “corrective measure instituted to atone for past history of discrimination in immigration.”⁵⁵ The Act did reduce institutionalized racial discrimination,⁵⁶ but it also had the effect of converting immigration admissions

settled on the border, often selecting a place where people from their home state were already established.

Olivia Cadaval, *United States-Mexico Borderlands/Frontera*, Migration in History, at <http://www.smithsonianeducation.org/migrations/bord/intro.html>. (last visited Mar. 20, 2005).

46. Spotts, *supra* note 19, at 605.

47. PBS, *supra* note 21, at <http://www.pbs.org/kpbs/theborder/history/timeline/20.html>.

48. Act of May 19, 1921, ch. 8, 42 Stat. 5; National Origins Act, ch. 190, 43 Stat. 153 (1924) (repealed 1965). “The ‘Wetback Act’ . . . aimed to discourage illegal Mexican immigration by criminally sanctioning anyone who smuggled or harbored aliens who had not been inspected and legally admitted. In 1954 alone, the United States deported 300,000 Mexicans under this Act.” See Kiera LoBreglio, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN’S L. REV. 933, 936 (2004).

49. See PBS, *supra* note 21, at <http://www.pbs.org/kpbs/theborder/history/index.html>.

50. James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT’L L. & POL’Y 227, 246 (1995).

51. *Id.*

52. Spotts, *supra* note 19, at 606.

53. *Id.*

54. Devin Love-Andrews, *Immigration Act of 1965*, North Park University of Chicago, at <http://campus.northpark.edu/history/WebChron/USA/ImmigrationAct.html> (Sept. 11, 2003) (last visited Mar. 20, 2005).

55. *Id.*

56. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. 1152(a) (1994)).

"into a social and political policy that served the private interests of U.S. legal permanent residents and their relatives."⁵⁷

The 1965 Act limited the number of immigrants admitted from countries in the Western Hemisphere, and also created a cap of no more than 20,000 immigrants from any one country.⁵⁸ The immigration limits placed on countries in the Western Hemisphere created extremely long waiting periods for Mexican aliens seeking immigrant visas.⁵⁹ For example, by 1976, "the waiting period for Mexicans to immigrate legally into the United States was over two and a half years long."⁶⁰ This backlog caused a dramatic increase in the amount of illegal immigration over the Southwest Border.⁶¹ In 1978, Congress established a worldwide cap on immigration, rather than country-specific limitations,⁶² and also created the Select Committee on Immigration and Refugee Policy (SCIRP).⁶³ SCIRP's primary goal was to analyze immigration policies, particularly the Immigration Act of 1965, and present recommendations for improvement.⁶⁴ The sixteen-member committee, appointed by President Carter, issued their report on March 1, 1981.⁶⁵ Its basic conclusion was that controlled immigration must be made a primary national interest.⁶⁶ SCIRP's recommendations were summarized and presented by Chairman Theodore Hesburgh:

We recommend closing the back door to undocumented, illegal migration, opening the front door a little more to accommodate legal migration in the interests of this country, defining our immigration goals clearly and providing a structure to implement them effectively, and setting forth procedures which will lead to fair and efficient adjudication and administration of U.S. immigration laws.⁶⁷

57. Spotts, *supra* note 19, at 606.

58. PBS, *supra* note 21, at <http://www.pbs.org/kpbs/theborder/history/timeline/23.html>.

59. LoBreglio, *supra* note 48, at 938. The Immigration Act of 1965 for the first time put a cap on immigration from the Western Hemisphere. As a result, Mexicans often had to wait years in order to gain the visas they need to enter the United States. *Id.* This ultimately delayed family reunification, which was the stated goal and purpose behind the Act. *Id.*

60. Spotts, *supra* note 19, at 607.

61. *Id.*

62. *Id.*

63. PHILIP MARTIN & PETER DUIGNAN, HOOVER INSTITUTION, MAKING AND REMAKING AMERICA: IMMIGRATION INTO THE UNITED STATES (2003), <http://www.whoover.stanford.edu/publications/he/25/25.pdf> (last visited Mar. 18, 2005).

64. Spotts, *supra* note 19, at 607.

65. Federation for American Immigration Reform, U.S. Immigration History, at <http://www.fairus.org/Research/Research.cfm?ID=1820&c=2> (July 2004) (last visited Mar. 3, 2005) [hereinafter Federation].

66. *Id.*

67. *Id.*

The report specifically called for “civil and criminal sanctions against employers who hired illegal immigrants, enhanced border enforcement, and an amnesty for illegal immigrants who had been here for a lengthy (but unspecified) period of time.”⁶⁸ By 1981, the number of undocumented aliens in the United States was estimated to be over 2,500,000, with illegal Mexicans making up over half that number.⁶⁹ Illegal immigration had now become a major problem in the United States and was gaining the attention of key politicians in Washington.⁷⁰

D. 1980-2000: Immigration Concerns Take Center Stage

In 1986, Congress passed the Immigration Reform and Control Act (IRCA)⁷¹ in response to the increase in illegal immigration and the public concern that America’s borders were being overrun.⁷² IRCA’s main objective was to “curtail illegal immigration by legalizing illegal immigrants already in the country, imposing sanctions on employers who hired undocumented illegal workers, and allocating additional funds to the Immigration and Naturalization Service for border enforcement.”⁷³ Mexicans were by far the largest group to apply for amnesty under the provisions of the IRCA.⁷⁴

The prospect of employment and amnesty in the United States encouraged many Mexicans to enter the United States illegally.⁷⁵ The IRCA attempted to address this issue by creating a new series of employer sanctions for those who knowingly hired illegal aliens not authorized to work in the United States.⁷⁶ The legislation also created a seven-year special agricultural worker program that expedited the availability of immigrant laborers and provided statutory protections for both U.S. and alien workers.⁷⁷ In practice, however, these provisions largely failed, as illegal aliens were often able to produce fake passports and other documents that would allow them to avoid apprehension and governmental sanction.⁷⁸ Consequently, the reforms enacted in the early 1980s, under the helm of President Reagan, were unable to adequately address the growing problem of illegal immigration.⁷⁹

68. Spotts, *supra* note 19, at 607.

69. U.S. ENGLISH FOUNDATION, INC., AMERICAN IMMIGRATION—AN OVERVIEW, at <http://www.us-english.org/foundation/research/amimmigr/Chapter3.PDF> (last visited Mar. 18, 2005).

70. Spotts, *supra* note 19, at 607.

71. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) [hereinafter IRCA].

72. LoBreglio, *supra* note 48, at 939.

73. *Id.*

74. *Id.*

75. Federation, *supra* note 65.

76. *Id.*

77. IRCA, *supra* note 71.

78. Spotts, *supra* note 19, at 611.

79. *Id.*

President George Bush, Sr., was not any more successful than President Reagan in reducing the flow of illegal immigration.⁸⁰ Over two million individuals "had been approved for temporary residency under the amnesty program established by IRCA"⁸¹ and nearly one million were still waiting to be processed.⁸² In response to this growing problem, Congress passed the Immigration Act of 1990.⁸³ The Act established a higher limit on immigration levels and started the diversity program in order to "encourage immigration from countries that had demonstrated low levels of immigration to the United States since the 1965 Act and that were currently underrepresented in the United States population."⁸⁴ Amendments to the Immigration Act later prohibited Mexicans from eligibility for the diversity program.⁸⁵ The only two provisions of the Act that specifically "related to illegal immigration had to do with the deportation of criminal aliens and increasing the size of the Border Patrol."⁸⁶ In the end, President Bush, during his four-year presidency, never gave the issue of illegal immigration the attention it deserved. The President was not involved in the passage of the Immigration Act of 1990 and did not enact any reforms, even as illegal immigration continued to skyrocket.⁸⁷

By the time President Bill Clinton was sworn into office in 1992, public frustration over illegal immigration was at an all time high.⁸⁸ Both President Clinton and Congress viewed the North American Free Trade Agreement (NAFTA)⁸⁹ as a possible solution to illegal Mexican immigration.⁹⁰ The idea was that NAFTA would improve the economic situation in Mexico, and thus encourage would-be Mexican immigrants to stay within their homeland where work would now be available.⁹¹ NAFTA did improve the Mexican economy but it failed to solve the problem of illegal immigration.⁹² Most of the

80. *Id.*

81. *Id.*

82. NANCY RYTINA, U.S. IMMIGRATION AND NATURALIZATION SERVICE, IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001 (2002), at http://uscis.gov/graphics/shared/aboutus/statistics/IRCA_REPORT/irca0114int.pdf (2002) (last visited Mar. 18, 2005).

83. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

84. LoBreglio, *supra* note 48, at 939.

85. *Id.*

86. Spotts, *supra* note 19, at 612.

87. *Id.*

88. *Id.*

89. The North American Free Trade Agreement, available at <http://www.dfaitmaeci.gc.ca/nafta-alena/agree-en.asp> (last visited Mar. 18, 2005). "Implementation of the North American Free Trade Agreement (NAFTA) began on January 1, 1994. This agreement removed most barriers to trade and investment among the United States, Canada, and Mexico." U.S. Department of Agriculture, Foreign Agricultural Service, The North American Free Trade Agreement, at <http://www.fas.usda.gov/itp/Policy/NAFTA/nafta.html> (last visited Mar. 18, 2005).

90. LoBreglio, *supra* note 48, at 940.

91. *Id.*

92. *Id.*

economic improvements were not being realized in the border regions. Immigrants were still enticed to enter the United States in order to capitalize on the growing economy to the north.⁹³ In response, President Clinton hired 600 more Border Patrol agents to secure the Southern Border.⁹⁴ Increasing the number of Border Patrol agents became the Clinton administration's primary solution when confronted with the problem of illegal immigration.⁹⁵

In 1994, the Border Patrol began putting up physical barriers and walls in order to make illegal entry into the United States as difficult as possible.⁹⁶ Operation "Hold the Line" was established in 1993 in El Paso, Texas, and proved to be an immediate success.⁹⁷ Under this plan, agents and technology were concentrated in specific areas, providing a "show of force" to potential illegal immigrants.⁹⁸ The number of illegal immigrants attempting to cross the border at or near El Paso was drastically reduced.⁹⁹ This encouraged the Border Patrol to undertake a similar full-scale effort in San Diego, California, where more than half of all illegal entries were occurring.¹⁰⁰ The San Diego plan, called "Operation Gatekeeper," was fully implemented in 1994.¹⁰¹ In the next two years, the number of illegal entries in this region fell by more than 75%.¹⁰² With illegal entries at a more manageable level, the Border Patrol was able to concentrate its resources on other areas, such as establishing anti-smuggling units and creating search and rescue teams.¹⁰³

In 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA).¹⁰⁴ The provisions of IIRIRA were aimed at creating stronger penalties against illegal immigration and organizing the removal process by limiting the number of appeals.¹⁰⁵ The IIRIRA also

93. *Id.*

94. Spotts, *supra* note 19, at 613.

95. *Id.*

96. Federation, *supra* note 65.

97. U.S. Customs and Border Protection, *supra* note 29.

98. *Id.*

99. *Id.*

100. *Id.*

101. U.S. Citizenship and Immigration Services, *Operation Gatekeeper: New Resources, Enhanced Results*, at <http://www.uscis.gov/graphics/publicaffairs/factsheets/opgatefs.htm> (July 14, 1998) (last visited Mar. 18, 2005).

On October 1, 1994, a new initiative called Operation Gatekeeper was launched to restore integrity and safety to the San Diego border, the busiest in the nation. By committing unprecedented resources and implementing innovative strategies, the Immigration and Naturalization Service and other federal agencies have met this ambitious goal. Today, Gatekeeper is the model for operations in other vulnerable border regions.

Id.

102. U.S. Customs and Border Protection, *supra* note 29.

103. *Id.*

104. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 100 Stat. 3009 (1996).

105. Federation, *supra* note 65.

authorized the hiring of five thousand additional Border Patrol agents, increased the severity of punishment for those who smuggled illegal immigrants into the United States, and most importantly, authorized the construction of a triple-layered, fourteen-mile-long, security fence just south of San Diego, California.¹⁰⁶ The IIRIRA was created to deter would-be illegal immigrants from even attempting to enter the United States, rather than tracking down and punishing those who had already evaded detection and were physically within the country.¹⁰⁷

As of October 1996, there were over five million illegal aliens living within the United States and that number was increasing at an average rate of 275,000 per year.¹⁰⁸ In 1997, the United States Commission on Immigration Reform¹⁰⁹ recommended that "illegal immigration be completely shut down while simultaneously reducing the levels of legal immigration."¹¹⁰ As the United States prepared to enter the next century, it was obvious that NAFTA, the IIRIRA, and other immigration reforms had little success in slowing the tide of illegal immigration into the United States.¹¹¹ The Border Patrol continued to grow in size and was apprehending greater numbers of illegal immigrants each year. Although more apprehensions were taking place, U.S. Immigration and Naturalization Service (INS) statistics also showed that the number of immigrants entering the United States illegally without detection had increased at a rate of about 300,000 per year.¹¹²

106. Spotts, *supra* note 19, at 615.

107. *Id.*

108. U.S. GENERAL ACCOUNTING OFFICE, ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED (GAO/GDD-98-21, Dec. 11, 1997), <http://www.fas.org/irp/gao/ggd98021.htm> (last visited Mar. 18, 2005) [hereinafter GAO].

109. See generally U.S. Commission on Immigration Reform, Mexico – U.S. Binational Migration Study Report, at <http://www.utexas.edu/lbj/uscir/binational.html> (last updated Mar. 14, 1998) (last visited Mar. 18 2005).

After a meeting of the Migration and Consular Affairs Group of the Mexican-United States Binational Commission in March 1995, the governments of Mexico and the United States decided to undertake a joint study of migration between the two countries. Research teams in each country studied each of five aspects of migration within their country and collaboratively analyzed the findings. National coordinators were designated for each country with the Commission on Immigration Reform coordinating the work of U.S. researchers. The main objective of the Binational Study is to contribute to a better understanding and appreciation of the nature, dimensions, and consequences of migration from Mexico to the United States.

Id.

110. Spotts, *supra* note 19, 616.

111. *Id.* at 617.

112. GAO, *supra* note 108, at 10; see also Spotts, *supra* note 19, at 617.

III. THE NEED FOR A SECURITY FENCE

The superior man, when resting in safety, does not forget that danger may come. When in a state of security he does not forget the possibility of ruin. When all is orderly, he does not forget that disorder may come. Thus his person is not endangered, and his States and all their clans are preserved.¹¹³

In a perfect world there would be no war, no terrorism, and no need for national borders.¹¹⁴ In this perfect world, the mass murder of innocent civilians in furtherance of some radical religious or political ideology would be merely a bad dream.¹¹⁵ Instead, all individuals would live together in peace and harmony. Unfortunately, we do not live in a perfect world.¹¹⁶ The terrorist acts that occurred on September 11, 2001, sadly illustrated that the dream of a world without borders is still far from being realized.¹¹⁷

As a result of the September 11th attacks, the majority of Americans have called for enhanced homeland security measures, including heightened border protection.¹¹⁸ However, the federal government has decided to employ only the most minimal measures to strengthen the security of America's borders.¹¹⁹ In fact, if there is one message current border security strategies are sending to would-be terrorists around the world, it is that the golden doors to America are still wide open.¹²⁰ Alarming, September 11th, in addition to the federal government's historically lax border control policies, illustrates the reality that America remains highly susceptible to another terrorist attack.¹²¹

A. *The Simplicity of Crossing the Border*

The Southern Border encompasses nearly 2,000 miles of land adjacent to Mexico, with thousands of potential illegal crossing points.¹²² The border

113. Confucius, Chinese philosopher & reformer (551 B.C. – 479 BC), at <http://www.quotationspage.com/quotes/Confucius> (last visited Mar. 3, 2005).

114. Melissa Blair, *Terrorism, America's Porous Borders, and the Role of the Invasion Clause Post – 9/11/2001*, 87 MARQ. L. REV. 167 (2003).

115. *Id.*

116. *Id.* “On September 11, 2001, terrorists invaded our country in the worst possible way – and the world will never forget this day.” *Id.*

117. *Id.*

118. Joe Kovacs, *Americans Urge: Defend the Border!*, WORLDNETDAILY, Jan. 20, 2005, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=42460 (last visited Mar. 4, 2005).

119. Blair, *supra* note 114, at 167.

120. Michelle Malkin, *Invasion: How America Welcomes Terrorists*, Address at the Chicago/Oakbrook CMF Conference (Mar. 22, 2003), in CARDINAL MINDSZENTY FOUNDATION, MINDSZENTY REPORT, June 2003, at http://www.mindszenty.org/report/2003/mr_0603.pdf (last visited Mar. 18, 2005).

121. Blair, *supra* note 114, at 167.

122. TURNER, *supra* note 10, at 15-16.

includes such diverse areas as the residential neighborhoods of San Diego, California, and the barren deserts just outside of Presidio, Texas.¹²³ The Rio Grande River marks half of the United States-Mexico border, including the entire border between Mexico and Texas.¹²⁴ In many areas, the Rio Grande River offers only a very limited barrier to illegal border crossings, as the river is relatively easy to cross either on foot or by vehicle.¹²⁵ West of El Paso, the Rio Grande's path turns toward the north and no longer provides a clear mark of the United States-Mexico boundary.¹²⁶ "Through most of New Mexico, Arizona, and California, nothing more than two or three strands of barbed wire fencing . . . serve as a barrier to border crossings."¹²⁷ Clearly this type of fencing is not an effective obstacle to those determined to enter the United States illegally.¹²⁸

Other more remote areas along the Southern Border have absolutely no fencing or security mechanism of any kind.¹²⁹ In these areas, the United States government relies heavily on the remoteness of the region to deter illegal border

123. *Id.* at 16.

124. *Id.*

125. U.S. Border Report, Migration across the Mexico border: Undocumented aliens and illegal drugs enter Southwest U.S.A., at <http://www.dslextrreme.com/users/surferslim/text1.html> (Jan. 1, 2001) (last visited Mar. 18, 2005).

126. TURNER, *supra* note 10, at 16. For a map of the area, see *One River, One Country: McAllen, Texas and Matamoros, Mexico*, THE ECONOMIST NEWSPAPER LIMITED, 1997, at <http://www.uwec.edu/Geography/Ivogeler/w188/articles/tmxm.htm> (last visited Mar. 18, 2005).

127. TURNER, *supra* note 10, at 16.

128. *Id.*

129. *Id.* See also Michelle Malkin, Immigration, the War on Terror, and the Rule of Law, Speech delivered at the Hillsdale College Seminar, Rancho Mirage, Cal., (Feb. 18, 2003), at <http://www.hillsdale.edu/newimprimis/2003/april/default.htm> (last visited Mar. 4, 2005).

A year-and-a half after September 11, we have new laws, new agencies, and lots of new government spending to fight off foreign invaders. But our immigration policies leave the door to our nation open wide to the world's law-breakers and evildoers:

According to the Immigration and Naturalization Service, at least 78,000 illegal aliens from terror-supporting or terror-friendly countries live in the U.S. They are among an estimated seven to eleven million illegal aliens who have crossed our borders illegally, overstayed visas illegally, jumped ship illegally and evaded deportation orders illegally.

More than 300,000 illegal alien fugitives, including 6,000 from the Middle East, remain on the loose despite deportation orders.

Last year, at least 105 foreign nationals suspected of terrorist involvement received U.S. visas because of lapses in a new background check system.

There is still no systematic tracking of criminal alien felons across the country. Sanctuary for illegal aliens remains the policy in almost every major metropolis.

And "catch and release" remains standard operating procedure for untold thousands of illegal aliens who pass through the fingers of federal immigration authorities every day.

crossings.¹³⁰ Vehicle barriers have been constructed along some sections of the border, but these have not stopped individual illegal immigrants from crossing the border by foot.¹³¹ Additionally, these barriers are only present in some areas and nothing has prevented illegal immigrants from simply driving around them.¹³² The reality of the situation is that an illegal immigrant can literally “drive a truck through the porous U.S. border” at any time.¹³³

Every day, over one thousand illegal immigrants cross the 2,000-mile Southern Border between the United States and Mexico.¹³⁴ The INS estimated that in January of 2000 there were over seven million illegal aliens living in the United States, a number that is growing by half a million each and every year.¹³⁵ Thus, the illegal-alien population in 2004 is estimated to be well over

130. TURNER, *supra* note 10, at 17; *see also* U.S. GEN. ACCOUNTING. OFFICE, BORDER SECURITY: AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LANDS (GAO-04-590, July 2004), <http://www.gao.gov/atext/d04590.txt> (last visited Mar 18, 2005).

131. TURNER, *supra* note 10, at 17-18; *see also* NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, PARK SERVICE APPROVES ENVIRONMENTAL ASSESSMENT FOR VEHICLE BARRIER AT ORGAN PIPE CACTUS AND CORONADO NATIONAL MONUMENTS (Aug. 7, 2003), <http://www.nps.gov/orpi/vbeis.htm> (last visited Mar. 18, 2005).

132. *Id.* at 18. One striking example of the ease with which an illegal immigrant can drive a vehicle across the Southern border occurred outside of El Paso:

Border Patrol staff, while flying in broad daylight from El Paso to Presidio in an Immigration and Customs Enforcement (ICE) Blackhawk helicopter, observed three large panel trucks, two buses and four 18-wheel tractor trailers parked in a remote box canyon not far from the border. Upon landing, ICE Air and Marine Operations (AMO) officers accompanying the staff were unable to find any people present or other indications of the purpose of these vehicles in such a remote location that close to the border. The windows on the buses were blacked out and the trucks were parked close to one another in an apparent attempt to deter entry. The nearest farm was some miles away. Upon our return from touring the Presidio port-of-entry a few hours later, the four tractor trailers were spotted again, but this time, on the Mexican side of the border, having illegally driven back across the Rio Grande from the United States into Mexico.

Id.

133. *Id.* at 18; NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U. S., WHAT TO DO? A GLOBAL STRATEGY (Aug. 21, 2004), http://www.9-11commission.gov/report/911Report_Ch12.htm (last visited Mar. 4, 2005).

More than 500 million people annually cross U.S. borders at legal entry points, about 330 million of them noncitizens. Another 500,000 or more enter illegally without inspection across America’s thousands of miles of land borders or remain in the country past the expiration of their permitted stay. The challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected.

Id.

134. *See generally* GAO, *supra* note 108.

135. OFFICE OF POLICY AND PLANNING, U.S. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, 1 (Jan. 2003), http://uscis.gov/graphics/shared/aboutus/statistics/III_Report_1211.pdf (Jan. 2003) (last visited Mar. 4, 2005).

eight million.¹³⁶ Included in this estimate are approximately 78,000 illegal aliens from countries that are of special concern in the war on terror.¹³⁷

Crossing the Southern Border from Mexico is not difficult.¹³⁸ It is the primary method most illegal immigrants use in order to enter the United States undetected.¹³⁹ For the first seven months of 2004, approximately 660,000 illegal immigrants were arrested along the Southern Border.¹⁴⁰ The Border Patrol estimated that by the end of 2004 the total number of apprehensions in this region would total over one million.¹⁴¹ These numbers only represent those illegal immigrants who are actually detected and apprehended by the Border Patrol.¹⁴² The number of those who avoid detection and are able to successfully enter the country remains unknown, however, estimates range from 150,000 to 600,000 persons per year.¹⁴³ Such a porous border can easily give access to terrorists intending to attack America from within.¹⁴⁴

136. *Id.*

137. See Mark Krikorian, *Safety Through Immigration Control*, PROVIDENCE J., Apr. 24, 2004, at <http://www.cis.org/articles/2004/mskoped042404.html> (last visited Mar. 4, 2005). Not only are many of the illegal immigrants from countries of terrorist concern but many of the attackers, including those on September 11th, were illegal immigrants that were not prevented from entering the United States.

Our enemies have repeatedly exercised this option of inserting terrorists by exploiting weaknesses in our immigration system. A Center for Immigration Studies analysis found that nearly every element of the immigration system has been penetrated by the enemy. Of the 48 al-Qaida operatives who have committed terrorist acts here since 1993 (including the 9/11 hijackers), a third were here on various temporary visas, another third were legal residents or naturalized citizens, a fourth were illegal aliens, and the rest had pending asylum applications.

Id.

138. TURNER, *supra* note 10, at 11.

139. Department of Homeland Security, *Deportable Aliens Located by Program, Border Patrol Sector and Investigations District, Fiscal Years 1996-2002*, in 2002 YEARBOOK OF IMMIGRATION STATISTICS 171, Table 40 (2002) [hereinafter DHS].

140. *Id.*

141. *Id.*

Government apprehension data shows that Southern Border apprehensions reached 1,615,844 in 1986 and then decreased for three consecutive years after the passage of the Immigration Reform and Control Act, an amnesty program for certain illegal immigrants. From a low of 852,506 apprehensions in 1989, the numbers steadily increased every year until 2000 when it set an all time high at 1,643,679. Border apprehensions then declined 25% to 1,235,717 in 2001, another 25% in 2002 to 929,809 and another 2% to 905,065 in 2003.

Id.

142. *Id.*

143. SUB-COMM. ON CRIMINAL JUSTICE, DRUG POLICY AND HUMAN RES., U. S. HOUSE, COMM. ON GOV'T REFORM, *FEDERAL LAW ENFORCEMENT AT THE BORDERS AND PORTS OF ENTRY: CHALLENGES AND SOLUTIONS*, 30 (Report 107-794, July 2002); NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 383; CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS), *MANAGING MEXICAN MIGRATION TO THE UNITED STATES: RECOMMENDATIONS FOR POLICYMAKERS*, 1-3 (Apr. 2004).

144. TURNER, *supra* note 10, at 11.

An immense amount of money has been spent on preventing terrorists from entering the United States through official ports of entry such as airports and harbors, but little has been done to prevent illegal immigration from Mexico.¹⁴⁵ Terrorist organizations have already recognized the openness of America's Southern Border.¹⁴⁶ In 2002, al Qaeda, through a posting on their website, noted: "In 1996, 254 million persons, 75 million automobiles, and 3.5 million trucks entered America from Mexico. At the 38 official border crossings, only 5 percent of this huge total is inspected These are figures that really call for contemplation."¹⁴⁷

Al Qaeda has long been interested in America's Southern Border.¹⁴⁸ On August 18, 2004, the Federal Bureau of Investigations issued an alert, warning that al Qaeda leaders might attempt to enter the United States by crossing the Southern Border from Mexico.¹⁴⁹ This alert came just months after Border Patrol agents apprehended two terrorist suspects that entered the United States by crossing the Southern Border.¹⁵⁰ Equally troubling, just prior to September

Prior to September 11, 2001, it was extremely easy to enter the United States illegally, either by sneaking across the border or by securing permission to enter temporarily and then never leaving. Incredibly this has not changed in any meaningful way. With very few exceptions, any individual who is determined to enter the United States illegally will eventually be successful.

We cannot pretend that our homeland is secure if our borders are not. Every year millions of illegal aliens cross our borders, and fewer than half of them are apprehended. If it is so easy for impoverished and poorly-educated people to illegally cross our borders, consider how much easier it is for well-financed and highly-trained terrorists to do the same.

Id. at 12 (quoting T. J. Bonner, President of the National Border Patrol Council, *How Secure Are America's Borders?*, (Aug. 23, 2004)).

145. Pia M. Orrenius, *Illegal Immigration and Enforcement Along the Southwest Border*, FED. RESERVE BANK OF DALLAS, June 2001, http://www.dallasfed.org/research/border/tbe_orrenius.pdf (last visited Mar. 20, 2005).

146. TURNER, *supra* note 10, at 12.

147. *Id.*

148. *Id.*

149. *Id.* at 12-13; see also Lennox Samuels, *Hitting Below the Border: Mexican Tourist Spots, Oil Platforms Seen as Potential Targets*, DALLAS MORNING NEWS, August 7, 2004, at 1A.

150. News Release, Department of Homeland Security, *Pakistani Man Charged with Criminal Immigration Violations* (Aug. 10, 2004).

Farida Goolam Mahomed Ahmed, a Pakistani citizen, was arrested on July 19, 2004, by Border Patrol agents after they noted her passport was missing four pages and after they found a pair of muddy pants in her baggage. The investigation also showed that she had flown into Mexico City on a British Airways flight from London on July 14, 2004, and within a week had apparently walked across the Rio Grande and entered the United States illegally. On August 5, 2004, federal officials charged Kamran Ahkter, a Pakistani citizen, with immigration violations after he was detained in Charlotte, North Carolina on July 20, 2004, while videotaping the downtown area of Charlotte. The affidavit supporting the complaint detaining him noted that immigration records show that Shaikh entered the United States by illegally crossing the border from Mexico in 1991.

Id.

11th, two Syrian nationals were caught after attempting to cross the border near Eagle Pass, Texas.¹⁵¹ Seized from these would-be immigrants were cameras with pictures of the nuclear power plant in the Mexican port of Vera Cruz.¹⁵² Government officials noted that an attack at the Vera Cruz nuclear plant could have threatened thousands of lives within the United States.¹⁵³ Adding to this problem is the possibility that corrupt Mexican officials might assist terrorists in their mission to enter the United States.¹⁵⁴ In the last two years, over fifty Mexican officials have been arrested for corruption.¹⁵⁵

B. Illegal Immigration and Terrorism

Data from the Department of Homeland Security does not provide information on people who successfully cross the border and enter the United States undetected.¹⁵⁶ However, the Department generally accepts the notion that data collected from those apprehended is most likely similar to the data of those who escape detection.¹⁵⁷ In 2002, nationals of over 180 countries were apprehended.¹⁵⁸ In 2003, 95% of the illegal immigrants apprehended were Mexicans.¹⁵⁹ The remaining 5%, or 49,500 individuals, which the Department of Homeland Security terms "OTMs" (Other Than Mexicans), were from countries around the world.¹⁶⁰

Border Patrol data has revealed a frightening trend taking place on the Southern Border.¹⁶¹ Over the past year, there has been a significant increase in the number of OTMs entering the United States illegally from Mexico.¹⁶² Data shows that for the first seven months of 2004, 40,739 OTMs were apprehended; a 36% increase in those captured over the same seven-month period in 2003.¹⁶³ In one Border Patrol sector alone, agents caught 23,178

151. TURNER, *supra* note 10, at 13.

152. *Id.*

153. *Id.*

154. *Id.*

155. Ricardo Sandoval, *U.S., Mexico Say Border Breaches May be Tied to Terror Activity*, DALLAS MORNING NEWS, Aug. 17, 2004. "In November 2003, it was reported that a Mexican diplomat who served in Lebanon was arrested for her part in providing Mexican travel documents to unnamed Middle Easterners, a trend that is growing in occurrence." *Id.*

156. TURNER, *supra* note 10, at 14.

157. *Id.*

158. DHS, *supra* note 139 at 174, Table 39.

159. TURNER, *supra* note 10, at 14.

160. *Id.* "In the first seven months of 2004, 95% (752,749) of the 793,488 apprehensions were Mexican nationals. Honduras, El Salvador and Guatemala were the top three countries in the remaining 5% or 40,739 OTMs." *Id.* at n.23.

161. *Id.* at 14.

162. Leo W. Banks, *Other Than Mexicans*, TUCSON WEEKLY, Sept. 2, 2004, at <http://www.tucsonweekly.com/gbase/Currents/Content?oid=oid%3A60078> (last visited Mar. 4, 2005).

163. TURNER, *supra* note 10, at 14.

OTMs through August 2004, compared to just 14,919 OTMs in all of 2003.¹⁶⁴ Of the 23,178 OTMs caught, 16,616 were released on bond into the United States without further detention or proceedings.¹⁶⁵

With the increasing numbers of OTMs, border officials have also recognized a startling increase in the number of foreign nationals from countries of national security concern.¹⁶⁶ These countries are often referred to as “countries of interest” or “COIs”.¹⁶⁷ Border Patrol agents recorded around 3,500 COI apprehensions on the Southern Border in 2003.¹⁶⁸ Evidence collected from Southern Border crossing sites indicates that foreign nationals from countries of national security interest are crossing the Southern Border at a growing rate.¹⁶⁹

Certainly, most illegal immigrants have no connection with international terrorism.¹⁷⁰ However, evidence shows that there is some correlation between the terrorist acts committed in the United States and the immigration status of the perpetrators.¹⁷¹ The INS has disclosed some information indicating that at

164. *Id.*

The Brownsville Sector has been a growing target for illegal immigration by both Mexican and OTM nationals. Brownsville has also been the site of much of the crime that often accompanies illegal immigration. In the first half of 2004, Border Patrol agents in Brownsville apprehended over 20,000 criminal immigrants including over 80 homicide suspects, 30 kidnapping suspects, 150 sexual assault suspects, 200 robbery suspects, 1,200 suspects for assaults of other types and 2,600 suspects implicated in dangerous narcotics related charges.

Id. See also Bill Hess, *Illegal Immigration Numbers Don't Show Drop in Country*, SIERRA VISTA HERALD Dec. 2, 2003, at <http://www.svherald.com/articles/2003/12/02/news/news4.txt> (last visited Mar. 4, 2005).

165. TURNER, *supra* note 10, at 14.

166. *Id.* at 15.

167. *Id.*

168. *Id.* A list of COI apprehensions for the first seven months of 2004 for the Southern Border includes nationals from Afghanistan (16), Egypt (18), Kazakhstan (2), Kuwait (2), Indonesia (19), Iran (13), Iraq (10), Lebanon (13), Pakistan (109), Saudi Arabia (7), Somalia (5), Sudan (6), Syria (10), Tajikistan (3), Turkey (26), Uzbekistan (13) and Yemen (3). *Id.*

169. *Id.* The tribal police on the Tohono O'odham Nation reported finding an Iranian passport on their reservation.” *Id.* The national security interests surrounding Iran could not be more important:

Iran remains the ideological center of the America-hatred pervading the Islamic Middle East. That theocracy began warring with America when its rulers took 52 Americans hostage in 1979. Highlights of Iran's terrorism on Americans include the bombing and murder of 241 Marines in Beirut in 1983 and the killing of 19 US servicemen bombed at Khobar Towers in Saudi Arabia in 1996.

More recently, intelligence sources believe Iran harbors Al Qaeda operatives who orchestrated the bombing of a Western residential compound in Saudi Arabia last month [June 2003] that killed nine Americans. Iran . . . [continues to] sponsor[] such terrorist groups as Hezbollah, Hamas and Islamic Jihad in Lebanon, Israel, Gaza and the West Bank Clearly, Iran is the root of Islamic terrorism.

Joseph Kellard, *Iran is the Root of Islamic Terrorism*, CAPITALISM MAG., July 5, 2003, at <http://www.capmag.com/article.asp?ID=2888> (last visited Mar. 4, 2005).

170. TURNER, *supra* note 10.

171. Siobhan Gorman, *A Nation Without Borders*, 33 THE NAT'L J. 48 (2001); see also

least three of the September 11th terrorists were illegal immigrants.¹⁷² Of the forty-eight foreign born terrorists who committed attacks on the United States since 1993, twenty-two of them violated immigration laws.¹⁷³ In fact, an illegal immigrant has participated in every major terrorist plot perpetrated against the United States by foreign terrorists since 1993.¹⁷⁴ Again, while most illegal immigrants are not a threat to America's national security, the "former INS's 'catch and release' policy is analogous to playing Russian roulette with the lives of thousands of U.S. citizens."¹⁷⁵ September 11th should be a reminder that terrorists who seek to destroy America or attack innocent civilians may already be present and operating within the United States.¹⁷⁶

C. The Government is Not Doing Enough

Seventy-seven percent of Americans believe that the government is not doing all it can "to control the border and to screen people allowed into the country."¹⁷⁷ Eighty-five percent of Americans think that "enforcement of

Chadwick M. Graham, Note, *Defeating an Invisible Enemy: The Western Superpowers' Efforts to Combat Terrorism by Fighting Illegal Immigration*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 281 (2004).

172. Blair, *supra* note 114, at 174.

173. Graham, *supra* note 171, at 286.

174. *Id.*

Even though the September 11 attacks raised global awareness concerning the connection between terrorism and illegal immigration, the link existed long before 2001.

Terrorist Mir Aimal Kansi shot and killed two CIA agents in 1993. Kansi legally entered the United States with a valid business visa.

Six of the seven foreign-born terrorists involved in the first Trade Center bombing had violated immigration law at some point prior to taking part in the attack. The Abouhalima brothers, Ismoil, and Salameh had all overstayed visas at some point, and Ajaj and Yousef both had no legal right to be in the country.

Eleven foreign-born terrorists were arrested while formulating a plot to destroy several New York landmarks and murder prominent political figures Three of the terrorists had violated U.S. immigration laws after receiving valid tourist visas. Seven of the other eight perpetrators became legal residents by marrying women who were U.S. citizens. . . .

In 1997, a Palestinian immigrant, Ghazi Ibrahim Abu Maizar, came within hours of detonating a bomb in a Brooklyn, New York, subway station On three separate occasions, Maizar attempted to enter the United States illegally through Canada.

Three terrorists from Algeria plotted the "millennium" attack in December of 1999. All three were living in the United States illegally at the time.

Id. at 287-88.

175. *Id.* at 286-287; see also Wes Vernon, *How P.C. State Department and INS Abet Terrorists*, NEWSMAX, Sept. 25, 2002, at www.newsmax.com/archives/articles/2002/9/24/205216.shtml (last visited Mar. 4, 2005).

176. Graham, *supra* note 171, at 289.

177. Poll: *Many Believe Lax Border Controls Contributed to Attacks*, NAT'L J.

immigration laws and the border has been too lax and this made it easier for the [9-11] terrorists to enter the country."¹⁷⁸ Furthermore, over 79% of Americans want the government to militarize the border.¹⁷⁹

Regardless of the criticism of America's border security mechanisms, it is important to note that the government has implemented a number of improvements since September 11th.¹⁸⁰ Funds have been appropriated for hiring and training Border Patrol agents. In fact, over 500 Border Patrol agents were hired in 2002 alone.¹⁸¹ Additional appropriations were allotted to improve the technology used to detect illegal border crossings.¹⁸² A "comprehensive preparedness program" was also enacted to help train and equip border security agents in countering terrorist attempts to bring WMDs into the United States.¹⁸³

Also worth mentioning is the growing cooperation between North American countries. Meetings have been held to determine the feasibility of developing an intergovernmental network where data could be shared between all countries in North America in order to counter illegal immigration.¹⁸⁴

Nevertheless, a number of critical problems continue to persist.¹⁸⁵ Border Patrol agents are transferring to higher paying, less dangerous, jobs elsewhere.¹⁸⁶ As a result, some border sectors are only being patrolled by agents during daylight hours, while most illegal immigration continues to occur at night.¹⁸⁷ Even with evidence showing the rise in illegal immigration, the Bush Administration is attempting to cut funding for border security by \$705 million per year.¹⁸⁸ The technological equipment acquired by Border Patrol agencies after September 11th is largely inadequate and outdated.¹⁸⁹ According

CONG.DAILY, Sept. 28, 2001 (on file with author).

178. *Id.*

179. Bill O'Reilly, *A Politician Who Supports Putting Troops on our Borders*, FOXNEWS, at <http://www.foxnews.com/sotry/0,2933,69555,00.html> (Nov. 8, 2002) (last visited March 26, 2005).

180. TURNER, *supra* note 10, at 18-21.

181. Senator Robert C. Byrd, *Protecting the Nation From Terrorist Attack*, FIN. TIMES INFO., Jan. 16, 2003.

182. See Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 102, 116 Stat. 543, 102 (2002); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 402, 115 Stat. 272, 402 (2001).

183. Blair, *supra* note 114, at 176; see also 50 U.S.C.S. § 2353 (Law. Co-op. 2002).

184. Blair, *supra* note 114, at 176; see also 8 U.S.C.S. § 1751 (Law. Co-op. 2002).

185. *Border Sieve; Terrorists Can Join Masses Sneaking Into U.S.*, SAN DIEGO UNION-TRIB., Aug. 12, 2002, at B-6.

186. *Id.*

187. J. Zane Walley, *Arizona Border: Unwatched and Unguarded*, WORLDNETDAILY, April 8, 2003, at http://worldnetdaily.com/news/article.asp?ARTICLE_ID=31932 (last visited Mar. 26, 2005).

188. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003: PROTECTING THE HOMELAND (2003), available at <http://www.whitehouse.gov/omb/budget/fy2003/budget.html> (last visited Mar. 20, 2005).

189. Matthew Maddox, *Military Needed to Enforce U.S. Border*, BATTALION, July 1, 2002. One can only hope that none of the aliens entering through our border were terrorists.

to homeland security experts, illegal immigration levels are still at an all time high.¹⁹⁰ Clearly the federal government has not done enough to protect the nation's borders, and what has been done is largely unsuccessful.¹⁹¹

Hundreds of thousands of illegal immigrants, and tons of contraband, successfully cross America's Southern Border every year.¹⁹² There is nothing to stop equally determined terrorists from taking advantage of the same loopholes in order to enter the United States, bringing with them weapons and the intent to use them.¹⁹³ The relative ease by which potential terrorists can cross the United States-Mexico border reveals glaring weaknesses in the border security system.¹⁹⁴ To provide the necessary protection there must be a genuine transformation of the Southern Border. The deployment of new technology to monitor the entire border twenty-four hours a day, the doubling of Border

The border must remain militarized and closed. It isn't just a crossing point for Mexicans on their way to work. It's the most popular route for drug dealers and smugglers. An estimated 400 tons of cocaine, 150 tons of methamphetamines and 15 tons of heroin entered the US across the border last year alone. 2.7 million unauthorized Mexicans have established residence in the United States. The Mexican-American border is the busiest American frontier. The wage differential between the two countries (\$5/day - \$60/day) is the greatest between any two bordering countries in the world. In a few decades the Mexican-American population will become the largest single minority in the United States.

John Barry, *U.S.-Mexican Border: Can Good Fences Make Bad Neighbors?*, SPEAKOUT, June 15, 2000, at http://speakout.com/activism/issue_briefs/1370b-1.html (last visited Mar. 6, 2005).

190. The White House, *Reform the Immigration System - White House Budget Statement*, at <http://www.isn.org/news/20010302070338.html> (last visited Mar. 20, 2005).

191. Giorgino, *supra* note 16.

The . . . old rules may have seemed proper before 9/11. They make absolutely no sense in a frightening new world where chemical, biological, or even tactical nuclear weapons can be carried into our communities in a backpack. Anyone who thinks what happened at the World Trade Center can't happen again and can't happen here is living in a dream world.

Id.

192. OFFICE OF NAT'L DRUG CONTROL POLICY, SHIELDING U.S. BORDERS FROM THE DRUG THREAT (1999), at www.ncjrs.org/ondcppubs/publications/policy/99ndcs/iv-f.html (last visited Mar. 6, 2005).

In 1998, 278 million people, 86 million cars, and four million trucks and rail cars entered the United States from Mexico. More than half of the cocaine on our streets and large quantities of heroin, marijuana, and methamphetamine enter the United States across the Southwest border. Illegal drugs enter by all modes of conveyance—car, truck, train, and pedestrian border-crossers. They cross the open desert in armed pack trains as well as on the backs of human "mules." They are tossed over border fences and then whisked away on foot or by vehicle. Planes and boats find gaps in U.S./Mexican coverage and position drugs close to the border for eventual transfer to the United States.

Id.

193. *Id.*

194. Interview with John Annerino, Photojournalist, in *Photographer Recounts Crossing U.S. Border With Mexican Illegal Immigrants*, NATIONAL GEOGRAPHIC NEWS, Jan. 23, 2003, at http://news.nationalgeographic.com/news/2003/01/0123_030123_border.html (last visited Mar. 20, 2005). "The busiest gateway for illegal immigrants crossing the U.S.-Mexico border for the past five years—a 261-mile-long (420 kilometer) stretch of Sonoran Desert in southern Arizona—is now considered the deadliest point of entry as well." *Id.*

Patrol agents and inspectors, and increasing the detention space as well as the judicial and prosecutorial services needed to support these law enforcement efforts, is a start, but it is not nearly enough.¹⁹⁵ The security of the country, in the face of terrorists, who have both the ability and the intent to infiltrate and attack the United States, requires much more. In response to these threats, the United States must take a new direction. It must build a fully functional security fence to run the entire length of the Southern Border.

IV. LEGAL JUSTIFICATIONS FOR FENCING OUR SOUTHERN BORDER

"Crave death Make sure that nobody is following you Bring knives, your will, IDs, your passport Pray: 'Oh God, you who open all doors, please open all doors for me, open all venues for me, open all avenues for me.'" These instructions were found in September 11th terrorist-hijacker Mohammed Atta's luggage.¹⁹⁶ Other terrorists undoubtedly are ready and willing to follow these directions. As long as this terrorist threat remains, the federal government must aggressively protect our borders to ensure the safety of the citizens of the United States of America. The idea of building a security fence to prevent threats to national security is not new, nor has discussion of such fences been limited to the border between the United States and Mexico.¹⁹⁷

A. Security Fences Around the World

Historically, there have been innumerable instances where nations have attempted to protect their lands and citizens by building security fences or walls. From the Great Wall of China to the infamous Berlin Wall, barriers have long been put up in order to protect valuable national interests.¹⁹⁸ Today there are security fences all around the world.¹⁹⁹ Nations have put them up to disrupt the movement of terrorists, smugglers, and illegal immigrants.²⁰⁰

India has constructed a 1,800-mile security fence on its border with Pakistan, with most of the fence extending into the disputed territory of Kashmir.²⁰¹ The fence's primary objective is to stop terrorists from crossing into India from Pakistan and to prevent missile attacks from striking Indian

195. TURNER, *supra* note 10, at 122-128.

196. *Id.* MICHELLE MALKIN, *INVASION 3* (2002) (citing Bob Woodward, *In Hijacker's Bags, a Call to Planning, Prayer, and Death*, WASH. POST, Sept. 28, 2001, at A1).

197. Posting of James Joyner to Outside the Beltway at <http://www.outsidethebeltway.com/archives/9170> (Feb. 7, 2005) (last visited Mar. 6, 2005) (quoting Abigail Cutler, *Security Fences*, ATLANTIC MONTHLY, Mar. 2005) [hereinafter Joyner].

198. Barry, *supra* note 188.

199. *Id.*

200. Jonathan L. Snow, *The Foundation for Defense of Democracies, Security Fences Around the World*, at http://www.defenddemocracy.org/publications/publications_show.htm?doc_id=211945 (Feb. 23, 2004) (last visited Mar. 18, 2005).

201. *Id.* at 1.

targets.²⁰² The fence was also constructed in order to reduce the flow of arms and ammunition to and from Pakistan.²⁰³ Made primarily of barbed wire, the fence swallows up acres of fertile farmland, all in the furtherance of national security.²⁰⁴ India has also constructed a security fence on its border with Bangladesh in order to prevent the infiltration of armed rebels and attacks on its citizens.²⁰⁵ The fence will ultimately extend over 2,000 miles and will cost the Indian government over one billion dollars.²⁰⁶

Saudi Arabia built a security barrier between itself and Yemen in order to "stop the flow of terrorists and smugglers over this porous border region."²⁰⁷ When the fence is completed it will be over ten feet high and extend the full length of the Saudi-Yemen border.²⁰⁸ The Saudis have justified the security fence by claiming that it "is necessary to ensure the safety of Saudi nationals."²⁰⁹ On February 18, 2004, the Saudis halted construction of the barrier.²¹⁰ When construction starts up again in 2005, it will be done in accordance with a Saudi-Yemeni border treaty and in cooperation with the Yemeni government.²¹¹

In 1999, Uzbekistan constructed a security fence made primarily of barbed wire on their border with Kyrgyzstan.²¹² "The fence was constructed after Islamic terrorists from Kyrgyzstan were blamed for bomb attacks in the Uzbek capital of Tashkent."²¹³ The fence led to the separation of family members and also caused many workers within the border region to suffer severe economic hardship, especially those who worked in agricultural production.²¹⁴

The British government began constructing a series of separation fences known as the 'Peace Line' in Northern Ireland in the 1970s.²¹⁵ These barriers were constructed of brick, iron, and steel and were "first erected in 1970 to curb the escalating violence between Catholic and Protestant neighborhoods" in Belfast, Northern Ireland.²¹⁶ The fences are over twelve meters in height,

202. *Id.*

203. Joyner, *supra* note 197.

204. Somini Sengupta, *With Wrath and Wire, India Builds a Great Wall*, N.Y. TIMES, Jan. 2, 2002, at A4.

205. Snow, *supra* note 200; see also Agence France Press, *India Finishes Fence along 'Sensitive' Third of Bangladesh Border*, Nov. 11, 2003, at http://quickstart.clari.net/qs_sel/webnews/wed/ct/India-bangladesh.R3MO_DNC.html (last visited Mar. 6, 2005).

206. Joyner, *supra* note 197.

207. Snow, *supra* note 200; see also John Bradley, *Saudi Arabia Enrages Yemen with Fence*, INDEPENDENT (UK), Feb. 11, 2004.

208. Joyner, *supra* note 197.

209. Snow, *supra* note 200.

210. *Id.* Nick Megoran, *Bad Neighbors, Bad Fences*, ASIA TIMES, March 15, 2000.

211. Joyner, *supra* note 197.

212. Snow, *supra* note 200.

213. *Id.*

214. *Id.*

215. *Id.* See also Joyner, *supra* note 197.

216. Joyner, *supra* note 197.

"average 500 meters in length, and have multiplied over the years, from 18 in the early 1990s to 40 today."²¹⁷ The fences have been highly successful in preventing terrorist attacks.²¹⁸ "The gates of the fence remain closed at night, allowing two policemen to do the security job that used to take dozens."²¹⁹

In 2004, Thailand announced plans to build a concrete fence along parts of its 650-kilometer border with Malaysia in order to keep terrorists and smugglers from sneaking across the southern border.²²⁰ Still in the early planning stages, it is unclear what the final length and makeup of the fence will be.²²¹ However, officials have recently declared the intention of having military commands along the border fence in order to close down suspected escape routes used by secessionists in Thailand's largely Muslim southern regions.²²²

In 1991, the United Nations Security Council established a demilitarized zone (DMZ) to separate the countries of Iraq and Kuwait.²²³ "The DMZ extends six miles into Iraq, three miles into Kuwait, and across the full length of the 120-mile border from Saudi Arabia to the Persian Gulf."²²⁴ The barrier consists primarily of an electric fence, but is also supported by a "15-foot-wide and 15-foot-deep trench, complete with a 10-foot-high supporting dirt brace, and is guarded by hundreds of soldiers, several patrol boats, and helicopters."²²⁵ In addition to the DMZ, Kuwait decided in January of 2004 to construct a new "217-kilometer iron separation barrier as well."²²⁶

The DMZ between North and South Korea was constructed in 1953 and is "the most heavily fortified border in the world, consisting of sensors, watchtowers, razor wire, landmines, automatic artillery, [and] tank traps."²²⁷ This DMZ stretches approximately 250 kilometers in length, averages four kilometers in width and is patrolled by over two million troops.²²⁸

217. Snow, *supra* note 200; see also Sharon Sadeh, *Belfast Separation Fences Divide, but Slow Violence*, HA'ARETZ, Sept. 4, 2003, at <http://www.16beavergroup.org/mtarchive/archives/000453.php> (last visited Mar. 6, 2005).

218. Snow, *supra* note 200.

219. *Id.*

220. *Id.* See also *Fencing Out Troublemakers*, THE STRAITS TIMES (Singapore), Feb. 19, 2004, at <http://www.straitstimes.asia1.com.sg/home/1,8676,,00.html?> (last visited Feb. 21, 2005).

221. Snow, *supra* note 200.

222. Austin Ramzy, *Bad Neighbors, Better Fences*, TIME MAGAZINE ASIA, Mar. 8, 2004, available at <http://www.time.com/time/asia/magazine/article/0,13673,501040315598570,00.html> (last visited Mar. 26, 2005).

223. Snow, *supra* note 200; see also *Kuwait Installs Iron Barrier on its Borders with Iraq*, ARABICNEWS, Jan. 14, 2004, at <http://www.arabicnews.com/ansub/Daily/Day/040114/2004011402.html> (last visited Mar. 6, 2005).

224. Snow, *supra* note 200; see also Darrin Mortenson, *120-Mile Barrier Keeps Iraq, Kuwait at Arm's Length*, N.COUNTY TIMES, Mar. 5, 2003, at <http://www.nctimes.com/articles/2003/03/05/export5020.txt> (last visited Mar. 6, 2005).

225. Snow, *supra* note 200.

226. *Id.*

227. *Id.*

228. Joe Havelly, *Korea's DMZ: 'Scariest place on Earth'*, at <http://www.cnn.com/2003/>

In addition to the above mentioned security fences, perhaps the most recognized and controversial fence, was built in 2003 by Israel in the disputed West Bank territory.²²⁹ This security fence elicited protest from the international community and was debated at an advisory hearing in the International Court of Justice.²³⁰

Although security fences continue to persist all over the world, they are not immune from criticism.²³¹ In America, security fences have been opposed due to supposed human rights abuses,²³² destruction of environmental habitats and the prevention of animal migration,²³³ racial and ethnic discrimination,²³⁴

WORLD/asiapcf/east/04/22/koreas.dmoz/index.html (Aug. 28, 2003) (last visited Mar. 18, 2005). This has been called the "the scariest place on earth" by President Bill Clinton. *Id.*

229. Sean D. Murphy ed., *Contemporary Practice of the United States Relating to International Law: Settlement of Disputes: ICJ Advisory Opinion on Israeli Security Fence*, 98 AM. J. INT'L L. 361 (2004). "Though the International Court of Justice has ruled that the fence violates international law, it remains highly popular among Israelis—attacks have declined by as much as 90 percent in certain areas since construction began, two years ago." Joyner *supra* note 197.

230. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (July 9, 2004) [hereinafter Advisory Opinion].

Advisory Opinion: The Court is of the opinion that the construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory . . . as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child.

Id.

231. *Id.*

232. Steve Helfand, *Desensitization to Border Violence & The Bivens Remedy to Effectuate Systemic Change*, 12 LA RAZA L.J. 87 (2000).

The greater the shock value of the exhibited violence, the more likely the desensitization process will be overcome by society in general. The comparison of rates of abuse between the New York City community policing program and violence directed at illegal entrants by Border Patrol agents suggests that the rate of abuse along the border has not reached the numeric threshold to overcome the desensitization process.

Id. See also Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001).

233. SCOTTY JOHNSON, BORDER LOCK-UP WILL ONLY HURT WILDLIFE (OR "DON'T FENCE 'EM OUT"), DEFENDERS OF WILDLIFE 1 (2003).

The newest attempt by the Bush administration to deal with immigration problems along the border . . . reveals an unsurprising disregard for the environment. Even worse, it probably won't work. Current border policy has done little to stem the tide of undocumented migrants or drug smuggling. New plans by the Immigration and Naturalization Service (INS) are simple extensions of this failed policy with one difference: they will be devastating to Arizona's native wildlife and habitats.

Id. See also Tseming Yang, *Of Borders, Fences, and Global Environmentalism*, 4 CHI. J. INT'L L. 237 (2003).

234. Steven W. Bender, *Latcritical Perspectives: Individual Liberties, State Security, and the War on Terrorism: Sight, Sound, and Stereotype: The War on Terrorism and Its*

and impediments to trans-border Indian reservation movement.²³⁵ However, the greatest criticism to such fences has come from the corporate community.²³⁶ Fences have been proven to keep illegal immigrants from entering more developed neighboring nations, thus denying these nations a cheap supply of wage laborers.²³⁷ Not only are businesses denied a cheap labor base, but they are also inhibited from freely trading across the border at the times and places they wish.²³⁸ Fences regulate border transactions to predetermined ports of entry where security issues can be adequately addressed.²³⁹ If trans-border trade is forced to enter and exit at designated ports, instead of anywhere along the border, it will increase transportation time and possibly lower corporate net profits.²⁴⁰ Such are the primary arguments against constructing a permanent border security fence. Although each is important in its own right, none compare to the overwhelming interest a nation has in protecting its own territory and citizens.²⁴¹ In fact, as the next discussion will demonstrate, there can be little argument that the United States is permitted to build a complete border security fence between itself and Mexico. Such justifications are rooted in national sovereignty, natural law, the right of self-defense, the "war on terror," and the "Invasion Clause" of the U. S. Constitution.

B. State Sovereignty and Plenary Power

The plenary power doctrine underlies much of the historical precedence for both immigration and national security law.²⁴² Congress's judgments as to which non-citizens should be admitted into the United States, and which should be excluded, have largely been immune from judicial review.²⁴³ Founded on notions of inherent state sovereignty, plenary power gives Congress complete discretion to exclude immigrants, including the ability to effectively stop illegal

Consequences for Latinas/os, 81 OR. L. REV. 1153 (2002).

Increased calls for border security after the September 11 terrorist attacks, as well as the practice of profiling Arab Americans and Arabs in settings ranging from Department of Justice investigatory interviews to airport passenger screenings, may signal invigorated use of profiling against Latinas/os, particularly in the effort to interdict undocumented immigrants. Alarming, use of racial profiling in aid of border security, immigration enforcement, and the war on drugs seems consistent with the newly established prerogatives of the war on terrorism.

Id. See also Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 TEX. HISP. J.L. & POL'Y 37 (2002).

235. Kevin R. Johnson, *Law and the Border: Open Borders?*, 51 UCLA L. REV. 193 (2003).

236. *Id.*

237. *Id.*

238. *Id.*

239. See generally Advisory Opinion, *supra* note 230.

240. *Id.*

241. See generally Bradford, *supra* note 6.

242. For a very good analysis of the plenary power doctrine, see Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response To Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000).

243. JOHNSON, *supra* note 233, at 197.

immigration in any manner deemed necessary.²⁴⁴ "Under a strict plenary power regime, the U.S. government may act as if it is in a state of nature without legal constraints in a modern 'survival of the fittest' world."²⁴⁵ As such, the government of the United States can exclude illegal immigrants from its territory using whatever method that is determined to be will be most effective.²⁴⁶

Exclusion of illegal immigrants is part of the inherent territorial sovereignty of a nation.²⁴⁷ As once stated by Chief Justice Marshall, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."²⁴⁸ Any restrictions or prohibitions on this right to exclusive territorial sovereignty must be consented to by the nation itself, and cannot be imposed by any foreign power.²⁴⁹ The United States, in its relationship with foreign countries and their subjects, is one nation, "invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."²⁵⁰

International law largely respects each nation's inherent sovereignty, giving every country the discretion to make and manage immigration law systems.²⁵¹ "If sovereignty is to have any meaning, it must include a state's

244. *Id.*

245. *Id.* See also Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

246. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 14-15 (2003).

Federal courts have already used the plenary power doctrine to justify exclusions and deportations based on national origin, to exclude or deport people based on their political beliefs or associations, to deny even permanent residents a Fifth Amendment right to due process in deportation proceedings, and to allow indefinite detention pending deportation The courts . . . [have had] to develop a jurisprudence that addresses the regulation of immigration as an exercise of U.S. sovereignty, a subject about which the Constitution is silent. There is, in fact, an abundance of international law in support of the plenary power doctrine.

Id.

247. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) [Hereinafter *Chinese Exclusion Case*].

248. *The Schooner Exchange v. M'Faddon & Others*, 11 U.S. 116, 136 (1812).

249. Saito, *supra* note 246, at 15.

250. *Chinese Exclusion Case*, *supra* note 247, at 603-04 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 413 (1821)); see also *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Bugajewitz v. Adams*, 228 U.S. 585 (1913); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904); *The Japanese Immigrant Case*, 189 U.S. 86 (1903); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893). For an analysis of these cases, see generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987).

251. Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 65 (2004).

right to maintain its physical borders by deciding who may or may not enter.”²⁵²

In the United States, the Supreme Court has held that the political branches have plenary power over questions of immigration.²⁵³ Foundational cases provide the nature and extent of this plenary power, relying heavily on “concepts of sovereignty, the right of a nation to absolute independence and security, and the need to exclude and expel foreigners as essential to self-preservation.”²⁵⁴ These concepts are grounded in international law, and support the idea that no other country or international organization can control the inherent rights of the United States unless the U.S. government explicitly consents to such international control.²⁵⁵ “The power to . . . expel undesirable aliens . . . exists as inherently inseparable from the conception of nationality.”²⁵⁶ A nation has a duty to protect its own citizens and their property,²⁵⁷ but it does not have a similar duty either to recognize or protect the rights claimed by the citizens of a foreign country.²⁵⁸ As such, the United States is permitted by national sovereignty and plenary power to construct a security fence along its border with Mexico.

Only a security fence spanning the entire Southern Border can prevent millions of illegal immigrants, many of national security concern, from entering the United States undetected.²⁵⁹ Refusing to adequately address the current illegal immigration problem could result in the loss of national sovereignty.²⁶⁰ In this age of terror and weapons of mass destruction, the United States must prevent the migration of any true threat to its security, including undocumented

252. *Id.*

253. Chinese Exclusion Case, *supra* note 247, at 605.

254. Robert Pauw, *Plenary Power: An Outmoded Doctrine that Should not Limit IIRIRA Reform*, 51 EMORY L.J. 1095, 1114 (2002); *see also* Ekiu v. United States, 142 U.S. 651, 659 (1892). “It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or admit them only in such cases and upon such conditions as it may see fit to prescribe.” *Id.*

255. Pauw, *supra* note 254 at 1115; *see generally* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002).

256. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707-08 (1893) (quoting international law scholar, Emer de Vattel: “In virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner”). The Court quotes Ortolan who writes, “The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation.” *Id.*

257. Pauw, *supra* note 254, at 1115-1116.

258. *See* Galvan v. Press, 347 U.S. 522, 530 (1954).

259. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 89-90 (1984); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 33 (1985).

260. Peter H. Schuck, *The Message of 187: Facing up to Illegal Immigration*, AM. PROSPECT, Spring 1995, at 85.

illegal immigrants.²⁶¹ At no time in the history of the United States has border enforcement been a more desperate issue.²⁶²

Rather than simply trying to fix an already broken system by hiring more agents and increasing the budget for outdated and flawed detection technology, the answer to the current terrorist threat is to properly fence the perimeter of the Southern Border and force would-be immigrants to enter the United States legally at predetermined ports of entry or to not enter at all.²⁶³

C. Inherent Right to Self-Defense

Throughout history, the ability of nations to resort to preventative measures of self-defense was generally immune from regulation under international law.²⁶⁴ Sovereignty was its own justification for taking measures in self-defense, and nations have continued to claim the right to engage in any action necessary to counter perceived threats.²⁶⁵ However, early international treaties and agreements, most notably the Covenant of the League of Nations, attempted to prohibit "aggressive" preventative force, commonly defined as the "use of armed force against the territorial integrity or political independence of another state."²⁶⁶ The Charter of the United Nations, ratified in 1945, reflected the growing regulation of the use of preventative measures in self-defense.²⁶⁷ Article 2(4) of the Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state," and it is now considered "well settled in modern international law that no nation may engage in aggression."²⁶⁸

Although there are international treaties that restrict a nation from using aggressive preventative measures in self-defense, there is no restriction that limits a nation's inherent right to self-defense.²⁶⁹ The U.N. Charter regulates

261. Jan C. Ting, *Unobjectionable but Insufficient - Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002).

262. See Viet D. Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 401-06 (2002).

263. See U.S. Customs and Border Protection, *supra* note 29; see also Intelligence and Terrorism Information Center at the Center for Special Studies, *The Security Fence and Buffer Zone as a Successful Obstacle to Terrorism*, at http://www.intelligence.org.il/eng/c_t/fence/fence_b.htm (July 2004) (last visited March 8, 2005).

264. Bradford, *supra* note 6, at 1374-75.

265. LEE A. CASEY & DAVID B. RIVKIN, JR., WASHINGTON LEGAL FOUNDATION, "ANTICIPATORY" SELF-DEFENSE AGAINST TERRORISM IS LEGAL, (2001), at <http://www.wlf.org/upload/casey.pdf> (last visited Mar. 7, 2005).

266. See *Resolution on the Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975).

267. Bradford, *supra* note 6, at 1375.

268. U.N. CHARTER art. 2, para. 4.

269. Statement of Kofi Annan, U.N. Secretary General, Oct. 8, 2001, *reprinted in* United States Embassy, Tokyo, Japan, *U.N. Secretary-General Affirms U.S. Right to Self-Defense*, October 8, 2001, *available at* <http://japan.usembassy.gov/ef/tp-se0486.html> (last visited Mar. 7, 2005).

the use of preventative self-defense measures, but nations are still free to take any action deemed necessary as long as such measures are "in conformity with the Charter."²⁷⁰ Accordingly, nations may continue to use preventative self-defense in order to protect their territory and citizens, as long as they do not infringe upon the territorial integrity or political independence of other nations.²⁷¹ Moreover, "self-defense remains so intrinsic to the concept of sovereignty, even in the Charter era, that the right is one that would be asserted by nations absent recognition in international law."²⁷²

Article 2(4) of the U.N. Charter expressly prohibits only three state actions: (1) the threat or use of force prejudicial to the territorial integrity of states; (2) the threat or use of force contrary to the political independence of states; and (3) the threat or use of force "in any other manner inconsistent with the Purposes of the United Nations."²⁷³ Arguably then, all preventative measures that do not challenge either the territorial integrity or political independence of another state, and are not inconsistent with the maintenance of international peace and security, are therefore permissible.²⁷⁴ The exercise of the right to self-defense, even where it involves the creation of physical barriers like a security fence, is consistent with the maintenance of international peace and security and is not contrary to the U.N. Charter.²⁷⁵

The Charter also recognizes in Article 51, the "inherent right" of a nation to provide assistance to other countries that may need support during their own self-defensive struggles.²⁷⁶ The framers recognized that in order to achieve a lasting peace, countries must be permitted to take all necessary actions to resist national security threats.²⁷⁷ The traditional right of nations to self-defend should be presumed to have survived the Charter in the absence of compelling

Immediately after the 11 September attacks on the United States, the Security Council expressed its determination to combat, by all means, threats to international peace and security caused by terrorist acts. The Council also reaffirmed the inherent right of individual or collective self-defence in accordance with the Charter of the United Nations. The States concerned have set their current military action in Afghanistan in that context.

Id.

270. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 66 (Jul. 8).

271. Bradford, *supra* note 6, at 1378.

272. Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 218 (1998).

273. U.N. CHARTER art. 2, para. 4.

274. See Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 521-22 (2003).

275. Jonathan Gurwitz, *Blame Terror, Not Fence, for no Peace*, SEATTLE POST-INTELLIGENCER, Mar. 2, 2004, at http://seattlepi.nwsourc.com/opinion/162732_wall02.html (last visited Mar. 7, 2005). "The barrier to peace between Israelis and Palestinians is not this fence; rather, it is the terror supported and incited by Arafat that has made the fence necessary."

Id.

276. See U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . .").

277. Bradford, *supra* note 6, at 1378.

evidence to the contrary.²⁷⁸ Accordingly, preventative measures, a subset of the inherent right of self-defense, do not violate the text of Article 51, and do not require that an armed attack occur before self-defensive measures can be taken by a nation.²⁷⁹

On July 9, 2004, Article 2(4) of the U.N. Charter was partially relied upon by the International Court of Justice (ICJ) in order to rule against the security fence constructed by Israel on its border with the Palestinians.²⁸⁰ Article 2(4) of the Charter, however, was discussed only briefly, as the court relied much more on Articles 46 and 52 of the 1907 Hague Regulations²⁸¹ and Article 53 of the Fourth Geneva Convention,²⁸² which deal primarily with the wrongful requisition of disputed territory.²⁸³ The court also limited their

278. *Id.*

279. *See* Military and Paramilitary Activities, 1986 I.C.J. 14, 347-48 (June 27, 1986).

I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if, and only if, an armed attack occurs" I do not agree that the terms or intent of Article 51 eliminate the right of self-defense under customary international law, or confine its entire scope to the express terms of Article 51.

Id.

280. Advisory Opinion, *supra* note 230.

281. Article 46 states: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." Hague Convention art. 46 (1907), at <http://www.lib.byu.edu/~rdh/wwi/hague.html> (last visited Mar. 8, 2005). Article 52 states:

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Id. at art. 52.

282. Article 53 of the Fourth Geneva Convention states: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." Fourth Geneva Convention art. 53 (1949), at http://www.jewishvirtuallibrary.org/jsource/History/Human_Rights/geneva1.html. (last visited March 8, 2005).

283. Nicole Trudeau, *International Court of Justice to Give Advisory Opinion Concerning Israel's Barrier*, 11 HUM. RTS. BR. 34 (2004).

At the October session, the Assembly passed a resolution demanding that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law. Israel also states that the final border will be determined by negotiations because it does not recognize the Armistice Line of 1949 as a confirmed international boundary and disputes the legal status of the Occupied Palestinian Territory By building the Barrier on land in significant departure from the Line, the Palestinian Authority's views Israel as attempting to

Advisory Opinion to those fenced areas that were located within disputed Palestinian-Israeli lands, while refusing to make any ruling on the security fence that was found completely within Israeli territory.²⁸⁴ As taken from the ICJ's limited discussion, it appears that, although self-defence does not justify the building of a security fence over disputed territory, it does appear to be sufficient justification for constructing a security fence over non-disputed lands.²⁸⁵ Thus, it appears that international law does not prohibit the United States from erecting a security fence along the Southern Border with Mexico in furtherance of its inherent right of self-defense.

D. Natural Law

For centuries, academics and philosophers have defended the idea that there are absolute and universal rules that bind all mankind and political communities together and trump any inconsistent law.²⁸⁶ Natural law is the "immediate and eternal expression of the principles of rights and justice that, though gleaned from observation of the natural universe and referenced as the ultimate origin of law and the beginning of moral life proper, long antedates the origin of man, and is effectively super-law."²⁸⁷ Natural law and natural rights are rooted in the nature of man and the world, and are not restricted by the arbitrary power of the state.²⁸⁸ As such, natural law often conflicts with man-made, positive law that is not in harmony with natural justice.²⁸⁹ When such conflicts occur, natural law is meant to prevail over the inconsistent positive law.²⁹⁰ Additionally, natural law rejects the idea that contrary laws even have

expropriate land occupied by the Palestinians The Court's advisory opinion on this issue, though not binding on Israel's actions, should be respected and upheld by both the Israeli and Palestinian leadership, as well as the international community.

Id.

284. Advisory Opinion, *supra* note 230.

285. *Id.*

286. See Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 328 (1991).

287. See Louis Rene Beres, *International Law, Personhood and the Prevention of Genocide*, 11 LOY. L.A. INT'L & COMP. L. REV. 25, 34 (1989).

288. Posted by James A. Donald at *Natural Law and Natural Rights*, at <http://www.jim.com/rights.html> (last visited Mar. 7, 2005).

Law derives from our right to defend ourselves and our property, not from the power of the state. If law was merely whatever the state decreed, then the concepts of the rule of law and of legitimacy could not have the meaning that they plainly do have, the idea of actions being lawful and unlawful would not have the emotional significance that it does have. As Alkibiades argued, (Xenophon) if the Athenian assembly could decree whatever law it chose, then such laws were "not law, but merely force." The Athenian assembly promptly proceeded to prove him right by issuing decrees that were clearly unlawful, and with the passage of time its decrees became more and more lawless.

Id.

289. Bradford, *supra* note 6, at 1427.

290. *Id.*

the force of law at all.²⁹¹ Simply put, natural law is "eternal and unchangeable, binding at all times upon all peoples."²⁹² It provides structure to the legal world by laying out inherent rights and duties of parties and declaring that only good laws have the force of law at all.²⁹³

The relationship between natural law and the right of a nation to engage in preventative measures of self-defense has been argued for centuries.²⁹⁴ Cicero insisted that under natural law, "every means of securing our safety is honourable" if "our life be in danger from plots, or of open violence, or from the weapons of robbers or enemies."²⁹⁵ Thomas Hobbes believed it impossible to surrender natural rights to life, liberty and security.²⁹⁶ Such would be "against the dictates of true reason for a man to use all his endeavours to preserve and defend his Body, and the Members thereof from death."²⁹⁷ John Locke elaborated on Hobbes' theories, believing that there was a settled natural right to use preventive force against threats to one's safety.²⁹⁸

The founders of modern international law also acknowledged inherent rights under natural law, especially with regard to a nation's right to self-defense.²⁹⁹ Hugo Grotius, for example, believed that there was a fundamental right of self-defense under natural law for nations to undertake preventive measures that were necessary to protect their territory, civilians, and property.³⁰⁰ International law theorists, including Alberico Gentili and Samuel von Pufendorf, recognized that "states were entitled, at natural law,"³⁰¹ to take preventative measures "even though an enemy has not yet fully revealed his intentions"³⁰² The only limitation mentioned by these scholars on a nation's right to use preventive measures to protect their territory and their

291. *Id.*

292. CICERO, DE RE PUBLICA, DE LEGIBUS 385 (Clinton Walker Keyes trans., 1948), available at <http://www.constitution.org/rom/cicero.htm> (last visited Mar. 7, 2005).

293. Bradford, *supra* note 6, at 1427-28.

294. *Id.* at 1431.

295. The Speech of M.T. Cicero In Defence of Titus Annius Milo, in 3 ORATIONS OF MARCUS TULLIUS CICERO 394 (C. D. Yonge trans., 1911), available at http://www.phatnav.com/books/pdf/speech_in_defence_of_titus_annius_milo.pdf (last visited Mar. 7, 2005).

296. Donald, *supra* note 288.

297. THOMAS HOBBS, DE CIVE 47 (Howard Warrender ed., 1983) (1651), available at <http://www.constitution.org/th/decive.htm> (last visited Mar. 7, 2005).

298. Bradford, *supra* note 6, at 1431-32.

299. See HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 39 (Francis W. Kelsey trans., 1925) (1625), available at <http://www.constitution.org/gro/djbp.htm> (last visited Feb. 24, 2005).

The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.

Id.

300. *Id.* at 176.

301. Bradford, *supra* note 6, at 1433.

302. SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO THE NATURAL LAW 32 (Frank Gardner trans., Oxford Univ. Press 1927) (1682), available at <http://www.constitution.org/puf/puf-dut.htm> (last visited Mar. 7, 2005).

citizens was that negotiation and compromise be attempted first.³⁰³

Eventually the ideas encapsulated within natural legal philosophy were incorporated by leading political figures into the laws and constitutions of their various respective states.³⁰⁴ In the United States, Thomas Jefferson held that the natural law of self-defense “controlled the written laws,” and that, regardless of any domestic or international laws restricting the use of preventative measures, the United States had the right, but also the “moral duty,” to take all necessary precautions to ensure the nation’s “preservation and safety.”³⁰⁵ The U.S. Constitution also reflected these ideals, acknowledging that the government did not grant rights to the American people, but rather protected and secured each person’s natural rights to life, liberty, and property.³⁰⁶

At the end of the twentieth century, natural law jurisprudence continued to thrive, especially in the areas of international relations and human rights, where a number of scholars and non-governmental organizations attempted to extend the protection of inalienable rights to those being denied natural justice.³⁰⁷ For “new natural law” theorists, there are limits to lawmaking.³⁰⁸ Nations, although sovereign, are not free to transform a moral wrong into a legal right.³⁰⁹ Arguably then, nations have the right, under natural law, to take all preventative measures necessary to counter foreign threats posed by enemies.³¹⁰ This general principle allows the use of preventative measures in self-defense to protect the nation’s territory and citizens, and justifies the building of a security fence along the Southern Border between the United States and Mexico. This right holds true regardless of any domestic or international law to the contrary.³¹¹

303. Bradford, *supra* note 6, at 1434-35.

304. *Id.*

305. *Id.*

Compacts . . . between nation & nation are obligatory on them by the same moral law which obliges individuals to observe their compacts, and although treaties created the same moral duties between states that existed between individuals under natural law, for Jefferson there were circumstances . . . which sometimes excused the non-performance of contracts . . . between nation & nation.

Id. at n. 268 (quoting Thomas Jefferson, *Opinion on the French Treaties*, in THE POLITICAL WRITINGS OF THOMAS JEFFERSON 113-114 (Merril D. Peterson ed., 1993)).

306. BOB WIENER & ROSE WIENER, THE UNITED STATES CONSTITUTION AND NATURAL LAW, (1991), available at http://www.forerunner.com/forerunner/weiner/X0023_9110_Natural_Law.html (last visited Mar. 7, 2005).

307. See generally Gregory Flanagan, *Natural Rights and Natural Law*, The Libertocracy Association, at [http://www.libertocracy.com/Librademia/Essays/Government/\[7univerdefinlaw.htm#The%20right%20of%20nature](http://www.libertocracy.com/Librademia/Essays/Government/[7univerdefinlaw.htm#The%20right%20of%20nature) (last visited Mar. 7, 2005).

308. Jude Chua Soo Meng, *To Close a Generation Gap: Thomists and the New Natural Law Theory*, QUODLIBET ONLINE J. OF CHRISTIAN THEOLOGY & PHIL., (2001), at <http://www.quodlibet.net/pdf/meng-thomism.pdf> (last visited Mar. 7, 2005).

309. Bradford, *supra* note 6, at 1437.

310. *Id.*

311. *Id.*

E. Law of War: National Security

President Bush has characterized the events of September 11th as acts of "war," while also acknowledging that the "war on terror is a different kind of war."³¹² Unlike the conception of a war between two nations complete with declarations expressing their intent to do battle, the acts of terrorism targeting the United States over the past decade were not carried out under the authority or accountability of any particular country's government.³¹³ Thus, "because modern terrorists do not fight as a typical body of armed forces with long-range capabilities, governments at risk of terrorism must strengthen their borders . . . to combat this new threat."³¹⁴

Under the Constitution of the United States, the President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."³¹⁵ He is also vested with "the Executive Power" and charged with the duty to "take Care that the Laws be faithfully executed."³¹⁶ Finally, the President is also under an oath, taken the day upon entering office, requiring that he "preserve, protect and defend the Constitution of the United States."³¹⁷ Despite these constitutional provisions, the extent of the President's power, especially in regard to issues of national security, has been argued since the beginning of the United States as an independent nation.³¹⁸ The President is encouraged to exercise reasonable discretion in the use of preventative measures, but Congress is granted the ultimate power to "check executive action through its powers of appropriation, statutory authorization, and impeachment."³¹⁹ While the legislative and executive branches have fought over the exact commitments of power under the Constitution, the judicial branch has largely refused to rule upon issues of foreign relations due to the political question doctrine.³²⁰ Instead the courts have recognized that the

312. Graham, *supra* note 171, at 293; *see also* President George W. Bush, Address to the Nation on the Capture of Saddam Hussein at <http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html> (Dec. 14, 2003) (last visited Mar. 7, 2004).

313. Graham, *supra* note 171, at 293-94.

314. *Id.* at 294; *see also* President George W. Bush, Remarks at the American Legion National Convention in St. Louis, Missouri, Aug. 26, 2003, at <http://www.state.gov/p/nea/rls/rm/23551.htm> (last visited Mar. 7, 2005).

315. U.S. CONST. art. II, § 2.

316. *Id.* art. II, § 1-3.

317. *Id.* art. II, § 1.

318. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

319. *See* W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT'L L. 777, 783 (1989).

320. Nada Mourtada-Sabbah, *The Political Question Doctrine, Executive Discretion, and Foreign Affairs*, WHITE HOUSE STUDIES, (2003), at http://www.findarticles.com/p/articles/mi_m0KVD/is_3/ai_n6142003 (last visited Mar. 7, 2005) ("This doctrine involves the deference that courts are said to show vis-a-vis the political departments, especially the executive branch, when the issue at hand involves what are considered to be political matters.").

President is entitled to the widest margin of discretion in the exercise of his constitutionally committed power as the "sole organ of the nation in its external relations" and as "Commander in Chief."³²¹

The *Durand* court in 1860 upheld the exercise of the executive power to not only implement all necessary measures to protect the United States territory and citizens, but also declared that the President has a *duty* to do so.³²² The court recognized that threats to the United States "cannot be anticipated and provided for" and that measures taken in self-defense often "require the most prompt and decided action."³²³ The court realized that the executive branch was best equipped to provide the swift and immediate response to such foreign threats.³²⁴ It was the President's duty to use preventative measures to stop "acts of violence, or of threatened violence to the citizen or his property . . ."³²⁵

Without question, the President has a moral and legal obligation to defend the United States and its citizens.³²⁶ The *Neagle* Court implied that the origin of this presidential duty is found in extra-constitutional, nonpositivist sources of law.³²⁷ Extra-constitutional obligations most likely are a reference to natural law and the requirement of doing what is just, even if that means violating positivist law.³²⁸ As such, the President is required to engage in preventive action when necessary to defend the United States and its nationals against threats to life and liberty.³²⁹ The Report of the International Commission on Intervention and State Sovereignty recognizes "that sovereignty implies responsibility . . . for the protection of [the] people [within] the state."³³⁰ This offers strong support for the argument that "it is incumbent upon states to protect their nationals not only against domestic threats but from foreign threats as well . . ."³³¹ Where a President perceives a potential threat

321. Bradford, *supra* note 6, at 1442; see also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644-45 (1952).

322. *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186).

323. *Id.*

324. *Id.*

325. *Id.*

326. Bradford, *supra* note 6, at 1452-53. Individuals entered into contracts with political leaders in order to enhance their security, trading their personal liberty for the safety guaranteed by the sovereign, who was under a duty to defeat any threat to his citizens. *Id.* "Failure to engage or conquer threats to those within his protection stripped the sovereign" of his citizen's obedience and invalidated the contract. *Id.* at 1451. Conditionally exchanging protection for allegiance was adopted by a number of prominent colonial politicians and ultimately found expression in the Constitution of the United States. *Id.*

327. *In re Neagle*, 135 U.S. 1, 64 (1890).

328. Bradford, *supra* note 6, at 1454-55.

329. *Id.*

330. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT xi (2001), available at <http://www.iciss.ca/report-en.asp> (last visited Mar. 7, 2005).

331. Bradford, *supra* note 6, at 1462.

to the national security of the United States, he may implement protective measures immediately, including those necessary to secure the nation's border from terrorist infiltration.³³²

*F. Invasion Clause*³³³

The United States Constitution provides as follows: "The United States . . . shall protect each of . . . [the states] against Invasion."³³⁴ This clause is commonly referred to as the "Invasion Clause." James Madison, in *the Federalist No. 43*, provided the most explanatory description of the Invasion Clause. There he stated:

A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but also against ambitious or vindictive enterprises of its more powerful neighbors. The history, both of ancient and modern confederacies, proves that the weaker members of the union ought not to be insensible to the policy of this article.³³⁵

Most courts refuse to hear arguments regarding the Invasion Clause, insisting that such matters are nonjusticiable political questions.³³⁶ "[T]he protection of the states from "invasion" involves matters of foreign policy and defense, which are issues that the courts have been reluctant to consider."³³⁷ The few courts that have agreed to hear Invasion Clause cases generally hold that the clause is only applicable when the protesting state is exposed to some sort of armed hostility stemming from a political entity, such as another state or a foreign country.³³⁸ However, there is no express requirement in the Invasion Clause that the threat come from another state or foreign country.³³⁹ Instead, the only requirement is that the federal government must protect the states from any domestic and foreign threats to their security.³⁴⁰

332. Dahlia Lithwick, *What War Powers Does the President Have*, SLATE ONLINE NEWS, Sept. 13, 2001, at <http://www.slate.msn.com/id/1008290> (last visited Mar. 7, 2005); see also Don Crawford, *President Bush, Please Close our Borders!*, WORLDNETDAILY, Feb. 4, 2005, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=42717 (last visited Feb. 25, 2005).

333. For a very good discussion on the Invasion Clause in reference to the illegal immigration taking place on the Canadian-U.S. border, see generally Blair, *supra* note 114.

334. U.S. CONST. art. IV, § 4.

335. THE FEDERALIST NO. 43 (James Madison) 298 (Tudor Publishing Co. 1788) (1947).

336. See *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996).

337. *Id.*

338. *Id.* See also *Barclays Bank PLC v. Franchise Tax Bd.*, 114 S. Ct. 2268, 2284-85 (1994); *Chicago & S. Air Lines v. Waterman S.S.*, 333 U.S. 103, 111 (1948).

339. U.S. CONST. art. IV, § 4.

340. Blair, *supra* note 114, at 203; see also *Arizona v. United States*, 104 F.3d 1095 (9th

The term “invasion” has been, interpreted to refer to any hostile and foreign invasion perpetrated on American soil.³⁴¹ As such, the federal government has obligations under the Invasion Clause to protect the states from foreign threats, including terrorism.³⁴² In order to successfully prevent a terrorist invasion, or a terrorist attack, all necessary preventative measures must be taken, including the construction of a border-length security fence. As long as the threat remains, the federal government has a duty to aggressively protect the nation’s borders and ensure that the citizens of the United States of America are safe and secure.³⁴³ Yet, the legislative and executive branches have refused to appropriately address the national security issues connected with illegal immigration along the Southern Border.³⁴⁴ As such, the government’s inaction in the face of this foreign threat fails to adequately protect the states from invasion and likely violates the Invasion Clause.

V. CONCLUSION

“Mr. Bush, put up this wall!”³⁴⁵

Since September 11, 2001, much has been said about the porous Southern Border, the influx of illegal immigrants from nations of national security concern, and the ease of which weapons of mass destruction can be transported into the United States without detection.³⁴⁶ The Department of Homeland Security and other executive agencies have implemented numerous measures in order to curb this tide of illegal immigration, but to a large extent these measures have failed.³⁴⁷ Illegal immigration continues to grow, making it nearly certain that the United States will become the victim of another terrorist attack in the future.³⁴⁸

The argument in favor of constructing a security fence along the Southern Border between the United States and Mexico is merely an assertive acknowledgement of the right of a sovereign nation to control who shall and who shall not enter the country.³⁴⁹ Such is a right long protected throughout

Cir. 1996); *California v. United States*, 104 F.3d 1086 (9th Cir. 1996).

341. Blair, *supra* note 114, at 223.

342. *Id.* at 223.

343. *Id.*

344. Fred Elbel, Desert Invasion- U.S., Tidal Wave of Illegal Immigration, at http://www.desertinvasion.us/data/invasion_tidal_wave_2004.html (last visited Mar. 18, 2005); GEN. ACCOUNTING OFFICE, BORDER SECURITY—AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LANDS (June 2004), at <http://www.gao.gov/new.items/d04590.pdf> (last visited Mar. 7, 2005); Frosty Woolridge, *Immigration Invasion-A View From a Border Patrol Officer*, WASH. DISPATCH, May 25, 2004, <http://www.rense.com/general53/immig.htm> (last visited Mar. 7, 2005).

345. Posting by Steve Sailor to Vdare.com, *The Call for American Unity*, July 2, 2002, at http://www.vdare.com/sailor/israeli_fence.htm (last visited Mar. 7, 2005).

346. *See supra* Part III.

347. *Id.*

348. *Id.*

349. *See supra* Part IV.

history and well codified in immigration law precedents.³⁵⁰ Beyond a mere acknowledgment of a nation's sovereignty, there is a continuing recognition that nations have the universal customary right to use preventative self-defense against any security threat.³⁵¹ The right of self-defense is a right that is absolute, taking precedence over all other contrary laws and finding moral and legal justification in the annals of natural law jurisprudence.³⁵² Thus, even if a security fence is in tension with positive law, natural law stands on guard, prepared to support such actions in the name of justice and higher morality.³⁵³

In the United States, the President not only has the power to protect the nation's security, but also has a duty to do so.³⁵⁴ This is especially true during a time of war.³⁵⁵ The President must defend the country, and vital interests to the country, and this obligation is wholly consistent with international law.³⁵⁶ Furthermore, the federal government has a constitutional duty to protect the states from invasion, and an invasion is becoming all too real as millions of illegal immigrants, many with national security concerns, enter the United States each year.³⁵⁷

The terrorist threat is not something to take lightly. Prevention must start at home by securing the nation's borders, rather than expending scarce resources abroad. A security fence is a reasonable, proportional, and necessary measure directed toward the reduction of a threat of the highest magnitude: terrorist infiltration of the United States. The threat is very real. Any government that fails to respond aggressively to the menace of weapons of mass destruction and armed terrorism fails in its most solemn duty to the American people.³⁵⁸ The law governing self-defense, if it is to continue to serve any purpose in the post-September 11th world, must remain consistent with the moral imperative that nations are entitled, and obligated, to use all necessary means to defend their territory and their citizens.³⁵⁹ Only then will the collective goals of security, justice and peace ultimately be achieved.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*