



HOW TO FIX A BROKEN BORDER: **HIT THE CARTELS WHERE IT HURTS**

PART I OF III

By Terry Goddard

SEPTEMBER 2011

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ABOUT PERSPECTIVES ON IMMIGRATION

The Immigration Policy Center's *Perspectives* are thoughtful narratives written by leading academics and researchers who bring a wide range of multi-disciplinary knowledge to the issue of immigration policy.

ABOUT THE AUTHOR

Terry Goddard completed his second and final term as Arizona's Attorney General in January 2011 and has reentered the private practice of law. A native of Tucson, Arizona and graduate of Harvard College, he was first elected Arizona Attorney General in 2002. Over 8 years in office, he focused on protecting consumers and fighting the organized criminal activities of the drug cartels. He made significant progress in attacking cartel money laundering, seizing approximately \$20 million and culminating in an historic \$94 million settlement with Western Union in February, 2010. He received the Kelly-Wyman Award for 2010, the top recognition given by his fellow Attorneys General. Terry's first job out of ASU law school in 1976 was prosecuting corporate fraud. During his legal career, he has handled a wide variety of cases from a challenge to a federal highway route to election law matters before the state Supreme Court. Before law school, he served on active duty in the Navy, retiring as a commander after 27 years in the Reserves. Mr. Goddard is currently teaching at Columbia Law School in the Attorney General Project and a graduate course entitled "The Art of Public Decision Making" at Arizona State University School of Public Affairs. He has been selected a Wasserstein Fellow at Harvard Law School and is a Senior Fellow at the American Immigration Council. Terry lives in Phoenix with his wife Monica and teenage son.

ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

Introduction

Both sides of the immigration debate agree that our southwest border is “broken,” but they have very different views as to why or how to fix it. On one side, immigration reform advocates point to a broken immigration system that forces immigrants into the hands of increasingly violent smugglers in order to make the trip to the United States. This side of the debate seeks to improve border security by taking border crossers who seek legitimate work out of the flow of unauthorized immigrants. But the opponents of immigration reform argue that we can’t act on reform until we first “secure the border.” The Obama Administration seems to have accepted this argument, ramping up spending on border enforcement and deporting record numbers as a down payment on immigration reform at some unspecified time in the future.

As the Attorney General of Arizona, I have been part of law enforcement on the southwestern border for most of the past decade. My office confronted border crime on an almost daily basis. From that view, it is clear that much of the “secure the border” debate is nonsense. Again and again, symbols trump reality, misinformation buries the truth. Programs like building a bigger border wall or enlisting police in the local enforcement of immigration laws are sold as ways to make the border more secure. They will not. In the latter instance, the “cure” could actually make the crime problem worse. Equally misguided is the idea that a force buildup alone can keep the border secure in the face of increasingly sophisticated smuggling organizations—the cartels.

Since improved border security is a common denominator in the immigration debate, both sides should be anxious to know what actually works. This paper is based on the assumption that sincere parties on both sides want to go beyond the rhetoric and the symbols. I believe a more effective border defense is possible, but not on the present course. Not by the Administration’s defense-only buildup of Border Patrol and National Guard on the border, and not by the huge investment in bricks and mortar or the quasi-military responses proposed by the Administration’s critics.

A more effective border strategy starts with the money; the torrent of cash pouring across the border into the cartel pocketbooks. Cartels are, first and foremost, business enterprises.¹ Sophisticated cartel organizations are formed not for any lust for power or to employ the bosses’ relatives, but because they maximize profits. Cartel agents do not threaten, terrorize, and kill because they love the work, or out of religious zeal. They do it because they are very well-paid. So, go after the money. Taking away the profit cripples the organization. Conversely, as long as the money from drug sales and human smuggling—which may total more than \$40 billion a year²—flows to the cartels, the violence in Mexico, the sophisticated smugglers crossing our border, and the perception that nothing is being done to defend the border will continue.

We can also do a much better job of taking the fight directly to the drug cartels using the full arsenal of law-enforcement methods. We can significantly reduce the number of illegal crossers and the amounts of illegal drugs smuggled, as well as the violence in Mexico. The answers are straightforward; the mystery is why they have not been taken up long ago.

How Do We Define “Success”?

We in Arizona know something about border problems. Roughly 380 miles of the 2,000-mile border with Mexico are in our state. The most rugged terrain of the whole 2,000 miles is in the Tucson Sector of the Border Patrol. With intensified border enforcement in California and most of Texas, Arizona has become the primary corridor for the smuggling of drugs, guns, money, and people. In the last few years, Arizona has emerged as the poster child for ineffective border defenses.

From my first days as Arizona’s Attorney General, I found it astonishing and frustrating that, in the face of the huge smuggling problem, many of the steps law enforcement would normally take to fight crime, especially organized crime, were not being taken. Before spending billions on border security, my law-enforcement colleagues would first identify what threat is being defended against, decide how best to confront that threat, and estimate how much effort is needed to succeed. They would set clear goals so they could tell whether or not their strategy is successful. In short, before setting up a border defense, they would heed the words of Robert Frost’s poem, “Mending Wall,” and determine exactly “What I was walling in or walling out...”

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That has not happened. A clear objective—a precise statement of what we are walling out—was the first casualty in the post-9/11 border security buildup. It is often stated that our border security response is “risk based.” But it is far from clear what risk is being guarded against. What started as a mission to prevent terrorists from entering the country has morphed into preventing all illegal crossers from entering, including the thousands seeking work. Then it became a fight against drug smuggling by the international cartels, and—most recently—an effort to stop the spread of violence from Mexico.

What is appropriate border strategy depends on the threat we are fighting. The tactics and strategies to confront one threat may not work against others. No defense can be effective against every threat simultaneously. But, since the Obama Administration has been unwilling to state exactly what threat it is defending against, critics have enjoyed a field day decrying each Administration action as a “failure,” without having to be specific themselves. Last summer, every Administration border announcement was greeted by a chorus of “it’s not enough.”³ But no one asked the obvious question, “enough to do what”? The Administration protests, rightly, that the goal posts are continually being moved, yet they do not define where those posts should be.

Although relatively recent as a border concern, much of this country and Congress have begun to focus on the organized criminal organizations that smuggle massive amounts of drugs and people into the United States, and guns and money into Mexico. Despite the significant buildup of U.S. border defenses and the courageous efforts of the Calderón Administration, the drug

cartels have been spectacularly successful in their cross-border criminal activities and have taken over much of the civil authority in parts of Mexico. Their obvious successes moving contraband across the border gives added credibility to “broken border” proclamations.

Many Americans also have become concerned, bordering on hysterical, about the wave of cartel-related violence in Mexico. This is no fear of phantoms. An estimated 45,000 people have died since President Calderón began an all-out assault on the drug cartels over four years ago.⁴ Some killings have been singularly gruesome, with victim beheadings a cartel signature. Although the north side of the border has remained relatively safe, many in this country are convinced that the violence is already sweeping into the United States.

Without agreed-upon indicators to measure border-enforcement efforts, it is impossible to say whether they are succeeding or failing. The Obama Administration makes fulsome claims that they are creating a “21st Century Border,”⁵ but what does that mean? Presumably, a 21st Century Border is one that keeps criminals out, while permitting the vigorous flow of legitimate commerce. Unfortunately, according to many long-time border residents, the tactics being used today have the opposite effect. They disrupt and, in some cases, destroy commerce, while the effect on criminal activity is negligible.

Since no terrorists have been apprehended on the southwest border, our border-security efforts against the terrorist threat are either a total success or a total failure. Either border defenses missed every terrorist or deterred them all! It would be unfair to attribute the continued decline in the street prices for marijuana, heroin, cocaine, and meth to the current border-enforcement effort, since efforts to choke off the flow of illegal drugs have been failing for decades. Perhaps the greatest border success has been the low rate of violent crime on the U.S. side of the border. However, to my knowledge, crime suppression in border communities has never been a declared border goal, and no one gives Homeland Security credit for it anyway. In fact, many Americans believe that the border region is a free-fire zone.

DHS recently proclaimed that its border-security efforts have been successful because fewer illegal crossers are being caught. I will put aside the apparent illogic that the huge buildup of forces and technology has produced fewer arrests. Before the reduction in the number of illegal crossers arrested can be used as a valid indicator of success, DHS must prove that there were fewer actual attempts to cross illegally, and that those who attempted the trip were not just better at avoiding apprehension. An impossible task. We must also consider the impact of the reduced number of jobs available to immigrants in the U.S., and the strengthening of the Mexican economy, before accepting the decline in arrests as proof of effective deterrence.

More fundamentally, when did the number of illegal crossers arrested become the best indicator of border success? The view from Arizona is that the illegal crossers are a symptom of a much more serious disease, not the disease itself. Most people would never attempt to cross the treacherous desert in the Tucson Sector of the Border Patrol without criminal assistance. The sophisticated network of scouts, drivers, guards, drop houses, transportation equipment, and intelligence gatherers who monitor the Border Patrol and other law-enforcement agents are what make movement across the border possible. If anyone tries to cross the Arizona

border without the help of a criminal enterprise, they will be quickly arrested or join the hundreds who have perished in that parched and treacherous desert. In short, without the legions of cartel agents and subcontractors who service every mile of the route across the border and into destinations in the United States, illegal entry becomes far more difficult—or impossible.

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The problem is not the crossers, but the criminal organizations that make their crossing possible. In the face of heightened border enforcement and treacherous terrain, they get their “cargo” across the border. The arrest and deportation of those who make it across simply gives the cartels more customers. Heightened border security means the cartels charge more for the trip. Plus, thousands of arrests give the false impression that something is being done to reduce border crimes. Whether arrests are up or down is inconsequential as long as the cartels are in operation. Until the cartels are eliminated, the border cannot be considered secure. Period.

Targeting the Cartels—and Their Money

Any serious border defense must go after the cartel’s money, but that is not happening. Only recently have southbound, bulk cash shipments—shrink-wrapped bales of \$100 bills—been seized by DHS in any quantity. But, the spectacular seizures reported are a drop in the bucket of cross-border transfers. The main culprit is not DHS or the Department of Justice; it is the U.S. Department of the Treasury. Treasury officials who observe and regulate the international movement of currency remain unwilling or unable to go after money laundering across the Mexican border. For years, they ignored the hundreds of millions of dollars that were wire transferred to pay for human smuggling. In spite of concerns raised by Congress and by parts of Treasury itself, “stored value instruments” can still be taken across the border regardless of the amount of cash stored on them.⁶ Moreover, “funnel” accounts in major banks have moved billions of dollars illegally across the border. Yet when money-smuggling crimes have been uncovered, the perpetrators walk with no criminal penalties. Apparently, in Treasury’s view, allowing billions of dollars to flow into the cartel bank accounts is merely a technical violation of the law and not a deadly serious enterprise affecting the lives of tens of thousands on both sides of the border.

By not stopping the money from illegal enterprises flowing across the border, one thing is sure; the cartels will continue to have the resources to attack the border successfully. By not moving aggressively against illegal money transfers across the border, this country is literally providing our enemies the resources to continue operating at a level of organizational and technological sophistication that is almost unstoppable.

As Arizona’s Attorney General, I focused on cartel money transfers. Rather than wait for federal action, Arizona established the most robust and innovative state program in the nation. We were successful in driving hundreds of millions of dollars of proceeds from illegal activity out of our state. Through extended litigation, I forced reforms in the wire transfer industry so that the

virtually anonymous transactions which paid for much of the human smuggling in the past are no longer available. One state acting alone did a lot.

Unfortunately, the cartels have the whole 2,000-mile border to pick on. They simply shifted their money laundering operations away from Arizona in response to our prosecutions. Human smuggling into this country continued. Now, as a result of our settlement with Western Union in February 2010, the data on wire transfers along the entire southwest border is available to law enforcement. The Arizona successes can now be taken nationwide, if there is the will to do so. Last year, the U.S. Government Accountability Office (GAO) recommended a careful study of what we did in Arizona for implementation by DHS.⁷ It remains to be seen if the federal authorities will use this data treasure trove to uncover criminal operations along the border.⁸

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“Trade-based” money laundering and black market peso exchanges appear to be on the increase. The cartels are subcontracting with a virtual cottage industry of financial experts in the U.S.—people who make the illegal movement of money resemble legitimate international transactions. Transfers are broken down or structured into many accounts to evade suspicion from data analysts, and phony invoices are produced to make payments appear to be for legitimate goods or services. Failure to act means that every day the cartels are getting better and better at moving dollars out of the U.S. How long are we going to allow them to train in our backyard?

Going After the Cartel Bosses

In addition to disrupting the flow of cash, another law-enforcement tactic that can be used more effectively on the border is targeting the leaders of the criminal enterprises. When faced with sophisticated criminal organizations, cops will attack the top of the organization with every means at their disposal. Every charge they can make stick against the crime bosses will be used. It does little good to round up and imprison or deport the foot soldiers of the cartels. They are easily replaced with no damage to the organization. Yet most current efforts are directed at the small fries and the subcontractors. The highly publicized immigrant sweeps splash on nightly news and give the appearance of being tough, but the impact is minimal. The smuggling of drugs and people over the southwest border will not be reduced until it becomes hazardous to manage the criminal enterprises.

This country must break down the elaborate coordination required for successful smuggling. Arrest and incarceration of the bosses who coordinate the scouts, manage the money, and purchase the advanced technology will do just that. And we need to send a clear message that it will be extremely hazardous for anyone to take a fallen leader’s place. Such pressure, applied

at the same time the cartel money is disrupted, will destroy the criminal organization. Without the organizations, the holes in our border defenses disappear.

In Arizona, my office never had any doubt that dismantling the criminal organizations was our primary objective. With our federal and local partners, we investigated and prosecuted multiple cartel operations in cash, human, gun, and drug smuggling. Whenever possible, we closed the operations down, soup to nuts. We arrested not just the easily replaceable foot soldiers and subcontractors, but the top bosses.

Unfortunately, one state acting alone only has jurisdiction on the U.S. side of the border. Going after the major cartel bosses in Mexico was beyond our power. Ultimately, going after the bosses will require federal leadership and close cooperation with the law enforcement of Mexico; something which has been slow to come together, and which no state operating alone can accomplish. Such a multinational effort will require a much closer working relationship with Mexican law enforcement than has been achieved so far. There has been progress in that effort, especially in the last several months, but it is very hard to understand the protracted failure to engage in extensive common investigative efforts.

Yes, there is still corruption among Mexican law enforcement and the chance, although much progress has been made, that some targets might be warned off and investigations frustrated. But what is the alternative? No one can doubt the commitment of the Mexican government and people to the fight against the cartels. They have paid a huge price in blood for President Calderón's attempt to destroy these criminal organizations. If anyone has earned our respect and deserves our support, it is Mexico. With the Merida Initiative, begun by the Bush Administration and continued under Obama, the United States has placed extensive technology and firepower in the hands of the Mexican government. The support in material and arms has undoubtedly helped. But it is not enough.

The lack of bi-national coordination, in effect, provides cartel leaders a sanctuary south of the border. Without much better coordination with Mexican law enforcement on the most important cases involving the leaders of the cartels, they will continue to make a mockery of our border defenses.

Going on Offense

So far, United States' border efforts have been basically defensive. We have made very significant investments in manpower and technology on our side of the border. But a team that only plays defense, however inspired, will lose. And, so will we. The legions of Border Patrol agents lined up along the north side of the border are sure to fail without the rest of a focused, multi-faceted, anti-crime package: stopping the flow of cartel money, going after the cartel leaders, and dismantling their criminal organizations. We could double again the number of Border Patrol agents and see little improvement. The cartels will continue to pick the weakest spots and bring their contraband, human and drug, across. It is time for a new game plan.

One goal which would be specific enough to give a clear idea of whether we were succeeding or failing would be the arrest, prosecution, and incarceration of Chapo Guzman, the notorious leader of the Sinaloa cartel. Such a goal, clearly stated and unequivocal, would provide focus and accountability to the efforts and would force a close working relationship among law enforcement across the border. If U.S. forces can find Osama bin Laden, I am sure, with Mexican help, they can find and arrest Chapo. After all, *Forbes* magazine publishes his photograph in its annual edition on the world's billionaires. That arrest would do more to stop the flow of contraband into the U.S. and the slaughter in Mexico than all the billions spent so far. With Chapo and other cartel leaders in custody awaiting trial, the Obama Administration could validly proclaim that it has made the border materially safer.

Time is of the essence. The cartels are gaining significant authority within some areas in Mexico, and the Mexican people understandably tire of the bloodshed and cost of fighting them. I have little doubt that, when the Calderón Administration ends in just over a year, Mexico's commitment to the fight against the cartels will wane significantly, if not actually come to an end. In addition, the cartels are rapidly diversifying into new lines of criminal activity, taking over the production and sale of pirated music CDs, videos, and software. They steal and distribute petroleum and hijack commercial trucks on an unprecedented scale. As they diversify, the cartels become harder and harder to isolate from the mainstream economy and harder to close down.

This is the time for a maximum coordinated push. If leaders in the United States are serious about defending our border and not just using border failures as an excuse for doing nothing on immigration reform, this country must become more than a glowering presence. Put the offensive team on the field and commit to finishing the job. Border defense is far more than just playing a deadly version of Red Rover.

Protecting the Ports

One of the consequences of the hysteria about border security is the buildup of the Border Patrol at the expense of customs enforcement. The emphasis on protecting the long stretches of remote border between the official crossings (or "ports") has a price. With the de-emphasis on customs inspections at the ports and the resulting strain on Customs and Border Protection (CBP), more contraband gets through the ports.

Always opportunistic, the cartels have seen and seized the opportunity to put more contraband through the ports of entry. Most of the criminal activity has shifted to the border crossings, not the places in between. Texas congressmen have become particularly concerned by this misallocation of resources. But, the popular demand is for beefing up enforcement, not better inspections. Moreover, low staffing at the ports has damaged legitimate cross-border trade, with imported goods condemned to sit additional hours waiting to be inspected. By appearing tough—making fortification of the border with additional Border Patrol the top priority, while deemphasizing the ports of entry—it is easier for the criminals to come through our front door. Once again, the symbol has trumped reality.

A Changing Mexican Criminal Justice System

In the midst of waging an all-out war against the cartels, Mexico has been quietly revolutionizing its justice system. Their current criminal trial procedures convict only one percent of the defendants. Trials are held behind closed doors using documentary evidence only, without confrontation of live witnesses, and are easily corrupted. For the assault on organized crime to succeed, Mexico recognized that it must adopt a more public prosecution system. The country is now transitioning to public trials and live confrontation of witnesses, similar to the U.S. It would be a massive undertaking to make such a fundamental change in normal times, but to do so in the midst of the cartel wars, with prosecutors' and judges' lives literally on the line, is nothing short of heroic.

The new criminal justice system is being rolled out state by state across Mexico. Thousands of prosecutors and judges are being trained in an effort funded in large part by monies from the Merida Initiative. Training has been done by the U.S. Department of Justice and state Attorneys General's offices. Very quietly, this transformation of the Mexican criminal justice system has been a huge success, perhaps the brightest spot in the entire border defense. It has the potential to make huge differences in the fight against the cartels, yet it has been largely unnoticed by the media and the border hawks. And, typical of the failure of coordination on the border, the most recent State Department budget cuts the training funds in half. Just when the new Mexican criminal justice system is poised to take flight, the U.S. is inexplicably cutting its wings.

Conclusion

If the United States wants effective border security and not just a political punching bag, where symbolism trumps common sense, then more effective law-enforcement measures must be taken. By attacking money laundering and making bi-national criminal investigation and prosecution of the cartel bosses a priority, the border can be made significantly more secure. In the process, the mayhem in Mexico and the smuggling of drugs and people into the United States will be reduced. There must be a unified focus. All agencies must get on the same page for the effort to succeed. State and local law enforcement, with the coordinated efforts of all relevant federal agencies, can win this. Nothing less will.

Arizona can provide an instructive classroom for many of the procedures needed for success. We took the critical first steps in attacking the money laundering by human smugglers; we learned that trade through almost six years of trial and error. What is more, we developed excellent cross-border relationships, personal and institutional, and have—through the settlement with Western Union—unlocked a treasure trove of data relevant to illegal money transfers across the border. It is now up to the other states on the border, and federal officials, to take advantage of the lessons and mine the data bank for criminal leads. If that happens, we will take a long step toward eliminating the cartels. They are still flourishing today, precisely because one state working alone cannot make the comprehensive, bi-national, border-wide effort that is needed. Only the federal authorities can do that.

However relevant my experience may be to the challenges of border security, I cannot influence those whose only mission is to find fault instead of workable solutions. Those whose real intent is not to fix the border, but to stop—and, if possible, reverse—all immigration into the United States. They will never be satisfied. However, to those who are seriously interested in results, for those who want to see a secure and commercially viable border between the United States and the Republic of Mexico, a real 21st Century Border, my experience and the Arizona story can point the way.

Endnotes

¹ Calling these criminal enterprises “drug cartels” is a misnomer. Unlike the 19th century industrial Robber Barons, they are vigorously, often viciously, competitive. Drug cartels are also rapidly moving away from a concentration on the production, smuggling, and distribution for sale of illegal drugs, using their organization and resources to diversify into other criminal activities, including kidnapping for ransom, extortion, and media piracy. Mexico has become the media piracy capital of Latin America, exporting so many illegal movies that the recording studios no longer try to sell their products in Central America. The rival cartels even brand their illegal products with their unique logos. They have also become a serious producer of illegal software, making thousands of copies of computer operating systems like Microsoft’s Windows XP. Drug cartels are more accurately called “transnational criminal organizations” (TCOs), but I will stick with the common denomination of “drug cartel,” or just “cartel.”

² This estimate is derived from U.S. Department of Justice, National Drug Intelligence Center, [2009 National Drug Threat Assessment](#), December 2008, p. 49, and United Nations Office on Drugs and Crime, [The Globalization of Crime: A Transnational Organized Crime Threat Assessment](#), 2010, p. 65.

³ Arizona Governor Jan Brewer demanded 250 National Guardsmen at the beginning of the summer, but when the Administration promised twice that many, she did not hesitate to say the number was not nearly enough. See E. J. Montini, [“Brewer got twice what she asked for,” The Arizona Republic](#), July 23, 2010.

⁴ Mexican casualties in the cartel wars exceed the combined U.S. military losses in Iraq and Afghanistan.

⁵ See The White House, Office of the Press Secretary, [“Remarks by President Obama and President Calderón of Mexico at Joint Press Conference,”](#) March 3, 2011.

⁶ Congress, as part of credit card reform, ordered Treasury to write regulations for stored value instruments by February 2009. They did not. When regulations were finally drafted in 2010, they failed to cover international movement of the cards. The final rule has recently been promulgated, making some long overdue changes in how stored value instruments are reported and monitored, but still not closing the loophole in international money laundering by requiring them to be disclosed at the border.

⁷ U.S. Government Accountability Office, [Alien Smuggling: DHS Could Better Address Alien Smuggling along the Southwest Border by Leveraging Investigative Resources and Measuring Program Performance](#), GAO-10-919T, July 22, 2010, p. 6.

⁸ The Internal Revenue Service (IRS) and Immigration and Customs Enforcement (ICE) are showing interest in this data, although no arrests have yet been made.



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Introduction

Debates over immigration miss the critical border-security issues. Critics of current U.S. border strategies correctly point out that illegal drugs are still being smuggled across our southwestern border in wholesale quantity and that the flow of illegal border crossers, although reduced in recent years, is still significant. Until the border is “fixed,” they refuse to consider any immigration reforms. The Obama Administration takes the opposite tack, saying with great pride that it is creating a “21st Century Border”—one that is more secure now than it has ever been. Neither side in this debate seems interested in defining what a “secure border” means. And, without a definition, it is hard to say who is right or even what constitutes success or failure.

With all the overheated border-security rhetoric, it is commonly assumed that the problems on the border are basically simple and that they can be fixed the old-fashioned way with a greater infusion of money and manpower and maybe a better fence. The prevailing assumption is that all we need to stop illegal crossings of drugs, people, cash, and guns are more Border Patrol agents, more National Guard troops, and more surveillance and sensors to cover the hundreds of rugged miles between lawful ports of entry. The dispute is over how much is enough, with one side saying the current buildup has done the job and the other saying we need even more. Lost in this war of words is any understanding of the nature of modern-day smuggling.

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It is easy to be misled by focusing exclusively on the border as a physical barrier. Rather than being just a line in the desert sand, the southwest border is a complex, multidimensional interrelationship of immigration laws, cyberspace money transfers, and international business connections. Consequently, smugglers must understand and move easily in the multidimensional universe that is the border. Superbly organized, technologically adept, and very well funded, they can penetrate border defenses almost at will.

If this country wants to stop smuggling and not just present an obstacle to immigration reform, we must take a broader and more analytical approach to what motivates the smugglers—and the means by which they illegally move drugs, money, guns, and people in such large volumes with such impunity. Going after the contraband product or smuggled people, as this country has been doing for years, is destined to be an endless chase. The cartels will just regroup and continue operations, learning from their mistakes. If we are serious about stopping the threat on the border, we have to dismantle the criminal organizations that carry the contraband and take away the tools that make them so effective. Anything less will fail.

My perspective on border security and cartel procedures comes from a multitude of investigative reports and criminal prosecutions in Arizona over the past decade, while I served as the Arizona Attorney General. Although Arizona contains only 380 of the 2,000 border miles,

it is the entry point for over half of the people and drugs being smuggled into this country. My experience covers hundreds of different cases. In the process, I have gained a deep respect for the cartels' abilities, their sophistication, and their adaptability.

The Truth about Border Violence

Given the hysteria about border security in much of the national media, many are surprised to find out how safe and even tranquil the border region of the United States is today. El Paso is the safest city of its size in the country. There has not been a murder in Nogales, Arizona, in years and other violent crimes are rare. Pat Castro, the wife of former Arizona Governor Raul Castro, told me with indignation, "What do they mean about violence? I walk my dog every night in sight of the border and no one bothers me." The murder of border rancher Rob Krantz was a tragic event, but the fact remains that his death was the only such tragedy in many years in one of the most robust smuggling corridors in the world.

Cartels are not interested in power or violence for their own sake. They want to sell drugs or pirated videos or bootleg software—not create chaos.

Politicians trying to fan outrage over the "broken border" fail to grasp that the cartels are not interested in power or violence for their own sake. They want to do business—to sell drugs or pirated videos or bootleg software—not create chaos. They will go to great lengths to protect their business interests, but they are opportunists, not terrorists. Violent confrontation in the United States is not in their best interest. Violence focuses U.S. public opinion and law-enforcement power against them, so they avoid confrontation in this country with iron discipline. Large loads of valuable drugs are abandoned rather than risk a fire fight with U.S. law enforcement. Instead of a range war against U.S. border defense personnel—a war the cartels are very well equipped to fight—their agents drop their guns and run when they are confronted. Faced with U.S. law-enforcement pressure, the cartels quickly shift ground, changing their points of entry, the size of their loads, the kinds of vehicles used, the time of day they move, and even the cargo being smuggled. Confrontation interferes with business, and business comes first.

The Border Build-Up

Under the Bush Administration, and at an increasing rate under President Obama, the troops and technology in the stretches of the southern border between the ports of entry have grown substantially. The number of Border Patrol agents now stands at 21,000—twice what it was in 2003. The increase on the southwest border is even greater. New technology is continually being deployed. Portable ground radar units can (and do) spot jackrabbits as well as human border crossers. Vehicle X-ray machines the size of Good Humor trucks can scan a semi trailer in seconds and show if there are spaces to hide contraband. Aircraft are being deployed in increasing numbers, including unmanned aerial drones. Flying at night without lights at very

high altitude, the drones can spot virtually anything moving on the ground without being heard or seen.

Because much of this manpower and technology have been authorized to fight illegal immigration, it is assumed that would-be border crossers will be deterred simply by the size of our border operations. But, while this build-up may have deterred some border crossers, it has created a robust and profitable market for more sophisticated smuggling—one that the cartels have been only too ready to enter. As long as smuggling is profitable, there will be cartel smugglers ready, willing, and in most cases able to go over, under, around, and through whatever barriers are placed in their way.

I have seen over and over again how the cartels put sophisticated, military-grade hardware in the hands of highly proficient, specially trained operatives who are willing to take great risks for large profits. These agents are more innovative, more opportunistic, and more aggressive than the forces defending the border against them—and they have the advantage of being able to wait patiently until they can exploit the slightest opening. Technologically sophisticated, they can undermine, neutralize, or avoid whatever border defenders put in their way. Consequently, troops and technology alone will not stop the smuggling. The cartel agents can only be defeated by a completely new approach—one that is as flexible, opportunistic, and multi-dimensional as they are. The approach must target the cartel organizations themselves, not just the contraband they smuggle.

The challenge is by no means simple and the solution will take far more determination than has been applied so far. What will definitely not work are the simplistic one-dimensional answers that sound good on the evening news, but do little or nothing to stop the threat. The cartels don't care much about which product they sell, just their profits. To stop them, we must look at our defense the same way. They are opportunistic and highly flexible. For the border effort to succeed, there must be a national strategy that is as opportunistic and flexible as they are. We must stop compartmentalizing border objectives by illegal activity. Current agency efforts are focused on stopping particular kinds of contraband. A successful effort cannot be about immigration alone (ICE), or drugs alone (DEA), or guns alone (ATF). It must address, disrupt, and destroy the total business of the cartels. What also won't work is continuing the practice of committing some government agencies against the cartels while others stay uninvolved or actually work against our national interests. We will need a much better grasp of the problem and far better coordination of the defense effort than exist today.

Cartel agents can only be defeated by a completely new approach—one that is as flexible, opportunistic, and multi-dimensional as they are.

Jumping La Linea

The movement of contraband, people, and drugs across the border is managed by drug cartels (or, more accurately, Transnational Criminal Organizations). These are dynamic, intensely competitive organizations, constantly shifting their territorial control and relative power. But for this analysis it is sufficient to see them as a unified threat. Whatever the cartel, Sinaloa or Gulf, Los Zetas or Tijuana, the organization, techniques, and technologies for crossing the border are similar. They all provide the coordination of effort, equipment, intelligence about law-enforcement activities, and security needed to move people and drugs through border defenses and into this country.

Cartels don't want the movement of large numbers of people to draw attention to or interfere with the incredibly lucrative drug trade moving along the same physical routes into the United States.

The cartels keep a sharp eye on border defenses, posting scouts on high points on both sides of the border. As survival experts, these men can stay on location for weeks if need be. Water and food are cached in the desert for them. They have powerful binoculars and solar-powered, secure communications devices. Every Border Patrol move along *La Linea* (the line, or the border) is observed and reported by these scouts.

When scouts report a break in Border Patrol coverage, smuggling teams are ready. The break may only last a few minutes, but that is enough. For instance, specially equipped pickups (extra shocks and cargo capacity) will be standing by south of the border, loaded with a ton or more of marijuana. One crossing method uses a special ramp mounted on a second truck. The ramp vehicle drives up to the border fence, drops a ramp extension from the bed, and hydraulically extends another over the cab, making an arch above the fence. The load truck drives up and over, across the border without touching the fence! The ramps are retracted and both vehicles leave the border. The whole process takes only a few minutes.

Most crossings are done at night without showing a light since the vehicles are equipped with military-grade night-vision equipment. The cargo trucks move quickly into the rugged canyons and are on their way for 40 to 80 bone-crushing miles to a highway and on to a drop house in Phoenix or beyond. If the break in Border Patrol defenses is short or pursuit likely, the truck can be quickly camouflaged and hidden in an arroyo for weeks. Scouts keep a close eye on the load until the coast is clear and it can be moved north.

Human smugglers (*coyotes*) use a similar technique. Their cargo usually consists of around 20 people, often called *pollos* ("chickens"), who have paid a small down payment on their passage fee in Mexico and promised to pay the rest when they have safely crossed the border and arrived at a drop house in Phoenix or another non-border location. Ten years ago that fee was around \$1,600. Today it is around \$3,500 and rising.

The *pollos* camp near the border, so when a break in Border Patrol defenses is reported, they can walk quickly across *La Linea* and into the rugged desert beyond. The *coyotes* move their cargo rapidly, staying in low areas as much as possible so the ground radar cannot pick them up. Sometimes the *pollos* carry 60-pound packs of marijuana as partial payment for their passage. Chemical stimulants help to hold off weariness, sometimes with tragic results. Depending on the crossing location, the walkers will come to a highway after a long day's hike or as many as three or four. The country is rugged and the heat can be deadly. Most travel is at night. Directed by the scouts stationed on the high points, the travelers take cover whenever the Border Patrol is getting close.

Coyotes

There is a belief held by many that coyotes are modern-day Robin Hoods—that they take the poor workers under their protection, shepherding them across the border and the desert wastes to sanctuary in the United States, with little thought for themselves. If this manner of *coyote* ever existed, the species is extinct today. The cartels have moved into the human-smuggling business and taken it over. Why? First, they are much more effective against the built-up border defenses than any mom-and-pop operation. Second, the cartels don't want the movement of large numbers of people to draw attention to or interfere with the incredibly lucrative drug trade moving along the same physical routes into the United States. In the smuggling corridors, the controlling cartel schedules all northbound movement, human and drug. No independent involvement is allowed. Third, as border security has increased, the price for transportation has soared, making the trade in human beings very lucrative. The end result: Exit Robin Hood, enter highly organized, systematically brutal, and very efficient cartels.

The Journey North

After crossing the border, the journey north is a grueling trek even for the athletic. In his book *Midnight on the Line*, Reuter's reporter Tim Gaynor recounts how two young, fit journalists attempted the crossing without *coyote* help.¹ They push on for just over a day and a half, find they are hopelessly lost, exhausted, hungry, and thirsty—and desperately signal to the Border Patrol to pick them up before they perish. The hardships of the journey are also well described in the 2006 teen novel *Crossing the Wire*, by Will Hobbs. The perils of passage through the desert and mountains, the villainous *coyote*, and the suffering of the drug mules are compellingly presented in this story of two boys trying to find work in *El Norte*.²

When a smuggled group reaches a highway or a major roadway, the criminal organization may have arranged for a vehicle to be parked and ready, keys in the ignition and the tank full of gas, for the run to a drop house. For other groups, carefully coordinated drivers arrive just in time to pick up the *pollos* as they come out of the scrub. Most times, the carry vehicle(s) will be accompanied by a scout car that goes ahead and looks for roadblocks or law enforcement. Usually, there will also be a heavily armed guard car to prevent hijacking. Besides law enforcement, gangs of robbers (*bajadores*) are watching for the *pollo* carry cars, ready to

swoop down and seize the cargo. The *bajadores* then collect the rest of the payment due, or raise the price and hold the *pollos* for ransom.

Since the business relationship between the *coyotes* and *pollos* is a one-time contact, payment must be quick and secure. For years, the preferred method has been wire transfer, which gives smugglers the choice of many pickup locations, instant cash, and few questions asked. They find a location where the clerk, for a fee, is willing to ignore federal reporting requirements or allow the pick-up agent to change identification and become a different person for reporting purposes whenever the \$10,000 federal reporting limit is approached.

Money Drives the Show: Cartel Organization

Cartels are masters at contracting out. In the United States, cartels don't work through family or initiated members. Instead, they rely upon subcontractors—businesses which are either set up to serve the smugglers' needs or formerly legitimate operations that become providers to the cartels. Once a business starts working with the cartels, the criminal-related activity becomes its main customer base. While exclusive, the relationship is handsomely profitable, paying over the going rate for goods and services. This practice has been one, perhaps the only, consistent factor during the years I have worked on cartel-related investigations and prosecutions.

Contracting out creates misimpressions about the effectiveness of the law-enforcement response to smugglers. When a U.S. official holds a news conference proudly proclaiming the investigation of a "cartel" smuggling operation, the identification and arrest of the principals, and seizure of their assets, what this really means is that a business which contracts with the cartels for part of their operations has been identified and disrupted. That should be applauded, but in context. The elimination of one contractor, however satisfying, is by no means a blow to the criminal effort. There are certain to be other contractors operating on parallel tracks at each stage of the smuggling operation. Contractors are easily replaced. At worst, the smugglers experience some dislocation and must perform damage control.

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A good example of subcontracting is found in Operation River Walker, a 2008 prosecution resulting from a seven-month investigation into the Suarez-Fernandez Organization. The suspects arranged for the transportation of people from the border to drop houses in Phoenix. According to investigators, undocumented immigrants were charged about \$2,500 each to be smuggled into the United States. At the border, a "guide" or "walker" brought the smuggled people through the San Pedro River Riparian National Conservation Area. They were met by a "border organizer" who paid the different "sub-contractors" along the route—such as drivers, drop-house operators, bank-account holders, and load drivers—for their services. The Suarez-Fernandez Organization had set up this network over 10 years earlier. It facilitated the illegal

entry of over 8,000 persons per year into the United States, or at least 80,000 persons total. Operation River Walker took down an entire criminal enterprise, arresting not only the two coordinators, but all of the sub-contractors who made the business tick. It was a great success, but human smuggling continued in the same corridor.

Other prosecutions show how the cartels have been able to subvert formerly legitimate businesses. Seven travel agencies that catered to cartel customers were seized in Operation Fly by Night. These Arizona travel agents found it very profitable to provide tickets for lists of passengers, sight unseen, who were seeking air transportation from the McCarran International Airport in Las Vegas, one way to destinations in the deep South. Payment was usually in cash at over the list ticket price.

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In Operation Car War, 11 used-car lots in Phoenix were seized and the owners prosecuted for providing and storing used cars which transported *pollos* from the border. This investigation helped to answer the question of where were all the cars needed to transport thousands of people from the border. The answer: in plain sight, in the middle of town, on used car lots. It must have been perplexing for a would-be used car buyer at some Phoenix area car lots to find that none of the cars were for sale! A critical aspect of the scheme was that the lot operators, after selling their cars for cash to a *coyote*, placed phony liens on them. That way, when the Border Patrol or other law enforcement seized the cars, they were dutifully towed back to the “lien holder” car lot and the process started all over. The informant who broke this case was an inquisitive tow truck driver.

Operation En Fuego involved a large van transportation network that moved *pollos* from the border to Phoenix and on to 22 states. Operation Vaqueros went after a drug-trafficking organization responsible for moving large quantities of marijuana through southern Arizona, primarily in Cochise County. The organization employed advanced counter-surveillance, ramp trucks to overcome vehicle barriers at the border, and cleverly hidden vehicle compartments.

The use of technology in the smuggling of drugs has many variations. Specially constructed compartments welded into car bodies or attached to the undercarriage, hidden compartments in gas tanks where the gas smell will throw off drug-sniffing dogs, and other special modifications are common. In the case of Operation Driveshaft, drugs or money were hidden inside specially modified drive shafts of the defendants’ vehicles. Even when dogs alerted on the vehicles, investigators failed to find the hidden compartment. During the execution of a warrant at the residence of a suspect, officers found three disassembled drive shafts. Two were packed with large quantities of cocaine. In another instance, officers stopped a southbound vehicle and found \$143,500 hidden within the drive shaft. In total, Operation Driveshaft led to the seizure of 36 pounds of cocaine, four pounds of heroin, 40 pounds of marijuana, and close to \$2.25 million in racketeering proceeds.

Operation Tumbleweed showed in detail how a sophisticated criminal operation could compromise border security. Equipped with radio towers set up in the desert to communicate, employing as many as 50 scouts scattered through the rugged border country to direct the operation, and using a mobile ramp to help vehicles hop the border fence, the Garibaldi-Lopez drug-trafficking organization was highly effective. It was beaten by the combined efforts of Phoenix police, the Pinal County Sheriff's Office, and the Arizona Department of Public Safety, along with federal agents. Linked to the Sinaloa cartel, the group smuggled over 400,000 pounds of marijuana per year into the United States from Mexico to stash houses in Phoenix to be sold across the U.S. Over its years in operation, the Garibaldi-Lopez organization smuggled over 2 million pounds of marijuana with a wholesale value estimated by agents to be \$1 billion.

The organization modified vehicles stolen in the United States to carry 2,000 to 2,500 pounds of bundled marijuana. Between one and four "load vehicles" were used for each cross-border shipment. The organization ran approximately one shipment per week. Each shipment occurred in two stages. The first stage transported bulk marijuana from the border into the remote country between Tucson and Phoenix. The organization allegedly loaded the vehicles in Sonoyta, Mexico, and crossed covertly into the U.S. through the Tohono O'Odham Nation. The movement of each load vehicle from Mexico to its final destination at a stash house in Phoenix involved no fewer than 20 people.

In indictments made public in December 2008, investigators describe the organization's movement through the desert as methodical. They went to great lengths to remain undetected, driving load vehicles through dry washes and dirt roads in barren parts of the desert. Drivers were outfitted with night-vision equipment to enable the vehicles to travel in the dark without any illumination. The load vehicles also carried tarps in the event they needed to stop and cover up so as not to be visible from the air. After being used, load vehicles were abandoned in Pinal County's Hidden Valley. The organization deployed scouts in the high ground of the U.S. desert to act as counter-surveillance against law enforcement. The scouts were outfitted with electronic equipment to communicate with the load trucks, advising the load drivers when to move. Scout coordinators dropped off food and supplies, enabling the scouts to stay in place for weeks at a time.

The second phase of the shipment involved transporting the marijuana into the Phoenix metro area. Once in Pinal County, the bulk loads were broken down into smaller loads. A separate group of drivers using inconspicuous SUVs and pickup trucks brought the marijuana into the Phoenix metro area, where it was turned over to the first-level customers who allegedly took their share to their respective stash houses. Payment for the marijuana was sent in bulk cash by car from Phoenix to Mexico. The load drivers from the first stage and the scouts from the desert would come to Phoenix to be paid, and then return to Mexico in a shuttle bus to prepare for the next load. When loads were not being moved, the scouts stayed in a compound in Pinal County, housing 10 to 15 scouts at a time awaiting redeployment.

Eerily reminiscent of Operation Tumbleweed was Operation Pipeline Express, completed with a flurry of arrests on October 31, 2011. Proclaimed as an “historic” blow to the Sinaloa cartel, the 17-month investigation claimed that it shut down an unnamed criminal organization which allegedly was smuggling \$33 million a month in drugs through the same deserts of western Arizona that were used by the Garibaldi-Lopez organization dismantled by Operation Tumbleweed. According to the Immigration and Customs Enforcement (ICE) press release, Operation Pipeline Express “dealt a significant blow to a Mexican criminal enterprise” and sent a “resounding message to the Mexican cartels that Arizona is off limits.”³ As the *New York Times* reported, “the authorities acknowledged that the huge smuggling ring operated under their noses, in rugged terrain that is difficult to patrol.” The drugs were carried across the border, mostly in backpacks, and then transported to a network of stash houses in the Phoenix area. From there, the drugs were sold to distributors across the country. The route was through desolate desert in southern Arizona, including the Tohono O’odham Nation. Like the smugglers in Tumbleweed, spotters watched for out for law enforcement and diverted the loads if necessary.⁴

While this latest operation cites an impressively high level of interagency law-enforcement cooperation—federal, state, and local—the inflated rhetoric is identical to statements made less than three years earlier in announcing the conclusion of Operation Tumbleweed. Especially suspect is the claim that for the past five years the unnamed organization taken down in Pipeline Express exercised a “virtual monopoly” over the 80 miles of Arizona-Mexico border between Sells and Yuma. The clear implication is that authorities have stopped the only criminal smuggling operation in the corridor. However, it is impossible to reconcile this “virtual monopoly” language with the 2 million pounds of marijuana smuggled in the same corridor by the Garibaldi-Lopez group only a few years before.

These large busts, while highly satisfying and good fodder for the media, do not end the criminal operations.

Pipeline Express, perhaps inadvertently, makes one point with crystal clarity: There is no operator “monopoly” in the smuggling routes, but many parallel operations controlled by a cartel. These large busts, while highly satisfying and good fodder for the media, do not end the criminal operations. Even the impressive amount of drugs seized and persons arrested in Pipeline Express hardly makes a dent in the illegal traffic. Far from ending criminal activity in the area, the cartels go to school on operations like Tumbleweed and Pipeline Express, modify their procedures, and continue to push drugs and people across the border using parallel organizations in the same corridors. Matthew Allen, ICE’s special agent in charge for Arizona, commented that it was only a matter of time before either the Sinaloa cartel or another operation reclaims the area affected by the bust.⁵

It didn’t take long. Only hours after the news conference proclaiming how Pipeline Express broke up the alleged smuggling “monopoly,” Francisco Guillermo Morales Esquer, 36, was caught in Pinal County with more than \$1.5 million of heroin and methamphetamine. According to Pinal County Sheriff Paul Babeu, the Morales arrest is an example of the shape-shifting

nature of cartels. Babeu, in a news conference, opined that although Pipeline “struck a body blow” to the cartel, “they are still operating in robust fashion.”⁶ Not much of a “body blow.”

Of course, another version of contracting out done by the cartels is their associations with organized street gangs in the United States. These criminal alliances have been identified by the Justice Department in over 200 U.S. cities.⁷ Cartel representatives or agents are present in cities where alliances exist, primarily for observation and communication back to Mexico. The business on the street is conducted by local gang members. These very important criminal connections are for the local distribution of drugs and sale to the end user. I have not observed gang affiliations involved in the smuggling of drugs or people across the international border, so they are beyond the scope of this paper.

Bribery and Intimidation in the U.S.

In the last few months of 2010, some particularly disturbing cases crossed my desk. Disturbing not for the large amount of drugs or number of people involved, but for the use of U.S. citizens and officials as part of the criminal scheme. Many in the United States believe that official corruption “can’t happen here”; that only in other countries do corrupt officials take bribes. Unfortunately, they are wrong. The cartels have been very successful using bribes and intimidation to turn officials in Mexico. It is beginning to happen in the U.S. as well. In one case, a legal assistant in the Cochise County Attorney’s Office was caught sending information to drug smugglers. She was not a high-level employee, but she had access to enough confidential information to provide the criminals with valuable tips on what was or was not being investigated. Another group smuggling drugs across the Tohono O’Odham Nation employed an Army National Guard member in uniform to keep vehicles from being searched.

Many in the United States believe that official corruption “can’t happen here”; that only in other countries do corrupt officials take bribes. Unfortunately, they are wrong.

Over the years, there have been reported instances of federal officers in the Customs Service being bribed to look the other way when a load of contraband comes through their gate. The pressure on these officials is increasing as more contraband is funneled through the official ports of entry.⁸ More recently, as reported by the *New York Times* in September, “authorities were reminded of how challenging the drug war had become when they arrested a Homeland Security official stationed at the border, charging him with leading the police on a chase through the desert during which he hurled packages of marijuana from his government vehicle.” In October, “a federal grand jury in Tucson handed up an indictment charging a Border Patrol agent with accepting a bribe to let a truck that he believed was smuggling drugs and migrants past a checkpoint in southern Arizona.”⁹

This past May, three employees of America’s self-proclaimed toughest sheriff were arrested in a drug and human trafficking case. Maricopa County Sheriff Joe Arpaio said a deputy and two female detention officers at the sheriff’s largest jail facility were among 12 people taken into

custody and accused of being in a Phoenix-based international drug-smuggling ring.¹⁰ They were alleged to have worked with members of the Sinaloa cartel to bring more than five pounds of heroin into the Phoenix metropolitan area every week. The deputy, Alfredo Navarrette, was a member of the sheriff's human-smuggling unit. One of the detention officers, Marcella Hernandez, told authorities that she was eight-months pregnant with the child of Francisco Arce-Torres, the alleged drug ring's leader, who court documents said is a member of the Sinaloa cartel. The county Attorney's Office made plea bargain offers to 19 defendants in the case, saying that the proposed sentences ranged from probation to "substantial prison terms."¹¹ The investigation and filed charges show that even the most overtly anti-smuggling agency can be infiltrated.

Cartel recruitment of American high-school students is on the rise as well.¹² Children provide cover and, if caught, are punished less severely than adults. Economic distress along the border makes the offers by the cartel agents especially enticing to teens. Anti-racketeering funds are being successfully used to reduce the number of vulnerable youth on the border. The Santa Cruz Sheriff's Office received \$50,000 in December 2010 for their anti-gang initiative, to be used jointly with the Nogales Boys and Girls Club. At the same time, the Yuma County Sheriff's Office was granted \$25,000 for a similar program.

Why the Wall Won't Work

One can't help but hear support for a border wall, including—most notably—from Arizona Sen. John McCain. It is a recurring theme on talk radio. According to some advocates, the wall is supposed to keep "drug cartels, violent gangs, an estimated 20 million illegal aliens, and even terrorists" out of the country.¹³ These grand claims, made on an officially sanctioned State of Arizona web site, might be funny—just another Arizona diversion for late-night comics—were not border security so serious. Not many contributors have been misled, so far. In over six months of solicitation for private funds, the official effort had raised only \$191,675 as of January 15, 2012.

From a law-enforcement, public-security perspective, the wall distracts this country from serious efforts to fight border crime. It could potentially divert a staggering amount of public resources to a construction project that does nothing of consequence to stop smugglers. It is naive to think that any physical structure today could even slow down the smuggling efforts of the drug cartels with their superb organizations, advanced technology, and vast resources.

***...The wall
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The cartels have the capacity to go over, under, around, and even through virtually any physical barrier. Janet Napolitano once memorably observed that, "for every 50 foot wall, there is a 51 foot ladder."¹⁴ Walls can be defeated by tunneling; the ground under Nogales, Arizona is honeycombed with known tunnels and no one thinks they have all been found. A wall can be flown over, and already the drug smugglers' vehicle of choice is an ultra-light aircraft. The most imposing sections of the wall in Nogales, made of metal landing mats, can be cut through with high-temperature plasma cutting torches in seconds. The Border Patrol has had to weld so

many patches over the holes that the wall there looks more like a patchwork quilt than a barrier. According to the Government Accountability Office (GAO), “during fiscal year 2010, there were 4,037 documented and repaired breaches” of border fencing.¹⁵ Besides, no wall on earth could have stopped half of the people who are illegally in the U.S. today because they crossed with valid papers through a port of entry and overstayed their visas.¹⁶

Constructing any part of the wall wastes valuable time and resources. Worse, like a modern version of the Maginot Line, it provides a false sense of security, the illusion that we are doing something to remedy border problems. This is no time to get distracted by building the wall or any other diversion.

Targeted Enforcement

The U.S. should be putting all available resources, public and private, where they will be most effective: into fighting the drug cartels. An effective border defense must be intelligence driven and multi-level. We have seen how the cartels can use their information systems and secure communications to pick out and exploit the slightest hole in border defense. It is almost impossible to stop such sophisticated smugglers at the border. They will usually get across. Therefore, smuggling routes must be monitored deep into this country. Information from wire taps, informants, and thousands of discrete sources on both sides of the border must be gathered, synthesized, and analyzed. Sophisticated intelligence analysis can do more to protect the border than any wall.

The U.S. should be putting all available resources, public and private, where they will be most effective: into fighting the drug cartels. An effective border defense must be intelligence driven and multi-level.

But most important of all, border-enforcement efforts must target the cartel organizations. It is these organizations which make it possible to elude detection using sophisticated technology, advanced communications, and real-time intelligence—along with the dual persuaders of threats and rewards. The cartels and their legion of subcontractors are the real criminal threat; not the migrants who hope to find work or join their families in the United States. Arresting thousands of *pollos* is a huge waste of resources. They or others like them will continue to attempt illegal entry, making the cartels even stronger with their passage fees. Pouring even more money and manpower into enforcement on the border will have little impact as long as the criminal organizations remain intact.

Whatever makes the cartel organizations strong must be attacked. Their communication systems must be cracked, jammed, and shut down. Their leaders must be identified, arrested, and incarcerated. Most important, the illegal flow of funds across the border into cartel pockets must be disrupted, interrupted, and stopped. Money is at the heart of all criminal organizations and this country has hardly lifted a finger to stop over \$40 billion a year in cartel funds pouring across the border.¹⁷ International banks, wire transfer companies, stored value instrument issuers, and many import-export businesses are involved or complicit in the illegal movement of

funds. The physical border is irrelevant to the flow of money; it is the virtual border in cyberspace and currency exchanges that must be defended. Unless the Department of the Treasury becomes a full participant in the effort to stop the cartels by cutting off the illegal transfer of funds, there is little hope of success.

Our country has the law-enforcement expertise for what is needed. The mystery is why it has not yet been fully engaged. Why has there not been the kind of full-scale, all-out assault that was directed at the Mafia? So far, we see token and isolated gestures. The seizure of contraband, however impressive, does little to disrupt the cartel businesses. The round ups of “illegals” make headlines and pad agency budgets while the criminal organizations quietly regroup and keep breaking our laws.

Critical time is wasting. Few think that the courageous Mexican initiative against the cartels will be continued at the current level after the Calderón Administration ends in less than a year. This is the time for a maximum effort against the cartels. Only when the smuggling organizations are dismembered will border defense efforts be equal to the threat. Only then can it truthfully be said that the border is “secure.”

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¹³ See the State of Arizona's [“Build the Border Fence”](#) website.

¹⁴ Marc Lacey, [“Arizona Officials, Fed Up With U.S. Efforts, Seek Donations to Build Border Fence,”](#) *New York Times*, July 19, 2011.

¹⁵ U.S. Government Accountability Office, *Border Security: DHS Progress and Challenges in Securing the U.S. Southwest and Northern Borders*, GAO-11-508T, March 30, 2011, p. 9.

¹⁶ Pew Hispanic Center, *Modes of Entry for the Unauthorized Migrant Population* (Washington, DC: May 22, 2006).

¹⁷ This estimate is derived from U.S. Department of Justice, National Drug Intelligence Center, *2009 National Drug Threat Assessment*, December 2008, p. 49, and United Nations Office on Drugs and Crime, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, 2010, p. 65.



HOW TO FIX A BROKEN BORDER: **FOLLOW THE MONEY**

PART III OF III

By Terry Goddard

MAY 2012

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ABOUT PERSPECTIVES ON IMMIGRATION

The Immigration Policy Center's *Perspectives* are thoughtful narratives written by leading academics and researchers who bring a wide range of multi-disciplinary knowledge to the issue of immigration policy.

ABOUT THE AUTHOR

Terry Goddard completed his second and final term as Arizona's Attorney General in January 2011 and has reentered the private practice of law. A native of Tucson, Arizona, and graduate of Harvard College, he was first elected Arizona Attorney General in 2002. Over eight years in office, he focused on protecting consumers and fighting the organized criminal activities of the drug cartels. He made significant progress in attacking cartel money laundering, seizing approximately \$20 million and culminating in an historic \$94 million settlement with Western Union in February 2010. He received the Kelly-Wyman Award for 2010, the top recognition given by his fellow Attorneys General. Terry's first job out of ASU law school in 1976 was prosecuting corporate fraud. During his legal career, he has handled a wide variety of cases, from a challenge to a federal highway route to election law matters before the state Supreme Court. Before law school, he served on active duty in the Navy, retiring as a commander after 27 years in the Reserves. Mr. Goddard is currently teaching at Columbia Law School in the Attorney General Project. He also teaches a graduate course entitled "The Art of Public Decision Making" at Arizona State University School of Public Affairs. He has been selected a Wasserstein Fellow at Harvard Law School and is a Senior Fellow at the American Immigration Council. Terry lives in Phoenix with his wife Monica and teenage son.

ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy in U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

Introduction

For all the political rhetoric and chest pounding about border security in recent years, the U.S. has done very little, and politicians have said almost nothing about, the need to cut off the funds flowing illegally across the southwest border and feeding the drug cartels. The most basic, the most effective approach to fighting organized crime has always been to cut off their funds. But this is not being done in the case of the cartels. Billions of dollars in illegal revenue from the sale of drugs and other contraband continues to flow into cartel pocketbooks, as well as to criminals within the U.S. The money pours over the border by many means, from bulk cash shipments and wire transfers to funnel bank accounts and stored value instruments. Most of these transactions clearly violate anti-money laundering laws. Yet, rather than disrupting this flow of cash, the U.S. government expends almost all of its border security resources building more fences and chasing would-be workers through the desert.

By letting so much illegal cash literally flow through its fingers, the United States is making sure that the cartels have the resources they need to attack and defeat our border defenses.

Only recently has the Department of Homeland Security been making substantial seizures of bulk currency headed south. The totals are impressive—over \$150 million in bulk currency seized in fiscal year 2011 (up from \$7.3 million in 2005).¹ However, compared to the billions headed to Mexico, this is a drop in the bucket. The National Drug Intelligence Center has estimated the amount of money flowing from the United States to Mexico from the sale of illegal drugs in this country at between \$19 billion and \$39 billion per year.² That number is four years old and undoubtedly low. Revenue from the total sale of drugs in the United States was estimated last year to be \$64 billion.³ More recently, the number was placed at “over \$85 billion by a Justice Department official.”⁴ Human smuggling into the United States, according to a United Nations estimate, brings in over \$6 billion more.⁵

Although some cartel funds are used to purchase guns and other products and services in the United States, most of the cartel revenues must be moved back across the border. And, because of changes in Mexican law in 2010 restricting the holding of dollars by Mexican citizens, the dollars must be converted to pesos. This torrent of cash pays for the highly trained personnel who are killing Mexican police and public officials, and who are so expert at smuggling drugs, guns, and people across the U.S. border. The money also encourages corrupt officials to look the other way and pays for the sophisticated technology and weapons that the cartels use to such deadly effect.

By letting so much illegal cash literally flow through its fingers, the United States is making sure that the cartels have the resources they need to attack and defeat our border defenses. But, some say, the cartels are not terrorists and cutting off terrorist funds must be our main international objective. However, there is no way to distinguish between illegal money transfers to the cartels and similar transactions to terrorist organizations. Once the guards against money laundering are down, the money corridors and criminal money brokers are impartial. Leave open the door for one, and it is open for all.

Over the past decade, Arizona has occupied a front-row seat for the dramatic increase in smuggling of people, drugs, guns, and contraband across the southwest border. Frustrated by the lack of federal response, law enforcement in the Grand Canyon State attacked what they knew to be the most vulnerable point in the massive smuggling organizations—their access to cash. As one state, working virtually alone, Arizona could not stop the criminal monster. But we did learn some valuable lessons, discover some cartel vulnerabilities, and develop important investigative resources that, if aggressively deployed in federal hands, could prove decisive in the effort to protect the southwest border.

Wire Transfers

Wire transfer has been, and in some places may still be, the payment vehicle of choice for human smugglers. The reasons are obvious. Human smugglers have a one-time contact with their “cargo.” Once the person being smuggled is released in the United States, it is likely that the smuggler will never see them again. Payment must be fast, close in time to the moment the cargo is safely deposited at a drop house, and as anonymous as possible. The cartel agent must be able to collect many individual payments at the same time without arousing official suspicion. Once the wired funds are received by the smuggler, or *coyote*, the smuggled person is released from the drop house or escorted on the rest of his or her journey.

Arizona: A Case Study in Enforcement

More than 10 years ago, under the expert leadership of Cameron (Kip) Holmes,⁶ the Arizona Attorney General’s Office started to go after smuggler money. At the time, and until a few years ago, hundreds of millions of cartel dollars were being wired illegally into Arizona. As the Arizona Attorney General from 2003 to 2011, I made targeting these practices a top priority.

Our investigators with the Arizona Financial Crimes Task Force looked for financial anomalies; mismatches that did not correspond to business reality. They immediately saw that Arizona was a huge net importer of wired funds. At the top-ten Arizona wired-funds locations, over \$100 were coming in for every dollar wired out. Wire transfers into Arizona from other states, in amounts over \$500, totaled more than \$500 million per year. Since there was no apparent business reason for this imbalance, the investigators took a closer look.

Arizona investigators posing as drug dealers picked up wired payments at telegraph offices.⁷ After receiving wires totaling almost \$10,000—the threshold at which transactions in a single day under one name must be reported to the federal government—the agent would pull out identification for someone else and attempt to continue receiving wire transfers under the new name, so as to not trigger a report. Far from being astonished by this miraculous change in identity, desk clerks routinely accepted multiple IDs—as many as six at a time. In one case, the clerk examined the freshly produced ID and told the agent that it was not a very convincing forgery and that her cousin a few doors away would do a much better job. In other cases, the clerk would just give the customer a new ID from a stack kept behind the counter.

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Beginning in June 2003, Arizona started issuing Geographic Targeting Orders (GTOs)⁸ by which the state required additional identification or required additional reporting from the wire-transfer agents for certain types of financial transactions in an identified geographical area.⁹ Under a GTO, Arizona could, for example, require all high-volume money transmitter locations in the southern part of the state to obtain the fingerprints and signatures from all persons who received person-to-person wire transfers in amounts over \$500. Based on analysis of the transaction data produced by the GTOs, as well as other evidence gathered through more traditional law-enforcement actions, the Task Force obtained 25 court-ordered warrants from the summer of 2001 through 2006 permitting seizure of wire transfers it had probable cause to believe were intended to pay for human smuggling or narcotics trafficking.

These “damming warrants” described the type of wire transfers the Task Force determined were most likely to be used for payment to human smugglers. At first, the descriptions were pretty simple. When we first used damming warrants, passage across the border cost around \$2,000, and an identifiable set of smugglers picked up most of the money at a few high-volume locations on the Arizona side of the border. The damming warrant therefore described transactions of approximately \$2,000, picked up by one of several specified *coyote* agents at specified locations. Later in the process the courts accepted a detailed description of the transaction—such as the amount of the wire, location of the pick-up, and number of similar transactions—but without naming the pickup operators, as sufficient grounds to issue a warrant.

Under the warrant, the money transmitter was ordered to electronically divert into a holding account wire transfers that matched the court-targeted criteria. When the *coyotes’* runners, called “pick-up operators” by law enforcement, tried to obtain the funds, they were told that the money was being held by the Attorney General. The money transmitter company provided a number to call if the frustrated recipient wished to pursue the money. That number was answered by specially trained, bilingual police officers who tried to determine if there was a legitimate purpose for the wire payment. Many of the callers were very frank, saying the money was to pay a *coyote* for illegally bringing someone into the country. Others made up elaborate stories, almost all of which fell apart when questioned.

The police officers handling the calls were instructed to let even semi-plausible explanations pass and, in those cases, to release the money. But if the caller admitted an illegal purpose for the funds, or the story was too improbable to believe, the money remained in official detention. All detained funds were taken before a court for a final seizure proceeding. At that hearing, the state had to demonstrate to the court’s satisfaction why it believed that the funds were the proceeds of illegal acts. Anyone whose money was held could appear at that hearing to make their case that a particular seizure was improper. About \$17 million was detained by the damming warrants and processed for court seizure. In almost six years of court actions and 25 warrants, no party successfully challenged a money seizure for forfeiture.

No damming warrant was effective for very long. As soon as the smugglers got word that money was being held at their usual pick-up points, they figured out the criteria being used and quickly

changed their payment procedures. If a certain dollar amount was being targeted, the next payments would be broken into smaller amounts. If certain locations were targeted, the pick-up operators went elsewhere. The money detained by each warrant reached its highest point shortly after initiation and within three days fell to almost zero as the smugglers adapted to law-enforcement's initiative.

As the damming warrants became more successful, the disproportionate volume of inbound wires to Arizona began to shrink. By 2006, the peak month of incoming transactions over \$500 had fallen from a high a year earlier of over \$36 million per month to less than \$2 million per month. Especially steep declines in early 2005 and early 2006 came after damming warrant interdictions. At the same time, the receive-to-send ratio of transactions at the 10 highest volume wire-transfer locations fell from about 100 to one to about three to one.

There is no accounting for such a dramatic change apart from the conclusion that a substantial amount of illegal funds were being wired into Arizona. Unfortunately, the drying up of the Arizona wire-transfer business by no means meant that human smuggling through Arizona had stopped. The cartel agents simply changed their payment procedures and smuggling continued. Smugglers started "triangulating"—having their payments wired to a confederate just south of the border, who would pick up the money and phone the drop house operator in Arizona to confirm that payment had been received, allowing the release of the smuggled person. Although having tens of millions of dollars in cash flooding small Mexican border communities had undoubted risks, it kept the funds away from Arizona authorities.

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Continuing to go after the money, Arizona law-enforcement officials obtained a damming warrant to seize wire transfers sent from specified "corridor states" to locations in northern Mexico, just south of the Arizona border. The seizure order was only in effect for three days, but took in \$200,000 of suspect transactions before an Arizona judge shut it down. The Arizona Supreme Court eventually ruled that a state court did not have jurisdiction to issue a warrant for seizures outside the territorial limits of the state.

By the fall of 2009, the Arizona Attorney General's Office and Western Union, by far the largest volume transmitter of cash by wire in the world and into Mexico, began to seek a way to stop multiple ongoing legal actions between them. In February 2010, an agreement was reached. All lawsuits were dismissed and Western Union agreed to make sweeping changes to increase adherence to federal requirements and to more aggressive reporting of suspicious transactions by their agents. A fund was established to pay for the changes and a monitor appointed by the court to make sure the new procedures would go into effect. Perhaps most important, all the data involving unusually large wire transfers for the past five years and going forward would be made available to law enforcement—state, local, and federal.

Finally, and the capstone to this effort to increase border security, Western Union contributed \$50 million to a fund which would make competitive grants to local and state law-enforcement efforts to attack money laundering and other border-related crimes. The Southwest Border Anti-Money Laundering Alliance was established with this money and the Executive Board selected Kip Holmes as its executive director. The wire-transfer data has been flowing to the Alliance since November 2010 and is being analyzed by their agents. Promising information is passed on to the appropriate law-enforcement agencies (state, federal, and the PGR in Mexico) for further investigation. Significant improvements in border security are being funded by the Alliance.

Beyond Arizona: Next Steps

Arizona has done about all a single state can on the anti-money laundering front. We identified a serious criminal problem, developed a successful investigation/prosecution technique, and changed smuggler behavior, at least in Arizona. But the next step must be national. Using the same leads Arizona derived from wire-transfer data, federal authorities are in an ideal position to coordinate among the states and with Mexican law enforcement to close down the criminal exploitation of the wire-transfer system. Nothing of the kind has happened, yet.

I testified several times before Congress urging increased action to fight money laundering, most recently in July of 2010. The U.S. Governmental Accountability Office (GAO) that same month recommended that the Department of Homeland Security should study the Arizona successes in tracking and seizing wire transfers:

A second opportunity involves assessing the financial investigative techniques used by an Arizona Attorney General task force. The task force seized millions of dollars and disrupted alien smuggling operations by following cash transactions flowing through money transmitters that serve as the primary method of payment to those individuals responsible for smuggling aliens. By analyzing money transmitter transaction data, task force investigators identified suspected alien smugglers and those money transmitter businesses that were complicit in laundering alien smuggling proceeds.¹⁰

In spite of this strong GAO endorsement, there has been no adoption of the Arizona model. After almost two years, no convictions. No indictments. Just rumors of investigations and hints in SEC filings give hope that something may be changing. Considering the treasure trove of new data is available to facilitate these investigations and better track organized criminal activity and seize their money, the lack of action is very disappointing.

It is especially frustrating because the federal government has an opportunity to use the wire-transfer data in ways that state officials never could. They can “up stream” an investigation. When a suspect wire transfer came to our attention in Arizona, we could seize it and prevent the cartels from getting the money. We could not go up stream to check out the sender in another state to find out what other criminal enterprises that person or enterprise might be conducting. The federal government, however, can do exactly that and cast a wide net against criminal behavior.

Unfortunately, not only is there little positive movement by federal authorities in combating illegal wire transfers, but some money transmission agents appear to be actively evading federal rules.

These companies collectively processed billions of dollars in wire transfers last year to Mexico. The companies require very little identification from senders of wire transfers under \$1,000, just a name. Other specific identifiers such as a birth date, driver's license, or address are not required. Furthermore, these companies do not seem to be particular about the qualifications of the subagents in Mexico who receive their wire transfers. Subagents may not even be known to the U.S. transmitter. They could be criminals with long records and the U.S. company would not know.

Hypothetically, under such lax oversight, a cartel operative could set up as a receiving subagent in Mexico and then wire funds from the United States illegally by "structuring"—that is, breaking large payments into multiple small transmissions. If the receiving agent is a money launderer, the names of real people would not be needed. Any list of fictitious names would do. The receiving agent could divide the amount of money that has to be moved out of the United States among a list of names in varying amounts. The names and corresponding amounts would then be sent to a confederate in the U.S. who would send the requested wire transfers to the receiving agent, all in small, apparently legitimate, and facially unrelated transactions. By structuring the transmission, and with the cooperation of the sending agent, the sender can avoid the \$10,000 reporting requirement, even if the total amount sent is in the hundreds of thousands of dollars. The receiving agent reaggregates the funds and passes them to the cartel.

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Such techniques can effectively disguise the movement of large amounts of cash. The hypothetical money laundering situation described above is further exacerbated because, although Western Union subagents are exclusive to that company, other wire-transfer companies allow their subagents to represent many different money transmitters. Thus, a single operator could be a subagent for several transmission companies, allowing a large transaction to be split not only among a large number of recipients, but among several different carriers, structuring the money transfer even more effectively. When a sender can coordinate with the receiving agent, effective control over international wire transfers virtually disappears. Eventually, one hopes that FinCEN, a division of the Department of the Treasury, would notice a large flow of funds to a mysterious location that had little or no economic reason to receive so much money. But FinCEN has been planning to monitor international wire-transfer data for about eight years and the system is still not operational.

Most international wire-transfer activity is made up of millions of legitimate transactions. The money launderers are tiny needles in a huge haystack. But without careful identification requirements on each transmitter and pick-up agent, and alert action by the transmission agents in spotting suspicious activity and filing Suspicious Activity Reports (SARs), human smugglers and other criminals are able to hide their cash transfers amid the forest of legitimate wires. Companies that operate outside the anti-money laundering rules present a huge challenge, not only to the effectiveness of the 2010 Western Union settlement with the border states, but to whether this country can enforce its anti-money laundering laws at all.

Money Laundering Technologies and Techniques

Currency Brokers

More and more, illicit cross-border money transactions are done by currency brokers—specialists who can divide a large sum into numerous small amounts that are virtually unnoticeable and can be aggregated at the receiving end. The currency broker has far more options for money laundering than the wire-transfer agent, including bank accounts set up in fictitious names and trade accounts of companies that either do export/import activity and can hide laundered transactions among many legitimate ones, or shell corporations set up to look as if they are involved in cross-border trade.

According to a GAO report, alien smugglers increasingly use “funnel accounts,” deposit accounts opened to receive payments for smuggled goods and services. Federal officials in Arizona report large-scale money laundering through major U.S. banks that have a nationwide branch and automated teller machine (ATM) network. A deposit account opened by smugglers in Arizona would receive payments from the sponsors of smuggled aliens through an ATM or bank office from anywhere in the United States. The alien smuggler then quickly withdraws the money and closes or abandons the account, leaving virtually no trace.¹¹

Trade-Based Money Laundering and the Black Market Peso Exchange

Cross-border businesses have always been tempted to disguise currency smuggling amid the flow of legitimate commerce. Booking an extra cost for the purchase of goods in Mexico can move dollars across the border and reduce taxable income. A more sophisticated version of the money-brokering process is found in the current evolution of the Black Market Peso Exchange (BMPE). Starting out as the market for illegal currency in Columbia, the original BMPE was taken over by Colombian drug cartels to repatriate drug proceeds in the 1990s. The Peso Exchange has become the default description of almost any procedure that uses product shipments to avoid currency restrictions and reporting, whether it touches an actual Exchange or not.

The pesos paid for U.S. goods (a tractor trailer truck, for example) sold in Mexico can take some surprising turns in the currency conversion process. Instead of converting pesos to dollars through a legitimate currency exchange with formal reports of the transaction, direct payment is sometimes made to the truck seller by third parties, unrelated to the purchaser—payments which are the dollar proceeds of illegal drug sales in the U.S. The pesos needed to purchase the product in Mexico are paid to the cartel’s money broker (usually at a discount from the legal exchange rate) and the purchased truck crosses the border to complete the transaction.

Sometimes, such transactions take place without moving any goods at all. A warehouse north of the border issues an invoice to someone wishing to convert drug dollars to pesos. The invoice shows a “purchase” of a Mexican product (perfume, for example) and the dollars to be converted are paid to the writer of the invoice who then “purchases” product in Mexico and receives a receipt in pesos for the alleged “import” goods. The pesos are paid to the cartel’s money broker by a third party who needs dollars in the U.S. and is looking for a good discount. No goods change hands, only cash

and paperwork. The business in the U.S. keeps some of the invoiced product on hand in case of inquiry. It looks like a lot of perfume has crossed the border. But in reality, only cash does.¹²

Stored Value Instruments or Prepaid Access Cards

One particularly mystifying failure of our nation's border defense is the inability or unwillingness to monitor and control the cross-border movement of "stored value" devices. These are innocent-looking plastic cards that can contain thousands if not millions of dollars and are not covered by any currency disclosure requirements at the border. They resemble credit cards, but have access not to a credit account at a financial institution, but to a specific amount of cash "stored" on the card in a microprocessor chip or in an account accessible through the card. Along with other digital devices, these cards are the currency of the future. Throughout the economy, more and more payments are being made with stored value cards. From a volume of only \$6.2 million 10 years ago, the use of prepaid access cards exploded to over \$800 billion in 2008, with projections as high as \$1.3 trillion for the current year.¹³ One large user of these cards is the United States government, which uses them for a wide variety of payments, including virtually all public assistance.

There are several types of stored value devices. The least sophisticated contain a fixed amount and are activated by a merchant. The funds on the card are drawn down as purchases are made until the card is empty. This type of card is not rechargeable. Commonly known as gift cards, they are available at every supermarket checkout counter. This version is not a problem (unless a smuggler is carrying hundreds of them). More problematic are the cards that can be refilled from a computer or ATM. These are, in effect, little bank accounts and the balances stored on them are not apparent without a scanner equipped with the appropriate software. These cards can carry a large balance that can be downloaded after crossing the border. The cards can be passed easily from hand to hand, making them essentially anonymous.

Stored value devices are not listed as monetary instruments or otherwise subject to declaration at the border, even though they could contain many times the \$10,000 disclosure threshold.

Under U.S. law, no traveler may take over \$10,000 in cash or cash equivalents, called "monetary instruments," into or out of the United States without declaring that money at the border. The definition of "monetary instruments" is evolving. It includes travelers' cheques, bearer bonds, some letters of credit, and other documents readily convertible to cash. Stored value devices are not listed as monetary instruments or otherwise subject to declaration at the border, even though they could contain many times the \$10,000 disclosure threshold. This loophole, clearly identified by federal authorities over six years ago, provides smugglers with a massive opportunity to evade anti-money laundering security at the border. Since there is no obligation to disclose, border officials have no authority to even inquire how much value is stored on a stored value instrument, and no way to read any cards they happen to spot.

A third type of prepaid access device provides access to an account through its magnetic strip (or other electronic mechanism) and a password. These are readily transferable and can be used with participating financial institutions on both sides of the border. Presumably, it takes a higher degree

of identification to open the original account than is the case with a rechargeable card, making these instruments somewhat less desirable to smugglers. However, the low level of identification that has been required by some financial institutions does not pose an obstacle for money launderers. These cards have recently been renamed “prepaid access” devices by federal regulators to emphasize the fact that they usually do not actually store value on the device, but more often provide access to an account.

Attempts to Control Money Laundering Technologies

The huge hole that stored value devices pose to our anti-money laundering efforts cannot be a surprise. In 2006, the National Drug Intelligence Center (NDIC) in its Assessment of stored value cards warned that prepaid access devices constituted a significant loophole in our border defenses.

Key judgments from the NDIC Assessment include:

- Prepaid stored value cards—a product experiencing explosive growth—provide an ideal money laundering instrument to anonymously move monies associated with all types of illicit activity, without fear of documentation, identification, law enforcement suspicion, or seizure. Therefore, it is very likely that drug traffickers and criminals alike are exploiting and will increasingly exploit the convenience and anonymity of prepaid stored value cards to launder and move funds associated with their illicit enterprises.
- Prepaid stored value cards cannot be seized for Report of International Transportation of Currency or Monetary Instrument (CMIR) violations; are loosely regulated; function as remittance cards; frequently provide cardholder anonymity when individuals are obtaining cards or adding value to cards; often have liberal daily limits on total card value, reloading, withdrawal, and spending of funds; and feature fees that are generally consistent with or lower than the normal “cost” of laundering money.
- Prepaid stored value cards are, in many ways, superior to established methods of money laundering and money movement—specifically, the use of money transmitters and bulk cash smuggling—and may replace these methods under certain conditions.
- Drug traffickers and other criminals will most likely use prepaid stored value cards in lieu of electronic money transfers because the fund-transfer processes are similar and use of the cards provides additional benefits.
- Prepaid stored value cards are an advantageous alternative to bulk cash smuggling via package delivery services or couriers on board commercial conveyances (airplanes, buses, trains)—methods that carry a significant risk of detection by law enforcement.
- It is much less likely that prepaid stored value cards will replace traditional bulk cash smuggling by private or commercial vehicle—methods that currently appear to be adequate to fulfill traffickers’ needs.
- U.S. regulatory action alone will not be sufficient to suppress the money laundering threat posed by prepaid cards, since cards issued by non-U.S. banks or other institutions

can be used domestically to transfer funds, make purchases, or access cash at automated teller machines (ATMs).¹⁴

Among other conclusions, the Assessment recommended specific regulatory changes:

The U.S. Department of the Treasury has acknowledged the need to modify and clarify existing regulations related to the prepaid stored value card industry; in fact, FinCEN recently announced that it will issue new regulations designed to clarify the roles and obligations of issuers of prepaid cards. Although it is not yet clear what actions will be taken, **there is an obvious need** {emphasis added} to implement several changes to existing regulations. In order to enable seizure of prepaid stored value cards with a monetary value of more than \$10,000, stored value should be included in the definition of monetary instruments for CMIR purposes. Because it is often difficult to distinguish between traditional debit cards and network-branded prepaid stored value cards, a requirement designed to distinguish the appearance of open and semi-open system prepaid stored value cards would enable law enforcement agencies to better identify suspicious cards. Due diligence procedures required of financial institutions under the USA PATRIOT Act—such as identity verification and comparison of customers’ identities against names of known terrorists—should be applied to prepaid stored value cards because open and semi-open system prepaid stored value cards are used in a manner that approximates a traditional checking account. Additionally, the imposition of compliance programs such as those that apply to money transmitters—including customer identification, recordkeeping, and SAR-MSB reporting requirements—would empower law enforcement investigations by allowing agencies to access information such as cardholders’ identities, to track transactions, and to identify patterns of suspicious activity.¹⁵

In spite of the above dramatic conclusions, FinCEN did not act in 2006. As part of credit card reform, Congress ordered Treasury to write regulations for prepaid access devices by February 2009. Nothing happened. When regulations were finally drafted in 2010, they failed to cover the international movement of the cards. The final rule took effect on September 27, 2011. It changed the official name of the cards to “prepaid access devices” and made some long-overdue changes in how the cards are reported by the issuer and monitored, but the rule did not close the international money laundering loophole. Only now is the rule change for international transportation of such devices being officially proposed.

Retired U.S. Representative Gabrielle Giffords introduced legislation to close the prepaid access loophole in May 2010.¹⁶ That proposed legislation defined prepaid access devices to include developing technologies for money transfers such as cell phones; established a disclosure requirement for prepaid access devices transported out of the country when they, or they in combination with cash or monetary instruments, total more than \$10,000; required registration of prepaid access programs; mandated that law-enforcement officers have the software needed to determine the value accessible with devices they encounter; subjected non-conforming prepaid access devices to forfeiture; and established criminal and civil penalties for violations. Although the bill died at the end of the 111th Congress, some of its provisions were included in the September 2011 final rule from Treasury. The broader objectives of the bill, however, including the need to control international movement of prepaid access devices and provide meaningful penalties for

abuse, remain undone. Senators Grassley, Levin, and Feinstein have introduced a less comprehensive effort to control the international transport of prepaid access devices in the 112th Congress.¹⁷ But no action has been taken on that legislation, either.

The prepaid access industry has fought any attempt to require disclosure of card balances, to allow official examination of the cards with scanners, or even to identify the cards visually in a way that makes clear that they are different from debit and credit cards as was recommended by the Department of Justice Assessment. Since credit-card companies such as Visa and MasterCard are the primary issuers of prepaid access cards, there is no way to tell by observation what type of cards a cartel courier is carrying. I have spoken to Treasury officials on this subject and testified before Congress to urge the elimination of the stored value or prepaid access card loophole. In 2009, the 18th annual Southwest Border Money Laundering Conference in Phoenix was dedicated solely to the threat posed by prepaid access devices. Treasury agents attended this and other anti-money laundering conferences where the urgent need to fix this problem has been discussed.

The federal government has been stubbornly unwilling to patch the hole that prepaid access devices create in our anti-money laundering regulations.

The federal government has been stubbornly unwilling to patch the hole that prepaid access devices create in our anti-money laundering regulations. Federal inaction is very hard to understand. True, the ideal fix is statutory and not regulatory, making it more complicated and time consuming. Statutes would have to be passed to impose the obligation on travelers crossing the border to declare any prepaid access devices in their possession or face criminal consequences. Border agents must be supplied with card readers able to verify the amount contained on the cards or in accounts accessible through the cards. But, surprisingly, the agency in charge of preventing money laundering has not pushed legislation and has conspicuously dragged its feet on regulating the international transportation of these cards, even in the face of urgent law-enforcement demands and Congressional mandate.

What Next?

Some long overdue efforts to tighten up the criminal laws against money laundering began in 2011. The Administration has put forward an anti-money laundering and forfeiture legislative package which it calls the Proceeds of Crime Act (POCA). In hearings on February 8, 2012, before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, officials from the Departments of Justice and Treasury testified in support of the POCA provisions, saying they are needed to combat transnational organized crime and international money laundering. Their analysis indicating that money laundering is a major threat to our financial system was thorough, but their suggestions for remedy were not.

The Administration proposed the following changes to the criminal statutes under POCA:

- harmonizing the definition of money transmitting businesses (including more *casas de cambio* and check cashers).
- extending wiretap authority to schemes reliant on electronic communications (wiretaps are often the most productive information sources in money laundering investigations).
- confronting the problem of commingled funds (reversing the tendency of courts to assume that in a commingled account the dirty money comes out last).
- promoting corporate transparency (requiring proof of beneficial ownership when opening bank accounts).
- extraterritorial application of the RICO and VICAR statutes (increasing the predicate offenses overseas that would prevent the proceeds being invested in the U.S.).

While these are worthwhile improvements, at best they are on the margins, tightening up definitions and expanding the list of predicate offenses. Plus, most of the suggested changes involve cutting down on dirty money coming into the United States, not keeping it from flowing out. If all the POCA reforms were enacted tomorrow, big holes in the anti-money laundering fabric would remain. Although representatives of Justice and Treasury both testified at a recent Congressional hearing that prepaid access cards were a significant smuggling problem, neither suggested doing anything about it. Especially surprising is that the Department of Justice, which so clearly identified the threat in 2006, has not included reform of prepaid access cards in POCA.

Generally speaking, the failures of the anti-money laundering effort are not because of inadequate statutes, but a failure of enforcement.

Prosecutors in federal court today operate under tight restrictions on when they can seize the cash they believe to be part of a criminal scheme. Under Arizona law, it is far easier to hold suspected funds pending further examination of their source.¹⁸ Giving this authority to federal agents would put important teeth in their anti-money laundering efforts. However, POCA contains no recommendations concerning the lack of effective authority to detain and ultimately seize funds when there is a reasonable suspicion that they are the proceeds of a crime.

Another area in which state law could be a model for federal law relates to the consequences for giving false information in connection with a financial transaction. In Arizona, if you give a false name when you open an account at a financial institution, the money is subject to forfeiture.¹⁹ If you give a false social security number when you use a money transmitter, the money is forfeitable.²⁰ In both cases, the depositor and the sender have committed money laundering under state law. If someone tries to bribe a money transmitter or other employee to ignore a reporting requirement, he or she has committed money laundering and the money is forfeitable.²¹ If a money transmitter or an employee accepts false personal identifying information from any person or incorporates false personal identifying information into any report, it is a money laundering violation and the money is forfeitable.²² The same clear forfeiture authority is not contained in

federal law. These statutory changes would be very valuable to a federal prosecutor battling money laundering.

Time to Clamp Down on Money Laundering in All Its Forms

The *Manchester Guardian* reported in April 2011 how hundreds of billions of dollars in “wire transfers, traveler’s cheques and cash shipments” were moved illegally through Wachovia Bank and across the U.S.-Mexico border in 2005 and years preceding. These funds undoubtedly paid for murder and mayhem in Mexico, yet an investigation into Wachovia Bank’s procedures resulted in a fine of less than 10 percent of the money laundered and no criminal prosecutions.²³ As one commentator rightfully observed, the best way to end these insidious practices is the “rattling of hand cuffs in some bank boardrooms.” Yet one of the consistent factors in money laundering prosecutions is the lack of penal consequences. Major financial institutions continue to be less than diligent in enforcing anti-money laundering regulations and some respond to law-enforcement subpoenas in ways that undercut the investigations by closing out the subject account and sending the deposited funds back to the depositor.

Until government agencies, especially Treasury, get more serious about cutting off the illegal international flow of funds, we can never say we have a “secure” border.

Generally speaking, the failures of the anti-money laundering effort are not because of inadequate statutes, but a failure of enforcement.²⁴ Again and again, huge amounts of funds flowing illegally out of this country could be stopped, if financial institutions and government agencies focused on the problem. But the prevailing attitude is permissive of violations and reluctant to sanction violators. Of course, there will always be sophisticated nuances and complex trade relationships which can be exploited to move money illegally, but the billions of dollars going to the drug cartels are not flowing through nuances. They are going through the front door of the financial system, through bank accounts, large trade transactions, prepaid access devices, and wire transmissions. As opponents, the cartels have not made the problem any easier, proving to be extraordinarily innovative and opportunistic. They have mastered the international financial system and exploited it to their great advantage.

The U.S. government must enforce existing anti-money laundering provisions and quickly close the identified loopholes to stop (or at least slow down) the cash flowing to the cartels. Until government agencies, especially Treasury, get more serious about cutting off the illegal international flow of funds, we can never say we have a “secure” border. Stopping less than one percent of the opponent’s cash smuggling transactions should never be considered a good job. Especially when the money pouring across the border is wreaking such havoc in Mexico and making a mockery of the U.S. border defenses.

With the Calderon Administration in Mexico in its last months in office, the best chance to strike back against the cartels is rapidly disappearing. The United States should be making every effort to strengthen Mexico’s hand right now. The most effective means available is to stop the cash that

makes the cartels so strong. We can fix the “broken” border and stop the bloodshed in Mexico—by just following the money.

Endnotes

¹ Eric Tucker, [“Cash Smuggling from Mexico Presents US With Challenge,”](#) Huffington Post, February 12, 2012.

² National Drug Intelligence Center, [National Drug Threat Assessment 2009](#), December 2008.

³ United Nations Office on Drugs and Crime, [Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes](#), October 2011, p. 21.

⁴ Testimony of Jennifer Shasky Calvery, Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice, before the Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary, U.S. House of Representatives, February 8, 2012.

⁵ United Nations Office on Drugs and Crime, [The Globalization of Crime: A Transnational Organized Crime Threat Assessment](#), 2010, p. 66.

⁶ Mr. Holmes, a Harvard-educated former Portland cop, has focused his career in law enforcement on detection and prosecution of money laundering. He drafted the Arizona money laundering laws, among the toughest in the nation, and led the Financial Crimes Task Force at the Arizona Attorney General’s Office. Today, Kip is the Director of the Southwest Border Anti-Money Laundering Alliance.

⁷ At the beginning of these investigations, agents did not pose as human smugglers, or *coyotes*, because being a *coyote* was not yet a state crime.

⁸ The 1991 money transmitter regulation statutes, 6-1201 through 6-1242, and—in particular—6-1241(J), relating to GTOs, and the 2002 amendments to it adding (K).

⁹ The GTO provisions are 6-1241(J) and (K).

¹⁰ U.S. Government Accountability Office, [Alien Smuggling: DHS Could Better Address Alien Smuggling along the Southwest Border by Leveraging Investigative Resources and Measuring Program Performance](#), GAO-10-919T, July 22, 2010, p. 6.

¹¹ U.S. Government Accountability Office, [Alien Smuggling: DHS Needs to Better Leverage Investigative Resources and Measure Program Performance along the Southwest Border](#), GAO-10-328, May 2012 p. 35.

¹² See, for example, Juan Aguilar, “In Laredo, Was A Criminal Enterprise Bathed in Sweet Perfume?” *Texas Tribune*, November 12, 2011.

¹³ This information is from the materials prepared for the 2009 Southwest Border Money Laundering Conference.

¹⁴ U.S. Department of Justice, National Drug Intelligence Center, [Assessment: Prepaid Stored Value Cards: A Potential Alternative to Traditional Money Laundering Methods](#), Product No. 2006 R0803-001, October 31, 2006, p. 1.

¹⁵ *Ibid.*, p. 7.

¹⁶ H.R. 5127, 111th Congress, 2d Session.

¹⁷ SB1731.

¹⁸ This is because ARS 13-4304 defining property subject to forfeiture applies to property subject to forfeiture under in personam causes of action such as ARS 13-2314 (D) and 13-4312 and property subject to forfeiture as substitute assets under ARS 13-4313(A) and/or ARS 13-2314(D)(6)(d) and (E), or under a special treble substitute assets provision relating to money laundering under ARS 13-2317(D), and because all property subject to forfeiture is subject to seizure for forfeiture under ARS 13-4305.

¹⁹ ARS 13-2317(A)(6-8).

²⁰ ARS 13-2317(A)(7)..

²¹ ARS 13-2317(C)(1).

²² ARS 13-2317(B)(4),(5) & (9).

²³ Ed Vulliamy, [“How a big US bank laundered billions from Mexico’s murderous drug gangs,”](#) *Manchester Guardian*, April 3, 2011.

²⁴ Except for the failure to include prepaid access cards among the funds which must be disclosed at the border and the difficulty seizing cash assets in federal actions.