
From: Grindler, Gary (OAG)
To: Admin. Assistant
Sent: 3/3/2011 9:30:39 PM
Subject: Fw: Final Gunrunner Answers

From: Weinstein, Jason (CRM)
Sent: Thursday, March 03, 2011 09:25 PM
To: Moran, Molly (OAG); Wilkinson, Monty (OAG); Grindler, Gary (OAG); Stuart.Goldberg2@usdoj.gov
<Stuart.Goldberg2@usdoj.gov>
Cc: Breuer, Lanny A. (CRM); Raman, Mythili (CRM)
Subject: Fw: Final Gunrunner Answers

Thought this might be helpful as additional insight into the Fast and Furious case and some of the legal/investigative challenges it presented.

Jason M. Weinstein
Deputy Assistant Attorney General
Criminal Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Office: (202) 305-9827
Cell: (202) 330-1514

From: Burke, Dennis (USAAZ) <Dennis.Burke@usdoj.gov>
To: Schmalzer, Tracy (SMO) <Tracy.Schmalzer@SMOJMD.USDOJ.gov>; Weinstein, Jason
Sent: Thu Mar 03 21:05:30 2011
Subject: FW: Final Gunrunner Answers

Sounds like this guy filed his story this afternoon. This is much more fodder than you would ever need but wanted to send it, so that you have some more background and facts as these stories develop.

-----Original Message-----

From: Solomon, John [<mailto:jsolomon@publicintegrity.org>]
Sent: Wednesday, March 02, 2011 12:18 PM
To: Schmalzer, Tracy (SMO)
Cc: Solomon, John
Subject: FW: Questions for DOJ

Tracy:

Here are the questions for which we need on the record answers from DOJ:

1.) What did Main Justice know about the ATF operation code named Fast and Furious in Phoenix? Did the attorney general or Lanny Breuer know about ATF's efforts to let guns flow to straw buyers as part of a larger strategy to making bigger cases against Mexican drug organizations?

[FROM JOHN ON MY QUESTION RE: BASIS FOR THIS -- "I have confirmed this with DOJ employees and internal DOJ memos. If you read the F&F case summary sent to main Justice you'll see there are specific numbers given for the number of weapons ATF permitted to be sold to know straw and

suspect buyers and then monitored between October 2009 and January 2011. If you want to dispute that premise, I'll be glad to quote you."]

This is a question for Main Justice to answer and Arizona is not aware of the of the “case summary” to which they refer. However, ATF was not engaged in an effort “to let guns flow to straw buyers.”

The guns flow FROM straw buyers and until agents observe illegal conduct they cannot treat them as anything other than ordinary buyers. At the time of transfer of the firearms from the FFL to the straw purchaser based upon the facts available to the FFL at the time of the sale, the sales to the “straw purchasers” are lawful; and seizure of the weapons in the hands of those purchasers without evidence of criminality would violate the United States Constitution and would be an unlawful seizure and deprivation of property rights without cause. (Fourth and Fifth Amendments).

In these investigations, there may come a point over the course of an investigation where ATF believes, though it is well short of proof beyond a reasonable doubt required in criminal cases, that they can prove that a particular person only buys guns for the purposes of illegal trafficking. However, seizure of the guns at that point may not be legal because 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.

2.) Why did lawyers from the US Attorney's office in Phoenix meet with FFLs and encourage them to keep selling guns to known straw buyers, including [ATF] was already listed in ATF's database as a suspect buyer? How did DOJ lawyers address the concerns of gun sellers about civil liability or future prosecution if they continued to let the gun sales proceed?

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.

The FFLs wanted to know that the information that they provided was actually useful, and that they were not unwittingly implicating themselves in some criminal activity of which they weren't aware. As we have said so many times before, they were told that ATF could not authorize illegal sales to be made any more than they could prohibit lawful sales, however, ATF appreciated their cooperation and willingness to voluntarily provide information to ATF including notice of multiple long gun purchases and notice of single gun sales of certain types of firearm or sales to particular individuals. No one discussed civil liability. The FFLs were providing information to ATF regarding transactions that the FFL must have viewed as lawful, having no knowledge or reason to know that the transfers were unlawful.

3.) Does DOJ believe its answers last month to Sen. Grassley were accurate and complete? If so, why?

This is for DOJ to answer but the only reasonable answer is: “Yes, our answers were accurate and complete.”

4.) Is DOJ contemplating any action against ATF agents who talked to Sen. Grassley about their concerns?

This is for DOJ.

5.) What if any concerns does DOJ have if ATF agents are monitoring the sales of guns to suspected straw buyers or begin seeing the guns they have been monitoring show up in crimes on both sides of the border?

The number one concern for DOJ is interdicting guns that are unlawfully transferred to persons in the United States and in Mexico who will then commit crimes with those guns. The purpose of this investigation was to locate those guns, interdict those guns and bring those responsible for their unlawful purchase, transfer, finance and use to justice.

The full array of rights available to indicted defendants is also available to those persons suspected of committing gun crimes, and the government cannot violate legitimate gun owners rights by prematurely seizing their guns.

DOJ's goals of the investigation were two-fold: 1. Interdiction of the weapons that were purchased or possessed in furtherance of the unlawful trafficking conspiracy; and 2. Investigation with an emphasis on discovering other members of the trafficking organization, particularly the leaders of the organization who procure the guns from straw purchasers and have them smuggled into Mexico to the Cartels. 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. As explained in answer to question 1, that seizure would be unlawful, but ATF may only seize when a lawful basis for seizure can be proven.

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.

How is it that a person becomes a suspect in a straw purchase investigation?

If they are buying multiple handguns, it could be because of multiple sales reports to ATF, notifying the bureau that a suspect is buying large quantities of handguns. If they are buying only long guns, they may not become a suspect until guns they have purchased can be traced after being recovered at a crime scene, or an FFL voluntarily notifies ATF of an unusually large purchase.

But a multiple purchase by itself, or the recovery of a firearm at a crime scene does not establish that the original buyer of the gun is a straw purchaser. If it did, then when a person buys a gun and then decides they don't shoot it well, or it recoils too much, or they really can't afford the ammunition, and sells it, out of the paper, or a gun show, or to a friend, if the next owner of the gun commits a crime with it, the original purchaser is a suspect in a trafficking case. And your question presupposes that ATF agents should never let mere suspects possess a firearm.

Your question seems to presume that once ATF identifies a suspect, they can treat that suspect as though they were a prohibited person, never again allowed to possess a firearm, regardless of the fact that they have not been convicted of a crime. If this were the case, ATF could stop any person they label a suspect and take any gun they have away from them. This means that if you (1) bought two 5.7 mm pistols because you wanted one for the home and one for the office, or (2) bought three AR type rifles for you and your two sons to target shoot, or (3) you sold one of your guns to your brother in law, who resold it to a co-worker who took it into Mexico and got caught with it, then you are a straw purchase suspect and the next time you buy a gun, with your own money, for a hunting trip, ATF should take it away from you.

Thanks

John