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The U.S. Firearms Trafficking Statute's Failure to Curb Drug Violence in Mexico

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Now reaching epidemic proportions, drug trafficking violence in Mexico greatly concerns both the Mexican and United States governments. Despite the continuation of the War on Drugs, drug trafficking continues largely unabated from Mexico to the United States, resulting in lost lives, lost revenue, and a violence previously unknown in Mexico. Thus far, the United States’ efforts to deal with drug trafficking and violence in Mexico includes the recent debacle of Operation Fast and Furious. News regarding the Bureau of Alcohol, Tobacco, Firearms and Explosives’ (ATF) Operation Fast and Furious shocked citizens and lawmakers alike, as it allowed firearms to “walk” down to Mexico unimpeded, in a futile attempt to identify Mexican drug cartels members trafficking in firearms. Ultimately, this operation lead to over 2,000 firearms in Mexico, likely leading to continued violence in the south and the possibility of spillover violence on the border. 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 current tactical decisions and development of these operations require a more comprehensive approach to the problems facing Mexico (and the United States).

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Within that context, this Article discusses extraterritoriality and the effects of U.S. domestic criminal laws on foreign countries, specifically in the context of U.S. domestic firearms trafficking laws. The Article lays out the problem (Mexican drug cartels in receipt of thousands of weapons from the United States), the dynamics of that problem (the current legal framework, the resource issue, and the NRA lobbying effort), and further examines ATF’s Project Gunrunner, and Operation Fast and Furious within those dynamics. It argues that the lack of a simple and strong firearms trafficking statute contributed to ATF’s decision to implement Operation Fast and Furious, but, more importantly, also contributed 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 consequent drug violence will ultimately come to naught. Besides seeking to contribute to the dialogue on solving a looming and important problem, this Article seeks to contribute to the 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 the complaints lobbed against the negligible domestic effects of those laws.

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“[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 narcotrafficking source outside our borders.”¹

I. Introduction

Over the past four years, drug-related killings in Mexico have reached alarming proportions. By January 2011, more than 34,000 people died in drug cartel or gang-related killings, jumping almost sixty percent in 2010 alone.² The

violence has not stopped in 2011; most statistics now demonstrate over 40,000 lives claimed by drug violence.\(^3\) Since 2006, with the election of Mexican President Felipe Calderon, Mexican drug cartels\(^4\) have engaged in a campaign of terror and gun violence unlike anything seen in recent memory. Indeed, more than seventy percent of Mexicans indicate 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 the government is currently progressing in its fight against the drug cartels.\(^6\)

It is clear this is not just Mexico’s problem. First and foremost, the United States serves as the Mexican drug trafficking organizations (“DTOs”) biggest and best customer of their products.\(^7\) No one can argue against the proposition that the

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\(^3\) Maloney, supra note 2. See also Mexico horror: Gunmen dump 35 bodies on avenue, USATODAY.COM, Sept. 21, 2011, available at 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 35 victims while gunmen stood guard and pointed weapons at motorists – a number of the victims had criminal records for murder, drug dealing, kidnapping and extortion).

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


\(^6\) See Pew Research Center, supra note 5 (describing how 45% of Mexicans believe the Mexican government is making progress against drug cartels, 25% believe that it is “about the same” and 29% believe the Mexican government is losing ground).

customer base in the United States fuels Mexican drug cartel profits. But, perhaps more importantly, the United States also serves as the prime exporter of the instrumentalities of drug violence in Mexico.\(^8\) Since 2007, the Mexican government has recovered more than 100,000 firearms, and, according to one source, “84% of those guns came from the United States.”\(^9\) An ATF study also confirms this general presumption: in 2009 and 2010, 70 percent of the firearms recovered in Mexico were either manufactured in the United States or first imported to the United States prior to traveling to Mexico.\(^10\) Transnational gangs, such as MS-13 and 18\(^{th}\) Street serve as conduits for trafficking guns south to Mexico, which become part of the Mexican drug cartel arsenal.\(^11\) Besides being a clear source of money for Mexican drug cartels, the United States implicitly arms

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\(^8\) Maloney, *supra* note 2.

\(^9\) *Id.*; see also Violence Policy Center, *Indicted: Types of Firearms and Methods of Gun Trafficking from the United States to Mexico as Revealed in U.S. Court Documents*, at 1, 6, Apr. 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) weapons (42 percent), armor-piercing handguns (18 percent), or anti-armor .50 caliber sniper rifles (2 percent)) (hereinafter VPC, *Indicted*); see also GAO Firearms Trafficking, *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.").

\(^10\) 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 Street J. Online, June 11, 2011, available at 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 not determined. And 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). This article notes the original claims by U.S. officials of 90% of firearms recovered in Mexico originating in the United States.

\(^11\) TOM DIAZ, *NO BOUNDARIES: TRANSNATIONAL LATINO GANGS AND AMERICAN LAW ENFORCEMENT* 278 (2009).
those cartels. The clear implication of arming drug cartels south of the United States is not just that violence will continue in the south, but also the concern that violence will (and already has) spilled over the border into the United States.

And yet, what is to be done? A ban on firearms in the United States will never be seriously considered, nor in the current political climate will there be a ban on certain types of weapons favored by the drug cartels. Indeed, since 2004 when the Federal Assault Weapons ban ("FAWB") expired, it appears that significant numbers of assault-style rifles traveled more easily to Mexico and resulted in increased gun violence. 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 firearms trafficking down to Mexico. Additionally, the lobbying efforts of the National Rifle Association ("NRA") hampers any real changes proposed to firearms-related laws in the United States,

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12 Historically, “U.S. and Mexican officials [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 Firearms Trafficking, supra note 7, at 9.

13 The general six firearms favored by the DTOs are: semiautomatic rifles such as AK-47-type or the AR-15-type, and large frame semiautomatic pistols such as the .38 Super, 9mm, .45 and the 5.7 mm. ATF, Project Gunrunner: The Southwest Border Initiative, at 2, available at http://www.atf.gov/publications/download/p/atf-p-3317-6.pdf.


15 Dep’t of Justice, Off. of Inspect. Gen., Review of ATF’s Project Gunrunner, at vi (Nov. 2010), available at http://www.justice.gov/oig/reports/ATF/e1101.pdf (hereinafter “Project Gunrunner”) (“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.”).
while politics further dampers true discussion on meaningful changes to the firearms trafficking laws.

Those are the problems. Within these confines, as hopeful efforts to curb drug violence in Mexico, ATF developed and initiated Project Gunrunner and Operation Fast and Furious, however, leading to clearly disastrous results. Specifically, ATF and the DOJ initiated Fast and Furious as a firearms trafficking investigation to identify traffickers in firearms and allow weapons to travel so as to identify the end-users of those weapons. ATF’s Operation Fast and Furious, while misguided in application and implementation, at least demonstrated an effort by the U.S. government to creatively deal with the problem of firearms flow to Mexico. While this creative effort fell flat and resulted in at least one U.S. law enforcement officer’s death, it also demonstrated a failing of U.S. firearms trafficking laws in general.

The current statute seeks to criminalize “dealing in firearms” and generally has a clear domestic focus. Given events over the past four years, and the large amount of firearms traffic traveling to Mexico, the current statute’s failings demonstrate a need for change. While the current firearms statutes have a purely domestic focus, a more extraterritorial focus would be more beneficial towards curbing southbound firearms trafficking (and curbing 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? And if the U.S. government does this, how far should the effort go,


17 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.
especially 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 affect on drug violence in Mexico.

Specifically, this Article argues two things: First, that the extraterritorial effects of U.S. domestic laws should be considered and that these effects may (and should) often drive the passage of domestic criminal laws in the United States. Second, it argues that, in the context of firearms trafficking, domestic criminal laws should be reconsidered in order to pass a stronger and more robust law, and that the effect of this law should be the main driver for passage of such a law. Within the context of current legal scholarship, the academy often discusses the extraterritorial effects of domestic laws post-passage, but this Article argues that such effects should clearly be a part of the conversation ex ante and that, in at least in the context of firearms trafficking, the extraterritorial effects should be the driving force for passage.

II. The Extraterritorial Effects of U.S. Domestic Laws, and Especially Domestic Criminal Law

Numerous academics address the extraterritorial effects of U.S. domestic laws; often, the discussions argue over the detrimental effects of those laws on the economies of other countries. 18 Scholarship on the criminal side of this issue

18 See, e.g., Alvaro Cuervo-Cazurra, The Effectiveness of Laws Against Bribery Abroad, 39 J. INT’L BUS. STUD. 634 (demonstrating that companies located in countries with anti-
generally deals with laws that criminalize actions by U.S. citizens and companies in foreign countries. Abundant scholarship also exists on the scope of extraterritorial application of U.S. securities laws. And discussions about extraterritorial application of U.S. law are quite in vogue at the moment. As Anthony Colangelo writes,

With the proliferation of laws seeking aggressively to regulate foreign conduct, some commentators and courts have started to

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engage more foundational questions about the existence 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."

He notes that two lines of extraterritoriality arise; one line regarding how to determine the scope of statutes that deal with extraterritoriality and one line (more recently developed) involving whether or not such statutes are constitutional.

The academic discussion is silent, however, on purely domestic statutes that have positive extraterritorial effects, and whether such effects should be considered relevant to the passage of domestic criminal laws. For instance, federal drug trafficking laws are relevant to domestic crime control, but also seek to stem the tide of money traveling south to Mexico (in exchange for illegal drugs). Most violent crimes do not generally provide any clear extraterritorial effects, and generally the reach of such laws is purely domestic. As noted above, securities laws and antitrust laws often have certain extraterritorial effects, and their effects are oft-debated and subject to vigorous academic discussion.

The Foreign Corrupt Practices Act (“FCPA”) is one area of criminal law specifically dealing with extraterritorial effects of a domestic law on a foreign country. It generally seeks to curb bribery by all U.S. persons and firms doing business in foreign countries, and to prohibit “corrupt payments to foreign officials for the purpose of obtaining or keeping business.” In the legislative history updating the FCPA, the Senate noted the FCPA’s objectives primarily dealt with

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22 Colangelo, supra note 21.
23 Id.
trade relationships, rather than solely to promote fair and honest trade practices worldwide. The Department of Justice (“DOJ”) notes 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.” It is clear, however, that passage of the FCPA did not necessarily have the extraterritorial effect it intended: “In 1997, . . . the United States and thirty-three other countries signed the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.” Hence, although the FCPA appears to be a domestic criminal statute that likely has extraterritorial effects, twenty years after passage of the FCPA, the United States still sought a multilateral approach to curb the problem of foreign official bribery.

Firearms offenses, however, appear to be quite in a class by themselves. The United States has a clear love-hate relationship with firearms, extending back to the passage of the Bill of Rights and the Second Amendment. This odd relationship with firearms contributes to the difficulties currently faced in Mexico, especially given the extensive and powerful lobbying arm of the National Rifle Association (NRA). While Congress conducts inquiries into Mexican drug violence (and the U.S. government’s role in that violence), it fails to take actions that might stem the tide of that violence. In this context, the extraterritorial effects of a domestic firearms trafficking statute should be a paramount consideration of Congress, as such effects should (and will) outweigh the domestic concerns voiced by the NRA and other libertarian/conservative groups.

Firearms trafficking and gun control occupy a tension in the law, and gun control advocates tend to focus on domestic gun control as a primary concern. As Franklin Zimring notes, gun control legislative proposals did not receive

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28 Id.
serious traction until at least 1965.\textsuperscript{30} The real work occurred in 1968, after the assassinations of Martin Luther King Jr. and Robert Kennedy, along with public unrest and uneasiness about increased violent crime.\textsuperscript{31} What resulted was the Gun Control Act of 1968, which delineated a number of controls on firearms, especially for convicted felons and others.\textsuperscript{32} The major objectives of the Gun Control Act of 1968 focused on elimination of interstate traffic in firearms and ammunition, denying firearms to certain groups, such as minors and convicted felons, and cessation of surplus military firearm imports other than sporting weapons.\textsuperscript{33} Clearly, congressional intent dealt with domestic crime and violence, and did not demonstrate any intent to ensure the safety of persons outside the United States from violent crime.

\section*{III. The Problem of Firearms Trafficking}

Mexico has a problem.\textsuperscript{34} Indeed, Mexico has a \textit{big} problem. Due to drug violence, over the past four years more than 40,000 Mexican citizens have died on account of drug violence.\textsuperscript{35} And these statistics are staggering. Entire villages and towns are in lockdown; large cities are in dismal shape. The politics of drug violence in Mexico affects the national scene. According to the most recent U.S. government report, “47,515 people were killed in narcotics-related violence in

\begin{footnotes}
\item[30] \textit{Id}.
\item[31] \textit{Id}.
\item[33] Zimring, \textit{supra} note 32, at 149.
\item[34] As of 2009, Mexican officials indicated to congressional investigators 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 Firearms Trafficking, \textit{supra} note 7, at 10.
\item[35] Maloney, \textit{supra} note 2; Zagaris, \textit{supra} note 2.
\end{footnotes}
Mexico between December 1, 2006 and September 30, 2011.”36 “The killings over the last four and one-half years have been gruesome and public, with mass graves, torture, decapitations as trademarks, severing of body parts, and warnings carved into corpses.”37 All of this fueled, at least in part, by firearms, which generally are prohibited in Mexico.38

It is clear that the United States and Mexico mutually desire methods to curb and 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.39

37 Baldini-Potermin, supra note 36, at n.9
The United States and Mexico do not appear interested in sitting back and ultimately failing to deal with the problems inherent to drug violence in Mexico. For instance, in October 2007, both countries launched the Merida Initiative, which provides for increased interaction to combat drug cartels through greater coordinated efforts.\(^{40}\) That initiative set out parameters to provide 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.\(^{41}\) It also sought to provide advice and training for Mexican authorities, and provide money to vet Mexican police officers.\(^{42}\)

The United State 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.”\(^{43}\) Since that time, there have been numerous calls for coordination between ATF and the Mexican government, as well as discussions about further agency coordination. While


\(^{41}\) Walser, supra note 40, at 3.

\(^{42}\) Id.

some coordinative efforts have increased, there still is a gulf between the two governments and their respective agencies regarding drug interdiction and drug violence.

A. **Statistics and Costs**

Notwithstanding the historical statistics, the violence continues unabated. For instance, over a six-day period at the end of August 2011, fifteen people were killed in the Tijuana area.\(^44\) Unfortunately, over the second week of that period (through September 7, 2011), another 12 people were killed for a total of 27 dead in Tijuana drug violence over a two week period.\(^45\) Daily news reports from Mexico demonstrate the clear physical toll among Mexican citizens. It is hard to argue that drug violence in Mexico is being “dealt with” or that the Mexican government has curbed the violence. 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 to effectively reduce the violence.

The economic toll from the violence in Mexico is less clear, but arguably just as devastating. Despite conventional wisdom, Mexico’s Finance Minister, Ernest Cordero, announced that Mexico’s tourism economy seemed unaffected by the current drug violence.\(^46\) While stating that some cities were clearly suffering, Minister Cordero indicated that Mexico’s economy “grew by 5.5% last year, its

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fastest annual rate in 10 years.”

This statement counters 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 US border have been parlay[zed] economically by drug violence.”

Cities on the border, such as Nuevo Laredo and Matamoros saw a falloff in business due to bloody turf battles between drug gangs. 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. Despite official reports by the Mexican government, the anecdotal evidence, especially in the tourism industry, demonstrates that drug violence in Mexico has a clear detrimental affect on the economy.

B. The Current Domestic Legal Framework of Firearms Trafficking

Given that Mexican drug violence stems, ultimately, from firearms in the hands of Mexican drug traffickers, it makes sense to turn to the current U.S. domestic firearms trafficking laws. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act, which provided a number of new statutes governing criminal violations. Congress passed this Act in response to rulings on state wiretapping statutes, but also in response to “findings concerning the impact of

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47 Id.
49 Id.
50 See Mexico Travel Warning, supra note 36 (outlining the general conditions, including Mexico’s war with transnational criminal organizations and urging deferring non-essential travel to a number of Mexican states).
52 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, WAYNE LAFAVE, JEROLD ISRAEL, NANCY
the traffic in firearms on the prevalence of lawlessness and violent crime in the United States.” This Act amended the federal criminal code to include a number of unlawful acts relating to firearms, such as engaging in the business of dealing in firearms without a license. Of course, at the time, Congress was not concerned with the outbound flow of firearms to other countries, but only with the domestic provision of firearms to those persons within the country who should not have them.

The current “firearms trafficking” statute is 18 U.S.C. § 922. 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.” This provision precludes “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. The statute criminalizes the

King, Orin Kerr, Modern Criminal Procedure at 505-06 (12th ed.). 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 ground work for the federal wiretapping statute within the Omnibus Criminal Control Act. See 18 U.S.C. §§ 2510-22. See also David Sklansky, Katz v. United States: The Limits of Aphorism, in Criminal Procedure Stories at 250 (Carol S. Steiker ed., 2006); Stewart M. Young, Targeting the Phone or the Person: Roving Wiretaps and the Future of Electronic Surveillance (unpublished manuscript) (laying out the general history of the wiretapping statute in relation to Berger and Katz).

53 Bryan, 524 U.S. at 186-87 (emphasis added).
54 Id.
55 In fact, the Gun Control Act’s legislative history notes Congress’ concern with surplus military firearms coming from outside the country. Zimring, supra note 32, at 149.
56 Oddly enough, the actual term “trafficking” in the context of firearms 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) and 929. The Inspector General’s Report on Project Gunrunner noted this particular oddity. Project Gunrunner, supra note 15, at 59 & n. 78.
58 18 U.S.C. § 922(a)(2). The term “licensed trafficker” is not a definitional term in the statute. It is merely a descriptive term for this Article for those persons who are 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.”
transport or receipt of any firearm purchased or obtained in another state, as well as the transfer, sale, or trade of a firearm to another person who does not reside in the state where the transferor resides. Finally, the bread and butter statute of firearms prosecution, the “lie-and-buy” statute, criminalizes the “acquisition or attempted acquisition of any firearm . . . knowingly to make any false or fictitious” statements to acquire a firearm.

Title 18, United States Code, Section 922, further criminalizes other activities by licensed traffickers. For instance, licensed traffickers may not sell firearms to anyone under the age of eighteen, to anyone who is not a resident of the state, and may not sell machine guns, destructive devices or short-barreled shotgun unless authorized by the Attorney General “consistent with public safety and necessity.” The statute further criminalizes the disposition or sale of any firearm to any person that might be under indictment or has been convicted of a felony, is a fugitive from justice, abuses narcotics, or is an alien unlawfully present in the United States. Finally, it is unlawful to deliver firearms to a common carrier without notice to that carrier.

What is missing from all of this is an actual statute that criminalizes “trafficking in firearms.” The only “trafficking” that is criminalized in 18 U.S.C. § 922 is the trafficking done by someone “engaged in the business of importing . . .

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61 18 U.S.C. § 922(a)(6). This provision criminalizes both lying in order to procure a firearm for oneself, as well as the lie itself.
Congress defined this portion of that statute in 18 U.S.C. §§ 921(a)(21) & (22). Specifically,

(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 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;

It further defines “engaged in the business” for an importer of firearms, and ammunition. Title 18, United States Code, Section 921 also defines the term regarding “livelihood and profit” as:

(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.

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71 Supra note 57.
72 18 U.S.C. § 921(a)(22)(E) (“as 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.”).
73 18 U.S.C. § 921(a)(21)(F) (“as 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.”).
The current statute further defines the terms of dealer, importer, and manufacturer as well (the crux of what I term “legal traffickers”). The main thrust of the cases, however, usually turn on the “engaged in the business” prong of the statute. A number of the federal criminal pattern jury instructions essentially mirror the statutory language and definitions.

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

Courts have consistently wrestled with the “engaged in the business” prong of 18 U.S.C. § 922 for quite some time. In 1975, the Tenth Circuit considered the

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75 18 U.S.C. § 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.”).

76 18 U.S.C. § 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.”).

77 18 U.S.C. § 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.”).

78 See Fifth Cir. Crim. Pattern Jury Instr., 2.44 Dealing in Firearms Without License (2001) (including the “engaged in the business” definition and “livelihood and profit” prong in the instructions); Ninth Cir. Crim. Pattern Jury Instr., 8.53 (Firearms-Dealing, Importing or Manufacturing Without Licenses (18 U.S.C. § 922(a)(1)(A) and (B))) (2010) (the Ninth Circuit instruction includes 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); Eleventh Cir. Crim. Pattern Jury Instr., 34.1 (Dealing in Firearms without a License, 18 U.S.C. § 922(a)(1)(A)) (2010) (“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 criminal pattern instructions only defines “firearm,” but not “engaged in the business” nor discusses the profit motive, but does address those terms in the Use Note. Tenth Cir. Crim. Pattern Jury Instructions, 2.41 (Dealing in Firearms Without License, 18 U.S.C. § 922(a)(1)(A)) (2011).
scope of that language for the first time in *United States v. Swinton*.\(^79\) In *Swinton*, the court considered whether it should “lift” the “business” definition from *Cherot v. United States Fidelity and Guaranty Company*.\(^80\) and apply it to Swinton’s case.\(^81\) The *Swinton* court noted that both the Sixth Circuit and the Seventh Circuit caselaw provided some merit to Swinton’s argument that “business” meant “an undertaking engaged with some regularity and for profit and income.”\(^82\) In the Sixth Circuit’s case of *United States v. Day*,\(^83\) that court held 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.”\(^84\) And the Seventh Circuit’s *United States v. Gross*\(^85\) held 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.”\(^86\)

The *Swinton* court noted “contrary decisions” from both the Eighth Circuit and the Southern District of Ohio, in which each did not require a profit motive to charge someone with being “engaged in the business of dealing in firearms.”\(^87\) The Eighth Circuit’s *United States v. Wilkening*\(^88\) 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.”\(^89\) And the Southern District of Ohio’s *United States v. Jackson*\(^90\) 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

\(^79\) 521 F.2d 1255 (10th Cir. 1975).
\(^80\) 264 F.2d 767 (10th Cir. 1959).
\(^81\) *Swinton*, 521 F.2d at 1258.
\(^82\) *Id.*
\(^83\) 476 F.2d 562 (6th Cir. 1973).
\(^84\) *Swinton*, 521 F.2d at 1258.
\(^85\) 451 F.2d 1355 (7th Cir. 1971).
\(^86\) *Swinton*, 521 F.2d at 1258.
\(^87\) *Id.*
\(^88\) 485 F.2d 234 (8th Cir. 1973).
\(^89\) *Swinton*, 521 F.2d at 1258.
the purpose of selling them to those persons he accepts as customers.” 91 Ultimately, the Tenth Circuit held 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.” 92 Even after the Swinton court recognized the circuit split on the profit motive, the Ninth Circuit recognized in United States v. Van Buren 93 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.” 94

Accordingly, in response to this circuit split, Congress acted. 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 a profit motive for persons to “be in the business of dealing in firearms.” 95 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. Furthermore, Congress’ passage of the Tiahrt Amendment, constricting information that ATF may provide to the

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91 Swinton, 521 F.2d at 1258.
92 Id.
93 593 F.2d 125 (9th Cir. 1979).
94 Id. at 126.
95 Pub. L. No. 99-308, 100 Stat. 449, 450 (1986), and amended by Pub. L. No. 99-360, 100 Stat. 776 (1986) (adding that the profit motive is not required if a person engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.”). Certain cases held that the profit motive was required to be “engaged in the business of dealing in firearms.” The second 1986 amendment removed that requirement for firearms sold for criminal or terrorism purposes. See also Fed. Judicial Center, Fed. Jury Prac. And Instr., Pattern Crim. Jury Instr. 78 (1988); United States v. Graham, 305 F.3d 1094, 1101-02 (10th Cir. 2002) (noting that “the 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.”); Firearms Owner’s Protection Act, H. Rep. 99-495 at 12 (1986), reprinted in 1986 U.S.C.C.A.N. 1327, 1338 (1986) (“Court 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”).
public about firearms (and firearms trafficking), also demonstrates the difficulties of prosecution for firearms violations.96

This author 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 previously bought firearms from someone in Arizona. The Arizona target offered to sell this CI more weapons, and especially long rifles. The agents told the CI to tell the target defendant that he needed to buy more weapons and “take them south.” Clearly, the implication was that these weapons would be heading down to Mexico, and the target defendant understood this premise (he often remarked on it). At times, the target defendant mentioned the drug violence down 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 20 guns, including a number of AK-47-type rifles. During the takedown of the operation, agents executed a search warrant and searched the target defendant’s house, finding more than 65 other firearms. After the takedown, the target defendant’s counsel began the negotiation process, and it became clear that the “engage in the business of . . . dealing in firearms” prong would be the critical issue. Additionally, the defense counsel made 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, often on the recordings, the target defendant would complain that he was not making any profit on some of the transactions (despite his willingness to drive from Arizona to San Diego to facilitate the transactions). 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, this author re-indicted the target defendant for transporting firearms across state lines, which had lesser penalties (but lacked any proof problems). Such an experience is, however, 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.\(^97\) Ultimately, the statute lacks any real punch – the profit motive and the “engaged in the business” prong of the statute make proving firearms trafficking quite difficult.

The ATF is not necessarily the sole agency responsible for focusing on firearms trafficking. While ATF has primary responsibility on arms trafficking, Immigration and Customs Enforcement (“ICE”) (and its predecessor Customs before it), is responsible for enforcing U.S. export laws, including “enforcing laws related to the export of military items and dual-use goods.”\(^98\) ICE has historically engaged in public awareness efforts related to firearms trafficking to Mexico, but it generally does not engage in the types of prosecutions related to ATF’s enforcement.\(^99\) Customs and Border Protection (“CBP”) 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

\(^97\) Statement by Peter J. Forcelli, Supervisory Special Agent, ATF, House Oversight and Government Reform Committee Hearing, June 15, 2011. See also House Comm. on Oversight and Gov’t Reform, Transcribed Interview of ATF Special Agent Carlos Canino, at 59-60 (June 16, 2011), in Outgunned, supra note 16, 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.”); House Comm. on Oversight and Gov’t Reform, Transcribed Interview of ATF Special Agent Olindo “Lee” Casa, at 81-82 (Apr. 28, 2011), in Outgunned, supra note 16, 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 a deterrent effect.”).

\(^98\) GAO Firearms Trafficking, supra note 7, at 11 and n.6.

\(^99\) 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. 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.
not been a focus of CBP’s efforts.” Nevertheless, the current legal regime for firearms trafficking offenses focuses solely on “dealing in firearms,” and ATF generally is the agency most responsible for prosecuting firearms violations. The toothless nature of the gun statutes in general, and specifically with firearms trafficking, demonstrates the need for a true firearms trafficking statute.


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 government had in place the federal assault weapons ban (“FAWB”) that covered a “first time restriction on the manufacture, transfer and possession of semi-automatic weapons.” This ban created a definition for the term “assault weapons” and restricted possession of certain firearms in accordance with that definition. The ban further restricted the manufacturing of assault weapons, criminalized the possession of illegally imported assault weapons, and restricted the transfer of such weapons that were not pre-existing prior to the implementation

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100 Id. at 12-13 and n.9; id. at 34-39.
103 FAWB.
of the FAWB.\textsuperscript{104} Of course, other states also had their own bans on such weapons, including California,\textsuperscript{105} and New York,\textsuperscript{106} among others.\textsuperscript{107}

Several recent empirical studies of Mexican violence from 2002-2006 demonstrate the efficacy of the FAWB.\textsuperscript{108} Controlling for a number of variables, including cartel destabilization, local violence, and distance from the border, Dube and his associates investigated the number of homicides and gun-related homicides for this period. The authors of the study theorized that gun-related homicides might increase in U.S.-Mexico border municipalities (border municipalities within 100 miles of the border, which encompassed a major highway, and near a well-trafficked port of entry) after the 2004 expiration of the federal assault weapons ban.\textsuperscript{109} Given that California continued its own state-controlled ban of 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.\textsuperscript{110}

Ultimately, the data demonstrated that after the expiration of the FAWB, Mexican border municipalities within 100 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.”\textsuperscript{111} Indeed, after the expiration of the FAWB, it appears that municipalities at the Arizona and Texas border ports saw total homicides rise by

\begin{flushleft}
\textsuperscript{104} \textit{Id.} \\
\textsuperscript{105} See Roberti-Roos Assault Weapons Control Act of 1989 (California’s assault weapon ban). Cal. Sen. Bill 23 apparently increased the reach of California’s ban. Dube, et al., \textit{supra} note 14, at 6. \\
\textsuperscript{106} New York State Penal Law § 265.02(6). \\
\textsuperscript{107} Minnesota and New Jersey also have assault weapons bans, but I have yet to find their statutes. \\
\textsuperscript{108} Dube, et al., \textit{supra} note 14. \\
\textsuperscript{109} \textit{Id.} at 2-3. \\
\textsuperscript{110} \textit{Id.} at 6. \\
\textsuperscript{111} \textit{Id.} at 26.
\end{flushleft}
40% compared with municipalities 100 miles away. One may argue with the methodology of the study, but the results demonstrate that the FAWB provided at least some deterrent effect on firearm violence in Mexico, which has dramatically increased since 2006 (the end point of the study).

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. Of course, the study showed that firearms-related violence in Mexico increased after the expiration of the FAWB, it is likely that the reverse correlation is true: the imposition of the FAWB in 1994 probably decreased firearms-related violence in Mexico. Clearly, a new FAWB would be important in curbing further drug-related violence in Mexico, especially given that several of the drug cartels’ weapons of choice were part of the previous FAWB.

A second study, conducted by an economist at Notre Dame, also studied the effects of the FAWB (and its expiration) and came to a similar conclusion as the first study. This study viewed 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 the homicide rate in Mexico. While the Dube study specifically examined border municipalities within 100 miles of the U.S.-Mexico border, the Chicoine study analyzed data from every Mexican state during the FAWB up through 2008. In Mexican cartel states, the study found that the homicide rate increased by 24.6 percent after the FAWB expiration, with a national increase of at least 16.4 percent. The study also concluded that this percentage increase was

112 Id. The authors posit this “impl[ies] an additional 158 more homicides in the two years following the expiration of the FAWB.” Id.
113 See supra notes 13–14.
114 Chicoine, supra note 14.
115 Id. at 22.
116 Id. at 6.
117 Id. at 22.
equivalent to an additional 2,684 homicides in Mexico over the time period from 2004-08.\textsuperscript{118}

The Department of Justice’s National Institute of Justice (and several members of Congress) also requested a study regarding the efficacy of the FAWB.\textsuperscript{119} The study concluded that after implementation of the FAWB, gun crimes decreased from 17\% to 72\% for certain localities studied.\textsuperscript{120} Christopher Koper and his colleagues 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).”\textsuperscript{121} They did not find a corresponding drop or clear decline in the use of assault rifles, due to “the rarity of crimes with these weapons and by substitution of post-ban rifles that are very similar to the banned AR models.”\textsuperscript{122} Subsequently, the study could not conclude that domestic gun crimes dropped due to the FAWB, and noted that any effect by reauthorization of the FAWB would “likely . . . be small at best and perhaps too small for reliable measurement.”\textsuperscript{123} 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.”\textsuperscript{124}

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

\textsuperscript{118} Id.
\textsuperscript{119} Koper, et al., \textit{supra} note 101, at i, 1-3.
\textsuperscript{120} The localities included Baltimore, Miami, Milwaukee, Boston, St. Louis and Anchorage. \textit{Id.} at 1.
\textsuperscript{121} Id.
\textsuperscript{123} Koper, et al., \textit{supra} note 101, at 1-2.
\textsuperscript{124} \textit{Id.} at 2.
have affected gun crime violence markedly in an extraterritorial manner. Taking the cumulative studies at face value, the net result is that, at least on the domestic side, a FAWB does not have much efficacy. And yet the two studies on the Mexican side of the equation demonstrate at least some, if not a considerable, amount of efficacy to curbing drug violence. One of the likely keys to this determination comes from the Koper study’s statements relating to the particular weapons used in domestic gun crime: namely, assault rifles are rarely used in crime, whereas they are generally the gun of choice for Mexican DTOs. Thus, while domestic support for another FAWB does not garner its “smoking gun” from historical domestic efficacy studies, support for another FAWB is clearly demonstrated when one accounts for the extraterritorial effects of the ban.

Another FAWB on certain firearms favored by drug cartels in Mexico continues to be touted by gun control advocates and the Mexican government. For instance, in May 2010, President Calderon called on Congress to restore the assault weapons ban to stem the flow of these weapons to Mexico. Speaking for thirty-five minutes before a joint session of Congress, President Calderon 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.” He further noted the strong correlation between the increase in violence by drug trafficking organizations and the expiration of the federal assault weapons ban.

Additionally, Mexican Secretary of the Interior Alejandro Poire Romero recently reiterated the comments of President Calderon regarding imposition of

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125 *Id.* at 1-2.
126 See *supra* note 13.
128 *Id.* Other reports back up this figure. GAO Firearms Trafficking, *supra* note 7, at 15.
129 Knowlton, *supra* note 127. Of course, it is clear that violence increased dramatically after President Calderon took office and declared open war on the cartels, in conjunction with severe destabilization of several cartels.
another FAWB. Secretary Poire Romero noted that in 2005, approximately \( \frac{1}{3} \) of the weapons seized in Mexico were assault weapons. But this number has increased dramatically, now resulting in approximately 60 to 65 percent of the guns seized by Mexican authorities. According to Poire Romero, “The significant rise in violence and the increase in the number of public officials killed in Mexico coincides with lifting of the assault weapons ban.” Of course, the empirical studies appear to back up those statements.

**IV. Examining ATF’s Operations and its Challenges**

Given the current climate does not support a FAWB, and given the difficulties with prosecuting actual “firearms trafficking” due to the statute including the “engaged in the business” prong, U.S. law enforcement efforts have not adequately curtailed the firearms creating drug violence in Mexico. The ATF has, however, created an uproar with activities designed to curtail firearms trafficking. In order to understand part of the investigative debacle caused by the ATF, this section examines the context of ATF’s operations, along with an ensuing discussion of typical investigative techniques ATF failed to use.

A. **Project Gunrunner and Operation Fast and Furious**

Operation Fast and Furious, as part of Project Gunrunner, apparently failed to use many typical investigative techniques, ultimately resulting in “gunwalking.” While ATF desired Operation Fast and Furious to push the envelope in firearms trafficking prosecution, it clearly suffered from a lack of (adult) supervision on the

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131 *Id.*

132 *Id.*

133 *Id.*
one hand, and the lack of a simple/straightforward firearms trafficking statute on the other hand.

1. Targeting Firearms Traffickers – Project Gunrunner

From the fall of 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.\(^{134}\) As previously discussed, several narco-trafficking cartels in Mexico engage in heightened violence upon Mexican citizens, law enforcement and rival cartel/gangs. And since 2006-07, 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 defacto heads of the Tijuana cartel) created a power vacuum for drug trafficking routes of several cartels.\(^{135}\) Additionally, however, it appears that the increased availability of long rifles might have contributed to the drug violence (especially given that these long rifles have become the weapon of choice among violent cartels).\(^{136}\)

Project Gunrunner (the pile of money that ultimately supported Operation Fast and Furious) began as a pilot program in Laredo, Texas, and expanded nationally in 2006.\(^{137}\) It sought to “help combat firearms trafficking into Mexico,” as well as to broadly “reduce cross-border drug and firearms trafficking and the

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136 VPC, Indicted, supra note 9.
137 Project Gunrunner, supra note 13, at i.
high level of violence associated with these activities on both sides of the border.”\textsuperscript{138} Gunrunner had four components, specifically: “the expansion of gun tracing in Mexico, international coordination, domestic activities, and intelligence” and targeted four Southwest border field divisions.\textsuperscript{139}

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.\textsuperscript{140} 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.”\textsuperscript{141} The ATF received approximately $21.9 million in 2009 and $37.5 million in 2010 for Project Gunrunner operations, and ATF agents on the project increased from 84 special agents to 224.\textsuperscript{142}

Despite the funding and agent increases, the number of large firearms trafficking cases did not increase. In fact, Project Gunrunner focused mostly on gun dealer inspections and straw purchaser investigations, rather than focusing on “higher-level gun traffickers, smugglers and the ultimate recipients of the trafficked guns.”\textsuperscript{143} During Project Gunrunner, ATF clearly increased the number of gun traces submitted from Mexico, the number of cases referred for prosecution, as well as the number of compliance checks on Federal Firearms Licensees (FFLs).\textsuperscript{144} These cases, however, “mostly involve[d] straw purchasers and corrupt gun dealers, not those who organize and command the trafficking

\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 2.
\textsuperscript{141} Id. at 4.
\textsuperscript{142} Id. at 5.
\textsuperscript{143} Id. at v, 93-94; Fatally Flawed, supra note 16, at 11-12.
\textsuperscript{144} Project Gunrunner, supra note 13, 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).
operations.”

A thorough review of Project Gunrunner by the DOJ Inspector General included a recommendation that ATF “[f]ocus on developing more complex conspiracy cases against high level gun traffickers and gun trafficking conspirators.”

Despite noting the lack of a true firearms trafficking statute, however, the Inspector General’s analysis of Project Gunrunner did not include any recommendation on further firearms trafficking legislation. While Project Gunrunner seemed to head in the right direction towards targeting important aspects of firearms trafficking to Mexico, it suffered from a lack of coordinated strategy and legislative assistance.

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

With Project Gunrunner on the books, ATF sought to expand its operations and snare higher-level gun traffickers in an attempt to hurt the Mexican drug cartels. Operation Fast and Furious appeared to be the answer, and it developed out of an ATF proposal in the fall of 2009. Interestingly enough, prior to its implementation, the DOJ held a three-day training session from August 4-7, 2009. Entitled “Southwest Border Firearms Trafficking Training,” this seminar included prosecutors and agents generally from the southwest border. What appears likely is that the Arizona ATF and U.S. Attorney’s Office took these materials from its training in August 2009 and began planning Operation Fast and Furious in September 2009. The timing and correlation is striking, to say the least.

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145 Id. at 51-54.
146 Id. at 52-54, 95.
147 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.
148 The DOJ held this conference at the National Advocacy Center in Columbia, South Carolina. I attended this event. The training materials are in my office.
149 See Dep’t of Just., “Southwest Border Firearms Trafficking Training,” Overview of Straw Purchases, Aug. 4-7, 2009 (on file with author).
The operation sought to target gun traffickers by allowing guns to move up the chain. Normally, the ATF’s modus operandi is to find a straw purchaser and charge that straw purchaser, but in this manner it fails to move up the ladder to prosecute the individuals who actually receive the firearms. In Fast and Furious, the ATF and DOJ prosecutors\textsuperscript{150} 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. 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.

Fast and Furious used confidential informants, undercover agents, wiretaps, surveillance, and a host of other law enforcement tactics to investigate southbound firearms trafficking. ATF agents further engaged actual licensed firearms dealers and allowed them to sell guns to questionable straw purchasers to continue the operation. 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. Unfortunately, given the jury-rigged nature of these devices, a number of the GPS devices failed.

Ultimately, approximately 2,000 firearms traveled down south to Mexico during Operation Fast and Furious. Rather than interdict these weapons either in transit or at the border, ATF allowed the guns to “walk” and end up in the hands of cartel members. Often, these weapons showed up at crime scenes in Mexico, and

\textsuperscript{150}There is a discrepancy 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. In this author’s experience, an AUSA does not generally have such wide and vast operational control. But that is likely the subject of another article. See Stewart M. Young, \textit{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).
several appeared at a Border Patrol agent’s murder scene in Arizona. ATF and 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. While the sentiment might have been honorable (i.e., to target firearms trafficking on a larger scale),\footnote{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.” Editorial, \textit{Lax U.S. gun laws enable killing in Mexico}, WASH. POST, Feb. 4, 2012, at http://www.washingtonpost.com/opinions/lax-us-gun-laws-enable-killing-in-mexico/2012/02/02/gIQAWb9CqQ_print.html.} the execution of Fast and Furious was quite poor.

3. \textit{The Resulting Disaster}

ATF touted the success of Operation Fast and Furious in numerous fact sheets and press releases over time. But the real results came not from the press releases, but from newspaper articles. For one, approximately 2,000 guns “walked” down to Mexico through the operation, with the Mexican government none the wiser. Moreover, Mexican law enforcement recovered three\footnote{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, \textit{Third Gun Linked to “Fast and Furious” Identified at Border Agent’s Murder Scene}, FoxNews.com, Sept. 9, 2011, available at http://www.foxnews.com/politics/2011/09/09/exclusive-third-gun-linked-to-fast-and-furious-identified-at-border-agents/} 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 just being found at the crime scene are obvious. So obvious, in fact, that the Congressional House Committee on Oversight and Government Reform began an investigation into its linkage with Operation Fast and Furious.\footnote{U.S. Congress, Joint Staff Report, \textit{The Department of Justice’s Operation Fast and Furious: Accounts of ATF Agents}, 112\textsuperscript{th} Congress, June 14, 2011 (hereinafter Accounts of ATF Agents); U.S. Congress, Joint Staff Report, \textit{The Department of Justice’s Operation}
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.” 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.” Other ATF agents received promotions or transfers, while the 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.

B. Typical Investigative Operations

Despite the problems discussed in the sections above, the ATF and DOJ still possess methods to investigate and prosecute firearms offenses in a more limited context. Other commentators, including Congressman Darrell Issa and various journalists, have already argued that the ATF failed to take appropriate investigatory actions during their operations that endangered lives in both Mexico and the United States. And clearly ATF and DOJ failed to use a number of investigatory techniques and methods at its disposal to ferret out firearms violations and gather evidence for prosecution under the admittedly weak firearms

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

156 Id. Some may claim this is a promotion (mainly civil litigators), but most criminal prosecutors would not view this as a promotion. At least not any of the ones that I know. See also Sari Horwitz & Jerry Markon, *ATF head Kenneth Melson reassigned in shakeup following gun-trafficking probe*, WASH. POST, Aug. 30, 2011, available at http://www.washingtonpost.com/politics/atf-head-kenneth-melson-reassigned-amid-gun-trafficking-probe/2011/08/30/gIQAjALppJ_story.html.

trafficking statute. In a typical gun trafficking investigation, ATF agents have a wide variety of techniques to gather prosecutorial evidence against traffickers, and a number of these investigatory techniques are addressed briefly below.

1. **Brief Investigatory Stops (Terry Stops)**

Undoubtedly, ATF agents have authority to engage in brief, investigatory stops of persons or vehicles based on reasonable suspicion.\(^{158}\) ATF agents can engage in brief, temporary seizures of persons or vehicles once they have reasonable suspicion that the subjects are trafficking in firearms (or carrying firearms). Often, agents will stop a person or vehicle based on reasonable suspicion and will conduct a swift investigation to dispel that reasonable suspicion, thereby allowing the target to go on their way. In this manner, however, agents are able to identify individuals (using driver’s licenses or other methods),\(^{159}\) and may possibly place GPS trackers on the vehicle for surveillance purposes.\(^{160}\) These brief *Terry* stops allow agents to gather information and

\(^{158}\) 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 a period of time that it takes to dispel that reasonable suspicion. *Id.*

\(^{159}\) 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.

\(^{160}\) 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*, No. 10-1259, 556 U.S. ___ (2012). The constitutionality of GPS tracker use was argued before the Supreme Court on November 8, 2011, in *United States v. Jones*. 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 publically accessible part of the automobile (and placed while the automobile is publically accessible) was not a violation of a person’s expectation of privacy and thereby not a violation of the Fourth Amendment. *United States v. Pineda-Moreno*, 591
continue their investigation, even if they do not result in a seizure of the firearms or arrests of the targets. As noted below, the case agents (and the prosecutor) in Operation Fast and Furious refused to allow agents to conduct these brief, investigatory stops for information gathering. The brief investigatory stop do not have to be punitive in nature, but if done right, will not tip off the traffickers that they are being investigated (especially if done far from the gun-buy).

2. **Wall Stops**

Another investigative technique that dovetails on *Terry* stops is a “wall stop.” A wall stop is a vehicle (or person) stop based on a criminal (or moving) violation, wherein the agent actually has reason to believe that other criminal activity is currently going on. The best example of a wall stop occurs during a Title III (or the 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). 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.\(^1\) During the stop, the

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\(^1\)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 a legitimate stop based on a traffic violation (or other legitimate reason), the actual motivations of the officer involved generally cannot be considered.

official will conduct a normal traffic stop and, usually, probable cause develops for a vehicle search.\footnote{Invariably, wall stops work well only if the local law enforcement official has a narcotic detector dog (“NDD”) handy or close by, because once that NDD alerts to the vehicle for the presence of drugs, there is probable cause to search (albeit with some small caveats).}

With a properly conducted wall stop, agents are generally able to conceal an ongoing investigation. As noted below, it appears that ATF and DOJ concerned itself with operational security, to the point of not informing ATF’s own attaché placed in Mexico.\footnote{\textit{Fueling Cartel Violence}, supra note 153, at 27-33.} Generally, wall stops allow investigations of persons 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 enforcement agencies involved and generally as long as the prosecutors involved are not part of the same organization). The use of wall stops would have enabled agents to continue to conduct its operations in Operation Fast and Furious while at least having some defendants prosecuted on the state side (and then having those persons ultimately wrapped up into the federal case after ATF finally took down its investigation).

3. \textit{Border Stops}

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

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 heading to Mexico. As noted in other literature, the vast majority of firearms trafficking generally occurs at the ports of entry, whereas drug and alien smuggling occurs both at the ports of entry and in-between the ports. Therefore, southbound border checkpoints at the ports of entry, especially targeting certain automobiles (including the target vehicles), would have likely yielded the contraband firearms.

It is important to note that although contraband firearms may be found on the target individuals, the agents and prosecutor did not then need to 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, doing that a number of times would have yielded both the firearms (thereby preventing the firearms from traveling to Mexico) and provided a goldmine of information for their investigation. Given that the ATF agents had a wiretap going during the investigation, they likely could have learned more information based off the calls

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

165 There are remedies to this seizure; the federal government generally indicts the firearms and subjects them to court proceedings and anyone may contest the seizure. To contest the seizure, however, one has to assert a property interest. In the many years of firearms seizure at the border, there has not been a single case of anyone contesting the seizure of such weapons.
after the firearms seizures and expanded their target ring.\textsuperscript{166} In any event, with the use of outbound border searches and seizures, ATF and DOJ might have thwarted large numbers of firearms crossing the border while continuing to keep their investigation intact.

4.  \textit{Lures}

All of the techniques described above are helpful for gathering evidence, but what techniques are available for securing targets that are not within the United States? Extraditions are an approved technique,\textsuperscript{167} and the Mexican government now allows extradition in much greater numbers than before. While extradition is generally approved, it can often take a long time based on 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.\textsuperscript{168} 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 to travel to a

\textsuperscript{166} Of course, I recognize the alternative to this argument as well, 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 for those phones. Such an argument necessitates the development and increased use of roving wiretaps, a rarely discussed law enforcement tool. \textit{See} Stewart M. Young, \textit{Targeting the Person: Roving Wiretaps and the Changing Nature of Electronic Surveillance} (working paper) (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).


\textsuperscript{168} \textit{See} Dep’t of Justice, U.S. Attorney’s Manual, § 9-15.630, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm#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.
third country (that allows extradition) or to come 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.\footnote{Id.} Sometimes a lure may involve the use of confidential informants, and often these informants may provide the target defendant with falsified documents so that they can travel to the United States (and get caught at the border as they come into the United States with false documents).\footnote{Given the DOJ’s role in the lure, the DOJ never prosecutes someone for use of the fake documents that brought that person into the country. Clearly that would add insult to injury.} Once someone is within the jurisdiction of the United States, ATF agents then may arrest him or her for the firearms trafficking activities.

All of these techniques described above do not appear to have been used by the ATF in Operation Fast and Furious, but they could have helped to stem the flow of firearms into Mexico while not necessarily taking down the entire investigation.

C. Clear Issues Resulting from the Operations

One might argue that Operation Fast and Furious had potential to make a dent in firearms trafficking in the southern United States. Prior to initiating this operation, ATF agents identified a number of the straw purchasers involved in the operation.\footnote{Accounts of ATF Agents, supra note 153, at 5, 25, 44.} 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 34 persons accused of engaging in straw purchases to buy hundreds of weapons.\footnote{Bruce Zagaris, Federal Indictment Against 17 Persons for Trafficking Firearms to Mexican Drug Cartels, INT’L ENFORCEMENT L. REPT. (Jan. 2011); Dep’t of Just., U.S. Attorney’s Off., Arizona, Press Release: Grand Juries Indict 34 Suspects in Drug Firearms Trafficking Organization, Jan. 25, 2011, available at} The main indictment, the Avila indictment, included 34...
counts of “False Statements in Connection with the Acquisition of Firearms” – constituting the “straw purchaser” counts of the indictment.\(^\text{173}\) After a year of running an operation and the sale of approximately 2,000 firearms, the U.S. Attorney’s Office basically prosecuted only straw purchasers – albeit a number of them – but failed to actually prosecute and disrupt a “major firearms trafficking organization.” But given the state of the federal firearms trafficking statute, one may argue that the ATF and the DOJ constructed the best case they could under the existing framework. This demonstrates the inherent problem with the existing framework, and 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 be fruitful for investigating firearms violations, but these operational techniques does 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 did not rise to its potential by using approved investigative techniques, but the lack of a firearms trafficking statute also forced ATF to cobble together firearms charges in a haphazard manner. If ATF and DOJ actually had a statute the criminalized true firearms trafficking, its operations (and the extraterritorial effects of its operations) would have greater affect on actually catching and prosecuting firearms violations. I address a more comprehensive framework below.

V. 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 Calderon. At that press conference, President Obama highlighted the United States’ responsibility to 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 Calderon 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.\footnote{Dep’t of Just., Strategy to Combat Transnational Organized Crime at 15 (July 2011), available at http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf.}

Clearly, the Obama Administration (and the Bush Administration before it) recognizes the problems inherent in southbound firearms trafficking. To that end, President Obama’s call 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 organized criminal networks.\footnote{Id.} Indeed, that strategy touts the “increased emphasis on stemming these outbound flows” of weapons and cash.\footnote{Id.} It notes the deployment of “outbound teams” within U.S. Customs and Border Protection, screening outbound vehicle traffic for weapons and bulk cash shipments, as well as greater resources for “the integrated Border Enforcement Security Task Forces” to investigate cross-border crimes. \footnote{Id.} 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.”\footnote{Id.} What is missing from this July 2011 publication is any discussion of implementing a useful and effective domestic firearms trafficking statute – something that might actually help combat gunrunning and the rush of firearms traveling southbound to Mexican drug cartels.\footnote{One might argue that the Strategy’s statement that the Obama Administration will “work with Congress” might indicate a desire to affect an actual firearms trafficking statute with meat. It is clear, however, that the Administration does not view that as a priority. One of the proposed actions from the Strategy includes: “Work 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: “Seek 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.} 

A. An Actual “Firearms Trafficking” Statute

scholarship on firearms or firearms trafficking.\textsuperscript{181} A number of policy groups provide data and lobbying efforts regarding firearms trafficking as well.\textsuperscript{182} When the subject of guns and Mexico arises, there are numerous calls to use the Merida Initiative as a backbone to curb the violence in Mexico.\textsuperscript{183} As noted previously,

economic literature on firearms trafficking to Mexico, and on firearms trafficking in general, is also available. And furthermore, there are myriad academic discussions relating to violence in Mexico and calls for drug reform. Yet, what is lacking is any discussion about the currently impotent firearms trafficking statute, or any argument for construction of such a statute based upon the likely (and positive) extraterritorial affect it would have on drug violence in Mexico.

1. **Mirroring Drug Trafficking Statutes**

One should ask, then, what might a true firearms trafficking statute look like? First, it would not include the “engaged in the business” prong. Clearly, as demonstrated above, that is subject to a lot of discussion, analysis and interpretation. And a look at the federal drug statutes also fails to reveal any such prong. Indeed, the federal drug trafficking statutes are fairly self-explanatory. Those two statutes, importation and distribution/possession with intent to distribute, make it a federal crime to engage in virtually any activity involving illicit narcotics.

Title 21, U.S.C. § 952 governs the importation of a controlled substance into the United States. For Schedule I and II controlled substances, it states, in relevant part:

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186 Hoskin, supra note 40.
187 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 97; Editorial, supra note 151.
188 See supra note 79–97.
189 See 21 U.S.C. §§ 952 and 960 (Importation and Penalties); 841 (Possession with Intent to Distribute).
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 II . . .

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.” It would need to include a conspiracy section, and an attempt section, given that conspiracy to traffic in firearms would likely target the most responsible individuals 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 of firearms).

This approach has several advantages and disadvantages. In the advantage category, it is clean, straightforward, and may have fairly easy application. 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 would also provide those involved in the legitimate business of exporting firearms a cause for concern, but this should be alleviated by including a “legal traffickers” exemption.

The second drug trafficking statute, 21 U.S.C. § 841, may also have efficacy as a firearms trafficking statute. That statute reads, in relevant part:

(a) . . . Except as authorized . . . it shall be unlawful for any person knowingly or intentionally—

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190 21 U.S.C. § 952. Title 21, United States Code, Sec. 960 lays out the penalties for importation. (This is why prosecutors charge 21 U.S.C. §§ 952 and 960 when they charge importation; the possession with intent to distribute statute, however, includes the penalties. See 21 U.S.C. § 841.) Additionally, 21 U.S.C. § 953 governs the export of controlled substances. It includes a host of exceptions, and therefore the importation statute is simpler.
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . . 191

A firearms trafficking statute along these lines could mirror the 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.” For “legal traffickers” there would clearly need to be an exception, and the normal conspiracy and attempt sections would also be important.

As to this approach, the NRA and Second Amendment advocates would clearly voice concerns. The current firearms regime allows for private parties, rather than just “legal traffickers,” to sell their firearms to anyone (within reason) and not even report those sales. A statute that criminalizes the sale of such firearms without being a “legal trafficker” would likely cause a firestorm of public controversy. It is important to at least broach the subject, but even the current administration would never go this far. Accordingly, when looking at the drug trafficking statutes, mirroring firearms trafficking law off the importation statute, rather than the distribution/possession with intent statute, would at least be more politically feasible (and practical).

2. Extending the Statute Through a Focus on Prohibited Person Trafficking

There is another approach on the horizon to amend the firearms trafficking law to make it more efficacious. On July 14, 2011, Congresswoman Carolyn Maloney (D. NY), introduced H.R. 2254, entitled “Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011.”192 The remarks on this bill discussed the drug violence in Mexico and the concerns over hamstrung law enforcement

192 Information available at http://thomas.loc.gov/cgi-bin/bdquery/D?d112:21.:/temp/~bdMT4X.
efforts to combat firearms trafficking.\textsuperscript{193} Congresswoman Maloney specifically noted the concerns of law enforcement officials arising from the House Oversight and Government Reform Committee hearings (the Issa Hearings on Operation Fast and Furious), about including “a specific firearms trafficking provision in the criminal code.”\textsuperscript{194} Given ATF’s request for reports on multiple long gun 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 by way of H.R. 2254.\textsuperscript{195}

The text of H.R. 2254 amends Title 18 of the United States Code by adding Section 932 to the firearms trafficking statute.\textsuperscript{196} It reads:

\textbf{§ 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.\textsuperscript{197}

The proposed bill also includes language for “organizer,” “conspiracy,” and a definition section.\textsuperscript{198} Finally, it provides maximum penalties for violation 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

\textsuperscript{194} Id.; see also supra note 97.
\textsuperscript{195} Maloney Speech, supra note 193
\textsuperscript{196} Stop Gun Trafficking and Strengthen Law Enforcement Act, H.R. 2254, 112\textsuperscript{th} Cong. 1\textsuperscript{st} Sess., available at http://www.gpo.gov/fdsys/pkg/BILLS-112hr2554ih/pdf/BILLS-112hr2554ih.pdf.
\textsuperscript{197} Id.
\textsuperscript{198} Id.
person occupies a supervisory role.\textsuperscript{199} Alas, for a conspiracy violation, the proposed legislation includes only a ten-year maximum penalty,\textsuperscript{200} even though the conspiracy charge would likely be the most useful (and used) by ATF agents.

Congresswoman Maloney’s bill has merit and advances the ball up the field when discussing international firearms trafficking. H.R. 2254 criminalizes the provision of firearms to other persons that should not have them, but does not necessarily include a transnational element to it; such a transnational element would target the drug cartels seeking these firearms and likely have at least some deterrent effect.

The NRA argument against this bill proceeds in the following manner: the Second Amendment provides for the right to bear firearms, and therefore for the right to dispose of those firearms, at least in a lawful manner. Criminalizing the transfer or distribution of firearms to another person and then penalizing the transferor based on the transferee’s intent, would be unfair. Indeed, the “intent or will to use” requirement would likely be quite difficult for prosecutors to prove. Other than the transferee explaining his or her illegal purpose for the weapon, and recording that explanation, it would be difficult to prosecute under § 932(a)(2). And proof problems are generally among the main reasons for declination of prosecutions for firearms violations.\textsuperscript{201}

Ultimately, mirroring the federal firearms trafficking statute off the drug importation statute has the most merit. The focus on prohibited persons, while valid, does not carry the same ability to prosecute as a focus on the travel of firearms. While not a strict liability crime, the focus on traveling firearms generally is easier to prove than the focus on the intent by the prohibited person who receives the firearms.

\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Project Gunrunner, \textit{supra} note 15, at 63-66.
The Arms Export Control Act ("AECA") provides a number of requirements for export and imports of defense articles and services. It falls under Title 22 of the United States Code, which is entitled "Foreign Relations and Intercourse." As such, it carries criminal penalties, while it is not part of the United States criminal code in either Title 18 (Crimes and Criminal Procedure) or Title 21 (Food and Drugs, including the drug trafficking statutes). It requires export licenses for export of certain defense articles, and also requires 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." It further implemented the International Traffic in Arms Regulations ("ITAR") as the set of regulations one must follow when considering export of defense articles. And willful failure to comply is subject to a 20 year maximum sentence (along with the possibility of a $1 million fine).

Mainly, ITAR prohibits export of certain defense articles and technical data, including the brokering of defense articles by persons in the United States and all U.S. persons abroad. The statute and regulations generally target defense manufacturers (and spies), as the State Department is charged with

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202 Not to be confused with the African Elephant Conservation Act (also AECA). 16 U.S.C. §§ 4223(1).
204 Title 22, United States Code.
205 Title 18, United States Code.
207 Id. at (a)(2).
210 ITAR §§ 120.6, 120.9, 120.10, 120, 13-15, 120.17, 129.2(b).
ensuring compliance with AECA and administering ITAR. 211 Generally, the articles that are controlled are arms and munitions, rather than small firearms (and the guns of choice among the Mexican gun cartels). 212 While small arms are included on the munitions list, the sentencing guidelines are exceedingly low for small arms and if the offense involves less than two firearms. 213 Additionally, given that AECA is placed in Title 22, line federal prosecutors are generally not informed about these potential charges. Nor are many agents involved in prosecuting crimes under Title 22. 214

AECA and ITAR might provide some utility for prosecuting firearms trafficking to Mexico, given that its structure provides criminal penalties for violating its provisions. 215 Of course, not using ATF agents for prosecutions of

211 Id. § 120.12. The State Department’s Directorate of Defense Trade Controls (DDTC) administers ITAR. Id.
212 See 22 C.F.R. § 121.1 (known as “The United States Munitions List”).
213 United States Sentencing Guidelines (U.S.S.G.) § 2M5.2(a)(2). The Base Offense Level is a 14 if the offense involves “only (A) non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed two.” Id. At least in 2008, the Base Offense Level was a 14 if the offense involved less than ten firearms. United States v. Sero, 520 F.3d 187, 190 (2d Cir. 2008).
215 22 U.S.C. § 2278(c) (providing a maximum of 20 years in prison, and a maximum $1,000,000 fine, or both, for a willful violation of § 2278 or any rule or regulation issued under § 2278 (which includes ITAR)). Interestingly, when Congress
firearms offenses appears to be slightly limiting, given that ATF is generally the expert agency regarding firearms and its traffic to Mexico and other countries. The low penalties for non-automatic firearms trafficking also seems like an impediment towards 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 is controlled by the State Department. As such, while the AECA and ITAR might ultimately provide fodder for prosecuting firearms trafficking to Mexico, it appears that ATF is generally not involved in these cases, nor does it appear that run-of-the-mill southbound firearms trafficking is generally considered for prosecution under these statutes.

B. Why Multilateral International Approaches Are Not Enough

The Obama Administration (and the Bush Administration before it) 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 by staging drug cartel raids emanating from the United States. The low penalties for non-automatic firearms violations, especially for non-automatic weapons, likely cause this statute’s use to suffer for “normal” Mexico-bound firearms trafficking. A very deep analysis of this statute and its lack of use for “normal” firearms trafficking would benefit this area of the law.

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216 22 U.S.C. § 2278(a) & (b).
217 I recognize that this section could be developed into its own stand alone article about the failure of the AECA and ITAR to be used by ATF to prosecute firearms trafficking. It is likely inter-agency footprints are somewhat to blame for this problem (CBP, ICE and State Department likely have domain 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, especially for non-automatic weapons, likely cause this statute’s use to suffer for “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.
from the United States’ side. 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. 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.” In addition, the United States currently flies American Predator and Global Hawk drones over Mexico to gather information and intelligence on drug manufacturing facilities and the highly trafficked smuggling routes. The United States does not employ just unmanned drones, but has sent manned flights across the border equipped with electronic eavesdropping equipment to intercept cellphone communications. “And 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.”

While these actions and coordination between the United States and Mexico are unprecedented and certainly beneficial, they carry their own complications. In August, the Deputy Secretary of State “walked into that storm during a visit to Mexico . . . and strongly defended the partnership” that is currently deployed by the two governments. And the U.S. government is now taking great pains to emphasize that it is not conducting “joint operations” with the Mexican government.

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219 Id.
220 Id. Of course, the joint operation status begs the question about evidentiary issues should the raids result in prosecutions on the United States’ side.
221 Id. at A3.
222 Id. Again, the use of these electronic interceptions in federal (or state) prosecutions is likely an open question. It appears, however, that these interceptions are provided to the Mexican authorities, rather than used for U.S.-based cartel prosecutions.
223 Id.
224 Id.
225 Id.
There is an interesting historical corollary to these operations, given that the United States and Mexico worked together in a similar manner during the Clinton Administration. In the late 1990s, the DEA helped Mexico combat the Tijuana cartel for a brief time by arranging vetted Mexican police to stage their raid operations out of Camp Pendleton in San Diego.\footnote{Id.} 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.”\footnote{Id.}

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 violence in Mexico.\footnote{GAO Firearms Trafficking, supra note 7, at 13.} Generally, INL “oversees funding provided to assist Mexico in its fight against organized crime under the Merida Initiative.”\footnote{Id.} While the Merida Initiative provides funding to “strengthen partner countries’ capacities to combat organized criminal activities that threaten the security of the region,”\footnote{Id.} the Initiative does not encompass a prosecution strategy. Nor does the Initiative bolster the requirements of each individual country to better prosecute criminal firearms trafficking throughout the region. 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 new alternative legal frameworks that may be more effective.

Another wrinkle to the multilateral approach to curb firearms trafficking is the perceived lack of initiative on the Mexican side.\footnote{Project Gunrunner, supra note 15, at vii.} Beginning in 2006, one of the cornerstones of Project Gunrunner consisted of eTrace use for guns recovered

\begin{thebibliography}{9}
\footnotetext[226]{Id.}
\footnotetext[227]{Id.}
\footnotetext[228]{GAO Firearms Trafficking, supra note 7, at 13.}
\footnotetext[229]{Id.}
\footnotetext[230]{Id.}
\footnotetext[231]{Project Gunrunner, supra note 15, at vii.}
\end{thebibliography}
in Mexico.\textsuperscript{232} The Inspector General’s report following 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.\textsuperscript{233} And the trace requests that Mexico provided to the ATF generally lacked crucial gun data, despite the fact ATF provided training in firearms identification.\textsuperscript{234} Additionally, the Inspector General’s review of Project Gunrunner “determined that Mexican law enforcement authorities do not view gun tracing as an important investigate tool.”\textsuperscript{235}

There are two likely reasons provided for this lack of excitement about gun tracing on behalf of the Mexican authorities: first, the ATF trace requests did not provide other investigative material related to the trace requests (such as criminal histories of target subjects), and second, some ATF officials believed that they did a poor job of relating the importance of gun tracing to their Mexican counterparts.\textsuperscript{236} Indeed, one can imagine the lack of initiative from the Mexico side on gun tracing when the ATF fails to provide relevant and helpful investigative material resulting from the gun tracing. It is hard to get excited about sharing information when only one side is involved in the sharing. And it appears that the ATF generally has some problems when it comes to inter-agency cooperation and sharing of relevant information.\textsuperscript{237} Reluctance and lack of enthusiasm on behalf of the Mexican authorities is hardly surprising in this instance.

\textsuperscript{232} \textit{Id.} at vi-vii, 73-76.
\textsuperscript{233} \textit{Id.} at vii. \textit{See also} GAO Firearms Trafficking, \textit{supra} note 7.
\textsuperscript{234} Project Gunrunner, \textit{supra} note 15, at vii. Interestingly, it appears that successful trace requests actually declined since Project Gunrunner began. \textit{Id.} at 75-76
\textsuperscript{235} \textit{Id.} at vii, 78-79.
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} \textit{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. \textit{Id.} at 67-68.
Furthermore, there is a concern about corruption in Mexico, thereby significantly hampering U.S. law enforcement efforts to combat firearms trafficking. The GAO’s study indicated, “[a]ccording to Mexican government officials, corruption pervades all levels of Mexican law enforcement—federal, state and local.”238 The GAO study discussed several cases involving both federal and state/local Mexican law enforcement engaging in kidnapping or murder, thereby necessitating the Calderon Administration’s use of the Mexican military for a number of drug/firearm interdiction operations.239 The Calderon Administration attempted to enact reforms and tried to root out corruption to better facilitate work with the U.S. government.240 Public corruption will always be a problem in coordinating firearms (and drug) interdiction on both sides of the border, but it is important to note that both U.S. and Mexican law enforcement 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 its full potential.241

Finally, the initial enthusiasm over the Merida Initiative’s ability to spur both interagency and inter-country cooperation clearly waned given the more recent agency results over the past four years. Evidencing that enthusiasm, in

238 GAO Firearms Trafficking, supra note 7, at 50-51.
239 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.” Id.
240 Id. For instance, in 2006, the administration suspended 953 federal employees and dismissed 945, through investigations into public corruption. Id.
241 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,” at 16, June 2011, available at http://www.feinstein.senate.gov/public/index.cfm?Fuseaction=Files.View&FileStore_id=beaff893-63c1-4941-9903-67a0dc739b9d. However, the United States is already in compliance with CIFTA, thereby not facilitating any real changes in U.S. domestic laws, which are responsible for firearms traveling to Mexico.
2008, Ambassador Marisa R. Lino stated, “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.” Indeed, according to her, “ATF, ICE and CBP agree upon broad principles as part of an interagency strategy to identify, investigate, and interdict cross-border trafficking of firearms and ammunition to Mexico.” 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 its operation. While many expected the Merida Initiative to create a culture of exchange and cooperation to combat firearms trafficking, the passage of four years belies that expectation given the results thus far.

C. Passage of Another Federal Assault Weapons Ban

As noted above, the expiration of the FAWB appears to have affected firearms-related violence in Mexico, at least through 2006. The Dube study demonstrated that homicides increased by 40% in Mexico border municipalities within 100 miles of states that did not have their own state-imposed assault weapons ban. The data from that study also demonstrated similar increases in gun-related crimes and prosecution, thereby exhibiting the likely efficacy, on some

243 Id. at 17. Lino notes that, “Discussions are ongoing to address more detailed procedures regarding the coordination of multi-agency operations and information sharing.” Id. Obviously, these discussions did not result in much operational cooperation, at least in Operation Fast and Furious.
244 Supra notes 134-156 and accompanying text.
245 See supra notes 102-133 and accompanying text.
246 Chicoine, supra note 14, at 22; Dube, et al., supra note 14, at 26-27.
247 Id.
level, of the FAWB. This study therefore begs the question: Why might the imposition of a similar ban not have the same effect again, lessening the drug-related violence in Mexico?

Imposing another FAWB in the current political climate appears to be a non-starter. Indeed, the NRA and the general tenor of the Republican Party appears to be against further curtailment of gun rights for citizens. At the beginning of the Obama Administration, Attorney General Eric Holder indicated some support for reinstating the assault weapons ban. That support appeared tempered by other democratic lawmakers, and any push for enactment of another FAWB has not received very much support.

Additionally, the Supreme Court has recently strengthened the legal regime surrounding the Second Amendment and the ability of citizens to legally possess firearms. Using the Second Amendment, the recent cases of D.C. v. Heller and McDonald v. City of Chicago advance the rights of citizens to possess weapons in a legal manner. While neither Heller nor McDonald completely eviscerate the possibility of a federal ban on certain types of firearms, these cases do not help the gun control position in a significant manner.

There does appear to be a silver lining in the Heller opinion, however, that provides some fodder for a future FAWB. In Heller, the Court noted an

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249 Id. (quoting House Speaker Nancy Pelosi as stating, “On 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. Journal Online, Mar. 13, 2009, available at http://online.wsj.com/article/SB123690314709013801.html
250 Although there does appear to be more support recently given the drug violence in Mexico. See Feinstein, et al., supra note 241, at 4, 13-14.
251 554 U.S. 570 (2008) (holding that DC’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).
252 130 S.Ct. 3020 (2010) (holding the Fourteenth Amendment incorporates the Second Amendment right to keep and bear arms onto the States).
“important limitation on the right to keep and carry arms,” specifically, “the sorts of weapons protected were those ‘in common use at the time.’” Citing to numerous authorities, the Court suggested that this limitation had fair support in historical tradition. It then remarked on the argument put forward relating to the Second Amendment right and militia service -- that “weapons that are most useful in military service--M-16 rifles and the like—may be banned.” 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 cop-killing handguns). To specifically discuss the M-16 rifle, a military style rifle like the AK-47 and AR-15, and to note that such a weapon is not a protected weapon “in common use at the time” demonstrates that Heller could not be used to oppose a future FAWB.

While another FAWB may provide some relief to those suffering from drug violence in Mexico, it does not go all the way. A true firearms trafficking statute would provide the tool needed by ATF and DOJ to construct actual firearms cases with greater scope and an international bite. While the FAWB would shut off the spigot of weapons favored by the drug cartels, it would not eliminate all of those weapons. Failing to include appropriate prosecutorial tools to combat southbound firearms trafficking would only signal an interest in eliminating certain weapons, rather than focusing on curbing all weapons traveling to Mexico. The FAWB clearly deals with a subset of weapons that travel to Mexico and

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253 Id. at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).
254 Id. (citations omitted).
255 Id.
256 See supra note 13.
257 Heller, 554 U.S. at 627.
258 See supra note 13. 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, 9mm, .45 and the 5.7 mm., which would not be subject to a new FAWB.
wreak havoc among the 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*, “Self-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.”\(^\text{259}\) *McDonald* later notes, “*Heller* makes it clear that this right [of self-defense] is ‘deeply rooted in this Nation’s history and tradition.’”\(^\text{260}\) Any attack on a firearms trafficking statute will no doubt invoke such lines from *McDonald* and *Heller* to ensure that that the right to bear (powerful and deadly) firearms is not infringed. Indeed, Glenn Reynolds mentions as much, arguing that *Heller* and *McDonald* allows for gun ownership (and transportation of guns, and transfer of guns) to be a more “constitutionally protected act” and therefore laws restricting gun rights will be “ripe for close judicial scrutiny.”\(^\text{261}\)

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

\(^{259}\) *McDonald*, 130 S.Ct. at 3036 (citing and quoting *Heller*, 554 U.S. at 599).


\(^{261}\) Reynolds, *supra* note 181, at 254.
laws imposing conditions and qualifications on the commercial sale of arms."

The Heller Court also notes other helpful commentators that relate certain limits on the Second Amendment right. “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.”

Additionally, other Court precedent cedes power to an argument in favor of a firearms trafficking statute. 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 (and especially countries that ban individual possession of firearms) would not be “bearing arms for a lawful purpose.” Trafficking in firearms that may be lawfully possessed in the United States, and sending them down to the Republic of Mexico (or any other country) without appropriate export documents, does not infringe on a person’s right to bear arms. While the right to bear arms extends to the States through the Fourteenth Amendment, the right to dispose of those firearms in an extraterritorial manner would not be a lawful purpose, at least in accordance with United States v. Cruikshank. Accordingly, any argument proffered by the NRA or other gun-rights organization immediately loses its appeal when discussing an unfettered right to dispose of lawfully purchased domestic weapons transnationally in contravention of another country’s firearms laws.

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262 McDonald, at 3047 (quoting Heller, 554 U.S. at 626-27). 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.
263 Heller, 554 U.S. at 626 (citations omitted).
264 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.
266 Id.
While some might argue that the gun lobby arguments have validity, in terms of non-legal trafficking exports, these arguments fail. 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 argument to be made about the current firearms trafficking is whether Mexico can sue the United States for providing an easy method to traffic the firearms into its country. For the gun lobby, it is easy to argue about gun rights within the country, but these arguments are unpersuasive when used to argue for the 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

In 2009, in response to heightened violence in Mexico and complaints by a lack of data on the issue, certain representatives of Congress asked the Government Accountability Office to conduct a study on firearms trafficking to Mexico.\(^267\) The Report remarked on several challenges faced by U.S. law enforcement in its efforts to stem illicit sales/transfers of firearms to Mexico. It noted “certain provisions of some federal firearms laws present challenges to U.S. efforts according to ATF officials.”\(^268\) Unfortunately, the provisions it identified included restrictions on collection and reporting of firearms purchases, lacking background checks on private sales, and limits on multiple gun purchasing reporting requirements.\(^269\) The report further discussed corruption issues, and the

\(^{267}\) GAO Firearms Trafficking, *supra* note 7, at 3.
\(^{268}\) *Id.* at 3.
\(^{269}\) *Id.* It also noted concerns with a lack of coordination between ATF and ICE and a failure of analysis and reporting of relevant data. *Id.*
lack of a “bilateral, multiagency arms trafficking task force.”

But the GAO report did not discuss the lack of a firearms trafficking statute--the glaring impediment to cross-border firearms trafficking interdiction.

Since the news broke on Operation Fast and Furious, Congress has conducted numerous hearings and issued several reports relating to the ATF’s (and DOJ’s) activities. Congressional uproar, especially on the Republican side, is legion, especially as there are numerous calls for Attorney General Holder to resign. 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. Rather, more than anything, it appears that poor oversight occurred.

What is telling, however, is that the misguided gunwalking effort has not spurned a clarion call for revamping the federal firearms trafficking statute in order to more effectively combat guns traveling to Mexico and curb the existent drug violence. Rather, instead of viewing this as an opportunity to provide law enforcement with better tools to fight firearms trafficking, many members of Congress complain about ATF’s gunwalking tactics and call for resignations. Indeed, numerous commentators have gone as far as to claim that the Obama

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270 Id. at 4.

271 For instance, Attorney General Eric Holder has testified on Fast and Furious six times, including before both the Judiciary Committee and Committee on Oversight and Government Reform (Issa Committee). The Issa Committee has issued several reports on their findings. See Joint Staff Report, The Department of Justice’s Operation Fast and Furious: Fueling Cartel Violence (July 26, 2011), available at http://oversight.house.gov/images/stories/Reports/FINAL_FINAL.pdf; Joint Staff Report, The Department of Justice’s Operation Fast and Furious: Accounts of ATF Agents (June 14, 2011), available at http://oversight.house.gov/images/stories/Reports/ATF_Report.pdf; Fatally Flawed, supra note 16. 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 and specifically Darrell Issa’s staff).
Administration instituted the gunwalking operations in order to alter federal firearms policy once those tactics backfired.\textsuperscript{272}

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, reporting requirements, and no actual firearms trafficking statute. All the shock of ATF’s actions in Fast and Furious does nothing to solve the current problem, which is that ATF does not have the prosecutorial tools to actually charge true firearms trafficking. Rather, Congress has been aware of the issues facing ATF for some time, at least since 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.\textsuperscript{273} Indeed, Congress has been aware that without a specific federal firearms trafficking statute, “ATF uses a wide variety of statutes to address criminal firearms trafficking” and that these statutes “carry relatively low penalties.”\textsuperscript{274} Indeed, Congress’ actions attacking ATF seems to be the very definition of “chutzpah,” when Congress complains about violence in Mexico, fails to provide ATF and DOJ with an appropriate statute to combat the problem, and then open congressional hearings regarding ATF subsequent poor tactical decisions. While it is clear that ATF acted inappropriately in Fast and Furious, the general tenor of Congress has not risen to the occasion and provided ATF and DOJ with the

\begin{footnotes}
\footnotetext{272}{Sharyl Attkisson, “Documents: ATF used ‘Fast and Furious’ to make the case for gun regulations,” CBSNews.com, Dec. 7, 2011, available at http://www.cbsnews.com/8301-31727_162-57338546-10391695/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.}
\footnotetext{273}{Project Gunrunner, \textit{supra} note 15, at 58-59.}
\footnotetext{274}{\textit{Id.} at 59-60.}
\end{footnotes}
necessary prosecutorial tools to stem firearms trafficking (and the resulting drug violence in Mexico).

VI. Analyzing Domestic Criminal Laws and Extraterritorial Affect: For Firearms Trafficking, Such Effects Should Receive Priority

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 into account these effects, but domestic criminal legislation is not an arena where such effects are touted, much less discussed. In two areas, however, such effects are considered, and firearms trafficking is the third area wherein such extraterritorial affect should matter. I address each in turn.

A. The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act criminalizes the actions of multinational corporations that engage in bribery in foreign countries. This is a completely separate statute from domestic bribery. It specifically targets bribery of foreign officials, and criminalizes conduct that occurs outside the United States for the benefit of a corporation doing business within the United States. The legislative history for the FCPA makes clear that corrupt foreign payments by U.S. companies severely impact the “image of American democracy abroad” along with hampering efficient function of the capital markets and impairing confidence in corporate financial integrity.\textsuperscript{275} Congress acknowledged that the widespread paying of foreign bribes by some U.S. firms tarnished the reputation and image of

\textsuperscript{275} S. Rep. 95-114, at 3-4 (May 2, 1977).
U.S. corporations, requiring a strong antibribery law to “bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.”

The legislative history of the FCPA indicates that its primary interest is to encourage appropriate activities by U.S. companies. It does not indicate that its primary interest is to ensure that historically corrupt countries alter their practices. Nor does it indicate that changing the way that U.S. corporations do business outside of the United States will lead to changes within the world economy or specific countries. Rather, the legislative history indicates that the FCPA is to restore international confidence in U.S. corporations and to boost American democracy’s image abroad. While one could argue that implementation of the FCPA is a perfect vehicle for measuring positive extraterritorial effects based on domestic criminal legislation, it appears that such statements are devoid of the legislative history. Therefore, the positive extraterritorial effects appear to be a happy coincidence, rather than an intentional affect.

B. The Arms Control Export 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 a completely new Act and implementing statute. For arms trafficking, the bill sought to “restructure U.S. arms sales policies to provide for increased congressional supervision,” including placing a $9 billion cap on defense articles and defense services sales by the U.S. government or

276 Id. at 4.
277 I recognize the argument of paternalism inherent in the stated benefits of the FCPA. It seems, however, that most can generally agree that government bribery is not something usually viewed as a benefit to a country’s economy. Accordingly, the paternalism counterargument does not carry much weight, when certain domestic criminal laws can be used to provide net positive benefits internationally.
commercial entities.\textsuperscript{279} The legislative history further examined the relevant discussion relating to why, how, and when certain arms transfers should be approved.\textsuperscript{280} Indeed, the reason for passing the AECA appears primarily dependent on “the importance which arms transfers have for our own national security” rather than as much of a primary concern for the instability that such transfers will provide by rogue transfers of arms into a foreign country.\textsuperscript{281}

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. . . “\textsuperscript{282} The House Report noted that this was “a reform measure” and remarked on the vast amount of security assistance it had provided to friendly foreign countries, in order to “provide for collective security” and help countries maintain their own internal security.\textsuperscript{283} Relating to commercial sales, “[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.”\textsuperscript{284}

By looking at the AECA’s legislative history in totality, Congress’ intent was to create a regime that allows for commercial imports and exports of defense articles under the control of the Executive branch.\textsuperscript{285} The AECA’s requirement

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\item \textsuperscript{279} \textit{Id.} at 8-9.
\item \textsuperscript{280} \textit{Id.} at 12-13. These considerations include, “What is the U.S. interest in helping to preserve that security? . . . An what are the consequences for us if we fail to respond?”
\item \textsuperscript{281} \textit{Id.} at 13.
\item \textsuperscript{282} \textit{Id.} at 9.
\item \textsuperscript{283} \textit{Id.} at 10.
\item \textsuperscript{284} \textit{Id.} at 7. Interestingly, there is no mention of illegal arms trafficking mentioned in the legislative history; the bill is aimed at commercial traffickers.
\item \textsuperscript{285} The Bill itself reveals this contention. 22 U.S.C. § 2751 indicates that the “Secretary of State, in consultation with the Secretary of Defense, shall conduct a
\end{itemize}
that the Secretary of State compile a report documenting the Act’s affect on “unemployment in the United States,” the “foreign policy of the United States,” and “the trade with foreign countries,” demonstrates the commercial realities of the AECA.\textsuperscript{286} Tellingly, there is no companion provision requiring the Secretary of State (or Attorney General) to examine the affect of the AECA on violence in foreign countries.

C. Firearms Trafficking

The legislative history of the Gun Control Act of 1968 demonstrates concern to federally regulate interstate firearms traffic.\textsuperscript{287} For instance, in the General Statement on the legislation, it notes that the “subject legislation responds to widespread national concern that existing Federal control over the sale and shipment of firearms (across) State lines is grossly inadequate.”\textsuperscript{288} On the issue of “long gun” regulation, the report notes that this legislation “is designed effectively to control the indiscriminate flow of such weapons [rifles and shotguns] across State borders and to assist and encourage States and local communities to adopt and enforce strict gun control laws.”\textsuperscript{289} Furthermore, the legislative history evidences a concern about importation of firearms, but fails to evidence any concern about the export of firearms (especially long guns and rifles).\textsuperscript{290} And 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, Section 218.

\textsuperscript{286} \textit{Id.}

\textsuperscript{287} H.R. Rep. No. 90-1577, at 3 (June 21, 1968).

\textsuperscript{288} \textit{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.

\textsuperscript{289} \textit{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.

\textsuperscript{290} \textit{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
close view of the legislation itself, in its entirety, never discusses exports of firearms or exporters of firearms.

Clearly, the Gun Control Act of 1968 demonstrates no intent on the part of Congress to regulate exports of firearms or any international outgoing 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 towards “unemployment,” “foreign policy,” and “trade.”291 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 using American-made or American-imported weapons.

D. Using Extraterritorial Affects as a Trigger for Legislation

As the legislative history discussion above demonstrates, generally, extraterritorial effects of domestic criminal statutes are not the driving force for passage of those statutes. Understandably, the passage of most domestic criminal statutes is not driven by its possible effect outside of the United States. But with firearms trafficking that should be a driving force, especially given the shocking death toll that continues only a few miles south of the border. While the effect on domestic firearms regulations would likely be negligible (except for extraterritorial firearms traffickers), the effect on the Republic of Mexico would be much larger. Providing the tools that ATF desperately needs to prosecute “real” firearms trafficking is paramount at this critical juncture.292 And passage of a true firearms trafficking statute that criminalizes the actual trafficking293 would allow

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292 See supra notes
293 See supra notes 180-217 and accompanying text.
ATF and DOJ to build cases 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 that be enough for consideration of passage for a statute? And if it is a consideration for passage, how much weight should it be given? At least in the context of firearms trafficking, such extraterritorial effect of a more robust firearms trafficking statute should be given great weight to counter the usual 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 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, there still exists the concern of spillover violence, which is a hybrid domestic and extraterritorial effect of the drug violence. 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. And finally, passage of a more robust firearms trafficking statute would likely alleviate the problems stemming from Operation Fast and Furious (or at least one would hope).

Passing a true firearms trafficking statute would receive much opposition from the gun lobby, but the extraterritorial affect argument should be enough to counter the usual arguments. If the United States is serious about trying to curb drug violence in Mexico, merely providing monetary and tactical support will not provide law enforcement and prosecutors enough tools to combat the problem on the northside. Rather, providing those tools will demonstrate the United States’ commitment to solving the problem; it will also actually result in prosecutions that

\[294\text{ See supra note 259-266 and accompanying text.}\]
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.

VII. 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. Not only is this a human rights issue ripe for U.S. involvement, but a valid fear of drug violence spillover into the United States. Such spillover violence has already occurred, albeit not on significant levels thus far, but the fear exists nonetheless. 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 ATF and DOJ can use effectively. The counterargument exists, however, that domestic criminal laws should not consider their extraterritorial effects as a primary concern. This Article lays out the reasons why such extraterritorial effects are important and should be highlighted as reasons for passage of certain domestic criminal laws. Indeed, 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 affect 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 domestic laws that have considerable effects internationally. Indeed, one of the major debates in Congress and among the courts is not the effect of domestic laws on other countries, but the use of international law in the interpretation of domestic laws. 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 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 firearms trafficking statutes discussed in this Article would alleviate some of the problems faced by law enforcement and prosecutors, and would stem the flow of firearms southbound to Mexico. While the lobbying efforts of the NRA and other organizations (and lawmakers) may make implementation of this statute difficult, a statutory-oriented approach would provide ATF and DOJ the tools to target firearms traffickers in a more efficient and straightforward manner. These statutes may also alleviate ATF’s (and DOJ’s) need to invent creative operations to target weapons trafficking, thereby avoiding potentially destructive practices such as “gun-walking” 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. The passage of a robust firearms trafficking statute, providing positive extraterritorial effects, is necessary for stopping Mexican drug violence, despite the likely very vocal opposition resulting 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 concerns over the passage of such a statute.