

GOING NOWHERE “FAST” (OR “FURIOUS”): THE NONEXISTENT U.S. FIREARMS TRAFFICKING STATUTE AND THE RISE OF MEXICAN DRUG CARTEL VIOLENCE

Stewart M. Young*

Drug trafficking violence in Mexico, now reaching epidemic proportions, greatly impacts both the Mexican and United States governments. Despite the escalation of the “War on Drugs,” drug trafficking from Mexico to the United States continues largely unabated, stifling tourism revenue and lawful economic opportunities, and causing violence previously unknown in Mexico. Thus far, the United States’ efforts to deal with this drug trafficking and violence include the recent debacle of Operation Fast and Furious. News regarding this Bureau of Alcohol, Tobacco, Firearms and Explosives’ (ATF) operation shocked citizens and lawmakers alike, as Fast and Furious allowed firearms to “walk” down to Mexico unimpeded in a futile attempt to identify firearms traffickers in Mexican drug cartels. Ultimately, this operation led to the presence of over two thousand additional firearms in Mexico, contributing to continued violence south of the U.S. border and the possibility of spillover violence back into the United States. An analysis of Operation Fast and Furious and other law enforcement attempts to stop firearms trafficking and drug cartel violence in Mexico demonstrates that the development and tactics of these operations require a more comprehensive approach to the problems facing Mexico and the United States.

This Article discusses extraterritoriality, and the effects of U.S. domestic criminal laws on a foreign country, in the context of U.S. domestic firearms trafficking laws. First, this Article lays out the problem: Mexican drug cartels are receiving thousands of weapons from the United States with which to create havoc and wreak violence upon both nations. It then discusses the dynamics of that problem, which include addressing the current legal framework and the NRA lobbying effort against restrictions on firearms. The Article examines the ATF’s Project Gunrunner and Operation Fast and Furious and argues that the lack of a simple and strong firearms trafficking statute contributed to ATF’s decision to implement Operation Fast and Furious, thereby contributing to large numbers of firearms heading south to Mexico. The Article further argues that without a true comprehensive firearms trafficking statute, the combined efforts of the United States and Mexico to stem the southbound flow of firearms and resulting drug violence will ultimately fail. Besides seeking to contribute to the dialogue on solving a looming and important

* Assistant Professor of Law and Director, Prosecution Assistance Program, University of Wyoming College of Law. J.D., Stanford Law School; A.B. Princeton University. I am grateful for comments from Shima Baradaran-Robison, Paul Cassell, Timothy Kearley, Max Minzer, Noah Novogrodsky, Matthew Wilson, and Michael Young, and editing support by Joshua Taylor and Shaina Case. I also appreciate the incredible work done by the entire staff of the *University of Michigan Journal of Law Reform*. This Article was written with the generous support of the Dyckman Faculty Research Fund. This Article does not represent the views of any former or current employer; it consists solely of my own views, and all errors are mine.

problem, this Article endeavors to promote discussion about the extraterritorial effects of U.S. domestic criminal laws. Ultimately, it argues that, in certain contexts, the positive extraterritorial effects of such laws should take priority over complaints about their negligible domestic effects.

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“[It] is simply too easy to say the problem is over there”¹

INTRODUCTION

Over the past four years, drug-related killings in Mexico have reached alarming proportions. From mid-2006 through September 2011, more than 47,500 people died in drug cartel or gang-related killings, jumping almost 60 percent in 2010 alone.² The violence’s ferocity continued throughout 2011; statistics now indicate that over 55,000 lives were claimed by drug violence.³ Since the 2006

1. *U.S. Obligations Under the Merida Initiative: Hearing of W. Hemisphere Subcomm. of the H. Comm. on Foreign Aff.*, 110th Cong. 4 (2008) (statement of Hon. Eliot L. Engel), available at <http://www.hcfa.house.gov/110/40659.pdf> [hereinafter “*U.S. Obligations*”]. The full quote states that “[it] is simply too easy to say the problem is over there and that we can just send some money and helicopters to a few foreign countries and keep the narco-trafficking scourge outside our borders.” *Id.*

2. Mark Stevenson, *Mexico: 34,612 Drug War Deaths; 15,273 in 2010*, THE HUFFINGTON POST (Jan. 12, 2011, 9:25 PM), http://www.huffingtonpost.com/2011/01/12/mexico-drug-war-deaths-2010_n_808277.html; see also 157 CONG. REC. E1338–39 (daily ed. July 15, 2011) (statement by Rep. Carolyn B. Maloney), available at <http://www.gpo.gov/fdsys/pkg/CREC-2011-07-15/html/CREC-2011-07-15-pt1-PgE1338-5.htm>; Bruce Zagaris, *Federal Indictment Against 17 Persons for Trafficking Firearms to Mexican Drug Organizations*, 27 INT’L ENFORCEMENT L. REP. 652, 652 (2011).

3. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL32724, MEXICO: ISSUES FOR CONGRESS 6 (2012), available at <http://www.fas.org/sgp/crs/row/RL32724.pdf>; Maloney, *supra* note 2; see also *Mexico Horror: Gunmen Dump 35 Bodies on Avenue*, USATODAY, Sept. 21, 2011, <http://www.usatoday.com/news/world/story/2011-09-20/drug-war-mexico/50486328/1?loc=interstitialskip> (reporting that on September 20, 2011, suspected gun traffickers drove two trucks to a main avenue in Boca del Rio during afternoon rush hour traffic and dumped thirty-five victims into the middle of the street while gunmen stood guard and pointed weapons at motorists. A number of the victims had criminal records for murder, drug dealing, kidnapping, and extortion).

election of Mexican President Felipe Calderon, Mexican drug cartels⁴ have engaged in a campaign of terror and gun violence unlike anything seen in recent memory. Indeed, more than 70 percent of Mexicans living in Mexico believe that “illegal drugs are a *very* big problem in their country and even more (77%) see the violence associated with drug cartels as a major challenge.”⁵ And fewer than half of Mexicans believe that the government is currently making progress in its fight against the drug cartels.⁶

This is not just Mexico’s problem. First and foremost, the United States is the biggest and best customer of Mexican drug trafficking organizations (DTOs).⁷ American customers fuel Mexican drug cartel profits.⁸ And the United States generally provides the bulk of the guns used by the Mexican DTOs.⁹ Since 2007, the Mexican government has confiscated more than one hundred thousand firearms, and, according to one source, “84% of those guns came from the United States.”¹⁰ An ATF study confirms this observation: in 2009

4. These drug cartels are also known in the literature as “drug trafficking organizations” or “DTOs.”

5. *Fewer than Half See Progress in Drug War: Crime and Drug Cartels Top Concerns in Mexico*, PEW RESEARCH CTR. (Aug. 31, 2011), <http://www.pewglobal.org/2011/08/31/crime-and-drug-cartels-top-concerns-in-mexico/>.

6. *See id.* (describing how 45 percent of Mexicans believe that the Mexican government is making progress against drug cartels, 25 percent believe that it is “about the same,” and 29 percent believe the Mexican government is losing ground).

7. According to both the Department of Justice (DOJ) and the U.S. Government Accountability Office (GAO), since 2006, the “Mexican DTOs and criminal groups and the most influential drug traffickers are the greatest organizational threat to the United States.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-709, FIREARMS TRAFFICKING: U.S. EFFORTS TO COMBAT ARMS TRAFFICKING TO MEXICO FACE PLANNING AND COORDINATION CHALLENGES 8 (2009) available at <http://www.gao.gov/new.items/d09709.pdf>; *see also* NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUSTICE, 2011-Q0317-001, NATIONAL DRUG THREAT ASSESSMENT 7 (2011), available at <http://www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf> (“Mexican-based [transnational criminal organizations] and their associates dominate the supply and wholesale distribution of most illicit drugs in the United States.”).

8. Peter Reuter, *How Can Domestic U.S. Drug Policy Help Mexico?*, in SHARED RESPONSIBILITY: U.S. MEXICO POLICY OPTIONS FOR CONFRONTING ORGANIZED CRIME 121, 122 (Eric L. Olson, David A. Shirk & Andrew Selee eds., 2010) (“Mexico’s principal drug problems, the violence and corruption related to trafficking, are the consequence of the large U.S. market for cocaine, heroin, marijuana and methamphetamine. If the U.S. market disappeared, Mexico’s problem would diminish dramatically, even with its own domestic consumption remaining.”). Estimates of U.S. drug consumption in 2005 include approximately 381 metric tons of cocaine and 2,947 metric tons of marijuana, primarily shipped from Mexico. *Id.* at 126.

9. Maloney, *supra* note 2.

10. *Id.*; *see also* VIOLENCE POLICY CTR., INDICTED: TYPES OF FIREARMS AND METHODS OF GUN TRAFFICKING FROM THE UNITED STATES TO MEXICO AS REVEALED IN U.S. COURT DOCUMENTS 1, 6 (2009), available at <http://www.vpc.org/studies/indicted.pdf> (analyzing indictments and informations filed in federal district courts in border districts from February 2006 through February 2009, finding that these indicted individuals are alleged to be responsible for trafficking approximately 1,700 firearms to Mexico, and demonstrating that, based on limited data, 63 percent of the firearms recovered *before* entering Mexico were either assault (rifle)

and 2010, 70 percent of the firearms recovered by the Mexican government (and that the Mexican government submitted for trace) were either manufactured in the United States or were first imported to the United States before being transported to Mexico.¹¹ Transnational gangs, such as MS-13 and 18th Street, build the drug cartel arsenal by serving as conduits for trafficking guns south to Mexico.¹² In short, the United States funds *and* arms the Mexican drug cartels. The clear implication of arming drug cartels south of the United States is not just that violence will continue south of the U.S. border, but also that the violence has spilled and will continue to spill over the border into the United States.¹³

What can be done?¹⁴ A ban on firearms in the United States will never be seriously considered,¹⁵ nor, in the current political climate, will there be a ban on certain types of weapons favored by the

weapons (42 percent), armor-piercing handguns (18 percent), or anti-armor .50 caliber sniper rifles (2 percent)); GAO, *supra* note 7, at 15 (“[W]e determined over 20,000, or 87 percent, of firearms seized by Mexican authorities and traced from fiscal year 2004 to fiscal year 2008 originated in the United States. Over 90 percent of the firearms seized in Mexico and traced over the last 3 years have come from the United States.”).

11. Maloney, *supra* note 2; see also Evan Perez, *Mexican Guns Tied to U.S.: American-Sourced Weapons Account for 70% of Seized Firearms in Mexico*, WALL ST. J., June 11, 2011, <http://online.wsj.com/article/SB10001424052702304259304576375961350290734.html> (showing that in 2009, of 21,313 firearms recovered in Mexico, 10,945 were manufactured in the United States and 3,268 were first imported into the United States before ending up in Mexico, with the origin of 7,100 firearms undetermined; of 7,971 firearms recovered in 2010, 4,186 were manufactured in the United States and 2,105 were first imported into the United States, with the origin of 1,680 firearms undetermined); GAO, *supra* note 7, at 14–16 (noting that from fiscal year 2004 through fiscal year 2008, approximately 87 percent of the firearms traced by the ATF, and provided by the Mexican government, originated or were trafficked through the United States). This Article notes the original claims by U.S. officials of 90 percent of firearms recovered in Mexico originating in the United States.

12. TOM DIAZ, NO BOUNDARIES: TRANSNATIONAL LATINO GANGS AND AMERICAN LAW ENFORCEMENT 278 (2009).

13. Randal C. Archibold, *Mexican Drug Cartel Violence Spills Over, Alarming U.S.*, N.Y. TIMES, Mar. 22, 2009, http://www.nytimes.com/2009/03/23/us/23border.html?page_wanted=all&_r=0; Elizabeth Llorente, *Texas Attorney General Says Mexico Drug Violence Spilling Over*, FOXNEWS.COM (Nov. 2, 2011), <http://latino.foxnews.com/latino/politics/2011/11/02/texas-attorney-general-says-mexico-cartel-violence-is-spilling-into-lone-star/>.

14. Both “U.S. and Mexican officials [have indicated] that, in the past, the Mexican government considered illicit arms trafficking a problem that originated in the United States and thus needed to be dealt with by U.S. authorities.” GAO, *supra* note 7, at 9.

15. Indeed, the power of the National Rifle Association (NRA) is just too great to allow for a ban on firearms in the United States, as we have seen with the contempt vote against Eric Holder. Seventeen moderate Democratic House members voted in favor of the contempt charge at the NRA’s behest. See Ed O’Keefe, *Which Democrats Voted to Hold Eric Holder in Contempt?*, WASH. POST (June 29, 2012, 6:00 AM), http://www.washingtonpost.com/blogs/2chambers/post/which-democrats-voted-to-hold-eric-holder-in-contempt-of-congress/2012/06/28/gJQAUkV9V_blog.html?hpid=Z4 (noting specifically that all but one of the seventeen received endorsement by the NRA and that the NRA would be tracking this vote to determine future endorsements).

drug cartels.¹⁶ Since 2004, when the Federal Assault Weapons Ban¹⁷ (FAWB) expired, it indeed appears that significant numbers of assault-style rifles traveled more easily to Mexico and resulted in increased gun violence.¹⁸ Meanwhile, the current legal regime for firearms trafficking prosecution in the United States is limited in scope and does not provide meaningful deterrence to limit gun trafficking to Mexico.¹⁹ Additionally, the lobbying efforts of the National Rifle Association (NRA) hamper any real changes proposed to firearms-related laws in the United States, while the totality of the political climate further dampens true discussion on meaningful reform to firearms trafficking laws.²⁰

Those are the problems.²¹ In response, ATF developed and initiated Project Gunrunner and Operation Fast and Furious as hopeful

16. The six firearms generally favored by the DTOs are semiautomatic rifles, including the AK-47-type or the AR-15-type, and large frame semiautomatic pistols, such as the .38 Super, 9 mm, .45 and the 5.7 mm. See generally BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP'T OF JUSTICE, PROJECT GUNRUNNER: THE SOUTHWEST BORDER INITIATIVE (2009), available at <http://www.atf.gov/publications/download/p/atf-p-3317-6.pdf>.

17. The Federal Assault Weapons Ban was codified at 18 U.S.C. § 921(a)(30), implemented in 1994, and expired in 2004. See Jill Lawrence, *Federal Ban on Assault Weapons Expires*, USATODAY, Sept. 14, 2004, http://www.usatoday.com/news/washington/2004-09-12-weapons-ban_x.htm.

18. Arindrajit Dube, Oeindrila Dube & Omar Garcia-Ponce, *Cross-Border Spillover: U.S. Gun Laws and Violence in Mexico 23–24* (July 2011) (unpublished manuscript), available at http://econ.as.nyu.edu/docs/IO/18622/Dube_03052011.pdf (providing economic data demonstrating that the FAWB's expiration in 2004 led to a marked increase in gun-related murders and gun-related prosecutions and seizures from 2004 to 2006 in Mexican municipalities within one hundred miles of the borders of Arizona and Texas); see also Luke Chicoine, *Exporting the Second Amendment: U.S. Assault Weapons and the Homicide Rate in Mexico 22* (July 2011) (unpublished manuscript), available at http://nd.edu/~lchicoin/Chicoine_AWB_Mexico.pdf (examining statistics for 2004–2008 and finding that the Mexican homicide rate following the expiration of the FAWB increased markedly).

19. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF ATF'S PROJECT GUNRUNNER vi (2010), available at <http://www.justice.gov/oig/reports/ATF/e1101.pdf> (“Because there is no federal firearms trafficking statute, ATF must use a wide variety of other statutes to combat firearms trafficking. . . . USAOs are less likely to accept and prosecute Project Gunrunner cases.”).

20. Despite the statistics provided by the governments of Mexico and the United States, the NRA “aggressively challenges statistics that show 80 to 90 percent of the weapons seized in Mexico are first sold in the United States.” James Grimaldi & Sari Horwitz, *As Mexico Drug Violence Runs Rampant, U.S. Guns Tied to Crime South of the Border*, WASH. POST, Dec. 15, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202663.html>. As noted by the executive director of the NRA Institute for Legislative Action, “To suggest that U.S. gun laws are somehow to blame for Mexican drug cartel violence is a sad fantasy.” *Id.* Just the fact that the NRA has an “Institute for Legislative Action” demonstrates the power of the gun lobby, including its ability to employ a staff of eighty and a “team of full-time lobbyists” to work on gun control issues. See *About NRA-ILA*, NRA-ILA, <http://www.nraila.org/about-nra-ila.aspx> (last visited Oct. 9, 2012).

21. See also MINORITY STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 112TH CONG., FATAALLY FLAWED: FIVE YEARS OF GUNWALKING IN ARIZONA 1, 32–43 (2012), available at http://democrats.oversight.house.gov/images/stories/minority_report_13112.pdf; MINORITY STAFF

efforts to curb drug violence in Mexico. Unfortunately, these initiatives produced disastrous results.²² The ATF- and DOJ-initiated Fast and Furious allowed government-tracked weapons to travel freely across the border in order to identify their end-users. While misguided in application and implementation, Fast and Furious was at least a creative effort by the U.S. government²³ to address the problem of firearms flowing to Mexico. Although the initiative fell flat and may have resulted in the death of a U.S. law enforcement officer,²⁴ it also demonstrated the inadequacies of U.S. firearms trafficking laws in general. Without a true firearms trafficking statute, ATF agents and federal prosecutors cobble together firearms charges that provide no real bark or bite to deter criminals from trafficking in firearms.²⁵ Accordingly, while Operation Fast and Furious sought to reduce the large-scale trafficking of firearms to Mexican drug cartels from Arizona, the inherent flaws in the current firearms trafficking laws did not allow agents and prosecutors to make a true firearms trafficking case.

OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 112TH CONG., *OUTGUNNED: LAW ENFORCEMENT AGENTS WARN CONGRESS THEY LACK ADEQUATE TOOLS TO COUNTER ILLEGAL FIREARMS* (2011), available at <http://democrats.oversight.house.gov/images/stories/OUTGUNNED%20Firearms%20Trafficking%20Report%20-%20Final.pdf>.

22. See MINORITY STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 112TH CONG., *FATALLY FLAWED: FIVE YEARS OF GUNWALKING IN ARIZONA 1*, 32–43 (2012), available at http://democrats.oversight.house.gov/images/stories/minority_report_13112.pdf; MINORITY STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 112TH CONG., *OUTGUNNED: LAW ENFORCEMENT AGENTS WARN CONGRESS THEY LACK ADEQUATE TOOLS TO COUNTER ILLEGAL FIREARMS* (2011), available at <http://democrats.oversight.house.gov/images/stories/OUTGUNNED%20Firearms%20Trafficking%20Report%20-%20Final.pdf>.

23. One may quibble with whether this was an effort by the “U.S. government” or a small misguided attempt by ATF agents and Assistant U.S. Attorneys in the District of Arizona. Indeed, there appears to be a split over who was ultimately responsible for Operation Fast and Furious. Compare Katherine Eban, *The Truth About the Fast and Furious Scandal*, *FORTUNE* (June 27, 2012, 5:00 AM), <http://features.blogs.fortune.cnn.com/2012/06/27/fast-and-furious-truth/> (making the argument that ATF supervisors did not intentionally allow guns to “walk” down to Mexico, but that the federal prosecutors consistently derailed their efforts to arrest suspects and initiate prosecution) with JOINT STAFFS OF H. COMM. ON OVERSIGHT & GOV'T REFORM & S. COMM. ON THE JUDICIARY, 112TH CONG., *THE DEPARTMENT OF JUSTICE'S OPERATION FAST AND FURIOUS: ACCOUNTS OF ATF AGENTS 28–34*, 46–51 (2011) and JOINT STAFFS OF H. COMM. ON OVERSIGHT & GOV'T REFORM AND S. COMM. ON THE JUDICIARY, 112TH CONG., *THE DEPARTMENT OF JUSTICE'S OPERATION FAST AND FURIOUS: FUELING CARTEL VIOLENCE 27–39* (2011).

24. See JOINT STAFFS, *ACCOUNTS OF ATF AGENTS*, *supra* note 23, at 43–46.

25. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS 17* (2012) (“There is no federal statute specifically prohibiting firearms trafficking or straw purchasing. Instead, these activities are investigated by agents and charged by prosecutors using a variety of criminal statutes depending on the circumstances of each particular case.”); OFFICE OF INSPECTOR GEN., *supra* note 19, at vi (making the same points).

The current statute, 18 U.S.C. § 922, criminalizes “dealing in firearms” and generally has a clear domestic focus. It does not criminalize actual firearms trafficking because firearms have a special role in the American psyche and are not inherently contraband, as opposed to illegal drugs.²⁶ Given the events of the past four years, and the large amount of firearms traffic into Mexico, the current statute’s failings demonstrate a need for change. The current firearms statutes have a purely domestic focus;²⁷ a more extraterritorial focus would be beneficial to curb southbound firearms trafficking and thus curb drug violence in Mexico.

This then begs the question, should the U.S. government be in the business of passing and enforcing U.S. domestic laws based on their perceived affect on other countries? If so, how far should the effort go, particularly in the context of firearms trafficking? This Article argues that the extraterritorial effects of U.S. domestic criminal laws, particularly in the arena of firearms trafficking, are important and must be a strong consideration in the passage of a more comprehensive federal firearms trafficking statute. It argues that the implementation of a true firearms trafficking statute, possibly along the lines of the federal drug trafficking statutes, would alleviate the currently confining structure of firearms prosecutions in the United States and have a clear and marked effect on drug violence in Mexico.

Specifically, this Article makes two main arguments. First, it proposes that the extraterritorial effects of U.S. domestic laws should be considered and should often drive the passage of domestic criminal laws in the United States. Second, the Article urges reconsidering domestic criminal laws in the context of firearms trafficking to establish a stronger and more robust law, and proposes that the *effect* of this law should primarily drive its passage. Within the context of current legal scholarship, the academy often discusses the extraterritorial effects of domestic laws post-passage. This Article argues that such effects should clearly be a part of the conversation before passage, and that—at least in the context of firearms trafficking—the extraterritorial effects should be the driving force for passage. Passing a true firearms trafficking statute would effectively curb the rising drug violence in Mexico.

26. Eban, *supra* note 23 (“The ATF is a bureau of judgment calls. Drug enforcement agents can confiscate cocaine and arrest anyone in possession of it. But ATF must distinguish constitutionally protected legal guns from illegal ones, with the NRA and other Second Amendment activists watching for missteps.”).

27. OFFICE OF INSPECTOR GEN., *supra* note 25, at 17–19 (identifying the numerous charges for domestic firearms activities).

I. THE EXTRATERRITORIAL EFFECTS OF U.S. DOMESTIC LAWS, ESPECIALLY DOMESTIC CRIMINAL LAW

Numerous academics have addressed the extraterritorial effects of U.S. domestic laws, especially the detrimental effects of those laws on the economies of other countries.²⁸ Scholarship on the criminal side of this issue generally deals with laws that criminalize actions by U.S. citizens and companies in foreign countries.²⁹ Abundant scholarship also exists on the scope of extraterritorial application of U.S. securities laws.³⁰ Overall, discussions about the extraterritorial application of U.S. law are quite in vogue.³¹ As Anthony Colangelo writes,

[w]ith the proliferation of laws seeking aggressively to regulate foreign conduct, some commentators and courts have started to engage more foundational questions about the existence

28. See, e.g., Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634 (2008) (demonstrating that companies located in countries with anti-bribery legislation invest less in countries where bribery is more prevalent); Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997) (discussing issues of extraterritorial criminal prosecution); Henry H. Rossbacher & Tracy W. Young, *The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT'L L. 509 (1997) (arguing that Foreign Corrupt Practices Act (FCPA) enforcement could be more effective and noting that pre-OECD legislation to curb foreign bribery was ineffective); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010) (arguing that anti-bribery legislation, and specifically the implementation of the FCPA, ultimately deters U.S. investment in countries that have lax bribery laws and therefore deters investment opportunities and further economic growth in emerging markets that are subject to bribery-based regimes).

29. See, e.g., Anthony Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121 (2007); Podgor, *supra* note 28; Spalding, *supra* note 28; Brian A. Lichter, Note, *The Offences Clause, Due Process, and the Extraterritorial Reach of Federal Criminal Law in Narco-Terrorism Prosecutions*, 103 NW. U. L. REV. 1929 (2009).

30. Knu Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89 (2003); Donald C. Langevoort, Schoenbaum Revisited: *Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace*, 55 LAW & CONTEMP. PROBS. 241 (1992); Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677 (1990); John D. Kelly, Note, *Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence with Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts*, 28 L. & POL'Y INT'L BUS. 477 (1997); see also Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2882–87 (2010).

31. See, e.g., Anthony Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011) (developing a unified approach to extraterritoriality); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 (2010); Austin Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455 (2008); Todd Keithley, Note, *Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?*, 105 COLUM. L. REV. 2135 (2005).

and contours of constitutional limits under Congress's power to legislate extraterritorially in the first place and the potential for individual rights violations under the Due Process Clause resulting from arbitrary or unfair applications of U.S. law abroad.³²

He notes that two lines of extraterritoriality scholarship have arisen: one line regarding how to determine the scope of statutes that deal with extraterritoriality, and a more recently developed line evaluating the constitutionality of such statutes.³³

The academic discussion is silent, however, on purely domestic statutes that have positive extraterritorial effects and whether such effects should have relevance for the passage of domestic criminal laws. For instance, federal drug trafficking laws relate to domestic crime control but also seek to stem the tide of money flowing south to Mexico in exchange for illegal drugs. Most violent crimes do not generally create any clear extraterritorial effects,³⁴ so laws regulating these crimes have a purely domestic impact. As noted above, securities laws and antitrust laws often have certain extraterritorial effects, which are oft-debated and subject to vigorous academic discussion.

The Foreign Corrupt Practices Act (FCPA) is one criminal statute specifically intended to have extraterritorial effects.³⁵ It generally seeks to curb bribery by all firms and individuals subject to the securities laws of the United States who engage in business in foreign countries, and prohibits "corrupt payments to foreign officials for the purpose of obtaining or keeping business."³⁶ In the legislative history of revisions to the FCPA, Congress' Conference Report noted the FCPA's objectives primarily pertain to U.S. trade relationships³⁷ rather than to promoting fair and honest trade practices worldwide. The Department of Justice (DOJ) stated that "Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system."³⁸ It is clear, however, that passage of the FCPA did not necessarily curb bribery around the world and did not have the

32. Colangelo, *supra* note 31, at 1022.

33. *Id.*

34. This is more a thought experiment than anything else; it is rare to see a murder, assault, battery, or other violent crime charged that takes place in the United States but actually has extraterritorial effects.

35. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2006).

36. *Id.*; *Foreign Corrupt Practices Act: Antibribery Provisions*, U.S. DEP'T OF JUSTICE, 1, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Sept. 5, 2012).

37. H.R. REP. NO. 100-576, at 916 (1988) (Conf. Rep.).

38. U.S. DEP'T OF JUSTICE, *supra* note 36, at 1-2.

intended effect: “In 1997, . . . the United States and thirty-three other countries signed the OECD [Organisation for Economic Cooperation and Development] Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.”³⁹ Hence, although the FCPA is a domestic criminal statute with extraterritorial effects, twenty years after passage of the FCPA, the United States still sought a multilateral approach to curb bribery of foreign officials.

Firearms offenses, however, are in a separate class of their own. The United States has an odd relationship with firearms, extending back to the passage of the Bill of Rights and the Second Amendment. This relationship contributes to the difficulties currently faced in Mexico, particularly given the extensive and powerful lobbying arm of the National Rifle Association (NRA).⁴⁰ While Congress is, as of this writing, conducting inquiries into Mexican drug violence and the U.S. government’s role in that violence, it has not acted to stem the tide of the violence. The extraterritorial effects of a domestic firearms trafficking statute should be a paramount consideration of Congress, as such effects should—and would—outweigh the domestic concerns voiced by the NRA and libertarian or other conservative groups.

Firearms trafficking and gun control occupy a place of tension in the law, and gun control advocates tend to focus primarily on domestic gun control.⁴¹ As Franklin Zimring notes, gun control legislative proposals did not receive serious attention until at least 1965.⁴² This changed in 1968, after the assassinations of Martin Luther King, Jr. and Robert Kennedy, along with public unrest and uneasiness about increased violent crime.⁴³ The result was the Gun Control Act of 1968, which imposed a number of controls on firearms, especially relative to convicted felons.⁴⁴ The major objectives of the Gun Control Act of 1968 were eliminating interstate traffic in

39. *Id.*

40. Jonathan Weisman, *Democrats Feel Pressure from Gun Lobby on Contempt Vote*, N.Y. TIMES, June 26, 2012, <http://www.nytimes.com/2012/06/27/us/house-democrats-up-for-re-election-feel-gun-lobby-pressure-on-contempt-vote.html> (“NRA leaders are convinced that [Operation Fast and Furious] was started to prove the Justice Department’s contention that 90 percent of the weapons fueling the Mexican drug wars come from the United States and that tighter gun laws are needed.”).

41. Franklin E. Zimring, *Continuity and Change in the American Gun Control Debate*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 148–49 (Bernard Harcourt ed., 2003).

42. *Id.* at 148.

43. *Id.*

44. *Id.*; Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEG. STUD. 133, 147–48 (1975).

firearms and ammunition, denying firearms to groups such as minors and convicted felons, and ceasing imports of surplus military firearms other than sporting weapons.⁴⁵ Congress sought to address domestic crime and violence and did not indicate any intent to ensure the safety of people outside the United States.

II. THE PROBLEM OF FIREARMS TRAFFICKING

Mexico has a violence problem.⁴⁶ Due to drug cartel activities and violent acts carried out by drug cartel workers, more than forty-seven thousand Mexican citizens—including many not associated in any way with the cartels—have died from drug violence since 2006.⁴⁷ Entire villages and towns are in lockdown; even industrial cities are subject to drug cartel terror.⁴⁸ The politics of drug violence in Mexico affect the national scene. According to the most recent U.S. government report, “47,515 people were killed in narcotics-related violence in Mexico between December 1, 2006 and September 30, 2011.”⁴⁹ Continuing into 2012, between April and May 2012, cartels decapitated fourteen people and left their headless bodies in front of city hall in Nuevo Laredo, hung nine people from a bridge in that same city, left eighteen decapitated bodies in an area frequented by tourists near Guadalajara, and unloaded forty-nine headless (and footless and handless) bodies out of a dump truck near Monterrey, Mexico’s industrial capital.⁵⁰ Maria

45. Zimring, *supra* note 41, at 149.

46. As of 2009, Mexican officials, speaking to congressional investigators, indicated that “they now regard illicit firearms as the number one crime problem affecting the country’s security, and they are intent on working with their U.S. counterparts to address the threat posed by weapons smuggling.” GAO, *supra* note 7, at 10.

47. The most recent statistics, from January 2012, indicate that 47,515 people have died due to drug cartel violence since President Felipe Calderon assumed office in December 2006. Q&A: *Mexico’s Drug-Related Violence*, BBC NEWS (May 30, 2012, 3:24 PM), <http://www.bbc.co.uk/news/world-latin-america-10681249>; see also Maloney, *supra* note 2; Zagaris, *supra* note 2.

48. SEELKE, *supra* note 3, at 5–6.

49. *Travel Warning*, TRAVEL.STATE.GOV (Feb. 8, 2012), available at http://travel.state.gov/travel/cis_pa_tw/tw/tw_5665.html; see also Maria Baldini-Potermín, *Making the Case for Mexicans Seeking Relief from Persecution and Torture: Asylum, Withholding and Relief Under the Convention Against Torture*, 11-08 IMMIGR. BRIEFINGS 1 (Aug. 2011) (noting between 35,000 and 40,000 have been killed since December 2006); Randal C. Archibold, *More Than 20 Shot Dead in Monterrey, Mexico*, N.Y. TIMES, July 9, 2011, <http://nyti.ms/mT9BWz>.

50. William Booth, *Mexico’s Two Major Crime Cartels Now at War*, WASH. POST, May 24, 2012, http://www.washingtonpost.com/world/the_americas/mexicos-two-major-crime-cartels-now-at-war/2012/05/24/gJQAUhKlmU_print.html; William Booth, *In Nuevo Laredo, 23 Corpses Found on Grisly Day in Mexican Drug-Cartel War*, WASH. POST, May 4, 2012, http://www.washingtonpost.com/world/in-nuevo-laredo-23-corpses-found-on-grisly-day-in-mexican-drug-cartel-war/2012/05/04/gIQAFegK2T_story.html.

Baldini-Potermin has observed, “The killings over the last four and one-half years have been gruesome and public, with mass graves, torture, decapitations as a trademark, severing of body parts, and warnings carved into corpses.”⁵¹ All of this is fueled, at least in part, by firearms, which generally are prohibited in Mexico.⁵²

It is clear that the United States and Mexico both seek to curtail violence south of the border. It is also clear that, at least since 2008, the United States is aware of its role as a source of firearms for DTOs in Mexico. In February 2008, the Assistant Director of ATF’s Office of Field Operations testified to Congress:

Mexican drug trafficking organizations have aggressively turned to the U.S. as a source of firearms. These weapons are used against other DTOs, the Mexican military, Mexican and United States law enforcement officials, as well as civilians on both sides of the border. . . . Recently, the weapons sought by drug trafficking organizations have become increasingly higher quality and more powerful.⁵³

The United States and Mexico do not appear interested in ignoring the problems created by drug violence in Mexico. In October 2007, both countries launched the Merida Initiative, which provides for increased interaction to combat drug cartels through greater coordinated efforts.⁵⁴ That initiative set out parameters to provide

51. Baldini-Potermin, *supra* note 49, at n.9.

52. See Chris Hawley, *Mexico: Gun Controls Undermined by U.S.*, USA TODAY, Apr. 1, 2009, http://www.usatoday.com/news/world/2009-03-31-mexicoguns_N.htm. (noting that “Mexico has some of the toughest gun-control laws in the world”); *Guns Are Illegal in Mexico*, CONSULATE GEN. OF THE U.S., <http://tijuana.usconsulate.gov/tijuana/warning.html> (last visited Sept. 6, 2012).

53. *U.S. Obligations*, *supra* note 1, at 19–25 (testimony of William J. Hoover, Assistant Director, Office of Field Operations, Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Dep’t of Justice); see also *ATF Testimony*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <http://www.atf.gov/press/releases/2008/02/020708-testimony-atf-ad-hoover-sw-border.html> (last visited Sept. 6, 2012).

54. Supplemental Appropriations Act, Pub. L. No. 110-252, § 1406(a), 122 Stat. 2323 (2008). For commentary on the Merida Initiative, see generally Stephanie Erin Brewer, *Rethinking the Merida Initiative: Why the U.S. Must Change Course in Its Approach to Mexico’s Drug War*, 16 HUM. RTS. BRIEF no. 3, Spring 2009, at 9; Steven E. Hendrix, *The Merida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence*, 5 LOY. U. CHI. INT’L L. REV. 107 (2008); Ryan Hoskin, *Mexican Drug Violence: Why the Merida Initiative, Gun Bans and Border Controls Will Fail and Drug Reform Is the Solution*, 4 NEW VOICES IN PUB. POL’Y 1–24 (2010), available at <http://journals.gmu.edu/index.php/newvoices/article/viewFile/133/106>; Ray Walser, *Mexico, Drug Cartels, and the Merida Initiative: A Fight We Cannot Afford to Lose*, HERITAGE FOUND. EXEC. SUMMARY BACKGROUNDER, no. 2163, July 23, 2008, available at http://s3.amazonaws.com/thf_media/2008/pdf/bg2163.pdf.

money to the Mexican government to purchase ion scanners; canine units to interdict drugs, firearms, and cash; as well as purchasing helicopters and non-intrusive inspection equipment.⁵⁵ It also sought to provide advice and training for Mexican authorities and money to vet Mexican police officers.⁵⁶

The United States and Mexico did not stop at merely throwing money at the problem through the Merida Initiative. Over a year later, on August 13, 2009, the two governments signed a letter of intent calling for the development of a “coordinated and intelligence-based response to the threat of cross-border smuggling and trafficking of weapons and ammunition.”⁵⁷ Since that time, there have been numerous calls for coordination between the ATF and the Mexican government as well as discussions about further agency cooperation. Although coordination efforts have increased, there remains a gulf between the two governments and their respective agencies regarding drug interdiction and drug violence.

A. Statistics and Costs

It is clear that drug violence in Mexico continues unabated. Over a six-day period at the end of August 2011, fifteen people were killed in the Tijuana area.⁵⁸ By September 7, 2011, another twelve had been killed—a total of twenty-seven deaths caused by Tijuana drug violence over a two-week period.⁵⁹ And more than six months later, the violence only appeared to be getting worse: between April and May 2012, two warring cartels⁶⁰ engaged in incredibly violent

55. Walsler, *supra* note 54, at 3.

56. *Id.*

57. Bruce Zagaris, *U.S. and Mexico Develop Investigative Cooperation on International Firearms Trafficking Cases*, 25 INT’L ENFORCEMENT L. REP. 468, 468 (2009); Press Release, U.S. Dep’t of Justice, DOJ, DHS and Mexico Announce Arrangement to Bolster Investigative Cooperation on International Firearms Trafficking Cases (Aug. 13, 2009), available at <http://www.justice.gov/opa/pr/2009/August/09-odag-796.html>.

58. Omar Millán, *15 People Killed in Last Six Days in Tijuana*, SAN DIEGO RED (Aug. 30, 2011), <http://www.sandiegored.com/noticias/18015/15-people-killed-in-last-six-days-in-Tijuana/> (noting that killings are down in the state of Baja by about 180 people from one year ago).

59. Omar Millán, *27 Killed in Two Weeks in Tijuana Drug Violence*, SAN DIEGO RED (Sept. 7, 2011), <http://www.sandiegored.com/noticias/18463/27-killed-in-two-weeks-in-Tijuana-drug-violence/>. The death toll for the State of Baja alone is 353 for 2011, and “authorities estimate that 80 percent of the murders can be attributed to conflicts among criminal bands over the sale of illegal drugs on the street.” *Id.*

60. The Zetas and the Sinaloa Cartel are the two main warring cartels. Booth, *Mexico Cartel War*, *supra* note 50. The Sinaloa cartel is more established and headed by Mexico’s notorious Joaquín “El Chapo” Guzmán. JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO’S DRUG TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF THE RISING VIOLENCE

and sadistic behavior in three separate Mexican cities.⁶¹ Daily news reports from Mexico demonstrate the clear physical and emotional toll of this violence on Mexican citizens.⁶² It is hard to argue that drug violence in Mexico is being “dealt with” or that the Mexican government has curbed it. Rather, the Mexican government does not appear to have a handle on this violence nor has the U.S. government provided resources or other measures that have effectively reduced it.

The economic toll from the violence in Mexico is less clear but arguably just as devastating.⁶³ Despite conventional wisdom, Mexico’s Finance Minister, Ernest Cordero, announced that Mexico’s tourism economy seemed unaffected by the current drug violence.⁶⁴ While stating that some cities were clearly suffering, Minister Cordero indicated that Mexico’s economy “grew by 5.5% last

26–27 (2012), available at <http://www.fas.org/sgp/crs/row/R41576.pdf>. The Zetas started out as a group of ex-Mexican Special Forces that provided security for several of the cartels, but eventually branched out, deeming it more lucrative to engage in drug trafficking themselves. See *id.* at 8; see also Farhanna Hossain & Xaquín G.V., *The Reach of Mexico’s Drug Cartels*, N.Y. TIMES, Sept. 11, 2011, <http://www.nytimes.com/interactive/2009/03/22/us/BORDER.html?ref=drugtrafficking> (describing the circles of control, including the overlap with the Sinaloa Cartel, the Zetas organization, and the Beltrán Leyva organization).

61. BEITTEL, *supra* note 60, at 21.

62. Randal C. Archibold, *Mexico’s Drug War Bloodies Areas Thought Safe*, N.Y. TIMES, Jan. 18, 2012, http://www.nytimes.com/2012/01/19/world/americas/mexico-drug-war-bloodies-areas-thought-safe.html?_r=1&hp=&pagewanted=all; Damien Cave, *Mexico Updates Death Toll in Drug War to 47,515, but Critics Dispute the Data*, N.Y. TIMES, Jan. 11, 2012, <http://www.nytimes.com/2012/01/12/world/americas/mexico-updates-drug-war-death-toll-but-critics-dispute-data.html?ref=Americas> (noting that although the homicide rate increase has been lower compared to previous years, “that will hardly calm a public scared by the recent arrival of grisly violence in once-safe cities like Guadalajara”). Social media demonstrates clear fear and disgust by Mexico’s residents. For instance, after discovery of twenty-three corpses in Nuevo Laredo, one tweet stated that “[w]e have no law in Nuevo Laredo. Welcome to the jungle!” Booth, *Nuevo Laredo Corpses*, *supra* note 50. Businesses in Mexico are seeking to contain violence by helping state governments recruit “new, uncorrupted police officers” and market a safer Mexico. Elisabeth Malkin, *With Stake in Stability, Businesses in Mexico Help City Shaken by Violence*, N.Y. TIMES, Jan. 10, 2012, <http://www.nytimes.com/2012/01/11/world/americas/mexican-businesses-pitch-in-to-counter-violence-in-monterrey.html?pagewanted=call>.

63. M. ANGELES VILLARREAL, CONG. RESEARCH SERV., R41402, *THE MEXICAN ECONOMY AFTER THE GLOBAL FINANCIAL CRISIS 17* (2010), available at <http://fpc.state.gov/documents/organization/148789.pdf> (“The escalation of violence has resulted in increased risk aversion which has impacted foreign investment flows, particularly in the manufacturing industry. . . . Some estimates of the costs associated with violence, investment losses, drug abuse, and other direct costs are estimated at \$4.6 billion per year, or 0.5% of GDP.”); Christian Watjen, *Mexico’s Drug Violence Drags Down Economic Recovery*, THE EPOCH TIMES (Aug. 3, 2011), <http://www.theepochtimes.com/n2/world/mexicos-drug-violence-drags-down-economic-recovery-59132.html>; *Mexico Says Drug Violence Dents Economy*, FOXBUSINESS (Sept. 1, 2010), <http://www.foxbusiness.com/markets/2010/09/01/mexico-says-drug-violence-dents-economy/>.

64. *Mexico Economy Unharmful by Violence—Finance Minister*, BBC NEWS (Mar. 22, 2011, 10:54 AM), <http://www.bbc.co.uk/news/business-12818647>.

year, its fastest annual rate in 10 years.”⁶⁵ This statement contradicts other reports that demonstrate the drug violence has taken a clear toll on the Mexican economy. In August 2010, for instance, reports surfaced that “[s]ome areas of Mexico along the U.S. border have been paraly[z]ed economically by drug violence.”⁶⁶ Border cities like Nuevo Laredo and Matamoros saw a decline in business activity due to bloody turf battles between drug gangs.⁶⁷ Recently, the U.S. Department of State provided a detailed travel advisory for Mexico, cautioning U.S. citizens to defer non-essential travel to numerous areas in the country.⁶⁸ Despite official reports by the Mexican government, the anecdotal evidence,⁶⁹ especially in the tourism industry, demonstrates that drug violence in Mexico has a clear detrimental effect on the economy. Although there are numerous contradictory statements about the effects of drug violence in Mexico,⁷⁰ the violence is clearly not a *good* thing.

B. *The Current U.S. Legal Framework for Firearms Trafficking*

Given that Mexican drug violence ultimately stems from firearms in the hands of Mexican drug traffickers, and many⁷¹ of these firearms may have arrived in Mexico through U.S. operations, one wonders why Operation Fast and Furious occurred in the first place. To understand how Fast and Furious came about, it makes sense to turn to the current U.S. domestic firearms trafficking laws. In 1968, Congress passed the Omnibus Crime Control and Safe

65. *Id.*

66. *See Drug Violence Hits Mexico Economy*, BELFAST TELEGRAPH (Aug. 13, 2010), <http://www.belfasttelegraph.co.uk/news/world-news/drug-violence-hits-mexico-economy-14909889.html>.

67. *See id.*

68. *See* TRAVEL.STATE.GOV, *supra* note 49 (outlining the general conditions in Mexico, including its war with transnational criminal organizations, and urging the deferral of non-essential travel to a number of Mexican states).

69. *See* BEITTEL, *supra* note 60, at 27 (“As it has spread to new locations, the fear of violence has closed businesses and had an impact on tourism. American investors in Mexico have grown concerned about the violence and businesses have sent home dependents or closed operations altogether in some cities.”).

70. *Id.* at 26–27 (“The Mexican government recently published a report indicating that foreign direct investment (FDI) has continued to pour into some of the most violent states at levels exceeding the investment prior to 2006, but others argue that job creating investment has been moving into safer cities in central Mexico where drug trafficking-related violence is lower.”).

71. Of course, a number of weapons sold legally by the United States government also fall into the hands of drug cartels as well. *See* Sharyl Attkisson, *Legal U.S. Gun Sales to Mexico Arming Cartels*, CBSNEWS.COM (Dec. 11, 2011) http://www.cbsnews.com/8301-500202_162-57337289/legal-u.s-gun-sales-to-mexico-arming-cartels.

Streets Act, which provided a number of new statutes governing criminal violations.⁷² Congress passed this Act in response to court rulings on state wiretapping statutes⁷³ and to “findings concerning the impact of the traffic in firearms on the prevalence of lawlessness and violent crime *in the United States*.”⁷⁴ At the time, Congress was not concerned with the outbound flow of firearms to other countries,⁷⁵ only with the domestic provision of firearms to those persons within the country who should not have them.

The Act is codified at 18 U.S.C. § 922 and currently regulates “firearms trafficking.”⁷⁶ It criminalizes a number of activities relating to firearms, including (with certain caveats) being “engaged in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.”⁷⁷ This provision makes it illegal for “any importer, manufacturer, [or] dealer . . . to ship or transport in interstate or foreign commerce any firearm to any person other than” a licensed firearm trafficker.⁷⁸ The statute criminalizes the transport or receipt of any firearm purchased or obtained in another state,⁷⁹ as well as the transfer, sale, or trade of a firearm

72. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197-239 (1968) (codified as amended in scattered sections of 5, 18 & 42 U.S.C.); see also Bryan v. United States, 524 U.S. 184, 186–87 (1998) (outlining the Act’s criminal firearms provisions).

73. The Supreme Court invalidated New York’s state wiretapping law in *Berger v. New York*, 388 U.S. 41 (1967), and explained the Fourth Amendment requirements for a proper wiretapping statute. YALE KAMISAR ET AL., CRIMINAL PROCEDURE 505–06 (12th ed. 2008). In that same year, the Court also commented on warrantless interception of telephone calls by bug in *Katz v. United States*, 389 U.S. 347 (1967), thereby laying the groundwork for the federal wiretapping statute within the Omnibus Criminal Control Act. See 18 U.S.C. §§ 2510–2522 (2006); see also David Sklansky, *Katz v. United States: The Limits of Aphorism*, in CRIMINAL PROCEDURE STORIES 250 (Carol S. Steiker ed., 2006); Stewart M. Young, *Targeting the Person: Roving Wiretaps and the Changing Nature of Electronic Surveillance* (unpublished manuscript) (on file with author) (laying out the general history of the wiretapping statute in relation to *Berger* and *Katz*).

74. *Bryan*, 524 U.S. at 186–87 (emphasis added).

75. In fact, the Gun Control Act’s legislative history notes Congress’ concern with surplus military firearms coming from outside the country. See Zimring, *supra* note 44, at 149.

76. Oddly enough, the term “trafficking” does not appear in the Gun Control Act except when referring to “drug trafficking.” See 18 U.S.C. §§ 924(c)(1), 924(g), 929 (2006). The Inspector General’s Report on Project Gunrunner noted this particular oddity. See OFFICE OF INSPECTOR GEN., *supra* note 19, at 59 & n.78.

77. 18 U.S.C. § 922(a)(1)(A) (2006). § 922(a)(1)(B) criminalizes the same actions with regard to ammunition.

78. § 922(a)(2). The term “licensed trafficker” is not a definitional term in the statute. It is merely a descriptive term for purposes of this Article for a person who is a “licensed importer, licensed manufacturer, licensed dealer, or licensed collector.” *Id.* For these exceptions, I like to use the term “legal trafficker” or “licensed trafficker.”

79. § 922(a)(3).

to another person who does not reside in the state where the transferor resides.⁸⁰ Finally, the “lie-and-buy” statute—the bread and butter of firearms prosecutions—criminalizes the “acquisition or attempted acquisition of any firearm” by knowingly making “any false or fictitious” statements to acquire a firearm.⁸¹

18 U.S.C. § 922 criminalizes other activities by licensed traffickers. For instance, licensed traffickers may not sell firearms to anyone under the age of eighteen⁸² or to anyone who is not a resident of the state.⁸³ Licensed traffickers also may not sell machine guns, destructive devices, or short-barreled shotguns unless authorized by the Attorney General as “consistent with public safety and necessity.”⁸⁴ The statute also criminalizes the disposition or sale of any firearm to any person who is under indictment, has been convicted of a felony,⁸⁵ is a fugitive from justice,⁸⁶ abuses narcotics,⁸⁷ or is an alien unlawfully present in the United States.⁸⁸ Finally, it is unlawful to deliver firearms to a common carrier without notice to that carrier.⁸⁹

What is missing is a statute that criminalizes “trafficking in firearms.”⁹⁰ The only “trafficking” contemplated by 18 U.S.C. § 922 is trafficking done by someone “engaged in the business of importing . . . or dealing in firearms.”⁹¹ Congress defined this portion of that statute in 18 U.S.C. § 921(a)(21)–(22):

(21) The term “engaged in the business” means—

(C) as applied to a dealer in firearms, . . . a person who devotes *time, attention, and labor* to dealing in firearms as a *regular course of trade or business* with the *principal objective of livelihood*

80. § 922(a)(5).

81. § 922(a)(6). This provision criminalizes both lying to procure a firearm for oneself and the lie itself. *Id.*

82. § 922(b)(1).

83. 18 U.S.C. § 922(b)(3) (2006).

84. § 922(b)(4).

85. § 922(d)(1).

86. § 922(d)(2).

87. § 922(d)(3).

88. 18 U.S.C. § 922(d)(5)(A) (2006). It also criminalizes these sales to an alien that has a nonimmigrant visa. § 922(d)(5)(B).

89. § 922(e).

90. Again, note the oddity of the lack of the term “trafficking” in 18 U.S.C. §§ 922–929, except when referring to “drug trafficking.” *See, e.g.*, §§ 924(c)(1), 924(g), 929 (2006); *see also supra* text accompanying note 76.

91. §§ 924(c)(1), 924(g), 929.

and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms. . . .

The statute further defines “engaged in the business” with respect to an importer of firearms⁹² and ammunition.⁹³ 18 U.S.C. § 921 also defines “livelihood and profit”:

(22) The term “with the principal objective of livelihood and profit” means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: *Provided*, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.⁹⁴

The current statute further defines dealer,⁹⁵ importer,⁹⁶ and manufacturer⁹⁷—a group I term “legal traffickers.” The cases that arise under this statute, however, usually turn on the “engaged in the business” prong. A number of the federal criminal pattern jury

92. 18 U.S.C. § 921(a)(22)(E) (2006) (“[A]s applied to an importer of firearms, a person who devotes time, attention, and labor to importing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms imported.”).

93. § 921(a)(21)(F) (“[A]s applied to an importer of ammunition, a person who devotes time, attention, and labor to importing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition imported.”).

94. § 921(a)(21)–(22).

95. § 921(a)(11) (“The term ‘dealer’ means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term ‘licensed dealer’ means any dealer who is licensed under the provisions of this chapter.”).

96. § 921(a)(9) (“The term ‘importer’ means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution; and the term ‘licensed importer’ means any such person licensed under the provisions of this chapter.”).

97. § 921(a)(10) (“The term ‘manufacturer’ means any person engaged in the business of manufacturing firearms or ammunition for purposes of sale or distribution; and the term ‘licensed manufacturer’ means any such person licensed under the provisions of this chapter.”).

instructions essentially mirror the statutory language and definitions.⁹⁸

1. Historic Issues with “Engaged in the Business” and “Profit”

For quite some time, courts have wrestled with the “engaged in the business” prong of 18 U.S.C. § 922. The statute does not define what it means to be “engaged in the business” of dealing in firearms, nor is there any indication in the legislative history or other relevant documentation that helps courts to easily define this term.⁹⁹ Given this lack of a definition, courts have had to consider the scope and meaning of this language without any clear guidance. In 1975, the Tenth Circuit considered the scope of this language for the first time in *United States v. Swinton*.¹⁰⁰ In that case, Swinton told ATF agents that he had stolen guns for sale and tried numerous times to buy guns for the agents.¹⁰¹ The Tenth Circuit proceeded to consider whether it should use the definition of “business”¹⁰² from *Cherot v. United States Fidelity and Guaranty Co.*¹⁰³ The *Swinton* court noted that Sixth Circuit and Seventh Circuit cases supported Swinton’s argument that “business” meant “an undertaking engaged with some regularity and for profit and income.”¹⁰⁴ The court referenced *United States v. Day*,¹⁰⁵ in which it found the

98. See U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, FIFTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS § 2.44 (2001) (entitled “Dealing in Firearms Without License” and including the “engaged in the business” definition and “livelihood and profit” prong in the instructions); U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, NINTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS, § 8.53 (2010) (entitled “Firearms—Dealing, Importing or Manufacturing Without Licenses” (codified at 18 U.S.C. § 922(a)(1)(A) & (B) (2006)), and including the “primary source of income” notation and the “time, attention and labor to selling firearms” notation in the Comment but not in the instructions themselves); U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, ELEVENTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS § 34.1 (2010) (entitled “Dealing in Firearms Without a License,” codified at 18 U.S.C. § 922(a)(1)(A) (2006), and noting, “The ‘principal objective of livelihood and profit’ is the intent to earn a living or make some money from the regular sale of firearms—not just to improve a person’s collection or reduce a personal collection. Whether profit actually results does not matter.”). The Tenth Circuit’s criminal pattern instructions define “firearm” but neither “engaged in the business” nor the profit motive. They do address those terms in UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, TENTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS § 2.41 Use Note (2011) (entitled “Dealing in Firearms Without License,” codified at 18 U.S.C. § 922(a)(1)(A) (2006)).

99. See *infra* notes 339–343 and accompanying text.

100. 521 F.2d 1255 (10th Cir. 1975).

101. *Id.* at 1256–57. He ultimately purchased one gun, a sawed-off shotgun. *Id.*

102. *Id.* at 1258.

103. 264 F.2d 767 (10th Cir. 1959).

104. *Swinton*, 521 F.2d at 1258 (internal quotation marks omitted).

105. 476 F.2d 562 (6th Cir. 1973).

Sixth Circuit to have held that a person was “engaged in the business of dealing in firearms if such an activity occupies the person’s time, attention, and labor for the purpose of livelihood or profit.”¹⁰⁶ The court also mentioned the Seventh Circuit’s decision in *United States v. Gross*,¹⁰⁷ which the court said stood for the proposition that “‘dealer’ meant anyone engaged in the business of selling firearms; and that the word ‘business’ referred to that which occupies time, attention, and labor for the purpose of livelihood or profit.”¹⁰⁸

The *Swinton* court also noted “contrary decisions” from both the Eighth Circuit and the Southern District of Ohio, which the court deemed to have held that a profit motive need not exist to charge someone with being “engaged in the business of dealing in firearms.”¹⁰⁹ The *Swinton* court noted that the Eighth Circuit’s decision in *United States v. Wilkening*¹¹⁰ held that “the offense of dealing in firearms did not require that the defendant’s primary business be dealing in firearms or that he make a certain profit from it.”¹¹¹ And it noted that *United States v. Jackson*,¹¹² heard in the Southern District of Ohio, held that “one is engaged in the ‘business of dealing in firearms’ if he has guns on hand or is ready and able to procure them for the purpose of selling them to those persons he accepts as customers.”¹¹³

Ultimately, the Tenth Circuit sided with the Eighth Circuit, holding in *Swinton* that the statute did “not require that the Government establish that a person engaged in the business of dealing in firearms make a profit, even though the ‘dealing’ activity requires time, attention and effort.”¹¹⁴ The Ninth Circuit later disagreed, holding in *United States v. Van Buren*¹¹⁵ that “where transactions of sale, purchase or exchange of firearms are regularly entered into in expectation of profit, the conduct amounts to engaging in business.”¹¹⁶

Congress then took action in response to this circuit split. It is important to note that the term “engaged in business” was not always in the statute. In 1986, Congress added this term, and further amended the statute to require the existence of a profit motive for

106. *Swinton*, 521 F.2d at 1258 (internal quotation marks omitted).

107. 451 F.2d 1355 (7th Cir. 1971).

108. *United States v. Swinton*, 521 F.2d 1255, 1258 (10th Cir. 1975).

109. *Id.*

110. 485 F.2d 234 (8th Cir. 1973).

111. *Swinton*, 521 F.2d at 1258.

112. 352 F. Supp. 672 (S.D. Ohio 1972).

113. *Swinton*, 521 F.2d at 1258.

114. *Id.*

115. 593 F.2d 125 (9th Cir. 1979).

116. *Id.* at 126.

persons to “be in the business of dealing in firearms.”¹¹⁷ Firearms trafficking cases dropped precipitously after this amendment, and further issues hamstrung the ATF over time. For instance, the number of ATF agents from 1971 to the present stayed constant at 2,500, although law enforcement agents in other agencies increased dramatically. Congress’s passage of the Tiahrt Amendment, which restricted the information that the ATF may provide to the public about firearms (and firearms trafficking), compounded the difficulties of prosecuting firearms violations.¹¹⁸

I actually dealt with this specific issue as a federal prosecutor during one gunrunning operation. In San Diego, ATF agents engaged a confidential informant (CI) who had purchased firearms in Arizona from a target of the investigation. The target offered to sell the CI more weapons, particularly long guns (rifles and shotguns). The agents told the CI to tell the target defendant that he needed to buy more weapons and “take them south.” The clear implication was that these weapons were heading to Mexico, which the target defendant understood and often remarked on. At times, the target defendant mentioned the drug violence in Mexico (this was in 2008), but did not seem overly concerned that he might be contributing to that violence by selling firearms to the CI.

During the operation, the target defendant sold the CI more than twenty guns, including a number of AK-47-type rifles. During the culmination of the operation, agents executed a search warrant and searched the target defendant’s house, finding more than sixty-five other firearms. After the takedown, the target defendant’s counsel began the negotiation process, and it became clear that the “[engagement] in the business of . . . dealing in firearms” prong would be the critical issue. Additionally, the defense counsel made

117. Firearms Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 450 (1986), amended by Pub. L. No. 99-360, 100 Stat. 776 (1986) (“[T]he profit motive is not required if a person engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.”). While certain cases held that a profit motive was required to be “engaged in the business of dealing in firearms,” the above Act removed that requirement. See also *United States v. Graham*, 305 F.3d 1094, 1101–02 (10th Cir. 2002) (“[T]he definition [of engaged in the business] was added to the firearms statute by Congress in 1986, to resolve a circuit split regarding the meaning of the term as it applies in the firearms statute.”); H. Rep. No. 99-495, at 12 (1986), reprinted in 1986 U.S.C.C.A.N. 1327, 1338 (“Courts have not been unanimous regarding the question whether a profit motive is an essential ingredient in determining if one is ‘engaged in the business’ of firearms.”); FED. JUDICIAL CTR., FEDERAL JURY PRACTICE AND INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS 78 (1988).

118. See generally Colin Miller, *Lawyers, Guns, and Money: Why the Tiahrt Amendment’s Ban on the Admissibility of ATF Trace Data in State Court Actions Violates the Commerce Clause and the Tenth Amendment*, 2010 UTAH. L. REV. 665; Angela Jacqueline Tang, Note, *Taking Aim at Tiahrt*, 50 WM. & MARY L. REV. 1787 (2009).

a convincing argument that these firearms were sold from the defendant's personal collection, thereby demonstrating that he was not "engaged in the business." Indeed, the target defendant would often complain on the recordings from the takedown that he was not making any profit on some of the transactions, despite his willingness to drive from Arizona to San Diego to facilitate them. The violation appeared clear on its face—selling one gun was to "engage in the business"—but the U.S. Attorney's Office was concerned, and rightly so, that the court might not see it that way. Ultimately, I re-indicted the target defendant for transporting firearms across state lines, which had lesser penalties but lacked any problems of proof. This experience is typical. One supervisor in the ATF has noted "the lack of a "firearms trafficking statute" and "the toothless nature of the 'straw purchasing law'" in Congressional testimony.¹¹⁹ Ultimately, the statute lacks any real punch—the profit motive requirement and the "engaged in the business" prong make proving firearms trafficking quite difficult. The toothless nature of the gun statutes in general, specifically those that cover firearms trafficking, demonstrates the need for a true firearms trafficking statute.

The ATF is not necessarily the sole agency responsible for focusing on firearms trafficking. While the ATF has primary responsibility, Immigration and Customs Enforcement (ICE) (like its predecessor, the U.S. Customs Service)¹²⁰ is responsible for enforcing U.S. export laws, including "enforcing laws related to the export of military items and dual-use goods."¹²¹ ICE has historically promoted public awareness of firearms trafficking to Mexico, but it generally does not engage in law enforcement efforts similar to

119. *Operation Fast and Furious: Reckless Decisions, Tragic Outcomes: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 107–13 (2011) (statement of Peter J. Forcelli, Supervisory Special Agent, ATF); see also Interview by House Comm. on Oversight & Gov't Reform with ATF Special Agent Carlos Canino, at 59–60 (June 16, 2011), in MINORITY STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, *OUTGUNNED*, *supra* note 21, at 11 ("A trafficking statute would be helpful, too. . . . What we want to do is we want to stop otherwise legal guns from getting into an illegal secondary market."); Interview by House Comm. on Oversight & Gov't Reform with ATF Special Agent Olindo "Lee" Casa, at 81–82 (Apr. 28, 2011), in MINORITY STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, *OUTGUNNED*, *supra* note 21, at 11 ("There is really no trafficking, firearms trafficking statute, per se. It would be nice to have a trafficking statute per se . . . just to be [sic] a deterrent effect.").

120. ICE is the "principal investigative arm of the U.S. Department of Homeland Security (DHS) . . . created in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service." *Overview*, ICE, <http://www.ice.gov/about/overview/> (last visited Sept. 29, 2012).

121. GAO, *supra* note 7, at 11 & n.6.

those of the ATF.¹²² Customs and Border Protection (CBP)¹²³ also plays a role “in intercepting southbound illicit firearms at the border, [but] southbound inspections of vehicles and persons traveling from the United States to Mexico have generally not been a focus of CBP’s efforts.”¹²⁴ Nevertheless, the current legal regime for firearms trafficking offenses focuses solely on “dealing in firearms,” and the ATF generally is the agency most responsible for investigating firearms offenses.

2. The Federal Assault Weapons Ban: R.I.P. 2004

In previous administrations, the United States enacted certain bans that altered the legality of the purchase or possession of certain weapons, thereby affecting Mexican drug cartels’ access to such weapons. From 1994 to 2004, the federal assault weapons ban (FAWB)¹²⁵ was in place, which covered a “first time restriction on the manufacture, transfer and possession of semi-automatic weapons.”¹²⁶ This ban defined the term “assault weapons” and restricted possession of certain firearms in accordance with that definition.¹²⁷ The ban further restricted the manufacture of assault weapons, criminalized the possession of illegally imported assault weapons,

122. See *id.* at 10–11. For instance, ICE disseminated brochures and posters to educate firearms purchasers regarding U.S. firearms and smuggling laws. As part of its border enforcement duties, ICE has recently worked to “expand seizures of firearms destined for Mexico on the U.S. side of the border.” *Id.* (footnote omitted). Furthermore, it has worked to provide “end use verification checks for firearms lawfully exported to Mexican government entities” to ensure those lawful firearms exports go to the appropriate authorities. *Id.* at 11.

123. Customs and Border Protection is responsible for both manning the ports of entry (the CBP arm) and manning the borders between the ports of entry (the Border Patrol arm). See *Border Patrol History*, DEP’T OF HOMELAND SEC., http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/history.xml (last visited Sept. 12, 2012). On March 1, 2003, the Department of Homeland Security consolidated the U.S. Border Patrol into U.S. Customs and Border Protection. *Id.*

124. GAO, *supra* note 7, at 12–13, 34–39 & n.9.

125. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 110101–110106, 108 Stat. 1796 (1994) (containing the “Federal Assault Weapons Ban” and its sunset provisions set for Sept. 13, 2004) [hereinafter FAWB]; see also CHRISTOPHER S. KOPER, DANIEL J. WOODS & JEFFREY A. ROTH, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, REPORT TO THE NATIONAL INSTITUTE OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf> (assessing the domestic impact on crime from the FAWB).

126. Dube et al., *supra* note 18.

127. FAWB §§ 110102(a) (entitled “Restriction on Manufacture, Transfer and Possession of Certain Semiautomatic Assault Weapons” and codified at 18 U.S.C. § 922(v)(1)–(3)) & 110102(b) (entitled “Definition of Semiautomatic Assault Weapon” and codified at 18 U.S.C. § 921(a)(30)).

and restricted the transfer of assault weapons that were not manufactured before the implementation of the FAWB.¹²⁸ States also had their own bans on such weapons, including California¹²⁹ and New York¹³⁰ among others.¹³¹

Several recent empirical studies of Mexican violence from 2002 to 2006 demonstrate the efficacy of the FAWB.¹³² Controlling for a number of variables, including cartel destabilization, local violence, and distance from the border, Arindrajit Dube, Oeindrila Dube, and Omar Garcia-Ponce investigated the number of homicides and gun-related homicides during this period. The authors of the study theorized that gun-related homicides might increase in U.S.-Mexico border municipalities (cities within one-hundred miles of the border that encompassed a major highway and were near a well-trafficked port of entry) after the 2004 expiration of the federal assault weapons ban.¹³³ Given that California continued its own state-controlled ban on these weapons, the authors further posited that Mexican border municipalities along the Arizona and Texas border might experience greater violence than municipalities along the California border.¹³⁴

Ultimately, the data demonstrated that after the FAWB expired, Mexican border municipalities within one hundred miles of the Arizona and Texas border experienced “differential increases in total homicides, homicides tied specifically to guns, as well as criminal convictions for murders and gun-related offenses in the post-2004 period.”¹³⁵ Indeed, it appears that municipalities at the Arizona and Texas border ports saw total homicides rise by 40 percent compared with municipalities one hundred miles away.¹³⁶ These results demonstrate that the FAWB provided at least some deterrent effect

128. § 110102(a).

129. See CAL. PENAL CODE. §§ 12275–12290 (Deering 2012) (containing California’s assault weapon ban). Cal. Sen. Bill 23 apparently increased the reach of California’s ban. Dube et al., *supra* note 18, at 6.

130. N.Y. PENAL LAW § 265.02(6) (McKinney 2010).

131. Other states that have assault weapons bans include Connecticut, Hawaii, Maryland, Massachusetts and New Jersey. See LEGAL CMTY. AGAINST VIOLENCE, BANNING ASSAULT WEAPONS: A LEGAL PRIMER FOR STATE AND LOCAL ACTION, 5–6, 20 (2004), available at http://smartgunlaws.org/wp-content/uploads/2012/05/Banning_Assault_Weapons_A_Legal_Primer_8.05_entire.pdf; see also CONN. GEN. STAT. §§ 53-202a to -202o (2009); HAW. REV. STAT. §§ 134-1, -4, -8 (LexisNexis 2006); MASS. GEN. LAWS ch. 140, §§ 121–23, 131 & 131M (West 2007), MD. CODE ANN., CRIM. LAW §§ 4-301 to -306 (West 2012); N.J. STAT. ANN. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13 (West 2005).

132. See, e.g., Dube et al., *supra* note 18.

133. *Id.* at 2–3.

134. *Id.* at 6.

135. *Id.* at 26.

136. *Id.* The authors posit that this “impl[ies] an additional 158 more homicides in the two years following the expiration of the FAWB.” *Id.*

given the lack of a readily available supply of firearms smuggled to Mexico during the implementation of the FAWB.¹³⁷ Of course, as noted above, the amount of violence has dramatically increased since 2006 (the end point of the study).¹³⁸

This study demonstrates the efficacy of looking at U.S. domestic laws and their extraterritorial effects. In the context of Mexican drug violence, the study demonstrated that the FAWB clearly had a positive effect in Mexico. The study showed that violence involving firearms in Mexico *increased* after the FAWB expired. Thus, it is likely that the reverse correlation is also true: the imposition of the FAWB in 1994 may have decreased firearms-related violence in Mexico. Clearly, a new FAWB would be important in curbing further drug-related violence in Mexico, particularly given that the previous FAWB banned several of the drug cartels' weapons of choice.¹³⁹

A second study, conducted by Luke Chicoine, an economist at Notre Dame, also studied the effects of the FAWB and its expiration, and came to a similar conclusion as the Dube study.¹⁴⁰ Chicoine examined the time period from 2004 to 2008 and concluded that the expiration of the FAWB led to at least a 16.4 percent increase in Mexico's homicide rate.¹⁴¹ While the Dube study specifically examined border municipalities within one hundred miles of the U.S.-Mexico border, Chicoine analyzed data from every Mexican state during the FAWB from 2004 through 2008.¹⁴² In Mexican states wherein cartels have a major presence, the study found that homicide rates rose 24.6 percent after the FAWB expired, an increase even higher than that observed at the national level.¹⁴³ The study also concluded that this increase amounted to an additional 2,684 homicides in Mexico from 2004 to 2008.¹⁴⁴

137. *Id.*

138. *See supra* notes 2–6 and accompanying text.

139. *See supra* notes 16–17.

140. Chicoine, *supra* note 18.

141. *Id.* at 22.

142. *Id.* at 6.

143. *Id.* at 22.

144. *Id.* It is important to note that these studies did not consider the effect of President Calderon's rise to power and his clarion call against the drug cartels. SEELKE, *supra* note 3, at 6 (noting President Calderon's decision to make "combating drug trafficking and organized crime a top priority of his administration," and noting the cartels' "increasingly brazen violence committed by criminal groups, partially in response to government pressure"). At least some of the increase in deaths should be attributed to President Calderon's decision to target the drug cartels, but the rise in firearms available after the FAWB expired should also factor into the equation. *Compare id.* and Charles Bowden & Molly Molloy, *Who Is Behind the 25,000 Deaths in Mexico?*, THE NATION, July 23, 2010, <http://www.thenation.com/article/37916/who-behind-25000-deaths-mexico#> (arguing that the Calderon administration's claim

The Department of Justice's National Institute of Justice and several members of Congress commissioned a study, led by Christopher Koper and his colleagues, of the efficacy of the FAWB in the United States.¹⁴⁵ The study concluded that gun crimes decreased in the localities studied between 17 and 72 percent from their respective rates.¹⁴⁶ The authors also noted, however, that the decline in use of assault weapons was "due primarily to a reduction in the use of assault pistols (APs), which are used in crime more commonly than assault rifles (ARs)."¹⁴⁷ They did not find a corresponding drop or clear decline in the use of assault rifles, because of "the rarity of crimes with these weapons and by substitution of post-ban rifles that are very similar to the banned AR models."¹⁴⁸ The study did not conclude that domestic gun crime dropped due to the FAWB and noted that any effect of reauthorization would "likely . . . be small at best and perhaps too small for reliable measurement."¹⁴⁹ The study presciently noted that lifting the FAWB would likely make pre-ban assault weapons lose their "value and novelty, prompting some of their owners to sell them in undocumented secondhand markets, where they can more easily reach high-risk users, such as criminals, terrorists, and other potential mass murderers."¹⁵⁰

Accordingly, on the domestic side, the FAWB does not seem to have affected total gun-crime violence in a significant manner, but it does appear to have affected gun-crime violence markedly in an extraterritorial manner. Taking the cumulative conclusions of these studies at face value, the net result is that, at least on the domestic side, a ban does not have much efficacy. And yet the two studies on the Mexican side of the equation demonstrate the FAWB had moderate to considerable efficacy in curbing drug violence. One factor that is likely key to understanding these results emerges from the Koper study's conclusions regarding the particular weapons used in

that 90 percent of the death toll in Mexico "are criminals" is false and blaming Calderon's administration for the spike in the death toll); *with* Chicoine, *supra* note 18, at 22 *and* Dube et al., *supra* note 18, at 26.

145. KOPER ET AL., *supra* note 125, at i, 1–3.

146. The localities included Baltimore, Miami, Milwaukee, Boston, St. Louis, and Anchorage. *Id.* at 1.

147. *Id.*

148. *Id.* *But see* BRADY CTR. TO PREVENT GUN VIOLENCE, THE IMPACT OF THE 1994 FEDERAL ASSAULT WEAPON ACT (2004), available at http://www.bradycenter.org/xshare/pdf/reports/on_target.pdf (noting that assault weapons traced to crime dropped approximately 66 percent from the pre-ban rate).

149. KOPER ET AL., *supra* note 125, at 1–2.

150. *Id.* at 2.

domestic gun crime: namely, assault rifles are rarely used in domestic criminal activities,¹⁵¹ whereas they are generally the gun of choice for Mexican DTOs.¹⁵² Thus, while supporters of another FAWB will not find a “smoking gun” in historical studies of domestic efficacy, the extraterritorial effects of the ban provide a clear rationale for another FAWB.

Gun control advocates and the Mexican government have expressed support for another FAWB on certain firearms favored by Mexican drug cartels. For instance, in May 2010, President Calderón called on Congress to restore the assault weapons ban to stem the flow of these weapons to Mexico.¹⁵³ Speaking for thirty-five minutes before a joint session of Congress, President Calderón decried the drug trafficking-fueled violence and noted, “We have seized 75,000 guns and assault weapons in Mexico in the past three years, and more than 80 percent of those we have been able to trace come from the United States.”¹⁵⁴ He further noted the strong correlation between the increase in violence by drug trafficking organizations and the expiration of the FAWB.¹⁵⁵

Mexico’s Secretary of the Interior, Alejandro Poire Romero, recently reiterated the position of President Calderón on imposing another FAWB.¹⁵⁶ Secretary Poire Romero noted that in 2005, approximately one-third of the firearms seized in Mexico were assault weapons.¹⁵⁷ But this number has increased dramatically, and now accounts for approximately 60 to 65 percent of the guns seized by

151. *Id.* at 1–2. I am aware, of course, of such violent tragedies as the Aurora *Dark Knight Rises* shooting in July 2012, but the use of assault rifles in normal street crime is generally incredibly low. See *Who Has Illegal Guns and How Are They Acquired?*, NAT’L INST. OF JUSTICE (June 25, 2008), <http://www.nij.gov/nij/topics/crime/gun-violence/acquired.htm>. Semi-automatic handguns are usually the weapon of choice for street thugs, armed robber, and the like. See *Gun Violence*, NAT’L INST. OF JUSTICE (Oct. 26, 2010), <http://www.nij.gov/topics/crime/gun-violence/welcome.htm> (“Most murders in the United States are committed with firearms, especially handguns.”).

152. See *supra* note 16. Unlike the average domestic street thug, Mexican DTOs prefer assault rifles and their ilk for their drug trafficking activities. *Id.*

153. Brian Knowlton, *Calderón Calls for Restoring Assault Weapons Ban*, N.Y. TIMES (May 20, 2010, 12:43 PM), <http://thecaucus.blogs.nytimes.com/2010/05/20/calderon-calls-for-restoring-assault-weapons-ban/>.

154. *Id.* Other reports back up this figure. See, e.g., GAO, *supra* note 7, at 15.

155. Knowlton, *supra* note 153. Of course, it is clear that violence increased dramatically after President Calderón took office and declared open war on the cartels, in conjunction with the severe destabilization of several cartels. SEELKE, *supra* note 3, at 5–6.

156. Editorial, *Lax U.S. Gun Laws Enable Killing in Mexico*, WASH. POST, Feb. 4, 2012, http://www.washingtonpost.com/opinions/lax-us-gun-laws-enable-killing-in-mexico/2012/02/02/1QAWb9CqQ_print.html.

157. *Id.*

Mexican authorities.¹⁵⁸ According to Poire Romero, “The significant rise in violence and the increase in the number of public officials killed in Mexico [coincide] with [the] lifting of the assault weapons ban.”¹⁵⁹ The empirical studies described above appear to substantiate those statements.

Although the Calderón presidency stressed in public its fight against the cartels, it remains to be seen how the new Mexican presidential administration, led by Enrique Peña Nieto, will fare.¹⁶⁰ President-elect Peña Nieto’s election, previously mired in allegations of vote buying and calls for a recount,¹⁶¹ may signal a shift in attitude and policy relating to the Mexican government’s interaction with the cartels.¹⁶² The Institutional Revolutionary Party (PRI) President-elect has indicated his willingness to continue to fight the cartels but has also stated an interest in “stabilization of the situation in Mexico and advancement on many of the issues Americans care about.”¹⁶³ While President-elect Peña Nieto has announced his willingness to continue Mexico’s fight against the cartels, only time will tell what institutional methods and priorities the PRI and the President-elect will favor.

158. *Id.*

159. *Id.*

160. Catherine E. Shoichet, *Officials: Pena Nieto Projected Winner in Mexican Presidential Vote*, CNN (July 2, 2012, 1:15 AM), <http://www.cnn.com/2012/07/01/world/americas/mexico-elections/index.html>.

161. Nick Miroff & William Booth, *Mexico’s Presidential Election Tainted by Claims of Vote Buying*, WASH. POST, July 4, 2012, http://www.washingtonpost.com/world/mexico-presidential-election-tainted-by-claims-of-vote-buying/2012/07/04/gJQAHqTzNW_story.html; SEELKE, *supra* note 3, at 3 (noting that the parties have since pledged to abide by the Federal Electoral Tribunal’s decision that certified the results of the election).

162. Indeed, one commentator noted President-elect Peña Nieto’s engagement with big business in Mexico, stating “[t]he hope of the entrepreneurs in Mexico is that Pena-Nieto, as past PRI administrations have done, will put together a deal with the drug cartels, allowing the violence to stop. Of course, if this happens, the corruption of the state could increase.” Beatriz Schiava, *Mexican Elections, PRI Entrepreneurs, and the Power Behind Pena Nieto*, EXAMINER.COM (July 29, 2012), <http://www.examiner.com/article/mexican-elections-pri-entrepreneurs-and-the-power-behind-pe-a-nieto>. Indeed, the official line from the President-elect is that he will seek to quickly reduce violence. Margaret Warner, *Where Frontrunner Pena Nieto Might Take Mexico’s Drug War*, PBS NEWSHOUR (June 28, 2012, 5:30 PM), <http://www.pbs.org/newshour/rundown/2012/06/mexico-dispatch-6.html> (providing commentary from Peña Nieto’s campaign manager, Luis Videgaray, that Peña Nieto will “very quickly prioritize reducing violence . . . [because if not,] we as a country are endangering the social support for fighting crime”). The same piece notes, however, that Peña Nieto will not do what other former PRI governors did and buy off the cartels. *See id.*

163. William Booth, *Enrique Peña Nieto to Fight Cartels*, THE ARIZ. REPUB., July 2, 2012, <http://www.azcentral.com/arizonarepublic/news/articles/2012/07/02/20120702mexico-president-winner-pena-nieto-to-fight-cartels.html>.

III. EXAMINING THE ATF'S OPERATIONS AND ITS CHALLENGES

Given the lack of support for a FAWB in the current climate, and the difficulties with prosecuting actual “firearms trafficking” due to the nature of the statute (including the “engaged in the business” prong) U.S. law enforcement efforts have not adequately curtailed the trafficking of firearms contributing to drug violence in Mexico. Furthermore, the ATF has created an uproar with operations intended to curtail firearms trafficking. To explain part of the investigative debacle caused by the ATF, this section examines the context of the ATF's operations, then discusses typical investigative techniques that the ATF failed to use.

A. *Project Gunrunner and Operation Fast and Furious*

Project Gunrunner and Operation Fast and Furious failed to use many typical investigative techniques, ultimately resulting in “gunwalking.” Although the ATF sought to push the envelope with Operation Fast and Furious in firearms trafficking prosecution, it clearly suffered from a lack of thoughtful¹⁶⁴ supervision on the one hand and the lack of a simple/straightforward firearms trafficking statute on the other.

1. Targeting Firearms Traffickers: Project Gunrunner

From fall 2009 until early 2011, the ATF carried out an extensive firearms sting operation designed to ensnare Mexican drug cartels engaging in firearms trafficking into Mexico.¹⁶⁵ As previously discussed, several narco-trafficking cartels in Mexico perpetrate high levels of violence against Mexican citizens, law enforcement, and rival cartels or gangs. And since 2006, the drug violence carried out by these cartels has increased dramatically. One reason for this heightened violence is that the United States' prosecution of the Arellano-Felix brothers (the de facto heads of the Tijuana cartel) created a power vacuum in the drug trafficking routes of several cartels.¹⁶⁶ And it appears that the increased availability of long

164. A number of accusations and concerns have been made on both sides regarding the supervision, both by the ATF and the DOJ, of Operation Fast and Furious. *See supra* note 23.

165. Fred Lucas, *Gun-Running Timeline: How DOJ's 'Operation Fast and Furious' Unfolded*, CNSNEWS.COM (July 7, 2011), <http://www.cnsnews.com/news/article/gun-running-timeline-how-doj-s-operation>.

166. *10 Years After Prison Escape, "El Chapo" Thrives*, CBSNEWS (Jan. 18, 2011, 4:32 PM), <http://www.cbsnews.com/stories/2011/01/18/world/main7258730.shtml> (quoting U.S.

guns—the weapon of choice among violent cartels—may have contributed to the drug violence.¹⁶⁷

Project Gunrunner, which helped to fund Operation Fast and Furious, began as a pilot program in Laredo, Texas and expanded nationally in 2006.¹⁶⁸ It sought to “help combat firearms trafficking into Mexico” and to broadly “reduce cross-border drug and firearms trafficking and the high level of violence associated with these activities on both sides of the border.”¹⁶⁹ Gunrunner had four components: “the expansion of gun tracing in Mexico, international coordination, domestic activities, and intelligence.” It targeted four border ATF field divisions in the American Southwest.¹⁷⁰

The initiative set five main objectives, including investigation of persons engaging in illicit firearms trafficking along the border and coordination with Mexican law enforcement in these firearms cases.¹⁷¹ Intending to concentrate resources among the four Southwest border field divisions, Project Gunrunner’s “primary enforcement initiative [was] to stem the trafficking of illegal weapons across the U.S. border into Mexico and to reduce gun-driven violence on both sides of the border.”¹⁷² The ATF received approximately \$21.9 million in 2009 and \$37.5 million in 2010 for Project Gunrunner operations, and ATF special agents on the project increased from eighty-four to 224.¹⁷³

Despite the funding and agent increases, the number of large firearms trafficking cases did not grow. In fact, Project Gunrunner focused mostly on gun dealer inspections and straw purchaser investigations rather than on “higher-level traffickers, smugglers and the ultimate recipients of the trafficked guns.”¹⁷⁴ During Project Gunrunner, the ATF increased the number of gun traces submitted from Mexico, the number of cases referred for prosecution, and

Customs and Border Protection Commissioner Alan Bersin as saying, “The virtual destruction of the Arellano Felix cartel has opened a vacuum, which is being exploited by the Sinaloa cartel and Chapo Guzman, who is arguably and provably the largest, most powerful organized crime head in Mexico.”)

167. VIOLENCE POLICY CTR., *supra* note 10.

168. OFFICE OF INSPECTOR GEN., *supra* note 19, at i.

169. *Id.*

170. *Id.* ATF is divided into twenty-six “field divisions.” *Field Divisions*, ATF.gov, <http://www.atf.gov/field/> (last visited Nov. 5, 2012). For instance, the Los Angeles Field Division ranges from San Diego and Imperial County (very southern California) to Los Angeles, Ventura, and counties in between. *Los Angeles Field Division*, ATF.gov, <http://www.atf.gov/field/losangeles/> (last visited Oct. 8, 2012).

171. OFFICE OF INSPECTOR GEN., *supra* note 19, at 2.

172. *Id.* at 4.

173. *Id.* at 5.

174. *Id.* at v, 93–94; *see also* MINORITY STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, *FATALLY FLAWED*, *supra* note 22, at 11–12.

the number of compliance checks on Federal Firearms Licensees (FFLs).¹⁷⁵ These cases, however, “mostly involve[d] straw purchasers and corrupt gun dealers, not those who organize and command the trafficking operations.”¹⁷⁶ A thorough review of Project Gunrunner by the DOJ Inspector General included a recommendation that the ATF “[f]ocus on developing more complex conspiracy cases against high level gun traffickers and gun trafficking conspirators.”¹⁷⁷ Although it noted the lack of an effective U.S. firearms trafficking statute, the Inspector General’s analysis of Project Gunrunner did not include any recommendations for further firearms trafficking legislation.¹⁷⁸ While Project Gunrunner seemed to head in the right direction—toward targeting important aspects of firearms trafficking to Mexico—it suffered from a lack of coordinated strategy and legislative assistance.¹⁷⁹

2. The Road to Hell Paved with Good Intentions: Operation Fast and Furious

With Project Gunrunner in effect, the ATF sought to expand its operations and snare higher-level gun traffickers to hurt the Mexican drug cartels. Operation Fast and Furious appeared to be the answer. It developed out of an ATF proposal in the fall of 2009. Following a three-day training session in August 2009 entitled “Southwest Border Firearms Trafficking Training,”¹⁸⁰ the Arizona ATF and U.S. Attorney’s Office took the materials from that training and began planning Operation Fast and Furious in September of that year.¹⁸¹

175. OFFICE OF INSPECTOR GEN., *supra* note 19, at 23, 26 (noting a 109 percent increase in gun investigations, and a 54 percent increase in the number of cases referred for prosecution upon implementation of Project Gunrunner).

176. *Id.* at 51–54.

177. *Id.* at 52–54, 95.

178. It did, however, include a recommendation that the DOJ and ATF “explore options for seeking a requirement for reporting multiple sales of long guns.” *Id.* at 94. Such a recommendation would require a legislative solution.

179. See OFFICE OF INSPECTOR GEN., *supra* note 25, at 17, 106–208 (outlining Fast and Furious in great detail, noting the lack of coordination between agencies and the lack of a firearms trafficking statute).

180. See U.S. DEP’T OF JUSTICE, *Southwest Border Firearms Trafficking Training, Overview of Straw Purchases*, Aug. 4–7, 2009 (on file with author). The DOJ held this conference at the National Advocacy Center in Columbia, South Carolina. I attended this event, and the training materials are in my office.

181. OFFICE OF INSPECTOR GEN., *supra* note 25, at 103.

The operation sought to target gun traffickers by allowing guns to move up the chain.¹⁸² Normally, the ATF's modus operandi is to find a straw purchaser and charge that straw purchaser, but this method fails to capture and prosecute the individuals who actually receive the firearms. In *Fast and Furious*, the ATF and DOJ prosecutors¹⁸³ made the specific decision to allow guns to "walk" farther than they had in the past. In other words, ATF agents would not immediately stop and arrest a person they believed purchased guns for another person.¹⁸⁴ Instead, they would sit back and wait until that "straw purchaser" delivered the guns to the intended recipient, or even allow these guns to move further up the chain.¹⁸⁵

Fast and Furious used confidential informants, undercover agents, wiretaps, surveillance, and a host of other law enforcement tactics to investigate southbound firearms trafficking.¹⁸⁶ ATF agents further engaged actual licensed firearms dealers and allowed them to sell guns to straw purchasers to continue the operation.¹⁸⁷ At times, agents placed jury-rigged Global Positioning System (GPS) devices on or within the guns so they could keep track of the weapons' whereabouts.¹⁸⁸ Unfortunately, given the makeshift nature of these devices, a number of them failed.¹⁸⁹

Ultimately, approximately two thousand firearms traveled from the United States to Mexico during Operation *Fast and Furious*.¹⁹⁰

182. *Id.* at 113 (noting the desire to "actively identif[y] much larger players in the organization").

183. There is a disagreement as to whether the "gunwalking" component of *Fast and Furious* was decided by the prosecutors or the agents. Indeed, ATF agents claim that the Assistant U.S. Attorney running the operation, Emory Hurley, told agents to stand down in certain cases when agents were about to stop and arrest certain individuals. JOINT STAFFS OF H. COMM. ON OVERSIGHT & GOV'T REFORM & S. COMM. ON THE JUDICIARY, *FAST AND FURIOUS: ANATOMY OF A FAILED OPERATION* 56, 114–19 (2012), available at <http://oversight.house.gov/wp-content/uploads/2012/07/7-31-12-FF-Part-I-FINAL-REPORT.pdf>. In this author's experience, an AUSA does not generally have such wide and vast operational control. But that is likely a subject for another article. See Stewart M. Young, *Agents and Prosecutors and Judges, Oh My! Operational Controls for Proactive Criminal Investigations* (discussing the controls on investigations and arguing about potential line-drawing between allowing prosecutors to control a criminal investigation and allowing a law enforcement agent to control the investigation) (work in progress on file with author).

184. JOINT STAFFS, *ACCOUNTS OF ATF AGENTS*, *supra* note 23, at 18–35 (describing Gunwalking and various accounts of agents being required to not immediately interdict guns).

185. *Id.*

186. See JOINT STAFFS, *ACCOUNTS OF ATF AGENTS*, *supra* note 23, at 4–5.

187. *Id.*

188. *Why Operation Fast and Furious Failed*, NPR.ORG (June 21, 2012), <http://www.npr.org/2012/06/21/155513757/why-operation-fast-and-furious-failed> (detailing how agents placed GPS devices on some of the guns, but that the batteries ran out).

189. *Id.*

190. JOINT STAFFS, *FUELING CARTEL VIOLENCE*, *supra* note 23, at 16 (indicating that over 1,900 guns likely entered into Mexico during the operation).

Rather than interdict these weapons either in transit or at the border, the ATF allowed the guns to “walk” and end up in the hands of cartel members.¹⁹¹ Often these weapons showed up at crime scenes in Mexico and several appeared at a Border Patrol agent’s murder scene in Arizona.¹⁹² The ATF and the DOJ (especially the Assistant U.S. Attorney) specifically sought not to interdict these weapons at an early stage so as to create a larger trafficking case.¹⁹³ While the sentiment might have been honorable (i.e., to target firearms trafficking on a larger scale),¹⁹⁴ the execution of Fast and Furious was extremely poor.¹⁹⁵

3. The Resulting Disaster

The ATF touted the success of Operation Fast and Furious in numerous fact sheets and press releases over time. But those “successes” failed to account for the devastating results: approximately two thousand guns “walked” down to Mexico through the operation with the Mexican government none the wiser.¹⁹⁶ Moreover, Mexican law enforcement recovered three¹⁹⁷ of the weapons from Fast and Furious at the scene of Border Patrol Agent Brian Terry’s murder on December 14, 2010. While it is not clear whether any of those weapons were actually used to kill Agent Terry, the ramifications of those weapons’ presence at the crime scene are obvious. So obvious, in fact, that the Congressional House Committee on Oversight and Government Reform began investigating links between that incident and Operation Fast and Furious.¹⁹⁸

191. JOINT STAFFS, ACCOUNTS OF ATF AGENTS, *supra* note 23, at 30–35.

192. *Id.* at 6, 35–38, 43–46; JOINT STAFFS, FUELING CARTEL VIOLENCE, *supra* note 23, at 8–14 (detailing in a chart numerous weapons traced to Fast and Furious recovered at Mexican crimes scenes).

193. *Id.* at 5–6, 30–32.

194. The Washington Post’s editorial board called the operation a “well-intentioned, misguided response to—and not the cause of—the proliferation of illegal guns in Mexico.” *Supra* note 194.

195. OFFICE OF INSPECTOR GEN., *supra* note 25, at 419–31.

196. JOINT STAFFS, FUELING CARTEL VIOLENCE, *supra* note 23, at 27–28 (“ATF and DOJ leadership kept their own personnel in Mexico and Mexican government officials totally in the dark about all aspects of Fast and Furious.”).

197. Previously, only two weapons were linked. But it appears that a third weapon found at the scene has now been linked to Fast and Furious. See William Lajeunesse, *Third Gun Linked to ‘Fast and Furious’ Identified at Border Agent’s Murder Scene*, FOXNEWS (Sept. 9, 2011), <http://www.foxnews.com/politics/2011/09/09/exclusive-third-gun-linked-to-fast-and-furious-identified-at-border-agents/>.

198. See JOINT STAFFS, ACCOUNTS OF ATF AGENTS, *supra* note 23; JOINT STAFFS, FUELING CARTEL VIOLENCE, *supra* note 23.

The fallout from Operation Fast and Furious continues. On August 30, 2011, the DOJ reassigned Acting ATF Director Kenneth Melson to a post as “senior advisor on forensic science in the Department of Justice’s Office of Legal Programs.”¹⁹⁹ The U.S. Attorney for the District of Arizona, Dennis Burke, was “also a casualty in the shakeup tied to the botched gun-running program.”²⁰⁰ Other ATF agents received promotions or transfers, and the Assistant U.S. Attorney (AUSA) assigned to run the day-to-day operations of the case, Emory Hurley, was transferred from the criminal division to the civil division in his office.²⁰¹

B. Typical Investigative Operations

Despite the problems discussed in the sections above, the ATF and the DOJ still possess methods to investigate and prosecute firearms offenses in a more limited context. Several commentators, including Congressman Darrell Issa, have already argued that the ATF did not take appropriate investigatory actions during its operations, thereby endangering lives in both Mexico and the United States.²⁰² And the ATF and the DOJ did not use a number of investigatory techniques and methods at their disposal to ferret out firearms violations and gather evidence for prosecution under the admittedly weak firearms trafficking statute. In a typical gun trafficking investigation, ATF agents have a wide variety of techniques to gather prosecutorial evidence against traffickers. A number of these investigatory techniques are addressed briefly below.

199. William Lajeunesse, *ATF Director Reassigned; U.S. Attorney Out Amid ‘Fast and Furious’ Uproar*, FOXNEWS (Aug. 30, 2011), <http://www.foxnews.com/politics/2011/08/30/sources-atf-director-to-be-reassigned-amid-fast-and-furious-uproar/>.

200. *Id.* Burke apparently became physically ill during questioning and could not continue his session with congressional investigators. *Id.*

201. *Id.* Some (mainly civil litigators) might claim that this is a promotion, but most criminal prosecutors would not view it as such—at least not any of the ones that I know. See also Jerry Markon & Sari Horwitz, *ATF Head Kenneth Melson Reassigned in Shakeup Following Gun-Trafficking Probe*, WASH. POST, Aug. 30, 2011, http://www.washingtonpost.com/politics/atf-head-kenneth-melson-reassigned-amid-gun-trafficking-probe/2011/08/30/gIQAjALppJ_story.html.

202. JOINT STAFFS, FUELING CARTEL VIOLENCE, *supra* note 23; JOINT STAFFS, ACCOUNTS OF ATF AGENTS, *supra* note 23, at 14–18. The majority report of the Congressional Committee discusses various operational tactics not undertaken during the ATF investigation that may have led to numerous firearms traveling to Mexico (including the aforementioned three firearms recovered at Agent Terry’s murder scene). JOINT STAFFS, ACCOUNTS OF ATF AGENTS, *supra* note 23 at 14–18.

1. Brief Investigatory Stops (*Terry* Stops)

ATF agents have clear authority to conduct brief investigatory stops of persons or vehicles based on reasonable suspicion.²⁰³ ATF agents can also briefly detain people and seize vehicles once the agents have reasonable suspicion that the subjects are trafficking or carrying firearms.²⁰⁴ Often, agents will stop a person or vehicle based on reasonable suspicion and will conduct a swift investigation that dispels such suspicion, thereby allowing the target to go on his or her way. In this manner, agents are able to identify individuals using driver's licenses or other methods,²⁰⁵ and may place GPS trackers on vehicles for surveillance purposes.²⁰⁶ These brief *Terry* stops (named for the Supreme Court's decision in *Terry v. Ohio*) allow agents to gather information and continue their investigation, even if the stops do not result in a seizure of firearms or arrests of targets. As noted above, the case agents and the prosecutor in Operation Fast and Furious refused to allow agents to conduct these brief investigatory stops for information gathering. These brief investigatory stops do not have to be punitive in nature and, if done right, will not tip off the traffickers that they are being investigated (especially if done far from the gun-buy).

203. The original case for this proposition is *Terry v. Ohio*, 329 U.S. 1 (1968). With reasonable suspicion, which is defined as more than a hunch (but not much more), an officer may temporarily detain a person he or she believes is engaged in criminal conduct and may detain them only for the period of time that it takes to dispel that reasonable suspicion. *Id.* at 27.

204. Reasonable suspicion allows for a *brief Terry* stop and allows for further investigation to dispel that reasonable suspicion. *Id.* at 27, 28–30.

205. While agents may have identified a number of the traffickers, it is not unusual for agents not to know all of the individuals in a certain car. Thus, the brief investigatory stop allows agents to identify all the persons in a car, in the guise of a quick traffic stop, and agents can use this information to further their investigation.

206. Of course, the specific use of these GPS trackers is in doubt after the U.S. Supreme Court's holding in *United States v. Jones*, 132 S. Ct. 945 (2012). The constitutionality of GPS tracker use was argued in *Jones* before the Supreme Court on November 8, 2011. At that time, there was a circuit split regarding the constitutionality of the use of slap-on trackers (trackers that do not invade the automobile—those are known as “hard-wired” trackers) in the public sphere. The Ninth Circuit, which includes Arizona, recently ruled that the use of GPS trackers placed on a publicly accessible part of the automobile (and placed while the automobile is publicly accessible) was not a violation of a person's expectation of privacy and therefore not a violation of the Fourth Amendment. *See United States v. Pineda-Moreno*, 591 F.3d 1212, 1216–17 (2010). *But see United States v. Maynard*, 615 F.3d 544, 563–65, 567 (D.C. Cir. 2010) (holding that GPS tracking require a court-approved warrant).

2. Wall Stops

Another investigative technique that dovetails with *Terry* stops is a “wall stop.”²⁰⁷ A wall stop occurs when a vehicle or person is stopped based on a criminal offense or moving violation, wherein the agent actually has reason to believe that other criminal activity is occurring.²⁰⁸ The best example of a wall stop occurs during a Title III or state-equivalent wiretap investigation. Using the Title III wiretap information, an agent will garner probable cause that a vehicle or person is carrying narcotics (or some other Title III-approved contraband) and will contact a law enforcement official not connected with the investigation (usually state or local law enforcement—often highway patrol).²⁰⁹ The agent will request the local law enforcement official to locate the vehicle (or will provide locational information for that vehicle) and request the official to stop the vehicle once he or she develops independent probable cause for the stop.²¹⁰ During the stop, the official will conduct a normal traffic stop and will usually find a basis for probable cause for a vehicle search.²¹¹

Through a properly conducted wall stop, agents are generally able to conceal an ongoing investigation. As noted below, it appears that the ATF and the DOJ were so concerned with operational security that they did not inform the ATF’s attaché in Mexico about the operation.²¹² Generally, wall stops allow investigations and even actual prosecutions to go forward without revealing the overall investigation (as long as there is a true wall set up between the law

207. This is also known as a “walled off” stop. *United States v. Covarrubias*, 302 Fed. Appx. 702, 703, 2008 WL 5112147 (9th Cir. 2008); *United States v. Covarrubias*, No. 06-CR-116-BR, 2007 WL 30275, at *1 (D. Or. 2007); *see also* *United States v. Pedraza-Bucio*, No. 2:08-CR-698(TC), 2009 WL 1110332, at *1 n.1 (D. Ut. 2009) (“Although a ‘wall stop’ is based on a legitimate traffic violation, it is motivated by the underlying belief that some sort of contraband is likely located in the car.”); KEN WALLENTINE, *STREET LEGAL: A GUIDE TO PRE-TRIAL CRIMINAL PROCEDURE FOR POLICE, PROSECUTORS, AND DEFENDERS* 61 (2007) (“The term ‘wall stop’ is based on the theory that there is a wall between the stopping officers and the investigators who give the tip to the stopping officers. Essentially, the investigators have ‘handed off’ the information to the stopping officers.”).

208. WALLENTINE, *supra* note 207, at 61.

209. *Id.*

210. *Whren v. United States*, 517 U.S. 806 (1996), provides the axiom that the officer’s subjective motivations are generally not taken into account as long as the officer is not conducting racial profiling; as long as the initial stop was legitimate, based on a traffic violation or other legitimate reason, the actual motivations of the officer involved generally will not be considered.

211. Invariably, wall stops work well only if the local law enforcement official has a narcotic detector dog (NDD) handy or close by. Once a NDD indicates that a vehicle contains illegal drugs, there is probable cause to search (albeit with some caveats).

212. JOINT STAFFS, *FUELING CARTEL VIOLENCE*, *supra* note 23, at 27–33.

enforcement agencies involved, and generally as long as the prosecutors involved are not part of the same organization).²¹³ Using wall stops would have enabled agents to continue to conduct their investigation in Operation Fast and Furious while having at least some defendants prosecuted on the state side. This approach also would have preserved the opportunity to have those persons ultimately wrapped up into the federal case after the ATF took down the operation.

3. Border Stops

The lack of border stops in Operation Fast and Furious is probably one of the most glaring and surprising failures of the ATF and DOJ. Generally, any vehicle or person coming into the United States is subject to search in accordance with long-standing border search doctrine and precedent.²¹⁴ Outbound border checkpoints and searches are generally allowed as well, although those are subject to more scrutiny to ensure that they comply with relevant constitutional provisions.²¹⁵ All firearms that are not legally exported to Mexico are contraband, and anyone carrying unauthorized firearms into Mexico commits a crime under Mexican law.²¹⁶ Therefore, as long as a vehicle has been stopped in conjunction with border search doctrine, and firearms are found, those firearms may be seized by law enforcement.²¹⁷

In Fast and Furious, ATF agents might have requested Customs and Border Protection and Border Patrol to set up outbound border checkpoints upon their belief that purchased firearms were

213. WALLENTINE, *supra* note 207, at 61.

214. *United States v. Ramsey*, 431 U.S. 606, 616–19 (1972) (discussing the longstanding border search doctrine).

215. See Stewart M. Young, *The (Un)Constitutionality of Outgoing Border Stops and Searches* (working paper) (on file with author) (arguing that, subject to certain criteria, outbound border stops and searches are unconstitutional, but noting also the conditions that must be in place for these stops and searches to comport with constitutional protections).

216. *Guns Are Illegal in Mexico*, U.S. DEP'T OF STATE, TIJUANA CONSULATE, <http://tijuana.us consulate.gov/tijuana/warning.html> (last visited Nov. 5, 2012).

217. There are remedies to this seizure; the federal government generally indicts the firearms and subjects them to court proceedings and forfeiture, which anyone who has asserted a property interest may contest. In the many years of firearms seizure at the border, however, there has not been a single case of anyone contesting the seizure of such weapons.

heading to Mexico. The vast majority of firearms trafficking generally occurs at ports of entry, whereas drug and alien smuggling occur both at and in between ports of entry.²¹⁸ Therefore, instituting southbound border checkpoints at these ports of entry to target relevant vehicles would have likely yielded the contraband firearms.

It is important to note that even when contraband firearms are found on target individuals, agents and prosecutors do not need to immediately indict these individuals and end the investigation. Rather, just seizing and forfeiting the firearms at the border checkpoint and documenting the driver and occupants would have sufficed, and the investigation could have continued. Indeed, repeatedly using this technique would have uncovered the firearms, preventing them from traveling to Mexico while providing a gold mine of information for the investigation. Given that the ATF agents ran a wiretap during the investigation, they likely could have learned more information from the calls made after the firearms seizures and used this information to expand their target ring.²¹⁹ In any event, with the use of outbound border searches and seizures, the ATF and the DOJ might have thwarted large numbers of firearms crossing the border while continuing to keep their investigation intact.

4. Lures

All of the techniques described above are helpful for gathering evidence. But what techniques are available for securing targets who are not within the United States? Extraditions are an approved technique,²²⁰ and the Mexican government now allows extradition in much greater numbers than in the past.²²¹ While extradition is

218. OFFICE OF THE PRESIDENT, NATIONAL SOUTHWEST BORDER COUNTERNARCOTICS STRATEGY IMPLEMENTATION UPDATE 8, 10, 21–23 (2010), available at http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/swb_implementation10_0.pdf.

219. I recognize the rejoinder to this argument, which is that the border seizures, if done often, might cause the target individuals to “drop” their phones. Once the phones are dropped, the wiretap would be useless until the ATF agents identified new phones used by the targets and developed new probable cause to tap those phones. Such an argument necessitates the development and increased use of roving wiretaps, a rarely discussed law enforcement tool. See Young, *Targeting the Person*, *supra* note 73 (arguing that, with a few changes of the Title III statute, roving wiretaps should be much more widely used given the increased ability and awareness of criminals to thwart electronic surveillance).

220. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-15.000, available at http://www.justice.gov/usafo/eousa/foia_reading_room/usam/title9/15mcrim.htm#9-15.000 (outlining the method, paperwork, and other parameters of extradition).

221. SEELKE, *supra* note 3, at 16–18,

generally approved, it can often take a long time because of the Mexican court system and other bureaucratic red tape.

Lures are a DOJ-approved method of bringing potential defendants and co-conspirators from a foreign country into the United States.²²² One might say that lures are the little brother of extraditions, but they are generally cheaper and faster (and often yield better results) than extraditions. Generally, a lure is a subterfuge inviting a target to leave the foreign country where he resides and travel to the United States or a third country that allows extradition to the United States. The U.S. Attorney's Manual describes a lure as something as simple as inviting a target defendant by telephone to come and attend a party in the United States.²²³ Sometimes a lure may involve the use of confidential informants, who often provide the target defendant with falsified documents to enable the target to travel to the United States and be apprehended at the border.²²⁴ Once someone is within the jurisdiction of the United States, ATF agents may then arrest the person for their firearms trafficking activities.

The techniques described above could have helped to stem the flow of firearms into Mexico while preserving the investigation. The ATF, however, never chose to use them in Operation Fast and Furious.

C. Clear Issues Resulting from the Operation

One might argue that Operation Fast and Furious had the potential to decrease firearms trafficking in the Southwest. Before initiating this operation, ATF agents identified a number of straw purchasers involved in firearms trafficking.²²⁵ Indeed, once the operation concluded soon after Border Patrol Agent Terry's tragic death, the U.S. Attorney's Office in Arizona announced five indictments against persons accused of engaging in straw purchases to

222. See U.S. DEP'T OF JUSTICE, *supra* note 220, at § 9-15.630. In the interest of full disclosure, I was party to a number of lures for target defendants. They were quite fun, actually. Lures are generally not used on low-level targets but focus on much higher-level defendants. Planning a lure that involves a defendant coming into the United States for a party, the lottery, or even with a fake visa or false travel documents requires many levels of the DOJ to sign off, but the payoff is quite good when the defendant realizes what has happened.

223. *Id.*

224. Given the DOJ's role in such a lure, the DOJ would never prosecute someone for use of the fake documents that brought that person into the country. Clearly, that would add insult to injury.

225. JOINT STAFFS, ACCOUNTS OF ATF AGENTS, *supra* note 23, at 5, 25, 44.

buy hundreds of weapons.²²⁶ The main indictment, the “Avila indictment,” included thirty-four counts of “false statements in connection with the acquisition of firearms,” which constituted the straw purchaser counts of the indictment.²²⁷ After a year of running an operation and the sale of approximately two thousand firearms, the U.S. Attorney’s Office essentially prosecuted only straw purchasers—albeit a number of them—and did not prosecute or otherwise disrupt a major firearms trafficking organization.²²⁸ Given the weakness of the federal firearms trafficking statute, one might argue that the ATF and the DOJ constructed the best case they could under the existing framework. This incident demonstrates the inherent problem with that framework and shows why calls for a more robust firearms trafficking statute are appropriate.

The section above demonstrates that there are a number of investigative tactics that can bear fruit when investigating firearms violations, but also that these operational techniques do not alleviate the lack of a true firearms trafficking statute. Engaging in investigative techniques that provide evidence of firearms violations is useful, but without the actual statute to charge all of the players in a conspiracy, all is for naught. Operation Fast and Furious was not what it could have been had approved investigative techniques been used, but the lack of a firearms trafficking statute also created additional problems by forcing the ATF to haphazardly cobble together firearms charges. If the ATF and the DOJ actually had a statute that criminalized true firearms trafficking,²²⁹ their operations (and the extraterritorial effects of those operations) would have made it more likely that firearms violations were detected and prosecuted. I address a more comprehensive framework for this statute below.

226. Press Release, U.S. Dep’t of Justice, U.S. Attorney’s Office, Arizona, Grand Juries Indict 34 Suspects in Drug Firearms Trafficking Organization (Jan. 25, 2011) *available at* http://www.justice.gov/usao/az/press_releases/2011/PR_01252011_Press%20Conference.pdf; Zagaris, *supra* note 2.

227. Indictment at 1–43, *United States v. Avila*, No. CR-11-126-PHX-JAT (D. Ariz. Jan. 19, 2011), *available at* www.justice.gov/usao/az/press_releases/2011/US_v_Avila_Indictment.pdf.

228. See JOINT STAFFS, *supra* note 183, at 20 (“[M]erely seizing firearms through interdiction will not stop firearms trafficking to Mexico. We must identify, investigate, and eliminate the sources of illegally trafficked firearms and the networks that transport them.”) (discussing the new strategy at the Department of Justice) (footnote omitted).

229. OFFICE OF INSPECTOR GEN., *supra* note 25, at 17 (“There is no federal statute specifically prohibiting firearms trafficking or straw purchasing. Instead, these activities are investigated by agents and charged by prosecutors using a variety of criminal statutes depending on the circumstances of each particular case.”); OFFICE OF INSPECTOR GEN., *supra* note 19, at vi (providing the same description).

IV. REFINING OR REDEFINING THE LEGAL FRAMEWORK OF FIREARMS PROSECUTIONS

On March 3, 2011, President Barack Obama spoke at a joint press conference with Mexican President Felipe Calderón. At that press conference, President Obama highlighted the United States' responsibility to help prevent drug violence in Mexico and mentioned U.S. law enforcement actions to prevent such violence:

I reiterated that the United States accepts our shared responsibility for the drug violence. So to combat the southbound flow of guns and money, we are screening all southbound rail cargo, seizing many more guns bound for Mexico, and we are putting more gunrunners behind bars. . . . We are very mindful that the battle President Calderón is fighting inside of Mexico is not just his battle; it's also ours. We have to take responsibility just as he's taking responsibility.²³⁰

Clearly, the Obama Administration, like the George W. Bush Administration, recognizes the problems inherent in southbound firearms trafficking. To that end, President Obama's assertion that "we are putting more gunrunners behind bars" is a clarion call. The Obama Administration's recent "Strategy to Combat Transnational Organized Crime" notes the importance of stopping the flow of weapons and cash to transnational criminal networks.²³¹ That strategy document touts an "increased emphasis on stemming these outbound flows" of weapons and cash.²³² It also provides for the deployment of "outbound teams" within U.S. Customs and Border Protection that screen outbound vehicle traffic for weapons and bulk cash shipments, and directs greater resources toward "integrated Border Enforcement Security Task Forces" to investigate cross-border crimes.²³³ Furthermore, the Strategy states, "We will also work with Congress to seek ratification or accession to key multilateral instruments related to countering the illicit trafficking of weapons."²³⁴ What is missing from this July 2011 publication is any discussion of implementing a useful and effective domestic firearms

230. U.S. DEP'T OF JUSTICE, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME 15 (2011), available at http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

trafficking statute—something that would significantly help in combating gunrunning and the rush of firearms traveling southbound to Mexican drug cartels.²³⁵

A. An Actual “Firearms Trafficking” Statute

Discussions among academics and policy experts who focus on firearms and firearms trafficking have generally been silent on the currently impotent firearms trafficking statute²³⁶ and on the positive extraterritorial effects on curbing drug violence that an effective statute would engender. Firearms trafficking from the United States to Mexico does garner attention among legal scholars.²³⁷ Mostly, however, gun control cases, such as *District of Columbia v. Heller* and *McDonald v. City of Chicago*, and manufacturer liability are the current flavors of the day in scholarship focused on firearms and firearms trafficking.²³⁸ A number of policy groups provide data

235. One might argue that the Strategy’s statement that the Obama Administration will “work with Congress” might indicate a desire to create an actual firearms trafficking statute with meat. It is clear, however, that the Administration does not view this as a priority. One of the proposed actions from the Strategy includes “[w]ork with Congress to secure ratification of the Inter-American Convention against the Illicit Manufacturing and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials.” *Id.* at 16. Another related action is “[s]eek accession to the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organized Crime.” *Id.* Nothing is mentioned about strengthening criminal firearms trafficking statutes domestically.

236. There have been calls for a “federal firearms trafficking statute” in the popular press and in congressional hearings but none thus far in the legal academic literature. *See, e.g.*, Statement by Peter J. Forcelli, *supra* note 119; Editorial, *supra* note 156.

237. *See* Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. REV. 1233 (2009); Benjamin Kai Miller, Note, *Fueling Violence Along the Southwest Border: What More Can Be Done to Protect the Citizens of the United States and Mexico from Firearms*, 32 HOUS. J. INT’L L. 163 (2009); *see also* Anthony A. Braga & David M. Kennedy, *Gunshows and the Illegal Diversion of Firearms*, 6 GEO. PUB. POL’Y REV. 7 (2000) (discussing the flow of illegal guns); Phillip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277 (2001) (discussing the use of firearms tracing in criminal investigations); Harold Hongju Koh, *A World Drowning in Guns*, 71 FORDHAM. L. REV. 2333 (2003); Eric Proshansky, *The Movement of Illegal Guns in America Report*, 217 PLI/CRIM 387 (July 22, 2009) (discussing gun tracing in American cities).

238. *See, e.g.*, Dustin Bower, *Guns Don’t Kill People, Although 30,000 Americans Each Year Would Disagree: An Analysis of Gun Manufacturer Liability*, 7 RUTGERS J.L. & PUB. POL’Y 187 (2010); David S. Cohen, *The Paradox of McDonald v. City of Chicago*, 79 GEO. WASH. L. REV. 823 (2011); Michael B. de Leeuw et al., *Ready, Aim, Fire? District of Columbia v. Heller and Communities of Color*, 25 HARV. BLACK LETTER L.J. 133 (2009); Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325 (2009); Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J.L. & PUB. POL’Y 203 (2010); Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?) in McDonald v. City of Chicago*, 63 FLA. L. REV. 487 (2011); Glenn Harlan Reynolds, *Second Amendment*

and lobby in support of effectively regulating firearms trafficking.²³⁹ When the subject of guns and Mexico arises, there are numerous calls to use the Merida Initiative to curb the violence in Mexico.²⁴⁰ As noted previously, economic literature on firearms trafficking to Mexico²⁴¹ and on firearms trafficking in general²⁴² is also available. Furthermore, there are also academic discussions relating to violence in Mexico and calls for drug law reform.²⁴³ Despite all this talk, there has been no discussion of the positive effects that would occur if the United States government implemented a true firearms trafficking statute to criminalize trafficking firearms to Mexico or other countries.

1. Mirroring Drug Trafficking Statutes

What might a true firearms trafficking statute look like? First, it would not include the “engaged in the business” prong of the existing statute. As discussed above, this prong has given courts insufficient guidance in applying the statute.²⁴⁴ And the prong is not necessary. A look at the federal drug statutes, which are fairly self-explanatory, reveals that they contain no equivalent prong, and that they can serve as useful models for a firearms trafficking statute.²⁴⁵

The following two statutes, which cover importation and distribution/possession with intent to distribute, make it a federal crime to engage in virtually any activity involving illicit narcotics. 21 U.S.C. § 952 governs the importation of a controlled substance into the

Penumbras: Some Preliminary Observations, 85 S. CAL. L. REV. 247 (2012); Brian J. Siebel, *Gun Industry Immunity: Why the Gun Industry’s “Dirty Little Secret” Does Not Deserve Congressional Protection*, 73 UMKC L. REV. 911 (2005); Neil S. Siegel, *Prudentialism in McDonald v. City of Chicago*, 6 DUKE J. CONST. L. & PUB. POL’Y 16 (2010). I have not done this footnote justice. Indeed, a recent WestlawNext search revealed 684 law review citations for *D.C. v. Heller* and 167 law review citations for *McDonald v. City of Chicago*.

239. See, e.g., VIOLENCE POLICY CTR., *supra* note 10; VIOLENCE POLICY CTR., *IRON RIVER: GUN VIOLENCE & ILLEGAL FIREARMS TRAFFICKING ON THE U.S.-MEXICO BORDER* (2009), available at <http://www.vpc.org/studies/ironriver.pdf>.

240. See *supra* notes 54–56.

241. Dube et al., *supra* note 18.

242. Stefano DellaVigna & Eliana La Ferrara, *Detecting Illegal Arms Trade*, ECONOMETRICS LAB. SOFTWARE ARCHIVE, 1–4, 5–6, 26 (Dec. 2009), available at http://elsa.berkeley.edu/~sdellavi/wp/weapons_Dec09.pdf (proposing “a method to detect illegal arms trade based on investor knowledge” that focuses on “countries under arms embargo” and determines whether arms companies are trading arms illegally based on stock prices).

243. E.g., Hoskin, *supra* note 54.

244. See *supra* notes 99–118 and accompanying text.

245. See 21 U.S.C. §§ 841 (Prohibited Acts—Including Possession with Intent to Distribute), 952, 960 (Importation and Penalties) (2006).

United States. For Schedule I and II controlled substances, it states in relevant part:

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in Schedule I or II²⁴⁶

A firearms trafficking statute, without the “engaged in the business” portion, might look very similar: “It shall be unlawful to export outside of the customs territory of the United States from any place inside thereof, any firearm.” Much like the drug trafficking statute,²⁴⁷ this would require an intent requirement, so as not to create a strict liability crime. This statute would also need conspiracy and attempt provisions, since conspiracy to traffic in firearms would likely target individuals more responsible²⁴⁸ for firearms trafficking. Furthermore, there would need to be some kind of exception for lawful exporters, as well as licensed dealers, of firearms (the legal traffickers).

This proposed statute has the advantages of being clean, straightforward, and fairly easy to apply. The gun lobby would oppose such a statute, but it is hard to argue that criminalizing non-commercial (and non-legitimate) exports of firearms would affect even a small number of NRA members. Such a statute might worry those involved in the legitimate business of exporting firearms, but a “legal traffickers” exemption would alleviate such concern.

The second drug trafficking statute, 21 U.S.C. § 841, may also be an efficacious model for an effective firearms trafficking statute. That statute reads in relevant part, “Except as authorized . . . it shall

246. 21 U.S.C. § 952 (2006). 21 U.S.C. § 960 lays out the penalties for importation. *See* 21 U.S.C. § 960 (2006). This is why prosecutors use 21 U.S.C. §§ 952 and 960 to charge for importation; the possession with intent to distribute statute, however, includes the penalties. *See* 21 U.S.C. § 841 (2006). Additionally, 21 U.S.C. § 953 (2006) governs the export of controlled substances. It includes a host of exceptions, and therefore the importation statute is simpler. *See generally* 21 U.S.C. § 953 (2006).

247. 21 U.S.C. § 952 (2006) does not list a mens rea requirement, but the case law requires proof that a defendant knew or intended that the narcotics would be imported into the United States. *United States v. Londono-Villa*, 930 F.2d 994, 997–1000 (2d Cir. 1991); *United States v. Ortiz-Alarcon*, 917 F.2d 651, 652–53 (1st Cir. 1990).

248. Or at least with more skin in the game in terms of paying for the weapons to be trafficked down south to Mexico.

be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance”²⁴⁹

A firearms trafficking statute could mirror this statute in relevant part: “It shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or possess with intent to manufacture or distribute, a firearm.” There would need to be an exception for “legal traffickers” in addition to the normal conspiracy and attempt sections.

The NRA and other Second Amendment advocates would likely raise concerns with this approach. The current firearms regime allows for private parties, rather than just “legal traffickers,” to sell their firearms to anyone, within reason, without reporting those sales. A statute that criminalizes the sale of such firearms for those who are not “legal traffickers” would likely cause a firestorm of public controversy. But even the current administration, already unpopular with the NRA,²⁵⁰ would never go this far. Accordingly, when considering drug trafficking statutes as a foundation for the firearms trafficking statute, the importation statute, rather than the distribution/possession with intent statute, would be the most politically feasible and practical option.

2. Extending the Statute Through a Focus on Trafficking by Prohibited Persons

There is another approach on the horizon to amend the firearms trafficking law to make it more effective. On July 14, 2011, Congresswoman Carolyn Maloney introduced H.R. 2554, the “Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011.”²⁵¹ Her remarks on this bill discussed the drug violence in Mexico and concerns over hamstrung law enforcement efforts to combat firearms trafficking.²⁵² Congresswoman Maloney specifically noted the concerns of law enforcement officials, expressed at House Oversight and Government Reform Committee hearings (the Issa Hearings

249. 21 U.S.C. § 841(a)(1) (2006).

250. Sean Lengell, *NRA Official: Obama Wants to Outlaw Guns in 2nd Term*, WASH. TIMES (Feb. 10, 2012), <http://www.washingtontimes.com/blog/inside-politics/2012/feb/10/nra-official-obama-wants-outlaw-guns-2nd-term/>; Clarence Page, *Gun Lobby Fires Up Obama Fear; NRA Targets President Despite His 'Pro-Gun' Record*, CHI. TRIB., July 22, 2012, http://articles.chicagotribune.com/2012-07-22/news/ct-oped-0722-page-20120722_1_anti-gun-president-gun-show-loophole-nra-leaders.

251. See *H.R. 2554: Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2554> (last visited Sept. 30, 2012).

252. See Maloney, *supra* note 2.

on Operation Fast and Furious), about including “a specific firearms trafficking provision in the criminal code.”²⁵³ Given the ATF’s request for reports on multiple long rifle purchases and the Sentencing Commission’s proposal for stiffer penalties on straw purchasers, Congresswoman Maloney and her co-sponsors sought to enact a tougher firearms trafficking statute via H.R. 2554.²⁵⁴

H.R. 2554 would amend 18 U.S.C. § 932 of the firearms trafficking statute.²⁵⁵ It reads:

§ 932. Trafficking in firearms

- (a) In General—It shall be unlawful for any person, regardless of whether anything of value is exchanged, to receive, or to transfer or otherwise dispose of to 1 or more individuals, 2 or more firearms that have been shipped or transported in interstate or foreign commerce, knowing or having reasonable cause to believe that such conduct will result in the disposing of 1 or more firearms to an individual—
- (1) whose possession or receipt of the firearm would be unlawful; or
 - (2) who intends to or will use, carry, possess, or dispose of the firearm unlawfully.²⁵⁶

The proposed bill also includes language describing “organizer” and “conspiracy,” and a definition section.²⁵⁷ Finally, it provides severe penalties for violations of 18 U.S.C. § 932, including a twenty-year maximum for a violation and a twenty-five-year maximum for a violation “in concert with 5 or more other persons” when that person occupies a supervisory role.²⁵⁸ Alas, for a conspiracy violation, the proposed legislation includes only a ten-year maximum penalty,²⁵⁹ even though the conspiracy charge would likely be the most useful for (and used by) ATF agents.

253. *Id.*; see also *supra* note 119.

254. Maloney, *supra* note 2.

255. Stop Gun Trafficking and Strengthen Law Enforcement Act, H.R. 2554, 112th Cong. (1st Sess. 2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2554ih/pdf/BILLS-112hr2554ih.pdf>.

256. *Id.*

257. *Id.* at section 2(a) (amending section 932 to add “(b) Organizer,” “(c) Conspiracy,” and “(d) Definitions”).

258. *Id.* at section 2(b) (amending section 924(a) to include a twenty-year maximum penalty and increasing the penalty for an organizer/supervisory role).

259. *Id.* at section 2(b) (amending section 924(a) to include a ten-year maximum penalty for violation of section 932(c) (conspiracy)).

Congresswoman Maloney's bill has merit and advances the discussion of meaningful regulation on international firearms trafficking. It would criminalize the provision of firearms to persons that should not have them. But it does not explicitly include a transnational element that would target the drug cartels seeking these firearms and enhance the statute's deterrent effect.

The likely NRA argument against such a bill would proceed as follows: The Second Amendment provides for the right to bear firearms and therefore for the right to dispose of those firearms lawfully. Criminalizing the transfer or distribution of firearms to another person, and then penalizing the transferor based on the transferee's intent, would be unfair. Moreover, the "intent or will to use" requirement would likely be quite difficult for prosecutors to prove. Unless the transferee explains his or her illegal purpose for the weapon, and records that explanation, it will be difficult to prosecute these crimes under § 932(a)(2). And proof problems are generally among the main barriers to effective prosecutions for firearms violations.²⁶⁰

Ultimately, modeling the federal firearms trafficking statute after the drug importation statute still has the most merit. The focus on prohibited persons, while valid, does not enable prosecution to the same degree as a focus on the transportation of firearms would. While I appreciate Congressperson Maloney's approach that focuses on possession by prohibited persons, it appears easier to prove a violation of how the firearms traveled, rather than to whom those firearms traveled. Thus, I would still argue in favor of prohibiting the "type of travel" of the firearms as I advocate in the section above, rather than favor the proposed legislation that prohibits who receives the firearms.

3. Prosecuting Firearms Trafficking Under the Arms Export Control Act and International Traffic in Arms Regulations

The United States has also set up a regime for exporting defense articles and for the prosecution of persons who export those defense articles without authorization from the U.S. government. An examination of the statute governing this regime, the Arms Export

260. OFFICE OF INSPECTOR GEN., *supra* note 19, at 63–66.

Control Act (AECA) provides an interesting corollary to the arguments about the federal firearms trafficking statute. The AECA²⁶¹ lists a number of requirements for exporting and importing defense articles and services.²⁶² It falls under Title 22 of the United States Code, “Foreign Relations and Intercourse.”²⁶³ As such, it carries criminal penalties, although it is not part of the United States criminal code provisions set forth in either Title 18 (Crimes and Criminal Procedure)²⁶⁴ or Title 21 (Food and Drugs, including the drug trafficking statutes).²⁶⁵ The AECA requires export licenses for certain defense articles and provides that “[d]ecisions on issuing export licenses under this section shall take into account whether the export or an article would contribute to an arms race, . . . support international terrorism, [or] increase the possibility or outbreak or escalation of conflict.”²⁶⁶ It further implemented the International Traffic in Arms Regulations (ITAR), a set of regulations governing the export of defense articles.²⁶⁷ Willful failure to comply is subject to a twenty-year maximum sentence along with the possibility of a one million dollar fine.²⁶⁸

ITAR mainly prohibits exporting certain defense articles and technical data, as well as the brokering of defense articles by persons in the United States and all U.S. persons abroad.²⁶⁹ The statute and regulations generally target defense manufacturers and spies; the State Department is charged with ensuring compliance with AECA and administering ITAR.²⁷⁰ Generally, the articles that are controlled are arms and munitions, rather than the small firearms long favored by the Mexican drug cartels.²⁷¹ While small arms are included on the munitions list, the sentencing guidelines are exceedingly low for offenses involving them (or involving fewer than two firearms).²⁷² Additionally, given that the AECA is placed in Title

261. Not to be confused with the African Elephant Conservation Act (also AECA) codified at 16 U.S.C. § 4223(1) (2006).

262. 22 U.S.C. § 2778 (2006).

263. Title 22, United States Code.

264. Title 18, United States Code.

265. Title 21, United States Code (including 21 U.S.C. § 841 (2006) and 21 U.S.C. §§ 952, 960 (2006)).

266. 22 U.S.C. § 2778(a)(2) (2006).

267. International Traffic in Arms Regulations [hereinafter ITAR], 22 C.F.R. §§ 120.1–130.17 (2011).

268. 22 U.S.C. § 2778(c) (Supp. 2012).

269. ITAR §§ 120.6, .9–.10, .13–.15, .17, 129.2(b).

270. § 120.12. The State Department’s Directorate of Defense Trade Controls (DDTC) administers ITAR. *Id.*

271. See § 121.1 (known as “The United States Munitions List”).

272. United States Sentencing Guidelines (U.S.S.G.) § 2M5.2(a)(2) (2011). The Base Offense Level is fourteen if the offense involves “only (A) non-fully automatic small arms (rifles,

22, line federal prosecutors are generally not informed about these potential charges. Nor are many ATF agents involved in prosecuting these crimes.²⁷³

AECA and ITAR could be useful for prosecuting firearms trafficking to Mexico, given that they provide criminal penalties for violating their provisions.²⁷⁴ Not using ATF agents for prosecutions of firearms offenses appears to be slightly limiting, given that the ATF is the expert agency regarding firearms and firearms trafficking to Mexico and other countries. The low penalties for non-automatic firearms trafficking also seem like an impediment toward using AECA and ITAR for Mexican firearms trafficking. Finally, it is likely that these charges are viewed in the law enforcement community as closer to paperwork violations (much like convicting Al Capone for tax evasion) and are also considered more complicated than other firearms violations. Indeed, the AECA requires the President to issue the prohibited munitions list through ITAR, and includes registration and licensing requirements, much of which are controlled by the State Department.²⁷⁵ While the AECA and ITAR might technically enable prosecuting firearms trafficking to Mexico, it appears that the ATF is generally not involved in these cases, and it appears

handguns, or shotguns), and the number of weapons did not exceed two." *Id.* This does appear to be a nice increase from a requirement of less than ten firearms, given that in 2008, the Base Offense Level was fourteen if the offense involved less than ten firearms. *United States v. Sero*, 520 F.3d 187, 190 (2d Cir. 2008). Thus, once the firearms exported exceed two, the Base Offense Level increases to twenty-six. U.S.S.G. § 2M5.2(a)(1) (2011).

273. ATF agents are tasked with enforcing federal firearms laws, which fall under Title 18 of the United States Code. U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE 2 (2005), available at <http://www.atf.gov/publications/download/p/atf-p-5300-4.pdf>. FBI agents are tasked with investigating a number of criminal violations but not Title 22. *Frequently Asked Questions*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/faqs> (last visited Nov. 5, 2012) ("Federal law gives the FBI authority to investigate all federal crime not assigned exclusively to another federal agency ([Title]28, Section 533 of the U.S. Code.)"). CBP and ICE agents appear to be involved in enforcing Title 22 regulations, however, although such violations do not appear widely prosecuted. See, e.g., Jamie Satterfield, *Judge: Man Violated Federal Arms Export Control Act, Deserves Prison*, KNOXVILLE NEWS (Oct. 12, 2011, 8:00 PM), <http://www.knoxnews.com/news/2011/oct/12/judge-man-violated-federal-arms-export-control/> (stating that, because of an ICE investigation, a Tennessee man received forty-six months for attempting to ship body armor to Columbia).

274. 22 U.S.C.A. § 2778(c) (West 2010) (providing a maximum of twenty years in prison and a maximum \$1,000,000 fine, or both, for a willful violation of § 2778 or any rule or regulation issued under § 2778 (which includes ITAR)). Interestingly, when Congress implemented the AECA in 1976, the enforcement section called only for a \$100,000 fine or a maximum of two years imprisonment or both. 22 U.S.C. § 2278 (1976); H.R. REP. NO. 94-1144 (1976).

275. 22 U.S.C. § 2778(a)-(b) (2006).

that run-of-the-mill southbound firearms trafficking is not generally considered for prosecution under these statutes.²⁷⁶

B. Why International, Multilateral Approaches Are Not Enough

The Obama and George W. Bush Administrations initiated several “out-of-the-box” operations to aid the Mexican government’s fight against drug cartels. Most recently, Mexican commandos and police have received support from the United States to stage “boomerang” drug cartel raids. These “boomerang operations” allow Mexican law enforcement authorities to stage their raids from the U.S. side and helicopter back across the border to raid the cartel targets.²⁷⁷ As part of these raids, the DEA “provides logistical support on the American side of the border . . . arranging staging areas and sharing intelligence that helps guide Mexico’s decisions about targets and tactics.”²⁷⁸ The United States currently flies American Predator and Global Hawk drones over Mexico to gather information and intelligence on drug manufacturing facilities and highly trafficked smuggling routes.²⁷⁹ The United States also employs manned flights equipped with electronic eavesdropping equipment to intercept cellular phone communications across the border.²⁸⁰ Finally, “the D.E.A. has set up an intelligence outpost—staffed by Central Intelligence Agency operatives and retired American military personnel—on a Mexican military base.”²⁸¹

While one might argue that this coordination between the United States and Mexico should be beneficial,²⁸² it comes with complications. In August, U.S. Deputy Secretary of State William J.

276. I recognize that this section could be developed into its own stand-alone article about the failure of the ATF to use AECA and ITAR to prosecute firearms trafficking. Inter-agency footprints are likely somewhat to blame for this problem (CBP, ICE, and the State Department likely all have jurisdiction over investigating violations of these statutes). It is also likely that ATF agents have never received much (or adequate) training on these statutes. Finally, the low penalties, particularly for non-automatic weapons, likely limit this statute’s effect on “normal” Mexico-bound firearms trafficking. A very deep analysis of this statute and its lack of use for “normal” firearms trafficking would be beneficial in this area of the law.

277. Mark Mazzetti & Ginger Thompson, *U.S. Widens Role in Mexican Fight: Allows Drug Raids to Start North of the Border*, N.Y. TIMES, Aug. 26, 2011, at A1, A3.

278. *Id.* Of course, the joint operation status begs the question about evidentiary issues should the raids result in prosecutions on the United States’ side.

279. *Id.* at A3.

280. *Id.* Again, the use of these electronic interceptions in federal (or state) prosecutions is an open question. It appears, however, that these interceptions are provided to the Mexican authorities rather than used for U.S.-based cartel prosecutions.

281. *Id.*

282. Beittel, *supra* note 60, at 31, 36 (noting the prospects of increased cooperation between Mexico and the United States).

Burns “strongly defended the partnership” currently deployed by the two governments, although his defense came at a time when many Mexican citizens had concerns about such a partnership.²⁸³ But the U.S. government is also now taking great pains to emphasize that it is not conducting “joint operations” with the Mexican government.²⁸⁴

Interestingly, these operations parallel similar cooperation between the United States and Mexico during the Clinton Administration. In the late 1990s, the DEA briefly helped Mexico combat the Tijuana cartel by arranging for vetted Mexican police to stage their raid operations out of Camp Pendleton in San Diego.²⁸⁵ These raids ended “in 2000 when cartel leaders struck back by kidnapping, torturing and killing a counternarcotics official in the Mexican attorney general’s office, along with two fellow drug agents.”²⁸⁶

The Department of State’s Bureau of International Narcotics and Law Enforcement (INL) is primarily engaged in multilateral approaches to curbing incoming drugs and outgoing firearms to Mexico.²⁸⁷ Generally, INL “oversees funding provided to assist Mexico in its fight against organized crime under the Merida Initiative.”²⁸⁸ While the Merida Initiative provides funding to “strengthen partner countries’ capacities to combat organized criminal activities that threaten the security of the region,”²⁸⁹ the Initiative does not include a prosecution strategy. Nor does the Initiative impose any requirements on each country to better prosecute criminal firearms trafficking. Accordingly, having the State Department coordinate and control the money doled out through the Merida Initiative provides incentives for each country to use existing enforcement and legal frameworks rather than strategize to create more effective alternatives.

Another wrinkle to the multilateral approach to curbing firearms trafficking is the perceived lack of initiative on the Mexican side.²⁹⁰ In 2006, using eTrace²⁹¹ for guns recovered in Mexico became a

283. Mazzetti & Thompson, *supra* note 277, at A3.

284. *Id.* It appears that the United States government is afraid of Mexico’s citizens viewing their own government as a puppet of the United States. For this reason, it has characterized these operations as other than “joint” operations. *Id.*

285. *Id.*

286. *Id.*

287. GAO, *supra* note 7, at 13.

288. *Id.*

289. *Id.*

290. OFFICE OF INSPECTOR GEN., *supra* note 19, at vii.

291. eTrace is an “online internal tracing system” used by the ATF, which allows the agents to initiate a trace to determine the origin of a firearm that has been found at a crime scene or interdicted in some way. JOINT STAFFS, FUELING CARTEL VIOLENCE, *supra* note 23, at

cornerstone of Project Gunrunner.²⁹² The Inspector General's report covering three years of Project Gunrunner noted that its use "yielded very limited information of intelligence value" and that the ATF received trace data for less than a quarter of weapons seized in Mexico.²⁹³ The trace requests that Mexico provided to the ATF generally lacked crucial gun data, despite the fact that the ATF provided training in firearms identification.²⁹⁴ Additionally, the Inspector General's review "determined that Mexican law enforcement authorities do not view gun tracing as an important investigative tool."²⁹⁵

There are two likely reasons for this lack of commitment to gun tracing on the part of the Mexican authorities. First, the ATF trace requests did not provide other, related investigative material, such as criminal histories of target subjects. Second, some ATF officials believed that they did a poor job of communicating the importance of gun tracing to their Mexican counterparts.²⁹⁶ One can understand the lack of initiative in Mexico on gun tracing after the ATF failed to provide relevant and helpful investigative material related to the tracing. It is hard to get excited about sharing information when only one side is actively involved in the sharing. And it appears that the ATF generally has difficulties with inter-agency cooperation and sharing of relevant information.²⁹⁷ Reluctance and lack of enthusiasm on behalf of the Mexican authorities is hardly surprising in this situation.

Furthermore, a concern about corruption in Mexico significantly hampers U.S. law enforcement efforts to combat firearms trafficking. A Government Accountability Office (GAO) study indicated

16 (detailing eTrace and the Suspect Gun Database, which is a database list of all the guns purchased that "ATF believes might turn up at crime scenes").

292. OFFICE OF INSPECTOR GEN., *supra* note 19, at vi–vii, 73–76.

293. *Id.* at vii; *see also* GAO, *supra* note 7, at 16. The DOJ notes that "most seized guns in Mexico are not traced . . . because of missing or improperly entered gun data." OFFICE OF INSPECTOR GEN., *supra* note 19, at 73. DOJ faults the Mexico Attorney General's office for the operation of the gun trace system, noting the barriers to receiving access to the guns for tracing. *Id.*

294. OFFICE OF INSPECTOR GEN., *supra* note 19, at vii. Interestingly, it appears that successful trace requests have actually declined since Project Gunrunner began. *Id.* at 75–76.

295. *Id.* at vii, 78–79.

296. *Id.*

297. *Id.* at vi, 68–72 ("We also found that ATF and ICE do not work together effectively on investigations of firearms trafficking to Mexico. . . . ATF and ICE rarely conduct joint investigations of firearms trafficking to Mexico, do not consistently notify each other of their firearms trafficking cases, and do not consistently coordinate their investigative work with each other."). But ATF does coordinate well with the DEA and CBP in its operations and investigations. *Id.* at 67–68.

that “[a]ccording to Mexican government officials, corruption pervades all levels of Mexican law enforcement—federal, state, and local.”²⁹⁸ The GAO study discussed several cases involving both federal and state/local Mexican law enforcement agents engaging in kidnapping or murder, thereby necessitating the Calderón Administration’s use of the Mexican military for a number of drug/firearm interdiction operations.²⁹⁹ The Calderón Administration attempted to enact reforms to root out corruption and better facilitate work with the U.S. government.³⁰⁰ Perceived public corruption in Mexico will always be a problem in coordinating firearms (and drug) interdiction on both sides of the border, but both U.S. and Mexican law enforcement personnel have put forth herculean efforts to lessen its impact. Until it is eradicated, however, multilateral efforts to curb firearms trafficking, such as the Merida Initiative, will not reach their full potential.³⁰¹

Finally, the initial enthusiasm over the Merida Initiative’s ability to spur both interagency and inter-country cooperation has waned given the more recent agency results. Evidencing that enthusiasm, Marisa R. Lino, former U.S. Ambassador to Albania and then-Assistant Secretary for International Affairs at the Department of Homeland Security, stated in 2008 that “[a] perfect example of how interagency cooperation will support Merida on the U.S. side of the border is a joint strategy based on broad principles developed by CBP, ICE, ATF and DEA aimed at identifying and disrupting the illicit cross-border trafficking of firearms and ammunition.”³⁰² According to Lino, “ATF, ICE and CBP agree upon broad principles as part of an interagency strategy to identify, investigate, and interdict the illicit cross-border trafficking of firearms and ammunition

298. GAO, *supra* note 7, at 50–51.

299. *Id.* at 51 (“[A]ccording to U.S. and Mexican government officials” the Mexican military “is generally considered to be less vulnerable to corruption than law enforcement.”).

300. *Id.* For instance, in 2006, the administration suspended 953 federal employees and dismissed 945 of the same through investigations into public corruption. *Id.*

301. There is also an argument that Senate ratification of the Inter-American Convention Against the Illicit Manufacturing of and Trafficking of Firearms, Explosives, and Other Related Materials (CIFTA) “would encourage other countries in the Americas to ratify the Convention and make necessary changes in their own laws.” See DIANNE FEINSTEIN, CHARLES SCHUMER & SHELDON WHITEHOUSE, HALTING U.S. FIREARMS TRAFFICKING TO MEXICO: A REPORT TO THE UNITED STATES SENATE CAUCUS ON INTERNATIONAL NARCOTICS CONTROL 16 (2011), available at http://www.feinstein.senate.gov/public/index.cfm?Fuseaction=files.View&FileStore_id=beaff893-63c1-4941-9903-67a0dc739b9d. The United States is already in compliance with CIFTA, which therefore does not facilitate any real changes in U.S. domestic laws (which are responsible for firearms traveling to Mexico).

302. *U.S. Obligations, supra* note 1, at 14 (statement of Hon. Marisa R. Lino, Assistant Sec’y, Office of Policy/Int’l Affairs, U.S. Dep’t of Homeland Sec.).

into Mexico.”³⁰³ Fast-forwarding to ATF operations in 2010 and 2011 with Operation Fast and Furious, it is clear that ATF did not coordinate with CBP, ICE, or DEA in those operations.³⁰⁴ While many expected the Merida Initiative to create a culture of exchange and cooperation to combat firearms trafficking, the facts of the past four years belie that expectation.

C. Passage of Another Federal Assault Weapons Ban

As noted above,³⁰⁵ the expiration of the FAWB appears to have affected firearms-related violence in Mexico, at least through 2006.³⁰⁶ The Dube study demonstrated that homicides increased by 40 percent in Mexico border municipalities within one hundred miles of states that did not have their own state-imposed assault weapons ban.³⁰⁷ The data from that study also demonstrated similar increases in gun-related crimes and prosecution, indicating the likely efficacy, on some level, of the FAWB. This study therefore begs the question: why wouldn't imposing a similar ban have the same effect, lessening drug-related violence in Mexico?

Imposing another FAWB in the current political climate appears to be a non-starter. Indeed, the NRA and the Republican Party in general appear to be against further perceived curtailment of gun rights for citizens.³⁰⁸ At the beginning of the Obama Administration, Attorney General Eric Holder indicated some support for

303. *Id.* at 17. Lino notes that “[d]iscussions are ongoing to address more detailed procedures regarding the coordination of multi-agency operations and information sharing.” *Id.* These discussions did not result in much operational cooperation, at least in Operation Fast and Furious. OFFICE OF INSPECTOR GEN., *supra* note 25, at 17, 106–208 (outlining Fast and Furious in great detail and noting the lack of coordination between agencies).

304. *Supra* notes 180–201 and accompanying text.

305. *See supra* notes 126–163 and accompanying text.

306. Dube et al., *supra* note 18, at 26–27; Chicoine, *supra* note 18, at 22.

307. Dube et al., *supra* note 18, at 26–27; Chicoine, *supra* note 18, at 22.

308. *See* Republican Party, *Republican Party Platform*, GOP.COM 13 (2012), available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf> (“The Second Amendment: Our Right to Keep and Bear Arms”; calling for the protection of the “God-given right of self-defense,” and the support of federal legislation “that would expand the exercise of [the individual right of self-defense] by allowing those with state-issued carry permits to carry firearms in any state that issues such permits to its own residents.”). The platform also condemns the “ill-considered Clinton gun ban” and opposes “the improper collection of firearms sales information in the four southern border states.” *Id.* *See also* *GOP Adopts Strongly Pro-Gun Platform*, NRA.ORG (Aug. 31, 2012), <http://www.nraila.org/news-issues/articles/2012/gop-adopts-strongly-pro-gun-platform.aspx> (supporting Republican Platform and calling it “the most pro-Second Amendment position ever included in a major party platform”) (emphasis in original).

reinstating the assault weapons ban.³⁰⁹ That support was tempered by other Democratic lawmakers,³¹⁰ and efforts to enact another FAWB have made little headway.³¹¹

Additionally, the Supreme Court recently strengthened the legal regime surrounding the Second Amendment and the ability of citizens to legally possess firearms. *D.C. v. Heller*³¹² and *McDonald v. City of Chicago*³¹³ advanced the rights of citizens to possess weapons. While neither case completely eviscerates the possibility of a federal ban on certain types of firearms, neither helps advance gun control.

There does appear to be a silver lining in the *Heller* opinion that may provide some hope for a future FAWB. In *Heller*, the Court noted an “important limitation on the right to keep and carry arms” in that “the sorts of weapons protected were those ‘in common use at the time.’”³¹⁴ Citing to numerous authorities, the Court suggested that this limitation had fair support in historical tradition.³¹⁵ It then remarked that “weapons that are most useful in military service—M-16 rifles and the like—may be banned.”³¹⁶ This demonstrates that, although the Court willingly recognized the individual right to bear arms, it also recognized that right within the context of arms “in common use at the time.” This statement is especially helpful to supporting a FAWB given that the current firearms of choice among the drug cartels are certain long rifles (and so-called “cop-killer” handguns).³¹⁷ *Heller*’s discussion of the M-16 rifle—a military style rifle like the AK-47 and AR-15—and conclusion that such a weapon is not a protected weapon “in common use at the time” of the founding,³¹⁸ demonstrates that the case could not be used to oppose a future FAWB.

309. Brent Lang, *Holder Revives Talk of an Assault Weapons Ban*, CBSNEWS (Feb. 26, 2009, 2:28 PM), http://www.cbsnews.com/8301-503544_162-4831751-503544.html.

310. *Id.* (quoting House Speaker Nancy Pelosi as stating, “[o]n that score, I think we need to enforce the laws we have right now. I think it’s clear the Bush Administration didn’t do that”); Alex Roth, Paulo Prada & Corey Dade, *New Calls for Assault-Gun Ban*, WALL ST. J., Mar. 13, 2009, <http://online.wsj.com/article/SB123690314709013801.html>.

311. There has been at least one recent proposal to enact a FAWB, however. See FEINSTEIN ET AL., *supra* note 301, at 4, 13–14.

312. 554 U.S. 570 (2008) (holding that D.C.’s statute banning handgun possession in the home violated the Second Amendment and that the Second Amendment conferred an individual right to keep and bear arms).

313. 130 S. Ct. 3020 (2010) (holding that the Fourteenth Amendment incorporates the Second Amendment right to keep and bear arms onto the States).

314. *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

315. *Id.* (citations omitted).

316. *Id.*

317. See *supra* note 16. One might argue that *Heller* might allow for banning “cop-killer” handguns favored by the cartels, but it is unlikely that other guns preferred by the cartels—the long guns—would pass muster under such a ban under *Heller*.

318. *D.C. v. Heller*, 554 U.S. 570, 627 (2008).

While another FAWB might provide some relief to those suffering from drug violence in Mexico, it would not do enough. A true firearms trafficking statute would provide the necessary tools for the ATF and the DOJ to construct actual firearms cases with greater scope and an international bite. Although a new FAWB might shut off the spigot of weapons favored by the drug cartels, it would not eliminate all of those weapons.³¹⁹ Failing to include appropriate prosecutorial tools to combat southbound firearms trafficking would only signal an interest in eliminating certain weapons, rather than in curbing all weapons traveling to Mexico. The FAWB dealt with a subset of weapons that travel to Mexico and wreak havoc in that country, but passage of a true firearms trafficking statute, possibly in conjunction with a new FAWB, would have a much bigger effect on prosecutorial activities within the United States.

D. Opposition to a Firearms Trafficking Statute

Both *McDonald* and *Heller* point the way for how several gun advocacy groups would level opposition to an actual firearms trafficking statute. According to *McDonald*, “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and . . . individual self-defense is ‘the central component’ of the Second Amendment right.”³²⁰ *McDonald* later notes that “*Heller* makes it clear that this right [of self-defense] is ‘deeply rooted in this Nation’s history and tradition.’”³²¹ Any attack on a firearms trafficking statute will no doubt invoke these statements from *McDonald* and *Heller* to ensure that that the right to bear (powerful and deadly) firearms is not infringed. Indeed, Glenn Reynolds argues that *Heller* and *McDonald* provide that gun ownership (plus transportation and transfer of guns) are “constitutionally protected act[s],” and therefore laws restricting gun rights will be “ripe for close judicial scrutiny.”³²²

Yet *McDonald* and *Heller* both answer this likely attack in a relatively straightforward manner. The *McDonald* Court notes that it

319. See *supra* note 16 and accompanying text. While semi-automatic rifles such as the AK-47 and the AR-15 would likely be subject to the FAWB, the other firearms favored by the drug cartels include semiautomatic pistols such as the .38 Super, 9 mm, .45, and the 5.7 mm., which would not be subject to a new FAWB.

320. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (citing and quoting *Heller*, 554 U.S. at 599).

321. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

322. Reynolds, *supra* note 238, at 254.

“made it clear in *Heller* that our holding [striking down D.C.’s handgun ban] did not cast doubt on such longstanding regulatory measures as [felon in possession statutes] . . . ‘or laws imposing conditions and qualifications on the commercial sale of arms.’”³²³ The *Heller* Court also cites other helpful commentators who opined that certain limits exist on the rights encompassed by the Second Amendment: “From Blackstone through the 19th century cases, commentators and courts routinely explained that the right was not a right to keep and carry a weapon whatsoever in any manner whatsoever and for whatever purpose.”³²⁴

Additionally, other Court precedents lend credence to arguments in favor of the constitutionality of a firearms trafficking statute.³²⁵ While possessing legal firearms for use and protection within the confines of the United States appears appropriate under *Heller* and *McDonald*, trafficking in firearms to other countries, especially countries that ban individual possession of firearms, would not be “bearing arms for a lawful purpose.”³²⁶ Prohibiting trafficking in firearms that may be lawfully possessed in the United States, but are sent to Mexico or another country without appropriate export documents, does not infringe on a person’s right to bear arms. While this right extends to the fifty states through the Fourteenth Amendment, the right to dispose of those firearms in an extraterritorial manner would not be a lawful purpose, at least according to *United States v. Cruikshank*.³²⁷ Accordingly, arguments proffered by the NRA or other gun-rights organizations immediately lose their appeal insofar as they advocate an unfettered right to dispose of lawfully purchased domestic weapons transnationally in contravention of another country’s firearms laws.

While some might argue that the gun lobby arguments have validity in the context of non-legal trafficking exports, this argument fails. Notwithstanding *Heller* and *McDonald*, no one has identified a right to export guns outside the commercial arena, nor has anyone identified a right to provide weapons so that violence can occur in another country. Indeed, an interesting question regarding current firearms trafficking is whether Mexico can sue the United States for

323. *McDonald*, 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 570, 626–27 (2008)). The list submitted by the Court in *Heller* is not meant to be exhaustive, thereby allowing for at least the discussion about a true firearms trafficking statute. *Heller*, 554 U.S. at 627 n.26.

324. *Heller*, 554 U.S. at 626 (citations omitted).

325. Even the *McDonald* Court responded to the municipalities’ doomsday scenario of lacking regulations on firearms by noting that incorporating the Second Amendment onto the States through the Fourteenth Amendment “does not imperil every law regulating firearms.” *McDonald*, 130 S. Ct. at 3047.

326. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

327. *Id.*

allowing easily trafficked firearms into its country. For the gun lobby, it is easy to argue for unfettered gun rights within this country, but these arguments are unpersuasive when deployed to support an alleged right to dispose of such legally obtained weapons extraterritorially. Any firearms trafficking statute that actually criminalizes true extraterritorial trafficking would not impinge on the legal rights of gun owners within the United States.

*E. Congressional Chutzpah*³²⁸

In 2009, in response to heightened violence in Mexico and complaints of a lack of data on firearms trafficking to Mexico, members of Congress asked the GAO to conduct a study on the issue.³²⁹ The report enumerated several challenges faced by U.S. law enforcement in its efforts to stem illicit sales and transfers of firearms to Mexico. It noted that “certain provisions of some federal firearms laws present challenges to U.S. efforts according to ATF officials.”³³⁰ Unfortunately, the provisions it identified included only such measures as restrictions on collection and reporting of firearms purchases, the lack of background checks on private sales, and limits on multiple gun purchasing reporting requirements.³³¹ The report discussed corruption issues and the lack of a “bilateral, multi-agency arms trafficking task force.”³³² But the GAO report did not discuss the lack of a firearms trafficking statute—the glaring impediment to interdicting cross-border firearms trafficking.

Since the news broke on Operation Fast and Furious, Congress has conducted numerous hearings and issued several reports relating to the ATF’s and the DOJ’s activities.³³³ Congressional uproar,

328. A recent commentator noted “[i]rony abounds when it comes to the Fast and Furious scandal. But the ultimate irony is this: Republicans who support the National Rifle Association and its attempts to weaken gun laws are lambasting ATF agents for not seizing *enough* weapons—ones that, in this case, prosecutors deemed to be legal.” Eban, *supra* note 23.

329. GAO, *supra* note 7, at 3.

330. *Id.*

331. *Id.* It also noted concerns with a lack of coordination between the ATF and ICE and a failure of analysis and reporting of relevant data. *Id.*

332. *Id.* at 4.

333. For instance, Attorney General Eric Holder has testified on Fast and Furious nine times, including before both the Judiciary Committee and Committee on Oversight and Government Reform (Issa Committee). David A. Graham, *Eric Holder, Contempt of Congress, and Fast and Furious: What You Need to Know*, THE ATLANTIC (June 21, 2012), <http://www.theatlantic.com/politics/archive/2012/06/eric-holder-contempt-of-congress-and-fast-and-furious-what-you-need-to-know/258783/#>. The Issa Committee has issued several reports on their findings. See JOINT STAFFS, ACCOUNTS OF ATF AGENTS, *supra* note 23; JOINT STAFFS, FUELING CARTEL VIOLENCE, *supra* note 23; MINORITY STAFF, FATALLY FLAWED, *supra* note 21.

especially on the Republican side, is quite high, and there are numerous calls for Attorney General Eric Holder to resign (along with a contempt vote against him).³³⁴ While the DOJ surely handled the initial requests for evidence poorly, there is no evidence demonstrating that ATF agents coordinated “gunwalking” with the DOJ in any consistent manner. Instead, it appears the operation suffered from poor oversight.

What is telling, however, is that the misguided gunwalking effort has not spurred a clarion call for revamping the federal firearms trafficking statute in order to more effectively combat guns traveling to Mexico and curb existing drug violence. Instead of viewing this as an opportunity to provide law enforcement with better tools to fight firearms trafficking, many members of Congress complain about the ATF’s gunwalking tactics and call for resignations. Numerous news outlets and commentators have gone as far as to claim that the Obama Administration instituted the gunwalking operations in order to alter federal firearms policy once those tactics backfired.³³⁵

Yet the incredulity of numerous members of Congress at Operation Fast and Furious fails to illuminate the real issue: Congress has consistently hamstrung ATF efforts by allowing for lax gun regulation laws and reporting requirements, and providing no effective firearms trafficking statute.³³⁶ The shock over the ATF’s actions in Fast and Furious has done nothing to solve the current problem, which is that the ATF and DOJ do not have the prosecutorial tools to actually charge offenders with firearms trafficking. Congress has been aware of the issues facing the ATF for some time, at least since

The Committee on Oversight and Government Reform also maintains a website devoted to its investigation of Operation Fast and Furious, at <http://issues.oversight.house.gov/fastandfurious/> (it appears to be maintained by the majority, specifically Darrell Issa’s staff).

334. Ed O’Keefe & Sari Horwitz, *House Votes to Hold Attorney General Eric Holder in Contempt*, WASH. POST June 28, 2012, http://www.washingtonpost.com/politics/fast-and-furious-house-plans-vote-on-holding-eric-holder-in-contempt/2012/06/28/gJQAznIG9V_story.html?hpid=Z3; Alan Silverleib, *House Holds Holder in Contempt*, CNN.COM (June 28, 2012), <http://www.cnn.com/2012/06/28/politics/holder-contempt/index.html>; Eban, *supra* note 23 (“Conservatives have pummeled the Obama administration, and especially Holder, for more than a year. . . . On June 20, in a day of political brinkmanship, Issa’s committee voted along party lines, 23 to 17, to hold Holder in contempt of Congress for allegedly failing to turn over certain subpoenaed documents, which the Justice Department contended could not be released because they related to ongoing criminal investigations.”).

335. Sharyl Attkisson, *Documents: ATF Used ‘Fast and Furious’ to Make the Case for Gun Regulations*, CBSNEWS (Dec. 7, 2011, 1:44 PM), http://www.cbsnews.com/8301-31727_162-5733854-6-10391695/documents-atf-used-fast-and-furious-to-make-the-case-for-gun-regulations/. Senator Charles Grassley subscribed to this specific view: “There’s plenty of evidence showing that this administration planned to use the tragedies of Fast and Furious as rationale to further their goals of a long gun reporting requirement.” *Id.*

336. *See supra* notes 308–311 and accompanying text.

DOJ's Project Gunrunner Report submitted in November 2010. That report, which has been discussed in Fast and Furious congressional hearings, specially notes that "statutes used to combat firearms trafficking do not have strong penalties" and that current U.S. law lacks a firearms trafficking statute.³³⁷ Indeed, Congress has been aware that, without a specific federal firearms trafficking statute, the "ATF uses a wide variety of statutes to address criminal firearms trafficking" and that these statutes "carry relatively low penalties."³³⁸ Congress's actions attacking the ATF seem to be the very definition of chutzpah, because Congress complained about violence in Mexico, failed to provide the ATF and the DOJ with an appropriate statute to combat the problem, and then opened congressional hearings regarding the ATF's subsequent poor tactical decisions. While it is clear that the ATF acted inappropriately in Fast and Furious, the general tenor of Congress has not risen to the occasion and provided the ATF and the DOJ with the necessary prosecutorial tools to stem firearms trafficking and, indirectly, the resulting drug violence in Mexico.

V. ANALYZING DOMESTIC CRIMINAL LAWS AND EXTRATERRITORIAL EFFECTS: PRIORITIZING EXTRATERRITORIAL EFFECTS FOR FIREARMS TRAFFICKING

Generally, the extraterritorial effects of domestic laws are not the primary concern, nor the primary driver, of congressional legislation and domestic criminal statutes. In areas of national security or trade, Congress does take these effects into account, but domestic criminal legislation is not an arena where such effects are touted, much less discussed. In two areas, however, such effects are considered. Firearms trafficking should be the third such area.

A. *Firearms Trafficking*

The legislative history of the Gun Control Act of 1968 indicates concern about federal regulation of interstate firearms traffic.³³⁹ For instance, the General Statement on the legislation notes that the "subject legislation responds to widespread national concern that existing Federal control over the sale and shipment of firearms

337. OFFICE OF INSPECTOR GEN., *supra* note 19, at 58–59.

338. *Id.* at 59–60.

339. H.R. REP. NO. 90-1577, at 3 (1968).

[across] State lines is grossly inadequate.”³⁴⁰ On the issue of “long gun” regulation, the report notes that this legislation “is designed effectively to control the indiscriminate flow of such weapons across State borders and to assist and encourage States and local communities to adopt and enforce strict gun control laws.”³⁴¹ Furthermore, the legislative history evidences a concern about the importation of firearms but does not indicate any concern about the export of firearms (especially long guns and rifles).³⁴² And a close reading of the entire legislation reveals no mention of exports of firearms or exporters of firearms.

Thus, the Gun Control Act of 1968 demonstrates no congressional intent to regulate exports of firearms or any international outgoing firearms trafficking activity. While one might argue that Congress passed the AECA with the intent to regulate international firearms trafficking, the section above demonstrates Congress’ intent to actually regulate international commercial transactions involving firearms, with an eye toward “unemployment,” “foreign policy,” and “trade.”³⁴³ These are not the buzzwords associated with curbing drug violence in a foreign country, and especially not the nomenclature associated with suppressing violence by DTOs that use American-made or American-imported weapons.

B. The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act specifically targets bribery of foreign officials and criminalizes conduct by multinational corporations that occurs outside the United States for the benefit of a corporation doing business within the United States.³⁴⁴ This statute is entirely separate from domestic anti-bribery laws.³⁴⁵ The legislative history for the FCPA makes clear that corrupt foreign payments by U.S. companies severely impact the “image of American democracy

340. *Id.* The use of the capitalized “State” rather than lowercase “state” indicates a concern about guns crossing local state lines rather than nation-state lines.

341. *Id.* Again, the use of “across State borders” indicates a desire to control state-state crossing of firearms rather than nation-state to nation-state crossing of firearms.

342. *Id.* (“It has also been urged that the import restrictions of existing law . . . should be relaxed. . . . The main purpose of the import restrictions is to arrest the present flood of imports of surplus military weapons . . . since these types of important weapons have caused major law enforcement problems.”).

343. Pub. L. No. 94-329 § 218, 90 Stat. 729 (1976).

344. 15 U.S.C. § 78dd-1(a)(1) (2006).

345. The domestic anti-bribery statute is 18 U.S.C. § 201, whereas 15 U.S.C. § 78dd-1 deals with payments, gifts, promises to “foreign officials.” *Id.*

abroad,” hamper efficiency in capital markets, and impair confidence in corporate financial integrity.³⁴⁶ Congress acknowledged that the widespread paying of foreign bribes by some U.S. firms tarnished the reputation and image of U.S. corporations, requiring a strong anti-bribery law to “bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.”³⁴⁷

The legislative history of the FCPA indicates that its primary interest is to encourage appropriate behavior by U.S. companies, rather than ensuring that historically corrupt countries alter illegal or unethical practices. But the legislative history does not indicate that changing the way that U.S. corporations do business outside of the United States will lead to reform throughout the world economy or in specific countries; it merely notes that the FCPA will restore international confidence in U.S. corporations and boost American democracy’s image abroad.³⁴⁸ Therefore, the positive extraterritorial effects appear to be a happy coincidence rather than an intentional effect.

C. The Arms Export Control Act

The legislative history of the AECA and the implementing ITAR is relatively scant. Congress passed the AECA as an amendment of the Foreign Military Sale Act, rather than as a completely new act and implementing statute.³⁴⁹ For arms trafficking, the bill sought to “restructure U.S. arms sales policies to provide for increased congressional supervision,” including placing a cap on defense articles and defense services sales by the U.S. government or commercial entities.³⁵⁰ The legislative history further examined the relevant discussion relating to why, how, and when certain arms transfers should be approved.³⁵¹ Indeed, passage of the AECA appears to

346. S. REP. NO. 95-114, at 3–4 (1977).

347. *Id.* at 4.

348. *Id.*

349. H.R. REP. NO. 94-1144 (1976).

350. *Id.* at 8–9. In 1976, the cap was \$9 billion. *Id.* That cap does not appear to be in place after 1986. See Amendment to the International Security Assistance and Arms Export Control Act, Pub. L. No. 99-247, 100 Stat. 9 (1986); see also GAO, GAO-05-234, DEFENSE TRADE: ARMS EXPORT ENFORCEMENT CONTROL SYSTEM IN THE POST-9/11 ENVIRONMENT 20 (2005), available at <http://www.gao.gov/new.items/d05234.pdf> (noting an increase of arms export license cases (not criminally prosecuted cases) increasing from approximately forty-three thousand in 1999 to fifty-four thousand in 2003).

351. H.R. REP. NO. 94-1144, at 12–13 (1976). These considerations include, “What is the U.S. interest in helping to preserve that security? . . . And what are the consequences for us if we fail to respond?” *Id.*

have depended on “the importance which arms transfers have for our own national security” rather than concern for the instability that rogue transfers of arms may produce in a foreign country.³⁵²

The bill included other provisions not specifically relevant to the AECA but relevant to the climate of its passage. Namely, Congress enacted U.S. policy “that no security assistance should be furnished to any foreign country if the laws, regulations, official policies or governmental practices of such country discriminate against any U.S. citizen and prevent” “furnishing or sale of . . . defense articles and defense services.”³⁵³ The House report noted that this was “a reform measure” and remarked on the vast amount of security assistance the measure provided to friendly foreign countries to “provide for collective security” and help such countries maintain their own internal security.³⁵⁴ Relating to commercial sales, the report noted that “[t]he sale of defense articles through commercial channels is increasing each year. If the United States is to develop a rational arms sales policy, it is essential that the totality of U.S. arms exports be considered.”³⁵⁵

By looking at the AECA in totality, Congress’ intent appears to be to create a regime that allows for commercial imports and exports of defense articles and is subject to the control of the Executive branch.³⁵⁶ The AECA’s requirement that the Secretary of State compile a report documenting the Act’s effect on “unemployment in the United States,” the “foreign policy of the United States,” and “trade with foreign countries” demonstrates the commercial realities of the AECA.³⁵⁷ Tellingly, there is no companion provision requiring the Secretary of State or Attorney General to examine the effect of the AECA on violence in foreign countries.

352. *Id.* at 13.

353. *Id.* at 9.

354. *Id.* at 10.

355. *Id.* at 7. Interestingly, there is no mention of illegal arms trafficking mentioned in the legislative history; the bill is aimed at commercial traffickers.

356. The Act itself reveals this contention. The 1976 version of the Act indicates that the “Secretary of State, in consultation with the Secretary of Defense, shall conduct a comprehensive study of the effects of the enactment of [the AECA] with a view to determining the consequences of such provisions on (1) the foreign policy of the United States, (2) the balance of payments of the United States, (3) the trade with foreign countries, (4) unemployment in the United States, and (5) weapons procurement by the Department of Defense.” Pub. L. 94-329 § 218, 90 Stat. 729 (1976) (codified as amended at 22 U.S.C. § 2751 (2006)).

357. *Id.*

D. Using Extraterritorial Effects As a Trigger for Legislation

As the legislative history discussed above demonstrates, the extraterritorial effects of domestic criminal statutes are generally not the driving force for their passage. Understandably, the passage of most domestic criminal statutes is not driven by its possible effect outside of the United States. With firearms trafficking, this should be a driving force, particularly given the shocking death toll that continues only a few miles south of the border. While the affect on domestic firearms regulations would likely be negligible (except on those trafficking firearms extraterritorially), the affect on the Republic of Mexico would be much larger. Providing the tools that the ATF and the DOJ desperately need to prosecute “real” firearms trafficking is paramount at this critical juncture.³⁵⁸ And passage of a true firearms trafficking statute that criminalizes the actual trafficking³⁵⁹ would allow the ATF and the DOJ to build and prosecute those cases that would curb violence in Mexico.

This then begs the question: When the effects in the United States are relatively negligible, but the effects extraterritorially are great, should the latter effects be a consideration in determining whether to pass a statute? And if these effects do amount to a consideration for passage, how much weight should they be given? At least in the context of firearms trafficking, the extraterritorial effect of a more robust firearms trafficking statute should be given great weight to counter the arguments made by the gun lobby. There are several reasons for this. First, if more robust domestic criminal laws can provide relief for countries like Mexico that are devastated by violence, then the United States has a duty to at least examine and seriously consider those alternative laws. Second, if the United States takes its role in the Mexican drug violence seriously, then it should desire to act and not just throw money at the problem. Third, the concern about spillover violence—a hybrid domestic and extraterritorial effect of the drug violence—mandates that both the internal and external effects of these laws be considered. Fourth, if a deterrent statute led to less firearms trafficking to Mexico, then the United States could claim a victory on the war against drug violence without devoting massive resources to the problem. Finally, passage of a more robust firearms trafficking statute would likely alleviate the problems stemming from Operation Fast and Furious.

358. See *supra* notes 244–276 and accompanying text.

359. See *supra* notes 236–276 and accompanying text.

Passing a true firearms trafficking statute would nevertheless be subject to extensive opposition from the gun lobby,³⁶⁰ but the extraterritorial effect argument should be enough to counter this lobby's claims. If the United States is serious about trying to curb drug violence in Mexico, merely providing monetary and tactical support will not equip law enforcement and prosecutors with enough tools to combat the problem in the United States. Providing better prosecutorial tools will demonstrate U.S. commitment to solving the problem. It will also actually result in prosecutions that one hopes will send a deterrent message to others engaged in firearms trafficking. Both these domestic and extraterritorial effects are important to rebutting anti-gun control arguments, and, on this specific issue, they should trump the dialogue to affect passage of a true extraterritorial firearms trafficking statute.

CONCLUSION

Mexico and the United States share a common concern: curbing the massive drug violence and killings in Mexico carried out in large part by the Mexican drug cartels. This is a human rights issue ripe for U.S. involvement, and drug violence spillover in the United States is a real and valid fear. Such spillover violence has already occurred in the U.S., though not yet on significant levels. Accordingly, if the United States is serious about cutting off the deadly spigot of firearms trafficked south to Mexico, it must implement a robust firearms trafficking statute that the ATF and the DOJ can use effectively. Some would argue against this point on the basis that the extraterritorial effects of domestic criminal laws should not be a primary concern. In this case, the positive extraterritorial effects should be the primary reason for passing a more efficacious firearms trafficking statute.

Generally, the most important consideration for a domestic criminal law is its effect on domestic crime. The exogenous effects of a criminal law are not usually considered, nor do these effects exhibit a rallying cry for the creation of domestic laws that have considerable effects internationally. Indeed, Congress and the courts have focused on the use of international law in the interpretation of domestic laws, rather than the effects of domestic laws on other countries. This Article argues the value of the former—that the United States should consider passage of domestic criminal laws that cause beneficial effects on other countries. Specifically, the passage of a

360. See *supra* notes 320–327 and accompanying text.

true firearms trafficking statute, along with heightened penalties for gun trafficking and an assault weapons ban, would alleviate the murderous violence undertaken by drug cartels in Mexico.

The model firearms trafficking statute outlined in this Article would alleviate some of the problems faced by law enforcement and prosecutors and could stem the flow of firearms southbound to Mexico. While the lobbying efforts of the NRA and other organizations and lawmakers might make passing and implementing this statute difficult, a statutorily oriented approach would provide the ATF and the DOJ the tools to target firearms traffickers in a more efficient and straightforward manner. These statutes may also alleviate the ATF's (and the DOJ's) need to invent creative operations to target weapons trafficking, thereby avoiding potentially destructive practices such as "gunwalking" to Mexico.

In sum, if the United States is serious about providing tools to stem drug violence in Mexico, throwing money at the problem through the Merida Initiative, or even "coordinating" law enforcement efforts, is not enough. Passing a robust firearms trafficking statute that provides positive extraterritorial effects is necessary for stopping Mexican drug violence, regardless of the very vocal opposition that will likely result from such a statute. In the realm of drug violence, this is an area of the law for which the extraterritorial effects of such a domestic criminal statute should trump the legislative concerns, the gun lobby's concerns, and the conservative caucus' concerns over the passage of such a statute.