

UNITED STATES DEPARTMENT OF JUSTICE

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HEARING  
BEFORE THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED TWELFTH CONGRESS  
SECOND SESSION

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JUNE 7, 2012  
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**Serial No. 112-152**

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Printed for the use of the Committee on the Judiciary



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## UNITED STATES DEPARTMENT OF JUSTICE

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THURSDAY, JUNE 7, 2012

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to call, at 9:39 a.m., in room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Committee) presiding.

Present: Representatives Smith, Sensenbrenner, Gallegly, Goodlatte, Lungren, Chabot, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Chaffetz, Griffin, Marino, Gowdy, Ross, Adams, Quayle, Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Cohen, Johnson, Pierluisi, Quigley, Chu, Deutch and Sánchez.

Staff Present: (Majority) Travis Norton, Counsel; Holt Lackey, Counsel; (Minority) Perry Apelbaum, Staff Director and Chief Counsel; Danielle Brown, Counsel; and Aaron Hiller, Counsel.

Mr. SMITH. The Judiciary Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

I will recognize myself and then the Ranking Member for an opening statement.

Welcome, Attorney General Holder, to today's oversight hearing of the Department of Justice.

Regrettably the Obama administration has shown a disregard for the Constitution and rule of law in an effort to impose their agenda on the American people, and there are many examples. Efforts to block congressional inquiries about the Administration's actions undermine the balance of power on which our Nation is founded.

The Department of Justice still has not provided enough information about Operation Fast and Furious so that the American public and Congress can judge who in the Department bears responsibility for the decisions that led to Agent Brian Terry's death. The Justice Department refuses to comply with Congressional subpoenas that may shed light on why this program was authorized and who had knowledge of the inappropriate tactics.

The Department of Justice also has failed to provide relevant information that would have revealed the extent of Justice Kagan's involvement in the development of the Affordable Care Act when she was Solicitor General. If she did give counsel on the healthcare bill, which was her job, then she should recuse herself rather than evaluating the law as a member of the Supreme Court. The Justice Department has refused to let us interview her former assistants.

Neglecting to enforce or defend the law as enacted by Congress is another violation of the Administration's constitutional obligation to the American people. Under this President, the Justice Department has engaged in a pattern of selective enforcement of the law in order to advance its own partisan agenda. For instance, the Obama administration has sought to prevent State and local authorities from enforcing immigration laws. At the same time, the Justice Department has refused to bring cases against sanctuary cities that violate Federal law by prohibiting their officials from communicating with the Department of Homeland Security about illegal immigrants they encounter. Such sanctuary cities directly challenge the Federal Government's authority to enforce immigration laws. The Administration's unwillingness to uphold immigration laws has led to injuries and even death.

The Administration refuses to defend the Defense of Marriage Act, a law enacted by Congress and signed by then-President Bill Clinton. This was a significant piece of legislation that was approved by a vote of 342 to 67 in the House and 85 to 14 in the Senate. Regardless of how one feels about the substance of the bill, the Department of Justice has an obligation to defend the laws of the land.

Efforts by the Administration to override election laws enacted by States also raise constitutional concerns. Instead of acting to prevent voter fraud, the Department of Justice has challenged common-sense voter ID laws that require voters to identify themselves before they are allowed to vote. The Department of Justice recently moved to block implementation of voter ID laws enacted by legislatures in Texas and South Carolina. The Texas proposal was based on a similar law passed by the Indiana Legislature which was upheld by the Supreme Court in 2008. The Justice Department's challenge to the law ignores Supreme Court precedent that affirms a State's right to enact laws to protect the integrity of its elections.

The Department of Justice even threatened to sue Florida for trying to remove ineligible non-citizens from its voter rolls. Why would the Department of Justice not want States to remove ineligible felons, ineligible non-citizens and the dead from their voter rolls? The Administration's actions aren't just wrong, they are arrogant, undemocratic and an insult to the rule of law.

The Administration's disregard for the Constitution and rule of law not only undermines our democracy, it threatens our national security. The Justice Department has not taken the initiative to prosecute leaks of national security secrets. Recent leaks about a foiled bomb plot out of Yemen and a cyberattack against Iran are, in the words of Senate Intelligence Chairwoman Dianne Feinstein, quote, "very detrimental, very concerning, and hurt our country," end quote.

The past 3½ years, this Administration has engaged in a pattern of obstructionism, unaccountability and partisanship. The American people should have confidence that the Department of Justice fairly enforces laws. That confidence is lacking today. This hearing will explore how that confidence can be restored.

That concludes my opening statement, and the gentleman from Michigan, the Ranking Member of the Judiciary Committee, is recognized for his.

Mr. CONYERS. Thank you, Chairman Smith.

And welcome, Attorney General Holder.

The opening statement is an opportunity for both of us here to set the tone for this hearing, but never in the career of Chairman Smith as the Chair of this Committee have I heard so many erroneous statements, and having never heard them before, I can assure him and you that I will be going over his statements and help him arrive at a more factual and impartial conclusion.

Now, having said that, we welcome you once again to the House Judiciary Committee. This, by my count, is the eighth time this Congress that the Attorney General has made himself available for questioning, and this level of access is extraordinary, particularly when we compare your record to that of your immediate predecessor.

Now, with respect to the continuing investigation into Operation Fast and Furious, I want to thank you for your patience and diligence. To date, the Department of Justice has provided over 7,600 pages of documents to the Congress. You made additional law enforcement-sensitive materials available to us in dozens of briefings. You have permitted us to question senior Department officials in hearing and in transcribed interviews. And you yourself have appeared before this Committee once every 6 months since the controversy became public. I hope that the tone of today's discussion reflects the many courtesies that you and the Department of Justice have shown us in the past months.

And I also want to commend you and the Department of Justice on a series of important accomplishments in the field of civil rights and voting rights, a couple of issues that I have paid special attention since I first became a Member of the House Judiciary Committee.

Enforcing section 5 of the Voting Rights Act. The Department has aggressively enforced section 5, which ensures that States with a history of discrimination can't create additional barriers to minority access to the ballot box. The Department has already blocked discriminatory voter IDs laws in Texas and South Carolina, and I would encourage you to look at other similar troubling laws taking effect across the country.

Stopping illegal purges of the voting rolls. Last week the Voting Section wrote to the State of Florida demanding that they cease and desist from purging voters from the rolls. The practice was not submitted to the Department under section 5 and would not have been approved if it had been.

Protecting the rights of members of the armed services in terms of their voting. The Department has secured court orders and consent decrees in 14 jurisdictions to better enforce the Military and Overseas Voter Empowerment Act, MOVE.

Restoring the integrity of the Civil Rights Division. After the Office of the Inspector General and the Office of Professional Responsibility completed their review of illegal, partisan hiring practices under another Administration, their final report included recommendations for improved transparent hiring process at the Civil Rights Division itself. And under the leadership of Assistant Attorney General Tom Perez, the Division has fully adopted each of

those recommendations and is now predominantly staffed by attorneys with actual experience in the field of civil rights law.

Enforcing the Fair Housing Act and the Equal Credit Opportunity Act. The Department's \$335 million settlement with Countrywide Financial last December compensated families who were charged higher fees and interest rates because of their race or national origin. This enforcement action makes clear the Department will not hesitate to hold financial institutions accountable for lending discrimination.

There are, of course, areas which we hope the Department will improve. But today, 4 years after the worst economic upheaval since the Great Depression, we are still looking to hold some of those Wall Street barons accountable. And according to one—well, let me conclude. My time has ended, and I thank the Chairman.

And yet what we want to do here today is have a thorough and fair discussion. And I am going to ask that our colleagues on this Committee conduct themselves in a manner that is worthy of the Attorney General's present appearance here. I thank the Chair, and I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Conyers.

Our only witness today is United States Attorney General Eric H. Holder, Jr. On February 3, 2009, Attorney General Holder was sworn in as the 82nd Attorney General of the United States.

Attorney General Holder has enjoyed a long career in both the public and private sectors. First joining the Department of Justice through the Attorney General's Honors Program in 1976, he became one of the Department's first attorneys to serve in the newly formed Public Integrity Section. He went on to serve as a judge of the Superior Court of the District of Columbia and the U.S. Attorney for the District of Columbia.

In 1997, Mr. Holder was named by President Clinton to be the Deputy Attorney General. Prior to becoming Attorney General, Mr. Holder was a litigation partner at Covington & Burling, L.L.P., in Washington, D.C.

Mr. Holder, a native of New York City, is a graduate of Columbia University and Columbia Law School.

Mr. Holder, we appreciate your presence today, look forward to your testimony, and please begin.

**TESTIMONY OF THE HONORABLE ERIC H. HOLDER, JR.,  
ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE**

Attorney General HOLDER. Well, good morning, Chairman Smith, Ranking Member Conyers, and distinguished Members of this Committee. I appreciate the chance to discuss some of the key accomplishments that have distinguished the Department's work throughout this Administration and to outline our plans to build upon this particular record of achievement.

In particular I am proud of the work that has been done by the Department's 116,000 employees, as well as our government and law enforcement partners worldwide to help fulfill the promises that I made before this very same Committee about 3 years ago.

Shortly after I became Attorney General, I pledged to strengthen the Department's efforts to protect the American people from terrorism and other national security threats, to ensure that every de-

cision, and every investigation, and every prosecution would be guided by the facts and by the law and by nothing else. I also reaffirmed my commitment to move aggressively to prevent and combat violent crime and financial fraud, to seek justice for victims, to protect the most vulnerable among us, to safeguard the environment, and to uphold the civil rights of all of our citizens.

In each of these areas, the Department has made tremendous and, I think, in many case historic progress. Nowhere is this more evident than in our national security efforts. In the last 3 years, the Department has secured convictions against scores of dangerous terrorists. We have identified and we have stopped multiple plots by foreign terrorist groups as well as homegrown extremists, and we have strengthened essential surveillance and intelligence-gathering capabilities in a manner that is consistent with the rule of law and our most treasured values.

Just last month we secured our seventh conviction in our Article III civilian courts in one of the most serious terrorism cases that our Nation has faced since 9/11, an al Qaeda-sponsored plot to conduct coordinated suicide bomb attacks in the New York City subway system. And roughly 2 weeks ago, we obtained a guilty verdict in the case of a former member of the U.S. Army who intended to bomb U.S. soldiers in a restaurant in Killeen, Texas. On the same day another Texas man was sentenced to 20 years in prison for attempting to become a part of al Qaeda in the Arabian Peninsula.

Now, in addition to our national security successes, the Department has made meaningful, measurable strides in protecting Americans from violent crime. Through innovative programs, such as our Defending Childhood Initiative and the National Forum on Youth Violence Prevention, we developed comprehensive, collaborative approaches to addressing the causes and remedying the consequences of violence among and directed toward our Nation's young people.

By forging and strengthening partnerships between our United States attorneys' offices and Federal, State, local and tribal, and international law enforcement officials, we are combating gun, gang and drug-fueled violence more effectively than ever before. Alongside key law enforcement allies and our counterparts in Mexico and other countries, we have orchestrated a series of coordinated strikes against violent drug cartels, arresting thousands of cartel members and seizing billions of dollars in assets.

We are also implementing strategic, desperately needed plans to address the shocking rates of violence that plague American Indian and Alaska Native women through tribal communities. And we are using every resource and tool at our disposal, including the power of research and scientific analysis, to protect our Nation's law enforcement community, which in recent years has seen an unfortunate and totally unacceptable rise in the line-of-duty deaths.

Many of you worked to raise awareness about the tragic fact that violence against law enforcement officers is approaching the highest level that we have seen in nearly two decades. As Attorney General and as the brother of a retired police officer, I am proud that the Department has responded to this recent crisis with resolve and with robust action.

Just last week I met with the Major Cities Chiefs Police Association at its summer meeting to discuss the ways we have developed

and implemented the host of important programs, such as the landmark VALOR Initiative, which is providing our law enforcement partners with the latest in training tools and resources, as well as the Bulletproof Vest Partnership Program, which has helped more than 13,000 jurisdictions purchase lifesaving bullet- and stab-resistant equipment in order to help protect those who risk their lives to keep us safe. But simply, our commitment to officers' safety has never been stronger, and as recent achievements prove, the same can be said of our resolve to protect American consumers.

Since the start of this Administration, the Justice Department has signaled an unwavering commitment to preventing and combating a wide range of financial and healthcare fraud crimes. We have taken bold steps to address the contributing factors and consequences of the recent economic crisis, and this work is paying dividends.

Last year alone the Department's Consumer Protection Branch, working with U.S. Attorneys' offices across the country, obtained a 95 percent conviction rate; secured more than \$900 million in criminal and civil fines, restitution and penalties; and obtained sentences totaling more than 130 years of confinement against more than 30 individuals.

In cooperation with our partners at the Department of Housing and Urban Development and a bipartisan group of 49 State attorneys general, we achieved a \$25 billion settlement with five of the Nation's top mortgage servicers, the largest joint Federal-State settlement in the history of the United States of America. Through the efforts of the President's Financial Fraud Enforcement Task Force, which was launched in 2009, we obtained prison sentences up to 60 years in a variety of fraud cases, including multimillion-dollar Ponzi schemes and the largest hedge fund insider trading case in the history of this country.

We have established two new working groups to enhance civil and criminal enforcement of consumer fraud and to bring Federal and State authorities together in investigating and prosecuting misconduct by financial institutions in the organization, securitization and servicing of mortgages that contributed to our financial crisis. And we have continued to make tremendous gains in our work to combat healthcare fraud. In fact, over the last fiscal year, in cooperation with the Department of Health and Human Services and my partner Kathleen Sebelius, by utilizing authorities provided under the False Claims Act and other essential statutes, we have recovered nearly \$4.1 billion in cases involving fraud or in Federal healthcare programs. That is the highest amount ever recorded in a single year. And for every dollar that we have spent combating healthcare fraud, we have returned on average \$7 to the U.S. Treasury, the Medicare Trust Fund, and others.

The Department has also taken crucial steps forward in protecting the most vulnerable members of our society and ensuring the civil rights of all of our citizens. Over the past 3 years, our Civil Rights Division has filed more criminal civil rights cases than ever before, including record numbers of human-trafficking cases, in an effort to ensure that in our workplaces and our military bases, in our housing and lending markets, in our schools and



places of worship, in our immigrant communities, and in our voting booths the rights of all Americans are protected.

In addition, we are working to strengthen the rule of law across both the country and around the world and beyond our borders establishing the global alliance that is necessary to combat transnational organized crime as outlined in the President's strategy. This includes combating intellectual and financial property crimes, child pornography rings, organized criminal networks, and criminal facilitation of terrorist activities. And we have partnered effectively with Members of Congress to advance important changes in policy and legislation, from landmark hate-crimes legislation to the reduction of the unjust and unfair crack/powder cocaine sentencing disparity.

This work goes on today in our efforts to help ensure the reauthorization of the Violence Against Women Act, a critical law that has transformed our Nation's response to crimes against women and enhanced our ability to achieve justice for victims, while holding offenders accountable. It goes on in our strong support for the renewal of essential authorities, such as those included in the Foreign Intelligence Surveillance Act amendment of 2008. And it endures in our determination to build upon the extraordinary accomplishments that have defined the past 3 years; to take our fight against terrorism, crime, fraud and other threats to a new level.

I am proud of these and the Department's many other achievements, and I hope to spend most of our time today discussing how we are working to build on this progress. However, I would like to briefly address the ongoing investigations into the ATF gun-trafficking operations along the southwest border.

As a result of concerns raised by ATF agents, we now know of several Arizona-based investigations that occurred under this Administration and the previous one where inappropriate tactics were used in an attempt to stem the flow of illegal guns across the southwest border. Although these law enforcement operations were focused on the laudable goal of dismantling illegal gun-trafficking networks, they were flawed both in concept and execution. I share your concerns about how these operations were developed and how they were implemented, and that is why, just as congressional leaders have called for answers, I asked the Department's inspector general to conduct a comprehensive investigation as well.

I also put in place new leadership at ATF, which has taken steps, including the implementation of a stricter oversight procedure for all significant investigations, to prohibit the flawed tactics employed in these operations.

Now, many of the key enhancements implemented by the Department are set out in the Deputy Attorney General's letter to the Committee that is dated January 27th of this year. Even since the date of that letter, however, we have continued to refine the Title III process. For example, our Office of Enforcement Operations now requires that before it even accepts a request for a wiretap intercept from a United States attorney's office, a supervisor in the relevant U.S. Attorney's office must personally approve that request.

Now, I would be remiss if I did not point out that the ATF agents who testified before Congress have also asked that law enforcement be provided with the tools that it needs to effectively combat gun

trafficking on the southwest border. And I want to reiterate my commitment to working with congressional leaders to meet the needs of our law enforcement partners and to help address serious national security challenges on our borders.

Finally, I want to make clear that we welcome the recent engagement of congressional leadership in the Department's continued efforts to satisfy the legitimate goals of congressional oversight, while at the same time reserving the integrity and the independence of the Department's ongoing criminal investigations and prosecutions.

The leadership's recent letter represented, I think, a promising step toward reaching a resolution as it accomplished two things. First, it narrowed the universe of documents still in dispute between the Justice Department and the House Oversight Committee. Second, it identified the specific questions that remain of concern to leadership.

We are confident that the constructive discussions that have occurred since this letter can result in a mutually acceptable resolution. In all of these efforts, I am grateful for your continued support, and I would be happy to answer any of the questions that you might have. Thank you.

Mr. SMITH. Thank you, Mr. Attorney General.

[The prepared statement of Mr. Holder follows:]



# **Department of Justice**

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**STATEMENT FOR THE RECORD OF**

**ERIC H. HOLDER, JR.  
ATTORNEY GENERAL**

**BEFORE THE**

**COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES**

**ENTITLED**

**“OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE”**

**PRESENTED**

**JUNE 7, 2012**

**Statement of  
Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice**

**Committee on the Judiciary  
U.S. House of Representatives**

**“Oversight of the U.S. Department of Justice”  
June 7, 2012**

Good morning, Chairman Smith, Ranking Member Conyers, and distinguished members of the Committee. Thank you for the opportunity to appear before you today – and for your continued support of the Justice Department, and the goals that we share. I appreciate the chance to discuss some of the key accomplishments that have distinguished the Department’s work throughout this Administration – and to outline our plans to build upon this record of achievement.

In particular, I am proud of the work that’s been done – by the Department’s 116,000 employees, as well as our government and law enforcement partners worldwide – to help fulfill the promises that I made before this Committee more than three years ago. Shortly after I became Attorney General, I pledged to strengthen the Department’s efforts to protect the American people from terrorism and other national security threats; and to ensure that every decision – and every investigation and prosecution – would be guided by the facts and the law. I also reaffirmed my commitment to move aggressively to prevent and combat violent crime and financial fraud, to seek justice for victims, to protect the most vulnerable among us, to safeguard the environment, and to uphold the civil rights of *all* citizens.

In each of these areas, the Department has made tremendous – and, in many cases, historic – progress. Nowhere is this more evident than in our national security efforts. In the last three years, the Department has secured convictions against scores of dangerous terrorists. We’ve identified – and stopped – multiple plots by foreign terrorist groups, as well as homegrown extremists. And we’ve strengthened essential surveillance and intelligence-gathering capabilities.

Just last month, we secured our seventh conviction in one of the most serious terrorism cases our nation has faced since 9/11: an al-Qaeda-sponsored plot to conduct coordinated suicide bomb attacks in the New York subway system. And roughly two weeks ago, we attained a guilty verdict in the case of a former member of the U.S. Army who intended to bomb U.S. soldiers at a restaurant in Killeen, Texas. On the same day, another Texas man was sentenced to 20 years in prison for attempting to become part of al-Qaeda in the Arabian Peninsula.

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such as our Defending Childhood Initiative and National Forum on Youth Violence Prevention, we've developed comprehensive, collaborative approaches to addressing the causes and remedying the consequences of violence among, and directed toward, our nation's young people. By forging and strengthening partnerships between our United States Attorneys' Offices and federal, state, local, tribal, and international law enforcement officials, we're combating gun-, gang-, and drug-fueled violence more effectively than ever before – and nationwide, the steady decline of violent crime rates reflect this fact. Alongside key law enforcement allies – and our counterparts in Mexico and other countries – we've orchestrated a series of coordinated strikes against violent drug cartels, arresting thousands of cartel members and seizing billions of dollars in assets. We're also implementing strategic, desperately-needed plans to address the shocking rates of violence that plague American Indian and Alaska Native women throughout tribal communities. And we're using every resource and tool at our disposal – including the power of research and scientific analysis – to protect our nation's law enforcement community, which – in recent years – has seen an unfortunate, and unacceptable, rise in line-of-duty deaths.

Many of you have worked to raise awareness about the tragic fact that violence against law enforcement officers is approaching the highest level we've seen in nearly two decades. As Attorney General – and as the brother of a retired police officer – I am proud that the Department has responded to this recent crisis with resolve and robust action. Just last week, I met with the Major Cities Police Chiefs Association at its summer meeting to discuss the ways we've developed and implemented a host of important programs, such as the landmark VALOR Initiative, which is providing our law enforcement partners with the latest in training, tools, and resources – as well as the Bulletproof Vest Partnership Program, which has helped more than 13,000 jurisdictions purchase lifesaving bullet- and stab-resistant equipment – in order to help protect those who risk their lives to keep us safe.

Put simply, our commitment to officer safety has never been stronger. And – as recent achievements prove – the same can be said of our resolve to protect American consumers.

Since the start of this Administration, the Justice Department has signaled an unwavering commitment to preventing and combating a wide range of financial and health-care fraud crimes. We've taken bold steps to address the contributing factors and consequences of the recent economic crisis. And this work is paying dividends.

Last year alone, the Department's Consumer Protection Branch – working with U.S. Attorneys' Offices across the country – attained a 95 percent conviction rate; secured more than \$900 million in criminal and civil fines, restitution, and penalties; and obtained sentences totaling more than 130 years of confinement against more than 30 individuals. In cooperation with the Department of Housing and Urban Development and a bipartisan group of 49 state attorneys general, we achieved a \$25 billion settlement with five of the nation's top mortgage servicers – the largest joint federal-state settlement in history. Through the efforts of the President's Financial Fraud Enforcement Task Force – which was launched in 2009 – we've obtained prison sentences of up to 60 years in a variety of fraud cases – including multimillion-dollar Ponzi schemes and the largest hedge-fund insider-trading case in U.S. history. We've established two new Working Groups to enhance civil and criminal enforcement of consumer fraud and to bring federal and state authorities together in investigating and prosecuting

misconduct by financial institutions in the origination, securitization and servicing of mortgages that contributed to our financial crisis. And we've continued to make tremendous gains in our work to combat health-care fraud.

In fact, over the last fiscal year – in cooperation with the Department of Health and Human Services and other partners, and by utilizing authorities provided under the False Claims Act and other essential statutes – we recovered nearly \$4.1 billion in cases involving fraud on federal health-care programs. That's the highest amount ever recovered in a single year. And for every dollar we've spent combating health-care fraud, we've returned an average of *seven* dollars to the U.S. Treasury, the Medicare Trust Funds, and others.

The Department also has taken crucial steps forward in protecting the most vulnerable members of society – and ensuring the civil rights of all citizens. Over the past three years, our Civil Rights Division has filed more criminal civil rights cases than ever before – including record numbers of human trafficking cases – in an effort to ensure that – in our workplaces and military bases; in our housing and lending markets; in our schools and places of worship; in our immigrant communities and our voting booths – the rights of *all* Americans are protected.

In addition, we're working to strengthen the rule of law both across the country and beyond our borders – establishing the global alliances necessary to combat transnational organized crime as outlined in the President's strategy. This includes combating intellectual and financial property crimes, child pornography rings, organized criminal networks, and criminal facilitation of terrorist activities. And we've partnered effectively with Members of Congress to advance important changes in policy and legislation – from landmark hate crimes prevention legislation to the reduction of the unjust and unfair crack/powder cocaine sentencing disparity.

This work goes on today in our efforts to help ensure the reauthorization of the Violence Against Women Act – a critical law that has transformed our nation's response to crimes against women, and enhanced our ability to achieve justice for victims while holding offenders accountable. It goes on in our strong support for the renewal of essential authorities such as those included in the Foreign Intelligence Surveillance Act Amendments of 2008. And it endures in our determination to build upon the extraordinary accomplishments that have defined the past three years; to take our fight against terrorism, crime, fraud, and other threats to a new level; and to join with members of this Committee in advancing the mission that remains our common cause – and making good on our nation's founding promise of equal justice under law.

I am proud of these and the Department's many other achievements, and I hope to spend most of our time today discussing how we are working to build on this progress. However, I would like to briefly address the ongoing investigations into ATF gun trafficking operations along the Southwest Border.

As a result of concerns raised by ATF agents we now know of several Arizona-based investigations that occurred under this administration and the previous one where inappropriate tactics were used in an attempt to stem the flow of illegal guns across the Southwest Border. Although these law enforcement operations – which include Wide Receiver, Medrano, Hernandez, Fast and Furious, and others – were focused on the laudable goal of dismantling

illegal gun trafficking networks, they were flawed in both concept and execution. I share your concerns about how these operations were developed and implemented. That's why – just as Congressional leaders have called for answers – I asked the Department's Inspector General to conduct a comprehensive investigation as well.

I also put in place new leadership at ATF, which has taken steps – including the implementation of stricter oversight procedures for all significant investigations – to prohibit the flawed tactics employed in these operations. Many of the key enhancements implemented by the Department are set out in the Deputy Attorney General's letter to the Committee dated January 27, 2012. Even since the date of that letter, however, we have continued to refine the Title III process. For example, our Office of Enforcement Operations now requires that, before it even accepts a request for a wiretap intercept from a United States Attorney's Office, a supervisor in the relevant United States Attorney's Office must personally approve that request.

I would be remiss if I did not point out that the ATF agents who testified before Congress also have asked that law enforcement be provided with the tools it needs to effectively combat gun trafficking on the Southwest Border. And I want to reiterate my commitment to working with Congressional leaders to meet the needs of our law enforcement partners – and to help address serious national security challenges on our borders.

Finally, I want to make clear that we welcome the recent engagement of Congressional leadership in the Department's continued efforts to satisfy the legitimate goals of Congressional oversight while, at the same time, preserving the integrity and independence of the Department's ongoing criminal investigations and prosecutions. Leadership's recent letter represented a promising step toward reaching a resolution, as it accomplished two things: first, it narrowed the universe of documents still in dispute between the Justice Department and the House Oversight Committee; second, it identified the specific questions that remain of concern to Leadership. We are confident that the constructive discussions that have occurred since this letter will result in a mutually acceptable resolution.

In all of these efforts, I am grateful for your continued support. I look forward to working with each one of you. And I would be happy to answer any questions you may have.

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Mr. SMITH. Let me remind Members that the Attorney General is with us until 1:30 this afternoon, and in order for all 40 Members of the Committee to be able to make comments and ask questions, we are going to need to adhere strictly to the 5-minute rule. And I will recognize myself for questions.

Mr. Attorney General, the Foreign Intelligence Surveillance Act amendments, which help protect our country from terrorists, expires the end of this year. Do you support the extension of those amendments?

Attorney General HOLDER. We do support them. It is the most important legislative concern of the Intelligence Community, and we hope that Congress will pass that reauthorization before the expiration at the end of the year.

Mr. SMITH. Okay. Now, let me go to Operation Fast and Furious you mentioned in your testimony. Mr. Attorney General, who is the highest-level official in this Administration who knew that these tactics were being used? And I am talking about knew the tactics were being used before the death of Agent Brian Terry on December 15, 2010.

Attorney General HOLDER. Well, we know that the operation began in the field office in Arizona, both the U.S. Attorney's office and in the ATF office there. The inspector general is in the process of examining the way in which—

Mr. SMITH. To your knowledge, who was the highest-ranking official in the Administration who knew about the tactics?

Attorney General HOLDER. At this point I can say that it started in Arizona, and I am not at all certain who beyond that can be said to have been involved with regard to the use—now, there was knowledge of it, but with regard to the use of the tactics, I certainly don't—

Mr. SMITH. No one other than ATF officials in Arizona, you are saying, knew about the tactics used in Operation Fast and Furious before December 15, 2010; is that right?

Attorney General HOLDER. I think that in terms of knowledge of the tactics as opposed to the operation itself, I don't think that anybody in Washington knew about those tactics until the beginning of—

Mr. SMITH. Speaking of those tactics, when were you first told or became knowledgeable about U.S. officials allowing firearms to be sold to the drug cartels in Mexico? And I would like a specific date, if you can give it to us.

Attorney General HOLDER. I don't have a specific date. I got a letter from Senator Grassley at the end of January of 2011. I think I became aware of tactics themselves probably in February of 2011, as I have indicated in the seven previous times that I have testified.

Mr. SMITH. Okay. And it wasn't until that letter from Senator Grassley that you knew about the firearms being allowed to be transferred to the drugs cartels in Mexico.

Attorney General HOLDER. No, it was not in the letter. The letter directed my attention to the area that ultimately led to my understanding about the tactics. But the letter itself did not mention Operation Fast and Furious.

Mr. SMITH. Okay. And so once again, when did you learn about the tactics that were being used?

Attorney General HOLDER. As I said, the early part of 2011.

Mr. SMITH. Okay. And that was immediately after—several weeks after the death of Brian Terry?

Attorney General HOLDER. That happened in December 2010.



Mr. SMITH. Okay. And is that the same date that you found out that these firearms that were connected to Fast and Furious were found at the murder scene of Brian Terry, or did you find out about that before?

Attorney General HOLDER. I don't know when I found out about—I don't remember when I found out about that particular fact. I would guess it would also be sometime in the early part of 2011.

Mr. SMITH. Why was it do you think that individuals who worked for you who were in this Administration would not have made it known to you or others outside of Arizona that firearms that were allowed to be given to drug cartels in Mexico by U.S. officials? Why did it take so long for you to learn or for others to tell you? Was there a coverup going on, or what was the explanation for you in your position not knowing more about the tactics?

Attorney General HOLDER. Well, I think the answer is found in your question. No one knew about the tactics at the time of that initial discovery. It wasn't until the tactics were discovered that people started to understand that we had a problem here. But for those tactics, Fast and Furious was a midlevel regional investigation that from all reports was going on pretty successfully.

Mr. SMITH. But again, you didn't find out about those tactics until, say, 6 weeks or 2 months after the death of Brian Terry; is that correct?

Attorney General HOLDER. Sometime in February. I think Agent Terry was killed December 10th or 14th, I believe, of December.

Mr. SMITH. When was anyone in the White House first informed about the tactics that were used under Operation Fast and Furious?

Attorney General HOLDER. I don't know.

Mr. SMITH. Did you yourself not inform anyone in the White House about Operation Fast and Furious?

Attorney General HOLDER. I am sure there was contact between staff, and the Justice Department probably, and the appropriate people in the White House about Fast and Furious. I don't remember myself ever sharing that information with—

Mr. SMITH. How would anyone in the White House have learned about it, and who would have learned about it under the normal chain of command?

Attorney General HOLDER. I am sorry?

Mr. SMITH. How would the White House have learned about Operation Fast and Furious if not from you?

Attorney General HOLDER. Well, through my staff and the interactions that we have with the White House Counsel's Office. That is the nature of—

Mr. SMITH. When did your staff inform the White House about Operation Fast and Furious?

Attorney General HOLDER. I don't know.

Mr. SMITH. Were you ever curious about that?

Attorney General HOLDER. My focus was on dealing with the problems associated with Fast and Furious.

Mr. SMITH. It seems to me that you would want to know—would want White House officials to know what was going on in order to correct the problem.

My time——

Attorney General HOLDER. My focus was on the tactics and trying to solve the problem, and not awfully concerned about what the knowledge was in the White House. That is my responsibility.

Mr. SMITH. I understand, but I still think the White House would have been informed.

Thank you, Mr. Holder.

The gentleman from Michigan Mr. Conyers, the Ranking Member, is recognized for his questioning.

Mr. CONYERS. Thank you, Chairman Smith.

Attorney General Holder, would you pull your mic up just a little bit closer, please?

You have made reference to the ATF Multiple Sales Reporting program for certain types of rifles in States along the southwest border. This rule is intended to get at the real problem of gun violence on the border of Mexico. In your view, has the program been effective? Have we been stopping guns and saving lives?

Attorney General HOLDER. Yeah. The rule simply says that for the multiple sale of certain kinds of weapons, including AK-47s, if somebody buys more than one over the space of 5 days in four border States, that that information has to be reported to the ATF. That has led to actionable leads. It is a very measured, responsible regulation that has been upheld by a court that has considered it and said that it is appropriate. And it is also totally consistent with what we do right now and have for the last 30 years with regard to the sale of multiple handguns.

Mr. CONYERS. And by the way, I think we repealed the assault weapon ban, and that has led to a proliferation of weapons that I think we need to take another look at here in our Legislature.

Let us talk about the Mortgage Fraud Task Force of the President and how it is coming along. You know the effect this has had in our economy and on foreclosures and on families from one end of the country to the other. How is your staffing and resources picture in this context?

Attorney General HOLDER. Well, I think we are doing pretty well. We have about, I think, 100 people or so who are presently involved in that task force. Subpoenas have been sent out; investigations are under way. We are working, I think, very effectively with a number of U.S. Attorneys as well as our partners on the State side, I think principally the attorney general from New York, Eric Schneiderman, as well as other State attorney generals. So I think the progress we are making there is very good.

Mr. CONYERS. Thank you.

In 2009, you created a working group to review the Department's profiling guidance that came out in 2003 under then-Attorney General Ashcroft. In April of this year, 64 Members of Congress wrote to urge you to revise that guidance. What is the status of the working group? And are there going to be changes to the guidance? And if you can, what would some of those changes be?

Attorney General HOLDER. We are in the process of looking at that earlier policy and seeing if in light of experience there are changes that need to be made. I had a meeting concerning this issue, I think, over the last 2 weeks. It would be my expectation

that to the extent that changes are to be made, that those would happen relatively soon.

We are certainly working within the Justice Department, then I suspect we will have to have an interagency group, because there are a number of agencies whose equities are implicated by the prospective change. But it is something that we continue to look at and something in which I have been personally involved over the last 2 to 3 weeks.

Mr. CONYERS. And what was the goal of the so-called profiling guidance?

Attorney General HOLDER. Well, to try to make sure that we did not hamper law enforcement, but at the same time that we had in place rules, regulations, guidance to those in law enforcement that did not—so that we did not engage in racial profiling, which is simply bad law enforcement.

If one looks at al Qaeda, they understand that if we engage in profiling, they will be more successful. They look for—and this has been reported—people, as they call it, with clean skin, people who do not fit a particular profile. Those are the ones who they are trying to send to harm this Nation, and that is why profiling certainly in the national security context as well as, I would say, with regard to domestic law enforcement is such a bad idea.

Mr. CONYERS. Let me squeeze in my last question. Can you talk a little bit about the charges of selective enforcement of immigration law? I don't know if you have heard of any of those kinds of complaints, but can you respond to that for me, please?

Attorney General HOLDER. Selective immigration?

Mr. CONYERS. Selection enforcement of immigration law.

Attorney General HOLDER. You mean, by the Federal Government or—

Mr. CONYERS. The Arizona law and other—

Attorney General HOLDER. The States.

Mr. CONYERS. At the State level.

If I can finish this question, Mr. Chairman.

Mr. SMITH. Please, answer the question.

Attorney General HOLDER. We have filed suit against immigration laws that have been passed by a variety of States. The Supreme Court has obviously heard argument in connection with the Arizona law.

The concern that we have is that this is inherently a Federal responsibility, and that if we allow these State laws to proliferate, we will have a patchwork of laws that will make ultimate enforcement of our immigration laws impossible.

Having said that, I understand the frustration that many States feel. I think it points out the need for a comprehensive solution to this problem.

Mr. CONYERS. Thank you very much.

Mr. SMITH. Thank you, Mr. Conyers.

The gentleman from Wisconsin Mr. Sensenbrenner is recognized for his questions.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Mr. Attorney General, I do want to echo Mr. Conyers' commendation of you for coming before us on a very regular basis. I know it takes a lot of your time to prepare. I also know that you don't

know what is going to get thrown at you, and sometimes there will be curveballs and beanballs. I hope mine is a curveball.

I want to talk a little bit about the Florida voter registration case. And it appeared in The New York Times yesterday, there was an article there about the State defending its search for ineligible voters. And Secretary of State Ken Detzner of Florida has sent a letter to Mr. Herren of the Voting Section of the Civil Rights Division talking about the problem. And the problem is simply this, and that is as Florida is trying to purge its voter registration rolls of noncitizens, including illegal immigrants, people who are clearly not eligible to vote, and the Department of Homeland Security has had a 9-month delay in giving the national voter registration laws to the State, and now Mr. Herren appears to be taking the position that Florida can't do anything after the Federal Government has delayed giving Florida the information that it needs to do. What can be done to solve this problem?

Attorney General HOLDER. Well, the problem with the Florida effort is that it runs counter to the National Voter Registration Act, which says you can't do this within 90 days of an election. You can successfully do that which Florida is trying to do as has been done and has been approved by the Justice Department in North Carolina and Georgia. They did it the right way.

The database that I think Florida is requesting is not necessarily the answer to these problems. That database, as I understand it, which is a DHS database, does not contain on its rolls or within that database people who were born in the United States. That database will therefore be flawed and could result in the exclusion of people from voting who are native-born Americans.

Mr. SENSENBRENNER. Well, the State of Florida has attempted to obtain this database for 9 months so that it could do its thing prior to the 90-day shutoff in the national voter registration law. And I have a copy of the letter from Secretary of State Detzner that talks about the due process protections, such as a notification by certified mail; return receipt; 30 days to respond; hearing if requested; if the mail notice is returned as undeliverable, then the names and addresses appear in a newspaper of general circulation; an additional 30 days, at the conclusion of the notice-and-hearing process, the registrar is supposed to make a final determination based upon the preponderance of the evidence and allow for an appeal of any determination of ineligibility to a State circuit court.

Now, you know, this is probably due process times 3 or 4, maybe even 5 times. I would like to know what rights do noncitizens, and particularly illegal immigrants, you know, have to the protection of the Voting Rights Act and the National Voter Registration Act?

Attorney General HOLDER. They have no rights, and I stand with any State official, Federal official who wants to make sure that our voting system is done in an appropriate way, and that people who are not allowed to vote in fact do not vote.

But as a result of the way in which Florida has carried this out, I saw a report that an election official in southern Florida indicated that about 450 people on the list that—I believe it was a woman—that she got were indicated to be people who were not eligible to vote, who, in fact, were eligible to vote, and I think that points out the problem in the process that Florida is engaged in.

Mr. SENSENBRENNER. With all due respect, Mr. Attorney General, there is a problem. And any ineligible voter or fraudulent voter who has a ballot placed in the same ballot box as hundreds of legitimate voters ends up diluting the votes of the legitimate voters, and the Federal law is very clear on that.

And, you know, here the Department of Homeland Security hasn't given Florida the means to start the process out with all of these protections that I have just listed. And it seems to me that if your job is to uphold the law, you know, the law sets out a process to give the States time to do this, but we have another agency of the government that you are supposed to be advising as Attorney General that has prevented the State of Florida from doing this.

Attorney General HOLDER. I would say I respectfully disagree, and I point to you, as I said, other States that have—I don't know all the ways in which they did it, but who successfully have implemented a policy that I would agree with. I don't think we should have people who don't have the ability, who don't have the right to vote casting votes in our Nation. North Carolina, Georgia did it.

Mr. SENSENBRENNER. Well, then, please help Florida to do it, because apparently there has been a roadblock here in Washington. And my time is up.

Mr. SMITH. Thank you, Mr. Sensenbrenner.

The gentleman from New York Mr. Nadler is recognized.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Attorney General, we have made several requests to you to allow us to review the Office of Legal Counsel memo that reportedly provides the legal justification for the lethal targeting of U.S. citizens who are terror suspects. The Department has sought dismissal of cases seeking judicial review of lethal targeting by arguing, among other things, that the appropriate check on executive branch conduct here is Congress, and that information is being shared with Congress to make that check a meaningful one. Yet we have yet to get any response to our request. Will you commit to providing that memo to us and to providing a briefing?

Attorney General HOLDER. We certainly want to provide information to the extent that we can with regard to the process that we use in selecting targets. I gave a speech at Northwestern University. Mr. Brennan gave a speech here, I believe—

Mr. NADLER. Excuse me. Will you commit to providing a copy of the briefing—a copy of the legal memo from OLC?

Attorney General HOLDER. We will certainly look at that request and try to determine whether—

Mr. NADLER. And a briefing to the Members of this Committee?

Attorney General HOLDER. And we will certainly consider the possibility of a briefing.

Mr. NADLER. The possibility? You won't commit to giving a briefing to this Committee?

Attorney General HOLDER. I think that we are going to probably be in a position to provide a briefing, but I would like to hear from the involved people in the Intelligence Community as well as people at OLC about how we might structure—

Mr. NADLER. You will get back to us on that within, let us say, a month?

Attorney General HOLDER. We can do that.

Mr. NADLER. Thank you.

When running for President and talking about medical marijuana being legally used around the country in certain jurisdictions, President Obama said the following, quote: "I am not going to be using Justice Department resources to try to circumvent State laws on this issue," closed quote. Apparently the Department has not followed the President's admonition. Since 2009, DOJ has conducted around 200 raids on medical marijuana dispensaries and growers and brought more than 60 indictments. It is my understanding that the Department has a more aggressive record on prosecuting these cases in this Administration than under the previous Administration.

The President clearly did not want to prioritize prosecutions involving medical marijuana. And while I understand selling and possessing marijuana remains against Federal law, the citizens of 17 States and the District of Columbia believe its medical use should be legal.

Given these facts, why is DOJ focused so extensively on investigating and punishing those who legally grow and sell marijuana legally under local law, contrary to the apparent intent of what the President said on this subject?

Attorney General HOLDER. See, this is inconsistent with these little things called the facts. The Justice Department indicated in a memo that went out by the Deputy—then-Deputy Attorney General that we were not going to use the limited resources that we have to go after people who are acting in conformity with State law, people who had serious illnesses, people who were acting, as I said, consistent with State law.

But one has to deal with the reality that there are certain people who took advantage of these State laws and a different policy that this Administration announced than the previous Administration had, and have come up with ways in which they are taking advantage of these State laws and going beyond that which the States have authorized. Those are the only cases that we—

Mr. NADLER. So you are saying that you are not targeting people who are growing and distributing marijuana only for medical purposes and following the applicable State law?

Attorney General HOLDER. Yes. We limit our enforcement efforts to those individuals, organizations that are acting out of conformity with State laws, or, in the case of instances in Colorado, where distribution centers were placed within close proximity to schools.

Mr. NADLER. Okay. On September 23, 2009, you issued a memo setting forth policies and procedures governing the executive branch's invocation of the state secrets privilege. That policy requires your personal approval for the Department to defend assertion of the privilege in litigation. In how many cases since September of 2009 have approved personally invocation of the privilege?

Attorney General HOLDER. I would have to look at that. There have not been many. I think one, two, three, something along those lines. I am not sure.

Now, those numbers get skewed a little bit because in the second circuit, in order to use the SEPA statute, the second circuit has a

rule that says we have to invoke the state's privilege, but I don't think that is the same——

Mr. NADLER. I have a number of other more specific questions on this that I am going to submit to you, but I see I am coming to my end of time, so I have one further question on this.

You do not indicate in this policy whether the Administration will agree to judicial review of the basis for invoking the privilege. The prior Administration took the position that information could not even be disclosed in camera to an Article III judge, thus ensuring that there was no judicial review of whether the privilege was being properly invoked.

What is your position as to judicial review of the information that the government seeks to withhold in two key respects: One, can a judge review the allegedly privileged information; and two, can the judge disagree with the executive branch's decision as to whether the privilege is properly invoked?

Attorney General HOLDER. Well, I think that we have shared information with Article III judges, but the way in which the privilege is set out, it is, I think, at the end of the day for the executive branch to make that determination. But we have put in place a process that requires multiple levels of review.

Mr. NADLER. Within the executive branch. But you are saying that you do not agree that ultimately a decision should be subject to judicial approval or disapproval as to invocation of the privilege?

Attorney General HOLDER. Ultimately a judge, I think, would probably override our assertion of the privilege, and then we would have to decide whether or not we wanted to dismiss the case. But our hope is that through the process that we go through, we only invoke the privilege where it is absolutely necessary. And I think if we look at the statistics, we would probably see that we have invoked the privilege far fewer times than our predecessors.

Mr. NADLER. I hope you will share those statistics with us. Thank you.

Mr. SMITH. Thank you, Mr. Nadler.

The gentleman from California Mr. Gallegly is recognized.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

Good to see you again, Attorney General Holder.

On your last visit here, we asked about a few issues that we would like to get a response from. In fact, I am disappointed that to date your office has been unable to provide answers to what I consider some very simple questions that we asked in that meeting having to do with prosecutions of worksite enforcement cases. I am especially interested in the number of DOJ worksite enforcement prosecutions for each of the last 4 years, the number of prosecutions of illegal workers who have been using fraudulent documents. When can I realistically expect to get a response on that?

Attorney General HOLDER. I was under the impression that we had responded to all of the questions that were put to me either during the hearing or as I guess we call "Q-fers." If that is not the case, I will make sure——

Mr. GALLEGLY. I have not received them. In fact, we will be happy to reiterate with specificity what those were, but it is pretty straightforward.

Attorney General HOLDER. All right. We will get you those numbers, and I apologize if you have not gotten them.

Mr. GALLEGLY. Okay. We will work with your office.

You know, we all know that many illegal immigrants are using fraudulent Social Security numbers or individual taxpayer numbers to take jobs from American citizens. I don't think there is any question about that in anyone's mind. They also receive taxpayer benefits such as child tax credits, earned income tax credits. There have been reports that some illegal immigrants are claiming tax credits for children not even living in the United States.

What specific—and I want to emphasize the word “specific”—steps are being used by DOJ to stop this fraud, recover taxpayer money, deport the illegal immigrants who have committed the criminal fraud?

Attorney General HOLDER. Well, you know, we work with our partners at DHS to come up with a number of ways in which we try to make sure that people, through worksite enforcement, through reaching out to employers, to make it clear what the policies are, what the law is. We use a variety of techniques to try to make sure that the kinds of people you are talking about are not, in fact, getting benefits to which they are not entitled. It is something that we have worked, I think, pretty effectively with with DHS.

Mr. GALLEGLY. Would this group of individuals that I am speaking about, those that have clearly committed fraud, are these folks on a priority list for deportation, or are they among those that have been given an exemption or a review to get a temporary green card?

Attorney General HOLDER. No. I mean, I think that we look—we certainly have prioritized those people for deportation, and we have tried to place at the head of that list people who potentially pose criminal problems for those of us in the United States or in the immigrant community, people who have engaged in violent acts. Those are the ones we are emphasizing. It doesn't mean that those further down the list are not also people who we are trying to deport—

Mr. GALLEGLY. Well, we know, and I am glad to hear, that acts of violence by criminal aliens are at the top of the list, but the fraud issue, to me, is also an offense that should be very close to the top of the list when they are stealing the taxpayers' dollars that could otherwise be used to help your Department, for instance.

Also back in December, we talked about DOJ addressing the issue of Medicare fraud. And we know by many accounts there is as much as \$60 billion a year that has been used as being stolen from our Medicare program fraudulently. What steps is DOJ taking to increase prosecutions on Medicare and also Medicaid fraud?

Attorney General HOLDER. I am sorry. We are working with our partners at DHS, Kathleen Sebelius, the Secretary at HHS, have been going around the country and expanding what we call the Heat Strike Force teams to increase the Federal presence in our investigative capacity in those cities where we have identified these problems. And what we have seen is that we have received in the settlements in the prosecutions that we have brought record amounts of money brought back into the Federal Government. As



I indicated in my opening statement, for every dollar that we spend in enforcement, we bring back \$7 to the Federal Government. And it is something that I think should be funded at as high a level as we possibly can.

Mr. GALLEGLY. One closing question. Could you provide information to the Committee on what specific enforcement is taking place in this area in California, specifically southern California, and more specifically in and around the area of Los Angeles and areas like Glendale, California?

Attorney General HOLDER. We can do that. I can certainly make clear to you what we are doing generally with regard to all the cities that we have targeted, but I can also share with you what we are doing in California, in the area of California.

Mr. GALLEGLY. Thank you, Mr. Chairman. I yield back.

Mr. SMITH. Thank you, Mr. Gallegly.

The gentleman from California Mr. Berman is recognized.

Mr. BERMAN. Thank you very much, Mr. Chairman, and welcome, Attorney General.

I want to start by commending you and the Department for your diligent work defending U.S. taxpayers against fraud by government contractors. Every year I watch the total amount recovered for taxpayers under the False Claims Act increase, and I am grateful for the work that the Department and whistleblowers do together to protect our tax dollars. I think we are now up to something just over \$30 billion. And a lot of my colleagues today are focusing on their beefs with you today. I want to talk about this subject, because here I think here the Justice Department and you are doing this right, and it seems the law is quite effective, and I would like to make sure it stays that way.

Earlier this year you invited me to take part in the commemoration of the 25th anniversary of the False Claims Act, and though I wasn't able to participate in the panel discussion that followed the main event, I am told that one of the issues discussed on that panel was whether or not we should change how relators are compensated for their efforts and recovery on behalf of the taxpayers.

In October of last year, the United States Chamber of Commerce put out a report suggesting that a hard cap of \$15 million would be adequate to compensate any relator. Their logic seemed to be that that amount would cover most people's future earnings if their efforts as a whistleblower kept them from working again. The report also suggests that such a cap would not deter whistleblowers from pursuing qui tam cases, because in their study of 26 cases, the whistleblowers responded to a question about why they would be willing to bring suit, and most of them said that they did it because it was the right thing to do.

I believe that, but I also know for a fact that the whistleblowers put themselves at tremendous risk when they make the decision to file suit and try to recover on behalf of the government and the American taxpayer. These cases are expensive to pursue, and they can last for years. They require commitment, and I don't know if a general good feeling about, quote, "doing right" is what will make someone remain committed to the cause for the long haul.

Right now relators can be awarded a percentage between 15 and 30 percent depending upon the certain factors such as whether or

not the government joined the relators as plaintiffs. In my mind, and I think the history of the act bears this out, this percentage share encourages a relator to pursue a case until they can recover an amount equal to the entire impact of their fraud as opposed to settling when the case goes too long, perhaps because they know there is a hard cap, and they can only recover so much money.

Though the Chamber argues that a hard cap would save the government money, I have to wonder how many cases it would deter or at least reduce the recovery for the taxpayers. In today's world, where some of these cases recover billions of dollars, if a hard cap deterred even one such case, it would be a very costly endeavor for taxpayers.

When we consider the False Claims Act amendments in 1986 and in revisions since, proposals to enforce a hard cap have not been well-received. Of course, there are reasons that defendants fighting qui tam suits would want to limit damages, but I am more focused on what works best for the taxpayer. I believe what we have now is working well.

I sent you a letter on this subject earlier this month, but I wonder if you could share some thoughts with me now about whether the Department remains committed to relators being awarded a percent share or if you support a shift to a hard cap.

Attorney General HOLDER. Well, I have to say that I am not totally familiar with the proposal that you have described. But I can say that the act, as it is presently constructed, is working extremely, extremely well. And you are right, we asked you to come to the Justice Department to celebrate the success that we have had over the past 25 years with regard to an act that you were instrumental in passing.

Over the past 25 years, we have had nearly 8,000 qui tam cases that have filed that have yielded more than \$21 billion in recoveries—\$21 billion in recoveries—for the United States, \$3.4 billion in awards to relators. In fiscal year 2011 alone, the Department recovered more than \$2.78 billion in qui tam cases; relators received about \$530 million as their statutory shares.

The statute as it is presently constructed works, and works quite well. I would be reluctant to fool around with a formula that for the past 25 years has shown to be an effective tool in getting at fraud and incentivizing people to stay involved in the process and working with government as partners. Now, again, I will look at it, but I have to tell you that, on the basis of my examination of the regulation as it exists, the statute as it exists, I would be extremely reluctant to tamper with it.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from Virginia, Mr. Goodlatte, is recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman.

General Holder, both the Criminal Division head Lanny Breuer and his deputy, Jason Weinstein, had knowledge that the ATF let a bunch of guns walk, and some were recovered in Mexico, all related to the Fast and Furious scandal.

In a prior operation, when they reviewed the February 4, 2011, letter that falsely denied the ATF knowingly allowed the sale of assault weapons to a straw purchaser who transported them to Mex-

ico, do you think it is a serious offense for an individual to mislead the Congress?

Attorney General HOLDER. Well, first, with regard to the question, I think you have it a little off there. The two individuals who you talk about, Mr. Weinstein and Mr. Breuer, did not know about the tactics used in Fast and Furious until the beginning of last year. The——

Mr. GOODLATTE. But they did acknowledge that, quote, “ATF let a bunch of guns walk,” and, quote, “some were recovered in Mexico,” end quote.

Attorney General HOLDER. That was in connection, I believe, with Operation Wide Receiver that occurred——

Mr. GOODLATTE. Correct.

Attorney General HOLDER [continuing]. In the prior Administration.

Mr. GOODLATTE. Correct. Correct. But they did not acknowledge that in their communication with the Congress. So my question to you is, do you think it is a serious offense for an individual to mislead the Congress about what they know about what is going on in your department?

Attorney General HOLDER. Well, to the contrary, they did acknowledge to Congress that they did have that information about Wide Receiver and said that it was a mistake on their part not to share it with the leadership of the Department, that prior knowledge. Also indicated that it was a mistake on their part not to use that prior knowledge when they were looking at Fast and Furious to try to understand that they should have been more sensitive to what was going on with regard to Fast and Furious.

Mr. GOODLATTE. What consequences have they faced as a result of that?

Attorney General HOLDER. Well, they are certainly—they have apologized. They have been——

Mr. GOODLATTE. An apology is a good thing, but it is not a consequence for gross mismanagement of an operation that cost the life of one border security guard. Why haven't these two most senior political attorneys in the Criminal Division faced any consequences at all for their participation in this lack of being forthcoming to the Congress and to others and for not putting a halt to the subsequent activities that took place?

Attorney General HOLDER. Well, again, I think your premises are wrong. They have been forthcoming to Congress. They have testified or been interviewed in a way that I think is consistent with the facts. They have been very forthright about——

Mr. GOODLATTE. But what about the underlying decision of allowing this to go forward?

Attorney General HOLDER. And that is the another part of, I think, your premise that is not right. They were not in charge of, they did not have operation control of Operation Fast and Furious.

Mr. GOODLATTE. But when they knew about it, what did they do about it?

Attorney General HOLDER. Well, that happens about the same time everybody in Washington finally hears about these tactics. They were assured by the people in Arizona that the gun-walking in fact did not occur. That is the information that they got. If you

look at the materials that we submitted to Congress, the deliberative materials that we submitted to Congress around the February 4th letter, you will see that neither Mr. Breuer nor Mr. Weinstein had information about the use of—they were, in fact, assured that gun-walking tactics were not employed with regard to Operation Fast and Furious.

Mr. GOODLATTE. Now, with regard to the prosecution of Senator Ted Stevens in Alaska, in that case Senator Stevens was falsely prosecuted. His reputation was ruined; he was not re-elected to the United States Senate. And it was determined that the U.S. prosecutors were engaged in outright fabricating of some evidence, deliberately withholding information that revealed the Senator's innocence. And, ultimately, they were held in contempt of court, and the charges against Senator Stevens were dismissed.

But what consequences have they faced? To my knowledge, the only consequences for engaging in the outright fabrication of evidence and deliberately withholding exculpatory evidence that would have revealed the Senator's innocence was that one of them was suspended without pay for 40 days and the other for 15 days. Why were not these individuals fired?

Attorney General HOLDER. Well, there—

Mr. GOODLATTE. Some would say they should have been disbarred for that activity. That is not the purview of the Justice Department, but, certainly, no longer having them on the payroll of the Justice Department would be a good step in the right direction, wouldn't it?

Attorney General HOLDER. Well, again, there are a number of premises there that are inconsistent with the facts.

This is a case that was brought by the prior Administration. It was not dismissed by the court. I dismissed the case, this Attorney General dismissed that case after I had concerns about the way in which we had failed to turn over information that the defense had a right to.

The OPR report looked at the matter and made a determination that they did not do so intentionally. It is inconsistent or it is at tension with the report that was done by Mr. Schuelke and the recommendation made by those people charged with the responsibilities that those penalties should be imposed, I guess 40 days and 15 days.

This is not something that the Attorney General, the Deputy Attorney General is involved in, the determinations as to how those cases—what punishment should be made or findings of fact is done by people who are career within the Department. The same thing happened with regard to the determination concerning Mr. Yoo and the creation of those OLC memos involving interrogation techniques. Whether or not the Attorney General agrees or disagrees with what the career people do, the tradition in the Department is that that is something for career people charged with that responsibility to ultimately determine.

Mr. GOODLATTE. Mr. Chairman, I would ask that a letter dated February 4, 2011, signed by Ronald Weich, Assistant Attorney General, which I think rebut the statements made by the Attorney General with regard to what was known and what was not known

about Operation Wide Receiver and Operation Fast and Furious, be made a part of the record.

Mr. SMITH. Without objection, the documents will be made a part of the record.

[The information referred to follows:]



U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 4, 2011

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Senator Grassley:

This responds to your letters, dated January 27, 2011 and January 31, 2011, to Acting Director Kenneth Melson of the Department's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), regarding Project Gunrunner. We appreciate your strong support for the Department's law enforcement mission.

At the outset, the allegation described in your January 27 letter—that ATF “sanctioned” or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico—is false. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico. Indeed, an important goal of Project Gunrunner is to stop the flow of weapons from the United States to drug cartels in Mexico. Since its inception in 2006, Project Gunrunner investigations have seized in excess of 10,000 firearms and 1.1 million rounds of ammunition destined for Mexico. Hundreds of individuals have been convicted of criminal offenses arising from these investigations and many others are on-going. ATF remains committed to investigating and dismantling firearms trafficking organizations, and will continue to pursue those cases vigorously with all available investigative resources.

In this vein, the suggestion that Project Gunrunner focuses simply on straw purchasers is incorrect. The defendants named in the indictments referenced in your January 27 letter include leaders of a sophisticated gun trafficking organization. One of the goals of the investigation that led to those indictments is to dismantle the entire trafficking organization, not merely to arrest straw purchasers.

I also want to assure you that ATF has made no attempt to retaliate against any of its agents regarding this matter. We recognize the importance of protecting employees from retaliation relating to their disclosures of waste, fraud, and abuse. ATF employees receive annual training on their rights under the Whistleblower Protection Act, and those with knowledge of waste, fraud, or abuse are encouraged to communicate directly with the

The Honorable Charles E. Grassley  
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Department's Office of Inspector General. These protections do not negate the Department's legitimate interest in protecting confidential information about pending criminal investigations.

We also want to protect investigations and the law enforcement personnel who directly conduct them from inappropriate political influence. For this reason, we respectfully request that Committee staff not contact law enforcement personnel seeking information about pending criminal investigations, including the investigation into the death of Customs and Border Patrol Agent Brian Terry. Like you, we are deeply concerned by his murder, and we are actively investigating the matter. Please direct any inquiry into his killing to this office.

The Department would be pleased to provide a briefing to Committee staff about Project Gunrunner and ATF's efforts to work with its law enforcement partners to build cases that will disrupt and dismantle criminal organizations. That briefing would not address the on-going criminal investigation referenced in your letter. As you know, the Department has a long-standing policy against the disclosure of non-public information about pending criminal investigations, which protects the independence and effectiveness of our law enforcement efforts as well as the privacy and due process interests of individuals who may or may not ever be charged with criminal offenses.

We hope that this information is helpful and look forward to briefing Committee staff about Project Gunrunner. Please do not hesitate to contact this office if we may provide additional assistance about this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

cc: The Honorable Patrick J. Leahy  
Chairman

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Mr. SMITH. The gentleman from Virginia, Mr. Scott, is recognized.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

And thank you, Mr. Attorney General, for being with us today.

Mr. Holder, you have been criticized for not turning over information upon request to one of the Committees. Did some of those requests involve information pertaining to confidential informants

and wiretaps under seal, court-ordered seal, and information related to ongoing investigations?

Attorney General HOLDER. Yes, that is true, but we have turned over a very significant amount of information. We have collected data from 240 custodians. We have processed millions of electronic records. We have turned over 7,600 pages on 46 separate productions. We have——

Mr. SCOTT. Well, could you tell us, what is wrong with handing over information involving confidential informants, wiretap information under court seal, and information related to ongoing investigations?

Attorney General HOLDER. We are, by law, prohibited from discussing or turning over the contents of wiretap-related material. There is a criminal provision that has a 5-year penalty that prevents us from doing that.

And there is also a very practical reason. There are concerns that one would have about people who are involved in these matters. You might put victims' safety at risk. You might put at risk the success of a prosecution.

Those are all the reasons why there are very tight restrictions on the provision of material connected to wiretaps.

Mr. SCOTT. Thank you.

Mr. ISSA. Would the gentleman yield?

Mr. SCOTT. I have very little time.

Mr. ISSA. I will be very brief.

Mr. SCOTT. Go ahead.

Mr. ISSA. We did not request any wiretaps under seal, since I am the person who signed the subpoenas.

Mr. SCOTT. Thank you.

Reclaiming my time, Mr. Attorney General, Section 5 is there to prevent discriminatory election practices from going into effect. If you didn't have Section 5, discriminatory voting changes could go into effect until the victims of discrimination raised enough money to get into court to get an injunction. Those who benefit from the discrimination would get to legislate until the law is overturned. And when overturned, they would get to run with all the advantages of incumbency as a result of their discrimination.

And so there is an incentive to keep discriminating. But under Section 5, the burden is on covered States to demonstrate that an election change does not have a discriminatory effect and purpose. Section 5-covered States were not selected randomly; they were covered the old-fashioned way: They earned it, with a history of discrimination.

Now, how is the Department of Justice using Section 5 to prevent discriminatory voting practices? And, specifically, what are you doing in Florida to prohibit purging of voters, according to press reports, that include decorated war veterans clearly eligible to vote?

Attorney General HOLDER. Well, I think firstly, just a bit of an overview. And this will take just a second.

You have to understand that over the course of the time in which I have been Attorney General, we have looked at about 1,800 requests for preclearance under Section 5. We have opposed 11—11. Eighteen hundred requests, we have opposed 11. Now, included

among those is what Florida has been trying to do with regard to the Section 5-covered counties, that one of which—one of those changes which a Federal judge has already said is inappropriate.

Section 5 was reauthorized by a near-unanimous Congress, signed by President Bush, findings made by this Congress that the need for Section 5 continues, reauthorized, I believe, until 2031. It is the position of this Department of Justice and certainly this Attorney General that we will vigorously defend and vigorously use Section 5. The need for it is still there.

Mr. SCOTT. Thank you.

The first bill this President signed was the Lilly Ledbetter Act dealing with discrimination in employment. One of the things that, in talking about discrimination in employment, in 1965 President Johnson signed an Executive order prohibiting all discrimination in employment with Federal contracts. I understand this Administration still allows discrimination in Federal contracts based on religion, if it is a so-called faith-based group.

My question is, do they need permission, a certification to qualify for the right to discriminate? Or do they just get the right to discriminate based on the fact that they are faith-based organizations using Federal money?

Attorney General HOLDER. Well, I think we are committed to ensuring that we partner with faith-based organizations in a way that is consistent with our laws, our values. And the Department will continue to evaluate legal questions that arise with respect to these programs and try to ensure that we—make sure that we ensure that we fully comply with all of the applicable laws.

Mr. SCOTT. Does that mean they can discriminate?

Mr. SMITH. The gentleman's time has expired.

Mr. SCOTT. I think it was a yes-or-no answer.

Mr. SMITH. Okay.

Mr. Attorney General, go on. If you would, answer the question.

Attorney General HOLDER. As I said, we try to do this—we look at the policies and try to make sure that they act in a way that is consistent with law.

Mr. SMITH. Okay. Thank you, Mr. Scott.

The Chairman from California, Mr. Lungren, is recognized.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Mr. Attorney General, I would just follow up on what my friend from Virginia, Mr. Goodlatte, had to say with respect to the Stevens case. I realize that you reassigned people after that. I realize it was an investigation and indictment that came before you were Attorney General. That is not the point. The point is, if you have no real consequences now, you are going to have no real changes in the future.

That was conduct that was stated by the judge to be outrageous. He held a hearing as to whether a new trial ought to be called. Before he made a ruling, you did come forward with a motion to dismiss, recognizing the problems internally. The investigations showed widespread misconduct among the whole team, and yet I am unaware of anybody that was fired.

And Senator Stevens lost his election, but, more importantly, he lost his reputation. And I happen to think that in the absence of serious action taken against employees of either the Department of



Justice prosecutorial corps or the FBI, that, frankly, the message is not seriously received. So I would just like to state that for the record.

And now, Mr. Attorney General, if I were lucky enough to be invited down to meet you or see you at your office at the Justice Department, wouldn't I have to show a government-issued photo ID to get in to see you?

Attorney General HOLDER. You might.

Mr. LUNGREN. If I were to go to the Federal courthouse here in D.C. either as a party or as an attorney, wouldn't I have to show a government-issued photo ID?

Attorney General HOLDER. That has not been my experience here in D.C. I don't—you know.

Mr. LUNGREN. Some Federal courts—are you aware that that is required in some Federal courts in this land?

Attorney General HOLDER. I don't know.

Mr. LUNGREN. Are you aware that if I have to come here from California to exercise my constitutional right of travel and as an ordinary citizen petition the government for a redress of my grievances, I have to show a government-issued photo ID, do I not?

Attorney General HOLDER. That one, yes. To get on a plane, you have to have a photo ID.

Mr. LUNGREN. Okay. And that does involve the constitutional right of travel among the States, correct?

Attorney General HOLDER. Yep. The Supreme Court has said that the right to travel is of constitutional dimension.

Mr. LUNGREN. So is your Justice Department investigating the discriminatory effect of those laws with respect to someone's constitutional right to travel or constitutional right to visit you? I mean, the Constitution doesn't say, petition the government for redress of grievances only goes to some people. I mean, if I have a complaint with the Justice Department and want to come to the Justice Department, are you inhibiting me, affecting my constitutional right by requiring me to show a government-issued photo ID?

Attorney General HOLDER. No, but let's get to the bottom line here. That——

Mr. LUNGREN. Well, no, this—my question is——

Attorney General HOLDER. All right. Well, I will give you an answer. The answer——

Mr. LUNGREN. Well, that is all I am asking.

Attorney General HOLDER. The answer is that, with regard to the limited things that you have discussed, it might not have an impact on your constitutional right, but that some of the laws that we have challenged do have an impact on a person's ability to exercise that most fundamental of constitutional rights, and that is the right to vote.

Mr. LUNGREN. It is a fundamental right to petition the government to redress my grievances. Don't you think that is as important as, quote/unquote, the "right to vote"?

Attorney General HOLDER. I would agree with President Johnson, with what he said after the 1965 Voting Rights Act was passed, that voting is the most important right that we have as

American citizens. It is what distinguishes this country and makes it exceptional as compared to other Nations around the world.

Mr. LUNGREN. Okay. I also happen to think it is important that we have the opportunity to petition the government to redress the grievances. I think that is as fundamental a concept.

Attorney General HOLDER. But through the vote, I can change the government. I have that ability through my right to vote.

Mr. LUNGREN. Well, you can sue me in court. You can threaten to sue me in court. And as a proud individual American citizen, I suppose I have a right to at least talk to you about whether you are going to bring me before the court and bring the majesty of the government against me. And I would think that that is as important a right.

Now——

Attorney General HOLDER. Well, I certainly have that ability to talk to you. But if I disagree with you, at the end of the day, I have the ability to cast a ballot——

Mr. LUNGREN. But I can't even come in and talk to you unless I show a government-issued photo ID, is my point.

Now——

Attorney General HOLDER. No, that is not true in the government. That is not true at the Justice Department. If you were to show up at the Justice Department, somebody could vouch for you and you could come into the Department and we could have a very civil, I am sure, conversation.

Mr. LUNGREN. Is that right? Okay. I haven't tried that with TSA. That doesn't work very, very well in terms of being able to get on an airplane to fly back here to knock on your door to get to see you.

Attorney General HOLDER. Well, there are terrorists who are trying to bring down planes, as we have seen over the course of the last, I guess, 12 years.

Mr. LUNGREN. And there are people who cheat about voting when they don't have a right to vote.

Attorney General HOLDER. We do not see that to the proportions that people have said, you know, in an attempt to try to justify these photo ID laws. All of the, I think, empirical and neutral evidence shows that questions of vote fraud do not exist to the extent that people say that it does exist.

Mr. LUNGREN. So the Supreme Court was wrong in its decision in 2007 when it said that States have a legitimate interest in requiring photo IDs for voters even absent evidence of widespread fraud in order to inspire confidence in the electoral system? You disagree with the Court on that?

Attorney General HOLDER. You know, what is interesting there—and please expand——

Mr. SMITH. If you will, answer the question, and then we will move on.

Attorney General HOLDER. Sure.

The Supreme Court—the Crawford case is fundamentally different from that which we are talking about now. That was not a Section 5 case. Indiana is not covered by Section 5 of the Voting Rights Act.

And I would just—with all due respect, Attorney General Mukasey talked about the Crawford decision, the Indiana decision,

and this tells how it is different. He says that “the Court acknowledged the undeniable fact that voter ID laws can burden some citizens’ right to vote. It is important for States to implement and administer such laws in a way that minimizes that possibility.” He then said, “We will not hesitate to use the tools available to us, including the Voting Rights Act, if these laws, important though they may be, are used improperly to deny the right to vote.”

That is Michael Mukasey talking about the Indiana Crawford decision—Michael Mukasey, not Eric Holder, Michael Mukasey.

Mr. SMITH. Thank you, Mr. Lungren.

The Chairman from North Carolina, Mr. Watt, is recognized.

Mr. WATT. Thank you, Mr. Chairman.

Let me start by just expressing my disappointment that some of my colleagues are spending so much time advancing the notion that we should be disqualifying people from exercising the most basic right that they have in our democracy, the right to vote. And that this is the Judiciary Committee in which these arguments are being advanced is just disappointing to me.

Second, I want to applaud the Justice Department for some work that they are doing in my congressional district in particular, some very high-level cases fighting drug trafficking, protecting against child predators, a bunch of money we spent on the COPS program. And the most vigorous supporters of the COPS program are the most conservative sheriffs in my congressional district because they have been able to access funding to beef up their law enforcement capacity.

So I won’t go back to the voting rights part of this because I think I will get too emotional about that. Let me deal with the thing that is under my Subcommittee’s jurisdiction, the one that I am the Ranking Member on, and that is, we have made some efforts to try to do something about piracy. We were not successful legislatively, but the problem has not gone away.

A recent article in USA Today notes the proliferation of dangerous counterfeit products that pose safety concerns for the American public. Many of these products, including counterfeit pharmaceuticals, are available online and come from foreign sources.

In January of this year, the Department of Justice issued indictments against Megaupload, a foreign-based Web site that was charged with illegally infringing the copyrights of American businesses. And now I note that some group has—what is it called, Anonymous—unleashed a series of cyber attacks in the aftermath of the indictments against Megaupload. So now there is a connection between piracy on the one hand and cybersecurity on the other hand.

Can you just talk to us about the real threats that we have in that area, both on the piracy side of this issue and on the cybersecurity, and their connections just a little bit so we will have some background that at least informs the American people of how serious the problem is?

Attorney General HOLDER. I mean, the piracy issue has a number of dimensions to it. It is an economic issue, it is a jobs issue. When the theft of our intellectual property or the methods that we use to produce things is stolen by other organizations or by other countries, it has a direct impact on our economy.

There is also a safety factor. Health items, medicines that are produced in a way that are inconsistent with the great standards we have in the United States, then sold back to the United States or sold in other countries, can put people at risk. The whole question of various parts that can be used in airplanes. Other things that are not done in a way consistent with the way in which our intellectual property standards are done can have a negative impact on safety in that way.

So the piracy question is one that has economic consequences as well as safety consequences. If one looks at the whole cyber issues, again, these are national security issues. The ability of foreign countries or organizations to have an impact on our infrastructure, to use cyber tools to ferret out secret information from the United States, all puts our Nation at risk and is worthy of the attention of, I think, this Committee, this Congress, and the executive branch. And I would hope that we would be able to work together to come up with a way in which we could craft tools to deal with what is truly a 21st-century problem.

Mr. WATT. I thank you. And at the risk of not going over time like some of my colleagues have, I will just stop there, because any other question I could ask would be well over into the next person's time.

So I will yield back, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Watt.

The gentleman from California, Mr. Issa, is recognized.

Mr. ISSA. Thank you, Mr. Chairman.

Attorney General, December 14, 2010, Brian Terry was gunned down, and we began knowing more about Fast and Furious shortly thereafter. But you have said, people representing you have said repeatedly that you didn't know about it before then.

I have sent you a number of letters. Senator Grassley has sent you a number of letters. You mentioned in your opening statement the Speaker's letter. The Speaker did not limit the scope of the subpoenas you are under an obligation to respond to. He simply asked you for a response to two key areas. He did not revoke any subpoenas.

However, you implied that we were working together, when, in fact, since May 18th, nothing—nothing—has come from your department, not one shred of paper.

I want to ask you first of all today, have you and your attorneys produced internally the materials responsive to the subpoenas?

Attorney General HOLDER. We believe that we have responded to the subpoenas—

Mr. ISSA. No, Mr. Attorney General, you are not a good witness. A good witness answers the question asked. So let's go back again. Have you and your attorneys produced internally the materials responsible? In other words, have you taken the time to look up our subpoena and find out what material you have responsive to it? Or have you simply invented a privilege that doesn't exist?

Attorney General HOLDER. You are saying internally, have we—

Mr. ISSA. Internally, have you pulled all that information?

Attorney General HOLDER. We have looked at 240 custodians, we have processed millions of electronic records, and we have reviewed over 140,000 documents and produced to you about 7,600—

Mr. ISSA. So, 140,000 documents. How many documents are responsive but you are withholding at this time?

Attorney General HOLDER. Well, we have produced 7,600—

Mr. ISSA. Look, I don't want to hear about the 7,600.

Ms. JACKSON LEE. Mr. Chairman, I would beg to allow—

Mr. ISSA. The lady is out of order. Would the lady please suspend.

Ms. JACKSON LEE. Mr. Chairman, a—

Mr. ISSA. This is my time.

Ms. JACKSON LEE [continuing]. Parliamentary inquiry. Excuse me, Mr. Chairman. I would beg to allow the Attorney General to be able to finish his answer.

Mr. SMITH. The Attorney General will be allowed to answer the question.

Ms. JACKSON LEE. I thank the Chairman.

Mr. SMITH. And the Attorney General will have more time to do that if we don't have interruptions.

Mr. ISSA. And I would like my time reclaimed that was used up by the gentlelady.

Mr. SMITH. You will be given additional time—

Mr. WATT. Mr. Chairman, I suggest we take back the time that Mr. Lungren used, the 2 minutes over his time that he used, and—

Mr. ISSA. If you want to give me an additional 2 minutes, I am fine with it.

Mr. WATT. No, I am going to give you the 45 seconds I yielded back. But if we are going to apply a rule on one side of this aisle—

Mr. SMITH. Let's get back to—

Mr. WATT [continuing]. Then we ought to apply the rule consistently. That is the point I am trying to make.

Mr. SMITH. Let's get back to regular order. The gentleman from California has the time, and the Attorney General will be allowed to answer the question.

Mr. ISSA. Isn't it true, Mr. Attorney General, that you have not produced a log of materials withheld, even though our investigators have asked for it?

Attorney General HOLDER. I know that—I am not sure about that. I know that the—

Mr. ISSA. Okay. I am sure you didn't. So let's move on.

March 15, 2010, before Brian Terry was gunned down; April 19, 2010, before Brian Terry was gunned down; May 7, 2010, before Brian Terry was gunned down; May 17, 2010, before Brian Terry was gunned down; June 2, 2010, before Brian Terry was gunned down; July 2, the real date of our independence, 2010—obviously earlier—before Brian Terry was gunned down.

These wiretap applications which we did not subpoena but which were given to us by a furious group of whistleblowers that are tired of your stonewalling indicate that a number of key individuals in your Administration in fact were responsible for information contained in here that clearly shows that the tactics of Fast and Furi-

ous were known. They were known and are contained in these wiretaps.

I understand you have read these wiretaps since we brought them to your attention. Is that correct?

Attorney General HOLDER. I have read them. And I disagree with the conclusion you have just reached.

Mr. ISSA. So let me go through a very simple line of questioning, if I may, Mr. Attorney General.

James Cole, Deputy Attorney General, has written that the Department has a greater obligation than just checking the legal sufficiency in approving wiretap application. He thinks that applications also have to comply with DOJ policy. Is that correct?

Attorney General HOLDER. Applications have to agree with DOJ policy?

Mr. ISSA. That is what he said.

Attorney General HOLDER. Sure.

Mr. ISSA. Okay.

During a transcribed interview, Deputy Assistant Attorney General Jason Weinstein testified that senior officials approving the wiretap applications do not read the wiretap applications. Is this practice acceptable to you?

Attorney General HOLDER. They read summaries of the applications, and that is a process that has been used by this Administration and by all previous Administrations. It is the way in which the Office of Enforcement—

Mr. ISSA. And are you aware that Federal—

Attorney General HOLDER. Let me answer the question.

Mr. ISSA. Are Federal judges, to your knowledge—

Attorney General HOLDER. Can I answer my question, the question you have asked me?

Mr. ISSA. No. You have given me a sufficient answer considering the amount of questions I have and the amount of time I have.

You are okay with that practice? You have already answered that.

So would you agree that senior officials are responsible for documents they signed? I would assume the answer is yes.

So now let me ask you the question. Jason Weinstein, is he responsible for what is in these wiretaps?

Attorney General HOLDER. Is he responsible—

Mr. ISSA. He is a responsible officer under statute. Is he responsible for them even if he only read a summary?

Attorney General HOLDER. He did not create those affidavits. He did not create that material. He would have been a person, as a Deputy Assistant Attorney General, who would review the—

Mr. ISSA. So when Congress writes a statute requiring certain individuals be responsible, such as Jason Weinstein, Lanny Breuer, and yourself—

Mr. WATT. Regular order, Mr. Chairman. Regular order, Mr. Chairman.

Mr. ISSA. I am in the middle of a question.

Mr. SMITH. The Attorney General will be allowed to answer this question.

Mr. WATT. He hasn't asked the question, Mr. Chairman.

Mr. ISSA. I am halfway through it if you will quit interrupting.

If in fact the statute says they are responsible, and if in fact they are not read, then in fact——

Mr. WATT. Regular order, Mr. Chairman.

Mr. ISSA [continuing]. How are the American people to understand who is——

Mr. WATT. Regular order, Mr. Chairman.

Mr. ISSA [continuing]. Responsible for what is contained in these documents——

Mr. SMITH. The Attorney General will be allowed to answer this question.

Mr. ISSA. Because anyone of ordinary reading, including the ATF director, former director, Melson, anyone reading these, according to him, would be sick to their stomach because they would be immediately aware——

Mr. WATT. Does he have a question, Mr. Chairman?

Mr. ISSA. So who is responsible, Mr. Attorney General?

Attorney General HOLDER. All right. You have really conflated a bunch of things here.

The responsibility——

Mr. ISSA. You have delivered so little in——

Mr. WATT. Regular order now, Mr. Chairman. Will he be allowed to answer the question now?

Mr. SMITH. The Attorney General will be allowed to answer the question, but I would appreciate no more interruptions so the AG can answer the question.

Attorney General HOLDER. The responsibility about which you speak is, in fact, the responsibility of a Deputy Assistant Attorney General looking at those summaries to make sure that there is a basis to go into court and to ask that court to grant the wiretap based on a determination that a responsible official makes that probable cause exists to believe that a wire facility has been used in the commission of a crime. They do not look at the affidavits to see if, in fact—to review all that is engaged, all that is involved in the operation.

I have read those now. I have read those. I have read those; I have read them from Wide Receiver, as well. And I can say that what has happened in connection with Fast and Furious was done in the same way as wiretap applications were done under the previous Administration in Wide Receiver. I have looked at the summaries, and they acted in a way that is consistent with the practice and the responsibility that they have as defined by the statute.

Mr. SMITH. Thank you, Mr. Issa.

The gentlewoman from California, Ms. Lofgren, is recognized.

Mr. CONYERS. Mr. Chairman? Before——

Mr. SMITH. Does the Ranking Member wish to speak out of order?

Mr. CONYERS. If I may, please.

Mr. SMITH. The gentleman is recognized.

Mr. CONYERS. I think that the previous questioning was the first note of hostility and interruption of the witness that I think has been uncharacteristic of what we have been doing here so far today. And I would like to ask the Chair to admonish all the witnesses from here on out to please try to—all of the Members from here on out to please allow the witness to finish his answers.

Mr. ISSA. Would the gentleman yield?

Mr. CONYERS. Of course.

Mr. ISSA. You know, I appreciate that there was hostility between the Attorney General and myself.

Attorney General HOLDER. Just for the record——

Mr. ISSA. I would hope that the Ranking Member would understand——

Attorney General HOLDER [continuing]. There was no hostility on my part.

Mr. ISSA [continuing]. That, in fact, most of it was produced by the fact that I have a great many questions and a relatively little period of time in which to get answers, and that for a year and a half my Committee, through subpoena and interrogatories, has been attempting to get answers for which this witness has basically said he asserts a privilege without——

Mr. WATT. Parliamentary inquiry, Mr. Chairman.

Mr. SMITH. The gentleman from Michigan has the time.

Mr. WATT. Parliamentary inquiry, if the gentleman will yield.

Mr. CONYERS. I would like to yield to the Attorney General at this point, please.

Attorney General HOLDER. Well, with all due respect to Chairman Issa, he said there is hostility between us. I don't feel that, you know. I understand he is asking questions; I am trying to respond as best I can. I am not feeling hostile at all. I am pretty calm. I am okay. So, you know.

Mr. SMITH. Let me assure the gentleman from Michigan that the Attorney General will be allowed to answer future questions.

And the gentlewoman from California, Ms. Lofgren, is recognized for her questions.

Ms. LOFGREN. Thank you, Mr. Chairman.

And, Mr. Attorney General, thank you for being here with us.

When you were last before us in December, I asked you about a case involving the seizure of a domain name called Dajaz1.com for alleged copyright infringement. In December, you said you were unfamiliar with the case but that you would certainly look into it and get back to me. Since that hearing, not only have I not heard from you but new details have surfaced. And, therefore, I would like to revisit the issue.

To refresh everyone's memory, Dajaz1 is a blog. It is a blog dedicated to discussion of hip-hop music. And in November of 2010, the domain name of the site was seized as part of ICE's Operation In Our Sites and on an application by prosecutors in your department. After the government seized the domain name, the owners filed a request for the government to return it to them, and under the law the government had 90 days to initiate a full forfeiture proceeding against the domain or else return the property.

However, in this case, that deadline passed with no action. When the Web site's lawyer inquired with the Department's lawyers, he was told the government had filed an extension but under seal. The Web site was given no notice, and they were never given an opportunity to appear in court and to respond.

And I have talked to the representative of the Web site, and he assures me that he made diligent efforts to try and actually appear and make his case. When he asked for proof that the extension ex-



isted, your department's lawyers basically said that he would have to trust them.

Now, this happened two more times. Finally, in December of last year, more than a year after the original seizure, the government decided that it didn't, in fact, have probable cause to support the seizure and returned the domain.

Now, we now have unsealed court records, and we know that ICE and your department were actually waiting for the Recording Industry Association of America, which made an initial allegation of infringement, to provide detail, apparently proof. And I have reviewed the affidavit—which I would ask unanimous consent to put into the record—that in September of 2011, 10 months after the seizure, the ICE agent was still waiting for information from RIAA to give probable cause.

Now, here is the concern I have. Blogs are entitled to First Amendment protection. And I think it is the law that you have to have probable cause before you seize things. You can't seize things, have secret proceedings in the Federal court, and then a year later come up with probable cause.

So here is my question for you. It looks to me—and, I would say, another issue as to Web sites. I mean, this isn't like a car that is stolen and is going to disappear, or a bag of cocaine. It is a Web site, so the evidence can be completely preserved even without seizures. So I think the issue of seizure does need to be visited with us.

But I want to know what the Department's posture is if an ICE agent is behaving recklessly in an investigation, as it seems to be in this case. Don't the prosecutors in your department have an obligation to reject faulty affidavits? Do you think that the ex parte process that was included here is proper and consistent with the First and Fifth Amendments, to seize a domain name that has First Amendment protection for a year without any opportunity for the owner to be heard?

Attorney General HOLDER. As with all domains that are seized or were seized, I guess, in Operation In Our Sites, I believe that the seizure that you reference was conducted pursuant to a lawful court order, and the procedures that the Department followed in that case, including the ex parte procedures you mentioned, were consistent with the statutes that authorize the seizure and forfeiture and also consistent with due process protections that those statutes provide.

Ms. LOFGREN. So you are suggesting that the representation, which turned out to be false, under the initial affidavits—which I again would ask to be made a part of the record—those false affidavits were sufficient to have ex parte communications and secret proceedings in the Federal court to suppress this speech for over a year?

Attorney General HOLDER. No, I mean, clearly, if material was submitted that was false in an underlying affidavit—

Ms. LOFGREN. Or at least misleading.

Attorney General HOLDER [continuing]. Or misleading, that would not be an appropriate basis for action on behalf of the government.

The seizure and forfeiture of property is a really powerful tool that the government has, and it has to be used judiciously. And to the extent that there are problems along the lines that you have described, that would be of great concern. We should not be in court trying to do the kinds of things that I have described here—domain name seizures—if the underlying material is not consistent with the facts. That is something we shouldn't be doing.

Ms. LOFGREN. Well, as I say, last December you were going to get back to me, and I know you have many things to do. But I would appreciate, and I will ask again, if I could get a report on this specific case. And, certainly, as my colleague, Mr. Watt, has mentioned, there are important enforcement issues that need to go on. I do not disagree with that. But we also have to be very careful about the First Amendment and the Fifth Amendment, and I hope that you do not disagree with that.

Mr. SMITH. All right. Thank you, Ms. Lofgren.

And, without objection, the documents that the gentlewoman referred to will be made a part of the record.

[The information referred to follows:]

1 ANDRÉ BIROTTE JR.  
 United States Attorney  
 2 ROBERT E. DUGDALE  
 Assistant United States Attorney  
 3 Chief, Criminal Division  
 STEVEN R. WELK (CBN 149883)  
 4 Assistant United States Attorney  
 Chief, Asset Forfeiture Section  
 5 Federal Courthouse, 14th Floor  
 312 No. Spring Street  
 6 Los Angeles, California 90012  
 Telephone: (213) 894-6166  
 7 Facsimile: (213) 894-7177  
 Email: [Steven.Welk@usdoj.gov](mailto:Steven.Welk@usdoj.gov)

8 Attorneys for Plaintiff  
 9 United States of America

2011 SEP -8 PM 3:33  
 DISTRICT COURT  
 CENTRAL DISTRICT OF CALIF.  
 LOS ANGELES

10 UNITED STATES DISTRICT COURT  
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 12 WESTERN DIVISION

13	IN THE MATTER OF THE SEIZURE)	CR MISC. NO. 11-00110
14	OF THE INTERNET DOMAIN NAME )	
14	"DAJAZ1.COM"	EX PARTE APPLICATION FOR ORDER
15	)	EXTENDING FOR SIXTY DAYS THE
15	)	DEADLINE FOR FILING COMPLAINT
16	)	FOR FORFEITURE; MEMORANDUM OF
16	)	POINTS AND AUTHORITIES;
17	)	DECLARATION OF SPECIAL AGENT
17	)	ANDREW T. REYNOLDS
18	)	[UNDER SEAL]

19  
 20 The United States of America ("the government") hereby  
 21 applies to this court for an order extending for sixty days the  
 22 time within which to file a civil forfeiture complaint against  
 23 the asset listed above (the "seized asset"), which was seized on  
 24 November 24, 2010. This application is made pursuant to the  
 25 Court's inherent authority to control its dockets and 18 U.S.C.  
 26 § 983.  
 27  
 28


1 As explained below, there is an on-going criminal  
 2 investigation concerning the above-listed asset that arises out  
 3 of the same facts which supported the seizure of the asset. See  
 4 Reynolds Decl. There is currently a deadline of September 13,  
 5 2011 for the filing of a civil forfeiture complaint against the  
 6 asset.<sup>1</sup> However, the government believes that the filing of a  
 7 complaint while the criminal investigation is on-going will have  
 8 an adverse effect on the investigation. The government requests  
 9 a sixty-day extension of the filing deadline (to November 11,  
 10 2011) in order to protect the criminal investigation.

11 This application is made ex parte and under seal so as not  
 12 to expose the existence and scope of the criminal investigation,  
 13 which would likely be seriously jeopardized by the filing of a  
 14 forfeiture complaint.

15 DATED: September 8, 2011

Respectfully submitted,

16 ANDRÉ BIROTTE JR.  
 17 United States Attorney  
 18 ROBERT E. DUGDALE  
 19 Assistant United States Attorney  
 20 Chief, Criminal Division

21   
 22 STEVEN R. WELK  
 23 Assistant United States Attorney  
 24 Chief, Asset Forfeiture Section

25 Attorneys for Plaintiff  
 26 United States of America

27 <sup>1</sup> On July 18, 2011, the Court granted the government's ex  
 28 parte application to extend the time within which to file a civil  
 forfeiture complaint from July 15, 2011 to September 13, 2011.  
See, In the Matter of the Seizure of the Internet Domain Name  
"DAJAZ1.com", CR Misc. No. 11-00110.

## MEMORANDUM OF POINTS AND AUTHORITIES

## I.

INTRODUCTION AND STATEMENT OF FACTS

By this application, the United States of America ("the government") requests a sixty (60) day extension of the deadline to file a judicial complaint for forfeiture against the domain name "DAJAZ1.com," which was seized pursuant to a federal seizure warrant on November 24, 2010 in connection with what is believed to have been serious and repeated violations of federal law relating to the distribution of copyrighted intellectual property (the "seized asset" or "domain name").

Following the seizure of the domain name by agents of Immigration and Customs Enforcement ("ICE"), the Department of Homeland Security, Customs and Border Protection ("CBP") initiated administrative forfeiture proceedings against it. The owner of the domain name, Andre Nasib, submitted a claim in the administrative proceedings, requesting that the matter be referred to the U.S. Attorney's Office in this district (the "USAO") for judicial forfeiture proceedings. In the meantime, ICE continued its investigation.

The USAO has determined that further criminal investigation is appropriate and so the investigation is still on-going. The current deadline for the filing of a civil forfeiture complaint is September 13, 2011. The governing statute, discussed below, authorizes the court to extend the filing deadline where the filing of the complaint would have an adverse effect on a related criminal investigation. The requested deadline would be November

1 11, 2011.

2 II.

3 ARGUMENT

4 There are two potential grounds for granting the relief  
5 requested by the government here. First, the Court possesses the  
6 inherent authority to extend filing deadlines because it has the  
7 power to control the disposition of the causes on its docket with  
8 economy of time and effort for itself, counsel and litigants.  
9 See, e.g., Landis v. North American Co., 299 U.S. 248, 254, 57 S.  
10 Ct. 163, 81 L.Ed 153 (1936). In addition, 18 U.S.C. § 983(a),  
11 which governs the procedural aspects of federal administrative  
12 and judicial civil forfeiture proceedings, provides specific  
13 authority for the extension of a deadline for the filing of a  
14 judicial civil forfeiture complaint. Section 983(a)(3)(A)  
15 provides that

16 Not later than 90 days after [an administrative] claim  
17 has been filed, the Government shall file a complaint  
18 for forfeiture[,] . . . except that a court in the  
19 district in which the complaint will be filed may  
20 extend the period for filing a complaint for good cause  
21 shown or upon agreement of the parties.

22 Generally speaking, where the government seizes property for  
23 forfeiture, the seizing agency is required to send notice of the  
24 seizure and the agency's intent to commence administrative (*i.e.*,  
25 non-judicial) forfeiture proceedings within 60 days. An owner of  
26 the seized property who wishes to contest the forfeiture may  
27 submit an administrative claim to the agency, which filing has  
28 the effect of suspending the administrative proceedings so that  
the matter may be referred to the USAO of the district in which  
the seizure occurred. The quoted provision above requires the

1 government to file a complaint within 90 days of the submission  
2 of the administrative claim.

3 Here, claimant Nasib submitted an administrative claim on  
4 February 15, 2011, making the government's complaint due on May  
5 16, 2011. However, the filing of a complaint would require the  
6 government to reveal, not only in the complaint itself but in the  
7 disclosures that necessarily would follow, information concerning  
8 the on-going criminal investigation. The disclosure of that  
9 information would likely have an adverse effect on the  
10 investigation, if for no other reason than it would indicate the  
11 direction and scope of the investigation.

12 Under the circumstances, good cause exists for the requested  
13 sixty day extension. While "good cause" is not defined in § 983  
14 (a)(3)(A), another extension provision in § 983 (authorizing  
15 extension of the administrative notice deadline) includes  
16 specific examples of proper bases for an extension, including  
17 situations where sending notice to the owner "may have an adverse  
18 result, including . . . seriously jeopardizing an investigation .  
19 . . ." § 983(a)(1)(D)(v).<sup>2</sup>

20  
21 <sup>2</sup>18 U.S.C. § 983(a)(1)(C) and (D) provide:

22 (C) Upon motion by the Government, a court may extend the  
23 period for sending notice under subparagraph (A) for a  
24 period not to exceed 60 days, which period may be further  
25 extended by the court for 60-day periods, as necessary, if  
26 the court determines, based on a written certification of a  
27 supervisory official in the headquarters office of the  
28 seizing agency, that the conditions in subparagraph (D) are  
present.

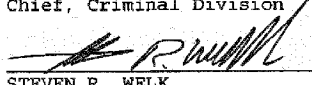
(D) The period for sending notice under this paragraph may  
be extended only if there is reason to believe that notice  
may have an adverse result, including-

1 For the foregoing reasons, the government requests that the  
 2 court grant a sixty day extension (from September 13, 2011 to  
 3 November 11, 2011) of the time within which the government is  
 4 required to file a forfeiture complaint against the seized asset.

5 DATED: September 8, 2011

Respectfully submitted,

6 ANDRÉ BIROTTE JR.  
 United States Attorney  
 7 ROBERT E. DUGDALE  
 Assistant United States Attorney  
 8 Chief, Criminal Division

9   
 10 STEVEN R. WELK  
 Assistant United States Attorney  
 11 Chief, Asset Forfeiture Section

12 Attorneys for Plaintiff  
 13 United States of America

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- 
- 23 (i) endangering the life or physical safety of an  
 individual;  
 24 (ii) flight from prosecution;  
 25 (iii) destruction of or tampering with evidence;  
 26 (iv) intimidation of potential witnesses; or  
 27 (v) otherwise seriously jeopardizing an investigation  
 28 or unduly delaying a trial.



**DECLARATION OF SPECIAL AGENT ANDREW T. REYNOLDS**

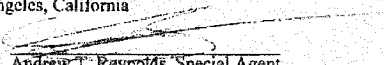
I, Andrew T. Reynolds, declare:

1. I am a Special Agent with the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HSI) and am currently assigned to the Office of the Special Agent in Charge, Los Angeles (SAC/LA) Intellectual Property Rights group.
2. This declaration is submitted in support of the Government's ex parte application for a court ordered extension of the 60 day notice period, as required by 18 U.S.C. § 983(a)(1)(A)(i). The facts stated below are within my personal knowledge and I believe all the information to be true. This affidavit does not purport to set forth all of my knowledge of, or investigation into, this matter.
3. HSI initiated an investigation into websites that allow the unauthorized downloading of copyrighted music and motion picture files by members of the general public. The domain name "DAJAZ1.com" was seized pursuant to a federal seizure warrant on or about November 24, 2010 in connection with what the investigation revealed to be serious and repeated violations of federal law relating to the distribution of copyrighted intellectual property.
4. HSI continues its investigation in locating records of material, purported to be infringing and removed due to its rights-holder request, connected to DAJAZ1.com; identifying revenue associated with the DAJAZ1.com website; identifying DAJAZ1.com administrator(s), associates and business partners; and locating and evaluating material being distributed by DAJAZ1.com associates and affiliates.
5. A sampling of content obtained from the DAJAZ1.com website and its purported affiliate websites was submitted for rights holder evaluation and has yet to be returned to HSI, SAC/LA. Additionally, a representative with the Recording Industry Association of America (RIAA) has stated that he will provide a very comprehensive statement to ICE's and CBP's outstanding questions, in coordination with corresponding rights holders, which will be forthcoming in approximately 30 days.

6. The filing of a civil forfeiture complaint while the criminal investigation is on-going will have an adverse effect on the investigation. Persons being investigated would learn the nature, scope, and history of the Government's investigation. Individuals connected to this investigation could flee, destroy evidence of their criminal activity, dissipate assets, or otherwise obstruct the purposes of this on-going investigation. Moreover, the disclosures required by the initiation of a civil forfeiture action would make it difficult to continue the covert elements of the investigation.

7. I declare under penalty of perjury under the laws of the U.S. that the foregoing is true and correct.

Executed on September 07, 2011, at Los Angeles, California

  
Andrew T. Reynolds, Special Agent  
Homeland Security Investigations  
Immigration and Customs Enforcement

# United States District Court

ORIGINAL

CENTRAL DISTRICT OF CALIFORNIA

In the Matter of the Seizure of  
(Address or brief description of property or premises to be seized)

THE FOLLOWING DOMAIN NAMES:

RAPGODFATHERS.COM,  
TORRENT-FINDER.COM,  
RMX4U.COM,  
DAJAZI.COM, and  
ONSMASH.COM

APPLICATION AND AFFIDAVIT  
FOR SEIZURE WARRANT

CASE NUMBER 10-2822M

I, ANDREW REYNOLDS, being duly sworn depose and say:

I am a Special Agent with the Homeland Security Investigations, Immigration and Customs Enforcement and have reason to believe that in the CENTRAL District of CALIFORNIA there is now concealed a certain person or property, namely the following Internet domain names: (describe the person or property to be seized)

RAPGODFATHERS.COM, registered with Enom, Inc., which has its headquarters at 15801 NE 24th Street, Bellevue, Washington 98008;

TORRENT-FINDER.COM registered with Blue Razor Domains, Inc., which has its headquarters at 14455 North Hayden Road, Suite 226, Scottsdale, Arizona 85260;

RMX4U.COM registered with Enom, Inc. which has its headquarters at 15801 NE 24th Street, Bellevue, Washington 98008;

DAJAZI.COM registered with Fast Domain, Inc., which has its headquarters at 1958 South 950 East, Provo, Utah 84606; and

ONSMASH.COM registered with Godaddy.com, Inc., which has its headquarters at 14455 N. Hayden Road, Suite 219, Scottsdale, Arizona 85260.

which is (state one or more bases for seizure under United States Code)

subject to seizure and civil forfeiture under 18 U.S.C. §§ 2323(a)(1)(B) and § 981(b); concerning a violation of Title 17, United States Code, Section 506(a) and Title 18, United States Code, Section 2319. The facts to support a finding of Probable Cause for issuance of a Seizure Warrant are as follows:

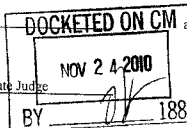
Continued on the attached sheet and made a part hereof. ☒ Yes ☐ No

Signature of Affiant

ANDREW T. REYNOLDS  
SPECIAL AGENT  
IMMIGRATION AND CUSTOMS  
ENFORCEMENT, HOMELAND  
SECURITY INVESTIGATIONS

Sworn to before me, and subscribed in my presence

11/17/10  
Date



Los Angeles, California  
City and State

Hon. Margaret A. Nagle, U.S. Magistrate Judge  
Name and Title of Judicial Officer

Margaret A. Nagle  
Signature of Judicial Officer

A F F I D A V I T

I, Andrew Reynolds, being duly sworn, hereby state as follows:

I.

INTRODUCTION

1. I am employed as a Special Agent ("SA") with the Department of Homeland Security ("DHS"), United States Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations ("HSI") and have been so employed since August 2009. I am currently assigned to the Office of the Special Agent In Charge, Los Angeles ("SAC/LA") Intellectual Property Rights ("IPR") group. While a SA with ICE HSI, I have investigated and assisted other agents in investigating numerous investigations involving violations regarding fraud and Intellectual Property Rights (IPR). Prior to my employment with ICE HSI as a SA, I served as a Student Trainee (Criminal Investigator) with ICE for approximately one year at the SAC/LA Border Enforcement Security Task Force (BEST), SAC/LA Narcotics and Smuggling groups. My duties included assisting agents in investigating narcotics trafficking and human smuggling violations. Furthermore as an ICE student trainee, I participated and assisted other state and federal agencies in a wide variety of investigations.

II.

PURPOSE OF AFFIDAVIT

2. I make this affidavit in support of the government's application, pursuant to Title 18, United States Code, Sections 2323(a)(1)(A)-(B) and 981, for warrants to seize the following property (in this case, website domains):

- a. The domain name WWW.RAPGODFATHERS.COM, registered with Enom, Inc., which has its headquarters at 15801 NE 24th Street, Bellevue, Washington 98008;
- b. The domain name WWW.TORRENT-FINDER.COM registered with Blue Razor Domains, Inc., which has its headquarters at 14455 North Hayden Road, Suite 226, Scottsdale, Arizona 85260;
- c. The domain name WWW.RMX4U.COM, registered with Enom, Inc. which has its headquarters at 15801 NE 24th Street, Bellevue, Washington 98008;
- d. The domain name WWW.DAJAZ1.COM, registered with Fast Domain, Inc., which has its headquarters at 1958 South 950 East, Provo, Utah 84606; and
- e. The domain name WWW.ONSMASH.COM, registered with Godaddy.com, Inc., which has its headquarters at 14455 N. Hayden Road, Suite 219, Scottsdale, Arizona 85260

(collectively referred to as "THE SUBJECT DOMAIN NAMES").

3. The procedure by which the government will seize the SUBJECT DOMAIN NAMES is described in Attachment A hereto and below.

4. As set forth below, there is probable cause to believe that the SUBJECT DOMAIN NAMES are property used, or intended to be used to commit or facilitate criminal copyright infringement, in violation of 18 U.S.C. § 2319 and 17 U.S.C. § 506(a), and are subject to seizure and forfeiture pursuant to 18 U.S.C. § 2323(a).

5. The facts set forth in this affidavit are based upon my personal observations, my training and experience, and information and reports obtained from other agents and individuals. This affidavit is intended to show merely that there is probable cause for the requested seizure warrants and does not purport to set forth all of my knowledge of or investigation into this matter.

### III.

#### TECHNICAL BACKGROUND

6. Based on my training and experience and information learned from others, I am familiar with the following terms:

a. Internet Protocol Address: An Internet Protocol address (IP address) is a unique numeric address used by computers on the Internet. An IP Address is a series of four numbers, each in the range 0-255, separated by periods (e.g., 121.56.97.178). Every computer attached to the Internet must be assigned an IP address so that Internet traffic sent from and

directed to that computer may be directed properly from its source to its destination. An IP address acts much like a home or business street address -- it enables computers connected to the Internet to properly route traffic to each other. The assignment of IP addresses to computers connected to the Internet is controlled by ISPs.

b. Domain Name: A domain name is a simple, easy-to-remember way for humans to identify computers on the Internet, using a series of characters (e.g., letters, numbers, or other characters) that correspond with a particular IP address. For example, "usdoj.gov" and "cnn.com" are domain names.

c. Domain Name System: The domain name system ("DNS") is, among other things, a hierarchical convention for domain names. Domain names are composed of one or more parts, or "labels," that are delimited by periods, such as "www.example.com." The hierarchy of domains descends from right to left; each label to the left specifies a subdivision, or subdomain, of the domain on the right. The right-most label conveys the "top-level" domain. For example, the domain name "www.example.com" means that the computer assigned that name is in the ".com" top-level domain, and the "example" second-level domain, and that same computer is the web server.

d. Domain Name Servers: DNS servers are computers connected to the Internet that convert, or resolve, domain names into Internet Protocol ("IP") addresses. For each top-level domain (such as ".com"), there is a single company, called a "registry," that determines which second-level domain resolves to which IP address. For example, the registry for the ".com" and ".net" top-level domains is VeriSign, Inc., which has its headquarters at 21355 Ridgetop Circle, Dulles, Virginia.

e. Registrar & Registrant: Domain names may be purchased through a registrar, which acts as the intermediary between the registry and the purchasers of the domain name. The individual or business that purchases, or registers, a domain name is called a "registrant." Registrants control the IP address, and thus the computer, to which their domain name resolves. Thus, a registrant may easily move a domain name to another computer anywhere in the world. Typically a registrar will provide a registrant with the ability to change the IP address a particular IP address resolves through an online interface. Registrars typically maintain customer and billing information about the registrants who used their domain name registration services.



f. Internet Service Provider ("ISP"): Many individuals and businesses obtain access to the Internet through businesses known as Internet Service Providers ("ISPs"). ISPs provide their customers with access to the Internet using telephone or other telecommunications lines; provide Internet e-mail accounts that allow users to communicate with other Internet users by sending and receiving electronic messages through the ISP's servers; remotely store electronic files on their customers' behalf; and may provide other services unique to each particular ISP. ISPs maintain records pertaining to the individuals or businesses that have subscriber accounts with them. Those records often include identifying and billing information, account access information in the form of log files, e-mail transaction information, posting information, account application information, and other information both in computer data and written record format.

g. WhoIs query: A standardized query or method for identifying a particular computer on the Internet by obtaining information from a registry database that identifies the registrar for a particular IP address. For example, if you enter a domain name such as "microsoft.com," Whois will return the name and address of the domain's owner (in that case, Microsoft

Corporation). A "Whois" query can be found on numerous different websites, including [www.domaintools.com](http://www.domaintools.com).

h. Cam: The term "Cam" is a term used to describe multimedia video and audio content which is illegally recorded in a cinema or theater where films are shown. After the content is illegally recorded, the multimedia video and audio is then enhanced in preparation for illegal distribution.

i. Screener: A screener, also known as a work print, normally refers to a Digital Video Disc ("DVD") containing a full length motion picture that is specifically prepared for and sent to movie critics and censors for reviewing purposes before that content is available to the public. It is common practice for "screener" footage to contain watermarks or subtitles which reflect the copyright holder's ownership over the material. Screeners, however, are sometimes illegally obtained and copied or "downloaded" to digital format to allow for illegal distribution. When diverted before or during a motion picture's theatrical release, a screener DVD provides a significantly higher quality of pirated motion picture content compared to content that is obtained through the use of a camcorder in a movie theater. This level of quality is normally not available until the official release date of the motion picture's DVD,

which normally occurs between 60 days and six months after theatrical release.

j. Internet Forum: An "Internet forum," "message board," or "forum" is an online discussion webpage where people can hold conversations in the form of posted messages. They differ from chat rooms in that messages are stored on the server or computer of the website that displays them. Depending on the access level of a user and/or the forum set-up, a posted message might need to be approved by an administrator before it becomes visible to the general public. It is common for forums to require that the general public register with the website in order to become a forum "user" who is able to post messages in the forum. Forums have their own language; e.g. a single conversation is called a "thread." A forum is hierarchical or tree-like in structure: forum - subforum - topic - thread - reply.

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IV.

SUMMARY OF INVESTIGATION AND EFFECT OF INTERNET PIRACY

7. This application arises from an ongoing nation-wide investigation into websites that illegally distribute copyright-protected content, particularly movies, songs, albums and computer software, over the Internet.

8. I know from my participation in the investigation that the Motion Picture Association of America (MPAA) is an industry trade group that represents various major United States motion picture studios that own the rights to the movies that are discussed in this affidavit, and provides investigative analysis and evaluation services for products owned and maintained by their member representatives. According to statistics compiled by the MPAA for 2008, the motion picture and television production industries (the "industry") employ approximately 2.4 million people and paid over \$140 billion in total wages. Over 450,000 of those jobs are in related businesses that distribute motion pictures and television shows to consumers. The industry employs more than 95,000 businesses in all 50 states, businesses such as caterers, dry cleaners, florists, hardware and lumber suppliers, and retailers, to name a few. Approximately \$15.7 billion in federal taxes were collected in 2008 as a result of the industry's activities.

9. Based on my participation in the investigation, I have learned that there is a "domino effect" to online piracy. Online piracy deprives the industry of revenue derived from the "downstream" distribution of movies, software, music and television shows after those products are released in theaters or on television. Downstream revenue funds are used, among other things, to further investment in the industry and to fund pension and healthcare plans for unionized workers in the industry. According to the MPAA, 75% of a motion picture's revenue comes from markets after the initial theatrical release, and more than 50% of scripted television revenues are generated after the first run on television. Domestic industries lose approximately \$25.6 billion a year in revenue to piracy, the domestic economy loses nearly 375,000 jobs either directly or indirectly related to online piracy, and American workers lose more than \$16 billion in annual earnings as a result of copyright infringement.

10. As a result of statistics and yearly reports from the International Federation of the Phonographic Industry (IFPI)<sup>1</sup>, I

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<sup>1</sup>The IFPI represents the interests of international musical artists and recording industry ("member") companies and firms. The IFPI's mission is to promote the value of recorded music by safeguarding the rights of record producers through international anti-piracy coordination, to include the submission of cease and desist (C & D) requests to violators and involved third parties.

have also learned that in 2008, the digital music business internationally grew by approximately 25 percent to \$3.7 billion. Digital platforms now account for about 20 percent of recorded music sales up from 15 percent in 2007. The recorded music industry generates a greater proportion of its revenues through digital sales than the film industry by a five to one ratio. The United States is the world leader in digital music sales, accounting for some 50 percent of the global digital music market value. Single track downloads crossed the one billion mark for the first time in 2008, totaling 1.1 billion; and digital album sales totaled 66 million. IFPI estimates that more than 40 billion files were illegally file-shared in 2008, giving a piracy rate of around 95 percent.

11. Many of the websites that are involved in the illegal distribution of copyright-protected content over the Internet may be divided into three classes: "linking" websites, "cyberlocker" websites and "Bit torrent" websites.

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12. I know from my participation in the investigation that "linking" websites generally collect and catalog links<sup>2</sup> to files on third party websites that contain illegal copies of copyrighted content, including movies, television shows, software and music.<sup>3</sup> Linking websites organize these links by, for example, movie title or genre, to make them easily accessible. Users simply click on a link to begin the process of downloading or streaming (real-time viewing/listening) to their own computer an illegal copy of a movie, television show, software program or music file from the third party website at which it is stored. Linking websites are popular because they allow users to quickly browse content and locate illegal copies that would otherwise be more difficult to find through manual searches of the Internet.

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<sup>2</sup> For purposes of this affidavit, a "link" is code which specifies a particular webpage or file on the Internet. If clicked on by a user, a link can, for example, bring up the relevant web page in an Internet browser or run a program. For example, "http://movies.nytimes.com/2010/06/18/movies/18toy.html?scp=1&sq=toy%20story%203&st=cse" is a link to a webpage containing the New York Times' review of the movie "Toy Story 3." A "link" may also be referred to as a "Uniform Resource Locator" or "URL."

<sup>3</sup> I know from my participation in the investigation that illegal copies of motion pictures are frequently made by surreptitiously videotaping movies while they are being shown in theaters. These infringing copies are then quickly distributed over the Internet, sometimes within hours of a movie's initial release. Illegal copies of motion pictures are also made by illegally copying authorized DVD's of those movies.

Linking websites also often allow users to post links to infringing content. Some linking websites are "forum-based," meaning that the links to pirated content are contained in the website's Internet forum.

13. I also know from my participation in the investigation that the third party websites on which the illegal copies of movies and television shows are stored for later downloading or streaming are sometimes referred to as "cyberlocker" websites. Cyberlockers allow users to upload infringing content and often feature high-capacity data connections that allow users conveniently to download or stream that content relatively quickly. Cyberlocker websites also may allow users to search for and download specific content directly without first going through a linking website. Finally, a cyberlocker may use different servers to host its webpage, receive uploads, and handle downloading or streaming content. Each computer server connected to the Internet is identified by one or more IP addresses.

14. I also know from my participation in the investigation that the websites through which illegal copies of movies and television shows are shared and transferred are known as "Bit torrent" websites. A Bit torrent (referred to in short as "torrent" or "torrent file") is a files distribution system used



for transferring files across a network of people. As you download a file to your computer, Bit torrent makes what you download available for other people to download straight from your computer; when multiple people are downloading the same file at the same time, they provide (or "upload") pieces of the file to each other. Bit torrent pieces together the file you are downloading, so it does not matter whether you have the first part of the file or the last part of the file, or in what order you download it. As you continue to retrieve the file, Bit torrent also prioritizes how to connect people to one another for file sharing based on the pieces of the file they have obtained. For example, a person with 98 percent of the file done is directed to the people with the 2 percent of the file they still need. Bit torrent websites allow users to upload infringing content and often feature high-capacity files while allowing users conveniently to download or stream that content relatively quickly from large numbers of other people also downloading the file. Bit torrent websites also may allow users to search for and download Bit torrent files through a linking site. Finally, a Bit torrent website may use different servers to host its webpage, receive uploads, and handle Bit torrent content. Each computer server connected to the Internet is identified by one or more IP addresses.

15. This investigation has identified five linking, cyberlocker or Bit torrent websites that are among the most popular such websites on the Internet for distributing illegal copies of movies, television shows, software and music files. These websites are: (1) RapGodFathers.com (hereinafter "RAPGODFATHERS.COM"); (2) torrent-finder.com (hereinafter "TORRENT-FINDER.COM", (3) RMX4U.COM (hereinafter "RMX4U.COM"), (4) dajaz1.com (hereinafter "DAJAZ1.COM"), and (5) onsmash.com (hereinafter "ONSMASH.COM"). Based on the facts set forth below, I believe that each of these websites are actively facilitating the distribution of pirated content. Based on the investigation, it appears that website administrators and/or representatives from each of these five websites supply access to, and advertising for, the pirated content via their websites and/or provide access for any Internet users to download such pirated content.

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## v.

PROBABLE CAUSE FOR SEIZURE AND FORFEITURE

16. During the course of this investigation, I have reviewed the below linking sites, Bit torrent sites cyberlockers using computers located in Long Beach, in Los Angeles County, California, and have used those websites to download multiple illegal copies of copyrighted motion pictures, software and music, as described below.

The RAPGODFATHERS.COM WebsiteA. General Description

17. Based on my review of webpages that are available at the RAPGODFATHERS.COM website, I have learned the following:

a. RAPGODFATHERS.COM is a forum-based "linking" website. According to the site's "Terms of Service" page:

The service is offered to you conditioned on your acceptance without modification of the terms, conditions, and notices contained herein. By visiting and using RapGodFathers.com or any of its affiliate sites and services, you are acknowledging your full compliance to the terms listed here. . . .

RapGodFathers.com is based on its links to third party sites. The linked sites are not under the control of RapGodFathers.com and RapGodFathers.com is not responsible for the content of any linked sites or links contained in a linked site. . . .The links are gathered automatically . . . .

We do not manually check every file for copyright issues, and therefore we do not assume any responsibility or liability for the contents of the

file, from completeness to legalities including, but not limited to copyright issues. However, RapGodFathers.com is sensitive to the rights of copyright owners. You may not use this site to distribute or download any copyrighted material in which you do not have the legal rights to do so. RapGodFathers.com user agrees that RapGodFathers.com is hereby absolved from any and all liabilities. Losses, costs and claims, including attorney's fees asserted against RapGodFathers.com, its agents, officers, employees, or associates, that may arise or result from any service provided, performed, be agreed to be performed by RapGodFathers.com.

b. Based on my participation in the investigation and my discussion with MPAA and RIAA representatives, I know that despite the disclaimer displayed in its "Terms of Service" page, the webpage still lists terms which indicate the production and distribution of pirated content.

c. On September 30, 2010 and October 5, 2010, I accessed the homepage of RAPGODFATHERS.COM and learned that the website contained several sections including: "News," "Downloads," "Singles," "RGF TV," and "Forum." As set forth in further detail below, by further searching this website, it appeared to me that the website contained links to thousands of songs and hundreds of movies.

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<sup>4</sup> "RGF" is apparently an acronym for RapGodFathers.

d. RAPGODFATHERS.COM also included an Internet forum, located at [WWW.RAPGODFATHERS.COM/FORUM](http://WWW.RAPGODFATHERS.COM/FORUM), which consisted of several subforums, topics and descriptions including the following:

Download Zone

- The Studio: Get your latest music downloads or share your links with the community.
- Other Genres: Post your pop, rock, reggae, techno or any other types of music here.
- The Lab: Download Applications, Games, TV Shows, Books, etc.
- Movie Downloads
- Champagne Room: The champagne room, otherwise known as the XXX porn room / picture room (18+ ONLY).
- Request Spot: Drop by to request anything you want. Minimum 50 posts required.

e. Upon further examination of the "Download Zone" subforum, I clicked on the link "The Lab," which consisted of the following topics and descriptions:

- Applications: Get all your applications **bootlegs** here. (Emphasis added.)
- Games: Your source for games, of course all **bootlegged**. (Emphasis added.)
- TV

f. Based on my training and experience, I know that the above-referenced terms "bootlegs" and "bootlegged" refer to pirated material, i.e. illegally copied multimedia that is copyrighted. Based on my training and experience, only website administrators and other Internet users with administrative control of the RAPGODFATHERS.COM website could have created these subsections and description titles listed on the website.

g. Advertisements appear on various portions of the website, including on pages that are accessed, as pop-up and banner advertisements. I know from my participation in the investigation that companies which place advertisements on a website typically pay a fee to the website's owner(s) based on, among other things, the number of website users who view the advertisement, as well as the number of times users click on the advertisement. Both of these figures depend on, among other things, the website's popularity and its overall number of users.

**B. Pirated Songs via RAPGODFATHERS.COM**

18. Upon further examination of the "Downloads" section of the homepage, it contained a directory of copyrighted music albums which users could browse and download, listed in date order when they were uploaded to the website. (The most recent ones are first on the list.) For example, on November 9, 2010, the first five album titles listed on the RAPGODFATHERS.COM

website were: (1) Nelly - "5.0," (2) Kanye West - "My Beautiful Dark Twisted Fantasy," (3) Rihanna - "Loud," (4) Trey Songz - "Trigga Trey," and (5) Lil B - "Red Flame."

a. Each album selection was linked to a corresponding web page which contained the album's title, a photograph of the album cover or artist, and a track list of all the song titles contained in the album. Below the track list was a download link that transferred the user to a cyberlocker website where the user could illegally download the corresponding album. The cyberlocker listed the size of the file, the user who uploaded the file to the cyberlocker, the date the file was uploaded, the number of times the file was downloaded by others, and a description of the file. On November 14, 2010, the directory contained in the "Downloads" section of RAPGODFATHERS.COM was 93 pages long, with 50 links per page, meaning that the website appeared to contain more than 4,600 albums available for download in its directory.

b. Based on my review of public records listings, as well as my conversations with representatives of the Recording Industry Association of America (RIAA)<sup>5</sup> and my review of public

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<sup>5</sup> The RIAA represents large companies that oversee the recording and distribution of music in the US. The RIAA protects the copyrighted content of the above-referenced music recording and distribution share-holders by working with law enforcement to

recordings listings and release dates, I know that several of the above-referenced albums were yet to be released, were copyrighted, and that the copyright holders did not authorize their third party distribution over the Internet by RAPGODFATHERS.COM or any other website.

C. Pirated Movies via RAPGODFATHERS.COM

19. On October 15, 2010, I viewed the RAPGODFATHERS.COM forum and explored the subforum "Movie Downloads," focusing on the topic titled "DVDSscr/R5/Screener"<sup>6</sup> (emphasis added).

20. I viewed the "DVDSscr/R5/Screener" topic, which appeared to contain hundreds of movies available for download, and located a number of forum threads which were isolated from the other threads in the forum. (A screen shot of this page, as it existed on October 15, 2010, is attached hereto as Exhibit A.) These isolated threads were marked with the word "sticky," a term used to differentiate threads which are set apart at the top of the forum and do not defer to newly posted threads or postings.<sup>7</sup>

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promote copyright protection and disruption of internet piracy organizations.

<sup>6</sup> Again, as noted above, based on my training and experience, only website administrators and other Internet users with administrative control of the RAPGODFATHERS.COM website could have created this forum and its description title.

<sup>7</sup> Normally, in the context of website forums, as new posts are made, they are posted above older posts, in reverse chronological order, based on the date the posts are created. In other words,



Administrative access is required to designate a forum post or thread as "sticky," and six out of seven of the isolated threads marked "sticky" had been created by the forum user "T." Below the name "T" was the title "v.i.p." highlighted in orange, unlike the titles of normal users which are not highlighted in color and are not denoted "v.i.p." The "signature"<sup>8</sup> of each post by "T" contained the phrase "will get you banned" in red and depicted a post by the forum user "JrRyder88" in which "JrRyder88" had posted the gibberish "sadsadf" as a substitute for the "thanks" required to view download links. Under the name "JrRyder88" was the word "Banned" indicating that user JrRyder88 had, in fact, been banned from that web forum. Administrative access is required in order to "ban" forum users.

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as a new post is made, the older posts "defer" to the new post and move downward on the page. However, if a post is marked "sticky," it does not move and remains at the top of the page. Only an administrator of the website forum or an Internet user with administrative control of the website forum can designate a post as "sticky."

<sup>8</sup> This is similar to the "signature" of an email user, in which every time the person writes an email, his or her name, title and contact information is displayed at the bottom of the email. But here, the signature of "T" is not his contact information, but rather, a copy of another user's post, JrRyder88, in which JrRyder88 didn't follow the rules of RAPGODFATHERS.COM by saying "thanks" and thus, he was banned from the website, thus explaining the top of the signature stating, "Will get you banned." Administrative access is required in order to ban users of the website's forums.

21. The access capabilities of the forum user "T," specifically, that he placed a "sticky" on multiple forum threads that he posted, that he banned a web forum user, and his title reflected as "v.i.p." reflected the capacity of a forum administrator, or a user which represents and acts on behalf of the website RAPGODFATHERS.COM. Thus, I believe that forum user "T" is a RAPGODFATHERS.COM administrator and/or representative who is directly making pirated content available for download on the website's Internet forum.

D. Pirated Computer Software via RAPGODFATHERS.COM

22. On or about October 12, 2010, I accessed the above-referenced forum topic titled "Applications" and located a post titled "Windows Essential Applications," which had been created on or about September 19, 2010 by the forum user "/|GunMetalGr3G|\". Based on the description below the user's avatar, the user "/|GunMetalGr3G|\" had created approximately 535 forum posts since "joining" or registering with the website forum on or about September of 2009. (A screen shot of this page on RapGodFather.com as it appeared on October 12, 2010, is attached hereto as Exhibit B.)

23. In order for the general public to be able to view the download links posted by forum users, a person is required to register with the Internet forum on RAPGODFATHERS.COM. After

completing the registration process, that person is also required to post a "thank you" message to view any download links. Based on my training and experience, I know that requiring the general public to register with an Internet forum in order to post thank you messages increases the amount of "views" or website traffic and consequently increases the website's popularity.

24. After registering as a forum user and posting a thank you message, I was able to view the links to the "bootleg" (pirated) computer software, which included, in part, the following:

- Sony "Vegas HD Platinum 10 3D Edition"
- Google "SketchUp Pro"
- Adobe "Photoshop CS5"

25. When I clicked on the download links for the above bootleg computer software, however, I was forwarded to a cyberlocker which indicated that the downloads were no longer available. Thus, I was unable to obtain any of the above-referenced pirated computer software.

**B. Downloads of Infringing Content via RAPGODFATHERS.COM**

26. On or about October 14, 2010, I used the uppermost thread which forum user "T" (as noted above, who I believe is an administrator or representative of the website) had created on or

about October 14, 2010, titled "Red.2010.DVDSCR" to link to the cyberlocker megaupload.com. On or about the date listed in the chart below, I clicked on the links for the below-listed movie on the RAPGODFATHERS.COM website, selected the link <http://www.megaupload.com/?d=HP3R636U> to download the movie from the below-mentioned cyberlocker site, and downloaded a copy of the movie "Red" from the relevant cyberlocker in a manner that indicated that the entire movie had been uploaded and made available to RAPGODFATHERS.COM forum users ("the Red movie file").<sup>9</sup>

Date	Movie	File Name	Download Link
10/15/2010	RED (2010)	Red.2010.DVDscr.JEKYLL.avi	<a href="http://www.megaupload.com/?d=HP3R636U">http://www.megaupload.com/?d=HP3R636U</a>

27. While downloading the Red movie file, I noticed the "File description" on the megaupload.com cyberlocker was "http://www.rapgodfathers.com/forum." Based on my training and experience, I know that at the time a file is uploaded, the uploader is able to input a file description for the referenced file download. Whenever someone downloads the file, the "file description" listed will show the website "URL" <http://rapgodfathers.com/forum>. If the downloader were to follow this "URL," it would lead to the RAPGODFATHERS.COM forum.

<sup>9</sup> I downloaded the entire movie, at the beginning, middle, and end to ascertain whether the uploaded content was the complete theatrical production.

28. Upon viewing the Red movie file, I noticed the subtitle "Property of Summit Entertainment" in white lettering at the top of the footage. Based on my training and experience, I know that such white lettering reflects that the Red movie file is a screener and is not intended for public or Internet release. On or about October 18, 2010, I submitted a sample of the Red movie file for evaluation to Michael Radziewicz, an MPAA investigator.

29. Based on my review of public movie listings, the evaluation of examination by investigator Radziewicz, as well as conversations with representatives of the MPAA and other movie studios, I know that as of October 15, 2010, the above-referenced movie "Red" was playing in theaters, was copyrighted, was confirmed to be a screener, and that the copyright holders did not authorize its third party distribution over the Internet by RAPGODFATHERS.COM or any other website.

30. On or about November 15, 2010, I also used the RAPGODFATHERS.COM website to link to cyberlockers and download illegal copies of pirated albums. On or about the dates listed in the chart below, I clicked on links for the below-listed songs on the RAPGODFATHERS.COM website and downloaded the albums from the below-listed cyberlocker sites. Beneath each of the download links for the below-referenced albums was listed a link to the RAPGODFATHERS.COM forum, titled "More Downloads on RGF Forum."

Date	Album Title	Artist	Cyberlocker	Date Listed as Uploaded on RspGodFathers.com	Date Listed as released for sale to the public
11/15/2010	My Beautiful Dark Twisted Fantasy	Kanye West	Fileserve.com	11/11/2010	11/22/2010
11/15/2010	Nelly 5.0	Nelly	Zshare.net	11/09/2010	11/12/2010
11/15/2010	Loud	Rihanna	Mediafire.com	11/09/2010	11/12/2010

31. On or about November 15, 2010 I reviewed the above-referenced downloaded albums and successfully listened to each of the songs which they contained. Based on my review of public records listings, as well as conversations with representatives of the RIAA, I know that all of the above-referenced songs were determined to be "pre-release" (i.e. not yet released for purchase to the general public) at the time they were uploaded on the RAPGODFATHERS.COM website, were copyrighted, and the copyright holders did not authorize their third party distribution over the Internet by RAPGODFATHERS.COM or any other website.

F. ISP Representative's Statements Relating to RAPGODFATHERS.COM

32. On or about October 18, 2010, I emailed Colocate USA<sup>10</sup> at its email address of company@colocateusa.net to request a point of contact in connection with this investigation; I did not provide details of the investigation. On or about October 20, 2010, I received a phone call from Colocate USA Director of Sales Ray Womack, who requested that I call him back at telephone number xxx-xxx-5010.

33. On or about October 22, 2010, at approximately 8:43 a.m., I called Womack at the number he gave me and spoke with him. During our conversation, and without me giving him any information regarding which website was the focus of our investigation, Womack made the following spontaneous statements:

a. "Just tell me who you're serving... is it rapgodfathers?"

b. "Between you, me and the fifth folks<sup>11</sup>, who are you going to serve?"

c. "We can cut a lot of the bullshit out if you just tell me who it is because. . . looking at paperwork, I am

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<sup>10</sup> Colocate USA is an Internet Service Provider (ISP) owned and operated in Texas, which serves as the hosting ISP for RAPGODFATHERS.COM.

<sup>11</sup> By mentioning "the fifth folks," Womack was apparently referring to the Fifth Amendment.

probably sure it's rapgodfather. It's the only IP complaint that we have on our books and we try in our due diligence to work with those clients. To forewarn them and to work with them."

G. The RAPGODFATHERS.COM Domain

34. According to valuethewebsite.com, as of on or about November 12, 2010:

- a. The Alexa.com<sup>12</sup> ranking for RAPGODFATHERS.COM shows it was the 15,150<sup>th</sup> most popular website in the United States;
- b. RAPGODFATHERS.COM had 24,708 daily page views;
- c. RAPGODFATHERS.COM had an estimated worth of \$ 129,652.00

35. A search of publicly available WhoIs domain name registration records revealed that the RAPGODFATHERS.COM domain was registered on or about April 13, 2005 through the registrar Enom, Inc. which has its headquarters at 15801 NE 24th Street, Bellevue, Washington 98008. The publicly available WHOIS database lists the registrant of the RAPGODFATHERS.COM as

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<sup>12</sup> Alexa.com is a "web traffic metric service," meaning that it performs a function similar to the traditional Nielsen television ratings service. Among other things, Alexa.com measures the amount of visitors to a particular website relative to other websites on the Internet, provides an overall ranking of the website's popularity, and collects other information relating to the website, including the number of other websites that link to it.



WhoisGuard.com, a company which protects the identity of domain registrants by placing their information in WHOIS and providing an option to redirect email and regular mail to the customer's real address.

36. Publicly available WHOIS records also revealed that the RAPGODFATHERS.COM site is hosted on a computer assigned IP address 67.216.80.3, which is owned by ColocateUSA, located at 2327 Wise Road, Grand Prairie, Texas 75052.

The TORRENT-FINDER.COM Website

A. General Description

37. Based on my review of web pages that are available at the TORRENT-FINDER.COM website, I have learned the following:

a. TORRENT-FINDER.COM is a linking and Bit torrent website. According to a disclaimer located at the bottom of the site's web pages, "Torrent Finder is a 100% legal website, in strict compliance with all local laws and copyright agreements." The website's home page also explains that "Torrent Finder is a Bit Torrent Multi Search Engine which searches 165 torrent sites and trackers from one page. . . Protect yourself from your ISP, Hide your personal activity while downloading torrents."

b. Based on my participation in the investigation and my discussion with MPAA representatives, I know that despite this disclaimer, the webpage still lists terms which indicate the

production and distribution of pirated content as well as the concealment of the user's identity while downloading pirated content.

c. On or about October 15, 2010, the website's homepage displayed several "High Speed Downloads," the first of which was titled "Secretariat Ripped." Based on my training and experience, queries of public movie listings and my discussion with MPAA representatives, I know that "Secretariat" is a first-run movie that was released in theaters on or about October 8, 2010 and was not yet released to the general public for home-viewing. I also know that in the above-referenced context, the term "Ripped" refers to a pirated copy of a movie which was created - i.e. ripped from - the original digital source material, often after the security protection on the original digital source is removed.

d. The top of the site's home page includes the logos and titles of other torrent websites which are links available through TORRENT-FINDER.COM. The titles of these torrent websites included the following: "PSP Pirates," "Pirateeeuropa," "ThePirateBay," "Kick Ass Torrents," "FileMP3.org," "OpenSharing," and "MoviesDVDR." (Emphasis added.)

e. The first page a user sees when accessing the site

contains a search text-box, in which a user is able to enter any keyword or phrase to initiate a search of links available on TORRENT-FINDER.COM which lead to downloadable content.

**B. Pirated Movies via TORRENT-FINDER.COM**

38. On or about November 10, 2010, I used the above-referenced search text-box to search for download links which contain the keyword "Cam" in the file title. (As explained in the technical definition section above, "Cam" refers to movies that have been recorded with camcorders while the movie is playing in theaters. Movie files created in this way frequently have the term "cam" in the file title.) The result of my search consisted of 1,000 pages with 30 download links per page, equaling 30,000 links. The results were listed beginning with the most popular links which contained the keyword "Cam;" the listings also showed how many computers were currently accessing ("Seeding" or "leeching") the torrent file and whether or not the links were "verified torrents"<sup>13</sup>:

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<sup>13</sup> In the above-referenced context to Bit torrent files, a "seed" is a computer that has an entire copy of the torrent and offers it for upload. The more seeders there are, the better the chances of getting a higher download speed. If the seeder seeds the whole copy of the download they should get faster downloads. A "leech" is a computer that either does not have 100 percent of the data or who has a negative effect on the download speed by downloading much more of the file than they upload. A "verified" Bit torrent file is a file that has been checked and approved by the evaluators of the website (which can either be people or an

- Paranormal Activity 2 2010 CAM Xvid-REVIVE [verified], [approximately 3,840 seeds / leeches]
- Inception.2010.CAM.Xvid-TA(FULL MOVIE) [verified], [approximately 3,738 seeds / leeches]
- Jackass 3D 2010 Cam H264 Feel-Free [verified], [approximately 3,531 seeds / leeches]
- The Social Network CAM XViD - IMAGINE [verified], [approximately 3,178 seeds / leeches]
- DUE DATE 2010 Cam Xvid Feel-Free [verified] [approximately 3,597 seeds / leeches]
- Megamind 2010 Cam-CLASSIFIED [verified] [approximately 2,311 seeds / leeches]

39. I know that once a user selects a movie and clicks on the corresponding link, a new webpage listing numerous details about the movie file<sup>14</sup> as well as links to download the movie file from cyberlocker websites or as a Bit torrent file appears. A user can then click on one of the links to download the movie from the relevant website.

40. Based on my participation in the investigation, review of public movie listings and my discussions with MPAA representatives, I know that the above-referenced titles reflect several movies which are currently unreleased on DVD, unavailable

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automated computer function) which attaches the term to the Bit torrent file link.

<sup>14</sup> Details to include pictures, cover art, cast, screenshots, descriptions and reviews.

for public home-viewing and the copyright holders did not authorize their third party distribution over the Internet by TORRENT-FINDER.COM or any other website.

41. On November 15, 2010, I did the same search for keyword "cam" and the result again consisted of 1,000 pages containing 30 links per page, equaling 30,000 matches. This time, I reviewed the first 10 pages of results and it appeared that approximately 80% of the results on those 10 pages contained movies with the term "cam" in the digital file title.<sup>15</sup> Some of the movie titles listed on the first page (hence, the most popular downloaded movies) were the following:

- Due Date 2010 Cam XviD Peel-Free [verified],  
[approximately 5,860 seeds / leeches]
- Paranormal Activity 2 2010 CAM-XviD-REVIVE  
[verified], [approximately 4,719 seeds / leeches]
- Megamind 2010 Cam-CLASSiFIED [verified]  
[approximately 2,627 seeds / leeches]
- The Social Network CAM XviD - IMAGiNE [verified]  
[approx 2,517 seeds / leeches]
- Saw 7 2010 CAM XviD - danytheone (NEWVIDEOSOURCE)  
[verified] [approximately 3,041 seeds / leeches]

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<sup>15</sup> The other approximately 20% of the results contained "cam" in the file title for some other reason, such as the actress Cameron Diaz being listed in the file title.

C. TORRENT-FINDER.COM Forum Posts by Forum User "Torrent Finder"

42. Users of the torrent-finder.com website can click tabs at the top of each webpage to browse categories such as "Search" "Forums," and "News." On October 26, 2010, I accessed the portion of the website called "Forums" which allowed users to post comments about movies, software, video games, music, participate in forum discussions with other users, and create messages which link to other Bit torrent websites.

43. I was able to view several posts by the user "Torrent Finder," including "Top 10 Most Pirated Movies on BitTorrent," "Piracy in the Music Industry," "Piracy Can Boost Book Sales Tremendously," "The First Episode of 'The Walking Dead' Leaks to BitTorrent," and "Piracy domain seizure bill gains support."

44. From reviewing these posts by the user "Torrent Finder," I learned that the above-referenced postings contained links and information to pirated movies including "Wall Street: Money Never Sleeps," "The Social Network," "Red," and other movies. (A screen shot, as it existed on October 26, 2010, is attached hereto as Exhibit C.) Based on my conversations with MPAA representatives and my review of public movie listings, I learned that as of October 26, 2010, these movies were playing in theaters and the copyright holders did not authorize their third

party distribution over the Internet by TORRENT-FINDER.COM or any other website.

45. During my investigation, I further concluded that the user "Torrent Finder" is an Administrator and representative of TORRENT-FINDER.COM. I came to this conclusion based on two significant facts. First, the title "Admin" is located below the user's name. Based on my training and experience, I know that a forum user's title can only be created by the website, not the user. Second, the words "Torrent Finder Admin" and the Torrent Finder.com logo are listed in the user's "signature."<sup>16</sup>

**D. Downloads of Infringing Content via TORRENT-FINDER.COM**

46. On October 15, 2010, I searched TORRENT-FINDER.COM for the movie "The Town" and received four results which contained the word "Cam" in the file title. At the time of this search, the movie "The Town" was still playing in theaters and was not yet released to the general public for home viewing. I clicked on the link to the torrent file listed as "The Town CAM AC3 XViD {READ NFO} - IMAGINE - {GalaxyRelease}" (hereinafter "The Town movie file") which displayed the torrent file hosting website

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<sup>16</sup> In the above-referenced context to Internet forums, the term "signature" refers to the signature block or block of text automatically appended at the bottom of an email message, forum post or other Internet-based discussion.

"Kick Ass Torrents." At this point, I was still on the Torrent Finder website, but was able to see a page of the Kick Ass Torrents website associated with The Town movie file. The page contained a detailed description of The Town movie file which included a copy of an advertising poster for "The Town" film, screenshots of The Town movie file, an Internet Movie Database (IMDb)<sup>17</sup> link and description, cast listings, the term "Cam" listed under "Detected Quality" as well as a list of the files stored within the torrent file.

47. Towards the bottom of the webpage, under a text box labeled "IMAGINE NOTES," were listed the following comments:

VIDEO: Thanks to a very good friend. . . . :)

AUDIO: Thanks to a very good friend. . . . :)

Video on this was pretty good other than the odd auto focus issues. First was the colors, we messed about with the . . . colors and also brightened it up a bit, . . . and . . . dulled the real bright spots . . . sounds fairly good for cam audio. You can hear the odd laughing and such, but not bad at all. Sample was made so you could hear the laughter at one certain spot. . .

48. Based on my training and experience, the above comments

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<sup>17</sup> The Internet Movie Database (IMDb) is an online database of information related to movies, actors, television shows, production crew personnel, video games, and fictional characters featured in visual entertainment media.



refer to the fact that the movie was videotaped with a camcorder and that you could hear the laughter of the movie audience in the theater where the film was illegally recorded. While initiating the download, I was provided with the following two options to download the movie: (1) "Download Torrent" (from a Bit torrent site), and (2) "Download Movie" (a direct download from a cyber locker).

49. I clicked on the "Download Movie" option and it took me to a page contained on the "Kick Ass Movz" website which contained a download link to download The Town movie file. After attempting to download the movie, it required that I register and pay a fee to Kick Ass Movz, so I instead returned to Torrent Finder.com and clicked on the option listed as "Download Torrent." This allowed me to download the Bit torrent file and as a result, I was ultimately able to download a copy of the following file:

Date	Movie	Linking website	Bit torrent website	File Name
10/15/2010	The Town	www.torrent-finder.com	"KICK ASS Torrents"	The Town CAM AC3 XViD - IMAGINE

50. On October 18, 2010, I submitted a sample of the Town movie file to MPAA investigator Michael Radziewicz.

51. On or about October 28, 2010, MPAA representatives examined a copy of The Town movie file that I obtained via TORRENT-FINDER.COM. I was informed by MPAA investigator Radziewicz that The Town movie file was an unauthorized release of the movie "The Town," a movie owned by Summit Entertainment, LLC. I later reviewed a copy of the copyright application for The Town and learned that the film was copyrighted based on the following Claim Details:

Claim Id	Case #	Title of Work	Type of Work	Authors	Claimant
1-81XK55	1-486974771	The Town	Motion Picture	Warner Bros. Entertainment Inc.	Warner Bros. Entertainment Inc.

52. Radziewicz also informed me that the Town movie file was a "cam," meaning that it had been illegally copied in the theater with a camcorder.

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**E. Advertising Revenue Paid to TORRENT-FINDER.COM**

53. Advertisements appear on various portions of the TORRENT-FINDER.COM website, including on pages that include download links to movies, music, and computer software. As noted above, I also know from my participation in the investigation and as a result of information obtained from, and my discussions with, representatives of Value Click,<sup>18</sup> that companies which place advertisements on websites typically pay a fee to the website's owner based on, among other things, the number of website users who view the advertisement as well as the number of times users click on the advertisement.

54. Based upon information I received from Value Click, the following chart reflects advertising revenues that Value Click paid to the owners of the TORRENT-FINDER.COM website for advertisements appearing on various portions of the TORRENT-FINDER.COM website, corresponding to the number of people that view and interact with the website<sup>19</sup>:

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<sup>18</sup> ValueClick, based in Westlake Village, California, is an online advertising company which provides online advertising campaigns and programs for advertisers and advertising agency customers in the United States and internationally.

<sup>19</sup> It is significant to note that ValueClick is only one of multiple online advertising companies that TORRENT-FINDER.COM uses on its website and thus is not the only advertising company which provides revenue to the TORRENT-FINDER.COM website owners. Thus, the above advertising revenues reflect only a portion of

Website listed on Account	Amount	Date Sent	Method
www.torrent- finder.com	\$345.00 USD	2/23/2009	Direct
www.torrent- finder.com	\$89.00 USD	1/16/2009	Deposit Direct
www.torrent- finder.com	\$1,469.85 USD	12/18/2008	Deposit Direct
www.torrent- finder.com	\$1,527.85 USD	11/25/2008	Deposit Direct
www.torrent- finder.com	\$2,111.15 USD	10/24/2008	Deposit Direct
www.torrent- finder.com	\$4,265.20 USD	8/19/2008	Deposit Direct
www.torrent- finder.com	\$2,845.25 USD	7/18/2008	Deposit Direct
www.torrent- finder.com	\$565.80 USD	6/19/2008	Deposit Direct
www.torrent- finder.com	\$640.80 USD	5/19/2008	Deposit Direct
www.torrent- finder.com	\$568.45 USD	4/21/2008	Deposit Direct
www.torrent- finder.com	\$631.90 USD	3/20/2008	Deposit Direct
finder.com			Deposit

the advertising profits that the owners of TORRENT-FINDER.COM are receiving.

F. The TORRENT-FINDER.COM Domain

55. According to valuethewebsite.com, as of on or about November 12, 2010:

- a. The Alexa.com ranking for TORRENT-FINDER.COM shows it was the 4,980<sup>th</sup> most popular website in the United States;
- b. TORRENT-FINDER.COM had 103,978 daily page views;
- c. TORRENT-FINDER.COM had an estimated worth of \$ 373,678.00

56. A search of publicly available WhoIs domain name registration records revealed that the TORRENT-FINDER.COM domain was registered on or about August 22, 2004 through the registrar Blue Razor Domains, Inc. which has its headquarters at 14455 North Hayden Road, Suite 226, Scottsdale, Arizona 85260. The publicly available WhoIs database lists the registrant of the TORRENT-FINDER.COM as W7 Media, a company which protects the identity of domain registrants by placing their information in WhoIs, providing an option to redirect email and regular mail to the customer's real address as well as providing a number of IP related services to its clients.

57. Publicly available WhoIs records also revealed that the TORRENT-FINDER.COM site is hosted on a computer assigned IP address 208.87.34.18, which is owned by Secure Hosting, located at Robinson & Marathon Roads, P.O. Box CB13862, Nassau, Bahamas.

The RMX4U.COM Website

A. General Description

58. Based on my review of webpages that are available at the RMX4U.COM website, I have learned the following:

a. RMX4U.COM is a German Internet forum-based "linking" website. The site's homepage displays album covers and links to several different subforums and topics.<sup>20</sup> (A screen shot as it existed on October 25, 2010 is attached hereto as Exhibit D.) Upon clicking on one of the topics, such as "GFX Resources / Appz / Help"<sup>21</sup>, the user is directed to a new page containing a list of threads created by forum users which are organized in reverse chronological order corresponding to the date and time the thread was created. (A screen shot as it existed on October 25, 2010 is attached hereto as Exhibit E.)

b. The RMX4U.COM subforum "Music Zone" was organized into topics in which each topic corresponded to a specific genre of music: "RnB Tracks," "Electronical Tracks/Mixes 2010," "German Tracks/Remixes," "Music Clips Request" and others. Within each

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<sup>20</sup> The subforums were called "zones," and contained several topics in which registered forum users were able to post threads and messages.

<sup>21</sup> The acronym GFX, as used in the above-referenced context, refers to the term "graphics" which corresponds to photo editing software such as Adobe Photoshop.

of these topics, a registered forum user is able to create new threads as well as post replies to already created threads or posts.

**B. Pirated Music Albums via RMX4U.COM**

59. Based on my review of the RMX4U.COM forum, I discovered that the forum provided registered users with the ability to obtain or distribute music files through the above-referenced forum threads.

60. On or about October 26, 2010, I viewed a thread titled "Joe Discography" within the subforum "Black Zone" and the topic "Old But Gold Alben." The initial post contained several album titles beneath which was a picture of the album cover, a description of the album, a track list for the album and one or more download links to obtain the pirated album files. The download link transferred the user to a cyberlocker hosting website at which the user could illegally download the corresponding file:

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Album Title	Artist	Label	CyberCocker
Everything (1993)	Joe	Mercury	<a href="http://ul.to">http://ul.to</a>
All That I Am (1997)	Joe	Jive	<a href="http://ul.to">http://ul.to</a>
My Name Is Joe (2000)	Joe	Zomba Records Singapore/ BMG Records	<a href="http://ul.to">http://ul.to</a>
Better Days (2001)	Joe	Jive/Zomba	<a href="http://ul.to">http://ul.to</a>
And Then... (2003)	Joe	Jive	<a href="http://ul.to">http://ul.to</a>
And Then (Dutch Bonus Tracks)	Joe	Jive Records	<a href="http://ul.to">http://ul.to</a>
The Best of Joe (2006)	Joe	N/A	<a href="http://ul.to">http://ul.to</a>
Ain't Nothin' Like Me (2007)	Joe	RCA	<a href="http://ul.to">http://ul.to</a>
Joe Thomas New Man (2008)	Joe	Kedar Ent.	<a href="http://ul.to">http://ul.to</a>

61. Several of the pirated album files went so far as to list the "Ripper" as well as the "Supplier" of the original album's content.<sup>22</sup>

62. Based on my review of public record listings, as well as conversations with representatives of the RIAA, I know that as of October 26, 2010, the above-referenced albums were copyrighted, and that the copyright holders did not authorize their third party distribution over the Internet by RMX4U.COM or any other websites.

<sup>22</sup> Based on the above-referenced context, the term "Ripper" refers to the person who "ripped" or illegally copied the album or CD. The term "supplier" refers to the source from which the original album was obtained.



C. Pirated Computer Software Programs via RMX4U.COM

63. On or about October 25, 2010, I accessed the RMX4U.COM website and explored the subforum titled "Photoshop Zone," specifically targeting the topic "GFX Resources / Appz / Help." I know that the term "Appz" refers to the word applications, which often include software and other related computer programs in the above-referenced context of graphics ("GFX").

64. Upon further examination, I observed several threads whose titles reflected photo editing software owned and maintained by the company Adobe, including the following:

- "Adobe Photoshop Lightroom 3.2.0 Finals"
- "Adobe Illustrator v10.0.128.0.00"
- "Adobe Photoshop CS5 Extended v12.0 Final + Portables"
- "Adobe Flash Professional CS4 v10.0.0"
- "Photoshop CS5 Portable Plus Topaz Plug-In Bundles"

65. I clicked on the thread titled "Adobe Illustrator v10.0.128.0.00," which had been created on or about October 17, 2010 by the forum user "yoann102." I noticed that the user's name had been crossed out by a line and was described by the word "Banned" which was depicted beneath the user's name. The post

included a picture of the Adobe Illustrator computer software cover which clearly depicted the registered mark Adobe<sup>23</sup> beneath a red and white triangle which is characterized to resemble the letter "A."<sup>24</sup>

**D. Downloads of Infringing Content via RMX4U.COM**

66. On or about the date listed in the chart below, I clicked the link for the below-listed file on the RMX4U.COM website, selected the link to download the file from the below-listed cyberlocker site, and downloaded a copy of the file comprising the below listed computer software.

Date	Computer Software Title	Filename	Cyberlocker
10/25/2010	Adobe Illustrator	Portable.Adobe.Illustrator.v10.0.128.0.rar	fileserv.com

67. On or about October 26, 2010, I returned to the "GFX

<sup>23</sup> According to the United States Patent and Trademark Office (USPTO), the certification typed drawing word mark "Adobe" is a registered trademark assigned to the registrant Adobe Systems Incorporated, Corporation California, 345 Park Avenue Legal Department San Jose California 95110. The serial number of the mark is 1475793; the mark was registered on or about February 9, 1988 and the mark is active and live.

<sup>24</sup> According to the USPTO, the certification mark "A" (rectangles as single or multiple line borders which is characterized to consist of a stylized letter "A") is a registered trademark assigned to the registrant Adobe Systems Incorporated, Corporation Delaware Legal Department, 345 Park Avenue San Jose California 95110. The serial number of the mark is 78542134; the mark was registered on or about December 20, 2005 and the mark is active and live.

Resources / Appz / Help" topic of RMX4U.COM and selected the thread titled "Adobe Photoshop CS5 Extended v12.0 Final + Portables," which had been created on or about October 17, 2010 by the user yoann102. I noticed that the user's name had been crossed out by a line and was described by the word "Banned" which was depicted beneath the user's name. Upon further examination, I noticed the following text at the end of the post: "Geändert von .soulvocals (26:10:2010 um 18:18 Uhr) Grund: icon added." The text indicated that the post had been adjusted, changed or modified on or about October 26, 2010 by the Internet user represented by the username "soulvocals." Based on my training and experience, I know that Administrative user access is required in order for a forum user to modify a post created by another forum user.

68. On or about the dates listed in the chart below, I clicked the links for the below-listed files on the RMX4U.COM website, selected the links to download the files from the below-listed cyberlocker sites, and downloaded copies of the files comprising the below-listed computer software.

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Date	Computer Software Title	Filename	Cyberlocker
10/26/2010	Adobe Photoshop CS5 Extended	EDK_Adobe.Photoshop.CS5.Extended.Full.Keymaker_UDS	Fileserve.com
10/26/2010	Adobe Photoshop CS5 Extended	EDK_Adobe.Photoshop.CS5.Extended.Full.Keymaker_UDS	Fileserve.com
10/26/2010	Adobe Photoshop CS5 Extended	EDK_Adobe.Photoshop.CS5.Extended.Full.Keymaker_UDS	Fileserve.com
10/26/2010	Adobe Photoshop CS5 Extended	EDK_Adobe.Photoshop.CS5.Extended.Full.Keymaker_UDS	Fileserve.com
10/26/2010	Adobe Photoshop CS5 Extended	EDK_Adobe.Photoshop.CS5.Extended.Full.Keymaker_UDS	Fileserve.com
10/26/2010	Adobe Photoshop CS5 Extended	EDK_Adobe.Photoshop.CS5.Extended.Full.Keymaker_UDS	Fileserve.com
10/26/2010	Adobe Photoshop CS5 Extended	EDK_Adobe.Photoshop.CS5.Extended.Full.Keymaker_UDS	Fileserve.com
10/26/2010	Adobe Photoshop CS5 Extended	EDK_Adobe.Photoshop.CS5.Extended.Full.Keymaker_UDS	Fileserve.com
10/26/2010	Adobe Photoshop CS5 Extended	EDK_Adobe.Photoshop.CS5.Extended.Full.Keymaker_UDS	Fileserve.com

69. On October 27, 2010, I submitted a sample of the above-listed computer software files on a recordable DVD (DVD-R) to Adobe Systems Inc. Anti-Piracy Enforcement Manager Chris Stickler for evaluation.

70. On or about November 3, 2010, Stickle examined samples of the above-referenced pirated computer software that I downloaded from RMX4U.COM. Stickle informed me that the downloaded program files were fully functioning versions of the Adobe computer software and Adobe did not authorize their third party distribution over the Internet by RMX4U.COM or any other website. Stickle additionally informed me that the pirated computer program file titled "Photoshop CS5 Extended" contained counterfeit Adobe serial number 1325-1558-5864-4422-1094-1126. Finally, Stickle informed me that the MSRP (Manufacturer's Suggested Retail Price) for "Illustrator 10" is \$399.00 and "Photoshop CS5 Extended" is \$999.00.

**E. Forum Posts by Forum User "soulvocals" on RMX4U.COM**

71. During the course of the EDK\_Adobe.Photoshop.CS5.Extended.Full.Keymaker\_UDS.part05.rar file download, I searched the RMX4U.COM Internet forum for the username "soulvocals" and clicked on the above-referenced forum thread titled "Joe Discography"; a message which depicted download links for several pirated MP3<sup>28</sup> files, including "Joe-

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<sup>28</sup> MP3 is an acronym for the term MPEG-1 Audio Layer 3, an audio file format commonly used for mobile audio / music listening devices.

The\_Best\_Of\_Joe\_(Mixed\_by\_DJ\_Finesse)-Bootleg-2006"<sup>26</sup>. (Emphasis added.) The forum user represented by the username "soulvocals" posted the following reply to the above-referenced message on or about "06.07.2009" and at approximately "11:15": "wuhuu.danke dir !"<sup>27</sup>

72. I noticed that the "soulvocals" user's name had been highlighted in blue and was described by the word "Moderatorin"<sup>28</sup> which was depicted beneath the user's name. During my investigation, I concluded that the user "soulvocals" is an Administrator and representative of RMX4U.COM. I came to this conclusion based on two significant facts. First, "soulvocals" reviewed and modified the message titled "Adobe Photoshop CS5 Extended v12.0 Final + Portables" which later contained pirated computer software files of the pirated copyrighted computer program "Adobe Photoshop CS5 Extended." Based on my training and experience, I know that Administrative user access is required in

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<sup>26</sup> As noted earlier, the term "bootleg" refers to something, such as a recording, which is made, reproduced, or sold illegally or without authorization.

<sup>27</sup> In the above-referenced context, the phrase "danke dir" is German for "thank you."

<sup>28</sup> In the above-referenced context, the phrase "Moderatorin" is German for "Moderator." Based on my training and experience, I am aware that the term "Moderator" refers to the person who controls an Internet forum.

order for a forum user to modify a post created by another forum user. Second, I noticed that the "soulvocals" username had been highlighted in blue and was described by the word "Moderatorin," meaning "Moderator," which was depicted beneath the user's name. Based on my training and experience, I know that a forum user's title can only be created by the website, not the user. Since the title listed below "soulvocals" means "Moderator" and since a Moderator controls an Internet forum, I believe that the user "soulvocals" is an administrator or representative of the website.

F. The RMX4U.COM Domain

73. According to valuethewebsite.com, as of on or about November 12, 2010:

- a. The Alexa.com ranking for RMX4U.COM shows it was the 57,948<sup>th</sup> most popular website in the United States;
- b. RMX4U.COM had 4,358 daily page views;
- c. RMX4U.COM had an estimated worth of \$ 31,753.00.

74. A search of publicly available WhoIs domain name registration records revealed that the RMX4U.COM domain was registered on or about December 17, 2006 through the registrar Enom, Inc. which has its headquarters at 15801 NE 24TH Street, Bellevue, Washington 98008. The publicly available WHOIS

database lists the registrant of the RMX4U.COM as WhoisGuard.com, a company which protects the identity of domain registrants by placing their information in WhoIs and providing an option to redirect email and regular mail to the customer's real address.

75. Publicly available WhoIs records also revealed that the RMX4U.COM site is hosted on a computer assigned IP address 212.117.166.2, which is owned by "root SA," located at 35, Rue John F. Kennedy, 7327 Steinsel, Luxembourg.

#### The DAJAZ1.COM Website

##### A. General Description

76. Based on my review of webpages that are available at the DAJAZ1.COM website, I have learned the following:

a. DAJAZ1.COM is a linking website. The site's homepage displays album covers and recording artist photographs, short descriptions, and links for numerous pirated songs. For example, on or about October 26, 2010, the DAJAZ1.COM homepage displayed album covers and recording artist photographs, descriptions and links for, among other songs, "Jamie Foxx ft. Drake- Fall For Your Type," "High Off Life - Cassidy feat Jr. Reid," "I Can't Help It - T.I. feat Rocko," and "Purified Thoughts - Ghostface." I was also able to click on a link titled "Older Entries" which allowed me to individually view prior home



pages from the website; these home pages, taken together, included what appeared to be hundreds of links to pirated songs.

b. On the initial DAJAZ1.COM homepage is a section titled "About Me" which contained the (alleged) website administrator's contact information:

Location: Queens, New York, United States  
 DAJAZ1.COM (DUH-JAZZ-ONE)  
 Twitter - @splash\_dajaz1  
 Bigsplash1024@aol.com  
 Splashmixtapes@tmail.com  
 Splash.Dajaz1@gmail.com  
 MYSPACE.COM/MIXTAPESPLASH

c. The DAJAZ1.COM website homepage contained a link titled "MP3 Downloads." Upon clicking the "MP3 Downloads" link, the user is directed to a new page which displays additional album covers and recording artist photographs, short descriptions, and links for numerous pirated songs. For example, on or about October 26, 2010, the DAJAZ1.COM "MP3 Downloads" web page displayed album covers and recording artist photographs, descriptions and links for, among other songs, "Jamie Foxx ft. Drake- Fall For Your Type," "Long Gone - Nelly feat Chris Brown and Plies," "Making a Movie - Ne-Yo," and "T.I. - Ya Hear Me."

77. Upon clicking a link for one of the songs, the user is directed to a new page containing the title of the song, the artist(s) who produced it, a description, the date which it was posted on the website, a photograph of the artist or album which

featured the song, the administrative user responsible for uploading the file or message and multiple download links.

78. On or about October 26, 2010, I noted that approximately 14 administrative message postings had been created by the website administrator with the username "Splash." During my investigation, I concluded that the user "Splash" is an Administrator and representative of DAJAZ1.COM. I came to this conclusion based on two significant facts. First, "Splash" created the above-referenced DAJAZ1.COM message postings which later contained pirated song files. Based on my training and experience, I know that Administrative user access is required in order for a message to be created and viewable on the DAJAZ1.COM homepage and "MP3 Downloads" webpage. Secondly, I noticed that the "Splash" username matched the name listed in the "About Me" section of the DAJAZ1.COM homepage and was further contained in several of the email addresses listed on the DAJAZ1.COM homepage. Based on my training and experience, I know that administrator access is required to create and modify sections of websites and webpages, such as the above-referenced "About Me" section.

**B. Downloads of Infringing Content via DAJAZ1.COM**

79. I used the DAJAZ1.COM website to link to cyberlockers and stream and/or download illegal copies of songs. On or about the dates listed in the chart below, I clicked on links for the

below listed songs on the DAJAZ1.COM website and streamed and/or downloaded the songs from the below-listed cyberlocker sites. Where indicated in the below chart, one or more of the available download links had been removed on the designated cyberlocker websites, replaced by the message "This file is either removed due to Copyright Claim, has Expired or is deleted by the uploader." The "Reason for deletion" was described as "International Federation of the Phonographic Industry (IFPI)".

Date	Song Title	Artist	Cyberlocker	One or More Links Contained IFPI Message
10/26/2010	Fail For You	Jamie Foxx	usershare.net	No
	Type			
10/26/2010	Duces	Chris Brown	Filezee.com	Yes
10/26/2010	Long Gone	Nelly	Filezee.com	Yes
10/26/2010	Mechanics	Reek Da Villian	Usershare.net	No

80. Based on my review of public records listings, as well as conversations with RIAA representatives, I know that as of October 26, 2010, all of the above-referenced songs were determined to be "Pre-release" or not yet released for purchase to the general public, three were copyrighted, and the copyright holders did not authorize their third party distribution over the Internet by DAJAZ1.COM or any other website.

81. On October 27, 2010, ICE agents submitted samples of the above-referenced multimedia files to RIAA Vice President of Anti-Piracy Legal Affairs Carlos Linares.

82. On or about October 28, 2010, Linares examined samples of the pirated songs that I obtained from DAJAZ1.COM. Linares informed me that the pirated songs were unauthorized copies of rights holder's works.

C. Advertisements on DAJAZ1.COM

83. Advertisements appear on various portions of the DAJAZ1.COM website, including on pages that include download links to pirated music.

84. On or about October 28, 2010, I obtained information from ValueClick, Inc. indicating that an account had been created for the DAJAZ1.COM website. The account was established on or about September 24, 2010 but "no money [had been] earned yet." According to documents produced by ValueClick, bigsplash1024@aol.com was the contact email address for the account listed under "Account Information" and held the status of "Superuser" and the title of "Owner".<sup>29</sup> The information obtained from Value Click indicates that while DAJAZ1.COM had not yet earned any advertising revenue because its account was recently

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<sup>29</sup> Bigsplash1024@aol.com contained the above referenced DAJAZ1.COM administrative username "Splash" and is one of the email addresses listed under the "About Me" section of the DAJAZ1.COM homepage.

opened, the website is set up to earn advertising revenue from ValueClick in the future.

D. The DAJAZ1.COM Domain

85. According to valuethewebsite.com, as of on or about November 12, 2010:

- a. The Alexa.com ranking for DAJAZ1.com shows it was the 71,024<sup>th</sup> most popular website in the United States;
- b. DAJAZ1.com had 3,555 daily page views;
- c. DAJAZ1.com had an estimated worth of \$ 25,907.00.

86. A search of publicly available WhoIs domain name registration records revealed that the DAJAZ1.COM domain was registered on or about February 29, 2008 through the registrar Fast Domain, Inc. which has its headquarters at 1958 South 950 East, Provo, Utah 84606. The publicly available WHOIS database lists the registrant of the DAJAZ1.COM site as HostMonster.Com, a company which protects the identity of domain registrants by placing their information in WhoIs and providing an option to redirect email and regular mail to the customer's real address.

87. Publicly available WhoIs records also revealed that the DAJAZ1.COM site is hosted on a computer assigned IP address 74.220.215.217, which is owned by Bluehost, Inc. located at 1958 South 950 East, Provo, Utah 84606.

The ONSMASH.COM Website

**A. General Description**

88. Based on my review of webpages available at the ONSMASH.COM website on October 12 and October 26, 2010, I have learned the following:

a. ONSMASH.COM is a linking website. The site's homepage displays album covers and recording artist photographs, short descriptions, and links for numerous pirated songs.

b. The ONSMASH.COM website homepage contained a link titled "Music." Upon clicking the Music link, the user is directed to a new page which displays additional album covers and recording artist photographs, short descriptions, and links for numerous pirated songs. For example, on or about October 26, 2010, the ONSMASH.COM "Music" webpage displayed album covers and recording artist photographs, descriptions and links for, among other songs, "CASSIDY - HIGH OFF LIFE (FEAT. JUNIOR REID)," "JAMIE FOXX - FALL FOR YOUR TYPE (FEAT. DRAKE)," and "KID CUDI - MR. RAGER." I was also able to click on a link titled "Next Page" which allowed me to individually view prior home pages from the website; these home pages, taken together, included what appeared to be hundreds of links to pirated songs.

c. Upon clicking a link for one of the songs, the

user is directed to a new page containing the title of the song, the artist(s) who produced it, a description, the date which it was posted on the website, a photograph of the artist or album which featured the song, the administrative user responsible for uploading the file or message and multiple streaming and/or download links.

d. On or about October 26, 2010, I noted that approximately 12 administrative message postings had been created, by the website administrator with the username "thekidLEGEND."

e. During my investigation, I concluded that the user "thekidLEGEND" is an administrator and/or representative of ONSMASH.COM. I came to this conclusion based on the significant fact that "thekidLEGEND" created the aforementioned ONSMASH.COM message postings which later contained pirated song files. Based on my training and experience, I know that administrative user access is required in order for a message to be created and viewable on the ONSMASH.COM homepage and "Music" webpage.

f. When a user clicks on the link for the particular song file, for example "KiD CuDi - Mr. Rager", the user is directed to a webpage that features more descriptions by the administrator "thekidLEGEND." The message which was posted beneath the album cover and above the download link for the

above-referenced "KiD CuDi" song contained the following information:

This track actually leaked a couple months back, back when a couple CuDi songs were hitting the nets a bit early but this is the final version of the title track from *Man On The Moon II: The Legend of Mr. Rager*. We must have to say, this might be one of the more anticipated albums we're looking forward to in the 4<sup>th</sup> quarter... You can pre-order the album on iTunes tomorrow & receive a bonus track on the day of release.<sup>30</sup>

89. A picture of the cover art for the "Man On The Moon II: The Legend of Mr. Rager" album was included above the above-referenced description and depicted the registered certification mark "PARENTAL ADVISORY EXPLICIT CONTENT".<sup>31</sup>

**B. Downloads of Infringing Content via ONSMASH.COM**

90. I used the ONSMASH.COM website to link to cyberlockers and stream and/or download illegal copies of songs. On or about the dates listed in the chart below, I clicked on links for the below listed songs on the ONSMASH.COM website and streamed and/or downloaded the songs from the below-listed cyberlocker sites.

<sup>30</sup> The term "Leaked," as used in the above description, refers to the unauthorized disclosure of copyrighted multimedia content.

<sup>31</sup> According to the USPTO, the certification mark PARENTAL ADVISORY EXPLICIT CONTENT is a registered trademark assigned to the registrant Recording Industry Association of America, Inc. Corporation New York 1025 F Street, N.W., 10<sup>th</sup> Floor, Washington D.C. 20004. The serial number of the mark is 78142196, the mark was registered on or about January 6, 2004 and the mark is active and live.



Date	Song Title	Artist	Label	Cyberlocker
10/21/2010	Last Wish	Ray J	SRG Records	Mediafire.com
10/21/2010	In for the	La Rouxe ft.	Interscope	Mediafire.com
	Kill (remix)	Kanye West		
10/21/2010	Wet Wet	Ace Hood	Island Def Jam	Mediafire.com
10/21/2010	Dollar Signs	Three 6 Mafia	Columbia	Mediafire.com
10/21/2010	Wallstreet	Romeo	No Limit	Mediafire.com
			Records	
10/21/2010	Alphabet Boys	Consequence	Motown	Mediafire.com
10/21/2010	Today My Life	Bruno Mars	Elektra	Mediafire.com
	Begins			
10/21/2010	The Bizness	Ca\$his	Shady	Mediafire.com
			Aftermath	
10/26/2010	Fall For Your	Jamie Foxx	RCA	Hulkshare.com
	Type			
10/26/2010	Mr. Rager	Kid Cudi	UMG	Hulkshare.com

91. Based on my review of public records listings, as well as conversations with representatives of the RIAA, I know that as of October 26, 2010, all except one of the above-referenced songs were determined to be "Pre-release" or not yet released for purchase to the general public, all were copyrighted, and the copyright holders did not authorize their third party distribution over the Internet by ONSMASH.COM or any other website.

92. On October 27, 2010, ICE agents submitted samples of the above-referenced multimedia files to RIAA Vice President of Anti-Piracy Legal Affairs Carlos Linares.

93. On or about October 28, 2010, Linares examined samples

of the pirated songs that I obtained from ONSMASH.COM. Linares informed me that the pirated songs were unauthorized copies of rights holder's works.

C. Advertisements on DAJAZ1.COM

94. Advertisements appear on various portions of the ONSMASH.COM website, including on pages that include download links to pirated music.

95. On or about October 28, 2010, I received information from ValueClick, Inc. indicating that an account had been created for the ONSMASH.COM website. The account was established on or about January 10, 2008 and "makes \$200-\$400 [per] month". According to documents produced by ValueClick, Complex Magazine was the name listed for the account listed under "Account Information" and held the status of "Superuser," and the title of "Operator". Information returns from Value Click indicated the following information reflecting advertising revenues being paid to the owners of ONSMASH.COM for advertisements appearing on various portions of the ONSMASH.COM website, corresponding to the number of people that view and interact with the website.<sup>32</sup>

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<sup>32</sup> It should be noted that ValueClick is only one of multiple online advertising companies that ONSMASH.COM uses on its website and thus is not the only advertising company which provides revenue to the ONSMASH.COM website owners. Thus the above advertising revenues reflect only a portion of the advertising profits that the owners of ONSMASH.COM are receiving.

Website listed on Account	Amount	Date Sent	Method
www.onsmash.com	\$407.34 USD	10/18/2010	Check
www.onsmash.com	\$289.58 USD	9/15/2010	Check
www.onsmash.com	\$223.10 USD	8/16/2010	Check
www.onsmash.com	\$221.28 USD	7/15/2010	Check
www.onsmash.com	\$221.17 USD	6/15/2010	Check
www.onsmash.com	\$133.42 USD	4/19/2010	Check
www.onsmash.com	\$215.14 USD	2/17/2010	Check
www.onsmash.com	\$148.09 USD	10/28/2009	Check
www.onsmash.com	\$127.43 USD	9/17/2009	Check
www.onsmash.com	\$180.65 USD	7/16/2009	Check
www.onsmash.com	\$319.37 USD	6/16/2009	Check

**D. THE ONSMASH.COM DOMAIN**

96. According to valuethewebsite.com, as of on or about November 12, 2010:

- a. The Alexa.com ranking for Onsmash.com shows it was the 9,520<sup>th</sup> most popular website in the United States;
- b. Onsmash.com had 54,392 daily page views;
- c. Onsmash.com had an estimated worth of \$ 225,477.00.

97. A search of publicly available WHOIS domain name registration records revealed that the ONSMASH.COM domain was registered on or about May 27, 1999 through the registrar Godaddy.com, Inc. which has its headquarters at 14455 N. Hayden Road, Suite 219, Scottsdale, Arizona 85260. The publicly available WhoIs database lists the registrant of the ONSMASH.COM site as Private, Registration Domains by Proxy, Inc., a company which protects the identity of domain registrants by placing

their information in WhoIs and providing an option to redirect email and regular mail to the customer's real address. Publicly available WhoIs records also revealed that the ONSMASH.COM site is hosted on a computer assigned IP address 207.58.138.102, which is owned by ServInt located at 6861 Elm Street 4th Floor, McLean, Virginia 22101.

# VI.

## STATUTORY BASIS FOR SEIZURE AND FORFEITURE

98. Title 18, United States Code, Section 2323(a)(1)(A) and (B) provide, in relevant part, that any property used, or intended to be used to commit or facilitate criminal copyright infringement (18 U.S.C. § 2319; 17 U.S.C. § 506(a)), or constituting or derived from proceeds obtained directly or indirectly from the violation of Title 18, United States Code, Section 2319 and/or Title 18, United States Code, Section 2319(d)(1) are subject to both civil and criminal forfeiture to the United States government.

99. Title 18, United States Code, Section 2323(a)(2) provides that the procedures set forth in Chapter 46 of Title 18 (18 U.S.C. § 981, et seq.) shall extend to civil forfeitures under Section 2323(a). Title 18, United States Code, Section 981(b)(1) authorizes seizure of property subject to civil forfeiture based upon a warrant supported by probable cause.

Title 18, United States Code, Section 981(b)(3) permits the issuance of a seizure warrant by a judicial officer in any district in which a forfeiture action against the property may be filed and may be executed in any district in which the property is found.

100. Neither a restraining order nor an injunction is sufficient to guarantee the availability of the SUBJECT DOMAIN NAMES for forfeiture. By seizing the SUBJECT DOMAIN NAMES and redirecting them to another website, the Government will prevent third parties from acquiring the names and using them to commit additional crimes. Furthermore, seizure of the SUBJECT DOMAIN NAMES will prevent third parties from continuing to access the five websites listed above.

101. As set forth above, there is probable cause to believe that the SUBJECT DOMAIN NAMES are subject to both civil and criminal forfeiture because they were used in the commission of criminal copyright infringement and conspiracy to commit criminal copyright infringement.

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VII.

SEIZURE AND FORFEITURE PROCEDURE

102. As detailed in Attachment A, upon execution of the seizure warrant, the registry for the ".net" and ".com" top-level domains, Verisign, Inc., headquartered at 21355 Ridgetop Circle, Lakeside III, Dulles, Virginia 20166 ("Verisign"), shall be directed to restrain and lock the SUBJECT DOMAIN NAMES pending transfer of all right, title, and interest in the SUBJECT DOMAIN NAMES to the United States upon completion of forfeiture proceedings, to ensure that changes to the SUBJECT DOMAIN NAMES cannot be made absent court order or, if forfeited to the United States, without prior consultation with ICE.

103. In addition, upon seizure of the SUBJECT DOMAIN NAMES by ICE, Verisign will be directed to point the SUBJECT DOMAIN NAMES to a particular IP address, which will display a web page notifying users, including the registrants, of the seizure of the SUBJECT DOMAIN NAMES.

104. Registrars also maintain certain records relating to the owner of each domain name for which it is the top-level registry, including the SUBJECT DOMAIN NAMES (the "Domain Name Records"). Certain of these records are available to the public through a "Whois" lookup through a web browser, among other means. At the time the SUBJECT DOMAIN NAMES are seized, the

relevant registrars will be directed to change the "Technical Contact" and "Administrative Contact" fields of the Domain Name Records for the SUBJECT DOMAIN NAMES to contact information relating to ICE to reflect the fact that the SUBJECT DOMAIN NAMES have been seized; and to change the name server fields of the Domain Name Records to effect the forgoing changes. All other fields will be changed so that they do not reflect any individual or entity.

105. Upon completion of forfeiture proceedings, all Domain Name Records for the SUBJECT DOMAIN NAMES will be changed to reflect the transfer of ownership to the United States.

#### VIII.

#### CONCLUSION

106. Based on the information contained in this affidavit there is probable cause to believe that the SUBJECT DOMAIN NAMES are property that has been used, or are intended to be used to commit or facilitate criminal copyright infringement. Accordingly, the SUBJECT DOMAIN NAMES are subject to civil forfeiture under 18 U.S.C. § 2323(a) and seizure pursuant to 18 U.S.C. § 981(b).

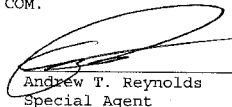
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Accordingly, it is requested that the seizure warrants be  
issued for the following SUBJECT DOMAIN NAMES:

RAPGODFATHERS.COM,  
TORRENT-FINDER.COM,  
RMX4U.COM,  
DAJAZ1.COM, and  
ONSMASH.COM.

  
\_\_\_\_\_  
Andrew T. Reynolds  
Special Agent  
Immigration and Customs Enforcement,  
Homeland Security Investigations

Subscribed and sworn to before  
me on this 17th day of November 2010.

  
\_\_\_\_\_  
THE HONORABLE MARGARET A. NAGLE  
UNITED STATES MAGISTRATE JUDGE



ATTACHMENT A

I. Seizure Procedure

A. The seizure warrant will be presented in person or transmitted via facsimile or email to personnel of the domain name registry listed in Section II ("Subject Registry") and the domain name registrars listed in Section III ("Subject Registrars") who will be directed, for the domain names listed in Section IV ("Subject Domain Names") for which it serves as the top-level domain registry, to make any changes necessary to restrain and lock the domain names pending transfer of all rights, title, and interest in the Subject Domain Names to the United States upon completion of forfeiture proceedings.

B. Upon seizure of the Subject Domain Names, the Subject Registry shall point the Subject Domain Names to IP address 74.81.170.110, at which the Government will display a web page with the following notice:

*This domain name has been seized by ICE - Homeland Security Investigations, pursuant to a seizure warrant issued by a United States District Court under the authority of 18 U.S.C. §§ 981 and 2323.*

*Willful copyright infringement is a federal crime that carries penalties for first time offenders of up to five years in federal prison, a \$250,000 fine, forfeiture and restitution (17 U.S.C § 506, 18 U.S.C. § 2319). Intentionally and knowingly trafficking in counterfeit goods is a federal crime that carries penalties for first time offenders of up to ten years in federal prison, a \$2,000,000 fine, forfeiture and restitution (18 U.S.C. § 2320).*

C. Upon seizure of the Subject Domain Names, the Subject Registry shall take all steps necessary to restrain and lock the domain at the registry level to ensure that changes to the Subject Domain Names cannot be made absent a court order or, if forfeited to the United States government, without prior consultation with United States Immigration and Customs Enforcement. The DNS record should be altered to remove any applicable name servers.

D. Upon seizure of the Subject Domain Names, the Subject Registrars shall modify any records, databases, tables, or documents that are used by the Subject Registrars to identify the owner of the Subject Domain Names to reflect the seizure of the Subject Domain Names. These changes relate to the following records, if they exist:

1. The "Technical Contact" and "Administrative Contact" fields will reflect the following information:

- a. Name: U.S. Immigration and Customs Enforcement
- b. Address: National Intellectual Property Rights  
500 12th Street SW  
Washington, DC 20024
- c. Country: USA
- d. Telephone: 1-866-IPR-2060 (477-2060)
- e. Email: IPRCenter@dhs.gov
- f. Fax: 202-307-2127

2. Any remaining fields will be changed so they do not reflect any individual or entity.

E. The Subject Registry shall take any steps required to propagate the changes detailed in Section D to any applicable DNS servers.

## II. Subject Registry

Verisign, Inc.  
21355 Ridgetop Circle  
Dulles, Virginia 20166

III. Subject Registrars

Enom, Inc.,  
15801 NE 24th Street  
Bellevue, Washington 98008

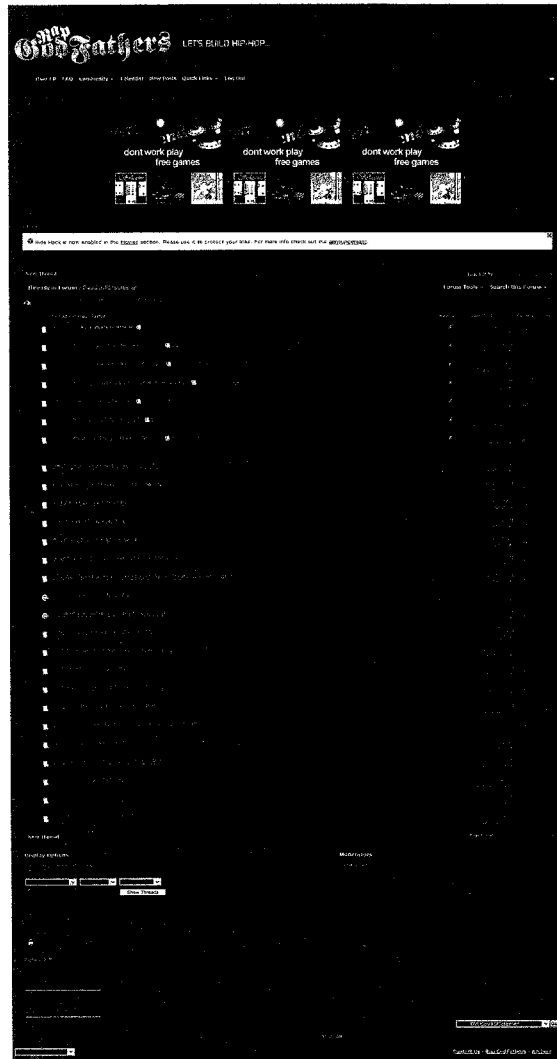
Blue Razor Domains, Inc.  
14455 North Hayden Road, Suite 226  
Scottsdale, Arizona 85260

Godaddy.com, Inc.  
14455 N. Hayden Road, Suite 219  
Scottsdale, Arizona 85260

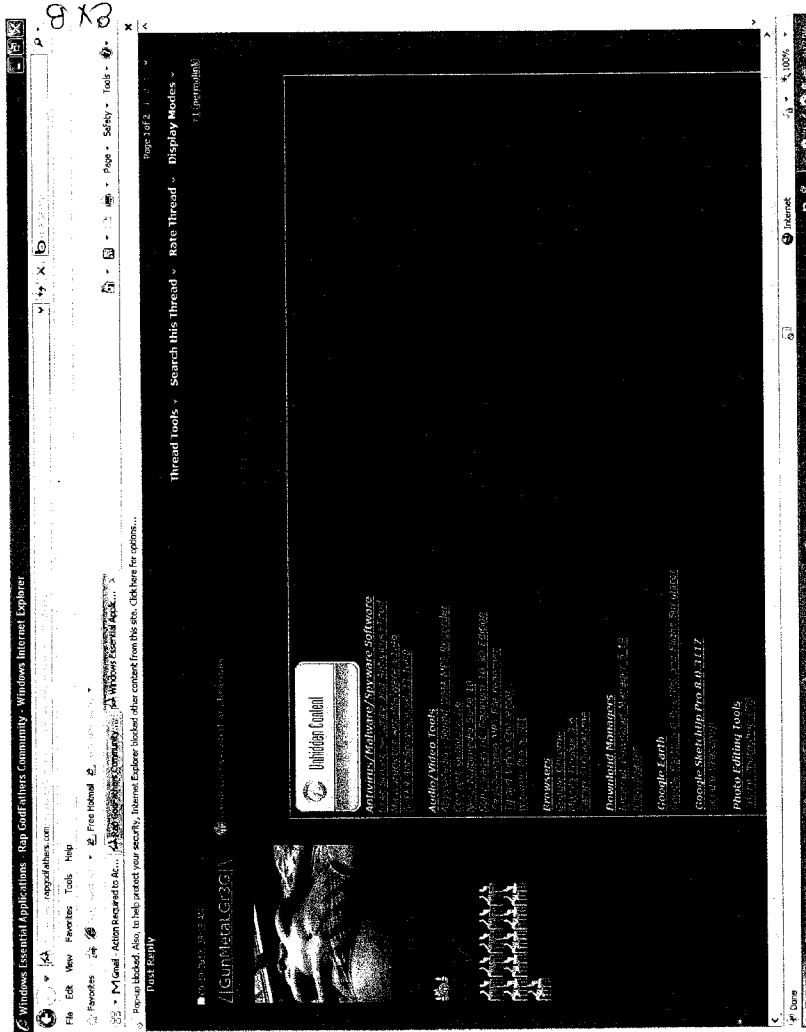
Fast Domain, Inc.  
1958 South 950 East  
Provo, Utah 84606

IV. Subject Domain Names

RAPGODFATHERS.COM,  
TORRENT-FINDER.COM,  
RMX4U.COM,  
DAJAZ1.COM, and  
ONSMASH.COM



EX A



TorrentFreak

Home Contact About Archives Forum

Top 10 Most Pirated Movies on BitTorrent

Torrent

The top 10 most downloaded movies on BitTorrent, "Wall Street: Money Never Sleeps" tops the chart this week, followed by "Resident Evil: Afterlife." Red completes the Top Three.

This week there are three newcomers in the list including a Cam of The Social Network. Wall Street: Money Never Sleeps is the most downloaded movie on BitTorrent this week.

The data for our weekly download chart is collected by TorrentFreak, and is for informational and educational reference only. All the movies in the list are DVDs/rips unless stated otherwise.

RSS feed for the weekly movie download chart.

Week ending October 26, 2010

Ranking		Movie	BitTorrent Trailer
1	(1)	Wall Street: Money Never Sleeps (RS)	6.7 / trailer
2	(2)	Resident Evil: Afterlife (RS)	6.4 / trailer
3	(3)	Red (DVD/rip)	7.6 / trailer
4	(3)	Jonah Hex	4.4 / trailer
5	(4)	Get Him To The Greek	6.9 / trailer
6	(1)	The Switch (RS)	5.9 / trailer
7	(5)	Machete (RS)	7.5 / trailer
8	(9)	Knight and Day (RS)	6.6 / trailer
9	(1)	The Social Network (Cam)	8.4 / trailer
10	(10)	Piranha (RS)	6.5 / trailer

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Previously: Piracy and the Music Industry, The Values Of Artists Matter

New: Secret anti-piracy negotiations, 3 Strikes, and a Taxpayer Funded Campaign

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WYZO

WYZO

The webpage cannot be found

Most likely causes:

- There might be a typing error.
- If you clicked on a link it may

What you can try:

- Retype the address.
- Go back to the previous page.

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You are one step  
away from  
helping

Ex C



Willkommen, Unregistriert (Registrieren Bitte)

Benutzername:  Passwort:

Suchen

Forum

REGISTRIERTEN MITGLIEDER

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9xE

Willkommen, Unregistriert (Registrieren Hilfe)

Benutzername:  Passwort:  [Angemeldet bleiben](#)

Suchen:

[FORUM](#)
[BUGS](#)
[WAS IST NEP?](#)
[BLACK](#)
[ELETRIO](#)
[HELPDESK](#)

[Hilfe](#)
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[Sticky threads](#)

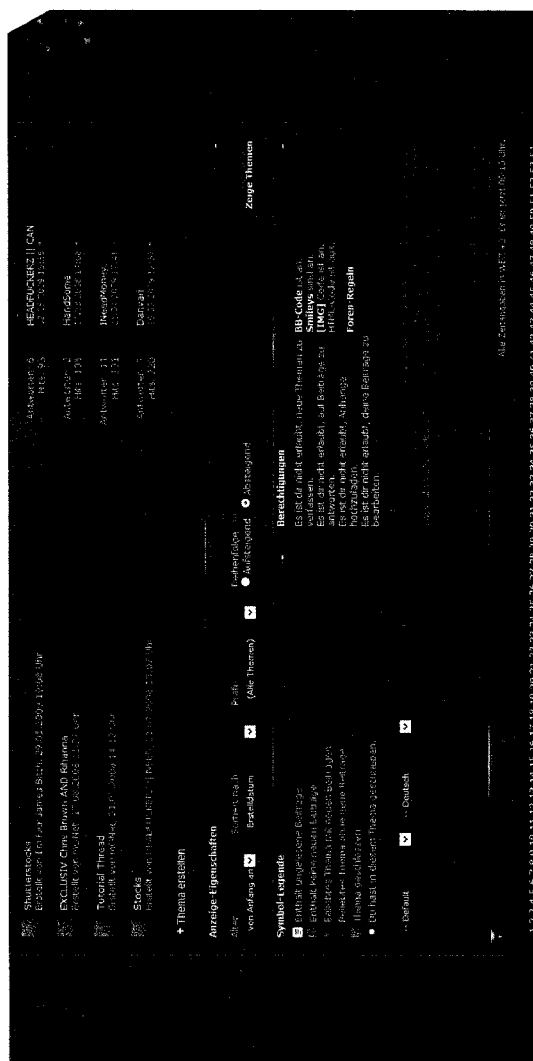
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Ms. JACKSON LEE. Mr. Chairman, I have a parliamentary inquiry, please.

Mr. SMITH. The gentlewoman will state her parliamentary inquiry.

Ms. JACKSON LEE. I appreciate it very much, Mr. Chairman.

The gentleman from California in his statement about his own subpoena mentioned today that he did not request wiretaps under seal. And in Mr. Issa's contempt citation, the wiretap applications document the extensive involvement of the Criminal Division in the Fast and Furious—

Mr. SMITH. Would the gentlewoman state her parliamentary inquiry?

Ms. JACKSON LEE. Yes, I will. My question is, did anyone review with the Justice Department before this hearing—

Mr. SMITH. That is not a parliamentary inquiry.

Ms. JACKSON LEE.—whether the use of this leaked information will harm the Department's ability to bring justice to those who violated our laws?

Mr. SMITH. Ms. Jackson Lee, that is not a parliamentary inquiry.

Ms. JACKSON LEE. It refers to the questioning of Mr. Issa in this hearing. If not, how do we know that the use of the information during this hearing, if asked, is consistent with—

Mr. SMITH. Ms. Jackson Lee, we are going to have to deduct this from your time if you continue. That is not a parliamentary inquiry.

Ms. JACKSON LEE. I believe it is, Mr. Chairman. But I hope that we have reviewed—

Mr. SMITH. The gentleman from Virginia, Mr. Forbes, is recognized for his questions.

Mr. FORBES. Thank you, Mr. Chairman.

General, thank you for being here today.

And I think, despite all the rhetoric, we know that this Committee is not asking you to break the law regarding what you say or information you provide to Congress. It is just, as you know, it doesn't matter if you appear in Congress 7 times or 70 times, if, when you are asked, you say "I don't know" to the questions that are most pertinent. Or it doesn't matter if you supply 7,000 pages or documents or 700,000 pages if they are not the proper papers to answer key questions.

So I want to begin where you began, and that was the standard that you said that you have in the Department, which is that every action is guided by law and facts and nothing else. I think I stated that correctly. Is that fair?

Attorney General HOLDER. Well, certainly when we are at our best, that is what happens.

Mr. FORBES. We know that every Cabinet Secretary doesn't adhere to that standard. In fact, we have in a paper today the fact that several Cabinet members were required to come to a meeting at the Democratic National Committee headquarters, where the campaign manager, the top strategist for the campaign, the executive director of the Democratic National Committee, was there telling them the actions that they should take in four items: to help the President win re-election, regarding the campaign structure, the importance of the Electoral College, and the importance of staying on message.

The question I want to ask you this morning is, I know that you are familiar with David Axelrod, who is Obama's top campaign strategist. And to the best of your knowledge, has Mr. Axelrod or anybody on his behalf or anybody on behalf of the campaign had any discussions with you or members of the Justice Department regarding actions that you should or should not take, messaging that you should or should not make, or hiring decisions that you should or should not support?

Attorney General HOLDER. Absolutely not. I mean, one of the things that I like a great deal about my interaction with people in the White House is that—and I think they take their lead from the President—is that they have respected what I would call a wall that has to exist between the Justice Department and the political operation that goes on in the White House. I have not had any of that kind of interaction.

Mr. FORBES. So there have been some publications out, and, of course, we never know whether these publications are accurate or not, but at least in one book that claims that you and Mr. Axelrod had some type of confrontation when he was trying to get you to hire someone. And you are saying that is not accurate at all; you have never had any kind of meetings with him regarding any hiring decisions at the Department of Justice.

Attorney General HOLDER. No, we talked about, not a hiring decision, we talked about ways in which we might improve the ability of the Justice Department to respond to political attacks that were coming my way.

David Axelrod and I are good friends. He is a close friend of mine. We have a great relationship. He is a person I respect a great deal. We worked together on the campaign while he was at the White House. But he has never done anything that I would consider inappropriate.

Mr. FORBES. But, then, what you are saying is you have had contact with Mr. Axelrod, campaign strategists, about how you should handle different attacks coming to you as Attorney General, correct?

Attorney General HOLDER. Yeah, I mean, there is a political dimension to the job that I have as Attorney General. I mean, the reality is that I don't sit up in an ivory tower and just do law enforcement. I am the subject of attacks. I am a person who was seen by some as pretty controversial. And there are times, or at least there was that time, when I was looking for some help in that regard.

Mr. FORBES. So you have had those discussions. Did he ever try to encourage you to hire or put any particular person at the Department of Justice?

Attorney General HOLDER. No.

Mr. FORBES. With Fast and Furious, there has been a lot of discussions about it, and we know that is a big item not just for us, but the Ambassador to Mexico has said that that operation, which took place under your watch, has poisoned the Mexican people and really put a strain on strides we have made in two successive Administrations in the United States. He has been concerned that the investigation hasn't been completed.

Have you ever had any consultation with the White House or anyone with the campaign or with Mr. Axelrod about messaging related to Fast and Furious?

Attorney General HOLDER. About messaging with regard to Fast and Furious?

Mr. FORBES. Yes. Comments that were made, how you were going to message it, any of that.

Attorney General HOLDER. Well, we have certainly talked about the way in which we could deal with the interaction between the

Justice Department and Congress, about ways in which I would, we would——

Mr. FORBES. But nothing about press messaging at all?

Attorney General HOLDER. Well, I mean, in terms of trying to get a message out that was consistent with the facts and make sure that it was done in an appropriate way, I have had conversations like that with people in the White House Counsel's Office.

Mr. FORBES. Okay.

Just two other quick questions. I know that you have filed actions against Arizona, South Carolina, Utah, and Alabama—all Republican Governors. My time is up. Would you give us a list of any similar actions of a similar profile you have filed against any Democratic Governors—States with Democratic Governors.

And, also, the final thing is, if you will let us know if you had any relationship or meetings with the White House and members of the campaign about any of the messaging or any of these actions that took place on that.

And, Mr. Chairman, my time has expired.

Mr. SMITH. Thank you, Mr. Forbes.

Attorney General HOLDER. One thing in regard to the question of the Governors, I am not sure that there has been a photo ID attempt made by a State run by a Democratic Governor.

Mr. FORBES. No, no, I wasn't asking about photo IDs. I think, if you look at these States, they were regarding, I think, immigration policies. But any action that you have taken against a Democratic Governor of a similar high profile with an investigation——

Attorney General HOLDER. Well, I think with regard to the immigration laws, as I understand it—and I can check, but I don't think that there has been a similar immigration attempt made by States run by Democratic Governors, which would be the reason why we have not opposed them. But I will check, and we will share that information with you.

Mr. FORBES. And, also, Mr. Attorney General, when you check, if you would make sure you let us know the contacts you had with Mr. Axelrod regarding any messaging or anything that might come regarding those actions.

Thank you.

Mr. SMITH. Okay. Thank you, Mr. Forbes.

The gentlewoman from Texas, Ms. Jackson Lee, is recognized for questions.

Ms. JACKSON LEE. I thank the Chairman, and I thank the Ranking Member. And I certainly thank the Attorney General for his service.

I just wanted to add what I don't think, very quickly, was in the introduction of the Attorney General. And then my series of questions, Mr. General, without any disrespect will be bullet-like, not toward you but questioning, so that I can get a series of questions in.

But I did note that you were a Deputy Attorney General under the Bush administration. You continued to serve, I think, through the time that you were appointed under President Obama. Is that correct? Did you remain during that time?

Attorney General HOLDER. Little-known fact: I was George Bush's first Attorney General.



Ms. JACKSON LEE. I think that should be made clear for the record, because you have had a continuous public service commitment. You were in the private sector for a moment, but between a judgeship and the superior court, that I understand you were appointed by President Ronald Reagan at that time. Is that correct, Mr. Attorney General?

Attorney General HOLDER. That is correct.

Ms. JACKSON LEE. Let me thank you again for your service and ask a series of questions.

I will be giving to you today, June 7th, a letter to ask for the investigation of the State of Texas for its purging of 1.5 million voters. And I encourage and hope that there will be a speedy review inasmuch as we are in a process of election, a November 2012 election. And I do want to just ask the question on this issue of voting. And my good friend from California wanted to establish certain rights, egress, ingress, but the protection of access under the First Amendment.

And I want to just focus, if you wanted to petition your government and use no government ID, most could either take their vehicle, hitch a ride, but they would not be totally prohibited from exercising that constitutional right. And you made a point about fundamental right, but if you were denied the right to vote, there is no alternative, is there not? There is no other way—maybe you could get a bullhorn in the middle of the street, but there is no way that you could impact the choice of those who will govern.

Could you just be very quick on that answer, please?

Attorney General HOLDER. No, I think that is right. If you want to directly impact governmental policy, who is setting those policies, that is directly tied to the ability to vote, to cast a ballot.

Ms. JACKSON LEE. So do you believe it is a legitimate duty, action of the Division on Civil Rights of the Department of Justice, operating under existing current law, to assess issues of purging or the impact of the voter ID law?

Attorney General HOLDER. Absolutely. We apply the law that was passed by this Congress as early as 1965, reauthorized as recently as 6 years ago, overwhelmingly by Congress—

Ms. JACKSON LEE. Are you going outside the bounds of the law when you, in essence, review Florida or Texas or Ohio or Indiana, the case preceding the Indiana case? Are you outside the boundaries, as you can assess?

Attorney General HOLDER. All we are doing is applying the law that exists and has existed for over 40 years now.

Ms. JACKSON LEE. With respect to the affordable care decision which is pending, but I just want a simple question. Do you feel that there was an adequate review—and the decision ultimately rested with the Supreme Court, which I think has done a decent and fair job on recusals with respect to Justice Kagan. Could you have done anything more than what was appropriately done by the Justice Department?

Attorney General HOLDER. With regard to the recusal issue?

Ms. JACKSON LEE. Yes.

Attorney General HOLDER. I don't think that we should have done any more. The question of recusal, I think, is something best brought up by the litigants in the case. They had that opportunity;

I don't know if they raised it or not. But I think the Justice Department has done all it can, certainly responding to FOIA requests. And all information that I think appropriately can be shared has been shared.

Ms. JACKSON LEE. I appreciate it.

We are certainly saddened by the loss of life that was resulted by the Fast and Furious. I think you have said that often. And are you aware of the report produced by Ranking Member Elijah Cummings?

Attorney General HOLDER. Yes.

Ms. JACKSON LEE. And were you aware that in the—do you believe that under this report that his staff and Ranking Member Cummings of the Oversight Committee extensively reviewed either the 7,600—or at least the whirl of information that was given?

Attorney General HOLDER. Yes, I think they did a good job of reviewing the information. They produced a good report that contains a number of reforms that we have tried to implement.

Ms. JACKSON LEE. Quickly, the statement says that they found no politically motivated operation, that Fast and Furious was not conceived and directed by high-level Obama administration political appointees at the Department of Justice. Would you concede that they would have the basis to say that?

Attorney General HOLDER. I think if one looks at the documents, that statement is manifestly true.

Ms. JACKSON LEE. Can I ask you, as well, to investigate and are you concerned or have you seen the impact of single-race-based juries in a number of cases? This has been an issue in a number of areas, particularly in the South, in cases that are particularly sensitive.

I am going to ask you to investigate the Chad Holley case, which is a beating incident that occurred in Houston, Texas, and the series of trials that are coming forward. But, in particular, one case was tried by a single-race jury and, of course, resulted in the acquittal. Would you please take this as an official request for the Justice Department to investigate the beating and the resulting trial that was a single-race jury in the case of Chad Holley?

Attorney General HOLDER. I mean, the Supreme Court has recognized that the selection process—that a deliberate attempt at creating a jury of a single race, under the Batson case, is not appropriate.

I am familiar with the Holley case, not intimately familiar with it, but I am familiar with the Holley case. And that is something that we are in the process of determining what course of action we should take.

Mr. SMITH. Mr. Attorney General, a number of Members today have made requests from you of information. When can they expect those requests to be responded to? Within 2 weeks or so?

Attorney General HOLDER. We will do the best that we can, and quickly as we can. I am a little surprised that we have not responded at least to some of the things that have been raised in connection with the last time that I was here—

Mr. SMITH. Uh-huh.

Attorney General HOLDER [continuing]. But we will try to do a better job than that.

Mr. SMITH. Okay.

Ms. JACKSON LEE. I thank the Chairman.

Thank you, Mr. General.

Mr. SMITH. Thank you, Ms. Jackson Lee.

The gentleman from Iowa, Mr. King, is recognized.

Mr. KING. Thank you, Mr. Chairman.

Thank you, Attorney General, for being here to testify today.

Just in picking up on the Chairman's remarks, I would point out that I had a series of questions that I asked December 8th here. And although we haven't pressed relentlessly for those responses, I haven't seen them. And so I am going to be submitting a new request from December 8th and then additionally here for this today, I believe.

But I think, first of all, there is one piece left on the Fast and Furious I would just ask you, that—can you tell me when you first started to doubt that the original letter was inaccurate? Can you tell me what piece of information caused you to do that?

Attorney General HOLDER. Yeah, I mean, I think my first doubts happened just before, or just about the same time that I asked for the inspector general to conduct a report. As I listened to media reports and things I was getting from Senator Grassley, I had some—that is when I think my doubts first began about the accuracy of the February 4th letter.

Mr. KING. Was there a piece of information, though, in particular in those media reports that caused you to doubt, or just the information itself? You thought you had to look into it?

Attorney General HOLDER. I am not sure I can remember anything specific. But I do remember that the reports were inconsistent with what I was hearing from people within the Department and also inconsistent with what Senator Grassley was telling me in a letter I think that he sent to me, like, on February 9th or something like that.

Mr. KING. Okay. Yeah, I have a February 4th letter denying ATF ever walked guns. That was from 2011. I don't have the date of Senator Grassley's letter, but that letter was formally withdrawn on December 2, 2011. That is consistent your testimony, though, I recognize. And I thank you.

And then I would take us back to the Pigford issue and the discrimination issues that we discussed the last time, General Holder. And now—we discussed Pigford then, and I posed the question that, in the farm bill of 2008, consistent with, I believe, your testimony and also a statement made personally to me by Secretary Vilsack, that the farm bill authorized the negotiations in the agreement that ultimately lays out in the terms of \$1.25 billion to be distributed to Black farmers who have claims of discrimination. And the authorization within the farm bill is \$100 million, and that is to cap that for all of the settlements that are there.

And now I see that not only is it not capped at \$100 million, it has been expanded to \$1.25 billion, and that we have three other cases out here since that period of time: *Garcia v. Vilsack*, *Keepseagle v. Vilsack*, *Love v. Vilsack*. And when I total them up, it is \$1.33 billion in this order, *Garcia*; \$760 million, *Keepseagle*; \$1.33 billion, *Love*—coincidence, I suppose, \$1.25 billion, *Pigford*; for a total of, all together, \$4.93 billion poised to—either having

been distributed or poised to be distributed under these discrimination cases, a lot of it, \$3.58 billion, coming out of the judgment fund.

And can you tell me how much is in the judgment fund, and is—I am going to ask you to produce a report of the funds that come in and the funds that are distributed out of the judgment fund. I think this Congress needs an oversight if we are dealing with numbers that are approaching \$5 billion.

Attorney General HOLDER. What I can say is that those settlements that were reached, we set pools of money that can be tapped if people can prove that, in fact, they were discriminated against. There is certainly an unfortunate history of discrimination that I think everybody acknowledges exists between the Department of Agriculture in dealing with farmers of a variety of ethnicities and genders, and the attempts at structuring these settlements was to deal with, redress those wrongs.

Mr. KING. But \$5 billion in round figures, 4.93 billion, that is a big chunk of money to be distributed without congressional oversight. And do you have any resistance to Congress taking a look at that data, the contingency fees and the distributional amounts, and the sources of that money and the amounts?

Attorney General HOLDER. No, I mean, I think that is legitimate oversight to talk about the way in which the cases were settled, how it impacts the judgement fund.

Mr. KING. Thank you. But then I will follow up with a more specific question, but I want to also ask you about your reaction when you saw the video of the young man who claimed your ballot here some months ago, and your reaction toward requirement for a photo ID after you saw that video.

Attorney General HOLDER. Yeah, I mean, it is an attempt to show something, I suppose, but I think what I drew from that video was that that guy was very careful not to say he was Eric Holder, not to actually get a ballot. He didn't do the kinds of things that would have subjected him to criminal prosecution.

Mr. KING. And I am not worried about that, but he could have obtained your ballot with ease. It was offered to him. And so I just suggest this, that it may not be impossible, but I think it has been determined here today in the questioning of Mr. Lungren that visiting a Federal building, even your building, is maybe not impossible, but difficult without a picture ID. And if it is difficult or impossible to visit a government building without a photo ID, then how can we allow someone to help choose our government without a photo ID?

Attorney General HOLDER. I think the question is if you look at, for instance, South Carolina, they had in place measures that protected the integrity of the ballot before they went to the photo ID. And I don't per se say that photo IDs are necessarily bad. The question is how the structure is put in place, how they are distributed, whether or not it has a disproportionate impact on people of a certain race, certain ethnicity, a certain age group.

Mr. KING. Well, why would it?

Mr. SMITH. The gentleman's time has expired. Thank you, Mr. King.

The gentlewoman from California Ms. Waters.

Ms. WATERS. Thank you very much.

We would like to welcome you, Mr. Attorney General. I have a number of questions I wanted to ask you, but my attention has been diverted to the line of questioning from Congressman Goodlatte.

It is well known that you dismissed the charges that were placed against Senator Stevens following your investigation that indicated that certain exculpatory evidence had been withheld. Now, was there just one thing or were there several things that were done that you disagreed with that caused you to dismiss?

Attorney General HOLDER. The thing that was the main motivator for my decision to dismiss the case was I thought the pretty solid evidence that we had uncovered, Brady material, exculpatory material, had not been shared with the defense. And I think that was the basis, the main motivation for my deciding to dismiss the case.

Ms. WATERS. And it seems that—I think his name is pronounced Mr. Schuelke, S-C-H-U-E-L-K-E.

Attorney General HOLDER. Ed Schuelke.

Ms. WATERS. Agreed with you basically, but the punishment now does not seem to match the crime, prosecutorial misconduct. And a lot of people are wondering how does the Office of Professional Responsibility literally dispute the seriousness of the withholding of the exculpatory evidence? How do you account for that?

Attorney General HOLDER. I wouldn't agree that they don't take it seriously. Mr. Schuelke, who I know and respect as a good lawyer, came up with a report and said that he thought the material was withheld intentionally. The OPR report, which was about 700 pages long, says the information was withheld, but says it was done recklessly, not intentionally. And it was on that basis that the OPR recommendation was made as to what the appropriate sanction was.

Mr. Schuelke never made a recommendation as to what he thought the appropriate sanction should be, because I think, as Judge Sullivan said, there was not an order that he could actually point to so that he could find contempt or something like that.

So I think that is the difference between the Schuelke report and the OPR report, the state of mind of the person who was engaged who did not turn over the information, or people who didn't turn over the information.

Ms. WATERS. So in your opinion, do you believe that the recommendations for punishment by the Office of Professional Responsibility, are those recommendations basically in line with the unintentional withholding, or perhaps it could have been stronger? What do you think?

Attorney General HOLDER. Well, I think it is appropriate for the Attorney General not to comment on these determinations because it is something that is not my responsibility to do. We put that in the hands of the career people. We have a great OPR, great Office of Professional Responsibility. We have a structure in place so that people outside of OPR look at the findings of OPR and then make a determination as to what the appropriate sanctions should be, and the people who are political in nature are really insulated from that process.

Ms. WATERS. So I suppose what we can conclude is that you dismissed; you felt that the withholding of the information was serious enough to dismiss?

Attorney General HOLDER. Yes.

Ms. WATERS. And I asked, I think, earlier was there leaking of information, was there sharing of information with others that it should not have been shared with in addition to the withholding of information?

Attorney General HOLDER. No. As I remember it, the concern that I had was with the nonproviding of information that the defense was entitled to. That was the concern that I had.

Ms. WATERS. And so clearly you addressed that concern, but, again, after having addressed it, the Office of Professional Responsibility had the responsibility to determine what the punishment should be, and you have no hand in that; is that right?

Attorney General HOLDER. That is correct.

Ms. WATERS. Okay. Well, I just wanted to get on the record that the withholding of the evidence was a serious matter, and that you made a decision based on that.

Attorney General HOLDER. I would agree with you. Whether you agree with Mr. Schuelke or OPR, whether it was intentional, or reckless, negligent, it was serious and I think necessitated the dismissal of the case, which is what I did.

Ms. WATERS. Thank you very much.

I yield back the balance of my time.

Mr. SMITH. Thank you, Ms. Waters.

Does the gentleman from Virginia Mr. Scott have a unanimous consent request?

Mr. SCOTT. Yes, thank you, Mr. Chairman.

Mr. Chairman, I ask unanimous consent to enter into the record letters from the National Organization for Black Law Enforcement Executives, City of Philadelphia Police Department, Boston Police Department, and Association of Prosecuting Attorneys on behalf of the Attorney General; and also a copy of the draft contempt citation—we were questioning what had been asked for—draft contempt citation offered by the Committee on Oversight and Government Reform, which says in part, “The wiretap applications document extensive involvement of the Criminal Division in Fast and Furious, yet the Department of Justice has failed to produce them in response to the Committee’s subpoena,” so that we know exactly what was asked for.

Mr. SMITH. Without objection, those documents will be made a part of the record.

[The information referred to follows:]

**Boston Police**

Office of the Police Commissioner

1 Schroeder Plaza, Boston, MA 02120-2014

May 10, 2012

The Honorable Patrick Leahy  
 United States Senate  
 437 Russell Senate Building  
 Washington, DC, 20515

The Honorable Darrell Issa  
 U.S. House of Representatives  
 2409 Rayburn House Office Building

The Honorable Lamar Smith  
 U.S. House of Representatives  
 2409 Rayburn House Office Building

Dear Chairman Leahy, Chairman Smith, and Chairman Issa:

As a member of the Major Cities Chiefs Association I am writing to express my strong support for Attorney General Eric Holder and the progress that has been made on behalf of law enforcement under his leadership of the Department of Justice. We are extremely concerned about threats to find the Attorney General in contempt of Congress in part for his commitment to protecting information related to ongoing criminal investigations from public disclosure.

We urge you to consider the pressing matters that Americans are confronting each and every day. In our cities, crime prevention and suppression are our highest priorities and our efforts have been aided by Attorney General Holder's unwavering support for our departments and our officers. The Department of Justice under Attorney General Holder has prioritized support for state and local law enforcement through improvements in the COPS Hiring Program, the Attorney General's Officer Safety Initiative and the VALOR Program. These programs ensure that our departments and officers receive the federal support that we need in order to keep our communities safe.

The ongoing Congressional inquiry to determine the facts in a tragically flawed operation, spanning at least two Administrations is understandable. The inquiry, however, has also distracted the Department of Justice in its efforts to assist state and local law enforcement -- particularly in the area of violent crime prevention and suppression. This causes us deep concern. Therefore, we ask that you respect the Department's tradition of withholding information related to ongoing law enforcement operations, rather than seeking to cite Attorney General Holder for contempt for standing up for this important principle.

Sincerely,

  
 Edward F. Davis  
 Police Commissioner



*Washington DC Office – 1615 L Street NW, Suite 1100 (202)861-24280*

May 23, 2012

The Honorable Darrell E. Issa  
Chairman  
Committee on Oversight  
and Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Elijah E. Cummings  
Ranking Member  
Committee on Oversight  
and Government Reform  
2235 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Patrick J. Leahy  
Chairman  
Senate Judiciary Committee  
437 Russell Senate Building  
Washington, D.C. 20510

The Honorable Chuck Grassley  
Ranking Member  
Senate Judiciary Committee  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Chairman Issa, Chairman Leahy, Congressman Cummings, and Senator Grassley,

The Association of Prosecuting Attorneys (APA) is a private non-profit whose mission is to support and enhance the effectiveness of prosecutors in their efforts to create safer communities. We are the only national organization to include and support all prosecutors, including both appointed and elected prosecutors, as well as their deputies and assistants, whether they work as city attorneys, city prosecutors, district attorneys, state's attorneys, attorneys general or US attorneys. On behalf of APA, we believe that the Committee's ongoing investigation into an operation which the Deputy Attorney General has identified as the ATF's flawed response to the problem of gun trafficking impacts prosecutors and other law enforcement agencies. Because of this issue and out of concern for the integrity of the process and our profession we present the prosecutor's perspective.

As professional prosecutors, we believe it is important to hold dangerous offenders fully accountable, especially when the allegations include the murder of at least two law enforcement officers. Those responsible for the murder of Brian Terry, for example, must face consequences that ensure justice and deter other criminal enterprises and offenders from similar conduct. Prosecutors throughout this country are handling cases every day which include information from confidential informants, wiretaps and witnesses, who are reluctant to come forward out of fear for their safety as well as their family and friends.

***Our mission is to support and enhance the effectiveness of prosecutors in their efforts to create safer communities.***



Further, it is common practice for prosecutors to refuse to disclose the identity of their informants as well as the identity and whereabouts of key witnesses who are likely to be executed by the accused or his criminal enterprise. Every effort is made by prosecutors to comply with criminal discovery yet ensure the legal protections our justice system affords.

Therefore, in cases where witnesses may be intimidated by Mexican drug cartels, where informants may be compromised (thereby jeopardizing ongoing criminal investigations and prosecutions, as well as future leads), and where releasing photographs and other sensitive information may hinder prosecutors' ability to proceed in a current criminal trial or be unable to file future cases, it is logical to delay release of information until all of the related investigations are closed and related cases have been finally adjudicated.<sup>1</sup> Not only is it necessary, we have been provided the legal basis that it is indeed against the law to disclose core investigative materials, such as transcripts of grand jury proceedings and wiretap applications, from ongoing criminal investigations and prosecutions.<sup>2</sup> As a former California prosecutor, I am fully aware that ethical prosecutors are prevented from publically releasing evidence pre-trial. This preclusion includes information concerning confidential informants, photographs, and wiretaps. Prosecutors are only allowed to release the name of the accused, the charges and the maximum penalty.<sup>3</sup> They are forbidden to discuss the evidence or provide information which is not contained in the charging document or included in a public record. The discussion about the case, the investigation, and other criminal acts by the accused is only proper after verdict and sentencing.

As prosecutors, we are accustomed to doing the public's business in the public. Prosecutors' offices throughout the country respond to requests for information, hold press conferences, testify before grand juries and appear before committees and commissions. It is important that those with oversight responsibility are fully informed as to the basis for the actions of the public prosecutor's office. However, since "providing open investigative files in response to a congressional subpoena could give rise to a claim, by defense counsel or others, of improper congressional influence over the criminal justice process . . ."<sup>4</sup>, we at the APA encourage congress to delay those aspects of its investigation that necessitate disclosure of trial-related documents until all related investigations and prosecutions have been finally adjudicated.

<sup>1</sup> See Letter from James M. Cole, Deputy Attorney General, to Darrell E. Issa, Chairman, Committee on Oversight and Government Reform (May 15, 2012), at 1.

<sup>2</sup> *Id.* at 5.

<sup>3</sup> As the Terry trial is set to commence in California, federal prosecutors are bound to California's rules of ethics. 28 CFR 77.3. ("In all criminal investigations and prosecutions . . . attorneys for the government shall conform their conduct and activities to the state rules and laws . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.")

<sup>4</sup> Letter from Janet Reno, Attorney General, to Orrin Hatch, Chairman, Committee on the Judiciary (May 17, 2000).

***Our mission is to support and enhance the effectiveness of prosecutors in their efforts to create safer communities.***

Thank you for your consideration of this important matter and please feel free to contact me or my staff if we may be of any assistance.

Sincerely,

A handwritten signature in dark ink, appearing to read "David LaBahn", enclosed within a hand-drawn oval.

David LaBahn  
President and CEO

*Our mission is to support and enhance the effectiveness of prosecutors in their efforts  
to create safer communities.*

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Mr. SMITH. The gentleman from Arizona Mr. Franks is recognized for questions.  
Mr. FRANKS. Well, thank you, Mr. Chairman.  
Thank you, General.

Mr. Holder, on April 27, 2011, Members of this Committee asked you to give us information surrounding the decision by Justice to forego prosecution of the unindicted coconspirators in the Holy Land Foundation case. This is the largest terrorism finance case, of course, in U.S. history. You refused to comply with this request, and you still have not produced, or you are still not prosecuting despite there being what many consider to be a mountain of evidence against these Jihadist groups, at least one of which now says it is working inside your agency to help advise on the purge of counterterrorism training materials.

We are told that this mountain of evidence which outlines the Jihadist network within the United States amounts to 80 bankers' boxes full of documents. This evidence was turned over to the court, and much of it was given to the Jihadist defense lawyers.

Members of this Committee and other Committees would like to review this evidence, whether it has to be on a classified basis or not. Would you commit today to give us and provide us with those documents which comprised the government's case in the Holy Land Foundation trial?

Attorney General HOLDER. It is hard for me to answer that question. I don't know—

Mr. FRANKS. No, it is not to answer, it is just will you, or will you not.

Attorney General HOLDER. I don't know what the nature of the evidence is. I don't know if it is grand jury material, I don't know if it is wiretap information. There are a variety of things that I would have to look at.

I can certainly take your request, and we can check to see what the nature of the evidence is and make a determination about whether it is appropriate for that material to be reviewed. I just don't know.

Mr. FRANKS. Well, we made the request on April 27 of last year, and so far it hasn't happened. So I would like to make the request. And would you give us your best efforts basis that—your good-faith effort that you would give that information to us if you can do so?

Attorney General HOLDER. I will certainly make a good-faith effort to look at the request that you have made and see whether or not it can be complied with.

Mr. FRANKS. Well, I guess I would hope that you would also give us some explanation as to why the request has been ignored thus far.

Let me shift gears on you here. It has been reported that multiple agencies, including the FBI, are now purging counterterrorism training materials of information outside groups might find offensive, including discussion of things as fundamental as that, quote, "al Qaeda is a group that endorses violent ideology that should be examined," unquote. That is one example.

Per the new guidelines FBI agents may no longer discuss this in their training sessions because it offends some people, and it has been purged. And this strikes me as the sacrificing of vital national security, the muzzling of our national security apparatus on the altar of political correctness. And this concern, I think, General, seems warranted given that the bipartisan Senate report on the Fort Hood massacre, to quote them, "the worst terrorist attack on

U.S. soil since 9/11,” found that, quote, “political correctness inhibited officials from taking actions that could have stopped the attack.”

Now, members of multiple Committees are now investigating. Has anyone inside your agency coordinated with any other Federal agencies such as DOD, DHS or the Department of State to carry out this review of counterterrorism training materials?

Attorney General HOLDER. Well, let me say first off that the decisions that were made by the FBI with regard to what use would be made of certain materials is not based on political correctness or whether or not something is offensive. The search was for materials that were simply incorrect, that stated—had assertions about particular things that were simply wrong, and we didn’t think that was appropriate to be included in the training materials.

Bob Mueller has taken this very seriously. But I can tell you, if anybody knows Bob Mueller, he is not making the determinations on the basis of what is either offensive or politically correct. That is not the driver in this attempt to make sure that our training materials are accurate.

Mr. FRANKS. So has anyone inside your agency coordinated this effort such as it is, whatever it might be, with DOD, or DHS or the State Department?

Attorney General HOLDER. Well, I am not sure that we necessarily have to. We obviously interact with our partners all the time in a variety of ways. The Deputy Attorney General issued some guiding principles to all DOJ component heads and U.S. Attorneys to make sure that these training materials were accurate.

We interact with our partners all the time, and it is on that basis, among other things, that we have an ability to decide what materials are accurate.

Mr. FRANKS. Well, it is one of two things. Either your position is that no one in your agency has spoken with or met with other agencies or the White House in carrying out this purge of vital counterterrorism materials, or they have. And if they have, who directed that these agencies in general to purge these materials? And what outside groups are advising the Department on the issue?

Attorney General HOLDER. This is an internal process being done by members of the FBI, members of the Justice Department who are steeped in this—

Mr. FRANKS. Can you tell us what outside groups are advising you on this process?

Attorney General HOLDER. This is something that is being run primarily out of the FBI. I mean, to the extent there are outsiders who are involved, who we are trying to interact with, perhaps we can try to get you those names.

Mr. FRANKS. I will leave it right there. I just respectfully officially ask you to give us the list of who the outside groups are that are working with you on the process, because one of them is a Jihadist group that says they are working with you on it. And I just want to make that—

Attorney General HOLDER. I don’t believe that exactly. But I will relay the request to the FBI.

Mr. FRANKS. All right. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Franks.

The gentleman from Illinois Mr. Quigley is recognized for questions.

Mr. QUIGLEY. Thank you so much, Mr. Chairman.

Sir, it is, as you know, very hard to minimize or diminish the tragedy that is Fast and Furious, a horribly ill-conceived program that led to the loss of life of an agent, endangered others. And as you agree, there must be a continued thorough, independent investigation. Justice must be done; corrections must be made, and I believe have been made.

But with the greatest respect, I would say that I believe that the effort here has become politically motivated in an attempt to embarrass the Administration, and that diminishes the process. The operative phrase that comes to mind since "bad witness" has been used is "Pay no attention to the man behind the curtain."

Mr. Attorney General, welcome to Oz. Pay no attention to the fact that this process began under a previous Administration. Pay no attention that the agencies lack sufficient resources. Pay no attention that the head of the ATF hasn't been allowed to be appointed. Pay no attention that the laws are inadequate to protect agents and citizens on both sides of the border; even more specifically that in Arizona any citizen may purchase an unlimited number of AK-47s and transfer them within the State in private sales; that Special Agent Peter Forcelli in the Phoenix Field Division testified at a previous hearing that as it relates to straw purchasers and punishments, he used the expression, quote, "Some people view this as no more consequential than doing 65 in a 55."

And as it relates to the gun show loophole, we recognize the fact—and others would ask you to pay no attention—you can buy any type of gun you want without any background check. You could be adjudicated as dangerously mentally ill, you could be a felon, you could be on your third order of protection, you could be on a terrorist watch list, and you can buy what you want.

In terms of resources, the Washington Post said in 2010 the ATF has the same number of agents it had in 1970, while the FBI has grown by 50 percent and DEA by 233 percent. I am glad those agencies got the growth they need because they make us safer, but ATF does as well.

And finally, pay no attention to the fact that Special Agent Peter Forcelli of the ATF said, I have less than 100 agents assigned to the entire State of Arizona. That is 114,000 square miles. Do we have the resources? No, we don't. End of quote: We desperately need them.

So, Mr. Attorney General, life is unfortunately, even after tragedy, is about moving on. I ask you in a perfect world what other situations and resources that you and other agencies have to combat the threats that are still going on, the fact that people are still dying from gun violence in the border area?

Attorney General HOLDER. Yeah, it is an issue that we have to confront. Recent studies have shown that of the 94,000 guns that were seized in Mexico, 64,000 of those guns can be traced back to the United States.

I think there are a number of steps that Congress could take to help us in connection with this fight. We need a comprehensive firearms-trafficking statute. We need tougher sentences for straw

purchasers, so you don't have that 65-, 55-mile-an-hour thought. We need to give ATF the resources that it needs. In fiscal year 2011, Congress cut our request for 14 project gunrunner teams in half. It decreases our capacity to do these kinds of things. And I think that Congress should not attempt to block the long gun reporting requirement that has recently been upheld by a Federal court that would require somebody buying multiple AK-47s over a 5-day period to have that information simply shared with the ATF. That is a valuable intelligence tool and has helped us while it has been in place in only four border States to develop leads and deal with the situations that you have described.

Mr. QUIGLEY. If I might switch gears briefly, I come from Illinois, I come from Chicago. It is important to recognize the gentleman stepping down from the attorney general's position in Chicago has left an extraordinary legacy. I want to commend his efforts, and I will give you the opportunity to do the same if you will.

Attorney General HOLDER. I have known Pat Fitzgerald since he was a line lawyer in the Southern District of New York and working on really consequential and important terrorism cases. I admired his work then. He has been an outstanding U.S. Attorney in two Administrations. He is a true patriot. He has been a great U.S. Attorney. He has focused on public corruption matters as well as national security matters. He has, in fact, been a model U.S. Attorney and somebody who is going to be sorely missed by us in the Justice Department.

Mr. QUIGLEY. Thank you, sir.

I yield back.

Mr. SMITH. Thank you, Mr. Quigley.

The gentlelady from Texas Ms. Jackson Lee is recognized for a unanimous consent request.

Ms. JACKSON LEE. Mr. Chairman, thank you for your courtesies.

Unanimous consent to submit into the record a report of the minority staff of the Oversight and Government Reform dealing with Fast and Furious. I ask unanimous consent a statement on the draft contempt citation of the oversight committee, a letter regarding the purging of voters, and a letter regarding race-based juries. I ask unanimous consent to submit it into the record.

Mr. ISSA. Reserving the right to object.

Mr. SMITH. The gentleman reserves the right to object and can be heard on his objection.

Mr. ISSA. I have no objections to the latter material, but in the case of the former material, I would ask unanimous consent that if we are going to enter one side of any document from another Committee if you want it into the record, that corresponding documents be allowed to be paired in so as to give a complete report.

Mr. SMITH. Without objection, the documents mentioned by the gentlewoman—

Ms. JACKSON LEE. And I have no objection.

Mr. SMITH [continuing]. From Texas will be made a part of the record, and the documents referred to by the gentleman from California will be made a part of the record.

[The information referred to follows:]

**Material submitted by the Honorable Sheila Jackson Lee**



For information related to this report, please contact:

Minority Staff, Committee on Oversight and Government Reform  
(202) 225-5051  
<http://democrats.oversight.house.gov/>

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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

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January 30, 2012

Dear Members of the Committee on Oversight and Government Reform:

On December 15, 2010, Brian Terry, an Agent in an elite Customs and Border Protection tactical unit, was killed in a gunfight 18 miles from the Mexican border. Two AK-47 variant assault rifles found at the scene were traced back to purchases by one of the targets of an investigation called Operation Fast and Furious being conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). When he purchased these weapons, the target had already been identified as a suspected straw purchaser involved with a large network of firearms traffickers illegally smuggling guns to deadly Mexican drug cartels. Despite knowing about hundreds of similar purchases over a year-long period, ATF interdicted only a small number of firearms and delayed making arrests.

Last June, I pledged to Agent Terry's family that I would try to find out what led to this operation that allowed hundreds of firearms to be released into communities on both sides of the border. Following the Committee's year-long investigation of this matter, I directed my staff to compile this report to provide some of those answers. I instructed them to focus on the facts we have discovered rather than the heated and sometimes inaccurate rhetoric that has characterized much of this investigation.

As a result, this report tells the story of how misguided gunwalking operations originated in 2006 as ATF's Phoenix Field Division devised a strategy to forgo prosecutions against low-level straw purchasers while they attempted to build bigger charges against higher-level cartel members. Unfortunately, this strategy failed to include sufficient operational controls to stop these dangerous weapons from getting into the hands of violent criminals, creating a danger to public safety on both sides of the border.

The report describes how, rather than halting this operation after its flaws became evident, ATF's Phoenix Field Division launched several similarly reckless operations over the course of several years, also with tragic results. Operation Fast and Furious was the fourth in a series of operations in which gunwalking—the non-interdiction of illegally purchased firearms that could and should be seized by law enforcement—occurred since 2006.

This report also details complaints by ATF line agents and senior officials in Washington, who told the Committee that these failures were aggravated and compounded by the Arizona



U.S. Attorney's Office, which failed to aggressively prosecute firearms trafficking cases, and Federal courts in Arizona, which showed leniency toward the trafficking networks that fuel armed violence in Mexico.

This report debunks many unsubstantiated conspiracy theories. Contrary to repeated claims by some, the Committee has obtained no evidence that Operation Fast and Furious was a politically-motivated operation conceived and directed by high-level Obama Administration political appointees at the Department of Justice. The documents obtained and interviews conducted by the Committee indicate that it was the latest in a series of reckless and fatally flawed operations run by ATF's Phoenix Field Division during both the previous and current administrations.

Although this report provides a great amount of detail about what we have learned to date, it has several shortcomings. Despite requests from me and others, the Committee never held a hearing or even conducted an interview with former Attorney General Michael Mukasey. The Committee obtained documents indicating that in 2007 he was personally informed about the failure of previous law enforcement operations involving the illegal smuggling of weapons into Mexico, and that he received a proposal to expand these operations. Since the Committee failed to speak with Mr. Mukasey, we do not have the benefit of his input about why these operations were allowed to continue after he was given this information.

The Committee also rejected my request to hold a public hearing with Kenneth Melson, the former Acting Director of ATF, the agency primarily responsible for these operations. Although Committee staff conducted an interview with Mr. Melson, the public has not had an opportunity to hear his explanations for why these operations continued for so many years without adequate oversight from ATF headquarters.

As its title indicates, the Committee on Oversight and Government Reform has two primary missions. Not only are we charged with conducting oversight of programs to root out waste, fraud, and abuse, but we are also responsible for reforming these programs to ensure that government works more effectively and efficiently for the American people. For these reasons, this report sets forth constructive recommendations intended to address specific problems identified during the course of this investigation.

Above all, in offering this report and these recommendations, I recognize and commend the contributions of hundreds of thousands of law enforcement agents across our government who risk their lives on a daily basis in the pursuit of public safety and in defense of this nation.

Sincerely,

  
Elijah E. Cummings  
Ranking Member

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## **I. EXECUTIVE SUMMARY**

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On December 15, 2010, Customs and Border Protection Agent Brian Terry was killed in a gunfight in Arizona, and two AK-47 variant assault rifles found at the scene were traced back to purchases by one of the targets of an investigation called Operation Fast and Furious being conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The target already had been identified as a suspected straw purchaser involved with a large network of firearms traffickers smuggling guns to deadly Mexican drug cartels.

At the request of the Committee's Ranking Member, Rep. Elijah E. Cummings, this report describes the results of the Committee's year-long investigation into the actions and circumstances that led to this operation.

The report finds that gunwalking operations originated as early as 2006 as agents in the Phoenix Field Division of ATF devised a strategy to forgo arrests against low-level straw purchasers while they attempted to build bigger cases against higher-level trafficking organizers and financiers. Rather than halting operations after flaws became evident, they launched several similarly reckless operations over the course of several years, also with tragic results. Each investigation involved various incarnations of the same activity: agents were contemporaneously aware of illegal firearms purchases, they did not typically interdict weapons or arrest straw purchasers, and firearms ended up in the hands of criminals on both sides of the border.

### **Operation Wide Receiver (2006-2007)**

In 2006, ATF agents in Phoenix initiated Operation Wide Receiver with the cooperation of a local gun dealer. For months, ATF agents watched in real-time as traffickers purchased guns and drove them across the border into Mexico. According to William Newell, the Special Agent in Charge of the Phoenix Field Division, these suspects told the gun dealer that the "firearms are going to his boss in Tijuana, Mexico where some are given out as gifts." Although ATF officials believed they had sufficient evidence to arrest and charge these suspects, they instead continued surveillance to identify additional charges. As one agent said at the time, "we want it all."

Paul Charlton, then the U.S. Attorney in Phoenix, was informed that firearms were "currently being released into the community," and he was asked for his position on allowing an "indeterminate number" of additional firearms to be "released into the community, and possibly into Mexico, without any further

ability by the U.S. Government to control their movement or future use." As his subordinate stated, "[t]his is obviously a call that needs to be made by you Paul."

Over the next year, ATF agents in Phoenix went forward with plans to observe or facilitate hundreds of suspected straw firearm purchases. In 2007, a year after the investigation began, ATF initiated attempts to coordinate with Mexican officials. After numerous attempts at cross-border interdiction failed, however, the lead ATF case agent for Operation Wide Receiver concluded: "We have reached that stage where I am no longer comfortable allowing additional firearms to 'walk'."

In late 2007, the operational phase of Operation Wide Receiver was terminated, and the case sat idle for two years. When a Justice Department prosecutor reviewed the file in 2009, she quickly recognized that "a lot of guns seem to have gone to Mexico" and "a lot of those guns 'walked'." The defendants were indicted in 2010 after trafficking more than 450 firearms.

#### **The Hernandez Case (2007)**

ATF agents in Phoenix attempted a second operation in 2007 after identifying Fidel Hernandez and several alleged co-conspirators who "purchased over two hundred firearms" and were "believed to be transporting them into Mexico."

After being informed of several failed attempts at coordinating with Mexican authorities, William Hoover, then ATF's Assistant Director of Field Operations, temporarily halted operations, writing:

I do not want any firearms to go South until further notice. I expect a full briefing paper on my desk Tuesday morning from SAC Newell with every question answered. I will not allow this case to go forward until we have written documentation from the U.S. Attorney's Office re full and complete buy in. I do not want anyone briefed on this case until I approve the information. This includes anyone in Mexico.

In response, Special Agent in Charge Newell wrote to another ATF official, "I'm so frustrated with this whole mess I'm shutting the case down and any further attempts to do something similar." Nevertheless, ATF operational plans show that additional controlled deliveries were planned for October and November of that year.

In the midst of these operations, Attorney General Michael Mukasey received a briefing paper on November 16, 2007, in preparation for a meeting with the Mexican Attorney General. It stated that "ATF would like to expand the possibility of such joint investigations and controlled deliveries—since only then will it be possible to investigate an entire smuggling network, rather than arresting simply a

single smuggler." The briefing paper also warned, however, that "the first attempts at this controlled delivery have not been successful." Ten days later, ATF agents planned another operation in coordination with Mexico, again without success.

Hernandez and his co-conspirators, who had purchased more than 200 firearms, were arrested in Nogales, Arizona on November 27, 2007, while attempting to cross the border into Mexico. They were brought to trial in 2009, but acquitted after prosecutors were unable to obtain the cooperation of the Mexican law enforcement officials who had recovered the firearms.

#### **The Medrano Case (2008)**

In 2008, ATF agents in Phoenix began investigating a straw purchasing network led by Alejandro Medrano. Throughout 2008, ATF agents were aware that Medrano and his associates were making illegal firearms purchases from the same gun dealer who cooperated with ATF in Operation Wide Receiver.

An ATF Operational Plan describes an instance on June 17, 2008, in which agents watched Medrano and an associate illegally purchase firearms and load them into a car bound for Mexico. According to the document, "Agents observed both subjects place the firearms in the backseat and trunk," and then "surveilled the vehicle to Douglas, AZ where it crossed into Mexico."

Agents from U.S. Immigration and Customs Enforcement (ICE) balked when they learned about these tactics. After an interagency planning meeting in August 2008, the head of ICE's Arizona office wrote to ATF Special Agent in Charge Newell that, although ICE agents "left that meeting with the understanding that any weapons that were followed to the border would be seized," ATF agents later informed them that "weapons would be allowed to go into Mexico for further surveillance by LEAs [law enforcement agents] there."

On December 10, 2008, Federal prosecutors filed a criminal complaint that appears to confirm that ATF agents watched as Medrano and his associates smuggled firearms into Mexico. Describing the incident on June 17, 2008, for example, the complaint asserts that the suspects "both entered into Mexico with at least the six (6) .223 caliber rifles in the vehicle." Medrano and his associates were sentenced to multi-year prison terms after trafficking more than 100 firearms to a Mexican drug cartel.

#### **Operation Fast and Furious (2009-2010)**

In Operation Fast and Furious, ATF agents in Phoenix utilized gunwalking tactics that were similar to previous operations. In October 2009, ATF agents had

identified a sizable network of straw purchasers they believed were trafficking military-grade assault weapons to Mexican drug cartels. By December, they had identified more than 20 suspected straw purchasers who "had purchased in excess of 650 firearms."

Despite this evidence, the ATF agents and the lead prosecutor in the case believed they did not have probable cause to arrest any of the straw purchasers. As the lead prosecutor wrote: "We have reviewed the available evidence thus far and agree that we do not have any chargeable offenses against any of the players."

In January 2010, ATF agents and the U.S. Attorney's Office agreed on a strategy to build a bigger case and to forgo taking down individual members of the straw purchaser network. The lead prosecutor presented this broader approach in a memo that was sent to U.S. Attorney Dennis Burke. The memo noted that "there may be pressure from ATF headquarters to immediately contact identifiable straw purchasers just to see if this develops any indictable cases and to stem the flow of guns." In the absence of probable cause, however, the U.S. Attorney agreed that they should "[h]old out for bigger." Over the next six months, agents tried to build a bigger case with wiretaps while making no arrests and few interdictions.

After receiving a briefing on Operation Fast and Furious in March 2010, ATF Deputy Director William Hoover became concerned about the number of firearms involved in the case. Although he told Committee staff that he was not aware of gunwalking, he ordered an "exit strategy" to take down the case and ready it for indictment within 90 days. ATF field agents chafed against this directive, however, and continued to facilitate suspect purchases for months in an effort to salvage the broader goal of the investigation. The case was not indicted until January 2011, ten months after Deputy Director Hoover directed that it be shut down.

#### **No evidence that senior officials authorized gunwalking in Fast and Furious**

The documents obtained and interviews conducted by the Committee reflect that Operation Fast and Furious was the latest in a series of fatally flawed operations run by ATF agents in Phoenix and the Arizona U.S. Attorney's Office. Far from a strategy that was directed and planned by "the highest levels" of the Department of Justice, as some have alleged, the Committee has obtained no evidence that Operation Fast and Furious was conceived or directed by high-level political appointees at Department of Justice headquarters.

ATF's former Acting Director, Kenneth Melson, and ATF's Deputy Director, William Hoover, told Committee staff that gunwalking violated agency doctrine, that they did not approve it, and that they were not aware that ATF agents in Phoenix were using the tactic in Operation Fast and Furious. They also stated that,

because they did not know about the use of gunwalking in Operation Fast and Furious, they never raised it up the chain of command to senior Justice Department officials.

Apart from whether Mr. Hoover was aware of specific gunwalking allegations in Operation Fast and Furious, it remains unclear why he failed to inform Acting ATF Director Melson or senior Justice Department officials about his more general concerns about Operation Fast and Furious or his March 2010 directive for an "exit strategy." During his interview with Committee staff, Mr. Hoover took substantial personal responsibility for ATF's actions, stating: "I have to take responsibility for the mistakes that we made."

Former Phoenix U.S. Attorney Dennis Burke told Committee staff that although he received multiple briefings on Operation Fast and Furious, he did not approve gunwalking, was not aware it was being used, and did not inform officials in Washington about its use. He told Committee staff that, at the time he approved the proposal for a broader strategy targeting cartel leaders instead of straw purchasers, he had been informed that there was no probable cause to make any arrests and that he had been under the impression that ATF agents were working closely with Mexican officials to interdict weapons. Given the number of weapons involved in the operation, Mr. Burke stated that he "should have spent more time" focusing on the case. He stated: "it should not have been done the way it was done, and I want to take responsibility for that."

Gary Grindler, the former Acting Deputy Attorney General, and Lanny Breuer, the Assistant Attorney General for the Criminal Division, both stated that neither ATF nor the U.S. Attorney's Office ever brought to their attention concerns about gunwalking in Operation Fast and Furious, and that, if they had been told, they "would have stopped it."

When allegations of gunwalking three years earlier in Operation Wide Receiver were brought to the attention of Mr. Breuer in 2010, he immediately directed his deputy to share their concerns directly with ATF's leadership. He testified, however, that he regretted not raising these concerns directly with the Attorney General or Deputy Attorney General, stating, "if I had known then what I know now, I, of course, would have told the Deputy and the Attorney General."

The Committee has obtained no evidence indicating that the Attorney General authorized gunwalking or that he was aware of such allegations before they became public. None of the 22 witnesses interviewed by the Committee claims to have spoken with the Attorney General about the specific tactics employed in Operation Fast and Furious prior to the public controversy.



Testifying before the Senate Judiciary Committee, the Attorney General stated:

This operation was flawed in its concept and flawed in its execution, and unfortunately we will feel the effects for years to come as guns that were lost during this operation continue to show up at crime scenes both here and in Mexico. This should never have happened and it must never happen again.

The strategy of forgoing immediate action in order to build a larger case is common in many law enforcement investigations, and the Committee has obtained no evidence to suggest that ATF agents or prosecutors in Arizona acted with anything but a sincere intent to stem illegal firearms trafficking.

Nevertheless, based on the evidence before the Committee, it is clear that ATF agents in Phoenix and prosecutors in the Arizona U.S. Attorney's Office embarked on a deliberate strategy not to arrest suspected straw purchasers while they attempted to make larger cases against higher-level targets. Although these officials claimed they had no probable cause to arrest any straw purchasers at the time, allowing hundreds of illegally purchased military-grade assault weapons to fall into the hands of violent drug cartels over the course of five years created an obvious and inexcusable threat to public safety on both sides of the border.

## II. METHODOLOGY

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Over the past year, the Committee has conducted an investigation into firearms trafficking investigations run by the Phoenix Field Division of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). This inquiry was originally brought to the Committee's attention by Senator Charles Grassley, the Ranking Member of the Senate Judiciary Committee, who had asked ATF to respond to allegations that agents had knowingly allowed the sale of firearms to suspected straw purchasers during Operation Fast and Furious. The Committee has been joined in its investigation by Majority and Minority staff of the Senate Judiciary Committee.

To date, there have been nine congressional hearings relating to these topics, including three before this Committee. Attorney General Eric Holder has agreed to testify before the Committee on February 2, 2011. He has testified previously on five other occasions regarding these issues, including before the Senate and House Judiciary Committees in November and December 2011, respectively.

Committee staff have interviewed 22 witnesses from the ATF Phoenix Field Division, the U.S. Attorney's Office for the District of Arizona, ATF headquarters, and the Department of Justice. Committee staff have also interviewed multiple Federal firearms dealers. The Department has made numerous officials available for briefings, transcribed interviews, and hearings, including the former Deputy Attorney General, the Assistant Attorney General for the Criminal Division, the Deputy Assistant Attorney General for the Criminal Division, and the U.S. Attorney for the District of Arizona. The Department has also organized briefings during the course of the investigation, including with senior leaders from the Federal Bureau of Investigation (FBI) and Drug Enforcement Agency (DEA).

In March 2011, the Committee sent letters to ATF and the Department of Justice requesting documents and communications. Committee Chairman Darrell Issa subsequently issued subpoenas for these documents in March and October 2011, and he has issued numerous document requests to other agencies, including the FBI and DEA.

The Committee has now obtained more than 12,000 pages of internal emails, reports, briefing papers, and other documents from various Federal agencies, whistleblowers, firearms dealers, and other parties. The Department of Justice has produced approximately 6,000 pages of documents to the Committee, including sensitive law enforcement materials related to the pending prosecution of the defendants in the underlying Fast and Furious case.

The Department has declined to produce some documents, including “reports of investigation” and prosecutorial memoranda in the underlying cases. The Department has stated that providing these particular documents at this time could compromise the prosecution of 20 firearms trafficking defendants scheduled for trial in September. In addition, the Department has not provided documents related to its internal deliberations about responding to this congressional investigation, with the exception of documents and correspondence related to the drafting of the February 4, 2011, letter to Senator Grassley, which the Department formally withdrew on December 2, 2011. The Deputy Attorney General explained this policy in a letter to the Committee:

The Department has a long-held view, shared by Administrations of both political parties, that congressional requests seeking information about the Executive Branch’s deliberations in responding to congressional requests implicate significant confidentiality interests grounded in the separation of powers under the U.S. Constitution.<sup>1</sup>

The letter stated that the Department made an exception to this policy and provided documents relating to the drafting of the February 4 letter because Congress had unique equities in understanding how inaccurate information had been relayed to it.<sup>2</sup>

On November 4, 2011, Ranking Member Elijah Cummings requested a hearing with former Attorney General Michael Mukasey in light of documents obtained by the Committee indicating that the former Attorney General was briefed in 2007 on an unsuccessful coordinated delivery operation, as well as a proposal to expand such operations in the future. Ranking Member Cummings wrote:

Given the significant questions raised by the disclosures in these documents, our Committee’s investigation will not be viewed as credible, even-handed, or complete unless we hear directly from Attorney General Mukasey.<sup>3</sup>

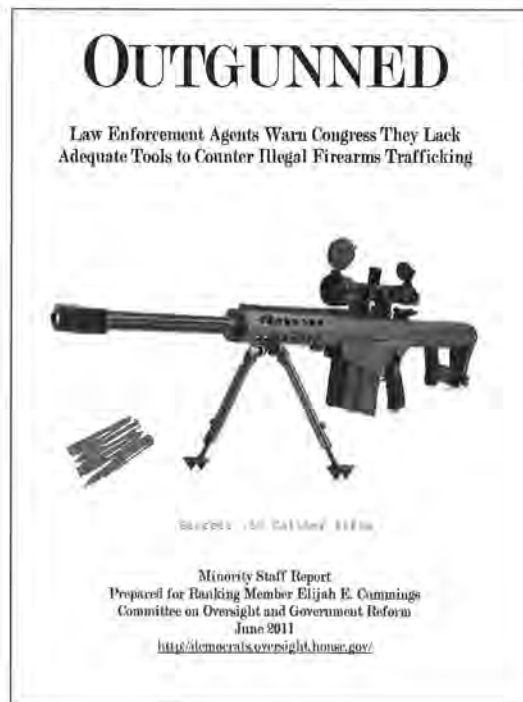
The Committee has not held a hearing with Mr. Mukasey, nor has it conducted an interview with him, depriving the Committee of important information directly relevant to the origin of these operations.

In addition, on October 28, 2011, Ranking Member Cummings requested a public hearing with Kenneth Melson, the former Acting Director of ATF. He wrote:

Since the Attorney General has now agreed to appear before Congress in December, I believe Members also deserve an opportunity to question Mr. Melson directly, especially since he headed the agency responsible for Operation Fast and Furious.<sup>4</sup>

To date, the Committee has declined to hold this hearing.

In June 2011, Ranking Member Cummings issued a report entitled “Outgunned: Law Enforcement Agents Warn Congress They Lack Adequate Tools to Counter Illegal Firearms Trafficking.”<sup>5</sup> He also hosted a Minority Forum of experts regarding the larger problem of firearms trafficking and the lack of law enforcement tools to stem this tide.<sup>6</sup>



## III. BACKGROUND

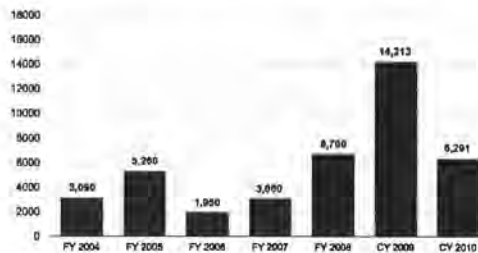
Over the past five years, the Mexican government has been locked in a battle with drug trafficking organizations seeking control of lucrative trafficking routes that carry billions of dollars in narcotics destined for the United States. This battle is fueled in part by the tens of thousands of military-grade weapons that cross the U.S. border into Mexico every year. In particular, law enforcement officials have reported that the “weapons of choice” for international drug cartels are semi-automatic rifles and other assault weapons. These weapons are frequently purchased in the United States because they are generally illegal to purchase or possess in Mexico.<sup>7</sup> According to the latest statistics from the Mexican Attorney General’s office, 47,515 people have been killed in drug-related violence since 2006.<sup>8</sup>

On November 1, 2011, Assistant Attorney General Lanny Breuer testified before the Senate Judiciary Committee that the vast majority of guns recovered in Mexico were imported illegally from the United States:

From my understanding, 94,000 weapons have been recovered in the last five years in Mexico. Those are just the ones recovered, Senator, not the ones that are in Mexico. Of the 94,000 weapons that have been recovered in Mexico, 64,000 of those are traced to the United States.<sup>9</sup>

These statistics are consistent with reports from the Mexican government. In May 2010, Mexican President Felipe Calderon stated before a joint session of

**NUMBER OF FIREARMS SEIZED IN MEXICO AND  
TRACED BACK TO THE UNITED STATES, 2004 - 2010**



Sources: Hearing U.S. Foreign Corrupt Practices Act: A Report by Senators Dianne Feinstein, Charles Schumer, and Nathan Wittman to the United States Senate Caucus on International Narcotics Control (June 2011); Government Accountability Office Report, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking in Mexico Face Planning and Coordination Challenges*; and Letter from ATF Acting Director Kenneth E. Smith to Senator Dianne Feinstein (June 2009). Note: FY=Fiscal Year; CY=Calendar Year.

Congress that, of the 75,000 guns and assault weapons recovered in Mexico over the past three years, more than 80% were traced back to the United States.<sup>10</sup>

ATF is the primary U.S. law enforcement agency charged with combating firearms trafficking from the United States to Mexico. ATF enforces Federal firearms laws and regulates the sale of guns by the firearms industry under the Gun Control Act of 1968.<sup>11</sup> ATF reports to the Attorney General through the Office of the Deputy Attorney General.<sup>12</sup> ATF is organized into 25 Field Divisions led by Special Agents in Charge who are responsible for multiple offices within their jurisdiction.<sup>13</sup> In Phoenix, the Special Agent in Charge is currently responsible for offices in Phoenix, Flagstaff, Tucson, and Yuma, Arizona, as well as Albuquerque, Las Cruces, and Roswell, New Mexico.<sup>14</sup>

The U.S. Attorney for the District of Arizona is the chief Federal law enforcement officer in the State of Arizona. The District of Arizona has approximately 170 Assistant United States Attorneys and approximately 140 support staff members split equally between offices in Phoenix and Tucson.<sup>15</sup> As part of its responsibilities, the U.S. Attorney's Office has primary responsibility for prosecuting criminal cases against individuals who violate Federal firearms trafficking laws in its region.<sup>16</sup>

Attorneys from the Department's Criminal Division in Washington, D.C. serve as legal experts on firearms-related issues and assist in prosecuting some firearms trafficking cases.<sup>17</sup> In addition to developing and implementing strategies to attack firearms trafficking networks, Criminal Division attorneys occasionally assist the U.S. Attorneys' offices in prosecuting firearms trafficking cases.<sup>18</sup>

In 2006, ATF implemented a nationwide program called Project Gunrunner to attack the problem of gun trafficking to Mexico.<sup>19</sup> Project Gunrunner is part of the Department's broader Southwest Border Initiative, which seeks to reduce cross-border drug and firearms trafficking and the high level of violence associated with these activities on both sides of the border.<sup>20</sup>

In June 2007, ATF published a strategy document outlining the four key components to Project Gunrunner: the expansion of gun tracing in Mexico, international coordination, domestic activities, and intelligence. In implementing Project Gunrunner, ATF has focused resources on the four Southwest Border States. Additionally, Attorney General Holder has testified that, since his confirmation in 2009, the Department of Justice has made combating firearms trafficking to Mexico a top priority.<sup>21</sup>

In November 2010, the Department of Justice Inspector General issued a report examining the effectiveness of Project Gunrunner in stopping the illicit trafficking of guns from the United States to Mexico. The Inspector General found

that “ATF’s focus remains largely on inspections of gun dealers and investigations of straw purchasers rather than on higher-level traffickers, smugglers, and the ultimate recipients of the trafficked guns.” The report recommended that ATF “[f]ocus on developing more complex conspiracy cases against higher level gun traffickers and gun trafficking conspirators.” The report also found that U.S. Attorneys’ offices often declined Project Gunrunner cases because firearms investigations are often difficult to prosecute and result in lower penalties.<sup>22</sup>

Typical firearms trafficking cases involve a “straw purchase” in which the actual buyer of a firearm uses another person, “the straw purchaser,” to execute the paperwork necessary to purchase the firearm from a gun dealer.<sup>23</sup> The actual buyer typically is someone who is prohibited from buying a firearm and cannot pass the background check or who does not want a paper trail documenting the purchase. Gun trafficking organizations regularly use straw purchasers who deliver firearms to intermediaries before other members of the organizations transfer the guns across the border.<sup>24</sup>

There is no Federal statute specifically prohibiting firearms trafficking or straw purchases. Instead, ATF agents and Federal prosecutors use other criminal statutes, including: (1) 18 USC § 924(a)(1)(A) which prohibits knowingly making a false statement on ATF Form 4473; (2) 18 USC § 922(a)(6) which prohibits knowingly making a false statement in connection with a firearm purchase; (3) 18 USC § 922(g)(1) which prohibits possession of a firearm by a convicted felon; and (4) 18 USC § 922(a)(1)(A) which prohibits engaging in a firearms business without a license.<sup>25</sup>

#### CURRENT WEAPONS OF CHOICE



##### Primary Weapons of Choice

Bushmaster XM15 Rifles  
 Rem-um Cuglr 7.62 x 39mm rifles  
 FN 5.7 x 28mm pistols  
 .50 caliber rifles (Berrett, Beowulf)  
 DPMS .223 rifles  
 Beretta Model 92 pistols  
 Taurus PT 9mm pistols  
 Colt .38 Super pistols

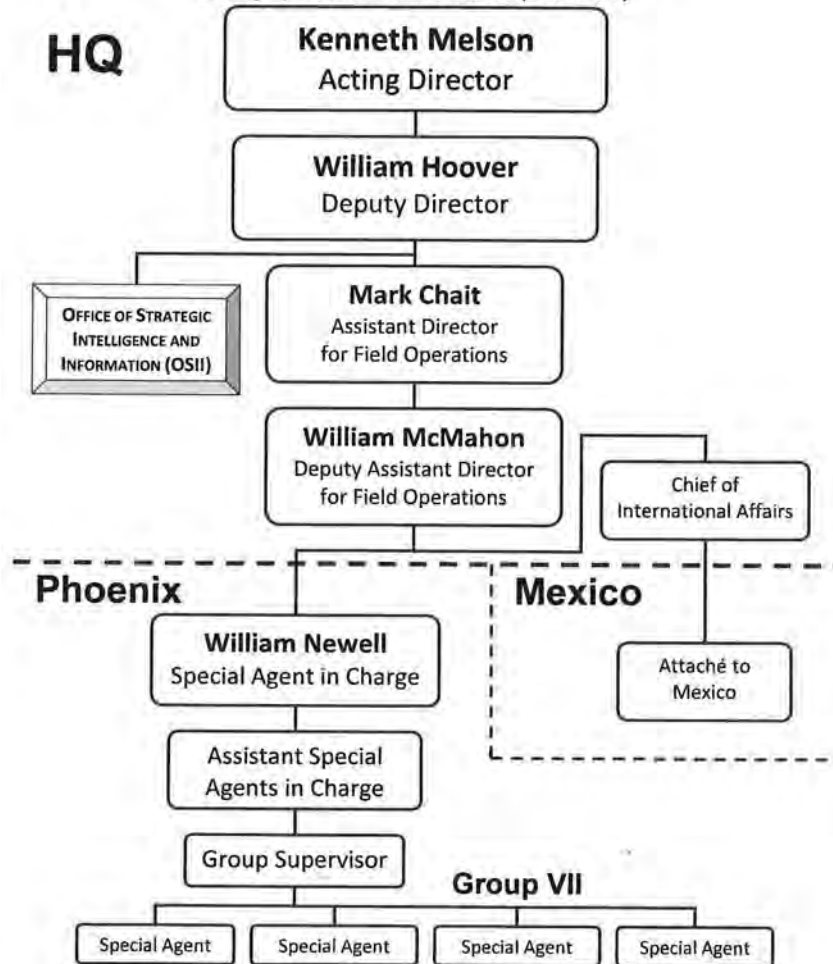
##### Secondary Market Inspection Weapons of Choice

Colt AR15 Sporter & Bushmaster XM15 rifles  
 Rem-um 7.62 x 39mm rifles  
 DPMS and Olympic Arms .223 rifles  
 Norinco, Polytech, and Maadi AKS rifles  
 Alexander Arms Beowulf .50 rifles  
 Beretta and Taurus 9mm pistols  
 Colt .38 Super & .45 Pistols

Source: Bureau of Alcohol, Tobacco, Firearms and Explosives, “Firearms: A Gun Trafficking Problem.”

## Key ATF Personnel

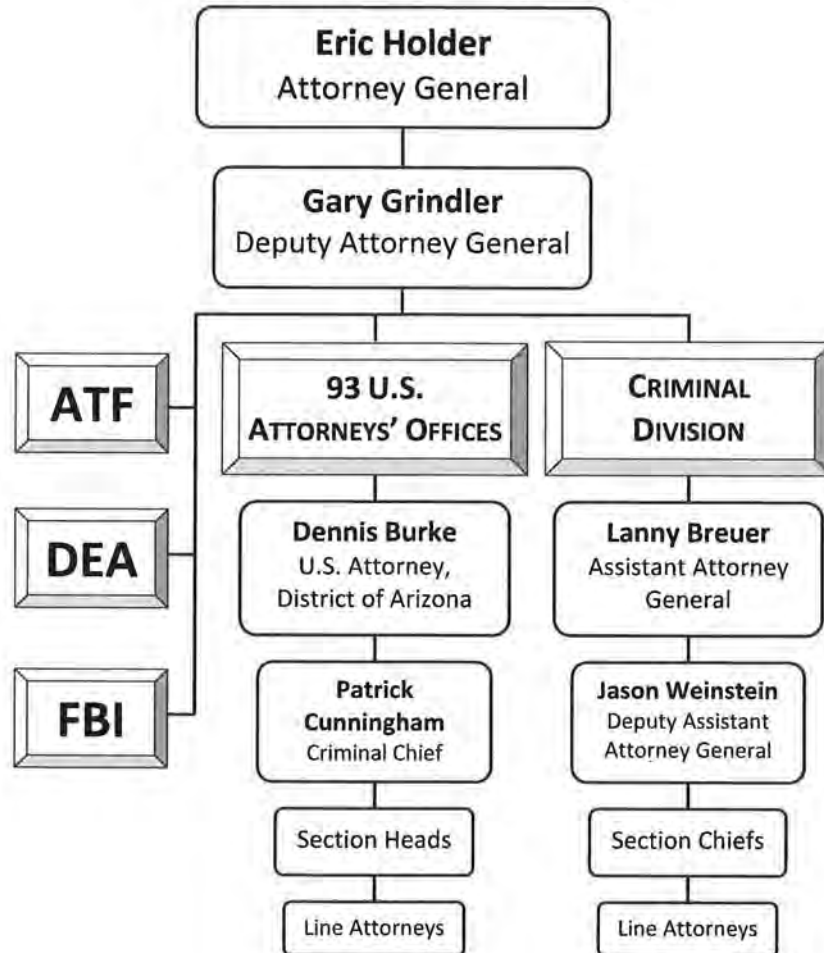
*During Operation Fast and Furious (2009-2010)*





## Key DOJ Personnel

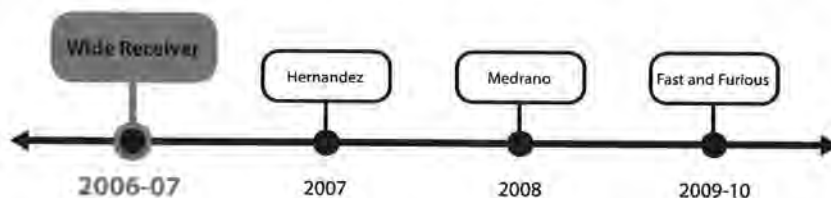
*During Operation Fast and Furious (2009-2010)*



## IV. FINDINGS

### A. ATF PHOENIX FIELD OPERATIONS INVOLVING "GUNWALKING"

Documents obtained by the Committee and transcribed interviews conducted by Committee staff have identified a series of gunwalking operations conducted by ATF's Phoenix Field Division. Beginning in 2006, each of these investigations involved various incarnations of the same activity: ATF-Phoenix agents were contemporaneously aware of suspected illegal firearms purchases, they did not typically interdict the weapons or arrest the straw purchasers, and those firearms ended up in the hands of criminals on both sides of the border.



#### 1. Operation Wide Receiver (2006-07)

Operation Wide Receiver began in early 2006 when ATF agents in Tucson opened an investigation of a suspected straw purchaser after receiving information from a cooperating gun dealer. Documents indicate that agents worked closely with this dealer, including by contemporaneously monitoring firearms sales to known straw purchasers without arrests or interdiction, and that they sought authorization for the expansion of this operation from then-U.S. Attorney for the District of Arizona, Paul Charlton.

The evidence also indicates that, between March 2006 and mid-2007, ATF agents had contemporaneous knowledge of planned sales of firearms to known straw purchasers and repeatedly designed surveillance operations of these illegal firearms purchases without effectuating arrests. According to documents obtained by the Committee, agents avoided interdicting weapons despite having the legal authority to do so in order to build a bigger case. Despite repeated failed attempts to coordinate surveillance with Mexican law enforcement, the ATF agents continued to attempt these operations.

Although the operational phase of the investigation ended in 2007, the case was not prosecuted for more than two years, during which time no arrests were made and the known straw purchasers remained at large. A prosecutor from the Criminal Division of the Department of Justice who was assigned to Operation Wide Receiver in 2009 and reviewed the case file raised concerns that many guns had "walked" to Mexico.

#### **ATF-Phoenix monitored gun dealer selling to straw buyers**

In March 2006, ATF-Phoenix agents received a tip from a Federal Firearms Licensee (FFL) in Tucson, Arizona, that a suspected straw purchaser had purchased six AR-15 lower receivers and placed an order for 20 additional lower receivers.<sup>26</sup> The agents opened an investigation of the purchaser because the nature of the transaction suggested a possible connection to illegal firearms trafficking.<sup>27</sup>

Some military-style firearms consist of an upper and lower receiver, with the lower receiver housing the trigger mechanism, and the upper receiver including the barrel of the firearm. According to a memorandum from the U.S. Attorney's Office, ATF had information that the suspects were obtaining both receivers and assembling them to create illegal firearms.<sup>28</sup> The firearms were illegal because the barrels were 10.5 inches in length, and rifles with barrels shorter than 16 inches must be registered and licensed with ATF.<sup>29</sup>

According to summaries prepared subsequently by a Department of Justice attorney prosecuting the case, "The FFL agreed to work with ATF to target the persons who were interested in purchasing large quantities of lower receivers for AR-15s." Specifically, "The FFL agreed to consensual recordings both of the purchases and phone calls."<sup>30</sup> Soon thereafter, ATF-Phoenix briefed prosecutors in the Arizona U.S. Attorney's Office that several suspicious individuals were purchasing "large quantities of lower receivers" from a Tucson FFL.<sup>31</sup>

In a June 22, 2006, memorandum, the Special Agent in Charge of ATF-Phoenix explained that the three suspects in the case had purchased a total of 126 AR-15 lower receivers. According to the memo, one of the suspected straw purchasers "advised the CS [confidential source] that he takes the firearms to a machine shop at or near Phoenix, AZ and they are converted into machine guns." The ATF agents also suspected that these firearms were making their way to Mexico and into the hands of a dangerous drug cartel. Specifically, the Special Agent in Charge wrote that, "ATF just recently tracked the vehicle to Tijuana, Mexico," and one suspected straw purchaser "stated that these straw purchased firearms are going to his boss in Tijuana, Mexico where some are given out as gifts."<sup>32</sup>

ATF agents learned that the suspected straw purchasers were seeking a new supplier of upper receivers:

The purchasers have asked the FFL to provide the uppers to them as well, indicating that they are not pleased with their current source for the uppers. The FFL has expressed reluctance to the purchasers regarding selling them both the lowers and the 10.5 inch uppers, as that would look very suspicious as if he was actually providing them with an illegal firearm. The purchasers are well aware that it is illegal to place a 10.5 inch upper on the lowers they are purchasing from the FFL. The FFL has indicated that he could try to find another 3rd party source of uppers for the purchasers.<sup>33</sup>

According to legal research provided by ATF counsel to attorneys in the U.S. Attorney's Office, it is illegal to possess both the upper and lower receivers, even if they are not assembled: "The possessor does not have to assemble the lower and the upper so long as the firearm is in actual or constructive possession of the offender, and can be 'readily restored' to fire."<sup>34</sup>

Despite evidence that the suspects illegally possessed both upper and lower receivers, were assembling them, and were transporting them to Mexico, ATF did not arrest the suspects. On March 31, 2006, the Resident Agent in Charge of the Tucson office—a local office that reports to the Special Agent in Charge of the Phoenix Field Division—wrote an email explaining that they had enough evidence to arrest the suspects, but that they were waiting to build a bigger case. He wrote:

We have two AUSA assigned to this matter, and the USAO @ Tucson is prepared to issue Search and Arrest Warrants. We already have enough for the 371 and 922 a6 charges, but we want the Title II manufacturing and distribution pieces also—we want it all.<sup>35</sup>

#### **ATF-Phoenix sought U.S. Attorney's approval to walk guns**

The evidence indicates that, rather than arrest the straw buyers, the ATF Phoenix Field Division sought the approval of the U.S. Attorney's Office to let the guns walk in June 2006. The prosecutors handling the case wrote a memorandum to Paul Charlton, U.S. Attorney for the District of Arizona, which outlined the request. They wrote:

ATF is interested in introducing a CI [confidential informant] to act as this source of uppers. This would further the investigation in that it would provide more solid evidence that the purchasers are in fact placing illegal length uppers on the lowers that they are purchasing from the currently-involved FFL. It may also lead to discovery of more information as to the ultimate delivery location of these firearms and/or the actual purchaser.<sup>36</sup>

ATF-Phoenix and the Arizona U.S. Attorney's Office both understood that ATF was already letting firearms walk by working with a cooperating FFL to provide "lower receivers" to straw purchasers trafficking them to Mexico. According to the prosecutors' memorandum to U.S. Attorney Charlton:

[The ATF Agent] pointed out that these same exact firearms are currently being released into the community, the only difference being that at this time ATF is only involved in providing the lower receiver. We know that an illegal upper is being obtained from a third party, but the government is not currently involved in that aspect.<sup>37</sup>

The memo to U.S. Attorney Charlton then relayed ATF-Phoenix's request:

The question was posed by RAC [Resident Agent in Charge] Higman as to the U.S. Attorney's Office's position on the possibility of allowing an indeterminate number of illegal weapons, both components of which (the upper and the lower) were provided to the criminals with ATF's knowledge and/or participation, to be released into the community, and possibly into Mexico, without any further ability by the U.S. Government to control their movement or future use.

The memo further stated that the proposed tactics were controversial and opposed by ATF's legal counsel:

[The ATF agent] indicated that ATF's legal counsel is opposed to this proposed method of furthering the investigation, citing moral objections. Recognizing that it will eventually be this office that will prosecute the individuals ultimately identified by this operation, RAC Higman has requested that we ascertain the U.S. Attorney's Office's position with regard to this proposed method of furthering the investigation.<sup>38</sup>

When the Chief of the Criminal Division in the U.S. Attorney's Office sent the prosecutor's memo to U.S. Attorney Charlton, she accompanied it with an email in which she stated that it "does a very good job outlining the investigation and the potential concerns. This is obviously a call that needs to be made by you Paul."<sup>39</sup> U.S. Attorney Charlton responded the next day: "Thanks—I'm meeting with the ATF SAC [Special Agent in Charge William Newell] on Tuesday and I'll discuss it with him then."<sup>40</sup>

Although the Committee has obtained no document memorializing the subsequent conversation between U.S. Attorney Charlton and the Special Agent in Charge, documents obtained by the Committee indicate that ATF-Phoenix went forward with their plans to observe or facilitate hundreds of firearms purchases by

the suspected straw purchasers without arrests. Committee staff did not conduct a transcribed interview of Mr. Charlton.



United States Attorney's Office  
District of Arizona

**Memorandum**

**To:** Paul K. Charlton, United States Attorney for the District of Arizona  
**From:** Jennifer J. Maldonado, Assistant U.S. Attorney  
David P. Petermann, Assistant U.S. Attorney  
**Subject:** Operation Wide Receiver, Policy Question  
**Date:** July 13, 2006

Enclosed, only with AUSA Jennifer J. Maldonado and David P. Petermann (2) dated 7/13/06, are two copies of a memorandum for the investigation. The question was posed by RAC Hight as to the U.S. Attorney's Office's position on the possibility of allowing an indeterminate number of illegal weapons, both components of which (the upper and the lower) were provided to the criminals with AFI's knowledge and/or participation, to be released into the community, and possibly into Mexico, without any further ability by the U.S. Government to control such inventory or future use. Hight also pointed out that this same issue

**ATF-Phoenix continued to walk guns after consulting with U.S. Attorney**

In October 2006, ATF agents planned a surveillance operation to observe a suspect purchase AR-15 lower receivers and two AR-15 rifles, determine if the suspect was going to make additional purchases, and identify any of his associates.<sup>41</sup> The Operational Plan noted:

It is suspected that [the suspect] will now be moving the firearms to Tijuana himself. We are not prepared to make any arrests at this time because we are still attempting to coordinate our efforts with AFI [Agencia Federal de Investigación] in Mexico. ... If it is determined that [the suspect] has spotted the surveillance unit, surveillance will be stopped immediately.<sup>42</sup>

Documents indicate that ATF agents observed the suspect purchase five AR-15 lower receivers and terminated surveillance after three hours.<sup>43</sup> Notes taken after the investigation explained that the surveillance included audio recordings of the suspect stating that he "is now personally transporting the firearms to Tijuana, Mexico himself."<sup>44</sup>

On December 5, 2006, Special Agent in Charge Newell wrote that another key suspect in the Wide Receiver investigation had recently "purchased a total of ten (10)

AR-15 type lower receivers on two separate purchases.”<sup>45</sup> He also wrote that, during those transactions, the suspect told the confidential source that he was taking the firearms to Mexico and would soon be ordering an additional 50 lower receivers.<sup>46</sup> Special Agent in Charge Newell wrote that the Tucson field office was planning to secure the cooperation of Mexican authorities:

The Tucson II Field Office has maintained contact with the ATF Mexico City Country Office in an effort to secure the cooperation and join investigation with the Agencia Federal de Investigación (Mexico). Three Tucson II Field Office SA have obtained official U.S. Government passports in anticipation of a coordination meeting with the AFT early during calendar year 2007.<sup>47</sup>

On February 23, 2007, ATF agents planned to conduct a traffic stop of one suspected straw purchaser “with the assistance of the Tucson Police Department.”<sup>48</sup> Although the Operational Plan indicated that “[p]robable cause exists to arrest [the suspect],” the agents’ goal was to lawfully detain him at the traffic stop and bring him to the ATF office for questioning.<sup>49</sup> According to a memorandum from Special Agent in Charge Newell, between February 7 and April 23, 2007, the suspect and co-conspirators together purchased and ordered 150 firearms, including AK-47 and AR-15 rifles and pistols.<sup>50</sup> Although ATF apparently had probable cause for arrest, on February 27, 2007, the subject was interviewed by ATF agents and released.<sup>51</sup> The documents do not indicate why he was not arrested and prosecuted at that time.

#### **ATF agents unsuccessfully attempted to coordinate with Mexico**

The documents indicate that, although ATF had sufficient evidence to arrest the suspected straw purchasers, the agents continued to press forward with plans to attempt coordinated surveillance operations with Mexico. In April 2007, the ATF agents in charge of Operation Wide Receiver were unsure whether they could successfully coordinate surveillance with their Mexican counterparts. On April 10, 2007, the case agent for Wide Receiver wrote to a Tucson Police Department (TPD) officer:

Assuming that the MCO [ATF’s Mexico Country Office] can coordinate with the Mexican authorities, we anticipate that Tucson VCIT will hand off his surveillance operation at the U.S. / Mexican border. No ATF SA or local officers working at our direction will travel into Mexico. Through MCO we have requested that the Mexican authorities pick up the surveillance at the border and work to identify persons, telephone numbers, “stash” locations and source(s) of money supply in furtherance of this conspiracy.<sup>52</sup>

According to an ATF Operational Plan, just one day later, ATF agents and Tucson Police officers conducted surveillance and recorded the "planned arrival of [the suspect] and other persons at the FFL."<sup>53</sup> The Operational Plan stated that U.S. law enforcement would watch the "firearms cross international lines and enter Mexico. ... If the Mexican authorities decline or fail to participate in this operation the firearms traffickers will be arrested prior to leaving the United States."<sup>54</sup> Although the agents obtained an electronic record of the sale and initiated surveillance, the plan failed according to a summary prepared by one agent:

ATF agents in conjunction with TPD VCIT Task Force Officers conducted a surveillance of suspected firearms traffickers in furtherance of this investigation. Suspects purchased 20+ firearms which totaled over \$35,000.00 in retail cost. The surveillance successfully obtained electronic evidence of the transaction, further identified the traffickers and additional suspect vehicles. The traffickers were followed to a neighborhood on the Southside of Tucson and then later lost. The suspects are planning on making a purchase of 20-50 M4 rifles and are negotiating this next deal. The investigation continues.<sup>55</sup>

Despite the surveillance of the straw purchase and other evidence collected during the April 11, 2007, operation, the suspects were not arrested even after they were later located. Instead, more operations were planned.

An April 23, 2007, memo from Special Agent in Charge Newell to the Chief of Special Operations requesting additional funding for Operation Wide Receiver documented the failure to coordinate surveillance with Mexican law enforcement and public safety risks associated with continuing on that course:

To date, the Tucson II Field Office and TPD SID have been unable to surveil the firearms to the International border. From contact with those offices, the Mexican Federal law enforcement authorities understand that the surveillance is difficult and that several firearms will likely make it to Mexico prior to a U.S. law enforcement successful surveillance of firearms to the international border.<sup>56</sup>

Two weeks later, on May 7, 2007, ATF agents and Tucson Police conducted surveillance of another "planned arrival" of a suspected straw purchaser and his associates at an FFL.<sup>57</sup> The Operational Plan shows that ATF agents had advance notice that the suspect had contacted the FFL to arrange the purchase of more than 20 firearms, planned to purchase the firearms from the FFL later in the day, and had made arrangements for a vehicle to transport the weapons into Mexico that night.<sup>58</sup> The Operational Plan indicated that "[i]f the Mexican authorities decline or fail to participate, the firearms traffickers will be arrested prior to leaving the



United States.”<sup>59</sup> ATF agents contacted Mexican law enforcement in advance of the operation and they agreed to assist with surveillance of the suspects if they entered Mexico.<sup>60</sup> According to a subsequent summary of these events:

[The suspects] were scheduled to purchase the ordered firearms. [Redacted] cancelled at the last minute, but [the suspect] purchased 15 firearms and was surveilled to his residence at [redacted]. Surveillance was discontinued the following day due to neighbors becoming suspicious of surveillance vehicles.”<sup>61</sup>

The suspects were not arrested, the firearms were not interdicted, and the investigation continued in anticipation of the suspects’ next major purchase.

#### **ATF agents expressed concern about gunwalking**

Agents in ATF’s Phoenix Field Division began to express concern that Operation Wide Receiver was not yielding the desired results. In a June 7, 2007, email, one special agent on the case wrote to his supervisor:

We have invested a large amount of resources in trying to get the load car followed to Mexico and turning it over to PGR [Mexican federal prosecutors] and are preparing to expend even more. We already have numerous charges up here and actually taking in to Mexico doesn’t add to our case specifically at that point. We want the money people in Mexico that are orchestrating this operation for indictment but obviously we may never actually get our hands on them for trial, so the real beneficiary is to PGR.”<sup>62</sup>

Despite the agent’s concerns, Operation Wide Receiver remained on the same course with another “planned arrival” attempted on June 26, 2007.<sup>63</sup> The Operational Plan indicated that ATF agents had advance notice that the suspect had been in contact with the FFL, that the suspect was “extremely anxious” to purchase more firearms, and that firearms are to be purchased and then continue to “unknown locations throughout Tucson and Southern Arizona.”<sup>64</sup> Documents show that ATF agents and Tucson police were unable to follow the firearms to the Mexican border.<sup>65</sup>

In an email sent on June 26, 2007, as the surveillance operation was set to begin, the ATF case agent for Operation Wide Receiver expressed reluctance about the repeated failures to coordinate surveillance of firearms traffickers with Mexican law enforcement.<sup>66</sup> He wrote to a prosecutor at the Texas U.S. Attorney’s Office:

We anticipate surveillance this evening where the subject(s) of interest are scheduled to purchase approx. \$20K of associated firearms for

further shipment to Caborca, Mx, and we are coordinating with the Mexican authorities in the event that the surveillance is successful. We have reached that stage where I am no longer comfortable allowing additional firearms to 'walk,' without a more defined purpose.<sup>67</sup>

### **Criminal Division took over prosecution and found gunwalking**

In late 2007, the operational phase of Operation Wide Receiver was terminated, and the case was passed to the U.S. Attorney's Office for prosecution. The case then sat idle for nearly two years without indictments or arrests. The first prosecutor assigned to the case became a magistrate judge, and the second prosecutor did not open the case file for more than six months.<sup>68</sup>

In 2009, the Department of Justice's Criminal Division in Washington, D.C. offered to assign prosecutors to support firearms trafficking cases in any of the five border-U.S. Attorneys' offices.<sup>69</sup> The U.S. Attorney's Office in Arizona accepted the offer and asked for assistance with the prosecution of targets in Operation Wide Receiver.<sup>70</sup> In September 2009, the Criminal Division assigned an experienced prosecutor to take over the case.<sup>71</sup>

After reviewing the investigative files from 2006 and 2007, the Criminal Division prosecutor quickly realized that there were serious questions about how the case had been handled. On September 23, 2009, she wrote an email to her supervisors giving a synopsis of the case and its problems: "In short it appears that the biggest problem with the case is its [sic] old should have been taken down last year AND a lot of guns seem to have gone to Mexico."<sup>72</sup>

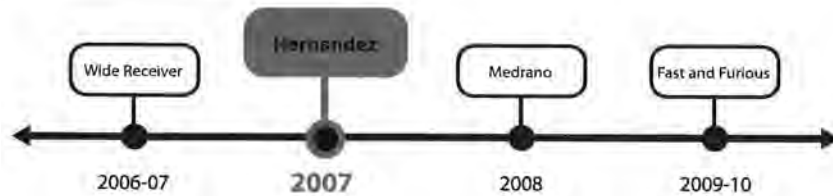
As she prepared the case for indictment, she continued to update her supervisors as new details emerged from the case file. On March 16, 2010, she sent an email to her supervisor:

It is my understanding that a lot of those guns "walked." Whether some or all of that was intentional is not known. The AUSA seemed to think ATF screwed up by not having a mechanism in place to seize weapons once they crossed the border.<sup>73</sup>

The prosecutor also found evidence that guns involved in Operation Wide Receiver were connected to crime scenes in Mexico. She wrote that "13 of the purchased firearms have been recovered in Mexico in connection with crime scenes, including the April 2008 Tijuana gun battle" and that "[t]wo potential defendants were recently murdered in Mexico."<sup>74</sup>

The Criminal Division proceeded with prosecutions relating to the investigation. In May 2010, one suspect pleaded guilty to forfeiture charges pre-

indictment while two additional co-conspirators were indicted in federal court.<sup>75</sup> On October 27, 2010, seven additional suspects were indicted in the District of Arizona on gun-trafficking related charges.<sup>76</sup>



## 2. The Hernandez Case (2007)

According to documents obtained by the Committee, agents in the ATF Phoenix Field Division unsuccessfully attempted a second operation in the summer of 2007 after identifying Fidel Hernandez and several alleged co-conspirators as suspected straw purchasers seeking to smuggle firearms into Mexico. Despite failed attempts to coordinate with Mexican authorities, ATF agents sought approval from the U.S. Attorney's Office to expand so-called "controlled deliveries." In addition, documents obtained by the Committee indicate that then-Attorney General Michael Mukasey was personally briefed on these failed attempts and was asked to approve an expansion of these tactics. During the course of the investigation, Hernandez and his co-conspirators reportedly purchased more than 200 firearms.

### **ATF-Phoenix watched guns cross border without interdiction**

According to their Operational Plan, ATF-Phoenix Field Division agents initiated a firearms trafficking investigation in July 2007 against Fidel Hernandez and his associates who, between July and October 2007, "purchased over two hundred firearms" and were "believed to be transporting them into Mexico."<sup>77</sup> ATF analysts discovered that "Hernandez and vehicles registered to him had recently crossed the border (from Mexico into the U.S.) on 23 occasions" and that "four of their firearms were recovered in Sonora, Mexico."<sup>78</sup>

According to contemporaneous ATF documents, ATF-Phoenix unsuccessfully attempted a cross-border operation in September 2007 in coordination with Mexican law enforcement authorities:

On September 26 and 27, 2007, Phoenix ATF agents conducted nonstop surveillance on Hernandez and another associate, Carlos Morales. ATF had information that these subjects were in possession

of approximately 19 firearms (including assault rifles and pistols) and were planning a firearm smuggling trip into Mexico. The surveillance operation was coordinated with Tucson I Field Office and the ATF Mexico Country Attaché. The plan, agreed to by all parties and authorized by the Phoenix SAC, was to follow these subjects to the border crossing in Nogales, Arizona while being in constant communication with an ATF MCO [Mexico Country Office] agent who would be in constant contact with a Mexican law enforcement counterpart at the port of entry and authorized to make a stop of the suspects' vehicle as it entered into Mexico.

On September 27, 2007, at approximately 10:00 pm, while the Phoenix agents, an MCO agent and Mexican counterparts were simultaneously on the phone, the suspects' vehicle crossed into Mexico. ATF agents observed the vehicle commit to the border and reach the Mexican side until it could no longer be seen. The ATF MCO did not get a response from the Mexican authorities until 20 minutes later when they informed the MCO that they did not see the vehicle cross.<sup>79</sup>

#### **ATF headquarters raised concerns about operational safeguards**

Failed attempts to coordinate with Mexican authorities to capture suspected firearms traffickers as part of controlled deliveries raised serious concerns at ATF headquarters. On September 28, 2007, the day after the failed attempt, Carson Carroll, ATF's then-Assistant Director for Enforcement Programs, notified William Hoover, ATF's then-Assistant Director of Field Operations, that they had failed in their coordination. Mr. Carroll stated that when the suspected firearms traffickers were observed purchasing a number of firearms from an FFL in Phoenix, Arizona, ATF officials "immediately contacted and notified the GOM [Government of Mexico] for a possible controlled delivery of these weapons southbound to the Nogales, AZ., US/Mexico Border."<sup>80</sup> Mr. Carroll continued:

ATF agents observed this vehicle commit to the border and reach the Mexican side until it could no longer be seen. We, the ATF MCO did not get a response from the Mexican side until 20 minutes later, who then informed us that they did not see the vehicle cross.<sup>81</sup>

According to internal ATF documents, ATF agents attempted a second cross-border controlled delivery with Mexican authorities on October 4, 2007. That operation also failed to lead to the successful capture of the subject in Mexico.<sup>82</sup>

That same day, Assistant Director Hoover sent an email to Assistant Director Carroll and ATF-Phoenix Field Division Special Agent in Charge William Newell demanding a call to discuss the investigation:

Have we discussed the strategy with the US Attorney's Office re letting the guns walk? Do we have this approval in writing? Have we discussed and thought thru the consequences of same? Are we tracking south of the border? Same re US Attorney's Office. Did we find out why they missed the handoff of the vehicle? What are our expected outcomes? What is the timeline?<sup>83</sup>

The next day, Assistant Director Hoover wrote Mr. Carroll again:

I do not want any firearms to go South until further notice. I expect a full briefing paper on my desk Tuesday morning from SAC Newell with every question answered. I will not allow this case to go forward until we have written documentation from the U.S. Attorney's Office re full and complete buy in. I do not want anyone briefed on this case until I approve the information. This includes anyone in Mexico.<sup>84</sup>

Mr. Hoover's concerns seem to have temporarily halted controlled delivery operations in the Hernandez investigation. On October 6, 2007, Special Agent in Charge Newell wrote to Assistant Director Carroll:

I'm so frustrated with this whole mess I'm shutting the case down and any further attempts to do something similar. We're done trying to pursue new and innovative initiatives—it's not worth the hassle.<sup>85</sup>

Nevertheless, Mr. Newell insisted that he did have approval from the U.S. Attorney's Office. He wrote:

We DO have them [the U.S. Attorney's Office] on board and as a matter of fact they (Chief of Criminal John Tocchi) recently agreed to charge the firearms recipients in Mexico (if we could fully [ID] them via a controlled delivery) with a conspiracy charge in US court.<sup>86</sup>

Despite the concerns expressed by Assistant Director Hoover, ATF operational plans show that additional controlled deliveries were planned for October 18, November 1, and November 26-27, 2007.<sup>87</sup> The documents describe ATF plans to observe the purchases at the FFL, follow the suspects "from the FFL in Phoenix, AZ to the Mexican port of entry in Nogales, Arizona," allow the suspects to "cross into Mexico," and allow "Mexican authorities to coordinate the arrest of the subjects."<sup>88</sup>

#### **Attorney General Mukasey briefed and asked to "expand" operations**

In the midst of these ongoing operations, on November 16, 2007, Attorney General Michael Mukasey received a memorandum in preparation for a meeting

with Mexican Attorney General Medina Mora. The memo described the Hernandez case as “the first ever attempt to have a controlled delivery of weapons being smuggled into Mexico by a major arms trafficker.”<sup>89</sup> The briefing paper warned the Attorney General that “the first attempts at this controlled delivery have not been successful.”<sup>90</sup> Despite these failures, the memorandum sought to expand such operations in the future:

ATF would like to expand the possibility of such joint investigations and controlled deliveries—since only then will it be possible to investigate an entire smuggling network, rather than arresting simply a single smuggler.<sup>91</sup>

This briefing paper was prepared by senior officials at ATF and the Department of Justice only weeks after Assistant Director Hoover had expressed serious concerns with the failure of these tactics.<sup>92</sup>

The emails exchanging drafts of the Attorney General’s briefing paper also make clear that ATF officials understood that these were not, in fact, the first operations that allowed guns to “walk.” Assistant Director Carroll wrote to Assistant Director Hoover: “I am going to ask DOJ to change ‘first ever’... there have [been] cases in the past where we have walked guns.”<sup>93</sup> That change never made it into the final briefing paper for Attorney General Mukasey.

Ten days after Attorney General Mukasey was notified about the failed surveillance operations and was asked to expand the use of the cross-border gun operations, ATF agents planned another surveillance operation in coordination with Mexico. The Operational Plan stated:

- 1) Surveillance units will observe [redacted] where they will attempt to confirm the purchase and transfer of firearms by known targets.
- 2) Once the transfer of firearms is confirmed through surveillance, units will then follow the vehicle and its occupants from the FFL in Phoenix, AZ to the Mexican port of entry in Nogales, Arizona. Once the subjects cross into Mexico, ATF attachés will liaison with Mexican authorities to coordinate the arrest of the subjects.
- 3) ATF agents will not be involved with the arrest of the subjects in Mexico but will be present to coordinate the arrest efforts between surveillance units and Mexican authorities as well as to conduct post-arrest interviews.<sup>94</sup>

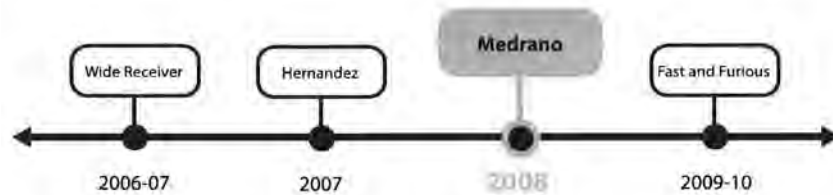
As part of this operation, surveillance units were monitoring the FFL during normal business hours in order to observe large firearms transfers by their known targets.<sup>95</sup>

The Committee has not received any documents indicating that ATF-Phoenix agents were able to successfully coordinate with Mexican law enforcement to interdict firearms in the Hernandez case. During the course of the investigation, Hernandez and his co-conspirators purchased more than 200 firearms. In multiple instances, ATF agents witnessed Hernandez and his associates take these weapons into Mexico.<sup>96</sup>

Hernandez and his associate were arrested in Nogales, Arizona on November 27, 2007, while attempting to cross the border into Mexico.<sup>97</sup> The defendants were charged with Conspiracy to Export Firearms, Exporting Firearms, and two counts of Attempted Exportation of Firearms. The defendants were brought to trial in 2009, but acquitted after prosecutors were unable to obtain the cooperation of the Mexican law enforcement officials who had recovered firearms purchased by Hernandez. An ATF briefing paper from 2009 summarized the result:

The judge also would not allow us to introduce evidence of how the guns were found in Mexico unless we could produce the Mexican Police Officials who located the guns. We were unable to obtain the cooperation of Mexican law enforcement to identify and bring these witnesses to trial to testify.<sup>98</sup>

At the conclusion of the trial, the jury was unable to reach a verdict on three counts of the indictment, and the defendants were acquitted on a fourth charge.<sup>99</sup>



### 3. The Medrano Case (2008)

In February 2008, ATF agents in Phoenix began investigating a straw purchasing network led by Alejandro Medrano. Documents obtained by the Committee indicate that on multiple occasions throughout 2008, ATF agents were aware that Medrano and his associates were making illegal firearms purchases and trafficking the weapons into Mexico. According to documents obtained by the Committee, ATF-Phoenix did not arrest suspects for approximately one year while their activities continued, instead choosing to continue surveillance. During the summer of 2008, agents from U.S. Immigration and Customs Enforcement (ICE) raised concerns about the tactics being used, but the tactics continued for several more months. On December 10, 2008, a criminal complaint was filed against Medrano and his associates in the United States District Court for the District of Arizona, and the targets were later sentenced to varying prison sentences.

#### **ATF agents watched as firearms crossed the border**

An ATF-Phoenix Operational Plan obtained by the Committee describes an instance on June 17, 2008, in which ATF agents watched Medrano and an associate, Hernan Ramos, illegally purchase firearms at an FFL in Arizona, load them in their car, and smuggle them into Mexico:

Agents observed both subjects place the firearms in the backseat and trunk [of a vehicle]. Agents and officers surveilled the vehicle to Douglas, AZ where it crossed into Mexico at the Douglas Port of Entry (POE) before a stop could be coordinated with CBP [Customs and Border Protection].<sup>100</sup>

Neither Medrano nor Ramos was arrested or detained at the time or in the months after. The Operational Plan does not include any indication that ATF agents attempted to coordinate with Mexican law enforcement. The fact that the suspects continued to make firearms purchases in the United States and take them to Mexico suggests that they were not intercepted by Mexican law enforcement.



In the two months following these surveillance operations, Medrano and his co-conspirators purchased several additional firearms at gun shows and from FFLs in the Phoenix area.<sup>101</sup> The suspects also continued to travel back and forth to Mexico.<sup>102</sup> The ATF Operational Plan also stated:

The group particularly targeted gun shows where several members purchased firearms from various FFL'S. According to TECS [the Treasury Enforcement Communications System, a government database used to track individuals' travel patterns], identified subjects routinely crossed into Mexico prior to and following a large number of firearms purchases. While only purchasing a small number of firearms, MEDRANO crossed into Mexico utilizing several vehicles that were not registered to him or his immediate family. MEDRANO routinely returned to the US on foot while other identified subjects drove a vehicle into the US. It is believed that identified subjects entering the US on foot were carrying bulk cash to pay for future firearms.<sup>103</sup>

According to the Operational Plan, multiple firearms connected to the network were recovered in Mexico, some very soon after they were sold:

Hernan RAMOS purchased a 7.62 caliber rifle in February 2008 that was recovered in June 2008. Jose ARIZMENDIZ purchased two pistols that were recovered at the same location in Mexico. One of the pistols had a time to crime of fifteen (15) days.<sup>104</sup>

#### **ICE agents raised concerns**

Documents obtained by the Committee indicate that in the summer of 2008, ATF agents handling the Medrano investigation met with ICE agents to coordinate surveillance of another cross-border smuggling attempt. At this meeting, ICE agents balked when they learned about the tactics being employed by ATF-Phoenix. On August 12, 2008, the head of ICE's offices in Arizona wrote to ATF Special Agent in Charge Newell asking for an in-person meeting about the dispute among agents over ATF operational plans to allow straw purchased guns to cross the border:

One of [the ICE] groups worked with your guys over the weekend on a surveillance operation at a Tucson gun show. While we had both met in advance with the USAO, our agents left that meeting with the understanding that any weapons that were followed to the border would be seized. On Friday night, however, our agents got an op plan that stated that weapons would be allowed to go into Mexico for further surveillance by LEAs [law enforcement agents] there.<sup>105</sup>

I need to get some clarification from my folks tomorrow because I was told that your folks were aware of the plan to allow the guns to cross, in close cooperation with both our offices in Mexico as well as Mexican Feds.<sup>106</sup>

### Criminal complaint also confirms "gunwalking"

On or about June 17, 2008, at or near Tucson, Arizona, Alejandro Medrano and Hernan Ramos went together to Mad Dawg Global, a federally licensed firearms dealer, where Hernan Ramos purchased six (6) .223 caliber rifles for approximately \$4800.00 and falsely represented on the 4473 that he was the actual purchaser. Both Alejandro Medrano and Hernan Ramos placed the six (6) rifles in the back seat of their vehicle.<sup>108</sup>

[illegible]

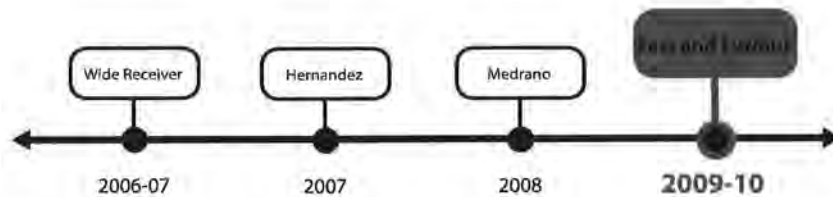
Alejandro Medrano drove Hernan Ramos's vehicle with Hernan Ramos as a passenger from Mad Dawg Global in Tuscon, Arizona, to the Douglas Port of Entry where they both entered into Mexico with at least the six (6) .223 caliber rifles in the vehicle.<sup>109</sup>

The complaint states that the information was obtained by ATF agents conducting surveillance:

ATF Special Agents conducted surveillance, recorded firearms transactions, and identified the dates and times that the conspirators herein crossed the international border either in vehicles or on foot.<sup>110</sup>

The complaint also describes how quickly Medrano and his associates traveled back and forth between the United States and Mexico for additional firearm purchases. For example, in one instance on May 21, 2008, Hernan Ramos entered the United States and returned to Mexico "less than two hours later in the same vehicle." The complaint also states that in another instance on August 13, 2008, Medrano and an associate entered the United States "driving a vehicle which had entered into Mexico approximately fifteen minutes earlier."<sup>111</sup>

On August 9, 2010, Medrano was "sentenced to 46 months in prison for his leadership role in the conspiracy."<sup>112</sup> Ramos was sentenced to 50 months in prison and "[m]ost of the remaining defendants in the conspiracy received prison terms ranging from 14 to 30 months."<sup>113</sup> Many of the firearms purchased by the Medrano network were subsequently recovered in Mexico.<sup>114</sup>



#### 4. Operation Fast and Furious (2009-10)

The investigation that became known as Operation Fast and Furious began in the ATF Phoenix Field Division in October 2009. Despite having identified 20 suspects who paid hundreds of thousands of dollars in cash to buy hundreds of military-grade firearms on behalf of the same trafficking ring, ATF-Phoenix and the Arizona U.S. Attorney's Office asserted that they lacked probable cause for any arrests. Three months into the investigation, they agreed instead on a broader

strategy to build a bigger case against cartel leaders, rather than straw purchasers, through long-term surveillance and wiretaps. While they pursued this broader strategy, ATF-Phoenix agents did not interdict hundreds of firearms purchased and distributed by the suspects under their surveillance. In March 2010, the Deputy Director of ATF became concerned with the operation and ordered an "exit" strategy to bring indictments within 90 days. The documents indicate that ATF-Phoenix field agents chafed against this directive, however, and allowed suspect purchases to continue for months in an effort to salvage the broader goal of the investigation. In January 2011, the U.S. Attorney's Office indicted 19 straw purchasers and the local organizer of the network, all of whom had been identified at the beginning of the investigation in 2009.

#### **Initiated by ATF-Phoenix in the Fall of 2009**

According to documents obtained by the Committee, the investigation that became known as Operation Fast and Furious started in October 2009 when ATF agents received a tip that four suspected straw purchasers had acquired numerous AK-47 style rifles from the same gun dealer. ATF also received a tip about a man named Uriel Patino who had purchased numerous AK-47 rifles from the same dealer.<sup>115</sup>

#### **ATF-Phoenix presentation on Fast and Furious**

The next month, ATF identified six additional suspected straw purchasers and two local properties that were being utilized as firearm drop locations.<sup>116</sup> On November 20, 2009, some of the guns purchased by the suspects were recovered in Naco, Mexico, including firearms with a "short time to crime." Two additional suspects were identified based on the firearms recovered in Naco.<sup>117</sup>



The case continued to grow in December with the identification of seven additional suspected straw purchasers and Manuel Celis-Acosta, a suspect connected to a large-scale Drug Enforcement Administration (DEA) investigation.<sup>118</sup>

A Briefing Paper prepared by ATF-Phoenix noted the size of the organization and the rapid pace of firearm purchases in those initial months of the investigation. It stated:

It should also be noted that the pace of firearms procurement by this straw purchasing group from late September to early December, 2009 defied the “normal” pace of procurement by other firearms trafficking groups investigated by this and other field divisions. This “blitz” was extremely out of the ordinary and created a situation where measures had to be enacted in order to slow this pace down in order to perfect a criminal case.<sup>119</sup>

The Briefing Paper stated that the investigation had identified more than 20 individual straw purchasers, all connected to the same trafficking ring, who “had purchased in excess of 650 firearms (mainly AK-47 variants) for which they have paid cash totaling more than \$350,000.00”<sup>120</sup>

#### **Prosecutors claimed no probable cause to arrest straw buyers**

According to documents obtained by the Committee, on January 5, 2010, ATF-Phoenix officials working on the investigation had a meeting with the lead prosecutor on the case, Arizona Assistant U.S. Attorney Emory Hurley. The ATF agents and the prosecutor wrote separate memos following the meeting reflecting a consensus that no probable cause existed to arrest any of the straw purchasers despite the significant number of firearms that had been purchased. The ATF-Phoenix Briefing Paper, prepared three days after the meeting, stated:

On January 5, 2010, ASAC Gillett, GS [Group Supervisor] Voth, and case agent SA MacAllister met with AUSA Emory Hurley who is the lead federal prosecutor on this matter. Investigative and prosecutions strategies were discussed and a determination was made that there was minimal evidence at this time to support any type of prosecution; therefore, additional firearms purchases should be monitored and additional evidence continued to be gathered. This investigation was briefed to United States Attorney Dennis Burke, who concurs with the assessment of his line prosecutors and fully supports the continuation of this investigation.<sup>121</sup>

Similarly, the prosecutor wrote a memo to his direct supervisor, stating: “We have reviewed the available evidence thus far and agree that we do not have any chargeable offenses against any of the players.”<sup>122</sup>

During a transcribed interview with Committee staff, the ATF-Phoenix Group Supervisor who oversaw the operation and participated in the meeting explained that he had to follow the prosecutor’s probable cause assessment:

I don’t think that agents in Fast and Furious were forgoing taking action when probable cause existed. We consulted with the U.S.

Attorney's Office. And if we disagree, I guess we disagree. But if the U.S. Attorney's Office says we don't have probable cause, I think that puts us in a tricky situation to take action independent, especially if that is contradictory to their opinion.<sup>123</sup>

In another exchange, the Group Supervisor explained the prosecutor's assessment with respect to Uriel Patino, the single largest suspected straw purchaser in the Fast and Furious network:

Q: Does that meet your understanding of probable cause to interdict a gun when Uriel Patino goes in for the fifth or sixth or 12th time to purchase more and more guns with cash?

A: We talked that over at the U.S. Attorney's Office, and the conclusion was that we would need independent probable cause for each transaction. Just because he bought 10 guns yesterday doesn't mean that the 10 he is buying today are straw purchased. You can't transfer probable cause from one firearm purchase to the next firearm purchase. You need independent probable cause for each occurrence.

Q: And it doesn't matter not just that he bought 10 last week and 20 the week before, but that five of them ended up in Mexico at a crime scene, at a murder?

A: Again, in talking to the U.S. Attorney's Office, unless we could prove that he took them to Mexico, the fact that he sold them or transferred them to another [non-prohibited] party doesn't necessarily make him a firearms trafficker. If he sells them to his neighbor lawfully and then his neighbor takes them to Mexico, it is the neighbor who has done the illegal act, not Patino, who sold them to his neighbor.<sup>124</sup>

Although the determination of whether sufficient probable cause existed to make arrests ultimately rested with the prosecutor, documents obtained by the Committee indicate that all of the participants agreed with the strategy to proceed with building a bigger case and to forgo taking down individual members of the straw purchaser network one-by-one. The ATF Briefing Paper stated:

Currently our strategy is to allow the transfer of firearms to continue to take place albeit, at a much slower pace, in order to further the investigation and allow for the identification of additional co-conspirators who would continue to operate and illegally traffic

firearms to Mexican DTOs [drug trafficking organizations] which are perpetrating armed violence along the Southwest Border.<sup>125</sup>

During his transcribed interview with Committee staff, Special Agent in Charge Newell explained:

[T]he goal was twofold. It was to identify the firearms-trafficking network, the decision-makers, and not just focus on the straw purchasers. We would go after the decision-makers, the people who were financing.<sup>126</sup>

He stated that it was critical to identify the network rather than arresting individual straw purchasers one-by-one:

The goal of the investigation, as I said before, was to identify the whole network, knowing that if we took off a group of straw purchasers this, as is the case in hundreds of firearms trafficking investigations, some that I personally worked as a case agent, you take off the low level straw purchaser, all you're doing is one of – you're doing one of two things, one of several things. You're alerting the actual string-puller that you're on to them, one, and, two, all they are going to do is go out and get more straw purchasers.

Our goal in this case is to go after the decision-maker, the person at the head of the organization, knowing that if we remove that person, in the sense of prosecute that person, successfully, hopefully, that we would have much more impact than just going after the low-level straw purchaser.<sup>127</sup>

#### **Prosecutor encouraged U.S. Attorney to “hold out for bigger” case**

In addition to finding no probable cause to arrest suspected straw purchasers who had already purchased hundreds of firearms, the lead prosecutor recommended against employing traditional investigative tactics against the suspects. In a memorandum to his supervisor on January 5, 2010, Mr. Hurley wrote:

In the past, ATF agents have investigated cases similar to this by confronting the straw purchasers and hoping for an admission that might lead to charges. This carries a substantial risk of letting the members of the conspiracy know that they are the subject of an investigation and not gain any useful admissions from the straw buyer. In the last couple of years, straw buyers appear to be well coached in how to avoid answering question about firearms questions. Even when the straw buyers make admissions and can be prosecuted, they

are easily replaced by new straw buyers and the flow of guns remains unabated.<sup>128</sup>

The lead prosecutor noted that ATF-Phoenix was aware that ATF headquarters would likely object to both the strategy of trying to build a bigger case and the proposal to forgo using traditional law enforcement tactics:

ATF [Phoenix] believes that there may be pressure from ATF headquarters to immediately contact identifiable straw purchasers just to see if this develops any indictable cases and to stem the flow of guns. Local ATF favors pursuing a wire and surveillance to build a case against the leader of the organization. If a case cannot be developed against the hub of the conspiracy, he will be able to replace the spokes as needed and continue to traffic firearms. I am familiar with the difficulties of building a case only upon the interviews of a few straw purchasers and have seen many such investigations falter at the first interview. I concur with Local ATF's decision to pursue a longer term investigation to target the leader of the conspiracy.<sup>129</sup>

Later the same day, January 5, 2010, the lead prosecutor's supervisor forwarded the memorandum to U.S. Attorney Dennis Burke, recommending that he agree to both the strategy and tactics. The supervisor's email to Mr. Burke stated:

Dennis—Joe Lodge has been briefed on this but wanted to get you a memo for your review. Bottom line – we have a promising guns to Mexico case (some weapons already seized and accounted for), local ATF is on board with our strategy but ATF headquarters may want to do a smaller straw purchaser case. We should hold out for the bigger case, try to get a wire, and if it fails, we can always do the straw buyers. Emory's memo references that this is the "Naco, Mexico seizure case"—you may have seen photos of that a few months ago.<sup>130</sup>

Mr. Burke responded two days later with a short message: "Hold out for bigger. Let me know whenever and w/ whomever I need to weigh-in."<sup>131</sup>

Although Mr. Burke agreed with the proposal to target the organizers of the firearms trafficking conspiracy, he told Committee staff that neither ATF-Phoenix nor his subordinates suggested that agents would be letting guns walk as part of the investigation. As discussed in Section C, below, Mr. Burke stated in his transcribed interview that he was under the impression that ATF-Phoenix was coordinating interdictions with Mexican officials. Mr. Burke stated:

I was under the opposite impression, which was that based on his [Mr. Newell's] contacts and the relationships with Mexico and what they



were doing, that they would be working with Mexico on weapons transferred into Mexico.<sup>132</sup>

According to documents obtained by the Committee, Mr. Burke also received explicit assurances from the lead prosecutor on the case, Mr. Hurley, that ATF-Phoenix agents "have not purposely let guns 'walk.'"<sup>133</sup>

#### **ATF-Phoenix sought funding and wiretaps to target higher-level suspects**

To secure additional resources for Operation Fast and Furious, including agents, funding, and sophisticated investigative tools, ATF-Phoenix requested funding from the Organized Crime Drug Enforcement Task Forces (OCDETF) Program, which provides funding "to identify, disrupt, and dismantle the most serious drug trafficking and money laundering organizations and those primarily responsible for the nation's drug supply."<sup>134</sup>

In January 2010, ATF-Phoenix submitted an investigative strategy in its application for funding from OCDETF.<sup>135</sup> ATF-Phoenix and the U.S. Attorney's Office used evidence gathered from another agency's investigation to draft its proposal.<sup>136</sup> The application explained that the goal Operation Fast and Furious was to bring down a major drug trafficking cartel:

The direct goal of this investigation is to identify and arrest members of the CONTRERAS DTO [Drug Trafficking organization] as well as seize assets owned by the DTO. Based upon the amount of drugs this organization distributes in the US it is anticipated that the investigation will continue to expand to other parts of the US and enable enforcement operations in multiple jurisdictions. In addition to the CONTRERAS DTO, this investigation is intended to identify and expand to the hierarchy within the Mexico-based drug trafficking organization that directs the CONTRERAS DTO.<sup>137</sup>

ATF-Phoenix's proposal for Operation "The Fast and the Furious" was approved by an interagency group of Federal law enforcement officials in Arizona in late January 2010.<sup>138</sup>

ATF-Phoenix also drafted a proposal to conduct a wiretap with the goal of obtaining evidence to connect the straw purchasers to the leaders of the firearms trafficking conspiracy.<sup>139</sup> During his transcribed interview with Committee staff, U.S. Attorney Burke explained the purpose behind this wiretap application:

[T]he belief was, at least in I think January 2010, was when they first, my recollection is that they first started referencing the interest in

getting the [wiretap]. But the point being that they were going to try to reach beyond just the straw purchasers and figure out who the actual recruiters were and organizers of the gun trafficking ring.<sup>140</sup>

ATF-Phoenix submitted its wiretap application with the necessary affidavits and approvals from the Department of Justice, Office of Enforcement Operations, and received federal court approval for its first wiretaps.<sup>141</sup>

#### **ATF-Phoenix agents watched guns walk**

Documents obtained by the Committee indicate that while ATF-Phoenix and the U.S. Attorney's Office pursued their strategy of building a bigger case against higher-ups in the firearms trafficking conspiracy, ATF-Phoenix field agents continued daily surveillance of the straw purchaser network. With advance or real-time notice of many purchases by the cooperating gun dealers, the agents watched as the network purchased hundreds of firearms. One ATF-Phoenix agent assigned to surveillance described a common scenario:

[A] situation would arise where a known individual, a suspected straw purchaser, purchased firearms and immediately transferred them or shortly after, not immediately, shortly after they had transferred them to an unknown male. And at that point I asked the case agent to, if we can intervene and seize those firearms, and I was told no.<sup>142</sup>

When asked about the number of firearms trafficked in a given week, one agent answered:

Probably 30 or 50. It wasn't five. There were five at a time. These guys didn't go to the FFLs unless it was five or more. And the only exceptions to that are sometimes the Draco, which were the AK-variant pistols, or the FN Five-seveN pistols, because a lot of FFLs just didn't have ... 10 or 20 of those on hand.<sup>143</sup>

Agents told the Committee that they became increasingly alarmed as this practice continued, which they viewed as a departure from both protocol and their expectations as law enforcement officials. One agent stated:

We were walking guns. It was our decision. We had the information. We had the duty and the responsibility to act, and we didn't do so. So it was us walking those guns. We didn't watch them walk, we walked.<sup>144</sup>

### **ATF Deputy Director Hoover ordered an "exit strategy"**

The documents obtained and interviews conducted by the Committee indicate that, following a briefing in March 2010, ATF Deputy Director William Hoover ordered an "exit strategy" in order to extract ATF-Phoenix from this operation. At the March briefing, the ATF Intelligence Operations Specialist and the Group Supervisor made a presentation regarding Operation Fast and Furious that covered the suspects, the number of firearms each had purchased, the amount of money each had spent, the known stash houses where guns were deposited, and the locations in Mexico where Fast and Furious firearms had been recovered. The briefing also included Assistant Director for Field Operations Mark Chait and Deputy Assistant Director for Field Operations William McMahon, four ATF Special Agents in Charge from ATF's Southwest border offices, and others.

In his transcribed interview with Committee staff, Deputy Director Hoover stated that he became concerned sometime after the briefing about the number of guns being purchased and ordered an "exit strategy" to close the case and seek indictments within 90 days:

Q: It's our understanding that you and Mr. Chait, in March approximately, asked for an exit strategy for the case?

A: That is correct. ...

Q: And if you could tell us what led to that request?

A: We received a pretty detailed briefing in March, I don't remember the specific date, I'm going to say it's after the 15th of March, about the investigation, about the number of firearms purchased by individuals. ... That would have been by our Intel division in the headquarters. ... During that briefing I was, you know, just jotting some notes. And I was concerned about the number of firearms that were being purchased in this investigation, and I decided that it was time for us to have an exit strategy and I asked for an exit strategy. It was a conversation that was occurring between Mark Chait, Bill McMahon and myself. And I asked for the exit strategy 30, 60, 90 days, and I wanted to be able to shut this investigation down.

Q: And by shutting the investigation down, you were interested in cutting off the sales of weapons to the suspects, correct?

A: That's correct.

Q: And you were worried, is it fair to say, that these guns were possibly going to be getting away and getting into Mexico and showing up at crime scenes?

A: I was concerned not only that that would occur in Mexico, but also in the United States.<sup>145</sup>

Other than requesting an exit strategy, Mr. Hoover did not recall making any other specific demands because he generally "allowed field operations to run that investigation."<sup>146</sup>

**ATF-Phoenix did not follow the 90-day exit strategy and continued the operation**

In April 2010, more than one month after Deputy Director Hoover's demand for an exit strategy, ATF-Phoenix still had not provided it, and Special Agent in Charge Newell expressed his frustration with perceived interference from ATF headquarters that he believed could prevent him from making a larger case. In an April 27, 2010, email to Deputy Assistant Director McMahon, he wrote:

I don't like HQ driving our cases but understand the "sensitivities" of this case better than anyone. We don't yet have the direct link to a DTO that we want/need for our prosecution, [redacted]. Once we establish that link we can hold this case up as an example of the link between narcotics and firearms trafficking which would be great on a national media scale but if the Director wants this case shut down then so be it.<sup>147</sup>

Although Mr. Newell delivered an exit strategy that day at Mr. McMahon's reminder, the operation continued to grow and expand rather than wind down over the months to follow.<sup>148</sup> In June 2010, three months after Deputy Director Hoover's directive, the operational phase of the case was still continuing. On June 17, 2010, the ATF-Phoenix Group Supervisor received an email from a cooperating gun dealer raising concerns about how the firearms he was selling could endanger public safety. The dealer stated:

As per our discussion about over communicating I wanted to share some concerns that came up. Tuesday night I watched a segment of a Fox News report about firearms and the border. The segment, if the information was correct, is disturbing to me. When you, Emory and I met on May 13<sup>th</sup> I shared my concerns with you guys that I wanted to make sure that none of the firearms that were sold per our conversation with you and various ATF agents could or would ever end up south of the border or in the hands of the bad guys. I guess I

am looking for a bit of reassurance that the guns are not getting south or in the wrong hands. I know it is an ongoing investigation so there is limited information you can share with me. But as I said in our meeting, I want to help ATF with its investigation but not at the risk of agents safety because I have some very close friends that are US Border Patrol agents in southern AZ as well as my concern for all the agents safety that protect our country.<sup>149</sup>

A month later, on July 14, 2010, Special Agent in Charge Newell sent an email to an ATF colleague in Mexico stating that ATF was "within 45-60 days of taking this [Operation Fast and Furious] down IF the USAO goes with our 846/924(c) conspiracy plan."<sup>150</sup> At that time, the case was still months away from indictment.

In August 2010, the operation continued, with another cooperating gun dealer writing to the ATF-Phoenix Group Supervisor seeking advice about a large purchase order made by Uriel Patino, who personally purchased more than 600 assault weapons from a small handful of cooperating gun dealers. The dealer stated:

One of our associates received a telephone inquiry from Uriel Patino today. Uriel is one of the individuals your office has interest in, and he looking to purchase 20 FN-FNX mm firearms. We currently have 4 of these firearms in stock. If we are to fulfill this order we would need to obtain the additional 16 specifically for this purpose.

I am requesting your guidance as to whether [sic] or not we should perform the transaction, as it is outside of the standard way we have been dealing with him.<sup>151</sup>

The Group Supervisor wrote back requesting that the gun dealer fulfill the order:

[O]ur guidance is that we would like you to go through with Mr. Patino's request and order the additional firearms he is requesting, and if possible obtain a partial down payment. This will require further coordination of exact details but again we (ATF) are very much interested in this transaction and appreciate your [] willingness to cooperate and assist us.<sup>152</sup>

During a transcribed interview with Committee staff, another cooperating gun dealer explained that ATF agents had promised to address the concerns he raised about their capability to interdict these weapons:

I was assured in no uncertain terms—and let me be straight about this. She assured that they would have enough agents on sight to surveil the sale and make sure that it didn't get away from them, as it was stated

to me. ... To continue, we went along with these sales at their request. ATF would want us to continue with them, and we did so.<sup>153</sup>

### **Indictments delayed for months**

By August 2010, rather than indicting the suspects in Operation Fast and Furious, ATF-Phoenix and the prosecutor were still in the process of compiling evidence to make indictment decisions. During his transcribed interview with Committee staff, Special Agent in Charge Newell stated:

Well, the next phase in the investigation, it really moves from an investigation phase to prosecution phase at that point in the sense of getting the case ready for indictment. So I know that the case agent ... as well as the others were meeting regularly with the AUSA Emory Hurley, compiling all the different pieces of evidence specific to each individual prospective defendant, to get to a point where we met what we felt in conjunction with the U.S. Attorney's Office, in coordination with them, that met the burden of proof to be able to seek an indictment.<sup>154</sup>

Mr. Newell stated that he understood that this process of "compiling" evidence takes significant time and, as a result, "we were hoping to get indictments in, as I recall, I think it was maybe October, November roughly."<sup>155</sup> Mr. Newell attributed the delay in the indictments to "a combination of workload [at the U.S. Attorney's Office] and the fact that there was a lot of work that needed to be done as far as putting the charges together."<sup>156</sup>

In contrast, U.S. Attorney Burke informed Committee staff that the delay in the indictments was because ATF-Phoenix failed to produce to the prosecutor the completed case file until October 2010:

There is a formal process when an agency gives us a case with their cover, and the actual full documentation of the case was given to us, our office in October 2010, and I believe it was represented that it was given to us in August 2010.<sup>157</sup>

On January 19, 2011, ten months after Deputy Director Hoover ordered an exit strategy, the U.S. Attorney's Office filed an indictment against Manuel Celis-Acosta and 19 straw purchasers that included counts for conspiracy, dealing in firearms without a license, conspiracy to possess a controlled substance with intent to distribute, possession with intent to distribute marijuana, conspiracy to possess a firearm in furtherance of a drug trafficking offense, false statements in connection with acquisition of firearms, conspiracy to commit money laundering, money laundering, and aiding and abetting.<sup>158</sup>



## B. CHALLENGES SPECIFIC TO THE ARIZONA U.S. ATTORNEY'S OFFICE

Numerous ATF agents in Phoenix and senior ATF officials in Washington, D.C. informed the Committee that the U.S. Attorney's Office in Arizona historically has been reluctant to prosecute firearms traffickers. Due to the Federal prosecutors' analysis of heightened evidentiary thresholds in their district, agents reported that they faced significant challenges over the course of many years getting the U.S. Attorney's Office in Arizona to arrest, prosecute, and convict firearms traffickers.

### **"Viewed as an obstacle more than a help"**

In testimony before the Committee, ATF Special Agent Peter Forcelli stated that within a few weeks of transferring to the Phoenix Field Division from New York in 2007, he noticed a difference in how Federal prosecutors in Arizona handled gun cases:

In my opinion, dozens of firearms traffickers were given a pass by the U.S. Attorney's Office for the District of Arizona. Despite the existence of "probable cause" in many cases, there were no indictments, no prosecutions, and criminals were allowed to walk free.<sup>159</sup>

Special Agent Forcelli testified that "this situation wherein the United States Attorney's Office for Arizona in Phoenix declined most of our firearms cases, was at least one factor which led to the debacle that's now known as 'Operation Fast and Furious.'"<sup>160</sup> He added that little improvement has been made to date:

I would say, if anything, we have gone from a 'D-minus' to maybe a 'D.' It is still far from, again, effective or far from what, you know, the taxpayers deserve. But it is still very bad. I mean I wouldn't say it is effective. ... Guns in the hands of gang members or cartel traffickers, that's pretty concerning.<sup>161</sup>

He added: "the U.S. Attorney's Office is kind of viewed as an obstacle more than a help in criminal prosecutions here in Arizona, here in the Phoenix area."<sup>162</sup>

In his transcribed interview with Committee staff, Acting ATF Director Kenneth Melson stated that Arizona historically has been a very difficult place to prosecute firearms traffickers. He stated:

A: We have had, as Peter Forcelli said, a long history with the District of Arizona going back to Paul Charlton, if not earlier, where it was difficult to get these cases prosecuted. Diane



Humetewa was the second U.S. Attorney there who had issues with our cases and wouldn't prosecute. I was head of the Executive Office for U.S. Attorneys at the time. I know exactly what was going on there and the issues we had with getting cases prosecuted in the District of Arizona.

Q: What was going on there?

A: Well, they—

Q: Were they prosecuting gun cases?

A: No, no. And they had a limit—for example, they wouldn't take any case that had less than 500 pounds of marijuana coming across the border with people in custody of it. We had to take some of our most significant cases to the state courts to try because they wouldn't take them.

Q: So is it fair to say there was a frustration—I believe you said earlier there was a frustration and aggravation with the Arizona U.S. Attorney's office, is that fair?

A: Yes, I think there was a frustration. Peter Forcelli said it really like it was. Let me say it, Dennis Burke has really made a change in the office. And he has turned that office around, maybe not 180 degrees but he's getting there. He's at least at 45 or 50 degrees. We have gotten more prosecutions out of his office than before, but historically, we have had a real hard time getting prosecutions. And when we do, we get no sentences. The guidelines are so low.<sup>163</sup>

#### **Evidentiary thresholds in Arizona**

According to ATF officials, prosecutors in the Arizona U.S. Attorney's Office insisted that they could not prosecute firearms cases without physical possession of the firearms at issue. The prosecutors referred to this as the doctrine of *corpus delicti* ("body of the crime").<sup>164</sup> Because it was difficult to get Mexican authorities to cooperate in returning recovered firearms from that country, agents claimed that this created an effective bar to prosecution of many trafficking suspects. Agents told the Committee that prosecutors in the Arizona U.S. Attorney's Office applied the *corpus delicti* doctrine to refuse to prosecute cases even when suspects confessed to committing the crime.<sup>165</sup>

ATF counsel strongly disagreed with the U.S. Attorney's Office that firearms had to be present to prove that straw purchasers had lied on the Federal forms they

filled out when purchasing firearms. According to Special Agent in Charge Newell, the other other U.S. Attorneys' offices in his jurisdiction—New Mexico, Colorado, Wyoming, and Utah—did not share Arizona's interpretation of this evidentiary standard.<sup>166</sup>

On February 24, 2010, ATF counsel prepared a memorandum criticizing the *corpus delicti* doctrine as interpreted by the Arizona U.S. Attorney's Office. The memo stated:

In furtherance of ATF's primary investigative authority and the Southwest Border Initiative, ATF agents spend a very significant number of hours—and often place themselves in dangerous circumstances—investigating alleged straw transactions as part of firearms trafficking cases. In recent years, few of these investigations have resulted in Federal prosecutions in the District of Arizona. It is our desire to work with your office to adjust the scope of our investigations and/or our investigative procedures to provide straw purchaser cases that fall within the prosecution guidelines of your office.<sup>167</sup>

According to ATF agents in Phoenix, the U.S. Attorney's Office also established additional evidentiary hurdles that made prosecuting firearms cases difficult, including requiring independent evidence of illegality for each firearms transaction. According to ATF agents, prosecutors would not build a case based on a pattern of multiple successive firearms purchases followed in quick succession by trips to Mexico. Instead, agents had to prove that each transaction, standing by itself, was illegal. The ATF-Phoenix Group Supervisor for Fast and Furious told the Committee how this policy applied:

We talked that over at the U.S. Attorney's Office, and the conclusion was that we would need independent probable cause for each transaction. Just because he bought 10 guns yesterday doesn't mean that the 10 he is buying today are straw purchased. You can't transfer probable cause from one firearm purchase to the next firearm purchase. You need independent probable cause for each occurrence.<sup>168</sup>

The ATF Group Supervisor explained that application of this requirement meant that agents could not rely on prior actions as the basis for arresting suspected straw purchasers or interdicting weapons.<sup>169</sup>

ATF agents also informed the Committee that the Arizona U.S. Attorney's Office required proof, by clear and convincing evidence, that every person in a chain of people who possessed the firearm had the intent to commit a crime.<sup>170</sup> Agents

understood this to mean that they would not have sufficient probable cause to arrest a suspect or interdict weapons when suspects transferred guns to non-prohibited persons who then trafficked the guns to Mexico.<sup>171</sup>



DEA photo from announcement of Fast and Furious indictments  
(January 2011)

### C. NO EVIDENCE THAT SENIOR OFFICIALS AUTHORIZED OR CONDONED GUNWALKING IN FAST AND FURIOUS

Contrary to some claims, the Committee has obtained no evidence that Operation Fast and Furious was conceived and directed by high-level political appointees at the Department of Justice. Rather, the documents obtained and interviews conducted by the Committee reflect that Fast and Furious was the latest in a series of fatally flawed operations run by ATF's Phoenix Field Division and the Arizona U.S. Attorney's Office during both the previous and current administrations.

The Acting Director of ATF, the Deputy Director of ATF, and the U.S. Attorney in Arizona each told the Committee that they did not approve of gunwalking in Operation Fast and Furious, were not aware that agents in ATF-Phoenix were using the tactic, and never raised any concerns with senior officials at the Department of Justice in Washington, D.C. In addition, the Deputy Attorney General and Assistant Attorney General for the Criminal Division both stated that ATF and prosecutors never raised concerns about gunwalking in Operation Fast and Furious to their attention, and that, if they had been told about gunwalking, they would have shut it down. The Attorney General has stated consistently that he was not aware of allegations of gunwalking until 2011, and the Committee has received no evidence that contradicts this assertion.

#### Attorney General Holder

The Attorney General has stated repeatedly that he was unaware that gunwalking occurred in Operation Fast and Furious until the allegations became public in early 2011.<sup>172</sup> In testimony before the Senate Judiciary Committee, Attorney General Holder was unequivocal in his criticism of the controversial tactics employed in Fast and Furious:

*"This should never have happened and it must never happen again."*  
-Attorney General Holder

Now I want to be very clear, any instance of so called gunwalking is simply unacceptable. Regrettably this tactic was used as part of Fast and Furious which was launched to combat gun trafficking and violence on our Southwest border.

This operation was flawed in its concept and flawed in its execution, and unfortunately we will feel the effects for years to come as guns that were lost during this operation continue to show up at crime scenes

both here and in Mexico. This should never have happened and it must never happen again.<sup>173</sup>

Testifying before the House Judiciary Committee, the Attorney General rejected the allegation that senior leaders at the Department of Justice approved of gunwalking in Operation Fast and Furious:

I mean, the notion that people in the—in Washington, the leadership of the Department approved the use of those tactics in Fast and Furious is simply incorrect. This was not a top-to-bottom operation. This was a regional operation that was controlled by ATF and by the U.S. Attorney's Office in Phoenix.<sup>174</sup>

The Committee has obtained no evidence indicating that the Attorney General authorized gunwalking or that he was aware of such allegations before they became public. None of the 22 witnesses interviewed by the Committee claims to have spoken with the Attorney General about the specific tactics employed in Operation Fast and Furious prior to the public controversy.

To the contrary, the evidence received by the Committee supports the Attorney General's assertion that the gunwalking tactics in Operation Fast and Furious were developed in the field. The leaders of the two components with management responsibility for Operation Fast and Furious—ATF and the U.S. Attorney's Office—informed the Committee that they themselves were not aware of the controversial tactics used in Operation Fast and Furious and did not brief anyone at Justice Department headquarters about them. Similarly, the Attorney General's key subordinates—the Deputy Attorney General and the Assistant Attorney General for the Criminal Division—informed the Committee that they were never briefed on the tactics by ATF or the U.S. Attorney's Office and never raised concerns about the operation to the Attorney General.

In 2010, the Office of the Attorney General received six reports from the National Drug Intelligence Center that contained a brief, one paragraph overview of Operation Fast and Furious. None of the information in the documents discussed the controversial tactics used by ATF agents in the case. One typical paragraph read:

From August 2 through August 6, the National Drug Intelligence Center Document and Media Exploitation Team at the Phoenix Organized Crime Drug Enforcement Task Force (OCDETF) Strike Force will support the Bureau of Alcohol, Tobacco, Firearms, and Explosives' Phoenix Field Division with its investigation of Manuel Celis-Acosta as part of OCDETF Operation Fast and the Furious. This investigation, initiated in September 2009 in conjunction with the Drug Enforcement Administration, Immigration and Customs Enforcement,

and the Phoenix Police Department, involves a Phoenix-based firearms trafficking ring headed by Manuel Celis-Acosta. Celis-Acosta and [redacted] straw purchasers are responsible for the purchase of 1,500 firearms that were then supplied to Mexican drug trafficking cartels. They also have direct ties to the Sinaloa Cartel which is suspected of providing \$1 million for the purchase of firearms in the greater Phoenix area.<sup>175</sup>

In his October 7, 2011, letter, the Attorney General explained that he never reviewed the reports and that his staff typically reviews these reports. He also testified that even if he had reviewed them personally, they did not indicate anything problematic about the case because "the entries suggest active law enforcement action being taken to combat a firearms trafficking organization that was moving weapons to Mexico."<sup>176</sup>

Documents provided to the Committee indicate that in December 2010, the Arizona U.S. Attorney's Office was preparing to inform the Attorney General's Office about the general status of upcoming indictments in Operation Wide Receiver when news of Agent Terry's death broke.

On December 14, 2010, Monty Wilkinson, the Attorney General's Deputy Chief of Staff, sent an email to U.S. Attorney Burke asking if he was available for a call that day.<sup>177</sup> The next day, U.S. Attorney Burke replied, apologized for not responding sooner, and said he would call later in the day.<sup>178</sup> He also stated that the U.S. Attorney's Office had a large firearms trafficking case he wanted to discuss that was set to be indicted in the coming weeks.<sup>179</sup>

Several hours later on December 15, 2010, U.S. Attorney Burke learned that Agent Terry had been murdered.<sup>180</sup> He alerted Mr. Wilkinson, who replied, "Tragic, I've alerted the AG, the Acting DAG, Lisa, etc."<sup>181</sup>

Later that same day, U.S. Attorney Burke learned that two firearms found at Agent Terry's murder scene had been purchased by a suspect in Operation Fast and Furious. He sent an email to Mr. Wilkinson forwarding this information and wrote: "The guns found in the desert near the murder [sic] BP officer connect back to the investigation we were going to talk about—they were AK-47's purchased at a Phoenix gun store."<sup>182</sup> Mr. Wilkinson replied, "I'll call tomorrow."<sup>183</sup>

In his interview with Committee staff, U.S. Attorney Burke stated that he did not recall having any subsequent conversation with Mr. Wilkinson that "included the fact that Fast and Furious guns were found at the scene" of Agent Terry's murder.<sup>184</sup> In a November 2011 hearing of the Senate Judiciary Committee, Senator Charles Grassley asked Attorney General Holder, "Did Mr. Wilkinson say anything to you about the connection between Agent Terry's death and the ATF operation?"

Attorney General Holder responded, “No, he did not.”<sup>185</sup> In a January 27, 2011, letter to the Committee, the Department stated that Mr. Wilkinson “does not recall a follow-up call with Burke or discussing this aspect of the matter with the Attorney General.”<sup>186</sup>

#### Deputy Attorney General Grindler

During his interview with Committee staff, Gary Grindler, the former Acting Deputy Attorney General stated that he was not aware of the controversial tactics that ATF-Phoenix employed in Operation Fast and Furious, never authorized them, and never briefed anyone at the Department of Justice about them.<sup>187</sup>

“*I would have stopped it.*”  
-former Deputy Attorney General Grindler

In March 2010, Acting ATF Director Melson and Deputy Director Hoover met with Mr. Grindler for a monthly check-in meeting and shared information about Operation Fast and Furious and other matters. As part of this briefing, Mr. Melson and Mr. Hoover stated that they discussed the total number of firearms purchased by individual suspects in Operation Fast and Furious, the total amount of money spent on purchasing these firearms, and a map displaying seizure events for the case in both the United States and Mexico.<sup>188</sup>

Mr. Grindler stated that neither of ATF’s senior leaders raised any concerns with him about Operation Fast and Furious at that briefing or mentioned gunwalking:

- Q: And to your recollection, did Director Melson or Deputy Director Hoover ever tell you that they were deliberately allowing firearms to be transferred to Mexico in order to use them as a predicate for cases in the United States?
- A: I mean, I am extraordinarily confident that they didn’t tell me that. That is just an absurd concept. If that had been told to me, I would not only have written something, but done something about it.
- Q: What would you have done?
- A: I would have stopped it. I would have asked for detailed briefings about this matter and figure out more clearly what’s going on here.<sup>189</sup>

Deputy Director Hoover corroborated Mr. Grindler’s account. In his interview with the Committee, Mr. Hoover explained that he did not inform the

Deputy Attorney General about gunwalking in Operation Fast and Furious because he did not know about it himself:

A: Well, there's been reports that the Deputy Attorney General's office was aware of the techniques being employed in Fast and Furious, and that's not the case, because I certainly didn't brief them on the techniques being employed in Fast and Furious.

Q: Because you didn't know?

A: Right.<sup>190</sup>

When asked whether he ever discussed his briefing on Operation Fast and Furious with the Attorney General, Mr. Grindler said, "I don't have any recollection of advising the Attorney General about this briefing in 2010."<sup>191</sup>

#### **Acting ATF Director Melson**

In an interview with Committee staff on July 4, 2011, then-Acting ATF Director Kerneth Melson stated that he was not aware of the controversial tactics that the ATF-Phoenix Field Division employed, never authorized them, and never briefed anyone at the Department of Justice about them. Mr. Melson stated:

I don't believe that I knew or that [Deputy Director] Billy Hoover knew that they were—that the strategy in the case was to watch people buy the guns and not interdict them at some point. That issue had never been raised. It had never been raised to our level by the whistleblowers in Phoenix—that stayed in-house down there. The issue was never raised to us by ASAC [Assistant Special Agent in Charge] Gillett who was supervising the case.

It unfortunately was never raised to my level by SAC [Special Agent in Charge] Newell who should have known about the case, if he didn't, and recognize the issue that was percolating in his division about the disagreement as to how this was occurring. Nor was it raised to my level by DAD [Deputy Assistant Director] McMahon who received the briefing papers from [Phoenix Group Supervisor] Voth and may have had other information on the case. Nor was it given to me by a Deputy Assistant Director in OSII, the intel function, when he briefed this case the one time I wasn't there and he raised an objection to it and saw nothing change.<sup>192</sup>



Director Melson also denied that Department of Justice or senior ATF officials devised or authorized those tactics:

Q: Did you ever use or authorize agents to use a tactic of non-intervention to see where the guns might go?

A: I don't believe I did.

Q: Did you ever tell agents not to use or authorize agents not to use other common investigative techniques like "knock and talks" or police pullovers in order to see where the guns might go in this case?

A: No.

Q: Did anyone at the Department of Justice ever tell you or tell anyone else at headquarters and it got to you that those tactics were authorized as part of a new strategy in order to follow the guns, let the guns go, see where they might end up?

A: No.<sup>193</sup>

Documents obtained by the Committee indicate that Mr. Melson received three briefings regarding Fast and Furious in the early months of the operation and had regular status updates thereafter. He stated that "the general assumption among the people that were briefed on this case was that this was like any other case that ATF has done."<sup>194</sup> In addition to stating that he was not aware of the controversial tactics in Operation Fast and Furious, Mr. Melson stated that he did not know the full scope or scale of criminal activity by suspects until after concerns about gunwalking became public.

After the public controversy broke, Mr. Melson requested copies of Operation Fast and Furious case files to review for himself. He told Committee staff that he became extremely concerned after reviewing them:

I think I became fully aware of what was going on in Fast and Furious when I was reading the ROIs. And I remember sitting at my kitchen table reading the ROIs, one after another after another, I had pulled out all Patino's—and ROIs is, I'm sorry, report of investigation—and you know, my stomach being in knots reading the number of times he went in and the amount of guns that he bought.

And this is why I wish the people in Phoenix had alerted us during this transaction to exactly this issue, so we could have had at least made a judgment as to whether or not this could continue or not.<sup>195</sup>

#### **ATF Deputy Director Hoover**

During his interview with Committee staff, then-Deputy Director William Hoover stated that he had not been aware of the tactical details in Operation Fast and Furious and had not raised any concerns with Acting ATF Director Melson or anyone at Justice Department headquarters.<sup>196</sup> Deputy Director Hoover rejected the suggestion that senior management officials at ATF or the Department of Justice were responsible for any of the controversial tactical decisions made in Operation Fast and Furious:

Q: But you don't believe that this is some sort of top-down—it wasn't a policy or some tactical strategy from either ATF management or main Justice to engage in what happened here in Phoenix in Fast and Furious?

A: No, sir. It's my firm belief that the strategic and tactical decisions made in this investigation were born and raised with the U.S. Attorney's Office and with ATF and the ODCETF strike force in Phoenix.<sup>197</sup>

Mr. Hoover's subordinates also informed the Committee that they did not warn him about gunwalking allegations in Operation Fast and Furious because they were unaware of them. Assistant Director for Field Operations Mark Chait told the Committee that he was "surprised" when he learned of allegations that gunwalking occurred in Operation Fast and Furious in February 2011.<sup>198</sup> Deputy Assistant Director for Field Operations William McMahon, the supervisor above the Phoenix Field Division, stated:

I don't think at any point did we allow guns to just go into somebody's hands and walk across the border. I think decisions were made to allow people to continue buying weapons that we suspected were going to Mexico to put our case together. But I don't believe that at any point we watched guns going into Mexico. I think we did everything we could to try to stop them from going to Mexico.<sup>199</sup>

Although Mr. Hoover stated that he was unaware of gunwalking allegations in Operation Fast and Furious prior to the public controversy, he informed Committee staff that he became concerned in March 2010 about the number of guns being purchased.<sup>200</sup> As discussed above, Mr. Hoover received a briefing in March 2010 during which ATF officials described the suspects, the number of firearms, the

amount of money each had spent, known stash houses, and the locations where firearms had been recovered. Mr. Hoover told the Committee that he ordered an “exit strategy” to close the case and seek indictments within 90 days.

Apart from whether Mr. Hoover was aware of specific gunwalking allegations in Operation Fast and Furious, it remains unclear why he failed to inform Acting ATF Director Melson or senior Justice Department officials about his more general concerns with the investigation or his directive for an exit strategy.

During his interview with Committee staff, Deputy Director Hoover took substantial personal responsibility for ATF’s actions in Operation Fast and Furious. He stated:

I blame no one else. I blame no one else – not DEA, not the FBI, not the U.S. Attorney’s Office. If we had challenges, then we need to correct those challenges. I am the deputy director at ATF, and, ultimately, you know, everything flows up, and I have to take responsibility for the mistakes that we made.<sup>201</sup>

#### **United States Attorney Burke**

During an interview with Committee staff, Arizona U.S. Attorney Dennis Burke stated that neither he nor anyone above him ever authorized non-interdiction of weapons or letting guns walk in Operation Fast and Furious:

Q: To your knowledge as the U.S. Attorney for the District of Arizona, did the highest levels of the Department of Justice authorize [the] non-interdiction of weapons, cutting off of surveillance, as an investigative tactic in Operation Fast and Furious?

A: I have no knowledge of that.

Q: Do you believe you would have known if that was the case?

A: Yes.

Q: Did you ever authorize those tactics?

A: No.

...

Q: Did anyone ever discuss—from the Department of Justice main headquarters—your supervisors—ever discuss with

you or raise to your attention that there was a new policy with respect to interdiction of weapons or surveillance of firearms?

A: No. Not that I can recall at all.

Q: And did anyone ever—from the Department of Justice, Main Justice I will call it, ever tell you that you were authorized to allow weapons to cross the border when you otherwise would have had a legal authority to seize or interdict them because they were a suspected straw purchase or it was suspected that they were being trafficked in a firearms scheme?

A: I have no recollection of ever being told that.<sup>202</sup>

Although U.S. Attorney Burke agreed with ATF-Phoenix's proposal to build a "bigger" case that targeted the organizers of the firearms trafficking conspiracy, he stated that ATF-Phoenix never indicated that agents would be letting guns walk as part of the investigation:

Q: Did you ever discuss with him [Special Agent in Charge Newell] a deliberate tactic of non-interdiction to see where the weapons ended up? To see if they ended up with the DTO in Mexico?

A: I do not recall that at all.

Q: Would that stick out in your mind at this point if he had said we're going to let the guns go, find them in crime scenes in Mexico, and then use that to make a connection to a DTO?

A: I don't recall that at all. I was under the opposite impression, which was that based on his contacts and the relationships with Mexico and what they were doing, that they would be working with Mexico on weapons transferred into Mexico.<sup>203</sup>

Emails from Special Agent in Charge Newell touting recent seizures of firearms in both the United States and in Mexico are consistent with U.S. Attorney Burke's statement that he believed ATF-Phoenix was coordinating interdiction with appropriate law enforcement agencies on both sides of the border. For example, on June 24, 2010, Mr. Newell sent an email to Mr. Burke with a picture of a .50 caliber weapon that had been recovered, stating: "Never ends ... our folks are working non-stop around the clock 7 days a week. But they are making some great seizures and gleaning some great Intel."<sup>204</sup>

The lead prosecutor on the case, Emory Hurley, sent Mr. Burke similar updates. On August 16, 2010, for example, Mr. Hurley prepared a memorandum asserting that “the investigation has interdicted approximately 200 firearms, including two .50 caliber rifles” and stating, “[a]gents have not purposely let guns ‘walk.’”<sup>205</sup>

### **Criminal Division review of Fast and Furious wiretap applications**

In testimony before a Subcommittee of the Senate Judiciary Committee on November 1, 2011, Assistant Attorney General Lanny Breuer stated that he first became aware of the controversial tactics in Operation Fast and Furious after they became public:

I found out first when the public disclosure was made by the ATF agents early this year. When they started making those public statements, of course, at that point, as you know, both the leadership of ATF and the leadership of the U.S. Attorney’s Offices adamantly said that those allegations were wrong.

But as those allegations became clear, that is when I first learned that guns that could—that ATF had both the ability to interdict and the legal authority to interdict, that they failed to do so. That is when I first learned that, Senator.<sup>206</sup>

Similarly, in an interview with Committee staff, Deputy Assistant Attorney General Jason Weinstein stated:

I did not know at any time during the investigation of Fast and Furious that guns had walked during that investigation. I first heard of possible gunwalking in Fast and Furious when the whistleblower allegations were made public in early 2011. Had I known about gunwalking in Fast and Furious before the allegations became public, I would have sounded the alarm about it.<sup>207</sup>

*“I would have sounded the alarm”*

*-Assistant Attorney General Breuer*

Mr. Breuer and Mr. Weinstein also rejected the allegation that they should have been able to identify gunwalking in Operation Fast and Furious based on the Criminal Division’s legal reviews of wiretap applications submitted by the Arizona U.S. Attorney’s Office.

Federal law requires that senior Department officials approve all Federal law enforcement applications to Federal judges for the authority to conduct wiretaps.<sup>208</sup> The Department has assigned that legal review duty to the Office of

Enforcement Operations in the Criminal Division.<sup>209</sup> During Operation Fast and Furious, numerous wiretap applications were submitted to the Criminal Division to determine whether they satisfied the legal threshold established under the Fourth Amendment to the United States Constitution. Drafts of the applications were sent to the Office of Enforcement Operations, which prepared cover memos for final review and approval by a Deputy Assistant Attorney General.<sup>210</sup> The wiretap applications are under court seal and therefore have not been produced to the Committee.

Mr. Weinstein informed the Committee that he reviewed the cover memoranda prepared by the Office of Enforcement Operations for three wiretap applications in Operation Fast and Furious and that he approved all three.<sup>211</sup> He stated that his general practice was to read the cover memo first and examine the underlying affidavit only if there were issues or questions necessary to the probable cause determination that the summary memo did not provide.<sup>212</sup> Mr. Weinstein stated that he believed his practice was consistent with the conduct across various administrations.<sup>213</sup>

Mr. Weinstein rejected the criticism that he should have identified gunwalking in Operation Fast and Furious based on his review of the memoranda summarizing the wiretap affidavits in the case. Although he could not comment on the contents of the documents because they are under seal by a Federal District Court judge, he stated:

It's not a fair criticism. As I said earlier, I can't comment on the contents. What I can say is I obviously have a sensitive radar to gunwalking, since that's been the focus of my life, my professional life, is keeping guns out of the hands of criminals. So when I saw in Wide Receiver that an investigation, however well intentioned it may have been, was being conducted in a way that put guns in the hands of criminals, I reacted pretty strongly to it. Had I seen anything at any time during the investigation of Fast and Furious that raised the same concerns, I would have reacted. And I would have reacted even more strongly because that would have meant it was still going on and that Wide Receiver was not in fact an isolated incidence as I believed it to be.<sup>214</sup>

“*The focus of my life, my professional life, is keeping guns out of the hands of criminals.*”  
-Deputy Assistant Attorney General Weinstein

In testimony before the Senate Judiciary Committee, Mr. Breuer made clear that his staff reviews wiretap affidavits to determine the legal sufficiency of the

request rather than to conduct oversight of investigative tactics in law enforcement investigations. He stated:

[A]s Congress made clear, the role of the reviewers and the role of the deputy in reviewing Title III applications is only one. It is to ensure that there is legal sufficiency to make an application to go up on a wire and legal sufficiency to petition a Federal judge somewhere in the United States that we believe it is a credible request. But we cannot—those now 22 lawyers that I have who review this in Washington, and it used to only be 7, cannot and should not replace their judgment, nor can they, with the thousands of prosecutors and agents all over the country.

Theirs is a legal analysis: Is there a sufficient basis to make this request? We must and have to rely on the prosecutors and their supervisors and the agents and their supervisors all over the country to determine that the tactics that are used are appropriate.<sup>215</sup>

#### **Criminal Division response to Wide Receiver**

Questions have been raised about whether Mr. Breuer or Mr. Weinstein should have been aware of gunwalking in Operation Fast and Furious because they learned about similar tactics in a different case dating back to 2006 and 2007, Operation Wide Receiver. Documents obtained by the Committee indicate that as soon as they learned about gunwalking during the previous Administration, Mr. Breuer and Mr. Weinstein took immediate steps to register their concerns directly with the highest levels of ATF leadership, but they did not inform the Attorney General or the Deputy Attorney General.

In March 2010, a Criminal Division supervisor sent an email to Mr. Weinstein regarding the Wide Receiver case stating that, “with the help of a cooperating FFL, the operation has monitored the sale of over 450 weapons since 2006.”<sup>216</sup> In response, Mr. Weinstein expressed concern, writing: “I’m looking forward to reading the pros[ecution] memo on Wide Receiver but am curious—did ATF allow the guns to walk, or did ATF learn about the volume of guns after the FFL began cooperating?”<sup>217</sup> The supervisor inaccurately responded: “My recollection is they learned afterward.”<sup>218</sup> As discussed above, ATF Operational Plans and other documents provided to the Committee show that ATF agents in Arizona were contemporaneously aware of the illegal straw purchases.

The next month, Mr. Weinstein received and reviewed a copy of the prosecution memorandum prepared by the criminal prosecutor in the Wide Receiver case.<sup>219</sup> On April 12, 2010, Mr. Weinstein wrote to the prosecutors stating:

ATF HQ should/will be embarrassed that they let this many guns walk—I'm stunned, based on what we've had to do to make sure not even a single operable weapon walked in UC [undercover] operations I've been involved in planning—and there will be press about that.<sup>220</sup>

In his interview with Committee staff, Mr. Weinstein explained that "there was no question from the moment those sales were completed that ATF had a lot of evidence that those sales were illegal. That's pretty rare. And it's that specific fact that set me off on Wide Receiver."<sup>221</sup> He also stated that the gunwalking tactics used in Wide Receiver "were unlike anything I had encountered in my career as a prosecutor."<sup>222</sup> As a former prosecutor in the U.S. Attorney's Office in Baltimore, he added:

One of my priorities in all of the work I did in Maryland was to stop guns from getting to criminals and get guns out of the hands of criminals who managed to get their hands on them. But I was very sensitive about any situation or any operation that might result in law enforcement, however inadvertently, putting a gun into the hands of a criminal. And so all of the operations that I participated in designing, and I referred to this in the email, were designed to make sure that not even a single operable weapon got in the hands of a criminal.<sup>223</sup>

After reading the prosecution memorandum, Mr. Weinstein contacted his supervisor, Assistant Attorney General Breuer. On April 19, 2010, they met to discuss Mr. Weinstein's concerns about ATF-Phoenix's handling of the case.<sup>224</sup> According to Mr. Weinstein, Mr. Breuer shared his shock about the gunwalking tactics used in Wide Receiver:

[T]here's no question in my mind from his reaction at the meeting that Mr. Breuer shared the same concerns that I did. As I indicated in my opening, Mr. Breuer has made helping Mexico and stopping guns from getting to Mexico a top priority. I had commented to somebody in my office that I traded when I came from Baltimore to the Criminal Division, I traded having a boss come into my office every day and ask me what am I doing to keep the murder rate down, to a boss who is asking me virtually every day, what am I doing to stop guns from going to Mexico? So when he heard about this he had the same reaction I did.<sup>225</sup>

According to Mr. Weinstein, Mr. Breuer directed him to immediately register their concerns "directly with the leadership of ATF."<sup>226</sup> The next day, Mr. Weinstein contacted ATF Deputy Director Hoover to request a meeting.<sup>227</sup> On April 28, 2010, Mr. Weinstein and Mr. Hoover met and were joined by the Acting Chief of the Organized Crime and Gang Section at DOJ, James Trusty and ATF Deputy Assistant



Director William McMahon.<sup>228</sup> Mr. Weinstein told the Committee that he expressed his serious concerns about ATF-Phoenix's management of Wide Receiver and the fact that so many firearms had been allowed to walk. Notes taken at that meeting indicate that of 183 guns sold in the first part of Operation Wide Receiver, the "vast majority walk[ed]" and were linked to "violent crime."<sup>229</sup> Mr. Weinstein stated:

[A]t the meeting the first topic on the agenda was to talk about the tactics. And so Mr. Trusty and I went through the facts of the case and I explained my concerns about the tactics. The meeting was nearly 2 years ago now, and as I sit here today I just can't recall the specific words used, but my strong memory from that meeting is that Mr. Hoover had the same reaction I did; that is, that he shared my concerns about the tactics. And I walked away from that meeting being satisfied that although this had happened in '06 and '07, this was not the kind of thing that would be happening under Mr. Hoover's watch. I wish I could remember the exact words used, but that's the strong sense I walked away with.<sup>230</sup>

Although neither Mr. Breuer nor Mr. Weinstein had direct supervisory authority over ATF, Mr. Weinstein told the Committee that the seriousness of issue compelled them to request the meeting. Mr. Weinstein stated:

I raised this with Mr. Hoover because I knew it was something he would be concerned about, and he was concerned about it. I didn't direct him. It's not my place to direct him. I didn't ask him to do anything in particular. His reaction, as I said, was exactly what I expected, which was concern about the tactics. And so I just walked away. I walked away feeling there was no reason to worry that this was the kind of thing that he would tolerate.<sup>231</sup>

Mr. Weinstein stated that he relayed the details of the meeting to Mr. Breuer, and at that time both of them believed that they had satisfied their duty to address the issue with the appropriate managers.<sup>232</sup> Mr. Weinstein also noted that he believed the gunwalking in Wide Receiver was an "extreme aberration from years ago."<sup>233</sup>

Despite raising these concerns about gunwalking in Operation Wide Receiver immediately with senior ATF leadership, Mr. Breuer later expressed regret for not raising these concerns directly with the Attorney General or Deputy Attorney General. During an exchange at a hearing with Senator Grassley, Mr. Breuer stated:

I regret the fact that in April of 2010, I did not. At the time, I thought that we—dealing with the leadership of ATF was sufficient and reasonable. And frankly, given the amount of work I do, at the time,

I thought that that was the appropriate way of dealing with it. But I cannot be more clear that knowing now—if I had known then what I know now, I, of course, would have told the Deputy and the Attorney General.<sup>234</sup>

### **Criminal Division interactions with Mexican Officials**

According to documents obtained by the Committee, Assistant Attorney General Breuer met with senior officials from the Mexican government in Mexico on February 2, 2011, to discuss potential areas of cooperation to fight transnational organized crime and drug trafficking.<sup>235</sup> According to a summary, the group discussed a wide range of issues including U.S. extradition requests to Mexico, firearms trafficking, and a cooperative security agreement between the United States, Mexico, and countries in Central America.<sup>236</sup>

With respect to combating firearms trafficking, the Mexican Undersecretary for North America explained that “greater coordination and flow of information would be helpful to combat arms trafficking into Mexico.”<sup>237</sup> Mr. Breuer responded by telling the Mexican officials that the Department had sought to increase penalties for straw purchasers and desired their support for such measures. According to the summary, Mr. Breuer also made a suggestion about one way the two countries could increase coordination:

AAG Breuer suggested allowing straw purchasers cross into Mexico so SSP [Mexican federal police force] can arrest and PGR [the Mexican Attorney General’s Office] can prosecute and convict. Such coordinated operations between the US and Mexico may send a strong message to arms traffickers.<sup>238</sup>

Documents produced to the Committee indicate that this summary of Mr. Breuer’s meeting was shared with Acting ATF Director Melson in anticipation of his February 8, 2011, meeting with the U.S. Ambassador to Mexico.<sup>239</sup> According to a summary of this latter meeting, Mr. Melson discussed with the Ambassador the possibility of controlled firearms deliveries, but the Department of Justice Attaché who was also present raised concern about the “inherent risk” of such joint operations:

Melson and the Ambassador discussed the possibility of allowing weapons to pass from the US to Mexico and US law enforcement coordinating with SSP and PGR to arrest and prosecute the arms trafficker. I raised the issue that there is an inherent risk in allowing weapons to pass from the US to Mexico; the possibility of the GoM [Government of Mexico] not seizing the weapons; and the weapons being used to commit a crime in Mexico.<sup>240</sup>

The documents obtained by the Committee do not indicate that any action was taken after this meeting regarding efforts to coordinate operations with Mexican authorities.

As described in the section above on the Hernandez case, the memo prepared for Attorney General Mukasey in 2007 similarly explained that “ATF would like to expand the possibility of such joint investigations and controlled deliveries—since only then will it be possible to investigate an entire smuggling network, rather than arresting simply a single smuggler.”<sup>241</sup> The memo provided to Attorney General Mukasey was explicit, however, in warning that previous operations “have not been successful.”<sup>242</sup>

## D. DEPARTMENT RESPONSES TO GUNWALKING IN OPERATION FAST AND FURIOUS

### **Inaccurate information initially provided to Congress**

On January 27, 2011, Senator Charles Grassley wrote a letter to the Department of Justice relaying allegations from whistleblowers that ATF-Phoenix had walked guns in Operation Fast and Furious.<sup>243</sup> On February 4, 2011, Ron Weich, the Assistant Attorney General for Legislative Affairs, sent a written response that stated:

[T]he allegation described in your January 27 letter—that ATF “sanctioned or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico”—is false. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.<sup>244</sup>

As this report documents, it became apparent during the course of the Committee’s investigation that this statement in the Department’s letter was inaccurate and, on December 2, 2011, the Deputy Attorney General formally withdrew the Department’s February 4th letter.<sup>245</sup> On the same day, the Department provided the Committee with more than 1,000 pages of internal emails, notes, and drafts from all of the parties involved in the drafting of the February 4 letter, as well as a lengthy explanation of how the inaccurate information was included in the letter. According to the Department:

Department personnel, primarily in the Office of Legislative Affairs, the Criminal Division and the Office of the Deputy Attorney General, relied on information provided by supervisors from the components in the best position to know the relevant facts: ATF and the U.S. Attorney’s Office in Arizona, both of which had responsibility for Operation Fast and Furious. Information provided by those supervisors was inaccurate.<sup>246</sup>

The documents obtained by the Committee and the interviews conducted by Committee staff support this explanation.

Documents obtained by the Committee indicate that, during the drafting of the letter, senior ATF officials insisted that ATF-Phoenix had not allowed guns to walk in Operation Fast and Furious. Detailed notes of a meeting with Acting Director Melson taken by a Department of Justice official state that ATF “didn’t let a guns [sic] walk,” and “didn’t know they were straw purchasers at the time.”<sup>247</sup>

Additional notes taken of a meeting with Deputy Director Hoover state that "ATF doesn't let guns walk," and "we always try to interdict weapons purchased illegally."<sup>248</sup>

Both Acting ATF Director Melson and ATF Deputy Director Hoover told the Committee that they did not intend to mislead the Department or Congress and that they sincerely believed that guns had not walked in Operation Fast and Furious at the time the letter was drafted.<sup>249</sup>

The U.S. Attorney's Office in Arizona also adamantly denied allegations of gunwalking. On January 31, 2011, U.S. Attorney Burke wrote to senior Department officials that the allegations "are based on categorical falsehoods."<sup>250</sup> Mr. Burke and the Chief of the Criminal Division at the U.S. Attorney's Office sent a series of emails over the course of that week continuing to deny the allegations and pressing for a strong response.<sup>251</sup>

In his interview with Committee staff, U.S. Attorney Burke stated that, after later learning about the scope of gunwalking in Operation Fast and Furious, he deeply regretted conveying "inaccurate" information to senior Department officials drafting the February 4 response, but that it "was not intentional."<sup>252</sup>

The Committee was not able to interview one witness from the U.S. Attorney's Office, the former Criminal Chief, Patrick Cunningham. In a letter on January 19, 2011, Mr. Cunningham's attorney informed the Committee that he was exercising his Fifth Amendment right against self-incrimination. The letter stated:

I am writing to advise you that my client is going to assert his constitutional privilege not to be compelled to be a witness against himself. The Supreme Court has held that "one of the basic functions of the privilege is to protect innocent men." *Grunewald v. United States*, 353 U.S. 391,421 (1957); see also *Ohio v. Reiner*, 532 U.S.17 (2001) (per curiam). The evidence described above shows that my client is, in fact, innocent, but he has been ensnared by the unfortunate circumstances in which he now stands between two branches of government. I will therefore be instructing him to assert his constitutional privilege.<sup>253</sup>

During his interview with Committee staff, U.S. Attorney Burke stated that Mr. Cunningham adamantly denied that gunwalking occurred in Operation Fast and Furious.<sup>254</sup> Similarly, Deputy Assistant Attorney General Weinstein informed Committee staff that Mr. Cunningham continued to assert that gunwalking had not occurred in Operation Fast and Furious after the February 4, 2011, letter.<sup>255</sup>

Within the Criminal Division, Mr. Weinstein informed the Committee that he offered to assist in the drafting of the February 4 letter "to be helpful," but that he

had no independent knowledge of Operation Fast and Furious and relied on ATF and the U.S. Attorney's Office for information. He stated:

As the Department prepared its response, I and others in Main Justice were repeatedly and emphatically assured by supervisors in the relevant components who were in position to know the case best—that is the Arizona U.S. Attorney's Office and ATF leadership—that no guns had been allowed to walk in connection with Fast and Furious; and it was on that basis that the Department provided inaccurate information to Congress in the February 4th letter.

Now much attention has been paid to the sentence in that letter that reads, "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico." As the documents you've received made clear, I and others at Main Justice received multiple assurances from the U.S. Attorney's Office and from ATF that this statement, like the other information in the letter, was true. ...

Given what I know now, of course, I wish I had not placed such faith in the assurances provided to me by the leadership of the U.S. Attorney's Office and ATF. But given what I knew then and given the strength of those assurances I believed at the time that it was entirely appropriate to do so. I trusted what was said to me and I firmly believed at that time that in fact ATF had not let guns walk in Fast and Furious. Obviously, time has revealed the statements made to me and others to be inaccurate, and that is beyond disappointing to me.<sup>256</sup>

Mr. Weinstein also explained why he did not raise concerns about gunwalking during the previous administration in Operation Wide Receiver in 2006 and 2007. During his interview with Committee staff, he stated:

Now some have said that because I knew about Wide Receiver at the time I assisted with the February 4th letter, I knew that statement to be untrue, and that is just not correct. Let me explain why.

Wide Receiver was an old case in which inappropriate tactics had been used in the investigative phase years earlier. This occurred under a prior administration, under a different U.S. Attorney's Office management and different ATF management. Because of the repeated assurances I and others received in February 2011, from the then current leadership of the U.S. Attorney's Office in ATF that guns had not walked in Fast and Furious and from ATF that it was making every effort to interdict guns, I did not make any connection between

Wide Receiver and Fast and Furious. For that reason, I simply was not thinking about Wide Receiver as I assisted with the February 4th letter which I understood to be about Fast and Furious.<sup>257</sup>

Mr. Weinstein also rebutted the allegation of an intentional cover-up:

Q: Mr. Weinstein, during the drafting of the February 4th letter, did you intentionally try to mislead Congress?

A: Absolutely not.

Q: To your knowledge, did Mr. Breuer ever try to intentionally mislead Congress?

A: Absolutely not.

Q: To your knowledge, did anyone else at Main Justice, during the drafting of the February 4th letter, intentionally try to mislead Congress?

A: Absolutely not.<sup>258</sup>

#### **Request for IG investigation and reiteration of Department policy**

Soon after the Attorney General became aware of allegations relating to gunwalking in Operation Fast and Furious, he took several steps to address them. First, the Attorney General requested that the Inspector General investigate Operation Fast and Furious and the Department's response to Senator Grassley's letter.<sup>259</sup> Testifying before a Senate Appropriations Subcommittee, the Attorney General stated:

It is true that there have been concerns expressed by ATF agents about the way in which this operation was conducted, and on that I took those allegations, those concerns, very seriously and asked the Inspector General to try to get to the bottom of it. An investigation, an inquiry is now under way.

I've also made clear to people in the Department that letting guns walk—I guess that's the term that the people use—that letting guns walk is not something that is acceptable. Guns are—are different than drug cases or cases where we're trying to follow where money goes.

We cannot have a situation where guns are allowed to walk, and I've made that clear to the United States Attorneys as well as the Agents in Charge in the various ATF offices.<sup>260</sup>

On March 9, 2011, Deputy Attorney General James Cole hosted a conference call with Southwest Border United States Attorneys in which he reiterated the Department's policy against gunwalking. After the call, Mr. Cole followed up with an email summarizing the conversation:

As I said on the call, to avoid any potential confusion, I want to reiterate the Department's policy: We should not design or conduct undercover operations which include guns crossing the border. If we have knowledge that guns are about to cross the border, we must take immediate action to stop the firearms from crossing the border, even if that prematurely terminates or otherwise jeopardizes an investigation.<sup>261</sup>

### **Personnel actions**

Justice Department officials have explained that, although they are awaiting the findings from the Inspector General's investigation before making any final personnel determinations, they have removed the key players in Operation Fast and Furious from any further operational duties.

At the U.S. Attorney's Office for the District of Arizona, all of the key personnel have resigned, been removed, or been relieved of their relevant duties in the aftermath of Operation Fast and Furious. On August 30, 2011, Dennis Burke resigned as the U.S. Attorney.<sup>262</sup> In January 2012, the Chief of the Criminal Division, Patrick Cunningham, resigned his position and left the U.S. Attorney's Office.<sup>263</sup> The Section Head responsible for supervising Operation Fast and Furious resigned his supervisory duties in the fall of 2011, and the Assistant U.S. Attorney who was responsible for managing Operation Fast and Furious was moved out of the criminal division to the civil division.<sup>264</sup>

On August 30, 2011, the Justice Department removed Kenneth Melson as the acting head of ATF and reassigned him to a position as a forensics advisor in the Department's Office of Legal Policy.<sup>265</sup> On October 5, 2011, ATF removed Deputy Director William Hoover from his position and subsequently reassigned to a non-operational role.<sup>266</sup> Also on October 5, 2011, ATF removed Assistant Director for Field Operations Mark Chait from his position and subsequently placed him in a non-operational role as well.<sup>267</sup> Deputy Assistant Director for Field Operations William McMahon was also reassigned as a Deputy Assistant in the ATF Office of Professional Responsibility and Security Operations on May 13, 2011, and was later reassigned to a non-operation position.<sup>268</sup>

ATF supervisors from the Phoenix Field Division have also been reassigned. Special Agent in Charge William Newell was reassigned to an administrative position as a special assistant in the ATF Office of Management.<sup>269</sup> Assistant Special



Agent in Charge George Gillett was reassigned as a liaison to the U.S. Marshal's Service.<sup>270</sup> The former Supervisor of Group VII, David Voth, was reassigned to ATF's Tobacco Division.<sup>271</sup>

### **Agency reforms**

On January 28, 2011, Deputy Attorney General James Cole sent a letter to Congress explaining that the Department was "undertaking key enhancements to existing Department policies and procedures to ensure that mistakes like those that occurred in Wide Receiver and Fast and Furious are not repeated."<sup>272</sup> The letter detailed numerous reforms, including:

- Implementing a new Monitored Case Program to increase coordination between ATF headquarters and the field for sensitive investigations and to improve oversight;
- Clarifying the prohibition on gunwalking and providing guidance on responding to a gun dealer concerns about suspicious purchasers;
- Revising ATF's Confidential Informants Usage Policy and its Undercover Operations Policy and establishing committees on undercover operations and confidential informants;
- Providing training to personnel in ATF's Phoenix Field Division to address U.S.-Mexico cross-border firearms trafficking issues, improve techniques and strategies, and educate agents on the applicable law; and
- Restructuring ATF's Office of the Ombudsman by appointing a senior special agent as Chief ATF Ombudsman and adding a full-time special agent to handle agent complaints.<sup>273</sup>

Deputy Attorney General Cole also outlined key improvements to ensure the "accuracy and completeness" of the information the Department provides to Congress. The Department issued a directive requiring the responding component to ensure that it supplies Congress with the most accurate information by soliciting information from employees with detailed personal knowledge of the relevant subject matter. Ultimate responsibility for submitting or reviewing a draft response to Congress is assigned to an appropriate senior manager, according to the new directive. Finally, the directive emphasizes the importance of accuracy and completeness of the information provided to Congress over the timeliness of responding to requests.<sup>274</sup>

## V. RECOMMENDATIONS

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As its title indicates, the Committee on Oversight and Government Reform has two primary missions. Not only is it charged with conducting oversight of programs to root out waste, fraud, and abuse, but it is also responsible for reforming these programs to ensure that government works more effectively and efficiently for the American people. For these reasons, set forth below are ten constructive recommendations intended to address operational problems identified during the course of this investigation.

These recommendations for both Executive and Congressional action are not intended to be comprehensive or exhaustive, and some already may be under consideration or in various stages of implementation at the Department of Justice and ATF.

**Strictly Enforce the Prohibition on Gunwalking Across Law Enforcement Agencies.** Documents obtained by the Committee indicate that ATF lacked sufficient clarity regarding its operational policies and training for firearms trafficking cases. Following the public controversy over Fast and Furious, Acting ATF Director B. Todd Jones issued a memo strongly stating the Department's policy against gunwalking, and the Attorney General has used his position to publicly reiterate this prohibition. These measures should be complemented by efforts within each Federal law enforcement agency to establish clear operational policies with respect to suspect firearms transfers and provide appropriate training for field agents and supervisors.

**Improve Management and Oversight of ATF Trafficking Investigations.** Documents obtained by the Committee reveal a lack of adequate communication between ATF field offices and headquarters about significant trafficking investigations. In several cases, deficient communication was magnified by disagreements between the field and headquarters about tactics and strategy. ATF should improve its management of investigations by requiring operational approval of all significant gun trafficking investigations by senior ATF officials in order to ensure consistent application of ATF policies and procedures.

**Require "Operational Safety Strategy" in Trafficking Investigations.** As part of its broader effort to improve management and oversight of significant trafficking investigations, ATF should require that each Operational Plan developed in the field include an Operational Safety Strategy that analyzes the risks to agents and the public of firearms potentially being released into

the community and sets forth appropriate operational safeguards. Senior ATF officials should approve these plans in order to ensure that each specific operation has sufficient resources to implement the safeguards intended to protect agent and public safety.

**Enhance the Accessibility and Responsiveness of the ATF Ombudsman.** Documents obtained by the Committee indicate that Operation Fast and Furious was one of several deeply flawed operations run by ATF's Phoenix Field Division since 2006. Line agents reported to the Committee that they made their concerns about these controversial tactics public only after raising them first with their supervisors, but they stated that their concerns were not heeded. To ensure agents' concerns are communicated to ATF leadership, ATF should consider ways to improve its Office of the Ombudsman to make it more accessible and responsive to ATF line agents.

**Conduct a Review of the U.S. Attorney's Office in Arizona.** Documents and testimony received by the Committee indicate that the legal interpretations and prosecutorial decisions regarding firearms cases made by officials in the U.S. Attorney's Office in Arizona may differ substantially from those of other U.S. Attorneys' offices. Because it remains unclear to what extent these differences are the result of judicial, prosecutorial, or individual decisions, the Department of Justice should direct the Executive Office for United States Attorneys to conduct a thorough review of the Arizona U.S. Attorney's Office to ensure that it is doing everything it can to keep illegal guns off the streets and out of the hands of criminals.

**Expand the Multiple Long Gun Sales Reporting Requirement.** Numerous law enforcement agents testified before the Committee that obtaining reports on multiple purchases of long guns, including AK-47 variant assault weapons and .50 caliber semi-automatic sniper rifles that are now the "weapons of choice" for international drug cartels, would provide them with timely and actionable intelligence to help combat firearms trafficking rings. In July 2011, the Department of Justice issued a rule requiring such reports for weapon sales in certain states. Earlier this month, a Federal District Court upheld the rule, finding that "ATF acted rationally."<sup>275</sup> ATF should now expand the reporting requirement to apply to other states in which firearms trafficking networks are particularly active.

**Confirm or Appoint a Permanent ATF Director.** Consistent and strong leadership is vital to strengthening ATF and ensuring that policies and procedures are applied consistently. For six years, however, ATF has been forced to contend with temporary leadership because individual senators have blocked the confirmation of a permanent director. The Senate should

confirm a permanent director for ATF as soon as possible, and the President should consider a recess appointment if the Senate fails to do so.

**Enact a Dedicated Firearms Trafficking Statute.** During the Committee's investigation, multiple law enforcement agents warned that there is currently no Federal statute that specifically prohibits firearms trafficking and, as a result, prosecutors often charge traffickers with "paperwork violations" such as dealing in firearms without a license. The agents testified that these cases are difficult to prove and that U.S. Attorneys' offices frequently decline to prosecute. They stated that a Federal statute specifically dedicated to prohibiting firearms trafficking would help them disrupt, defeat, and dismantle firearms trafficking organizations. In July 2011, Ranking Member Elijah Cummings and Representative Carolyn Maloney introduced legislation in the House to establish such a firearms trafficking statute. Senator Kirsten Gillibrand has introduced a similar bill in the Senate. Congress should consider and pass this legislation without delay.

**Provide ATF with Adequate Resources to Combat Illegal Gun Trafficking.** Documents and testimony obtained by the Committee revealed that ATF line agents were drastically under-resourced, resulting in deficient surveillance of suspected straw purchasers and firearms traffickers. Over the past decade, ATF's budget has not kept pace with its law enforcement responsibilities, particularly in light of the exponential growth in illegal firearms trafficking to Mexico. Congress should appropriate the additional resources ATF needs to perform its mission and combat gun trafficking along the Southwest Border.

**Repeal the Prohibition Against Reporting Crime Gun Trace Data.** To increase transparency by ATF and oversight by Congress, Congress should repeal the prohibition against reporting crime gun trace data and require ATF to provide yearly reports to Congress that include aggregate statistics about crime gun trace data categorized by State and Federal Firearms Licensee, as well as aggregate gun trace data for guns that are recovered in Mexico, categorized by State and Federal Firearms Licensee. This information will assist Congress in understanding the problem of gun trafficking along the Southwest Border and assessing ATF's progress in fighting it.

## ENDNOTES

- 1 Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, *et al.* (Dec. 2, 2011).
- 2 *Id.*
- 3 Letter from Rep. Elijah E. Cummings, Ranking Member, House Committee on Oversight and Government Reform, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (Nov. 4, 2011).
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- 244 Letter from Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to Sen. Charles Grassley, Ranking Member, Senate Judiciary Committee (Feb. 4, 2011).
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- 246 Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, *et al.* (Dec. 2, 2011).
- 247 Handwritten Notes, Faith Burton, Special Counsel, Office of Legislative Affairs, Department of Justice, Meeting with Kenneth Melson, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, *et al.* (Jan. 28, 2011).
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- 249 House Committee on Oversight and Government Reform, Transcribed Interview of Kenneth Melson (July 4, 2011); House Committee on Oversight and Government Reform, Transcribed Interview of William Hoover (July 21, 2011).
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**SHEILA JACKSON LEE**  
18TH DISTRICT, TEXAS

WASHINGTON OFFICE:  
2100 Rayburn House Office Building  
Washington, DC 20515  
(202) 225-3216

DISTRICT OFFICE:  
1918 Smith Street, Suite 1180  
The George "Mickey" Islando Federal Building  
Houston, TX 77002  
(713) 660-0050

ACRES HOME OFFICE:  
8719 West Montgomery, Suite 204  
Houston, TX 77060  
(713) 661-4682

HEIGHTS OFFICE:  
420 West 19th Street  
Houston, TX 77008  
(713) 261-4020

FIFTH WARD OFFICE:  
4200 Lyons Avenue, Suite 202  
Houston, TX 77025  
(713) 227-7740

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

**COMMITTEES:**  
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AFRICA AND GLOBAL HEALTH  
MIDDLE EAST AND SOUTH ASIA  
TERRORISM, NONPROLIFERATION, AND TRADE

**SENATE**  
**DEMOCRATIC CAUCUS**

June 7, 2012.

The Honorable Eric Holder  
U.S. Attorney General  
United States Department of Justice  
Robert F. Kennedy Building  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530

Dear Attorney General Holder:

I am deeply concerned about the systemic and possibly illegal voter purge happening in Texas right now. This comes on the heels of restrictive voter photo identification legislation pending or already signed into law in Texas. In my opinion, these actions by the Texas Secretary of State's Office have only one purpose: to disenfranchise certain voters. I am requesting immediate action because of the broad implications that the voter purging has on ongoing and future state, local, and federal elections.

According to a recent article in the Houston Chronicle, more than 300,000 valid voters were notified that they could be removed from the Texas voter rolls from November 2008 to November 2010. This overt purging is done under the guise of reducing voter fraud and updating voter registration rolls. The article noted that more than 1.5 million Texas voters could have their registrations cancelled.

As with legislation introduced in various states around the country the true purpose of the purging is the disenfranchisement of eligible voters especially the elderly, young voters, students, minorities, and low-income voters. Approximately 2 percent of voting-age citizens in the country or more than 20 million individuals lack government-issued photo identification.

I urge you to protect the voting rights of Americans by using the full power of the Department of Justice to review the voter purging in Texas and scrutinize the broader implications and implementation.

The Voting Rights Act vests significant authority in the Department to ensure laws are not implemented in a discriminatory manner. Section 5 of the Voting Rights Act requires preclearance by the Department

when there is an attempt to change any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting in covered jurisdictions.

In Section 5 jurisdictions, such as Texas, whenever photo identification legislation is considered, the Department should closely monitor the administrative and legislative process to track any unlawful intent evinced by the proceedings, which I believe is occurring in my state.

Restrictive voter photo identification legislation, and the subsequent purging of voter rolls has the potential to block millions of eligible American voters in Texas and other states, and thus suppress the right to vote. I urge you to exercise your authority to examine the law and brash actions by the State of Texas so that voting rights are not jeopardized.

I also request that you brief me on the efforts the Department is undertaking to ensure these actions are implemented in accordance with Texas state law, the United States Constitution, and the Voting Rights Act.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Sheila Jackson Lee", written in a cursive style.

Sheila Jackson Lee

**SHEILA JACKSON LEE**  
18TH DISTRICT, TEXAS

WASHINGTON OFFICE:  
2160 Rayburn House Office Building  
Washington, DC 20515  
(202) 225-3818

DISTRICT OFFICE:  
1819 SMITH STREET, SUITE 1180  
THE GEORGE "MICKEY" LELAND FEDERAL BUILDING  
HOUSTON, TX 77002  
(713) 655-0550

ACRES HOME OFFICE:  
6718 WEST MONTAGU, SUITE 204  
HOUSTON, TX 77019  
(713) 891-8882

HEIGHTS OFFICE:  
420 WEST 13TH STREET  
HOUSTON, TX 77003  
(713) 881-4070

FIFTH WARD OFFICE:  
4300 LYONS AVENUE, SUITE 200  
HOUSTON, TX 77020  
(713) 227-7740

**Congress of the United States**  
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**FOREIGN AFFAIRS**  
SUBCOMMITTEES:  
AFRICA AND GLOBAL HEALTH  
ASIA, EAST AND SOUTH ASIA  
TERRORISM, NONPROLIFERATION, AND TRADE

**SENATE HELP**  
**DEMOCRATIC CAUCUS**

June 7, 2012

The Honorable Eric Holder  
U.S. Attorney General  
United States Department of Justice  
Robert F. Kennedy Building  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530

Dear Attorney General Holder:

I am deeply troubled about the continued incidents of race in jury selection that are ongoing and systemic in Texas and likely in other states, particularly in the South. It is only part of a recent trend in racial comments and invective filling up our airwaves, dominating blog discussions, and seemingly ubiquitous in the commentary sections of major newspapers and websites. I request the Department of Justice act expeditiously to ensure that instances of race-based jury selection in the State of Texas are dealt with to the fullest extent of the law.

In Houston, Texas just this year, one officer was acquitted in the case of Chad Holley. As I referenced in a letter I wrote to you recently, in the first trial on this matter Officer Blomberg was found not guilty on May 16, 2012. I asked that aspects of this case be investigated to determine whether Mr. Holley's civil rights were violated. Also it should be determined whether this is a practice and pattern of the Houston Police Department. Further issues with law enforcement in Harris County will also be submitted.

As you'll recall from the holding of the Batson case the Court held that if the trial court decided that the facts established prima facie, purposeful discrimination and that the prosecution did not proffer a neutral explanation for its actions, petitioner's conviction had to be reversed. The Court overruled Swain v. Alabama, holding that "to the extent that it required petitioner to establish a systematic pattern of discrimination in jury selection."

It is a travesty that in this day and age incidents like this are still occurring. Was the Chad Holley case Houston's Rodney King moment? I certainly hope not. Chad Holley and his family deserve a fair and just federal civil rights investigation. We must not allow the actions of some officers to become the image of the entire department.

I urge you to protect the rights of Americans by using the full power of the Department of Justice to review acts, real and perceived which demonstrate purging of certain individuals from juries in Texas and scrutinize the broader implications and implementation.

As a Member of the Judiciary Committee, I have an obligation to do all that is possible to prevent all forms of bias, especially in the implementation of the law and by those entrusted to protect our citizens and ensuring the preservation of equality and justice in our criminal justice system. Thank you in advance for your consideration of this issue. We all share a commitment to ensuring that our nation's law enforcement epitomizes the ideals of equality under the law enshrined in our Constitution.

I also request that you brief me on the efforts the Department is undertaking to ensure these actions are implemented in accordance with Texas state law, the United States Constitution, and all applicable penal laws.

Very Truly Yours,



Sheila Jackson Lee

CC: Assistant Attorney General Thomas Perez



## Material submitted by the Honorable Darrell Issa

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WASHINGTON, DC 20515-6143

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## MEMORANDUM

**To:** Members, Committee on Oversight and Government Reform

**From:** Darrell Issa, Chairman

**Date:** May 3, 2012

**Re:** Update on Operation Fast and Furious

Since February 2011, the House Oversight and Government Reform Committee has been conducting a joint investigation with Senate Judiciary Committee Ranking Member Chuck Grassley (R-IA) of reckless conduct in the Justice Department's Operation Fast and Furious. The committee has held three hearings, conducted twenty-four transcribed interviews with fact witnesses, sent the Department of Justice over fifty letters, and issued the Department of Justice two subpoenas for documents. The Justice Department, however, continues to withhold documents critical to understanding decision making and responsibility in Operation Fast and Furious.

This memo explains key events and facts in Operation Fast and Furious that have been uncovered during the congressional investigation; remaining questions that the Justice Department refused to cooperate in helping the Committee answer; the ongoing relevance of these questions; and the extent of the harm created by both Operation Fast and Furious and the Department's refusal to fully cooperate. The memo also explains issues for Committee Members to consider in making a decision about holding Attorney General Eric Holder in contempt of Congress for his Department's refusal to provide subpoenaed documents.

Attached to this memo for review and discussion is a draft version of a contempt report that the Committee may consider at an upcoming business meeting.

**Introduction to Fast and Furious**

In the aftermath of a federal agent's death, on February 4, 2011, the United States Department of Justice sent a letter to Congress denying whistleblower allegations that the Justice Department had facilitated the illegal transfer of weapons to Mexican drug cartels. The Justice Department insisted that federal authorities always make, "every effort to interdict weapons that have been

purchased illegally and prevent their transportation to Mexico,” and rejected accusations that two assault rifles found at the Arizona desert murder scene of a U.S. Border Patrol agent resulted from a Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) case known as Operation Fast and Furious.

Nearly ten months later, on December 2, 2011, the Justice Department sent Congress a new letter rescinding the previous written denial and acknowledging that Operation Fast and Furious was “fundamentally flawed.”

The Congressional investigation into this dangerously flawed operation has focused on ensuring accountability for reckless conduct that contributed to deaths and continues to jeopardize public safety. More than a year later, the family of a murdered Border Patrol agent, federal agents facing retaliation for blowing the whistle on reckless conduct, and the citizens of one of America’s most important and growing trade partners continue to demand the full truth. The Justice Department’s refusal to fully cooperate with this investigation has outraged many Americans and left Congress with the choice of challenging or accepting the Justice Department’s insistence that it only face an internal investigation of itself.

While field operations for Fast and Furious began in September 2009 and ended in January 2011, the scandal began to unravel in the early morning hours of December 15, 2010, when a warrior and patriot lost his life defending the United States.

#### *A Tragic Death Leads to Whistleblowers*

Late in the evening of December 14, 2010, Border Patrol Agent Brian Terry, a native of Michigan and Marine veteran, was on patrol with three other agents in Peck Canyon, near Rio Rico, Arizona. The agents spotted a group of five suspected illegal aliens – at least two were carrying rifles. As the agents approached, at least one of the suspects fired at them. The agents returned fire. In the midst of the gunfight, Agent Terry was struck by a bullet. Most of the suspected aliens fled the scene, though one of them had been wounded and was unable to flee. Though Agent Terry was fully conscious after being wounded, his bleeding could not be stopped and he died in the desert during the early morning hours of December 15 while the group waited for medical assistance to arrive.

When help finally did arrive, investigators recovered two AK-47 variant rifles at the scene. Traces conducted later that day showed the two weapons had been bought on January 16, 2010, by a then 23 year old – Jaine Avila of Phoenix, Arizona. The traces also showed investigators something else.

ATF had entered Avila as a suspect into the database more than a year earlier on November 25, 2009, as part of Operation Fast and Furious – the Department of Justice’s largest ongoing firearms trafficking case at the time. Avila was a low-level straw-buyer in a weapons trafficking organization – a seemingly legal purchaser of firearms who conducted transactions with the illegal motive of buying them for someone else. In Avila’s case, the real purchaser of the weapons he procured was a Mexican drug cartel.

In the wake of the Terry murder, law enforcement agents quickly located and arrested Avila. The U.S. Attorney's Office in Arizona indicted Avila on three counts of "lying and buying"—charges made primarily on the grounds that he had falsely indicated that weapons had been purchased for his own use.

The news of Terry's death quickly made its way back to the ATF agents working on Operation Fast and Furious. This news was the nightmare agents working the case had long dreaded, even expected. Two ATF agents, John Dodson and Larry Alt, described their feelings:

**Agent Dodson:**

*We knew Jaime Avila was a straw purchaser, had him identified as a known straw purchaser supplying weapons to the cartel .... And then in May, we had a recovery where Border Patrol encounters an armed group of bandits and recovered an AK variant rifle ... purchased during the time we were watching Jaime Avila, had him under surveillance, and we did nothing.*

*Then on December 14th, 2010 Agent Brian Terry is killed in Rio Rico, Arizona. Two weapons recovered from the scene ... two AK variant weapons purchased by Jaime Avila on January 16th, 2010 while we had him under surveillance, after we knew him to be a straw purchaser, after we identified him as purchasing firearms for a known Mexican drug cartel.*

**Agent Alt:**

*I have loved working for ATF since I have been hired here. I came here to retire from ATF .... I am not -- I am embarrassed here. I regret the day that I set foot into this field division because of some of the things that a few people have done and ... the impact it has had on the public and safety and Agent Terry.*

Although agents indicated they had already complained to supervisors that the reckless tactics used would result in tragedies, Agent Terry's senseless death left the impression on some agents that more needed to be done. These agents again appealed to unsympathetic supervisors, but pleas fell on deaf ears and efforts to look outside ATF for help began. One agent indicated that he tried to alert the U.S. Department of Justice Inspector General's office as a whistleblower but got nowhere.

By January 2011 — just a month after Agent Terry's tragic murder — blogs, media outlets, and a United States Senate office had picked up on the agents' concerns and helped bring their allegations about Operation Fast and Furious to a national audience. On February 4, the Department of Justice, insinuating that the whistleblowers were lying, formally denied the allegations in a letter to Congress.

*Fast and Furious Conceived*

The ATF Phoenix Field Division began Operation Fast and Furious in the fall of 2009 after suspicious weapons purchases led agents to the discovery of an apparent Phoenix-based arms trafficking syndicate. Having been encouraged to devise grander strategies to stop the transfers of weapons to Mexican drug cartels, the Phoenix based agents devised a strategy that went beyond simple arrests or weapons confiscations. They would allow the U.S.-based associates of a Mexican drug cartel to continue acquiring firearms uninterrupted. In doing so, they hoped the weapons, after they were recovered at crime scenes in Mexico, could be traced and linked to cartel operatives including possible high-level financiers, suppliers, and possibly even king-pins.

The operation sought to achieve its lofty goals by focusing on the ringleader of the weapons smuggling syndicate they had identified: Manuel Celis-Acosta. Celis-Acosta was using a then-unknown number of straw-purchasers, including Jamie Avila, to purchase weapons.

In January 2010, ATF partnered with the U.S. Attorney's Office for the District of Arizona and applied to Justice Department headquarters in Washington for funding through the Department's Organized Crime Drug Enforcement Task Force (OCDETF) program. As senior Justice Department officials in Washington felt the operation had great promise, it won approval and additional funding. Operation Fast and Furious was reorganized as a Strike Force including agents from ATF, FBI, the Drug Enforcement Administration (DEA), and the Immigration and Customs Enforcement (ICE) component of the Department of Homeland Security. ATF Agent John Dodson, who would later help blow the whistle on what occurred, was among the agents transferred to Phoenix to help with the operation as a result of the designation.

The Strike Force designation also meant that the U.S. Attorney's Office – rather than ATF – would run Fast and Furious. At the time, the U.S. Attorney's Office in Arizona was led by Dennis Burke, a new political appointee who had previously served as Chief of Staff to then Arizona Governor and now Homeland Security Secretary Janet Napolitano. Earlier in his career, Burke had worked with former White House Chief of Staff Rahm Emanuel on gun control legislation as a U.S. Senate staff member.

The newly organized Strike Force, led by the U.S. Attorney's office, gave Operation Fast and Furious a chance to utilize sophisticated law enforcement techniques such as federal wire intercepts – more commonly known as wiretaps. The use of advanced techniques like wiretaps, which require a court order, also meant that Justice Department officials in Washington, D.C., would have to play a critical role. Federal law requires certain senior officials to review evidence and certify the necessity of wiretaps and other techniques.

During Fast and Furious, ATF agents were directed to monitor actual transactions between Federal Firearms Licensees (gun stores) and straw purchasers like Jamie Avila. After the purchases, ATF sometimes conducted surveillance of these weapons with assistance from local police departments. Such surveillance included following the vehicles of the straw purchasers. Frequently, the straw purchasers transferred the weapons they bought to stash houses. In other instances, they transferred the weapons to third parties.

To achieve the goal of letting weapons lead law enforcement to senior criminal figures, Operation Fast and Furious embraced a controversial tactic that outraged some veteran ATF agents: gunwalking. In Operation Fast and Furious, it was not that some weapons *got away* from agents, but rather that agents were purposefully directed to *allow* the flow of guns from straw purchasers to third parties. Instead of trying to interdict the weapons, ATF purposely avoided contact with known straw purchasers or curtailed surveillance, allowing the guns to fall into the hands of criminals and bandits on both sides of the border. ATF agents have explained that this practice was at odds with their core training. As one agent explained:

*When we should have done something and it wasn't, you have let it walk. There has to be an active decision . . . a choice is made to allow it to walk. It is not like something got away from you or you lost it. If a suspect beats you in a foot chase and he gets away, you didn't let him walk, you just lost the chase. So that's what walking is.*

During Operation Fast and Furious, law enforcement agents assigned to the task force allowed approximately 2,000 illegally purchased weapons walk away from gun stores. In some instances over the year and a half that Fast and Furious was conducted in the field, gun store owners expressed concern to ATF that they felt uncomfortable making repeated sales to individuals they suspected or knew were involved in criminal activity. ATF agents and prosecutors from the U.S. Attorney's office repeatedly reassured store owners that weapons were being actively tracked and their sales not only posed no danger to the public, but would actually assist law enforcement in bringing dangerous criminals to justice. They were never told of the operation's real strategy and were encouraged to continue making sales to known straw-buyers and contacting ATF with details after sales occurred.

#### **Extent of Fast and Furious' Failure Known at Its Conclusion**

Shortly after Operation Fast and Furious began in the fall of 2009, ATF had identified a number of suspected low-level straw-purchasers and the smuggling syndicate's ringleader, Manuel Celis-Acosta. Although some field agents and officials in Washington had long ago begun to feel uncomfortable with Operation Fast and Furious, it was not until after the death of Border Patrol Agent Brian Terry that its field operations finally ended.

Washington-based Justice Department officials had earlier discussed bringing Attorney General Eric Holder to Phoenix for a triumphant press conference with Arizona U.S. Attorney Dennis Burke to herald the conclusion of the Department's flagship firearms trafficking case. In the aftermath of Agent Terry's death, the task of announcing indictments at a press conference fell to ATF Phoenix Division Special Agent in Charge William Newell and Burke. Holder did not attend.

At the press conference on January 25, 2011, Newell triumphantly announced the indictment of twenty members of an arms trafficking syndicate that had been supplying weapons to the Sinaloa

Cartel – Mexico's largest and most powerful cartel led by the notorious Joaquin "El Chapo" Guzman. The indictments included the syndicate's ringleader, Manuel Celis-Acosta and nineteen low-level straw-buyers. What Newell did not mention, however, was that agents were aware of Celis-Acosta's role almost from the beginning, as well as that of his lower-level subordinates who had also been indicted. Newell also did not discuss Operation Fast and Furious' other shocking failures, of which by this time he was also aware.

Following Celis-Acosta's arrest, ATF finally had the chance to confront the syndicate's ringleader with the trouble he faced and begin the deal making process intended to ensnare his higher level cartel associates – the links that ATF believed could fulfill the goals of bringing senior figures in the Sinaloa Cartel to justice.

When Celis-Acosta informed ATF of the names of the two cartel contacts for whom he had been working, agents quickly came to learn that these two U.S.-based cartel contacts were already known to the Department of Justice. The DEA and FBI had jointly opened a separate investigation specifically targeting these two cartel associates, and, by January 2010, had collected a wealth of information on them - including their dealings with Manuel Celis-Acosta.

In exchange for one associate's guilty plea to a minor charge of "Alien in Possession of a Firearm," both of these cartel associates became FBI informants and were considered essentially unindictable well before Operation Fast and Furious concluded. One ATF official would later say that the discovery that the primary targets of their investigation were not indictable was a "major disappointment." Adding to the information-sharing failure, DEA had actually provided Celis-Acosta's cartel connection to ATF in December 2009 in an effort to ensure that ATF's efforts in Operation Fast and Furious were not duplicative.

Newell shocked colleagues by telling the public the exact opposite of what had occurred in the operation. As reports about gunwalking had surfaced after Agent Terry's death, when asked at the press conference whether ATF had allowed guns to walk, Newell offered a memorable response: "Hell, no." ATF agents who blew the whistle on Operation Fast and Furious have described their reaction to this denial in no uncertain terms:

**ATF Agent Peter Forcelli:**

*I was appalled, because it was a blatant lie.*

**ATF Agent Larry Alt:**

*Candidly, my mouth fell open. I was asked later by the public information officer for our division . . . and I told him that I thought that – I was just astounded that he made that statement.*

**The Department of Justice's Contempt Against the American People**

Much of Operation Fast and Furious remained a mystery when the Department of Justice forcefully dismissed whistleblower accusations and denied that anything improper had occurred to Congress on February 4, 2011. Why, after all, would anyone be so stupid as to think arming drug cartels was a good idea?

A congressional investigation and reports by journalists utilizing whistleblowers and other sources have shed immense light on what occurred and why. Little of what is known today, however, came as a result of formal Justice Department disclosures. Instead, most of the information about what happened has come from whistleblowers and other sources with documentation that investigators have used to piece together the facts and confront officials who had responsibilities in Operation Fast and Furious.

Still, some important areas remain cloaked in secrecy:

- **How did the Justice Department finally come to the conclusion that Operation Fast and Furious was “fundamentally flawed”?**

On February 4, 2011, the Department of Justice denied whistleblower allegations that guns in Operation Fast and Furious had been allowed to “walk” to Mexico and defended the Operation itself. Ten months later, on December 2, 2011, the Justice Department formally withdrew this denial and acknowledged that Fast and Furious was “fundamentally flawed.” In responding to Congress, however, the Justice Department has taken the position that it will not share its internal deliberations related to Operation Fast and Furious that occurred after it denied anything inappropriate occurred on February 4, 2011. This position effectively denies Congress and the American people information about:

- The Justice Department switching its view from denying whistleblower allegation to admitting they were true.
- Hiding the identity of officials who led the charge to call whistleblowers liars and retaliated against them.
- The reactions of top officials when confronted with evidence about gunwalking in Fast and Furious, including whether they were surprised or were already aware.
- The Justice Department's assessment of responsibility for officials who knew about reckless conduct or were negligent.
- Whether senior officials and political appointees at fault in Operation Fast and Furious were held to the same standards as lower level career employees whom the Department has primarily blamed.

While the Department of Justice claims that divulging this information would have a “chilling effect” on future internal deliberations, virtually any agency could use this bland argument on nearly any topic. Congress, under both Democratic and Republican leadership, has never recognized internal agency discussions as privileged and protected. This claim by the Department of Justice is also at odds with a previous decision to make internal deliberations available to Congress in the midst of a 2007 investigation into the dismissals of several U.S. Attorneys.

No one disputes that the Justice Department has this critical information – the Justice Department’s flimsy rationale for withholding this information is simply about avoiding accountability for what occurred.

- **What senior officials at the Department of Justice were told about or approved the controversial gunwalking tactics that were at the core of the operation’s strategy?**

Operation Fast and Furious was not a local effort. It was the Justice Department’s flagship arms trafficking investigation for a year and a half. Justice Department headquarters in Washington approved it as part of the Department’s Organized Crime Drug Enforcement Task Force (OCDETF) program that put it under the control of the Arizona U.S. Attorney’s office. The OCDETF designation also meant Fast and Furious would be able to use advanced investigative techniques, such as wiretaps, which by law required senior headquarters officials to review operational details.

Although they helped write the February 4, 2011, letter to Congress denying that ATF allowed gunwalking to occur, some senior officials – after being confronted with evidence – have had to acknowledge that they did know about gunwalking. They have, however, consistently denied that they knew critical details about *the gunwalking that took place in Operation Fast and Furious*.

These denials are peculiar because top officials across the Justice Department received briefings on Operation Fast and Furious that included both information on surveillance techniques and the fact that hundreds of weapons were turning up at crime scenes in Mexico. Adding to suspicion that senior Justice Department officials knew far more than they have admitted, the Justice Department has refused to turn over documents from the field that were supplied to senior officials in Washington. While the Department has argued that turning over such materials to Congress could jeopardize prosecutions, it has offered no mutually agreeable accommodation for reviewing them – such as making them available to be reviewed but not copied, or giving Congress a complete list and brief description of responsive documents. After repeated false denials about Operation Fast and Furious, the Justice Department’s unwillingness to work with Congress casts doubt on its motives.



- **How did inter-agency cooperation in a nationally designated Strike Force fail so miserably in Operation Fast and Furious?**

Operation Fast and Furious tried to use outrageous gunwalking tactics in an effort to identify top cartel associates. Although the operation let nearly 2,000 weapons walk out of Phoenix area gun stores to the Sinaloa Cartel in furtherance of this goal, it never had a chance of success. While some senior Justice Department officials, including Assistant Attorney General Lanny Breuer, head of the Department's Criminal Division, embraced the view that gunwalking could be justified, even they would now have to agree that Fast and Furious never had a chance. The reason: the Justice Department already knew about the cartel contacts for Manuel Celis-Acosta's smuggling syndicate, and the contacts were on their way to becoming essentially unindictable FBI informants. Even more blatant, the DEA had told ATF about Celis-Acosta's cartel connections at the beginning of Fast and Furious as these contacts were targets of a separate investigation.

The reforms born out of the tragic September 11th terrorist attacks were designed to put a stop to the problem of federal agencies "stove-piping" information. In a Strike Force operation like Fast and Furious that was specifically designed by the Justice Department to bring together resources from its component agencies including ATF, FBI, DEA, and Justice Department headquarters, the failure of coordination and information sharing in Operation Fast and Furious indicates a likelihood of monumental management dysfunction. To date, the Justice Department has not indicated what official had the responsibility to coordinate and de-conflict law enforcement efforts across agencies.

A core goal of congressional oversight is to identify agency mismanagement and ensure that appropriate legislative or administrative adjustments are implemented. Until now, the Justice Department's desire to protect senior officials from embarrassment from Operation Fast and Furious has superseded its willingness to work cooperatively with Congress to address a massive information sharing and agency coordination problem that Congress and the Bush Administration worked together to solve a decade ago.

Despite a subpoena, the Justice Department has refused to produce documents related to how this clear failure occurred through multiple agencies and the involvement of top Justice Officials who had responsibilities to monitor multi-agency efforts. While the Justice Department has maintained that it is concerned about exposing cartel associates with informant status to scrutiny, the Department has rebuffed Committee efforts to examine the decisions and failures of officials without looking at the informants themselves. The fact that the Committee has already learned the identity of the associates and the outrageous crimes they committed before being given informant status, stands in contrast to the Department's suggestion that its reason for non-cooperation is the informants' well-being.

When the Committee issued a subpoena to U.S. Attorney General Eric Holder on October 12, 2011, for Justice Department documents, the Committee specified 22 categories of documents it required the Department to produce. Department representatives specifically confirmed their

understanding of each category. To date, the Department has not produced any responsive documents for 12 of the 22 categories. The Department has not completely fulfilled any of the 10 categories for which documents have been produced.

For over a year, the Department has issued false denials, given answers intended to misdirect investigators, sought to intimidate witnesses, unlawfully withheld subpoenaed documents, and waited to be confronted with indisputable evidence before acknowledging uncomfortable facts. The Justice Department's demonstrable contempt for the congressional investigation has inflicted harm on the people of two nations seeking the truth – and very pointedly on the family of fallen Border Patrol Agent Brian Terry and ATF whistleblowers who now face retaliation in the wake of their own heroic efforts to expose wrongdoing.

*Answers for the Family of Border Patrol Agent Brian Terry*

Three days after his murder in Arizona, on December 18, 2010, Brian Terry's body arrived back in Michigan for burial. His family waited on the tarmac in Detroit. Bagpipes played as Brian's casket was unloaded from the plane, then loaded into a hearse for a police escort to the funeral home. This was not the holiday homecoming that the Terry family had envisioned for Brian. In the words of his family:

*Brian did ultimately come home that Christmas; we buried him not far from the house that he was raised in just prior to Christmas day. The gifts that Brian had picked out with such thought and care began to arrive in the mail that same week. With each delivery, we felt the indescribable pain of Brian's death, but at the same time also remembered his amazing love and spirit.*

One month later, federal officials offered the Terry family scant details about Brian's death and refused to answer many questions. Brian's brother and stepmother walked out of the meeting with law enforcement officials, believing that the government was not being honest with them about Brian's death.

The following week, it became clearer to the Terry family why the Department of Justice had acted evasively. News reports began to emerge that the weapons found at Brian's murder scene had linked back to something they had never heard of before: Operation Fast and Furious. As Brian Terry's mother explained, "[We] never really got a call about anything like that until it was brought out in the newspapers . . . I was – just flabbergasted. I didn't believe it at first."

The Terry family wanted answers, but no one in federal law enforcement would help. Brian's cousin, a Secret Service agent, testified at a June congressional hearing that "there is a level of frustration for the family." Terry's mother, when asked what she would say to the person who authorized Operation Fast and Furious, responded, "I don't know what I would say to them, but I would like to know what they would say to me."

In August 2011, the Terry family made a motion to intervene as crime victims under the Crime Victims' Rights Act as a party in the case against Jamie Avila, the straw-purchaser of the

weapons found at the scene of Agent Terry's murder. Inexplicably, the Justice Department filed a highly unusual motion against the Terry family, claiming that the defendant's "offenses are too factually and temporally attenuated from the murder – if connected at all." Only after months of pressure from Congress and the public did the Department finally withdraw its objection to the Terry family's motion.

In October 2011, the Terry family again wrote to Congress seeking answers and explaining that the "family remains unsatisfied with the answers provided by government officials to date, not only about the genesis and operation of Fast and Furious, but what actually occurred precipitating Brian's death."

Three weeks later, Attorney General Eric Holder testified before the Senate Judiciary Committee. Instead of providing answers, the Attorney General's testimony brought additional pain to the Terry family when, despite evidence to the contrary, he stated, "it's unfair to assume that mistakes from Fast and Furious directly led to the death of Agent Terry." He also declined to apologize to the Terry family when asked by a Senator if he believed he should do so.

The testimony was certainly not what the Terry family had hoped to hear. Brian's mother "sat in a chair and cried" upon watching it, the family said. Brian's father said, "I think they are liars and I would tell them that. What would I say to Eric Holder? They would not be nice words." Brian's father also said, "Nobody wants to outlive their son. It's just hard. I can't sleep, just thinking about him – I love him very much."

In March 2012, as more details emerged about how a lack of coordination within the Justice Department had further botched Fast and Furious, the Terry family again learned these new facts through media reports – not from Department officials. This information "sickened" the family, who observed that had "this simple piece of information been shared among the different law enforcement agencies in Arizona . . . U.S. Border Patrol Agent Brian Terry would still be alive."

While the Justice Department's admissions have largely come as a result of being confronted with indisputable facts, the painfully slow process of getting the truth has been a continuing frustration for the Terry family. They still do not have all the facts about the circumstances surrounding Brian Terry's murder.

In life, many of Brian's friends knew him as "Superman." The local gym in Arizona where Brian worked out had to order special, 150 lb. dumbbells for him, due to his impressive strength. The dumbbells arrived at the gym the week following Brian's death, and now sit in a corner of the gym, in a shrine to Brian, not for use by others.

In death, Brian, a Marine veteran, stands as a hero who gave his life for his country. The tragic circumstances surrounding his murder, however, remain unresolved due to the Justice Department's stubborn refusal to provide critical documents and fully cooperate with the investigation of Operation Fast and Furious. As Brian's sister said of his family's desire to know the full truth, "Brian was about making a difference and justice. And I just feel that this country owes it to him, because he spent his whole life fighting for this country some way or another."

*Whistleblowers Left to Twist in the Wind*

ATF agents distraught in the aftermath of Agent Terry's death started blowing the whistle in an effort to stop the reckless tactics of Operation Fast and Furious and reveal what had happened. ATF Special Agent John Dodson was the first to contact Congress, reaching out to the office of Senator Chuck Grassley in January 2011 with allegations of gunwalking.

Upon learning of Agent Dodson's contact with Senator Grassley's staff in late January 2011, ATF officials were clearly displeased. They ordered him to write a memo to ATF leadership detailing exactly what he told Senator Grassley's staff. His supervisors called him on his cell phone, his home phone, and even contemplated personally visiting his home late Friday night in an attempt to manage the impact of his allegations. Only after Senator Grassley learned of this harassment and wrote to the Justice Department the following Monday did ATF leadership drop its demand for Dodson to write a summary of his contact with Senator Grassley's staff. Under federal law, no one can interfere with such an effort to contact Congress.

One confidential witness told Congress that he overheard Scot Thomasson, chief ATF spokesman, say early on in the congressional inquiry into Fast and Furious: "We need to get whatever dirt we can on these guys [the whistleblowers] and take them down." The actions of the Department of Justice towards the whistleblowers over the next year indicate that these words were part of a concerted effort at retaliation.

On June 29, 2011, a reporter asked the Committee to comment on documents he had received related to Agent John Dodson during the time period when Fast and Furious occurred. The Department of Justice had yet to provide these documents to the Committee pursuant to the March 31, 2011, subpoena of ATF, but had apparently provided them to a reporter in an attempt to undermine Dodson's credibility. The Committee worked with the reporter and his news organization to examine the claims the documents purportedly supported and made the argument that the documents were part of an underhanded strategy to smear a whistleblower. The news organization eventually decided against running the story.

Congressional investigators later determined that the individual who was behind the leaked documents was the U.S. Attorney for the District of Arizona, Dennis Burke – the Obama Administration political appointee who led the office in charge of Operation Fast and Furious. Burke later testified that the reporter contacted him, and that he believed the reporter had already seen the documents or had them read to him from someone else in the Department of Justice. Instead of e-mailing the documents to the reporter in Washington, Burke, who was in Arizona at the time, e-mailed them to a friend of his in Washington, who then printed out the documents and then delivered them to the reporter personally. These efforts successfully kept Burke's fingerprints off of the leak until he publicly admitted his role more than two months after his August 2011 resignation as blame for Fast and Furious spread.

Since Dodson became a whistleblower, ATF has transferred him to Greenville, South Carolina, where he currently serves as an investigative agent. A confidential witness has told the

Committee that ATF made the unusual decision not to reimburse him for \$30,000 in moving expenses. The real motive for this decision remains unknown.

On April 25, 2011, Committee investigators subpoenaed another whistleblower, Special Agent Larry Alt, to provide testimony about Operation Fast and Furious. Agent Alt notified his superiors about his impending testimony. The next day, ATF Internal Affairs notified Alt that they wanted to talk with him about another matter. On May 5, 2011, Agent Alt met with ATF internal affairs investigators about allegations that Alt downloaded two prohibited applications to his government-issued phone. The total cost of these applications was eight dollars.

Agent Alt adamantly denied knowingly downloading the applications. Internal Affairs investigators searched Alt's phone and were unable to find either of them. The applications were also not compatible with the make and model of the phone issued to Alt. The timing of the Internal Affairs investigation into Larry Alt, and the apparent lack of evidence regarding the allegations against him, makes the motivation for the inquiry suspect at best. Alt was prevented from transferring offices and his eligibility for promotions and pay raises barred during the pendency of the investigation – all supposedly over eight dollars in phone applications.

Special Agent Peter Forcelli, a Group Supervisor in the ATF Phoenix Field Division, also experienced retaliation by the Department of Justice for his role in blowing the whistle on Fast and Furious. During his June 15, 2011 testimony before Congress, Special Agent Forcelli testified candidly about the difficulties he encountered in getting the U.S. Attorney's Office in Arizona to prosecute certain ATF cases. The Justice Department confirmed Agent Forcelli's concerns by transferring three high-profile cases involving ATF out of that U.S. Attorney's Office.

During Agent Forcelli's June 15 testimony, the Chief of the Criminal Division of the Arizona U.S. Attorney's Office, Patrick Cunningham – who had been tasked by the Department of Justice with examining the truthfulness of the whistleblowers' allegations – was at ATF headquarters in Washington, D.C. mining Forcelli's testimony for inaccuracies. Cunningham alleged to senior officials that Forcelli was being untruthful during his testimony. Over the next several months, the Justice Department began publicizing documents relating to cases Forcelli had previously investigated at ATF in an effort to smear his character and integrity as a Special Agent. These cases had nothing to do with Fast and Furious.

In August 2011, the Office of the Inspector General began investigating Forcelli about one of the cases that the Department had publicized. In preparation for an interview with the OIG, the Arizona U.S. Attorney's Office created a memo, dated August 10, 2011, about a meeting its prosecutors had had with Forcelli three months earlier. The memo, written well-after-the-fact, characterized him as "visibly angry" during the earlier interaction.

In the midst of this saga, during a phone call with the U.S. Attorney's Office in August 2011, prosecutors notified Agent Forcelli that any contact between him and any prosecutor in the U.S. Attorney's Office would need to be reported up the chain of command. Such a policy made it practically impossible for Agent Forcelli to work with federal prosecutors in Arizona.

Due to this situation, ATF transferred Forcelli from the ATF Phoenix Field Division to ATF headquarters. Despite facing a considerable loss in the sale of his house Forcelli pulled his two children out of school and moved with his family to Virginia in March 2012 to assume a desk job.

In addition to stark individual experiences, the ATF whistleblowers have collectively described a climate of hostility and fear of reprisals since their decisions to speak up about Operation Fast and Furious. Some have even learned that deeply personal information, unrelated to their jobs, has been dug up and placed in the hands of reporters and others. During a November 2011 hearing, Senator Chuck Grassley asked Attorney General Holder to reveal the identity of a Justice Department official who had been caught participating in the leaking of documents to smear an ATF whistleblower. Instead of naming the official at the hearing, Holder decided to protect his identity and refused to answer the question.

Brave whistleblowers at ATF, and gun store owners who were lured by federal authorities into making repeated sales to criminals during Operation Fast and Furious, must live in fear as a result of retaliation by Justice Department officials who have yet to be publicly exposed for their role in Operation Fast and Furious. Until the truth is exposed about responsibility for bad decisions and a lack of leadership in Operation Fast and Furious, whistleblowers who came to Congress will continue to face fear of reprisals.

#### *The Relationship with Mexico*

Ciudad Juarez, across the border from El Paso, Texas, is the most dangerous city in the world. Fourteen hundred people were murdered in Juarez in 2008 – three times more than the highest number in any U.S. city – and this number increased to over 2,600 murders in 2009. On October 26, 2009, Ciudad's Juarez's leading newspaper proclaimed in wonderment: "Not One Person Murdered Yesterday." That day, however, nine murders occurred in Juarez.

In 2010, there were over 3,000 murders in the city. The violence in Juarez, and across Mexico, was increasing.

Ciudad Juarez is considered "ground zero" in the drug war. Control of the trafficking routes in Juarez affords easy access to the United States. In 2008, the Sinaloa Cartel, headed by Joaquin "El Chapo" Guzman, moved into Juarez in an attempt to wrest control of the lucrative routes from the Juarez cartel. Forbes magazine labeled Guzman as its 55<sup>th</sup> most powerful person in the world, and Guzman once paid some \$2.5 million in bribes to prison officials to make a daring escape from a maximum security Mexican prison.

In 2010, Guzman's regional enforcer in Juarez for the Sinaloa Cartel was Jose Antonio Torres Marrufo, also known as "El Jaguar." El Jaguar has a history of violent acts against those who crossed the Sinaloa Cartel. He orchestrated an attack on a drug treatment clinic center in Juarez where he suspected rival cartel members were hiding. El Jaguar's hooded gunmen forced clinic

patients into a corridor, lined them up, and shot 18 of them. As an ominous threat to members of the rival Juarez cartel, El Jaguar's men once skinned a rival cartel member's face and stitched it onto a soccer ball.

Three months into Operation Fast and Furious, El Paso had emerged as a central hub for the transport of weapons being smuggled by Manuel Celis-Acosta's syndicate. Since the beginning of Fast and Furious, ATF intelligence analysts had noticed an eastern shift in weapons crossing the border – from Tijuana and Arizona to El Paso and Juarez. ATF leadership knew that Fast and Furious weapons were heading to the Sinaloa Cartel, and Attorney General Holder was sent several memos in 2010 notifying him that the Sinaloa Cartel was buying them. As one ATF agent in Mexico who understood what was occurring observed, "Chapo is arming for war."

By the spring of 2010, six months after Fast and Furious began and intense weapons purchases by the Sinaloa Cartel, El Jaguar's men had won the battle with the Juarez Cartel and took control of trafficking routes through Ciudad Juarez.

In October 2010, cartel members kidnapped Mario Gonzalez Rodriguez, the brother of the Attorney General for the Mexican state of Chihuahua, where Juarez is located. The cartel posted a video of the kidnapped Rodriguez online, in which he alleged, under duress, that his sister had ordered killings at the behest of the Juarez cartel. The video went viral and became a major news story in Mexico. Two weeks later, Mexican authorities found Rodriguez's body in a shallow grave. In a subsequent shootout with cartel members responsible for the murder, police arrested eight and recovered sixteen weapons. Two of these weapons traced back to Operation Fast and Furious.

Although the Department of Justice learned that these weapons traced back to Fast and Furious almost immediately, no one informed the Mexican government. Not until congressional investigators were on the verge of learning the truth about the connection did an ATF agent in Mexico finally tell the Mexican Attorney General in June 2011 – seven months after Rodriguez's murder.

In May 2011, cartel members fired a powerful Barrett .50 caliber rifle at a Mexican Federal Police helicopter in the state of Michoacan, forcing it to make an emergency landing. The attack wounded two of the officers on board. A subsequent raid on those responsible for shooting down the helicopter resulted in the deaths of 11 cartel members and the arrest of 36 more. A cache of more than 70 rifles were recovered at the scene, including several that traced back to Operation Fast and Furious.

Though the President of Mexico, Felipe Calderon has been outspoken about demanding the United States curb the flow of its firearms into Mexico, he has taken a diplomatic approach in responding to Fast and Furious given the U.S. role as a key trading partner for Mexico. The United States is the largest source of foreign direct investment in Mexico, and the United States is, by far, Mexico's largest trading partner – over 80% of Mexican exports are sent to the United States. Mexico's continued growth also has great potential to help increase U.S. exports that create American jobs.

Other Mexican officials, though, have been more pointed with their deep concerns about what the Justice Department allowed to occur. The president of the Mexican Congress, the Chamber of Deputies, has said that Fast and Furious was “a serious violation of international law.” The Chairman of the Justice Committee in the Chamber of Deputies commented that there were “150 cases of injuries and homicides” from weapons that ATF agents allowed to walk into Mexico. And over a year after Fast and Furious was first exposed, the program still remains on the minds of the Mexican press. In April, the very first question from the Mexican press during a trilateral joint press conference with President Calderon, President Obama, and Prime Minister Stephen Harper of Canada was about the trafficking of weapons from the U.S. to Mexico.

The people of Mexico have suffered tremendous loss due to cartel violence. A U.S. operation – kept secret from Mexican authorities – that sought to arm cartels has created justifiable outrage among our neighbors to the south who seek the truth about what happened and who was responsible.

*Congress Faces a Choice as Integrity Questions Loom Over Justice Department*

The congressional investigation into Operation Fast and Furious has yielded significant results. It forced the Department of Justice to withdraw its false denial of whistleblower allegations. Dennis Burke – the U.S. Attorney for Arizona who headed the office that led Operation Fast and Furious – was forced to resign. Attorney General Eric Holder now admits the operation was “fundamentally flawed” and that guns from the operation will continue to show up at crime scenes in Mexico and the United States “for years to come.” Attorney General Holder has also committed to ensuring that such an operation will never happen again.

Nevertheless, Operation Fast and Furious’ outrageous tactics, the Justice Department’s refusal to fully cooperate with the investigation, and efforts to smear and retaliate against whistleblowers have tainted the institutional integrity of the Justice Department. Only 567 of the nearly 2,000 weapons from the operation have been recovered and, as the Attorney General admits, the effects from Fast and Furious are far from over.

The Justice Department’s initial denials that anything inappropriate occurred, and its insinuation that whistleblowers were not telling the truth, indicated an early mindset of a Department more concerned about appearances than actual truth. Making matters worse, a pattern of questionable behavior ensued that heightened concerns. Attorney General Holder initially expressed puzzlement when asked when he first heard of Operation Fast and Furious at a congressional hearing, but neither he nor his staff ever acknowledged that memos on the flawed operation had been addressed to him until they were publicly uncovered several months later. Even later in the investigation, senior political appointees in the Department’s Criminal Division were forced to acknowledge evidence that they had known about reckless gunwalking – and did nothing about it – even though the Attorney General had insisted that such tactics had always been against Department policy. Several other senior officials who attended briefings on Operation Fast and Furious repeatedly insisted they could not recall key details about what they knew. In an



interview, Attorney General Holder's former Deputy Chief of Staff stated that he could not recall specific incidents or even his own actions 82 times over the course of a three hour interview.

Perhaps the most damning assessments of the Department's handling of the fallout from Operation Fast and Furious have come from two Justice Department officials. Kenneth Melson, the former Acting AFT Director during the pendency of Fast and Furious, told Congress that, "it appears thoroughly to us that the department is really trying to figure out a way to push the information away from their political appointees at the department." Patrick Cunningham, who had been tasked by the Justice Department with investigating ATF whistleblower allegations of gunwalking, would later invoke his Fifth Amendment privilege against self-incrimination in refusing to answer questions about his work.

The suggestion of veteran Justice Department officials that a cover-up potentially involving criminal conduct may have occurred, even after Fast and Furious' field operations ended, underscores the Justice Department's inability to investigate itself or decide what information should be withheld from the Congressional investigation.

In dealing with a prostitution scandal in Cartagena, Columbia, the Secret Service has demonstrated that agencies can conduct investigations swiftly, determine responsibility, and act decisively to hold wrongdoers accountable. The Justice Department's response, however, has been the polar opposite. More than a year after field operations of Fast and Furious ended, the Attorney General still insists he needs more facts before holding individuals responsible for facilitating the transfer of weapons to Mexican drug cartels to account. To many Americans, this inaction creates the impression that the Department is trying to run out the clock on the relatively short lifespan of political appointments.

The Justice Department's failure to respond appropriately to the allegations of whistleblowers and to cooperate with Congressional oversight has crossed the line of appropriate conduct for a government agency. Congress now faces a moment of decision between exerting its full authority to compel an agency refusing to cooperate with congressional oversight or accepting a dangerous expansion of Executive Branch authority and unilateral action allowing agencies to set their own terms for cooperating with congressional oversight.

DRAFT

RESOLUTION RECOMMENDING THAT THE HOUSE OF  
REPRESENTATIVES FIND ERIC H. HOLDER, JR., ATTORNEY GENERAL,  
U.S. DEPARTMENT OF JUSTICE,  
IN CONTEMPT OF CONGRESS FOR REFUSAL TO  
COMPLY WITH A SUBPOENA DULY ISSUED BY THE  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

R E P O R T  
OF THE  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
UNITED STATES HOUSE OF REPRESENTATIVES

The form of the resolution that the Committee on Oversight and Government Reform would recommend to the House of Representatives for citing Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, for contempt of Congress pursuant to this report is as follows:

*Resolved*, That Eric H. Holder, Jr., Attorney General of the United States, shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

*Resolved*, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on Oversight and Government Reform, detailing the refusal of Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, to produce documents to the Committee on Oversight and Government Reform as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Mr. Holder be proceeded against in the manner and form provided by law.

*Resolved*, That the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena.

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**I. Executive Summary**

The Department of Justice has refused to comply with Congressional subpoenas related to Operation Fast and Furious, an Administration initiative that allowed around two thousand firearms to fall into the hands of drug cartels and may have led to the death of a U.S. Border Agent. The consequences of the lack of judgment that permitted such an operation to occur are tragic.

The Department's refusal to work with Congress to ensure that it has fully complied with the Committee's efforts to compel the production of documents and information related to this controversy is inexcusable and cannot stand. Those responsible for allowing Fast and Furious to proceed and those who are preventing the truth about the operation from coming out must be held accountable for their actions.

Having exhausted all available options in obtaining compliance, the Chairman of the Oversight and Government Reform Committee recommends that Congress find the Attorney General in contempt for his failure to comply with the subpoena issued to him.

## II. Authority and Purpose

An important corollary to the powers expressly granted to Congress by the Constitution is the implicit responsibility to perform rigorous oversight of the Executive Branch. The U.S. Supreme Court has recognized this Congressional power on numerous occasions. For example, in *McGrain v. Daugherty*, the Court held that “the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it.”<sup>1</sup> Further, in *Watkins v. United States*, Chief Justice Warren wrote for the majority: “The power of Congress to conduct investigations is inherent in the legislative process. That power is broad.”<sup>2</sup>

Both the Legislative Reorganization Act of 1946 (P.L. 79-601), which directed House and Senate Committees to “exercise continuous watchfulness” over Executive Branch programs under their jurisdiction, and the Legislative Reorganization Act of 1970 (P.L. 91-510), which authorized committees to “review and study, on a continuing basis, the application, administration and execution” of laws, codify the oversight powers of Congress.

The Committee on Oversight and Government Reform is a standing committee of the House of Representatives, duly established pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the Constitution.<sup>3</sup> House Rule X grants to the Committee broad oversight jurisdiction, including authority to “conduct investigations of any matter without regard to clause 1, 2, 3, or this clause [of House Rule X] conferring jurisdiction over the matter to another standing committee.”<sup>4</sup> The rules direct the Committee to make available “the findings and recommendations of the committee . . . to any other standing committee having jurisdiction over the matter involved.”<sup>5</sup>

House Rule XI specifically authorizes the Committee to “require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.”<sup>6</sup> The rule further provides that the “power to authorize and issue subpoenas” may be delegated to the Committee chairman.<sup>7</sup> The subpoenas discussed in this report were issued pursuant to this authority.

The Committee’s investigation into actions by senior officials in the U.S. Department of Justice and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) in designing, implementing, and supervising the execution of Operation Fast and Furious, and subsequently

<sup>1</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

<sup>2</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>3</sup> U.S. CONST., art. I, § 5, clause 2.

<sup>4</sup> House Rule X, clause (4)(c)(2).

<sup>5</sup> *Id.*

<sup>6</sup> House Rule XI, clause (2)(m)(1)(B).

<sup>7</sup> House Rule XI, clause (2)(m)(3)(A)(i).

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providing false denials to Congress, is being undertaken pursuant to the authority delegated to the Committee under House Rule X as described above.

The oversight and legislative purposes of the investigations are (1) to examine and expose any possible malfeasance, abuse of authority, or violation of existing law on the part of the executive branch with regard to the conception and implementation of Operation Fast and Furious, and (2) based on the results of the investigation, to assess whether the conduct uncovered may warrant additions or modifications to federal law and to make appropriate legislative recommendations.

In particular, the Committee's investigation has highlighted the need to obtain information that will aid Congress in considering whether reconsideration of the statutory provisions governing the approval of federal wiretap applications may be necessary. The major breakdown in the process that occurred with respect to the Fast and Furious wiretap applications necessitates careful examination of the facts before proposing a legislative remedy. Procedural improvements may need to be codified in statute to mandate immediate action in the face of highly objectionable information relating to operational tactics and details contained in future applications.

The Committee's investigation has called into question the ability of ATF to carry out its statutory mission and the ability of the Department of Justice to adequately supervise it. The information sought is needed to consider legislative remedies to restructure ATF as needed.

### **III. Background on the Committee's Investigation**

In February 2011, the Oversight and Government Reform Committee joined Senator Charles E. Grassley, Ranking Member of the Senate Committee on the Judiciary, in investigating Operation Fast and Furious, a program conducted by ATF. On March 16, 2011, Chairman Darrell Issa wrote to then-Acting ATF Director Kenneth E. Melson requesting documents and information regarding Fast and Furious. Responding for Melson and ATF, the Department of Justice did not provide any documents or information to the Committee by the March 30, 2011 deadline. The Committee issued a subpoena to Melson the next day. The Department produced zero pages of non-public documents pursuant to that subpoena until June 10, 2011, on the eve of the Committee's first Fast and Furious hearing.

On June 13, 2011, the Committee held a hearing entitled "Obstruction of Justice: Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?" The Committee held a second hearing on June 15, 2011, entitled "Operation Fast and Furious: Reckless Decisions, Tragic Outcomes." The Committee held a third hearing on July 26, 2011, entitled "Operation Fast and Furious: The Other Side of the Border."

On October 11, 2011, the Justice Department informed the Committee its document production pursuant to the March 31, 2011 subpoena was complete. The next day, the Committee issued a detailed subpoena to Attorney General Eric Holder for additional documents related to Fast and Furious.

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On February 2, 2012, the Committee held a hearing entitled “Fast and Furious: Management Failures at the Department of Justice.” The Attorney General testified at that hearing.

The Committee has issued two staff reports documenting its initial investigative findings. The first, *The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents*, was released on June 14, 2011. The second, *The Department of Justice's Operation Fast and Furious: Fueling Cartel Violence*, was released on July 26, 2011.

Throughout the investigation, the Committee has made numerous attempts to accommodate the interests of the Department of Justice. Committee staff has conducted numerous meetings and phone conversations with Department lawyers to provide clarification of and highlight priorities with respect to the subpoenas. Committee staff has been flexible in scheduling dates for transcribed interviews, agreed to review certain documents *in camera*, allowed extensions of production deadlines, and agreed to postpone interviewing the Department's key Fast and Furious trial witness.

Despite the Committee's flexibility, the Department has refused to produce certain documents to the Committee. The Department has represented on numerous occasions that it will not produce broad categories of documents. The Attorney General has continued to withhold documents without any assertion of executive privilege by the President, and the Department has not provided a privilege log delineating with particularity why certain documents are being withheld.

The Department's efforts at accommodation and ability to work with the Committee regarding its investigation into Fast and Furious have been wholly inadequate. The Committee requires the subpoenaed documents to meet its constitutionally mandated oversight and legislative duties.

#### **IV. Operation Fast and Furious: Breakdowns at All Levels of the Department of Justice**

The story of Operation Fast and Furious is one of widespread dysfunction across numerous components of the Department of Justice. This dysfunction allowed Fast and Furious to originate and grow at a local level before senior officials at Department of Justice headquarters ultimately approved and authorized it. The dysfunction within and among Department components continues to this day.

##### **A. The ATF Phoenix Field Division**

In October 2009, the Office of the Deputy Attorney General (ODAG) in Washington, D.C. promulgated a new strategy to combat gun trafficking along the Southwest Border. This new strategy directed federal law enforcement to shift its focus away from seizing firearms from criminals as soon as possible, and to focus instead on identifying members of trafficking

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networks. The Office of the Deputy Attorney General shared this strategy with the heads of many Department components, including ATF.<sup>8</sup>

Members of the ATF Phoenix Field Division, led by Special Agent in Charge Bill Newell, became familiar with this new strategy and used it in creating Fast and Furious. In mid-November 2009, just weeks after the strategy was issued, Fast and Furious began. Its objective was to establish a nexus between straw purchasers of firearms in the United States and Mexican drug-trafficking organizations (DTOs) operating on both sides of the United States-Mexico border. Straw purchasers are individuals who are legally entitled to purchase firearms for themselves, but who unlawfully purchase weapons with the intent to transfer them to someone else, in this case DTOs or other criminals.

During Fast and Furious, ATF agents used an investigative technique known as “gunwalking” – that is, allowing illegally-purchased weapons to be transferred to third parties without attempting to disrupt or deter the illegal activity. ATF agents abandoned surveillance on known straw purchasers after they illegally purchased weapons that ATF agents knew were destined for Mexican drug cartels. Many of these transactions established probable cause for agents to interdict the weapons or arrest the possessors, something every agent was trained to do. Yet, Fast and Furious aimed instead to allow the transfer of these guns to third parties. In this manner, the guns fell into the hands of DTOs, and many would turn up at crime scenes. ATF then traced these guns to their original straw purchaser, in an attempt to establish a connection between that individual and the DTO.

Federal Firearms Licensees (FFLs), who cooperated with ATF, were an integral component of Fast and Furious. Although some FFLs were reluctant to continue selling weapons to suspicious straw purchasers, ATF encouraged them to do so, reassuring the FFLs that ATF was monitoring the buyers and that the weapons would not fall into the wrong hands.<sup>9</sup> ATF worked with FFLs on or about the date of sale to obtain the unique serial number of each firearm sold. Agents entered these serial numbers into ATF’s Suspect Gun Database within days after the purchase. Once these firearms were recovered at crime scenes, the Suspect Gun Database allowed for expedited tracing of the firearms to their original purchasers.

By December 18, 2009, ATF agents assigned to Fast and Furious had already identified fifteen interconnected straw purchasers in the targeted gun trafficking ring. These straw purchasers had already purchased 500 firearms.<sup>10</sup> In a biweekly update to Bill Newell, ATF Group Supervisor David Voth explained that 50 of the 500 firearms purchased by straw buyers had already been recovered in Mexico or near the Mexican border.<sup>11</sup> These guns had time-to-crimes of as little as one day, strongly indicating straw purchasing.<sup>12</sup>

<sup>8</sup> E-mail from [Dep’t of Justice] on behalf of Deputy Att’y Gen. David Ogden to Kathryn Ruemmler, et al. (Oct. 26, 2009).

<sup>9</sup> Transcribed Interview of Special Agent Peter Forcelli, at 53-54 (Apr. 28, 2011).

<sup>10</sup> E-mail from Kevin Simpson, Intelligence Officer, Phoenix FIG, ATF, to David Voth (Dec. 18, 2009).

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

<sup>12</sup> *Id.*



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Starting in late 2009, many line agents objected vociferously to some of the techniques used during Fast and Furious, including gunwalking. The investigation continued for another year, however, until shortly after December 15, 2010, when two weapons from Fast and Furious were recovered at the murder scene of U.S. Border Patrol Agent Brian Terry.

Pursuant to the Deputy Attorney General's strategy, in late January 2010 the ATF Phoenix Field Division applied for Fast and Furious to become an Organized Crime Drug Enforcement Task Force (OCDETF) case. In preparation for the OCDETF application process, the ATF Phoenix Field Division prepared a briefing paper detailing the investigative strategy employed in Fast and Furious. This document was not initially produced by the Department pursuant to its subpoena, but rather was obtained by a confidential source. The briefing paper stated:

Currently our strategy is to allow the transfer of firearms to continue to take place, albeit at a much slower pace, in order to further the investigation and allow for the identification of additional co-conspirators who would continue to operate and illegally traffic firearms to Mexican DTOs which are perpetrating armed violence along the Southwest Border.<sup>13</sup>

Fast and Furious was approved as an OCDETF case, and this designation resulted in new operational funding. Additionally, Fast and Furious became a prosecutor-led OCDETF Strike Force case, meaning that ATF would join with the Federal Bureau of Investigation, Drug Enforcement Administration, Internal Revenue Service, and Immigrations and Customs Enforcement under the leadership of the U.S. Attorney's Office for the District of Arizona.

#### **B. The United States Attorney's Office for the District of Arizona**

The U.S. Attorney's Office for the District of Arizona led the Fast and Furious OCDETF Strike Force. Although ATF was the lead law enforcement agency for Fast and Furious, its agents took direction from prosecutors in the U.S. Attorney's Office. The lead federal prosecutor for Fast and Furious was Assistant U.S. Attorney Emory Hurley, who played an integral role in the day-to-day, tactical management of the case.<sup>14</sup>

Many ATF agents working on Operation Fast and Furious came to believe that some of the most basic law enforcement techniques used to interdict weapons required the explicit approval of the U.S. Attorney's Office, and specifically from Hurley. On numerous occasions, Hurley and other federal prosecutors withheld this approval, to the mounting frustration of ATF agents.<sup>15</sup> The U.S. Attorney's Office chose not to use other available investigative tools common in gun trafficking cases, such as civil forfeitures and seizure warrants, during the seminal periods of Fast and Furious.

<sup>13</sup> Phoenix Group VII, Phoenix Field Division, ATF, *Briefing Paper* (Jan. 8, 2010).

<sup>14</sup> Transcribed Interview of Special Agent in Charge William Newell, at 32-33 (June 8, 2011).

<sup>15</sup> Transcribed Interview of Special Agent Larry Alt, at 94 (Apr. 27, 2011).

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The U.S. Attorney's Office advised ATF that agents needed to meet unnecessarily strict evidentiary standards in order to speak with suspects, temporarily detain them, or interdict weapons. ATF's reliance on this advice from the U.S. Attorney's Office during Fast and Furious resulted in many lost opportunities to interdict weapons.

In addition to leading the Fast and Furious OCDETF task force, the U.S. Attorney's Office was instrumental in preparing the wiretap applications that were submitted to the Justice Department's Criminal Division. Federal prosecutors in Arizona filed at least six of these applications, each containing immense detail about operational tactics and specific information about straw purchasers, in federal court after Department headquarters authorized them.

### C. ATF Headquarters

Fast and Furious first came to the attention of ATF Headquarters on December 8, 2009, just weeks after the case was officially opened in Phoenix. ATF's Office of Strategic Information and Intelligence (OSII) briefed senior ATF personnel about the case on December 8, 2009, discussing in detail a large recovery of Fast and Furious weapons in Naco, Sonora, Mexico.<sup>16</sup>

The next day, December 9, 2009, the Acting ATF Director first learned about Fast and Furious and the large recovery of weapons that had already occurred.<sup>17</sup> The following week, OSII briefed senior ATF officials about another large cache of Fast and Furious weapons that had been recovered in Mexico.<sup>18</sup>

On January 5, 2010, OSII presented senior ATF officials with a summary of all of the weapons that could be linked to known straw purchasers in Fast and Furious. In just two months, these straw purchasers bought a total number of 685 guns. This number raised the ire of several individuals in the room, who expressed concerns about the growing operation.<sup>19</sup>

On March 5, 2010, ATF headquarters hosted a larger, more detailed briefing on Operation Fast and Furious. David Voth, the Group Supervisor overseeing Fast and Furious, traveled from Phoenix to give the presentation. He gave an extremely detailed synopsis of the status of the investigation, including the number of guns purchased, weapons seizures to date, money spent by straw purchasers, and organizational charts of the relationships among straw purchasers and to members of the Sinaloa drug cartel. At that point, the straw purchases had bought 1,026 weapons, costing nearly \$650,000.<sup>20</sup>

ATF's Phoenix Field Division informed ATF headquarters of large weapons recoveries tracing back to Fast and Furious. The Phoenix Field Division had frequently forwarded these

<sup>16</sup> Interview with Lorren Leadmon, Intelligence Operations Analyst, Washington, D.C., July 5, 2011 [hereinafter Leadmon Interview].

<sup>17</sup> *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (May 4, 2011) (Questions for the Record of Hon. Eric H. Holder, Jr., Att'y Gen. of the U.S.).

<sup>18</sup> Leadmon Interview, *supra* note 16.

<sup>19</sup> Transcribed Interview of Deputy Ass't Dir. Steve Martin, ATF, at 36 (July 6, 2011) [hereinafter Martin Tr.].

<sup>20</sup> See generally "Operation the Fast and the Furious" Presentation, Mar. 5, 2010.

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updates directly to Deputy ATF Director Billy Hoover and Acting ATF Director Ken Melson.<sup>21</sup> When Hoover learned about how large Fast and Furious had grown in March 2010, he finally ordered the creation of an exit strategy.<sup>22</sup> This exit strategy, something Hoover had never before requested in any other case, was a timeline for ATF to wind down the case.<sup>23</sup>

Though Hoover ordered the exit strategy in March, he did not receive it until early May. The three-page document outlined a 30-, 60-, and 90-day strategy for winding down Fast and Furious and handing it over to the U.S. Attorney's Office for prosecution.<sup>24</sup>

In July 2010, Acting Director Melson expressed concern about the number of weapons flowing to Mexico,<sup>25</sup> and in October 2010 the Assistant Director for Field Operations, the number three official in ATF, expressed concern that ATF had not yet halted the straw purchasing activity in Fast and Furious.<sup>26</sup> Despite these concerns, however, the U.S. Attorney's Office continued to delay the indictments, and no one at ATF headquarters ordered the Phoenix Field Division to simply arrest the straw purchasers in order to take them off the street. The members of the firearms trafficking ring were not arrested until two weapons from Fast and Furious were found at the murder scene of Border Patrol Agent Brian Terry.

#### **D. The Criminal Division**

##### **1. Coordination with ATF**

In early September 2009, according to Department e-mails, ATF and the Department of Justice's Criminal Division began discussions "to talk about ways CRM [Criminal Division] and ATF can coordinate on gun trafficking and gang-related initiatives."<sup>27</sup> Early on in these discussions, Lanny Breuer, Assistant Attorney General in charge of the Criminal Division, sent a prosecutor to help the U.S. Attorney's Office in Arizona prosecute ATF cases. The first case chosen for prosecution was Operation Wide Receiver, a year-long ATF Phoenix Field Division investigation initiated in 2006, which involved several hundred guns being walked. The U.S. Attorney's Office in Arizona, objecting to the tactics used in Wide Receiver, had previously refused to prosecute the case.

According to James Trusty, a senior official in the Criminal Division's Gang Unit, in September 2009 Breuer was "VERY interested in the Arizona gun trafficking case [Wide Receiver], and he is traveling out [to Arizona] around 9/21. Consequently, he asked us for a 'briefing' on that case before the 21<sup>st</sup> rolls around."<sup>28</sup> The next day, according to Trusty, Breuer's chief of staff "mentioned the case again, so there is clearly great attention/interest from the front office."<sup>29</sup>

<sup>21</sup> E-mail from Mark Chait to Kenneth Melson and William Hoover (Feb. 24, 2010) [HOCR 001426].

<sup>22</sup> Transcribed Interview of William Hoover, ATF Deputy Director, at 9 (July 21, 2011).

<sup>23</sup> *Id.* at 72.

<sup>24</sup> E-mail from Douglas Palmer, Supervisor Group V, ATF, to William Newell, ATF (Apr. 27, 2010).

<sup>25</sup> E-mail from Kenneth Melson to Mark Chait, et. al., (July 14, 2010) [HOCR 002084].

<sup>26</sup> E-mail from Mark Chait to William Newell (Oct. 29, 2010) [HOCR 001890].

<sup>27</sup> E-mail from Jason Weinstein to Lanny Breuer (Sept. 10, 2009) [HOCR 003378].

<sup>28</sup> E-mail from James Trusty to Laura Gwinn (Sept. 2, 2009) [HOCR 003375].

<sup>29</sup> E-mail from James Trusty to Laura Gwinn (Sept. 3, 2009) [HOCR 003376].

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When the Criminal Division prosecutor first arrived in Arizona, she gave Trusty her impressions of the case. Her e-mail stated:

Case involves 300 to 500 guns . . . It is my understanding that a lot of these guns "walked". Whether some or all of that was intentional is not known.<sup>30</sup>

Discussions between ATF and the Criminal Division regarding inter-departmental coordination continued over the next few months. On December 3, 2009, the Acting ATF Director e-mailed Breuer about this cooperation. He stated:

Lanny: We have decided to take a little different approach with regard to seizures of multiple weapons in Mexico. Assuming the guns are traced, instead of working each trace almost independently of the other traces from the seizure, I want to coordinate and monitor the work on all of them collectively as if the seizure was one case.<sup>31</sup>

Breuer responded:

We think this is a terrific idea and a great way to approach the investigations of these seizures. Our Gang Unit will be assigning an attorney to help you coordinate this effort.<sup>32</sup>

Kevin Carwile, Chief of the Gang Unit, assigned an attorney, Joe Cooley, to assist ATF, and Operation Fast and Furious was selected as a recipient of this assistance. Shortly after his assignment, Cooley had to rearrange his holiday plans to attend a significant briefing on Fast and Furious.<sup>33</sup>

Cooley was assigned to Fast and Furious for the next three months. He advised the lead federal prosecutor, Emory Hurley, and received detailed briefings on operational details. Cooley, though, was not the only Criminal Division attorney involved with Fast and Furious during this time period. The head of the division, Lanny Breuer, met with ATF officials about the case, including Deputy Director Billy Hoover and Assistant Director for Field Operations Mark Chait.<sup>34</sup>

Given the initial involvement of the Criminal Division with Fast and Furious in the early stages of the investigation, senior officials in Criminal Division should have been greatly alarmed about what they learned about the case. These officials should have halted the program,

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<sup>30</sup> E-mail from Laura Gwian to James Trusty (Sept. 3, 2009) [HOCR 003377].

<sup>31</sup> E-mail from Kenneth Melson to Lanny Breuer (Dec. 3, 2009) [HOCR 003403].

<sup>32</sup> E-mail from Lanny Breuer to Kenneth Melson (Dec. 4, 2009) [HOCR 003403].

<sup>33</sup> E-mail from Kevin Carwile to Jason Weinstein (Mar. 16, 2010) [HOCR 002832].

<sup>34</sup> Meeting on "Weapons Seizures in Mexico w/ Lanny Breuer" at Robert F. Kennedy Building, Room 2107, Jan. 5, 2010, 10:00 AM [HOCR 001987].

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especially given their prior knowledge of gunwalking in Wide Receiver, run by the same leadership in the same ATF field division.

On March 5, 2010, Cooley attended a briefing about Fast and Furious. The detailed briefing highlighted the large number of weapons the gun trafficking ring had purchased and discussed recoveries of those weapons in Mexico. According to Steve Martin, Deputy Assistant Director in ATF's Office of Strategic Intelligence and Information, everyone in the room knew the weapons from Fast and Furious were being linked to a Mexican cartel.<sup>35</sup> Two weeks later, in mid-March 2010, Carwile pulled Cooley off Fast and Furious, when the U.S. Attorney's Office informed him that it had the case under control.<sup>36</sup>

## 2. Wiretaps

At about the same time, lawyers in the Criminal Division authorized wiretap applications for Fast and Furious to be submitted to a federal judge. Fast and Furious involved the use of seven wiretaps between March and July of 2010.

In a letter to Chairman Issa, the Deputy Attorney General acknowledged that the Office of Enforcement Operations (OEO), part of the Justice Department's Criminal Division, is "primarily responsible for the Department's statutory wiretap authorizations."<sup>37</sup> According to the letter, lawyers in OEO review these wiretap packages to ensure that they "meet statutory requirements and DOJ policies."<sup>38</sup> When OEO completes its review of a wiretap package, federal law provides that the Attorney General or his designee – in practice, a Deputy Assistant Attorney General in the Criminal Division – reviews and authorizes it.<sup>39</sup> Each wiretap package includes an affidavit which details the factual basis upon which the authorization is sought. Each application for Fast and Furious included a memorandum from Assistant Attorney General Breuer to Paul O'Brien, Director of OEO, authorizing the interception application.<sup>40</sup>

The Criminal Division's approval of the wiretap applications in Fast and Furious violated Department of Justice policy. The core mission of the Bureau of Alcohol, Tobacco, Firearms, and Explosives is to "protect[] our communities from . . . the illegal use and trafficking of firearms."<sup>41</sup>

The wiretap applications document the extensive involvement of the Criminal Division in Fast and Furious, yet the Department of Justice failed to produce them in response to the Committee's subpoena. The Criminal Division authorized Fast and Furious wiretap applications

<sup>35</sup> Martin Tr. at 100.

<sup>36</sup> E-mail from Kevin Carwile to Jason Weinstein (Mar. 16, 2010, 9:00 a.m.) [HOCR DOJ 2382].

<sup>37</sup> Letter from Dep Att'y Gen. James M. Cole Chairman Darrell Issa et al., at 6 (Jan. 27, 2012) [hereinafter Cole Letter].

<sup>38</sup> *Id.*

<sup>39</sup> See 18 U.S.C. § 2516(1).

<sup>40</sup> See, e.g., Memorandum from Lanny A. Breuer, Ass't Att'y Gen., Criminal Division to Paul M. O'Brien, Director, Office of Enforcement Operations, Criminal Division, Authorization for Interception Order Application, Mar. 10, 2010.

<sup>41</sup> Bureau of Alcohol, Tobacco, Firearms, and Explosives, "ATF's Mission," <http://www.atf.gov/about/mission> (last visited May 1, 2012).

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on March 10, 2010; April 15, 2010; May 6, 2010; May 14, 2010; June 1, 2010; and July 1, 2010. Deputy Assistant Attorney General Jason Weinstein, Deputy Assistant Attorney General Kenneth Blanco, and Deputy Assistant Attorney General John Keeney signed these applications on behalf of Assistant Attorney General Lanny Breuer.

#### **E. The Office of the Deputy Attorney General**

The Office of the Deputy Attorney General (ODAG) maintained close involvement in Operation Fast and Furious. In the Justice Department, ATF reports to the Deputy Attorney General (DAG).<sup>42</sup> In practice, an official in the Office of the Deputy Attorney General is responsible for managing the ATF portfolio. This official monitors the operations of ATF, and raises potential ATF issues to the attention of the DAG.<sup>43</sup> During the pendency of Fast and Furious, this official was Associate Deputy Attorney General Edward Siskel.

Officials in ODAG became familiar with Fast and Furious as early as March 2010. On March 12, 2010, Siskel and then-Acting DAG Gary Grindler received an extensive briefing on Fast and Furious during a monthly meeting with the ATF's Acting Director and Deputy Director. This briefing presented Grindler with overwhelming evidence of illegal straw purchasing during Fast and Furious. The presentation included a chart of the names of the straw purchasers, 31 in all, and the number of weapons they had acquired to date, 1,026.<sup>44</sup> Three of these straw purchasers had already purchased over 100 weapons each, with one straw purchaser having already acquired over 300 weapons. During this briefing, Grindler learned that buyers had paid cash for every single gun.<sup>45</sup>

A map of Mexico detailed locations of recoveries of weapons purchased through Fast and Furious, including some at crime scenes.<sup>46</sup> The briefing also covered the use of stash houses where weapons bought during Fast and Furious were stored before being transported to Mexico. Grindler learned of some of the unique investigative techniques ATF was using during Fast and Furious.<sup>47</sup> Despite receiving all of this information, then-Deputy Attorney General Gary Grindler did not order Fast and Furious to be shut down, nor did he follow-up with ATF or his staff about the investigation.

Throughout the summer of 2010, ATF officials remained in close contact with their ODAG supervisors regarding Fast and Furious. Fast and Furious was a topic in each of the monthly meetings between ATF and the DAG. ATF apprised Ed Siskel of significant recoveries of Fast and Furious weapons, as well as of notable progress in the investigation, and Siskel indicated to ATF that he was monitoring it.<sup>48</sup> In mid-December 2010, after Fast and Furious had been ongoing for over a year, Grindler received more details about the program. On December 15, 2010, Border Patrol Agent Brian Terry was killed. Two Fast and Furious weapons were

<sup>42</sup> USDOJ: About Department of Justice Agencies, available at <http://www.justice.gov/agencies/index-org.html> (last visited May. 1, 2012).

<sup>43</sup> Transcribed Interview of Acting Dir. Kenneth Melson, at 25 (July 4, 2011).

<sup>44</sup> "Operation the Fast and the Furious," March 12, 2010 [HOCR 002820 – HOCR 002823].

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> E-mail from Edward N. Siskel to Mark R. Chait (July 14, 2010) [HOCR 002847].

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recovered at the scene of his murder. Two days later, Associate Deputy Attorney General Brad Smith sent Grindler and four ODAG officials an e-mail detailing the circumstances of Terry's murder and its connection to Fast and Furious.<sup>49</sup> Smith attached a four-page summary of the Fast and Furious investigation.

#### V. The Committee's October 12, 2011 Subpoena to Attorney General Holder

On October 12, 2011, the Committee issued a subpoena to Attorney General Eric Holder, demanding documents related to the Department of Justice's involvement with Operation Fast and Furious. The subpoena was issued following six months of constant refusals by the Justice Department to cooperate with the Committee's investigation into Operation Fast and Furious.

##### A. Events Leading Up to the Subpoena

On March 16, 2011, Chairman Issa sent a letter to then-ATF Acting Director Ken Melson asking for information and documents pertaining to Operation Fast and Furious.<sup>50</sup> Late in the afternoon of March 30, 2011, the Department, on behalf of ATF and Melson, informed the Committee that it would not provide any documents pursuant to the letter. The Committee informed the Department it planned to issue a subpoena. On March 31, 2011, the Committee issued a subpoena to Ken Melson for the documents.

On May 2, 2011, Committee staff reviewed documents the Department made available for *in camera* review at Department headquarters. Many of these documents contained partial or full redactions. Following this review, Chairman Issa wrote to the Department on May 5, 2011, asking the Department to produce all documents responsive to the Committee's subpoena forthwith.<sup>51</sup>

In spite of this letter, for the two months following the issuance of the subpoena, the Department produced zero pages of non-public documents. On June 8, 2011, the Committee again wrote to the Department requesting complete production of all documents by June 10, 2011.<sup>52</sup> The Department responded on June 10, 2011, stating "complete production of all documents by June 10, 2011 . . . is not possible."<sup>53</sup> At 7:49 p.m. that evening, just three days before a scheduled Committee hearing on the obligation of the Department of Justice to cooperate with congressional oversight, the Department finally produced its first non-public documents to the Committee, totaling 69 pages.<sup>54</sup>

Over the next six weeks, through July 21, 2011, the Department produced an additional 1,286 pages of documents. The Department produced no additional documents until September

<sup>49</sup> E-mail from Assoc. Deputy Att'y Gen. Brad Smith to Deputy Att'y Gen. Gary Grindler, et al. (Dec. 17, 2010) [HOCR 002875-002881].

<sup>50</sup> Letter from Chairman Darrell Issa to ATF Acting Dir. Kenneth Melson (Mar. 16, 2011) [hereinafter Mar. 16 Letter].

<sup>51</sup> Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (May 5, 2011).

<sup>52</sup> Letter from Chairman Darrell Issa to ATF Acting Dir. Kenneth Melson (June 8, 2011).

<sup>53</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 10, 2011).

<sup>54</sup> *Id.*

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1, 2011, when it produced 193 pages of documents.<sup>55</sup> On September 30, 2011, the Department produced 97 pages of documents.<sup>56</sup> On October 11, 2011, the Department produced 56 pages of documents.<sup>57</sup>

Early in the investigation, the Committee received hundreds of pertinent documents from whistleblowers. Many of the documents the whistleblowers provided were not among the 2,050 pages that the Department had produced by October 11, 2011, demonstrating that the Department was withholding materials responsive to the subpoena.

The Committee requested additional documents from the Department as the investigation proceeded during the summer of 2011. On July 11, 2011, Chairman Issa and Senator Grassley wrote to the Attorney General requesting documents from twelve people in Justice Department headquarters pertaining to Fast and Furious.<sup>58</sup> The Justice Department first responded to this letter on October 31, 2011, nearly four months later.<sup>59</sup>

On July 11, 2011, Chairman Issa and Senator Grassley sent a letter to the FBI requesting documents relating to the FBI's role in the Fast and Furious OCDETF investigation.<sup>60</sup> The letter requested information and documents pertaining to paid FBI informants who were the target of the Fast and Furious investigation. The FBI never produced any of the documents requested in this letter.

On July 15, 2011, Chairman Issa and Senator Grassley sent a letter to the DEA requesting documents pertaining to another target of the Fast and Furious investigation.<sup>61</sup> The DEA was aware of this target before Fast and Furious became an OCDETF case, a fact that raises serious questions about the lack of information-sharing among Department components. Though DEA responded to the letter on July 22, 2011, it, too, did not provide any of the requested documents.<sup>62</sup>

On September 1, 2011, Chairman Issa and Senator Grassley wrote to the Acting U.S. Attorney in Arizona requesting documents and communications pertaining to Fast and Furious.<sup>63</sup> As the office responsible for leading Fast and Furious, the Arizona U.S. Attorney's Office possesses a large volume of documents relevant to the Committee's investigation. The Department of Justice, on behalf of the U.S. Attorney's Office for the District of Arizona, did not

<sup>55</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Sep. 1, 2011).

<sup>56</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Sep. 30, 2011).

<sup>57</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Oct. 11, 2011) [hereinafter Oct. 11 Letter].

<sup>58</sup> Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (July 11, 2011).

<sup>59</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Oct. 31, 2011) [hereinafter Oct. 31 Letter].

<sup>60</sup> Letter from Chairman Darrell Issa and Senator Charles Grassley to FBI Dir. Robert Mueller (July 11, 2011) [hereinafter Mueller Letter].

<sup>61</sup> Letter from Chairman Darrell Issa and Senator Charles Grassley to DEA Adm'r Michele Leonhart (July 15, 2011).

<sup>62</sup> Letter from DEA Adm'r Michele Leonhart to Chairman Darrell Issa and Senator Charles Grassley (July 22, 2011).

<sup>63</sup> Letter from Chairman Darrell Issa and Senator Charles Grassley to Acting U.S. Att'y Ann Scheel (Sep. 1, 2011).



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respond to this letter until December 6, 2011, the eve of the Attorney General's testimony before the House Judiciary Committee.<sup>64</sup>

On September 27, 2011, Chairman Issa and Senator Grassley sent a letter to the Attorney General raising questions about information-sharing among Department components, the Department's cooperation with Congress, and FBI documents requested in the July 11, 2011 letter to FBI Director Mueller.<sup>65</sup> To date, the Department has not responded to this letter.

The Department wrote to Chairman Issa on October 11, 2011, stating it had "substantially concluded [its] efforts to respond to the Committee requests set forth in the subpoena and the letter of June 8<sup>th</sup>."<sup>66</sup> The letter further stated:

[O]ther documents have not been produced or made available for these same reasons because neither redacting them nor making them available for review (as opposed to production) was sufficient to address our concerns. Our disclosure of the vast majority of the withheld material is prohibited by statute. These records pertain to matters occurring before a grand jury, as well as investigative activities under seal or the disclosure of which is prohibited by law . . . we also have not disclosed certain confidential investigative and prosecutorial documents, the disclosure of which would, in our judgment, compromise the pending criminal investigations and prosecution. These include core investigative and prosecutorial material, such as Reports of Investigation and drafts of court filings.

Finally . . . we have also withheld internal communications that were generated in the course of the Department's effort to respond to congressional and media inquiries about Operation Fast and Furious. These records were created in 2011, well after the completion of the investigative portion of Operation Fast and Furious that the Committee has been reviewing and after the charging decisions reflected in the January 25, 2011 indictments. Thus, they were not part of the communications regarding the development and implementation of the strategy decisions that have not been the focus of the Committee's inquiry. . . . Disclosure would have a chilling effect on agency officials' deliberations about how to respond to inquiries from Congress or the media. Such a chill on internal communications would interfere with our ability to respond as effectively and efficiently as possible to congressional oversight requests.<sup>67</sup>

<sup>64</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Dec. 6, 2011) [hereinafter Dec. 6 Letter].

<sup>65</sup> Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (Sep. 27, 2011).

<sup>66</sup> Oct. 11 Letter, *supra* note 57.

<sup>67</sup> *Id.*

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The following day, on October 12, 2011, after the Department announced its intention to cease producing documents responsive to the Committee's March 31, 2011 subpoena to Melson, the Committee issued a subpoena to Attorney General Eric Holder demanding documents relating to Fast and Furious.

#### **B. Subpoena Schedule Requests**

In the weeks following the issuance of the subpoena, Committee staff worked closely with Department lawyers to provide clarifications about subpoena categories, and to assist the Department in prioritizing documents for production. Committee and Department staff engaged in discussions spanning several weeks to enable the Department to better understand what the Committee was specifically seeking. During these conversations, the Committee clearly articulated its investigative priorities as reflected in the subpoena schedule. The Department memorialized these priorities with specificity in an October 31, 2011 e-mail from the Office of Legislative Affairs.<sup>68</sup>

Despite the Department's acknowledgement that it understands what the Committee was seeking, it has yet to provide a single document for 12 out of the 22 categories contained in the subpoena schedule. The Department has not adequately complied with the Committee's subpoena, and it has unequivocally stated its refusal to comply with entire categories of the subpoena altogether.

A review of each of the 22 schedule categories in the subpoena reflects the Department's clear understanding of the documents sought by the Committee for each category. Below is a listing of each category of the subpoena schedule, followed by what the Department has explained is its understanding of what the Committee is seeking for each category.

1. All communications referring or relating to Operation Fast and Furious, the Jacob Chambers case, or any Organized Crime Drug Enforcement Task Force (OCDETF) firearms trafficking case based in Phoenix, Arizona, to or from the following individuals:
  - a. Eric Holder Jr., Attorney General;
  - b. David Ogden, Former Deputy Attorney General;
  - c. Gary Grindler, Office of the Attorney General and former Acting Deputy Attorney General;
  - d. James Cole, Deputy Attorney General;
  - e. Lanny Breuer, Assistant Attorney General;
  - f. Ronald Weich, Assistant Attorney General;
  - g. Kenneth Blanco, Deputy Assistant Attorney General;
  - h. Jason Weinstein, Deputy Assistant Attorney General;
  - i. John Keeney, Deputy Assistant Attorney General;
  - j. Bruce Swartz, Deputy Assistant Attorney General;
  - k. Matt Axelrod, Associate Deputy Attorney General;
  - l. Ed Siskel, former Associate Deputy Attorney General;

<sup>68</sup> E-mail from Office of Leg. Affairs Staff, U.S. Dep't of Justice, to Investigations Staff, H. Comm. on Oversight and Gov't Reform (Oct. 31, 2011) [hereinafter OLA e-mail].

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- m. Brad Smith, Office of the Deputy Attorney General;
- n. Kevin Carwile, Section Chief, Capital Case Unit, Criminal Division;
- o. Joseph Cooley, Criminal Fraud Section, Criminal Division; and,
- p. James Trusty, Acting Chief, Organized Crime and Gang Section.

*Department Response:* In late October 2011, the Department acknowledged that it had “already begun searches of some of the custodians listed here relating to Fast and Furious, such as in response to the Chairman’s letter of 7/11/11.”<sup>69</sup> Still, it has produced no documents since the issuance of the subpoena pursuant to subpoena categories 1(a), 1(b), 1(g), 1(i), and 1(k), only two documents pursuant to subpoena category 1(d), and very few documents pursuant to subpoena category 1(j) and 1(l).

2. All communications between and among Department of Justice (DOJ) employees and Executive Office of the President employees, including but not limited to Associate Communications Director Eric Schultz, referring or relating to Operation Fast and Furious or any other firearms trafficking cases.

*Department Response:* According to the Department, the Committee identified for the Department several people likely to be custodians of these documents.<sup>70</sup> Still, the Department has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

3. All communications between DOJ employees and Executive Office of the President employees referring or relating to the President’s March 22, 2011 interview with Jorge Ramos of Univision.

*Department Response:* The Department represented that it would “check on communications with WH Press Office in the time period preceding the President’s 3/22/11 interview,” and that it had identified the most likely custodians of those documents.<sup>71</sup> Nonetheless, it has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

4. All documents and communications referring or relating to any instances prior to February 4, 2011 where the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) failed to interdict weapons that had been illegally purchased or transferred.

*Department Response:* The Department has produced some documents responsive to this subpoena category.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

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5. All documents and communications referring or relating to any instances prior to February 4, 2011 where ATF broke off surveillance of weapons and subsequently became aware that those weapons entered Mexico.

*Department Response:* The Department has produced documents responsive to this subpoena category.

Most of the responsive documents the Department has produced pursuant to the subpoena pertain to categories 4 and 5 and relate to earlier cases the Department has described as involving gunwalking. The Department produced these documents strategically, advancing its own narrative about why Fast and Furious was neither an isolated nor a unique program. It has attempted to accomplish this objective by simultaneously producing documents to the media and the Committee.

6. All documents and communications referring or relating to the murder of Immigrations and Customs Enforcement Agent Jaime Zapata, including, but not limited to, documents and communications regarding Zapata's mission when he was murdered, Form for Reporting Information That May Become Testimony (FD-302), photographs of the crime scene, and investigative reports prepared by the FBI.

*Department Response:* The Department "understand[s] that the Zapata family has complained that they've been 'kept in the dark' about this matter" which necessitated this subpoena category.<sup>72</sup> The Department "conferred with the U.S. Attorney's Office . . . which we hope will be helpful to them and perhaps address the concerns that are the basis of this item."<sup>73</sup> The Department, however, has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

In late February 2012, press accounts revealed that prosecutors had recently sentenced a second individual in relation to the murder of Immigration and Customs Enforcement (ICE) Agent Jaime Zapata. One news article stated that "[n]obody was more astonished to learn of the case than Zapata's parents, who didn't know that [the defendant] had been arrested or linked to their son's murder."<sup>74</sup> Press accounts alleged that the defendant had been "under ATF surveillance for at least six months before a rifle he trafficked was used in Zapata's murder" – a situation similar to what took place during Fast and Furious.<sup>75</sup> Despite this revelation, the Department has still failed to produce any documents responsive to this subpoena category.

7. All communications to or from William Newell, former Special Agent-in-Charge for ATF's Phoenix Field Division, between:

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Sharyl Attkisson, *Second gun used in ICE agent murder linked to ATF undercover operation*, (Feb. 22, 2012, 5:29 P.M.), [http://www.cbsnews.com/8301-31727\\_162-57383089-10391695/second-gun-used-in-ice-agent-murder-linked-to-atf-undercover-operation/](http://www.cbsnews.com/8301-31727_162-57383089-10391695/second-gun-used-in-ice-agent-murder-linked-to-atf-undercover-operation/).

<sup>75</sup> *Id.*

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- a. December 14, 2010 to January 25, 2011; and,
- b. March 16, 2009 to March 19, 2009.

*Department Response:* The Department has not produced any documents responsive to subpoena category 7(b), despite its understanding that the Committee sought documents pertaining “to communications with [Executive Office of the President] staff regarding gun control policy” within a specific and narrow timeframe.<sup>76</sup> The Department has not informed the Committee that no documents exist responsive to this schedule number.

- 8. All Reports of Investigation (ROIs) related to Operation Fast and Furious or ATF Case Number 785115-10-0004.

*Department Response:* Department representatives contended that this subpoena category “presents some significant issues for” the Department due to current and potential future indictments.<sup>77</sup> The Department has not produced any documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

- 9. All communications between and among Matt Axelrod, Kenneth Melson, and William Hoover referring or relating to ROIs identified pursuant to Paragraph 8.

*Department Response:* The Department acknowledged its understanding that this request specifically pertained to “emails Ken sent to Matt and Billy, expressing concerns, perhaps in March 2011, [that] are core to [the Committee’s] work, and we’ll look at those.”<sup>78</sup> Still, it has produced no documents pursuant to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

- 10. All documents and communications between and among former U.S. Attorney Dennis Burke, Attorney General Eric Holder Jr., former Acting Deputy Attorney General Gary Grindler, Deputy Attorney General James Cole, Assistant Attorney General Lanny Breuer, and Deputy Assistant Attorney General Jason Weinstein referring or relating to Operation Fast and Furious or any OCDETF case originating in Arizona.

*Department Response:* The Department has produced some documents pursuant to this subpoena category.

- 11. All communications sent or received between:

- a. December 16, 2009 and December 18, 2009, and;
- b. March 9, 2011 and March 14, 2011, to or from the following individuals:

<sup>76</sup> OLA e-mail, *supra* note 68.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

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- i. Emory Hurley, Assistant U.S. Attorney, Office of the U.S. Attorney for the District of Arizona;
- ii. Michael Morrissey, Assistant U.S. Attorney, Office of the U.S. Attorney for the District of Arizona;
- iii. Patrick Cunningham, Chief, Criminal Division, Office of the U.S. Attorney for the District of Arizona;
- iv. David Voth, Group Supervisor, ATF; and,
- v. Hope MacAllister, Special Agent, ATF.

*Department Response:* The Department acknowledged that it “will first search these custodians for records re a) the Howard meeting in 12/09; and b) the ROI or memo that was written during this time period relating to the Howard mtng in 12/09.”<sup>79</sup> Although the Department has produced documents that are purportedly responsive to this category, these documents do not pertain to the subject matter that the Department understands that the Committee is seeking.

12. All communications sent or received between December 15, 2010 and December 17, 2010 to or from the following individuals in the U.S. Attorney’s Office for the District of Arizona:
- a. Dennis Burke, former United States Attorney;
  - b. Emory Hurley, Assistant United States Attorney;
  - c. Michael Morrissey, Assistant United States Attorney; and,
  - d. Patrick Cunningham, Chief of the Criminal Division.

*Department Response:* The Department understood that the Committee’s “primary interest here is in the communications during this time period that relate to the Terry death and, per our conversation, we will start with those.”<sup>80</sup> Although the Department has produced some documents responsive to this subpoena category, it has not represented that it has produced all responsive documents in this category.

13. All communications sent or received between August 7, 2009 and March 19, 2011 between and among former Ambassador to Mexico Carlos Pascual; Assistant Attorney General Lanny Breuer; and Deputy Assistant Attorney General Bruce Swartz.

*Department Response :* The Department acknowledged that it “understand[s] the Committee’s focus here is Firearms Trafficking issues along the SW Border, not limited to Fast & Furious.”<sup>81</sup> Despite the Department’s understanding, it has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

14. All communications sent or received between August 7, 2009 and March 19, 2011 between and among former Ambassador to Mexico Carlos Pascual and any Department of

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

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Justice employee based in Mexico City referring or relating to firearms trafficking initiatives, Operation Fast and Furious or any firearms trafficking case based in Arizona, or any visits by Assistant Attorney General Lanny Breuer to Mexico.

*Department Response:* The Department has produced approximately ten pages pursuant to this subpoena category, even though it “understand[s] that [the Committee] wants [the Department] to approach this effort with efficiency.”<sup>82</sup> Despite the Committee’s request for an efficient effort, the Department produced a key document regarding Attorney General Lanny Breuer three and a half months after the subpoena was issued, after several previous document productions, and long after Breuer testified before Congress and could be questioned about the document. Given the importance of the contents of the document and the request for an efficient effort on the part of the Department in this subpoena category, it is inconceivable that the Department did not discover this document months prior to its production. The Department’s actions suggest that it kept this document hidden for strategic and public relations reasons.

15. Any FD-302 relating to targets, suspects, defendants, or their associates, bosses, or financiers in the Fast and Furious investigation, including but not limited to any FD-302s ATF Special Agent Hope MacAllister provided to ATF leadership during the calendar year 2011.

*Department Response:* The Department “understand[s] that [the Committee’s] primary focus here is the 5 FBI 302s that were provided to SA MacAllister, which she later gave to Messrs. Hoover and Melson.”<sup>83</sup> Despite the specificity of this document request, the Department has not produced any documents responsive to this schedule number. The Department has not informed the Committee that no documents exist responsive to this schedule number.

16. Any investigative reports prepared by the FBI or Drug Enforcement Administration (DEA) referring or relating to targets, suspects, or defendants in the Fast and Furious case.

*Department Response:* The Department was “uncertain about the volume here,” regarding the amount of documents, and pledged to “work[] on this [with] DEA and FBI.”<sup>84</sup> Despite this pledge, it has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

17. Any investigative reports prepared by the FBI or DEA relating to the individuals described to Committee staff at the October 5, 2011 briefing at Justice Department headquarters as Target Number 1 and Target Number 2.

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

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*Department Response:* The Department acknowledged that it “think[s] we understand this item.”<sup>85</sup> Despite this understanding, it has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

18. All documents and communications in the possession, custody or control of the DEA referring or relating to Manuel Fabian Celis-Acosta.

*Department Response:* The Department agreed to “start with records regarding information that DEA shared with ATF about Acosta, which we understand to be the focus of your interest in this item.”<sup>86</sup> Despite this understanding, the Department has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

19. All documents and communications between and among FBI employees in Arizona and the FBI Laboratory, including but not limited to employees in the Firearms/Toolmark Unit, referring or relating to the firearms recovered during the course of the investigation of Brian Terry’s death.

*Department Response:* The Department’s understanding was that “[the Committee’s] focus here is how evidence was tagged at the scene of Agent Terry’s murder, how evidence was processed, how the FBI ballistics report was prepared and what it means.”<sup>87</sup> Despite this clear understanding, the Department has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

20. All agendas, meeting notes, meeting minutes, and follow-up reports for the Attorney General’s Advisory Committee of U.S. Attorneys between March 1, 2009 and July 31, 2011, referring or relating to Operation Fast and Furious.

*Department Response:* This category asks for documents from the Attorney General’s Advisory Committee within a clearly specified date range. Despite the fact that the Department has acknowledged this category “is clear,” the Department has produced no documents responsive to this subpoena category.<sup>88</sup> The Department has not informed the Committee that no documents exist responsive to this schedule number.

21. All weekly reports and memoranda for the Attorney General, either directly or through the Deputy Attorney General, from any employee in the Criminal Division, ATF, DEA, FBI, or the National Drug Intelligence Center created between November 1, 2009 and September 30, 2011.

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



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*Department Response:* This category asks for weekly reports and memoranda to the Attorney General from five different Department components “regarding ATF cases re firearms trafficking.”<sup>89</sup> The Department has produced some documents responsive to this subpoena category.

22. All surveillance tapes recorded by pole cameras inside the Lone Wolf Trading Co. store between 12:00 a.m. on October 3, 2010 and 12:00 a.m. on October 7, 2010.

*Department Response:* This category asks for all ATF surveillance tapes from Lone Wolf Trading Company between two specified dates in October 2010. Both the Committee and the Department “understand a break-in occurred” at that time.<sup>90</sup> The Department has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

**C. Attempts of Accommodation by the Committee, Lack of Compliance by the Justice Department**

In public statements, the Department has maintained that it remains committed to “work[ing] to accommodate the Committee’s legitimate oversight needs.”<sup>91</sup> The Department, however, believes it is the sole arbiter of what is “legitimate.” In turn, the Committee has gone to great lengths to accommodate the Department’s interests as an Executive Branch agency. Unfortunately, the Department’s actions have not matched its rhetoric. Instead, it has chosen to prolong the investigation and impugn the motives of the Committee. A statement the Attorney General made at the February 2, 2012, hearing was emblematic of the Department’s posture with respect to the investigation:

But I also think that if we are going to really get ahead here, if we are really going to make some progress, we need to put aside the political gotcha games in an election year and focus on matters that are extremely serious.<sup>92</sup>

This attitude with respect to a legitimate congressional inquiry has permeated the Department’s ranks. Had the Department demonstrated a willingness to cooperate with this investigation from the outset – instead of attempting to cover up its own internal mismanagement – this investigation likely would have concluded well before the election year even began. The Department has intentionally withheld documents for months, only to release a selected few on the eve of the testimony of Department officials.<sup>93</sup> The Department has impeded the ability of a

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Fast and Furious: Management Failures at the Department of Justice: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. (Feb. 2, 2012) (Statement of Hon. Eric H. Holder, Jr., Att’y Gen. of the U.S.).

<sup>92</sup> *Id.*

<sup>93</sup> On Friday January 27, 2012, just days before the Attorney General testified before Congress, documents were delivered to the Senate Judiciary Committee so late in the evening that a disc of files had to be slipped under the

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co-equal branch of government to perform its constitutional duty to conduct Executive Branch oversight. By any measure, it has obstructed and slowed the Committee's work.

The Committee has been unfailingly patient in working with Department representatives to obtain information the Committee requires to complete its investigation. The Department's progress has been unacceptably slow in responding to the October 12, 2011 subpoena issued to the Attorney General. Complying with the Committee's subpoena is not optional. Indeed, the failure to produce documents pursuant to a congressional subpoena is a violation of federal law.<sup>94</sup> Because the Department has not cited any legal authority as the basis for withholding documents pursuant to the subpoena its efforts to accommodate the Committee's constitutional obligation to conduct oversight of the Executive Branch are incomplete.

#### 1. *In Camera* Reviews

In an attempt to accommodate the Justice Department's interests, Committee staff has viewed documents responsive to the subpoena that the Department has identified as sensitive *in camera* at Department headquarters. Committee staff has visited the Department on April 12, May 4, June 17, October 12, and November 3, 2011, as well as on January 30 and February 27, 2012 to view these documents. Many of the documents made available for *in camera* review, however, have been repetitive in nature. Many other documents seemingly do not contain any sensitive parts that require them to be viewed *in camera*. Other documents are altogether non-responsive to the subpoena.

Committee staff has spent dozens of hours at Department headquarters reviewing these documents. In addition, the Department has identified hundreds of other sensitive documents responsive to the subpoena, which it refuses to make available even for *in camera* review, instead withholding them from the Committee altogether. The Committee has made these accommodations to the Department at the expense of not being able to make these documents available for review by Committee Members.

#### 2. Redacted Documents

The Department has redacted varying portions of many of the documents it has produced. These redactions purportedly protect ongoing criminal investigations and prosecutions, as well as other sensitive data. The Department has so heavily redacted some documents produced to Congress that they are unintelligible. There appears to be no objective, consistent criteria delineating why some documents were redacted, only provided *in camera*, or withheld entirely.

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door. This is not only an extreme inconvenience for congressional staff but also deprives staff of the ability to review the materials in a timely manner.

<sup>94</sup> 2 U.S.C. § 192 states, in pertinent part:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before . . . any committee of either House of Congress, willfully makes default . . . shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

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On the evening of May 2, 2011, Department of Justice representatives notified the Committee that the Department was planning to make approximately 400 pages of documents available for an *in camera* review at its headquarters.<sup>95</sup> Committee staff went to review those documents on May 4, 2011, only to discover they were partially, or in some cases almost completely, redacted. Since these documents were only made available pursuant to Committee's first subpoena and only on an *in camera* basis, redactions were inappropriate and unnecessary.

On June 14, 2011 the Department produced 65 pages of documents to the Committee in a production labeled "Batch 4."<sup>96</sup> Of these 65 pages, every single one was at least partially redacted, 44 were completely redacted, and 61 had redactions covering more than half of the page.

On July 18, 2011, after more than a month of discussions between Committee and Department staff, the Department finally included a redaction code that identifies the reason for each redaction within a document.<sup>97</sup> While the Department has used this redaction code in subsequent document productions to the Committee, documents produced and redacted prior to July 18, 2011 do not have the benefit of associated redaction codes for each redaction.

The Department has over-redacted certain documents. The Committee has obtained many of these documents through whistleblowers and has compared some of them with those produced by the Department. In some instances, the Department redacted more text than necessary, making it unnecessarily difficult and sometimes impossible for the Committee, absent the documents provided by whistleblowers, to investigate decisions made by Department officials.

Further, any documents made available pursuant to the Committee's subpoenas must not have any redactions. To fully and properly investigate the decisions made by Department officials during Fast and Furious, the Committee requires access to documents in their entirety. The Department has not complied with this requirement.

The Committee does recognize the importance of privacy interests and other legitimate reasons the Department has for redacting portions of documents produced to the Committee. The Committee has attempted to accommodate the Department's stated concerns related to documents it believes are sensitive. The Committee intended to release 230 pages of documents in support of its July 26, 2011 report entitled *The Department of Justice's Operation Fast and Furious: Fueling Cartel Violence*, and gave the Department an opportunity to suggest its own redactions before the documents became public.<sup>98</sup> These actions are consistent with the Committee's willingness to accommodate the Department's interests.

<sup>95</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (May 2, 2011).

<sup>96</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 14, 2011).

<sup>97</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (July 18, 2011).

<sup>98</sup> E-mail from Office of Leg. Affairs Staff, U.S. Dep't of Justice, to Staff, H. Comm. on Oversight and Gov't Reform (July 28, 2011).

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### 3. Privilege Log

Mindful of the Justice Department's prerogatives as an Executive Branch agency, the Committee has offered the opportunity for the Department to prepare a privilege log of documents responsive to the subpoena but withheld from production. A privilege log would outline the documents withheld and the specific grounds for withholding. Such a log would serve as the basis for negotiation between the Committee and the Department about prioritizing the documents for potential production.

On January 31, 2012, Chairman Issa wrote to the Attorney General. He said:

Should you choose to continue to withhold documents pursuant to the subpoena, you must create a detailed privilege log explaining why the Department is refusing to produce each document. If the Department continues to obstruct the congressional inquiry by not providing documents and information, this Committee will have no alternative but to move forward with proceedings to hold you in contempt of Congress.<sup>99</sup>

On February 14, 2012, Chairman Issa again wrote to the Attorney General. He said:

We cannot wait any longer for the Department's cooperation. As such please specify a date by which you expected the Department to produce all documents responsive to the subpoena. In addition, please specify a Department representative who will interface with the Committee for production purposes . . . This person's primary responsibility should be to identify for the Committee all documents the Department has determined to be responsive to the subpoena but is refusing to produce, and should provide a privilege log of the documents delineating why each one is being withheld from Congress. Please direct this individual to produce this log to the Committee without further delay.<sup>100</sup>

On several occasions, Committee staff has asked the Department to provide such a privilege log, including a listing, category-by-category, of documents the Department has located pursuant to the subpoena and the reason the Department will not produce those documents. Despite these requests, however, the Department has neither produced a privilege log nor responded to this aspect of Chairman Issa's letters of January 31, 2012 and February 14, 2012.

The Department has not informed the Committee that it has been unable to locate certain documents. This suggests that the Department is not producing responsive documents in its possession. Since the Department will not produce a privilege log, it has failed to make a good faith effort to accommodate the Committee's legitimate oversight interests.

<sup>99</sup> Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Jan. 31, 2012) [hereinafter Jan. 31 Letter].

<sup>100</sup> Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Feb. 14, 2012) (emphasis in original) [hereinafter Feb. 14 Letter].

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#### 4. Assertions of Non-Compliance

The Committee's investigation into Operation Fast and Furious is replete with instances in which the Justice Department has openly acknowledged it would not comply with the Committee's requests. These pronouncements began with the March 31, 2011 subpoena to the former Acting ATF Director, continued through the Committee's October 12, 2011 subpoena to the Attorney General, and persist to this day.

##### a) March 31, 2011 Subpoena

On March 16, 2011, Chairman Issa sent a letter to the then-Acting ATF Director requesting documents about Fast and Furious.<sup>101</sup> As part of this request, Chairman Issa asked for a "list of individuals responsible for authorizing the decision to 'walk' guns to Mexico in order to follow them and capture a 'bigger fish.'"<sup>102</sup> On the afternoon of March 30, 2011, the deadline given in Chairman Issa's letter, Department staff participated in a conference call with Committee staff. During that call, Department staff expressed a lack of understanding over the meaning of the word "list."<sup>103</sup> Department officials further informed Committee staff that the Department would not produce documents by the deadline and were uncertain when they would produce documents in the future. Committee staff understood this response to mean the Department did not intend to cooperate with the Committee's investigation.

The next day Chairman Issa authorized a subpoena for the Acting ATF Director. The following day, the Department wrote to Chairman Issa. Assistant Attorney General Ronald Weich wrote:

As you know, the Department has been working with the Committee to provide documents responsive to its March 16 request to the Bureau of Alcohol, Tobacco, Firearms and Explosives. Yesterday, we informed Committee staff that we intended to produce a number of responsive documents within the next week. As we explained, there are some documents that we would be unable to provide without compromising the Department's ongoing criminal investigation into the death of Agent Brian Terry as well as other investigations and prosecutions, but we would seek to work productively with the Committee to find other ways to be responsive to its needs.<sup>104</sup>

Despite the Department's stated intention to produce documents within the next week, it produced no documents for over two months, until June 10, 2011. In the interim, the Department made little effort to work with the Committee to define the scope of the documents required by the subpoena.

<sup>101</sup> Mar. 16 Letter, *supra* note 50.

<sup>102</sup> *Id.*

<sup>103</sup> Teleconference between Committee Staff and U.S. Dep't of Justice Office of Leg. Affairs Staff (Mar. 30, 2011).

<sup>104</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 1, 2011).

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On April 8, 2011, the Department wrote to Chairman Issa to inform the Committee that it had located documents responsive to the subpoena. Assistant Attorney General Weich wrote that the Department did not plan to share many of these materials with the Committee. His letter stated:

To date, our search has located several law enforcement sensitive documents responsive to the requests in your letter and the subpoena. We have substantial confidentiality interests in these documents because they contain information about ATF strategies and procedures that could be used by individuals seeking to evade our law enforcement efforts. We are prepared to make these documents, with some redactions, available for review by Committee staff at the Department. They will bear redactions to protect information about ongoing criminal investigations, investigative targets, internal deliberations about law enforcement options, and communications with foreign government representatives. In addition, we notified Committee staff that we have identified certain publicly available documents that are responsive. While our efforts to identify responsive documents are continuing, many of your requests seek records relating to ongoing criminal investigations. Based upon the Department's longstanding policy regarding the confidentiality of ongoing criminal investigations, we are not in a position to disclose such documents, nor can we confirm or deny the existence of records in our ongoing investigative files. This policy is based on our strong need to protect the independence and effectiveness of our law enforcement efforts.<sup>105</sup>

The letter cited prior Department policy in support of its position of non-compliance:

We are dedicated to holding Agent Terry's killer or killers responsible through the criminal justice process that is currently underway, but we are not in a position to provide additional information at this time regarding this active criminal investigation for the reasons set forth above. . . .<sup>106</sup>

On June 14, 2011, after the Department had produced 194 pages of non-public documents pursuant to the subpoena, the Department informed the Committee that it was deliberately withholding certain documents:

As with previous oversight matters, we have not provided access to documents that contain detailed information about our investigative activities where their disclosure would harm our pending investigations and prosecutions. This includes information that would identify investigative subjects, sensitive techniques, anticipated actions, and other details that would assist individuals in evading our law enforcement efforts. Our judgments begin with the premise that we will disclose as much as possible that is responsive to the Committee's interests, consistent

<sup>105</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 8, 2011).

<sup>106</sup> *Id.*

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with our responsibilities to bring to justice those who are responsible for the death of Agent Terry and those who violate federal firearms laws.<sup>107</sup>

The June 14, 2011 letter arrived one day after the Committee held a hearing featuring constitutional experts discussing the legal obligations of the Department to comply with a congressional subpoena. The Department's letter did not address the views expressed at the hearing, instead reiterating its internal policy. The letter noted that the Department would not provide access to documents discussing its use of "sensitive techniques" – even though these techniques were central to the Committee's investigation.

On July 5, 2011, Chairman Issa and Senator Grassley wrote to the Department about serious issues involving the lack of information sharing among Department components, in particular, between the FBI and DEA.<sup>108</sup> These issues raised the possibility that the Department had been deliberately concealing information about Fast and Furious from the Committee, including the roles of its component agencies. The next day, the Department responded. It wrote:

Your letter raises concerns about the alleged role of other agencies in matters that you say touch on Operation Fast and Furious. Chairman Issa's staff previously raised this issue with representatives of the Department and it is my understanding that discussions about whether and how to provide any such sensitive law enforcement information have been ongoing. . . .<sup>109</sup>

On July 11, 2011, Chairman Issa and Senator Grassley wrote to the FBI requesting information on the issue of information sharing within the Department. The letter included a request for information relating to the murder of Immigrations and Customs Enforcement Agent Jaime Zapata.<sup>110</sup> On August 12, 2011, the FBI responded. It wrote:

Your letter also asks for specific information related to the crime scene and events leading to the murder of ICE Agent Jaime Zapata in Mexico on February 15, 2011. As you know, crime scene evidence and the circumstances of a crime are generally not made public in an ongoing investigation. Furthermore, the investigative reports of an ongoing investigation are kept confidential during the investigation to preserve the integrity of the investigation and to ensure its successful conclusion. We regret that we cannot provide more details about the investigation at this time, but we need to ensure all appropriate steps are taken to protect the integrity of the investigation.<sup>111</sup>

<sup>107</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 14, 2011).

<sup>108</sup> Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (July 5, 2011).

<sup>109</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (July 6, 2011).

<sup>110</sup> Mueller Letter, *supra* note 60.

<sup>111</sup> Letter from Stephen Kelley, Ass't Dir., FBI Office of Congressional Affairs, to Chairman Darrell Issa and Senator Charles Grassley (Aug. 12, 2011).

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The FBI did not provide any documents to the Committee regarding the information sharing issues raised, though it did offer to provide a briefing to staff. It delivered that briefing nearly two months later, on October 5, 2011.

On October 11, 2011, the Department wrote to Chairman Issa. The Department stated:

We believe that we have now substantially concluded our efforts to respond to the Committee requests set forth in the subpoena and the letter of June 8<sup>th</sup>.<sup>112</sup>

The Department was well aware that the Committee was struggling to understand how the Department created its February 4, 2011 letter to Senator Grassley, which the Committee believed to contain false information. To that end, the Department stated:

As we have previously explained to Committee staff, we have also withheld internal communications that were generated in the course of the Department's effort to respond to congressional and media inquiries about Operation Fast and Furious. These records were created in 2011, well after the completion of the investigative portion of Operation Fast and Furious that the Committee has been reviewing and after the charging decisions reflected in the January 25, 2011 indictments. Thus, they were not part of the communications regarding the development and implementation of the strategy decisions that have been the focus of the Committee's inquiry. It is longstanding Executive Branch practice not to disclose documents falling into this category because disclosure would implicate substantial Executive Branch confidentiality interests and separation of powers principles. Disclosure would have a chilling effect on agency officials' deliberations about how to respond to inquiries from Congress or the media. Such a chill on internal communications would interfere with our ability to respond as effectively and efficiently as possible to congressional oversight requests.<sup>113</sup>

The next day, the Committee issued a subpoena to Attorney General Holder.

#### **b) October 12, 2011 Subpoena**

On October 31, 2011, the Department produced its first batch of documents pursuant to the Committee's October 12, 2011 subpoena.<sup>114</sup> This production consisted of 652 pages. Of these 652 pages, 116 were about the Kingery case, a case that the Department wanted to highlight in an attempt to discredit some of the original Fast and Furious whistleblowers. Twenty-eight additional pages were about an operation from the prior administration, the Hernandez case, and 245 pages were about another operation from the prior administration, Operation Wide Receiver.

<sup>112</sup> Oct. 11 Letter, *supra* note 57.

<sup>113</sup> *Id.*

<sup>114</sup> Oct. 31 Letter, *supra* note 59.



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Although the subpoena covered documents from the Hernandez and Wide Receiver cases, their inclusion into the first production batch under the subpoena was indicative of the Department's strategy in responding to the subpoena. The Department briefed the press on these documents at the same time as it produced them to the Committee. The Department seemed more interested in spin control than in complying with the congressional subpoena. Sixty percent of the documents in this first production were related to either Kingery, Hernandez, or Wide Receiver, and therefore, unrelated to the gravamen of the Committee's investigation into Fast and Furious.

On December 2, 2011, shortly before the Attorney General's testimony before the House Judiciary Committee, the Department produced 1,364 pages of documents pertaining to the creation of its February 4, 2011 letter.<sup>115</sup> Despite its statements in the October 11, 2011 letter, the Department, through a letter from Deputy Attorney General James Cole, publicly admitted under pressure its obvious misstatements, formally acknowledging that the February 4, 2011 letter "contains inaccuracies."<sup>116</sup>

On December 13, 2011, on the eve of the Committee's interview with Gary Grindler, Chief of Staff to the Attorney General, the Department produced 19 pages of responsive documents.<sup>117</sup>

On January 5, 2012, the Department produced 482 pages of documents responsive to the subpoena.<sup>118</sup> Of these 482 pages, 304 of them, or 63 percent, were related to the Wide Receiver case. This production brought the total number of pages produced pursuant to Wide Receiver to 549, nearly 100 more than the Department had produced at that time regarding Fast and Furious in three document productions.

On January 27, 2012 the Department produced 486 pages of documents pursuant to the October 12, 2011 subpoena.<sup>119</sup> In its cover letter, the Department stated, "[t]he majority of materials produced today are responsive to items 7, 11 and 12 of your October 11 subpoena." There are no documents in the production, however, responsive to items 7(b) or 11(b)(i-v). The Department wrote in its January 27 cover letter:

We are producing or making available for review materials that are responsive to these items, most of which pertain to the specific investigations that we have already identified to the Committee. We are not, however, providing materials pertaining to other matters, such as documents regarding ATF cases that do not appear to involve the inappropriate tactics under review by the Committee; non-ATF cases, except for certain information relating to the death of Customs and Border

<sup>115</sup> Letter from Deputy Att'y Gen. James Cole to Chairman Darrell Issa and Senator Charles Grassley (Dec. 2, 2011).

<sup>116</sup> *Id.*

<sup>117</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Dec. 13, 2011).

<sup>118</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Jan. 5, 2012).

<sup>119</sup> Cole Letter, *supra* note 37.

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Protection Agent Brian Terry; administrative matters; and personal records.<sup>120</sup>

The Department refused to produce documents pursuant to the subpoena regarding investigations that it had not previously specified to the Committee, or investigations that “do not appear” to involve inappropriate tactics. In doing so, the Department made itself the sole arbiter of the Committee’s investigative interests, as well as of the use of “inappropriate” tactics. The Department has prevented Congress from executing its constitutionally mandated oversight function, preferring instead to self-regulate.

The October 12, 2011 subpoena, however, covers all investigations in which ATF failed to interdict weapons that had been illegally purchased or transferred – not just those cases previously identified by the Department. The subpoena does not give the Department the authority to define which tactics are inappropriate. Rather, the language in sections 4 and 5 of the subpoena schedule is clear. The Department’s refusal to cooperate on this front and only produce documents about investigations that it had previously identified – documents that support the Department’s press strategy – is in violation of its obligation to cooperate with congressional oversight.

On January 31, 2012, Chairman Issa again wrote to the Attorney General, this time asking that the Department produce all documents pursuant to the subpoena by February 9, 2012.<sup>121</sup> The following day, the Department responded. It stated:

Your most recent letter asks that we complete the production process under the October 11, 2011 subpoena by February 9, 2012. The broad scope of the Committee’s requests and the volume of material to be collected, processed and reviewed in response make it impossible to meet that deadline, despite our good faith efforts. We will continue in good faith to produce materials, but it simply will not be possible to finish the collection, processing and review of materials by the date sought in your most recent letter.<sup>122</sup>

Yet, as discussed in Section V.B above, the Department was acutely aware in October 2011, approximately three months earlier, exactly what categories of documents the Committee was seeking. In response to the subpoena, the Department had, up to February 1, 2012, produced more documents relating to a single operation years before *Fast and Furious* even began than it had relating to Operation *Fast and Furious* itself.

On February 16, 2012, the Department produced 304 pages of documents pursuant to the subpoena.<sup>123</sup> The production included nearly 60 pages of publicly available and previously produced information, as well as other documents previously produced to the Committee.

<sup>120</sup> *Id.*

<sup>121</sup> Jan. 31 Letter, *supra* note 99.

<sup>122</sup> Letter from Deputy Att’y Gen. James Cole to Chairman Darrell Issa (Feb. 1, 2012) [hereinafter Feb. 1 Letter].

<sup>123</sup> Letter from Ass’t Att’y Gen. Ronald Weich to Chairman Darrell Issa (Feb. 16, 2012) [hereinafter Feb. 16 Letter].

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On February 27, 2012, the Department produced eight pages pursuant to the subpoena.<sup>124</sup> These eight pages, given to the Committee by a whistleblower ten months earlier, were produced only because a transcribed interview with a former Associate Deputy Attorney General was to take place the next day.

On March 2, 2012, the Department produced 26 pages of documents pursuant to the October 12, 2011 subpoena.<sup>125</sup> Five of these documents were about the Kingery. Fourteen documents – over half of the production – related to Wide Receiver. Seven pages were duplicate copies of a press release already produced to the Committee.

On March 16, 2012, the Department produced 357 pages of documents pursuant to the subpoena. Three hundred seven of these pages, or 86%, related to the Hernandez and Medrano cases from the prior Administration. Twenty other pages had been previously produced by the Department, and seven pages were publicly available on the Justice Department's website.

On April 3, 2012, the Department produced 116 pages of documents pursuant to the subpoena. Forty four of these pages, or 38%, related to cases other than Fast and Furious. On April 19, 2012, the Department produced 188 pages of documents pursuant to the subpoena.

The Department has produced a total of 6,959 pages to the Committee to date.<sup>126</sup>

#### **c) Post-February 4, 2011 Documents**

Many of the documents the October 12, 2011 subpoena requires were created or produced after February 4, 2011. The Department first responded to Congress about Fast and Furious on this date. The Department has steadfastly refused to make any documents created after February 4, 2011 available to the Committee.

The Department's actions following the February 4, 2011 letter to Senator Grassley are crucial in determining how it responded to the serious allegations raised by the whistleblowers. The October 12, 2011 subpoena covers documents that would help Congress understand what the Department knew about Fast and Furious, including when and how it discovered its February 4 letter was false, and the Department's efforts to conceal that information from Congress and the public. Such documents would include those relating to actions the Department took to silence or retaliate against Fast and Furious whistleblowers and to find out what had happened, and how the Department assessed the culpability of those involved in the program.

The Attorney General first expressed the Department's position regarding documents created after February 4, 2011 in his testimony before the House Judiciary Committee on December 8, 2011. In no uncertain terms, he stated:

[W]ith regard to the Justice Department as a whole – and I'm certainly a member of the Justice Department – we will not provide memos after

<sup>124</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Feb. 27, 2012).

<sup>125</sup> Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Mar. 2, 2012).

<sup>126</sup> The most recent production by the Department, on April 19, 2012, ended with Bates number HOCR 006959.

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February the 4th . . . e-mails, memos – consistent with the way in which the Department of Justice has always conducted itself in its interactions.<sup>127</sup>

He again impressed this point upon Committee Members later in the hearing:

Well, with the regard to provision of e-mails, I thought I've made it clear that after February the 4th it is not our intention to provide e-mail information consistent with the way in which the Justice Department has always conducted itself.<sup>128</sup>

The Department reiterated this position less than a week later in a December 14, 2011, transcribed interview of Gary Grindler, the Attorney General's Chief of Staff. Department counsel broadened the Department's position with respect to sharing documents created after February 4, 2011 in refusing to allow Grindler to answer any questions relating to conversations that he had with anyone in the Department regarding Fast and Furious after February 4, 2011. Grindler stated:

What I am saying is that the Attorney General made it clear at his testimony last week that we are not providing information to the committee subsequent to the February 4th letter.<sup>129</sup>

Department counsel expanded the position the Attorney General articulated regarding documentary evidence at the House Judiciary Committee hearing to include testimonial evidence as well.<sup>130</sup> Given the initial response by the Department to the congressional inquiry into Fast and Furious, the comments by Department counsel created a barrier preventing Congress from obtaining vital information about Fast and Furious.

The Department has maintained this position during additional transcribed interviews. In an interview with Deputy Assistant Attorney General Jason Weinstein on January 10, 2012, Department counsel prohibited him from responding to an entire line of questioning about his interactions with the Arizona U.S. Attorney's Office because it "implicates the post-February 4th period."<sup>131</sup>

The post-February 4 period is replete with details germane to the Committee's investigation. Documents encompassing this period are responsive to the October 12, 2011 subpoena. For example, following the February 4, 2011, letter, Weinstein, at the behest of Assistant Attorney General Breuer, prepared an analytical review of Fast and Furious.<sup>132</sup> Weinstein interviewed Emory Hurley and Patrick Cunningham of the Arizona U.S. Attorney's

<sup>127</sup> *Oversight Hearing on the United States Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. (Dec. 8, 2011) (Test. of Hon. Eric H. Holder, Jr., Att'y Gen. of the U.S.).

<sup>128</sup> *Id.*

<sup>129</sup> Transcribed Interview of Gary Grindler, Chief of Staff to the Att'y Gen., at 22 (Dec. 14, 2011) [hereinafter Grindler Tr.].

<sup>130</sup> *Id.*

<sup>131</sup> Transcribed Interview of Jason Weinstein, Deputy Ass't Att'y Gen. at 177 (Jan. 10, 2012).

<sup>132</sup> Transcribed Interview of Dennis K. Burke at 158-60 (Dec. 13, 2011).

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office in conducting this review.<sup>133</sup> The document that resulted from Weinstein's analysis specifically discussed issues relevant to the Committee's inquiry. To date, the Department has not produced this document to the Committee.

Chairman Issa has sent several letters urging the Department urging to produce documents pertaining to the Fast and Furious from the post-indictment period, and raising the possibility of contempt if the Attorney General chose not to comply. Initially, the Department refused to produce any documents created after January 25, 2011, the date that the case was unsealed. On November 9, 2011, Chairman Issa wrote to the Department:

Over the past six months, Senator Grassley and I have asked for this information on many occasions, and each time we have been told it would not be produced. This information is covered by the subpoena served on the Attorney General on October 12, 2011, and I expect it to be produced no later than Wednesday, November 16, at 5:00 p.m. Failure to comply with this request will leave me with no other alternative than the use of compulsory process to obtain your testimony under oath.

\*\*\*

Understanding the Department's actions after Congress started asking questions about Fast and Furious is crucial. As you know, substantial effort was expended to hide the actions of the Department from Congress . . . I expect nothing less than full compliance with all aspects of the subpoena, including complete production of documents created after the indictments were unsealed on January 25, 2011.<sup>134</sup>

On December 2, 2011, the Department produced documents pertaining to its February 4, 2011 response to Senator Grassley. When the Attorney General testified before Congress on December 8, 2011, he created a new cutoff date of February 4, 2011, after which no documents would be produced to Congress, despite the fact that such documents were covered by the October 12, 2011 subpoena. In support of this position regarding post-February 4, 2011 documents, in transcribed interviews, Department representatives have asserted a "separation of powers" privilege without further explanation or citation to legal authority.<sup>135</sup> The Department has not cited any legal authority to support this new, extremely broad assertion of privilege.

On January 31, 2012, Chairman Issa wrote to the Attorney General about this new, arbitrary date created by the Department, and raised the possibility of contempt:

In short, the Committee requires full compliance with all aspects of the subpoena, including complete production of documents created after the Department's February 4, 2011 letter . . . . If the Department continues to obstruct the congressional inquiry by not providing documents and

<sup>133</sup> *Id.* at 158-59.

<sup>134</sup> Letter from Chairman Darrell Issa to Ass't Att'y Gen. Ronald Weich (Nov. 9, 2011).

<sup>135</sup> *See, e.g.,* Grindler Tr. at 22.

information, this Committee will have no alternative but to move forward with proceedings to hold you in contempt of Congress.<sup>136</sup>

The Department responded the following day. It said:

To the extent responsive materials exist that post-date congressional review of this matter and were not generated in that context or to respond to media inquiries, and likewise do not implicate other recognized Department interests in confidentiality (for example, matters occurring before a grand jury, investigative activities under seal or the disclosure of which is prohibited by law, core investigative information, or matters reflecting internal Department deliberations), we intend to provide them.<sup>137</sup>

The Department quoted from its October 11, 2011 letter, stating:

[A]s we have previously explained to Committee staff, we have also withheld internal communications that were generated in the course of the Department's effort to respond to congressional and media inquiries about Operation Fast and Furious. These records were created in 2011, well after the completion of the investigative portion of Operation Fast and Furious that the Committee has been reviewing and after the charging decisions reflected in the January 25, 2011 indictments. Thus, they were not part of the communications regarding the development and implementation of the strategy decisions that have been the focus of the Committee's inquiry. It is longstanding Executive Branch practice not to disclose documents falling into this category because disclosure would implicate substantial Executive Branch confidentiality interests and separation of powers principles. Disclosure would have a chilling effect on agency officials' deliberations about how to respond to inquiries from Congress or the media. Such a chill on internal communications would interfere with our ability to respond as effectively and efficiently as possible to congressional oversight requests.<sup>138</sup>

On February 14, 2012, Chairman Issa again wrote to the Department regarding post-February 4, 2011 documents, and again raised the possibility of contempt:

Complying with the Committee's subpoena is not optional. Indeed, the failure to produce documents pursuant to a congressional subpoena is a violation of federal law. The Department's letter suggests that its failure to produce, among other things, "deliberative documents and other internal communications generated in response to congressional oversight requests" is based on the premise that "disclosure would compromise

<sup>136</sup> Jan. 31 Letter, *supra* note 99.

<sup>137</sup> Feb. 1 Letter, *supra* note 122.

<sup>138</sup> *Id.*

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substantial separation of powers principles and Executive Branch confidentiality interests.” Your February 4, 2011 cut-off date of providing documents to the Committee is entirely arbitrary, and comes from a “separation of powers” privilege that does not actually exist.

You cite no legal authority to support your new, extremely broad assertion. To the contrary, as you know, Congress possesses the “power of inquiry.” Furthermore, “the issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking.” Because the Department has not cited any legal authority as the basis for withholding documents, or provided the Committee with a privilege log with respect to documents withheld, its efforts to accommodate the Committee’s constitutional obligation to conduct oversight of the Executive Branch are incomplete.<sup>139</sup>

\* \* \*

Please specify a date by which you expect the Department to produce all documents responsive to the subpoena. In addition, please specify a Department representative who will interface with the Committee for production purposes. This individual should also serve as the conduit for dealing with possible contempt proceedings, should the Department continue to ignore the Committee’s subpoena.<sup>140</sup>

On February 16, 2012, the Department responded. The response did not address the post-February 4, 2011 documents, nor did it address the possibility of contempt. The Department’s letter stated:

We have produced documents to the Committee on a rolling basis; since late last year these productions have occurred approximately twice a month. It is our intent to adhere to this rolling production schedule until we have completed the process of producing all responsive documents to which the Committee is entitled, consistent with the longstanding policies of the Executive Branch across administrations of both parties. Moreover, we intend to send a letter soon memorializing our discussions with your staff about the status of our production of documents within the various categories of the subpoena.

Our efforts to cooperate with the Committee have been a significant undertaking, involving a great deal of hard work by a large number of Department employees. The Department has been committed to providing the documents and information necessary to allow the Committee to satisfy its core oversight interests regarding the use of inappropriate tactics in *Fast and Furious*.

<sup>139</sup> Feb. 14 Letter, *supra* note 100.

<sup>140</sup> *Id.* (emphasis in original).

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The Department, however, has yet to produce any documents pursuant to the subpoena created after February 4, 2011. Despite warnings by Chairman Issa that the Committee would initiate contempt if the Department failed to comply with the subpoena, the Department has refused to produce documents.

**d) Interview Requests**

In addition to the October 12, 2011 subpoena, the Committee has requested to interview key individuals in Operation Fast and Furious and related programs. The Committee accommodated the Department's request to delay an interview with Hope MacAllister, the lead case agent for Operation Fast and Furious, despite her vast knowledge of the program. The Committee agreed to this accommodation due to the Department's expressed concern about interviewing a key witness prior to trial.

Throughout the investigation, the Department has had an evolving policy with regard to witnesses that excluded ever-broader categories of witnesses from participating in volunteer interviews. The Department first refused to allow line attorneys to testify in transcribed interviews, and then it prevented first-line supervisors from testifying. Next, the Department refused to make Senate-confirmed Department officials available for transcribed interviews. One such Senate-confirmed official, Assistant Attorney General Lanny Breuer, is a central focus in the Committee's investigation. On February 16, 2012, the Department retreated somewhat from its position, noting in a letter to the Committee that it was "prepared to work with [the Committee] to find a mutually agreeable date for [Breuer] to appear and answer the Committee's questions, whether or not that appearance is public."<sup>141</sup> The Department has urged the Committee to reconsider this interview request.

While the Department has facilitated a dozen interviews to avoid compulsory depositions, there have been several instances in which the Department has refused to cooperate with the Committee in scheduling interviews. The Department has stated that it would not make available certain individuals that the Committee has requested to interview. On December 6, 2011, the Department wrote:

We would like to defer any final decisions about the Committee's request for Mr. Swartz's interview until we have identified any responsive documents, some of which may implicate equities of another agency. The remaining employees you have asked to interview are all career employees who are either line prosecutors or first- or second-level supervisors. James Trusty and Michael Morrissey were first-level supervisors during the time period covered by the Fast and Furious investigation, and Kevin Carwile was a second-level supervisor. The remaining three employees you have asked to interview - Emory Hurley, Serra Tsethlikai, and Joseph Cooley - are line prosecutors. We are not prepared to make any of these attorneys available for interviews.<sup>142</sup>

<sup>141</sup> Feb. 16 Letter, *supra* note 123.

<sup>142</sup> Dec. 6 Letter, *supra* note 64.



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The Department did, however, make Patrick Cunningham, Chief of the Criminal Division for the U.S. Attorney's Office in Arizona, available for an interview. The Committee had been requesting to interview Cunningham since summer 2011. The Department finally allowed access to Cunningham for an interview in December 2011. Cunningham chose to retain private counsel instead of Department counsel. On January 17, 2012, Cunningham canceled his interview scheduled for the Committee on January 19, 2012.

Chairman Issa issued a subpoena to Cunningham to appear for a deposition on January 24, 2012. In a letter dated January 19, 2012, Cunningham's counsel informed the Committee that Cunningham would "assert his constitutional privilege not to be compelled to be a witness against himself."<sup>143</sup> On January 24, 2012, Chairman Issa wrote to the Attorney General to express that the absence of Cunningham's testimony would make it "difficult to gauge the veracity of some of the Department's claims" regarding Fast and Furious.<sup>144</sup>

On January 27, 2012, Cunningham left the Department of Justice. After months of Committee requests, the Department finally made him available for an interview just before he left the Department. The actions of the Department in delaying the interview and Cunningham's own assertion of the Fifth Amendment privilege delayed and denied the Committee the benefit of his testimony.

#### **5. Failure to Turn Over Documents**

The Department has failed to turn over any documents pertaining to three main categories contained in the October 12, 2011 subpoena.

##### **a) Who at Justice Department Headquarters Should Have Known of the Reckless Tactics**

The Committee is seeking documents relating to who had access to information about the objectionable tactics used in Operation Fast and Furious, who approved the use of these tactics, and what information was available to those individuals when they approved the tactics. Documents that whistleblowers have provided to the Committee indicate that those officials were the senior officials in the Criminal Division, including Lanny Breuer and one of his top deputies, Jason Weinstein.

Documents in this category include those relating to the preparation of the wiretap applications, as well as certain ATF, DEA, and FBI Reports of Investigation. Key decision makers at Justice Department headquarters relied on these and other documents to approve the investigation.

<sup>143</sup> Letter from Tobin Romero, Williams & Connolly LLP, to Chairman Darrell Issa (Jan. 19, 2012).

<sup>144</sup> Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Jan. 24, 2012).

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**b) How the Department Concluded that Fast and Furious was “Fundamentally Flawed”**

The Committee requires documents from the Department relating to how officials learned about whistleblower allegations and what actions they took as a result. The Committee is investigating not just management of Operation Fast and Furious, but also the Department’s efforts to slow and otherwise interfere with the Committee’s investigation.

For months after the congressional inquiry began, the Department refused to acknowledge that anything improper occurred during Fast and Furious. At a May 5, 2011 meeting with Committee staff, a Department representative first acknowledged that “there’s a there, there.” The Attorney General acknowledged publicly that Fast and Furious was “fundamentally flawed” on October 7, 2011. On December 2, 2011 the Department finally admitted that its February 4, 2011 letter to Senator Grassley contained false information – something Congress had been telling the Department for over seven months.

Documents in this category include those that explain how the Department responded to the crisis in the wake of the death of U.S. Border Patrol Agent Brian Terry. These documents will reveal when the Department realized it had a problem, and what actions it took to resolve that problem.

**c) How the Inter-Agency Task Force Failed**

The Organized Crime Drug Enforcement Task Force (OCDETF) program was created to coordinate inter-agency information sharing. As early as December 2009, the DEA shared information with ATF that should have led to arrests and the identification of the gun trafficking network that Fast and Furious sought to uncover. The Committee has received information suggesting that, after arrests were made one year later, ATF discovered that two Mexican drug cartel associates at the top of the Fast and Furious network had been designated as national security assets by the FBI, and at times have been paid FBI informants. Because of this cooperation, these associates are considered by some to be unindictable.

Documents in this category will reveal the extent of the lack of information-sharing among DEA, FBI, and ATF. Although the Deputy Attorney General is aware of this problem, he has expressed little interest in resolving it.

**VI. Historical Perspectives on Contempt**

Contempt proceedings in Congress date back over 215 years. These proceedings provide Congress a valuable mechanism for adjudicating its interests. Congressional history is replete with examples of the pursuit of contempt proceedings by House committees when faced with strident resistance to their constitutional authority to exercise investigative power.

**A. Past Instances of Contempt**

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Congress first exercised its contempt authority in 1795 when three Members of the House charged two businessmen, Robert Randall and Charles Whitney, with offering bribes in exchange for the passage of legislation granting Randall and his business partners several million acres bordering Lake Erie.<sup>145</sup> This first contempt proceeding began with a resolution by the House deeming the allegations were adequate “evidence of an attempt to corrupt,” and the House reported a corresponding resolution that was referred to a special committee.<sup>146</sup> The special committee reported a resolution recommending formal proceedings against Randall and Whitney “at the bar of the House.”<sup>147</sup>

The House adopted the committee resolution which laid out the procedure for the contempt proceeding. Interrogatories were exchanged, testimony was received, Randall and Whitney were provided counsel, and at the conclusion, on January 4, 1796, the House voted 78-17 to adopt a resolution finding Randall guilty of contempt.<sup>148</sup> As punishment Randall was “ordered [] to be brought to the bar, reprimanded by the Speaker, and held in custody until further resolution of the House.”<sup>149</sup> Randall was detained until January 13, 1796, when the House passed a resolution discharging him.<sup>150</sup> In contrast, Whitney “was absolved of any wrongdoing,” since his actions were against a “member-elect” and occurred “away from the seat of government.”<sup>151</sup>

Congressional records do not demonstrate any question or hesitation regarding whether Congress possesses the power to hold individuals in contempt.<sup>152</sup> Moreover, there was no question that Congress could punish a non-Member for contempt.<sup>153</sup> Since the first contempt proceeding, numerous congressional committees have pursued contempt against obstinate administration officials as well as private citizens who failed to cooperate with congressional investigations.<sup>154</sup> Since the first proceeding against Randall and Whitney, House committees, whether standing or select, have served as the vehicle used to lay the foundation for contempt proceedings in the House.<sup>155</sup>

On August 3, 1983, the House passed a privileged resolution citing Environmental Protection Agency Administrator Anne Gorsuch Burford with contempt of Congress for failing to produce documents to a House subcommittee pursuant to a subpoena.<sup>156</sup> This was the first occasion the House cited a cabinet-level executive branch member for contempt of Congress.<sup>157</sup>

<sup>145</sup> Todd Garvey & Alissa M. Dolan, Congressional Research Service, *Congress’s Contempt Power: Law, History, Practice, & Procedure*, no. RL34097, Apr. 15, 2008 [hereinafter CRS Contempt Report].

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*; quoting Asher C. Hinds, *Precedents of the House of Representatives*, Sec. 1603 (1907).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 5.

<sup>154</sup> *Id.* at 6.

<sup>155</sup> *Id.* at 14.

<sup>156</sup> *Id.*

<sup>157</sup> Wm. Holmes Brown et al., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, 450 (2011).

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A subsequent agreement between the House and the Administrator, as well as prosecutorial discretion, was the base for not enforcing the contempt citation against Burford.<sup>158</sup>

Within the past fifteen years the Committee on Oversight and Government Reform has undertaken or prepared for contempt proceedings on multiple occasions. In 1998, Chairman Dan Burton held a vote recommending contempt for Attorney General Janet Reno based on her failure to comply with a subpoena issued in connection with the Committee's investigation into campaign finance law violations.<sup>159</sup> On August 7, 1998, the Committee held Attorney General Reno in contempt by a vote of 24 to 18.<sup>160</sup>

During the 110th Congress, Chairman Henry Waxman threatened and scheduled contempt proceedings against several Administration officials.<sup>161</sup> Contempt reports were drafted against Attorney General Michael B. Mukasey, Stephen L. Johnson, Administrator of the U.S. Environmental Protection Agency, and Susan E. Dudley, Administrator of the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget. Business meetings to consider these drafts were scheduled.<sup>162</sup> Former Attorney General Mukasey's draft contempt report charged him with failing to produce documents in connection to the Committee's investigation of the release of classified information. According to their draft contempt reports, Administrators Johnson and Dudley failed to cooperate with the Committee's lengthy investigation into California's petition for a waiver to regulate greenhouse gas emissions from motor vehicles and the revision of the national ambient air quality standards for ozone.

Most recently, the House Judiciary Committee pursued contempt against former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten.<sup>163</sup> On June 13, 2007, the Committee served subpoenas on Miers and Bolten.<sup>164</sup> After attempts at accommodations from both sides, the Committee determined that Miers and Bolten did not satisfactorily comply with the subpoenas. On July 25, 2007, the Committee voted, 22-17, to hold Miers and Bolten in contempt of Congress.

On February 14, 2008, the full House, with most Republicans abstaining, voted to hold Miers and Bolten in criminal contempt of Congress by a margin of 223-42.<sup>165</sup> One hundred seventy-three Members of Congress did not cast a vote either in favor or against the resolution.<sup>166</sup> All but nine Members who abstained were Republican.<sup>167</sup> Only three Republicans

<sup>158</sup> *Id.* at 20, 22.

<sup>159</sup> David E. Rosenbaum, *Panel Votes to Charge Reno With Contempt of Congress*, N.Y. TIMES (Aug. 7, 1998).

<sup>160</sup> *Id.*

<sup>161</sup> Laurie Kellman, *Waxman Threatens Mukasey With Contempt Over Leak*, U.S.A. TODAY (July 8, 2008); Richard Simon, *White House Says No to Congress' EPA Subpoena*, L.A. TIMES (June 21, 2008).

<sup>162</sup> Press Release, Rep. Henry Waxman, *Chairman Waxman Warns Attorney General of Scheduled Contempt Vote* (July 8, 2008) <http://oversight-archive.waxman.house.gov/story.asp?ID=2067> (last visited Feb. 22, 2012); Press Release, Rep. Henry Waxman, *Chairman Waxman Schedules Contempt Vote* (June 13, 2008) <http://oversight-archive.waxman.house.gov/story.asp?ID=2012> (last visited Feb. 22, 2012).

<sup>163</sup> CRS Contempt Report at 54-55.

<sup>164</sup> *Id.*

<sup>165</sup> See H. Res. 982.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

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supported the contempt resolution for Miers and Bolten.<sup>168</sup> This marked the first contempt vote by Congress with respect to the Executive Branch since the Reagan Administration.<sup>169</sup> The resolutions passed by the House allowed Congress to exercise all available remedies in the pursuit of contempt.<sup>170</sup> The House Judiciary Committee's action against Miers marked the first time that a former administration official had ever been held in contempt.<sup>171</sup>

## B. Document Productions

The Department has refused to produce thousands of documents pursuant to the October 12, 2011 subpoena because it claims certain documents are Law Enforcement Sensitive, others pertain to ongoing criminal investigations, and others relate to internal deliberative process. The President has not claimed Executive Privilege over any documents pertaining to Fast and Furious.

During the past ten years the Committee on Oversight and Government Reform has undertaken a number of investigations that resulted in strong opposition from the Executive Branch regarding document productions. These investigations include regulatory decisions of the Environmental Protection Agency (EPA), the leak of CIA operative Valerie Plame's identity, and the fratricide of Army Corporal Patrick Tillman. In all cases during the 110th Congress, the Administration produced an overwhelming amount of documents, sheltering a narrow few by asserting executive privilege.

In 2008, the Committee received or reviewed *in camera* all agency-level documents related to the EPA's decision regarding California's request for a rule waiver, numbering approximately 27,000 pages in total.<sup>172</sup> According to a Committee Report, the EPA withheld only 32 documents related to the California waiver decision based on executive privilege. These included notes of telephone calls or meetings in the White House "involving at least one high-ranking EPA official and at least one high-ranking White House official."<sup>173</sup> The White House Counsel informed the Committee that these documents represented "deliberations at the very highest level of government."<sup>174</sup>

During the Committee's 2008 investigation into the Administration's promulgation of ozone standards, the EPA produced or allowed *in camera* review of over 35,000 pages of documents. The President asserted executive privilege over a narrow set of documents, encompassing approximately 35 pages. One such document included "talking points for the EPA Administrator to use in a meeting with [the President]."<sup>175</sup>

<sup>168</sup> *Id.*

<sup>169</sup> Philip Shenon, *House Votes to Issue Contempt Citations*, N.Y. TIMES (Feb. 15, 2008).

<sup>170</sup> CRS Contempt Report at 54-55.

<sup>171</sup> *Id.*

<sup>172</sup> H. Comm. on Oversight and Gov't Ref. Minority Additional Views, *EPA, OIRA Investigations & Exec. Privilege Claims: Missed Opportunities by Majority to Complete Investigations*, Oct. 22, 2008.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

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In furtherance of the Committee's ozone regulation investigation, OIRA produced or allowed *in camera* review of 7,500 documents.<sup>176</sup> Documents produced by EPA and OIRA represented pre-decisional opinions of career scientists and agency counsel.<sup>177</sup> These documents were sensitive because some, if not all, related to ongoing litigation.<sup>178</sup> The OIRA Administrator withheld a certain number of documents that were communications between OIRA and certain White House officials, and the President ultimately "claimed executive privilege over these documents."<sup>179</sup>

Also during the 110th Congress, the Committee investigated the revelation of CIA operative Valerie Plame's identity in the news media. The Committee's investigation was contemporaneous with the Department of Justice's criminal investigation into the leak of this classified information — a situation nearly identical to the Committee's current investigation into Operation Fast and Furious.

Pursuant to the Committee's investigation, the Justice Department produced FBI reports of witness interviews, commonly referred to as "302s." Specifically, documents reviewed by the Committee staff during the Valerie Plame investigation included the following:

FBI interviews of federal officials who did not work in the White House, as well as interviews of relevant private individuals . . . total of 224 pages of records of FBI interview reports with 31 individuals, including materials related to a former Secretary, Deputy Secretary, Undersecretary [sic], and two Assistant Secretaries of State, and other former or current CIA and State Department officials, including the Vice President's CIA briefer.<sup>180</sup>

To accommodate the Committee, the Department permitted *in camera* review of the following:

[D]ocuments include[ing] redacted reports of the FBI interview with Mr. Libby, Andrew Card, Karl Rove, Condoleezza Rice, Stephen Hadley, Dan Bartlett, and Scott McClellan and another 104 pages of additional interview reports of the Director of Central Intelligence, and eight other White House or Office of the Vice President officials.<sup>181</sup>

The only documents the Justice Department declined to produce were the FBI 302s with respect to the interviews of the President and the Vice President.<sup>182</sup> Ultimately, the Committee relented in its pursuit of the President's 302.<sup>183</sup> The Committee, however, persisted in its request for the

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> H. Comm. on Oversight and Gov't Ref. Draft Report, *U.S. House of Reps. Regarding President Bush's Assertion of Exec. Privilege in Response to the Comm. Subpoena to Atty Gen. Michael B. Mukasey*, <http://oversight-archive.waxman.house.gov/documents/20081205114333.pdf> (last visited Mar. 5, 2012).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

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Vice President's 302. As a result, the President asserted executive privilege over that particular document.<sup>184</sup>

The Committee specifically included "302s" in its October 12, 2011 subpoena to the Attorney General regarding Fast and Furious. These subpoenaed "302s" do not include FBI interviews with White House personnel, or even any other Executive Branch employee. Still, in spite of past precedent, the Department has refused to produce those documents to the Committee or to allow staff an *in camera* review.

In the 110th Congress, the Committee investigated the fratricide of Army Corporal Patrick Tillman and the veracity of the account of the capture and rescue of Army Private Jessica Lynch.<sup>185</sup> The Committee employed a multitude of investigative tools, including hearings, transcribed interviews, and non-transcribed interviews. The Administration produced thousands of documents.<sup>186</sup> The Committee requested the following:

[T]he White House produce all documents received or generated by any official in the Executive Office of the President from April 22 until July 1, 2004, that related to Corporal Tillman. The Committee reviewed approximately 1,500 pages produced in response to this request. The documents produced to the Committee included e-mail communications between senior White House officials holding the title of "Assistant to the President." According to the White House, the White House withheld from the Committee only preliminary drafts of the speech President Bush delivered at the White House Correspondents' Dinner on May 1, 2004.<sup>187</sup>

The Department of Defense produced over 31,000 responsive documents, and the Committee received an unprecedented level of access to documents and personnel.<sup>188</sup>

The Oversight and Government Reform Committee's investigations over the past five years demonstrate ample precedent for the production of a wide array of documents from the Executive Branch. In these investigations, the Committee received pre-decisional deliberative regulatory documents, documents pertaining to ongoing investigations, and communications between and among senior advisors to the President. The Committee's October 12, 2011 subpoena calls for many of these same materials, including 302s and deliberative documents. Still, the Justice Department refuses to comply.

Further, the number of documents the Department has produced during the Committee's Fast and Furious investigation pales in comparison to those produced in conjunction with the Committee's prior investigations. In separate EPA investigations, the Committee received 27,000 documents and 35,000 documents respectively. In the Patrick Tillman investigation, the

<sup>184</sup> *Id.*

<sup>185</sup> H. Comm. on Oversight and Gov't Ref. Comm. Report, *Misleading Information From the Battlefield: the Tillman & Lynch Episodes*, H. Rep. 110-858, Sept. 16, 2008.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*; The minority views by Hon. Tom Davis states that the Comm. received 50,000 pages of documents and reviewed additional documents *in camera*.

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Committee received 31,000 documents. Moreover, in the Valerie Plame investigation, the Committee received access to highly sensitive materials despite the fact that the Justice Department was conducting a parallel criminal investigation.

As of May 1, 2012, in the Fast and Furious investigation, in the light most favorable to the Department of Justice, it has “produc[ed] or [made] available over 7,300 pages of documents to the Committee” – a small fraction of what has been produced to the Committee in prior investigations and of what the Department has produced to the Inspector General in this matter.<sup>189</sup> This small number reflects the Department’s lack of cooperation since the Committee sent its first letter to the Department about Fast and Furious on March 16, 2011.

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<sup>189</sup> Letter from Ass’t Att’y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 19, 2012).





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*The Department of Justice's Operation Fast and Furious:  
Fueling Cartel Violence*

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JOINT STAFF REPORT

Prepared for

Rep. Darrell E. Issa, Chairman  
United States House of Representatives  
Committee on Oversight and Government Reform  
&  
Senator Charles E. Grassley, Ranking Member  
United States Senate  
Committee on the Judiciary

112<sup>th</sup> Congress  
July 26, 2011

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***“That is, I mean, this is the perfect storm of idiocy.”***

—Carlos Canino, Acting ATF Attaché in Mexico

## **I. Executive Summary**

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The previous joint staff report entitled *The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents* chronicled Operation Fast and Furious, a reckless program conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the courageous ATF agents who came forward to expose it. Operation Fast and Furious made unprecedented use of a dangerous investigative technique known as “gunwalking.” Rather than intervene and seize the illegally purchased firearms, ATF’s Phoenix Field Division allowed known straw purchasers to walk away with the guns, over and over again. As a result, the weapons were transferred to criminals and Mexican Drug Cartels.

This report explores the effect of Operation Fast and Furious on Mexico. Its lethal drug cartels obtained AK-47 variants, Barrett .50 caliber sniper rifles, .38 caliber revolvers, and FN Five-seveNs from Arizona gun dealers who were cooperating with the ATF by continuing to sell to straw purchasers identified in Operation Fast and Furious.

In late 2009, ATF officials stationed in Mexico began to notice a large volume of guns appearing there that were traced to the ATF’s Phoenix Field Division. These weapons were increasingly recovered in great numbers from violent crime scenes. ATF intelligence analysts alerted Darren Gil, Attaché to Mexico, and Carlos Canino, Deputy Attaché, about the abnormal number of weapons. Gil and Canino communicated their worries to leadership in Phoenix and Washington, D.C., only to be brushed aside. Furthermore, ATF personnel in Arizona denied ATF personnel in Mexico access to crucial information about the case, even though the operation directly involved their job duties and affected their host country.

Rather than share information, senior leadership within both ATF and the Department of Justice (DOJ) assured their representatives in Mexico that everything was “under control.” The growing number of weapons recovered in Mexico, however, indicated otherwise. Two recoveries of large numbers of weapons in November and December 2009 definitively demonstrated that Operation Fast and Furious weapons were heading to Mexico. In fact, to date, there have been 48 different recoveries of weapons in Mexico linked to Operation Fast and Furious.

ATF officials in Mexico continued to raise the alarm over the burgeoning number of weapons. By October 2010, the amount of seized and recovered weapons had “maxed out”

space in the Phoenix Field Division evidence vault.<sup>1</sup> Nevertheless, ATF and DOJ failed to share crucial details of Operation Fast and Furious with either their own employees stationed in Mexico or representatives of the Government of Mexico. ATF senior leadership allegedly feared that any such disclosure would compromise their investigation. Instead, ATF and DOJ leadership's reluctance to share information may have only prolonged the flow of weapons from this straw purchasing ring into Mexico.

ATF leadership finally informed the Mexican office that the investigation would be shut down as early as July 2010. Operation Fast and Furious, however, continued through the rest of 2010. It ended only after U.S. Border Patrol Agent Brian Terry was murdered in December 2010 with weapons linked to this investigation. Only then did the ATF officials in Mexico discover the true nature of Operation Fast and Furious. Unfortunately, Mexico and the United States will have to live with the consequences of this program for years to come.

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<sup>1</sup> See E-mail from [ATF Evidence Vault Employee] to Hope MacAllister October 12, 2010 (HOCR ATF – 002131-32).

## II. Findings

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- In the fall of 2009, ATF officials in Mexico began noticing a spike in guns recovered at Mexican crime scenes. Many of those guns traced directly to an ongoing investigation out of ATF's Phoenix Field Division.
- As Operation Fast and Furious progressed, there were numerous recoveries of large weapons caches in Mexico. These heavy-duty weapons included AK-47s, AR-15s, and even Barrett .50 caliber rifles – the preferred weapons of drug cartels.
- At a March 5, 2010 briefing, ATF intelligence analysts told ATF and DOJ leadership that the number of firearms bought by known straw purchasers had exceeded the 1,000 mark. The briefing also made clear these weapons were ending up in Mexico.
- ATF and DOJ leadership kept their own personnel in Mexico and Mexican government officials totally in the dark about all aspects of Fast and Furious. Meanwhile, ATF officials in Mexico grew increasingly worried about the number of weapons recovered in Mexico that traced back to an ongoing investigation out of ATF's Phoenix Field Division.
- ATF officials in Mexico raised their concerns about the number of weapons recovered up the chain of command to ATF leadership in Washington, D.C. Instead of acting decisively to end Fast and Furious, the senior leadership at both ATF and DOJ praised the investigation and the positive results it had produced. Frustrations reached a boiling point, leading former ATF Attaché Darren Gil to engage in screaming matches with his supervisor, International Affairs Chief Daniel Kumor, about the need to shut down the Phoenix-based investigation.
- Despite assurances that the program would be shut down as early as March 2010, it took the murder of a U.S. Border Patrol Agent in December 2010 to actually bring the program to a close.
- ATF officials in Mexico finally realized the truth: ATF allowed guns to walk. By withholding this critical information from its own personnel in Mexico, ATF jeopardized relations between the U.S. and Mexico.
- The high-risk tactics of cessation of surveillance, gunwalking, and non-interdiction of weapons that ATF used in Operation Fast and Furious went against the core of ATF's mission, as well as the training and field experience of its agents. These flaws inherent in Operation Fast and Furious made its tragic consequences inevitable.

### III. Weapons Traced to the ATF Phoenix Field Division

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**FINDING:** In the fall of 2009, ATF officials in Mexico began noticing a spike in guns recovered at Mexican crime scenes. Many of those guns traced directly to an ongoing investigation out of ATF's Phoenix Field Division.

Starting in late 2009, ATF officials in Mexico noticed a growing number of weapons appearing in Mexico that were traced to the ATF's Phoenix Field Division. Completely unaware of Operation Fast and Furious at the time, Carlos Canino, then Deputy Attaché to Mexico, was surprised when he learned of the number of weapons seized in Mexico that were connected to this one case in Phoenix. Canino explained:

Either late October, early November, mid November, 2009, I was informed about the large number of guns that have made it on to the suspect gun database relating to this investigation [Operation Fast and Furious]. That is when I became aware, okay they just opened up this case in October of '09, and I thought, wow, look at all these guns.

I thought two things: I thought, okay, all these guns, the reason all these guns are here is because we are finally on to these guys, and we went back and did our due diligence and found out that these guys had already beaten us for 900 guns. That was one of the things I thought.<sup>2</sup>

Canino informed his boss, then ATF Attaché to Mexico, Darren Gil, about an unusual amount of weapons being seized in Mexico. Gil stated:

I remember the event that my chief analyst and my deputy came in and said, hey, we're getting this abnormal number of weapons that are being seized in Mexico and they're all coming back to the Phoenix field division. So that was my first awareness of this regarding anything to do with this case.<sup>3</sup>

ATF officials in Mexico never received any notice or warning from ATF in Phoenix or Washington, D.C. about the possibility of a spike in guns showing up in their host country. Instead, they began to suspect something was amiss as an inordinate number of weapons recovered in Mexico traced back to the Phoenix Field Division.

The weapons were being seized from violent crime scenes involving Mexican drug cartels. One of the early seizures occurred after a shoot-out between warring cartels. Canino described learning about this incident:

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<sup>2</sup> Canino Transcript, at 11. Carlos Canino became the Acting Attaché in October 2010. Prior to this time, he served as the Deputy Attaché.

<sup>3</sup> Transcribed Interview of Darren Gil, Transcript, at 13 (May 12, 2011) (on file with author) [hereinafter Gil Transcript].

Q. When was the next time that you got some information about Operation Fast and Furious after October, 2009?

A. I need to go back and check, but I was approached by an ICE agent at the U.S. embassy, and he showed me some pictures of a shootup between the Sinoloa cartel and the La Familia cartel in a small town up in the mountains of Sonora. He asked – I saw the picture a lot of dead bodies he told me that the Sinoloa cartel had come into the area to try to push out the La Familia cartel, the La Familia cartel had ambushed the Sinoloans up in the mountains, and literally decimated the group. There was some firearms recovered on the scene. He asked if we could trace the guns, and we did.

When we got the traces back, I believe two or three guns had come back to the case number that is now known as Operation Fast and Furious.

I believe I reached out to ATF Group VII special agent Tonya English via e mail and I notified her that some of the firearms in her case had been recovered as a homicide, what were they planning, what were they planning to do, what is going on with this case?<sup>4</sup>

According to Canino, he did not receive any information about the operation's future plans or an explanation for the growing number of weapons being recovered at Mexican crime scenes linked to Operation Fast and Furious.<sup>5</sup> However, these seizures were only the beginning. Over the next several months, an alarming number of weapons would be seized in Mexico and traced to Phoenix.

#### **IV. Fast and Furious Weapons Recovered at Crime Scenes**

**FINDING:** As Operation Fast and Furious progressed, there were numerous recoveries of large weapons caches in Mexico. These heavy-duty weapons included AK-47s, AR-15s, and even Barrett .50 caliber rifles – the preferred weapons of drug cartels.

The following chart represents a list of recoveries in Mexico where weapons found were traced back to Operation Fast and Furious. Despite its length, *this list is not complete*. Rather, this list is compiled solely from information the Justice Department has provided to date. Many more recoveries may have occurred and will continue to occur in the future, but it is impossible to determine precisely how many weapons recoveries in Mexico trace back to Operation Fast and

<sup>4</sup> Canino Transcript, at 9-10.

<sup>5</sup> *Id.* at 10.



Furious. So far, the Justice Department has provided documents that reference at least 48 separate recoveries involving 122 weapons connected to Operation Fast and Furious.

Recovery #	Date	Location	Notes on Recovery	# of Fast and Furious Guns Recovered
1	11/15/2009	Costa Grande, Guerrero	15 AK-47s, 30 guns, 9 guns traced to Operation Fast and Furious <sup>6</sup>	9
2	11/20/2009	Naco, Sonora	41 AK-47s and 1 50 caliber. "Time-to-crime," the period between the purchase date and the recovery date, of 1 day. Two multiple sales summaries linked to this seizure <sup>7</sup>	42
3	11/26/2009	Agua Prieta, Sonora	15 rifles, 8 pistols, traced to [SP 1] <sup>8</sup>	1
4	12/9/2009	Mexicali, Baja	\$2 million US, \$1 million Mexican, 421 kilos cocaine, 60 kilos meth, 41 AK-47s, 5 traced to Operation Fast and Furious <sup>9</sup>	5
5	12/18/2009	Tijuana, Baja	"El Teo" link, 5 AK-47 type rifles recovered and 1 linked to [SP 2] <sup>10</sup>	1
6	12/18/2009	Tijuana, Baja	Traced to weapons bought 11/13/09 <sup>11</sup>	1
7	1/8/2010	Tijuana, Baja	"El Teo" link, 2 guns traced to F&F, bought by [SP 2] on 12/13/09 and [SP 1] <sup>12</sup>	2
8	1/11/2010	Guasave, Sinaloa	2,700 rounds of ammo, 3 belts of rounds, 9 rifles, 2 grenade launchers, 1 gun traced to Operation Fast and Furious <sup>13</sup>	1

<sup>6</sup> E-mail from Tonya English to David Voth March 9, 2010 (HOCR ATF – 001803-12).

<sup>7</sup> E-mail from William Newell to Lorren Leadmon November 25, 2009 (HOCR ATF – 002141); *see also* e-mail from [ATF NTC] to Hope MacAllister December 9, 2009 (HOCR ATF – 002205-06); *see also* e-mail from Mark Chait to William Newell, Daniel Kumor November 25, 2009 (HOCR ATF – 001993).

<sup>8</sup> *See generally* "Operation The Fast and The Furious" Presentation, March 5, 2010.

<sup>9</sup> E-mail from [ATF NTC] to Tonya English, [ATF Group 7 SA], Hope MacAllister, David Voth January 8, 2010 (HOCR ATF – 002210-11); *see also* e-mail from [ATF Tijuana Field Office Agent] to David Voth February 24, 2010 (HOCR ATF – 002301); "Operation The Fast and The Furious" Presentation, March 5, 2010.

<sup>10</sup> E-mail from [ATF Intelligence Specialist] to [ATF Group 7 SA], Hope MacAllister, Tonya English, David Voth January 13, 2010 (HOCR ATF – 002166-70).

<sup>11</sup> E-mail from [ATF NTC] to Hope MacAllister December 29, 2009 (HOCR ATF – 002208-09).

<sup>12</sup> E-mail from Lorren Leadmon to [ATF Intelligence Specialist], [ATF Group 7 SA], Hope MacAllister, Tonya English, David Voth, [ATF Analyst Chief – Mexico] January 18, 2010 (HOCR ATF – 002112); *see also* e-mail from Tonya English to Hope MacAllister January 14, 2010 (HOCR ATF – 002214-15); *see also* e-mail from [ATF Tijuana Field Office Agent] to David Voth February 24, 2010 (HOCR ATF – 002301).

<sup>13</sup> E-mail from [ATF Intelligence Analyst] to David Voth March 9, 2010 (HOCR ATF – 002307-08).

Recovery #	Date	Location	Notes on Recovery	# of Fast and Furious Guns Recovered
9	2/8/2010	La Paz, Baja	4th recovery related to "El Teo" organization <sup>14</sup>	1
10	2/21/2010	Sinaloa, Mexico	15 rifles, 5 handguns, 11,624 rounds of ammunition. At least 4 weapons traced to [SP 1] <sup>15</sup>	4
11	2/25/2010	Tijuana, Baja	"El Teo" link, attempted State Police Chief assassination, guns traced to [SP 4] <sup>16</sup>	1
12	3/14/2010	Juarez, Chihuahua	5 weapons traced back to Operation Fast and Furious purchased by [SP 2], [SP 3], and [SP 2] <sup>17</sup>	5
13	6/15/2010	Acapulco, Guerrero	6 rifles, 1,377 rounds of ammo, 1 traced back to Operation Fast and Furious <sup>18</sup>	1
14	6/24/2010	Tijuana, Baja	6 AK-47 type firearms, 5 traced back to [SP 2] <sup>19</sup>	5
15	7/1/2010	Tubutama, Sonora	DTO battle, 15 firearms seized, 12 rifles, 3 pistols, 1 traced to Operation Fast Furious <sup>20</sup>	1
16	7/4/2010	Navajoa, Sonora	25 AK-47 rifles, 78 magazines, over 8,000 rounds of ammo, 1 AK-47 traced to [SP 1] 3/2/10 purchase <sup>21</sup>	1
17	7/8/2010	Culiacan, Sinaloa	Grenade launcher, 2 submachine guns, 8 rifles, 3 shotguns, 1,278	1

<sup>14</sup> See generally "Operation the Fast and the Furious" Presentation, March 5, 2010.

<sup>15</sup> E-mail from Tonya English to [ICE Agent] March 19, 2010 (HOCR ATF – 001813-15); see also e-mail from David Voth to Tonya English, Hope MacAllister, [ATF Group 7 SA] March 22, 2010 (HOCR ATF – 002114-15); see also e-mail from Lorren Leadmon to David Voth, [ATF Analyst Chief – Mexico] March 11, 2010 (HOCR ATF – 002133-40); see also e-mail from Lorren Leadmon to David Voth, [ATF Analyst Chief – Mexico] March 11, 2010 (HOCR ATF – 002315-16).

<sup>16</sup> E-mail from David Voth to Emory Hurley February 26, 2010 (HOCR ATF – 002271-72).

<sup>17</sup> E-mail from [ATF SA] to Hope MacAllister, Tonya English, [ATF El Paso SA] April 29, 2010 (HOCR ATF – 001713-16).

<sup>18</sup> E-mail from [ATF Mexico City SA] to Tonya English January 26, 2011 (HOCR ATF – 001863-65).

<sup>19</sup> E-mail from [ATF SA-EPIC] to Tonya English July 1, 2010 (HOCR ATF – 001821); see also e-mail from [ATF NTC] to Tonya English July 1, 2010 (HOCR ATF – 001824).

<sup>20</sup> E-mail from David Voth to Carlos Canino July 14, 2010 (HOCR ATF – 002378-2379).

<sup>21</sup> E-mail from [ATF SA-EPIC] to Tonya English August 3, 2010 (HOCR ATF – 001726-27); see also e-mail from [ATF NTC] to Hope MacAllister, Tonya English July 15, 2010 (HOCR ATF – 001729-1730); see also e-mail from David Voth to Tonya English July 30, 2010 (HOCR ATF – 001742-43); see also e-mail from Tonya English to [ATF SA-EPIC], [ATF Analyst] July 29, 2010 (HOCR ATF – 001796-97).

Recovery #	Date	Location	Notes on Recovery	# of Fast and Furious Guns Recovered
			rounds of ammo, 1 rifle traced to Operation Fast and Furious <sup>22</sup>	
18	7/21/2010	El Roble, Durango	5 handguns, 15 rifles, 70 armored vests, night vision goggles, 1 traced to [SP 1] 3/22/10 purchase <sup>23</sup>	1
19	7/27/2010	Durango, Durango	Barrett 50 caliber traced to [SP 1] purchase on 3/22/10 <sup>24</sup>	1
20	8/1/2010	Chihuahua, Chihuahua	Romarm 762s traced to 12/17/09 purchase <sup>25</sup>	1
21	8/1/2010	Sinaloa de Leyva, Sinaloa	Barrett 50 caliber traced to Operation Fast and Furious, bought 6/8/10 <sup>26</sup>	1
22	8/11/2010	Santiago, Durango	16 rifles, 110 magazines, 36 bullet-proof vests, 1 rifle traced to Operation Fast and Furious <sup>27</sup>	1
23	8/13/2010	Santiago Papasquiaro, Durango	Romarm/Cugir 762 traced to Operation Fast and Furious <sup>28</sup>	1
24	8/14/2010	El Naranjo, Sinaloa	16 firearms including Barrett 50 caliber, 69 magazines, 2,060 rounds of ammo, 1 weapon traced to Operation Fast and Furious <sup>29</sup>	1
25	8/24/2010	Nogales, Sonora	Romarm/Cugir 762 traced to Operation Fast and Furious, bought 12/14/09 <sup>30</sup>	1
26	9/8/2010	San Luis, Sonora	Romarm/Cugir 762 traced to Operation Fast and Furious, bought 12/14/09 <sup>31</sup>	1

<sup>22</sup> E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English July 19, 2010 (HOCR ATF – 001717-18); see also e-mail from [ATF NTC] to Hope MacAllister, Tonya English July 15, 2010 (HOCR ATF – 001723).

<sup>23</sup> E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] August 3, 2010 (HOCR ATF – 001731-32).

<sup>24</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] July 28, 2010 (HOCR ATF – 001733-36); see also e-mail from [ATF Firearms Specialist] to Tonya English, [ATF Group 7 SA], Hope MacAllister June 10, 2010 (HOCR ATF – 002117-20).

<sup>25</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] January 21, 2011 (HOCR ATF – 001856-57).

<sup>26</sup> E-mail from [ATF NTC] to Tonya English, Hope MacAllister August 13, 2010 (HOCR ATF – 002013-14).

<sup>27</sup> E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English October 18, 2010 (HOCR ATF – 002178).

<sup>28</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English October 18, 2010 (HOCR ATF – 002181-82).

<sup>29</sup> E-mail from [ATF Investigative Specialist] to [ATF NTC], Hope MacAllister, Tonya English August 23, 2010 (HOCR ATF – 002174-75).

<sup>30</sup> E-mail from [ATF SA-EPIC] to [ATF Group 7 SA], Hope MacAllister, Tonya English September 15, 2010 (HOCR ATF – 002123-24).

Recovery #	Date	Location	Notes on Recovery	# of Fast and Furious Guns Recovered
27	9/9/2010	Nogales, Sonora	Guns traced to Operation Fast and Furious, bought on 11/27/09 <sup>32</sup>	1
28	9/10/2010	Tijuana, Baja	6 firearms recovered, 6 firearms traced to Operation Fast and Furious purchases on 8/6/10 and 8/11/10 <sup>33</sup>	6
29	9/14/2010	Nogales, Sonora	Romarm/Cugir 762 traced to Operation Fast and Furious <sup>34</sup>	1
30	9/18/2010	Colonia Granjas, Chihuahua	Romarm/Cugir 762 traced to Operation Fast and Furious <sup>35</sup>	1
31	9/22/2010	Saric, Sonora	18 AK-47 rifles and 1 Barrett 50 caliber, 1 firearm traced to Operation Fast and Furious <sup>36</sup>	1
32	9/24/2010	Saric, Sonora	Guns bought on 2/16/10 traced to [SP 3] and [SP 1] <sup>37</sup>	1
33	9/26/2010	Reynosa, Tamaulipas	Traced guns to Operation Fast and Furious bought 3/18/10 <sup>38</sup>	1
34	9/28/2010	Juarez, Chihuahua	Romarm/Cugir 762 traced to Operation Fast and Furious, bought 1/7/10 <sup>39</sup>	1
35	10/11/2010	Saric, Sonora	Firearm traced to 11/17/09 purchase <sup>40</sup>	1
36	10/12/2010	Tepic, Nayarit	Barrett 50 caliber traced to Operation Fast and Furious, bought 2/17/10 <sup>41</sup>	1

<sup>31</sup> E-mail from [ATF SA-EPIC] to [ATF Group 7 SA], Hope MacAllister, Tonya English September 15, 2010 (HOGF ATF – 002121-22).

<sup>32</sup> E-mail from [ATF SA-EPIC] to [ATF Group 7 SA], Hope MacAllister, Tonya English September 20, 2010 (HOGF ATF – 002186-87).

<sup>33</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English September 17, 2010 (HOGF ATF – 001744-45); see also e-mail from [ATF NTC] to Hope MacAllister, Tonya English September 14, 2010 (HOGF ATF – 001748-49); see also e-mail from [ATF NTC] to Tonya English, Hope MacAllister September 20, 2010 (HOGF ATF – 001754-55).

<sup>34</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English September 16, 2010 (HOGF ATF – 001746); see also e-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] September 20, 2010 (HOGF ATF – 001752-53).

<sup>35</sup> E-mail from Hope MacAllister to [AUSA AZ District] November 29, 2010 (HOGF ATF – 001798-99).

<sup>36</sup> E-mail from [ATF Investigative Specialist] to Hope MacAllister, [ATF NTC], [ATF NTC] October 28, 2010 (HOGF ATF – 001756-59).

<sup>37</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English October 7, 2010 (HOGF ATF – 002126-27).

<sup>38</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English October 26, 2010 (HOGF ATF – 001831-32).

<sup>39</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English October 15, 2010 (HOGF ATF – 002129-2130).

<sup>40</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] November 19, 2010 (HOGF ATF – 002003-04).

<sup>41</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] November 19, 2010 (HOGF ATF – 002001-02).

Recovery #	Date	Location	Notes on Recovery	# of Fast and Furious Guns Recovered
37	10/12/2010	Juarez, Chihuahua	Romarm/Cugir 762 traced to Operation Fast and Furious bought 1/7/10 <sup>42</sup>	1
38	10/19/2010	Reynosa, Tamaulipas	Romarm/Cugir 762 traced to Operation Fast and Furious <sup>43</sup>	1
39	10/28/2010	Acapulco, Guerrero	Romarm/Cugir 762 traced to Operation Fast and Furious <sup>44</sup>	1
40	11/4/2010	Chihuahua, Chihuahua	16 guns, 2 traced to Operation Fast and Furious, Used in the murder of Mario Gonzalez <sup>45</sup>	1
41	11/22/2010	Nogales, Sonora	Traced to guns bought 11/27/09 <sup>46</sup>	1
42	12/14/2010	Puerto Penasco, Sonora	5 guns traced to Operation Fast and Furious, bought 12/11/09, 12/14/09, 6/8/10, and 6/15/10 <sup>47</sup>	5
43	12/17/2010	Zumu Rucapio, MC	Traced to Operation Fast and Furious, bought 11/27/09 <sup>48</sup>	1
44	12/28/2010	Obregon, Sonora	12 total firearms, 1 firearm traced to Operation Fast and Furious, bought 4/12/10 <sup>49</sup>	1
45	1/9/2011	Chihuahua, Chihuahua	6 rifles and magazines seized, 1 firearm traced to Operation Fast and Furious <sup>50</sup>	1
46	1/25/2011	Culiacan, Sinaloa	Romarm/Cugir 762 traced to Operation Fast and Furious, bought 3/8/10 <sup>51</sup>	1

<sup>42</sup> E-mail from [ATF NTC] to Hope MacAllister, [ATF Group 7 SA], Tonya English December 15, 2010 (HOGR ATF – 002190-91).

<sup>43</sup> E-mail from Hope MacAllister to [AUSA AZ District] November 29, 2010 (HOGR ATF – 001798).

<sup>44</sup> E-mail from Hope MacAllister to [AUSA AZ District] November 29, 2010 (HOGR ATF – 001799).

<sup>45</sup> E-mail from Tonya English to David Voth November 15, 2010 (HOGR ATF – 001792).

<sup>46</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English November 24, 2010 (HOGR ATF – 001833-38); see also e-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English December 8, 2010 (HOGR ATF – 002188-89).

<sup>47</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English December 28, 2010 (HOGR ATF – 001842-51).

<sup>48</sup> E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] December 22, 2010 (HOGR ATF – 001852-55).

<sup>49</sup> E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English March 21, 2011 (HOGR ATF – 001874-77); see also e-mail from [ATF NTC] to Hope MacAllister, Tonya English March 17, 2011 (HOGR ATF – 001885-86).

<sup>50</sup> E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] February 2, 2011 (HOGR ATF – 002192-93); see also e-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] January 18, 2011 (HOGR ATF – 002196-97).

<sup>51</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] March 21, 2011 (HOGR ATF – 001883-84).

Recovery #	Date	Location	Notes on Recovery	# of Fast and Furious Guns Recovered
47	2/4/2011	Juarez, Chihuahua	Barrett 50 caliber traced to Operation Fast and Furious, bought 2/2/10 <sup>52</sup>	1
48	2/19/2011	Navajoa, Sonora	37 rifles, 3 grenade launchers, 16,000 rounds of ammo, 1 Firearm traced to Operation Fast and Furious, purchased on 3/8/10 <sup>53</sup>	1
<b>TOTAL</b>				<b>122<sup>54</sup></b>

These documented recoveries indicate that a significant number of Operation Fast and Furious guns ended up in Mexico. However, there are indications that the numbers could be larger. For example, within 24 hours of the murder of Border Patrol Agent Brian Terry, Special Agent in Charge (SAC) Bill Newell asked for the total number of Operation Fast and Furious firearms recovered to date in Mexico and the U.S.<sup>55</sup> Five days later, on December 21, 2010, Newell forwarded the totals to his boss, Deputy Assistant Director William McMahon, indicating that he had the numbers compiled because, "I don't like the perception that we allowed guns to 'walk.'"<sup>56</sup> According to the tally Newell received on December 16, 2010, approximately 241 firearms had been recovered in Mexico and 350 in the U.S.<sup>57</sup> The number reported to Newell as recovered in Mexico as of the day after Agent Terry's death is twice what can be verified through documents produced by the Department of Justice as outlined in the table above. Furthermore, this number is much higher than the 96 firearms reported by the Department of Justice as recovered in Mexico in answers to questions for the record received on July 22, 2011.<sup>58</sup>

<sup>52</sup> E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] February 17, 2011 (HOCR ATF - 001859-62); *see also* e-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] March 21, 2011 (HOCR ATF - 001880-82); *see also* e-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] February 17, 2011 (HOCR ATF - 002020-21).

<sup>53</sup> E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] March 7, 2011 (HOCR ATF - 002198-99); *see* E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] March 1, 2011 (HOCR ATF - 002202-03).

<sup>54</sup> This total of 122 guns is based on documents produced to the Committees by DOJ and total represents the minimum number of guns recovered in Mexico as identified by the Committees.

<sup>55</sup> E-mail from David Voth to William Newell December 16, 2010, 7:22pm (HOCR ATF - 001935).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Letter from Ronald Weich, Asst. Att'y Gen., U.S. Dep't of Justice, to Senator Patrick Leahy, Chairman, Senate Jud. Comm., July 22, 2011, 14 ("Based on information known to ATF and analyzed as of May 26, 2011, we understand that ninety-six (96) firearms were recovered in Mexico after the suspects were identified in the investigation.").

From: McMahon, William G.  
 Sent: Tuesday, December 21, 2010 11:21 AM  
 To: Newell, William D.  
 Subject: RE: simple numbers on P&F recoveries

10-4 thanks.

William G. McMahon  
 Deputy Assistant Director (West)  
 Office of Field Operations  
 [REDACTED]

From: Newell, William D.  
 Sent: Tuesday, December 21, 2010 11:21 AM  
 To: McMahon, William G.  
 Subject: Fw: simple numbers on P&F recoveries

For what it's worth and since I don't like the perception that we allowed guns to "walk", I had David Voth put the numbers of the guns recovered in Mexico as well as those we had a direct role in taking off here in the US. Almost all of the 350 seized in the US were done based on our info and in such a way to not burn the wire or compromise the bigger case. The guns purchased early on in the case we couldn't have stopped mainly because we weren't fully aware of all the players at that time and people buying multiple firearms in Arizona is a very common thing.

\*\*\*  
 NOTICE: This electronic transmission is confidential and intended only for the person(s) to whom it is addressed. If you have received this transmission in error, please notify the sender by return e-mail and destroy this message in its entirety (including all attachments).

From: Voth, David J.  
 To: Newell, William D.  
 Sent: Thu Dec 16 19:22:42 2010  
 Subject: simple numbers on P&F recoveries  
 Sir,

I can make this more grand tomorrow if you wish but right now by my count:

- \* Firearms recovered in Mexico = 241
- \* Firearms recovered in the USA = 350

Thanks,

David Voth  
 Group Supervisor  
 Phoenix Group VII  
 [REDACTED]

More troubling, several of these recoveries highlight the deadly consequences of Operation Fast and Furious.<sup>59</sup>

<sup>59</sup> See Section VII *infra*, page 48 for an in-depth look at the tragic consequences of Operation Fast and Furious.

### A. *Tracing the Recoveries*

ATF officials in Mexico learned about many of these recoveries through open sourcing, such as articles in local newspapers or internet searches. After learning of these recoveries, however, it was incumbent on ATF employees in Mexico to attempt to view the weapons recovered as soon as possible in order to see if any link existed between the weapon and the United States. Mexican authorities transported the seized weapons to local police stations for processing. Once processed, the authorities turned the weapons over to the Mexican military, which stored them in vaults indefinitely. Once the Mexican military acquired these weapons, they were considered to be for the exclusive use of the military, and viewing them required a court order. It was therefore imperative for ATF agents in Mexico attempt to view the weapons as soon as possible after a recovery.

When ATF agents in Mexico were able to view these recovered weapons, they could also enter the serial numbers of the weapons into an online internal tracing system known as e-Trace. ATF has a procedure for tracing weapons. This initiates a manual tracing process which involves notifying the National Tracing Center (NTC), located in Martinsburg, WV, of the recovery. NTC then identifies the purchaser as well as the date of purchase. The process can take several days. ATF also maintains a Suspect Gun Database (SGD). This database is a list of all the guns purchased that ATF believes might turn up at crime scenes. Since no specific criteria exist for entering a gun into the SGD, it is usually up to the case agent's discretion. During Operation Fast and Furious, Group VII case agents entered over 1,900 guns into the SGD, usually within days of the purchase. Since these weapons were already in the SGD, the case agent would receive notice the trace request was submitted and the full manual trace process was unnecessary.

Starting in late 2009, ATF officials in Mexico began to notice that many of the weapon recoveries in Mexico traced back to the same Phoenix investigation. ATF personnel in Mexico called the Phoenix Field Division to notify them of what was occurring. The response from Phoenix was that everything was under control and not to worry about the investigation. Because the guns were in the SGD, the case agent in Phoenix received notice of trace requests. The case agent could limit the information that other ATF officials would receive to merely a notice that the trace results were "delayed," which effectively kept ATF personnel in Mexico out of the loop.

For example, in June 2010, Hope MacAllister, the Operation Fast and Furious case agent asked an NTC employee to postpone the completion of several traces for guns recovered in Mexico. With the subject line "RE: Suspect Gun Notification – DO NOT Trace?," the employee writes, "Good morning, as case agent you advised 'do not trace', [t]race will be held pending upon your instructions."<sup>60</sup> In her response, MacAllister asks, "Can we postpone completing that trace as well? Thanks!"<sup>61</sup> These holds prevented ATF personnel in Mexico from discovering the origin of the recovered guns.

<sup>60</sup> E-mail from [NTC employee] to Tonya English and Hope MacAllister, June 10, 2010 (HOGR ATF - 002114).

<sup>61</sup> E-mail from Hope MacAllister to [NTC employee], June 11, 2010 (HOGR ATF - 002117).



To make matters worse, ATF officials in Mexico did not even know that their fellow agents were shutting them out of the investigation. With reassurances from ATF Phoenix and ATF Headquarters in Washington D.C. that things were under control, ATF officials in Mexico remained unaware that ATF was implementing a strategy of allowing straw purchasers to continue to transfer firearms to traffickers. Even though large recoveries were taking place in Mexico, with the awareness of senior ATF officials in both Phoenix and Washington D.C., ATF officials in Mexico did not have the full picture. What they were able to piece together based on several large weapons seizures made them extremely nervous.

### ***B. The Naco, Mexico Recovery***

The first large recovery of weapons in Mexico linked to Operation Fast and Furious occurred on November 20, 2009, in Naco, Sonora – located on the U.S./Mexico border. All of the 42 weapons recovered in Naco traced back to Operation Fast and Furious straw purchasers. Forty-one of these weapons were AK-47 rifles and one was a Beowulf .50 caliber rifle. Twenty of the weapons in this recovery were reported on multiple sales summaries by ATF, and these weapons had a “time-to-crime” of just one day.<sup>62</sup> Within a span of 24 hours, a straw purchaser bought guns at a gun store in Arizona and facilitated their transport to Naco, Mexico with the intent of delivering the guns to the Sinaloa cartel.

Mexican authorities arrested the person transporting these weapons, a 21-year old female. Mexican authorities interviewed her along with her brother, who was also in the vehicle. According to an official in ATF’s Office of Strategic Information and Intelligence (OSII), the female suspect told law enforcement that she intended to transport the weapons straight to the Sinaloa cartel.<sup>63</sup> From the very first recovery of weapons ATF officials knew that drug trafficking organizations (DTOs) were using these straw purchasers.

### ***C. The Mexicali Recovery***

Nearly three weeks after the Naco recovery, an even bigger weapons seizure occurred in Mexicali, the capital of the state of Baja California, located near the border. The seizure included the following weapons:

- 41 AK-47 rifles
- 1 AR-15 rifle
- 1 FN 5.7

In addition, Mexican authorities seized the following items:

- 421 kilograms of cocaine
- 60 kilograms of methamphetamine
- 392 rounds of ammunition
- \$2 million U.S. dollars

<sup>62</sup> E-mail from Mark Chait to William Newell and Daniel Kumor, November 25, 2009 (HOGR ATF – 601993).

<sup>63</sup> Interview with Lorren Leadmon, Intelligence Operations Specialist, in Wash., D.C., July 5, 2011.

- \$1 million Mexican pesos

Of the twelve suspects detained, all were from the state of Sinaloa.<sup>64</sup> Several were identified members of the Sinaloa cartel.<sup>65</sup> The guns recovered at the scene traced back to straw purchasers being monitored under ATF's Operation Fast and Furious.<sup>66</sup> With a second large recovery tracing to the same case in Phoenix in less than three weeks, there was little doubt to ATF officials monitoring Operation Fast and Furious what was happening. As one ATF Special Agent wrote to Fast and Furious Case Agent Hope MacAllister, "[the head of the Sinaloa cartel] is **arming for a war.**"<sup>67</sup>

#### D. *The El Paso, Texas Recovery*

On January 13, 2010, the ATF Dallas Field Division seized 40 rifles traced to Operation Fast and Furious suspect [SP 2].<sup>68</sup> This seizure connected Operation Fast and Furious suspects with a specific high-level "plaza boss" in the Sinaloa DTO.<sup>69</sup> Additionally, this seizure may have represented a shift in the movement of Operation Fast and Furious weapons in order to provide the necessary firearms for the Sinaloa Cartel's battle for control of the Juarez drug smuggling corridor.<sup>70</sup>

This possible shift of Operation Fast and Furious weapons may have been a result of the death of Arturo Beltrán-Leyva in December 2009. Mexican authorities killed Beltrán-Leyva, the leader of the Beltrán-Leyva DTO, effectively crippling his family's DTO.<sup>71</sup> The resulting decreased competition in Sonora between the Sinaloa DTO and the Beltrán-Leyva DTO may have contributed to the shift in Operation Fast and Furious weapons transported to Juarez. The map below, created by the Drug Enforcement Administration (DEA), reflects the areas of DTO influence in Mexico:<sup>72</sup>

<sup>64</sup> See "Operation The Fast and The Furious" Presentation, March 5, 2010.

<sup>65</sup> *Id.*

<sup>66</sup> E-mail from [ATF Official] to David Voth, February 24, 2010 (HOCR ATF – 002301).

<sup>67</sup> E-mail from Jose Wall to Hope MacAllister, December 11, 2009 (HOCR ATF – 002024).

<sup>68</sup> This recovery is not listed in the chart in Section IV since it occurred in the United States.

<sup>69</sup> See "Operation the Fast and the Furious" Presentation, March 5, 2010.

<sup>70</sup> See Alicia A. Caldwell & Mark Stevenson, *Sinaloa Drug Cartel Wins Turf War in Juarez*, AP, April 9, 2010 available at <http://www.azcentral.com/news/articles/2010/04/09/20100409cartel-wins-turf-war-juarez-mexico09-ON.html> (highlighting statements made by FBI officials that the Sinaloa DTO gained control over trafficking routes through Ciudad Juarez).

<sup>71</sup> Ruth Maclean, *Mexico's Drug 'Boss of Bosses' Shot Dead in Raid on Luxury Hideout*, December 18, 2009, available at [http://www.timesonline.co.uk/tol/news/world/its\\_and\\_americas/article6960040.ece](http://www.timesonline.co.uk/tol/news/world/its_and_americas/article6960040.ece) (summarizing the bloody feud between the Beltrán-Leyva brothers and Joaquín Guzmán, the head of the Sinaloa DTO).



#### ***E. Tuesday Briefings at ATF Headquarters***

These weapons recoveries did not occur in a vacuum. Upon learning of the recoveries, analysts in ATF's Office of Strategic Information and Intelligence (OSII) in Washington, D.C. attempted to piece together fragments of information to report up the chain of command. According to ATF personnel, every Tuesday morning OSII holds a briefing for the field operations staff to share and discuss information about ongoing ATF cases.<sup>73</sup> Typically, the four Deputy Assistant Directors for Field Operations attend. Additionally, Mark Chait, the Assistant Director for Field Operations, often attends. Occasionally, Deputy Director William Hoover and Acting Director Kenneth Melson attend these briefings.

OSII first briefed on Operation Fast and Furious on Tuesday December 8, 2009, including the Naco recovery. The following week, OSII briefed the Mexicali recovery. Subsequent briefings covered other recoveries that had occurred in the United States. The magnitude of the Operation Fast and Furious investigation quickly became apparent to senior ATF officials.

<sup>73</sup> Interview with Lorren Leadmon, Intelligence Operations Analyst, in Wash., D.C., July 5, 2011.

#### F. January 5, 2010 Briefing

Assistant Director Mark Chait, Deputy Assistant Director Bill McMahon, International Affairs Chief Daniel Kumor, Southwest Border Czar Ray Rowley, and Assistant Director James McDermond all attended the January 5, 2010, field-ops briefing led by Intelligence Operations Specialist Lorren Leadmon.<sup>74</sup> At this briefing, the participants expressed concerns about Operation Fast and Furious. Though the briefing included the normal updates of weapons seizures linked to Operation Fast and Furious provided every Tuesday, the January 5, 2010, briefing also included a key addition.

OSII had compiled a summary of all of the weapons that could be linked to known straw purchasers under Operation Fast and Furious to date and presented this information to the group. The total number of guns purchased in just two months was 685.<sup>75</sup>

Steve Martin, an ATF Deputy Assistant Director for OSII, took extensive notes during the briefing. Examining the locations where the weapons ended up in Mexico, he outlined potential investigative steps that could be taken to address the problem.<sup>76</sup> Due to the sheer volume of weapons that had already moved south to Mexico, he had a hunch that guns were being walked:

A. So I made – they were talking about – I had [SP 1] in there, I had [SP 2] who were major purchasers. And I had numbers by them about how many guns they had purchased from the PowerPoint. I had a little picture drawn, with Phoenix at the top and then guns going two ways, one down to Naco and then over to Mexicali.

Q. Uh huh.

A. And that was because we said . . . it's the same distance to go from Phoenix to these two places. So they don't all have to go to here to arm the Sinaloa Cartel; they can go over to Mexicali and bring them that way-same distance. So that's one thing I wrote as I was being briefed.

I also wrote down guns, **I think, guns walking into Mexico. Because that's just, kind of, what's going through my head.** And I had, if yes into Mexico, then some things to do; if no into Mexico, things to do. Then I put a list of a whole list of stuff that you could do investigative wise: interview straw purchasers, put

<sup>74</sup> Transcribed Interview of Steve Martin, Transcript at 40, July 6, 2011 (on file with author) [hereinafter Martin Transcript].

<sup>75</sup> *Id.* at 43.

<sup>76</sup> Notes from Steve Martin, ATF Deputy Assistant Director for OSII, January 5, 2010 (HOCR ATF – 001532-53) (produced *in camera* by the Department of Justice).

trackers on the guns, put pole cams up, mobile surveillance, aerial surveillance, a number of stuff.<sup>77</sup>

Hoping to draw from his experience as a former Assistant Special Agent in Charge (ASAC) and Special Agent in Charge (SAC), Martin wanted to offer suggestions on a plan for the case – specifically, how to track weapons, conduct surveillance, and eventually bring Operation Fast and Furious to a close. Those in field operations – the chain of command responsible for overseeing and implementing Operation Fast and Furious – responded to his suggestions with complete silence. ATF personnel within field operations felt free to ignore OSI's suggestions and complaints because OSI's role was to support field operations:

A. From my notes, I asked Mr. Chait and Mr. McMahon, I said, **what's your plan? I said, what's your plan?** And I said, hearing none, **and I don't know if they had one.** I said . . . there are some things that we can do. Ray Rowley, who was the southwest border czar at the time, asked, **how long are you going to let this go on?**

Q. This is in January 2010?

A. January 5th, that meeting, that's correct. Ray has since retired. So I said, well, here are some things that . . . we might think of doing. And we had talked about this before, we'd brainstormed stuff, too, with Lorren. Lorren even talked about it. Kevin talked about it. Kevin O'Keefe had done a lot of trafficking investigations in south Florida – about identifying some weak straw purchasers, let's see who the weak links are, maybe the super young ones, the super old ones. Pole cameras . . . put them up to see who is coming and going, to help you with surveillance.

The aerial surveillance, the mobile surveillance, trackers. I said . . . one of the first things I would do is think about putting trackers, to help me keep track of where they're going.

And I said, as far as going into Mexico, I said, have we thought about putting trackers on them and let them - - follow them into Mexico? Dan Kumor said, the Ambassador would never go for that. I said, okay, fine. I said, I'm not going to pursue that anymore, assuming that.

Had we thought about putting trackers on them and following them down to see where they're going across, to see where they go, who they're in contact with, and where they cross the border, we might find out something new and then . . . interdict. And I got no response. And I wasn't asking for one. I was just . . . throwing this stuff out.

<sup>77</sup> Martin Transcript, at 39-41.

- Q. You said this to who again, Mr. Chait?
- A. Mr. Chait, Mr. McMahon, Mr. Kumor. My boss was there, Jim McDermond, who agreed with me because we talked probably daily.
- Q. **Did any of those folks step up at that time and say, "Oh, no, no, no. We've got another great plan in place"?**
- A. **No. No.**
- Q. **They were silent?**
- A. **Yes. And I don't know if they had one.** I mean, they could have. I don't know.
- Q. Do you remember if they were nodding their head, giving you **any nonverbal cues that . . . this sounds like a bright idea that you're suggesting?**
- A. **Not that I recall, no.**
- Q. Or was it just like a **blank look on their face?**
- A. Just listening.<sup>78</sup>

Whether Mr. Chait or Mr. McMahon had a plan for Operation Fast and Furious is unclear. What is clear is that they did not take kindly to suggestions from OSII about the operation. They were not inclined to discuss the operation at all, choosing instead to excuse themselves from the conversation:

- A. Somewhere during the meeting, Mr. Chait said that he had to go to another meeting, and he left. Mr. McMahon said that he had to go check some E-mails in a classified system, and he left. And then it was just the rest of us talking.
- Q. Do you feel that the other meeting, checking the E-mails on a classified system, was that an indication to you that they just didn't want to talk about this topic?
- A. You know, I'm not going to go into their brain on that one.
- Q. Okay. Well . . . sitting in a room with them, was that your perception?

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<sup>78</sup> *Id.* at 43-45.

A. Well, I would like – it would have been nice to have some interaction. . . .

Q. So it was a one-way conversation of suggestions from you, from Mr. McDermond, to how to effectively limit –

A. Pretty much from me and the others to the field officers.<sup>79</sup>

**G. March 5, 2010 Briefing**

**FINDING:** At a March 5, 2010 briefing, ATF intelligence analysts told ATF and DOJ leadership that the number of firearms bought by known straw purchasers had exceeded the 1,000 mark. The briefing also made clear these weapons were ending up in Mexico.

Two months after the January 5, 2010 briefing, ATF headquarters hosted a larger, more detailed briefing on Operation Fast and Furious. Not part of the normal Tuesday field ops briefings, this special briefing only covered Operation Fast and Furious. David Voth, the Phoenix Group VII Supervisor who oversaw Operation Fast and Furious, traveled from Phoenix to give the presentation. On videoconference were the four southwest border ATF SACs: Bill Newell in Phoenix, Robert Champion in Dallas, J. Dewey Webb in Houston, and John Torres in Los Angeles.

In addition to the usual attendees of the Tuesday morning field ops briefings (the Deputy Assistant Directors for Field Operations, including Bill McMahon, and Mark Chait, Assistant Director for Field Operations), Deputy Director William Hoover also attended. Joe Cooley, a trial attorney from the gang unit at Main Justice, also joined. After a suggestion from Acting ATF Director Ken Melson in December 2009, Assistant Attorney General Lanny Breuer personally assigned Cooley as a DOJ representative for Operation Fast and Furious. Kevin Carwile, chief of the Capital Case Unit at Main Justice, may have also been present. According to Steve Martin, the inclusion of Main Justice representatives was unusual.<sup>80</sup>

An extremely detailed synopsis of the current details of the investigation ensued, including the number of guns purchased, specific details of all Operation Fast and Furious weapons seizures to date, money spent by straw purchasers, and organizational charts of the straw purchasers and their relationship not only to each other, but also to members of the Sinaloa DTO. At that point, there had been 15 related weapons seizures over a four to five month period.<sup>81</sup>

<sup>79</sup> *Id.* at 45-46.

<sup>80</sup> *Id.* at 91 (“[Joe Cooley and Kevin Carwile] never sat in any of my briefings that I can recall.”).

<sup>81</sup> *Id.* at 97. See generally “Operation Fast and the Furious” Presentation, March 5, 2010.

Total Costs of Firearms Purchased as of February 27, 2010			
Name	Gun Purchases	Invoice Total	Notes
	\$8,189.50	\$8,880.81	
	11,984.00	13,002.64	
			Need Receipts
	2,589.60	3,125.57	
	36,959.75	38,823.33	
	36,541.75	39,663.33	
	3,199.60	3,466.77	
	6,487.00	7,038.39	
	3,999.50	4,333.46	
	22,719.80	23,781.91	
			Need Receipts
	8,789.50	9,530.91	
	849.98	849.98	
	4,494.75	4,873.80	
	100.00	100.00	
	7,445.97	7,731.27	
	59,663.40	64,929.98	
	1,999.75	2,166.73	
	1,999.80	2,158.78	
	204,110.59	213,756.87	
	3,992.00	4,331.32	
	1,799.00	1,951.92	
			Need Receipts
	134,638.84	140,034.36	
	19,963.75	21,657.66	
	7,984.00	8,662.63	
	24,892.25	24,892.25	Ammunition
TOTAL PURCHASES	\$615,394.08	\$649,745.32	

The next set of slides at the briefing detailed the fifteen recoveries of weapons that had already taken place during Operation Fast and Furious. Following a map indicating the locations in both the United States and Mexico of these recoveries were detailed slides for each recovery, including the number of guns recovered, the purchaser, the transporter, and the intended recipient in the Sinaloa cartel.



Two of the first slides in the March 5, 2010 presentation detailed the number of weapons bought as of February 27, 2010 – 1,026 – and the amount of money spent, in cash, to purchase these weapons – nearly \$650,000.<sup>82</sup>

Total Firearms Purchased as of February 27, 2010	
Name	Total of Firearms
[REDACTED]	313
[REDACTED]	241
[REDACTED]	116
[REDACTED]	68
[REDACTED]	55
[REDACTED]	30
[REDACTED]	25
[REDACTED]	22
[REDACTED]	20
[REDACTED]	20
[REDACTED]	18
[REDACTED]	17
[REDACTED]	13
[REDACTED]	10
[REDACTED]	10
[REDACTED]	8
[REDACTED]	8
[REDACTED]	8
[REDACTED]	5
[REDACTED]	5
[REDACTED]	3
[REDACTED]	2
[REDACTED]	1
[REDACTED]	1
[REDACTED]	1
[REDACTED]	1
[REDACTED]	1
[REDACTED]	1
[REDACTED]	1
[REDACTED]	1
TOTAL	1026

<sup>82</sup> See "Operation the Fast and the Furious" Presentation, March 5, 2010.

For example, the slide pertaining to the Mexicali seizure indicated that the 12 detained suspects were all from Sinaloa, Mexico, "Confirmed Sinaloa cartel."<sup>83</sup> The slide also catalogs the full recovery: "41 AK-47s, 1 AR-15 rifle, 1 FN 5.7 pistol, 421 kilograms of cocaine, 60 kilograms of meth, 392 miscellaneous rounds of ammunition, \$2 million U.S., and \$1 million Mexican pesos."<sup>84</sup> In addition, the slide graphically depicts the relationships between the straw purchasers and the weapons seized. And finally, the slide on the El Paso recovery links Operation Fast and Furious to a Texas investigation and to the "plaza boss" in the Sinaloa cartel that Fast and Furious ultimately targeted.<sup>85</sup>

Given the rich detail in the presentation, it is clear that the guns bought during Operation Fast and Furious were headed to the Sinaloa cartel. As Martin testified:

- Q. The guns are up to 1,026 at this point?
- A. That's correct.
- Q. I know you had expressed some complaints earlier when it was only at 685. So there's **no doubt after this briefing that the guns in this case were being linked with the Sinaloa cartel**, based on the -
- A. Based on the information presented, I'd say yes.
- Q. And that was presumably **very apparent to everybody in the room?**
- A. Based on this one, it says the people are connected with the Sinaloa cartel, I would say **that's correct**.<sup>86</sup>

The volume of guns purchased and the short time-to-crime for many of these guns clearly signaled that the Sinaloa cartel received the guns shortly after their purchase in Arizona. If ATF had attempted to interdict the weapons, it is likely that hundreds of these weapons would not have ended up with this dangerous cartel or entered Mexico.<sup>87</sup> Martin agreed that was clear:

- Q. But whether the guns were walking, whether they were flying, whether they just disappeared, based on all the evidence that you've collected to this point, **it was pretty clear that the guns were going almost linearly from the FFLs to the DTOs?**
- A. **They were headed that way**.<sup>88</sup>

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Martin Transcript, at 100.

<sup>87</sup> For a complete discussion of the shortcomings of ATF's investigation, see generally *The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents*, Joint Staff Report, 112th Congress, June 14, 2011.

<sup>88</sup> Martin Transcript, at 50.

Several individuals, such as Ray Rowley and those in OSII, had already expressed their concerns, only to have them fall on deaf ears. Others, however, remained silent, despite the ominous consequences:

- Q. Was there any concern ever expressed about the guns being . . . essentially just bee lined right to the drug trafficking organizations about what the DTOs might actually do with the guns?
- A. I think it was **common knowledge that they were going down there to be crime guns to use in the battle against the DTOs to shoot each other.**
- Q. So these guns, in a way, are murder weapons?
- A. **Potentially.**<sup>89</sup>

The only person that did speak up during the March 5, 2010 presentation was Robert Champion, SAC for the Dallas Field Division participating by videoconference, who asked “What are we doing about this?”<sup>90</sup> According to Lorren Leadmon, in response, Joe Cooley from Main Justice simply said that the movement of so many guns to Mexico was “an acceptable practice.”<sup>91</sup>

Shortly after the March 5, 2010 presentation on Operation Fast and Furious, OSII stopped giving briefings on the program to ATF management during the weekly Tuesday meetings. OSII personnel felt that nobody in field operations heeded their warnings, and OSII no longer saw the point of continuing to brief the program.

## V. Kept in the Dark

**FINDING: ATF and DOJ leadership kept their own personnel in Mexico and Mexican government officials totally in the dark about all aspects of Fast and Furious. Meanwhile, ATF officials in Mexico grew increasingly worried about the number of weapons recovered in Mexico that traced back to an ongoing investigation out of ATF’s Phoenix Field Division.**

Not surprisingly, ATF officials in Mexico grew increasingly alarmed about the growing number of weapons showing up in Mexico that traced back to the Phoenix Field Division. Yet, when they raised those concerns, ATF senior leadership both in Phoenix and Washington, D.C. reassured them that the Phoenix investigation was under control. No one informed them about

<sup>89</sup> *Id.* at 103-104.

<sup>90</sup> Interview with Lorren Leadmon, Intelligence Operations Specialist, in Wash., D.C., July 5, 2011.

<sup>91</sup> *Id.*

the details of Operation Fast and Furious. No one informed them that ATF was knowingly allowing guns to be sold to straw buyers and then transferred into Mexico.

**A. Volume of Weapons Raises Eyebrows in Mexico**

ATF leadership in Mexico started noticing an “abnormal” number of weapons flowing from Phoenix into Mexico as early as the end of 2009. Former ATF Attaché Darren Gil explained:

Q. Now, at some point you mentioned that in late 2009, early 2010, your analysts made you aware of an increase in the number of recoveries, firearm recoveries being traced back to Phoenix; is that right?

A. Correct.

Q. And I think the word you used was abnormal. Can you explain for us what exactly -- what was normal?

A. Normal was -- there's, I want to say there's at least 1,000 FFLs along the border. And . . . some people use the trail of ants terminology, some people use the river of iron terminology, but generally you'll get a handful of traces to this FFL, handful of traces to this FFL, Federal Firearms Licensee, all along the border.

\* \* \*

I asked my analyst, because I was fairly new. I said, why is this abnormal. He says, look, Darren, we have all these trace results and they come from a variety of FFLs, but then you have a high correlation here with this one particular investigation coming out of Phoenix where we're getting this way and above the number of recoveries we get from all these other Federal Firearms Licensees. So it stuck out to my analyst who presented that to me that it was an abnormal, his terminology actually, abnormal number of recoveries.<sup>92</sup>

The “abnormal number of recoveries” concerned Gil and his agents in Mexico. Gil sought answers:

Q. And when your analyst made you aware of this uptick, what was the next step that you took?

<sup>92</sup> Gil Transcript, at 61-62.

- A. Pretty much a review, show me what you're talking about, which he did. And then the phone call to Phoenix. And then after the phone call to Phoenix, which I spoke of, throughout the rest of the time it was primarily dealing with ATF headquarters, primarily with the chief of international affairs, Dan [Kumor].<sup>93</sup>

**B. Reassurances from Phoenix and Washington, D.C.**

Attaché Gil initially reached out directly to the Phoenix Field Division to express his concerns about the growing number of weapons. Gil explained:

- Q. So when your staff in Mexico determined that a particular weapon was tracked back to Phoenix, did they try or did you try to make contact with some of the ATF staff in the Phoenix field office?
- A. I did. I called the division, tried to make contact with the SAC. I don't believe I spoke with the SAC, but I got a returned call and spoke with the ASAC there, George [Gillett]. I identified my concerns, hey, we're getting an abnormal number of traces. From what I recall his response was, yes, we're aware of it. We have an ongoing investigation. We have a ton of resources on it. We're looking at it. We're working at it, and thanks for calling and making us aware and then we'll follow it up from there.<sup>94</sup>

Yet the seizures continued unabated, and the answers Gil received failed to better explain the underlying cause. Gil continued:

- Q. So your discussions with Mr. [Gillett] in early January, is it fair to say you weren't satisfied with the results of that call?
- A. I was satisfied with the first response, sure. They're working a case, they're trying to identify what the problem is, how these weapons are getting there, they're aware of it. That's a normal response, okay, good, we're on the job.

But . . . unfortunately, my chief analyst and my deputy would come back and say, Darren, these are – we're getting more and more and more of these seizures. And I would make inquiries with the Phoenix field division and I wasn't getting any responses back. And I may have gotten two more phone calls, yeah, we're working on it, we're working on it.<sup>95</sup>

<sup>93</sup> *Id.* at 63.

<sup>94</sup> *Id.* at 15-16.

<sup>95</sup> *Id.* at 17.

Despite these reassurances, the volume of weapons flowing from Phoenix into Mexico continued to grow. Further, no one at ATF provided Gil or his staff any explanation as to why the volume continued to grow. When Gil and his staff tried to access the trace data on their E-Trace system to find out for themselves, they learned they did not have access. As Gil explained:

And at that point, with the number of seizures we were receiving in Mexico, that wasn't – that connected to the fact that my analyst didn't have access to the trace data in E-Trace, where we entered the data, normally we . . . would get that information back regarding the trace.

Unfortunately, my . . . deputy advised me that we were entering the data but we weren't getting the trace results back, all we were getting was "trace information delayed". And what that generally means is, there's been a hold placed on it by either the tracing center or by a field division because they didn't want that information released for some particular reason.<sup>96</sup>

Members of Phoenix Field Division Group VII, including its case agent with support from the Group supervisor, actively shut out their colleagues in Mexico. As a result, Attaché Gil decided to seek answers from senior leadership in Washington, D.C.: "Ultimately I made phone calls to the chief of international affairs, Dan [Kumor], to try and get responses because I wasn't getting responses from Phoenix like I thought I should."<sup>97</sup> In early 2010, Attaché Gil shared his concerns with Kumor about the increasing number of gun recoveries in Mexico linked to Phoenix:

Q. At some point I understand you had some conversations with your boss back in Washington, Mr. [Kumor]. Was he the first person in Washington that you spoke to about the abnormal number of weapons that you were recovering?

A. Yes.

Q. And do you remember when the first time you raised this issue with Mr. [Kumor] was?

A. Again, it would be early 2010, probably around – probably January, about the same time.

We talked almost certainly weekly and almost daily basis, so he would have been notified at that time.

Q. And do you remember what his reaction was when you first raised the issue with him?

<sup>96</sup> *Id.* at 17-18.

<sup>97</sup> *Id.* at 17.

A. Certainly, yeah, okay, let me check on it, it's an ongoing investigation, let me make some inquiries and I'll get back with you.

Q. And did he ever get back with you?

A. Yes.

Q. And what did he say?

A. Again, he said an on-going investigation, they're looking at straw purchasers, they have cooperative Federal Firearms Licensees and it sounds like a significant investigation. And . . . he didn't have access to the trace information either but . . . the Phoenix field division is aware of the investigation. The chain up to him is aware of the investigation, so everybody is aware of it and it looks like they have it under control.<sup>98</sup>

Gil found it insufficient to hear the investigation was "under control." In the meantime, guns from a known straw purchasing ring continued to flow into Mexico from Arizona. Although Gil and his agents in Mexico remained in the dark about the tactics and strategy of Operation Fast and Furious, they realized something was wrong. Gil continued to express his concerns:

Q. And did you ever raise any issues with Mr. [Kumor] that while they . . . may think they have it under control, it may not be under control because we are recovering an abnormal number of firearms?

A. Again, spring time it got to the point of at what point are we going to . . . to close this investigation down? I mean, after 500 or so seizures I think you should have had enough data collection on what you're trying to show or prove. It was my position, it was Chief [Kumor's] position as well. He says, yeah, you're right. And he goes, so when are they going to close this down. And we were both on the same position there that this thing needed to be shut down.

So there was a number of ongoing – you saw my CBS interview, screaming matches . . . it was a very frustrated – high frustration level. And that was one of the reasons for . . . being frustrated.<sup>99</sup>

Understandably, Gil was frustrated. Hundreds of weapons appeared suddenly in Mexico – traced to Phoenix – without explanation. Gil and his agents struggled to get answers from their own agency. Although ATF officials in Phoenix and Washington, D.C. acknowledged that an

<sup>98</sup> *Id.* at 20-21.

<sup>99</sup> *Id.* at 21.

investigation was underway, they refused to share the details of the strategy and operation with the agents in Mexico. Gil took their silence as suggesting that his colleagues did not trust him to keep the information confidential:

- Q. Did you have any idea why you weren't being made aware of the specific details of this investigation?
- A. I can tell you what I was told and they were afraid that I was going to either brief the ambassador on it or brief the Government of Mexico officials on it.
- Q. And it was your understanding that individuals within ATF higher than Chief [Kumor] didn't want the ambassador to know about the investigations?
- A. I couldn't say that . . . specifically they didn't want the ambassador to know. I know I asked . . . why can't I be briefed on this. Well, they're afraid that you would brief the GOM officials, Government of Mexico officials or . . . brief the ambassador. **They were just worried about somebody leaking whatever was unique about this investigation.**<sup>100</sup>

## VI. More Complaints and More Reassurances

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ATF officials in Mexico constantly worried about the number of guns flowing from Phoenix to Mexico in connection with the Phoenix Field Division's investigation. Mexican authorities continued to seize guns at violent crime scenes involving Mexican DTOs. Without being privy to the particular tactics utilized by Operation Fast and Furious, ATF's representatives in Mexico suspected something was terribly amiss. Because initial contacts with Phoenix provided few answers, ATF officials in Mexico continued to report their concerns up the chain of command to ATF leadership in Washington, D.C. Instead of acting on their complaints, senior leadership at both ATF and the Department of Justice praised the investigation. However, ATF agents in Mexico kept sounding the alarm. In July 2010, Gil and his agents received notification that the Phoenix Field Division's investigation would be ending and shut down.<sup>101</sup> In reality, ATF agents in Phoenix closed the investigative stage of Operation Fast and Furious in January 2011, only after the tragic death of Border Patrol Agent Brian Terry in December 2010.

<sup>100</sup> *Id.* at 72.

<sup>101</sup> See Section VI.E *infra* page 44 (summarizing the exchange between Gil and Kumor regarding the timeline to shutdown Operation Fast and Furious).



**A. Concerns Raised up the Chain of Command**

**FINDING:** ATF officials in Mexico raised their concerns about the number of weapons recovered up the chain of command to ATF leadership in Washington, D.C. Instead of acting decisively to end Fast and Furious, the senior leadership at both ATF and DOJ praised the investigation and the positive results it had produced. Frustrations reached a boiling point, leading former ATF Attaché Darren Gil to engage in screaming matches with his supervisor, International Affairs Chief Daniel Kumor, about the need to shut down the Phoenix-based investigation.

Without knowing of possible gunwalking tactics used in Operation Fast and Furious, Gil and other ATF officials in Mexico knew the investigation needed to be shut down based on the empirical data. As Gil testified:

Q. And the number of firearms recovered in Mexico, you said it was about 500 in the spring, did that number continue to rise?

A. Yes, it did. I want to say by the time I left I think it was up to, which was in October, I think it was up to – the last data I think I was quoted was like 700 or so.

Q. And that continued to alarm you?

A. It was a topic of discussion every time – pretty much every time we spoke about when this thing was going to be shut down. And the general – the origin of it was, again, because it worried my folks. My chief analyst, who would see the data every day. He'd put in the trace results, he'd get information back, data – "trace results not available", which means ATF put a hold on it somewhere.

So number one, we were submitting our information and we weren't getting our own trace data back, so that was an issue. The number was an issue. The fact that these guns were found in crime scenes, which we could not notify the GOM, the Government of Mexico, was an issue.

The fact that this brought pressure on us from the GOM because they're saying, why are we using – we're spending – ATF is spending extraordinary number of resources to train them on the Spanish E-Trace. And in the same breath they're saying, look, we're not getting anything back so why should we use this Spanish E-Trace, it's a waste of our time. And we have to say, no, it gives you this, this, and this. And they go, yeah, but we're not getting anything back.

So it became a big event that we're not getting this trace data back and it frustrated my folks, they in turn notified me. And we had meetings on it and then I'd make my calls to headquarters, again, primarily Chief [Kumor], and voiced our concerns. And it got to the point I would have my staff, on conference calls that we have, speak with Chief [Kumor] trying to – what the heck is going on here.<sup>102</sup>

Gil and his staff struggled to deal with this growing crisis. Despite the increasing number of guns from Phoenix showing up at violent crime scenes in Mexico, ATF agents in Phoenix continually denied the ATF agents in Mexico the relevant information explaining this spike. Gil was so passionate about his and his staff's concerns that he had yelling matches with his boss:

Q. Who were those screaming matches with?

A. Primarily with Chief [Kumor]. And it wasn't just on this, all right, keep that in mind. . . . However, this was also part of it and at some point screaming, yelling . . . hey, when are they going to shut this, to put it bluntly, damn investigation down, we're getting hurt down here.

When, again, I think I mentioned in my CBS interview, when the Mexicans find out about this. **And this was not even knowing of the potential for gun walking. This was just . . . not shutting this investigation down and letting another 300 weapons come into the country after the first 300 weapons.** Because, again, it's inconceivable to me to even allow weapons to knowingly cross an international border.<sup>103</sup>

\* \* \*

Q. So it was clear to you that this ongoing case based out of Phoenix was proceeding, they weren't shutting it down, you disagreed with that because you saw too many weapons showing up in Mexico?

A. That's a fair assessment.<sup>104</sup>

Deputy Attaché Canino shared Gil's concerns about the number of guns entering Mexico and that something needed to be done:

Q. What discussions did you have about the weapons from the Phoenix case in Mexico with Mr. Gil, Mr. Darren Gil?

<sup>102</sup> Gil Transcript, at 30-32.

<sup>103</sup> *Id.* at 66-67.

<sup>104</sup> *Id.* at 24.

- A. We were very concerned . . . with that amount of guns and short period of time on a suspect gun data and they kept climbing.

\* \* \*

I said, Darren, this is a problem . . . these many guns coming down here is a problem. We made that known to Danny Kumor . . . Danny was in agreement he pushed it up the chain and we were told yeah it is a case out of Phoenix and it is going great.<sup>105</sup>

Gil and Canino prevailed upon their direct supervisor, Daniel Kumor, ATF's Chief of International Affairs, to take their concerns about the volume of weapons in Mexico up the chain of command:

- Q. When you say pushed it up the chain, what do you mean exactly?
- A. He told his superior.
- Q. That would have been who?
- A. That would have been deputy assistant director Bill McMahon.<sup>106</sup>

Gil also testified that Kumor spoke to his superior, Deputy Assistant Director McMahon, about this matter:

- Q. And do you know if [Kumor] had any conversations with Mr. [McMahon], did he ever relate to you that he's had these conversations with Mr. [McMahon]?
- A. Sure. He would say, I'll - I'm going to go meet with . . . Bill [McMahon], the deputy assistant director. And he would - and then in our conversations he would respond and, hey, I've spoken with Bill and he's going to send notification out or contact Phoenix and see what's going on, sure.<sup>107</sup>

Gil also discussed his concerns with McMahon during trips to Washington:

- Q. Did you take any trips to Washington during this time period of -
- A. Sure.
- Q. - January 2010 to before you left October 2010?

<sup>105</sup> Canino Transcript, at 16.

<sup>106</sup> *Id.* at 16-17.

<sup>107</sup> Gil Transcript, at 22-23.

A. Yes.

\* \* \*

Q. You said, might have discussed it with Mr. [McMahon]. If you did, it wasn't something that you remember in detail?

A. Yeah, would have been, hey . . . is this thing still going on, and when is it going to be shut down. And something to the effect they're either working on it – again, their general response was they're working on it, they're going to close it down as soon as they can, and we'll let you know.<sup>108</sup>

While Phoenix was “working on it,” guns continued to flow unabated into Mexico. Gil, Canino, and other ATF agents in Mexico raised legitimate concerns, but leadership told them to stand down. According to ATF leadership, not only was everything “under control,” but everyone in ATF *and* DOJ were well aware of the investigation in Phoenix:

Q. And at any point during those conversations was it made clear to you that the director is aware of this program?

A. Yes. At one point, I mean, again, probably during one of the final screaming matches was . . . I think I threw the question out there, hey, is DOJ aware of this investigation? Are they aware of what's going on, and are they approving this.

And then the chief's response was, yes, not only is . . . the director aware of it, Billy, William Hoover is aware of it, DOJ is aware of it. And then . . . through that fact – they have a Title 3, so DOJ must be aware of it certainly for that aspect. And certainly the US Attorney's office in Phoenix is aware of it because they had to approve the investigation.

But – so it wasn't just is the direct link aware of it . . . if the acting director is aware you assume everybody is aware of it. And then, okay, they don't want me to know something for some reason that's fine, they have their reasons and . . . you got to defer to your executive staff.<sup>109</sup>

Senior leadership in Phoenix and Washington, D.C. continued to provide reassurances without answers during their visits to Mexico. Canino recalled several visits by both Mark Chait and Bill McMahon:

<sup>108</sup> *Id.* 36-38.

<sup>109</sup> *Id.* at 24-25.

Q. Did senior officials from DOJ and ATF visit Mexico with regard to this case?

A. This case specifically?

Q. Did they make any visits to Mexico?

A. Sure, yeah. Mmh hmm.

Q. Would this case have been one of the things that got discussed during their visits?

A. We talked about it, but we said . . . hey what is going on with this case out of Phoenix, we are starting to see a lot of guns in the suspect gun database, kind of alarming, so many guns. They said hey . . . we've got it handled, we are working, it is a good case out of Phoenix.

Q. Who would these officials have been?

A. Well, the director had come down, the deputy director had come down, the deputy associate director had come down.

Q. Who is that?

A. Bill McMahon. This assistant director for field operations, that is the guy who is in charge of all agents.

Q. Mark Chait?

A. Mark Chait came down. Bill Newell came down. So, yeah these guys have come down.

Q. Multiple visits?

A. Yeah. Some of them, multi visits and they talked, hey, yeah, we got a big case out of Phoenix.<sup>110</sup>

As Gil later stated, "[a]t that point . . . you just got to say, fine, these guys, they're the leaders of this agency and they have some plan that I'm not aware of, but hopefully they have a good one."<sup>111</sup>

<sup>110</sup> Canino Transcript, at 19-20.

<sup>111</sup> Gil Transcript, at 69.

**B. A "Good Investigation"**

The Phoenix Field Division and ATF headquarters extolled the virtues of the investigation to ATF personnel in Mexico. For example, during Acting ATF Director Kenneth Melson's 2010 spring visit, Gil's staff asked about the Phoenix case. Gil detailed Acting Director Melson's response:

Q. And do you recall what Mr. Melson said?

A. Generally his response was, he's aware of it, it's an ongoing investigation, it's providing some good intelligence . . . [A]ll positive as far as the investigation, it looks good. And I remember, I think Deputy Director Hoover was there. I think he turned to the deputy director and said, yeah, we'll check on it when we get back but I think it's providing some good results and we'll check on when it's going to be closed down, but my understanding it should be closed down fairly soon.<sup>112</sup>

Canino confirmed Gil's recollection:

Q. And when any of the ATF officials came to Mexico, whether it is Melson or Hoover, do you recall briefing them? Or maybe briefing is the wrong word.

A. Mentioning it? Sure.

Q. Do you remember mentioning that there's a lot of firearms being tracked back to Phoenix?

A. Mmh-hmm.

Q. Do you remember what their response was?

A. It was like, yeah . . . we got a case. We got a good case going on in Phoenix.

\* \* \*

Q. Senior people in headquarters were aware of the case and they were not as alarmed?

A. Right.

<sup>112</sup> *Id.* at 40.

Q. They thought it was under control, or they thought it was a great case, about to come to fruition?

A. Correct.<sup>113</sup>

### ***C. Lanny Breuer and the Department of Justice***

Gil and Canino received the same message of support for Operation Fast and Furious from the Department of Justice. During a visit to Mexico, Lanny Breuer, the Assistant Attorney General for the Criminal Division demonstrated his awareness of the case:

Mr. [Breuer] kind of summed up his take on everything at the end, and one of them was that there's an investigation that ATF is conducting that looks like it's going to generate some good results and it will be a good positive case that we can present to the Government of Mexico as efforts that the US Government is taking to try and interdict weapons going into Mexico. And that was about -- that was it. That was just a general statement. Myself and my deputy I believe were in the room and we kind of looked at each other. We're aware of this case, and so we assumed that's what he was mentioning. And we just wanted to make sure -- we look at each other going, hope the ambassador [Carlos Pascual] doesn't ask any questions because we really don't know anything about the case. And luckily the ambassador did not.<sup>114</sup>

Canino also remembered a visit from Breuer where Breuer touted the Phoenix case:

Q. And during meetings with Mr. Breuer, did this subject come up?

A. I mean, I was in a meeting, it was a country team meeting, or it might have been a law enforcement team meeting . . . Ambassador, Mr. Breuer was there, Darren was there, Mr. Breuer . . . the Ambassador was saying hey, you know what . . . we need a big win we need some positive, some positive [firearms trafficking] cases. And Lanny Breuer says, yeah, there is a good case, there is a good case out of Phoenix. And that is all he said.

\* \* \*

Q. But do you remember the specific incident with the Ambassador talking about the success stories?

A. Right.

<sup>113</sup> Canino Transcript, at 102-103.

<sup>114</sup> Gil Transcript, at 44.

- Q. And that is when Breuer mentioned this large case in Phoenix?
- A. Yeah. He said we got, there is a good case out of Phoenix.
- Q. And is it your impression that the case he was referring to is what now what you now know to be Fast and Furious?
- A. Yeah, when he said, I thought, oh, okay . . . he knows. He knows about this case.<sup>115</sup>

The Department of Justice, and more specifically, Assistant Attorney General Lanny Breuer, clearly knew about Operation Fast and Furious. Further, the Department of Justice's Office of Enforcement Operations (OEO) approved numerous of the wiretap applications in this case. These applications were signed on behalf of Assistant Attorney General Breuer in the spring of 2010. Instead of stemming the flow of firearms to Mexico, Operation Fast and Furious arguably contributed to an increase in weapons and violence.<sup>116</sup>

Additionally, the United States Attorney's office in Arizona – another DOJ component – was inextricably involved in supervising Operation Fast and Furious as the office was part of a prosecutor-led and ODETF funded strike force.<sup>117</sup> According to many agents, the U.S. Attorney's office's intimate day-to-day involvement was to the detriment of ATF's Phoenix Field Division. Furthermore, although DOJ knew about the operation, it kept key people who needed this information in the dark.<sup>118</sup>

#### **D. Still in the Dark**

By their own accounts, members of the senior leadership of both ATF and DOJ wanted a big firearms trafficking case to demonstrate success in combatting Mexican cartels. Despite this goal, they failed to provide specifics of the case to both Mexican officials and ATF personnel stationed in Mexico. As the chief ATF advisor in Mexico, Gil found this lapse of information sharing embarrassing.<sup>119</sup>

As Attaché in Mexico, Gil needed to be aware of ATF operations that impacted Mexico. Nevertheless, his own agency intentionally withheld critical details of the tactics and strategy behind Operation Fast and Furious. Gil did not even know the name of the operation until January 2011:

- Q. And generally, it would have been your job to approve operations that involved Mexico given your position as the attaché?

<sup>115</sup> Canino Transcript, at 22-23.

<sup>116</sup> See Section IV *supra*, page 8 for a detailed discussion of the flow of weapons to Mexico and the increased violence as a result.

<sup>117</sup> Briefing Paper, Phoenix Field Division, 785115-10-0004 (Jan. 8, 2010).

<sup>118</sup> See *supra* Section V.B.

<sup>119</sup> Gil Transcript, at 45.



- A. Correct. Any activity regarding certain ATF in Mexico should have come through the ATF attaché's office in Mexico, and certainly any investigative activity should have been brought to the attention of the office.

\* \* \*

- A. Again, I was aware there was an investigation, but I wasn't aware of the particulars of the investigation.<sup>120</sup>

According to Gil, ATF leadership withheld information from him and other ATF agents in Mexico because of a fear that they would brief the Government of Mexico on the investigation and would jeopardize Operation Fast and Furious:

- Q. Did anyone ever tell you, this is sensitive and we can't let the Government of Mexico know about this case?
- A. Yeah, in one of my conversations -- it was probably more than one, but certainly one that I recall, because it was so out of character, but . . . what our impression was in Mexico was it's a high level investigation. We understand the security issues of it. There's a Title 3 going on. So we all assume it's probably a corrupt Federal Firearms Licensee or more or others, and maybe they do have a connection that's flowing weapons there and they're working on it.

But at some point, okay, you haven't gotten the information by this time . . . you need to shut it down just for safety and security reasons. So that was the assumption we had.

\* \* \*

Well, they're worried the Mexicans are going to get -- the Government of Mexico would get it and it would ruin their investigation. All right, so let us know. Well . . . they're afraid that you'll either willingly or unknowingly release this information to your GOM counterparts.

Okay, well, how about letting me know as the attaché. Well, they're afraid that you'll do the same. And at that point . . . I called my folks and I said, look, they say they have it under control, all we can do is continue our mission down here and work towards our objectives and hopefully this investigation will bear fruit down the road that everybody is going to be happy with.

<sup>120</sup> *Id.* at 111-112.

But the problem we had, and I noted in my interview, was that these weapons are being recovered in violent crime scenes of Mexican law enforcement interacting with cartels or Mexican military officials interacting with cartels. And these guns are going to come back in the murder of some of these officials and we're going to have some explaining to do.<sup>121</sup>

Ultimately, ATF leadership's withholding of information worked against its own representatives in Mexico. This realization was a source of major irritation and frustration for Gil:

Q. Is it inconceivable to you that you were not a part of these discussions?

A. Again, I've repeatedly said I was very frustrated down there. And so that answer is, yes, I was very frustrated because I was not part of the ongoing investigation.

Q. So when you're told about a bigger picture, when you're told about a more sophisticated case, you hear [Lanny Breuer] referencing an ATF case, which is presumably this case. . . . At any point in time did you say, why am I not read into this case? Why am I not a party to these conversations?

A. Sure. Myself, my deputy, my staff, we were all frustrated. We didn't understand it. We understand the concept to keep secret investigations, that if you leak something potentially that it could get corrupt the case or get somebody . . . unfortunately get somebody hurt or killed. We understand that, but as I said, one of my screaming matches was over this issue that, okay, you don't want us to -- okay, if you tell me I'm not going to release anything to the Government of Mexico then I won't release it, but let me know.

When you tell me, well, we don't want to let you know because we're afraid you'll notify the ambassador or ultimately somehow the Government of Mexico is going to find out, yes, that irritates me. **And you can see why the voice level went up and the vulgar language probably came out on certain occasion because it is very, very irritating.**

Q. And you were trying to help them understand these guns are being recovered at crime scenes, these guns are in the possession of cartels, people are dying?

A. Correct.

<sup>121</sup> *Id.* at 32-34.

Q. Is that part of your –

A. Myself, the deputy, I mean, it's like ground-hog day and – that's the best way to put it. Every time the event came up for whatever reason, maybe it was a new seizure, I was notified again, hey, when is this going to be shut down. And it's the same response that, hey, we're still working on it, it's still ongoing, we're getting some good information and we'll shut it down as soon as we can.<sup>122</sup>

**E. Told Operation Fast and Furious Being Shut Down**

**FINDING:** Despite assurances that the program would be shut down as early as March 2010, it took the murder of a U.S. Border Patrol Agent in December 2010 to actually bring the program to a close.

As the ATF officials in Mexico continued to express concerns throughout 2010, ATF leadership told them the investigation would be shut down as soon as possible. Gil explained:

I queried Chief [Kumor] again . . . and that – and the ongoing discussion continued, they're aware of it, they're going to close it down as soon as they possibly can, but there's still – they think the investigation is not to the point where they can close it yet. And the discussions went on and on. It went to the point I departed Mexico.<sup>123</sup>

Gil left his position as Attaché to Mexico in October 2010 and retired from the ATF just a few months later. At the time of his retirement, Operation Fast and Furious remained ongoing. Several months before Gil retired, Deputy Attaché Canino wrote to Dan Kumor with disturbing statistics:

Like I said, this is a problem. I sent an e-mail, I think it was July of 2010 . . . letting Dan Kumor know that approximately . . . the count was up to 1,900 guns in suspect gun data, 34 of which were, 34 of which were .50 caliber rifles. And I, my opinion was that these many .50 caliber rifles in the hands of one of these cartels is going to change the outcome of a battle. Dan pushed it forward. He was told, yeah, we are taking the case off in August of 2010. The case doesn't get taken off until January 25, 2011.<sup>124</sup>

Kumor's response led Canino to believe that arrests were imminent in Operation Fast and Furious:

<sup>122</sup> *Id.* at 113–115.

<sup>123</sup> *Id.* at 78.

<sup>124</sup> Canino Transcript, at 17.

- Q. So anyway let's talk about Danny Kumor telling you it is going to be closed down. You send him in the e-mail in July?
- A. He says, hey, I talked to Bill McMahon, Bill McMahon said they are taking the case down in August.
- Q. What did that mean to you? What was your understanding?
- A. That they were going to shut the case down and make arrests.
- Q. Now, at that point you still didn't know that they were gun walking?
- A. I never knew, I never believed it until this past April. Even after I ... talked to other guys in intel.
- Q. Just to go back to this. So when they said they are going to close the case down, what did you interpret that to mean? What was they were shutting down?
- A. They were going to start making arrests. Now ... through the fall, late fall, and I have been talking to Bill.
- Q. Bill Newell?
- A. Bill Newell, and Bill told me, hey, Carlos, we are going to probably take this down you know we are trying to take it down, I think he said December or so ... Novemberish. ... This is right around October ... November, December we are going to take this down ... then, the Terry murder happens.<sup>125</sup>

The first arrest finally came in December 2010, immediately after Agent Terry's murder. More followed a few weeks later in January 2011. Prior to these arrests, Canino and the other ATF agents in Mexico continued to urge ATF leaders to shut down Operation Fast and Furious to no avail. Canino testified:

Like I said, right around after somebody told me the figure was 1,200 guns ... there's a case out of Phoenix. ... They'll take it off when they take it off. We're concerned. ... I've made my concerns up the chain ... sent that e-mail in July. I'm told they're going take it off in August. From September nothing, October ... October, November, Bill Newell says, I'm going to start taking this off. ... October, November. December comes around, Agent Terry happens. They take it off in January, end of January.<sup>126</sup>

<sup>125</sup> *Id.* at 95.

<sup>126</sup> *Id.* at 123.

Kumor testified about his conversation with Deputy Assistant Director William McMahon about shutting down Operation Fast and Furious:

Q. But he did suggest to us in an interview we did that at least in part he was telling you we've got to shut that case down, we've got to shut that case down?

A. Oh, yeah, we've had those discussions.

Q. But that got heated as well. He was very animated about needing to shut this case down?

A. And if we did which is very possible and I'd say I agree with you a hundred percent but it's not my call, and I've already made those concerns known . . . to Bill [McMahon], and it's not -- I don't have the authority to do it. And I said, matter of fact, whoever comes down or if you want to pick up the phone, you can tell them and see if you get anywhere with them. But the bottom line is that they're saying that the U.S. attorney's office is not going to authorize them to arrest these people. And, again, they're up on a wire and they're trying to put this case together.

Q. And when you say "Bill," you mean McMahon?

A. Yes.<sup>127</sup>

***F. Concerns Communicated to Deputy Assistant Director McMahon***

Despite Dan Kumor's testimony to the Committees' investigators, Deputy Assistant Director for Field Operations William McMahon tried to minimize his knowledge of the concerns expressed by ATF agents in Mexico to their supervisors at Headquarters during his testimony to the Committees:

Q. What about Mr. Kumor? Did he express any concerns about this case?

A. Not that I remember.

Q. Essentially you were having two direct reports --

A. Uh huh.

Q. Expressing major concerns about this case to you.

<sup>127</sup> Transcribed Interview of Daniel Kumor, Transcript at 39, July 13, 2011 (on file with author) (hereinafter Kumor Transcript).

A. I did?

Q. Yes, Mr. Kumor and Mr. Rowley. That doesn't ring a bell?

A. No, it doesn't. Them expressing concerns?<sup>128</sup>

A December 17, 2009 e-mail from Bill Newell indicates that he intended to brief McMahon about Ray Rowley's concerns regarding weapons showing up in Mexico in great numbers.<sup>129</sup>

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<sup>128</sup> Transcribed Interview of William McMahon, Transcript at 38, June 28, 2011 (on file with author) [hereinafter McMahon Transcript].

<sup>129</sup> E-mail from Bill Newell to Dave Voith December 17, 2009 (HOCR ATF – 000906).

From: Newell, William D.  
 Sent: Thursday, December 17, 2009 11:45 AM  
 To: Gillett, George T. Jr.  
 Cc: Voth, David J.  
 Subject: Re:

Well done, thank you. I will address Ray's concerns with McMahon.  
 Bill Newell  
 Special Agent in Charge  
 ATF Phoenix Field Division (AZ and NM)

\*\*\*

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From: Gillett, George T. Jr.  
 To: Newell, William D.  
 Cc: Voth, David J.  
 Sent: Thu Dec 17 13:27:49 2009  
 Subject: Bill-

OSII has not yet finished a link diagram on this investigation. Therefore, there is no "chart" in existence diagramming this investigation. Lorren Leadmon and crew are currently working on such a link-diagram chart, but it is not yet complete. Mr. Leadmon did have a power point that gave an overview of the case and that has been forwarded to GS Voth. However, that power point is about 1 week old, so the info is already a bit dated. GS Voth and Mr. Leadmon are speaking on a regular basis, so the lines of communication are now the equivalent of the proverbial fire hose. During one of their conversations, Lorren told Voth that Ray Rowley received a briefing on the investigation this week and mentioned the possibility of needing to shut the investigation down due to the large number of guns that have already been trafficked. Therefore, I spoke with Ray Rowley today and explained that even though the identified straw-purchasers bought approximately 175 guns last week alone, we have slowed down the FBI on future purchases and are obtaining intelligence directly related to this investigation from the current DEA wire tap. Ray did express some concern regarding the total number of guns that have been purchased by this straw-purchase scheme. I cautioned Ray on not doing any type of informal calculations on purchase numbers as that likely will result in double counting of firearms (counting purchased guns as well as recovered guns). I have also advised that we will slow the purchasers down as much as possible, but we have not identified the network yet. The result will be that the responsible conspirators will have new straw-purchasers operational before we complete the booking paperwork. I have asked Ray to consider me his direct point of contact on any future questions and/or concerns and I will do the same with him. I have also spoken with Kevin O'Keefe today and maintain those lines of communication.

As for plans to proceed, I have asked Mr. Voth to begin preparing a white paper that outlines progress to date as well as plans for proceeding with the investigation. I know that he wants to take the information from the DEA wire and spin it off on a wire involving these subjects. I have also asked Mr. Voth to prepare a list of resources that HQ can provide (personnel and equipment) to support this investigation. I will keep you posted as things arise.

George T. Gillett  
 Assistant Special Agent in Charge  
 ATF - Phoenix Field Division

In his testimony, Kumor noted that he lacked the authority to shut down this investigation, but he reiterated that he raised the concerns expressed to him by ATF agents in Mexico with McMahon:

- Q. And you and Gil were in agreement that this was concerning, and you supported him in his view that something ought to be done –
- A. Yes, once they started showing up, absolutely.
- Q. But you didn't have the authority to do it?

A. No.

Q. However, you did raise those concerns with Bill McMahon?

A. Yes.<sup>130</sup>

Kumor specifically refuted McMahon's testimony to the Committees' investigators about these events:

Q. So if McMahon said to us that you never raised these concerns with him, that wouldn't be completely honest, right?

A. That I never raised them?

Q. Right.

A. That's false. That's not true.

Q. So you did raise these concerns on multiple occasions with Mr. McMahon?

A. I did. I raised the issue of the fact that these weapons had been had started showing up and . . . what are we going to do? What's going on? Obviously if they're showing up in Mexico, that's a problem.

Q. How early did you raise that with him as far as the best you can recall?

A. When this thing first started. When this case first started that you're going to have . . . I know in March when they were showing the screen and how many guns were involved.

Q. March of 2010?

A. March of 2010, yes.

Q. And McMahon was at that meeting?

A. I believe he was.

Q. So he saw all these guns?

A. Right.

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<sup>130</sup> Kumor Transcript, at 39-40.



Q. Did he ever express to you that's a concern of his?

A. Yeah, I think we've had – we had discussions where he was concerned as well. But, again, it kind of came back to . . . our hands are tied. The U.S. attorneys' office is not going to charge these guys . . . [T]hey want to go up on a wire, so they're going up on a wire, and they're going to do the case that way. So from my standpoint, I was like, well . . . the U.S. attorney's office is involved. . . . Newell is running the case. You're aware of it.<sup>131</sup>

## VII. Reaction of ATF Officials in Mexico

**FINDING:** ATF officials in Mexico finally realized the truth: ATF allowed guns to walk. By withholding this critical information from its own personnel in Mexico, ATF jeopardized relations between the U.S. and Mexico.

When Special Agent John Dodson and the other ATF whistleblowers first came forward with allegations that guns were walked across the Mexican border during Operation Fast and Furious, Canino and Gil refused to believe them. Gil and Canino could not believe that the ATF would actually utilize a tactic that contravened the training and field experience of every ATF agent. Gil and Canino, the top two ATF officials in Mexico, could not even conceive that ATF would employ a strategy of allowing weapons transfers to straw purchasers. As Canino testified:

Q. So at no time did you think [gunwalking] was a deliberate effort or part of a strategy?

A. No. That was, like I said, in 21 years as an ATF agent, as a guy who teaches surveillance techniques, as a guy who teaches agents how to conduct field operations, **never in my wildest dreams ever would I have thought that this was a technique. Never. Ever. It just, it is inconceivable to me.**<sup>132</sup>

Q. And that is because of the dangers involved?

A. Just – you don't do it. You don't wa[lk] guns. You don't wa[lk] guns. . . . **You don't lose guns. You don't walk guns. You don't let guns get out of your sight.** You have all these undercover techniques, all these safety measures in place so guns do not get out of your custody or control. I mean, I mean, you could follow, you could do a surveillance for 1,000 miles . . . either use planes, trackers, you use everything under the sun, but at the end of the

<sup>131</sup> *Id.* at 41-43.

<sup>132</sup> Canino Transcript, at 12.

day, those guns do not leave your control. At some point those guns do not get into the streets.<sup>133</sup>

Gil felt the same way as Canino:

...And so the -- to me, when I first heard this going on in the media about the potential for ATF letting guns walk, it **was inconceivable. I didn't want to believe it. It just -- it would never happen. Everybody knows the consequences on the other end of** . . . these guns aren't going for a positive cause, they're going for a negative cause. The term "guns walking" didn't exist in my vocabulary.<sup>134</sup>

In fact, Canino – an instructor for field operations and undercover operations for ATF since 1998, and a founding member and teacher of the ATF enhanced undercover training program – felt so confident that these allegations were false, that he began assuring people that the allegations had no merit:

Never, it is just, you don't do that. It is not – **what these guys did was basically grab the ATF rule book on trafficking and threw it out the window. This is indefensible. It is indefensible.** The ATF does not do this. . . . I owe people apologies because when this first came out, I did not believe it.

\* \* \* \*

[W]hen this first broke, I said there is no way this happened. . . . [M]y boss told me, hey, Carlos don't be so vocal about this . . . wait, wait to see what happens. I told him, I said, boss, we didn't do this. **He said how are you so sure? I said because we don't teach this, this is not how we are taught.**<sup>135</sup>

Dan Kumor remembers cautioning Canino about being too quick to deny the allegations. As Canino's supervisor, Kumor did not want him to potentially have to retract false and misleading comments made to his Mexican counterparts. As somebody stationed in ATF headquarters, Kumor may have known there could be some merit to the allegations:

And I said . . . but I told Carlos, I said . . . until we find out what's going on, I wouldn't be – if we get questions about what happened, we're going to have to direct all that to the Phoenix field division or field ops because we don't know. And the last thing I want to do is represent or have you guys represent to the Mexicans or anybody else that, hey . . . there's no issues with any of this case.

<sup>133</sup> *Id.* at 12-13.

<sup>134</sup> Gil Transcript, at 48.

<sup>135</sup> Canino Transcript, at 13-14.

We don't know, and I don't want that coming back later because that would certainly be an issue with them as far as their reputations and their ability to be able to operate in the future down there.<sup>136</sup>

As more information came to light, however, Gil and Canino concluded that hundreds and hundreds of guns had been walked. These guns ended up in at crime scenes in Mexico, about which Gil and Canino received extensive briefings. Gil and Canino became incensed when they finally began to learn about the full scope of Operation Fast and Furious and the investigative techniques involved:

Q. When you first got the impression that this was part of a strategy to let guns walk into Mexico, what was your reaction to that strategy?

A. I wasn't convinced that this happened until this past April after all the allegations were made, and I talked to different people. **I was beyond shocked. Embarrassed. I was angry. I'm still angry. Because this is not what we do.**

\* \* \*

That is, I mean, **this is the perfect storm of idiocy.** That is the only way I could put it. This is, I mean, this is inconceivable to me. This is group think gone awry. You know what General George Patton says, if we are all thinking alike, then nobody is thinking. Right? Nobody was thinking here. How could anybody think, hey, let's follow, I mean there is a guy in this case that bought over 600 guns. At what point do you think you might want to pull him aside and say, hey, come here for a second.<sup>137</sup>

When Canino himself uncovered hard evidence that ATF had allowed the guns to disappear from their surveillance he understood the whistleblower allegations were true:

Q. Okay, and take us through what happened in April.

A. I was here on a visit to headquarters.

Q. Alcohol, Tobacco and Firearms headquarters?

A. Alcohol, Tobacco and Firearms headquarters, and I was, I was looking at a, the management log on this case. **And the first two pages, if I'm not mistaken, there are entries there that chronicle us walking away on three separate occasions from stash houses.**

<sup>136</sup> Kumor Transcript, at 98-99.

<sup>137</sup> Canino Transcript, at 17-19.

- Q. And did that sound to you incredible?
- A. I stopped reading.
- Q. So you only got through two pages of this management log?
- A. Yeah.
- Q. And then you couldn't read it any longer?
- A. Didn't want to.
- Q. Because you were so upset?
- A. Yes.
- Q. And you were upset because walking away from three stash houses struck you as so outrageous?
- A. Walking away from one, walking away from one gun when you know that that gun is going to be used in a crime when you, I mean, there is no, there was no gray area here guys. There was no gray area here. We knew that these guys were trafficking guns into Mexico. There is no gray area. They weren't trafficking, [the] guys weren't going out and buying two Larson 22 pistols. These guys were buying 7.62, 223's, .50 caliber rifles, okay, there was no mistake about this. This is no gray area.<sup>138</sup>

Gil realized the full scope of Operation Fast and Furious only after he retired from ATF. It took the public allegations of the whistleblowers and contacts with his former colleagues for Gil to fully comprehend the tactics used in Operation Fast and Furious:

- Q. Now, when you were speaking with [a Congressional investigator] you indicated that you learned about the specific tactics of operation Fast and Furious. Can you remind us when that was?
- A. It was after I retired. It was after the shooting of Border Patrol Agent Terry. I started getting phone calls saying, hey, this is – there is something to this thing, these guns were knowingly allowed into Mexico. And so that was the first knowledge that I had about the potential allowing guns to go into Mexico.
- Q. And how did you become aware of that?

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<sup>138</sup> *Id.* at 25-26.

- A. Several phone calls from agents, speaking to my deputy or my former deputy, Carlos [Canino], who I remained in contact with. Seeing Agent Dodson on TV and getting phone calls primarily. And then I was contacted by several media sources including CBS.<sup>139</sup>

After realizing that ATF had let guns walk, Gil's concerns turned to the safety of ATF agents in Mexico:

- Q. And I believe you mentioned that in the aftermath of Agent Dodson's interview on CBS, you had concerns about your former agents in Mexico. What were -- what were the concerns you had for them?
- A. I had spoken to my deputy primarily and he mentioned that, obviously, the Government of Mexico, our counterparts are not happy with this situation. It made it tough for them that . . . didn't want to work with them. It's like, hey, we can't trust you, you guys are allowing these guns to come in. Inside the embassy because the **Government of Mexico was irritated with us, they held that against the other agencies within the embassy**, maybe slowing down Visas to allow personnel to come in and work in Mexico. . . Obviously **the ambassador** probably, I didn't speak -- I haven't spoken to him since I left the country, but my understanding is he **wasn't happy about it**. And so there might have been some friction there between the acting attaché, Carlos [Canino], and him. And so it was several conflicts going on. And, again, they just started looking at the articles and the bloggers and some of the media reports in Mexico that the ATF was corrupt, and we were taking kickbacks to allow these weapons to come in, which puts a big zero -- crossbar on my guys' backs down there.
- Q. When you say crossbar?
- A. I'm sorry, I should clarify that.
- Q. Sure.
- A. Puts a mark on their back, for instance, targets for not only corrupt cartel members to find out who they are and kidnap or kill, which is some of the unfortunate areas I had to deal with down there. And then -- or **Government of Mexico officials not happy and . . . they may arrest you, indict you, take away your Visa and**

<sup>139</sup> Gil Transcript, at 81-82.

throw you out of the country. So there's all these things going on down there amongst my former crew.<sup>140</sup>

## VIII. Persistent Consequences of Operation Fast and Furious

**FINDING:** The high-risk tactics of cessation of surveillance, gunwalking, and non-interdiction of weapons that ATF used in Fast and Furious went against the core of ATF's mission, as well as the training and field experience of its agents. These flaws inherent in Operation Fast and Furious made tragic consequences inevitable.

### A. The Murder of Mario Gonzalez Rodriguez

On October 21, 2010, drug cartel members kidnapped Mario Gonzalez Rodriguez from his office. At the time of the kidnapping, his sister Patricia Gonzalez Rodriguez was the Attorney General of the state of Chihuahua in northwestern Mexico. A few days after the kidnapping, a video surfaced on the Internet in which Mario Gonzalez Rodriguez sat handcuffed, surrounded by five heavily armed men wearing masks, dressed in camouflage and bullet-proof vests. Apparently under duress, Rodriguez alleged that his sister had ordered killings at the behest of the Juarez cartel, located in Chihuahua.<sup>141</sup> The video quickly went viral, instantly becoming a major news story in Mexico.

Patricia Gonzalez Rodriguez denied her brother's allegations, claiming the armed men holding him hostage coerced Mario into making his statements. Patricia Gonzalez Rodriguez asserted her brother's kidnapping was payback for the prosecutions of members of the Sinaloa cartel and corrupt Mexican law enforcement officers. Ms. Rodriguez left her post as attorney general later that month.

On November 5, 2010, Mexican authorities found Mario Gonzalez Rodriguez's body in a shallow grave.<sup>142</sup> Shortly after this grisly discovery, the Mexican federal police engaged in a shootout with drug cartel members, which resulted in the arrest of eight suspects. Police seized sixteen weapons from the scene of the shootout. Two of these weapons traced back to Operation Fast and Furious.<sup>143</sup>

E-mails obtained by the Committees indicate that ATF knew about the link to Operation Fast and Furious almost immediately after the trace results came back. A November 15, 2010 e-mail from ATF's OSII to the Phoenix Field Division alerted Phoenix that two of the recovered AK-47s weapons traced back to Operation Fast and Furious.<sup>144</sup> A number of employees from

<sup>140</sup> *Id.* at 82-84.

<sup>141</sup> Kim Murphy, *U.S. AK-47s Linked to Mexican attorney's slaying*, L.A. TIMES, June 23, 2011, available at <http://articles.latimes.com/2011/jun/23/nation/la-ne-gunrunner-20110623>.

<sup>142</sup> Maggie Ybarra, *8 Held in Death of Ex-Chihuahua AG's Brother*, EL PASO TIMES, November 5, 2010, available at [http://www.elpasotimes.com/news/ci\\_16537620](http://www.elpasotimes.com/news/ci_16537620).

<sup>143</sup> Email from Tonya English to David Voth, November 15, 2010 (HOGR ATF – 001792).

<sup>144</sup> *Id.*

OSII contacted their colleagues in Phoenix to alert them of this connection. OSII agents also told ATF personnel in Mexico.<sup>145</sup>

Carlos Canino informed ATF headquarters about the link between the Gonzalez murder and the subsequent shootout to Fast and Furious. However, no one authorized Canino to inform the Mexican government about the connection.

Q. Who did you mention it to?

A. I mentioned it to the Director.

Q. That's Acting Director Melson?

A. Yes. I mentioned it to Billy Hoover, I mentioned it to Mark Chait, I mentioned it to Bill McMahon, I mentioned it to my boss Danny Kumor.

\* \* \*

A. I remember at least two times when I mentioned it to them. I said one of us – look, here's what happened. Okay, this woman is a prominent politician.

Q. This is Miss Patricia Gonzalez?

A. Right.

Q. She's no longer a –

A. No longer, right. . . [T]his is front page news for days in Mexico; we need to tell them this, because if we don't tell them this, and this gets out, it was my opinion that the Mexicans would never trust us again because we were holding back this type of information. **And every time I mentioned it... guys started looking at their cell phones, silence in the room, let's move on to the next subject.** . . . I wasn't told, yea, tell her, but I was never told, no, you can't tell her. I was never told that. It was just indecision.

Q. So you were getting no instructions at all?

A. Zero instructions.<sup>146</sup>

<sup>145</sup> Interview with Lorren Leadmon, Intelligence Operations Specialist, in Wash., D.C., July 5, 2011.

<sup>146</sup> Canino Transcript, at 31-32.

Acting Attaché Canino continued to feel strongly that the Mexican government should be informed of the link between the Mario Gonzalez murderers and Operation Fast and Furious. He also believed that, given the seriousness of the information and the negative fallout that would likely ensue, ATF headquarters should share this information with the U.S. Ambassador to Mexico.<sup>147</sup>

The rapidly escalating media scrutiny would eventually expose the connection between the Mario Gonzalez Rodriguez murderers and Operation Fast and Furious. In Canino's view, sharing this information directly with Mexican officials before the press exposed it was of paramount importance to preserve U.S.-Mexico relations and the ability of ATF personnel to operate in Mexico. Not until June 2011, nearly eight months after ATF became aware of the link between Operation Fast and Furious and the guns recovered following the shootout, did Canino notify the Mexican government:

Q. And why did you do that [tell Ms. Morales]?

A. I communicated that to the Mexican Attorney General Maricela Morales because I did not want her to find out through media reports where these guns had come from. I wanted her to find out from me, because she is an ally of the U.S. Government. She is committed to fighting these cartels, she is a personal friend, and I owe her that.

Q. That courtesy?

A. I owe her that courtesy, absolutely.

\* \* \*

Q. And even though you really didn't get permission – well, I guess Mr. Kumor sort of approved, but no one else really did?

A. Right.

Q. But you still decided that it was important for you to disclose that information?

A. **If I hadn't told the Attorney General this, and this had come out in the news media, I would never be able to work with her ever again, and we would be done in Mexico.** We just might as well pack up the office and go home.

Q. So the fact that these guns traced back to this program Fast and Furious has the potential, perhaps even did, to create an international incident?

---

<sup>147</sup> *Id.* at 32.



- A. This has already created an international incident.
- Q. But this is even more personal?
- A. When the Mexican media gets ahold of this, it's going to go crazy.
- Q. By "this" you're talking about the tracing to the death of Mario Gonzalez?
- A. Absolutely.
- \* \* \*
- Q. Now, what was her reaction when you told her?
- A. She was shocked.
- Q. Did she say anything, exclaim anything?
- A. She said, "Hijole," which translates basically into, "Oh, my."
- Q. Oh, my God? Oh, my?
- A. Yeah.<sup>148</sup>

The failure to inform the Mexican government earlier risked possible international implications. This failure to inform is another example of ATF leadership withholding essential information related to Operation Fast and Furious.

#### **B. The Mexican Helicopter Incident**

A May 2011 shootout between Mexican police and cartel members demonstrates the broadening impact of Operation Fast and Furious. On May 24, 2011, La Familia DTO gunmen forced a Federal Police helicopter to make an emergency landing in the state of Michoacan, located in western Mexico.<sup>149</sup> The gunmen attacked the helicopter, wounding two officers on board and forcing the aircraft to land near the scene of the attack.<sup>150</sup> Canino described the event:

- A. I think it was on May 24th the Mexican Federal Police mounted an operation against members of La Familia.

<sup>148</sup> *Id.* at 30-31, 33.

<sup>149</sup> "Drug Gunmen Force Down Mexican Police Helicopter," *AP*, May 25, 2011, available at <http://www.signonsandiego.com/news/2011/may/25/drug-gunmen-force-down-mexican-police-helicopter/>.

<sup>150</sup> *Id.*

- Q. That's a drug cartel?
- A. Right. In the State of Michoacan. When the Mexican Federal Police was deploying its troops via helicopter, they came under fire from members of La Familia. I believe in the May 24th incident two crewmen were hit.
- Q. These were soldiers or policemen?
- A. Policemen, Federal policemen. They were hit. The helicopter flew off. My understanding is that that helicopter could have made it back to the base under its own power; however, it landed to render aid to the injured people on board.<sup>151</sup>

On May 29, 2011, the federal police launched a massive raid on the La Familia DTO. During the raid, cartel gunmen again attacked Federal Police helicopters and wounded two more officers:

- A. Fast forward to May 29th. Again, the Mexican Federal Police mount another operation. I believe this time it was in the State of - I need to look at a map. Anyway, it was a bordering State.
- Q. Okay.
- A. They were coming in. Members of La Familia cartel engaged – there were four helicopters – engaged them. I believe all four helicopters were struck by fire. Mexican Federal Police returned fire from the helicopters; able to suppress the fire coming in, offloaded, and the helicopters all flew back, and they were back in service within a few days.
- Q. Now, was there any people hurt on the ground, any deaths?
- A. I believe in the second operation, I believe ... Mexican Federal Police killed, I believe either 11 or 14 people.<sup>152</sup>

The raid resulted in the deaths of 11 cartel members and the arrest of 36 cartel members, including those suspected of firing on the helicopter several days earlier. Authorities also found a cache of more than 70 rifles at the scene, including a Barrett .50 caliber rifle. Some of these weapons traced back to Operation Fast and Furious.<sup>153</sup> Mexican police also found a stash of heavy-duty body armor belonging to the cartels. This was the first time ATF in Mexico had seen

<sup>151</sup> Canino Transcript, at 34.

<sup>152</sup> *Id.* at 34.

<sup>153</sup> *Id.* at 35.

such body armor in the hands of the cartels. Along with the Barrett .50 caliber rifles, these vests symbolized a new level of sophistication in cartel weaponry.<sup>154</sup>

During a trip to Mexico City on June 25, 2011, Members and staff from the U.S. House of Representatives Committee on Oversight and Government had an opportunity to visually inspect the damaged helicopter.<sup>155</sup> Several bullet holes were evident on the body of the aircraft, and one round from a .50-caliber rifle penetrated the thick “bullet proof” glass windshield.



The downed helicopter incident and subsequent police raid resulted in the recovery of Operation Fast and Furious weapons that may have been used against the Mexican police. Barrett .50 caliber rifles provide a significant upgrade to the cartels' ability to inflict serious damage and casualties on their enemies. As Canino testified:

[T]he count was up to 1,900 guns [associated with Fast and Furious] in suspect gun data, 34 of which were .50 caliber rifles. And I, my opinion was that these many .50 caliber rifles in the hands of one of these cartels is going to change the outcome of a battle.<sup>156</sup>

Previously, weapons had been linked back to the Sinaloa cartel and members of the El Teo organization, an off-shoot from the Beltrán-Leyva cartel. La Familia DTO is the third cartel connected to Operation Fast and Furious weapons. The May 24, 2011 shooting shows that Operation Fast and Furious weapons may be found in a broader geographic area than the territory controlled by the Sinaloa DTO.<sup>157</sup> This spread of Operation Fast and Furious weapons may place an even greater number of Mexican citizens in harm's way.

<sup>154</sup> Canino Transcript, at 36.

<sup>155</sup> Report from United States Embassy staff about Congressional Visit, June 25, 2011 (on file with author).

<sup>156</sup> Canino Transcript, at 17.

<sup>157</sup> See Areas of Cartel Influences in Mexico, *supra* page 19.

## IX. Conclusion

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According to the Justice Department's July 22, 2011 response to Questions for the Record posed by Senator Grassley, Fast and Furious suspects purchased 1,418 weapons *after* becoming known to the ATF.<sup>158</sup> Of those weapons, 1,048 remain unaccounted for, since the Department's response indicates that the guns have not yet been recovered and traced.<sup>159</sup> U.S. and Mexican law enforcement officials continue to seize weapons connected to the operation and recover weapons at crime scenes on both sides of the border. Given the vast amount of Operation Fast and Furious weapons possibly still in the hands of cartel members, law enforcement officials should expect more seizures and recoveries at crime scenes. According to several agents involved in Operation Fast and Furious, ATF agents will have to deal with these guns for years to come.<sup>160</sup>

Some aspects of Operation Fast and Furious may ultimately escape scrutiny given the difficulties of tracing weapons recovered in Mexico. The possibility remains for more high-profile deaths linked to Operation Fast and Furious. Canino bluntly described his reaction to that possibility:

- Q. When you first got the impression that this was part of a strategy to let guns walk into Mexico, what was your reaction to that strategy?
- A. The guys in Mexico will trace those . . . I'm beyond angry. Brian Terry is not the last guy, okay, guys? Let's put it out there right now. Nobody wants to talk about that. Brian Terry is not the last guy unfortunately. . . . **Unfortunately, there are hundreds of Brian Terrys probably in Mexico . . . we ATF armed the [Sinaloa] cartel. It is disgusting.**<sup>161</sup>

The faulty design of Operation Fast and Furious led to tragic consequences. Countless United States and Mexican citizens suffered as a result. The lessons learned from exposing the risky tactics used during Operation Fast and Furious will hopefully be a catalyst for better leadership and better internal law enforcement procedures. Any strategy or tactic other than interdiction of illegally purchased firearms at the first lawful opportunity should be subject to strict operational controls. These controls are essential to ensure that no government agency ever again allows guns to knowingly flow from American gun stores to intermediaries to Mexican drug cartels.

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<sup>158</sup> Letter from Ronald Weich, Asst. Att'y Gen., U.S. Dep't of Justice, to Senator Patrick Leahy, Chairman, Senate Jud. Comm., July 22, 2011, 13.

<sup>159</sup> *Id.* at 14.

<sup>160</sup> See Casa Transcript, at 17; see also *Operation Fast and Furious: Reckless Decisions, Tragic Outcomes*, 111th Cong. 44 June 14, 2011 (statement of Peter Forcellini, ATF Special Agent).

<sup>161</sup> Canino Transcript, at 17-19.



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*The Department of Justice's Operation Fast and Furious:  
Accounts of ATF Agents*

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JOINT STAFF REPORT

Prepared for

Rep. Darrell E. Issa, Chairman  
United States House of Representatives  
Committee on Oversight and Government Reform  
&  
Senator Charles E. Grassley, Ranking Member  
United States Senate  
Committee on the Judiciary

112<sup>th</sup> Congress  
June 14 2011

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## I. Executive Summary

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In the fall of 2009, the Department of Justice (DOJ) developed a risky new strategy to combat gun trafficking along the Southwest Border. The new strategy directed federal law enforcement to shift its focus away from seizing firearms from criminals as soon as possible—and to focus instead on identifying members of trafficking networks. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) implemented that strategy using a reckless investigative technique that street agents call “gunwalking.” ATF’s Phoenix Field Division began allowing suspects to walk away with illegally purchased guns. The purpose was to wait and watch, in the hope that law enforcement could identify other members of a trafficking network and build a large, complex conspiracy case.

This shift in strategy was known and authorized at the highest levels of the Justice Department. Through both the U.S. Attorney’s Office in Arizona and “Main Justice,” headquarters in Washington, D.C., the Department closely monitored and supervised the activities of the ATF. The Phoenix Field Division established a Gun Trafficking group, called Group VII, to focus on firearms trafficking. Group VII initially began using the new gunwalking tactics in one of its investigations to further the Department’s strategy. The case was soon renamed “Operation Fast and Furious,” and expanded dramatically. It received approval for Organized Crime Drug Enforcement Task Force (OCDETF) funding on January 26, 2010. ATF led a strike force comprised of agents from ATF, Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), Immigration and Customs Enforcement (ICE), and the Internal Revenue Service (IRS). The operation’s goal was to establish a nexus between straw purchasers of assault-style weapons in the United States and Mexican drug-trafficking organizations (DTOs) operating on both sides of the United States-Mexico border. Straw purchasers are individuals who are legally entitled to purchase firearms for themselves, but who unlawfully purchase weapons with the intent to transfer them into the hands of DTOs or other criminals.

Operation Fast and Furious was a response to increasing violence fostered by the DTOs in Mexico and their increasing need to purchase ever-growing numbers of more powerful weapons in the U.S. An integral component of Fast and Furious was to work with gun shop merchants, or “Federal Firearms Licensees” (FFLs) to track known straw purchasers through the unique serial number of each firearm sold. ATF agents entered the serial numbers of the weapons purchased into the agency’s Suspect Gun Database. These weapons bought by the straw purchasers included AK-47 variants, Barrett .50 caliber sniper rifles, .38 caliber revolvers, and the FN Five-seveN.

During Fast and Furious, ATF frequently monitored actual transactions between the FFLs and straw purchasers. After the purchases, ATF sometimes conducted surveillance of these weapons with assistance from local police departments. Such surveillance included following the vehicles of the straw purchasers. Frequently, the straw purchasers transferred the weapons they bought to stash houses. In other instances, they transferred the weapons to third parties. The volume, frequency, and circumstances of these transactions clearly established reasonable



suspicion to stop and question the buyers. Agents are trained to use such interactions to develop probable cause to arrest the suspect or otherwise interdict the weapons and deter future illegal purchases. Operation Fast and Furious sought instead to *allow* the flow of guns from straw purchasers to the third parties. Instead of trying to interdict the weapons, ATF purposely avoided contact with known straw purchasers or curtailed surveillance, allowing guns to fall into the hands of criminals and bandits on both sides of the border.

Though many line agents objected vociferously, ATF and DOJ leadership continued to prevent them from making every effort to interdict illegally purchased firearms. Instead, leadership's focus was on trying to identify additional conspirators, as directed by the Department's strategy for combating Mexican Drug Cartels. ATF and DOJ leadership were interested in seeing where these guns would ultimately end up. They hoped to establish a connection between the local straw buyers in Arizona and the Mexico-based DTOs. By entering serial numbers from suspicious transactions into the Suspect Gun Database, ATF would be quickly notified as each one was later recovered at crime scenes and traced, either in the United States or in Mexico.

The Department's leadership allowed the ATF to implement this flawed strategy, fully aware of what was taking place on the ground. The U.S. Attorney's Office for the District of Arizona encouraged and supported every single facet of Fast and Furious. Main Justice was involved in providing support and approving various aspects of the Operation, including wiretap applications that would necessarily include painstakingly detailed descriptions of what ATF knew about the straw buyers it was monitoring.

This hapless plan allowed the guns in question to disappear out of the agency's view. As a result, this chain of events inevitably placed the guns in the hands of violent criminals. ATF would only see these guns again after they turned up at a crime scene. Tragically, many of these recoveries involved loss of life. While leadership at ATF and DOJ no doubt regard these deaths as tragic, the deaths were a clearly foreseeable result of the strategy. Both line agents and gun dealers who cooperated with the ATF repeatedly expressed concerns about that risk, but ATF supervisors did not heed those warnings. Instead, they told agents to follow orders because this was sanctioned from above. They told gun dealers not to worry because they would make sure the guns didn't fall into the wrong hands.

Unfortunately, ATF never achieved the laudable goal of dismantling a drug cartel. In fact, ATF never even got close. After months and months of investigative work, Fast and Furious resulted only in indictments of 20 straw purchasers. Those indictments came only after the death of U.S. Border Patrol Agent Brian Terry. The indictments, filed January 19, 2011, focus mainly on what is known as "lying and buying." Lying and buying involves a straw purchaser falsely filling out ATF Form 4473, which is to be completed truthfully in order to legally acquire a firearm. Even worse, ATF knew most of the indicted straw purchasers to be straw purchasers *before Fast and Furious even began*.

In response to criticism, ATF and DOJ leadership denied allegations that gunwalking occurred in Fast and Furious by adopting an overly narrow definition of the term. They argue that gunwalking is limited to cases in which ATF itself supplied the guns directly. As field

agents understood the term, however, gunwalking includes situations in which ATF had contemporaneous knowledge of illegal gun purchases and purposely decided not to attempt any interdiction. The agents also described situations in which ATF facilitated or approved transactions to known straw buyers. Both situations are even more disturbing in light of the ATF's certain knowledge that weapons previously purchased by the same straw buyers had been trafficked into Mexico and may have reached the DTOs. When the full parameters of this program became clear to the agents assigned to Group VII, a rift formed among Group VII's agents in Phoenix. Several agents blew the whistle on this reckless operation only to face punishment and retaliation from ATF leadership. Sadly, only the tragic murder of Border Patrol Agent Brian Terry provided the necessary impetus for DOJ and ATF leadership to finally indict the straw buyers whose regular purchases they had monitored for 14 months. Even then, it was not until after whistleblowers later reported the issue to Congress that the Justice Department finally issued a policy directive that prohibited gunwalking.

This report is the first in a series regarding Operation Fast and Furious. Possible future reports and hearings will likely focus on the actions of the United States Attorney's Office for the District of Arizona, the decisions faced by gun shop owners (FFLs) as a result of ATF's actions, and the remarkably ill-fated decisions made by Justice Department officials in Washington, especially within the Criminal Division and the Office of the Deputy Attorney General. This first installment focuses on ATF's misguided approach of letting guns walk. The report describes the agents' outrage about the use of gunwalking as an investigative technique and the continued denials and stonewalling by DOJ and ATF leadership. It provides some answers as to what went wrong with Operation Fast and Furious. Further questions for key ATF and DOJ decision makers remain unanswered. For example, what leadership failures within the Department of Justice allowed this program to thrive? Who will be held accountable and when?

## II. Table of Names

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### **John Dodson**

*Special Agent, ATF Phoenix Field Division*

Agent Dodson is the original whistleblower who exposed Operation Fast and Furious. A seven-year veteran of ATF, Dodson also worked in the sheriff's offices in Loudoun County and other Virginia municipalities for 12 years. Agent Dodson was removed from Phoenix Group VII in the summer of 2010 for complaining to ATF supervisors about the dangerous tactics used in Operation Fast and Furious.

### **Brian Terry**

*U.S. Border Patrol Agent*

Brian Terry was an agent with the U.S. Border Patrol's Search, Trauma, and Rescue team, known as BORSTAR. He served in the military and was a Border Patrol agent for three years. On December 14, 2010, during a routine patrol, Terry was confronted by armed bandits. He was shot once and killed. Two weapons found at the scene traced back to Operation Fast and Furious.

### **Jaime Avila**

*Straw Purchaser*

Jaime Avila was the straw purchaser who bought the two AK-47 variant weapons that were found at the murder scene of Brian Terry. Avila bought the weapons on January 16, 2010. ATF, however, began conducting surveillance of Avila as early as November 25, 2009. On January 19, 2011, Avila was indicted on three counts of "lying and buying" for weapons purchased in January, April, and June 2010.

### **David Voth**

*Phoenix Group VII Supervisor*

Agent Voth was the former supervisor of the Phoenix Group VII, which conducted Operation Fast and Furious. As Group VII Supervisor, Voth controlled many operational aspects of Fast and Furious. Voth is no longer in Phoenix.

### **Pete Forcelli**

*Group Supervisor, ATF Phoenix Field Division*

Since 2007, Agent Forcelli has been the Group Supervisor for Phoenix Group I. Before Phoenix Group VII was formed in October 2009, Group I was the primary southwest border firearms group. Before joining ATF in 2001, Agent Forcelli worked for twelve years in the New York City Police Department as a police officer and detective.

**Olindo Casa***Special Agent, ATF Phoenix Field Division*

Agent Casa served in Phoenix Group VII during Operation Fast and Furious. Agent Casa is an 18-year veteran of ATF, having worked in Chicago, California, and Florida. In Chicago, Agent Casa worked on numerous firearms trafficking cases, including a joint international case. Agent Casa had never seen a gun walk until he arrived at Group VII in Phoenix and participated in Operation Fast and Furious.

**William Newell***Special Agent in Charge, ATF Phoenix Field Division*

Agent Newell was the former head of the ATF Phoenix Field Division during Operation Fast and Furious. Newell is no longer in Phoenix.

**Emory Hurley***Assistant U.S. Attorney, District of Arizona*

Emory Hurley is the lead prosecutor for Operation Fast and Furious. Hurley advised the ATF Phoenix Field Division on the Operation, including instructing agents when they were and were not able to interdict weapons.

**Larry Alt***Special Agent, ATF Phoenix Field Division*

Agent Alt served in Phoenix Group VII during Operation Fast and Furious. An 11-year veteran of ATF, Agent Alt worked as a police officer for five years before joining ATF. Agent Alt is also a lawyer, having served as deputy county attorney in Maricopa County, a county of nearly 4 million people that encompasses the Phoenix metro area.

### III. Findings

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- DOJ and ATF inappropriately and recklessly relied on a 20-year old ATF Order to allow guns to walk. DOJ and ATF knew from an early date that guns were being trafficked to the DTOs.
- ATF agents are trained to “follow the gun” and interdict weapons whenever possible. Operation Fast and Furious required agents to abandon this training.
- DOJ relies on a narrow, untenable definition of gunwalking to claim that guns were never walked during Operation Fast and Furious. Agents disagree with this definition, acknowledging that hundreds or possibly thousands of guns were in fact walked. DOJ’s misplaced reliance on this definition does not change the fact that it knew that ATF could have interdicted thousands of guns that were being trafficked to Mexico, yet chose to do nothing.
- ATF agents complained about the strategy of allowing guns to walk in Operation Fast and Furious. Leadership ignored their concerns. Instead, supervisors told the agents to “get with the program” because senior ATF officials had sanctioned the operation.
- Agents knew that given the large numbers of weapons being trafficked to Mexico, tragic results were a near certainty.
- Agents expected to interdict weapons, yet were told to stand down and “just surveil.” Agents therefore did not act. They watched straw purchasers buy hundreds of weapons illegally and transfer those weapons to unknown third parties and stash houses.
- Operation Fast and Furious contributed to the increasing violence and deaths in Mexico. This result was regarded with giddy optimism by ATF supervisors hoping that guns recovered at crime scenes in Mexico would provide the nexus to straw purchasers in Phoenix.
- Every time a law enforcement official in Arizona was assaulted or shot by a firearm, ATF agents in Group VII had great anxiety that guns used to perpetrate the crimes may trace back to Operation Fast and Furious.
- Jaime Avila was entered as a suspect in the investigation by ATF on November 25, 2009, after purchasing weapons alongside Uriel Patino, who had been identified as a suspect in October 2009. Over the next month and a half, Avila purchased 13 more weapons, each recorded by the ATF in its database within days of the purchase. Then on January 16, 2010, Avila purchased three AK-47 style rifles, two of which ended up being found at the murder scene of U.S. Border Patrol Agent Brian Terry. The death of Border Agent Brian Terry was likely a preventable tragedy.

- Phoenix ATF Special Agent in Charge (SAC) William Newell's statement that the indictments represent the take-down of a firearms trafficking ring from top to bottom, and his statement that ATF never allowed guns to walk are incredible, false, and a source of much frustration to the agents.
- Despite mounting evidence to the contrary, DOJ continues to deny that Operation Fast and Furious was ill-conceived and had deadly consequences.

#### IV. The ATF Policy on Gun Interdiction: “You Don’t Get to Go Home”

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ATF’s long-standing policy has been not to knowingly allow guns to “walk” into the hands of criminals. Yet DOJ and ATF used a 1989 ATF order to help justify allowing straw purchasers allegedly connected to Mexican drug cartels to illegally buy more than 1,800 weapons during Operation Fast and Furious. While this Order permits agents—at their discretion—to allow the illegal transfer of firearms to further an investigation, it does not go so far as to permit them to pull surveillance completely and allow the guns to walk.

##### A. The Justification for Operation Fast and Furious

**FINDING:** DOJ and ATF inappropriately and recklessly relied on a 20-year old ATF Order to allow guns to walk. DOJ and ATF knew from an early date that guns were being trafficked to the DTOs.

Released on February 8, 1989, ATF Order 3310.4(b) explains ATF’s Firearms Enforcement Program. The Department of Justice and ATF relied on this Order to defend Operation Fast and Furious. ATF leadership in Phoenix believed a specific clause within the Order, section 148(a)(2), justified Operation Fast and Furious and its policy to allow guns to walk. The clause reads as follows:

##### 148. “WEAPONS TRANSFERS”

- a. Considerations. During the course of illegal firearms trafficking investigations, special agents may become aware of, observe, or encounter situations where an individual(s) will take delivery of firearms, or transfer firearm(s) to others. In these instances, the special agent may exercise the following options:

\* \* \*

- (2) In other cases, *immediate intervention* may not be needed or desirable, and the special agent may choose to allow the transfer of firearms to take place in order to further an investigation and allow for the identification of additional coconspirators who would have continued to operate and illegally traffic firearms in the future, potentially producing more armed crime.<sup>1</sup>

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<sup>1</sup> BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES ORDER 3310.4(b) 148(a)(2) (Feb. 8, 1989) (emphasis added).

ATF's reliance on this section of the Order is misguided. The phrase "*immediate intervention* may not be needed or desirable" does not justify a complete lack of intervention with regard to thousands of weapons illegally purchased by straw buyers allegedly linked to drug cartels. ATF cited this Order in an early briefing paper that contained the following paragraph:

Currently our strategy is to *allow the transfer of firearms to continue to take place*, albeit at a much slower pace, in order to further the investigation and allow for the identification of co-conspirators who would continue to operate and *illegally traffic firearms to Mexican DTOs* which are perpetrating armed violence along the Southwest Border. This is all in compliance with ATF 3310.4(b) 148(a)(2). It should be noted that since early December efforts to "slow down" the pace of these firearms purchases have succeeded and will continue *but not to the detriment of the larger goal of the investigation*. It should also be noted that the pace of firearms procurement by this straw purchasing group from late September to early December, 2009 defied the "normal" pace of procurement by other firearms trafficking groups investigated by this and other field divisions. This "blitz" was extremely out of the ordinary and created a situation where measures had to be enacted in order to slow this pace down in order to perfect a criminal case.<sup>2</sup>

This statement leaves little doubt that ATF felt Operation Fast and Furious was compliant with existing ATF policy. Further, it shows that DOJ and ATF knew from an early date that the firearms were being illegally trafficked to Mexican drug cartels.

Although senior ATF management cited the Order as justification for Fast and Furious, it did not pass muster with street agents. They believed that it did not permit a total lack of intervention. Agents believed they must interdict at some point if they have knowledge of an illegal firearms transfer. Yet senior management used the Order to justify the notion that ATF would completely drop surveillance of the weapons and then wait until receiving trace requests when the weapons were eventually recovered at crime scenes. Such traces would supposedly create a "nexus" between the drug cartels and the straw purchasers. The agents, however, did not agree with any interpretation of the order that would be consistent with that kind of strategy.

As Special Agent John Dodson testified:

Q. And just so we are clear on what your understanding of the order was, and we can all obtain it and read it and have our own understanding of it, but what were you taught about what that means?

A. That that implies when the straw purchaser makes the purchase at the counter, you don't have to land on them right there at the counter or as soon as he walks out the door, that it is okay to allow it to happen, to allow him to go with that gun under your

<sup>2</sup> Briefing Paper, ATF Phoenix Field Division, Group VII (Jan. 8, 2010) (emphasis added).



surveillance to the ultimate purchaser of it or whom he is delivering it to, or if he is taking it to a gang or a stash house or whomever, it is okay to allow it to happen, to go there, to be delivered. *But you don't get to go home.* You get the gun, is my understanding, what I have been taught and how in every other ATF office not only that I have been in but that I have gone like TDY to work at that that policy is implemented.

Q. So, in other words, your understanding is that there is a temporal or time limitation on how long it can be allowed to continue on its course without you intervening.

A. I think it is not so much time as it is availability of eyes on. Like if I get an agent that's on the house and we know that gun is on the house, that's still okay . . . even if it is overnight, on to the next night, the gun and bad guy are still there. We are just waiting on the guy he is supposed to deliver it to to come by and pick it up.

Q. Well, the beginning of it said in other cases immediate intervention may not be needed or desirable.

A. Correct.

Q. So are you saying that, in other words, "intervention," that doesn't mean, "no intervention ever?"

A. Correct.

Q. Just the intervention doesn't have to happen right now, *but intervention does need to occur*, that's your understanding?

A. Yes, sir, that it is not as soon as the FFL hands the straw purchaser the gun, that's it, you can't let him leave the store with it.

Q. It is not a license to forego intervention at all?

A. Correct.<sup>3</sup>

During Operation Fast and Furious, however, ATF agents *did* go home. They did *not* get the guns. ATF simply broke off surveillance of the weapons. Yet, as Agent Dodson explains it, the Order used to justify that practice actually anticipates interdiction at some point. It does not authorize what occurred under Fast and Furious:

<sup>3</sup> Transcribed interview of ATF Special Agent John Dodson, Transcript at 121-123 (April 26, 2011) (on file with author) [hereinafter Agent Dodson Transcript].

More so, that line that says the agent has the discretion to allow the purchaser not – or the purchase to proceed or not, what it is trying to tell you is you don't have to effect the arrest or the interdiction right there in the store. It is telling you that you can allow it to happen until that guy leaves the store and meets with the person that he bought the gun for, then you can effect the arrest. **It is *not* telling you that you can watch this guy purchase thousands of firearms over 18 months and not do any follow-up on it.**<sup>4</sup>

### **B. Trained to Interdict**

**FINDING: ATF agents are trained to “follow the gun” and interdict weapons whenever possible. Operation Fast and Furious required agents to abandon this training.**

**Interdiction v. Prosecution:** Prior to their assignment with Operation Fast and Furious, ATF agents were trained to interdict guns and prevent criminals from obtaining them. Interdiction can be accomplished in many ways. While prosecutors focus on gathering proof “beyond a reasonable doubt” to be presented at trial, agents begin with a standard of “reasonable suspicion.” If an agent can articulate a reasonable basis to suspect an illegal purchase, then the agent can take proactive steps to investigate, potentially develop probable cause to arrest, or prevent the illegal transfer of firearms some other way. From the agents’ point of view, a prosecution isn’t necessary in order to achieve the goal of preventing criminals from obtaining firearms. An arrest may not even be necessary. In fact, another portion of the ATF Order describes some of these other interdiction strategies:

- b. Alternative Intervention Methods. In the event it is determined by the special agent that a weapons transfer should not take place, the special agent may consider *alternative methods of intervention* other than arrest and/or search warrants *that will prevent the culmination of the weapons transfer but allow the investigation to continue undetected.* These alternative methods are considered to be a course of action that must be approved by the RAC/GS or SAC as previously noted. These alternative interventions may include, but are not limited to:

- (1) A traffic stop (supported by probable cause to search or supported by a traffic violation allowing for plain view observations) by a State or local marked law enforcement vehicle that would culminate in the discovery and retention of the firearms. *This would prevent the weapons transfer from fully occurring and may in turn produce new investigative leads.* Should the occupants of the vehicle be new/unknown participants in the organization under investigation, they may be fully identified

<sup>4</sup> Agent Dodson Transcript, at 84.

which in turn will yield additional information for follow-up investigation. Should the occupants of the vehicle be known participants in the investigation, requesting telephone tolls for these individuals (or if a Penn Register/T-III interception order is in use) for the period shortly after the traffic stop may show calls and yield identifying information relating to the intended receivers of the firearms.<sup>5</sup>

Three of the special agents assigned to this operation had more than 50 years of law enforcement experience. Throughout their careers, ATF always taught them to get the guns away from criminals. When they observed signs of suspicious transactions, agents looked for ways to prevent weapons from falling into the wrong hands. Agent Dodson testified:

I can tell you this. We knew without a doubt at my old field division when someone had a case that said, hey, this guy is . . . supposed to be a straw and he is going to make this deal today, if he makes the deal, we were talking to them. I mean if we all left the office on an op for a suspected straw purchaser, that means we had, we suspected him of being a straw purchaser. Well, when he purchases, that adds to the suspicion. So he was getting talked to, either “knock and talk” or, depending on what happened or what he purchased might alter things and we might get to a higher level . . . that reasonable suspicion or probable cause. **But we were doing something. If nothing else we were putting him on notice that we were watching him, all right, and that every time he went to the gun store, we were going to be there with him, or the minute one of those guns turned up in a crime somewhere, we were coming back to talk to him,** or even better, or maybe not better, but some point down the road we might be back to knock on your door and ask you, still got those guns or are you selling without a license, you better have a receipt or something to go with them to prove your point.

The bottom line, sir, whenever a walk situation with a gun occurred . . . ***nobody went home until we found it, until we got it back.*** There were no ifs, ands or buts, you didn’t ask. Nobody said, “I got to make a soccer game,” [or] “I have got to pick my dog up,” nothing. Okay. If somebody said, “where is the gun,” you knew it was an all-nighter until we found it.<sup>6</sup>

Fast and Furious employed the exact opposite practices. ATF agents rarely talked with straw purchasers, or conducted a “knock and talk.” When guns recovered at crime scenes linked back to straw purchasers, ATF agents did not approach these straw purchasers. Agents did not

<sup>5</sup> BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES ORDER 3310.4(b) 148(b)(1) (Feb. 8, 1989) (emphasis added).

<sup>6</sup> Agent Dodson Transcript, at 60-61.

ask them why did they did not still possess guns they had recently sworn on a federal form were for their personal use. Instead, ATF agents stood by and watched for months as the straw purchasers bought hundreds upon hundreds of additional AK-47 variants and Barrett .50 caliber sniper rifles. ATF failed to conduct proper surveillance of the walked guns. ATF leadership in Phoenix cannot account for the location of the walked guns until they turn up at a crime scene, which may be *after* they have been used to kill or maim innocent victims on both sides of the border. Untold numbers of these weapons likely reached the DTOs in Mexico.

To the extent that these walked weapons reached the DTOs, it is a direct result of the policy decision to no longer focus on interdicting weapons as soon as possible. From the agents' perspective, that decision was the polar opposite of their understanding of the previous policy. For example, Special Agent Olindo Casa testified:

Q. And if you became aware that somebody purchased guns with the intent of transferring it to a third person, would it be your practice and experience to interdict those weapons *right away*?

A. Yes, yes.

Q. Is that your understanding of ATF policy?

A. Yes.<sup>7</sup>

However, under Fast and Furious in Phoenix, agents did not follow these methods. As Special Agent Lawrence Alt testified:

Q. [I]s it fair to say that if you saw a suspect, a suspicious person . . . leaving an FFL with . . . an armful of boxes that appeared to be AK-47s or like weapons, that in your experience as an agent, I mean, would you be able to interdict that?

A. That would be my normal course of action. I understand there is other strategies wherein you are trying to identify where those firearms are going to. So you might not interdict them until they are delivered, or if you have investigative measures in place to follow them, you might let them go to . . . what you believe is their ultimate destination.

*But prior to my coming to Phoenix, Arizona, I had never witnessed a firearm not – I never witnessed a situation where there wasn't at least an attempt to interdict or take the firearm at some point.*

<sup>7</sup> Transcribed Interview of ATF Special Agent Olindo James Casa Transcript, at 18 (April 28, 2011) (on file with author) [hereinafter Agent Casa Transcript].

Q. [Y]ou might allow the suspicious person to leave the FFL with a car full of weapons, you might make a decision not to do a traffic stop right then, but is it fair to say that you would want to follow that suspect?

A. I have had experiences or been aware and involved either directly or indirectly in experiences where we knew there was illegal firearms purchases. *Follow the gun was also the motto, follow the gun, stay with the gun.*

I am aware of a couple of instances in my past where people would sit on houses all night long, days on end, waiting for the guns to go so that they could then follow it, satisfy the requirements of the investigation. . . . But I have never been involved in a situation where you would simply not do anything.<sup>8</sup>

This changed when the Agent Alt arrived in Phoenix.

Agent Casa recounted a similar situation. He had also never heard of, nor seen, guns being allowed to walk until he got to Phoenix:

. . . . But from the time I started as an ATF special agent . . . up until the time I got to Phoenix, that was my understanding, that *we do not let guns walk, absolutely, positively not*. And if we – if ever a case [where] we would do that, there better be a really good explanation why we did not grab that gun when we could.

Q. But that changed when you came to Phoenix, I mean the practice at least changed, correct?

A. Yes.

Q. So that occurred while you were here?

A. Yes.<sup>9</sup>

ATF policy is clear and unambiguous. As Agent Casa further explained:

Q. So could you – are you saying if you determine that somebody has acquired a firearm unlawfully –

A. Correct.

<sup>8</sup> Transcribed interview of ATF Special Agent Lawrence Alt, Transcript at 37-39 (April 27, 2011) (on file with author) [hereinafter Agent Alt Transcript].

<sup>9</sup> Agent Casa Transcript, at 92.

Q. – ATF's policies and procedures would be to interdict that weapon?

A. Yes. Yes.<sup>10</sup>

Agent Dodson said it succinctly:

So my training and experience with ATF as well as with law enforcement prior to then essentially is *you interdicted a gun whenever you could. Guns didn't go.*<sup>11</sup>

A third agent, Special Agent Peter Forcelli, spoke of the importance of interdicting these weapons:

Q. Did you have any kind of policy regarding gun trafficking, in other words . . . was your policy to interdict guns whenever possible?

A. Absolutely.<sup>12</sup>

Every single agent on every single prior assignment adhered to a policy to interdict weapons as soon as possible, until Fast and Furious. As one agent put it, "It's like they grabbed the ATF rulebook and threw it out the window."<sup>13</sup>

## V. Gunwalking Defined: It's Semantics

**FINDING:** DOJ relies on a narrow, untenable definition of gunwalking to claim that guns were never walked during Operation Fast and Furious. Agents disagree with this definition, acknowledging that hundreds or possibly thousands of guns were in fact walked. DOJ's misplaced reliance on this definition does not change the fact that it knew that ATF could have interdicted thousands of guns that were being trafficked to Mexico, yet chose to do nothing.

The Department of Justice has repeatedly and steadfastly denied that any guns were walked under Operation Fast and Furious. According to the narrowest possible interpretation, a gun is walked only when an ATF agent physically places an AK-47 into the hands of a straw purchaser and then lets that straw purchaser walk out of sight. Conversely, every single ATF field agent interviewed stated that guns are walked when ATF has the opportunity to interdict illegally purchased weapons, yet chooses not to even try.

<sup>10</sup> Agent Casa Transcript, at 17.

<sup>11</sup> Agent Dodson Transcript, at 19.

<sup>12</sup> Transcribed Interview of ATF Special Agent Peter Forcelli, Transcript, at 25 (April 28, 2011) (on file with author) [hereinafter Agent Forcelli Transcript].

<sup>13</sup> Telephone interview with ATF Special Agent A.

DOJ officials must have known that straw purchasers were buying guns illegally and transferring them to third parties for trafficking across the border. This was clear, or at least should have been clear, from the following factors:

- (1) the sheer volume and frequency of the purchases,
- (2) ATF's and DOJ's communications with the cooperating gun dealers,
- (3) the contemporaneous notice dealers provided about hundreds of transactions with straw purchasers, and
- (4) notifications through the Suspect Gun Database that the firearms were being recovered in crime scenes in Mexico shortly after being purchased.

Yet, ATF failed to use this information to interdict future purchases and prevent guns from crossing the border.

Instead, ATF followed DOJ's new policy, and focused on simply trying to identify more and more members of the trafficking ring. It was a conscious decision to systematically avoid interdicting guns that normally should have been interdicted, according to the agents. Thus, the agents considered it to be gunwalking. Agent Dodson testified:

My understanding of letting something walk or defining walk is, when it was in or could have been in and quite possibly should have been in law enforcement custody, a decision is made, a conscious decision is made to not take it into custody or to release it. Then it is walked. . . . [Y]ou are talking about walking dope, walking money, walking anything else. To walk a firearm was never taught. It was what we consider a no-brainer.<sup>14</sup>

As the agent explained, ATF did not teach agents to walk firearms as such a practice was beyond comprehension. Agent Casa provided a similar understanding of gunwalking:

Now, when I talk about walking guns, my understanding is that is when a person we suspect or have probable cause that a person illegally came across guns, whatever way they came across it, and we have knowledge of it and we are there and we do not interdict those guns, we do not take those guns, we do not do any warrantless seizure based on probable cause of those guns. That would be my understanding of letting guns walk.<sup>15</sup>

Agent Forcelli defined gun walking as follows:

. . . . If you can interdict it and you don't, in my opinion you have walked it. There are times . . . we do a car stop, the person maybe

<sup>14</sup> Agent Dodson Transcript, at 18-19.

<sup>15</sup> Agent Casa Transcript, at 17.

bought two guns, they would have a story that was reasonable. They had a pay stub . . . that indicated they had a salary or they had a – they can articulate why they bought it. A couple times it happened. Like I said, maybe twice they went on their way. Okay.

But again . . . walking guns, in my opinion, is if you can stop it and you don't. There are some whose definition is if ATF has the gun and gives it, then we are walking it.<sup>16</sup>

Agent Alt also acknowledged two definitions of gunwalking:

So I call that the two versions of walking a gun. There is, it is a semantics issue. Some people will say that only the purest definition is walking a gun. Some people won't acknowledge that the other version is walking a gun. And I say potato, you say potato. I believe it is, my assessment, they are the same. That's it.<sup>17</sup>

Regardless of which definition one subscribes to, the two situations both warrant action. Still, DOJ and some senior ATF officials maintain that federal agents did not sanction or knowingly allow the transfer of firearms to straw purchasers. Yet, the evidence demonstrates that DOJ and ATF *were well aware* of what was happening.

Phoenix Field Division leadership did not tolerate debate or dissent from agents over terminology or strategy. Agent Dodson testified:

Q. I believe you mentioned that there was some dispute about exactly what gun walking meant.

\* \* \*

And can you describe what the difference was, difference of opinion was?

A. Well, yes, sir. . . . Again, as I said earlier, my understanding of gun walking . . . has been something was and/or should have been, could have been in law enforcement custody. When we should have done something and it wasn't, you have let it walk.

There has to be an active decision . . . a choice is made to allow it to walk. It is not like something got away from you or you lost it. If a suspect beats you in a foot chase and he gets away, you didn't let him walk, you just lost the chase. So that's what walking is.

<sup>16</sup> Agent Forcellini Transcript, at 33.

<sup>17</sup> Agent Alt Transcript, at 50.



When [the Assistant Special Agent in Charge] came down to our office . . . we were told you don't know what walking is, we are not walking guns. And that's pretty much the extent of the debate, because in Phoenix there is very little debating one of the ASACs or the [Special Assistant in Charge]. So it was . . . a declaration, you don't know what walking guns is, we are not walking guns, this is all okay.<sup>18</sup>

Regardless of whether it meets a technical definition of gunwalking, the strategy was clearly ill-conceived. Instead of candidly acknowledging the facts and working to correct the problem, DOJ has withheld critical information from Congress and the public, obfuscating the issue.

## **VI. Concerns about Gunwalking: "What the Hell is the Purpose of This?"**

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ATF special agents in Group VII expressed many concerns about the strategies employed during Fast and Furious. None of the agents had ever before allowed a gun to "walk." None of the agents had even heard of allowing a gun to be "walked." The ATF academy does not teach agents to walk weapons, and the practice is abhorrent. Yet, in this operation, veteran ATF agents acted against their training and well-established ATF practice in allowing guns to walk right out of their sight. In spite of the agents' frustration and dismay, ATF leadership from Phoenix to Washington refused to acknowledge the validity of their concerns.

### **A. Concerns Fall on Deaf Ears and Meet Resistance**

**FINDING:** ATF agents complained about the strategy of allowing guns to walk in Operation Fast and Furious. Leadership ignored their concerns. Instead, supervisors told the agents to "get with the program" because senior ATF officials had sanctioned the operation.

When agents learned that the tactics used in Fast and Furious required guns to be walked, many veteran special agents criticized and rebelled against the policy. These agents felt hamstrung, given that they could not use the training they had received throughout their careers. As Agent Dodson testified:

Q. Based on our training and experience, what did you think about [walking guns]?

A. It was something I had never done before, sir. And quite frankly, I took great issue with it and concern. I felt like I understand the

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<sup>18</sup> Agent Dodson Transcript, at 90-92.

importance of going after the bigger target, but there is a way to do that. We did it successfully in the dope world all the time. And those skills and practices that we used there, a lot of them transfer over, and more than applicable in gun trafficking investigations, but we weren't allowed to use any of them.

Q. And did you ever have a recollection of sharing your frustration with Special Agent Casa?

A. Oh, yes, sir.

Q. And any other special agents that you can –

A. Yes, sir.

Q. And maybe you could just tell us what other agents you –

A. Pretty much everyone, sir. It was, I shared my reservations and concerns with Special Agent [L], with Dave Voth, with Special Agent [D] Special Agent [H], Special Agent Alt, Special Agent [P], several of the special agents that came on the GRIT, G-R-I-T. The gunrunner initiative is what it stands for. I shared them with or I voiced my concerns to other agents inside the Phoenix field division that was on other groups.<sup>19</sup>

Agents felt compelled to speak up within days after joining Group VII. Agents complained to their superiors, to no avail. The agents, new to Phoenix, had to comply:

Q. So the special agents in Group 7 objected to this amongst themselves. And at what point did feedback start to get communicated up the chain, whether it was to the case agent, Special Agent [L], or Group Supervisor Voth?

A. Oh, it was *almost immediately* before we had . . . Special Agent Casa and I had taken it up with Special Agent [L], Special Agent [D], and as well as Group Supervisor Voth.<sup>20</sup>

Having launched an innovative strategic plan, ATF senior leadership at Phoenix was excited at the prospect of a new way of combating drug cartel activity. ATF and DOJ leadership both approved of this plan. As such, ATF Phoenix leadership were loathe to let disgruntled field agents scuttle their signature achievement. In this matter, a great divide developed between those who knew walking guns was a bad policy and vehemently spoke out against it, and those who believed walking guns was an effective policy.

<sup>19</sup> Agent Dodson Transcript, at 40–41.

<sup>20</sup> Agent Dodson Transcript, at 42.

A widely discussed e-mail from Group VII Supervisor David Voth best summarizes the divide that had emerged in Group VII, with senior special agents on one side, wanting to stop the operation, and those in the ATF chain of command on the other, wanting to continue the gun walking.<sup>21</sup>

It has been brought to my attention that there may be a schism developing amongst the group. This is the time we all need to pull together not drift apart. We are all entitled to our respective (albeit different) opinions however we all need to get along and realize that we have a mission to accomplish.

I am thrilled and proud that our Group is the first ATF Southwest Border Group in the country to be going up on wire. On that note I thank everyone for their efforts thus far and applaud the results we have achieved in a short amount of time.

Whether you care or not people of rank and authority at HQ are paying close attention to this case and they also believe we (Phoenix Group VII) are doing what they envisioned the Southwest Border Groups doing. It may sound cheesy but we are "The tip of the ATF spear" when it comes to Southwest Border Firearms Trafficking.

We need to resolve our issues at this meeting. I will be damned if this case is going to suffer due to petty arguing, rumors or other adolescent behavior.

I don't know what all the issues are but we are all adults, we are all professionals, and we have a exciting opportunity to use the biggest tool in our law enforcement tool box. If you don't think this is fun you're in the wrong line of work – period! This is the pinnacle of domestic U.S. law enforcement techniques. After this the tool box is empty. Maybe the Maricopa County Jail is hiring detention officers and you can get paid \$30,000 (instead of \$100,000) to serve lunch to inmates all day.

Despite this e-mail, agents continued to experience dismay and frustration as Operation Fast and Furious continued along its perilous path. As Agent Casa testified:

- Q. And is it fair to say that . . . the folks on your side of the schism wanted to do everything they could to interdict these weapons so they wouldn't get any farther down the street than they have to?
- A. Yes, sir. We were all sick to death when we realized that – when we realized what was going on or when we saw what was going on by the trends. We were all just, yes, we were all distraught.<sup>22</sup>

The rift widened when the Assistant Special Agent in Charge (ASAC) authoritatively and unambiguously told Group VII that guns were not being walked, that the special agents were incorrect in their terminology, and that there would be no more discussion or dissension about this topic. Agent Dodson testified:

- A. Then we got an e-mail that . . . there is going to be a meeting. [the ASAC] is coming down, [the ASAC] comes into the Group 7 office and tells us essentially we better stand down with our complaints, that we didn't know what the definition of walking

<sup>21</sup> Email from Group VII Supervisor David Voth to Phoenix Group VII (Mar. 12, 2010).

<sup>22</sup> Agent Casa Transcript, at 41.

guns was, we weren't familiar with the Phoenix way of doing things, that *all of this was sanctioned* and we just needed to essentially shut up and get in line. That's not a quote, but that's the feel of the meeting, so . . .

Q. Do you remember approximately when that occurred?

A. It was right after we went to the Group 7 building, so it had to be late February, early March 2010.<sup>23</sup>

Even some - outside Group VII - with reservations about the practice, indicated that they gave them the benefit of the doubt because the case was being supervised by the U.S. Attorney's office. Agent Forcelli testified:

And I expressed concern . . . about that. And I believe some of those guns were purchased historically. It wasn't like 1200 were watched to go, but apparently they weren't interdicting either. And his response was . . . if you or I were running the group . . . it wouldn't be going down that way and that **the U.S. Attorney is on board, and it was Mr. [Emory] Hurley, and they say there is nothing illegal going on.**<sup>24</sup>

#### ***B. Tragic, Yet Foreseeable Results***

**FINDING: Agents knew that given the large numbers of weapons being trafficked to Mexico, tragic results were a near certainty.**

Since Group VII agents were instructed not to interdict as early and as often as they believed they should, the agents quickly grasped the likelihood of tragic results. Agent Alt testified:

Q. At any point in time did you have communications that . . . this is going to end terribly, there is going to be deaths?

A. I know that was talked about . . . the probability of a bad situation arises with the number each - as the number of firearms increases, meaning firearms that are out and outside of our control in this environment with this type of a case, which we are talking about a firearms trafficking case, southwest border firearm trafficking case, I only hope the case agent knows where they are going. But they are out there and they are not accounted for by us, at least that I am aware of. So there is certainly a greater probability and a greater liability.

<sup>23</sup> Agent Dodson Transcript, at 44.

<sup>24</sup> Agent Forcelli Transcript, at 36.

I can tell you that as early as June of last year I predicted to some of my peers in the office that we would be sitting right where we are today in this room.

Q. Speaking with Congressional investigators?

A. That this would be in front of a Congressional investigation. And I was in agreement with Agent Dodson that someone was going to die. And my observations in the office were there was an overwhelming concern, *even amongst those persons on the other side of the schism*, if I can use that term, that something bad was going to happen.

\* \* \*

Q. And is it fair to say that anxiety is heightened because of the possibility of some of these guns getting into the hands of criminals and being used against your fellow law enforcement agents?

A. Yes. And it is not even the possibility, because we know that they were procured unlawfully. So if we know that from the beginning, they are already in the hands of criminals, so now we are simply dealing with what is the consequence of that.<sup>25</sup>

The most frustrating aspect of the gunwalking policy for the agents was that they believed they *could* have interdicted and stopped the guns from walking.

When agents arrived in Phoenix in December 2009, they believed there was *already* enough information to arrest the straw purchasers, try to flip them, and begin working up the chain with an eye toward “bigger fish” in the organization. Yet, the fall of 2009 brought a remarkable departure from the normal practice of interdiction. ATF’s strategy explicitly stated that it would allow straw purchasers to buy weapons, and that’s exactly what happened. Agent Dodson testified:

Q. With the new resources in Group 7 in the fall of ‘09 . . . you talked about some of the special agents that were joined, if all of you had interdicted the weapons as you saw them, what percentage do you think you could have prevented from sort of entering the stream . . . if you read the press accounts of this, it is somewhere along the lines of 2,000 firearms have disappeared. How many do you think you and your colleagues would have been successful to interdict? Is it 10 percent, 50 percent?

<sup>25</sup> Agent Alt Transcript, at 120-122.

- A. Well, the question is kind implausible, sir. . . . When we hit the ground in Phoenix, say, and the original 40 straw purchasers were identified, and I can't remember if it is 240 or 270 guns that they knew at that point that these guys were responsible for, you take, you minus that 270 from the estimate of 2,000, and whatever you have left is what we could have prevented.

Because we should have landed on every one of those people the minute that we hit here. And the ones that we landed on that we couldn't make cases on, at least they would have been on notice that we were watching and they would have stopped buying, or every time they did, the flag went up and we could have been on them then.

And of all the ones that we didn't land on, several of them would have spoken to us, a couple of them even maybe would have worked for us as a confidential informant or sources, which is how you climb the ladder in an investigation into an organization. Sitting back and watching isn't it. Okay? If you are watching a TV show at that point of the wire, you are not doing your job. Your job is to get out here and make a difference. And we could have done it when we hit the ground. So what are we talking? *1730, to answer your question*, is my opinion of how many of these firearms that we could have and should have prevented from ever being purchased by these individuals and subsequently trafficked to known criminals or cartel elements south of the border and elsewhere.

- Q. And is it fair to say if you started stopping these straw buyers as soon as they left [the gun dealers], is it fair to say that perhaps the drug trafficking organizations that they worked for would realize we got to get out of Phoenix, we have got to go to Dallas, we have got to go somewhere else, because Phoenix now has these new resources and they are catching us?
- A. Right, if not, come up with an entirely new alternative way to get their weapons. If we shut down the whole straw purchasing scenario here in Phoenix, or significantly hurt it to the point where it is not advantageous for them to do so, you figure, if they are paying \$600 for an AK or AK variant, all right, for every one that they buy we are taking off ten of them, okay, that's, I mean in any business sense that's not a good idea. Ultimately you are paying \$6600 for one AK at that point. Am I correct?<sup>26</sup>

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<sup>26</sup> Agent Dodson Transcript, at 61-63.

Unfortunately, the agents' complaints fell on deaf ears. As one ASAC noted, the policy and Operation had been sanctioned. For many of the agents, the operation only fueled their outrage. According to the agents, the operation failed to use their investigative strengths, honed over dozens of years in law enforcement. Agents saw the whole operation as pointless, a poor way to operate, and above all, dangerous. Agent Dodson testified:

- Q. Can you be more specific about the instances in which you were told not to use those techniques?
- A. Oh, certainly. Well, every time we voiced concerns, every time we asked the question. And this is so hard to convey because I understand you guys weren't there, you didn't live it. But every day being out here watching a guy go into the same gun store buying another 15 or 20 AK-47s or variants or . . . five or ten Draco pistols or FN Five-seveNs . . . guys that don't have a job, and he is walking in here spending \$27,000 for three Barrett .50 calibers at . . . walks in with his little bag going in there to buy it, and you are sitting there every day and you can't do anything, you have this conversation every day.

You asked me . . . a specific time where you voiced where you want to do this. Every day, all right? It was like are we taking this guy? No. Why not? Because it is not part of the plan, or it is not part of the case. [Agent L] said no, Dave said no, [Agent E] said no. *What are we doing here? I don't know. What the hell is the purpose of this? I have no idea.* This went on every day.<sup>27</sup>

DOJ and ATF determined that the goal of making the big case was worth the risk of letting hundreds and hundreds of guns go to criminals in the process. This conclusion was unacceptable to the agents on the ground carrying out these direct orders. The agents knew they were facilitating the sale of AK-47 variants to straw purchasers. Supervisors ignored complaints and retaliated against agents who did complain by transferring them out of ATF Phoenix Group VII. As Agent Dodson recalled:

- Q. [A]t any point in time do you have a recollection of commiserating with your colleagues, whether it was Special Agent Casa, whether it was Special Agent Alt, or some of the other special agents that were on sort of your side of the schism, for lack of a better word? Do you ever recall saying . . . good grief, if we had just snatched these guns at the FFLs we wouldn't even be in this situation?
- A. Oh, yes, sir, and not only with people on my side of the schism. I mean this was why I was, I mean I guess we will get to this later, but why I am no longer in Group 7, is because I addressed it with, or primarily with those on the other side of the schism.

<sup>27</sup> Agent Dodson Transcript, at 113.

\* \* \*

- Q. And is it fair to say at this point you are outraged?
- A. Outraged and disgusted, however else you want to look at it.
- Q. And is it fair to say that part of your outrage is because . . . needless deaths are possibly occurring?
- A. Oh, very much so, sir.
- Q. That countless number of crimes are being perpetrated with these weapons that you and your colleagues may have facilitated –
- A. Yes.<sup>28</sup>

### C. *Catastrophe Becomes Reality*

This agent's fear and outrage were realized by the death of Border Patrol Agent Brian Terry, a member of the U.S. Border Patrol Tactical Unit, as well as the almost certain deaths of countless Mexican citizens killed and the unknown amount of other crimes with weapons stemming from Fast and Furious. In Fast and Furious, ATF wanted to design a unique way to pursue the drug cartels. ATF and DOJ failed spectacularly to consider resulting negative outcomes. As Agent Dodson noted:

Well, sir, if I may, and first of all, please everyone understand, I am not on either, or either side of this political spectrum, nor do I want to be. And quite frankly, it is unfathomable to me how both sides or any person isn't completely livid about what we have been doing here. **I cannot see anyone who has one iota of concern for human life being okay with this**, and being willing to make this go away or not hold the people that made these decisions accountable. I don't understand it. And again, none of you owe me an explanation, that's just my personal opinion.<sup>29</sup>

## VII. Witnessing Gunwalking: "We Did Not Stop Them."

Fast and Furious required agents to stand down, ignoring their training and professional instincts. Allowing guns to fall into the hands of the DTOs was the Operation's central goal. Even when agents were able to interdict weapons, they received orders to stand down.

<sup>28</sup> Agent Dodson Transcript, at 57-58.

<sup>29</sup> Agent Dodson Transcript, at 101.



**A. Watching Guns Walk**

**FINDING:** Agents expected to interdict weapons, yet were told to stand down and “just surveil.” Agents therefore did not act. They watched straw purchasers buy hundreds of weapons illegally and transfer those weapons to unknown third parties and stash houses.

During their interviews, several agents offered detailed descriptions of their observations of suspected straw purchasers entering FFLs to purchase enormous quantities of assault rifles. Following orders, they did not intervene. Agent Dodson remembered:

Q. You got a guy that had purchased . . . **40 different AKs in the past two months** and . . . five or ten of them had already returned in time to crime. **So I thought here we go, we are going to start interdicting people.**

We – they would go in and buy another five or ten AK variants or . . . five or ten FN Five-seveN pistols at a time, and come out. We would see it. We would know . . . that whatever standard of reasonable suspicion or probable cause was met, and we were landing on somebody before the end of the day. **But that didn’t happen.**

Q. And that’s something you realized how early in your fieldwork, first or second day?

A. Oh, yes, sir. I mean first or second day you are starting to question why aren’t we doing this. And then by the end of the week it was . . . frustration already as to how many guns have we watched these guys get away with.

Q. In your first week, can you make an estimate of how many guns you saw get loaded into a vehicle and driven away? I mean, are we talking like 30 or one?

A. Probably 30 or 50. It wasn’t five. There were five at a time. These guys didn’t go to the FFLs unless it was five or more. And the only exceptions to that are sometimes the Draco, which were the AK variant pistols, or the FN Five-seveN pistols, because a lot of FFLs just didn’t have . . . 10 or 20 of those on hand.<sup>30</sup>

<sup>30</sup> Agent Dodson Transcript, at 33-34.

Witnessing, but not contacting, straw purchasers buying weapons from FFLs became common practice for Group VII field agents in Phoenix. Agents sometimes conducted minimal surveillance following the purchases. Sometimes they conducted no surveillance. As Agent Dodson testified:

We witnessed one of the individuals . . . the known straw purchasers arrive, go in. Sometimes one of us would actually be inside the FFL behind the counter. Sometimes if we had enough lead way we would go to the suspect's house and follow him from there to the FFL, or to a meeting . . . just prior to and see an exchange.<sup>31</sup>

Typically, agents ended surveillance of both the guns and the straw purchasers. Agent Alt testified:

Watched and/or was aware – I shouldn't say watched – was aware that purchasers were routinely making purchases . . . at least in one case suspects who were known to be purchasing for other people were buying firearms with funds that were known to come from other people. And those firearms were not interdicted. Those firearms often went to a house or a place, and then surveillance was terminated there. So the disposition of the particular firearm may or may not have been known.

Q. And did that happen frequently?

A. Yes.<sup>32</sup>

#### ***B. Ordered to Stand Down***

Superiors specifically ordered field agents to “stand down” despite establishing probable cause that a straw purchase had occurred. Agent Casa testified:

Q. And you were instructed or under orders from the case agent and group supervisor to do what, to do nothing?

A. Well, when I would call out on surveillance, yes, I was advised do not – I would ask do we want to do a traffic stop, do we want to – I will throw another definition, you guys have probably heard this. I am sorry, guys. I don't know what you heard or didn't. It is called “rip.” It is a slang for saying we are going to do a warrantless seizure of those firearms once we establish probable cause.

<sup>31</sup> Agent Dodson Transcript, at 39.

<sup>32</sup> Agent Alt Transcript, at 50.

Yeah . . . one of those days I called the case agent on the Nextel, said, hey . . . our straw purchaser, one of our targets has transferred the guns, he is driving south. This unknown person that just got delivered the firearms probably . . . all intents and purposes gave the straw purchaser the money to buy the guns had all the guns and he is going north. Hey, why don't we go ahead and stop that vehicle, rip the guns, and you can do what you want, we can arrest them. We don't have to arrest them. But we will grab the guns. And they said no. And I said this person is an unknown person. Well, you got the license plate. Well, it can be, that car could be registered to anybody, we don't know who that person is, let's at least do a vehicle stop so we can ID the person so maybe later we could get the guns back. *No, just surveil.*<sup>33</sup>

Agent Forcelli recounts that situation from a different point of view:

Well, as I said, there was that GRIT, people at command. And there was an instance where an agent was yelling over the radio. . . . There were a bunch of people milling around. And we heard an agent that sounded like he was in distress.

And what happened was he was attempting to do a car stop. And we heard a female agent . . . telling him to stand down and not do the car stop. I later found out there were guns in the car and that the agent felt distressed because they had made him on the surveillance. So to let the guns go, it doesn't make any sense to me if you are burned.

Q. Do you know who the agent was?

A. Yes. It was Agent Casa.

Q. And so you specifically yourself heard him on the radio saying something to the effect I want to go get these guns now?

A. Yeah. And again, the reason, being a cop for so long you hear so many things on the radio, but you always can tell when somebody is in distress by the tone of their voice. As a cop you start racing to the scene before you actually hear the call. This was a similar instance, where you can tell by the tone of his voice something wasn't right.

Later on I spoke with him. And he said that a car had almost come at him. That's how aggressive they had become during the surveillance. And that's why he was so excited on the radio. But

<sup>33</sup> Agent Casa Transcript, at 41-43.

he was told to not stop the car with the guns in it, which to me makes no sense.<sup>34</sup>

Agent Dodson described the situation:

I remember one time specifically we had been following this individual for so long to so many places that day . . . money pickups, gun drops, FFLs, and he got into an area of the city and he just started doing crazy [Ivans] . . . [like] unexplainable U-turns. He is doing heat runs, trying to burn surveillance, whatever cliché you want to use.

So we knew we were made. Okay? We are made. He knows we are following. He knows we have been following him for awhile and we haven't done anything. We have to do something. I mean you have to do – we have to pull him over. We have to interact with him at some point. If not, he is always going to wonder, well, why are you following me. At least, for no other reason than a ruse, pull him over because . . . he did that illegal U-turn and whatever we need.

We did it when I worked dope all the time. If they made surveillance, what did you do? Hey, there's an armed robbery back there, you guys match the description. No, you are not them. All right, later. And then we don't heat them up too bad. We weren't allowed to do that, not even for a ruse situation. **I mean there is a verbal screaming match over the radio about how . . . what are you talking about? There is no better time or reason to pull this guy over than right now.**

Q. So, in other words, whatever arguments might have been made before with regard to the specific instance that you are referring to about the utility of letting them continue their operations without knowing that you are onto them so that you can then follow and see where it goes, all those arguments go away at the point they made the fact they are being surveilled, right?

A. Correct.<sup>35</sup>

Unfortunately, ordering special agents to “stand down” when they planned to interdict guns became the norm. As Agent Dodson testified:

Q. Can you recollect a time when you were conducting surveillance on an FFL and you saw firearms being loaded into a car when you

<sup>34</sup> Agent Forcelli Transcript, at 60-62.

<sup>35</sup> Agent Dodson Transcript, at 116-117.

said to your colleague we got to go, we got to go seize this now, I understand the direction we have been given, but this is bad stuff, these are bad people, we need to go just –

A. Yes, sir.

Q. And did you ever do that?

A. No, sir. We were, at the time, one of the incidents that I recall specifically, Special Agent [D] was in the wire room at the time. We had been directed by both case agent and group supervisor that absent both of them, she is in charge. When we were communicating the interdiction that we were going to make over the radio, she, monitoring the radio traffic in the wire room, came back over and ordered us to stand down.

I debated this with her, probably far more lengthy than I should have over the radio, and again ultimately was just ordered to stand down. There were actually more than one of these discussions with her and Group Supervisor Voth, as well as with Special Agent [L], when *I thought we had a duty to act, that that was nonfeasance on our part by not doing so*. And each time I was . . . told to stand down and somewhat reprimanded afterwards for voicing it.<sup>36</sup>

Other agents had similar experiences in being told to stand down. Agent Casa remembered:

And a situation would arise where a known individual, a suspected straw purchaser, purchased firearms and immediately transferred them or shortly after, not immediately, shortly after they had transferred them to an unknown male. And at that point I asked the case agent to, if we can intervene and seize those firearms, and I was told no.<sup>37</sup>

These were not isolated incidents. Group VII members discussed, debated, and lamented walking guns on a daily basis, but the practice continued. Agent Casa testified:

Q. And what did you observe during your surveillance?

A. [I] observed suspected straw purchasers go to area federal firearms licensees, FFLs, go into the store, walk out with a large number of weapons, get into a vehicle, drive off.<sup>38</sup>

<sup>36</sup> Agent Dodson Transcript, at 45-46.

<sup>37</sup> Agent Casa Transcript, at 33.

<sup>38</sup> Agent Casa Transcript, at 29.

**C. “We Were Walking Guns. It was Our Decision.”**

As all of the accounts from numerous ATF agents demonstrate, ATF intentionally and knowingly walked guns. One of the ASACs in Phoenix reported that this policy was “sanctioned.” To allow these guns to be bought and transferred illegally was a conscious and deliberate decision, not merely by failing to take action to interdict, but also by giving the green light to gun dealers to sell to known straw purchasers. By sanctioning the purchases even after dealers expressed concerns, ATF agents said they were actually facilitating the transactions:

Q. And essentially you witnessed guns walk; that was not consistent with your training and experience?

A. Sir . . . by the very definition of allowing them to walk, if I witnessed guns walk, that means it is another agency’s operations. If I go help another agency and this is their op, then I witnessed guns walk.

**We were walking guns. It was our decision.** We had the information. **We had the duty and the responsibility to act, and we didn’t do so.** So it was us walking those guns. We didn’t watch them walk, we walked.<sup>39</sup>

Agent Dodson later explains the consequences:

Q. That countless number of crimes are being perpetrated with these weapons that you and your colleagues may have facilitated --

A. Yes.

Q. -- moving into the hands of the bad guys?

A. Yes, sir. **I would argue that it wasn’t a “may have facilitated.” It was facilitated.** These FFLs wouldn’t have made these purchases. I mean they addressed their concerns to, I mean to ATF both formally as well as to us when we were inside getting copies of the forms, that this whole --

The genesis of this case was when they were calling in these people that they knew. **This guy comes in, buys 10, 15, 20 AKs or . . . a 22-year-old girl walks in and dumps \$10,000 on . . . AK-47s in a day, when she is driving a beat up car that doesn’t have enough metal to hold hubcaps on it. They knew what was**

<sup>39</sup> Agent Dodson Transcript, at 41.

*going on.* The “may have facilitated” to me is kind of erroneous. We did facilitate it. How are we not responsible for the ultimate outcome of these [g]uns?<sup>40</sup>

## VIII. Collateral Damage: A Fast and Furious Inevitability

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An increase of crimes and deaths in Mexico caused an increase in the recovery of weapons at crime scenes. When these weapons traced back through the Suspect Gun Database to weapons that were walked under Fast and Furious, supervisors in Phoenix were giddy at the success of their operation.

### A. *Increasing Volume Equals Increasing Success*

**FINDING:** Operation Fast and Furious contributed to the increasing violence and deaths in Mexico. This result was regarded with giddy optimism by ATF supervisors hoping that guns recovered at crime scenes in Mexico would provide the nexus to straw purchasers in Phoenix.

Since ATF supervisors regarded violence and deaths in Mexico as inevitable collateral damage, they were not overly concerned about this effect of the Operation. Quite the opposite, they viewed the appearance of Fast and Furious guns at Mexican crime scenes with *satisfaction*, because such appearances proved the connection between straw purchasers under surveillance and the DTOs. For example, Group VII Supervisor David Voth eagerly reported how many weapons their “subjects” purchased and the immense caliber of some of these guns during the month of March alone:

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<sup>40</sup> Agent Dodson Transcript, at 59.

**From:** Voth, David J.  
**Sent:** Friday, April 02, 2010 10:31 AM  
**To:** [REDACTED]  
**Cc:** Phoenix Group VII  
**Subject:** No pressure but perhaps an increased sense of urgency...

MEXICO STATS

958 killed in March 2010 (Most violent month since 2005)

937 killed in January 2010

842 killed in December 2009

SINALOA - MARCH STATISTICS

187 murders in March, including 11 policemen

I hope this e-mail is well received in that it is not intended to imply anything other than that the violence in Mexico is severe and without being dramatic we have a sense of urgency with regards to this investigation. Our subjects purchased 359 firearms during the month of March alone, to include numerous Barrett .50 caliber rifles. I believe we are righteous in our plan to dismantle this entire organization and to rush in to arrest any one person without taking in to account the entire scope of the conspiracy would be ill advised to the overall good of the mission. I acknowledge that we are all in agreement that to do so properly requires patience and planning. In the event however that there is anything we can do to facilitate a timely response or turnaround by others we should communicate our sense of urgency with regard to this matter.

Thanks for everyone's continued support in this endeavor,

David Voth  
 Group Supervisor  
 Phoenix Group VII

The agents within Group VII described Voth's reaction to all this gun violence in Mexico as "giddy."<sup>41</sup> In addition to this e-mail, private conversations they had with Voth gave them the impression that Voth was excited about guns at Mexican crime scenes subsequently traced back to Fast and Furious. Agent Dodson explains:

Q. Then there is an e-mail that was on CBS news that I made notes about written on April 2, 2010 by Group Supervisor Voth?

A. Yes, sir.

Q. And he reported that our subjects purchased 359 firearms during March alone.

A. Yes, sir.

Q. That there were 958 people killed in March of 2010.

<sup>41</sup> Agent Dodson Transcript, at 118.



A. Yes, sir.

Q. And he was . . . he was essentially trumpeting up the violence that was occurring as a result of an ATF sanctioned program, is that correct?

A. Agent or Group Supervisor Voth took that, or the way that he presented that to us was look here, this is proof that we are working a cartel, the guns that our guys are buying that we are looking at are being found, are coming back with very short time to crime rates in Mexico in known cartel related violence, and the violence is going through the roof down there, we are onto a good thing here.

Q. The e-mail further goes on and says there was 937 killed in January 2010, 842 killed in December, 2009. The numbers are increasing?

A. Yes, sir.<sup>42</sup>

This evidence established a nexus between straw purchasers in the United States and the DTOs in Mexico, bringing ATF one step closer to catching the "bigger fish." This strategy of letting the "little fish" go in order to capture the "bigger fish" was the ultimate goal of Phoenix Group VII. As Agent Dodson explained:

Q. Okay. So earlier we were discussing an e-mail that . . . was describing from Mr. Voth where he appears to present the crimes in Mexico. You said something to the effect that he was, he was presenting the guns being recovered in Mexico as proof that you were watching the right people.

A. Correct.

Q. And that the increasing levels of violence were proof you were on the right track, essentially.

I just wanted to clarify. Is that, when you were saying those things, was that your reading of his e-mail, or do you recall other conversations that you had with him outside of the e-mail that . . . this was evidence that you were on the right track?

A. Well, both. I get that impression from reading his e-mail, but perhaps I get that impression because of knowing him how well I did.

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<sup>42</sup> Agent Dodson Transcript, at 56-57.

There were several instances. Whenever he would get a trace report back . . . *he was jovial, if not, not giddy, but just delighted about that, hey, 20 of our guns were recovered with 350 pounds of dope in Mexico last night. And it was exciting.* To them it proved the nexus to the drug cartels. It validated that . . . we were really working the cartel case here.<sup>43</sup>

Agent Alt described in great detail his disgust at the self-satisfaction of ATF leadership for sending guns into what they knew to be a war zone. He also expounded on his view that the Group Supervisor should have been more concerned with those deaths in Mexico rather than with motivating his team. He testified:

Why then do we stand by and try to motivate agents to do something more to stem the homicides . . . with no further mention on the homicides and correlate that with the number of guns recovered in Mexico in a given month, when we should be saying how many of those guns left this state that we knew about in relationship to our cases in conjunction with these murders? That didn't happen.<sup>44</sup>

#### **B. "You Need to Scramble Some Eggs"**

According to the ATF agents, their supervisors in Phoenix were sometimes shockingly insensitive to the possibility the policy could lead to loss of life. Agent Dodson explained:

Q. [S]omebody in management . . . used the terminology "scramble some eggs."

A. Yes, sir.

Q. If you are going to make an omelette you have got to scramble some eggs. Do you remember the context of that?

A. Yes, sir. It was – there was a prevailing attitude amongst the group and outside of the group in the ATF chain of command, and that was the attitude. . . . I had heard that . . . sentiment from Special Agent [E] Special Agent [L], and Special Agent Voth. And the time referenced in the interview was, I want to say, in May as the GRIT team or gunrunner initiative team was coming out. I was having a conversation with Special Agent [L] about the case in which the conversation ended with me asking her are you prepared to go to a border agent's funeral over this or a Cochise County

<sup>43</sup> Agent Dodson Transcript, at 117-118.

<sup>44</sup> Agent Alt Transcript, at 174.

deputy's over this, because that's going to happen. And the sentiment that was given back to me by both her, the group supervisor, was that . . . if you are going to make an omelette, you need to scramble some eggs.<sup>45</sup>

### C. *An Inevitable and Horrible Outcome*

The increasing number of deaths along with the increasing number of Fast and Furious guns found at Mexican crime scenes evoked a very different reaction among the line agents. They had great anxiety about the killings across the border. Their concern focused on reports of shootings and assaults of law enforcement officials. They worried openly of the consequences of walked weapons used to shoot a police officer.

This worst-case scenario came to fruition when United States Border Patrol Agent Brian Terry was murdered and two "walked" AK-47 rifles were found at the scene of the murder. Agent Forcelli described the mood following the Terry murder:

Q. Do you recall any specific conversations that you had about after, after learning that . . . two of the guns at the scene had been traced back to the Fast and Furious case?

A. [T]here was kind of a thing like deja vu, hey, we have been saying this was going to happen. The agents were pretty livid and saying exactly that. We knew. How many people were saying this was going to happen a long time before it did happen?

And then there was a sense like every other time, *even with Ms. Giffords' shooting, there was a state of panic*, like, oh, God, let's hope this is not a weapon from that case. And the shooting of Mr. [Zapata] down in Mexico, I know that, again, that state of panic that they had, like please let this not come back.

This was an embarrassment . . . that this happened to the agent, tragic. I mean my heart goes out to this family. I lost colleagues, and I couldn't imagine the pain they were going through. And it made it painful for us, even those not involved in the case, to think ATF now has this stain.<sup>46</sup>

Agent Alt explained the process by which ATF learned that weapons were being trafficked into Mexico.

Q. But how would you identify that they ended up in Mexico?

<sup>45</sup> Agent Dodson Transcript, at 135-136.

<sup>46</sup> Agent Forcelli Transcript, at 127-128.

- A. Well, there is a variety of ways. One . . . you would identify where they are going by virtue of recoveries that are happening in crimes or interdictions. . . . So you identify that they are going south. And I think then the strategy, if I understand it, is that the firearms are then, once . . . they are going south, you try and follow them and figure out where they are going and to who they are going to tie to a greater organization and more people, identify the hierarchy of the organization. That's the strategy.

And I don't know how you perfect a case doing that when you don't have the guns. . . . But the strategy to me would have to be that there has got to be some measure of accounting or follow-up as to where they end up.<sup>47</sup>

The notion that these guns moved into Mexico and aided the drug war distressed the ATF field agents, including Agent Casa:

- Q. It was a likely consequence of the policy of walking guns that some of those guns would wind up at crime scenes in Mexico?

A. Yeah.

- Q. And is it fair to say that some, if not many, of these crime scenes would be where people would be seriously injured or possibly killed?

A. Of course.

- Q. So is it a fair, predictable outcome of the policy that there would be essentially collateral damage in terms of human lives?

A. Sure.<sup>48</sup>

Agent Casa also emphasized that those who planned and approved Operation Fast and Furious could have predicted the ensuing collateral violence:

I feel for the family of Agent Terry, I feel for his death. . . . I don't know how some of the people I work with could not see this was going to be an inevitable outcome, something like this happening. And I don't know why they don't think that six months from now this won't happen again, or a year from now, a year and a half from now.

<sup>47</sup> Agent Alt Transcript, at 160-161.

<sup>48</sup> Agent Casa Transcript, at 126-127.

But I don't know the exact number of guns that were put out into the streets as a result of this investigation. But they are not going to disintegrate once they are used once. They are going to keep popping up over and over and over.<sup>49</sup>

**D. The Pucker Factor**

**FINDING:** Every time a law enforcement official in Arizona was assaulted or shot by a firearm, ATF agents in Group VII had great anxiety that guns used to perpetrate the crimes may trace back to Operation Fast and Furious.

The design defect of Fast and Furious was its failure to include sufficient safeguards to keep track of thousands of heavy-duty weapons sold to straw purchasers for the DTOs. ATF agents did not maintain surveillance of either the guns or the straw purchasers. The guns were therefore lost. The next time law enforcement would encounter those guns was at crime scenes in Mexico and in the United States. However, because ATF had contemporaneous notice of the sales from the gun dealers and entered the serial numbers into the Suspect Gun Database, agents were notified whenever a trace request was submitted for one of those walked guns. As Agent Alt testified:

Q. [A] little bit earlier you talked about a level of anxiety, the anxiety among the agents, perhaps even the supervisors, relating to weapons that are found at crime scenes. There was a death, there is a murder scene in Mexico. There is a trace that comes in of some kind, and the weapon is then connected to a weapon that may have been one of the weapons that were walked. . . . Is that accurate?

A. Yes. I used the word anxiety. The term I used amongst my peers is pucker factor.

\* \* \*

Q. Pucker factor, precisely. But that's what it is relating to? I am saying that correctly, right?

A. Yes.

Q. And this pucker factor, in your view, is related to a gun showing up at a crime scene, right, a murder scene, someone gets killed, et cetera?

<sup>49</sup> Agent Casa Transcript, at 127-128.

A. Absolutely.

Q. [B]ut isn't that crime scene also the reason or the place that permits us to trace the gun? In other words, once the gun is walked, let's say it walks south, isn't the only other information we are ever going to get about that gun, isn't that going to come from a crime scene?

A. Most likely, unless we have some resource in place down there, whether it be an informant or an undercover or an agent or something telling us where those guns end up.

\* \* \*

Q. **So assuming for a second that that does not exist because we don't have any evidence to speak of, the only way we are going to see this firearm that was let go --**

A. **Is a crime recovery.**

Q. Crime gun recovery --

A. That's correct.

Q. -- which would be either in the pocket of a person caught for some other offense or very likely at a shooting?

A. Most of the Mexican recoveries are related to an act of violence.

\* \* \*

Q. But so typically the recovery will have evolved around a serious injury or gun related?

A. Or about drug related.

Q. But someone is either dead or hurt or both or something frequently?

A. Yes . . . there is a lot of violence, and guns are recovered with respect to the violence. A lot of your big seizures of the guns, though, the big seizures of the guns, mass is usually in conjunction of seizures of other things.

\* \* \*

My opinion is the last portion of your statement is spot on, you have to accept that there is going to be collateral damage with regard to that strategy. **You can't allow thousands of guns to go south of the border without an expectation that they are going to be recovered eventually in crimes and people are going to die.**<sup>50</sup>

## **IX. The Tragic Death of U.S. Border Patrol Agent Brian Terry**

**FINDING:** Jaime Avila was entered as a suspect in the investigation by ATF on November 25, 2009, after purchasing weapons alongside Uriel Patino, who had been identified as a suspect in October 2009. Over the next month and a half, Avila purchased 13 more weapons, each recorded by the ATF in its database within days of the purchase. Then on January 16, 2010, Avila purchased three AK-47 style rifles, two of which ended up being found at the murder scene of U.S. Border Patrol Agent Brian Terry. The death of Border Agent Brian Terry was likely a preventable tragedy.

Fast and Furious has claimed the life of an American federal agent. Late in the evening of December 14, 2010, Border Patrol Agent Brian Terry, a native of Michigan, was on patrol with three other agents in Peck Canyon, near Rio Rico, Arizona. One of the agents spotted a group of five suspected illegal aliens; at least two were carrying rifles. Although one of the border patrol agents identified the group as federal agents, the suspected aliens did not drop their weapons. At least one of the suspected aliens fired at the agents, who returned fire. Agent Terry was struck by on bullet that proved to be fatal.<sup>51</sup>

Most of the suspected aliens fled the scene, though one of them, Manual Osorio-Arellanes, had been wounded and was unable to flee. A slew of federal agents from a variety of agencies arrived at the scene and the authorities' recovered three weapons from the suspects, who had dropped their rifles in order to flee the scene faster. Two of those recovered weapons were AK-47 variant rifles that had been bought on January 16, 2010 by straw purchaser Jaime Avila during Operation Fast and Furious. Avila was entered as a suspect in the investigation by ATF on November 25, 2009. This occurred after he purchased weapons with Uriel Patino, a straw buyer who had previously been identified as a suspect in October 2009. On November 24, 2009, agents rushed to the FFL to surveil Avila and Patino, but arrived too late. Over the next month and a half, Avila purchased 13 more weapons, each recorded by the ATF in its database within days of the purchase. Avila bought the weapons recovered at the scene of Agent Terry's murder almost two months after ATF knew he was working with Patino. Avila's purchases would eventually total fifty two under Fast and Furious.<sup>52</sup> Patino's purchases would eventually

<sup>50</sup> Agent Alt Transcript, at 187-191.

<sup>51</sup> In re: Manual Osorio-Arellanes, No. 10-10251M, aff. of [Name Redacted], Special Agent, (D.Ariz. Dec. 29, 2010).

<sup>52</sup> Chart of "Indicted targets", [Author Redacted], A/GS Phoenix FIG, (Mar. 29, 2011).

top 660. As with all the Fast and Furious suspects, gun dealers provided contemporaneous notice of each sale to the ATF.<sup>53</sup>

The day after the Terry shooting, law enforcement agents located and arrested Avila in Phoenix. The U.S. Attorney's Office in Arizona later indicted him. Avila's indictment, however, is typical of the indictments that have resulted thus far from Fast and Furious. Avila was indicted on three counts of "lying and buying"—including false statements on ATF Form 4473, a prerequisite to the purchase of any firearm. These three indictments, however, do not stem from the weapons purchased on January 16, 2010, that eventually ended up at the Terry murder scene. Instead, Avila was indicted with respect to rifles he bought *six months later* and which also turned up at a crime scene.

On May 6, 2011, DOJ unsealed an indictment of Manuel Osorio-Arellanes for the murder of Brian Terry.<sup>54</sup> Federal authorities, led by the FBI, are pursuing his co-conspirators, including the gunman suspected of firing the fatal shot and fleeing the scene.

In Phoenix, the news of Agent Terry's death deeply saddened, but did not surprise, Group VII agents. They had agonized over the possibility of this event, and they ruefully contemplated future similar incidents resulting from the abundance of illegal guns.

During their transcribed interviews, the ATF agents shared their reactions to Agent Brian Terry's murder. Agent Dodson testified:

Q. Along those lines, when did you find out that Agent Terry was killed?

A. I found out December 16<sup>th</sup>, 2010.

Q. And what can you tell us about your recollections that information?

\* \* \*

A. Well, I was called by another agent and was told that – or asked if I had heard about Agent Terry's death. I told him that I had. And then he confirmed for me what I already thought when he called, which was that it was one of the guns from Fast and Furious.

And then later that day, I was speaking to my acting supervisor, Marge Zicha, and she had made a comment to me that they were very busy because two of the Fast and Furious guns were found at the scene of Agent Terry's homicide.<sup>55</sup>

<sup>53</sup> *Id.*

<sup>54</sup> U.S. v. Manuel Osorio-Arellanes et al., No. CR-11-0150-TUC-DCB-JCG. (D.Ariz. Apr. 20, 2011).

<sup>55</sup> Agent Dodson Transcript, at 136-137.



Agent Dodson also detailed ATF's awareness of and its multiple contacts with the accused murderer, Jaime Avila, for months prior to Agent Terry's murder.

So essentially in January 2010, or December when I got there, **we knew Jaime Avila was a straw purchaser**, had him identified as a known straw purchaser supplying weapons to the cartel. Shortly thereafter, we had previous weapons recovered from Mexico with very short time to crime rates purchased by Jaime Avila, as I recall.

And then in May we had a recovery where Border Patrol encounters an armed group of bandits and recovered an AK variant rifle purchased by Jaime Avila, and we still did not – **purchased during the time we were watching Jaime Avila, had him under surveillance, and we did nothing.**

Then on December 14th, 2010 Agent Brian Terry is killed in Rio Rico, Arizona. Two weapons recovered from the scene . . . two AK variant weapons purchased by Jaime Avila on January 16th, 2010 while we had him under surveillance, after we knew him to be a straw purchaser, after we identified him as purchasing firearms for a known Mexican drug cartel.<sup>56</sup>

Although the ATF agents' worst fears were confirmed, they did not feel good about being right. In the wake of Agent Terry's death, they were even more upset, saddened, and embarrassed. Agent Alt explained:

I have loved working for ATF since I have been hired here. I came here to retire from ATF. I could be doing any number of things, as you all are aware. . . . I could be whatever I chose to be, and I chose to be here.

I am not -- I am embarrassed here. I regret the day that I set foot into this field division because of some of the things that a few people have done and the impact that it has had on our agency, and not the least of, not the least, though, is the impact it has had on the public and safety and Agent Terry. While I don't know that guns in any of these cases are directly responsible for his death, I am appalled that there would be in any way associated with his death.<sup>57</sup>

A December 15, 2010 e-mail exchange among ATF agents details the aftermath of Agent Terry's death. ATF, fearing the worst, conducted an "urgent firearms trace" of the firearms, recovered on the afternoon of the murder. By 7:45 p.m. that evening, the trace confirmed these fears:

<sup>56</sup> Agent Dodson Transcript, at 140-141.

<sup>57</sup> Agent Alt Transcript, at 180-181.

From: [REDACTED]  
 To: [REDACTED]  
 Cc: [REDACTED]  
 Sent: Wed Dec 15 19:45:03 2010  
 Subject: U.S. Border Patrol Agent killed in the line of duty - Two firearms recovered by ATF  
 The two firearms recovered by ATF this afternoon near Rio Rico, Arizona, in conjunction with the shooting death of U.S. Border Patrol agent Terry were identified as 'Suspect Guns' in the Fast and Furious investigation [REDACTED]

The firearms are identified as follows:

Romarm/CUGIR, 762 rifle, Model GP WASR 10/63, serial number 1971CZ3775  
 Romarm/CUGIR, 762 rifle, Model GP WASR 10/63, serial number 1983AH3977

[REDACTED] contact me late this afternoon requesting Intel assistance in the tracing of two recovered firearms.

I initiated an urgent firearm trace requests on both of the firearms and then contacted the NTC to ensure the traces were conducted today.

I was advised by the NTC that the firearms were entered into ATF Suspect Gun database by SA Medina and associated to the Fast and Furious investigation. The NTC further advised that on 01/16/10 Jaime AVILA purchased three Romarm 7.62 rifles from Lone Wolf Trading Company, two of these firearms are the recovered firearms cited above.

No trace has been submitted on the third firearm purchased by AVILA (serial number 1979IS1530). I am researching the trace status of the firearms recovered earlier today by the FBI.

Agent Terry did not die in vain. His passing exposed the practice of knowingly allowing the transfer of guns to suspected straw purchasers. ATF now maintains it no longer condones this dangerous technique. The cessation of this practice will likely save lives on both sides of the border. Tragically, however, we will be seeing the ramifications of the policy to allow guns from Fast and Furious be transferred into the hands of suspected criminals for years to come. These weapons will continue to be found at crime scenes in the United States and Mexico.

## **X. The Beginning of DOJ's Denials: "Hell, No!"**

**FINDING:** Phoenix ATF Special Agent in Charge (SAC) William Newell's statement that the indictments represent the take-down of a firearms trafficking ring from top to bottom, and his statement that ATF never allowed guns to walk are incredible, false, and a source of much frustration to the agents.

On January 25, 2011, Phoenix SAC William Newell gave a press conference announcing the indictment of 20 individuals as a result of Fast and Furious. Most of the indictment involves "lying and buying" – paper transgressions that carry much lighter sentences than felonies relating

to actual firearms trafficking. Under “lying and buying,” a straw purchaser improperly fills out ATF Form 4473, required before the purchase of any firearm, by submitting false information. A comparison of the indictment with the goals of Fast and Furious reveals the Operation’s utter failure. According to the agents, the Department could have indicted all 20 defendants far sooner than January 2011. Instead, the timing of the indictment appears to coincide with the outrage following the killing of Border Agent Brian Terry. Agent Dodson testified:

- A. Essentially, the indictments looked very similar in January 2011, when they were finally served, as they did in December 2009 when I first got here. The only difference is the number of purchases that were made. Some of the names of people are new, some have been added and some taken out, but no major players at all.
- Q. So the publicly announced indictments, they are all for straw purchasers, right?
- A. Yes, sir, which we could have rounded up . . . a year and a half ago.
- Q. You could have arrested them the day you saw this stuff happening?
- A. And saved those 1730 guns from being trafficked.<sup>58</sup>

At the press conference announcing the indictments, SAC Newell made two notable comments. Newell claimed that the indictments represented a take-down of a firearms trafficking ring from top to bottom.<sup>59</sup> Yet virtually all of the indicted defendants were mere straw purchasers—not key players of a criminal syndicate by any stretch of the imagination.

Newell’s second notable comment was equally negligent and inaccurate. When asked whether or not ATF ever allowed guns to walk, Newell emphatically exclaimed “**Hell, no!**”<sup>60</sup> His denial was shocking to those who knew the truth, like Agent Alt:

- Q. And why is that engrained in your memory?
- A. Candidly, my mouth fell open. I was asked later by the public information officer for our division . . . and I told him that I thought that – I was just astounded that he made that statement and it struck me and I don’t know how he could make that statement.<sup>61</sup>

\* \* \*

<sup>58</sup> Agent Dodson Transcript, at 141-142.

<sup>59</sup> Tamara Audi, *Alleged Gun Ring Busted*, W.S.J., Jan. 26, 2011.

<sup>60</sup> Dennis Wagner, *Sen. Chuck Grassley: Guns in ATF sting tied to agent’s death*, TUCSON CITIZEN, Feb. 1, 2011.

<sup>61</sup> Agent Alt Transcript, at 193-194.

Q. When SAC Newell made those statements at the press conference and you said something along the lines – did your jaw drop?

A. Literally my mouth fell open. I am not being figurative about that. I couldn't believe it.

Q. Is it fair to say that his statements that caused your mouth to drop, that's a spectacular lie, isn't it?

A. Yes. My mouth fell open because I thought, I perceived it as being either completely ignorant or untruthful. But also a person in that position I don't really – I don't know that I would have made – the statement was unnecessary to make. He did not need to make the statement.

If I am in a position like that and I have gotten involved or have knowledge of an investigation, me personally, I probably would have avoided comment. I certainly would have avoided making a comment like that.<sup>62</sup>

Agent Casa also expressed similar astonishment at Newell's inaccurate comment following the press conference:

Q. At the press conference I believe he was asked whether or not guns were walked, and his response was hell no. Do you remember that?

A. Yes, I do.

Q. What was your reaction to that statement?

A. I can't believe he just answered the question that way.

Q. And why can't you believe that?

A. Because we, in my definition of walking guns, we had walked a bunch of guns. When I say we, Group 7. And under this case that we are discussing, a bunch of firearms were walked against the objections of some senior agents.

Q. So Newell's statement was inaccurate?

A. I would say it was very inaccurate.<sup>63</sup>

<sup>62</sup> Agent Alt Transcript, at 202-203.

<sup>63</sup> Agent Casa Transcript, at 119-120.

Agent Forcelli shared similar sentiments over Newell's remarkable statements during the press conference.

- Q. Right. Did you attend that press conference that SAC Newell came down to do, or did?
- A. No. I was involved in the command post that day. I wasn't there, I heard about it. I was appalled.
- Q. Tell us about your reaction. What were you appalled by?
- A. My understanding is somebody asked him if guns walked, and his response was hell no.
- Q. How did you feel about that?
- A. Insulted. Because I know that they were saying that this was a technique that was like a great new technique we were using. . . . And it just amazes me. But he knew what was going on. He is the SAC. And agents knew that guns were not being interdicted.<sup>64</sup>

None of the agents interviewed believed Newell's dramatic comment to be truthful. His denial of the existing policy sought to end questioning on this topic once and for all. Instead, it only engendered more attention and interest.

## **XI. DOJ's Continued Denials: "That is False."**

**FINDING:** Despite mounting evidence to the contrary, DOJ continues to deny that Operation Fast and Furious was ill-conceived and had deadly consequences.

The denials of gunwalking became more sensational as they continued. Presented with an opportunity to set the record straight, the Department of Justice instead chose a path of denial.

### **A. "Of Course Not"**

In a February 4, 2011 letter to Senator Charles Grassey, Ranking Member of the Senate Judiciary Committee, DOJ's Assistant Attorney General for Legislative Affairs wrote:

At the outset, the allegation described in your January 27 letter – that ATF "sanctioned" or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico – **is false**.

<sup>64</sup> Agent Forcelli Transcript, at 52-53.

ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.<sup>65</sup>

When asked in later meetings and letters how this statement could be true in light of all the evidence to the contrary, DOJ officially stood by it. The argument that it is true relies on the fine distinction that it was not the *straw purchasers themselves* who physically crossed the border with the weapons, but rather the unknown third parties to whom they transferred the firearms. DOJ offered no specific defense of the second sentence.

Of course, this statement misses the point entirely. ATF permitted known straw purchasers to obtain these deadly weapons and traffic them to third parties. Then, at some point after ATF broke off surveillance, the weapons were transported to Mexico. ATF was definitely aware that these guns were ending up in Mexico, being transported through Arizona and Texas Points of Entry.<sup>66</sup>

The second part of this statement is also patently false. Numerous ATF agents have gone on the record with stories that directly contradict it. During interviews with, these agents had the chance to respond directly to DOJ's position. Not surprisingly, they uniformly rejected it. Agent Alt testified:

Q. And I will just read a portion of that into the record. The second paragraph of the letter said, the second sentence of the second paragraph says, "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico," period. Is that sentence, based on your knowledge of what was going on here in Phoenix, true or not true?

A. **No, it is not true.**<sup>67</sup>

Agent Forcelli agreed:

Q. [The] second sentence of the second paragraph of the letter says: "ATF makes every effort to interdict weapons that have been purchased illegally to prevent their transportation to Mexico," period. Have you heard that before, that that representation was made to Congress?

A. I was unaware of that. And I will tell you based on what I know has occurred that *that is false*.<sup>68</sup>

Agent Forcelli reiterated, "Based on my conversations in regards to that meeting between Mr. Hurley and the ATF's agents and the two gun dealers, no. *It is false.*"<sup>69</sup> And when asked if

<sup>65</sup> Letter from Assistant Attorney General Ronald Weich to Senator Charles E. Grassley (Feb. 4, 2011) (emphasis added).

<sup>66</sup> The Fast and The Furious, Organized Crime Drug Enforcement Task Force Interim Report (Sept. 9, 2010).

<sup>67</sup> Agent Alt Transcript, at 148.

<sup>68</sup> Agent Forcelli Transcript, at 143-144.

the DOJ's statement was true, given what he had personally witnessed in Phoenix, Agent Casa replied, "I think you already know the answer to that. *Of course not.*"<sup>70</sup>

### **B. More Denials**

Even after the U.S. Congress presented it with evidence that the statements in the February 4, 2011 letter were false, the Department of Justice *still* stood by its initial position. In a May 2, 2011 response to a letter from Senator Grassley, the Department maintained its original position:

It remains our understanding that ATF's Operation Fast and Furious did not knowingly permit *straw buyers* to take guns into Mexico. You have provided to us documents, including internal ATF emails, which you believe support your allegation. . . . [W]e have referred these documents and all correspondence and materials received from you related to Operation Fast and Furious to the Acting Inspector General, so that she may conduct a thorough review and resolve your allegations.<sup>71</sup>

The Justice Department also notes that the Attorney General has "made clear . . . that the Department should never knowingly permit firearms to cross the border." Although the Department issued this directive in early-March, well after the congressional investigation of Operation Fast and Furious had begun, it is a welcome affirmation of what the ATF whistleblowers had been trying to tell their bosses for over a year before Agent Brian Terry was killed.

## **XII. Conclusion**

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We will persist in seeking documents and testimony from Justice Department officials and other sources to thoroughly examine all the key questions. The Department should avail itself of the opportunity to come clean and provide complete answers. It should also reverse its position and choose to fully cooperate with the investigation.

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<sup>69</sup> Agent Forcelli Transcript, at 144.

<sup>70</sup> Agent Casa Transcript, at 131.

<sup>71</sup> Letter from Assistant Attorney General Ronald Weich to Charles E. Grassley (May 2, 2011).

Mr. SMITH. We will now go to the gentleman from Texas Mr. Gohmert for his questions.

Mr. GOHMERT. Thank you, Mr. Chairman.

So you know where I am coming from, Mr. Attorney General, I have been a prosecutor. I have been a district judge handling felonies including death penalty case. I have been a chief justice of a court of appeals. I have been appointed to defend cases I didn't want to defend, but I did my very best job and did it well.

I have had people come before me who were friends that I have sent to prison because that was consistent with justice of what I would have done to someone in their situation who was not a friend. I have sentenced the children of friends with a courtroom full of my supporters who were all begging me not to, but I knew if I was going to be consistent in justice, I had to do that. I have sent people to prison because it was the fair and just thing when considering all of the facts and considering what had been done in the past. And then I have gone in my office after sentencing and wept because of the personal anguish of those that I cared deeply about, but I knew I did the right thing, and history has borne me out.

So when I hear an Attorney General of the United States come before us and say somewhat cavalierly there is a political aspect to this office, it offends me beyond belief. Your job is justice, Mr. Attorney General. It is justice across the board, and that is what has been so troublesome around here.

When we made a request a year ago here for the documents that your Department has produced to people who were convicted of supporting terrorism, they are terrorists, and we wanted the documents you gave to the terrorists, we are a year later, and we still don't have them. Why in the world would your Department be more considerate of the terrorists than of the people who are Members of Congress who can vote to just completely defund your Department? It makes no sense.

So I will ask again, and there is no room for a response that, well, it is an ongoing investigation; well, some of these may be classified. I am asking for the documents your Department produced to the terrorist supporters convicted in the Holy Land Foundation trial. Can we get those documents, just the ones that you gave to the terrorist defendants?

Attorney General HOLDER. Well, certainly you can have access to those things that are on the public record and that were used in the trial.

I was also a judge, I sat in this Washington, D.C.—

Mr. GOHMERT. So is that a yes or no that we will get those documents?

Attorney General HOLDER. As I said, I was also a judge and understand the anguish that you go through. And just let me clear up one thing with regard to the political aspect of this job. I have to advance or try to advance legislation that I think is appropriate for the Department. That is a political job. I have pushed policy initiatives before the Department. That is a political component. I fight defunding requests that people kind of cavalierly throw around about the budget of this Department. That is, from my perspective, a political component of this job.



Mr. GOHMERT. Sir, it is not cavalierly. When a Department has parts of it that are not doing their job, and, in fact, may be giving more aid and comfort to people who are part of organizations who want to bring about an end to our way of life, then that concerns me that perhaps that is an area that should be defunded.

And when you have been here before, and we talked about Fast and Furious, and you are asked who actually authorized Fast and Furious, you had said, we may not ever know who authorized Fast and Furious. Are you any closer right now as you sit here to knowing who authorized Fast and Furious?

Attorney General HOLDER. I suspect that we are closer, given the fact that the inspector general is charged with the responsibility of investigating this matter at my request, has been in the field and been interviewing people. And my guess would be that we are closer to that. I would expect that report will be out relatively soon.

Mr. GOHMERT. Did you not ever go back to your office and say when you found out about Fast and Furious, I demand to know who authorized this? Are things so fast and loose in your office that somebody can authorize the sale to international criminals of American guns that are bringing about the death of even American agents, and nobody has to do that in writing?

Mr. CHABOT. [Presiding.] The gentleman's time has expired, but you can answer the question.

Attorney General HOLDER. What I did do, I asked the inspector general to conduct an investigation. I put an end to the policy that led to the Fast and Furious debacle. I made personnel changes at ATF and in U.S. Attorney's Office. We made changes in the procedures there. And that is in stark contrast to what happened to my predecessor Attorney General Mukasey when he was briefed about the transmission of guns to Mexico and, as far as I can tell, did far less than what I did.

Mr. GOHMERT. Sir, that was a different aspect.

Attorney General HOLDER. If you want to look at what I did, those are simply the facts.

Mr. GOHMERT. My question, though, Mr. Chairman, was did you go back and say, I demand to know who authorized this Fast and Furious program? That was the question.

Attorney General HOLDER. That is consistent with me telling the inspector general, find out what happened here. So the answer to your question is yes.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Georgia Mr. Johnson is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

On May 12, the House passed its Commerce-Justice-Science appropriations bill, and this is a part of the Ryan budget. And it tries its best to eviscerate and neuter the ability of the Justice Department to protect Americans, as it is supposed to do. You can't operate without money, and the bill, in its attempt to neuter the Department, cuts funding for financial and mortgage fraud enforcement, it prohibits funding for enforcing the requirement that licensed firearms dealers report multiple sales of rifles to the same person, it prohibits funding to bring actions against States for their voter identification law, among other things.

The bill would cut funding for the general administration line on the DOJ's budget request from \$81 million to 45 million—excuse me, yes, \$29 million less than requested. The DOJ program for rescissions and asset forfeitures has been cut. The number of U.S. Attorneys, you will have 1,000 unfilled positions, and you have already lost thus—attorneys, you have already lost 850 staff since the hiring freeze that was instituted in January of 2011 has gone—since that went into effect, and this bill could result in an additional 411 positions lost. The Antitrust Division is cut \$5.2 million. You could lose up to 70 positions in that unit. You have already lost 77 positions in that unit. That is the unit that keeps consumer prices low and gets at collusion and bid rigging and other activities that cost money to consumers—cost consumers money. The U.S. Trustee Program, which you administered, which is so important in bankruptcy, which are on the rise, you are seeing a 5 percent reduction; 50 positions may be suspended. Law enforcement wireless communications for the Department has been cut. The ability to hire people in foreign language, skilled in foreign languages, has been cut. These things hurt the Department's ability to be effective.

I want to get to that part about the voter identification laws. You were answering a question that was posed to you by Mr.—from Iowa, Mr. King, but you were cut off by the bell, and you were not given a chance to complete your statement on that. Can you complete it now, please?

Attorney General HOLDER. I will be honest with you, I don't remember where I was.

Mr. JOHNSON. It had to do with the South Carolina challenge of your Department to their voter ID laws.

Attorney General HOLDER. All I can say is that with regard to the South Carolina law, we looked at the evidence that was provided to us by South Carolina; did not feel that the evidence about voter fraud was substantial enough to overcome the disproportionate impact that the changes in their voting procedures had on minorities, older people, young people. It was on that basis and under section 5 of the Voting Rights Act that we decided to file suit looking to not preclear, which they had tried to do.

Mr. JOHNSON. So basically you were stating, or you have stated, that the reason that South Carolina gave for making it tougher to vote through voter ID requirements, the reason that they did that, which is to get at voter fraud, did not hold any water. In other words, there was insufficient evidence of voter fraud, and so, therefore, there must have been some other intention behind their legislation to make it more difficult to vote. Would you agree with me on that?

Attorney General HOLDER. Well, the initial material we got from them did not have any statistical proof. We got a submission from them later on that indicated there were perhaps 900 people who were dead who were on voter rolls, or something along those lines. That was then disputed by another South Carolina official.

This is all a matter that is now before the court and will be ultimately decided by the court here in Washington, D.C.

Mr. JOHNSON. And then as I stated earlier, the House Commerce-Justice-Science—

Mr. SMITH. [presiding.] The gentleman's time has expired.

Mr. JOHNSON [continuing]. Funding to bring actions against States for their voter identification laws.

And I will yield back the balance of my time, but I would like to make a unanimous consent request.

Mr. SMITH. Without objection. What document does the gentleman wish to enter into the record?

Mr. JOHNSON. There are 10 letters of support for Attorney General Holder praising his leadership from the National Fraternal Order of Police; from Patricia Maisch, the Tucson shooting survivor; a letter from the Leadership Conference to Chairman Issa; a letter from Commissioner Ramsey to Chairman Issa; a letter from the National Action Network to Chairman Issa; a letter from the Leadership Conference to Speaker Boehner; a letter from the National Immigration Law Center to Speaker Boehner; a letter from the National Women's Law Center to Chairman Issa, a tricaucus letter from Representative Gonzalez, Representative Cleaver and Representative Chu.

Mr. SMITH. Without objection, all those——

Mr. JOHNSON. Last but not least, a letter from the National Organization of Black Law Enforcement——

Mr. SMITH. Did you get these letters from the Attorney General himself? No, I am teasing.

Mr. SMITH. Without objection, all those letters will be made a part of the record.

Mr. JOHNSON. Thank you.

[The information referred to follows:]



**NATIONAL  
FRATERNAL ORDER OF POLICE®**

326 MASSACHUSETTS AVE., N.E.  
WASHINGTON, DC 20002  
PHONE 202-547-6189 • FAX 202-547-6190

CHUCK CANTERBURY  
NATIONAL PRESIDENT

JAMES O. PASCO, JR.  
EXECUTIVE DIRECTOR

2 November 2011

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman,

This is in response to your recent inquiry about the relationship between the Fraternal Order of Police and U.S. Attorney General Eric H. Holder, Jr.

As you know, the FOP supported the nomination of Mr. Holder in January 2009 after undertaking an exhaustive examination of Mr. Holder's record of public service. From his first twelve years in the U.S. Department of Justice in the Public Integrity Section, to his rulings from the bench of the Superior Court of the District of Columbia and his role as a prosecutor while serving as U.S. Attorney for the District of Columbia, to his role as Deputy Attorney General and Acting Attorney General of the United States, our review concluded that his positions and actions were consistent with the goals and objectives of the Fraternal Order of Police and the rank-and-file officers we proudly represent. We were the only law enforcement organization to testify in support of his nomination before the Judiciary Committee in 2009.

The FOP has unique insight into Mr. Holder's lengthy career in public service because we did not just work with him in his various policy-making roles at the Justice Department, but also in the courtroom, both as a judge and as U.S. Attorney. The leadership of the District of Columbia FOP Lodge and our members from the many different law enforcement agencies in the city reported that they found Judge Holder fair and U.S. Attorney Holder an able and aggressive prosecutor. These experiences have made him a more able U.S. Attorney General and we are happy to report that his commitment to law enforcement and the rank-and-file officer remains very strong.

We have been pleased to work with General Holder and other members of his leadership team on a wide variety of law enforcement issues, most recently and most importantly, on officer safety. This calendar year has seen a dangerous spike in the number of law enforcement officers killed in the line of duty. Early this year, General Holder reached out to the FOP in an effort to understand the reasons behind the increased death and to help improve the safety of officers in every region of the country.

— BUILDING ON A PROUD TRADITION —

0-0000-0

We are also pleased that we have been able to work with General Holder closely on the fiscal challenges that State and local law enforcement officers are facing as budgets are crunched and Federal assistance diminishes. He has been a true champion of the programs we care most about—the hiring program administered by the Office of Community Oriented Policing Services (COPS), the Edward Byrne Memorial Justice Assistance Grant (Byrne-JAG) program, the State Criminal Alien Assistance Program (SCAAP) and the Bulletproof Vest Partnership (BVP) grant program. With his able leadership, we hope to preserve these vital programs.

The FOP is very proud of the strong and positive working relationship that we have had with Eric Holder, not just for the two years in which he has served as the nation's "top cop," but through his long career of public service. As the brother of a retired law enforcement officer and one of the most dedicated and experienced law enforcement leaders, General Holder has been a true partner to the FOP and to our nation's rank-and-file officers. If I can be of any further assistance in this matter or share any additional details about our relationship with the Attorney General of the Department of Justice, please do not hesitate to contact me or Executive Director Jim Pasco in my Washington office.

Sincerely,



Chuck Canterbury  
National President

cc: The Honorable Charles E. Grassley, Ranking Member, Committee on the Judiciary, United States Senate

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May 6, 2012

Committee on Oversight and Government Reform  
U.S. House of Representatives  
2471 Rayburn House Office Building  
Washington, D.C. 20515

SENT VIA FAX TO 202.225.3974 - 3 PAGES  
SENT VIA USPS TO ABOVE ADDRESS

Dear Chairman Issa and Representative Cummings:

This letter is on behalf of a number of my fellow survivors and loved ones of victims of the mass shooting in Tucson that took the lives of six people and wounded 13 others, including your colleague, Congresswoman Gabby Giffords.

We are a diverse group of Republicans, Independents, Democrats, gun owners, small business owners, a school counselor, hunters and a retired military officer. As diverse as we are, we are united by our deeply personal resolve to be a force to stem the violence from illegal guns. In the year and a half since that horrible day, the failings of our legislators to take even one single step to help prevent more senseless murders, is more than a disappointment to us, it is a slap in our collective faces.

In November of last year, our "family" of Tucson survivors, along with more than 50 other gun violence survivors from around the country traveled to Washington to attend a Senate Crime Subcommittee hearing about the Tucson shooting and legislation by Senator Chuck Schumer that would fix the broken background check system – the very system that allowed Jared Loughner to slip through the cracks. We expected that every Senator would not only be eager but feel obliged to have a serious discussion about ways to keep guns out of dangerous, wrong hands while keeping secure the Second Amendment rights of law-abiding people – it was a heartbreak and disappointment to learn that was not the case.

Instead, Senator Grassley chose to dismiss the reason for the hearing and used his time questioning a witness from the Obama Administration about the "Fast and Furious" scandal. Senator Grassley continued to badger the witness with questions about which he had no ability to testify. I was told by the other survivors that as I gave heartfelt testimony about our horrible experience, Senator Grassley exhibited disrespect for the lives of those murdered that January 8, by focusing on his Blackberry instead of my words.

Another extreme disappointment to our Tucson "family" was the fact that neither of the Arizona Senators could take a few minutes to meet with their own constituents about this deadly serious matter. Instead, Senators Kyl sent several of his staffers to meet with us and McCain sent a member of his staff to meet with us. After several later requests to Senator Kyl, he met with some of us in Tucson. Even though we continue to make requests to Senator McCain to meet with us, he continues to ignore our requests. After our D.C. visit and our lack of response when we returned home, we were forced to come to terms and admit a disappointing fact to ourselves – you, our legislators, have incredibly little interest in learning about the bloodshed and horror that we witnessed, or, even more disturbing, in helping preventing future tragedies. We seemed only to be some part of your political games instead.

Page 2  
 May 6, 2012  
 Committee on Oversight and Government Reform  
 U.S. House of Representatives  
 Chairman Issa and Representative Cummings:

That hurtful episode was refreshed for us when we read of your plan to spend more of your time and our precious tax dollars on contempt charges against Attorney General Eric Holder about how many "Fast and Furious" documents he has given to you, and who knew what when. This prompts us to respectfully give you an opinion from outside Washington.

As survivors of gun violence, we have mourned the murder of Border Agent Brian Terry, prayed for his family, and hoped that not one other loved one should have to endure such pain and suffering. Agent Terry may have been killed with a gun that ATF agents allowed to fall into the wrong hands in that sting operation that went horribly wrong. His family deserves justice, and our government needs to insure this kind of thing never happens again. We understand safeguards have been put in place to achieve that.

We try not to question your motives, but as American taxpayers and victims of gun violence, we feel we have the right to question your priorities.

Since the first hearing with the Attorney General discussing "Fast & Furious" a year ago, more than 31,000 Americans have been killed with guns. We will never know how many of those murders could have been prevented with a better background check system – a cause, by the way, that when surveyed, most Americans, including most gun owners, say they want.

And yet, while we cannot turn on our televisions without hearing about "Fast & Furious," neither Congress nor the President have taken any action to fix the system. This in spite of the fact that background checks have absolutely nothing to do with our Second Amendment rights.

During this same period of time, more than 15,000 Mexican citizens have been murdered, mostly by drug gangs using assault rifles bought right here in the U.S. and trafficked south. Those guns are used to traffic drugs north into our home state of Arizona and other citizens' home states. Many of those deaths might have been prevented with a federal gun trafficking statute with serious penalties for criminal gun buyers. But neither you, our Congress, nor the President have taken a single step to pass such a law.

Representative Issa, we understand that as Chairman of the Oversight Committee, your job is oversight. But you are also a member of the Judiciary Committee, which has jurisdiction over gun laws. We wish you had used some of your obvious passion, intelligence and commitment to insist that the committee address the pathetically weak gun laws that are one of the real causes of Agent Terry's death, one of the real causes of another 31,000 American deaths every year, and one of the real causes of 15,000 Mexican murders!


Page 3  
May 6, 2012  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Chairman Issa and Representative Cummings:

Whether Attorney General Holder has given you enough documents, or the right documents, is beyond our scope of knowledge. But we do know that he seems to be the only one talking about the need for common sense gun laws, including a better background check system and tougher laws to fight gun trafficking.

We have a sincere, heartfelt and respectful request of you: When you finish your investigation into "Fast & Furious," will you please, please, please pledge to commit the same time, energy and taxpayer money to legislate common-sense laws that respect the Second Amendment, keep guns out of the wrong hands, and reduce the number of Americans being killed with guns every day?

We can only imagine how such actions on your part before January 8, 2011 might have changed the outcome of our lives. We can hope and imagine how such actions on your part NOW will keep others from ever experiencing a similar repeat of our tragic, sad Saturday morning at Congress on Your Corner.

Respectfully,

  
Patricia Maisch  
Tucson shooting survivor  
1471 W. Rancho Feliz Place  
Tucson, AZ 85704-8355  
520.797.3584  
primaisch@aol.com



May 7, 2012



The Honorable Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
U. S. House of Representatives  
Washington, DC 20515

Dear Chairman Issa:

On behalf of The Leadership Conference on Civil and Human Rights, we write in response to a May 4, 2012 report in *The Washington Post* that you are preparing a citation of contempt against Attorney General Eric Holder for failing to provide information related to the "Fast and Furious" program. We are deeply troubled by the prospect that the Attorney General will be cited for contempt by your committee, and believe that such action is unwarranted. We urge you to reconsider that decision.

While we believe that a review of the Fast and Furious program is a legitimate exercise of congressional authority, we are concerned that the tenor and approach you are taking does a disservice to Congress, the Attorney General's office, and the public, and may also be a partisan attempt to discredit the Attorney General. We are concerned that the contempt threat is intended to create a hostile environment aimed at pressuring the Attorney General to resign.

The Attorney General has acknowledged problems and flaws in the Fast and Furious program. According to reports, the Attorney General and the Department of Justice have submitted more than 7000 pages of document to Congress, and the Attorney General has appeared before your committee a reported seven times. The Department has also reportedly made several senior officials available for testimony, interviews, and briefings.

In addition, the Attorney General has ordered the Inspector General to investigate and has provided him with tens of thousands of additional documents—documents that would be inappropriate to turn over to Congress, because they reportedly include law enforcement information, grand jury transcripts, and other information that would compromise ongoing investigations and prosecutions.

To put it simply, the attempt to cite General Holder for contempt seems to be a rush to judgment intended to create a stain on the office of the Attorney General. It is contributing to an environment of accusatory vitriol and malignant suspicion that is both unwarranted and a significant distraction at a time when the Attorney General needs to focus on the nation's core problems. The harshness of the attacks themselves is misplaced, and to the extent these attacks are intended to divert the Attorney General from the vigorous enforcement of the nation's laws—including

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May 7, 2012  
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those protecting civil rights, voting rights, the environment, and other core concerns—we are deeply troubled. This development is particularly disturbing because of the exemplary job the Attorney General has done in enforcing the nation's civil rights laws.

The constituencies that we represent are eager to see our leaders focus on job creation, the continued reinvigoration of our economy, and the rooting out of waste, fraud and abuse. We urge you to reconsider this course of action. Thank you for your consideration. If you have any questions, please feel free to contact Senior Counsel Lisa Bornstein at (202) 263-2856 or Policy Associate Sakira Cook at (202) 263-2894.

Sincerely,

Wade Henderson  
President & CEO

Nancy Zinkin  
Executive Vice President

Judith L. Lichtman  
Interim Chair

Cc: The Honorable Elijah Cummings, Ranking Member



## CITY OF PHILADELPHIA

POLICE DEPARTMENT  
HEADQUARTERS, FRANKLIN SQUARE  
PHILADELPHIA, PENNSYLVANIA 19106

CHARLES H. RAMSEY  
Commissioner

May 09, 2012

Representative Darrell Issa  
2347 Rayburn House Office Building  
Washington DC 20515

Dear Chairman Issa:

I write to express my strong support for Attorney General Eric Holder and the progress that has been made on behalf of law enforcement under his leadership of the Department of Justice. I am extremely concerned about threats to find the Attorney General in contempt of Congress, in part, for his commitment to protect from public disclosure any information related to ongoing criminal investigations.

I have known Attorney General Holder for more than 12 years. He is a man whom I greatly admire for his high principals, integrity and devotion to duty. Over the nearly 9 years that I served as Chief of the Metropolitan Police in Washington, D.C., Attorney General Holder, as a former United States Attorney in D.C., provided insight which proved invaluable in my efforts to improve that Department. While serving as the First Deputy Attorney General for then Attorney General Janet Reno, I personally witnessed his commitment to the men and women in law enforcement. I called upon him on numerous occasions concerning issues of importance to law enforcement and he was always there for us. After leaving the Attorney General's Office he continued to support both law enforcement and his community by serving as Chairman of the Washington D.C. Police Foundation, a position he held for over 2 years.

I urge you to consider the pressing matters that Americans are confronting each and every day. In our cities, crime prevention and suppression are our highest priorities and our efforts have been aided by Attorney General Holder's unwavering support for our departments and our officers. Under Attorney General Holder, the Department of Justice has prioritized support for state and local law enforcement through improvements in the COPS Hiring Program, the Attorney General's Officer Safety Initiative and the VALOR Program. These programs ensure that our departments and officers receive the federal support that we need in order to keep our communities safe.

Page 2

Attorney General Eric Holder

The ongoing Congressional inquiry to determine the facts in a tragically flawed operation, which spans at least two Administrations, is understandable. The inquiry, however, has also distracted the Department of Justice in its efforts to assist state and local law enforcement — particularly in the area of violent crime prevention and suppression. Unfortunately, this inquiry has also been used as an attempt to tarnish the reputation of a man whose character, in my opinion, is above reproach. This causes me deep concern.

Therefore, I ask that you respect the Department's tradition of not making public any information related to ongoing law enforcement operations and reconsider your efforts to cite Attorney General Holder for contempt for standing up for this important principle.

Sincerely,



Charles H. Ramsey  
Police Commissioner, Philadelphia, P.D.  
President, Major Cities Chiefs Association  
President, Police Executive Research Forum

cc: President Barack Obama  
Vice President Joseph Biden  
Senator Robert Casey, Jr.  
Senator Patrick Toomey  
Senator Patrick Leahy  
Representative Lamar Smith  
Eric Holder, US Attorney General

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Reverend Al Sharpton, President & Founder  
 Reverend Dr. W. Franklyn Richardson, Chairman of the Board  
 Tamika D. Mallory, National Executive Director

The Honorable Darrell Issa  
 Chairman  
 Committee on Oversight and Government Reform  
 U. S. House of Representatives  
 Washington, DC 20515

May 9, 2012

Dear Chairman Issa:

Recent media reports have indicated that you are preparing to issue a contempt citation against Attorney General Eric Holder for allegedly failing to provide information related to the "Fast and Furious" program. We believe that this would be both an abuse of power and an unjustified use of such power. We appeal to you to reconsider such a blatantly partisan political act. The National Action Network is a civil rights organization that has been dedicated to continuing the Dream of Dr. Martin L. King, Jr. of an America that truly lives up to the ideal of one nation under God, indivisible, with Liberty and Justice for all. To abuse the power given to you as Chairman of the Committee on Oversight and Government Reform offends the nation's desire for Liberty and Justice for all. This becomes more pertinent when most reports indicate that the DOJ and Attorney General Holder have disputed the allegations of any failure to comply with the committee's request for documents and information. Indeed, it is our understanding that the DOJ has indicated that they have turned over more than 7,600 pages from approximately 46 separate productions of documents. It is further reported that the Attorney General has testified to Congress on the "Fast and Furious" program seven times in the last year and a half, in addition to other members of DOJ having provided information to congressional investigators. Mr. Chairman, the American people and the families of those who may have been adversely affected by any failures of the "Fast and Furious" program deserve better. We hope that you will reconsider this misguided use of the legitimate power of Congress to hold those who willfully and unjustifiably fail to cooperate in contempt of Congress.

Thank you for your consideration.

Sincerely,

Tamika D. Mallory

Executive Director

561 Seventh Ave. 14<sup>th</sup> FL New York, NY 10018  
[www.nationalactionnetwork.net](http://www.nationalactionnetwork.net)  
 646-380-2000

16/2 Steel, NW  
10th Floor  
Washington, DC  
20006

202.465.3211 voice  
202.465.3435 fax  
www.sivrightsg.org



May 29, 2012

The Honorable John Boehner  
Speaker of the House  
U. S. House of Representatives  
Washington, DC 20515

Dear Speaker Boehner:

On behalf of The Leadership Conference on Civil and Human Rights and the undersigned organizations, we write in response to a May 21, 2012 report in *Politico* that the House of Representatives will vote to hold Attorney General Eric Holder in contempt of Congress if he fails to provide additional information related to the "Fast and Furious" program. We are deeply troubled by the prospect that the Attorney General will be cited for contempt by the House, and believe that such action is unwarranted. We urge you to reconsider that decision.

While we believe that a review of the Fast and Furious program is a legitimate exercise of congressional authority, we are concerned that the tenor and approach you are reportedly taking does a disservice to Congress, the Attorney General's office, and the public, and may also be a partisan attempt to discredit the Attorney General.

The Attorney General has acknowledged problems and flaws in the Fast and Furious program. According to reports, the Attorney General and the Department of Justice have submitted more than 7000 pages of document to Congress, and the Attorney General has appeared before Congress on this issue a reported seven times. The Department has also reportedly made several senior officials available for testimony, interviews, and briefings.

In addition, the Attorney General has ordered the Inspector General to investigate and has provided him with tens of thousands of additional documents—documents that would be inappropriate to turn over to Congress, because they reportedly include law enforcement information, grand jury transcripts, and other information that would compromise ongoing investigations and prosecutions.

To put it simply, the attempt to cite General Holder for contempt seems to be a rush to judgment intended to create a stain on the office of the Attorney General. It is contributing to an environment of accusatory vitriol and malignant suspicion that is both unwarranted and a significant distraction at a time when the Attorney General needs to focus on the nation's core problems. The harshness of the attacks themselves is misplaced, and to the extent these attacks are intended to divert the Attorney General from the vigorous enforcement of the nation's laws—including

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Distribution/Enforcement  
 Committee Chairperson:  
 Robert K. Friedman  
 Asian American Justice Center  
 President & CEO  
 Wade C. Hancock  
 Executive Vice President & COO  
 (www.MJDL.com)

May 29, 2012  
Page 2 of 2



those protecting civil rights, voting rights, disability rights, and other core concerns—we are deeply troubled. We are concerned that the contempt threat is intended to create a hostile environment aimed at pressuring the Attorney General to resign. This development is particularly disturbing because of the exemplary job the Attorney General has done in enforcing the nation's civil rights laws.

The constituencies that we represent are eager to see our leaders focus on job creation, the continued reinvigoration of our economy, and the rooting out of waste, fraud and abuse. We urge you to reconsider this course of action. Thank you for your consideration. If you have any questions, please feel free to contact Senior Counsel Lisa Bornstein at (202) 263-2856 or Policy Research Associate Sakira Cook at (202) 263-2894.

Sincerely,

African American Ministers in Action  
The American-Arab Anti-Discrimination Committee  
AFSCME  
Asian American Justice Center, member of Asian American Center for Advancing Justice  
The Leadership Conference on Civil and Human Rights  
NAACP  
National Association of Human Rights Workers  
National Association of Social Workers  
National Center for Transgender Equality  
National Partnership for Women and Families  
National Fair Housing Alliance  
National Urban League  
People For the American Way  
Women in Federal Law Enforcement Foundation

Cc: The Honorable Eric Cantor  
The Honorable Darrell Issa  
The Honorable Elijah Cummings



June 7, 2012

The Honorable John Boehner  
Speaker of the House  
U.S. House of Representatives  
Washington, DC 20515

Dear Speaker Boehner,

On behalf of the undersigned organizations, we write to express our concern about media reports that the House of Representatives plans to cite Attorney General Holder for contempt. This action would be unprecedented and unwarranted. Therefore, we urge you not to take such a radical step.

During his tenure, Attorney General Holder has been a champion for civil rights, voting rights, consumer protections, and fair and just immigration enforcement. Under his leadership the Department of Justice has reestablished its reputation for fairness and integrity by increasing the Department's efforts to combat human trafficking; ensuring the rights of all Americans, including members of the military and overseas civilians, to vote; negotiating settlements with banks that had preyed on Latino and African American homeowners; and, challenging discriminatory laws, such as S.B. 1070 which unfairly target Latino individuals and immigrant communities. These issues impact the daily lives of millions of Americans and are of pressing importance.

We understand that certain members of Congress may want additional information from the Department of Justice; however, we would ask that you encourage those members to work with the Department to obtain the information they seek, rather than rushing to cite the Attorney General for contempt. If you have questions, please feel free to contact Don Lyster with the National Immigration Law Center at 202-384-1279 or Lisa Bornstein with The Leadership Conference on Civil and Human Rights at 202-263-2856.

Sincerely,

A. Philip Randolph Institute  
CASA de Maryland  
Center for Community Change  
CHIRLA - The Coalition for Humane Immigrant Rights of Los Angeles  
Japanese American Citizens League  
Latino Justice PRLDEF



The Leadership Conference on Civil and Human Rights  
League of United Latin American Citizens (LULAC)  
National Association of Human Rights Workers  
National Association of Social Workers  
National Fair Housing Alliance  
National Immigration Law Center (NILC)  
Poverty & Race Research Action Council  
Somos America Coalition  
United Food and Commercial Workers (UFCW)

Cc: The Honorable Eric Cantor  
The Honorable Darrell Issa  
The Honorable Elijah Cummings  
The Honorable Nancy Pelosi  
The Honorable Steny Hoyer



June 5, 2012

The Honorable Darrell Issa  
 Chairman  
 Committee on Oversight and Government Reform  
 U.S. House of Representatives  
 Washington, DC 20515

Dear Chairman Issa:

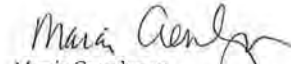
We are writing regarding reports that you are preparing a citation holding Attorney General Eric Holder in contempt of Congress if he fails to provide additional information related to the "Fast and Furious" program. We are very concerned by that prospect, and urge that no such contempt citation be pursued.

The vitally important responsibilities facing General Holder make this unfortunate course of action particularly unwise and harmful to the nation. We have seen the major efforts to protect women's legal rights, and their very lives, currently underway by Attorney General Holder, and the Justice Department. For example, the Office on Violence Against Women has made substantial contributions in the effort to prepare the country's response to claims of violence against women and children exposed to violence. The Civil Rights Division has initiated important cases to protect women against sexual harassment, including sexual assault by residential landlords and employers, and is enforcing the law against human trafficking. These examples reflect the stake that women in this country have in a vigorous Justice Department deserving the full attention of General Holder.

We have personally known and worked with General Holder for many years, and have seen firsthand his dedication to justice and the rule of law. Therefore, we urge that any consideration of a citation of contempt be dropped.

Sincerely,

  
 Nancy Duff Campbell  
 Co-President

  
 Marcia Greenberger  
 Co-President

NDC/MG:nb

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**Congress of the United States**  
**Washington, DC 20515**

June 6, 2012

The Honorable John A. Boehner  
 Speaker of the House  
 U.S. Capitol, Room H-232  
 Washington, DC 20515

Dear Speaker Boehner:

We write to express our collective concerns about unwarranted threats by the House Oversight and Government Reform Committee to hold Attorney General Holder in contempt of Congress. For over 15 months, the Department of Justice has cooperated with the Committee's inquiry by providing thousands of pages of documents, access to numerous senior Department officials for testimony and transcribed interviews including the Attorney General, the former Acting Deputy Attorney General and current Chief of Staff to the Attorney General, the Assistant Attorney General for the Office of Legislative Affairs, and the Assistant Attorney General for the Criminal Division. Indeed, the Attorney General himself has testified about the matter in seven (7) separate hearings before various Congressional committees.

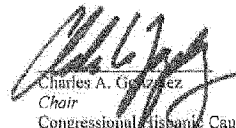

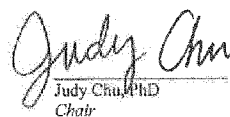
These efforts are clearly demonstrative of the great lengths to which the Department has gone in order to answer the Committee's legitimate questions. To the extent questions remain, the Committee has yet to exhaust all available avenues for obtaining the answers it seeks. The Department's Office of the Inspector General is conducting a review of the matter in question and has not yet issued its report--a review that you urged be completed before taking the step toward contempt when the circumstances involved a Democratic House investigating a Republican Administration. Moreover, the Department has consistently expressed its willingness to work with the Committee to provide additional interviews, briefings and/or appropriate documents that address the Committee's outstanding questions. For these reasons, we believe that holding Attorney General Holder in contempt would be unwarranted.

During his tenure as our Nation's top law enforcement official, Attorney General Holder has been tireless in his pursuit of justice for *all* communities. Under his leadership, the Department of Justice has seen great success including protecting consumers from financial fraud, upholding civil rights and voting rights, affirming federal authority over immigration, and other areas of particular concern to the country's most vulnerable populations. It is the continuation of these efforts that should occupy the time and attention of the Attorney General.

We are concerned that threats of contempt proceedings would distract the Nation's chief law enforcement officer from vigorously enforcing the nation's laws.

Our constituents expect Congress to work with the Attorney General and the Department of Justice to address the nation's ongoing law enforcement challenges. Therefore, we hope that you will encourage the Committee to resolve its dispute with the Department of Justice, without resorting to a counterproductive contempt proceeding.

Sincerely,

		
Charles A. Gonzalez Chair Congressional Hispanic Caucus	Emanuel Cleaver Chair Congressional Black Caucus	Judy Chu, PhD Chair Congressional Asian Pacific American Caucus

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Darrell E. Issa  
Chairman  
Committee on Oversight  
and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Elijah Cummings  
Ranking Minority Member  
Committee on Oversight  
and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Lamar Smith  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

The Honorable John Conyers, Jr.  
Ranking Minority Member  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Leahy, Chairman Smith, Chairman Issa, Senator Grassley, Congressman Conyers, and Congressman Cummings:

The National Organization of Black Law Enforcement Executives (NOBLE) writes to express our unwavering support of Attorney General Eric Holder and the U.S. Department of Justice (DOJ), and their commitment to enhancing state and local law enforcement. We are concerned about reported threats to find the Attorney General in contempt of Congress in part for protecting information related to ongoing criminal investigations from political interference and public disclosure.

Creating safe and secure communities through the reduction of crime and violence are our highest priorities. The DOJ has been an invaluable partner in creating safe and secure neighborhoods for both citizens and law enforcement professionals. For example, Attorney General Holder has launched the Officer Safety Initiative and VALOR Training Program that supports the safety of our officers and offers the promise of reduced officer injuries and deaths.

Attorney General Holder has reinvigorated the DOJ, Civil Rights Division, and it is working to build climates of mutual trust and respect among citizens and law enforcement in affected communities. Especially noteworthy has been Attorney General Holder's unwavering support for the advancement of fair and impartial policing practices and his unparalleled recognition of the critical importance of active community engagement and community partnerships to effective law enforcement. These commitments have resulted in important gains in the delivery of public safety services that must not be discounted.

The DOJ has implemented a number of reforms to improve the operations and effectiveness of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The Congressional inquiry is

becoming an unnecessary distraction, and an impediment to the vigorous enforcement of violence and crime that are affecting far too many of the nation's communities.

We believe Attorney General Holder and the DOJ have been forthcoming with Congress in keeping the tradition and duty of ensuring that law enforcement operations are not undermined by political obstacles. Therefore, we respectfully ask that you respect the DOJ's responsibility and tradition of withholding information related to ongoing law enforcement operations, rather than seeking to cite Attorney General Holder for contempt for standing up for this important principle.

Sincerely,



Joseph C. Akers, Jr.  
Interim Executive Director

Mr. JOHNSON. And I yield back.

Mr. SMITH. The gentleman from Texas Mr. Poe is recognized for questions.

Mr. POE. Thank you, Mr. Chairman.

Thank you for being here, Attorney General. I want to thank your office for the cooperation they have had on the specific issue of human trafficking, the new scourge that is happening in the United States.

A recent Pew study has come out and said that there are approximately 2 million ineligible voters in the United States. Of that 2 million, 1.8 million are dead people. I would assume you would agree that voter rolls, when verified that the folks on the rolls are dead, they should be purged in some manner. Would you agree with that or not?

Attorney General HOLDER. Absolutely. I think the purging should occur. It just ought to be done consistent with Federal law.

Mr. POE. Your office, how many specific cases have you prosecuted or your office has prosecuted on voter fraud since you have been Attorney General.

Attorney General HOLDER. I don't know what the number is. I know I prosecuted them myself when I was in the Public Integrity—

Mr. POE. Just when you have been Attorney General.

Attorney General HOLDER. I don't know what the number is.

Mr. POE. Would the number be zero?

Attorney General HOLDER. No. I think that we have had vote fraud cases I know that we have either settled through pleas—I am not sure if we have had trials, but I know that we have had cases where people have committed offenses where they made straw donations and other ways in which voter fraud was carried out. I know we have done those cases. I don't know what the numbers are.

Mr. POE. So that I know the exact number, because the information I have been given it is zero, so if you would provide me the actual number. I don't need the cases, just the number of cases that your office has prosecuted under section 8 of the law. And let me know and the Chairman know the exact number, because, like I said, my information is there are none.

Attorney General HOLDER. Well, I mean, our efforts to fight voter fraud, though, go beyond just section 8 of the NVRA. There are a whole range of other statutes that we use in those cases.

Mr. POE. I understand. I would like to know specifically section 8 prosecutions under your term as Attorney General.

Attorney General HOLDER. We can wrap that into the larger—

Mr. POE. I am not asking for the other ones. Just to be specific, I am asking for the section 8 prosecutions by your office.

Attorney General HOLDER. But just to be fair, to get a sense of what it is we are doing, as I said, we will give you that information, but as I said, I will give you a sense—

Mr. POE. You can give me more information if you wish, that is fine, just so section 8 is included in that. That would be great.

Attorney General HOLDER. Sure.

Mr. POE. The Mexican Ambassador to the United States recently has made comments about Fast and Furious that Mexico was un-

aware of—quote, “Mexico was never apprised how the operation would be designed and implemented”; talked about the fact that Fast and Furious has hurt the relationship between the United States and Mexico. I am not surprised that he would say something like this. We constantly talk, as we should, about the Americans that were killed in Fast and Furious, but there were apparently, according to the Mexican news reports, hundreds of Mexican nationals killed because of Fast and Furious.

The last time you were here, you answered a question and said more people will probably die because of Fast and Furious. Do you know how many people in Mexico have been killed as a result of the United States helping to facilitate straw purchases of automatic weapons going down to Mexico? Do you know how many?

Attorney General HOLDER. I don’t know, but I would think that there have been some, and I know that, given the 64,000 guns that have gone from the United States to Mexico, that Mexican citizens, Mexican law enforcement officers have lost their lives as a result of guns that started in the United States, but ended up in Mexico.

Mr. POE. How many of the guns have been recovered of the total number in Fast and Furious? You get different numbers. I have heard 1,200, I heard 2,000. How many guns have been recovered in Mexico that were the result of guns involved in the Fast and Furious operation?

Attorney General HOLDER. I don’t know that number.

Mr. POE. Any guess at all? I mean, that was the purpose, was it not, of Fast and Furious, to sort of keep up with the firearms when they go to Mexico, and see whether they were used in a crime scene, and then who the bad guys were? Wasn’t that sort of the purpose, veiled purpose?

Attorney General HOLDER. That was the stated purpose as it was in Wide Receiver and the other—the previous attempts at dealing with the sold guns from the United States to Mexico, none of which were ultimately successful, and all of which allowed guns to be inappropriately put into the stream of commerce.

Mr. POE. How many guns have been recovered on Fast and Furious?

Attorney General HOLDER. I have heard different numbers on that as well, anywhere from 800 to 1,200. I just don’t know. I think we start off with a number of about 2,000 that were put into—inappropriately put into the stream of commerce, and then the number that was recovered, I heard 800 to 1,200, but I don’t know.

Mr. POE. What would America’s reaction be if the roles were completely reversed; that if our neighbors, Mexico or Canada, they smuggled, facilitated the smuggling of automatic weapons into our country where Americans were killed and Mexican nationals killed? What would be our reaction to that as the head lawyer in the country?

Attorney General HOLDER. Probably similar to what the Ambassador has said, though I do have to say that we maintain a good relationship with Mexico that operates on a whole bunch of levels. Certainly law enforcement is the one that I am most familiar with. I have a good relationship with the Attorney General in Mexico. We talk all the time. And we continue to work together on a variety of law enforcement projects and have not been deterred by the



fact—the regrettable Fast and Furious episode. But I can understand the Mexican Ambassador’s comments.

Mr. POE. What are we doing to wrap the operation—I am sorry, Mr. Chairman, I didn’t realize.

Mr. SMITH. The gentleman’s time has expired.

Mr. POE. From the South we should get more than 5 minutes. We talk slower.

Mr. SMITH. Why doesn’t the gentleman from Texas ask a question that he would like the Attorney General to respond to in writing?

Mr. POE. I ask unanimous consent to submit—you mean ask the question or submit the question in writing?

Mr. SMITH. I suggest you ask the question you were planning to ask, and we will get the response later on.

Mr. POE. I will submit the numerous questions to the Attorney General, and he would submit back, if he would, to the Chairman. Thank you.

Mr. SMITH. Without objection.

Thank you, Mr. Poe.

The gentleman from Tennessee Mr. Cohen is recognized.

Mr. COHEN. Thank you, Mr. Chairman. And I will talk fast even though I am from the South.

Mr. Attorney General, we appreciate your coming before us. In October 2008, the Department of Justice approved the merger between Delta and Northwest Airlines. The Department of Justice issued a statement, you may not remember this, quote, “The proposed merger between Delta and Northwest is likely to produce substantial and credible efficiencies that will benefit U.S. consumers and is not likely to substantially lessen competition,” unquote.

Unfortunately that forecast has, in many people’s minds in Memphis in particular, proved to be grossly inaccurate. Many of the promises made by Delta in front of this Committee have been broken.

As anybody in Memphis can attest, the price of flying out of this, quote/unquote, fortress hub is much, much, much higher than it is flying out of other cities. And you can fly to cities through Memphis at cheaper prices than you can from Memphis to X. If you go from another city through Memphis to the city, it is cheaper than Memphis to.

This has caused the city the loss of conventions; the loss of businesses, who said, we left Memphis because the price of flight in and out was too great, so they move to Atlanta. A convention moved to Kansas City. Another group moved to Kansas City.

The people in Memphis are very upset about this, and we have unreasonably high airfares. Memphis is not alone; Cincinnati lost their hub, and service has been cut in Minneapolis as well.

Now that the merger in place, what type of enforcement mechanisms does your Department of Justice have to ensure competition or to try to get competition and break up what is in essence a monopoly.

Attorney General HOLDER. Well, I think that we have been appropriately aggressive in our antitrust enforcement efforts. There are a number of cases that we have brought everything from e-

books to the way in which telecommunications industry has tried to consolidate. And in those cases where we have not brought suit, we have extracted from the parties who have sought to join promises or concrete divestitures of assets so that we would maximize the chances that the consumer would benefit.

I think we have focused appropriately on what the impact will be on consumers, and I think that the——

Mr. COHEN. But in the airline industry have we done anything, because the airline industry has gotten to be basically three major carriers. They have divided up the middle cities, and the middle cities are hostages, they are company towns, and the people in the cities have to pay whatever they are charged. Can we do anything about that?

Attorney General HOLDER. Well, I mean, there is a certain amount of consolidation that has happened in the industry that I think is necessary for the survival of those companies. But, for instance, you look at what Delta and US Air tried to do, a transaction involving LaGuardia Airport and National Airport here in Washington, D.C. We approved what they wanted to do in New York, and we have reserved decision on what they wanted to do here in Washington to see what the impact of these consolidated——

Mr. COHEN. If I could interrupt you, because our timing is limited. Washington, Los Angeles, New York, the big cities have got competition. It is the middle-American cities that are getting the brunt of this. Memphis is one of them. What can you do about Memphis, Cincinnati, St. Louis, Pittsburgh?

Attorney General HOLDER. Well, I mean, what we can always do is to examine what the impact of these mergers has been, and if we find anticompetitive operations in a particular city——

Mr. COHEN. Well, then, can I ask you to look into Memphis and the situation there? Frontier Airlines came in; Delta came in, undercut them; Frontier left. US Air now is running Memphis, Washington. Delta is going to undercut them. Southwest is not looking to come in. We talked to Southwest. They said, if we come in, we are going to be undercut. That is monopoly.

Attorney General HOLDER. I can't comment on the particulars because I am not aware of them, but to the extent that one entity tries to undercut another inappropriately by lowering its prices and driving that competitor out of the market only to draw the competitor out of the market and raise its prices once the competitor is gone, that is inappropriate under our antitrust laws, and that is the kind of thing that would have an impact on consumers and that we would aggressively pursue.

Mr. COHEN. Well, let me ask you to look at the situation in Memphis. That is number one.

Number two, in Memphis, too, and I think I have written you about this, grocery store business, Kroger has come in and taken over the market. They bought out Schnucks. Then Schnucks took Kroger's place—shops in southern Illinois. Schnucks has got an area of influence in southern Illinois they didn't have because they swapped stores with Kroger. Prices have gone up. There is not competition there.

It is happening all over America. Business is finding ways to work with each other to create monopolistic practices and take advantage of consumers, and consumers are left off. It is what is happening.

Income inequality, purchasing ability inequality, the middle class and consumer, they have got nowhere to go. The only hope and change they have got is with you and this Administration, otherwise big business is cutting them out. So I appreciate your looking into this monopolistic practices and looking after the consumer, which I know you want to.

Attorney General HOLDER. Our focus is on the protection of consumers, and I think, as I said, that we have been aggressive. We put people to head that Division who share that attitude, and, as I said, I think they have done a good job.

Mr. COHEN. Thank you, and I yield back the proverbial remainder of my time when I have none.

Mr. POE. [Presiding.] The gentleman's time has expired.

The Chair recognizes the gentleman from Utah Mr. Chaffetz.

Mr. CHAFFETZ. Thank you.

Thank you, Mr. Attorney General, for being here. I would like to focus my comments on Fast and Furious.

You stated in previous testimony here today that you had read the six wiretap applications. I, too, have read those wiretap applications. I come to a conclusion that is totally different than your conclusions. That is but, I think, a sliver of the information that we are looking at where a reasonable person would only come to the conclusion that the seniormost people within the Department of Justice did indeed know that guns were walking, that those tactics were being used.

I guess my question for you, Mr. Attorney General, those things are sealed, those wiretap applications. Nobody wants to impede an ongoing investigation or hamper a prosecution opportunity. My question for you today is would you be willing to make yourself personally available to myself and to Mr. Gowdy and, in the essence of fairness, Mr. Bobby Scott and Mike Quigley to come talk to you, sit down, and I want you to show me how you don't come to that conclusion, and I would like to show you why I think there is a preponderance of evidence that would lead one to believe that, yes, indeed, the Department of Justice did know about this. Is that fair? Could you make yourself available?

Ms. JACKSON LEE. Mr. Chairman, a parliamentary inquiry.

Mr. CHAFFETZ. No, I—Mr. Chairman, please.

Mr. POE. She may inquire.

Ms. JACKSON LEE. Mr. Chairman, I know the Attorney General is about to answer, but is it appropriate for Members to refer to sealed documents in this Judiciary Committee room and suggest that the Attorney General makes a personal visit to Members on what is sealed and should not be provided during a criminal investigation?

Mr. CHAFFETZ. I simply asked again, please, Mr. Chairman, this does not count toward my time. I am simply asking, there is a dispute here. This has been going on for a year and a half. Most Members on this side asked about Fast and Furious. We are trying to resolve this, get to the end of it. It is hard to do in 5 minutes. I

am just asking for personal time to show you what we have seen and for you to share with us what you have seen.

Ms. JACKSON LEE. Mr. Chairman, I again refer, these are sealed documents. I am trying to understand is the gentleman wanting the Attorney General to speak to sealed documents that have been leaked and then discuss it with Members while there is a pending criminal investigation?

Mr. CHAFFETZ. I am not asking—

Mr. POE. The gentleman will suspend. The gentleman will suspend. The contents of the sealed documents may not be discussed.

The gentleman may have his time back and—

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. POE [continuing]. The remaining time that was been allotted to the gentlelady from Texas.

Mr. CHAFFETZ. Is that a reasonable request? Will you sit down with us and talk about this?

Attorney General HOLDER. Well, I don't think that under the Federal law I have an ability to talk about, as the statute says, the content of the wiretap—

Mr. CHAFFETZ. Would you be willing to sit with us and talk about all the other pieces of evidence that aren't sealed?

Attorney General HOLDER. Well, I have sat down with you on eight separate occasions.

Mr. CHAFFETZ. I am asking for more time to sit with you personally, more than just 5 minutes, and go through this in some depth. Give us 2 hours, two Members from the Democrats, two on the Republican side, and go through this.

Attorney General HOLDER. You know, with all due respect, I give you 4 hours at a crack on eight separate occasions. I am not sure there is an awful lot more I have to say. But here is one point I will say. You and I have both read materials that senior people in the Justice Department, as they went through those data approval process, did not read. As we know—

Mr. CHAFFETZ. Let me go on, please. So the answer is no? You are eating up my time, and I only have about 3½ minutes left. I would like more time. That is what I am asking for, and you are saying no.

Attorney General HOLDER. But—

Mr. CHAFFETZ. Let me share with you why I think this is imperative. Sunday, October 17, 11:07 p.m., Jason Weinstein sends an e-mail to James Trusty: Do you think we should try to have Lanny participate in a press when Fast and Furious and Laura's Tucson case are unsealed? It is a tricky case, given the number of guns that have walked, but it is a significant set of prosecutions.

James Trusty sends back to Jason Weinstein, it is not going to be any big surprise that a bunch of U.S. guns are being used in Mexico, so I am not sure how much grief we get for guns walking. It may be more like finally there are going to be people who sent guns—they are going after the people who sent guns down there.

Now, you claim with passion that nobody at the senior levels at the Department of Justice prior to the death of Brian Terry knew that guns were walking, and I got an e-mail from Jason Weinstein using the term "guns walking."

Attorney General HOLDER. I think we went through this exercise before. That refers to Wide Receiver, not Fast and Furious.

Mr. CHAFFETZ. That is not what the February 4th letter that was sent to the United States Congress said. It said that the ATF never uses those tactics, never.

Attorney General HOLDER. We said——

Mr. CHAFFETZ. And that is not true.

Attorney General HOLDER. And we said that that letter was inaccurate, and it was ultimately withdrawn. But the e-mail that you just read, and this is important, that e-mail referred to Wide Receiver. It did not refer to Fast and Furious. That has to be noted for the record.

Mr. CHAFFETZ. No, it doesn't. It says "Fast and Furious." Do you think we should try to have Lanny participate in press when Fast and Furious and Laura's Tucson case are unsealed? It is specific to Fast and Furious. That is not true, Mr. Attorney General. I am happy to share it with you.

I ask unanimous consent to give you some extra time to review.

Attorney General HOLDER. That is fine. The Laura Tucson case refers to Wide Receiver.

Mr. CHAFFETZ. It says "Fast and Furious." We will let the media have it and play it out.

Attorney General HOLDER. Laura Duffy was not involved—Laura was not involved in Fast and Furious.

Mr. CHAFFETZ. The e-mail says "Fast and Furious," and you say it doesn't. I have got it in black and white.

Did you personally read——

Attorney General HOLDER. I have superior knowledge.

Mr. CHAFFETZ. Did you personally read Speaker Boehner's letter spent to you on May 18, 2012?

Attorney General HOLDER. Yes, I got that.

Mr. CHAFFETZ. Did you read it?

Attorney General HOLDER. Yes.

Mr. CHAFFETZ. Have you personally responded to the Speaker?

Attorney General HOLDER. The Deputy Attorney General responded.

Mr. CHAFFETZ. So you delegated that to James Cole?

Attorney General HOLDER. I didn't delegate it to him. We thought it was appropriate for him to respond.

Mr. CHAFFETZ. You didn't think it was appropriate for you to respond?

Attorney General HOLDER. No, but what I indicated in my opening statement and certainly willing to indicate right now, is that I am willing to personally engage with the four people who signed that letter and try to come to an accommodation so that we can get you the information that you need consistent with what I think is our need to protect ongoing investigations. I want to be as flexible as we can and, as you said, get to the——

Mr. CHAFFETZ. I have a hard time buying that when you won't sit down with a guy like me——

Mr. POE. The gentleman's time has expired. The gentleman's time has expired.

The Chair recognizes the gentleman from Puerto Rico Mr. Pierluisi.

Mr. PIERLUISI. Welcome back, Attorney General. I realize it has been a long hearing, and you say the eighth occasion on which you appear before us. As I stated before, the first thing I will say is that I have to commend your demeanor, your patience, your decorum in appearing before us and subjecting yourself sometimes to a process that I do not believe is fair. If anything, this Committee should always try to afford due process. And I just have to say that sometimes here you are interrupted in a way that is not deserving to the position you are holding. So I for one, I thank you.

Now, as you probably expected, I want to complain a little bit. The familiar subject of my questioning is the Federal Government's response to drug-related violence in Puerto Rico and the neighboring U.S. Virgin Islands. The murder rate in Puerto Rico and the USVI is nearly six times the national average, and nearly three times higher than any State. Most of these homicides are linked to the cross-border trade in illegal drugs, which is primarily a Federal responsibility to combat.

During your previous testimony, you stated that drug-related violence in our Nation's Caribbean territories is a national security issue we have to confront. You also stated that Puerto Ricans are American citizens who deserve the protection of their government.

I know you and your team have been working to address this problem. You and the heads of the DOJ's component agencies have always made yourselves available to talk to me despite your busy schedules, and I appreciate that. And there have been some major success stories in recent months, including yesterday's Federal-State operation which resulted in the arrest of dozens of our airline workers in Puerto Rico who were smuggling drugs on flights to the mainland U.S.

Your men and women in Puerto Rico are doing terrific and courageous work. I hope you know that I recognize and respect that. But it is also clear to me and any reasonable observer that far more needs to be done. The CJS appropriations bill, which we approved recently this year, explicitly stated: "the committee is aware that efforts by Federal law enforcement to reduce drug trafficking and associated violence in the southwest border region has affected trafficking routes and crime rates in the Caribbean. The committee expects the Attorney General to address these trends by allocating necessary resources to areas substantially affected by drug-related violence and reporting back to the committee."

I wrote this very same week to the President asking him to direct ONDCP to prepare and publish a Caribbean border counter-narcotics strategy, which would outline a Federal plan of action to address drug trafficking and related violence in Puerto Rico and the VI. ONDCP already does this for the southwest border and the northern border.

So the first question I have is do you see any reason why ONDCP should not do the same for the Caribbean border?

Attorney General HOLDER. I think that is actually a fair point, and it is consistent with what I testified to, I think, before your remarks that—my remarks that you referenced before. When one looks at the Caribbean, Puerto Rico in particular, I think we need to have a strategy. We have a task force, on Puerto Rico, that the

Associate Attorney General is one of the cochairs of. I think to the extent that it is not explicit, that we should develop such a plan.

Mr. PIERLUISI. Thank you.

My second question, and, Mr. Chairman, you know, I would like to be able to make my question and then get an answer even if my time expires. Quite a few of my fellow Members have had that courtesy. I hope you can extend it to me as well.

Mr. POE. The gentleman just ask the question.

Mr. PIERLUISI. Okay. The second question is, can you explain the concrete steps that DOJ has taken to strengthen its presence in Puerto Rico? Wouldn't it be appropriate for DOJ to increase the resources it devotes to the island even if it is only a temporary surge, just as the Federal Government did when there was a spike in violence on the U.S. side of the southwest border.

I know we are living in an environment of constrained resources, but I am talking about prioritizing the limited resources you have and making sure they are being allocated to the areas where they are needed the most.

By the way—and I have the stats—DEA has increased its manpower, but the FBI and ATF have not in recent years. Shouldn't you be acting with more of a sense of urgency in this area? Please, tell me why I should feel better about this than I do.

Attorney General HOLDER. Yeah—

Mr. POE. The Attorney General will be brief.

Attorney General HOLDER. Okay.

Our law enforcement component's ability to develop recruitment and retention incentives for agents who are willing to—who are stationed in Puerto Rico, retention is a really—is a unique problem that we have in Puerto Rico. But I think the issue that you raise about surges is something that we are starting to embrace. Because we have seen—although we have seen historic drops in the crime rate, we have seen hot spots, for lack of a better term, around the country. And what we are now doing is developing a capacity to surge agents and resources, money at times, to help local law enforcement into those hot spots.

We have done it in a couple of cities in the United States mainland. We plan on looking at other places that we will. And I think Puerto Rico, given the homicide rate, the violent crime rate that far outstrips what is the national norm, I think Puerto Rico would certainly be a candidate for such a surge.

Mr. PIERLUISI. Thank you so much.

Mr. POE. The gentleman's time has expired.

The Chair recognizes the gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman. And I thank you for your great service to the great State of Texas as a Congressman and as a judge.

Mr. Attorney General, I want to ask you about a comment attributed to you and then a statement issued by the Department of Justice. In a New York Times interview in December of 2011, you said there is a desire to, quote, "get at you" because you, quote, "consistently take progressive stands." Shortly after that interview, the Department issued a statement wherein it said your critics, and I will quote, your critics "rightly view you as a progressive force."

The common theme in both of those statements is an apparent belief that you are targeted because you are, to use your term, progressive. So I want to be really clear with you, Mr. Attorney General. I am not a critic of yours because you consider yourself to be progressive. I am a critic because I don't think the Attorney General for the United States of America should have any political ideology whatsoever. You are the Attorney General for the entire country. Regardless of your political ideology or anyone else's political ideology, you are the Attorney General for everyone.

You are a former judge. You are a former U.S. Attorney. You are currently the chief law enforcement official for the United States. I don't know what attracted you to the criminal justice system; I haven't had an opportunity to ask you. I can tell you what attracted me to it was the notion of working solely for a woman who is blindfolded and carries nothing with her except a set of scales and a sword—no political ideology, no agenda, just a set of scales and a sword. And it is important to me that she doesn't care about anyone's station in life and she doesn't care about their political ideology and she doesn't care whether they are Black, White, Brown, progressive, conservative. It is just about the equal application of the law.

And further in that interview with the New York Times, you singled out my colleague from South Carolina, Senator Graham, as someone who had good faith in his criticisms toward you. So my question—and then you suggested that others are motivated by something more nefarious—bad faith, a desire to get at you, a desire to do damage to the President.

So my question to you is this: Do you think it is possible to be motivated by good faith and still ask who the senior-most-level officials within main Justice were who knew about the tactic of gun-walking prior to Brian Terry's death? Is it possible for me to ask that question and be motivated by good faith?

Attorney General HOLDER. Sure. I would say, you know, let's ask, do you think John Ashcroft was a conservative?

Mr. GOWDY. I don't know Mr. Ashcroft. I will tell you who I do know, Mr. Attorney General. I know the United States attorney for the district of South Carolina. He was appointed by President Obama. He is every bit as progressive as you say you are, if not more so. And not only have I not been a critic of his, I have been one of his biggest fans because you cannot tell what his political ideology is from the way he discharges his job. So I don't know John Ashcroft. I don't know you. I know Bill Nettles, I know the United States attorney.

And you can shake your head when I say that, but the truth is, you are the one who said you were being targeted because you are progressive. And my point to you is, I would be asking the exact same questions about Fast and Furious whether you were John Ashcroft, whether you were Dan Lungren, whether you were Bob Goodlatte. I don't care about the political ideology of the U.S. Attorney or the Attorney General.

Attorney General HOLDER. All I would say is this: The decisions that I have made in connection with anything that I have done in the Justice Department don't reflect my political ideology. They re-



flect my view of the facts, the law, and what my responsibility is as Attorney General of the United States.

Mr. GOWDY. Well, then why did your department say that? Why did your department in December say that you were a target because you consistently take progressive stands? Do you think that is why I am asking you about Fast and Furious, because of your political ideology?

Attorney General HOLDER. I have—I will accept that your question to me is one that is based in good faith. I am not going to say—I am not going to ignore reality and say that all of the attacks that have been directed at me have been those that are nonpolitical in nature or that have come in good faith. That is——

Mr. GOWDY. Can I be motivated by good faith——

Attorney General HOLDER [continuing]. Reality.

Mr. GOWDY. Can I be motivated by good faith and still believe that you ought to have to show an ID to vote in South Carolina, just like you do to have to enter the Federal courthouse?

Attorney General HOLDER. Absolutely. We can have a disagreement. You can operate in good faith and ask that question, as I can disagree with you in good faith and not have a political motivation behind my position.

Mr. GOWDY. Well, Mr. Attorney General, you have a difficult job. But if you think that you are being singled out because of political ideology or race or any other characteristic or factor when it comes to Fast and Furious, you are sorely mistaken. I would be asking the exact same questions regardless of what party was in power.

And, with that, I will yield back, Mr. Chairman.

Mr. POE. The gentleman's time has expired.

The Chair recognizes the gentlewoman from California, Ms. Chu, for 5 minutes.

Ms. CHU. Thank you, Mr. Chair.

Attorney General Holder, before I begin my questions, I would like to take a moment to commend you for the progress that the Department has made on various issues. For instance, on intellectual property rights, you have made that a priority. It is very, very important for our economy. And I congratulate the Department of Justice on the groundbreaking case earlier this year where you charged seven individuals and two corporations for running an international organized criminal enterprise that was responsible for causing more than half a billion dollars in harm to copyright owners.

And I also want to thank the Department for seeking to protect every American's right to vote. During 2011, the Civil Rights Division handled 27 new voting rights cases. And with 176 bills introduced in Congress that are aimed at suppressing Americans' right to vote, you are doing incredibly important work.

I also want to applaud you for changing the material that the FBI had been using in their counterterrorism materials that had many inflammatory statements about Islam and offensive stereotypes about Muslims. And, in fact, the FBI has conducted the review of this counterterrorism training material that indicated factually incorrect information.

And, earlier, Congressman Franks said that these were statements that had to do with political correctness, but, actually, I

wanted to name some of the statements that were made in these training materials that were incorrect and, in fact, offensive. For instance, this one that was in the FBI manual: "Never attempt to shake hands with an Asian." Or how about, "Never stare at an Asian." I personally take offense at that, I must tell you. And how about this: "The Arabic mind is swayed more by ideas than by facts." Or how about, "Traditional Muslim attire and growing facial hair is an indicator of extremism." I think those are statements that had to be removed from those manuals.

And my question has to do with the fact that a generation of FBI agents and Joint Terrorism Task Force members have been trained with these biased materials. What is the Department doing to make sure that those that have been trained with those materials don't hold these kinds of stereotypes?

Attorney General HOLDER. We have certainly removed those materials so that the training does not continue. And as people are updated in their training, we make clear to them that that material was inappropriately shared with them before. There are ongoing things that happen in the field offices to make sure that people don't rely on the kinds of things that you have just read into the record in their enforcement efforts. So it is an ongoing thing.

We understand that there have been certain agents who have been exposed to this, and we understand that it is our responsibility to make sure that—that information was incorrect, not politically incorrect, but it was simply factually incorrect—that we make sure that they operate only on the basis of factually correct information.

Ms. CHU. I truly appreciate that.

And, actually, I also wanted to talk about another issue, and that is the NYPD and the Muslim community. In August 2011, the Associated Press published an investigative article that described intelligence gathering by the NYPD of the Muslim community in New York.

Thirty-four Members of Congress and over 115 community and civil rights groups have requested that the Department of Justice open an investigation on this issue. Has the Department of Justice begun a formal investigation into this issue?

Attorney General HOLDER. Well, we are aware of the allegations. We have received, as you indicate, several requests to investigate the NYPD, and we are in the process of reviewing these requests. We are very far along in what I will call this preliminary stage, and I expect to be getting something, a formal recommendation, fairly soon.

Ms. CHU. I would appreciate that, because we want to make sure that innocent Americans aren't spied upon simply for eating at a restaurant or simply practicing their faith. And it is offensive to many. I always remember the fact that we had 120,000 Japanese Americans that were taken off to concentration camps based on allegations of spying, and yet, in the end, not a single case of espionage was ever proven. So we want to make sure that the rights of innocent Americans are protected.

Attorney General HOLDER. Okay. Yes. That is our objective, as well.

Ms. CHU. Thank you.

I yield back.

Mr. SMITH. [Presiding.] Thank you, Ms. Chu.

The gentlewoman from Florida, Ms. Adams, is recognized for questions.

Mrs. ADAMS. Thank you, Mr. Chairman.

Hello, Attorney General. Good to see you again.

Attorney General HOLDER. Good morning—good afternoon.

Mrs. ADAMS. Earlier, when you asked about when you became aware of the tactics of Fast and Furious, I believe you said it was the early part of 2011?

Attorney General HOLDER. Right.

Mrs. ADAMS. And how long after Agent Terry's death were you made aware of the fact that one of those guns that walked was actually used to kill your agent?

Attorney General HOLDER. I think roughly about the same time. I am not sure we have ever had a ballistic match in that regard, but I think I was made aware of the fact that guns found on the scene were from Fast and Furious. And I think that was about roughly the same time, sometime in February. I am not sure exactly when.

Mrs. ADAMS. Would you consider that—because I am going to go back to your opening statement. You said during your opening statement about how you and your agency are working closely with all the agencies and that on the issues that apply to, whether it is the national security leaks, homeland security and all of that, you are working very closely.

Yet you have an agent murdered, there are guns on the scene that come back to Fast and Furious, and it takes 1, 2 months before you are made aware of the fact that this has happened?

Attorney General HOLDER. Well, you are talking about my personal knowledge.

Mrs. ADAMS. Yes.

Attorney General HOLDER. There were other people—

Mrs. ADAMS. You are the Attorney General, are you not?

Attorney General HOLDER. I will stipulate to that.

Mrs. ADAMS. You are our chief law enforcement officer. You have a dead agent—

Attorney General HOLDER. No, but I am saying that there were people in the Justice Department who were aware of the fact that those guns found on the scene were from Operation Fast and Furious. I personally did not become aware of that until February, but there were people in the Department, working with our DHS allies and people in local law enforcement and the FBI, who were aware of that fact, yes.

I thought you were directing the question to just me as opposed to somebody else.

Mrs. ADAMS. Well, you know, I have heard, I have listened all day long, and I listened the other day when you were here also, and every time when questions are posed about Fast and Furious, we always get a different timeline, or somewhat similar, or we have had a letter called back for inaccuracies months after it was delivered to us.

So now we have you sit here and you tell us today in your opening statement how well your agencies are working together. Yet

you have an agent who is murdered, and it takes a couple of months before you are made aware, as the Attorney General, that the weapons that were left and allowed to gun-walk were used during this homicide.

So I go on to, if we have all of this going on—and I keep hearing you go back to, well, in the previous Administration we did this or they did that. You know, I don't really care what happened in the previous Administrations.

What I care about is the fact that when I worked with agents in the previous Administration as a law enforcement officer, I knew that when they went to get a wiretap they had to produce the evidence of probable cause to their supervisor, who then had to sign off on that. So I listened today as you said, well, they just signed off on a summary. So are you telling me that your supervisors sign off on wiretaps based on summaries without looking at probable cause?

Attorney General HOLDER. No, that is not what they do at all. They are satisfied, looking at the summaries that are prepared, that probable cause does in fact exist. But they do not review these things with an eye toward understanding the full panoply, the full scope of the underlying operation.

They only make sure that, when we go to court, there is a sufficient basis for us to say that probable cause exists, that with regard to the telephone number that we want to get the wire on that we can say that that particular phone was involved in the commission of a crime, not the full extent of what Operation Fast and Furious was all about.

Mrs. ADAMS. So, you know, you have covered a lot of different areas today. I am still waiting for an answer as to how so many thousands of guns walked. I have never been involved in an undercover operation that would allow such a thing to happen, and it is amazing to me that our own Attorney General's office is the one who allowed it to happen.

But then you go on to say that you have——

Attorney General HOLDER. I did not allow that to happen. And, in fact, as soon as I found out about it——

Mrs. ADAMS. It was your agency. You have control over that agency, do you not?

Attorney General HOLDER. As soon as I heard about it, I instructed that that policy, that practice had to stop.

Mrs. ADAMS. After the death of a——

Attorney General HOLDER. I was the first Attorney General to do that, and I did that.

Mrs. ADAMS. You also talk about how your agency is working deliberately on—and there was some information asked about immigration, and then you said, well, you know, we just need a comprehensive solution for immigration issues.

Wouldn't that solution be that you and your agency actually enforce the laws on the books that we have today?

Attorney General HOLDER. We do enforce the laws. We are more effective than any——

Mrs. ADAMS. Well, I will just let you know that when I ask about criminal aliens that are released back into our——

Mr. WATT. Regular order.

Mrs. ADAMS. Because what we have is criminal aliens being released back into our communities because their home countries will not take them back. And I asked, well, do we ever file 243(d) paperwork? And I was told no. None during this Administration have been attempted. So I have concerns when I ask you about our immigration laws being enforced.

The other thing before I go is I want to tell you this——

Mr. SMITH. The gentlewoman's time has expired.

Mrs. ADAMS. I will yield back.

Mr. SMITH. Okay. Thank you, Ms. Adams.

The gentlewoman from California, Ms. Sánchez, is recognized.

Mr. DEUTCH. I am next.

Mr. SMITH. I am sorry, the gentleman from Florida, Mr. Deutch, is recognized.

Mr. DEUTCH. I knew it wasn't intentional. Thank you, Mr. Chairman.

General Holder, thank you for joining us here today.

As we are all aware, General Holder, a statewide purge of suspected ineligible voters is under way in Florida. Now, all voters benefit from voter roll maintenance efforts conducted with oversight, with accuracy, and with enough time to rectify mistakes. Unfortunately, the purge under way in Florida is nothing of the sort.

A list of 182,000 suspected noncitizens has been compiled by Governor Scott's administration. This list is so riddled with mistakes that Governor Scott's own Secretary of State, Kurt Browning, objected to the list. Yet the risk was not reason enough for Governor Scott to stop.

Cross-checking driver's license data with State voter files was guaranteed to result in mistakes—guaranteed. Many legal immigrants who have become citizens are still classified as noncitizens in the motor vehicle records. But it doesn't explain how a World War II veteran and Bronze Star winner from Davie, Florida, was listed. And it doesn't explain how a Fort Lauderdale small-business owner was listed. It doesn't explain the staggering rate of inaccuracy in just the initial stage of the purge.

If the rate of inaccuracy in the initial 2,600 holds up for the remaining 180,000, then nearly 40,000 American citizens' voting rights are at risk.

And let me be clear about one issue: Everyone here agrees we don't want noncitizens on the roll. I don't. General Holder, you don't. The issue is that this purge will remove thousands of legitimate voters. Why is there zero concern for these voters?

Mr. Sensenbrenner earlier called this a model of due process. In fact, the letters going to voters say that they will be removed if they fail to respond within 30 days. The Governor believes that a failure to respond to a letter within 30 days is reason enough to lose your right to vote even if you are a U.S. citizen. Maybe you moved. Maybe you don't read your mail. Maybe it got lost. Or maybe, General Holder, you are a different elderly veteran of World War II who received the letter the week that his wife died and threw it out because he didn't have time to deal with the preposterous assertion that he is not a United States citizen. That happened, Mr. Attorney General.

Now, General Holder, I applauded you last Friday for requesting that Florida suspend this error-ridden, unaccountable, and illegal voter purge. The DOJ rightly pointed out that Federal voter laws prohibit voter purges within 90 days of an election, thanks to a law passed 2 decades ago. Because the closer you get to an election, the less time you have to correct mistakes—mistakes like disenfranchising voters.

Now, I am aware the Governor responded to you late last night in a letter that showcases his Administration's willingness to make up the law as they go along. And I know, Mr. Attorney General, your department will respond in detail in the coming days and will do everything necessary to compel Florida to comply with the law to prevent thousands of Floridians from being disenfranchised.

But, finally, I want to give you a chance to respond to a letter sent to you yesterday by a colleague of mine. The letter reads that your department's interference in this purge proves that you are, quote, "more concerned with protecting the re-election prospects of the President than with upholding justice and enforcing the rule of law, that you are actively working to keep noncitizens who have committed a felony on our State's voter rolls."

General Holder, with 16 cases of voter fraud found in Florida of over 8 million votes cast in 2008, the assertion that voter fraud is an actually electoral strategy is preposterous and offensive. And it is condescending, because voter fraud would be a totally ineffective way to rig an election. It is rare because it is a felony that risks prison time and huge fines, and it is a totally illogical way to try to sway an election.

You know what is an effective way to sway elections? Scrubbing thousands of legitimate voters off the rolls, eradicating voter registration drives, reducing early voting, and disenfranchising millions of seniors and impoverished Americans who lack government IDs. That is the tactic that Governor Scott and his ilk are using, not just in Florida but around the country.

But maybe I am wrong, General Holder. Can you just answer quickly, is my Republican colleague right, Mr. Attorney General? Have I missed some grand conspiracy here?

Attorney General HOLDER. I haven't seen the letter, but that is not what motivated our action or will continue to motivate the actions that we may have to take. I have not seen the response from the Governor or the Secretary of State in Florida. But I will assure you that we will make sure that the Federal law is enforced and that voter purges happen in a way that is consistent with the law.

I share your view that we do not want to have people inappropriately voting, that we don't want to have voter rolls that contain people who should not have the right to vote. At the same time, we should engage in a process that does not put off the rolls people who have served their country as veterans, people who want to exercise that most fundamental of American rights.

And so the notion that this is somehow a political ploy is inconsistent. One only has to look at the law, which is clear: 90 days. It is very, very clear: 90 days.

Mr. DEUTCH. And, in fact, General Holder, then, it is possible that as the highest law enforcement officer of the land that you actually have real concerns about American citizens being

disenfranchised and that the United States Department of Justice, the U.S. Department of Justice actually cares about protecting the constitutional rights, the constitutional rights of American citizens that are now being threatened by this illegal voter purge in Florida. Isn't that correct?

Attorney General HOLDER. That is right. At base, we have to enforce the law, a law that was designed by this Congress, or its predecessor, to protect the rights of American citizens. That is what our action is all about, to protect the rights of American citizens.

Mr. DEUTCH. Thank you.

And I yield back.

Mr. SMITH. The gentleman yields back his time.

The gentleman from Arizona, Mr. Quayle, is recognized.

Mr. QUAYLE. Thank you, Mr. Chairman.

And thank you for being here, Mr. Attorney General.

I want to get back to how the wiretap application is approved and the process that it is. You said that basically whoever it was just reads the summary, determines whether there is probable cause, and if there is probable cause, then they send it off to get approval by the courts. Is that basically what you are saying the process is?

Attorney General HOLDER. Yeah, line lawyers in the Office of Enforcement Operations look at the affidavits, prepare a summary—

Mr. QUAYLE. Okay.

Attorney General HOLDER [continuing]. That is then reviewed by a Deputy Assistant Attorney General, and then it goes to—

Mr. QUAYLE. So the Deputy Assistant is only looking for probable cause, is that what you are stating?

Attorney General HOLDER. Right, to make sure there is a probable cause basis.

Mr. QUAYLE. How is that true? Because under extensive requirements for Federal eavesdropping law, the Justice Department officials have a duty—a duty—to evaluate the law enforcement tactics that have been used in the investigation, why they aren't going to actually make it so that we can have a further investigation, and why you need to have wiretapping put into place.

We have Title 18 U.S.C., section 2518(1)(c), says that the application needs a full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if they tried, or to be dangerous.

Now, we put these sorts of safe measures in place because wiretaps are extraordinarily intrusive. And so, probable cause being the only basis for putting the application is just blatantly—it is just false. I mean, unless your Justice Department was not living up to what is actually statutorily required for an application.

Attorney General HOLDER. What you are saying is absolutely right, that, in fact, there is that requirement. And if you look at the affidavits and the summaries, you will see that there is a statement by the person who does the affidavit and the person who prepares the summary that, in fact, other methods have been tried and have proven to be unsuccessful.

Mr. QUAYLE. So you are saying that they did know about—see, this is what I am trying to get at, is, did the Deputy U.S. Attorney who actually signed off on these wiretap applications, did they actually go through and understand what the tactics that were being used, since then they would actually know at the time of reviewing those, because you said that all they were looking at were the summaries and looking for probable cause, when, actually, they would have to be looking for the tactics, why they failed, and why you needed to have eavesdropping going forward. So that would mean that they would probably have that information a lot earlier than when you said earlier.

Attorney General HOLDER. But you are looking at the tactics that were used in order to try to surveil people. All right, that is what you are looking for in terms of these tactics. It doesn't mean that you are looking at every tactic that was used as—

Mr. QUAYLE. But it is part of the whole operation, though. But the investigation, for the operation of what they were trying to accomplish, you are using various different tactics. It is not just for surveilling, it is for the whole operation.

Attorney General HOLDER. And what I am—

Mr. QUAYLE. And so the tactics actually are part of the application, why they failed, why you need eavesdropping. So the Deputy Attorney actually knew about the tactics even though you have been saying all along that you didn't because you only had the summary and you were only looking for probable cause.

Attorney General HOLDER. I have looked at these affidavits, I have looked at these summaries. There is nothing in those affidavits, as I have reviewed them, that indicates that gun-walking was allowed. Let's get to the bottom line. And so I didn't see anything in there that would put on notice a person who was reviewing, either at the line level or at the Deputy Assistant Attorney General level, you would have knowledge of the fact that these inappropriate tactics were being used.

Mr. QUAYLE. Are you saying in the summaries or in the whole affidavit?

Attorney General HOLDER. In affidavit as well as—

Mr. QUAYLE. In whole. So there were no comments about the tactics of gun-walking within the whole affidavit. Or are you talking about the summaries? Because there is a clear distinction between the two, and if you are saying they are only relying on the summaries and not the whole affidavit—but then you would have to go to—actually, then, would it be an untrue affidavit to go get wiretaps if they didn't include the gun-walking? I mean, is that lying to the court on the tactics that were being used during the operation?

Attorney General HOLDER. I mean, we have to speak hypothetically here, okay, because we can't talk about the—

Mr. QUAYLE. I understand that, but hypothetically—so, I mean, I am just trying to get down to what the process was, because it seems to be a little misleading from what you have said and what Mr. Breuer said in the past, that it was only for legal sufficiency or probable cause in this instance, from your perspective, when in actuality the statutes that govern this, especially with Federal eavesdropping, are much more strict and require much more proof



that Federal eavesdropping and wiretapping is necessary to actually go through with it and get the court order to do it.

Attorney General HOLDER. These statutes do not require the degree of specificity that you are implying. They do not require you to go and describe all of the things that you have done during the course of an investigation with the degree of specificity that you are implying. That is not accurate.

Mr. QUAYLE. What degree of specificity do you think that I am implying here? I mean, you have to go through what the procedures are, what the tactics were. I mean, I am not trying to say that you need to put down every serial number of a certain shoe that somebody was wearing while they were surveilling somebody, but the basic gun-walking is a pretty big piece of the tactical operation in Operation Fast and Furious.

Attorney General HOLDER. Well, again, I can't get into the content of the Fast and Furious wiretaps. I am prohibited from doing that under Federal law.

But I can tell you that the notion that you are pushing, and you are pushing incorrectly, it does not require that degree of specificity, granularity, to appropriately put together an affidavit and a summary that can go to a Federal—

Mr. QUAYLE. But it provides more than probable cause, which is what you were saying earlier, and it provides more than legal sufficiency, which was what Mr. Breuer was saying earlier.

Mr. SMITH. The gentleman's—

Attorney General HOLDER. Are you going to ask me a question?

Mr. QUAYLE. My time has expired.

Mr. SMITH [continuing]. Time has expired.

The gentlewoman from California, Ms. Sánchez, is recognized.

Ms. SÁNCHEZ. Thank you, Mr. Chairman.

And, General Holder, thank you so much for joining us here today. I know that it is an important responsibility of your office to submit to this Committee's oversight, and I know that you would agree that this is an important role for our Committee to play. But it can't be easy—I feel your pain—to sit in front of us for such a lengthy period of time and answer questions about the many different areas under your purview.

So I am going to apologize—I come toward the end—if some of my colleagues have already bent your ear on this topic, but I would be remiss if I didn't bring up the recent changes in the Department of Justice policies regarding the reimbursement to local governments under the State Criminal Alien Assistance Program, known more commonly as SCAAP.

As I am sure you are aware, SCAAP permits States and localities to seek reimbursements for the cost of detaining deportable immigrants charged with a felony or two or more misdemeanors. Deportation is a Federal responsibility, and SCAAP is a program which acknowledges that our overburdened local law enforcement facilities shouldn't have to bear those costs without some kind of reimbursement or recompense from the Federal Government since it is the Federal Government's responsibility.

Shortly after I was first sworn in as a Member of Congress some 10 years ago, local police officials came to me and explained how a change in the SCAAP funding rules was having a very profound

effect on their budgets. And the 2003 SCAAP reinterpretation, in which States only receive reimbursement if a criminal alien is convicted of a felony or two misdemeanors and the arrest and the conviction occur in the same fiscal year, which is an odd and interesting requirement, has had tremendous repercussions throughout the law enforcement community, particularly in my State of California. In California, SCAAP reimbursement payments have declined from \$220 million in fiscal year 2002, prior to the Department of Justice reinterpretation, down to \$112 million in fiscal year 2009.

And for 10 years now in Congress, I have been working with colleagues on both sides of the aisle—it is a bipartisan issue—to try to help Justice recognize the need to return to the original congressional intent of this legislation. The police departments and sheriff's departments in my State are already having to do more in terms of deterring crime and protecting constituents with less. And this reinterpretation of the SCAAP reimbursement really hinders their ability to do that.

They are trying under very difficult budget circumstances to do an incredible—and they are doing an incredible job. But, you know, they keep asking me, what is the Federal Government going to do about SCAAP reimbursement? And I would love to be able to tell them that the funds that they desperately need are going to be coming.

But last month I was just dismayed to find that your department further reduced the reimbursements under the SCAAP program, which has the effect of only further increasing the pressure on local law enforcement and making their jobs that much harder. This change is not only going to—would only reimburse State and local law enforcement if they are holding a known inmate already in ICE's database.

And I just want to bring your attention to a letter that I have from the California State Sheriffs' Association.

And, Mr. Chairman, with your permission, I would like to enter it into the record.

Mr. SMITH. Without objection.

[The information referred to follows:]

**Officers**

*President*  
Keith Royal  
Sheriff, Nevada County

*Vice President*  
Greg Alcorn  
Sheriff, Alameda County

*Jail Vice President*  
Adam Christman  
Sheriff, Stanislaus County

*Secretary*  
Martin Ryan  
Sheriff, Sonoma County

*Treasurer*  
Donny Youngblood  
Sheriff, Kern County

*Sergeant-at-Arms*  
Bill Brown  
Sheriff, Santa Barbara County

*At Large*  
Sergeant-at-Arms, Emeritus  
Mark N. Pavia  
Sheriff, Merced County

**Directors**

Tom Rosenko  
Sheriff, Shasta County

John Crawford  
Sheriff, Alpine County

Steve Duffin  
Sheriff, Inyo County

Steve Freitas  
Sheriff, Sonoma County

Sandra Hutchins  
Sheriff, Orange County

David Livingston  
Sheriff, Contra Costa County

Margaret Mims  
Sheriff, Fresno County

Steve Moore  
Sheriff, San Joaquin County

Ed Prieto  
Sheriff, Folsom County

Clay Stanton  
Sheriff, Salina County

Bill Wismar  
Sheriff, Tulare County

**President's Counsel**

Ed Bannister  
Sheriff, Placer County

Robert Doyle  
Sheriff, Marin County

Laure Smith  
Sheriff, Santa Clara County

M. Carmen Green  
Deputy Executive Director

Nick Warner  
Legislative Director

Martin J. Mayer  
General Counsel



## California State Sheriffs' Association

*Organization Founded by the Sheriffs in 1894*

Date: May 29, 2012

To: California Congressional Delegation  
The Honorable Dianne Feinstein, U. S. Senator  
The Honorable Barbara Boxer, U. S. Senator

From: Sheriff Keith Royal, CSSA President  
Sheriff Robert Doyle, CSSA Legislative Committee Chair

**Re: CSSA Urges Reverse of DOJ Decision re SCAAP and "Unknown Inmates"**

On behalf of the California State Sheriffs' Association (CSSA), which represents the 58 elected Sheriffs of California, we write to urge your immediate help in reversing a decision by the Department of Justice (DOJ) that will cripple the State Criminal Alien Assistance Program (SCAAP) and place a significant financial hardship on California jails.

The Department of Justice announced a change in the SCAAP program on May 23, 2012 that will prohibit SCAAP funds from being used to reimburse localities for foreign-born criminal aliens housed in their jails that have been classified as "unknown inmates" by ICE. This ill-advised programmatic change would dramatically weaken SCAAP by limiting payment strictly to "known" inmates that are presently in ICE's computer database. It should also be noted that DOJ did not follow established procedures for making changes to the SCAAP program, thus calling into question the validity of the change. Should this be enacted, California Sheriffs would lose millions of dollars for the incarceration costs for criminal aliens due to the Federal Government's inability to properly apprehend, track and document these individuals. Based on a 2010 vetting report issued by DOJ, this payment change would have cut over \$18 million in 2010 SCAAP payments to California Sheriffs.

As we are sure you are aware, the vast majority of illegal aliens residing in the United States are not officially "known" to the Federal Government and thus this proposal would cripple the SCAAP program and further shift the financial burden of housing these criminal aliens to our localities.

These "unknown" criminal aliens, many of which committed violent crimes in our communities, were born outside of the United States and lack the documentation to show they are legally in the United States. However, because ICE was not aware they had illegally entered the United States, the Department of Justice, without the approval of Congress, has unilaterally implemented a change that will deny California (and every other state) the ability to secure partial reimbursement for incarceration costs by removing the "unknown" payment category.

May 29, 2012  
Page 2 ---

Under the law that created SCAAP, the federal government is required to take all criminal aliens into federal custody. If that is not possible, which has been the case since the program was created, the law calls for the federal government to compensate state and local governments for their incarceration costs. The Federal government must uphold its responsibility to the facilities that hold criminal aliens and not allow changes that would weaken the funding provided for SCAAP.

CSSA urges your assistance to reverse this DOJ decision before it is implemented and the FY 2012 applications are finalized. Thank you for your consideration of our concerns, your continued support of law enforcement and the SCAAP program.

Sincerely,

Kand

Keith Royal, CSSA President  
Sheriff, Nevada County

Robert C. Drake

Robert Doyle, CSSA Legislative Committee Chair  
Sheriff, Marin County

KR/RTD/cmc

cc: All California Sheriffs  
Carmen Green, CSSA Deputy Executive Director  
Nick Warner, CSSA Legislative Director

Ms. SÁNCHEZ. It suggests that if your department had made this change in 2010, it would have reduced payments to California sheriffs by an additional \$10 million. And that is already on top of the 50 percent cut from 2003 to 2009.

And I just want to quote a section of this letter, since I think that the California State Sheriffs' Association summarizes this issue very accurately. They state, and I am quoting, "The Federal Government must uphold its responsibility to the facilities that

hold criminal aliens and not allow changes that would weaken the funding provided for SCAAP.”

I hope that you will give this issue more thought and much more thought to the impact that this change is going to have on law enforcement communities across the Nation, not just to mention southern California. And I hope that you will reconsider this decision and consider rescinding it.

I just wanted to make you aware of that issue. I will be following up with your office, and I hope that we can work together to try to ensure that local law enforcement entities will be properly reimbursed for the great job that they do in trying to protect the public safety.

And I guess I will just allow you a brief comment and then yield back to the Chairman.

Mr. SMITH. Yeah, okay, thank you, Ms. Sánchez.

The gentleman from Arkansas, Mr. Griffin, is recognized.

Mr. GRIFFIN. Thank you, Mr. Chairman.

Thank you, Mr. Attorney General, for being here today.

I want to ask you if you are familiar with the Olmstead case that deals with disability law. Are you—

Attorney General HOLDER. Yes.

Mr. GRIFFIN. Are you prepared to speak about that today?

Attorney General HOLDER. Well, I mean, I am not an expert on it, but—

Mr. GRIFFIN. Okay. Let me ask you a few questions about it.

In my State, we have a number of homes, institutions, for the developmentally disabled. And around the country there have been a number of lawsuits against some of these homes alleging violations of civil rights. And, in some instances, these lawsuits are filed with the view that the Olmstead case contemplates a structure where the institutions sort of are phased out and that individuals who are disabled—intellectually disabled, developmentally disabled—those individuals are moved into more community-based care. My State has been, in Arkansas, has been the subject of some of these lawsuits.

First of all, I wanted to ask you, do you believe that the Olmstead case requires a movement away from institutional care for the developmentally disabled, or do you believe that these institutions can exist within the Olmstead framework?

Attorney General HOLDER. As I said, I am not an expert on Olmstead. I am familiar with what the decision talked about and, you know, unnecessary institutionalization, how that clashes with the ADA. You are asking a question that I think is just beyond my—

Mr. GRIFFIN. Okay. Could I get something in writing on that?

And let me continue a little bit. My concern is that those who are implementing—and I understand it is many levels below you. My concern is that some in the Civil Rights Division and the Special Litigation Section at DOJ are pursuing—and, to be fair, some of this litigation began in the last Administration, so this is an ongoing problem.

But my concern is that there are some who read the Olmstead case as, if not requiring a move away from institutional care, at least somehow endorsing the move that those at DOJ have—some

at DOJ have advocated for. And my reading of—well, I think anyone's reading of the case, the actual case, demonstrates that that is not what the case contemplated; that the case made it clear that segregation of those with disabilities will not be tolerated but that institutions could be a part of the solution there.

And, in fact, the opinion, the plurality opinion said, and I want to quote this to you, quote, "Each disabled person is entitled to treatment in the most integrated setting possible for that person, recognizing on a case-by-case basis that that setting may be an institution."

And so, if you could get me some answers on that, that would be very important to me. You know, the lawsuit that was filed in Arkansas was eventually dismissed for lack of evidence presented by the Department of Justice. And, unfortunately, it cost the State of Arkansas and the development center that was involved \$4.3 million to litigate that. And, in the end, it was dismissed for no evidence.

I won't go into the details here, but I will just tell you, in a small State like ours and with an institution like this, \$4.3 million was a significant sum of money. And, in fact, timber had to be sold, mineral rights had to be sold, et cetera, to help fund this litigation, which was then dismissed because DOJ had no evidence, or did not have sufficient evidence.

So if you could get me just your views on that, I would very much appreciate it. And I thank you for being here today and listening.

Attorney General HOLDER. Yeah, I would be glad to do that. I think that the underlying material that you have shared with regard to the disposition of those two cases is accurate. And so what I will endeavor to do is to respond to the questions that you have put to me, and I apologize for not being able to answer, based on that correct factual assertion that you have made.

Mr. GRIFFIN. Thank you, sir.

Mr. SMITH. Thank you, Mr. Griffin.

The gentleman from Florida, Mr. Ross, is recognized.

Mr. ROSS. Thank you, Mr. Chairman.

And, Mr. Attorney General, thank you for being here. I guess the benefit of having me question is you is I may be the last one. Thank you for your patience today.

I want to ask you a couple of questions. The House Committee on Oversight did receive six wiretap applications that it reviewed. It is that Committee's contention that those applications contained detailed information about Fast and Furious and gun-walking.

Now, it is my understanding you have reviewed those applications since your last testimony. Is it my understanding that you take issue as to what these applications actually detail as to whether Fast and Furious existed or whether there was any gun-walking?

Attorney General HOLDER. Yeah, I mean, what I would do, again, because I can't talk about the contents, I would align myself with the letter that—

Mr. ROSS. Is that James Cole's letter?

Attorney General HOLDER. No, the letter that Congressman Cummings set out—

Mr. ROSS. Okay.

Attorney General HOLDER.—I guess a couple of days or so ago, as he went through his analysis of that same material. I think that his perspective is the correct one, as opposed to what Chairman Issa—

Mr. ROSS. And since then, my understanding is there was a letter January 27th of this year to Chairman Issa from Deputy Attorney General James Cole that indicated that changes had been made. Two of those changes included the Department of Justice has changed its way of response to congressional inquiries, and it has also changed the internal process for wiretap reviews.

In fact, your office has tripled the number of attorneys now reviewing wiretaps; is that correct?

Attorney General HOLDER. That is correct.

Mr. ROSS. Is that an indication that what was done before was done inadequately and inappropriately?

Attorney General HOLDER. No, it was actually in response to office visits that I was making where people were saying it was taking too long for them to make requests in the field and to get them processed in Washington and get the approvals back into the—

Mr. ROSS. So it has nothing to do with another level of review to make sure as to the accuracy of the content?

Attorney General HOLDER. One of the changes actually does, when we now require somebody in the field, a supervisor, to look at the affidavit and the application that is sent to Washington. We now require a supervisor to look at that. That was not a requirement before. And that is to try to make sure that we have better accuracy.

Mr. ROSS. And, as I understand it, according to—on Tuesday, you have a spokeswoman, Tracy Schmalzer, who issued a statement that says, “The review process for wiretap applications is limited and a specific assessment of whether a legal basis exists to support a surveillance request. The review process is not an approval of an operation.” I am sure you agree with that.

So the sufficiency of it, then, has nothing to do with what may be alleged in there. For example, hypothetically, if there was a human trafficking operation going on and the wiretap was being requested for that, at what point do you just not look at the legal sufficiency of whether the requirement is met for the wiretap? At what point do you do something to stop the actual operation that is being asserted in there?

Attorney General HOLDER. Well, I mean, when you get these affidavits, they are pretty broad-ranging. They describe in pretty good detail what is going on in an operation. But they don’t go into all of the—as I was explaining to go Mr. Quayle, they don’t go into the nitty-gritty of everything that is going on in connection with an investigation.

If, for instance, an affidavit did contain—and we are talking totally hypothetically here—

Mr. ROSS. Right.

Attorney General HOLDER [continuing]. If an affidavit did contain some indication that trafficking was going on, that young girls were being tortured or something, or that guns were being walked—

Mr. ROSS. Right. What I am getting at is, we now have in place a process in reviewing these wiretap applications that will prevent another Fast and Furious; is that correct?

Attorney General HOLDER. I think we do with regard to that supervisory level. This is always assuming that the people who are working on the affidavits are sharing all of the information.

But it is not—but we shouldn't have that on the basis of just wiretaps. I mean, given the policy pronouncements that I have made and the changes that I have made, I think that is the primary reason why we should not have a repeat of Fast and Furious.

Mr. ROSS. And believe me, I would love to spend more time on that issue. I am sure you have had enough entertainment on that one. But what I would like to address with you is something that is near and dear to my State of Florida.

Is it your opinion that you feel that deceased people should vote?

Attorney General HOLDER. Obviously not.

Mr. ROSS. And illegal aliens should not vote either?

Attorney General HOLDER. No, but veterans should be able to.

Mr. ROSS. I couldn't agree more, so long as they are, you know, eligible to vote.

But when my State, in furtherance of its obligations to make sure that we have an adequate and sanctified voting process, 9 months ago requested from the Department of Homeland Security the citizen database and yet receives not only a "no" but no response, and then today when they are trying to do what is necessary to make sure that the sanctity of the voting process is preserved and appropriate, the Department of Justice stonewalls and said, "Sorry, you are within 90 days, and therefore the Voting Rights Act applies and you can't do it."

So what is my State supposed to do when DHS and DOJ does not cooperate with them in the furtherance of their obligation?

Attorney General HOLDER. Well, I can't speak to what DHS did, but I will say this about that DHS database. It does not contain people who were born in the United States, so it is not going to be a cure-all even if—

Mr. ROSS. But why would they refuse to give it? And now they have to go to the motor vehicle rolls to find out, to do their job. I mean, they had better tools with that database than what they have now with their own internal tools.

Attorney General HOLDER. Well, I mean, I don't know why they didn't. But I can say that the database itself would not be adequate for the kind of purging that is sought by the State of Florida, if it had been provided.

Mr. ROSS. And there is no reason they should not have—DHS should not have—they should have released it to—

Attorney General HOLDER. I don't know what the basis was for that determination by DHS.

I do know and I am concerned about the numbers of people who I have heard have been inappropriately purged from the voter rolls who are citizens who have voted in the past and who, for whatever reason, got those letters.

Mr. ROSS. Thank you.

I yield back.

Mr. SMITH. Thank you, Mr. Ross.



Mr. Attorney General, thank you for your testimony today.

Ms. JACKSON LEE. Mr. Chairman? I have one unanimous consent, please.

Mr. SMITH. The gentlewoman from Texas, Ms. Jackson Lee, is recognized for a unanimous consent——

Ms. JACKSON LEE. I thank you.

It is a clarification regarding an e-mail sent by Mr. Jason Weinstein. This is his testimony regarding an e-mail referred to by the gentleman from Utah. The e-mail referred to the Wide Receiver, and the testimony that I am submitting indicates this statement: “When I say it is a tricky case given the number of guns that have walked, I am talking exclusively about Wide Receiver.”

I ask unanimous consent to submit this testimony into the record.

Mr. SMITH. Without objection, the testimony will be made a part of the record.\*

Mr. Attorney General, thank you again for your testimony.

Without objection, all Members will have 5 legislative days to submit additional written questions to the Attorney General. And we hope he will be timely in his response.

This hearing is adjourned.

Attorney General HOLDER. Thank you.

[Whereupon, at 1:21 p.m., the Committee was adjourned.]

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\*The information referred to was not received by the Committee at the time this hearing record was printed.



## APPENDIX

### MATERIAL SUBMITTED FOR THE HEARING RECORD

**Material submitted by the Honorable Darrell Issa, a Representative in Congress from the State of California, and Member, Committee on the Judiciary**



### MEMORANDUM

TO: Members of the House Committee on the Judiciary

FROM: Lamar Smith, Chairman

RE: Oversight Hearing on the Department of Homeland Security

DATE: Tuesday, June 5, 2012

On Wednesday, October 26, 2011, the Committee on the Judiciary held an oversight hearing on the Department of Homeland Security. To ensure stenographer accuracy, please find a **verbatim** transcript of the hearing attached for your review. The Judiciary Committee's Rule III (c) pertaining to the printing of transcripts is as follows:

*The transcripts...shall be published in verbatim form, with the material requested for the record...as appropriate. Any requests to correct any errors, other than transcription, shall be appended to the record, and the appropriate place where the change is requested will be footnoted.*

Please return the transcript edits to the Committee by Tuesday, June 19, 2012, to the attention of: Kelsey Deterding, at 2138 Rayburn House Office Building, Washington, D.C., 20515. If you have any further questions or concerns, please contact Kelsey Deterding at (202) 225-3951.

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4 OVERSIGHT HEARING ON THE DEPARTMENT OF HOMELAND SECURITY  
5 Wednesday, October 26, 2011  
6 House of Representatives  
7 Committee on the Judiciary  
8 Washington, D.C.

9 The committee met, pursuant to call, at 10:07 a.m., in  
10 Room 2141, Rayburn Office Building, Hon. Lamar Smith  
11 [chairman of the committee] presiding.

12 Present: Representatives Smith, Conyers, Nadler,  
13 Sensenbrenner, Scott, Coble, Lofgren, Gohmert, Quigley, Poe,  
14 Chu, Chaffetz, Griffin, Jackson Lee, Gowdy, Johnson, Adams,  
15 Marino, Pierluisi, Quayle, Gallegly, Deutch, Issa, Sanchez,  
16 King, and Forbes.

2609 to prior year levels, we can reconsider that decision.

2610 Mr. DEUTCH. But -- but the decision -- the decision to  
2611 expand Tier One is a decision made by your office.

2612 Secretary NAPOLITANO. That is correct.

2613 Mr. DEUTCH. And, in fact, Tier One has been expended in  
2614 the past not just to include --

2615 Secretary NAPOLITANO. When there was money, yes.

2616 Mr. DEUTCH. I understand, but the further -- and I -- I  
2617 also understand the decisions Congress makes about funding,  
2618 but the -- it is the decision of the Department of Homeland  
2619 Security to keep the Tier One funding the same and slash  
2620 dramatically the funding to the Miami-Fort Lauderdale UASI.

2621 Secretary NAPOLITANO. I think that the reason,  
2622 Representative, is because the evaluation of risk and  
2623 consequence did not put the Miami UASI into the Tier One  
2624 status.

2625 Mr. DEUTCH. I would urge you to reconsider the -- and  
2626 -- and realize the -- the risk and consequences involved in  
2627 the decision.

2628 I yield back. Thank you, Madam.

2629 Mr. GALLEGLY. Time of the gentleman has expired.

2630 Mr. Issa?

2631 Mr. ISSA. I thank you, Mr. Chairman.

2632 Madam Secretary, back in February, I recall that you and  
2633 I were on the phone and on another important issue, but it

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2634 had to come to a premature end or come to an end because you  
2635 had to attend a memorial service for Jamie Zapata.

2636 Do you remember that conversation?

2637 Secretary NAPOLITANO. I don't remember the  
2638 conversation. I do remember the murder of Jamie Zapata.

2639 Mr. ISSA. But I won't forget it because it was sort of  
2640 just at a point in which "Fast and Furious" obviously was  
2641 becoming a major issue, both with Senator Grassley and with  
2642 my committee next door.

2643 Since that time, we have done a lot of work and I -- I  
2644 want to run you through some questions that concern me that  
2645 fall within your lane.

2646 One of them is earlier today, you have repeatedly said  
2647 that this was an ATF operation. Out of concern for the  
2648 investigatory process and the prosecutions that are ongoing,  
2649 we have -- we have avoided interviewing Lane France. Do you  
2650 know Lane?

2651 Secretary NAPOLITANO. I do not.

2652 Mr. ISSA. Do you know he works for you? He is an ICE  
2653 agent that was part of the "Fast and Furious?"

2654 Secretary NAPOLITANO. I know there was a -- a -- a  
2655 field agent assigned to a task force -- this is all things I  
2656 have learned in the wake of your investigation -- assigned to  
2657 a task force for deconfliction purposes in the wake of the  
2658 two ICE matters that were resolved by the AUSA to be within

2659 the context of ATF.

2660 Mr. ISSA. Well, it is -- it is our judgment that he  
2661 likely was very aware that there was gun walking going on,  
2662 had that information. The question is, when you assign  
2663 somebody like that, do you have a flow of information back to  
2664 your department so that your -- somebody in your department  
2665 could have, should have or would have known about the  
2666 operation?

2667 Secretary NAPOLITANO. Representative, we have hundreds  
2668 of operations and -- and thousands of agents on a daily  
2669 basis. So to my knowledge, the fact that an agent was  
2670 assigned somewhere about some matter would not necessarily  
2671 come to --

2672 Mr. ISSA. So --

2673 Secretary NAPOLITANO. -- even -- even to ICE  
2674 headquarters, much less to DHS headquarters.

2675 Mr. ISSA. Okay. So I guess I am going to make an  
2676 assumption here and that is that it is a fire and forget.  
2677 You send --

2678 Secretary NAPOLITANO. Pardon?

2679 Mr. ISSA. -- you send these people over there.

2680 Secretary NAPOLITANO. I'm sorry. I couldn't hear you.  
2681 Sorry --

2682 Mr. ISSA. Fire and forget, kind of like the missile  
2683 that you just send off and it looks for heat, and if it hits

2684 something so be it, even if it is one of the friendly  
2685 aircraft.

2686 Secretary NAPOLITANO. Oh, I don't think that is a --

2687 Mr. ISSA. Well, let's go through this.

2688 Secretary NAPOLITANO. Accurate --

2689 Mr. ISSA. You -- you testified that in December, you  
2690 became aware of "Fast and Furious."

2691 Secretary NAPOLITANO. I said after the death of Agent  
2692 Terry, yes.

2693 Mr. ISSA. Okay. And the details you became aware of  
2694 basically after our investigation began, putting those  
2695 details out.

2696 Secretary NAPOLITANO. I became aware, as I testified  
2697 here and in other committees, after the death of Agent Terry  
2698 and -- and knew some of the details and the name "Fast and  
2699 Furious" certainly no later than March.

2700 Mr. ISSA. Okay. You testified here today that you --  
2701 you haven't talked to Eric Holder about this.

2702 Secretary NAPOLITANO. That is correct.

2703 Mr. ISSA. And he testified here that he only knew about  
2704 it a few weeks before the interview he had in May here before  
2705 this committee and that he basically heard about it in the  
2706 newspaper.

2707 So you have two dead agents that worked for you -- one  
2708 north of the border, one south of the border -- and



2709 particularly in the case of Brian Terry, he was gunned down  
2710 with two weapons from "Fast and Furious."  
2711 It has been months, and you tell me that you are not --  
2712 you were not -- you were not doing it because of an IG  
2713 investigation. Well, let's go through a few questions here,  
2714 Madam Secretary.  
2715 Secretary NAPOLITANO. Well, wait -- wait just a minute.  
  
2716 Mr. ISSA. No, no. No, wait --  
2717 Secretary NAPOLITANO. Wait just -- wait just a minute.  
  
2718 Mr. ISSA. Let me finish my question.  
2719 Secretary NAPOLITANO. Wait just a minute.  
2720 Mr. ISSA. Madam Secretary, let me finish my question.  
2721 Secretary NAPOLITANO. Go ahead, but that insinuation is  
2722 not an accurate --  
2723 Mr. ISSA. Your -- Madam Secretary, you -- you -- we  
2724 could have the record read back. It would take a few minutes  
2725 but --  
2726 Secretary NAPOLITANO. No, it is the insinuation I am  
2727 objecting to. But go ahead and ask your question.  
2728 Mr. ISSA. Look, the -- you said because of an IG  
2729 investigation you were not having further investigation,  
2730 except you became aware of this in December. The IG  
2731 investigation began in February.

2732 For three months, you had a dead Border Patrol agent and  
2733 there was no IG investigation. What did you do between  
2734 December and February to find out about "Fast and Furious"  
2735 since a -- and we can give you the documents, happily. We  
2736 would get you the unredacted ones if we could. You get them  
2737 from other parts of government.

2738 You -- people on the ground knew those were "Fast and  
2739 Furious" weapons found at the scene within hours. So it  
2740 wasn't something that wasn't known. It was known at the  
2741 time.

2742 The question is, a Homeland Security employee is gunned  
2743 down, two weapons found at the scene part of "Fast and  
2744 Furious." Agents on the ground know that it is "Fast and  
2745 Furious" before Brian Terry was laid to rest.

2746 Three months go by, and now -- and today you told us  
2747 about an IG investigation. My question is, first of all, do  
2748 you have an IG and are you going to have your IG look into  
2749 what happens when you segund agents and they are aware of gun  
2750 running or, sorry, gun walking and do nothing? Is that  
2751 appropriate for you to have your IG investigate? Yes or no,  
2752 please.

2753 Secretary NAPOLITANO. Well, that -- I think I -- that  
2754 question merits a lengthier response and I am glad to give it  
2755 to you.

2756 Mr. ISSA. I will look -- I will look forward to that in

2757 writing. But back to the basic question. You knew about --  
2758 when Brian Terry was gunned down you knew, in fact, he was  
2759 gunned down.

2760 People on the ground knew that he was gunned down with  
2761 "Fast and Furious" weapons. Three months went by. What did  
2762 you do between -- between December and February to find out  
2763 the details about his loss of life, and aren't you outraged  
2764 here today that you -- if you were not informed that you were  
2765 not informed that weapons allowed to walk into drug dealers'  
2766 cartels' hands had killed one of your agents and during those  
2767 three months they kept it from you?

2768 Secretary NAPOLITANO. I think your insinuation that --

2769 Mr. ISSA. Ma'am, please answer the question. Don't --  
2770 don't -- please don't talk in terms of insinuation.

2771 Secretary NAPOLITANO. Mr. Chairman, may -- may I have  
2772 the opportunity to answer, please?

2773 Mr. GALLEGLY. Madam Secretary, I -- if you would try to  
2774 succinctly answer his question, and then if you would like to  
2775 elaborate the Chair will give you the time.

2776 Secretary NAPOLITANO. Well, what -- let me make a  
2777 suggestion, if I might, because he is -- the representative  
2778 is combining a lot of different things. If he would give me  
2779 his questions I will be happy to respond in writing.

2780 Mr. ISSA. Well, the one question I would like a

2781 succinct answer to is, you became aware that Brian Terry had  
2782 been gunned down. People on the ground at that time knew  
2783 they were "Fast and Furious" weapons. That was December.

2784       Between December and February of 2011, what did you do  
2785 to discover further the conditions around his death, one?  
2786 And then the second question, which was equally  
2787 straightforward, aren't you here today furious that the  
2788 Justice Department -- not ATF, the Justice Department --  
2789 withheld from you the knowledge of "Fast and Furious" during  
2790 this entire period of time, including one in which you had an  
2791 agent dead?

2792       Secretary NAPOLITANO. I think we all should be outraged  
2793 at the death of Agent Terry, and I think the first thing is  
2794 to recognize who actually killed him, and that our number-one  
2795 priority was to make sure the shooters were found -- some had  
2796 gone back into Mexico -- and that the FBI was in charge of  
2797 that investigation.

2798       Several days, as quickly as I could get to Arizona after  
2799 his death, I met with the FBI, their agents in charge. I met  
2800 with the AUSA who was going to conduct that investigation,  
2801 and that was my number-one concern -- that those responsible  
2802 for the shooting death of Agent Terry were brought to  
2803 justice, and that is what I was being kept apprised of.

2804       I will be -- I would be happy to answer your other  
2805 questions in writing.

2806 Mr. ISSA: Ma'am, we will be glad to follow up in  
2807 writing, and I thank the chairman for his indulgence.  
2808 Mr. GALLEGLY. The time of the gentleman has expired.  
2809 Ms. Sanchez?  
2810 Ms. SANCHEZ. Thank you.  
2811 Madam Secretary, we appreciate your presence today  
2812 before the committee, and as you can see, there is a broad  
2813 range of questions that people can ask.  
2814 Secretary NAPOLITANO. I have noticed that.  
2815 Ms. SANCHEZ. And you are asked to be an expert on -- on  
2816 each and every one of them and to know information at the tip  
2817 of your fingertips, which I know is not always possible.  
2818 Earlier in -- we appreciate the effort nonetheless --  
2819 earlier, you mentioned the Secure Communities program and it  
2820 is principally that program that I want to discuss with you.

2821 Studies by the Warren Institute showed that 93 percent  
2822 of those identified through Secure Communities were Latino as  
2823 of 2010, and given the scope of Secure Communities that  
2824 number seems a bit -- well, not a bit -- it seems alarmingly  
2825 high to me and hard to explain simply by saying, you know,  
2826 with sample size or mathematical variance.

2827 Many of my constituents, for example, look at that  
2828 number and conclude that the Secure Communities program may  
2829 be inadvertently encouraging local law enforcement officials

---

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**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON THE JUDICIARY  
2138 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6215  
(202) 225-3951  
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**MEMORANDUM**

TO: Members of the House Committee on the Judiciary

FROM: Lamar Smith, Chairman

RE: Oversight Hearing on the Department of Justice

DATE: Tuesday, June 5, 2012

On Thursday, December 8, 2011, the Committee on the Judiciary held an oversight hearing on the Department of Justice. To ensure stenographer accuracy, please find a **verbatim** transcript of the hearing attached for your review. The Judiciary Committee's Rule III (e) pertaining to the printing of transcripts is as follows:

*The transcripts...shall be published in **verbatim form**, with the material requested for the record...as appropriate. Any requests to correct any errors, other than transcription, shall be appended to the record, and the appropriate place where the change is requested will be footnoted.*

Please return the transcript edits to the Committee by Tuesday, June 19, 2012, to the attention of: Kelsey Deterding, at 2138 Rayburn House Office Building, Washington, D.C., 20515. If you have any further questions or concerns, please contact Kelsey Deterding at (202) 225-3951.

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1 RPTS DEAN  
2 DCMN HERZFELD

3 OVERSIGHT HEARING ON THE UNITED STATES  
4 DEPARTMENT OF JUSTICE  
5 Thursday, December 8, 2011  
6 House of Representatives,  
7 Committee on the Judiciary,  
8 Washington, D.C.

9 The committee met, pursuant to call, at 9:37 a.m., in  
10 Room 2141, Rayburn House Office Building, Hon. Lamar Smith  
11 [chairman of the committee] presiding.

12 Present: Representatives Smith, Sensenbrenner, Coble,  
13 Gallegly, Goodlatte, Lungren, Chabot, Issa, Pence, King,  
14 Franks, Gohmert, Jordan, Poe, Chaffetz, Griffin, Marino,  
15 Gowdy, Ross, Adams, Quayle, Amodei, Conyers, Berman, Scott,  
16 Watt, Lofgren, Jackson Lee, Waters, Cohen, Johnson,  
17 Pierluisi, Quigley, Chu, Deutch, Sanchez and Polis.

18 Also present: Representatives Schiff and Farenthold.

19 Staff Present: Crystal Jezierski, Chief Oversight  
20 Hearing; Travis Norton, Senior Counsel and Parliamentarian;

202 Chairman SMITH. The gentleman from California, chairman  
203 of the Oversight and Government Reform Committee, is  
204 recognized for an opening statement.

205 Mr. ISSA. Thank you, Mr. Chairman. And I would first  
206 like to ask unanimous consent that the following document be  
207 placed in the record. December 7th, an article by Sharyl  
208 Attkisson entitled "Documents: ATF Used Fast and Furious to  
209 Make Case for Gun Regulations."

210 Chairman SMITH. Without objection, they will be made a  
211 part of the record.

212 [The information follows:]

213 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*



214 Mr. ISSA. Thank you, Mr. Chairman. I thank you for  
215 holding this hearing. It is deja vu all over again. We are  
216 beginning the process of getting to the bottom, to the truth  
217 of Fast and Furious.

218 I take exception to my colleague on the other side of  
219 the aisle Mr. Conyers. What is too important is the Second  
220 Amendment. The idea that regulations without any approval of  
221 Congress had been added to create databases in the Southern  
222 Southwestern States, including California, Arizona,  
223 Mexico--New Mexico--Texas and New Mexico, clearly shows, in  
224 fact, this administration is more interested in building  
225 databases, more interested in talking about gun control than  
226 actually controlling the drugs and guns that they had control  
227 over. Whether it is money laundering, or, in fact, it is the  
228 flow of guns knowingly, just one individual was allowed to  
229 buy, under the auspices of the Justice Department, 700  
230 weapons, knowing exactly who they were going to before they  
231 ever went.

232 Our discovery, with the help of Senator Grassley, has  
233 shown that this was not an accident, and that this project  
234 was failed and flawed from the beginning. It is not just  
235 ATF, it is not just DEA; in fact, it includes the Department  
236 of Homeland Security in a task force that obviously did not  
237 respect the safeguards of the American people.

238 Brian Terry is dead today, in my opinion, because of

239 this failed program. But even today we will not hear Justice  
240 taking responsibility. They will instead talk about the two  
241 guns that were recovered. Yes, they were from Fast and  
242 Furious, but ballistics are inconclusive. And yet this  
243 Justice Department is not looking for a third weapon. They  
244 are not looking for who killed Brian Terry while they try to  
245 have the plausible deniability that Fast and Furious may not  
246 have been responsible. That is reprehensible to the family  
247 suffering under Brian Terry's needless murder.

248 Mr. Chairman, Fast and Furious began in November 2009.  
249 It was a new operation building on a failed operation under  
250 the previous administration. The difference in the previous  
251 administration is there was coordination with the Mexican  
252 Government. They made a real effort under Wide Receiver to  
253 pass off a small amount of weapons and track them. This  
254 program, just the opposite; even knowing the drug cartels are  
255 going to receive them, they simply allowed them to go to the  
256 stash house.

257 Mr. Attorney General, today I hope you will not point  
258 fingers and say that somehow this is not organic. There is  
259 nothing more organic than a law enforcement officer being  
260 gunned down because of a failure to protect within the  
261 Department of Justice. There is nothing more organic in  
262 Congress's responsibility than, in fact, following up on  
263 Congress being lied to. My committee just next door was

264 systematic lied to by your own representatives. There is a  
265 highly likelihood an individual was deliberately duped, but  
266 he was duped by people who still work for you today, still  
267 work for you today.

268 The President has said he has full confidence in this  
269 Attorney General. I have no confidence in a President who  
270 has full confidence in an Attorney General who has, in fact,  
271 not terminated or dealt with the individuals, including key  
272 lieutenants, who from the very beginning had some knowledge  
273 and long before Brian Terry was gunned down knew enough to  
274 stop this program.

275 There has been recrimination. There has been an attempt  
276 to find scapegoats. Many of the people who have been pointed  
277 to do share in the blame. But, Mr. Attorney General, the  
278 blame must go to your desk, and you must today take the real  
279 responsibility. Why haven't you terminated the many people  
280 involved? Why is it that we are still hearing about  
281 inconsistencies that don't even take the correct  
282 responsibility for Border Patrol agent Brian Terry's death?  
283 Those are the things we want to hear today.

284 Mr. Attorney General, I respect the fact that you said  
285 in the Senate that you gave truthful testimony, but I would  
286 like to hear what--when a few days becomes a few weeks, or a  
287 few weeks becomes a few months, are we to have the confidence  
288 that the President says he has in you and the many people up

289 and down the chain of command at Justice who saw this  
290 program, this operation and let it happen? And the many  
291 people who called your legislative affairs representative,  
292 who is sitting right behind you, caused him to bring false  
293 testimony to the committee. It is unheard of for  
294 testimony--or for letters or testimony to be taken back.  
295 They have had to be taken back because of people who still  
296 worked for Justice.

297 Mr. Chairman, I thank you for your indulgence, and I  
298 appreciate the opportunity to speak here and would ask that  
299 Blake Farenthold, a member of my committee who has been  
300 intimately involved in the investigation, also be allowed to  
301 sit on the dais under the same terms as Mr. Schiff.

302 Mr. CONYERS. Is he a Member of Congress?

303 Mr. ISSA. He is a Member of Congress.

304 Chairman SMITH. Mr. Issa, thank you.

305 Mr. ISSA. He is a freshman from Texas. He is impacted  
306 by these gun control regulations. He is an attorney.

307 Chairman SMITH. I understand there is no room right  
308 now, but we will consider that request in just a minute. As  
309 much as I would like to have a Texas colleague up at the  
310 podium--

311 Mr. ISSA. You got a few, but he is a good one.

312 Chairman SMITH. He is not a former Member of the  
313 Judiciary Committee, though. We certainly appreciate his

314 expertise on this subject. So let us wait until we have  
315 room, and we will take it up at that point.

316 Mr. ISSA. I thank the gentleman.

317 Chairman SMITH. The gentleman from Virginia Mr. Scott,  
318 the ranking member of the Crime Subcommittee, is recognized  
319 for an opening statement.

320 Mr. SCOTT. Thank you, Mr. Chairman. And I join my  
321 colleagues in welcoming the Attorney General this morning. I  
322 understand that the invitation to the Attorney General to  
323 appear this morning specifically referenced gun trafficking  
324 in the southwest border, so today we have an opportunity to  
325 discuss with him the positive steps we must take to protect  
326 our citizens from illegal firearms.

327 I am heartened that this Attorney General recognizes  
328 that the smartest and most effective way to protect ourselves  
329 from crime is to prevent it from occurring in the first  
330 place. With respect to preventing firearm violence, there  
331 are steps that we can take to reduce the toll of the injured  
332 and murdered. And there are steps that we must take in order  
333 to enhance the ability of law enforcement to effectively  
334 investigate gun crimes that have already occurred.

335 I note, as it is often said around here, that the best  
336 strategy to use when you are in a hole is to stop digging.  
337 Unfortunately this committee approved and the House passed a  
338 dangerous bill that would override the laws of almost every

395 Chairman SMITH. We are pleased to welcome today's  
396 witness, United States Attorney General Eric H. Holder, Jr.  
397 On February 3rd, 2009, Attorney General Holder was sworn in  
398 as the 82nd Attorney General of the United States.

399 Attorney General Holder has enjoyed a long and  
400 distinguished career in public service. First joining the  
401 Department through the Attorney General's Honors Program in  
402 1976, he became one the Department's first attorneys to serve  
403 in the newly formed Public Integrity Section. He went on to  
404 serve as a judge of the Superior Court of the District of  
405 Columbia and a U.S. attorney for the District of Columbia.

406 In 1997, Mr. Holder was named by President Clinton to be  
407 the Deputy Attorney General. Prior to becoming Attorney  
408 General, Mr. Holder was a litigation partner at Covington &  
409 Burling, LLP, in Washington, D.C.

410 Mr. Holder, a native of New York City, is a graduate of  
411 Columbia University and Columbia Law School.

412 Again, we welcome you and look forward to your  
413 testimony.

414 Mr. ISSA. Mr. Chairman? Mr. Chairman? I would move  
415 that the witness be sworn.

416 Chairman SMITH. I am going to ask that the gentleman  
417 withdraw that for two reasons. First of all, the Attorney  
418 General did receive a letter from the committee reminding him  
419 of the need and, in effect, that he is testifying under oath.

420 And two, we don't need to go through that necessarily  
421 because that is assumed by anybody who does testify before  
422 the committee.

423 Mr. ISSA. Point of inquiry, Mr. Chairman. Isn't it  
424 true that a false statement to Congress bears a different  
425 criminal violation than a sworn statement?

426 Chairman SMITH. I believe the answer to that is yes.

427 Mr. ISSA. Then I would once again ask, since this  
428 committee has at times sworn witnesses, as have all the  
429 committees, that in light of--

430 Chairman SMITH. If the gentleman would yield.

431 Mr. ISSA. Of course.

432 Chairman SMITH. I misunderstood the question, and the  
433 answer was no. So it is deemed as if he is under oath right  
434 now, any witness.

435 Mr. ISSA. So he is exactly the same as if he swears  
436 under our rules.

437 Chairman SMITH. That is correct.

438 Mr. ISSA. Then I withdraw.

439 Chairman SMITH. Okay. I thank the gentleman.

440 If the Attorney General will proceed.

1387 people that are repeatedly received as many as three and four  
1388 mammograms in 1 week. I see my time has expired. Yield  
1389 back.

1390 Attorney General HOLDER. I would just say you  
1391 identified something that really has to be a priority for the  
1392 Justice Department. And I hope that Congress will support  
1393 our funding request and HHS's funding request. The money  
1394 that we spend in these enforcement efforts, we save huge  
1395 amounts of money down the road by just investing relatively  
1396 small amounts of money in prevention and enforcement. It  
1397 makes the programs that much more financially stable.

1398 Mr. GALLEGLY. I look forward to seeing the data.

1399 And I yield back, Mr. Chairman.

1400 Chairman SMITH. Thank you, Mr. Gallegly.

1401 Mr. ISSA. Mr. Chairman?

1402 Chairman SMITH. For what purpose does the gentleman  
1403 from California seek recognition?

1404 Mr. ISSA. Thank you, Mr. Chairman.

1405 I would like to renew my request that Mr. Farenthold be  
1406 able to sit on the dais. Apparently, Mr. Schiff has  
1407 left--Mr. Schiff is there, but we have a number of seats that  
1408 are vacant on this side. And since he won't be asking  
1409 questions, any position would normally be fine.

1410 Chairman SMITH. Mr. Issa, I talked to the gentleman  
1411 from Texas, and actually, I was just getting ready to



1412 recognize him. And he has requested, and I want to recognize  
1413 the gentleman from Texas, my colleague, Blake Farenthold, who  
1414 is an active member of the Oversight and Government Reform  
1415 Committee. And he is sitting on the front row.

1416 Blake, give us a wave.

1417 And appreciate his being here. And he is, I think,  
1418 happy to observe the committee from where he is sitting.

1419 Mr. ISSA. He looks better on the dais, though, Mr.  
1420 Chairman.

1421 Chairman SMITH. Thank you.

1422 Mr. ISSA. I thank the gentleman.

1423 Chairman SMITH. Okay.

1424 The gentlewoman from Texas, Ms. Jackson Lee, is  
1425 recognized for her questions.

1426 Ms. JACKSON LEE. Thank you very much, Mr. Chairman, and  
1427 to the ranking member, for the opportunity.

1428 Mr. Attorney General, let me first of all thank you for  
1429 your service and thank those who are sitting so prominently  
1430 behind you. I work with chiefs of police as a former judge  
1431 in my community. I think my former mayor, Mayor Lee P. Brown  
1432 was a drug czar, but he was also the head of the Major Chiefs  
1433 Association. He had the uncanny ability of being mayor and  
1434 chiefs of police in New York, Houston, and Atlanta. And I  
1435 notice our good friend that was formerly the police chief  
1436 here in the city--the District of Columbia has now moved onto

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2005 [12:25 p.m.]

2006 Attorney General HOLDER. I mean, it certainly has a  
2007 negative impact on the organization. There are certain  
2008 groups that I think have actively opposed nominees, both put  
2009 up by President Bush as well as President Obama, who I think  
2010 were amply qualified to lead the organization and who, for  
2011 whatever reason, were not confirmed.

2012 Chairman SMITH. Thank you, Mr. Johnson.

2013 The gentleman from California, Mr. Issa, is recognized.

2014 Mr. ISSA. Thank you, Mr. Chairman.

2015 And I would be remiss if I didn't take exception to  
2016 calling the NRA members, the millions of them, radicals. I  
2017 think that is an offensive statement beneath contempt in this  
2018 committee.

2019 Mr. Attorney General, will you agree to come before the  
2020 oversight committee without the need for a subpoena in the  
2021 January time frame?

2022 Mr. JOHNSON. Will the gentleman yield?

2023 Mr. ISSA. I will not.

2024 Mr. Attorney General, will you agree to come before the  
2025 committee I chair, the oversight committee, the one you  
2026 produced these documents to, in the January time frame  
2027 without the need for a subpoena?

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2028 Attorney General HOLDER. I will consider it, but I will  
2029 note I have testified on four occasions with regard to this  
2030 matter. I have appeared before you on at least two  
2031 occasions.

2032 Mr. ISSA. You have appeared before this committee.  
2033 Your organization pushed back on the request for a joint  
2034 hearing here today. Not will you consider it, but do I need  
2035 to serve a subpoena on yourself, and Lanny Breuer, and the  
2036 other people under direct investigation of my committee, or  
2037 will you agree to come voluntarily in the January time frame  
2038 before the committee?

2039 Attorney General HOLDER. I will consider any request  
2040 that you make.

2041 Mr. ISSA. I thank you, Mr. Attorney General.

2042 I now would go to the questions of emails. This is the  
2043 document you refer to. Most of these documents, 5,000 or so,  
2044 are, in fact, emails. Mr. Attorney General, I have a  
2045 question for you. Not one of these emails, in fact, is  
2046 yours. Aren't you an a prolific emailer?

2047 Attorney General HOLDER. No.

2048 Mr. ISSA. Don't you email?

2049 Attorney General HOLDER. Yes.

2050 Mr. ISSA. Do you have a personal email account and as  
2051 well as an Attorney General's email account?

2052 Attorney General HOLDER. I have an email account at the

2053 Justice Department, yes.

2054 Mr. ISSA. Do you have a personal email?

2055 Attorney General HOLDER. Yes.

2056 Mr. ISSA. Do you regularly email to Lanny Breuer, your  
2057 former partner and your head of the Criminal Division?

2058 Attorney General HOLDER. No, I wouldn't say regularly.  
2059 There are only a limited number of people who know my email  
2060 address in the Justice Department.

2061 Mr. ISSA. Let me cut to the chase. Don't you think it  
2062 is a little conspicuous in his absence that there is not one  
2063 email to or from you related to Fast and Furious in any way,  
2064 shape or form?

2065 Attorney General HOLDER. There are a variety of reasons  
2066 why the emails that we have shared with you are there. We  
2067 have shared in an unprecedented way email information that no  
2068 Justice Department, no Attorney General has ever authorized  
2069 before. You have deliberative information contained, I  
2070 guess, in--

2071 Mr. ISSA. But isn't it true that executive privilege  
2072 does not flow to the Attorney General, only to the office of  
2073 the President? So deliberative process within your  
2074 Department running law enforcement, in fact, doesn't serve  
2075 executive privilege. As the chairman said going on, you  
2076 haven't cited any reason that these would not have been  
2077 delivered.

2078 Attorney General HOLDER. In making production  
2079 determinations, we have followed what Attorneys General in  
2080 the past have always used in applicable standards, and these  
2081 are Republican as well as Democratic Attorneys General. And  
2082 the information that we have provided to you has been  
2083 responsive, has been, I think, fulsome, and also  
2084 unprecedented.

2085 Mr. ISSA. Well, unprecedented would be an Attorney  
2086 General who knew nothing about something where his own DAG,  
2087 now his present chief of staff, was intimately familiar.

2088 Gary Grindler was well aware, according to documents  
2089 provided of Fast and Furious, on March 12th, 2010. Are you  
2090 aware of that, that he with an aware of Fast and Furious and  
2091 what its procedures were on March of 2010?

2092 Attorney General HOLDER. It was certainly brought to  
2093 his attention as a part of a regular briefing he got from  
2094 ATF, but he did not hear during that briefing anything about  
2095 the tactics.

2096 Mr. ISSA. Really? Is that why in his own handwriting  
2097 when he talks about going to stash houses, he clearly  
2098 understood in a document you have delivered--he clearly  
2099 understood in his own handwriting what the tactic was.

2100 Attorney General HOLDER. No, that is not--

2101 Mr. ISSA. I am sorry, but I am going to ask you a  
2102 different question--

2103 Attorney General HOLDER. Well--  
2104 Mr. ISSA. Because he understood. No, no.  
2105 Attorney General HOLDER. Could I answer that question?  
2106 Mr. ISSA. You have answered it less than truthfully.  
2107 Ms. JACKSON LEE. Could the questioner allow the witness  
2108 to answer the question?  
2109 Mr. ISSA. Madam, this is my time. I am not yielding.  
2110 Ms. JACKSON LEE. I am not asking you to yield.  
2111 Chairman SMITH. The gentleman from California Mr. Issa  
2112 has the time.  
2113 Ms. JACKSON LEE. I would appreciate it if you would  
2114 allow the witness to answer the question.  
2115 Chairman SMITH. The gentleman from California Mr. Issa  
2116 has the time.  
2117 Ms. JACKSON LEE. I understand that.  
2118 Chairman SMITH. The gentlewoman from Texas--  
2119 Ms. JACKSON LEE. I would appreciate it if the witness  
2120 could be allowed to answer the question, Mr. Chairman.  
2121 Chairman SMITH. The gentlewoman from Texas has not been  
2122 recognized.  
2123 Ms. JACKSON LEE. I ask for a sense of protocol here.  
2124 Chairman SMITH. The gentleman from California has the  
2125 time.  
2126 Mr. ISSA. Mr. Attorney General, as I was saying, Mr.  
2127 Grindler--you can't answer on his behalf, and so it makes no

2128 sense to. This is evidence that was delivered.

2129 Do you regularly talk to your chief of staff? And do  
2130 you regularly receive oral briefings from Mr. Grindler? And,  
2131 in fact, when you made the decision to have him be the DAG  
2132 and then the chief of staff, wouldn't it be reasonable to  
2133 assume that if he knew on March 10th, as this document  
2134 indicates, that you would also know, March 10th, March of  
2135 2010, March 12 of 2010?

2136 Attorney General HOLDER. Well, first, he was not  
2137 intimately--made intimately familiar with the program as a  
2138 result of that briefing. The briefing that he received from  
2139 then-Acting Director Nelson did not go into the tactics.  
2140 Nelson indicated--

2141 Mr. ISSA. Of course it didn't go into the tactics.

2142 Mr. Chairman, I would ask that I have the time restored  
2143 that I lost with the lady's interruption.

2144 Chairman SMITH. The gentleman is recognized for an  
2145 additional minute and also to give the opportunity to the  
2146 Attorney General to respond to the question.

2147 Mr. ISSA. I certainly look forward to that.

2148 Mr. Attorney General--

2149 Attorney General HOLDER. I was in the middle of an  
2150 answer, I think.

2151 Mr. ISSA. You know, you are in the middle of  
2152 filibustering, so I will let you answer. I have two more

2153 things to quickly go over, and then you can have all the time  
2154 the chairman will give you.

2155 Does it surprise you that these boxes, five boxes,  
2156 represent just what one gun dealer gave us voluntarily,  
2157 while, in fact, this seems to be all the information you have  
2158 responsive to our subpoena; does it cause you to think that,  
2159 in fact, we believe you were withholding documents? We  
2160 believe that, in fact, there is more production. So my final  
2161 question--and you can answer all of them for as long as the  
2162 chairman wants--is do you today have documents responsive to  
2163 the lawful request of the oversight committee that have not  
2164 yet been granted?

2165 Attorney General HOLDER. All right. Well, Let me go  
2166 back to my first answer that I was not--

2167 Mr. ISSA. Well, mine is pretty easy. Mine is a yes or  
2168 no, and then the others you are going to go on for a while.

2169 Attorney General HOLDER. I will get to that.

2170 - Mr. ISSA. Would you please get to it first?

2171 Attorney General HOLDER. With regard to Gary Grindler,  
2172 he was not provided with a detailed analysis of Fast and  
2173 Furious. He was given information about--

2174 Mr. ISSA. Mr. Chairman, I asked earlier that the  
2175 Attorney General be placed under oath. I was denied that.  
2176 But what I will make the point is that it is not productive  
2177 for anyone to come before this committee and tell us what



2178 somebody else didn't know. That is exactly how the  
2179 legislative liaison behind the Attorney General Mr. Weich  
2180 came and gave false testimony to my committee, false because  
2181 people who are still working for the Attorney General  
2182 knowingly gave him misleading information in addition to the  
2183 U.S. attorney, and no action has been taken.

2184 Ms. JACKSON LEE. Is the gentleman's time extended, or  
2185 is there regular order?

2186 Mr. ISSA. I might note for the record that the IG--

2187 Ms. JACKSON LEE. I have a parliamentary inquiry, Mr.  
2188 Chairman.

2189 Chairman SMITH. The gentleman--

2190 Ms. JACKSON LEE. I have a parliamentary inquiry, Mr.  
2191 Chairman.

2192 Chairman SMITH. The gentleman from California continues  
2193 to be recognized. And let me make a point in the record that  
2194 he is not over time near as much as the gentlewoman from  
2195 Texas was a few minutes ago.

2196 Ms. JACKSON LEE. I thank you for your courtesies, but I  
2197 would like to understand whether the gentleman has extended  
2198 time.

2199 Chairman SMITH. And he was recognized for that purpose,  
2200 as the Attorney General will be recognized for the purpose of  
2201 responding--

2202 Ms. JACKSON LEE. And will he allow the Attorney General

2203 to answer the question?

2204 Mr. ISSA. I look forward to it.

2205 Ms. JACKSON LEE. Thank you very much.

2206 Mr. ISSA. Mr. Chairman, I use only 5 more seconds.

2207 The fact is the inspector general has released

2208 information that was secret to the object of our

2209 investigation with the knowledge of the Justice Department.

2210 She is not currently, in our opinion, qualified to

2211 investigate and, in fact, has overstepped the line by

2212 delivering secret tapes to the object of our investigation

2213 while the Justice Department was slow-rolling that discovery.

2214 And this is the ATF agent that was intimately involved with

2215 this.

2216 So I want you to understand I have treated this Attorney

2217 General as a hostile witness because ultimately when he comes

2218 before us saying he is going to clean house, no house has

2219 been cleaned. And I would love to hear his answers.

2220 Chairman SMITH. The gentleman's time has expired. The

2221 Attorney General will be given the opportunity to respond.

2222 Attorney General HOLDER. I will try again. Gary

2223 Grindler was not provided with information as you have

2224 described, intimate information, about Operation Fast and

2225 Furious. He was not told about the tactics that were used

2226 there. The person who did the briefing was the acting head

2227 of ATF, and he has, I understand, testified before your

2228 committee that he did not, in fact, share that tactical  
2229 information with Mr. Grindler.

2230 I note that Mr. Nelson also briefed you, Congressman,  
2231 about a month or so later or before, I forget which, and he  
2232 said at that time he did not share with you information about  
2233 those tactics. So the notion for your contention that Gary  
2234 Grindler was familiar with this or intimately familiar with  
2235 this is inconsistent with what I think the facts are.

2236 And you take me to task for trying to assume what I know  
2237 Grindler to have said. You have not interviewed him as well,  
2238 and nevertheless you feel comfortable doing the same thing.

2239 With regard to the documents that you talked about, we  
2240 have not withheld any documents that are responsive to the  
2241 matters that you have--that you have asked us about. We have  
2242 withheld information that pertains to ongoing investigations;  
2243 that is the thing that might have limited our document  
2244 production. But again, what we produced on February the 4th  
2245 is unlike anything that any committee in any part of this  
2246 Congress, Senate or House, has ever seen before. And I want  
2247 to make clear, as we said in that letter, that is not  
2248 precedential, not holding, and I don't think any future  
2249 Attorney General should be expected to do that, but given the  
2250 nature of what we did in withdrawing that February 4th  
2251 letter, it seemed to me to make sense to make an exception to  
2252 what has been a long-recognized rule.

2253 Mr. ISSA. Mr. Chairman, could the AG be allowed to  
2254 fully answer, since it was pursuant to a subpoena whether or  
2255 not his answer about did he provide--  
2256 Chairman SMITH. The gentleman's time has expired.  
2257 Mr. ISSA. It means he was withholding or not  
2258 withholding. He did not answer that.  
2259 Ms. WATERS. Mr. Chairman, that requires unanimous  
2260 consent. I withhold--  
2261 Chairman SMITH. The gentlewoman has now been  
2262 recognized.  
2263 I was asking the Attorney General a question. Does the  
2264 Attorney General wish to respond any further to the  
2265 questions?  
2266 Attorney General HOLDER. I am fine.  
2267 Chairman SMITH. The gentleman from Virginia Mr. Scott  
2268 is recognized for his question.  
2269 Mr. SCOTT. Thank you, Mr. Chairman.  
2270 General Holder, a lot has been made about the letter  
2271 written by your Assistant Attorney General Mr. Ron Weich.  
2272 Nobody expected him or believes that he has any personal  
2273 knowledge of the information, but expected him to get the  
2274 information and relay it. The information has, I think, been  
2275 subsequently determined to be false. Do you know where he  
2276 got the false information?  
2277 Attorney General HOLDER. The information that was

3393 Chairman SMITH. The gentleman's time has expired.  
3394 Does the gentleman want to respond to the last question?  
3395 Attorney General HOLDER. I just was trying to say that  
3396 I have made personnel changes with regard to the agencies  
3397 that have been involved. And these are initial  
3398 determinations that I have made. It is not all that I am  
3399 possibly going to do. There is an impatience here, and in  
3400 some ways, I understand it, but the reality is that you have  
3401 to do these things on the basis of evidence, on the basis of  
3402 findings that are factually grounded. And when I am in that  
3403 position, I will take the appropriate actions. But I want to  
3404 assure you and the American people that people will be held  
3405 accountable for the mistakes that were made in Fast and  
3406 Furious.  
3407 Mr. ISSA. Mr. Chairman, point of inquiry.  
3408 Chairman SMITH. Thank you, Mr. Chaffetz.  
3409 Who seeks to be recognized?  
3410 The gentleman from California.  
3411 Mr. ISSA. A point of inquiry. Do political appointees  
3412 of the Presidents and the Attorney General serve at the  
3413 pleasure of the President or the Attorney General, or do they  
3414 need to have to be fired for cause?  
3415 Chairman SMITH. That is not actually a parliamentary  
3416 inquiry--  
3417 Mr. ISSA. But I am sure inquiring.

4684 Breuer has testified to, which is that he did not think that  
4685 he reviewed the letter--reviewed the drafts before they went  
4686 out. That is what he testified to.  
4687 Mr. GOWDY. But you agree with me--  
4688 Mr. ISSA. Mr. Chairman.  
4689 Mr. PIERLUISI. Regular order, Mr. Chairman. The  
4690 witness should be allowed to finish.  
4691 Mr. ISSA. Would the gentleman from Nevada be willing to  
4692 further yield?  
4693 Chairman SMITH. The gentleman from South Carolina has  
4694 the time.  
4695 Mr. GOWDY. I will be happy to yield to the gentleman  
4696 from California.  
4697 Mr. ISSA. I thank the gentleman. Mr. Attorney General,  
4698 if there were seven wiretaps and they were all approved under  
4699 the criminal justice committee, the criminal division,  
4700 certainly we would hope that between now and the time you  
4701 next appear, you would read them as would Lanny Breuer in  
4702 detail since he approved them through his minions.  
4703 Attorney General HOLDER. Well--  
4704 Mr. ISSA. Let me just go through one thing that I have  
4705 to ask you, yesterday--  
4706 Attorney General HOLDER. Understand something--  
4707 Mr. ISSA. --we became aware, Mr. Attorney General--  
4708 Attorney General HOLDER. Please.

4709 Mr. PIERLUISI. Mr. Chairman, regular order. The time  
4710 has expired.  
4711 Mr. ISSA. Mr. Attorney General, I didn't ask you a  
4712 question, I simply said I would like you to be aware.  
4713 Chairman SMITH. The gentleman from California has the  
4714 time. The gentleman from California is granted an extra one  
4715 minute to allow the AG to respond.  
4716 Mr. ISSA. There was no question. Here is the  
4717 question--  
4718 Attorney General HOLDER. No--  
4719 Mr. ISSA. Yesterday, Mr. Attorney General, we became  
4720 aware of the email between--  
4721 Mr. PIERLUISI. Mr. Chairman.  
4722 Mr. ISSA. --Lanny Breuer and his deputy Jason Weinstein,  
4723 about Fast and Furious in March time frame that they exist.  
4724 Some of these, actually all of these, have been withheld from  
4725 the committee. Will you agree to turn over those  
4726 communications in the March time frame between Lanny Breuer  
4727 and his deputy, Jason Weinstein?  
4728 Attorney General HOLDER. March of what year?  
4729 Mr. ISSA. 2011.  
4730 Attorney General HOLDER. As I have indicated we are not  
4731 going to be turning over materials after February--  
4732 Mr. ISSA. Are you aware that you are, in fact, by doing  
4733 so, in the fact that we already issued from the Oversight

4734 Committee a subpoena, you are standing in contempt of  
4735 Congress unless you have a valid reason that you express it,  
4736 that you provide logs which you refused to provide for the  
4737 other information, otherwise you will leave the committee no  
4738 choice but to seek contempt for your failure to deliver, or  
4739 to cite a constitutional exemption.

4740 Chairman SMITH. The gentleman's time has expired, the  
4741 Attorney General will be allowed to respond.

4742 Attorney General HOLDER. We will respond in a way that  
4743 is consistent with the way in which the Justice Department  
4744 has always responded to those kinds of--

4745 Mr. ISSA. That is not the question, Mr. Attorney  
4746 General.

4747 Attorney General HOLDER. Can I--

4748 Mr. PIERLUISI. Regular order, Mr. Chairman.

4749 Chairman SMITH. Please proceed, Mr. Attorney General.

4750 Attorney General HOLDER. We will respond in a way that  
4751 other Attorneys General have, other justices.

4752 Mr. ISSA. John Mitchell responded that way too.

4753 Mr. PIERLUISI. Regular order, Mr. Chairman.

4754 Attorney General HOLDER. Was that called for? Mr.  
4755 Chairman?

4756 Mr. PIERLUISI. He should be allowed to--

4757 Chairman SMITH. The gentleman from South Carolina has  
4758 the time, but I am going allow the Attorney General. Do you



4759 have any further response to that question?

4760 Mr. ISSA. To the question, Mr. Chairman, about whether  
4761 or not he understood that it was in fact an act of contempt  
4762 unless they recited a constitutional exemption and still had  
4763 a responsibility to provide us logs, both of which they are  
4764 refusing to do in testimony here today.

4765 Chairman SMITH. The gentleman from South Carolina's  
4766 time has again expired. Do you have a final response, Mr.  
4767 Attorney General?

4768 Attorney General HOLDER. Ms. Adams asked me  
4769 about--Congresswoman Adams asked me about political points.  
4770 The reference to John Mitchell, let's think about that, think  
4771 about that, at some point--as they said in the McCarthy  
4772 hearings at some point, have you no shame? But in any case,  
4773 I will say that with regard to--we have made our point clear  
4774 how we will respond. With regard to the question of wiretap  
4775 information, Mr. Gowdy knows there is only so much I will be  
4776 able to say about wiretap information. So reading it should  
4777 not lead anybody to believe that I am going to be free,  
4778 unless I--you want to get me in real trouble with a Federal  
4779 judge about what's contained in a wiretapping.

4780 Ms. ADAMS. Mr. Chair.

4781 Chairman SMITH. I thank you, Mr. Attorney General. Mr.  
4782 Attorney General, thank you for your testimony today.  
4783 Without objection, all members will have 5 legislative days

4784 to submit additional written questions for the witness or  
4785 additional materials for the record. I ask unanimous consent  
4786 that the gentleman from Colorado, Mr. Polis, be assigned to  
4787 the Subcommittee on Courts, Commercial and Administrative Law  
4788 and the Subcommittee on Crime, Terrorism and Homeland  
4789 Security. Is there an objection? If not, so ordered. The  
4790 hearing is adjourned.

4791 [Whereupon, at 4:05 p.m., the committee was adjourned.]

**Material submitted by the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Member, Committee on the Judiciary**

Why Republicans should stop their push against Holder | theGrio

<http://thegrio.com/2012/06/07/why-republicans-should-stop-their-pu...>

### Why Republicans should stop their push against Holder

Opinion

by Wade Henderson | June 7, 2012 at 9:54 AM



House Speaker John Boehner and Majority Leader Eric Cantor are considering an extreme measure in a bringup vote to hold Attorney General Eric Holder in contempt of Congress.

This course of action is being spearheaded by Congressman Darrell Issa (R-Calif.), chair of the committee of jurisdiction over investigations of federal government operations. Using the cover of an investigation of an anti-gun trafficking tactic known as "gunwalking" (the program is informally known as "Operation Fast and Furious") that occurred under the Bush and Obama administrations, Issa and House Republican leaders John Boehner and Eric Cantor are now threatening to abuse their roles in House leadership to discredit the attorney general.

Partisanship tends to be at play when contempt citations come up. When the House is run by one party and the president is from another, it is not an uncommon discussion.

What is uncommon is the extreme nature of this witch hunt against Holder. A thorough review of these anti-trafficking activities is a legitimate exercise of congressional authority—but a contempt citation is an extreme tactic that should be reserved for extreme circumstances.

The attorney general's activities simply do not meet that threshold.

The last two individuals held in contempt of Congress were two White House aides in the Bush administration, Harriet Miers and Josh Bolten, who cited executive privilege when they opted not to comply with subpoenas. Miers failed to appear for a congressional hearing and Bolten refused to submit any of the requested documents.

By contrast, Attorney General Holder has testified in front of Congress seven times already—and is expected to do so again this week. He has complied with Chairman Issa's investigation, submitted more than 7,000 pages of documents to the committee, and made several senior Department of Justice officials available for testimony, interviews, and briefings.

These are not the actions of a public official in contempt of Congress.

To the contrary, Eric Holder has proven to be one of the administration's champions for Congress and the American people. Attorney General Holder has zealously defended the federal role in immigration from state overreach, ensured that the Voting Rights Act and other federal voting rights laws are followed in federal elections, and worked with state attorneys general from all fifty states, representing both Republicans and Democrats, to protect homeowners who were victims of predatory lending.

To be fair, the attorney general has denied requests for many documents sought by Issa that would compromise ongoing federal investigations into gun traffickers. But this not a broadly interpreted citation

of executive privileges that could be used to obfuscate any or all requests – as in the cases of Miers and Belton. This is a legitimate denial of sensitive documents pertaining to the most violent criminals in the hemisphere. The difference is significant.

The House of Representatives has not cited a cabinet-level official for contempt in modern times and using this tactic would distract the entire Justice Department from its core mission of enforcing our nation's laws.

The attempt to cite Holder for contempt is not about justice, oversight, or government reform. It's intended to create a stain on the Office of the Attorney General.

This is an unprecedented detour from the real business of the House and an abuse of congressional authority. I hope that House Republican leaders reconsider their position.

*Wade Henderson is the president and chief executive officer of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national civil rights and human rights organizations.*

**Post-Hearing Questions submitted to the Honorable Eric H. Holder, Jr.,  
Attorney General, U.S. Department of Justice\***



June 27, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
Washington, D.C. 20530

Dear Attorney General Holder,

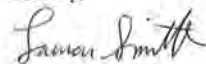
The Judiciary Committee held a hearing on "Oversight of the Department of Justice" on Thursday, June 7, 2012 at 9:30 a.m. in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Committee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Kelsey Deterding at [kelsey.deterding@mail.house.gov](mailto:kelsey.deterding@mail.house.gov) or 2138 Rayburn House Office Building, Washington, DC, 20515 by August 8, 2012. If you have any further questions or concerns, please contact Holt Lackey, Chief Oversight and Investigations Counsel, at [holt.lackey@mail.house.gov](mailto:holt.lackey@mail.house.gov) or at 202-225-3951.

Thank you again for your participation in the hearing.

Sincerely,

  
Lamar Smith  
Chairman

\*The Committee had not received a response to its questions at the time this hearing record was printed.

**United States House of Representatives**

*Committee on the Judiciary*

Questions for the Record

**Questions from Representative Lamar Smith**

I have learned through several channels of reports that certain recipients of grants from the Department of Health and Human Services (“HHS”) and the Centers for Disease Control (“CDC”) have used those federal funds to advocate for new or reformed legislation in state and local legislatures, councils, and departments.

I understand that on March 16, 2012, a group named “Cause of Action” submitted to the Department of Justice a letter detailing instances of this conduct and requesting an investigation.<sup>1</sup> A recent letter from Senator Collins to Secretary of Health and Human Services Kathleen Sebelius also describes similar activity.<sup>2</sup>

The conduct detailed in both the Cause of Action letter and the letter from Senator Collins appears to contravene the Anti-Lobbying Act, codified at 18 U.S.C. § 1913—which the Justice Department is responsible for enforcing—and which prohibits the use of appropriated funds, “directly or indirectly . . . to influence in any manner” any state or local official to take any action for or against legislation.

Moreover, as I noted in the Committee’s report of April 30, 2012, detailing the Obama Administration’s consistent disregard of the rule of law, “the Justice Department . . . has repeatedly put its partisan agenda ahead of its Constitutional duties [to enforce the law].”<sup>3</sup> The conduct reported here appears to be one more example of the Administration’s campaign to enforce its own policy goals regardless of federal prohibitions to the contrary: HHS and the CDC are allowing federal funds to be used unlawfully to impose the administration’s policy wish list on states and localities.

Please provide written responses to the following questions:

1. Does the Anti-Lobbying Act prohibit the expenditure of federal grant funds to persuade state and local governments to adopt or modify laws and regulations?

<sup>1</sup> See <http://causeofaction.org/about/>.

<sup>2</sup> See Letter from Sen. Susan Collins to Hon. Kathleen Sebelius, Secretary of the Dep’t of Health and Human Services (May 1, 2012), *available at* <http://www.collins.senate.gov/public/index.cfm/press-releases?ID=5eb56ba5-4c87-4e41-942d-8d16575f0d05>.

<sup>3</sup> See U.S. House of Representatives, Committee on the Judiciary, *The Obama Administration’s Disregard of the Constitution and the Rule of Law* (April 30, 2012), *available at* [http://judiciary.house.gov/issues/issues\\_Reports.html](http://judiciary.house.gov/issues/issues_Reports.html).

2. Are you aware of the conduct of HHS and CDC grantees described by Cause of Action and by Senator Collins in their respective letters? If so, is the Justice Department investigating that conduct?
3. How did you learn of the reported conduct by HHS and CDC grantees? Have you ordered, or do you plan to order, an investigation of the reported HHS and CDC grantee conduct?
4. In 2002, Congress amended the Anti-Lobbying Act to ban all expenditures of federal funds to lobby or urge state and local governments to change their law. What has the Justice Department done to implement and enforce these amendments? Has the Justice Department given any guidance to federal agencies, and specifically HHS or CDC, regarding the prohibitions and scope of the 2002 amendments?

**Questions from Representative Elton Gallegly**

Please provide:

1. The number of arrests, prosecutions, and convictions for Medicare and Medicaid fraud cases, the amount of taxpayer money stolen in those cases and the amount recovered for the taxpayer.
2. The number of arrests, prosecutions, and convictions for specific Medicare and Medicaid fraud enforcement actions taking place in California, in southern California, and specifically in Los Angeles and Glendale.
3. The number of worksite enforcement prosecutions for each of the last four years, and the number of prosecutions of illegal workers who have used fraudulent documents.



**Questions from Representative J. Randy Forbes**

1. I know you have filed actions against Arizona, South Carolina, Utah and Alabama – all Republican Governors. Would you give us a list of any similar actions, of a similar profile, you have filed against any states with Democratic Governors?
2. Please provide a list of any and all meetings with the White House and members of the campaign about any of the messaging that took place regarding the cases mentioned above, as well as the decisions to not take action against states with Democratic Governors?

**Questions from Representative Steve King**

**USDA Discrimination Settlements**

1. How much money has been distributed from the *Pigford I* and *Pigford II* settlements?
  - a. How many plaintiffs have received a settlement?
  - b. Which lawyers and law firms received compensation from the *Pigford* settlement funds?
  - c. How many attorneys were involved in the settlement?
  - d. How were the fees calculated and distributed?
2. How many claimants who were denied relief in *Pigford I* took part in *Pigford II*? How many of those claimants were awarded a settlement?
3. Were all of the named plaintiffs in the original *Pigford* suit successful? Did they all eventually receive a settlement from the United States government?
4. What is the status of the required GAO audits regarding the claims process?
5. How many outstanding claims exist?
  - a. How many have applied?
  - b. How many have been paid?
6. What is the geographic breakdown of *Pigford* claimants?
7. Were you aware of the number of black farmers and black farms in America when you announced the *Pigford II* settlement on February 18, 2010?
8. Please provide, in a searchable format, the names of all claimants, the dates of their applications, their addresses, and the dates and outcomes of their applications.
9. What number of *Pigford I* and *Pigford II* claimants were denied a settlement?
10. Please produce a report describing how the Department of Justice's Judgment Fund operates. What is the size of the Judgment Fund? How much is annually paid from the Judgment Fund?
11. What is the current dollar amount of cash distributions to claimants in the *Pigford II* settlement?

12. What is the total dollar amount of loan forgiveness of claimants in the *Pigford II* settlement?
13. What entity processes the settlements for *Pigford I* and *Pigford II*? What entity receives the claimant's application? Who reviews the application? What entity distributes cash settlements? What is the oversight process of this entity?
14. Is the DOJ aware of any (new or old) allegations of fraud regarding the disbursement of funds relating from the *Pigford*, *Garcia*, *Love*, and *Keepseagle* settlements? Please describe them.
15. Has the DOJ undertaken any investigations into alleged fraud in these settlements or does it plan to do so in the future?

#### Iowa SAVE denials

The Secretary of State of my home state, Iowa, along with other states has requested the use of the Department of Homeland Security's Systematic Alien Verification for Entitlements (SAVE) program as an aid in determining the eligibility of voters. According to DHS's Privacy Impact Assessment for SAVE, IIRIRA provides "for customer agencies to use SAVE for any legal purpose such as background investigations and voter registration."

DHS has responded to the Iowa Secretary of State's office that "SAVE personnel have contacted the Office of the Iowa Secretary of State on April 17, 2012, to better understand Iowa's intended use (e.g., verification of existing voters or registering voters) and determine if it is able to comply with all SAVE procedures, including providing the numeric identifiers found on each voter's immigration-related documents and copies of those documents, if requested. Once we receive more information from Iowa, we will be in a position to respond to the request." Despite providing the information requested by DHS, the State of Iowa has yet to hear back from DHS.

In a letter dated May 10, Colorado was denied use of the SAVE system by DHS saying that "While this additional information (alien registration numbers for registered voters) may facilitate the use of SAVE for this verification purpose, we must further assess serious legal and operational issues before we can make a determination on your request."

Additionally, DHS has stated in its letter to Iowa that USCIS needs to ensure that verifying the citizenship status of current and future voters using the SAVE Program does not conflict with the Voting Rights Act. As such, USCIS has sought guidance from the Department of Justice Voting Rights Section on this issue and we are now waiting on the Department's response.

1. Has the Department provided USCIS with an opinion as to whether verifying the citizenship status of current and future voters using the SAVE Program conflicts with the Voting Rights Act?
2. If not, when can it be expected? It is imperative that it is provided in a reasonable time (at least 120 days) before the election.

Internet Gambling

1. How does the Department explain its reversal of its decades long interpretation of the Wire Act? Seeing as the Wire Act is not the only provision making internet gambling illegal, couldn't that reversal be seen as in direct defiance of those laws?

GPS Tracking

In early June, 2012, the DOJ told Ninth U.S. Circuit Court of Appeals that it still has the right to place Global Positioning System tracking devices on cars without obtaining a search warrant—despite a January Supreme Court ruling that the warrantless installation of such a device violated the Constitution.

A Department spokesperson said “that a warrant is not needed for a GPS search, as the Court...did not resolve that question,” but said that the department has “advised agents and prosecutors going forward to take the most prudent steps and obtain a warrant for new or ongoing investigations” in most cases.

1. How many GPS tracking devices or other tracking devices did the DOJ/FBI have at the time of the Supreme Court's decision in *United States v. Jones* ?
2. How many of those had to be subsequently turned off?
3. How did the DOJ and the FBI recover those devices that were turned off?
4. How has the Bureau and the DOJ advised agents to deal with tracking devices going forward?
5. Why did the Department of Justice not testify during the recent May 17<sup>th</sup> hearing of H.R. 2168 (the Geolocational Privacy and Surveillance Act)? Further, with June 12<sup>th</sup> rapidly approaching, has the Department of Justice prepared its answers to Senator Franken's questions regarding the use of GPS technology and the Department's possible evasion of the *Jones* decision?

**Questions from Representative Louie Gohmert**

1. Attorney General Holder, please clarify your testimony before this Committee on June 7, 2012 about former Attorney General Michael Mukasey being briefed during his tenure about operations permitting guns to walk into Mexico.

At that hearing, you responded to me stating “[a]nd that is in stark contrast to what happened to my predecessor Attorney General Mukasey when he was briefed about the transmission of guns to Mexico and, as far as I can tell, did far less than what I did.”

Five days later in a Senate Judiciary Committee hearing, you gave a similar response to Senator Cornyn regarding Attorney General Mukasey being briefed on a gunwalking operation called Wide Receiver.

However, in a June 18, 2012 letter responding to Senate Judiciary Committee Ranking Member Charles Grassley, Acting Assistant Attorney General Judith Appelbaum retracted your statement to the Senate Judiciary Committee claiming that former Attorney General Mukasey was briefed on Wide Receiver. Please review the definition of “inadvertent” and explain how comments made in two different locations five days apart could be inadvertent rather than false. Further, have you apologized to former Attorney General Mukasey? Additionally, did your “inadvertent” comments about former Attorney General Mukasey result from the “political dimensions” that you said were part of your role as Attorney General?

**Questions from Representative Ted Poe**

1. Are you familiar with the Pew study<sup>4</sup> showing that there are almost 2 million ineligible voters on the rolls in this country including roughly 1.8 million dead people?
2. Considering that many of our elections are determined by a few hundred or a few thousand votes, this is obviously very significant. If our current Voter identification systems across the country are this flawed, how else can we ensure the validity of our elections without Voter ID? Clearly the current systems are not working.
3. Can you tell us today that you are 100% confident that voting fraud has not – or could not – sway the decision of a US election?
4. Are you familiar with the Florida Secretary of State's discovery of 53,000 dead voters<sup>5</sup> on the rolls when he started using the Social Security Death Index for list matching?
5. Section 8 of the National Voter Registration Act gives you power to bring cases against states to ensure dead and ineligible voters are not on the rolls. How many Section 8 cases has your voting section brought since you became Attorney General?
6. Why have you not brought more cases considering that independent analysis finds that as many as 1.8 million dead voters could be on our voting rolls? How can you explain this lack of action on the part of the Department of Justice?

**Fast and Furious**

1. In December of last year I asked you if there was any effort currently underway by the ATF or any other agency to locate and account for the weapons that were sold during operation fast and furious in the Houston area. What should I tell my constituents who are concerned about the prospect of these weapons falling into criminal hands?
2. Is the Department of Justice currently investigating any of those involved in Fast and Furious for crimes? Has anybody been fired?
3. Do you still stand by your contention you have made in the past that no senior DOJ officials knew about Fast and Furious?
4. Has any progress been made since the last time you came before the committee in locating any of the hundreds of missing weapons?
5. Do you think it is proper to have people who were involved in Fast and Furious who have demonstrated such recklessness and poor judgment still working at the ATF? Some in managerial positions?

<sup>4</sup> See <http://www.pewstates.org/research/reports/inaccurate-costly-and-inefficient-85899378437>.

<sup>5</sup> See <http://www.foxnews.com/politics/2012/05/17/florida-voter-rolls-suspected-having-roughly-53k-dead-2600-ineligible/>.

6. Are any of these individuals in positions where decisions they make could put lives jeopardy? Has anybody been fired or punished in any way since you last came before the committee?

**Questions from Representative Mark Amodei**

**State Criminal Alien Assistance Program (SCAAP) Questions:**

I, along with Chairman Smith and several of my other House colleagues, sent a letter to your attention on June 13, 2012, regarding changes you have recently made to the SCAAP reimbursement policy for localities housing “unknown” criminal aliens in their jails.

1. What possessed the Department to, in May 2012, unilaterally change the terms under which SCAAP reimbursement is provided to local law enforcement? Did you not think that you needed to confer with Congress, the body that authorizes and appropriates the funds for this program, before doing so?
2. When can we expect you to rescind this reimbursement policy change? If you refuse to do so, what is your statutory/legal basis for refusal?
3. Why do you believe it is appropriate to find cost-savings for the Department on the backs of local communities by refusing to reimburse them for criminal, illegal aliens you and the Department of Homeland Security have failed to track and to remove? How could you achieve savings in other areas of the Department instead, allowing SCAAP funds to be disbursed as Congress intended and authorized?
4. Do you recognize that local communities may have to release these criminals, who have repeatedly shown no respect for the rule of law, if they cannot find a way to pay for them to stay in their jails? Do you think this is appropriate? What solution would you propose to avoid this outcome?

**Tribal Law Enforcement Questions:**

As you may know, this Committee just reauthorized the Violence Against Women Act. Domestic violence, rape, and sexual assault on tribal lands are epidemic. Members of tribes in my district have expressed frustration that federal investigators and prosecutors are not, in their opinion, doing enough to pursue these and other violent crimes on tribal lands. FBI Director Mueller mentioned in his testimony before the Committee earlier this year that the FBI is aggressively investigating such crimes, particularly sexual assault and child sexual assault.

1. Could you tell me about the initiatives (both investigative and prosecutorial) you have launched to combat various kinds of violent crime on tribal lands and the successes you have had to date? Are there any specific steps you’re taking to deal with the problem of domestic violence on tribal land involving non-Indian-on-Indian violence? What is the standard protocol and timeline for handling those kinds of cases?
2. When you have declined to pursue or to prosecute criminal cases on tribal lands, is there a trend in your reason(s) for doing so? If so, what is that trend(s)?



3. How many prosecutors have you assigned to handle tribal criminal prosecutions? How many law enforcement agents have you assigned to handle tribal criminal investigations? What additional resources do you need?
4. How does the referral process work between tribes and federal law enforcement? Can this process be strengthened, in your opinion? If so, how?
5. What is being done to enforce the Indian Arts and Crafts Act of 2010, to provide trademark protection to Indian artwork against counterfeiters?

Department Conference Policy:

In April 2008, the Department of Justice's Financial Management Division issued a policy requiring special approval for all requests to hold "a predominately internal event in a non-federal facility" at, among other places, locations "known for gambling," "considered a tourist attraction or common vacation location," or "any resort facility or resort location."<sup>6</sup> Reno, Nevada and Lake Tahoe, Nevada were both specifically listed as examples of locations requiring special approval.

It is my understanding that the Department has continued this policy in the current Administration.

I have been informed that because of this policy, some well-respected judicial training institutions, including the National Judicial College and the National Council for Juvenile and Family Court Judges, both located in Reno, Nevada, have had difficulty obtaining approval to host essential training events in their own backyard. This policy leads to needless extra cost to the taxpayer and to these institutions, as they must scramble to secure, to travel to, and to host an event at a remote location not on the Department's list.

1. Could you confirm that this special approval policy for certain conference locations is still in effect in your Department? If so, has it been reformed in any way?
2. If this policy is still in effect, would you consider making an exception to the policy for those institutions that are headquartered in special-approval locations and that desire to hold essential meetings or conferences in their home city?

<sup>6</sup> See U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, AUDIT DIVISION, AUDIT OF DEPARTMENT OF JUSTICE CONFERENCE PLANNING AND FOOD AND BEVERAGE COSTS, AUDIT REPORT 11-43, at App. III, pg. 87 (Sept. 2011, revised Oct. 2011), <http://www.justice.gov/oig/reports/plus/a1143.pdf>.

**Questions from Representative Robert C. “Bobby” Scott**

**Faith Based Initiative Questions:**

First I'd like to thank you for your responses to my questions for the record submitted after your last appearance before this Committee on December 8, 2011. We just received those responses earlier this month.

With regard to my questions about the Faith-Based Initiative, I want to thank the Department for finally admitting in no uncertain terms that notwithstanding federal statute explicitly prohibiting discrimination based on religion, this Administration does in fact permit discrimination based on religion with federal funds. So once again, now in the 21st century, an employer using government money can tell a job applicant – the most qualified job applicant – we don't hire you kind, even for a job paid for with taxpayer dollars.

On that note, I do have some follow up questions and clarifications about the process by which this discrimination is permitted.

1. The response the Department provided to explain the self-certification process seems very different from the “case-by-case” process as explained by Joshua DuBois, Special Assistant to the President and Executive Director of the White House Office of Faith-based and Neighborhood Partnerships. He said, “On the hiring issue, . . . [w]e will work with the White House counsel and with the Department of Justice, the attorney general, to fully explore that individual case and make a recommendation to the president. At the end of the day, he will determine what he thinks the best path forward is.” Mr. DuBois has explained that this process was put in place because “[t]he President has said that he wants to fully understand the legal and policy intricacies of this issue before making decisions. In the case of co-religious hiring . . . , he wants to fully examine the issues on a case-by-case basis before moving forward.”<sup>7</sup>
  - a. Have you heard of the process Mr. DuBois describes?
  - b. Are you or other components of the Department involved in the specific review that Mr. DuBois describes?
  - c. If the President wants to fully examine issues and fully understand the legal and policy intricacies, is the self-certification process employed by the Department robust enough?
2. The response by the Department refers to an OJP policy that allows for case-by-case review. I believe that policy is laid out in a document dated October 2007. That document states that “exemptions should be granted” if the religious organization applying for funds certifies the

<sup>7</sup> See <http://www.pewforum.org/Social-Welfare/Government-Partnerships-With-Faith-Based-Organizations-Looking-Back-Moving-Forward.aspx>.

<sup>8</sup> See [http://www.usaid.gov/our\\_work/global\\_partnerships/fbcid/dubois\\_092209.html](http://www.usaid.gov/our_work/global_partnerships/fbcid/dubois_092209.html).

three statements set forth in the document, “unless the funding entity has good reason to question the certification.”

- a. Is such an exemption granted only for the duration of the funding agreement with the Department? Or is the exemption standing, so that if a faith-based organization is granted an exemption once it could apply for other grants without submitting a new certification?
  - b. I read this process as a self-certifying process and the funding agency can only deny a request to discriminate if it “has good reason to question the certification.” Is that your understanding of the policy or is there an actual review?
  - c. If there is an actual review, who receives the certification and makes a determination? And on what basis is the certification reviewed and the determination made? In other words, what are the standards applied to such a review, as separate and distinct from the standards or statements of certification?
  - d. If there is no such review, then why does the Administration claim a case-by-case review process? If there is no such review, then can't anyone claim the exemption with no review and no repercussions?
  - e. Please clarify whether the eight faith-based organizations that submitted certificates to OJP in FY2008 were *granted* exemptions? Was there a review before the exemptions were granted?
  - f. Have any requests for exemptions been received since FY2009? If so, please provide details about whether the exemptions were granted and any review or process completed by the Department pertaining to those requests for exemptions.
3. Regarding the legal authority to discriminate and its requirements and limitations:
- a. What notice are job applicants required to be given that anti-discrimination laws do not apply for a particular job opening?
  - b. If it is not illegal to discriminate, what if any recourse and remedy does a victim of discrimination have?
  - c. Does an entity need “certification” to discriminate? What authority does the Department have to require certification as a condition to discriminate? Why is certification necessary? Under current law, a faith based organizations using its own money may discriminate and may use its status as a faith based organization as a defense in court.

Why is the process different when a faith based organization is discriminating using federal taxpayer dollars?

Questions about the Pardon Process

1. Thank you for your responses we received on June 5, to questions for the record concerning the December *Washington Post* article about potential bias in recommendations to the President about pardon applications. The story found that white applicants were four times as likely as applicants of color to receive presidential pardons. You assured us that you were undertaking a statistical study and making changes such as instituting an office diversity policy, Spanish language materials and a frequently asked questions section for the website. "These changes," you wrote, "reflect the Department's commitment to the integrity of the executive clemency process, and to the equal and fair evaluation of all applicants." The December *Washington Post*/ProPublica series recounted disturbing evidence that appears to point to racial disparity in the granting of pardons. How will the measures you outlined in your June 5 response address this problem?
2. You mentioned in your responses that the *Washington Post*/ProPublica accounts alleging racial bias in pardon grants did not control for, among other things, expressions of remorse and candor. The grant outcome suggests that whites may be four times as remorseful and candid as people of color. Will your statistical study be controlling for and/or examining how expressions of remorse and candor correlated with race?
3. You mentioned that first among the things the OPA looks for in a clemency candidate is the severity of the sentence. Sentences are often excessive and unduly severe. Given this shared concern, I wonder whether you were struck, as I was, by the fact that of the thousands of applications for commutation made between 2001 and 2009, only 6 received positive recommendations from the Pardon Attorney. Even given a totality of the circumstances approach, are you concerned about the paucity of positive recommendations during the latter period continuing up to now and, if so, how would you propose to increase the number of favorable recommendations?
4. A story published by the *Washington Post* in collaboration with the investigative journalism organization, ProPublica on May 13, 2012 contained allegations that the Pardon Attorney misled the President of the United States about support for a clemency petitioner, Clarence Aaron. Specifically, the account stated that the Pardon Attorney so misrepresented the support for Mr. Aaron that Kenneth Lee, the attorney responsible for handling the case at the White House Counsel office, said that the Pardon Attorney had "presented the views of [U.S. Attorney Deborah] Rhodes and [the sentencing judge, Charles] Butler "in the least favorable light to the applicant." The article states, "[h]ad he read the statements at the time, Lee said, he would have urged Bush to commute Aaron's sentence."

- a. In light of your stated commitment to a fair evaluation and an office that operates with integrity, what steps are you taking, or plan to take, to investigate the allegations about the Office of the Pardon Attorney's handling of this case and its recommendation to the President?
- b. In light of the allegations that the President was misled by the Pardon Attorney as to the support for Clarence Aaron's commutation, what steps do you plan to take to investigate denials in what might be other deserving applications for commutation that have received negative recommendations from the Pardon Attorney?
- c. Given that the President of the United States is the institutional client of the Pardon Attorney and given that an attorney has a professional obligation to be forthcoming and truthful in dealings with a client, will you direct an inquiry into the Pardon Attorney's actions by the Office of Professional Responsibility in addition to any other investigative actions?

**Questions from Representative Jerrold Nadler and Representative Steve Cohen**

In response to a question asked of you regarding the investigation and prosecution of persons by the Department of Justice (DOJ) for actions relating to medical marijuana, you said that DOJ limits its “enforcement efforts to those individuals [or] organizations that are acting out of conformity with State laws, or, in the case of instances in Colorado, where distribution centers were placed within close proximity to schools.”

1. For each enforcement action DOJ has taken against persons or entities engaged in cultivating or selling medical marijuana in any jurisdiction in which medical marijuana is legal during your service as Attorney General, please provide information about the case, including the specific federal, state and/or local laws, regulations, and/or policies that allegedly were being violated. Please explain why in each enforcement action DOJ acted in the place of or instead of the applicable state and/or local law enforcement entity.
2. Besides the instances you mentioned in your answer in Colorado, have any DOJ personnel cited any federal law or section of the federal code, such as 21 U.S.C. 860 (known as the *Drug-Free School Zones Act*) as a reason in communications with any persons or entities engaged in cultivating or selling medical marijuana in any jurisdiction in which medical marijuana is legal during your service as Attorney General that the business should or must close or otherwise cease doing business? If the answer is yes, please detail each instance. How do such actions comport with your statement that enforcement actions only have occurred when persons or entities were acting out of conformity with state law? Why does DOJ believe 21 U.S.C. 860 is relevant to the authority of a medical marijuana business to operate when that provision only provides for enhanced penalties for violations of federal drug laws occurring too close to schools or other places children are likely to be?
3. With respect to actions you mentioned in your answer in Colorado, taking enforcement actions against medical marijuana entities allegedly too close in proximity to schools, why in each action did DOJ decide to enforce federal law when Colorado and the relevant localities, which had legalized medical marijuana, had chosen to allow these entities to operate legally?
4. For each future enforcement action by DOJ against persons or entities engaged in cultivating or selling medical marijuana in any jurisdiction in which medical marijuana is legal during your service as Attorney General, will you commit to making it clear to the public and Members of Congress both which specific federal, state and/or local laws, regulations and/or policies are allegedly being violated and why DOJ took action in the place of or instead of the applicable state and/or local law enforcement entity? Why or why not?

**Questions from Representative Jerrold Nadler**

1. You issued a memo on September 23, 2009 setting forth policies and procedures governing the executive branch's invocation of the state secrets privilege (the "state secrets memo"). That policy requires your personal approval for the Department to defend assertion of the privilege in litigation.
  - a. In how many cases (since September 2009) have you approved invocation of the privilege?
  - b. Where you have approved the privilege, have you ever referred allegations of wrongdoing raised in the case to an Inspector General of any agency or department for investigation (as is contemplated by the policy)?
    - (i) If so, how many cases?
    - (ii) What have been the results of those IG referrals and have you shared those with Congress? Will you share them with this Committee?
    - (iii) Where you have not referred it to an Inspector General, what evidence have you required to conclude that the allegations of wrongdoing are not credible?
  - c. In how many cases/instances have you disapproved of invocation of the privilege?
2. The state secrets memo indicates that the Department will provide "periodic reports" to "appropriate oversight committees" with respect to all cases in which the privilege is invoked.
  - a. How many periodic reports have been filed and with which committees?
  - b. Please provide copies of all such reports to the House Judiciary Committee. To the extent you object to doing so, please provide the basis for that objecting, including an explanation of why these reports, which involve the invocation of an evidentiary privilege in Article III courts, do not fall within the Judiciary Committee's oversight jurisdiction.
3. You do not indicate in the state secrets memo whether this Administration will agree to judicial review of the basis for invoking the privilege. The prior Administration took the position that information could not even be disclosed in camera to an Article III judge, thus ensuring that there was no judicial review of whether the privilege had been properly invoked.
  - a. What is your position as to judicial review of the information that the government seeks to withhold in two key respects:

- (i) Can a judge review the allegedly privileged information?
  - (ii) Can a judge disagree with the executive branch's decision as to whether the privilege is properly invoked?
4. We have made several requests to you to allow us to review the Office of Legal Counsel memo that reportedly provides the legal justification for the lethal targeting of U.S. citizens who are terror suspects. Your Department has sought dismissal of cases seeking judicial review of lethal targeting by arguing, among other things, that the appropriate check on executive branch conduct here is the Congress and that information is being shared with Congress to make that check a meaningful one. Yet we have yet to get any response to our requests.
- a. Will you commit to providing the memo?
  - b. Will you also commit to briefing interested Committee members?

