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**Smuggling of U.S. Arms to Mexican Drug Trafficking Organizations:  
Effective Policy Options Available to States and Localities**

**The U.S.-Mexico Border: A Discussion on Subnational Policy Options  
Tempe, Arizona, June 17-18, 2009**

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**Introduction**

The Violence Policy Center (VPC) is a national non-profit organization that conducts research and policy analysis with a focus on reducing firearms violence. I have been asked to address the issue of what can be done at the state and local levels in the United States to reduce arms smuggling to Mexico in a manner that does not violate the Second Amendment to the U.S. Constitution.

There is no doubt that the United States is a significant source of the firearms in the hands of Mexican DTOs (Drug Trafficking Organizations). Officials from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) have testified before Congress on numerous occasions outlining the factors that contribute to the problem, including: the strict prohibition and regulation of firearms in Mexico; a readily accessible source of firearms and ammunition in the U.S., particularly in border states; and, illegal “straw purchases” of firearms from Federal Firearms License holders (FFLs). A report released June 18<sup>th</sup> by the Government Accountability Office (GAO) confirms that “Over 90 percent of the firearms seized in Mexico and traced over the last 3 years have come from the United States.” The report also contains an important observation regarding the seized firearms that were not traced through ATF’s eTrace system:

While the eTrace data only represents data from gun trace requests submitted from seizures in Mexico and not all the guns seized, it is currently the only systematic data available, and the conclusions from its use that the majority of firearms seized and traced originated in the United States were consistent with conclusions reached by U.S. and Mexican government and law enforcement officials involved personally in combating arms trafficking to Mexico.<sup>1 2</sup>

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<sup>1</sup> *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges*, United States Government Accountability Office, June 18, 2009.

<sup>2</sup> The GAO report elaborated on this point: “Consistent with the results of eTrace data, U.S. law enforcement officials who had worked on arms trafficking in Mexico and along the U.S.-Mexican border told us their experience and observations corroborated that most of the firearms in Mexico had originated in the United States. Furthermore, U.S. and Mexican government and law enforcement officials also stated this scenario seemed

Moreover, the methods employed by gun traffickers supplying Mexican DTOs are becoming much better understood as we have been able to analyze the smuggling techniques detailed in criminal prosecutions of traffickers. Those prosecutions, along with evidence from large weapons seizures, also give us a much clearer picture of the types, makes, and models of firearms preferred by the DTOs.

What are the most effective strategies to interrupt the supply of weapons to the DTOs?

How much can states and local jurisdictions accomplish without federal action?<sup>3</sup>

States can institute controls at all levels of firearm design, manufacture, and distribution consistent with the U.S. Supreme Court's ruling in *District of Columbia v. Heller*.<sup>4</sup> The *Heller* decision specifically protects handgun possession in the home. At the same time, it specifically endorses myriad other restrictions. Moreover, a series of court rulings since *Heller* have upheld a variety of state-imposed restrictions. In practice, *Heller* should pose no true impediment to implementation of a wide variety of measures that would help address the problem of firearms trafficking to Mexican DTOs.<sup>5</sup>

## Manufacturers

Looking at the issue of weapons trafficking from the U.S. to Mexico, a key aspect is the types of firearms most preferred by traffickers. Gun traffickers supplying DTOs exhibit a clear preference for assault weapons (primarily rifles), armor-piercing handguns, and anti-armor 50 caliber sniper rifles—in addition to standard high-capacity pistols.

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most likely, given the ease of acquiring firearms in the United States; specifically, they told us they saw no reason why the drug cartels would go through the difficulty of acquiring a gun somewhere else in the world and transporting it to Mexico when it is so easy for them to do so from the United States.”

<sup>3</sup> The authority of local entities to act independently is limited by state preemption statutes that prohibit local action on firearms. Most states have some sort of state preemption forbidding localities from regulating firearms, although the extent of such preemption varies greatly. For details on individual state preemption provisions see e.g. Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State, and Selected Local Gun Laws* (2008 Edition).

<sup>4</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783; 171 L. Ed. 2d 637 (2008).

<sup>5</sup> California is the only border state with any significant state and local regulation of firearms. Although California has been identified by ATF as a source for DTO firearms, there has been no comprehensive analysis of the types of firearms supplied and the precise sources of such guns. In the VPC's analysis of federal gun trafficking prosecutions involving Mexico, we found the cases alleging massive weapons trafficking were filed in Arizona, Nevada, and Texas, with the associated weapons originating in those states. In the VPC's view, the guns coming from California are most likely primarily handguns and older weapons obtained on the secondary market at gun shows, flea markets, etc. However, more research and analysis is necessary to better understand the weapons flow from individual border states.

ATF officials have confirmed this in testimony to Congress:

Mexican drug trafficking organizations have aggressively turned to the U.S. as a source of firearms. These weapons are used against other DTOs, the Mexican military, Mexican and U.S. law enforcement officials, as well as innocent civilians on both sides of the border. Our comprehensive analysis of firearms trace data over the past three years shows that Texas, Arizona, and California are the three primary source states respectively for U.S.-sourced firearms illegally trafficked into Mexico. Recently, the weapons sought by drug trafficking organizations have become increasingly higher quality and more powerful. *These include the Barrett .50-caliber rifle, the Colt AR-15 .223-caliber assault rifle, the AK-47 7.62-caliber assault rifle and its variants, and the FN 5.57-caliber pistols better known in Mexico as the cop killer.*<sup>6</sup> [Italics added.]

Research conducted by the Violence Policy Center in its May 2009 study, *Indicted: Types of Firearms and Methods of Gun Trafficking from the United States to Mexico as Revealed in U.S. Court Documents*, identified these same makes and models of firearms as those most desired by traffickers.<sup>7</sup> The VPC analyzed 21 federal criminal prosecutions of gun traffickers over a three-year period in the border states of Arizona, California, Nevada, and Texas. There were more than 1,700 total firearms that prosecutors alleged were known to have been trafficked by the individuals indicted in the 21 cases. The court documents contained specific information regarding 501 firearms, with make and model information provided for 492 firearms. Of the 492 firearms with detailed weapon type listed, nearly two thirds (63 percent) were either assault weapons (209 or 42 percent), armor-piercing handguns (88 or 18 percent), or anti-armor 50 caliber sniper rifles (11 or two percent). The remainder were primarily semiautomatic pistols (148 or 30 percent). Of the armor-piercing handguns, all were FN Herstal Five-sevenN pistols.

Most recently, the June 18<sup>th</sup> GAO report confirmed that DTOs are acquiring guns that are “increasingly more powerful and lethal,” citing as examples the growing popularity of AK and AR-15 type semiautomatic rifles.

In short, traffickers seek out firearms that equip them with an enormous level of firepower that in many respects is equivalent to that used by U.S. troops in combat.<sup>8</sup>

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<sup>6</sup> Testimony of William J. Hoover, Assistant Director, Office of Field Operations, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), before the Western Hemisphere Subcommittee of the U.S. House of Representatives Committee on Foreign Affairs, February 7, 2008.

<sup>7</sup> <http://www.vpc.org/studies/indicted.pdf>, Violence Policy Center, 2009.

<sup>8</sup> For example, the Barrett 50 caliber anti-armor sniper rifle, which under federal law can be sold to civilians in the U.S. under the same purchase requirements as a traditional hunting rifle, is identical to those deployed for use by U.S. troops in Iraq and Afghanistan. The Barrett rifles are capable of piercing armor plate at a distance of a mile and a half and have been used to assassinate Mexican police and other government officials traveling in armored vehicles.

There is tremendous overlap between the military-style firearms preferred by traffickers and the guns that are most popular in the U.S. civilian market. This is because the profile of the U.S. civilian gun industry today is defined by military-style weaponry. As the industry publication *The New Firearms Business* recently observed, “the sole bright spot in the industry right now is the tactical end of the market, where AR and AK pattern rifles and high-tech designs, such as FNH USA’s PS90 carbine, are in incredibly high demand right now.” The referenced assault rifles—AR and AK variants and the FN PS90—are the most popular among traffickers, with the PS90 assault rifle rapidly becoming one of the most sought-after assault rifles based on the patterns that the VPC has observed in prosecutions and seizures.

States, however, have wide latitude to take steps to greatly reduce the level of firepower readily available to traffickers by tightly controlling or banning the most lethal weapons. Seven states have already implemented some form of ban on assault weapons. California banned .50 sniper rifles in 2004, and several other states—including New York and New Jersey—are currently considering bans on 50 caliber anti-armor rifles.

Bans of this nature are likely to withstand scrutiny under the Supreme Court’s *Heller* ruling. In June, a California appeals court upheld that state’s assault weapons and 50 caliber sniper rifle bans in the context of a case involving the criminal possession of those types of weapons by a person subject to a restraining order.<sup>9</sup> The California court cited language in *Heller* making it clear that “the right secured by the Second Amendment is not...a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” The court noted that the California legislature had passed the legislation implementing the ban on assault weapons and 50 caliber sniper rifles:

...in order to address the proliferation and use of unusually dangerous weapons: assault weapons, with an incredibly “high rate of fire and capacity for firepower,” which can be used to indiscriminately “kill and injure human beings” [citations omitted] and .50 caliber BMG rifles, which “have such a high capacity for long distance and highly destructive firepower that they pose an unacceptable risk to the death and serious injury of human beings, destruction or serious damage of vital public and private buildings, civilian, police and military vehicles, power generation and transmission facilities, petrochemical production and storage facilities, and transportation infrastructure” [citations omitted].

California’s assault weapons ban also includes a ban on high-capacity ammunition magazines (those holding more than 10 rounds). Five other states—Hawaii, New York, New Jersey, Massachusetts, and Maryland—also have restrictions on high-capacity ammunition magazines. This type of restriction is useful in reducing the lethality of standard pistols.

A majority of states (29) and the District of Columbia already have restrictions on the possession, manufacture, and/or sale of armor-piercing ammunition. Unfortunately, the

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<sup>9</sup> *People v. Michael Eugene James*, No. C057995, 2009 Cal. App. LEXIS 871 (Cal. App. 3d June 2, 2009).

definition of “armor-piercing” is usually modeled on current federal law which uses a content standard that applies only to handgun ammunition comprised of certain specified materials. This narrow definition fails to capture some current types of armor-piercing ammunition such as that used in the FN Five-seven “cop killer” handguns popular with the DTOs. A more effective approach would be to establish a performance-based standard that would apply to any handgun ammunition capable of piercing police body armor. Two states regulate armor-piercing incendiary ammunition available for 50 caliber sniper rifles. The VPC has found this type of ammunition to be readily available on the U.S. civilian market.

## Dealers

Federal Firearms License holders (FFLs) are the source for a vast number of the guns trafficked to the DTOs. The role of FFLs in supplying the illegal market in the United States is well documented. A 2000 ATF study of agency-initiated firearms trafficking investigations found that although FFLs were involved in the smallest proportion of investigations, FFLs were associated with “by far the highest mean number of illegally diverted firearms per investigation.”<sup>10</sup> This makes sense when one considers that FFLs, by virtue of having a federal license, have access to a large volume of newly manufactured firearms. The ATF study also found “straw purchasing” to be the most commonly used trafficking means.<sup>11</sup>

The findings of the ATF study are consistent with recent research findings by the Violence Policy Center. In the prosecutions we analyzed for *Indicted*, the vast majority of firearms were acquired from FFLs—often in bulk. For example, one case was initiated after an ATF inspection of a Texas FFL found that “over a 15 month time frame, 23 suspected gun traffickers purchased 339 firearms”—with at least 40 of the guns recovered by police in Mexico and three in Guatemala. ATF said the total expenditure for the guns by traffickers in the case was \$366,449. In another case, ATF said that one suspected trafficker based in Las Vegas, Nevada, “had either purchased, or caused others to purchase, over \$100,000 of firearms.”

One step that states and localities can take to better regulate their local FFLs is to require that, in addition to the federal license, FFL holders must also have a state and/or local license to operate a gun dealership. In addition, state and local officials should aggressively enforce any existing zoning, business, or other local laws that would apply to those in the business of selling guns.<sup>12</sup> Currently, 17 states and the District of Columbia have some form of dealer licensing. But California is the only border state with dealer regulations.

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<sup>10</sup> Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, 2000.

<sup>11</sup> A “straw purchase” is a sale in which an individual prohibited from legally purchasing firearms because of a felony conviction, illegal alien status, or other prohibiting factor recruits an individual who can pass the background check to complete the transaction(s).

<sup>12</sup> Federal law requires that all FFLs “comply with the requirements of State and local law applicable to the conduct of the business” in order to maintain their license. 18 USC § 923(d)(1)(F)(ii)(I).

Another option for state and local control of gun dealers is to prohibit them from operating in residential neighborhoods. In one of the major firearm trafficking cases analyzed in the VPC's study *Indicted*, a dealer, who operated under the trade name Mad Dawg Global and supplied a trafficking ring with at least 30 assault rifles, operated out of a house in a residential area of Tucson.

One dealer-related option for states and localities that could be particularly helpful in identifying transactions that may be contributing to illegal trafficking would be to require dealers to report gun sales to state and local law enforcement authorities. This would allow law enforcement to identify patterns—such as multiple sales of assault weapons to the same purchaser—that may suggest illegal trafficking. To augment this type of regulation, state and local law enforcement agencies could coordinate with ATF to use trace data associated with guns seized from traffickers to pinpoint source dealers for further investigation and/or prosecution. Requiring dealers to report multiple sales of specific categories of firearm known to be favored by traffickers—such as assault weapons and 50 caliber sniper rifles—to local law enforcement could also aid in identifying trafficking patterns (federal law already requires the reporting of multiple handgun sales).

ATF has also identified gun shows as a significant source of firearms for traffickers.<sup>13</sup> States can regulate firearm sales at gun shows by requiring that all transactions be subject to the federal Brady background check requirement.<sup>14</sup> States can impose additional gun show regulations such as licensing of gun show vendors and heightened recordkeeping requirements.<sup>15</sup>

State regulation of gun shows is almost certainly consistent with the *Heller* decision. Post-*Heller*, the U.S. Court of Appeals for the Ninth Circuit recently upheld the authority of Alameda County, California, to regulate gun shows. The court held that the county was entitled to regulate gun possession in its sensitive public spaces, and that the prohibition against gun possession in such spaces did not implicate gun show promoters' right to self-defense.<sup>16</sup>

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<sup>13</sup> See e.g. Testimony of William J. Hoover, Assistant Director, Office of Field Operations, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), before the Western Hemisphere Subcommittee of the U.S. House of Representatives Committee on Foreign Affairs, February 7, 2008.

<sup>14</sup> Under current federal law, FFLs are required to perform background checks on sales at gun shows but private sellers are exempt from the background check requirement unless state law imposes such a requirement.

<sup>15</sup> Seventeen states and the District of Columbia regulate gun shows in at least one of these ways. The only border state with any type of gun show regulation is California, which has an extensive set of requirements for gun shows.

<sup>16</sup> *Nordyke v. King*, 563 F.3d 439 (9<sup>th</sup> Cir. 2009).

## Buyers

ATF has identified illegal “straw purchases” as a major factor contributing to the trafficking of guns to Mexico.<sup>17</sup> This is consistent with the patterns the VPC observed in its analysis of federal gun trafficking prosecutions. In the majority of the 21 cases the VPC examined, the traffickers employed rings of “straw purchasers” to obtain guns from FFLs. In some cases, the primary trafficker paid the “straw purchasers” a fee for each gun he or she procured.

States can act to limit the pool of potential “straw buyers” by expanding the categories of persons prohibited under state law from legally purchasing firearms.<sup>18</sup> The most logical expansion would be to prohibit firearms purchases by persons with misdemeanor convictions involving violence such as battery, assault, aggravated assault, or any misdemeanor firearms conviction (federal law only prohibits transfers to persons with misdemeanor domestic violence convictions). Twenty-three states, including California and Texas, as well as the District of Columbia, have some restrictions on transfers to persons with convictions for violent and other serious misdemeanors.

States can also increase the effectiveness of the existing background check system by performing their own checks. A recent study shows that background checks conducted by states are more effective than the background checks performed by the federal government. The study found that local-level checks were associated with a 27 percent lower firearm suicide rate and a 22 percent lower homicide rate among adults 21 and older.<sup>19</sup> This is primarily because many records that are essential to conducting an effective check are kept by states, e.g. records related to mental illness and domestic violence. Currently, Arizona and Texas rely on the FBI to conduct background checks on firearm transfers in their states while California and Nevada act

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<sup>17</sup> See e.g. Statement of William J. Hoover, February 7, 2008.

<sup>18</sup> Federal law makes it unlawful to transfer a firearm to a person who: (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) is a fugitive from justice; (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act ); (4) has been adjudicated as a mental defective or has been committed to any mental institution; (5) who, being an alien—(A) is illegally or unlawfully in the United States, or (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act ); (6) has been discharged from the Armed Forces under dishonorable conditions; (7) having been a citizen of the United States, has renounced his citizenship; (8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; (9) has been convicted in any court of a misdemeanor crime of domestic violence; or, (10) is underage (the minimum federal age requirements are 21 to buy a handgun and 18 to purchase a long gun from a licensed dealer).

<sup>19</sup> Steven Sumner, *American Journal of Preventive Medicine*, May 2008. *Newsweek* coverage at <http://www.newsweek.com/id/141500>.

as Points of Contact (POC)<sup>20</sup> for background checks on firearm transfers.<sup>21</sup>

States can also place limits on multiple firearm purchases. The VPC's research identified many instances in which traffickers obtained multiple weapons in a single transaction. For example, in one case a suspected trafficker placed an order at a Texas gun store for 10 DPMS AR-15 type assault rifles and five Bushmaster Carbon 15 assault pistols. The total purchase price for the weapons was \$16,000. The trafficker paid in cash.

Currently, only three states—California, Maryland, and Virginia—have restrictions on multiple firearm purchases: limiting buyers to one handgun (or assault weapon in the case of Maryland) per month. The major challenge associated with implementing such limits is having a comprehensive recordkeeping system with the level of sophistication necessary to monitor gun dealer transfers statewide. California has such a comprehensive background check and record of sale system.

## Conclusion

In conclusion, there are a wide range of initiatives that states and some local entities can undertake to help address the problem of gun trafficking from the United States to Mexico focusing on the following.

- **Manufacturers.** Limiting the manufacture, distribution, and sale of the anti-personnel, military-style weapons that now dominate the U.S. civilian gun market and are favored by the DTOs is probably the single most effective short-term measure available to reduce illegal trafficking.
- **Dealers.** Improved local regulation and oversight of Federal Firearms License (FFL) holders coupled with new initiatives to help identify potential illegal traffickers through heightened dealer reporting can help limit high-volume sales destined for illegal transport to Mexico.
- **Buyers.** Measures focused on buyer qualification, multiple sales, and improved background checks can aid in reducing purchases by “straw purchasers.”

As shown by recent court decisions, policy initiatives in each of these three areas can be undertaken in full compliance with the U.S. Supreme Court's decision in *District of Columbia v. Heller*.

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<sup>20</sup> A Point of Contact (POC) is where a state agency conducts its own background checks in addition to, or instead of, the Federal Bureau of Investigation.

<sup>21</sup> Bureau of Justice Statistics, *Survey of State Procedures Related to Firearm Sales*, 2005.