



# THE CIP REPORT

CENTER FOR INFRASTRUCTURE PROTECTION  
AND HOMELAND SECURITY

VOLUME 9 NUMBER 3

## SEPTEMBER 2010 BORDER SECURITY

Renewable Energy .....	2
War on Drugs.....	3
Mérida Initiative.....	5
Canada-U.S. Trade .....	8
Unmanned Aircraft Systems .....	10
Bench Book.....	13
Legal Insights .....	15
SARMA .....	23

### EDITORIAL STAFF

#### EDITORS

Devon Hardy  
Olivia Pacheco

#### JMU COORDINATORS

Ken Newbold  
John Noftsinger

#### PUBLISHER

Liz Hale-Salice

Contact: [CIPP02@gmu.edu](mailto:CIPP02@gmu.edu)  
703.993.4840

Click [here](#) to subscribe. Visit us online  
for this and other issues at  
<http://cip.gmu.edu>

In this issue of *The CIP Report*, we highlight the challenging mission of securing our Nation's borders.

We begin with an article from the Department of Homeland Security's (DHS) Science and Technology (S&T) Directorate, Borders and Maritime Security Division (BMD). Their article discusses their partnership with the U.S. Department of Energy's National Renewable Energy Laboratory (NREL) to examine renewable energy solutions to border security. James Carafano, Director of the Douglas and Sarah Allison Center for Foreign Policy at the Heritage Foundation, then provides background information on Mexico's war on drugs and its potential to cross America's Southern border. Vanda Fellab-Brown, a fellow in the 21<sup>st</sup> Century Defense Initiative in Foreign Policy at the Brookings Institution, further examines Mexico's war on drugs, focusing especially on the Mérida Initiative, a new U.S. counternarcotics policy. David Davidson, Associate Director of the Border Policy Research Institute, inspects border security along the Canada-U.S. border, particularly Canada-U.S. trade as well as the infrastructure that supports this cross-border trade. The role of Unmanned Aircraft Systems (UAS), especially the Predator UAS, in border security is then scrutinized by Lindsay Voss, a Research Analyst with the Association for Unmanned Vehicle Systems International (AUVSI). Finally, Jeffrey Addicott, Director of the Center for Terrorism Law at St. Mary's University School of Law, describes their collaboration with other academic institutions to develop a "Legal and Policy Border Security Bench Book," an effort that would identify, address, and analyze legal and policy issues associated with border security.

This month's *Legal Insights* analyzes the main provisions of Senate Bill 1070, the immigration law recently enacted by Arizona Legislature.

We would like to take this opportunity to thank the contributors of this month's issue. We truly appreciate your valuable insight.

We hope you enjoy this issue of *The CIP Report* and find it useful and informative. Thank you for your support and feedback.

Mick Kicklighter  
Director, CIP/HS  
George Mason University, School of Law



### School of Law

CENTER  
for  
INFRASTRUCTURE PROTECTION  
and  
HOMELAND SECURITY

## Border Security through a Renewable Energy Research Agenda

by Andrea Watson and Alicen Kandt, National Renewable Energy Laboratory (NREL)  
Jeanne Lin, Department of Homeland Security/Science & Technology Directorate\*

Within the Department of Homeland Security's (DHS) Science & Technology (S&T) Directorate, the Borders and Maritime Security Division (BMD) develops and transitions technologies that help enhance the security of our Nation's borders and waterways without impeding the flow of commerce and travelers. BMD's research portfolio is in the process of identifying next generation renewable energy solutions that will meet BMD's mission. Recognizing the potential of renewable energy to contribute to border security, BMD is partnering with the U.S. Department of Energy's National Renewable Energy Laboratory (NREL) to examine border security energy demands and to ensure that advances in renewable energy and energy storage lead to increased security in these areas.

Renewable energy technologies include solar energy such as photovoltaics or solar hot water, wind energy, geothermal, hydro, and biomass. Fuel cells are another important technology that use hydrogen to create energy. Renewable energy technologies have many characteristics that make them particularly useful for increased border security.

**Diversification:** Employing renewable energy reduces

dependence on foreign oil, both nationally and locally, at the operational level. This helps hedge against rising oil prices and supply interruptions that could negatively affect performance at the local level. Furthermore, taking advantage of renewable energy reduces our dependence on fuels, which are often supplied from regions of conflict.



**Continuity of Operations:** In the event of grid failure, renewable energy can continue to operate, maintaining critical loads until grid service can be restored. The greater the utilization of renewable energy technologies, the longer operations can run without grid power.

**Remote Operation:** A renewable energy technology combined with energy storage can operate independent of the electricity grid in remote locations, often requiring very little maintenance to provide service. This can be a game changer

enabling new capabilities in remote border security operations.

**Covert:** Some renewable energy technologies (such as photovoltaics) operate silently and need little maintenance. These characteristics make them highly useful in locations where inconspicuous operations are needed.

**Reduced Reliance on Infrastructure:** In the United States, our fragile energy infrastructure poses a threat to national security. Electricity that is generated near the load reduces the reliance on the electricity infrastructure, thereby reducing risk.

**Clean and Sustainable:** By definition, renewable energy technologies are clean and sustainable. Unlike the current fossil fuels that our country relies on for most of its energy, such as coal, natural gas and oil, renewable energy technologies are constantly replenished and would never run out. Furthermore, many of these technologies are emissions free.

Echoing this idea is John Thornton, Energy Assurance R&D Coordinator at NREL, stating that renewable energy can be used in "prevention, through monitoring and detection; mitigation, with self-sustaining buildings and

*(Continued on Page 18)*

## Hitting Too Close to Home: Keeping Mexico's War on Drugs from Spilling across America's Southern Border

by James Carafano, Deputy Director, The Kathryn and Shelby Cullom Davis Institute for International Studies and Director, Douglas and Sarah Allison Center for Foreign Policy Studies at the Heritage Foundation

In 2006, Mexican President Felipe Calderon called on Mexican Federal troops to stop the activity of drug cartels. This would be no easy task. With estimated revenue from illegal drug sales falling somewhere between \$15 billion and \$30 billion a year, Mexican cartels have a powerful financial incentive to continue the drug trade by whatever means necessary.<sup>1</sup> The ensuing battle between the cartels and the Mexican government has been one marked by violence, as thuggish drug gangs have increasingly evolved into sophisticated syndicates that carry out ruthless operations with military precision.<sup>2</sup>

Since Mexico's war on drugs began, an estimated 28,000 people have been killed, including 4,185 in the first five months of this year alone.<sup>3</sup> As the death toll mounts, so too does American concern over

whether this violence can be prevented from flowing over the southern border. In March, two American citizens were murdered leaving the U.S. Consulate in Ciudad Juarez, Mexico, mere miles from El Paso, Texas.<sup>4</sup> And the violence hit closer to home in April, when Robert Krentz, Jr. was murdered on his ranch in southeast Arizona. Authorities suspected a drug scout may have been to blame.

With drug related murders in Mexico increasing 146 percent from 2008 to 2009, it is becoming clear that Mexico cannot fight this war on its own.<sup>5</sup> This violence has already begun to seep across the border. For example, Phoenix, Arizona now has the second most kidnappings of any U.S. city.<sup>6</sup> Given this fact, it is evident that protecting Americans from drug violence is in the national security

interest of the United States.

Securing the southern border with a physical fence, technology, and manpower is important to containing violence along the border — but it is not enough. Drug smugglers enter American territory by air, by land, by sea, and through underground tunnels.<sup>7</sup> To stop the flow of drugs and accompanying violence, a multi-layered approach must be taken.

### The Mérida Initiative

The Bush Administration introduced the Mérida Initiative in 2008 in an effort to establish a partnership with Mexico and Central America to fight the drug war. The three-year, \$1.5 billion anti-drug assistance package is

*(Continued on Page 4)*

<sup>1</sup> United States Department of State, Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report*, March 1, 2010, at <http://www.state.gov/documents/organization/137411.pdf> (August 2, 2010).

<sup>2</sup> The Council on Foreign Relations, "Mexico's Drug War", November 20, 2008, at [http://www.cfr.org/publication/13689/mexicos\\_drug\\_war.html](http://www.cfr.org/publication/13689/mexicos_drug_war.html) (July 23, 2010).

<sup>3</sup> Arthur Brice, "Drug War Death Toll in Mexico Since 2006 Exceeds 28,000, Official Says," CNN, August 3, 2010, at <http://www.cnn.com/2010/WORLD/americas/08/03/mexico.drug.deaths/index.html?iref=allsearch> (August 4, 2010); and Clare Ribando Seelke, "Mexico-U.S. Relations: Issues for Congress," Congressional Research Service, June 3, 2010, at <http://www.fas.org/sgp/crs/row/RL32724.pdf> (July 23, 2010).

<sup>4</sup> Jim Kavanagh, "Couple Slain in Mexican Shooting Had Baby on the Way," CNN, March 16, 2010, at <http://www.cnn.com/2010/WORLD/americas/03/16/mexico.victims.profile/index.html> (July 23, 2010).

<sup>5</sup> Mark P. Sullivan and June S. Beittel, "Mexico-U.S. Relations: Issues for Congress," Congressional Research Service, May 1, 2009, at <http://fas.org/sgp/crs/row/RL32724.pdf> (August 2, 2010).

<sup>6</sup> Brian Ross, Richard Esposito, and Asa Eslocker, "Kidnapping Capital of the U.S.A.," ABC News February 11, 2009, at <http://abcnews.go.com/Blotter/story?id=6848672&page=1> (August 3, 2010).

<sup>7</sup> BBC, "Mexico Drug Yacht Crew Burn Boat", October 14, 2009, at <http://news.bbc.co.uk/2/hi/americas/8306062.stm> (August 3, 2010); and Ken Stier, "Underground Threat: Tunnels Pose Trouble from Mexico To Middle East," Time, May 2, 2009, at <http://www.time.com/time/nation/article/0,8599,1895430,00.html> (August 3, 2010).

**War on Drugs** (*Cont. from 3*)

designed to strengthen the capabilities of the Mexican government in fighting the complex drug trafficking networks by providing funding for aircraft, vehicles, inspection technology, and training to increase the effectiveness of Mexican law enforcement.<sup>8</sup> The goal is to provide significant aid to help defeat the cartels, while leaving a small U.S. footprint in the region. Mérida's goals are laudable, and the initiative has served as a major step in fostering cooperation between the United States and Mexico with regard to security on the continent. However, to date, the initiative's goals have not been met because Mérida's funding is not being spent.

In July 2010, the Government Accountability Office released a report stating that as of March 31, 2010, only 46 percent of Mérida funds for fiscal years 2008 to 2010 had been obligated, and only around 9 percent had been expended.<sup>9</sup> The funds that have been used provided five Bell helicopters, several X-ray inspection devices, law enforcement canines and training for their handlers, and training for over 4,000 police officers.<sup>10</sup> This is a good start, but greater support for Mérida must be shown, so as to ensure that its funding is put to good use.

**North American Aerospace Defense Command (NORAD)**

NORAD helps defend the United States from terrorist and criminal threats by monitoring North American airspace and providing situational awareness of activity on the seas.<sup>11</sup> The same system should be used to detect and deter drug traffickers. The methods through which drugs are transported across the U.S. border are varied and always evolving. If the cartels find it too hard to cross the border by foot or vehicle, they dig an underground tunnel. If the tunnel does not work, they take to the skies. If air travel fails, they can transport their drugs by boat, and if the boat fails, they have submarines.

Detecting smugglers who use these stealthy modes of transportation is difficult, and Mexico needs help. NORAD would provide vital assistance to Mexico in organizing and sharing information to target traffickers operating by air and sea. It would also open up channels of communication between Mexican, American, and Canadian officials that would further build valuable international security relationships. Most importantly, NORAD has already proven its effectiveness. In May of 2010, NORAD detected an

ultralight aircraft flying across the southern border. Two F-16s were launched to intercept it, and they tracked the craft until it returned to Mexico.<sup>12</sup> This type of countermeasure acts as a deterrent to drug trafficking by air, and offers the opportunity to rip a page out of traffickers' playbook. The addition of NORAD to the anti-narcotics arsenal would provide significant intelligence to fight the war on drugs, while building on the security partnership between the United States and Mexico.

**Border Enforcement Security Task Force (BEST) Teams**

To more effectively combat security threats, DHS's Border Enforcement Security Task Forces (BESTs) act as fusion centers, promoting collaboration between Mexican law enforcement officials and U.S. Federal, State, and local law enforcement and intelligence agencies. In addition to integrating U.S. State and local forces into security operations, these teams facilitate information and intelligence sharing between U.S. and Mexican agencies in an attempt to dismantle cartels. DHS has created 17 BESTs since March 2009 and current plans call for the

*(Continued on Page 19)*

<sup>8</sup> Ray Walser, "U.S. Strategy Against Mexican Drug Cartels: Flawed and Uncertain," Heritage Foundation Backgrounder No. 2407, April 26, 2010, at <http://www.heritage.org/Research/Reports/2010/04/US-Strategy-Against-Mexican-Drug-Cartels-Flawed-and-Uncertain> (August 19, 2010).

<sup>9</sup> U.S. Government Accountability Office, Merida Initiative: The United States Has Provided Counternarcotics and Anticrime Support but Needs Better Performance Measures, GAO-10-837, July 2010, at <http://www.gao.gov/new.items/d10837.pdf> (July 23, 2010).

<sup>10</sup> Ibid.

<sup>11</sup> James Jay Carafano, "Let Mexico Join NORAD," Heritage Foundation Commentary, December 8, 2009, at <http://www.heritage.org/Research/Commentary/2009/12/Let-Mexico-Join-NORAD> (August 19, 2010).

<sup>12</sup> CNN, "NORAD: U.S. Jets Intercept Ultralight Plane from Mexico," May 16, 2010, at <http://news.blogs.cnn.com/2010/05/16/norad-u-s-jets-intercept-ultralight-plane-from-mexico/?hpt=T2> (July 23, 2010).

## Stemming the Violence in Mexico, but Breaking the Cartels

by Vanda Felbab-Brown\*

### The Intensifying and Expanding Drug-Violence

Over the past several years, and especially, since President Felipe Calderón took over Mexico's presidency in 2006, the drug-related violence in Mexico has been steadily and viciously escalating. Destabilized by a series of government interdiction operations that captured a number of top-level drug traffickers in Mexico, the drug market there is out of control — having become far more violent than is typical of drug markets. The drug trafficking organizations (DTOs) are battling each other over control of territory and drug trafficking routes and over networks of corruption, including corrupt law enforcement officials. Although Mexico's law enforcement is deeply corrupt, from the low-level beat cops to high-level officials mandated to suppress organized crime, efforts by President Calderón to clean up law enforcement, replace compromised officials, and conduct a comprehensive police reform has generated further insecurity for the DTOs. The DTOs are also battling the state that has continued with interdiction of high-value targets — i.e., top level capos. In addition, the drug groups are splintering, as battles over dominance are also taking place within them, due to the young *narcojuniores* and lieutenants of the incapacitated capos needing to prove that they have enough

strength to control the organization and stand up to outside groups. This competition in violence has been characterized by intense brutality, such as advertized beheadings, displaced corpses, and torture, even in routine hits. Although President Calderón called out the military to relieve the overwhelmed police, the nearly 50,000 soldiers on Mexico's streets have not been able to prevent the violence from escalating dramatically every year.

The spring and summer of 2010 have been especially difficult. More than 28,000 people have been killed since President Calderón came to power. The year 2010 is on track to be the most violent year so far, with murders in Ciudad Juarez, the worst afflicted city, growing more frequent. A series of atrocities have marked the year: massacres at a youth party in February in Ciudad Juarez, hits against drug treatment centers where DTOs expect rival hitmen to be hiding, mass graves found near Taxco and Monterey, and in August 2010, an atrocious slaughter of kidnapped migrants from elsewhere in Latin America by one of the DTOs — most likely the vicious Zetas — for refusing to pay ransom and carry drugs into the United States in exchange for being smuggled across the border.

Although their strategies and tactics are by no means uniform — with

differences in violence, brutality, and manner of operating, especially among the Familia Michoacana DTO and the Zetas on the one hand and the Sinaloa “cartel” on the other hand — the DTOs are showing less and less restraint. The year 2010 has featured the occurrence of car bombs, greater frequency of grenade attacks, increasing hits against public government officials — city mayors, police chiefs, prosecutors, and journalists — and even attacks against U.S. consulates and a murder of a U.S. embassy worker.

Increasingly, the violence is affecting civilians in Mexico. The Calderón government's position that the violence has been a sign of policy effectiveness and that it mainly takes place among criminals, has never been fully tenable. Even though the bullets may be hitting mainly thugs, they nonetheless fly on Mexico's street and negatively impact and, in the very violent areas, completely eviscerate the life of a community and its associational capacity. In northern Mexico, in places such as Ciudad Juarez, the violence has generated internal displacement, with not only public officials escaping to live in the United States, but much more widespread outmigration. More and more, the DTOs seem to be hitting civilians on purpose — to demonstrate their

*(Continued on Page 6)*

## Mérida Initiative (Cont. from 5)

power, expose the weakness of the government, and intimidate society, at least at the local level.

The violence has been expanding geographically, to places like Tamaulipas, and even the industrial and university city of Monterrey where Mexico's elite concentrates.<sup>1</sup> Expansion of the violence south to Guatemala and El Salvador has also been acute as Mexico's DTOs increasingly battle over control of the southern smuggling routes. Perhaps most worrisome is the fact that the DTOs have been systematically expanding their functions — obtaining local control not just over politicians and police departments, but also over prostitution, human and migrant smuggling, and even aspects of Mexico's very extensive and informal, but not illegal, economy, such as who sells tortillas on the *zócalo* and to which DTO they have to pay a cut for such license.

### The New U.S. Policy

The new orientation of the Mérida Initiative, the so-called *Beyond Mérida* launched in the spring of 2010, puts the overall U.S. counternarcotics strategy in Mexico on the right track. Its multifaceted State-building approach to counternarcotics represents a great improvement over the previously narrow design of Mérida.

The new strategy recognizes that there are no quick, technological fixes to the threat that DTOs pose

to the Mexican State and society. It also recognizes that high-value-targeting of drug capos, even while backed up by the Mexican military, will not end the power of the Mexican DTOs.

Instead, the new strategy focuses on four pillars: a comprehensive effort to weaken the DTOs that goes beyond high-value decapitation; institutional development and capacity building, including the civilian law enforcement, intelligence, and justice sectors; building a 21<sup>st</sup> century border to secure communities while encouraging economic trade and growth; and building communities resilient to participating the drug trade or drug consumption.

### The Implementation Challenges

Even a very good strategy is vulnerable to implementation problems. Deep obstacles persist in Mexico's political and economic arrangements and social organization that make effective implementation of such a strategy difficult. Notwithstanding the level of U.S. assistance so far, including having generated over several thousand newly trained Mexican Federal police officers, Mexico's law enforcement remains deeply eviscerated, deficient in combating street and organized crime, and corrupt. Police reform will require sustained commitment over a generation, and corruption problems persist even among the newly trained police as the recent

revolt of freshly trained Federal police in Ciudad Juárez pointedly demonstrated. Expanding the investigative capacity of Mexico's police, especially during times of intense criminal violence when law enforcement tends to become overwhelmed, apathetic, and all the more susceptible to corruption, is imperative, but it is frequently a difficult component of police reform. The military in the streets is limited in its investigative capacity and jurisdiction, one of the reasons why it has been unable to take control of neighborhoods and stem violence, and may be tempted to resort to torture to elicit information from its arrestees.

Moreover, the new strategy does not guarantee that substantial drops in drug-related violence will take place quickly. Indeed, the way interdiction has been carried out so far — focusing on high-value-target decapitation — has contributed to the levels of violence. Yet it is critical that drug-related violence is brought down in Mexico. Such violence cannot be dismissed as irrelevant. It is imperative that reducing violence becomes a critical part of the strategy, such as encouraging Mexico to better integrate police and military efforts, and to focus on investigations and community policing by uncorrupt police while using the military mainly as back-up during highly violent confrontations with the DTOs.

(Continued on Page 7)

<sup>1</sup> Expansion of the violence south to Guatemala and El Salvador has also been acute as Mexico's DTOs increasingly battle over control of the southern smuggling routes.

*Mérida Initiative (Cont. from 6)*

U.S. assistance to Mexico in its reform of the judicial system and implementation of the accusatorial system, including training prosecutors, can be particularly fruitful. As Mexico's justice system is becoming more capacious and less corrupt, it is also drawing unwanted attention from DTOs who are increasingly turning to assassination of prosecutors as a way to ensure their impunity. Although the assault on the judicial system has as yet not reached the level of crisis that Colombian DTOs inflicted on Colombia's justice in the 1980s, it is escalating and hampering the overall effort, with tens of investigators, prosecutors, and public security officials assassinated in Ciudad Juárez over the past two years alone. Protecting them as well as judges and witnesses is absolutely critical. Urgent attention also needs to be given to the reform of prisons, currently a breeding ground and schooling venue for current and potential members of drug trafficking organizations and flooded by the more than 70,000 detainees since Calderón took over the presidency, few of whom will be successfully prosecuted.

Implementation of the fourth pillar — building resilient communities by increasing their participation in the legal economy through socio-economic programs — is no easier. The persistence of monopolies in Mexico limits job creation, even in times of economic growth. Although it is critical and laudable that the U.S. government has stressed the need to generate jobs in places such as Ciudad Juárez to employ the scores of young men

who are available as cartel *sicarios* for a mere USD 500 a month, job generation there and throughout Mexico will be hampered by the violence and the broader macro-economic arrangements in Mexico. The taxation system that poses a heavy burden on the middle class and the fact that more than forty percent of Mexico's economy is informal put great constraints on the fiscal capacity of the Mexican State and its ability to encourage socio-economic development. Current patterns of land access and distribution encourage the persistence of illicit crop cultivation and poverty in Mexico's southern rural areas.

The structural limitations of such efforts have already been manifested in "100 Days of Ciudad Juárez," unveiled by President Felipe Calderón in February. Although Mexico's government has allocated more than \$270 million to building schools, hospitals, sports stadiums, and youth centers in Juárez, the money is trickling in slowly. Moreover, socio-economic programs should not be conceived as limited handouts to pacify a community or secure intelligence flows. Rather, they must be conceived as systematic, robust, and long-term urban planning. U.S. resources may perhaps be best concentrated on demonstration areas, such as a city or even a neighborhood, and by encouraging and assisting the government of Mexico in undertaking the necessary structural economic and law enforcement reforms and by encouraging them to sustain such efforts regardless of what political party is in power. But

public safety on the ground — still elusive in Juárez and elsewhere — is vital. Without it, the social policies and urban renewal will be greatly limited in their ability to take off.

Mexico should also focus on rural development in areas of illegal poppy and marijuana cultivation. Mexico's government has so far exhibited only a limited interest in such programs, preferring to deal with illicit crops through eradication. However, addressing the socio-economic needs of the marginalized areas of both the northern urban belt as well as southern rural areas is critical for reducing the recruitment pool for the drug trafficking organizations, severing the bonds between marginalized communities and criminal elements, and resurrecting the hope of many Mexican citizens that the Mexican State and legal behavior can best advance their future.

Given the depth of these problems in Mexico, the U.S. funding request of US\$310 million for 2011 is modest. But, although greater funding would expand U.S. assistance opportunities, the modest funding request is not necessarily inappropriate. First of all, the government of Mexico is devoting significantly greater resources to the effort. Second, counternarcotics programs can only be sustainable if embraced, including with respect to the funding responsibility, by the recipient country. Given the size of the U.S. assistance, it is also appropriate to focus U.S. resources

*(Continued on Page 21)*

# Border Security as an Aspect of Homeland Security, Seen Through the Lens of Canada – U.S. Trade

by David Davidson, Associate Director, Border Policy Research Institute

The Border Policy Research Institute (BPRI) was established in 2005 in order to examine processes and policies related to the Canada – U.S. border. The motivating factor was widespread awareness that the border was impacting commerce and society to an increased extent in the post-9/11 era. BPRI has sought to understand and analyze border-related processes, to explain policy implications, and to assist in the development of new policy. The body of research undertaken by BPRI since 2005 has pointed to significant problems in the efficient and secure management of cross-border flows of trade and travel. Issues related to Canada – U.S. trade are particularly significant in the context of the recent global

economic crisis. This article discusses several such issues, and also touches upon the importance of the infrastructure that supports cross-border trade. The article relies upon data from 2007, illustrating the situation prior to the economic “meltdown.”

The economies of Canada and the United States are highly integrated, as illustrated by patterns of cross-border trade:

- In aggregate, about 22 percent of U.S. exports are bound for Canada and about 85 percent of Canadian exports are bound for the United States.
- Canada is the primary foreign export market for 36 of the lower-48 states, and the second-ranked market for all the others except New Mexico and Louisiana.

- For States in the northern Great Plains, over 50 percent of their exports are destined for Canada, and in general, from one-fifth to one-half of exports from the

Midwest industrial states are Canada-bound.

Truck-borne cross-border trade is concentrated at a small number of crossing points. Figure 1 shows the percentage of annual-average-daily-traffic (AADT) handled at various crossings. Along the entire border, there are just eight crossings that handle an AADT of greater than 500 trucks, and those eight are individually labeled on the figure. For the smaller crossings, the figure shows the aggregate percentage of traffic handled by a group of ports of a given size — e.g., the smallest slice at the 12 o’clock position represents a group of 70 crossings that handle less than 20 trucks each per day, and those 70 crossings together accommodate just 2 percent of cross-border truck traffic. In contrast, Detroit’s Ambassador Bridge by itself handles 25 percent of all cross-border traffic. Notice that the eight individually labeled crossings together accommodate 73 percent of cross-border truck traffic. Achieving rapid and secure trade at a fairly small number of crossings would benefit a disproportionately large segment of the integrated Canada – U.S. economy.

There are significant regional

*(Continued on Page 9)*

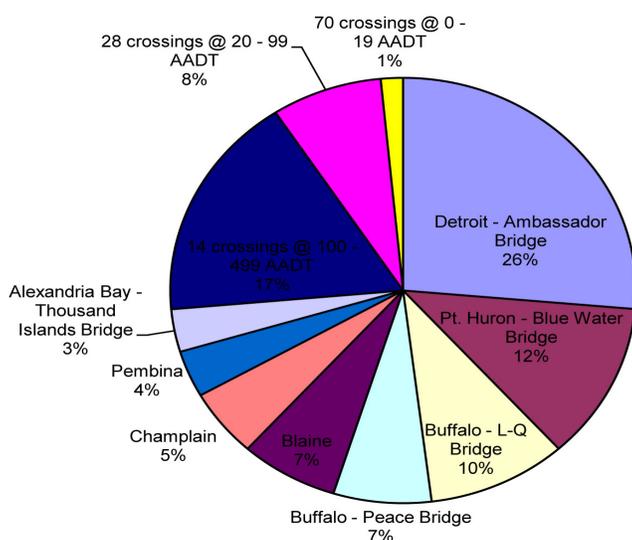


Figure 1: Proportion of Truck Traffic Entering U.S. via Various Crossings, 2007.<sup>1</sup>

<sup>1</sup> Data from border-crossing traffic counts available online from the Bureau of Transportation Statistics. Retrieval at: <http://www.transtats.bts.gov/BorderCrossing.aspx>.

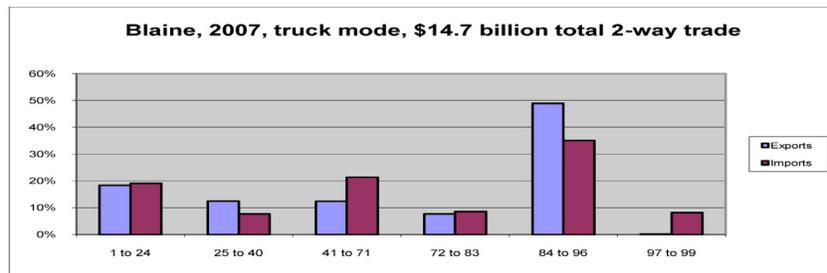
Canada-U.S. Trade (Cont. from 8)

differences in the nature of cross-border trade. Figure 2 shows a profile of the type of commodities that pass through two of the major crossing points — Detroit, in the heart of the Midwest industrial sector, and Blaine, in the Pacific Northwest. The figure refers to groups of commodities, based upon the 2-digit Harmonized Tariff Schedule (HTS) commodity codes used by U.S. Customs to characterize the goods traversing the border. In Detroit, an

overwhelming proportion of the trade is within the grouping we have labeled “manufactured goods,” which contains all goods classified within the range of 82 through 96 (inclusive) in the 2-digit HTS scheme. The dominance of trade in manufactured goods is found in both directions, reflecting the integrated nature of the manufacturing sector in the Midwest — parts and sub-assemblies built in Canada flow south for integration into finished

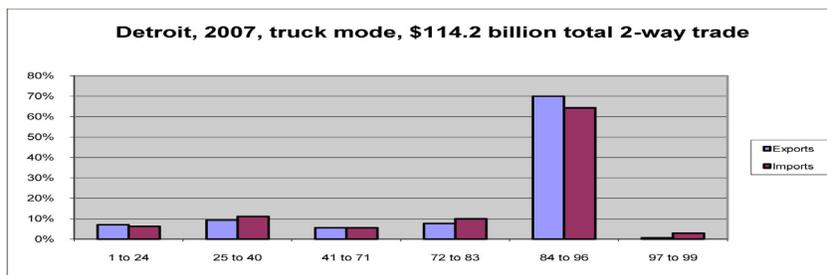
goods, and vice versa. In contrast, the profile for Blaine shows a wider variety of commodities, and also shows an imbalance in the nature of the goods crossing the border in each direction. Manufactured goods are still the major U.S. export to Canada, but various resource-dependent categories (wood, paper, pulp, minerals, ores, food, and agricultural commodities) comprise the bulk of Canadian exports to the United States.

(Continued on Page 20)



Blaine	
Exports	Imports
1,670,900,893	1,055,748,204
1,135,558,911	426,822,726
1,129,063,736	1,187,106,610
697,793,812	474,995,369
4,454,958,509	1,948,542,261
18,568,740	452,092,409
9,106,844,601	5,545,307,579

HS Code	Exports	Imports
1 to 24	18%	19%
25 to 40	12%	8%
41 to 71	12%	21%
72 to 83	8%	9%
84 to 96	49%	35%
97 to 99	0%	8%



Detroit	
Exports	Imports
4,506,295,280	3,160,145,478
5,904,083,746	5,563,789,480
3,539,349,769	2,806,731,802
4,879,094,747	4,997,206,310
44,646,586,340	32,395,237,975
356,135,003	1,485,064,450
63,831,544,885	50,408,175,495

HS Code	Exports	Imports
1 to 24	7%	6%
25 to 40	9%	11%
41 to 71	6%	6%
72 to 83	8%	10%
84 to 96	70%	64%
97 to 99	1%	3%

Figure 2: Proportional Composition of Trade at Two Major Ports, 2007.<sup>2</sup>

<sup>2</sup> Data from the Transborder Surface Freight database is maintained by the Bureau of Transportation Statistics. Retrieval at: <http://www.bts.gov/programs/international/transborder/>.

## Eyes on the Border: An Inside Look at the Role Unmanned Aircraft Play in Securing Our Nation

by Lindsay Voss, Research Analyst,  
Association for Unmanned Vehicle Systems International

Unmanned aircraft systems (UAS), and the Predator UAS in particular, are known for the capabilities they provide in Iraq and Afghanistan. The systems are recognized for their extensive endurance, discreet operations, and the fact that their pilots are located thousands of miles away from the battlefield. Predators are not limited to military missions, however, and they are increasingly being operated within the United States. Since 2005, the aircraft have aided U.S. Customs and Border Protection (CBP) in securing the Nation's 7,458 miles of land border and 12,383 miles of coastline.

Despite the successful integration of Predators into military operations overseas, the incorporation of UAS into border security at home has not been easy. Limited access to the National Airspace System (NAS), a shortage of qualified pilots, and questions regarding the safety of the technology are all challenges CBP has faced since operating its first Predator in 2005.

Nevertheless, CBP's UAS operations have increased over the last five years. The agency's UAS fleet has grown from two to six platforms, and CBP is anticipating future UAS purchases. Predator missions on the border have expanded as well. Early missions were focused on the southern border, but operations were extended in 2009 to monitor the

stretch of land separating the United States and Canada. Two CBP Predator systems are currently maintained and operated out of Grand Forks Air Force Base, North Dakota, to conduct these missions.

According to Paul Nelepovitz, Association for Unmanned Vehicle Systems International (AUVSI) Saguaro Chapter President and CEO of Spectre Concepts, LLC, CBP's use of unmanned aircraft will continue to grow as a result of the Predator's proven capability and cost factors. He anticipates UAS mission expansion on the northern U.S. border into areas such as upstate New York where the smuggling of contraband goods is a concern.

"It comes down to sheer economics," Nelepovitz says. "The Predator system has been proving itself on the border and elsewhere. It's a matter of the system's increased endurance and cost effectiveness."

Unmanned Aircraft Systems. *Photo courtesy of U.S. Customs and Border Protection, Office of Air and Marine.*



CBP has also turned to UAS to assist in patrolling the Nation's coastal waters. In 2009, the agency worked with the U.S. Coast Guard and UAS manufacturer General Atomics Aeronautical Systems, Inc. (GA-ASI) to modify a Predator B to a maritime configuration. The modification included the addition of a Raytheon SeaVue maritime radar and a specialized electro-optical infrared (EO/IR) camera as well as upgrades to the aircraft's avionics suite and communications systems. The maritime Predator, referred to as Guardian by CBP, is undergoing test and evaluation in 2010. Missions for this aircraft will include coastal surveillance, counternarcotics missions, and maritime interdiction operations in southern waters. A second Guardian could be purchased in the

*(Continued on Page 11)*

## Unmanned Aircraft *(Cont. from 10)*

future to provide maritime surveillance in the Great Lakes region.

Major General (retired) Michael Kostelnik, Assistant Commissioner, U.S. Customs and Border Protection, Office of Air and Marine, notes that in addition to border security missions, CBP's Predators can be deployed in response to a number of contingency operations. To date, the systems have responded to three hurricanes in the Gulf Coast as well as to flooding in North Dakota and Minnesota. Most recently, CBP operated its Guardian UAS to assist with the Deepwater Horizon oil spill.

Unlike Predator operations in Iraq and Afghanistan that often involve the aircraft being weaponized, CBP's platforms are unarmed and are used exclusively for surveillance. The agency's land-based Predators carry an EO/IR and synthetic aperture radar (SAR) payload that is ideal for tracking illegal cross-border activity such as weapons and narcotics smuggling. CBP also uses its Predator fleet to monitor for suspected terrorist activity.

Since 2007, CBP has been able to sustain its Predator operations, but there have been challenges. Access to airspace is high on the list of obstacles that CBP's UAS program will have to overcome in order to expand. In the current NAS, organizations wishing to operate unmanned aircraft may do so only under the limits of a Federal Aviation Administration (FAA) issued Certificate of Authorization

(COA). Obtaining a COA can be a lengthy process, taking more than 12 months in some cases.

Currently, only government or public organizations can be issued a certificate.

According to Mike Corcoran, former Director of Air Operations for DHS's northern border UAS branch and current ISR Systems Program Manager for Ulteig Engineers, limited access to airspace greatly reduces the effectiveness of unmanned aircraft for border operations.

"Unfortunately, bad guys don't follow any rules. They do evil things such as smuggle drugs, people and weapons all over the country, and rarely remain within the airspace where the FAA allows UAS flight activity," he says. "As a Federal agent that is trying to secure the country from bad guys, I can tell you it's maddening. I personally watched the morale of border agents get crushed because they could not pursue illicit activity beyond the confines of an FAA COA."

Access to airspace is not the only challenge facing CBP as it seeks to increase UAS coverage on the

border. Maintaining a qualified crew of Predator pilots, sensor operators and support staff has also been difficult for the agency. These individuals are in high demand not only within DHS, but also within the Department of Defense (DoD) as the need for UAS-provided real-time video surveillance remains high in Iraq and Afghanistan. Corcoran cites training inefficiencies, stiff competition for qualified crew members, and a tendency to focus on buying more aircrafts rather than bringing in good people as the major impediments to CBP's ability to foster workforce retention in its UAS program.

Kostelnik sees the UAS pilot shortage as a hindrance in the near-term, but not a long-term detriment to CBP's UAS program as a whole. CBP currently has 25 qualified Predator pilots and approximately 12 sensor operators. The agency does not anticipate hiring additional

*(Continued on Page 12)*



Unmanned Aircraft Systems. *Photo courtesy of U.S. Customs and Border Protection, Office of Air and Marine.*

## Unmanned Aircraft *(Cont. from 11)*

crew in fiscal year 2011. According to Kostelnik, CBP is attempting to make the UAS pilot and crew jobs more attractive by dual qualifying operators. For instance, pilots flying CBP's P-3 aircraft will also fly Predators, and P-3 radar operators will be qualified to operate the Predator's sensor suite.

Safety is also at the center of the debate surrounding UAS operations in the NAS. FAA has been tasked with ensuring that unmanned aircraft can be safely integrated with their manned counterparts. The task has proven to be difficult. Since CBP Predator operations started in 2005, the agency has repeatedly been asked about the safety of its systems and the potential for accidents. Kostelnik is quick to point out that CBP Predators have flown almost 7,000 hours since the program's inception without ever harming anyone or anything on the ground. Kostelnik does admit that there is a certain level of risk

associated with unmanned aircraft operations, but that the same level of risk can be applied to manned aviation or to driving a car.

"Unmanned aircrafts are not without their risk," Kostelnik says. "No aircraft is without risk. At the end of the day the real question is, are we willing to take risks in the homeland to protect ourselves?"

Corcoran agrees, stating, "There is always risk in flying. What we do as leaders and pilots is find methods to reduce that risk as much as possible so that systems are sufficiently safe to operate. If folks are waiting for a system that has zero risk, the only aircraft that can achieve that is the one that never leaves the hangar."

Despite airspace access and other challenges, the future looks promising for UAS to continue providing persistent surveillance over U.S. borders. CBP's UAS program is receiving support from

Congress, and in June 2010 the FAA granted the agency permission to expand Predator operations to the Texas-Mexico border and throughout the Gulf Coast region. Texas senators Kay Bailey

Hutchison and John Cornyn have both advocated for the expansion of UAS operations in response to a surge in border violence. In August 2010, the U.S. House of Representatives approved a bill to allocate \$600 million to fund border security enhancements, including the hiring of more border patrol agents. Approximately \$32 million would be directed to support Predator operations.

Given the strong Congressional support and CBP's commitment to its UAS program, the potential for unmanned aircraft to become more prevalent on U.S. borders is likely. But will the agency's UAS operations be limited to Predators? CBP will have a number of options if it chooses to increase its UAS fleet. Much smaller UAS, some weighing less than a pound, are currently being tested by police departments and law enforcement personnel around the country. These types of systems could eventually provide border patrol agents with a tactical surveillance capability.

CBP has already considered the possibility of expanding its UAS fleet. Three years ago, CBP partnered with the Air Force Special Operations Command to conduct operational tests using an AeroVironment, Inc. Wasp UAS. According to Kostelnik, small UAS could be very useful for specific missions, but to date CBP has not made plans to begin operating additional unmanned aircraft beyond its Predator systems. Corcoran agrees that small UAS

*(Continued on Page 19)*



Unmanned Aircraft Systems. *Photo courtesy of U.S. Customs and Border Protection, Office of Air and Marine.*

## Border Security: Legal & Policy Issues Require Detailed Study

by Jeffrey F. Addicott, Director\*  
Center for Terrorism Law

There can be little doubt that the so-called “War on Terror” has caused great stress to “civil liberties” over the past nine years. Without question, certain basic privacy rights of the individual have given way to ever increasing security measures designed to protect the American people from the reality of global terrorism. Nowhere is this concern more loudly raised than in discussions of border security, particularly along the U.S.-Mexico international border. While the matter of real border security is often portrayed as a necessary imperative to protect the public from attacks by al-Qa’eda and other radical Islamic groups, the issue of securing the border goes far beyond concerns about international terrorism. Indeed, in tandem with terrorism, meaningful discussions regarding border security must include other homeland security imperatives related to transnational drug crime, human smuggling, and illegal alien immigration.

First, America’s borders are not secure. With 5,525 miles of border with Canada, 1,989 miles of border with Mexico, and a maritime border of 95,000 miles of shoreline, this is in large part a function of the magnitude of the geography involved. Add to the shear length of the border the fact that only a

tiny fraction of the millions of people (400+ million), cars (130+ million), trucks (12+ million), rail freight cars (2+ million), and maritime containers (8+ million) that enter the United States (at over 3,700 terminals and 301 ports of entry) are ever subjected to inspection of any kind and the problem of border security seems beyond resolution.

Even in light of the above physical assessment, the functional matter of border security presents a difficult, but not insurmountable, task. In fact, the real and central challenge that the United States faces revolves around legal and policy debates about how to realistically secure the border under a democratically based rule of law — a rule of law that strikes an acceptable balance between increased security and civil liberties.

Certainly, the protection of human rights and civil liberties is a greater obligation for the government in times of crisis than in times of peace. On the one hand, while a fundamental obligation of the State is to protect its citizens from external as well as internal threats to person and property, civil liberties given up in the name of security are often hard to regain once the security threat passes. In many instances, they are irrevocably lost.

On the other hand, an unsecured border represents a threat that is growing in intensity, whether viewed from the perspective of terrorism, crime, or illegal immigration. Clearly, a coherent and workable solution must be developed and then enacted with alacrity. The sticking point, of course, is precisely where the line should be drawn between increased security needs and civil liberties.

A central hallmark of any free people is the ability to debate issues and to petition the government as it makes policy and law. There is no question that the issue of border security covers matters that span across a variety of fundamental legal concerns. Not only does a majority of the American people express great dissatisfaction with Federal and State government responses to border security, there appears to be little effort to pull all of the applicable information together into a single reference point for study and assessment.

A much needed step forward in this process would be to develop a detailed “Legal & Policy Border Security Bench Book,” which would identify, address, and analyze specific categories of legal and policy issues associated with border security to include: international

*(Continued on Page 14)*

**Bench Book** (*Cont. from 13*)

terrorism, narco-terrorism, human trafficking, drug trafficking, and illegal alien intrusion on the U.S. borders (Mexico and Canada). At a minimum, the bench book would serve as an invaluable resource for those operating in the sphere of border security. The study would enhance organizational preparedness of local, State, and Federal law enforcement agencies, first responders, the U.S. military, and the general public by detailing the interaction of existing laws and regulations within a framework that encompasses multi-level legal and technology compliance requirements from Federal, State, local, and international perspectives.

In this light, the Center for Terrorism Law, St. Mary's University School of Law, San Antonio, Texas, is working in conjunction with other academic institutions to explore the viability of conducting such a study with additional hopes that it will be able to offer and conduct tailored training courses and seminars to law enforcement organizations (and National Guard) using the bench book as the central training/discussion focus about technological/counter-terrorism tactics, legal concerns, and conflict management. Balancing the rights of individuals with the need for increased security requires that enforcement officers have a clear understanding of the legal implications of their actions, which can affect their exposure to criminal, civil, and administrative liabilities. Additionally, the effort will significantly improve the legal and operational understanding of contemporary border issues and

provide those charged with protecting the border with the necessary tools to overcome barriers to effectiveness.

In conjunction with nationally recognized subject-matter experts in the public and private sector, who will work closely with select academic institutions to delineate the required informational product, the "Legal & Policy Border Security Bench Book" would identify areas of conflict and agreement across the full spectrum of individualized legal issues, i.e., privacy concerns, compliance issues, and government/business relationships. Specific categories of study would include: (1) surveillance technology; (2) various Federal authorities regarding immigration administration and enforcement; (3) constitutionality of border searches; (4) integrated systems' vulnerabilities; (5) civilian patrols; (6) border landholder's property rights; (7) enforcement of current domestic laws; (8) isolation and quarantine issues; (9) international treaty obligations; (10) DoD activities; (11) criminal law enforcement; and (12) privacy concerns.

Not only is there inconsistency in Federal legislation and regulations, but a growing volume of State level developments in this area will certainly have various consequences which must be addressed both within and across State and international boundaries. Furthermore, the development of judicial case law is a topic that requires a detailed analysis in order to determine how broadly judicial decisions will impact on specific

areas of concern.

In conclusion, the government's goal is to implement border security that does not impede the efficient movement of legitimate commerce, citizens, and authorized visitors while deterring, detecting, and denying unwanted goods and people. South Texas in particular constitutes a unique venue where homeland security and criminal justice professionals are faced with numerous law enforcement problems — the region boasts the largest U.S.-Mexico inland port and millions of people, cars, commercial trucks, and trains enter and exit the United States annually through a variety of entry points, e.g., (on the Texas border) El Paso, Brownsville, and Laredo. Federal prosecution of drug and immigration offenses has risen substantially over the past decade.

Apart from the practical uses outlined above, the scope and breadth of the envisioned study will go far beyond serving government professionals exclusively, or even serving as a needed depository of knowledge for security and immigration issues. The real thrust of the study will be to energize policy makers, government leaders, and law enforcement officials to collaborate and test the efficacy of proposed laws, regulations, and procedures that safeguard the Nation under a rule of law that correctly balances civil liberties and security. ❖

*\*Jeffrey F. Addicott is a Distinguished*

*(Continued on Page 23)*

## LEGAL INSIGHTS

## Arizona Immigration Law Negatively Impacts Border Security

by Nicholas D. Gordon, Esq.

Frustrated with illegal immigration, the Arizona Legislature recently enacted Senate Bill 1070 as amended by House Bill 2162 (S.B. 1070) in an effort to rid itself of the estimated 460,000 undocumented aliens residing in the State.<sup>1</sup> In response to S.B. 1070, and concerned that inaction would permit the development of a patchwork of State and local immigration policies throughout the country, the Department of Justice (DOJ) filed a lawsuit in Federal district court challenging its constitutionality and seeking to enjoin its enforcement.<sup>2</sup>

The Nation's immigration laws reflect a careful balance of national law enforcement, foreign relations, and humanitarian interests. This article discusses the major provisions of S.B. 1070 and the merits of DOJ's lawsuit — including the court's recent ruling on its motion for a preliminary injunction — before concluding that permitting S.B. 1070 to go into effect will have a negative impact on

national security priorities and DHS's ability to effectively secure the border.

### S.B. 1070

Finding a compelling interest in the cooperative enforcement of Federal immigration laws throughout all of Arizona, the intent of S.B. 1070 is “to make attrition through enforcement the public policy of all State and local government agencies in Arizona.”<sup>3</sup> The provisions of the law are intended to “work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”<sup>4</sup> The following is a summary of some of the main provisions of the bill.<sup>5</sup>

- During any lawful stop, police must make a reasonable attempt to determine the immigration status of a person where “reasonable suspicion” exists that the person is an alien who is unlawfully present in the United States. Persons who

present any identification that requires verification of lawful status when issued (e.g., an Arizona driver's license) are presumed to be lawfully present.

- Police may make a warrantless arrest of a person if they have “probable cause” to believe the person has committed a public offense that renders the person removable from the United States.
- Police may not adopt any policy that restricts enforcement of Federal immigration laws. Arizonians may sue the police (or any other government agency) if they feel it adopts such a policy.
- State officials may not impose any kind of restriction on maintaining or exchanging information relating to a person's immigration status with any other governmental entity for purposes of (1) determining eligibility for any public benefit provided by the State; (2) verifying a claim of residence/domicile if

*(Continued on Page 16)*

<sup>1</sup> U.S. Department of Homeland Security, Office of Immigration Statistics, Population Estimates: January 2010, “Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009,” Table 4. Available online at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf).

<sup>2</sup> DOJ Complaint, available online at <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html>.

<sup>3</sup> Compare <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf> (S.B. 1070) with <http://www.tucsonsentinel.com/files/pdf/hb2162.pdf> (H.B. 2162).

<sup>4</sup> *Id.*

<sup>5</sup> This summary is a condensed version of the Federation for American Immigration Reform's Legislative Analysis outlining S. B. 1070. Available online at [http://www.fairus.org/site/DocServer/ariz\\_SB1070\\_summary.pdf?docID=4761](http://www.fairus.org/site/DocServer/ariz_SB1070_summary.pdf?docID=4761).

**Legal Insights** (*Cont. from 15*)

mandated by law or judicial order; (3) confirming the identity of a detainee; and (4) determining whether an alien is in compliance with Federal registration laws.

- Vehicles driven by unlawfully present aliens, or used to unlawfully transport them, may be impounded or forfeited.
- Unlawfully present aliens who violate Federal alien registration laws — which require aliens to register and carry their documents with them at all times — are now subject to arrest and penalties under the Arizona criminal code.
- Unlawfully present aliens that seek or actually work in the State may be convicted of a misdemeanor crime.
- Employers are required to maintain a record of an employee's E-Verify eligibility verification for either the duration of employment or at least three years.
- Persons that hire and/or pick up day laborers, and day laborers that solicit work, may be convicted of a misdemeanor crime if their roadside encounter impedes the normal flow of traffic.
- Persons that transport, harbor, or encourage unlawfully present aliens to remain in the United States — if the driver/person knows or recklessly disregards that they are

here illegally — may be convicted of a misdemeanor crime.

**DOJ's Lawsuit Against S.B. 1070**

In an action for declaratory and injunctive relief filed with the Federal district court in Arizona, DOJ principally argues that S.B. 1070 is preempted by Federal law and therefore in violation of the Supremacy Clause of the U.S. Constitution.<sup>6</sup>

The logic of DOJ's position flows throughout its complaint. The Constitution affords the Federal government the power to "establish [a] uniform Rule of Naturalization."<sup>7</sup> Pursuant to that authority, Congress has made laws governing immigration and the status of aliens within the United States. In doing so, Congress has vested the executive branch with considerable discretion in enforcing the immigration laws. In exercising its significant enforcement discretion, the executive branch prioritizes the removal of those aliens who pose a danger to national security or public safety, e.g., aliens engaged in or suspected of terrorism or espionage. After highlighting a number of ways in which States may assist the Federal government in its enforcement of the immigration laws, DOJ clarifies that "traditional police powers" do not permit States to enact their own immigration policies because such

regulations remain the exclusive province of the Federal government.<sup>8</sup>

DOJ is careful to note that "unlawful presence — standing alone — should not subject an alien to criminal penalties."<sup>9</sup> It reasons that a variety of humanitarian options exist for unlawfully present aliens, demonstrating that one aspect of Federal immigration policy is to "assist and welcome [certain] victims in the United States" notwithstanding their unlawful presence.<sup>10</sup> DOJ concludes that it would violate Federal policy to prosecute or detain these types of aliens based on their unlawful immigration status (which is often known by the Federal government and not used as a basis for a removal proceeding or criminal prosecution for affirmative policy reasons).<sup>11</sup>

DOJ takes issue with the remaining provisions of S.B. 1070 for a variety of reasons. For example, many of them are preempted by Federal law, e.g., alien smuggling; concealing, harboring, or encouraging an alien to enter or remain in the United States in violation of law; or aliens working without authorization.<sup>12</sup> The State criminal offense for an alien to fail to carry a registration card on his person at all times, or to seek or perform work in the State, is preempted by a comprehensive Federal scheme.<sup>13</sup> More

*(Continued on Page 17)*

<sup>6</sup> DOJ Complaint, available online at <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html>.

<sup>7</sup> U.S. Const., art. I § 8, cl. 4.

<sup>8</sup> DOJ Complaint, available online at <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See 8 U.S.C. § 1324.

**Legal Insights** (*Cont. from 16*)

importantly, S.B. 1070's mandatory State alien inspection scheme will result in a dramatic increase in the number of verification requests being issued to DHS, thereby requiring it to divert resources away from one of its top enforcement priorities — “dangerous aliens who pose a threat to national security and public safety”— in order to address the work that Arizona will create for it.<sup>14</sup>

In light of the above, DOJ argued that “such interference with Federal priorities, driven by State-imposed burdens on Federal resources, constitutes a violation of the Supremacy Clause.”<sup>15</sup> DOJ also alleged that S.B.1070's provisions are preempted by Federal law and U.S. foreign policy and that its efforts to restrict the interstate movement of aliens violates the Commerce Clause.<sup>16</sup>

**Federal District Court's Ruling on Motion for Preliminary Injunction**

After noting a “severability clause” which prevents it from enjoining S.B. 1070 in its entirety, the Court first noted the sections of the law that it did not enjoin because DOJ did not argue against their enforcement, ranging from the provisions that prohibit State

officials from limiting the enforcement of Federal immigration laws to the clause that permits Arizonians to sue any State agency that adopts such a policy.<sup>17</sup> The Court applied the same rationale to the creation or amendment of State crimes regarding the following: picking up day laborers if it impedes the normal movement of traffic, human smuggling, and employing unauthorized aliens.<sup>18</sup> The Court refused to enjoin two provisions of S.B. 1070 because it found that DOJ is not likely to succeed on the merits with respect to the following:

(1) The creation of a separate crime for a person to transport/harbor or encourage an unlawfully present alien to come to or live in Arizona.

(2) The amendment of the Arizona code permitting the impoundment of vehicles used to transport/harbor unlawfully present aliens.<sup>19</sup>

The Court did find, however, that DOJ is likely to succeed on the merits in showing that the following provisions of S.B. 1070 are preempted by Federal law:

(1) That police — during any lawful stop — must make a reasonable attempt to determine the immigration status of a person

where “reasonable suspicion” exists that the person is an alien who is unlawfully present in the United States.

(2) That police may make a warrantless arrest of a person if they have “probable cause” to believe the person has committed a public offense that renders the person removable from the United States.

(3) The creation of a separate crime for an alien's failure to apply for or carry alien registration papers.

(4) The creation of a separate crime for an unauthorized alien to apply for, solicit, or perform work in the State.<sup>20</sup>

Throughout its order, a running theme of the Court in enjoining some of S.B. 1070's provisions is that they would otherwise subject aliens to “the possibility of inquisitorial practices and police surveillance” in contravention of the Supreme Court's directive in *Hines v. Davidowitz*.<sup>21</sup>

**Negative Impact on National Security**

DHS is the Federal department with primary responsibility for the

*(Continued on Page 22)*

<sup>13</sup> See 8 U.S.C. §§ 1201, 1301-1306, and 8 C.F.R. Part 264 (pertaining to alien registration); see 8 U.S.C. §§ 1324a-1324c (pertaining to sanctions related to the employment of unauthorized aliens).

<sup>14</sup> DOJ Complaint, available online at <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> U.S. District Court for the District of Arizona, Order on Case No. CV 10-1413-PHX-SRB. Available online at [http://www.azd.uscourts.gov/azd/courtinfo.nsf/983700DFEE44B56B0725776E005D6CCB/\\$file/10-1413-87.pdf?openelement](http://www.azd.uscourts.gov/azd/courtinfo.nsf/983700DFEE44B56B0725776E005D6CCB/$file/10-1413-87.pdf?openelement).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 312 U.S. 52, 74 (1941).

## Renewable Energy *(Cont. from 2)*

uninterruptible power systems; response, using emergency power systems; and recovery, using backup power.” Thornton said that “the future of energy security lies in environmentally sustainable, secure energy sources that are readily available today.<sup>1</sup>”

Already, renewable energy has offered solutions in DHS operations, signaling that a research emphasis in this area may lead to innovation that improves security and operations significantly. The U.S. Coast Guard has deployed 4,777 floating solar powered buoys along the coast as aids to navigation. These devices operate continuously without requiring battery changes, reducing maintenance and leading to increased reliability.<sup>2</sup>

Considering the compelling arguments for integrating renewable energy into border security, in the past year BMD has initiated efforts to examine the energy needs along our borders, especially in remote areas; to identify opportunities to apply renewable energy solutions today; and to define the near- and long-term research agendas that will position border components and activities to take advantage of renewable energy technologies in the future.

By defining this research agenda in renewable energy, BMD is focused on providing energy solutions in remote locations where conventional generation is often

cumbersome, noisy, and not always reliable. The potential for improvement is great; generating solutions that may be applicable along both our southern and northern borders, but also in other remote locations that are crucial to our Nation’s security. With a BMD and NREL partnership, the borders energy research thrust areas will be defined and road mapped, leading to next generation renewable energy solutions for border protection and national security.

This research effort is funded by the S&T’s, Borders and Maritime Security Division. It is a product of a two-year interagency agreement between DHS and NREL. ❖

### \*Authors:

*Andrea Watson is a Project Leader within the Deployment and Industry Partnerships Group at NREL. She provides support to external entities who are interested in working with this group at NREL, including initial project scoping and task development as well as direct project support through technical assistance.*

*[Andrea.watson@nrel.gov](mailto:Andrea.watson@nrel.gov)  
(303) 275-4234*

*Alicen Kandt is a Senior Mechanical Engineer within the Deployment and Industry Partnerships Group at NREL. She assists Federal agencies, municipalities, and the private sector in identifying cost-effective opportunities for renewable energy, energy efficiency, and water efficiency*

*technologies.*

*[Alicen.kandt@nrel.gov](mailto:Alicen.kandt@nrel.gov)  
(303) 384-7518*

*Jeanne Lin is the Deputy Director and Research Lead within Borders and Maritime Security Division. As Research Lead, she develops the Division’s research strategy and programs for seamless integration into the Division’s overall strategy and mission. Ms. Lin has an M.S. degree in Systems Engineering from George Mason University.*

*[Jeanne.Lin@DHS.GOV](mailto:Jeanne.Lin@DHS.GOV)  
(202) 254-5737*

<sup>1</sup> Kandt, Alicen. “Renewable Energy is Key to Energy Security.” Save with Renewable Energy: A technical bulletin for Federal renewable energy champions.; November, 2003; pp 5-6.

<sup>2</sup> Lagan, Christopher “Earth Day 2010-Reducing our environmental footprint” Coast Guard Compass: official blog of the U.S.C.G, <http://coastguard.dodlive.mil>. Accessed July 26, 2010.

### Unmanned Aircraft (*Cont. from 12*)

could be beneficial for some border applications, but that their operation is years away due to airspace integration issues.

Until the time when UAS have unrestricted access to airspace and CBP can explore additional UAS options, the agency will press on with its Predators. CBP recently reported to Congress that its unmanned aircraft flew 6,979.5 hours between fiscal year 2006 and the third quarter of fiscal year 2010. During that time, UAS operations supported the apprehension of 7,163 aliens and the seizure of 39,049.87 pounds of marijuana estimated to be worth \$31.2 million. With increased access to airspace for CBP's Predators and additional support staff to run UAS operations, these statistics could drastically increase.

While unmanned aircrafts are only playing a small role securing U.S. borders today, it is a role that has increased exponentially since 2009, and one that Kostelnik believes will continue to expand in an effort to ensure national security. Kostelnik is determined to keep CBP's UAS program moving forward despite the challenges it faces.

"UAS are not a panacea," Kostelnik says, "but they are a very important piece in securing the Nation's borders." ❖

---

### War on Drugs (*Cont. from 4*)

creation of another team of 35 Mexican personnel in Mexico City to work directly with U.S. Embassy personnel.<sup>13</sup> Although corruption is a legitimate concern when working with Mexican officials, any apprehension about the fidelity of Mexican forces should be allayed by the fact that all Mexican agents privy to sensitive information are vetted by U.S. intelligence agencies. BESTs promote cooperation between the United States and Mexico, while also taking advantage of the specialized expertise of U.S. State and local forces. Creating more BESTs only increases these advantages.

### State and Local Grants

State and local law enforcement agencies have a significant advantage over their Federal counterpart: they know the geography and citizens of border communities, and they know the impact that drug violence has on those communities. Additionally, they are not plagued by corruption like their Mexican counterparts. The problem is that, at the moment, they are outmanned and outgunned by the cartels.<sup>14</sup>

While securing the border is the job of the Federal government, State and local agencies can play an important complementary role. By increasing their ability to prevent crime in their own localities, these agencies lighten the load of the Federal government, allowing it to concentrate more directly on protecting the border. With their specialized knowledge of the border region, State and local law enforcement agencies are an important asset in the war on drugs. Enhancing the DHS grant process to better aid border communities in deterring criminal activity would increase the Federal government's ability to police the border, while also complementing other programs aimed at promoting Federal cooperation with localities, like DHS's 287(g).

As Mexico's drug cartels become more dangerous, the threat to America's southern border grows. Since 2009 alone, Ciudad Juarez has experienced over 4,000 murders. With such out of control violence located directly along the border, American action is needed to prevent Mexican drug violence from threatening American safety and security. This is a war that Mexico cannot win alone — and that the United States cannot afford to lose. ❖

---

<sup>13</sup> Walser, "U.S. Strategy against Mexican Drug Cartels."

<sup>14</sup> James Jay Carafano, "Back to the Border for the National Guard," *The Washington Examiner*, March 1, 2009, at <http://dev.www.washingtonexaminer.com/opinion/columns/jamescarafano/Back-to-the-border-for-the-National-Guard-40512857.html> (July 23, 2010).

## Canada-U.S. Trade *(Cont. from 9)*

In the aftermath of 9/11, the United States recognized inbound trucks as a potential means by which dangerous materials and/or persons could enter the country. To counter this threat, a number of programs and technologies have been deployed at the Canada – U.S. border. Radiation portal monitors and Vehicle and Cargo Inspection System (VACIS) gamma-ray scanners provide non-intrusive means to examine the goods within a truck. The e-manifest program requires that the manifest for a given truck be submitted to U.S. Customs at least one hour prior to the arrival of the truck at the border, allowing officials to undertake intelligence-based screening of an inbound shipment. In general, though, the deployment of these new programs and technologies led to lengthier inspection times than existed prior to 9/11, and concern grew about the manner in which security measures impeded cross-border commerce. In response, U.S. Customs developed “trusted shipper” programs (FAST and C-TPAT), with the goal of providing expedited inspection processes for firms that install certain security features at their facilities and voluntarily submit to a vetting process. A loaded truck can make use of a FAST lane at the border if the driver, the trucking company, and the shipper have all enrolled in the trusted-shipper programs.

There is growing recognition that the trusted-shipper programs are not of universal utility along the breadth of the border. In Detroit, 44 percent of shipments enter the

United States via FAST lanes, but outside the auto-belt, the use of FAST is minimal. The design of the FAST program meshes with the nature of cross-border commerce in the auto-belt — i.e., shippers are sophisticated companies able to afford the cost of establishing eligibility; carriers are large firms carrying full truckloads of a single commodity over a short distance. At Blaine, in contrast, many carriers are “mom and pop” firms that cannot afford to establish eligibility. Many loads consist of multiple consignments, meaning that the truck cannot use FAST unless all the shippers associated with the load are enrolled in FAST. In addition, commodities that have a supply chain that is inherently difficult to secure (e.g., agriculture) are more prevalent. A security program optimized for facilitation of one group of commodities (e.g., manufactured goods) is of more benefit to one region than another.

Although nine years have passed since 9/11, there is persistent frustration within the business sector about the “thicker” border between the United States and Canada. Since the 2008 economic crisis, there is also a growing discussion about whether national security is best achieved by the existing border-security programs, given that the programs serve as an impediment to intra-continental trade. Maintaining American economic vitality is recognized as a crucial goal of our national security efforts, but in this era of global economic competition, hindering trade across the Canada – U.S. border hampers North America’s

global competitiveness. What constitutes the greater threat to national security: the possibility that a weapon of mass destruction (WMD) will be smuggled into the United States from Canada (our most trusted ally), or the possibility that our way of life will erode as we slowly cede economic strength?

On a final note, Figure 1 hints at yet another threat to national security, in that five of the eight largest crossings are bridges. If the mere “thickening” of the border due to inspection processes can plausibly be considered a threat to national economic vitality, then the destruction of one or more of these bridges clearly is an even greater threat. There are plans to build additional spans at Detroit and Buffalo, and the erection of such spans would not only alleviate traffic congestion experienced today, but provide crucial resilience within the transportation network. These bridges constitute infrastructure of critical importance to the United States and Canada.

There is a relationship between the scope of the screening processes undertaken at the Canada – U.S. border and the security of our Nation, with continued controversy about how to balance the economic benefits of trade facilitation against the benefits of the interdiction of threats. There should be little controversy, though, about the critical importance of the actual infrastructure that conveys trade across the border, and the need to protect that infrastructure. ❖

## Mérida Initiative (Cont. from 7)

selectively on demonstration areas, such as one or two cities in Mexico's North, where the four pillars and Mexico's efforts can be brought together.

### Another Way: Legalization?

Given the persistent escalation of the violence and few visible areas of progress so far, despite the institutional reforms embraced by Calderón, Mexico's public is growing weary of the violence. Although few publicly call for the return of the corporatist arrangement between Mexico's PRI-controlled state and the DTOs that characterized Mexico's handling of organized crime until the mid-1980s, many are increasingly questioning the wisdom of Calderón's outright confrontation with the DTOs.

Emphasizing the balloon-effect of counternarcotics policies that often displace the problem of cultivation, trafficking, and organized crime from one country to another, and pointing to the strong demand in the United States for drugs, the voices for legalizing drugs, at least marijuana, are growing in Mexico. Former President Vicente Fox has recently prominently joined them.

A country may have strong reasons to want to legalize some drugs, such as to decrease the burden on its prison system or to better manage the public health aspects of drug consumption, even at the cost of greater consumption which increased availability and smaller social opprobrium would likely bring about. While the U.S.

traditional approach of domestic imprisonment for users and eradication über alles of illicit crops abroad have been a failure, there are good reasons to doubt that legalization in Mexico today, even if only of marijuana, would relieve the violence.

If the DTOs income as a result of marijuana legalization actually fell, as many of the proponents of the policy, including President Fox, are promising, the DTOs may become even more violent in order to take control of the remaining illegal trade in hard drugs. They may also become more violent and determined to take over Mexico's informal economy and to extort legal businesses, as is common with the mafia. But as long as the State's control is weak, the DTOs will be perfectly capable of siphoning off the legal cultivated marijuana and smuggling it into the United States or cultivating their own fields and undercutting government taxation, thus still controlling the market. So, neither their political influence nor their money and violence may go down; rather just the opposite. In fact, Mexico's legalization would be far more viable and less damaging internally, if Mexico got its organized crime under control and its law enforcement clearly on top and capable of preventing the violence that has ensnared the country.

In fact, such a breakthrough in law enforcement is key. The United States can help by seriously addressing its demand for drugs — but that will take time and demand is strong and growing elsewhere.

Both Mexico and the United States are keenly focusing on anti-money-laundering efforts (AML) to bankrupt the DTOs: but AML is exceedingly difficult with efficacy rates rarely, if ever, greater than 2-5 percent. Finally, the United States can concentrate on stopping the weapons flow to Mexico: but the global market with small arms is fully integrated and there is not a place in the world that is lacking in small firepower.

In short, there are no shortcuts or outsourcing options for Mexico's suppression of its organized crime. Mexico needs to persevere with institutional reforms to increase the capacity and accountability of its law enforcement and justice systems and it needs to undertake other structural reforms in its social and economic spheres to connect its marginalized and eviscerated communities with the State so they see the State as a better alternative than crime, illegality, and informality and their role within the State as consistent with one's social progress. ❖

*\* Vanda Felbab-Brown is a fellow in the 21<sup>st</sup> Century Defense Initiative in Foreign Policy at the Brookings Institution, Washington, DC and author of Shooting Up: Counterinsurgency and the War on Drugs (Brookings Press, 2009).*

## Legal Insights (Cont. from 17)

enforcement of Federal immigration law. Within DHS, U.S. Immigration and Customs Enforcement (ICE) plays a key role in this enforcement by serving as the agency responsible for the apprehension and removal of individuals from the interior United States. ICE classifies aliens that pose a danger to national security, e.g., aliens engaged in or suspected of terrorism or espionage, as one of the “most important targets for apprehension and removal.”<sup>22</sup>

In a declaration supporting DOJ’s lawsuit against the enforcement of S.B. 1070, Daniel Ragsdale, ICE’s Executive Associate Director for Management and Administration, explains that ICE bases its highest enforcement priorities on a number of different factors, including the number of people present in the United States illegally — approximately 10.8 million aliens, including 460,000 in Arizona — and the number of people ICE is resourced to remove each year — approximately 400,000.<sup>23</sup>

In a similar statement, David Palmatier, ICE’s Unit Chief for the Law Enforcement Support Center (LESC), explains that his limited resources are currently dedicated in

part to national security objectives such as requests for immigration status determination from the United States Secret Service, the Federal Bureau of Investigation, and employment-related requests at “national security related locations that could be vulnerable to sabotage, attack, or exploitation.”<sup>24</sup>

Both Mr. Ragsdale and Mr. Palmatier express deep concern that responding to the high number of referrals likely to be generated by enforcement of S.B. 1070 will require ICE to divert existing resources utilized to protect national security and the border in order to pursue aliens who are in the United States illegally but pose no immediate or known danger or threat to the safety and security of the public.<sup>25</sup> The government of Mexico, a partner to ICE in many border law enforcement operations, has expressed strong concern about S.B. 1070’s “criminalizing” immigrants.<sup>26</sup> In other words, S.B. 1070 threatens cooperation from foreign governments; any decrease in participation and support from the government of Mexico will hinder ICE’s efforts to prioritize and combat cross-border crime. Finally, the legislative intent and publicity surrounding S.B. 1070

will lead many unlawfully present aliens to conclude that they will be subject to detention and removal if they choose to cooperate with authorities. Thus, S.B. 1070 will undermine ICE’s (and local police’s) efforts to secure the cooperation of confidential informants, witnesses, and victims (who are unlawfully present aliens) in combating terrorism, espionage, and crime generally.<sup>27</sup>

In summary, S.B. 1070’s singular focus on “attrition by enforcement” fails to take into account the multiple and often competing national interests at play in the “smart and tough” enforcement of Federal immigration laws. Many of its provisions are preempted by Federal law and should be struck down. Regardless of its constitutionality, however, permitting S.B. 1070 to go into effect will divert the Federal government’s limited resources away from protecting national security and the border, resulting in a United States that is more susceptible to another — perhaps more devastating — terrorist attack. ❖

<sup>22</sup> Declaration of Daniel Ragsdale, DHS-ICE Executive Associate Director for Management and Administration, available online at <http://www.justice.gov/opa/documents/declaration-of-daniel-ragsdale.pdf>.

<sup>23</sup> Id.

<sup>24</sup> Declaration of David C. Palmatier, DHS-ICE, Unit Chief for LESL, available online at <http://www.justice.gov/opa/documents/declaration-of-david-palmatier.pdf>.

<sup>25</sup> Declaration of Daniel Ragsdale, DHS-ICE Executive Associate Director for Management and Administration, available online at <http://www.justice.gov/opa/documents/declaration-of-daniel-ragsdale.pdf>; Declaration of David C. Palmatier, DHS-ICE, Unit Chief for LESL, available online at <http://www.justice.gov/opa/documents/declaration-of-david-palmatier.pdf>.

<sup>26</sup> Declaration of Daniel Ragsdale, DHS-ICE Executive Associate Director for Management and Administration, available online at <http://www.justice.gov/opa/documents/declaration-of-daniel-ragsdale.pdf>.

<sup>27</sup> Id.; see also Declaration of Tucson Police Department Chief Roberto Villasenor, available online at <http://www.justice.gov/opa/documents/declaration-of-roberto-villasenor.pdf>.

**Bench Book** (Cont. from 14)

*Professor of Law and Director of the Center for Terrorism Law, St. Mary's University School of Law. B.A. (with honors), University of Maryland; J.D.; University of Alabama School of Law; LL.M., The Judge Advocate General's Legal Center and School; LL.M. (1992) and S.J.D. (1994), University of Virginia School of Law. Additional reading on this topic can be found in Addicott, *Terrorism Law: Materials, Cases, Comments*, 6th Edition, (2011).*

SARMA's Fourth Annual  
Security Analysis and Risk Management Conference

**Tuesday, October 5, 2010 at 8:30 am**  
to  
**Thursday, October 7, 2010 at 12:00 pm**

**"The Road to Resilience: A Risk-Based Approach"**

Conference and Reception co-hosted by:

SARMA and the George Mason University School of Law's  
Center for Infrastructure Protection and Homeland Security (CIP/HS)

**George Mason University - Arlington Campus**  
**Original Building, Room 329**  
**3401 Fairfax Drive**  
**Arlington, VA 22201**

**Timothy W. Manning**, Deputy Administrator for the National Preparedness Directorate at the Federal Emergency Management Agency (FEMA) will provide opening keynote address.

For regular updates on keynote speakers; presentations and panels; sponsors; exhibitors; and more, please visit <http://www.cvent.com/EVENTS/Info/Summary.aspx?e=4fd5ce6f-fb76-4016-9883-cce06fdd1802>.

**Registration is open.**



The Center for Infrastructure Protection works in conjunction with James Madison University and seeks to fully integrate the disciplines of law, policy, and technology for enhancing the security of cyber-networks, physical systems, and economic processes supporting the Nation's critical infrastructure. The Center is funded by a grant from the National Institute of Standards and Technology (NIST).

If you would like to be added to the distribution list for *The CIP Report*, please click on this link:  
<http://listserv.gmu.edu/cgi-bin/wa?SUBED1=cipp-report-l&A=1>