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HOUSE OF REPRESENTATIVES

REPORT
112–546

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

REPORT

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

together with

ADDITIONAL AND MINORITY VIEWS

JUNE 22, 2012.—Referred to the House Calendar and ordered to be printed

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Mr. ISSA, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

The Committee on Oversight and Government Reform, having considered this Report, report favorably thereon and recommend that the Report be approved.

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.

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 Patrol 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."[1] 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."[2]

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.[3] 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."[4]

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[1] *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927).
[2] *Watkins* v. *United States*, 354 U.S. 178, 187 (1957).
[3] U.S. CONST., art. I, 5, clause 2.
[4] House rule X, clause (4)(c)(2).

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."[5]

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."[6] The rule further provides that the "power to authorize and issue subpoenas" may be delegated to the Committee chairman.[7] 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 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 a revision 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 Depart-

[5] *Id.*
[6] House rule XI, clause (2)(m)(1)(B).
[7] House rule XI, clause (2)(m)(3)(A)(i).

ment 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.

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 clarify 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; agreed to postpone interviewing the Department's key Fast and Furious trial witness; and narrowed the scope of documents the Department must produce to be in compliance with the subpoena and to avoid contempt proceedings.

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 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 networks. The Office of the Deputy Attorney General shared this strategy with the heads of many Department components, including ATF.[8]

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.[9] 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.

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[8] E-mail from [Dep't of Justice] on behalf of Deputy Att'y Gen. David Ogden to Kathryn Ruemmler, et al. (Oct. 26, 2009).

[9] Transcribed Interview of Special Agent Peter Forcelli, at 53–54 (Apr. 28, 2011).

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.[10] 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.[11] These guns had time-to-crimes of as little as one day, strongly indicating straw purchasing.[12]

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.[13]

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.[14]

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[10] E-mail from Kevin Simpson, Intelligence Officer, Phoenix FIG, ATF, to David Voth (Dec. 18, 2009).
[11] *Id.*
[12] *Id.*
[13] Phoenix Group VII, Phoenix Field Division, ATF, *Briefing Paper* (Jan. 8, 2010).
[14] Transcribed Interview of Special Agent in Charge William Newell, at 32–33 (June 8, 2011).

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.[15] 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.

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.[16]

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.[17] The following week, OSII briefed senior ATF officials about another large cache of Fast and Furious weapons that had been recovered in Mexico.[18]

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 of 685 guns. This number raised the ire of several individuals in the room, who expressed concerns about the growing operation.[19]

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

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[15] Transcribed Interview of Special Agent Larry Alt, at 94 (Apr. 27, 2011).

[16] Interview with Lorren Leadmon, Intelligence Operations Analyst, Washington, D.C., July 5, 2011 [hereinafter Leadmon Interview].

[17] *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.).

[18] Leadmon Interview, *supra* note 16.

[19] Transcribed Interview of Deputy Ass't Dir. Steve Martin, ATF, at 36 (July 6, 2011) [hereinafter Martin Tr.].

purchasers, and organizational charts of the relationships among straw purchasers and to members of the Sinaloa drug cartel. At that point, the straw purchasers had bought 1,026 weapons, costing nearly $650,000.[20]

NATF'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 updates directly to Deputy ATF Director Billy Hoover and Acting ATF Director Ken Melson.[21] When Hoover learned about how large Fast and Furious had grown in March 2010, he finally ordered the development of an exit strategy.[22] This exit strategy, something Hoover had never before requested in any other case, was a timeline for ATF to wind down the case.[23]

Though Hoover commissioned 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.[24]

In July 2010, Acting Director Melson expressed concern about the number of weapons flowing to Mexico,[25] 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.[26] 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."[27] Early on in these discussions, Lanny Breuer, Assistant Attorney General for the Criminal Division, sent an attorney 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 Assistant Attorney General

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[20] *See generally* "Operation the Fast and the Furious" Presentation, Mar. 5, 2010.
[21] E-mail from Mark Chait to Kenneth Melson and William Hoover (Feb. 24, 2010) [HOGR 001426].
[22] Transcribed Interview of William Hoover, ATF Deputy Director, at 9 (July 21, 2011).
[23] Id. at 72.
[24] E-mail from Douglas Palmer, Supervisor Group V, ATF, to William Newell, ATF (Apr. 27, 2010).
[25] E-mail from Kenneth Melson to Mark Chait, et al., (July 14, 2010) [HOGR 002084].
[26] E-mail from Mark Chait to William Newell (Oct. 29, 2010) [HOGR 001890].
[27] E-mail from Jason Weinstein to Lanny Breuer (Sept. 10, 2009) [HOGR 003378].

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 21st rolls around."[28] 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."[29]

When the Criminal Division prosecutor 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.[30]

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.[31]

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.[32]

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.[33]

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.[34]

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, especially given their prior knowledge of gunwalking in Wide Receiver, which was run by the same leadership in the same ATF field division.

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[28] E-mail from James Trusty to Laura Gwinn (Sept. 2, 2009) [HOGR 003375].
[29] E-mail from James Trusty to Laura Gwinn (Sept. 3, 2009) [HOGR 003376].
[30] E-mail from Laura Gwinn to James Trusty (Sept. 3, 2009) [HOGR 003377].
[31] E-mail from Kenneth Melson to Lanny Breuer (Dec. 3, 2009) [HOGR 003403].
[32] E-mail from Lanny Breuer to Kenneth Melson (Dec. 4, 2009) [HOGR 003403].
[33] E-mail from Kevin Carwile to Jason Weinstein (Mar. 16, 2010) [HOGR 002832].
[34] Meeting on "Weapons Seizures in Mexico w/ Lanny Breuer" at Robert F. Kennedy Building, Room 2107, Jan. 5, 2010, 10:00 AM [HOGR 001987].

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.[35] 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.[36]

2. WIRETAPS

At about the same time, senior 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."[37] According to the letter, lawyers in OEO review these wiretap packages to ensure that they "meet statutory requirements and DOJ policies."[38] 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.[39] 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.[40]

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."[41]

The wiretap applications document the extensive involvement of the Criminal Division in Fast and Furious. These applications were constructed from raw data contained in hundreds of Reports of Investigation (ROI); the Department of Justice failed to produce any of these ROI in response to the Committee's subpoena. The Criminal Division authorized Fast and Furious wiretap applications 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

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[35] Martin Tr. at 100.

[36] E-mail from Kevin Carwile to Jason Weinstein (Mar. 16, 2010, 9:00 a.m.) [HOGR DOJ 2382].

[37] Letter from Dep Att'y Gen. James M. Cole Chairman Darrell Issa et al., at 6 (Jan. 27, 2012) [hereinafter Cole Letter].

[38] *Id.*

[39] *See* 18 U.S.C. § 2516(1).

[40] *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.

[41] Bureau of Alcohol, Tobacco, Firearms, and Explosives, "ATF's Mission," http://www.atf.gov/about/mission (last visited May 1, 2012).

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).[42] 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.[43] 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.[44] 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.[45]

A map of Mexico detailed locations of recoveries of weapons purchased through Fast and Furious, including some at crime scenes.[46] 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.[47] 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.[48] 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 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

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[42] USDOJ: About Department of Justice Agencies, *available at* http://www.justice.gov/agencies/index-org.html (last visited May. 1, 2012).
[43] Transcribed Interview of Acting Dir. Kenneth Melson, at 25 (July 4, 2011).
[44] "Operation the Fast and the Furious," March 12, 2010 [HOGR 002820—HOGR 002823].
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] E-mail from Edward N. Siskel to Mark R. Chait (July 14, 2010) [HOGR 002847].

its connection to Fast and Furious.[49] 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.[50] 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.[51] That same day, senior Department officials met with Committee staff and acknowledged "there's a there, there" regarding the legitimacy of the congressional inquiry into Fast and Furious.

In spite of Chairman Issa's May 5, 2011, letter, during 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.[52] The Department responded on June 10, 2011, stating "complete production of all documents by June 10, 2011, . . . is not possible."[53] 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.[54]

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 1, 2011, when it produced 193 pages of documents.[55] On September 30, 2011, the

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[49] E-mail from Assoc. Deputy Att'y Gen. Brad Smith to Deputy Att'y Gen. Gary Grindler, et al. (Dec. 17, 2010) [HOGR 002875–002881].

[50] Letter from Chairman Darrell Issa to ATF Acting Dir. Kenneth Melson (Mar. 16, 2011) [hereinafter Mar. 16 Letter].

[51] Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (May 5, 2011).

[52] Letter from Chairman Darrell Issa to ATF Acting Dir. Kenneth Melson (June 8, 2011).

[53] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 10, 2011).

[54] *Id.*

[55] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Sep. 1, 2011).

Department produced 97 pages of documents.[56] On October 11, 2011, the Department produced 56 pages of documents.[57]

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.[58] The Justice Department first responded to this letter on October 31, 2011, nearly four months later.[59]

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.[60] 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.[61] 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.[62]

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.[63] 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 respond to this letter until December 6, 2011, the eve of the Attorney General's testimony before the House Judiciary Committee.[64]

On September 27, 2011, Chairman Issa and Senator Grassley sent a letter to the Attorney General raising questions about infor-

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[56] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Sep. 30, 2011).

[57] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Oct. 11, 2011) [hereinafter Oct. 11 Letter].

[58] Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (July 11, 2011).

[59] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Oct. 31, 2011) [hereinafter Oct. 31 Letter].

[60] Letter from Chairman Darrell Issa and Senator Charles Grassley to FBI Dir. Robert Mueller (July 11, 2011) [hereinafter Mueller Letter].

[61] Letter from Chairman Darrell Issa and Senator Charles Grassley to DEA Adm'r Michele Leonhart (July 15, 2011).

[62] Letter from DEA Adm'r Michele Leonhart to Chairman Darrell Issa and Senator Charles Grassley (July 22, 2011).

[63] Letter from Chairman Darrell Issa and Senator Charles Grassley to Acting U.S. Att'y Ann Scheel (Sep. 1, 2011).

[64] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Dec. 6, 2011) [hereinafter Dec. 6 Letter].

mation-sharing among Department components, the Department's cooperation with Congress, and FBI documents requested in the July 11, 2011, letter to FBI Director Mueller.[65] 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 8th."[66] 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.
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> 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.[67]

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

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[65] Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (Sep. 27, 2011).
[66] Oct. 11 Letter, *supra* note 57.
[67] *Id.*

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.[68]

Despite the Department's acknowledgement that it understands what the Committee was seeking, it has yet to provide a single document for 11 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. In a letter to Chairman Issa on May 15, 2012, the Department stated that it had delivered or made available for review documents responsive to 13 of the 22 categories of the subpoena.[69]

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;
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 re-

[68] 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].
[69] Letter from Deputy Att'y Gen. James Cole to Chairman Darrell Issa (May 15, 2012), at 4 [hereinafter May 15 Cole Letter].

sponse to the Chairman's letter of 7/11/11."[70] 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: The Department acknowledged that the Committee identified several people likely to be custodians of these documents.[71] Though the Department has stated it has produced documents pursuant to this subpoena category, the Committee has not found any documents produced by the Department responsive to this subpoena category.[72]

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.[73] 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.

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), pho-

[70] OLA e-mail.
[71] *Id.*
[72] May 15 Cole Letter, at 4.
[73] *Id.*

tographs 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.[74] 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." [75] Though the Department has stated it has produced documents pursuant to this subpoena category, the Committee has not found any documents produced by the Department responsive to this subpoena category.[76]

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." [77] 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.[78] Despite this revelation, the Department 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:

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.[79] 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.[80] 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

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[74] *Id.*
[75] *Id.*
[76] May 15 Cole Letter, at 4.
[77] 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/.
[78] *Id.*
[79] OLA e-mail, *supra* note 68.
[80] *Id.*

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."[81] 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 responsive to this subpoena category.

A complete production of these documents is crucial to allow Congress to understand how senior Department officials came to know that the February 4, 2011, letter to Senator Grassley was false, why it took so long for the Department to withdraw the letter despite months of congressional pressure to do so, and why the Department obstructed the congressional investigation for nearly a year. These documents will show the reactions of top officials when confronted with evidence about gunwalking in Fast and Furious. The documents will also show whether these officials knew about, or were surprised to learn of, the gunwalking. Additionally, these documents will reveal the identities of Department officials who orchestrated various forms of retaliation against the whistleblowers.

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:

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."[82] 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,

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[81] *Id.*
[82] *Id.*

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."[83] 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."[84] The Department has produced some documents responsive to this subpoena category.

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 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 only a handful of pages responsive to this subpoena category, even though it "understand[s] that [the Committee] wants [the Department] to approach this effort with efficiency."[85] 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."[86] 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.

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

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."[87] 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.

Department Response: The Department acknowledged that it "think[s] we understand this item."[88] 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."[89] 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."[90] 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.[91] The Department

[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*

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.

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."[92] 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.[93] 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."[94] 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.[95]

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

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[92] *Id.*
[93] *Id.*
[94] *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.).
[95] *Id.*

few on the eve of the testimony of Department officials.[96] The Department has impeded the ability of a 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.[97] 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

[96] 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 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.

[97] 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.

documents were redacted, only provided *in camera*, or withheld entirely.

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.[98] 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."[99] 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.[100] 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.[101] These actions are consistent with the Committee's willingness to accommodate the Department's interests.

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[98] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (May 2, 2011).
[99] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 14, 2011).
[100] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (July 18, 2011).
[101] 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).

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.[102]

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.[103]

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.

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[102] Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Jan. 31, 2012) [hereinafter Jan. 31 Letter].

[103] Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Feb. 14, 2012) (emphasis in original) [hereinafter Feb. 14 Letter].

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.[104] 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.'" [105] 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." [106] 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.[107]

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.

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:

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[104] Mar. 16 Letter, *supra* note 50.
[105] *Id.*
[106] *Teleconference between Committee Staff and U.S. Dep't of Justice Office of Leg. Affairs Staff* (Mar. 30, 2011).
[107] Letter from *Ass't Att'y* Gen. Ronald Weich to Chairman Darrell Issa (Apr. 1, 2011).

> 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.[108]

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. . . .[109]

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 with our responsibilities to bring to justice those who are responsible for the death of Agent Terry and those who violate federal firearms laws.[110]

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[108] Letter from Ass't Atty'y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 8, 2011).
[109] *Id.*
[110] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 8, 2011).

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.[111] 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. . . .[112]

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.[113] 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.[114]

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:

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[111] Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (July 5, 2011).

[112] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (July 6, 2011).

[113] Mueller Letter, *supra* note 60.

[114] Letter from Stephen Kelley, Ass't Dir., FBI Office of Congressional Affairs, to Chairman Darrell Issa and Senator Charles Grassley (Aug. 12, 2011).

> 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 8th.[115]

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.[116]

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.[117] 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.

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, unre-

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[115] Oct. 11 Letter, *supra* note 57.
[116] *Id.*
[117] Oct. 31 Letter, *supra* note 59.

lated 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.[118] 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."[119]

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.[120]

On January 5, 2012, the Department produced 482 pages of documents responsive to the subpoena.[121] 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.[122] 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 Protection Agent Brian Terry; administrative matters; and personal records.[123]

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 ille-

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[118] Letter from Deputy Att'y Gen. James Cole to Chairman Darrell Issa and Senator Charles Grassley (Dec. 2, 2011).
[119] *Id.*
[120] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Dec. 13, 2011).
[121] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Jan. 5, 2012).
[122] Cole Letter, *supra* note 37.
[123] *Id.*

gally 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.[124] 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 or 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.[125]

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.[126] The production included nearly 60 pages of publicly available and previously produced information, as well as other documents previously produced to the Committee.

On February 27, 2012, the Department produced eight pages pursuant to the subpoena.[127] 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.[128] Five of these documents were about the Kingery case. 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

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[124] Jan. 31 Letter, *supra* note 102.
[125] Letter from Deputy Att'y Gen. James Cole to Chairman Darrell Issa (Feb. 1, 2012) [hereinafter Feb. 1 Letter].
[126] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Feb. 16, 2012) [hereinafter Feb. 16 Letter].
[127] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Feb. 27, 2012).
[128] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Mar. 2, 2012).

pages, or 86 percent, 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 percent, related to cases other than Fast and Furious. On April 19, 2012, the Department produced 188 pages of documents pursuant to the subpoena.

On May 15, 2012, the Department produced 29 pages of documents pursuant to the subpoena. Ten of these pages, or 36 percent, related to cases other than Fast and Furious.

The Department has produced a total of 6,988 pages to the Committee to date.[129] Though the Department recently stated that it has "provided documents to the Committee at least twice every month since late last year," the Department has not produced any documents to the Committee in over 30 days.[130]

(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 February the 4th . . . e-mails, memos—consistent with the way in which the Department of Justice has always conducted itself in its interactions.[131]

He again impressed this point upon Committee Members later in the hearing:

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[129] The most recent production by the Department, on May 15, 2012, ended with Bates number HOGR 006988.

[130] May 15 Cole Letter, *supra* note 69.

[131] *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.).

> 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.[132]

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.[133]

Department counsel expanded the position the Attorney General articulated regarding documentary evidence at the House Judiciary Committee hearing to include testimonial evidence as well.[134] 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." [135]

Understanding the post-February 4th period is critical to the Committee's investigation. Furthermore, documents from this period are responsive to the October 12, 2011, subpoena. For example, following the February 4, 2011, letter, Jason Weinstein, at the behest of Assistant Attorney General Breuer, prepared an analytical review of Fast and Furious.[136] Weinstein interviewed Emory Hurley and Patrick Cunningham of the Arizona U.S. Attorney's office as part of this review.[137] The document that resulted from Weinstein's analysis specifically discussed issues relevant to the Committee's inquiry. To date, the Department has not produced documents related to Weinstein's review to the Committee.

Chairman Issa has sent several letters urging the Department 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:

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[132] *Id.*

[133] Transcribed Interview of Gary Grindler, Chief of Staff to the Att'y Gen., at 22 (Dec. 14, 2011) [hereinafter Grindler Tr.].

[134] *Id.*

[135] Transcribed Interview of Jason Weinstein, Deputy Ass't Att'y Gen. at 177 (Jan. 10, 2012).

[136] Transcribed Interview of Dennis K. Burke at 158–60 (Dec. 13, 2011).

[137] *Id.* at 158–59.

> 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.
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> * * * * * * *
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> 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.[138]

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.[139] 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 information, this Committee will have no alternative but to move forward with proceedings to hold you in contempt of Congress.[140]

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 investiga-

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[138] Letter from Chairman Darrell Issa to Ass't Att'y Gen. Ronald Weich (Nov. 9, 2011).
[139] *See, e.g.,* Grindler Tr. at 22.
[140] Jan. 31 Letter, *supra* note 102.

tive information, or matters reflecting internal Department deliberations), we intend to provide them.[141]

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.[142]

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 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 Com-

[141] Feb. 1 Letter, *supra* note 125.
[142] *Id.*

> mittee's constitutional obligation to conduct oversight of the Executive Branch are incomplete.[143]
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> * * * * * * *
>
> 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.[144]

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.

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

[143] Feb. 14 Letter, *supra* note 103.
[144] *Id* (emphasis in original).

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."[145] 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.[146]

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."[147] 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.[148]

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 Depart-

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[145] Feb. 16 Letter, *supra* note 126.
[146] Dec. 6 Letter, *supra* note 64.
[147] Letter from Tobin Romero, Williams & Connolly LLP, to Chairman Darrell Issa (Jan. 19, 2012).
[148] Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Jan. 24, 2012).

ment. 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.

(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. These documents will also show whether senior Department officials were surprised to learn that gunwalking occurred during Fast and Furious, or if they already knew that to be the case. These documents will also identify who at the Department was responsible for authorizing retaliation against the whistleblowers. The documents may also show the Department's assignment of responsibility to officials who knew about the reckless conduct or were negligent during Fast and Furious.

(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. ADDITIONAL ACCOMMODATIONS BY THE COMMITTEE

As discussed above in Section V.C.5, the Department has failed to turn over any documents responsive to three main categories covered by the October 12, 2011, subpoena:

(a) Who at Justice Department Headquarters Should Have Known of the Reckless Tactics;

(b) How the Department Concluded that Fast and Furious was "Fundamentally Flawed"; and,

(c) How the Inter-Agency Task Force Failed.

The Committee notified the Justice Department on multiple occasions that its failure to produce any documents responsive to these three categories would force the Committee to begin contempt proceedings against the Attorney General.

On May 18, 2012, Chairman Issa, along with Speaker John Boehner, Majority Leader Eric Cantor, and Majority Whip Kevin McCarthy, wrote a letter to the Attorney General. As an accommodation to the Department, the letter offered to narrow the scope of documents the Department needed to provide in order to avoid contempt proceedings.[149] Documents in category (c) are outside the scope of the narrowed request, and so the Department no longer needed to produce them to avoid contempt proceedings, even though such documents are covered by the October 12, 2011, subpoena.

The Committee also obtained copies of wiretap applications authorized by senior Department officials during Operation Fast and Furious. These documents, given to the Committee by whistleblowers, shined light on category (a). Still, many subpoenaed documents under this category have been deliberately withheld by the Department. These documents are critical to understanding who is responsible for failing to promptly stop Fast and Furious. The Department has cited such documents as "core investigative" materials that pertain to "pending law enforcement matters."[150] To accommodate the Department's interest in successfully prosecuting criminal defendants in this case, the Committee is willing to accept

[149] Letter from Speaker John Boehner et al. to Att'y Gen. Eric Holder (May 18, 2012).
[150] May 15 Cole Letter, *supra* note 69.

production of these documents after the current prosecutions of the 20 straw purchasers indicted in January 2011, have concluded at the trial level. This deferment should in no way be interpreted as the Committee ceding its legitimate right to receive these documents, but instead solely as an accommodation meant to alleviate the Department's concerns about preserving the integrity of the ongoing prosecutions.

In addition to deferring production of category (a) documents, the Committee is also willing to view these documents *in camera* with limited redactions. These accommodations represent a significant commitment on the part of the Committee to negotiating in good faith to avoid contempt.

Unlike documents in category (a), the Department has no legitimate interest in limiting the Committee's access to documents in category (b). On February 4, 2011, the Department wrote a letter to Congress categorically denying that gunwalking had occurred. This letter was false. Still, it was not withdrawn until December 2011. The Committee has a right to know how the Department learned that gunwalking did in fact occur, and how it handled the fallout internally. The deliberative process privilege is not recognized by Congress as a matter of law and precedent. By sending a letter that contained false and misleading statements, the Department forfeited any reasonable expectation that the Committee would accommodate its interest in withholding deliberative process documents.

On June 20, 2012, minutes before the start of the Committee's meeting to consider a resolution holding the Attorney General in contempt, the Committee received a letter from Deputy Attorney General James Cole claiming that the President asserted executive privilege over certain documents covered by the subpoena. The Committee has a number of concerns about the validity of this assertion:

1. The assertion was transparently not a valid claim of privilege given its last minute nature;
2. The assertion was obstructive given that it could have and should have been asserted months ago, but was not until literally the day of the contempt mark-up;
3. The assertion is eight months late. It should have been made by October 25, 2011, the subpoena return date;
4. To this moment, the President himself has not indicated that he is asserting executive privilege;
5. The assertion is transparently invalid in that it is not credible that every document withheld involves a "communication[ ] authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate,";[151]
6. The assertion is transparently invalid where the Justice Department has provided no details by which the Committee might evaluate the applicability of the privilege, such as the senders and recipients of the documents;

[151] In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir 1997).

7. Even if the privilege were valid as an initial matter, which it is not, it certainly has been overcome here, as: (i) the Committee has demonstrated a sufficient need for the documents as they are likely to contain evidence important to the Committee's inquiry and (ii) the documents sought cannot be obtained any other way. The Committee has spent 16 months investigating, talking to dozens of individuals, and collecting documents from many sources. The remaining documents are ones uniquely in the possession of the Justice Department; and,

8. Without these documents, the Committee's important legislative work will continue to be stymied. The documents are necessary to evaluate what government reform is necessary within the Justice Department to avoid the problems uncovered by the investigation in the future.

The President has now asserted executive privilege. This assertion, however, does not change the fact that Attorney General Eric Holder Jr. is in contempt of Congress today for failing to turn over lawfully subpoenaed documents explaining the Department's role in withdrawing the false letter it sent to Congress.

VII. 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

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.[152] 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.[153] The special committee reported a resolution recommending formal proceedings against Randall and Whitney "at the bar of the House."[154]

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.[155] 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."[156] Randall was de-

[152] *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].
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*

tained until January 13, 1796, when the House passed a resolution discharging him.[157] In contrast, Whitney "was absolved of any wrongdoing," since his actions were against a "member-elect" and occurred "away from the seat of government."[158]

Congressional records do not demonstrate any question or hesitation regarding whether Congress possesses the power to hold individuals in contempt.[159] Moreover, there was no question that Congress could punish a non-Member for contempt.[160] 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.[161] 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.[162]

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.[163] This was the first occasion the House cited a cabinet-level executive branch member for contempt of Congress.[164] 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.[165]

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.[166] On August 7, 1998, the Committee held Attorney General Reno in contempt by a vote of 24 to 18.[167]

During the 110th Congress, Chairman Henry Waxman threatened and scheduled contempt proceedings against several Administration officials.[168] 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.[169]

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[157] *Id.*
[158] *Id.*: quoting Asher C. Hinds, *Precedents of the House of Representatives,* Sec. 1603 (1907).
[159] *Id.*
[160] *Id.* at 5.
[161] *Id.* at 6.
[162] *Id.* at 14.
[163] *Id.*
[164] Wm. Holmes Brown et al., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, 450 (2011).
[165] *Id.* at 20, 22.
[166] David E. Rosenbaum, *Panel Votes to Charge Reno With Contempt of Congress*, N.Y. TIMES (Aug. 7, 1998).
[167] *Id.*
[168] 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).
[169] 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*

Continued

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.[170] On June 13, 2007, the Committee served subpoenas on Miers and Bolten.[171] 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.[172] One hundred seventy-three Members of Congress did not cast a vote either in favor or against the resolution.[173] All but nine Members who abstained were Republican.[174] Only three Republicans supported the contempt resolution for Miers and Bolten.[175] This marked the first contempt vote by Congress with respect to the Executive Branch since the Reagan Administration.[176] The resolutions passed by the House allowed Congress to exercise all available remedies in the pursuit of contempt.[177] The House Judiciary Committee's action against Miers marked the first time that a former administration official had ever been held in contempt.[178]

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.

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.

Contempt Vote (June 13, 2008) http://oversight-archive.waxman.house.gov/story.asp?ID=2012 (last visited Feb. 22, 2012).

[170] CRS Contempt Report at 54–55.

[171] *Id.*

[172] See H. Res. 982.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] Philip Shenon, *House Votes to Issue Contempt Citations*, N.Y. TIMES (Feb. 15, 2008).

[177] *CRS Contempt Report at 54–55.*

[178] *Id.*

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.[179] 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."[180] The White House Counsel informed the Committee that these documents represented "deliberations at the very highest level of government."[181]

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]."[182]

In furtherance of the Committee's ozone regulation investigation, OIRA produced or allowed *in camera* review of 7,500 documents.[183] Documents produced by EPA and OIRA represented pre-decisional opinions of career scientists and agency counsel.[184] These documents were sensitive because some, if not all, related to ongoing litigation.[185] 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."[186]

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

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[179] 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.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*

> and State Department officials, including the Vice President's CIA briefer.[187]

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.[188]

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.[189] Ultimately, the Committee relented in its pursuit of the President's 302.[190] The Committee, however, persisted in its request for the Vice President's 302. As a result, the President asserted executive privilege over that particular document.[191]

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.[192] The Committee employed a multitude of investigative tools, including hearings, transcribed interviews, and non-transcribed interviews. The Administration produced thousands of documents.[193] 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.[194]

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[187] 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 Att'y Gen. Michael B. Mukasey*, http://oversight-archive.waxman.house.gov/documents/20081205114333.pdf (last visited Mar. 5, 2012).

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] 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.

[193] *Id.*

[194] *Id.*

The Department of Defense produced over 31,000 responsive documents, and the Committee received an unprecedented level of access to documents and personnel.[195]

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 predecisional 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 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 15, 2012, in the Fast and Furious investigation, in the light most favorable to the Department of Justice, it has "provided the Committee over 7,600 pages of documents"—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.[196] 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.

VIII. RULES REQUIREMENTS

EXPLANATION OF AMENDMENTS

Mr. Gowdy offered an amendment that updated the Committee's Report to reflect that the President asserted the executive privilege over certain documents subpoenaed by the Committee. The amendment also updated the Report to include the Committee's concerns about the validity of the President's assertion of the executive privilege. The amendment was agreed to by a recorded vote.

COMMITTEE CONSIDERATION

On June 20, 2012, the Committee on Oversight and Government Reform met in open session with a quorum present to consider a report of contempt against Eric H. Holder, Jr., the Attorney General of the United States, for failure to comply with a Congressional subpoena. The Committee approved the Report by a roll call vote of 23–17 and ordered the Report reported favorably to the House.

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[195] *Id.*; The minority views by Hon. Tom Davis states that the Comm. received 50,000 pages of documents and reviewed additional documents *in camera.*

[196] Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (May 15, 2012).

ROLL CALL VOTES

The following recorded votes were taken during consideration of the contempt Report:

1. Mr. Welch offered an amendment to add language to the Executive Summary stating that contempt proceedings at this time are unwarranted because the Committee has not met with former Attorney General Michael Mukasey.

The amendment was defeated by a recorded vote of 14 Yeas to 23 Nays.

Voting Yea: Cummings, Towns, Maloney, Norton, Kucinich, Tierney, Lynch, Connolly, Quigley, Davis, Braley, Welch, Murphy and Speier.

Voting Nay: Issa, Burton, Mica, Platts, Turner, McHenry, Jordan, Chaffetz, Mack, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, Meehan, DesJarlais, Walsh, Gowdy, Ross, Guinta, Farenthold and Kelly.

2. Mr. Lynch offered an amendment asking for an itemized accounting of the costs associated with the Fast and Furious investigation.

The amendment was defeated by a vote of 15 Yeas to 23 Nays.

Voting Yea: Cummings, Towns, Maloney, Norton, Kucinich, Tierney, Clay, Lynch, Connolly, Quigley, Davis, Braley, Welch, Murphy and Speier.

Voting Nay: Issa, Burton, Mica, Platts, Turner, McHenry, Jordan, Chaffetz, Mack, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, Meehan, DesJarlais, Walsh, Gowdy, Ross, Guinta, Farenthold and Kelly.

3. Ms. Maloney offered an amendment to add language to the Executive Summary stating that contempt proceedings at this time are unwarranted because the Committee has not held a public hearing with the former head of the Bureau of Alcohol, Tobacco, Firearms and Explosives, Kenneth Melson.

The amendment was defeated by a vote of 16 Yeas to 23 Nays.

Voting Yea: Cummings, Towns, Maloney, Norton, Kucinich, Tierney, Clay, Lynch, Cooper, Connolly, Quigley, Davis, Braley, Welch, Murphy and Speier.

Voting Nay: Issa, Burton, Mica, Platts, Turner, McHenry, Jordan, Chaffetz, Mack, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, Meehan, DesJarlais, Walsh, Gowdy, Ross, Guinta, Farenthold and Kelly.

4. Mr. Gowdy offered an amendment that updated the Committee's Report to reflect that the President asserted the executive privilege over certain documents subpoenaed by the Committee. The amendment also updated the Report to include the Committee's concerns about the validity of the President's assertion of the executive privilege. The amendment was agreed to by a recorded vote.

The amendment was agreed to by a vote of 23 Yeas to 17 Nays.

Voting Yea: Issa, Burton, Mica, Platts, Turner, McHenry, Jordan, Chaffetz, Mack, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, Meehan, DesJarlais, Walsh, Gowdy, Ross, Guinta, Farenthold and Kelly.

Voting Nay: Cummings, Towns, Maloney, Norton, Kucinich, Tierney, Clay, Lynch, Cooper, Connolly, Quigley, Davis, Braley, Welch, Yarmuth, Murphy and Speier.

5. The Resolution was favorably reported, as amended, to the House, a quorum being present, by a vote of 23 Yeas to 17 Nays.

Voting Yea: Issa, Burton, Mica, Platts, Turner, McHenry, Jordan, Chaffetz, Mack, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, Meehan, DesJarlais, Walsh, Gowdy, Ross, Guinta, Farenthold and Kelly.

Voting Nay: Cummings, Towns, Maloney, Norton, Kucinich, Tierney, Clay, Lynch, Cooper, Connolly, Quigley, Davis, Braley, Welch, Yarmuth, Murphy and Speier.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. The Report does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this Report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Report will assist the House of Representatives in considering whether to cite Attorney General Eric H. Holder, Jr. for contempt for failing to comply with a valid congressional subpoena.

CONSTITUTIONAL AUTHORITY STATEMENT

The Committee finds the authority for this Report in article 1, section 1 of the Constitution.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the Report does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

EARMARK IDENTIFICATION

The Report does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

UNFUNDED MANDATE STATEMENT, COMMITTEE ESTIMATE, BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee finds that clauses 3(c)(2), 3(c)(3), and 3(d)(1) of rule XIII of the Rules of the House of Representatives, sections 308(a) and 402 of the Congressional Budget Act of 1974, and section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) are inapplicable to this Report. Therefore, the Committee did not request or receive a cost estimate from the Congressional Budget Office and makes no findings as to the budgetary impacts of this Report or costs incurred to carry out the report.

CHANGES IN EXISTING LAW MADE BY THE BILL AS REPORTED

This Report makes no changes in any existing federal statute.

ADDITIONAL VIEWS

Report of the Committee on Oversight and Government Reform

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

"The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents" Joint Staff Report, prepared for Representative Darrell Issa, Chairman, House Committee on Oversight and Government Reform, and Senator Charles Grassley, Ranking Member, Senate Committee on the Judiciary.

"The Department of Justice's Operation Fast and Furious: Fueling Cartel Violence" Joint Staff Report, prepared for Representative Darrell Issa, Chairman, House Committee on Oversight and Government Reform, and Senator Charles Grassley, Ranking Member, Senate Committee on the Judiciary.

The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents

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

112th Congress
June 14 2011

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I. Executive Summary

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

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

- 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"

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.[1]

[1] 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.[2]

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

[2] 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.[3]

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:

[3] 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.**[4]

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:
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> (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

[4] 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.[5]

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.
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> 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.[6]

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

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[5] BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES ORDER 3310.4(b) 148(b)(1) (Feb. 8, 1989) (emphasis added).

[6] 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*?
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> A. Yes, yes.
>
> Q. Is that your understanding of ATF policy?
>
> A. Yes.[7]

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.***

[7] Transcribed Interview of ATF Special Agent Olindo James Casa Transcript, at 18 (April 28, 2011) (on file with author) [hereinafter Agent CasaTranscript].

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.[8]

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.[9]

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.

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[8] Transcribed Interview of ATF Special Agent Lawrence Alt, Transcript at 37-39 (April 27, 2011) (on file with author) [hereinafter Agent Alt Transcript].
[9] Agent Casa Transcript, at 92.

Q. – ATF's policies and procedures would be to interdict that weapon?

A. Yes. Yes.[10]

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.*[11]

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.[12]

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."[13]

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.

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[10] Agent Casa Transcript, at 17.
[11] Agent Dodson Transcript, at 19.
[12] Transcribed Interview of ATF Special Agent Peter Forcelli, Transcript, at 25 (April 28, 2011) (on file with author) [hereinafter Agent Forcelli Transcript].
[13] 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.[14]

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.[15]

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

[14] Agent Dodson Transcript, at 18-19.
[15] 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.[16]

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.[17]

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.

[16] Agent Forcelli Transcript, at 33.
[17] 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.[18]

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?"

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

[18] 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.[19]

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.[20]

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.

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[19] Agent Dodson Transcript, at 40-41.
[20] 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:[21]

> 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.[22]

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 get 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

[21] Email from Group VII Supervisor David Voth to Phoenix Group VII (Mar. 12, 2010).
[22] 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.[23]

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.***[24]

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.

[23] Agent Dodson Transcript, at 44.
[24] 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.[25]

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?

[25] 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? [26]

[26] 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.[27]

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.

[27] 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.[28]

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.[29]

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.

[28] Agent Dodson Transcript, at 57-58.
[29] 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.[30]

[30] 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.[31]

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.[32]

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.

[31] Agent Dodson Transcript, at 39.
[32] 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.***[33]

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

[33] 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.[34]

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.[35]

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

[34] Agent Forcelli Transcript, at 60-62.
[35] 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.[36]

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.[37]

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.[38]

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[36] Agent Dodson Transcript, at 45-46.
[37] Agent Casa Transcript, at 33.
[38] 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.[39]

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***

[39] 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?[40]

VIII. Collateral Damage: A Fast and Furious Inevitability

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:

[40] Agent Dodson Transcript, at 59.

From: Voth, David J.
Sent: Friday, April 02, 2010 10:31 AM
To: [redacted]
Cc: Phoe-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."[41] 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.

[41] 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.[42]

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.

[42] 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.[43]

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.[44]

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

[43] Agent Dodson Transcript, at 117-118.
[44] 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.[45]

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.[46]

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?

---

[45] Agent Dodson Transcript, at 135-136.
[46] 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.[47]

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.**[48]

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.

[47] Agent Alt Transcript, at 160-161.
[48] 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.[49]

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?

[49] 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.**[50]

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.[51]

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.[52] Patino's purchases would eventually

[50] Agent Alt Transcript, at 187-191.
[51] In re: Manual Osorio-Arellanes, No. 10-10251M, aff. of [Name Redacted], Special Agent, (D.Ariz. Dec. 29, 2010).
[52] 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.[53]

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.[54] 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 16th, 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.[55]

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[53] *Id.*
[54] U.S. v. Manuel Osorio-Arellanes et al., No. CR-11-0150-TUC-DCB-JCG. (D.Ariz. Apr. 20, 2011).
[55] 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.[56]

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.[57]

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:

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[56] Agent Dodson Transcript, at 140-141.
[57] 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 firearms 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.[58]

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.[59] 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!"**[60] 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.[61]

* * *

[58] Agent Dodson Transcript, at 141-142.
[59] Tamara Audi, *Alleged Gun Ring Busted,* W.S.J., Jan. 26, 2011.
[60] Dennis Wagner, *Sen. Chuck Grassley: Guns in ATF sting tied to agent's death*, TUCSON CITIZEN, Feb. 1, 2011.
[61] 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.[62]

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 o f some senior agents.

Q. So Newell's statement was inaccurate?

A. I would say it was very inaccurate.[63]

[62] Agent Alt Transcript, at 202-203.
[63] 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.[64]

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**.

[64] Agent Forcelli Transcript, at 52-53.

> ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.[65]

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.[66]

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.**[67]

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.*[68]

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.*"[69] And when asked if

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[65] Letter from Assistant Attorney General Ronald Weich to Senator Charles E. Grassley (Feb. 4, 2011) (emphasis added).
[66] The Fast and The Furious, Organized Crime Drug Enforcement Task Force Interim Report (Sept. 9, 2010).
[67] Agent Alt Transcript, at 148.
[68] 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.***"[70]

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.[71]

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

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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[69] Agent Forcelli Transcript, at 144.
[70] Agent Casa Transcript, at 131.
[71] Letter from Assistant Attorney General Ronald Weich to Charles E. Grassley (May 2, 2011).

The Department of Justice's Operation Fast and Furious: Fueling Cartel Violence

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

112th Congress
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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

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.[1] 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.

[1] *See* E-mail from [ATF Evidence Vault Employee] to Hope MacAllister October 12, 2010 (HOGR ATF – 002131-32).

II. Findings

- 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

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.[2]

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.[3]

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:

---

[2] Canino Transcript, at 11. Carlos Canino became the Acting Attaché in October 2010. Prior to this time, he served as the Deputy Attaché.

[3] 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?[4]

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.[5] 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

[4] Canino Transcript, at 9-10.
[5] *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[6]	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[7]	42
3	11/26/2009	Agua Prieta, Sonora	15 rifles, 8 pistols, traced to [SP 1][8]	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[9]	5
5	12/18/2009	Tijuana, Baja	"El Teo" link, 5 AK-47 type rifles recovered and 1 linked to [SP 2][10]	1
6	12/18/2009	Tijuana, Baja	Traced to weapons bought 11/13/09[11]	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][12]	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[13]	1

[6] E-mail from Tonya English to David Voth March 09, 2010 (HOGR ATF – 001803-12).
[7] E-mail from William Newell to Lorren Leadmon November 25, 2009 (HOGR ATF – 002141); *see also* e-mail from [ATF NTC] to Hope MacAllister December 9, 2009 (HOGR ATF – 002205-06); *see also* e-mail from Mark Chait to William Newell, Daniel Kumor November 25, 2009 (HOGR ATF – 001993).
[8] *See generally* "Operation The Fast and The Furious" Presentation, March 5, 2010.
[9] E-mail from [ATF NTC] to Tonya English, [ATF Group 7 SA], Hope MacAllister, David Voth January 8, 2010 (HOGR ATF – 002210-11); *see also* e-mail from [ATF Tijuana Field Office Agent] to David Voth February 24, 2010 (HOGR ATF – 002301); "Operation The Fast and The Furious" Presentation, March 5, 2010.
[10] E-mail from [ATF Intelligence Specialist] to [ATF Group 7 SA], Hope MacAllister, Tonya English, David Voth January 13, 2010 (HOGR ATF – 002166-70).
[11] E-mail from [ATF NTC] to Hope MacAllister December 29, 2009 (HOGR ATF – 002208-09).
[12] E-mail from Lorren Leadmon to [ATF Intelligence Specialist], [ATF Group 7 SA], Hope MacAllister, Tony English, David Voth, [ATF Analyst Chief – Mexico] January 18, 2010 (HOGR ATF – 002112); *see also* e-mail from Tonya English to Hope MacAllister January 14, 2010 (HOGR ATF – 002214-15); *see also* e-mail from [ATF Tijuana Field Office Agent] to David Voth February 24, 2010 (HOGR ATF – 002301).
[13] E-mail from [ATF Intelligence Analyst] to David Voth March 9, 2010 (HOGR 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[14]	1
10	2/21/2010	Sinaloa, Mexico	15 rifles, 5 handguns, 11,624 rounds of ammunition. At least 4 weapons traced to [SP 1] [15]	4
11	2/25/2010	Tijuana, Baja	"El Teo" link, attempted State Police Chief assassination, guns traced to [SP 4] [16]	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][17]	5
13	6/15/2010	Acapulco, Guerrero	6 rifles, 1,377 rounds of ammo, 1 traced back to Operation Fast and Furious[18]	1
14	6/24/2010	Tijuana, Baja	6 AK-47 type firearms, 5 traced back to [SP 2][19]	5
15	7/1/2010	Tubutama, Sonora	DTO battle, 15 firearms seized, 12 rifles, 3 pistols, 1 traced to Operation Fast Furious[20]	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[21]	1
17	7/8/2010	Culiacan, Sinaloa	Grenade launcher, 2 submachine guns, 8 rifles, 3 shotguns, 1,278	1

[14] *See generally* "Operation the Fast and the Furious" Presentation, March 5, 2010.
[15] E-mail from Tonya English to [ICE Agent] March 19, 2010 (HOGR ATF – 001813-15); *see also* e-mail from David Voth to Tonya English, Hope MacAllister, [ATF Group 7 SA] March 22, 2010 (HOGR ATF – 002114-15); *see also* e-mail from Lorren Leadmon to David Voth, [ATF Analyst Chief – Mexico] March 11, 2010 (HOGR ATF – 002133-40); *see also* e-mail from Lorren Leadmon to David Voth, [ATF Analyst Chief – Mexico] March 11, 2010 (HOGR ATF – 002315-16).
[16] E-mail from David Voth to Emory Hurley February 26, 2010 (HOGR ATF – 002271-72).
[17] E-mail from [ATF SA] to Hope MacAllister, Tonya English, [ATF El Paso SA] April 29, 2010 (HOGR ATF – 001713-16).
[18] E-mail from [ATF Mexico City SA] to Tonya English January 26, 2011 (HOGR ATF – 001863-65).
[19] E-mail from [ATF SA-EPIC] to Tonya English July 1, 2010 (HOGR ATF – 001821); *see also* e-mail from [ATF NTC] to Tonya English July 1, 2010 (HOGR ATF – 001824).
[20] E-mail from David Voth to Carlos Canino July 14, 2010 (HOGR ATF – 002378-2379).
[21] E-mail from [ATF SA-EPIC] to Tonya English August 3, 2010 (HOGR ATF – 001726-27); *see also* e-mail from [ATF NTC] to Hope MacAllister, Tonya English July 15, 2010 (HOGR ATF – 001729-1730); *see also* e-mail from David Voth to Tonya English July 30, 2010 (HOGR ATF – 001742-43); *see also* e-mail from Tonya English to [ATF SA-EPIC], [ATF Analyst] July 29, 2010 (HOGR 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[22]	
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[23]	1
19	7/27/2010	Durango, Durango	Barrett 50 caliber traced to [SP 1] purchase on 3/22/10[24]	1
20	8/1/2010	Chihuahua, Chihuahua	Romarm 762s traced to 12/17/09 purchase[25]	1
21	8/1/2010	Sinaloa de Leyva, Sinaloa	Barrett 50 caliber traced to Operation Fast and Furious, bought 6/8/10[26]	1
22	8/11/2010	Santiago, Durango	16 rifles, 110 magazines, 36 bullet-proof vests, 1 rifle traced to Operation Fast and Furious[27]	1
23	8/13/2010	Santiago Papasquiaro, Durango	Romarm/Cugir 762 traced to Operation Fast and Furious[28]	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[29]	1
25	8/24/2010	Nogales, Sonora	Romarm/Cugir 762 traced to Operation Fast and Furious, bought 12/14/09[30]	1
26	9/8/2010	San Luis, Sonora	Romarm/Cugir 762 traced to Operation Fast and Furious, bought 12/14/09[31]	1

[22] E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English July 19, 2010 (HOGR ATF – 001717-18); *see also* e-mail from [ATF NTC] to Hope MacAllister, Tonya English July 15, 2010 (HOGR ATF – 001723).
[23] E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] August 3, 2010 (HOGR ATF – 001731-32).
[24] E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] July 28, 2010 (HOGR ATF – 001735-36); *see also* e-mail from [ATF Firearms Specialist] to Tonya English, [ATF Group 7 SA], Hope MacAllister June 10, 2010 (HOGR ATF – 002117-20).
[25] E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] January 21, 2011 (HOGR ATF – 001856-57).
[26] E-mail from [ATF NTC] to Tonya English, Hope MacAllister August 13, 2010 (HOGR ATF – 002013-14).
[27] E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English October 18, 2010 (HOGR ATF – 002178).
[28] E-mail from [ATF NTC] to Hope MacAllister, Tonya English October 18, 2010 (HOGR ATF – 002181-82).
[29] E-mail from [ATF Investigative Specialist] to [ATF NTC], Hope MacAllister, Tonya English August 23, 2010 (HOGR ATF – 002174-75).
[30] E-mail from [ATF SA-EPIC] to [ATF Group 7 SA], Hope MacAllister, Tonya English September 15, 2010 (HOGR 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[32]	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[33]	6
29	9/14/2010	Nogales, Sonora	Romarm/Cugir 762 traced to Operation Fast and Furious[34]	1
30	9/18/2010	Colonia Granjas, Chihuahua	Romarm/Cugir 762 traced to Operation Fast and Furious[35]	1
31	9/22/2010	Saric, Sonora	18 AK-47 rifles and 1 Barrett 50 caliber, 1 firearm traced to Operation Fast and Furious[36]	1
32	9/24/2010	Saric, Sonora	Guns bought on 2/16/10 traced to [SP 3] and [SP 1] [37]	1
33	9/26/2010	Reynosa, Tamaulipas	Traced guns to Operation Fast and Furious bought 3/18/10[38]	1
34	9/28/2010	Juarez, Chihuahua	Romarm/Cugir 762 traced to Operation Fast and Furious, bought 1/7/10[39]	1
35	10/11/2010	Saric, Sonora	Firearm traced to 11/17/09 purchase[40]	1
36	10/12/2010	Tepic, Nayarit	Barrett 50 caliber traced to Operation Fast and Furious, bought 2/17/10[41]	1

[31] E-mail from [ATF SA-EPIC] to [ATF Group 7 SA], Hope MacAllister, Tonya English September 15, 2010 (HOGR ATF – 002121-22).
[32] E-mail from [ATF SA-EPIC] to [ATF Group 7 SA], Hope MacAllister, Tonya English September 20, 2010 (HOGR ATF – 002186-87).
[33] E-mail from [ATF NTC] to Hope MacAllister, Tonya English September 17, 2010 (HOGR ATF – 001744-45); *see also* e-mail from[ATF NTC] to Hope MacAllister, Tonya English September 14, 2010 (HOGR ATF – 001748-49); *see also* e-mail from [ATF NTC] to Tonya English, Hope MacAllister September 20, 2010 (HOGR ATF – 001754-55).
[34] E-mail from [ATF NTC] to Hope MacAllister, Tonya English September 16, 2010 (HOGR ATF – 001746); *see also* e-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] September 20, 2010 (HOGR ATF – 001752-53).
[35] E-mail from Hope MacAllister to [AUSA AZ District] November 29, 2010 (HOGR ATF – 001798-99).
[36] E-mail from [ATF Investigative Specialist] to Hope MacAllister, [ATF NTC], [ATF NTC] October 28, 2010 (HOGR ATF – 001756-59).
[37] E-mail from [ATF NTC] to Hope MacAllister, Tonya English October 7, 2010 (HOGR ATF – 002126-27).
[38] E-mail from [ATF NTC] to Hope MacAllister, Tonya English October 26, 2010 (HOGR ATF – 001831-32).
[39] E-mail from [ATF NTC] to Hope MacAllister, Tonya English October 15, 2010 (HOGR ATF – 002129-2130).
[40] E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] November 19, 2010 (HOGR ATF – 002003-04).
[41] E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] November 19, 2010 (HOGR 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[42]	1
38	10/19/2010	Reynosa, Tamaulipas	Romarm/Cugir 762 traced to Operation Fast and Furious[43]	1
39	10/28/2010	Acapulco, Guerrero	Romarm/Cugir 762 traced to Operation Fast and Furious[44]	1
40	11/4/2010	Chihuahua, Chihuahua	16 guns, 2 traced to Operation Fast and Furious, Used in the murder of Mario Gonzalez[45]	1
41	11/22/2010	Nogales, Sonora	Traced to guns bought 11/27/09[46]	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[47]	5
43	12/17/2010	Zumu Rucapio, MC	Traced to Operation Fast and Furious, bought 11/27/09[48]	1
44	12/28/2010	Obregon, Sonora	12 total firearms, 1 firearm traced to Operation Fast and Furious, bought 4/12/10[49]	1
45	1/9/2011	Chihuahua, Chihuahua	6 rifles and magazines seized, 1 firearm traced to Operation Fast and Furious[50]	1
46	1/25/2011	Culiacan, Sinaloa	Romarm/Cugir 762 traced to Operation Fast and Furious, bought 3/8/10[51]	1

[42] E-mail from [ATF NTC] to Hope MacAllister, [ATF Group 7 SA], Tonya English December 15, 2010 (HOGR ATF – 002190-91).
[43] E-mail from Hope MacAllister to [AUSA AZ District] November 29, 2010 (HOGR ATF – 001798).
[44] E-mail from Hope MacAllister to [AUSA AZ District] November 29, 2010 (HOGR ATF – 001799).
[45] E-mail from Tonya English to David Voth November 15, 2010 (HOGR ATF – 001792).
[46] 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).
[47] E-mail from [ATF NTC] to Hope MacAllister, Tonya English December 28, 2010 (HOGR ATF – 001842-51).
[48] E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] December 22, 2010 (HOGR ATF – 001852-55).
[49] 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).
[50] 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).
[51] 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[52]	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[53]	1
			TOTAL	**122**[54]

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.[55] 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.'"[56] According to the tally Newell received on December 16, 2010, approximately 241 firearms had been recovered in Mexico and 350 in the U.S.[57] 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.[58]

---

[52] E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] February 17, 2011 (HOGR ATF – 001859-62); *see also* e-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] March 21, 2011 (HOGR ATF – 001880-82); *see also* e-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] February 17, 2011 (HOGR ATF – 002020-21).

[53] E-mail from [ATF SA-EPIC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] March 7, 2011 (HOGR ATF – 002198-99); *see* E-mail from [ATF NTC] to Hope MacAllister, Tonya English, [ATF Group 7 SA] March 1, 2011 (HOGR ATF – 002202-03).

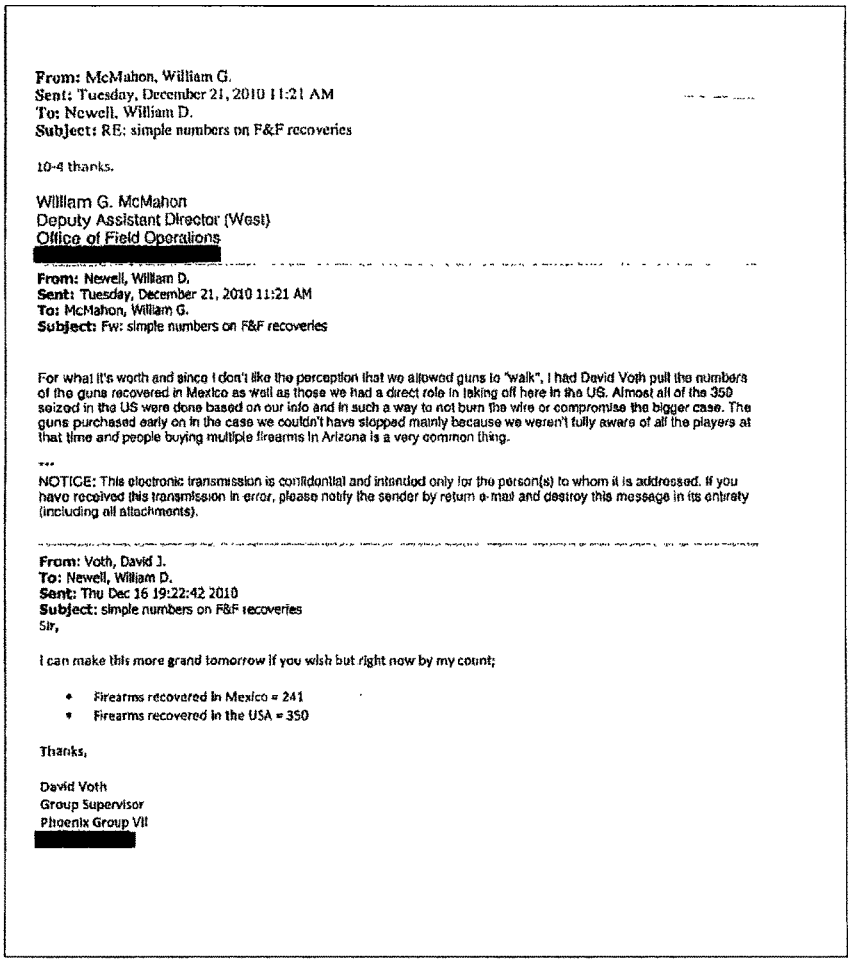
[54] This total of 122 guns is based on documents produced to the Committees by DOJ and total represents the minimum number of guns recovered in Mexico as identified by the Committees.

[55] E-mail from David Voth to William Newell December 16, 2010, 7:22pm (HOGR ATF – 001935).

[56] *Id.*

[57] *Id.*

[58] 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 F&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 F&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 pull 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 F&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.[59]

[59] *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."[60] In her response, MacAllister asks, "Can we postpone completing that trace as well? Thanks!"[61] These holds prevented ATF personnel in Mexico from discovering the origin of the recovered guns.

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[60] E-mail from [NTC employee] to Tonya English and Hope MacAllister, June 10, 2010 (HOGR ATF - 002114).
[61] 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.[62] 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.[63] 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

[62] E-mail from Mark Chait to William Newell and Daniel Kumor, November 25, 2009 (HOGR ATF – 001993).
[63] 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.[64] Several were identified members of the Sinaloa cartel.[65] The guns recovered at the scene traced back to straw purchasers being monitored under ATFs Operation Fast and Furious.[66] 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**."[67]

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].[68] This seizure connected Operation Fast and Furious suspects with a specific high-level "plaza boss" in the Sinaloa DTO.[69] 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.[70]

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.[71] 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:[72]

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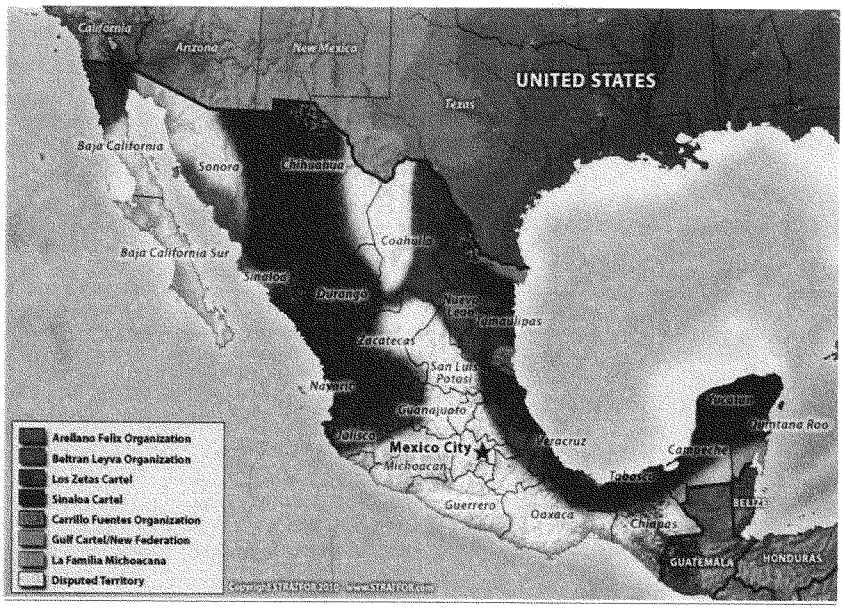
[64] *See* "Operation The Fast and The Furious" Presentation, March 5, 2010.
[65] *Id.*
[66] E-mail from [ATF Official] to David Voth, February 24, 2010 (HOGR ATF – 002301).
[67] E-mail from Jose Wall to Hope MacAllister, December 11, 2009 (HOGR ATF – 002024).
[68] This recovery is not listed in the chart in Section IV since it occurred in the United States.
[69] *See* "Operation the Fast and the Furious" Presentation, March 5, 2010.
[70] *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).
[71] 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/us_and_americas/article6960040.ece (summarizing the bloody feud between the Beltrán-Leyva brothers and Joaquín Guzmán, the head of the Sinaloa DTO).

AREAS OF CARTEL INFLUENCES IN MEXICO



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.[73] 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.

[73] 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.[74] 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.[75]

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.[76] 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

[74] Transcribed Interview of Steve Martin, Transcript at 40, July 6, 2011 (on file with author) [hereinafter Martin Transcript].
[75] *Id.* at 43.
[76] Notes from Steve Martin, ATF Deputy Assistant Director for OSII, January 5, 2010 (HOGR ATF – 001552-53) (produced *in camera* by the Department of Justice).

> trackers on the guns, put pole cams up, mobile surveillance, aerial surveillance, a number of stuff.[77]

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 OSII's suggestions and complaints because OSII'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.

[77] 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.[78]

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?

[78] *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.[79]

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.[80]

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.[81]

---

[79] *Id.* at 45-46.
[80] *Id.* at 91 ("[Joe Cooley and Kevin Carwile] never sat in any of my briefings that I can recall.").
[81] *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**
[redacted]	$8,189.50	$8,880.81	
[redacted]	11,984.00	13,002.64	
[redacted]			Need Receipts
[redacted]	2,589.60	3,125.57	
[redacted]	36,959.75	38,823.33	
[redacted]	36,541.75	39,663.33	
[redacted]	3,199.60	3,466.77	
[redacted]	6,487.00	7,038.39	
[redacted]	3,999.50	4,333.46	
[redacted]	22,719.80	23,781.91	
[redacted]			Need Receipts
[redacted]	8,789.50	9,530.91	
[redacted]	849.98	849.98	
[redacted]	4,494.75	4,873.80	
[redacted]	100.00	100.00	
[redacted]	7,445.97	7,731.27	
[redacted]	59,663.40	64,929.98	
[redacted]	1,999.75	2,166.73	
[redacted]	1,999.80	2,158.78	
[redacted]	204,110.59	213,756.87	
[redacted]	3,992.00	4,331.32	
[redacted]	1,799.00	1,951.92	
[redacted]			Need Receipts
[redacted]	134,638.84	140,034.36	
[redacted]	19,963.75	21,657.66	
[redacted]	7,984.00	8,662.63	
[redacted]	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**:[82]

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**

[82] *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."[83] 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."[84] 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.[85]

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**.[86]

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.[87] 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.**[88]

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[83] *Id.*
[84] *Id*
[85] *Id.*
[86] Martin Transcript, at 100.
[87] 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.
[88] 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.**[89]

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?"[90] 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**."[91]

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

[89] *Id.* at 103-104.
[90] Interview with Lorren Leadmon, Intelligence Operations Specialist, in Wash., D.C., July 5, 2011.
[91] *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.[92]

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?

[92] 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].[93]

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.[94]

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.[95]

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[93] *Id.* at 63.
[94] *Id.* at 15-16.
[95] *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.[96]

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."[97] 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?

[96] *Id.* at 17-18.
[97] *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.[98]

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.[99]

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

[98] *Id* at 20-21.
[99] *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.**[100]

VI. More Complaints and More Reassurances

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 authorizes 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.[101] 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.

[100] *Id.* at 72.

[101] *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.[102]

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.[103]
>
> * * *
>
> 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.[104]

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?

[102] Gil Transcript, at 30-32.
[103] *Id.* at 66-67.
[104] *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.[105]

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.[106]

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.[107]

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?

[105] Canino Transcript, at 16.
[106] *Id.* at 16-17.
[107] 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.[108]

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.[109]

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:

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[108] *Id.* 36-38.
[109] *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 those 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.[110]

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."[111]

[110] Canino Transcript, at 19-20.
[111] 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.[112]

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.

[112] *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.[113]

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.[114]

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.

---

[113] Canino Transcript, at 102-103.
[114] 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.[115]

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.[116]

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 OCDETF funded strike force.[117] 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.[118]

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.[119]

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?

---

[115] Canino Transcript, at 22-23.
[116] *See* Section IV *supra,* page 8 for a detailed discussion of the flow of weapons to Mexico and the increased violence as a result.
[117] Briefing Paper, Phoenix Field Division, 785115-10-0004 (Jan. 8, 2010).
[118] *See supra* Section V.B.
[119] 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.[120]

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.

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[120] *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.[121]

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.

[121] *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.[122]

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.[123]

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.[124]

Kumor's response led Canino to believe that arrests were imminent in Operation Fast and Furious:

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[122] *Id.* at 113-115.
[123] *Id.* at 78.
[124] 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.[125]

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.[126]

[125] *Id.* at 95.
[126] *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.[127]

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.

[127] 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?[128]

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:[129]

[128] Transcribed Interview of William McMahon, Transcript at 38, June 28, 2011 (on file with author) [hereinafter McMahon Transcript].
[129] E-mail from Bill Newell to Dave Voth December 17, 2009 (HOGR 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)
[redacted]

***

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: 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 FFL 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 a 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.[130]

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.

[130] 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.[131]

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.**[132]

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

[131] *Id.* at 41-43.
[132] Canino Transcript, at 12.

> day, those guns do not leave your control. At some point those guns do not get into the streets.[133]

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.[134]

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.**[135]

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.

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[133] *Id* at 12-13.
[134] Gil Transcript, at 48.
[135] 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.[136]

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.[137]

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.**

[136] Kumor Transcript, at 98-99.
[137] 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.**[138]

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?

[138] *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.[139]

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**

[139] 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.[140]

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.[141] 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.[142] 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.[143]

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.[144] A number of employees from

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[140] *Id.* at 82-84.
[141] 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-na-gunrunner-20110623.
[142] 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.
[143] Email from Tonya English to David Voth, November 15, 2010 (HOGR ATF – 001792).
[144] *Id.*

OSII contacted their colleagues in Phoenix to alert them of this connection. OSII agents also told ATF personnel in Mexico.[145]

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.[146]

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[145] Interview with Lorren Leadmon, Intelligence Operations Specialist, in Wash., D.C., July 5, 2011.
[146] 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.[147]

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?

[147] *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.[148]

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.[149] The gunmen attacked the helicopter, wounding two officers on board and forcing the aircraft to land near the scene of the attack.[150] Canino described the event:

A. I think it was on May 24th the Mexican Federal Police mounted an operation against members of La Familia.

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[148] *Id.* at 30-31, 33.
[149] "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/.
[150] *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.[151]

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.[152]

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.[153] 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

[151] Canino Transcript, at 34.
[152] *Id.* at 34.
[153] *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.[154]

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.[155] 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, 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.**[156]

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.[157] This spread of Operation Fast and Furious weapons may place an even greater number of Mexican citizens in harm's way.

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[154] Canino Transcript, at 36.
[155] Report from United States Embassy staff about Congressional Visit, June 25, 2011 (on file with author).
[156] Canino Transcript, at 17.
[157] *See* Areas of Cartel Influences in Mexico, *supra* page 19.

IX. Conclusion

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.[158] Of those weapons, 1,048 remain unaccounted for, since the Department's response indicates that the guns have not yet been recovered and traced.[159] 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.[160]

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.**[161]

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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[158] 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.
[159] *Id.* at 14.
[160] *See* Casa Transcript, at 17; *see also Operation Fast and Furious: Reckless Decisions, Tragic Outcomes*, 111th Cong. 44 June 14, 2011 (statement of Peter Forcelli, ATF Special Agent).
[161] Canino Transcript, at 17-19.

MINORITY VIEWS

Report of the Committee on Oversight and Government Reform

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

On June 20, 2012, the Committee adopted on a strictly party-line vote a report and resolution (hereinafter "Contempt Citation") concluding that Attorney General Eric H. Holder, Jr., the chief law enforcement officer of the United States, should be held in contempt of Congress for declining to produce certain documents pursuant to the Committee's investigation of "gunwalking" during Operation Fast and Furious and previous operations.

Committee Democrats were unanimous in their opposition to the Contempt Citation. These dissenting views conclude that Congress has a Constitutional responsibility to conduct vigorous oversight of the executive branch, but that holding the Attorney General in contempt would be an extreme, unprecedented action based on partisan election-year politics rather than the facts uncovered during the investigation.

These views find that the Committee failed to honor its Constitutional responsibility to avoid unnecessary conflict with the executive branch by seeking reasonable accommodations when possible. The Committee flatly rejected a fair and reasonable offer made by the Attorney General to provide additional internal deliberative documents sought by the Committee in exchange for a good faith commitment toward resolving the contempt dispute. Instead, the Committee has repeatedly shifted the goalposts in this investigation after failing to find evidence to support its unsubstantiated allegations.

The Contempt Citation adopted by the Committee contains serious and significant errors, omissions, and misrepresentations. To address these inaccuracies, these views hereby incorporate and attach the 95-page staff report issued by Ranking Member Elijah Cummings in January 2012, which provides a comprehensive analysis of the evidence obtained during the Committee's investigation.

I. The Committee's Actions Have Been Highly Partisan

The Committee's contempt vote on June 20, 2012, was the culmination of one of the most highly politicized congressional investigations in decades. It was based on numerous unsubstantiated allegations that targeted the Obama Administration for political purposes, and it ignored documented evidence of gunwalking operations during the previous administration.

During the Committee's 16-month investigation, the Committee refused all Democratic requests for witnesses and hearings. In one of the most significant flaws of the investigation, the Chairman refused multiple requests to hold a public hearing with Kenneth Melson, the former head of ATF, the agency responsible for con-

ducting these operations.[1] The Chairman's refusal came after Mr. Melson told Committee investigators privately in July 2011 that he never informed senior officials at the Justice Department about gunwalking during Operation Fast and Furious because he was unaware of it himself.[2] Mr. Melson's statements directly contradict the claim in the Contempt Citation that senior Justice Department officials were aware of gunwalking because Mr. Melson briefed Gary Grindler, then-Acting Deputy Attorney General, in March 2010.[3]

Despite promising that he would be "investigating a president of my own party because many of the issues we're working on began on [sic] President Bush," the Chairman also refused multiple requests for former Attorney General Michael Mukasey to testify before the Committee or to meet with Committee Members informally to discuss the origination and evolution of gunwalking operations since 2006.[4] Documents obtained during the investigation indicate that Mr. Mukasey was briefed personally on botched efforts to coordinate firearm interdictions with Mexican law enforcement officials in 2007 and was informed directly that such efforts would be expanded during his tenure.[5]

The Committee also failed to conduct interviews of other key figures. For example, the Committee did not respond to a request to interview Alice Fisher, who served as Assistant Attorney General in charge of the Criminal Division from 2005 to 2008, about her role in authorizing wiretaps in Operation Wide Receiver, or to a request to interview Deputy Assistant Attorney General Kenneth Blanco, who also authorized wiretaps in Operation Fast and Furious and still works at the Department, but who was placed in his position under the Bush Administration in April 2008.[6] No explanation for these refusals has been given.

During the Committee business meeting on June 20, 2012, every Democratic amendment to correct the Contempt Citation by noting these facts was defeated on strictly party-line votes.

II. Holding the Attorney General in Contempt Would Be Unprecedented

The House of Representatives has never in its history held an Attorney General in contempt of Congress. The only precedent referenced in the Contempt Citation for holding a sitting Attorney General in contempt for refusing to provide documents is this Committee's vote in 1998 to hold then-Attorney General Janet Reno in contempt during the campaign finance investigation conducted by then-Chairman Dan Burton.[7]

Chairman Burton's investigation was widely discredited, and the decision to hold the Attorney General in contempt was criticized by editorial boards across the country as "a gross abuse of his powers as chairman of the committee,"[8] a "fishing expedition,"[9] "laced with palpable political motives,"[10] and "showboating."[11] That action was so partisan and so widely discredited that Newt Gingrich, who was then Speaker, did not bring it to the House Floor for a vote.[12]

Similarly, numerous commentators and editorial boards have criticized Chairman Issa's recent actions as "a monstrous witch

hunt,"[13] "a pointless partisan fight,"[14] and "dysfunctional Washington as usual."[15]

III. The Committee Has Held the Attorney General to an Impossible Standard

For more than a year, the Committee has held the Attorney General to an impossible standard by demanding documents he is prohibited by law from producing.

One of the key sets of documents demanded during this investigation has been federal wiretap applications submitted by law enforcement agents in order to obtain a federal court's approval to secretly monitor the telephone calls of individuals suspected of gun trafficking.

The federal wiretapping statute, which was passed by Congress and signed by President Lyndon B. Johnson on June 19, 1968, provides for a penalty of up to five years in prison for the unauthorized disclosure of wiretap communications and prohibits the unauthorized disclosure of wiretap applications approved by federal judges, who must seal them to protect against their disclosure.[16] The statute states:

> Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction. Applications made and orders granted under this chapter shall be sealed by the judge.[17]

Similarly, in 1940, Congress passed a statute giving the Supreme Court the power to prescribe rules of pleading, practice, and procedure in criminal cases.[18] In 1946, the modern grand jury secrecy rule was codified as Rule 6(e) of the Federal Rules of Criminal Procedure, which provides for criminal penalties for disclosing grand jury information.[19]

The Department has explained this to the Committee repeatedly, including in a letter on May 15, 2012:

> Our disclosure to this oversight Committee of some material sought by the October 11 subpoena, such as records covered by grand jury secrecy rules and federal wiretap applications and related information, is prohibited by law or court orders.[20]

Despite these legal prohibitions, the Chairman continued to threaten to hold the Attorney General in contempt for protecting these documents. He also publicly accused the Attorney General of a "cover-up,"[21] claimed he was "obstructing" the Committee's investigation,[22] asserted that he is willing to "deceive the public,"[23] and stated on national television that he "lied."[24]

IV. The Documents at Issue in the Contempt Citation Are Not About Gunwalking

The documents at issue in the Contempt Citation are not related to the Committee's investigation into how gunwalking was initiated and utilized in Operation Fast and Furious.

Over the past year, the Department of Justice has produced thousands of pages of documents, the Committee has interviewed two dozen officials, and the Attorney General has testified before Congress nine times.

In January, Ranking Member Cummings issued a comprehensive 95-page staff report documenting that Operation Fast and Furious was in fact the fourth in a series of gunwalking operations run by ATF's Phoenix field division over a span of five years beginning in 2006. Three prior operations—Operation Wide Receiver (2006–2007), the Hernandez case (2007), and the Medrano case (2008)—occurred during the Bush Administration. All four operations were overseen by the same ATF Special Agent in Charge in Phoenix.[25]

The Committee has obtained no evidence that the Attorney General was aware that gunwalking was being used. To the contrary, as soon as he learned of its use, the Attorney General halted it, ordered an Inspector General investigation, and implemented significant internal reform measures.[26]

After finding no evidence of wrongdoing by the Attorney General, the Committee's investigation shifted to focusing on a single letter sent by the Department's Office of Legislative Affairs to Senator Charles Grassley on February 4, 2011. This letter initially denied allegations that ATF "knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico" and stated that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico." [27]

The Department has acknowledged that its letter was inaccurate and has formally withdrawn it. On December 2, 2011, the Department wrote that "facts have come to light during the course of this investigation that indicate that the February 4 letter contains inaccuracies." [28]

Acknowledging these inaccuracies, the Department also provided the Committee with 1,300 pages of internal deliberative documents relating to how the letter to Senator Grassley was drafted. These documents demonstrate that officials in the Office of Legislative Affairs who were responsible for drafting the letter did not intentionally mislead Congress, but instead relied on inaccurate assertions and strong denials from officials "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." [29]

Despite receiving these documents explaining how the letter to Senator Grassley was drafted, the Committee moved the goalposts and demanded additional internal documents created after February 4, 2011, the date the letter to Senator Grassley was sent. It is unclear why the Committee needs these documents. This narrow subset of additional documents—which have nothing to do with how gunwalking was initiated in Operation Fast and Furious—is now the sole basis cited in the Contempt Citation for holding the Attorney General in contempt.[30]

V. The Committee Refused a Good Faith Offer by the Attorney General for Additional Documents

The Committee failed to honor its Constitutional responsibility to avoid unnecessary conflict with the Executive Branch by seeking

reasonable accommodations when possible. On the evening before the Committee's contempt vote, the Attorney General met with Chairman Issa, Ranking Member Cummings, Senator Grassley, and Senator Patrick Leahy. The Attorney General offered to take the following steps in response to the Committee's demands for additional documents. Specifically, the Attorney General:

> (1) offered to provide additional internal deliberative Department documents, created even after February 4, 2011;
> (2) offered a substantive briefing on the Department's actions relating to how they determined the letter contained inaccuracies;
> (3) agreed to Senator Grassley's request during the meeting to provide a description of the categories of documents that would be produced and withheld; and
> (4) agreed to answer additional substantive requests for information from the Committee.

The Attorney General noted that his offer included documents and information that went even beyond those demanded in the Committee's subpoena. In exchange, the Attorney General asked the Chairman for a good faith commitment to work towards a final resolution of the contempt issue.[31]

Chairman Issa did not make any substantive changes to his position. Instead, he declined to commit to a good faith effort to work towards resolving the contempt issue and flatly refused the Attorney General's offer.

There is no question that the Constitution authorizes Congress to conduct rigorous investigations in support of its legislative functions.[32] The Constitution also requires Congress and the executive branch to seek to accommodate each other's interests and to avoid unnecessary conflict. As the D.C. Circuit has held:

> [E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.[33]

Similarly, then-Attorney General William French Smith, who served under President Ronald Reagan, observed:

> The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.[34]

VI. The Committee's Decision To Press Forward With Contempt Led to the Administration's Assertion of Executive Privilege

After the Chairman refused the Attorney General's good faith offer—and it became clear that a Committee contempt vote was inevitable—the President asserted executive privilege over the narrow category of documents still at issue. The Administration made clear that it was still willing to negotiate on Congress' access to the documents if contempt could be resolved.

On June 20, 2012, Deputy Attorney General James Cole wrote to the Chairman to inform the Committee that "the President, in light of the Committee's decision to hold the contempt vote, has asserted executive privilege over the relevant post-February 4 documents." [35] An accompanying letter from Attorney General Holder described the documents covered by the privilege as limited to "internal Department 'documents from after February 4, 2011, related to the Department's response to Congress.'" [36]

Claims by House Speaker John Boehner and others that the Administration's assertion of executive privilege raises questions about the President's personal knowledge of gunwalking reflect a misunderstanding of the scope of the privilege asserted.[37] Regarding the narrow subset of documents covered by the assertion, the letter from Attorney General explained:

> They were not generated in the course of the conduct of Fast and Furious. Instead, they were created after the investigative tactics at issue in that operation had terminated and in the course of the Department's deliberative process concerning how to respond to congressional and related media inquiries into that operation.[38]

The Attorney General's letter also explained the Administration's legal rationale for invoking executive privilege over internal deliberative Justice Department documents, citing opinions from former Attorneys General Michael B. Mukasey, John Ashcroft, William French Smith, and Janet Reno, as well as former Solicitor General and Acting Attorney General Paul D. Clement.[39] The letter also quoted the Supreme Court in United States v. Nixon, writing:

> The threat of compelled disclosure of confidential Executive Branch deliberative material can discourage robust and candid deliberations, for "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." . . . Thus, Presidents have repeatedly asserted executive privilege to protect confidential Executive Branch deliberative materials from congressional subpoena.[40]

VII. The Committee Failed To Responsibly Consider the Executive Privilege Assertion

Despite requests from several Committee Members, the Committee did not delay or postpone the business meeting in order to responsibly examine the Administration's assertion of executive privilege and determine whether it would be appropriate to continue contempt proceedings against the Attorney General.

Instead of following the example of previous Committee Chairmen who put off contempt proceedings in order to conduct a serious and careful review of presidential assertions of executive privilege, Chairman Issa stated that "I claim not to be a constitutional scholar" and proceeded with the contempt vote.[41]

In contrast, former Committee Chairman Henry Waxman put off a contempt vote after President George W. Bush asserted executive

privilege in the investigation into the leak of the covert status of CIA operative Valerie Plame.[42] He took the same course of action after President Bush asserted executive privilege over documents relating to the Environmental Protection Agency's ozone regulation on the same day as a scheduled contempt vote. At the time, he stated:

> I want to talk with my colleagues on both sides of the aisle about this new development. I want to learn more about the assertion and the basis for this assertion of the executive privilege.[43]

Although the Committee ultimately disagreed with the validity of President Bush's assertions of executive privilege, in neither case did the Committee go forward with contempt proceedings against the officials named in the contempt citations.

Similarly, Rep. John Dingell, as Chairman of the Energy and Commerce Committee during that Committee's 1981 investigation into the Department of Interior, received an assertion of executive privilege from the Reagan Administration regarding documents pertaining to the administration of the Mineral Lands Leasing Act.[44] Before proceeding to contempt, the Committee held two separate hearings on the executive privilege assertion, and the Committee invited the Attorney General to testify regarding his legal opinion supporting the claim of executive privilege.[45]

VIII. The Investigation Has Been Characterized by Unsubstantiated Claims

The Committee's investigation of ATF gunwalking operations has been characterized by a series of unfortunate and unsubstantiated allegations against the Obama Administration that turned out to be inaccurate.

For example, during an interview on national television on October 16, 2011, the Chairman accused the Federal Bureau of Investigation (FBI) of concealing evidence of the murder of Agent Brian Terry by hiding a "third gun" found at the murder scene.[46] The FBI demonstrated quickly that this claim was unsubstantiated.[47] Although the Chairman admitted during a subsequent hearing that "we do go down blind alleys regularly," no apology was issued to the law enforcement agents that were accused of a cover-up.[48]

At the same time, the Chairman has defended the previous Administration's operations as "coordinated."[49] In response to a question about gunwalking during the Bush Administration, the Chairman stated:

> We know that under the Bush Administration there were similar operations, but they were coordinated with Mexico. They made every effort to keep their eyes on the weapons the whole time.[50]

To the contrary, the staff report issued by Ranking Member Cummings on January 31, 2012, documents at least three operations during the previous Administration in which coordination efforts were either non-existent or severely deficient.[51]

In addition, the Chairman has stated repeatedly that senior Justice Department officials were "fully aware" of gunwalking in Oper-

ation Fast and Furious.[52] After conducting two dozen transcribed interviews, none of the officials and agents involved said they informed the Attorney General or other senior Department officials about gunwalking in Operation Fast and Furious. Instead, the heads of the agencies responsible for the operation—ATF and the U.S. Attorney's Office—told Committee investigators just the opposite, that they never informed senior Department officials about gunwalking in Operation Fast and Furious because they were unaware of it.[53]

Finally, the Chairman has promoted an extreme conspiracy theory that the Obama Administration intentionally designed Operation Fast and Furious to promote gunwalking. He stated in December 2011 that the Administration "made a crisis and they are using this crisis to somehow take away or limit people's second amendment rights."[54] This offensive claim has also been made by Rush Limbaugh and other conservative media personalities during the course of the investigation. For example, on June 20, 2011, Mr. Limbaugh stated:

> The real reason for Operation Gunrunner or Fast and Furious, whatever they want to call it now, the purpose of this was so that Obama and the rest of the Democrats can scream bloody murder about the lack of gun control in the U.S., which is causing all the murders in Mexico. This was a setup from the get-go.[55]

Another conservative commentator stated that "their political agenda behind this entire thing was to blame American gun shops for cartel violence in America in order to push an anti-Second Amendment, more regulations on these gun shops."[56] Yet another one stated:

> This was purely a political operation. You send the guns down to Mexico, therefore you support the political narrative that the Obama administration wanted supported. That all these American guns are flooding Mexico, they're the cause of the violence in Mexico, and therefore we need draconian gun control laws here in America.[57]

As recently as this month, Committee Member John Mica repeated this claim on Fox News. On June 15, 2012, he stated:

> People forget how all this started. This administration is a gun control administration. They tried to put the violence in Mexico on the blame of the United States. So they concocted this scheme and actually sending our federal agents, sending guns down there, and trying to cook some little deal to say that we have got to get more guns under control.[58]

There is no evidence to support this conspiracy theory. To the contrary, the documents obtained and interviews conducted by the Committee demonstrate that gunwalking began in 2006, was used in three operations during the Bush Administration, and was a misguided tactic utilized by the ATF field division in Phoenix.[59]

NOTES

[1] 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 (Oct. 28, 2011).

[2] House Committee on Oversight and Government Reform, Transcribed Interview of Kenneth E. Melson (July 4, 2011).

[3] House Committee on Oversight and Government Reform, *Report of the Committee on Oversight and Government Reform on 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,* at 11 (June 14, 2012) ("Contempt Citation").

[4] *The Daily Rundown,* MSNBC (Nov. 3, 2010) (online at http://videocafe.crooksandliars.com/david/darrell-issa-obama-must-answer-several-hundr); 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 (June 5, 2012); 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 (Feb. 2, 2012); 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).

[5] Department of Justice, *Meeting of the Attorney General with Mexican Attorney General Medina Mora* (Nov. 16, 2007).

[6] 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 (June 5, 2012).

[7] House Committee on Government Reform and Oversight, *Contempt of Congress: Refusal of Attorney General Janet Reno to Produce Documents Subpoenaed By the Government Reform and Oversight Committee,* 105th Cong. (1998) (H. Rept. 105–728).

[8] *The Contempt Citation,* Washington Post (Sept. 22, 1998).

[9] *Buck Stops With Reno; Appointing an Independent Counsel in Campaign Contribution Case: That Decision is Reno's Alone to Make on the Basis of Her Information and Her Interpretation of the Law,* Los Angeles Times (Aug. 6, 1998).

[10] *Tell Him No, Ms. Reno!,* Miami Herald (Aug. 6, 1998).

[11] *Give Reno Some Room,* St. Petersburg Times (Aug. 6, 1998).

[12] Congressional Research Service, *Congressional Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* (May 8, 2012).

[13] Juan Williams, *Issa's Monstrous Witch Hunt,* The Hill (May 14, 2012).

[14] *A Pointless Partisan Fight,* New York Times (June 20, 2012).

[15] *Holder Contempt Vote is Dysfunctional Washington as Usual,* Baltimore Sun (June 21, 2012). *See also* Eugene Robinson, *GOP Witch Hunt for Eric Holder Reflects Bigger Problem,* Washington Post (June 21, 2012); Paul Barrett, *In Contempt of Government Reform,* Businessweek (June 20, 2012); Dana Milbank, *Republicans' Attempt to Hold Holder in Contempt is Uphill Battle,* Washington Post (June 20, 2012) (describing the "contemptible antics" of the Committee's contempt proceedings); Sandra Hernandez, *Partisan Politics Plague Probe of 'Fast and Furious,'* Los Angeles Times ("Issa's demand loses some of its credibility and lapses into political theater when he threatens Atty. Gen. Eric H. Holder Jr. with criminal contempt for failing to cooperate") (Mar. 29, 2012).

[16] The White House, *Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968* (June 19, 1968); 18 U.S.C. 2511(4)(a) (providing that violators "shall be fined under this title or imprisoned not more than five years, or both"); 18 U.S.C. 2511(1)(e) (covering any person who "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized" under this chapter).

[17] 18 U.S.C. 2518(1), 2518(8).

[18] Sumner Courts Act, Pub. L. No. 76–675, 54 Stat. 688 (1940).

[19] Fed. R. Crim. Pro. 6(e)(7) (providing that a knowing violation of Rule 6 "may be punished as a contempt of court"); 18 U.S.C. 401(3) (providing that a "court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority").

[20] Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (May 15, 2012).

[21] Letter from Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, to Eric H. Holder, Jr., Attorney General, Department of Justice (Jan. 31, 2012).

[22] Letter from Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, to Eric H. Holder, Jr., Attorney General, Department of Justice (Oct. 9, 2011).

[23] Letter from Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, to Eric H. Holder, Jr., Attorney General, Department of Justice (Jan. 31, 2012).

[24] *On the Record with Greta Van Susteren,* Fox News (June 7, 2012) (online at www.foxnews.com/on-air/on-the-record/2012/06/08/issas-fast-and-furious-frustration-bubbles-over-holders-truth-not-consistent-facts?page=2).

[25] Minority Staff, House Committee on Oversight and Government Reform, *Fatally Flawed: Five Years of Gunwalking in Arizona* (Jan. 2012) (online at http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5575&Itemid=104).

[26] *Id.*; House Committee on the Judiciary, Testimony of Eric H. Holder, Jr., Attorney General, Department of Justice, *Oversight of the United States Department of Justice* (June 7, 2012).

[27] Letter from Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to Sen. Charles E. Grassley, Ranking Member, Senate Committee on the Judiciary (Feb. 4, 2011).
[28] 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).
[29] *Id.*
[30] Contempt Citation, at 41–42.
[31] *Id.*
[32] Congressional Research Service, *Congressional Oversight Manual* (June 10, 2011).
[33] *United State*s v. *AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977).
[34] 5 Op. Off. Legal Counsel. 27, 31 (1981).
[35] Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Rep. Darrell E. Issa, Chairman, House Oversight and Government Reform (June 20, 2012).
[36] Letter from Eric H. Holder, Jr., Attorney General, Department of Justice, to Barack H. Obama, President (June 19, 2012) (quoting Letter from Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, to Eric H. Holder, Jr., Attorney General, Department of Justice (June 13, 2012)).
[37] *Fast and Furious: How President Obama and John Boehner Got to the Brink*, Politico (June 22, 2012) (quoting Speaker John A. Boehner as stating that the "decision to invoke executive privilege is an admission that White House officials were involved in decisions that misled the Congress and have covered up the truth"); House Committee on Oversight and Government Reform, *Business Meeting* (June 20, 2012) (quoting Rep. James Lankford as stating "we weren't even aware that the President was engaged in the deliberations" and Rep. Jason E. Chaffetz stating that the assertion means that the President "somehow was personally involved").
[38] Letter from Eric H. Holder, Jr., Attorney General, Department of Justice, to Barack H. Obama, President (June 19, 2012) (quoting Letter from Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, to Eric H. Holder, Jr., Attorney General, Department of Justice (June 13, 2012)).
[39] Letter from Eric H. Holder, Jr., Attorney General, Department of Justice, to Barack H. Obama, President (June 19, 2012) (quoting Letter from Michael B. Mukasey, Attorney General, Department of Justice, to George W. Bush, President (June 19, 2008); Letter from Paul D. Clement, Solicitor General and Acting Attorney General, Department of Justice, to George W. Bush, President (June 27, 2007); Letter from John D. Ashcroft, Attorney General, Department of Justice, to George W. Bush, President (Dec. 10, 2001); 23 Op. Off. Legal Counsel 1, 1–2 (1999) (opinion of Attorney General Janet W. Reno); 5 Op. Off. Legal Counsel 27,29–31 (1981) (opinion of Attorney General William French Smith)).
[40] Letter from Eric H. Holder, Jr., Attorney General, Department of Justice, to Barack H. Obama, President (June 19, 2012) (citing *United States* v. *Nixon*, 418 U.S. 683, 705 (1974)).
[41] House Committee on Oversight and Government Reform, Statement of Chairman Darrell E. Issa, *Business Meeting* (June 20, 2012).
[42] House Committee on Oversight and Government Reform, *Report Regarding President Bush's Assertion of Executive Privilege in Response to the Committee Subpoena to Attorney General Michael B. Mukasey*, 110th Cong. (2008).
[43] House Committee on Oversight and Government Reform, Statement of Chairman Henry A. Waxman, *Hearing on the Johnson and Dudley Contempt of Congress Resolutions*, 110th Cong. (June 20, 2008).
[44] House Committee on Energy and Commerce, *Congressional Proceedings Against Interior Secretary James G. Watt for Withholding Subpoenaed Documents And For Failure to Answer Questions Relating to Reciprocity Under the Mineral Lands Leasing Act*, 97th Cong. (Sept. 30, 1982) (H. Rept. 97–898).
[45] *Id.*
[46] *Face the Nation*, CBS News (Oct. 16, 2011) (online at www.cbsnews.com/stories/2011/10/16/ftn/main20121072.shtml).
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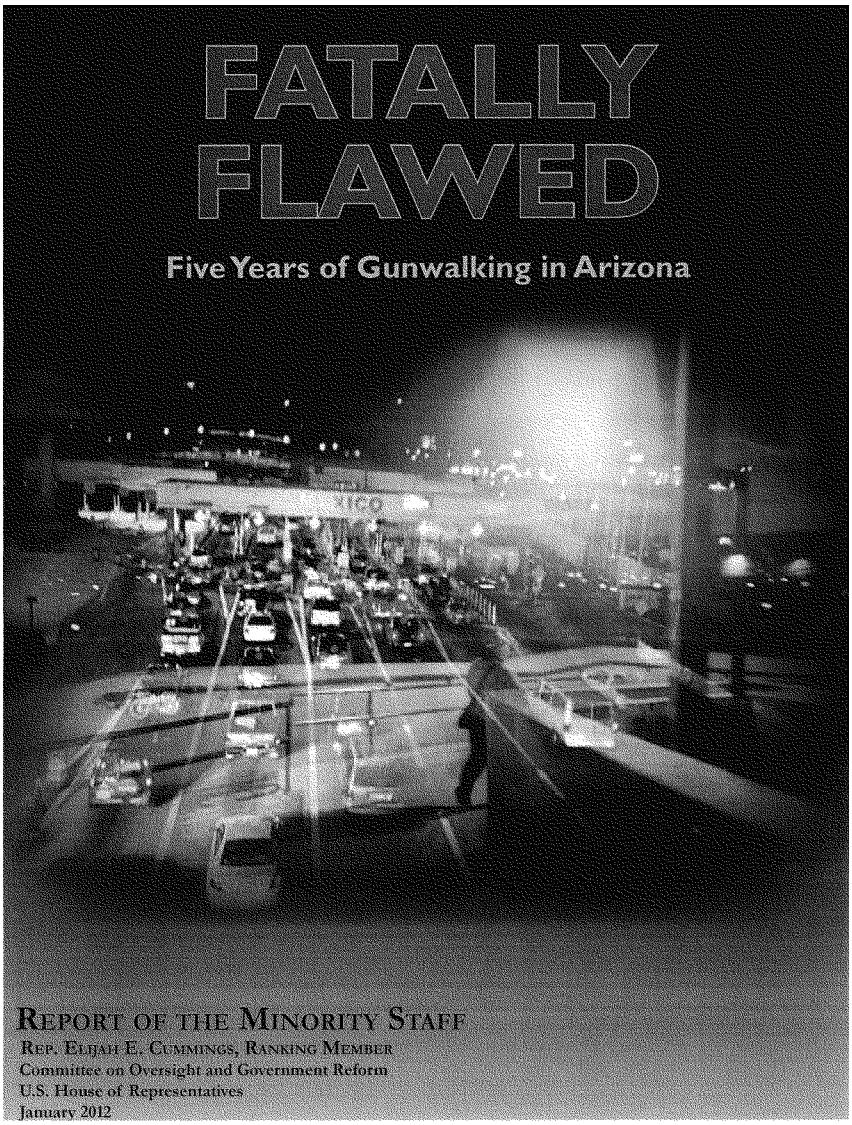
FATALLY
FLAWED
Five Years of Gunwalking in Arizona
REPORT OF THE MINORITY STAFF
REP. ELIJAH E. CUMMINGS, RANKING MEMBER
Committee on Oversight and Government Reform
U.S. House of Representatives
January 2012

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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

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

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.[1]

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.[2]

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.[3]

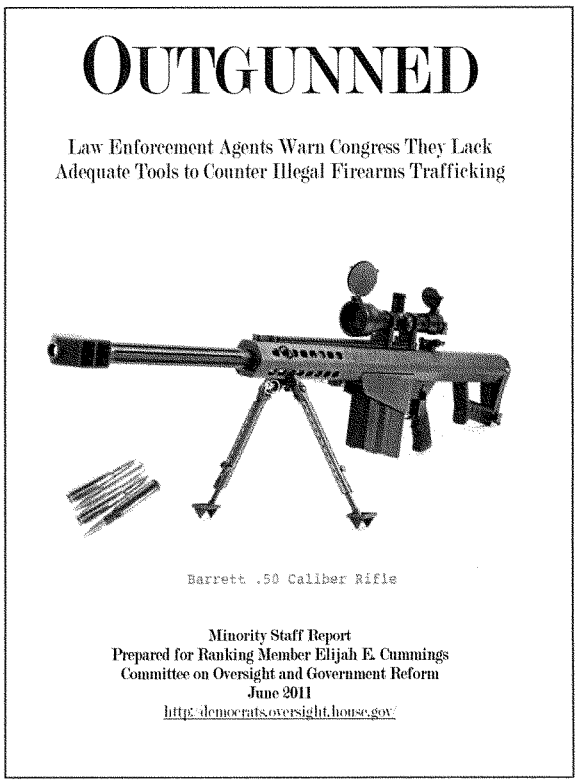
The Committee has not held a hearing with Mr. Mukasey, nor has it conducted an interview with him, depriving the Committee of important information directly relevant to the origin of these operations.

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.[4]

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."[5] 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.[6]



OUTGUNNED

Law Enforcement Agents Warn Congress They Lack Adequate Tools to Counter Illegal Firearms Trafficking

Barrett .50 Caliber Rifle

Minority Staff Report
Prepared for Ranking Member Elijah E. Cummings
Committee on Oversight and Government Reform
June 2011
http://democrats.oversight.house.gov

III. BACKGROUND

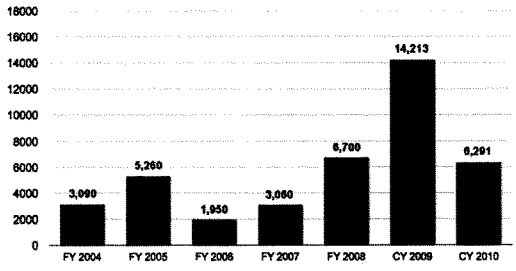
Over the past five years, the Mexican government has been locked in a battle with drug trafficking organizations seeking control of lucrative trafficking routes that carry billions of dollars in narcotics destined for the United States. This battle is fueled in part by the tens of thousands of military-grade 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.[7] According to the latest statistics from the Mexican Attorney General's office, 47,515 people have been killed in drug-related violence since 2006.[8]

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.[9]

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: Halting U.S. Firearms Trafficking to Mexico: A Report by Senators Dianne Feinstein, Charles Schumer and Sheldon Whitehouse 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 to Mexico Face Planning and Coordination Challenges; and Letter from ATF Acting Director Kenneth Melson 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.[10]

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.[11] ATF reports to the Attorney General through the Office of the Deputy Attorney General.[12] ATF is organized into 25 Field Divisions led by Special Agents in Charge who are responsible for multiple offices within their jurisdiction.[13] 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.[14]

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.[15] 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.[16]

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.[17] 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.[18]

In 2006, ATF implemented a nationwide program called Project Gunrunner to attack the problem of gun trafficking to Mexico.[19] 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.[20]

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.[21]

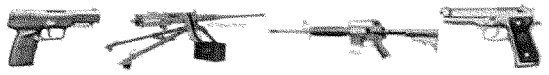
In November 2010, the Department of Justice Inspector General issued a report examining the effectiveness of Project Gunrunner in stopping the illicit trafficking of guns from the United States to Mexico. The Inspector General found

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.[22]

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.[23] 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.[24]

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.[25]

CURRENT WEAPONS OF CHOICE

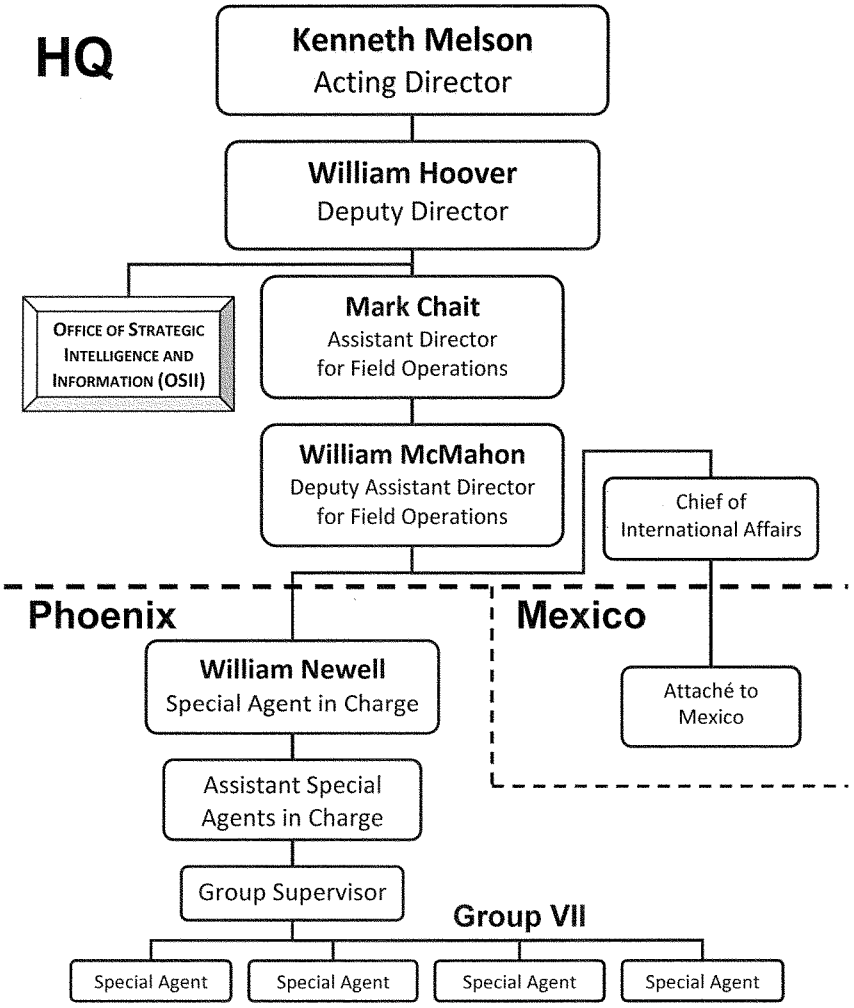


Primary Weapons of Choice	Secondary Market Inspection Weapons of Choice
Bushmaster XM15 Rifles	Colt AR15 Sporter & Bushmaster XM15 rifles
Romarm Cugir 7.62 x 39mm rifles	Romarm 7.62 x 39mm rifles
FN 5.7 x 28mm pistols	DPMS and Olympic Arms .223 rifles
.50 caliber rifles (Barrett, Beowulf)	Norinco, Polytech, and Maadii AKS rifles
DPMS .223 rifles	Alexander Arms Beowulf .50 rifles
Beretta Model 92 pistols	Beretta and Taurus 9mm pistols
Taurus PT 9mm pistols	Colt .38 Super & .45 Pistols
Colt .38 Super pistols	

Source: Bureau of Alcohol, Tobacco, Firearms and Explosives, Weapons of Choice Presentation (2008)

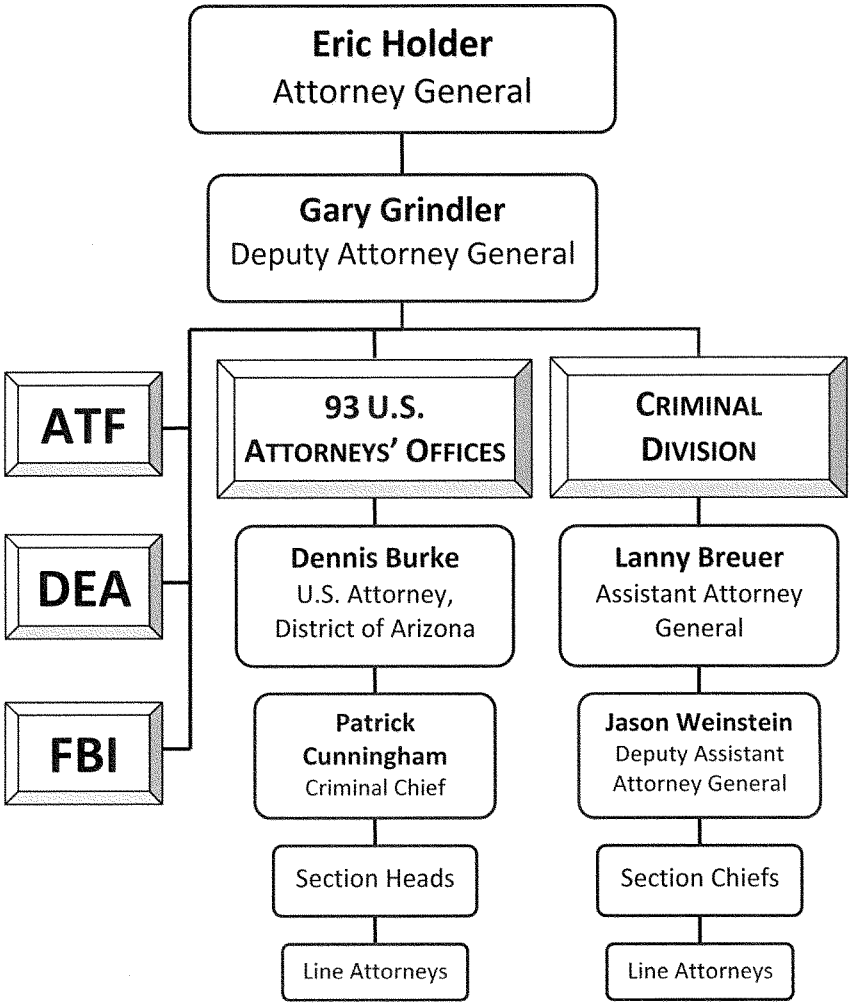
Key ATF Personnel

During Operation Fast and Furious (2009-2010)



Key DOJ Personnel

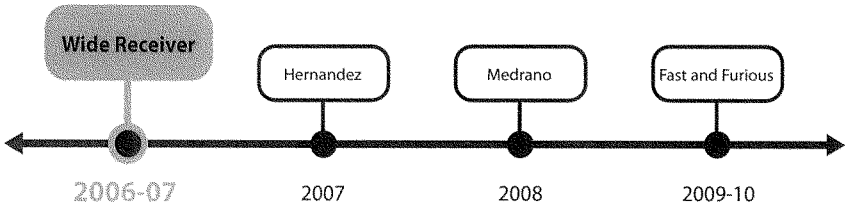
During Operation Fast and Furious (2009-2010)



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.[26] The agents opened an investigation of the purchaser because the nature of the transaction suggested a possible connection to illegal firearms trafficking.[27]

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.[28] 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.[29]

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."[30] 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.[31]

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."[32]

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.[33]

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."[34]

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.[35]

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.[36]

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.[37]

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.

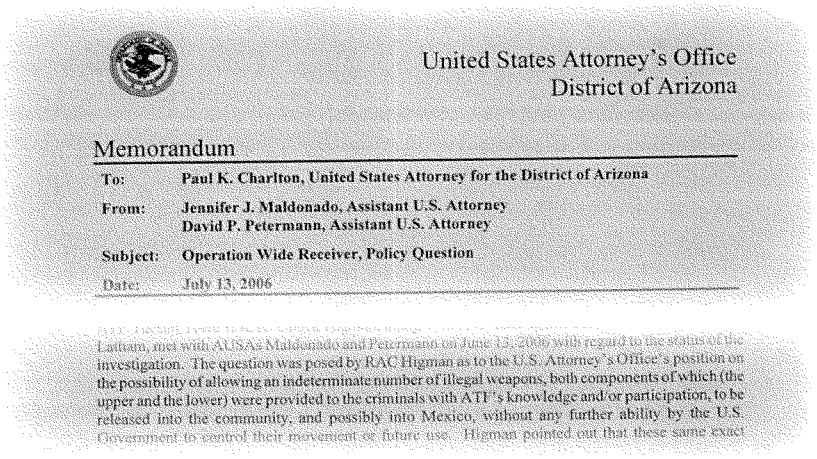
The memo further stated that the proposed tactics were controversial and opposed by ATF's legal counsel:

> [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.[38]

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."[39] 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."[40]

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

Latham, met with AUSAs Maldonado and Petermann on June 15, 2006 with regard to the status of the investigation. The question was posed by RAC 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. Higman pointed out that these same exact

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.[41] 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.[42]

Documents indicate that ATF agents observed the suspect purchase five AR-15 lower receivers and terminated surveillance after three hours.[43] 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."[44]

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."[45] 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.[46] 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.[47]

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."[48] 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.[49] 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.[50] Although ATF apparently had probable cause for arrest, on February 27, 2007, the subject was interviewed by ATF agents and released.[51] 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.[52]

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."[53] 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."[54] 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.[55]

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.[56]

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.[57] 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.[58] 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."[59] 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.[60] 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."[61]

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.[62]

Despite the agent's concerns, Operation Wide Receiver remained on the same course with another "planned arrival" attempted on June 26, 2007.[63] 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."[64] Documents show that ATF agents and Tucson police were unable to follow the firearms to the Mexican border.[65]

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.[66] 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.[67]

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.[68]

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.[69] The U.S. Attorney's Office in Arizona accepted the offer and asked for assistance with the prosecution of targets in Operation Wide Receiver.[70] In September 2009, the Criminal Division assigned an experienced prosecutor to take over the case.[71]

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."[72]

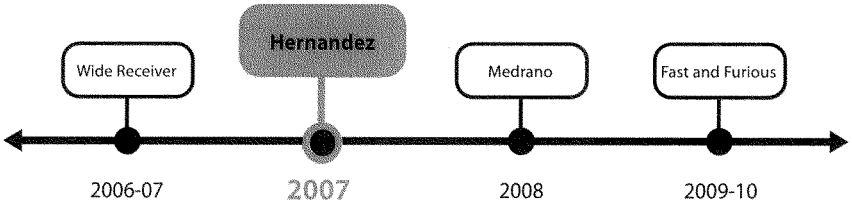
As she prepared the case for indictment, she continued to update her supervisors as new details emerged from the case file. On March 16, 2010, she sent an email to her supervisor:

> 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.[73]

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."[74]

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.[75] On October 27, 2010, seven additional suspects were indicted in the District of Arizona on gun-trafficking related charges.[76]



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."[77] 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."[78]

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.[79]

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."[80] 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.[81]

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.[82]

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?[83]

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.[84]

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.[85]

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 Tucchi) 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.[86]

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.[87] 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."[88]

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."[89] The briefing paper warned the Attorney General that "the first attempts at this controlled delivery have not been successful."[90] 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.[91]

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.[92]

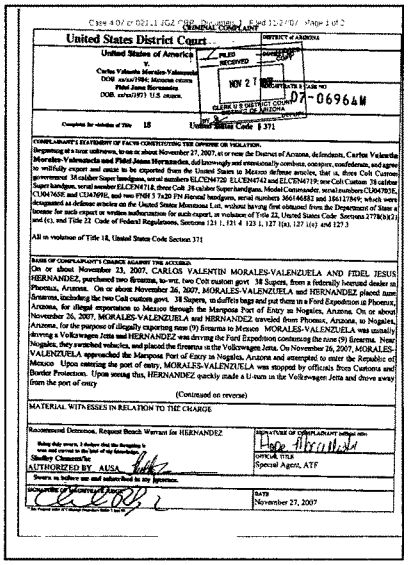
The emails exchanging drafts of the Attorney General's briefing paper also make clear that ATF officials understood that these were not, in fact, the first operations that allowed guns to "walk." Assistant Director Carroll wrote to Assistant Director Hoover: "I am going to ask DOJ to change 'first ever'... there have [been] cases in the past where we have walked guns."[93] 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.[94]

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.[95]

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.[96]



CRIMINAL COMPLAINT

United States District Court

DISTRICT of ARIZONA

United States of America
v.
Carlos Valentin Morales-Valenzuela
DOB: xx/xx/1984; Mexican citizen
Fidel Jesus Hernandez
DOB: xx/xx/1973; U.S. citizen

FILED
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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA

DEPUTY

MAGISTRATE'S CASE NO.
07-06964M

Complaint for violation of Title 18 United States Code § 371

COMPLAINANT'S STATEMENT OF FACTS CONSTITUTING THE OFFENSE OR VIOLATION:

Beginning at a time unknown, to on or about November 27, 2007, at or near the District of Arizona, defendants, Carlos Valentin Morales-Valenzuela and Fidel Jesus Hernandez, did knowingly and intentionally combine, conspire, confederate, and agree to willfully export and cause to be exported from the United States to Mexico defense articles, that is, three Colt Cutlass governmental 38 caliber Super handguns, serial numbers ELCEN4720 ELCEN4743 and ELCEN4719; one Colt Custom 38 caliber Super handgun, serial number ELCEN4718; three Colt 38 caliber Super handguns, Model Commander, serial numbers CLD47035, CL0047658, and CL0476991; and two FNH 5.7x28 FN Herstal handguns, serial numbers 386146582 and 386127849; which were designated as defense articles on the United States Munitions List, without having first obtained from the Department of State a license for such export or written authorization for such export, in violation of Title 22, United States Code Sections 2778(b)(2) and (c), and Title 22 Code of Federal Regulations, Sections 121.1, 121.4 123.1, 127.1(a), 127.1(c) and 127.3

All in violation of Title 18, United States Code Section 371

BASIS OF COMPLAINANT'S CHARGE AGAINST THE ACCUSED:

On or about November 23, 2007, CARLOS VALENTIN MORALES-VALENZUELA AND FIDEL JESUS HERNANDEZ, purchased two firearms, to-wit, two Colt custom govt .38 Supers, from a federally licensed dealer in Phoenix, Arizona. On or about November 26, 2007, MORALES-VALENZUELA and HERNANDEZ placed nine firearms, including the two Colt custom govt .38 Supers, in duffels bags and put them in a Ford Expedition in Phoenix, Arizona, for illegal exportation to Mexico through the Mariposa Port of Entry in Nogales, Arizona. On or about November 26, 2007, MORALES-VALENZUELA and HERNANDEZ traveled from Phoenix, Arizona, to Nogales, Arizona, for the purpose of illegally exporting nine (9) firearms to Mexico. MORALES-VALENZUELA was initially driving a Volkswagen Jetta and HERNANDEZ was driving the Ford Expedition containing the nine (9) firearms. Near Nogales, they switched vehicles, and placed the firearms in the Volkswagen Jetta. On November 26, 2007, MORALES-VALENZUELA approached the Mariposa Port of Entry in Nogales, Arizona and attempted to enter the Republic of Mexico. Upon entering the port of entry, MORALES-VALENZUELA was stopped by officials from Customs and Border Protection. Upon seeing this, HERNANDEZ quickly made a U-turn in the Volkswagen Jetta and drove away from the port of entry.

(Continued on reverse)

MATERIAL WITNESSES IN RELATION TO THE CHARGE:

Recommended Detention; Request Bench Warrant for HERNANDEZ

SIGNATURE OF COMPLAINANT (Official title)

OFFICIAL TITLE
Special Agent, ATF

Sworn to before me and subscribed in my presence.

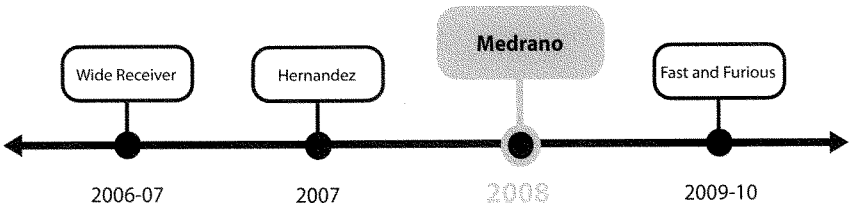
SIGNATURE OF MAGISTRATE

DATE
November 27, 2007

Hernandez and his associate were arrested in Nogales, Arizona on November 27, 2007, while attempting to cross the border into Mexico.[97] 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.[98]

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.[99]



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].[100]

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.[101] The suspects also continued to travel back and forth to Mexico.[102] 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.[103]

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.[104]

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.[105]

In his response, Mr. Newell acknowledged that letting guns cross the border was part of ATF's plan, but stated that he needed more information about what had happened:

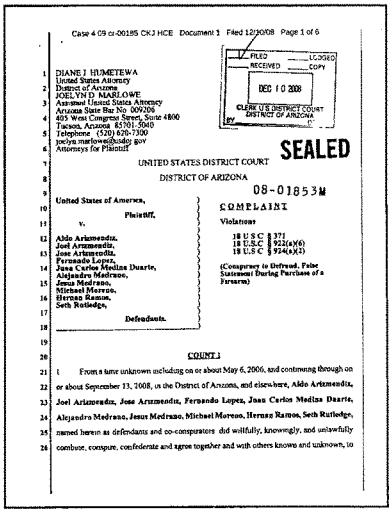
> I need to get some clarification from my folks tomorrow because I was told that your folks were aware of the plan to allow the guns to cross, in close cooperation with both our offices in Mexico as well as Mexican Feds.[106]

Although the subsequent correspondence does not explain how this dispute was resolved, the Medrano trafficking network reportedly supplied over 100 assault rifles and other weapons "to a member of the Sinaloan drug cartel known as 'Rambo.'"[107]

Criminal complaint also confirms "gunwalking"

On December 10, 2008, Federal prosecutors filed a complaint in the United States District Court for the District of Arizona that describes in detail gun trafficking activities conducted by Medrano and his associates that involved more than 100 firearms over the course of the year. The complaint confirms that ATF agents watched as Medrano and his associates trafficked illegal firearms into Mexico. For example, the complaint discusses the incident on June 17, 2008, discussed above, in which ATF agents observed the suspects purchase weapons, load them in their car, and drive them to Mexico. The complaint states:

> 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.[108]



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DISTRICT OF ARIZONA
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Attorneys for Plaintiff

SEALED

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

08-01853M

United States of America,

Plaintiff,

v.

Aldo Arizmendiz,
Joel Arizmendiz,
Jose Arizmendiz,
Fernando Lopez,
Jesus Carlos Medina Duarte,
Alejandro Medrano,
Jesus Medrano,
Michael Moreno,
Hernan Ramos,
Seth Rotledge,

Defendants.

COMPLAINT

Violations:

18 U.S.C. § 371
18 U.S.C. § 922(a)(6)
18 U.S.C. § 924(a)(2)

(Conspiracy to Defraud, False Statement During Purchase of a Firearm)

COUNT 1

From a time unknown including on or about May 6, 2006, and continuing through on or about September 13, 2008, in the District of Arizona, and elsewhere, Aldo Arizmendiz, Joel Arizmendiz, Jose Arizmendiz, Fernando Lopez, Jesus Carlos Medina Duarte, Alejandro Medrano, Jesus Medrano, Michael Moreno, Hernan Ramos, Seth Rotledge, named herein as defendants and co-conspirators did willfully, knowingly, and unlawfully combine, conspire, confederate and agree together and with others known and unknown, to

The complaint then explains that the suspects drove these firearms across the border. It states:

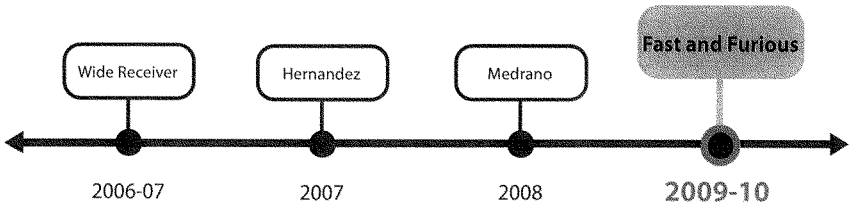
> Alejandro Medrano drove Hernan Ramos's vehicle with Hernan Ramos as a passenger from Mad Dawg Global in Tuscon, Arizona, to the Douglas Port of Entry where they both entered into Mexico with at least the six (6) .223 caliber rifles in the vehicle.[109]

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.[110]

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."[111]

On August 9, 2010, Medrano was "sentenced to 46 months in prison for his leadership role in the conspiracy."[112] 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."[113] Many of the firearms purchased by the Medrano network were subsequently recovered in Mexico.[114]



4. Operation Fast and Furious (2009-10)

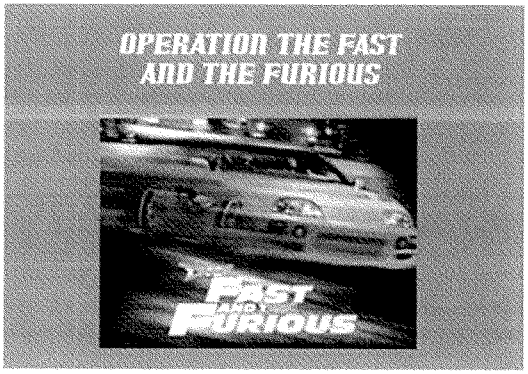
The investigation that became known as Operation Fast and Furious began in the ATF Phoenix Field Division in October 2009. Despite having identified 20 suspects who paid hundreds of thousands of dollars in cash to buy hundreds of military-grade firearms on behalf of the same trafficking ring, ATF-Phoenix 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.[115]

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.[116] 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.[117]

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.[118]

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.[119]

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"[120]

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.[121]

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."[122]

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.[123]

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.[124]

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.[125]

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.[126]

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.[127]

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.[128]

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.[129]

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.[130]

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."[131]

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.[132]

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.'"[133]

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."[134]

In January 2010, ATF-Phoenix submitted an investigative strategy in its application for funding from OCDETF.[135] ATF-Phoenix and the U.S. Attorney's Office used evidence gathered from another agency's investigation to draft its proposal.[136] 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.[137]

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.[138]

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.[139] 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.[140]

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.[141]

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.[142]

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.[143]

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.[144]

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.[145]

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."[146]

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.[147]

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.[148] 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 13th 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.[149]

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."[150] 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 weather [sic] or not we should perform the transaction, as it is outside of the standard way we have been dealing with him.[151]

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.[152]

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.[153]

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:

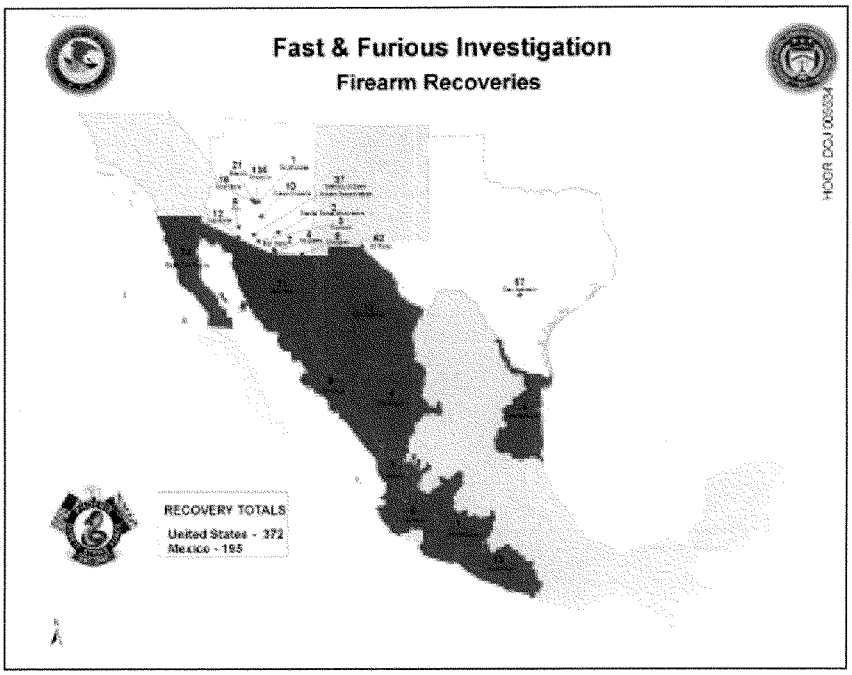
> Well, the next phase in the investigation, it really moves from an investigation phase to prosecution phase at that point in the sense of getting the case ready for indictment. So I know that the case agent ... as well as the others were meeting regularly with the AUSA Emory Hurley, compiling all the 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.[154]

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."[155] 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."[156]

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.[157]

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.[158]



Department of Justice, Report of Firearms Recoveries as of Indictment of Suspects (Jan. 21, 2011)

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.[159]

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.'"[160] 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.[161]

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."[162]

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.[163]

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").[164] 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.[165]

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.[166]

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.[167]

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.[168]

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.[169]

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.[170] 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.[171]

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

> *"This should never have happened and it must never happen again."*
> *-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.[172] In testimony before the Senate Judiciary Committee, Attorney General Holder was unequivocal in his criticism of the controversial tactics employed in Fast and Furious:

> 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.[173]

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.[174]

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.[175]

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."[176]

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.[177] The next day, U.S. Attorney Burke replied, apologized for not responding sooner, and said he would call later in the day.[178] 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.[179]

Several hours later on December 15, 2010, U.S. Attorney Burke learned that Agent Terry had been murdered.[180] He alerted Mr. Wilkinson, who replied, "Tragic, I've alerted the AG, the Acting DAG, Lisa, etc."[181]

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."[182] Mr. Wilkinson replied, "I'll call tomorrow."[183]

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.[184] 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."[185] 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."[186]

Deputy Attorney General Grindler

> *"I would have stopped it."*
> *-former 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.[187]

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.[188]

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.[189]

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.[190]

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."[191]

Acting ATF Director Melson

In an interview with Committee staff on July 4, 2011, then-Acting ATF Director Kenneth 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.[192]

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.[193]

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."[194] 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.[195]

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.[196] 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 OCDETF strike force in Phoenix.[197]

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.[198] 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.[199]

Although Mr. Hoover stated that he was unaware of gunwlking 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.[200] 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.[201]

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.[202]

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.[203]

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."[204]

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.'"[205]

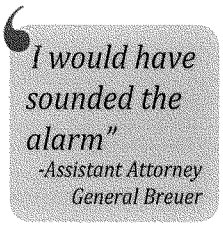
Criminal Division review of Fast and Furious wiretap applications

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.[206]

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.[207]



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.

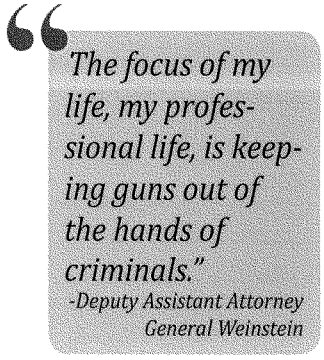
Federal law requires that senior Department officials approve all Federal law enforcement applications to Federal judges for the authority to conduct wiretaps.[208] The Department has assigned that legal review duty to the Office of

Enforcement Operations in the Criminal Division.[209] 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.[210] 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.[211] 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.[212] Mr. Weinstein stated that he believed his practice was consistent with the conduct across various administrations.[213]

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.[214]



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.[215]

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."[216] 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?"[217] The supervisor inaccurately responded: "My recollection is they learned afterward."[218] 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.[219] 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.[220]

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."[221] He also stated that the gunwalking tactics used in Wide Receiver "were unlike anything I had encountered in my career as a prosecutor."[222] 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.[223]

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.[224] 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.[225]

According to Mr. Weinstein, Mr. Breuer directed him to immediately register their concerns "directly with the leadership of ATF."[226] The next day, Mr. Weinstein contacted ATF Deputy Director Hoover to request a meeting.[227] 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.[228] 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."[229] 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.[230]

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.[231]

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.[232] Mr. Weinstein also noted that he believed the gunwalking in Wide Receiver was an "extreme aberration from years ago."[233]

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.[234]

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.[235] 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.[236]

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."[237] 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.[238]

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.[239] 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.[240]

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.[241] The memo provided to Attorney General Mukasey was explicit, however, in warning that previous operations "have not been successful."[242]

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.[243] 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.[244]

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.[245] 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.[246]

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."[247]

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."[248]

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.[249]

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."[250] 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.[251]

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."[252]

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.[253]

During his interview with Committee staff, U.S. Attorney Burke stated that Mr. Cunningham adamantly denied that gunwalking occurred in Operation Fast and Furious.[254] 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.[255]

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.[256]

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.[257]

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.[258]

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.[259] 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.[260]

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.[261]

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.[262] In January 2012, the Chief of the Criminal Division, Patrick Cunningham, resigned his position and left the U.S. Attorney's Office.[263] 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.[264]

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.[265] On October 5, 2011, ATF removed Deputy Director William Hoover from his position and subsequently reassigned to a non-operational role.[266] 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.[267] 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.[268]

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.[269] Assistant Special

Agent in Charge George Gillett was reassigned as a liaison to the U.S. Marshal's Service.[270] The former Supervisor of Group VII, David Voth, was reassigned to ATF's Tobacco Division.[271]

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."[272] 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.[273]

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.[274]

V. RECOMMENDATIONS

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."[275] 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).

4 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 (Oct. 28, 2011).

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251 *See, e.g.*, Email from Dennis Burke, U.S. Attorney, District of Arizona, to Jason Weinstein, Deputy Assistant Attorney General, Criminal Division, Department of Justice, *et al.* (Feb. 2, 2011) (requesting that the Department of Justice insert the following language into the Department's response to Sen. Grassley's January 27, 2011, letter: "Regarding the

allegations repeated in your letter that ATF in any way "sanctioned", [sic] had knowledge of, or permitted weapons purchased on January 16, 2010 in Arizona to reach the Republic of Mexico is categorically false.").

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253 Letter from Tobin Romero, Partner, Williams & Connelly LLP, Counsel, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (Jan. 19, 2011).

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