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## America's Borders and Civil Liberties in a Post-September 11th World

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### Cover Page Footnote

The author received his Bachelors degree from the University of California at Los Angeles and his Juris Doctor from the Southern Methodist University Dedman School of Law. While working towards his Juris Doctor, the author served as a member of the Computer Law Review and Technology Journal. He currently practices law in Los Angeles, California.

# AMERICA'S BORDERS AND CIVIL LIBERTIES IN A POST-SEPTEMBER 11TH WORLD

CHRISTOPHER H. LYTTON\*

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## I. INTRODUCTION

The burden of being an empire is a responsibility which every great nation has had to either accept or decline. Maintaining an empire requires the focus and devotion of its government and the people it governs. However, like all creations of man, even the most majestic empires will ultimately perish. No historical account proves this proposition better than the fall of the Roman Empire. In 408 A.D., Alaric and his Visigoths ended history's mightiest and most advanced empire.<sup>1</sup> History tells us that as the so-called barbarians neared the city, the Romans sought safety behind the locked gates of their beloved metropolis.<sup>2</sup> Consequently, the Visigoths surrounded Rome, cutting it off from the outside world until August, 410 A.D.<sup>3</sup> It was then, with the assistance of collaborators from inside the city walls, that the Visigoth warriors slipped into the city.<sup>4</sup> For three days they looted and sacked Rome,

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1. See Frank E. Smitha, *World History: Attitudes and Events from Early Humanity to A.D. 2000*, at <http://www.fsmitha.com/h1/ch24.htm> (last visited Feb. 19, 2003).

2. See *id.*

3. *Id.*

4. *Id.*

sparing only the Christian churches.<sup>5</sup> The seemingly unbelievable destruction of Rome left many across the empire and the world believing that the end of civilization was at hand.<sup>6</sup> Although the fall of Rome did not end civilization, it did usher in what is commonly known as the "Dark Ages" (500-1000 A.D.).<sup>7</sup>

While the fall of Rome is in the distant past, could the same fate that befell Rome await America in the decades to come? Is it possible that terrorists and enemies of democracy and freedom could cause the premature demise of the American Empire? Of course, this question presumes that America *is* an empire and thus, vulnerable to the diseases that have plagued empires throughout history. In truth, to call America anything other than an empire is disingenuous and historically irresponsible.

This article will employ the lens of history as the mechanism by which to discuss the birth of the American Empire and the role of domestic security in society and explore the current domestic security challenges presented by America's international borders. It will assess the challenges of securing the American nation in the post-September 11th world in light of the historical limitations placed on the federal military in effectuating domestic security and the challenges of maintaining secure borders in a global economy. Finally, it will argue that a nexus exists between the consequences of continued unabated immigration with the potential for further terrorist activities and the ultimate erosion of our civil liberties.

## II. THE END OF THE REPUBLIC

While there are those who will argue that America's hegemonic aspirations are not imperialistic in nature, history tells us that the last days of the American republic and the first days of American empire are rooted in the Spanish-American War of 1898.<sup>8</sup> As one historian notes,

Between the Civil War and [the year] 1900, the U.S. began its apprenticeship as an imperial power. As early as the 1850's, the U.S. was sending troops to Argentina, Nicaragua, Japan, Uruguay and China, as well as eyeing sugar rich Cuba for annexation purposes. The latter half of the Nineteenth Century was spent in industrialization and the installment

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5. *Id.*

6. *Id.*

7. *See id.*

8. *See* AMERICAN IMPERIALISM IN 1898 (Theodore P. Green ed., 1955).

and maintenance of a social order that would prove beneficial to capitalist expansion and progress.<sup>9</sup>

This change in the American character shows a break with the traditions of the Founding Fathers. Soon to be in the minority were those who “thought of the United States in the terms of its founders, as a nation opposed to militarism, conquest, standing armies and all the other bad habits associated with the monarchies of the old world.”<sup>10</sup> Simply put, Americans in the late nineteenth century could not wait for their crack at an empire.<sup>11</sup>

The Spanish-American War, called by some “a splendid little war,” ultimately ended with the defeat of the Spanish fleet in Manila Bay at the hands of American Admiral George Dewey.<sup>12</sup> The results were manifold: the occupation of Manila and the Philippines,<sup>13</sup> the capture of Cuba,<sup>14</sup> and the occupation of Puerto Rico.<sup>15</sup> The armistice signed in December 1898, known as the Treaty of Paris, also gave Guam to the United States, and it also gave the United States a protectorate over Cuba.<sup>16</sup> At this point, it can be said that the republic of the United States of America, the magnificent experiment in democracy, came to a premature end, and the American empire was born.

Once the republic was abandoned, America began its journey down the road of imperialism, like all the great empires before her. Whether we look to the history of Sweden under Charles XII, France under the Sun King or Napoleon, Russia under its czars, or Rome under its Caesars, maintaining an empire requires certain sacrifices. The last vestiges of the Victorian empires collapsed with the defeat of the Central Powers at the end of World War I, but the concept of empire did not fade into history at the Peace of Paris in 1919.<sup>17</sup> Rather, the empire finds its modern incarnation in the

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9. Christopher Conway, *The Birth of U.S. Imperialism: An Introduction to the Spanish-American War*, at <http://www.geocities.com/kajuble/usimp.htm> (last updated June 28, 2002). See generally AMERICAN IMPERIALISM IN 1898, *supra* note 8.

10. BARBARA W. TUCHMAN, *THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR 1890-1914*, at 137 (1966).

11. *See id.* at 149.

12. *Id.* at 151.

13. *Id.*

14. *Id.* at 150.

15. Marisabel Bras, *The Changing of the Guard: Puerto Rico in 1898*, Hispanic Division, Library of Congress, at <http://www.loc.gov/rr/hispanic/1898/bras.html> (last visited Mar. 5, 2003).

16. TUCHMAN, *supra* note 10, at 158. According to Tuchman, the causes of the war were United States interests in Cuba and the sinking of the U.S.S. Maine in Havana harbor on February 15, 1898. *Id.* at 150.

17. See generally Frank E. Smitha, *Upheaval in Germany, The Peace Treaty and Imperialism*, at <http://www.fsmitha.com/h2/ch09.htm> (last visited Mar. 6, 2003).

expansionistic dictatorships of Japan and Germany in the 1930s and 1940s, as well as in the Soviet model from 1922 to 1991.<sup>18</sup>

Today, there is only one great empire—the United States of America. Although modern America has not resorted to the imperial style of colonization along Victorian lines, the American economic, cultural, and military empire is undeniable. From the Manifest Destiny<sup>19</sup> which gave the United States territory ranging from Miami to Seattle and from San Juan to Honolulu, there is no question that America has, at times, stretched its power through military and economic subjugation.

America's rapid ascension to its present global predominance and the dawn of what is often called the "American Century" arguably began in the hot and bloody summer of 1914. The United States emerged from the carnage of the Great War and its progeny, the Second World War, as a nation transformed. The country went from a debtor nation to the largest creditor on earth, from a largely untested military power to the preeminent military force in the history of warfare.

The benefits of our empire are numerous. Nevertheless, these benefits come with a hefty price tag. Amazingly, after the sacrifices of World War II, America has only been forced to make limited sacrifices for her empire. However, the events of September 11th have demonstrated that the American way of life is threatened by the very openness and freedom that have contributed to her success.

While we must endeavor to adhere to the bedrock principles of freedom and liberty that underpin this nation, certain principles were applicable to our former republic and not our present empire. One fundamental American tenet is the strict separation between the regimes of civil law enforcement and the federal military.

The Posse Comitatus Act (PCA) embodies this separation of powers.<sup>20</sup> The genesis of the PCA lies in the ashes of the war-

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18. See generally Frank E. Smitha, *The 20th Century: Conflict Attitude and Changing Religions*, at <http://www.fsmitha.com/h2/index.html> (last visited Mar. 3, 2003).

19. See Conway, *supra* note 9. "Manifest Destiny was a phrase coined by a writer who was trying to get across the idea that it was the providential mission of the [United States] to extend itself over the frontier, claiming it as a god-given, national right. *Manifest Destiny* was not an explicit, policy phrase, but a cultural concept that reflected Anglo-Saxon attitudes about westward expansion and the Native-American question." *Id.*

20. 18 U.S.C. § 1385 (1988). The PCA delineates Army and Air Force *posse comitatus* power by stating: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." *Id.* *Posse comitatus* translates from Latin to mean "power of authority of the county." *Merriam-Webster's Collegiate Dictionary* 1426 (Deluxe ed. 1998). In this context it has the modern meaning "a body of persons summoned by a Sheriff to assist in preserving the public peace usually in an emergency." *Id.*

ravaged Southern states of the Reconstruction period.<sup>21</sup> American democracy managed to survive this period, as the passage of PCA allowed Southerners to rely on the civilian law system, not military justice, as a functional society was reestablished.<sup>22</sup> Undoubtedly, the protection and proliferation of civil liberties are fundamental to our society—ensuring our domestic security is the most proactive method of protecting those liberties now and in the future.

If our porous borders are allowed to flood the streets of cities like Los Angeles, Dallas, and Minneapolis with those who seek to harm Americans and the institution of democracy itself, there is no question that drastic security steps to restore order will be taken by the federal and state governments. There is also little doubt that such steps will negatively affect individual freedom and liberties. Whether we look to the Los Angeles riots in 1992 or the streets of Manhattan on September 12, 2001, civil liberties always suffer in the aftermath of chaos. While this may be necessary in the short term, the drastic curtailment of freedom could become an accepted way of life if Americans are subjected to suicide bombers in the local grocery store or at college football games. This would effectively end this experiment in democracy. If this were to occur, the next generation of Americans would know only a life in which curfews and restrictions are as perfunctory and accepted as metal detectors at airports. In the face of continued violence and terror, America's civil liberties will be sacrificed on the altar of collective safety. Therefore, Americans' liberties are more threatened by an ineffective border policy than by the introduction of a significant military presence at those vulnerable border areas.

America has always exhibited great flexibility and ingenuity in times of national crisis. Whether it was the remarkably smooth reunification of the Union and the Confederacy during Reconstruction or the unprecedented industrial juggernaut following the first day of infamy at Pearl Harbor, America has always risen to the occasion. What is at stake today is nothing short of the preservation of America as we know her.

When insecurity and chaos reign in the city streets, citizens will willingly sacrifice their former liberties in exchange for peace and security. An example of how a nation under pressure from within can buckle and face a terrible future comes from post-World War I Germany, in which chaos followed the conclusion of the Great War.

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21. Jeffrey Addicott, *Drafting the Military: The Posse Comitatus Act and the Hunt for the DC Sniper*, JURIST, at <http://www.jurist.lsw.pitt.edu/forum/forumnew62.php> (Oct. 17, 2002). See also Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle In Need of Renewal*, 75 WASH. U. L.Q. 953, 960-61 (1997).

22. See generally Stephen Young, *The Posse Comitatus Act: A Resource Guide*, Feb. 17, 2003, at <http://www.llrx.com/features/posse.htm> (last visited Mar. 6, 2003).

The former German Empire was thrown into anarchy and revolution. Demoralized and externally threatened on all borders, Germany also faced the real possibility of a Bolshevik coup.<sup>23</sup> In these dark days that would spawn the stab-in-the-back *Dolchstoss* myth—so adeptly used by the National Socialists to bring Corporal Adolph Hitler to power—a new form of totalitarianism loomed on the horizon.<sup>24</sup> The failure of the interim postwar government to protect the citizenry threatened the existence of the nation itself.<sup>25</sup> In this power vacuum, Gustav Noske was appointed the defense minister and uttered the famous words, “Someone must become the bloodhound. I won’t shirk the responsibility!”<sup>26</sup> Noske’s efforts were largely responsible for ferreting out the Bolshevik elements in Germany and temporarily salvaging the Weimar Republic’s ability to govern.<sup>27</sup> However, the damage was done. It may be argued that the long-term results of this instability, and the toll which it took on the citizenry, led to the Third Reich’s seizing power, the Holocaust, and millions of deaths. Certainly, Wilhelmine Germany was not a bastion of democracy.<sup>28</sup> However, the Nazi regime completely eliminated civil liberties and almost destroyed the German nation during its brief but horrific reign.<sup>29</sup>

While the process of Hitler’s rise to power was rather gradual, it was the continued instability during the Weimar transition that set the stage for the populace’s blind adherence to the Nazi promises of peace and security.<sup>30</sup> Looking back, it is difficult to understand how the educated and cultured nation of Germany fell under the demonic spell of the evil corporal. However, it is completely understandable that Germans in the 1920s and early 1930s longed for stability when their cities and towns were plagued by rogue *Freikorps*, mutinous soldiers, and violent Bolsheviks.<sup>31</sup> On a simple human level, the average Berliner or Bavarian wanted peace and security just like the average New Yorker or Californian.

Today, it appears that the United States military must assist civilian law enforcement in order to ensure the domestic security of

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23. See generally RICHARD M. WATT, *THE KINGS DEPART: THE TRAGEDY OF GERMANY VERSAILLES AND THE GERMAN REVOLUTION* (1968).

24. *Id.* at 463.

25. See *id.* at 317-342.

26. *Id.* at 239 (quoting *FALL OF THE GERMAN EMPIRE* 535 (Ralph H. Lutz ed., 1932)).

27. *Id.*

28. HOLGER H. HERWIG, *THE FIRST WORLD WAR: GERMANY AND AUSTRIA-HUNGARY 1914-1918*, at 18 (Hew Strachan ed., 1997).

29. See generally ALAN JOHN PERCIVALE TAYLOR, *THE ORIGINS OF THE SECOND WORLD WAR 102-130* (A Touchstone Book, 1996) (1961).

30. ROBERT GELLATELY, *BACKING HITLER: CONSENT AND COERCION IN NAZI GERMANY 9-50* (2001).

31. *Id.* See also ROBERT G.L. WAITE, *VANGUARD OF NAZISM: THE FREE CORPS MOVEMENT IN POSTWAR GERMANY, 1918-1923*, at 201-20 (1952).



the nation. Waiting until the situation worsens could have disastrous consequences for democracy. If the citizens of this nation deny an expanded role for the military and further acts of terrorism occur within our borders, only then is it rational to surmise that civil liberties, from Main Street to Wall Street, will suffer greatly. Taken to the extreme, such an environment could ultimately lead to the end of federalism, the centralization of power, and eventually, to totalitarianism and/or balkanization. We need only look to the continuing tragedy in Israel to verify that the consequences of having one's enemies at the gates, when the gates cannot be locked, are tragic and costly. Cafes, discos, markets, restaurants, and high-rises are the new battlefields in the war against freedom and democracy.

### III. THE SEPARATION OF POWERS AND THE POSSE COMITATUS ACT

The main obstacle to deploying the military into this present breach is the well intentioned and successful, yet antiquated, Posse Comitatus Act. When examining the PCA, one cannot separate the law itself from the context of the time and place in which it was enacted. The Reconstruction era was a time when the power of the federal government and the role of the federal military could have resulted in dramatic changes to the structure of American society. The hotly contested presidential election of 1876 directly led to the passage of the PCA under less than respectable circumstances:<sup>32</sup>

The post-Civil War military presence in the South continued to foment a distaste for military involvement in the civilian sphere. The military presence was necessary to support the Reconstruction governments installed in the South, but the situation came to a head during the 1876 presidential election, which was determined by only one electoral vote. In the election, Rutherford B. Hayes won with the disputed electoral votes of South Carolina, Louisiana, and Florida. In those states, President Ulysses S. Grant had sent troops as a *posse comitatus* for federal marshals to use at the polls, if necessary. This misuse of the military in an election—the most central event to a democracy—led Congress to enact the PCA in 1878.<sup>33</sup>

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32. Hammond, *supra* note 21, at 956.

33. *Id.* at 960-61.

This perceived unconstitutional power-grab by the executive branch forced a re-examination of the role of the military in American society.<sup>34</sup> The PCA was meant to prevent the degradation of our treasured checks and balances and the very concepts of federalism and freedom.<sup>35</sup> As noted by Seth Kreimer,

There are two rationales for the [Posse Comitatus] Act. First, the traditional concern that a powerful military engaged in domestic policies is in a better position to challenge civilian authority. Second, in the absence of such legislation, military policies prevent soldiers from adequately enforcing civilian law. Soldiers are taught to violently and effectively destroy the enemy and their training does not include sensitivity to constitutional limitations on search, seizure, and the use of reasonable force.<sup>36</sup>

While these rationales are as compelling today as they were in the late 1860s, the threats and challenges of the twenty-first century require new paradigms.

Its reputation notwithstanding, the PCA “does not prohibit all military action in support of civilian law enforcement.”<sup>37</sup> In fact, it allows such uses “in cases and under circumstances expressly authorized by the Constitution or an Act of Congress.”<sup>38</sup>

The allowable use of the military in the domestic arena is limited to circumstances such as quelling insurrections and “operations to ensure that federal laws are being enforced.”<sup>39</sup> “In recent years, Congress has attempted to force a generally unwilling Pentagon toward a more active role in the fight against [illegal] drugs, as well as an increased responsibility for disaster relief operations.”<sup>40</sup> Of course, the Pentagon’s reluctance is understandable, as the legislative and executive branches must assure the military it will be supported in this new role, even when the inevitable mistakes occur. To ensure success, it is incumbent on

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34. See *id.* at 956-61. See also 18 U.S.C. § 1385 (1994).

35. See generally Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66 (2001).

36. John Flock, *The Legality of United States Military Operations Along the United States-Mexico Border*, 5 SW. J. L. & TRADE AM. 453, 454 (1998) [hereinafter Flock].

37. Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing use of the American Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. L. REV. 1291, 1298 (1993) [hereinafter Schlichter].

38. *Id.* (citing 18 U.S.C. § 1385 (1988)).

39. *Id.* at 1299 (citing 10 U.S.C. § 332). See also Peter M. Sanchez, *The “Drug War”: The U.S. Military and National Security*, 34 A.F. L. REV. 109, 110-20 (1991); Hammond, *supra* note 21, at 959.

40. Schlichter, *supra* note 37, at 1299.

the government to prepare the American public for this new military role.

### A. *What Action Constitutes a Violation of the PCA?*

Although the PCA prohibits the use of the military as the mechanism by which laws are enforced, this does not mean that the military is prohibited from protecting America's citizens. The burden of establishing the balance between these two competing interests has fallen to the judicial branch.<sup>41</sup> Although the issue of the deployment of the military as *posse comitatus* is justiciable, courts—including the United States Supreme Court—have avoided the issue.<sup>42</sup> Consequently, the Judicial branch has failed to provide the necessary clarity on the scope and limitations of the PCA and the use of the military itself.<sup>43</sup> In this amorphous environment, the federal courts of this nation have developed an overly complicated and theoretical approach based on a limited number of cases. The application of which is more for the classroom than reality.

In attempting to balance the PCA and the realities of domestic security, courts have developed three formulations, all of which examine the role of the military in the realm of civilian law enforcement activity.<sup>44</sup> Courts have chosen to analyze this issue through the prism of an active *versus* passive analysis.<sup>45</sup> This active/passive formula, although embodied in three different formulations, stems from one incident in 1973—the standoff between the federal authorities and the Native Americans at Wounded Knee, South Dakota.<sup>46</sup> “The formulations allow passive assistance in support of law enforcement without causing a PCA violation.”<sup>47</sup>

The active/passive test was first set forth in *United States v. Red Feather*.<sup>48</sup> In *Red Feather*, the court held that the direct involvement of the United States Army or Air Force in assisting federal authorities would violate the PCA.<sup>49</sup> Assistance in the form of military supplies and equipment would not result in a breach of the PCA.<sup>50</sup>

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41. See Charles Doyle, Cong. Res. Serv. No. 88-583A, *Use of the Military to Enforce Civilian Law: Posse Comitatus Act and Other Considerations* 10 (1988) [hereinafter Doyle].

42. *Id.*

43. *Id.*

44. Hammond, *supra* note 21, at 965.

45. *Id.*

46. *Id.*

47. *Id.* See also Doyle, *supra* note 41, at 2.

48. 392 F. Supp. 916, 921-923 (D. S.D. 1975) (addressing the issue of whether involvement of military personnel in the takeover of the village of Wounded Knee violated the PCA).

49. *Id.*

50. *Id.*

The courts further analyzed the active/passive dichotomy in *United States v. Jaramillo*.<sup>51</sup> The court examined whether the military involvement "pervaded" the civilian activities. This fact-based analysis further complicated and muddled the PCA analysis.<sup>52</sup> Once again, the court found that the provision of supplies and equipment was acceptable although the court was critical of the role the military played in advising the civilian authorities.<sup>53</sup>

*United States v. McArthur*,<sup>54</sup> which was affirmed by the Eight Circuit in *United States v. Casper*,<sup>55</sup> set forth the third version of the active/passive test. The *McArthur* test focuses on the definition of "execute" in the posse comitatus statute.

[T]he posse comitatus statute with its mandate against the use of a part of the Army or Air Force to 'execute' the law; 'execute' implies an authoritarian act. I conclude that the feared use which is prohibited by the posse comitatus statute is that which is *regulatory, proscriptive or compulsory* in nature.<sup>56</sup>

This version of the test requires much deeper investigation into the facts surrounding military involvement.

While the intent of the active/passive formulation is laudable, none of its manifestations cure the essential ill of the test. The unwieldy analysis it requires does not address the core of the issue. This is not a matter of legal nuisance, nor should it be the subject of the judiciary legislating from the bench. The problem with the active/passive test cannot be cured through judicial "tweaking." Rather, the critical nature of the PCA and the handicap it places on

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It is clear from the legislative history of 18 U.S.C. § 1385 . . . the intent of Congress in enacting this statute and by using the clause 'uses any part of the Army or the Air Force as a posse comitatus or otherwise,' was to prevent the direct active use of federal troops, one soldier or many, to execute the laws. Congress did not intend to prevent the use of Army or Air Force material or equipment in aid of execution of the laws.

*Id.* at 923.

51. 380 F. Supp. 1375, 1381 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975) (addressing the issue of whether the PCA prohibits any use of military personnel to quell civil unrest).

52. *Id.* at 1379-80.

53. *Id.* at 1379-81. The *Jaramillo* court draws a distinction between using U.S. military forces to execute the laws and the mere presence of military forces during a law enforcement action. *Id.*

54. 419 F. Supp. 186 (D. N.D. 1975) (holding that evidence of military involvement in domestic law enforcement activities is relevant to the analysis of whether defendants were unlawfully interfering with law enforcement).

55. 541 F.2d 1275, 1278 (8th Cir. 1976).

56. *McArthur*, 419 F. Supp. at 194 (emphasis added).

the president require that the ineffectual active/passive framework be abandoned.

### *B. Exceptions to the PCA*

The PCA, as enacted by Congress, was never intended to categorically exclude the military from all domestic activity.<sup>57</sup> Nonetheless, until Congress grants the President the authority to deploy the military to strengthen border integrity, the President must rely on the exceptions to the PCA, as well as the inherent authority of the chief executive as commander-in-chief of all American armed forces to send troops to our international gateways.<sup>58</sup>

America now faces the legitimate risk of having its institutions and ideals destroyed by the enemies of democracy and the west. If another terrorist attack succeeds in destroying the White House, a nuclear power plant, or a packed athletic stadium, there is no question that civil liberties will be significantly curtailed in the resulting scramble to restore security. Curfews, checkpoints, and invasions of privacy could become the norm. Life in America would be akin to life in Israel, where civilians are forced to live under a cloud of fear, shopping and dining surrounded by tanks and

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57. See 14 U.S.C. § 1 (1988) (stating that the “Coast Guard . . . shall be a military service and a branch of the armed forces of the United States at all times” and that it “shall be a service in the Department of Transportation, except when operating as a service in the Navy”). With the passage of the Homeland Security Act of 2002, the Coast Guard is now a part of the Department of Homeland Security, rather than the Department of Transportation. Dep’t of Homeland Security—Organization, at <http://www.dhs.gov/dhspublic/display?theme=9> (last visited Mar. 5, 2003).

58. See 10 U.S.C. §§ 332, 333 (2000).

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

10 U.S.C. § 332 (2000).

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

10 U.S.C. § 333 (2000).

machine guns. This scenario represents the greatest threat to the existence of American democracy.

Given the extremely challenging and dangerous circumstances facing America, it is likely that the President already possesses the inherent authority to deploy troops along our borders.<sup>59</sup> However, such a decision is sure to be shrouded in controversy given the nature and source of presidential authority in this area. If the President were to take wide-ranging unilateral action to put troops on the border, he would be operating on the fringes of his power. The Supreme Court has dealt with an analogous situation in the case of *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>60</sup> During the conflict in Korea, President Truman ordered the seizure of a steel production plant, using his independent constitutional powers as a justification. However, the Court found that the seizure was not within the President's power. In his concurring opinion, Justice Jackson set forth a three-tiered framework that provided a sliding scale for the evaluation of presidential power:<sup>61</sup>

(1) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . (2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility . . . [and] (3) When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only on his own constitutional powers minus

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59. *Martin v. Mott*, 25 U.S. 19, 32-33 (1827).

We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.

*Id.* at 30.

60. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

61. *Id.* at 635-38.

and constitutional powers of Congress over the matter.<sup>62</sup>

It is within this “twilight zone” that the President may find his authority for military border deployment.<sup>63</sup> Congress is primarily responsible for the maintenance of the nation’s safety, and border integrity is the *sine qua non* of this mandate.<sup>64</sup> This responsibility likely renders the PCA and its limitations expendable in this debate. As noted by the author of a recent note,

[a]nother ‘constitutional’ exception to the PCA is described by the Department of Defense regulations based upon the ‘inherent right of the U.S. Government . . . to ensure the preservation of public order and to carry out governmental operations . . . by force, if necessary.’ The Office of Legal Counsel of the Department of Justice has promulgated a similar view in recognition of the U.S. government’s power to protect federal functions. The power to protect federal functions has been so broadly interpreted, however, that if accepted it would become the exception that swallows the rule. Now Chief Justice William Rehnquist interpreted this power to extend to any ‘uniquely federal responsibility’ while he was an attorney in the Office of Legal Counsel. However, this exception has yet to be tested in the courts and would likely be interpreted as narrowly as the other exceptions to the PCA.<sup>65</sup>

The allowances set forth here force the question: What is more uniquely federal than the securing of our borders from hostile

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62. *Id.* at 635-37.

63. See Hammond, *supra* note 21, at 968.

64. Article I, Section 8 of the United States Constitution addresses Congress’ responsibilities related to national security. It grants the power to raise and support Armies. U.S. CONST. art. I, § 8, cl. 12. It also grants the power to provide for calling forth a militia to “execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. CONST. art. I, § 8, cl. 15.

65. Hammond, *supra* note 21, at 968. Hammond cites United States Dep’t of Defense, Directive No. 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, encl. 4, at 4-6 (Jan. 15, 1986) (extending the PCA’s application to the Navy and Marine Corps “as a matter of DoD policy”), available at <http://www.dtic.mil/whs/directives/corres/html/55255.htm> (last visited Feb. 15, 2003). Hammond also cites Secretary of the Navy, Dep’t of the Navy, Instruction No. 5820.7B, *Cooperation with Civilian Law Enforcement Officials*, Office of the Secretary, 4 (Mar. 28, 1988), available at <http://neds.nebt.daps.mil/Directives/table54.html> (last visited Feb. 15, 2003). Additionally, Hammond cites a Memorandum from William H. Rehnquist, Asst. Att’y Gen., Office of Legal Counsel, United States Dep’t of Justice, to Robert E. Jordan, III, Gen. Counsel, United States Dep’t of the Army 1-2 (May 11, 1970).

foreign elements? Accordingly, the PCA must be reexamined in order to ensure that the citizens of this nation are adequately protected.

#### IV. CHALLENGES AHEAD: THE LONGEST UNDEFENDED INTERNATIONAL BORDER AND OUR NEIGHBORS TO THE SOUTH

The issue of securing America's borders is not only a physical security issue but one of economic security as well. The Canadian border is the primary gateway for the world's largest trade partnership, worth more than 1.6 billion Canadian dollars per day.<sup>66</sup> The use of some American military power on what is often called the world's longest undefended border seems inevitable given the extraordinary importance of this economic relationship.

To achieve tighter security since September 11th, the United States government has transferred agents from other duties to checkpoints along the 6,400-kilometer border with Canada.<sup>67</sup> With the passage of the North American Free Trade Association ("NAFTA")<sup>68</sup> and the attempts at economic integration of the North American continent, there is little question that old strategies will not be able to protect the two nations' economic partnership. "NAFTA is a comprehensive rules-based agreement among the United States, Canada, and Mexico, which took effect January 1, 1994."<sup>69</sup> The agreement eliminated many tariffs immediately, while other tariffs will fall to zero over a five to fifteen-year period.<sup>70</sup> The ripple effect of failing to secure the Canadian border could be economically disastrous for the United States, Canada, and the world.

Similarly, the relationship between Mexico and the United States is an economic colossus. In the year 2000, American exports totaled over \$111 billion to Mexico, while Mexican exports to the United States totaled \$135 billion.<sup>71</sup> With the passage of NAFTA,

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66. Canadian Embassy, *Canada—United States: The World's Largest Trading Relationship*, available at <http://www.canadianembassy.org/trade/wltr-en.asp> (last visited Mar. 3, 2003).

67. *Id.*

68. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 [hereinafter NAFTA].

69. United States-Mexico Chamber of Commerce, *The North American Free Trade Agreement (NAFTA) at Five Years: What it Means for the U.S. and Mexico*, available at <http://www.usmcc.org/n6.html> (last visited Mar. 5, 2003).

70. *Id.* NAFTA was "signed by the governments of the United States, Mexico, and Canada in December 1992, and ratified by the U.S. Congress in November 1993. . . . This Agreement broadened and superseded the 1989 free trade agreement between the United States and Canada." *Id.* "Mexico's population of approximately 96 million is about one-third the size of the U.S." and is the second-largest market for American goods and services, having surpassed Japan in 1997. *Id.*

71. United States-Mexico Chamber of Commerce, *Trade Statistics*, available at



the North American nations have created a trade zone which is the envy other countries, and produces trade numbers on a scale unimaginable twenty years ago.

While protection of the physical border itself is of the utmost importance to domestic security, America cannot afford the consequences of Berlin Walls with our northern and southern neighbors. Therefore, coincident with increasing border security, the immigration and judicial system must also amend failing policies that undermine security efforts at the border.<sup>72</sup> While such an analysis is beyond the scope of this article, the following is an egregious example of bureaucratic buffoonery. One particular defect in the administrative system is the process by which we deport those who enter the country illegally.

Under current U.S. government policy, a 24-year-old Sudanese who is caught illegally entering the United States through Mexico has a right to live freely on bond in this country until his deportation, unless authorities can demonstrate that he has a criminal record or is a flight risk.

This policy, implemented daily by U.S. immigration courts, has allowed more than 300,000 illegal immigrants from all over the globe—even from countries where major terrorist groups operate—to skip bail while waiting for their hearing or their ride home.<sup>73</sup>

How do these illegal aliens get home? Shockingly, even in the wake of September 11th, the Immigration and Naturalization Service (“INS”) still routinely sends unescorted deportees on commercial airlines back to their native countries.<sup>74</sup> This is obviously a practice rife with potential dangers, and is a ludicrous response to a logistical challenge. The conflicting regimes of the INS and United States Customs practices must be reconciled with our domestic security efforts if an effective, comprehensive policy is to be implemented. Domestic security begins at the various entry

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<http://www.usmcoc.org/eco2.html> (last visited Feb. 19, 2003).

72. See Luis Herrera-Lasso, *Border Cooperation: The Tijuana / San Diego Region—A Three Models Case Study*, 35 SAN DIEGO L. REV. 727, 736-37 (1998) (noting the drastically different immigration policies of the United States versus Mexico).

73. David Freddoso, *Border Violators Routinely Freed to Roam Country—Even Illegal Aliens From Terror-Sponsoring States Are Not Routinely Detained*, at <http://www.humaneventsonline.com/articles/01-07-02/freddoso.htm> (last visited Feb. 26, 2003).

74. Paul Sperry, *INS to Deport Arab Aliens on Airlines*, Aug. 1, 2002, at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_id=28474](http://www.worldnetdaily.com/news/article.asp?ARTICLE_id=28474) (last visited Feb. 28, 2003).

points to the United States. Our seaports, airports, and border crossings are the battlefield for the new war on terrorism, and they have long been the forward trenches in the failed war on illegal drugs.<sup>75</sup>

Clearly, the civilian government has a duty to remain vigilant against any overreaching by the military. Nonetheless, the watershed events of September 11th mandate that we reconsider the role of our military within our borders. While critics of an expanded role for the military in domestic affairs cite the protection of historical separation and the preservation of individual liberty as barriers to border deployment, our military is already serving on the border in an attempt to protect this nation.<sup>76</sup>

[A]long the United States-Mexico border . . . soldiers from the Army, Marine Corps, and National Guard have conducted more than 3,000 missions along the 1,700 mile border during the past seven years. The purpose of these missions is to stop drug traffic and curb illegal immigration. Although the military provides support to the United States Border Patrol, the troops are prohibited from detaining suspects or making arrests. Instead, soldiers are to report suspicious activity to Border Patrol agents.<sup>77</sup>

Although there are those opposed to such activities, there has been no public outcry, no military coup d'etat, no *junta* of generals seeking to overthrow the duly elected government officials. In light of the inadequate performance of the INS, along with the poor performance of other agencies in ensuring that border and immigration laws are enforced, we are faced with a choice. Like all decisions balancing civil liberties against government control and authority, this is a Handesque examination.<sup>78</sup> On one side of the scale is the PCA; on the other, the effort to maintain peace, security, and prosperity in this nation. Ultimately, we must decide which side will tip the scale.

Throughout most of her history, America has been considered the melting pot of the world. Nonetheless, as the heat of the

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75. See Douglas Herring, Comment, *Getting High from South of the Border: Illicit Smuggling of Rohypnol as an Example of the Need to Modify U.S. Response to International Drug Smuggling After NAFTA*, 18 LOY. L.A. INT'L & COMP. L. REV. 841, 849 (1996). See also Kris Axtman, *Rising Border Traffic, More Drugs*, CHRISTIAN SCI. MONITOR, May 8, 2001, available at 2001 WL 3735289.

76. See Flock, *supra* note 36, at 453-55.

77. *Id.* at 453.

78. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (referring to Judge Learned Hand's balancing test).

melting pot dwindles, the balkanization of our nation is a growing and legitimate concern that challenges our traditional reliance on common goals amongst disparate groups. As America becomes more divided politically and racially between the coasts and the heartland, the potential for balkanization is now a serious topic for sociologists and politicians, not just historians looking to southern Europe or other tales of irredentism. If border states become sieves, infecting and destabilizing this nation by the introduction of hostile foreigners, the potential for Balkanization or the evisceration of true Federalism is increased.

#### *A. Rationale for Keeping the Military Off Our Borders*

The prevailing criticism of the use of the military to secure our borders is essentially that such a deployment will ultimately lead to the erosion of valued civil liberties. An indispensable component of this argument is that:

Soldiers are not trained peace officers, and that distinction is crucial. The mission of an infantry unit is 'to close with the enemy to kill him, destroy his equipment, and shatter his will to resist,' which is hardly the role of a peace officer.<sup>79</sup>

While this statement is correct on its face, its application to the securing of United States borders is unsuitable because our borders are now more akin to war zones than city streets or college campuses. The prospect of a dirty nuclear bomb or a virulent chemical agent making its way across the border is enough to make many Americans view the border regions as the frontlines, the very trenches of the new war on terror. Given the changing attitudes and circumstances in post-September 11th America, old presuppositions fail to meet the challenges facing this expansive and diverse nation.

The tragic memory of the debacle at Kent State (as some critics claim) is no longer a valid argument for prohibiting the military from operations along the border. With some three thousand casualties stemming from September 11th, the cost-benefit analysis has been irrevocably altered. While the National Guard, as the modern militia, is an integral part of this nation and its defense, its horrendous failure some thirty-two years ago at Kent State is irrelevant to this debate. Today's professional federal military contains the most highly trained and disciplined soldiers in the

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79. See Schlichter, *supra* note 37, at 1303 (quoting U.S. ARMY, FIELD MANUAL 7-10: THE INFANTRY RIFLE COMPANY 1-1 (Dec. 14, 1990)).

world. While the fog of war can, and no doubt will, result in needless tragedy, this is a small price to pay for the preservation of the American way of life.

It is crucial to remember that military personnel on the border will be subject to not only their mission parameters, but also to strict rules of engagement. Such legal regimes should assuage the fears of critics who view the domestic deployment of the military on the border as tantamount to a military dictatorship.<sup>80</sup> Chief among laws which will limit the tactics and activities of the military in the border region is that of humanitarian law.<sup>81</sup> Humanitarian law is the law that governs armed conflict, and it is founded upon the Geneva Conventions and Additional Protocols, the Hague Convention of 1907, select United Nations resolutions, and international custom.<sup>82</sup>

"The Hague Conventions regulate military operations."<sup>83</sup> The purpose of the Hague Conventions is to "limit war's destruction by calling for the preservation of human life and its cultural and historical environment."<sup>84</sup> The Geneva Conventions owe their existence to the atrocities that were regular occurrences during the Second World War.<sup>85</sup> The Geneva Conventions "apply in times of war or other armed conflict between parties," and in times of occupation by another state.<sup>86</sup>

The Geneva Conventions provide special protections for 'protected persons,' defined as 'those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.'<sup>87</sup>

Another check on the activities of combatants during times of armed conflict comes from the fundamental precepts of armed conflict—that is, the right of the belligerent to use any means to

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80. See, e.g., Schlichter, *supra* note 37, at 1331-32 (concluding that politicians have become all too willing to use the military as a powerful tool for solving social problems).

81. Generally M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, 43 VA. J. INT'L L. 405, 412 n.26 (2002).

82. Neil A.F. Popovic, *Humanitarian Law, Protection of the Environment, and Human Rights*, 8 GEO. INT'L ENVTL. L. REV. 67, 71-86 (1995).

83. *Id.* at 72.

84. *Id.* at 73.

85. *Id.*

86. *Id.*

87. *Id.* (quoting Geneva Convention IV Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516).

achieve victory is not unlimited.<sup>88</sup> All these legal mechanisms will apply to further regulate the activities of the military on the border.

Given the highly centralized and controlled nature of the United States military, it is ludicrous to presume that crack Army Rangers will be gunning down Mexican women and children as those innocents race toward Camelot. One need only look at the military's immense capabilities and intelligence to know that such fears are nothing more than red herrings. Nonetheless, the executive and the legislative branches are obligated to impose clear and effective restrictions on our military. Further, a nonmilitary agency, such as the Department of Justice or the Department of Homeland Security, must implement, in conjunction with Congress and the President, sufficient oversight to ensure the localization and legality of domestic military activities. By adequately monitoring the military on the border, our citizenry can rest assured that the preeminence of the civilian authority will not be threatened while the security of our borders is increased.

## V. CONCLUSION

It is fair to say that this entire debate crystallizes around one question: "Do we trust our democracy?" In other words, can a free people maintain their democracy while allowing their military an expanded domestic role? America is no South American nation—there is no Hugo Chavez lurking in the wings. This is the world's greatest democracy, a successful experiment in the laboratory of freedom. Our freedom can afford the deployment of the military on the border, but our freedom cannot afford another September 11th. There is no doubt that if we allow the leaking sieves of our borders to result in another September 11th, our civil liberties will be systematically eroded in the name of national security. Clearly, this is a decision that requires public awareness and consensus along with sincere deliberation and oversight.

However, it is the price we, a free people, must pay to maintain our freedom. This issue does not require a discussion about race, diversity, tolerance, or compassion. When the Twin Towers crumbled, the lives of Latinos, Canadians, Muslims, Catholics, and Jews crumbled with them. To preserve our treasured freedoms and our way of life, the military's deployment to the border must without a doubt be accompanied by authoritative and detailed oversight and limitations. It is also important that the duration of this

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88. The five fundamental tenets of the law of armed conflict are limitation, discrimination, prevention of unnecessary suffering, proportionality, and military necessity. Betsy Baker, *Legal Protections for the Environment in Times of Armed Conflict*, 33. VA. J. INT'L L. 351, 359 (1993).

deployment be limited. However, the time frame should be a function of the circumstances, not politics. While life in post-September 11th America presents new challenges, these challenges are unfortunate burdens to shoulder as the world's dominant force—the modern Rome. Ultimately, we, like the World War II generation, must now pay the price and sacrifice for freedom. We must now become a “great” generation, and time is of the essence. Like the scene in Rome sixteen centuries ago, the Visigoths are at the gates, and our modern day legions must now go once more into the breach. This is a crucial test for democracy, and one we cannot afford to fail.