

Transcript of Senate Caucus on International Narcotics Control Hearing on Illegal Tunnels on the Southwest U.S. Border

Hearing Held on June 15, 2011

FEINSTEIN:

The hearing will come to order.

We are here today to explore the increasing number of -- and sophistication of tunnels along the Southwest border.

Now, most people don't know what this is or what's going on. But, as the United States/Mexico border has become more secure, criminals have sought out new ways to transfer drugs as well as people across the border.

For years, smugglers have tried to go around our border checkpoints. Now, they are trying to go under them to evade border enforcement.

Now, these tunnels range from anything from a shallow dirt crawl- way to sophisticated concrete structures with shoring, ventilation and electricity. One tunnel found in San Diego even had a makeshift elevator.

Underground tunnels present a serious national security threat. The first tunnel was discovered in May of 1990. However, beginning in 2001 they really began to increase dramatically. And between September of '01 and today, a 125 tunnels have been completed -- discovered equaling a total of 137 completed tunnels since 1990.

Now, these are most often used to transport narcotics from Mexico to the United States, but they're also used to smuggle weapons and people. They can be used to transport drugs across the border, they could be used to smuggle a terrorist or terrorists into the United States.

Now, I mentioned that there's been a striking increase in the sophistication of these tunnels. And to date, authorities have discovered 61 sophisticated tunnels, 37 of which were constructed in California.

In San Diego in February of 2006, I had the occasion to visit a very sophisticated tunnel discovered by the multi-agency San Diego Tunnel Task Force led by U.S. Immigration and Customs

The Department of Homeland Security has established these tunnel -- these tunnel task forces in San Diego, Nogales, El Paso, Yuma and Imperial Valley. So you know they're consequential.

The tunnel I saw was -- and it's the middle chart -- was 2,400 feet long. That's close to a half a mile long. It stretched from an abandoned warehouse near the southern border of California.

Now, this was a brand new big warehouse. Half a square block that was totally empty except when you went in and you went in to one small office and you lifted up the asphalt or linoleum floor plate it went down some eight feet.

This tunnel remains the longest cross-border tunnel discovered in U.S. history. It's more than nine stories below ground at its deepest point. It has ventilation, groundwater drainage systems, cement flooring, lighting, and even a pulley system to pull things for this plus 2,000 feet.

Authorities at that time seized over 4,200 pounds of marijuana in the tunnel, and have attributed the operation to the Arellano Felix Organization.

Now, the exit of the tunnel -- and let me see if I can point it out -- was concealed. I don't know if you can see it because it's so small, but this is the room I went into that was a vacant office. This is the entrance in Mexico. And here is the border. Here's the warehouse. And so, the line on the ground went all the way out across the border and into the second large block in Mexico.

This is what the warehouse looks like from the outside. As you can see not an impressive building. Somebody brought it to use for no other purpose but this. And, of course, this is the interior of the -- of the tunnel itself.

And so you can take a look. This is the (inaudible) tunnel that is as I say very sophisticated architecture.

So, I must tell you I was amazed, Mr. Vice Chairman to see this and, also, to know that what the trucks would do is just pull up to a loading bay at the warehouse. Nobody else was in the warehouse so they could bring the stuff in at night, any time, into the loading bay, loaded on to the truck and out it went into our country.

After seeing this I introduced something called the Border Tunnel Prevention Act. The bill became law in '07 and it criminalized the construction, financing or use of an unauthorized tunnel or subterranean passage across an international border -- any international border into the United States. We only have two.

It also imposes a punishment for anyone who negligently permits others to construct or use unauthorized tunnel or subterranean -- subterranean passage on their land.

The first prosecution under this law was in connection to a December '09 partially-built tunnel found in Calexico. An investigation resulted in the arrest of Daniel Alvarez, a United States citizen. Alvarez eventually pled guilty to criminal violations put into place by the Border Tunnel Prevention Act and was sentenced to 15 months in federal prison.

Tomorrow, I'm going to be introducing a bill to enhance the '07 law and provide law enforcement and prosecutors additional tools to locate tunnels, identify criminals and punish those involved.

Specifically, it will make the use, construction or financing of a border tunnel a conspiracy offense -- this would punish the intent to engage in tunnel activity, even in cases where the tunnel might not have been fully constructed because the only reason to build the tunnel is to avoid the authorities so that means you have to be -- going to commit a criminal event -- and include illegal tunneling as an offense eligible for title III wiretaps even when there are not drugs or other contraband to facilitate a wiretap, specify border tunnel activity as unlawful under the existing forfeiture and money laundering provisions to allow authorities to seize assets in this case.

Now, this is a growing problem. Let me point one other thing out to you over here.

Here are the numbers of tunnels on the border. Forty-two found in the San Diego area, 12 in Calexico areas -- area, 3 in San Luis, 88 in Nogales, Arizona, 1 in Naco, 3 in Douglas, Arizona, and 2 in El Paso.

As you can see the state hit the hardest are Arizona and San Diego. So, anyone that would be interested in cosponsoring -- I know, Senator Landrieu has indicated that she would like to co-sponsor it and we believe others will also -- the intention is to introduce it tomorrow morning.

So, Mr. Vice Chairman, we're delighted to hear from you.

GRASSLEY:

Well, of course this is a very important hearing and thank you for your leadership on it.

Before I get into the specifics of the topic of border tunnels I wanted to say a quick word about the report released on Monday by the chairwoman and two members of the caucus on her side of the aisle.

When we released the caucus report on responses to the Mexican drug trafficking organizations last month, Chairman Feinstein and I noted in our cover letter we had differing views on the causes and sources of firearms. While we may disagree on this point, I think it is a testament to the collegial spirit of the caucus that we can accommodate different points of view on such a hot button issue as preparing -- by preparing separate reports.

I, along with the members of the minority on the caucus intend to file a minority caucus report on the topic sometime in the future. However, we will likely release that report some time down the road given the important information we are uncovering as a part of the ongoing investigation into the Bureau of Alcohol, Tobacco, and Firearms operation "Fast and Furious."

Earlier today I testified before the House Oversight and Government Reform Committee about the joint investigation Chairman Issa and I are conducting on the ATF's operation "Fast and Furious". Our investigation has uncovered serious problems at the Department of Justice and ATF. Whistleblowers from within the ATF have come forward to both of our office to express their outrage with this operation because they were instructed by supervisors to "let guns walk".

According to these courageous whistleblowers, this phrase means that ATF knowingly allowed criminal straw buyers to purchase hundreds of high powered rifles, handguns, and semi-automatic firearms. These straw buyers bought hundreds of firearms that were never recovered by ATF and were later provided to criminals and drug cartels.

We now know that those firearms were found on both sides of our border at countless crime scenes including at the murder scene of Border Patrol Agent Brian Terry.

I've met with Agent Terry's family and this preventable tragedy is unfortunately one of the many tragedies in the U.S and Mexico caused by ATF's decision to let guns walk. Further, with so many "Fast and Furious" guns on the loose we do not know how many more crimes will be committed on both sides of the border with these guns.

Among other things, our minority report will include findings related to the Fast and Furious investigation and how ATF allowed the exports of firearms to Mexico. It will also deal with other sources of firearms in Mexico including high powered military rifles from Central American militaries stolen by drug cartels.

That said, today's hearing is a continuation of our efforts to discuss vulnerabilities across Southwest Border. We've heard on our previous hearings about methods used by drug cartels operating in Mexico and Central America to move drugs and other contraband into our country.

Although the border tunnels don't extend all the way to the Southwest Border to Iowa, the devastating effects of such contraband move through those tunnels do and seriously affect all parts of our country.

Illegal narcotics including meth, cocaine, and heroin are transported north through Mexico and up -- end up in the streets of our home states and the rest of the country. So these tunnels aren't just a problem for border states, like Senator Feinstein's or Senator Cornyn's state of Texas, but they affect all of us.

During a hearing held on both the drug caucus and the judiciary committee, experts told us that drug cartels and other criminal organization makes billions of dollars by moving illegal narcotics and other contraband. These criminal organizations are adept at shifting their operations and trafficking routes to the paths of least resistance.

Since 9/11 when the United States began increasing enforcement along our borders, tunnel construction has increased as smugglers were forced to come up with alternative ways to move contraband.

The increased use of tunnels, sometimes dug hundreds of feet underground, is an example of this shift. As pressure for ground routes has increased, the traffickers have moved below ground to move their products.

Smugglers have been digging for years under the Southwest border to avoid detection as they move this contraband. Mexican drug cartels build these tunnels to connect locations in Mexico to points in the United States along the border of San Diego, Nogales, and all the other places the chairman has shown us on our charts.

These tunnels range in sophistication from simple passageways to elaborate transportation systems. Some tunnels have been equipped with elevators, electrical and ventilation systems, and rail lines. The elevators and rail systems facilitate the movement of large amounts of contraband, and ventilation systems enable workers to spend hours underground.

The -- a problem this large and complex requires a coordinated effort on the part of administrative agencies. Tunnel investigations and detection operations are conducted by the multi-agency San Diego Tunnel Task Force. The task force includes personnel from Immigration and Customs Enforcement, Customs and Border Protection, and the DEA.

The Task Force was formed seven years ago. I guess, exactly seven years ago, I should have said, and uses varieties of techniques to detect border tunnels, from state-of-the-art electronic surveillance to old fashioned detective work.

The Department of Homeland Security, U.S. Northern Command, the Army Corps of Engineers, and other agencies formed the rapid reaction tunnel detection joint capability technology demonstration in 2010. The first task was to deploy a series of passive seismic sensors which can detect movement underground at hotspots along the border. I'm interested to hear more about this from our witnesses.

Additionally, the drug caucus report regarding U.S. and Mexican responses to Mexican drug trafficking organizations included a recommendation regarding border tunnels. Specifically, the report calls for Congress to pass legislation to enhance the 2007 law that criminalizes the financing, construction, and use of border tunnels.

This legislation would also make it illegal to use, construct, or finance a border tunnel. It would also make illegal tunneling an eligible offense for title III wire interception.

So I look forward to all this testimony and once again thank our chairwoman

FEINSTEIN:

Thank you very much, Mr. Vice Chairman.

I heard you on television on Fast and Furious -- whatever the name of that -- that is -- and it was really the first I've heard of it so I am very interested and we're going to take a good look at it. And I think we ought to have a hearing and get ATF up here and ask because, obviously, the guns affect the trafficking of narcotics. There's no question.

GRASSLEY:

I would sure welcome that. Thank you.

FEINSTEIN:

Good. And we'll do it.

And, in the meantime the majority including Senator Schumer and Whitehouse and I have put out this report on firearms trafficking to Mexico and -- so it is available for anyone that would like to have it.

I'd like to welcome our distinguished witnesses. The first person, I think, is going to be a real treat for you Mr. Vice Chairman.

is the United States Attorney for the Southern District of California. I met with her when I was in San Diego. I was very impressed with her. Her jurisdiction encompasses San Diego and Imperial Counties. It has approximately 3.1 million residents.

Ms. Duffy joined the United States Department of Justice in 1993 where she was stationed in Washington D.C. In 1997 she moved to the Southern District of California where she prosecuted organized crime and drug enforcement task force cases and high intensity drug trafficking area cases.

She targeted large scale drug trafficking and money laundering organizations operating internationally and in multiple jurisdictions throughout the United States.

She is the recipient of many prominent Department of Justice awards including the attorney generals award for distinguished service which you received in 2008 for her work on the Arellano Felix drug trafficking organization case. It's actually cases. So, I want to thank her for that.

Our second witness is James Dinkens who is the executive associate director of the homeland security investigations at the United States Immigration and Customs Enforcement. In this capacity he leads the second largest criminal investigative agency in the United States and DHS' largest investigative arm.

He became a special agent with customs in San Francisco -- my hometown -- in 1989. In 1996 he transferred to Detroit where he was promoted to group supervisor and then assistant special agent in- charge.

His other key leadership positions have included service as a special agent in charge in Washington D.C., acting director of the Office of Professional Responsibility, special agent in charge for Baltimore, Maryland and acting attache for ICE in Frankfurt, Germany.

The third witness is Tim Durst. He is the assistant special agent in charge for ICEs San Diego office.

Mr. Durst has worked for the former United States Custom Service and Immigration and Customs Enforcement throughout his law enforcement career. In 2002 he was promoted to group supervisor in San Diego with ICE.

During his tenure as a group supervisor he led a proactive narcotics and money-laundering group which was responsible for discovering the largest and most sophisticated tunnel ever encountered by United States law enforcement. In 2006, Mr. Durst was transferred to ICE headquarters and subsequently promoted to chief of the contraband smuggling unit which oversees the border enforcement security task force and border tunnel teams before returning to San Diego.

So today, Mr. Vice Chairman, we have before us three real pro's in the area. And I'd like to ask Ms. Duffy that you begin, if you will.

And if you could limit your remarks to the vicinity of five minutes. We'd like to reserve some time for Q&A.

(UNKNOWN)

(OFF-MIKE)?

DUFFY:

I'd be happy to.

Good Afternoon, Madam Chairman and Co-Chair Grassley...

FEINSTEIN:

Let me just say, if you'd like to put your written statement in the record and just talk to us. Because I know you talk very well off the cuff.

DUFFY:

OK.

(CROSSTALK)

DUFFY:

...off the cuff as I am able, but there are some thoughts that I want to share with you today.

Firs of all let me thank you for inviting me to testify. It's an honor to be here.

As Senator Feinstein indicated I have been a federal prosecutor my entire 18 year legal career and a large majority of that time has been devoted to prosecuting large drug trafficking organizations including members of the Mexican cartel and leadership figures within those cartels. So, I share your concern and your goal of wanting to do everything in our power to prevent, and to shut down, and to deter cross-border tunnels.

I'm very familiar with the destruction that these cartels bring to the citizens on both sides of our border. And I thank you for addressing these issues.

The United States Attorney's Office in the Southern District of California carries the fourth busiest criminal case load in the nation. And that case load is n large part driven by our location on the border.

In fact, in the past five years we have doubled our felony filings from 2,500 to 5,000. And we've done that with the help of our law enforcement partners in the community.

And I think it is because of that enforcement activity coupled with the enhancements to the border defense along the Southwest border that it is just becoming more difficult for smugglers to get their goods into the United States. So as Senator Feinstein indicated cartels are now when they cannot get their drugs in en route over ground are tunneling underneath of it.

More than half of the sophisticated tunnels that have been located that have actually breached the U.S./Mexican border have been found in California. And given the threat that those cases pose to our district and to the national security of this country, my office is committed to prosecuting every tunnel case in which a defendant can be linked.

However, as you know there are unique challenges to prosecuting these cases into building investigations and developing sufficient evidence to be successful in them. The majority of the criminal activity takes place outside of the United States and it is not until that border is breached that we are able to conduct independent investigation.

The increased sophistication of these tunnels make them very difficult to locate. Oftentimes law enforcement are not able to find defendants in the tunnels and because of the threat they were dealing with, these tunnels have to be shut down immediately upon our locating them. We don't have the luxury of continuing to develop investigative leads.

Let me give you an example. In December of 2009 Mexican federal police located a tunnel, an incomplete tunnel about 20 yards south of the border. It was located in a warehouse.

That tunnel was approximately 90 feet below ground. It was 6 feet in height. It was more than 800 feet in length. That tunnel was equipped with electricity, with a ventilation system, and with a power generator to help the drilling equipment function.

The tunnel was accessed through a bathroom floor that was actually set on hydraulic jacks. And when the Mexican authorities enter that warehouse the bathroom floor was being lowered, so the access to the tunnel was being closed. So had they arrived at that location just moments later they may never have even detected that tunnel given the sophisticated nature of its concealment.

And while U.S. agents were able to locate the exit point in a Southern District of California warehouse nobody was located on site. There were not links to defendants that were able to be made and so we were left with nobody to prosecute.

Now, there -- while there are real challenges through the very hard work of our agents and the prosecutors in my office, we've had a lot of successes in the southern district.

And when the culpable parties are identified Congress has given us some really strong tools to use in bringing the perpetrators to justice. This include the title 21 drug offences which have very effective minimum mandatory's and allow for enhancements in other areas. It also includes the title 18 tunnel legislation which fills a very important gap where we are not able to link a defendant to a drug conspiracy.

For example, in November of 2010 nine defendants were charged under these authorities in connection with two sophisticated tunnels that were discovered in the Southern District of California. Seven of those nine individuals, just seven month later, have already pled guilty and two are pending. One of those defendants pled guilty just yesterday as the jury was being empaneled in his matter.

Furthermore, in connection with those November 2010 tunnels, 49 tons of marijuana was seized by U.S. and Mexican law enforcement authorities. And that is just a staggering figure, but it's even more staggering when you consider that the tunnel -- one of the two tunnels was open for just one week period of time.

So while we have a very effective statutory tools I have to say and you've made mention -- both of you -- that maybe our most critical tool is the ICE-led San Diego task force which is managed and directed by Agent Durst.

I have to tell you the model of collaboration between our state, our local and our federal law enforcement agencies.

Since 2003 my office has actively partnered with this tunnel task force and it brings about results. This is a task force that dedicates its mission. It dedicates its resources solely to preventing, to discovering, to shutting down and deterring tunnels in our district.

We also work very collaboratively with our Mexican counterparts. In February of this year I and other members of the U.S. delegation met in Mexico City with our Mexico counterparts and this included all five of the Southwest border United States attorneys. We are planning to meet again this summer.

And through these meetings U.S. and Mexican prosecutors are now more than ever before in my experience openly discussing topics that are of common interest to both of us. Bi-national tunnel cases being one of the drug trafficking, alien smuggling and the issue of firearms.

I have every reason to expect that these joint efforts are going to lead to quicker and more decisive action against Mexican cartels.

Again, I want to thank you both for your commitment and your dedication to this very important issue. And I look forward to answer any of your questions.

FEINSTEIN:

Thank you very much. And thank you for your dedication and commitment. And I think both the Vice Chairman and I are very proud of you, so keep up the good work.

GRASSLEY:

She is born in Iowa.

(LAUGHTER)

(CROSSTALK)

FEINSTEIN:

Were you born in Iowa?

DUFFY:

I was.

FEINSTEIN:

Oh my goodness. I thought you were kidding.

DUFFY:

I share...

(CROSSTALK)

(LAUGHTER)

DUFFY:

...with both of you. My past and my present.

FEINSTEIN:

Yes. Right.

Mr. Dinkens?

DINKENS:

Ma'am, I want to thank you as well as Co-Chairman Grassley for allowing me to come and speak with you today on this important topic.

FEINSTEIN:

Is your mic on? Can you...

DINKENS:

I'm sorry. No, it is not. Now we are.

FEINSTEIN:

OK.

DINKENS:

So, thank you, again. I think it's a very important issue that we're discussing. I'm glad that you both took the time and interest to hold this hearing.

The use of increasing sophisticated subterranean tunnels by smuggling organizations poses a distinctive challenge to ICE homeland security investigations and our fellow law enforcement partners.

And while we have the lead investigator for all at ICE, it's something that we cannot do alone. In recognizing that we formed some serious partnerships with not only CBP but also DEA as well as the Department of Defense, and some of our state and local law enforcement partners.

Perhaps one of the closest one of those relationships though is the U.S. attorney's offices located on the Southern District of the United States, the Southwest border U.S. attorneys. They really have played a key role in our efforts and they have aggressively prosecuted at any given time any type of evidence that we could present on those tunnels and the discovery of them.

So it really is -- it's an honor for me to be in the panel with Ms. Laura Duffy from the Southern District of California. Her job -- over the last couple of years, their office has really done some great work.

Over the years, also, our investigations have shown that these tunnels as you had mentioned are most commonly utilized by drug trafficking organizations and occasionally human smuggling organizations. They're the organizations that continue to make the commitment, to dedicate the -- the time and the cost and the funding to actually develop and build these underground passageways for their transportation of narcotics and aliens in the United States.

And we've also seen a sharp rise over the years. As you mentioned, since 1990 when the first tunnel was discovered an increasing rise and we've now discovered 154 tunnel attempts, all but one being on the Southwest border.

In addition, over the past years, there's been a marked number of -- of sophisticated tunnels being discovered and a sharp rise since 1996.

And as you mentioned, I believe that this is distinct result of law enforcement efforts and enhanced border security where we're really forcing them to go underground to move their illicit cargo.

Successfully combating (inaudible) tunnels is really it comes down to good old-fashioned police work often. It's developing sources of information, following up leads, surveillance and Title III's that ICE special agents have found is really the best way to not only identify the tunnels, but the organizations responsible for attempting to exploit those tunnels.

And to address this threat -- as we've discussed here today -- is the San Diego Tunnel Task Force. Created in 2003 and then in 2006 it was moved under the Border Enforcement Security Task Force in San Diego. The best there and really is the model of how a task force should operate.

It has members from CBP, DEA, Department of Defense as well as various state and local agencies. And each one of those task force members brings a unique skill to our efforts to combat tunnels in Southern California.

The efforts of the tunnel task force as well as the four other BEST located on the Southwest border who have recently initiated similar tunnel initiatives is really producing results.

For example, in 2010 from good old police work and following up investigative leads they were able to identify a sophisticated 600- yard underground cross-border tunnel and from their investigative efforts seized a total of 30 tons of marijuana, the second largest narcotic seizure in U.S. soil.

FEINSTEIN:

Is that different from the one that...

DINKENS:

That's in part of -- that's one of the two that she had mentioned.

During their investigation they received information about -- these agents identified a tractor trailer leaving a warehouse. That tractor trailer was later stopped at a CBP border patrol checkpoint. During that checkpoint inspection, 10 tons of marijuana was found. They went back to the warehouse that they saw it leave from and searched the warehouse and seized 16 tons of marijuana in the warehouse and found the exit to the 600-yard tunnel.

Quick reacting on that information they contacted Mexican military who in Tijuana located the warehouses -- warehouse and the entrance of the tunnel and there they seized 4 tons of marijuana at that warehouse.

So this case illustrates really a key part of our strategy has been working with the government of Mexico. Not only do we need strong partners in the U.S. side with our law enforcement partners but also in the Mexico side of the border. And we've seen a distinct increase in their efforts to identifying and assisting in these investigations.

So, on that note I will end and I will pass it off to Assistant Special Agent Tim Durst.

FEINSTEIN:

Thanks, Agent Dinkens.

Agent Durst, would you like to go ahead?

DURST:

Thank you for the introduction.

Chairman Feinstein and Co-Chairman Grassley, I'm truly honored to be here today to discuss ICE's efforts to thwart the use of illegal tunnels in the San Diego, California area.

The SAC San Diego Office comes from the Pacific Ocean to the border of Arizona. We have four offices -- San Diego Proper, Oceanside, San Isidro and Calexico, California.

Since the first tunnel was discovered in 1990 nearly one-third of all attempted tunnels and tunnel completions occurred in the San Diego AOR.

As Mr. Dinkens mentioned, transnational criminal smuggling organizations continue to attempt to exploit subterranean passageways to move illicit drugs and humans into our commerce.

The sophistication levels as been noted by agents is continuing to grow more sophisticated over the years. This level of sophistication as well as the time, labor and finance it takes to complete a tunnel indicates that drug cartels feel the reward of a complete tunnel far outweighs the risk of discovery and arrest.

An example of this sophistication can be observed in the tunnel that was discovered by the San Diego Tunnel Task Force on Thanksgiving Day. This tunnel was nearly 2,200 feet long travelled at a depth of 90 feet. It contained electricity, ventilation, shoring, and a very elaborate rail system that was used to ferry contraband in to the United States.

As we've discussed here today, the San Diego Tunnel Task Force has yielded some important successes through collaboration with our interdictive, investigative, and prosecutorial partners at the federal foreign state and foreign levels.

Despite these successes, criminal smuggling organizations continue to build and use tunnels to smuggle drugs and humans into our commerce. Thus, we created the San Diego Tunnel Detection Outreach Program which is a community outreach and intelligence-driven enforcement initiative. The goal of the program is to educate property owners, property managers, tenants and workers in warehouses on the indications of tunneling activity.

We aim to leverage this program to increase awareness as well as to increase communication between citizens and the tunnel task force, hopefully, generating new tunnel leads, cultivating sources of information as well as increasing successful prosecutions of criminal organizations.

We believe that through community outreach and the tunnel task force we will continue to have many successes. And we care deeply about the same threat that you care about and we're going to do everything we can to help thwart this threat.

Again, thank you so much for allowing me to be here today.

I'll be happy to answer any questions.

FEINSTEIN:

Well, thank you very much, Agent Dinkens and thank you all very, very much and thank you for your service to our country. It is very much appreciated.

Ms. Duffy, let me begin with you.

I talked a little bit about the Border Tunnel Prevention Act which criminalized the construction or financing of a tunnel and it was signed into law in 2006. And yet since its passage only one person has been successfully prosecuted for illegal construction.

Why hasn't Justice used this law more? What is lacking? I've got a dozen questions on this so I'm just going to sum it up. What is lacking and what needs to be done?

DUFFY:

Well, let me first begin by thanking you because I know you've been a great champion of giving us some of the tools and sponsoring bills like that one to allow us to -- to do our jobs more efficiently.

The -- the tool that we have available come under both title 21 and title 18. What we do typically is we take every case and we look at the facts and the circumstances that are presented in a particular case.

Most of the cases that we have seen in our district, there is indicia and evidence sufficient for us to present charges that the tunnel was either being used for or was intended or the use of drug smuggling.

And the title 21 charges have the minimum mandatory charges -- minimum mandatory sentences that are available to us. They also have the ability to bring enhancements. Depending on an individual's criminal history we are able to double the minimum mandatory.

We also have available to us under the guidelines the ability to ask for career offender enhancements which increase the penalties severely if we are charging a drug offense.

So we take every case on a case-by-case basis.

(CROSSTALK)

FEINSTEIN:

But only one has been prosecuted.

DUFFY:

We -- we -- we typically charge the most serious offense.

When -- the individual who we did charge who you mentioned, Mr. Alvarez Perez, in that particular instance we were not able to sufficiently prove the drug link. So, in cases like that it's a very valuable tool. It fills that gap where we can't link it to a drug conspiracy and go with the more severe drug penalties.

We -- we charged it in another case. Individual by the name of Carlos Cunningham was charged with that offense but in negotiating the plea agreement in that matter he agreed to plead to the most severe offense charged in the indictment which carried the most severe sentence. It was a drug conspiracy...

FEINSTEIN:

OK.

DUFFY:

...charge.

FEINSTEIN:

Stop for a minute.

Would making the use construction or financing of a tunnel a conspiracy offense be a helpful tool for you? Yes or no?

DUFFY:

I can tell you that operationally in the field conspiracy charges are a valuable tool to have.

FEINSTEIN:

OK.

Would including illegal tunneling as an offense eligible for title III wiretap be helpful as a prosecutorial tool?

DUFFY:

Well, I appreciate what you shared with me about your proposed legislation in the discussion that we had in San Diego that you and your staff shared bits and pieces. I'm not specific with the entire piece of legislation, but, again, I can say that being able to have a title III predicate is -- is an important tool in the field for prosecutors to use.

FEINSTEIN:

OK.

And, finally, would it be useful to make border tunnel activity eligible for asset seizures?

DUFFY:

That, again, in the field is another important tool and leverage that we have.

FEINSTEIN:

Well, thank you.

Mr. Vice Chairman, I'll turn it over to you.

GRASSLEY:

(Inaudible).

FEINSTEIN:

Yes, keep them busy jumping up and down there.

(LAUGHTER)

GRASSLEY:

First of all since you're from Iowa I wanted to recognize your contribution to this and I've already done that.

I noticed you didn't go to the University of Northern Iowa though.

DUFFY:

(Inaudible).

GRASSLEY:

Yes. I know where you are.

Here's the first question. And I refer to my investigation of the ATF.

DUFFY:

Yes, sir.

GRASSLEY:

I've learned that there's a problem with prosecuting straw buyers if the gun was smuggled to Mexico. In other words, the guns not available in the sense of the -- of an instrument to prove that a crime -- that you have the crime itself.

It is my understanding that this concern was so great that there were no prosecutions even when there was a signed confession by a straw buyer.

So, are you aware of any legal requirements in the Ninth Circuit or any other jurisdiction that would prevent prosecution of straw buyers without the government having actual possession of the gun?

DUFFY:

I'm not specifically aware of any prohibition. We do prosecute straw purchaser offenders in our office. And...

GRASSLEY:

And...

(CROSSTALK)

DUFFY:

And typically we...

(CROSSTALK)

DUFFY:

Go ahead, sir.

GRASSLEY:

I presume you're saying that you can do that without actually having them have the -- having possession of the gun.

DUFFY:

It definitely makes a case more difficult, but typically what you have when you have a straw purchaser is you have an individual who is purchasing a gun for another individual. So that straw purchaser defendant oftentimes would not have possession of the gun and that gun can be linked and traced to -- to other individuals, to other crime scenes and that is quite frequently how we work backwards into such cases.

GRASSLEY:

You've answered my next question so let me go to the following one then. Are you aware of any other jurisdictions that deny prosecution on this route?

DUFFY:

I am not personally aware enough to say that there isn't.

GRASSLEY:

Are you aware of any Department of Justice policy or other guidance that will prohibit such prosecution?

DUFFY:

Not to my knowledge.

GRASSLEY:

Earlier today I heard testimony from ATF whistleblowers at the House oversight hearing that confirmed this was in fact the policy of the U.S. Attorney's Office in Arizona. And would you agree with that policy? I pressure you would not because you said you prosecuted without a gun but presumably in Arizona they can't.

DUFFY:

Well, that -- there may be some specific requirements in Arizona that I'm not privy to or aware of, but oftentimes we are looking at individuals who in act no longer have possession of the gun because they did not purchase it for themselves, that has been transferred to another individual.

GRASSLEY:

I'd like to go to Mr. Durst and Mr. Dinkens.

The effort to detect and dismantle border tunnels must be coordinated between agencies in the U.S. and Mexico. The U.S. Bureau of Immigration Customs Enforcement was currently establishing an investigative tunnel response team to help the government of Mexico address the problem in their side of the border. So, would either one of you answer for me when is this investigative tunnel response team scheduled to be fully operational?

(UNKNOWN)

(OFF-MIKE).

FEINSTEIN:

Please turn on your mic.

(UNKNOWN)

At this time we actually have identified the training that we're going to be giving them this summer -- two different courses -- so they should actually have the training they need to really get to work this summer. By the end of the summer.

GRASSLEY:

To date how many tunnels have been discovered by Mexican officials on their side of the border?

(UNKNOWN)

It's actually been increasing.

This year, I believe that they've -- right around eight of the 11 tunnels that we've identified this year have been discovered by the Mexican government on their side.

GRASSLEY:

OK. And what kind of help has the U.S. given Mexico to help detect these illegal tunnels? Has U.S. provided any training or equipment?

(UNKNOWN)

Yes. The training is -- is forthcoming along with the type of equipment that may be able to assist them.

GRASSLEY:

OK.

I would ask all three of you, if you can -- to this next question. Experts estimate that between \$18 and \$39 billion of illegal monies move every year from U.S. to Mexico. We've heard about numerous money laundering threats at the U.S./Mexican border including bulk cash smuggling, stored-value cards and mobile payment.

Millions of dollars of illegal funding generated by criminal activities obviously is a basis for all these threats we have. Do any of you -- to any of you that can answer this -- do any of you have any estimate on how much money has been intercepted in these illegal tunnels?

DUFFY:

I'll address what I know about that.

There have been no evidence discovered to my knowledge during the multiple tunnel investigations that we've done in the Southern District of California that indicate that money is being smuggled back south into Mexico through these tunnels.

GRASSLEY:

And would you folks have any other information?

(UNKNOWN)

We do not have any intelligence -- human or wiretap intelligence -- that they're moving money through tunnels.

A lot of times these (inaudible) large drug cartels are compartmentalized. They've different cells. One cell moves drugs to tunnels one cell moves money south.

GRASSLEY:

I assume all of you are interested in that money not moving so could you have any suggestions of what additional steps can we take to strengthen the anti-money laundering laws to do a better job of stopping the moving -- movement of illegal money across the Southwest border?

(UNKNOWN)

Not necessarily specifically on laws, but I'll tell you that over the last several months and a couple of years one of the more (inaudible) increase is really a holistic approach. Not only are they waiting for the money to get to the border but now CBP has actually -- Customs of Border Protection has outbound dedicated teams looking outbound and that's made a huge increase in our -- in our seizures of currency going into Mexico.

But also, trying to interdict it before it actually gets to the border so it's on our highways as it's travelling south. And then, actually, working with our foreign partners.

So once that money gets into Mexico it has to go to Columbia to pay for their -- for the cocaine and so forth. And working with the Mexican government to actually interdict the U.S. dollars into falling through Mexico to actually make it to Columbia. And we've had great success in that as well.

FEINSTEIN:

But I think his point is, how is that money moving? How is it being moved from the U.S. to Mexico?

(UNKNOWN)

The bulk of it would be smuggled. Concealed in compartments. Tractor trailers going southbound, cars going southbound. Broken down in small shipments a lot of times and shot gunned (ph) across and maybe passenger vehicles. So we found it going southbound in mattresses, in the back of RVs. You name it. If you can imagine it they will try to conceal it there.

GRASSLEY:

We also had some testimony before our caucus on the -- what do you -- hat do you call the plastic use of transferring money?

FEINSTEIN:

Stored-value.

GRASSLEY:

Yes. Stored-value. You run in to that much?

(UNKNOWN)

Yes. We have seen -- I think it's a bigger vulnerability than it is actually being exploited. There is a vulnerability for that being done, but at the same time is -- there is -- the large percentage of this is moving in that form of actually bulk cash.

However, it could be a vulnerability and be exploited. It's something that we see more commonly the bulk form of U.S. dollars going southbound.

GRASSLEY:

So you want to go back to your questions? And I've got some more but...

FEINSTEIN:

Sure. I'll just ask one.

ICE's I understand currently notifies owners along the border of relevant tunneling laws and provides directions to report suspicious activity. Do owners actually report suspicious activity? How are property owners and tenants notified this way and how often are they contacted?

Here's where I'm going. It seems to me there should be some responsibility of the property owner on our side of the border to see that their property isn't criminally used.

(UNKNOWN)

Ma'am, we feel it's very important for property owners to be aware of the laws and aware of the threat that's going on along our borders so we have developed this program to reach out to the property owners and managers. We're doing it through door-to-door canvassing and through mail.

And there has been event's...

FEINSTEIN:

How often do they get notified?

(UNKNOWN)

Well, it took several months for us to go literally from door-to-door in every warehouse in the high risk area (inaudible). So we just thought of this program in November and we're just finishing up as well as mailing out 700 letters to property owners throughout the country.

But, a big problem is that property owners in the (inaudible) area are sometimes large corporations and not in the San Diego area or tends -- there's a high rate of tenant turnover in the (inaudible) warehouse area.

FEINSTEIN:

Well, here's the thing. That brand new warehouse when I saw it it's a -- it's a sizable warehouse and it's -- it seems to me that the owner and/or the tenant has some responsibility. I don't know if the tenant was Alvarez. And maybe you could answer that, Ms. Duffy.

DUFFY:

That's not a fact that I'm aware of. I'm happy to find out.

FEINSTEIN:

OK.

I think it would be interesting to find out because I've tried to increase responsibility among the tenants and owners of property and there's a refusal to want to accept that responsibility. And so it's a somewhat difficult problem.

Do you see that, Mr. Durst?

DURST:

Yes. It is a difficult problem. And it's also difficult to prove the knowledge. That's why it's so important for us to be here today.

FEINSTEIN:

For you to be what?

DURST:

That's why it's so important for us to be here discussing this today because it's -- it's difficult to prove that they had knowledge because sometimes they're far-removed from the actual warehouse itself.

FEINSTEIN:

Well, that's right. But it seems to me if you get the record of sale transfers and leases and write to these people and tell them there are laws in place, you know, the U.S. of America would appreciate it if they could be responsible landowners and see that their property isn't used for criminal purposes.

DURST:

Yes, Ma'am.

FEINSTEIN:

And, you know, tunneling is a criminal event.

See, I think that's the part where we are -- we fall short. That we don't really get the cooperation to the extent we need of the building owners.

And then, you know, if there's false ownership or if there's corrupt ownership then you kind of go from there. Does that makes sense?

DURST:

Yes. It makes complete sense. In fact, the Thanksgiving Day tunnel, one of the warehouses was owned or purchased by a false owner, a straw purchaser. And we would have -- had much better luck, you know, if we could have been able to find that person, but they used false identifications, false bona fides and so we have no way to locate that person.

FEINSTEIN:

OK.

Mr. Vice Chairman?

GRASSLEY:

OK.

FEINSTEIN:

Thank you.

GRASSLEY:

Too bad.

Thank you.

I'm interested in -- whether or not so many tunnels have been found in Arizona and California and fewer in -- I guess, would be New Mexico and Texas. Is that because there is more of an effort to find them in California and Arizona and you do find them or -- or that there just aren't as many further east or we aren't finding them?

FEINSTEIN:

Good question.

(UNKNOWN)

I believe that basically the drug smugglers and human smugglers is taking advantage of what the opportunity is there for them to take advantage of. In San Diego area and Calexico area, these perfect soil conditions as well as perfect above the ground conditions for tunneling as well as in Arizona there's underground infrastructure already there for them to tie into to use as a tunnel to smuggle drugs and humans. However, in Texas you have the Rio Grande River so they have to figure out a way to get underneath that river, hence the HED (ph) drilling.

GRASSLEY:

So we don't have any reason to believe that there's more tunnels further east and they just aren't being discovered. Or there isn't enough effort to discover them. Is that...

(CROSSTALK)

(UNKNOWN)

Well we definitely are putting forth the effort. I just think that Arizona and California have more appropriate conditions for the drug smugglers to take advantage of.

GRASSLEY:

Let me ask a question based upon -- and I know the Department of Defense isn't involved in your operation or I guess maybe I'm leading up to a point could they be because when you use this technology that you use and you've been using it for a long time, but you have more sophisticated technology it's my understanding that the Department of Defense has become a little bit more interested in this tunnel detection because we have these 480 Taliban fighters escape from an Afghan prison by using a tunnel. Specifically, how is ICE coordinating if any with the Department of Defense in developing tunnel detection technology?

(UNKNOWN)

Sir, we work with Joint Task Force North as well as directly with the Department of Defense and Department of Homeland Security Science and Technology. They're often out in San Diego and Arizona testing new technology, developing new technology. We -- we want to help them in any way possible to -- because it will basically stop this (inaudible).

GRASSLEY:

But is there any way that they are in-turn helping you? Or is that the other way around, you're helping them?

(UNKNOWN)

Well, we're helping each other because they also provide us with equipment to use and test out -- like ground penetrating radar machines or they'll bring out robots and -- and hopefully in the long run they'll help us by developing great technology that works.

GRASSLEY:

Once tunnels are found I'm led to believe they're destroyed. If that's not true tell me. Could you describe the methods traditionally used to seal border tunnels so they cannot be used again?

(UNKNOWN)

Yes, sir. They -- (inaudible) contract for remediation of tunnels and what they do is they seal the U.S. side of the tunnel full of concrete slurry. And if it's a lot of channel (ph) like the one you talked about in 2006 they have to drill different holes in the ground and then fill it all the way through full with concrete slurry on the U.S. side of the border.

FEINSTEIN:

It's a big deal. They have to fill.

GRASSLEY:

And so, then, these -- you never found a tunnel reused after you do all that presumably?

(UNKNOWN)

Actually we have because the Mexican side of the border does not remediate tunnels. They do not have financing or legislation for tunnels. So what happens is, sometimes they will use previously dug tunnels in the Mexican side and use a different entrance in the U.S. side.

GRASSLEY:

Is there anything where the corruption of -- at least, I don't say this to be denigrating to Mexico but we understand that there seems to be a lot of corruption involved in Mexican government. Is there any -- what role does that play in maybe not helping us have Mexican officials help us find tunnels?

(UNKNOWN)

I can honestly say that the level of cooperation between Mexico and the United States has improved dramatically from 2006 to present. Of the 50 plus tons that we discovered in the month of November, nine tons of that was seized in Mexico by Mexican law enforcement officers.

I'm not saying things are perfect, but I'm saying that the cooperation has significantly improved.

FEINSTEIN:

Could I ask you Mr. Vice Chairman, as you know I have a call I have to make. I have to do it before a certain time. If I could be excused and I'll...

GRASSLEY:

Well, I'm done asking...

(CROSSTALK)

FEINSTEIN:

You're done?

GRASSLEY:

...question.

FEINSTEIN:

All right.

GRASSLEY:

Are you done asking?

FEINSTEIN:

I'm done. In more ways than one.

GRASSLEY:

OK.

FEINSTEIN:

Thank you very much.

This is an interesting hearing. You know, sort of an esoteric subject because most people don't think about it. But when you go and really see one of these things and you see what can happen when you're not looking it is really a problem. I mean, they could run armies through there for that matter. And -- or large groups and it's a real way of serious criminal penetration in to the United States. And obviously a lot of it we don't know about because we haven't found it.

So, I want to thank you for your work. Mrs. Duffy, I think you're one of the best prosecutors I've ever seen so I thank you for that. And gentlemen, I thank you for your work. It is important. And thank you for being here today. It is much appreciated.

And the hearing is adjourned.

DUFFY:

Thank you.