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DHS, Drug Interdiction and Common Sense

Fighting drug cartels requires that all agencies get on the same page. Jim Giermanski says Memoranda of Understanding are producing the opposite effect.

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This is about common sense and law enforcement. If one were a policeman, common sense tells you that the policeman can make an arrest. Common sense also tells you that the policeman has the right to gather evidence found at the scene of a crime or, at least protect the evidence found there until the crime scene personnel arrive. Finally, common sense tells you that the policeman can carry a firearm and use it in accordance with the law. It just makes sense that he or she has all the necessary legal rights to do his or her job, not more nor less. However, when one looks at the issue of drugs, border crossings, and law enforcement authority, we find that the agency responsible for interdicting and investigating drug traffic doesn't have directly all the legal means or authority to do so. It doesn't make sense!

The Homeland Security Act of 2002 (P.L.107-296) took many Federal agencies located in the Directorate of Border and Transportation Security (BTS) charged with, among many territorial areas of the country, securing our borders and managing ports of entry. Specifically, Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and the Transportation and Security Administration (TSA) were moved from BTS to the Department of Homeland Security (DHS). [1] ICE is the primary investigative branch of DHS. It has among its many duties "...interdicting narcotics shipments." [2] In Fiscal Year 2007, ICE drug-focused investigations led to "seizures of 241,967 pounds of cocaine, 4,331 pounds of heroin, 2,731 pounds of methamphetamine and 1.3 million pounds of marijuana. Additionally, ICE drug investigations led to 8,920 arrests and 5,539 convictions of individuals associated with narcotic violations." [3]

Now, the United States has an even greater urgency in disrupting the drug cartels of Mexico as they move into some U.S. cities. In February, 2009, Homeland Security Secretary Janet Napolitano announced support for Mexican President Felipe Calderon's crackdown and fight against drug cartels. Her remarks followed President Obama's statement that "Homeland Security is indistinguishable from National Security." Obama's officials further stated: DHS's job is "not just combating illegal immigration but on fighting criminal drug organizations..."[4] ICE has the responsibility in DHS for fighting these criminal cartels.

In addition to its investigations program, ICE has an Intelligence Program that includes drug collection intelligence, and an International Affairs Program that maintains relations with overseas agents involved in drug-related obligations. DHS, itself, staffs the "Office of National Drug and Control Policy." [5] It is quite clear, then, that DHS has a legal obligation to fight the proliferation of illegal drug entry, drug traffickers connected to it, and their support and expansion within the United States, to include domestic and foreign drug-related intelligence monitoring.

It makes perfect sense, therefore, that ICE would have the federal power needed to enforce the U.S. law governing federal drug enforcement embodied in 21 USC, Sec. 880 01/22/02, Chapter 13 - Drug Abuse Prevention and Control, Subchapter i - Control and Enforcement, Part E - Administrative and Enforcement Provisions. Title-21 authority "covers the importation, distribution, manufacture, and possession of illegal narcotics"& [6]

The specific authority to enforce is contained in Section 878:

Sec. 878. Powers of enforcement personnel

(a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may

- 1. carry firearms;*
- 2. execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;*
- 3. make arrests without warrant*
(A) for any offense against the United States committed in his presence, or
(B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;
- 4. make seizures of property pursuant to the provisions of this subchapter; and*
- 5. perform such other law enforcement duties as the Attorney General may designate.*

Unfortunately, not all ICE agents have that authority. Because of control exerted by the Drug Enforcement Administration (DEA), DEA has limited it to only 1400 out of 6,200 special agents. [7]

However, Title-21 gives that authority to any State or local enforcement agency designated by the Attorney General of the United States. Why not to ICE? There was at one time, perhaps, some reason not to provide this authority since not all of U.S. Customs working incoming cargo and personnel were considered law enforcement personnel, for instance Customs Inspectors. However, pre-DHS Customs agents (now part of ICE) have always been considered law enforcement and have attended, along with CBP field officers who do Customs/Immigration work, the Federal Law Enforcement Training Center (FLETC) that serves as an interagency law enforcement training organization for over 80 Federal agencies. If there were any question about law enforcement status, in 2008's Omnibus Spending Bill (PL 110-161), even CBP was granted official law enforcement status. It makes sense, then, that ICE should have at least what local and State law enforcement officials have Title 21 authority.

The obvious question is how does ICE accomplish one of the most important components of its mission - drug interdiction and enforcement? The answer appears to be through a **Memorandum of Understanding (MOU)** between the Drug Enforcement Agency (DEA) and INS (the agency from which ICE was created). The MOU provides guidelines, limitations of authority, delineations of responsibility, and general procedures to follow in its drug interdiction activities. The coordination among DEA, CBP, ICE and Border Patrol is currently bound by multiple Memoranda of Understanding. For instance, if CBP seizes drugs, it must contact ICE for review and/or acceptance for investigation. However, if the Border Patrol seizes drugs and apprehends individuals involved, it must offer a "right of first refusal" with respect to all drug-related apprehensions or seizures made by Border Patrol to DEA. In those cases where DEA accepts the interdiction for follow-up investigation, the Border Patrol has to notify ICE of the referral. If DEA declines to follow-up the investigation, Border Patrol will contact ICE offering the declined referral of DEA for follow-up investigation by ICE. ICE can also decline in which case the Border Patrol can present to the United States Attorney for authorization to prosecute or refer to State or local authorities for further consideration. [8] Does this make sense?

One year before the MOU's signing, John P. Torres Deputy Assistant Director of the Office of Investigations, Smuggling and Public Safety Division, U.S. Immigrations and Customs Enforcement before the House Committee on Government Reform, Sub-Committee on Criminal Justice, Drug Policy and Human Resources confirmed ICE's role in drug smuggling interdiction and investigations:

I want to assure the subcommittee that investigating, disrupting and dismantling drug smuggling organizations remains at the core of what ICE agents are focused on in order to secure our borders in furtherance of our homeland security mission. By eliminating the infrastructure exploited by smugglers, whether they smuggle drugs, people or other contraband, border security is enhanced. ICE is dedicated and committed to this mission.

While ICE at both the national and regional level in San Antonio was very uncooperative in furnishing any information about the origin of the MOU, the Border Patrol was extremely helpful in providing what ICE refused to provide: the date and signatories. The

MOU between INS and DEA was formally signed on March 25, 1996 and signed by INS Commissioner Doris Meissner, and by Thomas Constantine, DEA Administrator.

The MOU provides guidelines, limitations of authority, delineations of responsibility, and general procedures for the Border Patrol to follow in its drug interdiction activities. Included in this MOU are guidelines for granting all Border Patrol agents limited federal authority to conduct searches for and seize drugs at or along the border as long as probable cause is established.

There is a clear problem, however, in the MOU: the definition of interdiction activities. Because the interpretation of "interdiction" falls short of "investigation," ICE's drug seizure cases are usually turned over to the DEA or another federal, state, or local agency for investigation and prosecution.[10] The Border Patrol is also still governed by this pre-DHS Memorandum of Understanding with the Drug Enforcement Administration, which requires Border Patrol to refer its narcotics seizures to DEA for investigative follow up. Consequently, Border Patrol *informs* ICE of seizures, "but must continue to refer narcotics seizures to DEA even though ICE Investigations is the investigative arm for Border Patrol." [11]

Drug investigations, like most criminal investigations, go well beyond interdicting the flow of drugs. They include, among other actions, follow-up work on leads uncovered during interdiction and investigative questioning of suspects as to their involvement in these crimes and other drug smuggling activities. Drug interdiction and investigation should also include intelligence gathering, developing sources of information, and follow-up. Many CBP and ICE officials said the ICE, Border Patrol-DEA MOU should be reviewed; however, it seems that neither DHS nor the U.S. Attorney General have intentions to review it. Perhaps one of the reasons for a reluctance to review it is that ICE and CBP, two agencies within DHS have their own MOU, and relationships and cooperation are anything but close and smooth. One should read the Office of Inspector General Report of April 13, 2007 to see the extent of problems and turf issues between two of DHS own agencies.[12] It is little wonder that there may be issues among CBP, ICE, Border Patrol, and DEA. Title-21 should be applicable to each.

Why should there even be MOUs between DHS and the Department of Justice when their respective law enforcement agencies have drug interdiction responsibilities which by their nature include a required, and normal follow-up operations routinely made be all legitimate law enforcement agencies? These MOUs are nothing more than turf wars, with competing Federal agencies competing for attention, money, and credibility. Turf wars are certainly unnecessary especially in the face of not only horrific actions of Mexican drug cartels along our Southern border, but also in our cities. These drug-related crime waves in Mexico include killings, torture, kidnapping and corruption which threaten to spill over into the United States. Kidnappings already have! The United States needs no political issue, especially a turf issue, to divert attention from the serious escalation of drug and arms smuggling across its borders. "Our agents and officers, working together with local law enforcement agencies, are preventing millions of dollars from crossing the border into Mexico," said Secretary Napolitano. "In stopping the funds that fuel the drug

war, we will stifle cartel activity in the United States while helping our neighbors to the south by cracking down on illegal cash before it gets there." [13] Imagine what would happen if ICE had Title-21 authority. Improvements in drug interdictions, investigations, and arrests, would result.

DEA, ICE, CBP, Border Patrol, and State and local enforcement entities must be on the same page of music. All of them should be given Title-21 authority. It's time for Congress to act to fix this quickly. It's no more than common sense. Certainly Congress could use more of that! ##

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NOTES:

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2. Bureau of Immigrations and Customs Enforcement, Office of Investigations Fact Sheet, as cited in Border Security&, CSR Report&, May 13, 2008, p. 4.
3. <http://www.ice.gov/doclib/pi/news/factsheets/fy07acmplshmntsweb.pdf>, p.2.
4. Spencer S. Hsu, Napolitano Cites Mexican Drug Cartels as Major Threat, Washington Post, Thursday, February 26, 2009, p. A04.
5. Independent Review of the U.S. Immigration and Customs Enforcement's Reporting of FY 2008 Drug Control Obligations, Department of Homeland Security Office of Inspector General.
6. As cited in Homeland Security, Management Challenges Remain in Transforming Immigration Programs, GAO Report to Congressional Committees, October, 2004, p. 17.
7. http://www.ice.gov/about/leadership/invest_bio/marcy_forman.htm
8. Memorandum from Acting Commissioner for Customs and Border Protection and Assistant Secretary for Immigration and Customs Enforcement, entitled Guidance on Referral Coordination for U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, May 10, 2006, p. 2.
9. Border Patrol Drug Interdiction Activities on the Southwest Border, U.S. Department of Justice, Office of the Inspector General, Inspections Division, Report Number I-98-20, September 1998, p. 6.
10. Border Patrol Drug Interdiction&, U.S. Department of Justice& Report Number 1-98-20&, p.6
11. DHS' Progress In Addressing Coordination Challenges Between Customs and Border Protection and Immigration and Customs Enforcement, Department of Homeland Security, Office of Inspector General, April, 2007, p.10.
12. DHS' Progress In Addressing Coordination Challenges Between Customs and Border Protection and Immigration and Customs Enforcement, Department of Homeland Security, Office of Inspector General, April, 2007
13. Department of Homeland Security Addresses Increasing Threat from Mexican Drug Cartels March 19, 2009, http://www.fedagent.com/current_e-report.php#477