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To: Schmalzer, Tracy (SMO); Smith, Jessica A. (SMO)
CC: Burke, Dennis (USAAZ); Scheel, Ann (USAAZ); Hernandez, Rachel (USAAZ); Sherwood, Robert (USAAZ) <Contractor>
Sent: 3/9/2011 2:20:07 PM
Subject: Succinct Talking Points on Guns and Fast and Furious

Tracy and Jessica:

Enclosed are edited, succinct talking points for your review, editing and use internally or externally. Tracy also had a question as to how ATF got into the suspect data base, and when. I can explain those facts and how also.

Can you two talk by phone today so I can answer the suspect question and any others you may have? I am available on the cell anytime at **Privacy** By the way, the Wash Post story was good and balanced—thanks!

PJC

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A. On the issue of "sanctioning" or "encouraging" gun sales-it did not happen:

ATF Agents and Lawyers from the US Attorney's Office did not "encourage" any FFL to "keep selling guns to known straw buyers." In the two meetings with FFLs, attorneys and agents advised the FFLs that the Government cannot advise them to sell multiple guns or advise not to sell multiple guns. The FFLs were advised that those decisions were up to FFLs as are all decisions to sell left up to the FFL to evaluate the sale and determine whether it is lawful. In short, the FFLs were advised that the Government cannot advise FFLs to halt a sale that appears lawful and we cannot authorize a sale that appears unlawful. There was no mistake as to the clarity of the Agents' and Attorneys' message.

FFLs need no encouragement to sell guns as that is their actual business, selling guns. By the time that the government met with the owners, they had made many multiple sales and the guns were gone.

Main Justice position on the issue of Sanctioning or encouraging arms sales, the Quote of Assistant Attorney General Ronald Weich in his February 4, 2011 letter:

"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."

B. On the issue of "walking guns" from lawful sales or the timely seizure of guns:

Neither the USAO nor ATF was engaged in an effort "to let guns flow to straw buyers" or to "walk" guns that could have been lawfully seized. No such permission to "walk" a gun ever happened.

Purchasing multiple long guns in Arizona is lawful, transferring them to another is lawful and even sale or barter of the guns to another is lawful unless the United States can prove by clear and convincing evidence that the firearm is intended to be used to commit a crime. (18 USC 924 (d)). In short, the law does not permit agents to take guns away from anyone who buys ten AKs at a time solely because they bought multiple guns. In instances where ATF observed a sale by a FFL to an individual, ATF agents understood that unless the agents observed illegal conduct, agents could not stop a sale. It bears repeating that, at the time of sale by the FFLs, the determination by the FFLs was that a sale was lawful. Seizure of a firearm from a citizen at that point, before investigation has determined criminal behavior by the citizen, would violate the United States Constitution.

While ATF did not know of the sale by the FFL to [ATF] on January 16, 2010, the Federal Firearms Licensee (FFL or Dealer) possessed facts which made it appear to the FFL that the sale was lawful, as [ATF] affirmatively lied to the FFL and claimed that he was the true purchaser of the firearms. As of January 16, 2010, neither the FFL nor ATF had been notified that any previous purchases by [ATF] had resulted in [ATF] purchased guns being found in the possession of the others or at crime scenes. In other words, while subsequent investigation by ATF led to the charge in the indictment that [ATF] purchase of January 16, 2010 was an illegal straw purchase, that fact was only established much later, based on facts not available to the FFL at the time of the January 16, 2010 sale.

C. When weapons sales were monitored and those guns later turned up in crime scenes, had ATF somehow "authorized" the sales that ATF could have ordered stopped, or did ATF somehow not seize the guns appropriately or in a timely fashion?:

There seems to be some misconception on the part of the press and members of congress that the minute that ATF suspects that someone is a straw purchaser, agents can arrest that person and seize all of their guns. Such a seizure would be unlawful, and ATF may only seize guns when a lawful basis for seizure can be proven under the US Constitution and statutes passed by Congress. (18 USC 924 (d)).

The question seems to connote that ATF can promulgate a "No Sell" list like a "No Fly List", under which FLLs would be prohibited from selling any guns to any person on the list. ATF has no such power and ATF cannot interfere with the operation of commerce and prohibit a gun store from making a lawful sale to lists of suspects based upon nothing more than mere suspicion. A "No Sell" list, based on suspicion but not probable cause that a crime was committed, would be in violation of the United States Constitution.

D. Regarding the question "In regards to the guns recovered in Rio Rico after the Terry shooting, when they were purchased from [LES] (Jan, 2010) was there surveillance going on in conjunction with Operation Fast and Furious, or did ATF only become aware after the fact and link it to [LES] after the fact?"

Answer: There was no surveillance going on and the ATF did not learn of the sale until three days after it took place and the weapons were gone.

Further, at this point despite testing, neither gun is tied to the Officer Terry Shooting. It is an investigative goal to identify the weapon used in the murder of Agent Terry.

E. Regarding the LA Times and CBS News stories, they do not account for the fact, or rebut in any way,

that this District is actively prosecuting unlawful weapons and ammunition traffickers.

In just two recent investigations in Phoenix, 51 defendants in 10 indictments have been charged.

In the Tucson Office alone there are currently five (5) pending indictments charging 23 defendants with attempting to export thousands of rounds of ammunition to Mexico and with weapons offenses.

Each week the USAO announces new indictments charging unlawful trafficking in guns and ammunition.