

# United States Senate

WASHINGTON, DC 20510

January 27, 2011

## Via Electronic Transmission

Kenneth E. Melson  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
99 New York Avenue, NE  
Washington, DC 20226

Dear Acting Director Melson:

It is my understanding that the ATF is continually conducting operations along the southwestern United States border to thwart illegal firearm trafficking. I am specifically writing you concerning an ATF operation called "Project Gunrunner." There are serious concerns that the ATF may have become careless, if not negligent, in implementing the Gunrunner strategy.

Members of the Judiciary Committee have received numerous allegations that the ATF sanctioned the sale of hundreds of assault weapons to suspected straw purchasers, who then allegedly transported these weapons throughout the southwestern border area and into Mexico. According to the allegations, one of these individuals purchased three assault rifles with cash in Glendale, Arizona on January 16, 2010. Two of the weapons were then allegedly used in a firefight on December 14, 2010 against Customs and Border Protection (CBP) agents, killing CBP Agent Brian Terry. These extremely serious allegations were accompanied by detailed documentation which appears to lend credibility to the claims and partially corroborates them.

On Tuesday, according to press reports, the ATF arrested 17 suspects in a Project Gunrunner bust. William Newell, the Special Agent in Charge of the ATF's Phoenix Field Office was quoted as saying, "We strongly believe we took down the entire organization from top to bottom that operated out of the Phoenix area." However, if the 17 individuals were merely straw purchasers of whom the ATF had been previously aware before Agent Terry's death, then that raises a host of serious questions that the ATF needs to address immediately.

As you know, the Department of Justice Office of Inspector General (OIG) released a review of ATF's Project Gunrunner in November of 2010, in which the OIG concluded that Project Gunrunner has been unsuccessful, in large part because:

Project Gunrunner's investigative focus has largely remained on gun dealer inspections and straw purchaser investigations, rather than targeting higher-level traffickers and smugglers. As a result, ATF has not made full use of the

intelligence, technological, and prosecutorial resources that can help ATF's investigations reach into the higher levels of trafficking rings.<sup>1</sup>

Therefore, in order to gain a more complete understanding of ATF activities in Project Gunrunner, I request that you arrange for my staff to be briefed by knowledgeable ATF supervisors no later than February 3, 2011. Please contact Jason Foster or Brian Downey at (202) 224-5225 to schedule the briefing. All formal correspondence should be sent electronically in PDF format to [Brian\\_Downey@judiciary-rep.senate.gov](mailto:Brian_Downey@judiciary-rep.senate.gov) or via facsimile to (202) 224-3799.

Sincerely,



Charles E. Grassley  
Ranking Member

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<sup>1</sup> *Review of ATF's Project Gunrunner, Evaluation and Inspections Report 1-2011-001*, November 2010, available at <http://www.justice.gov/oig/reports/ATF/e1101.pdf>



U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

February 4, 2011

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

Dear Senator Grassley:

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

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

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

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

The Honorable Charles E. Grassley  
Page Two

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

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

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

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

Sincerely,



Ronald Weich  
Assistant Attorney General

cc: The Honorable Patrick J. Leahy  
Chairman



U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

March 2, 2011

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

Dear Senator Grassley:

This responds to your letters, dated February 9, 2011 and February 16, 2011, which reiterated your concerns about gun trafficking along the Southwest border and requested documents that apparently relate to a particular ongoing investigation in Arizona.

We appreciated the opportunity to brief Committee staff on February 10, 2011, regarding the efforts by Department prosecutors and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to interdict weapons sold illegally along the Southwest border and to hold accountable the leadership of criminal organizations that support this trafficking.

As you know, we are not in a position to disclose documents relating to any ongoing investigation, nor can we confirm or deny the existence of records in our ongoing investigative files, based upon the Department's longstanding policy regarding pending matters. We would appreciate the opportunity to confer with your staff if we can respond to your interests in another way, consistent with that policy.

The Attorney General has asked the Acting Inspector General to evaluate the concerns that have been raised about ATF investigative actions in light of its recent review of Project Gunrunner to determine whether additional examination by her Office is appropriate. We appreciate your interest in our law enforcement efforts and again ask that you direct to the Inspector General individuals who believe they have knowledge of misconduct by Department employees.

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of assistance in this or any other matter.

Sincerely,

Ronald Weich  
Assistant Attorney General

cc: The Honorable Patrick J. Leahy  
Chairman

**United States Senate**  
WASHINGTON, DC 20510

March 3, 2011

**Via Electronic Transmission**

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Kenneth E. Melson  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
99 New York Avenue, NE  
Washington, DC 20226

Dear Attorney General Holder and Acting Director Melson:

It has been over a month since I first contacted Acting Director Melson about serious whistleblower allegations related to a Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) operation called "Fast and Furious"—part of the broader "Project Gunrunner" initiative. Several agents alleged that ATF leadership encouraged cooperating gun dealers to engage in sales of multiple assault weapons to individuals suspected of illegally purchasing for resale to Mexican cartels. These agents were motivated to come forward after federal authorities recovered two of the Operation Fast and Furious guns at the scene where a Customs and Border Patrol Agent named Brian Terry was killed.

In response to my letter, the Department of Justice (DOJ) denied that ATF would ever knowingly allow weapons to fall into the hands of criminals, or let firearms "walk" in an operation. On February 9, I wrote to DOJ and attached documents that supported the whistleblower allegations about the guns found at the scene of Agent Terry's death.<sup>1</sup>

My office continues to receive mounting evidence in support of the whistleblower allegations. For example, attached are detailed accounts of three specific instances where ATF allowed firearms to "walk."<sup>2</sup> In all three instances, the suspect asks a cooperating

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<sup>1</sup> Letter from Senator Grassley to Attorney General Holder. February 9, 2011. Accessed at <http://judiciary.senate.gov/resources/documents/upload/020911GrassleyToHolder-ATF.pdf>.

<sup>2</sup> ATF Reports of Investigation (ROIs) detailing ATF Phoenix Field Operations from May 8-June 1, 2010. (Attachment 1)

defendant to purchase firearms at a gun dealer who was also cooperating with the ATF. So, two of the three participants in the transactions were acting in concert with the ATF. Yet, the ATF allowed the suspect to take possession of the firearms in each instance. In one case the suspect said that he “assumed the only real risk in their trafficking arrangement when he [REDACTED] ‘erase(d) the (serial) numbers’ from the firearms and ‘take (transports) them...’”<sup>3</sup>

The whistleblowers did not wait until a federal agent was killed before voicing their concerns internally. Several agents in the Phoenix Gun Trafficking Group (Group VII) voiced their opposition to the ATF’s handling of the case internally first. Group Supervisor David Voth sent an email on March 12, 2010 about the “schism developing amongst our group.”<sup>4</sup> His response to dissent within the group was to invite those who disagreed with the strategy to find another job:

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” [sic] when it comes to the 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.

**... 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 toolbox 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.<sup>5</sup>

Two weeks later, on April 2, 2010, Voth sent an email to Assistant U.S. Attorney Emory Hurley and Assistant Special Agent in Charge (ASAC) George Gillett with the subject, “No pressure but perhaps an increased sense of urgency.”<sup>6</sup> In the email, he reiterated support for the strategy, but cited increasing levels of violence as a reason to move more quickly. Voth wrote:

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 [sic] account the entire scope of the conspiracy would be ill advised to the overall good of the mission. I

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<sup>3</sup> *Id.*

<sup>4</sup> Email from Group Supervisor David Voth to Group VII. March 12, 2010. (Attachment 2)

<sup>5</sup> *Id.* (Emphasis in original.)

<sup>6</sup> Email from Group Supervisor David Voth to Group VII, Emory Hurley (USAAZ), and George Gillett. April 2, 2010. (Attachment 3)

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.<sup>7</sup>

Voth also acknowledged in a May 3, 2010 email to his group that “April was the second most violent month during the Calderon administration with 1,231 executions.”<sup>8</sup> ATF personnel in Mexico reportedly noted the increased violence and contacted ATF Headquarters to express concern over the Operation Fast and Furious strategy of allowing the weapons sales to proceed.

ATF Headquarters was fully aware of the strategy. A copy the Operation Fast and Furious case summary sent to ATF Headquarters states:

This OCDETF [Organized Crime Drug Enforcement Task Force] case is a large scale firearms trafficking case with the firearms being recovered in the Republic of Mexico or on/near the US/Mexico border (El Paso, TX, Nogales, AZ, Douglas, AZ, etc.) To date over 1,500 firearms have been purchased since October 2009 for over one million (\$1,000,000.00) cash in over-the-counter transactions at various Phoenix area FFLs. [REDACTION] There are many facets to this investigation but ATF is attempting to not only secure a straw purchase/dealing in firearms without a license case against various individuals but more specifically to make the bigger connection to the Mexican Cartel/Drug Trafficking Organization (DTO) obtaining these firearms for the best possible case and the most severe charges when it is time to Indict [sic] this case.<sup>9</sup>

Dismantling the Mexican drug cartels is a worthy goal. However, asking cooperating gun dealers to arm cartels and bandits without control of the weapons or knowledge of their whereabouts is an extremely risky strategy. ATF leadership did not allow agents to interdict the weapons in this case. Instead, agents simply monitored the purchases of “suspect guns” and entered them into a database of firearms “suspected to eventually be used in criminal activity.”<sup>10</sup> Over the course of this investigation, weapons allowed to walk were ending up in Mexico and along the Southwestern border. The ATF was well aware that this was happening. For example, in November 2009, four 7.62 caliber weapons were recovered in Naco, Mexico just two weeks after being purchased by one of the ATF’s suspects in Glendale, Arizona.<sup>11</sup> Also, in July 2010 a Romanian AK-47

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<sup>7</sup> *Id.*

<sup>8</sup> Email from Group Supervisor David Voth to Group VII. May 3, 2010. (Attachment 4)

<sup>9</sup> Phoenix Group VII, Operation Fast and Furious. (Attachment 5)

<sup>10</sup> Email from Senior Firearms Program Specialist to Group VII Agent. June 17, 2010. (Attachment 6)

<sup>11</sup> Email: Suspect Person Activity Report. March 18, 2010. (Attachment 7)



variant—the same model found at the scene of Agent Terry’s death—was recovered in Navojoa, Mexico.<sup>12</sup>

In light of this evidence, the Justice Department’s denials simply don’t hold water. On February 4, 2011, the Department claimed that the ATF did not “knowingly” allow the sale of assault weapons to straw purchasers and that “ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation into Mexico.”<sup>13</sup> Clearly those statements are not accurate. These documents establish that ATF allowed illegal firearm purchases by suspected traffickers in hopes of making a larger case against the cartels. ATF was not alone. The U.S. Attorney’s office appears to have been fully aware and engaged in endorsing the same strategy.

Congress needs to get to the bottom of this.

After close of business last night, I received a one-page response to my letters of February 9 and 16.<sup>14</sup> The response asks that I direct to the Inspector General any individuals who believe they have knowledge of misconduct by Department employees. You should know that just after Agent Terry died in December, at least one whistleblower contacted the Office of Inspector General before contacting my office. Despite reporting the allegations multiple times by phone, Internet, and fax, no one contacted the whistleblower until after my staff contacted the Acting Inspector General directly on February 1.

I have received no documents in response to my February 16, 2011, request. Last night’s DOJ reply cites the Justice Department’s “longstanding policy regarding pending matters” as a reason for withholding documents “relating to any ongoing investigation.”<sup>15</sup> However, as you know, that policy is merely a policy. It is not mandated by any binding legal authority.

There are many instances where the Justice Department and its components choose to provide information about pending investigations to Congress. These examples are not always officially documented, but often occur when there are particularly egregious allegations of government misconduct or there is an extremely high level of public interest in an investigation. Getting to the truth of the ATF whistleblower allegations in this case is extremely important to the family of Brian Terry and should be important to all Americans. There is no reason to wait the unknown number of years it might take for all of the trials and all of the appeals to be exhausted. The time for truth is now.

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<sup>12</sup> Email from ATF Violent Crime Analysis Branch and Group VII Agents, detailing a weapon recovery in Mexico. August 6, 2010. (Attachment 8)


<sup>13</sup> Letter from the Department of Justice to Senator Grassley. February 4, 2011. (Attachment 9)

<sup>14</sup> Letter from the Department of Justice to Senator Grassley. March 2, 2011. (Attachment 10)

<sup>15</sup> *Id.*

In addition to providing the documents I previously requested, please explain how the denials in the Justice Department's February 4, 2011 letter to me can be squared with the evidence.

Sincerely,

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley  
Ranking Member  
Committee on the Judiciary

cc:

The Honorable Patrick Leahy  
Chairman  
United States Senate Committee on the Judiciary

The Honorable Robert S. Mueller, III  
Director  
Federal Bureau of Investigation

The Honorable Alan D. Bersin  
Commissioner  
United States Customs and Border Protection

# Attachment 1

Title of investigation:

Investigation Number:  
785115-10

Report Number:  
1

SUMMARY OF EVENTS:

**ATF**

# ATF

# Report of Investigation

Title of Investigation:

Investigation Number:  
785116-10-

Report Number:  
1

# ATF

**ATF**

Title of Investigation:  
[REDACTED]

Investigation Number:  
785115-10 [REDACTED]

Report Number:  
1

**SUMMARY OF EVENT:**

**ATF**



# ATF

# Attachment 2



**ATF**

# Attachment 3

**ATF**

# Attachment 4

**ATF**

# Attachment 5



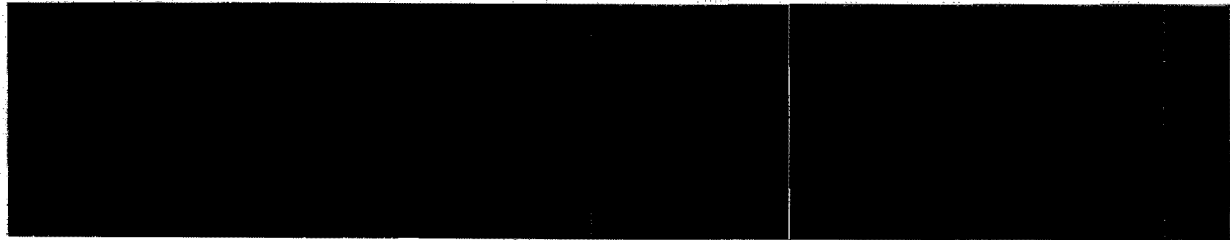
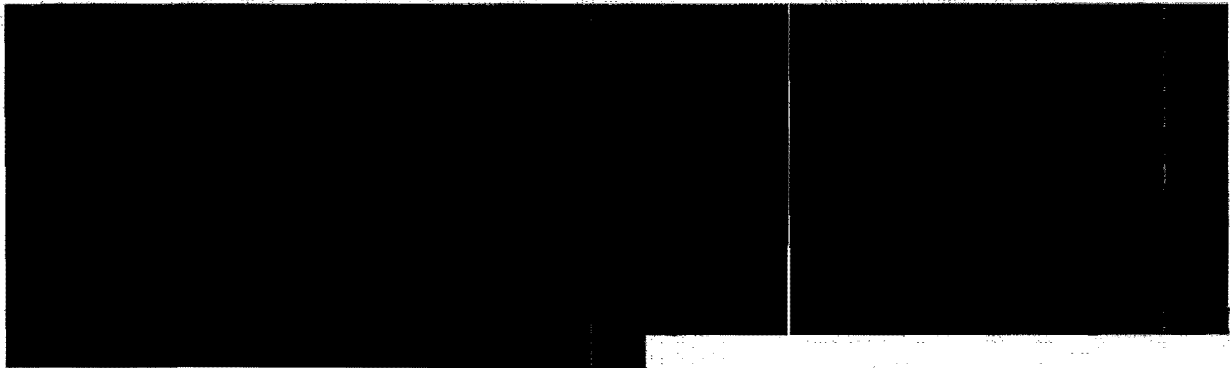
Phoenix Group VII

(GRIT/SWB Firearms Trafficking)

785115-10-0004, Operation Fast and Furious: This OCDEF case

ATF

**ATF**



# Attachment 6

**From:**  
**Sent:**  
**To:**  
**Cc:**  
**Subject:**  
**Attachments:**

**ATF**

**ATF**

# Attachment 7

**From:**  
**Sent:**  
**To:**  
**Cc:**  
**Subject:**  
**Attachments:**

**ATF**

**ATF**

# Attachment 8

**From:**  
**Sent:**  
**To:**  
**Cc:**  
**Subject:**  
**Attachments:**

**ATF**

.pdf

**ATF**

# Attachment 9





U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

February 4, 2011

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

Dear Senator Grassley:

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

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

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

The Honorable Charles E. Grassley  
Page Two

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

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

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

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

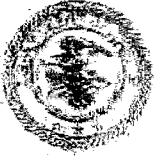
Sincerely,



Ronald Weich  
Assistant Attorney General

cc: The Honorable Patrick J. Leahy  
Chairman

# Attachment 10



U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

March 2, 2011

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

Dear Senator Grassley:

This responds to your letters, dated February 9, 2011 and February 16, 2011, which reiterated your concerns about gun trafficking along the Southwest border and requested documents that apparently relate to a particular ongoing investigation in Arizona.

We appreciated the opportunity to brief Committee staff on February 10, 2011, regarding the efforts by Department prosecutors and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to interdict weapons sold illegally along the Southwest border and to hold accountable the leadership of criminal organizations that support this trafficking.

As you know, we are not in a position to disclose documents relating to any ongoing investigation, nor can we confirm or deny the existence of records in our ongoing investigative files, based upon the Department's longstanding policy regarding pending matters. We would appreciate the opportunity to confer with your staff if we can respond to your interests in another way, consistent with that policy.

The Attorney General has asked the Acting Inspector General to evaluate the concerns that have been raised about ATF investigative actions in light of its recent review of Project Gunrunner to determine whether additional examination by her Office is appropriate. We appreciate your interest in our law enforcement efforts and again ask that you direct to the Inspector General individuals who believe they have knowledge of misconduct by Department employees.

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of assistance in this or any other matter.

Sincerely,

Ronald Weich  
Assistant Attorney General

cc: The Honorable Patrick J. Leahy  
Chairman

# United States Senate

WASHINGTON, DC 20510

March 4, 2011

## Via Electronic Transmission

Kenneth E. Melson  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
99 New York Avenue, NE  
Washington, DC 20226

Dear Acting Director Melson:

Due to my inquiry into the ATF's Operation Fast and Furious, I am concerned that the ATF may have employed the same risky strategy of encouraging weapons trafficking that was employed elsewhere by the ATF, beyond the Phoenix Field Office and its Operation "Fast and Furious."

As you know, U.S. Immigration and Customs Enforcement (ICE) Agent Jaime Zapata was murdered in Mexico on February 15. According to a press report based on an unnamed source, the weapon used to kill Zapata "was shipped through Laredo with the possible knowledge of the ATF," and "the feds were already investigating the suspects when the gun was sent to Mexico."<sup>1</sup> According to another report in the Dallas Morning News:

In North Texas . . . ATF agents were conducting another Project Gunrunner surveillance operation involving brothers Otilio and Ranferi Osorio. ATF and Drug Enforcement Administration officials organized the November undercover transfer of about 40 weapons believed to be destined for a Mexican drug cartel. When Immigration and Customs Enforcement Agent Jaime Zapata was gunned down Feb. 15 in Mexico, ballistics tests and a partial serial number linked one weapon used in the shooting to Otilio Osorio.<sup>2</sup>

In its March 1 press release announcing the arrest of the [ATF] as well as their next-door neighbor Kelvin Morrison, the Department of Justice (DOJ) confirmed that all three men were being investigated by the ATF as early as last November. Prior to the 40 weapons referenced above being confiscated in Laredo, [ATF] and Morrison provided the guns to an ATF confidential informant in Dallas in a meeting set up by the ATF. After the delivery of the illegal weapons, the three men were stopped by local police. Why were these traffickers not thereafter arrested in November?

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<sup>1</sup> Terry Wallace, "ATF: Gun in US agent's death traced to Texas man," *Associated Press*, February 28, 2011.

<sup>2</sup> "Federal gun-smuggling surveillance program backfires," *Dallas Morning News*, March 3, 2011.

Naturally, this raises questions about whether the ATF strategy of allowing straw purchasers to continue to operate in hopes of making bigger cases may have contributed to the shooting of ICE Agent Jaime Zapata. Please provide written answers to the following questions:

- (1) Although the gun used in the assault on Agent Zapata that has been traced back to the U.S. was purchased on October 10, 2010, how can we know that it did not make its way down to Mexico after the November investigation, when the arrest of these three criminals might have prevented the gun from being trafficked and later used to murder Agent Zapata?
- (2) When did law enforcement first become aware that Morrison purchased the gun?
- (3) Given that the likely recipients of any trafficked guns were so close to the border, did any ATF personnel raise concerns about the possibility of those guns being used against U.S. law enforcement? If so, how did the ATF address those concerns?
- (4) Did any ATF personnel raise concerns about the wisdom of allowing individuals like the Osorio brothers or Morrison to continue their activities after the November weapons transfer? If so, how did the ATF address those concerns?

In addition to answering those questions, please provide all records relating to:

- (5) When law enforcement officials first became aware of the trafficking activities of Otilio and [ATF] and Kelvin Morrison;
- (6) Surveillance that may have been conducted on [ATF] or Morrison prior to the November transfer of weapons between the ATF's confidential informant and [ATF] and Morrison;
- (7) The November transfer; and
- (8) Any surveillance that law enforcement continued to conduct on [ATF] [ATF] or Morrison after the November transfer.

Please contact my staff no later than March 7, 2011 to schedule a briefing on this matter. Should you have any questions regarding this letter, please contact Tristan Leavitt at (202) 224-5225.

Sincerely,

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley  
Ranking Member

cc: The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

United States Senate

March 4, 2011

Via Electronic Transmission

The Honorable Hillary Rodham Clinton  
Secretary  
U.S. Department of State  
Harry S. Truman Building  
2201 C Street, NW  
Washington, DC 20520

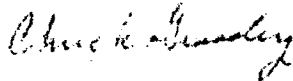
Dear Secretary Clinton:

Over the past month I have been investigating the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) operation called "Fast and Furious" - part of the broader "Project Gunrunner" initiative. According to several agents, ATF leadership encouraged gun dealers to engage in sales of multiple assault weapons to individuals suspected of illegally purchasing for resale to Mexican cartels. I am looking into the connection between Operation Fast and Furious and the firefight on December 14, 2010 that claimed the life of CBP Agent Brian Terry.

I understand that Assistant Attorney General Lanny Breuer, his deputy, and other officials met in Mexico City in the summer of 2010 to discuss "on-going investigations" related to Project Gunrunner with the U.S. Ambassador to Mexico. Accordingly, please provide all records relating to any such meeting that may have occurred from June through September 2010, to include meeting minutes, briefing notes, emails, or cables.

I would appreciate a response no later than March 11, 2011. If you have any questions about this request, please contact Jason Foster at (202) 224-5225. Thank you for your prompt attention to this important matter.

Sincerely,



Charles E. Grassley  
Ranking Member  
Committee on the Judiciary



# United States Senate

WASHINGTON, DC 20510

March 4, 2011

## Via Electronic Transmission

Alan D. Bersin  
Commissioner  
United States Customs and Border Protection  
1300 Pennsylvania Avenue, N.W.  
Washington, DC 20528

Dear Commissioner Bersin:

As you know, I am investigating the connection between the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) operation "Fast and Furious" and the firefight on December 14, 2010 that claimed the life of Customs and Border Protection (CBP) Border Patrol Tactical Unit (BORTAC) Agent Brian Terry. Terry's attackers were apparently armed with assault rifles originally purchased as part of ATF's Operation Fast and Furious. The BORTAC unit used thermal binoculars to identify the rifles and demanded that the suspected aliens drop their weapons. Yet, according to an affidavit filed by the FBI, even after the aliens refused to disarm themselves, the BORTAC unit was under standing orders to first use non-lethal bean bag rounds.<sup>1</sup> The aliens responded with gunfire, and Agent Terry was killed in the ensuing exchange.

It's difficult to understand why CBP would require its agents to use less-than-lethal force against people who are clearly armed and dangerous. Further, Agent Brian Terry's brother, Kent Terry, has said that of the four individuals in the BORTAC unit, only two were armed with standard firearms at all. Two carried *only* bean bag guns. These agents did not even have the means to defend themselves.

Please provide copies of all records relating to:

- (1) CBP's policy on the use of force in circumstances such as those Brian Terry reportedly faced, and
- (2) Any change to that policy in the last two years.

---

<sup>1</sup> Affidavit of FBI Agent Scott Hunter, December 29, 1020, Case No. 10-10251M. (Attachment 1)

In addition, please contact my staff no later than March 7, 2011 to schedule a briefing on this matter. Should you have any questions regarding this letter, please contact Tristan Leavitt at (202) 224-5225.

Sincerely,

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley  
Ranking Member  
Committee on the Judiciary

cc: The Honorable Janet Napolitano  
Secretary  
United States Department of Homeland Security  
301 7th Street, N.W.  
Washington, DC 20528

# Attachment 1

UNITED STATES DISTRICT COURT

*District of Arizona*

**ATF**

RETURN

**ATF**

---

UNITED STATES DISTRICT COURT  
*District of Arizona*

**ATF**

**ATF**

**ATF**





U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 8, 2011

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

Dear Senator Grassley:

This responds to your letters, dated March 3, 2011, and March 4, 2011, which reiterated your concerns about investigations into weapons trafficking along the Southwest border.

We appreciate your continuing concern about this matter. We have referred your letters and the attached documents to the Department's Office of the Inspector General (OIG). As you know, the Attorney General has asked the Acting Inspector General to evaluate concerns raised about Project Gunrunner, the effort by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to interdict weapons purchased illegally for transport to Mexican cartels. We urge you to provide the OIG with any additional information that you think would be helpful to its review.

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of assistance in this or any other matter.

Sincerely,

Ronald Weich  
Assistant Attorney General

cc: The Honorable Patrick J. Leahy  
Chairman

# United States Senate

WASHINGTON, DC 20510

March 8, 2011

## VIA ELECTRONIC TRANSMISSION

Kevin L. Perkins, Chair  
Integrity Committee  
Council of Inspectors General on Integrity and Efficiency  
935 Pennsylvania Ave., NW, Room 3973  
Washington, DC 20535-0001

**Re: Whistleblower allegations involving Operation Fast and Furious, a Project Gunrunner case at the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)**

Dear Mr. Perkins:

Agent ATF and other whistleblowers have alleged that the ATF intentionally allowed thousands of weapons to be illegally trafficked to Mexico.<sup>1</sup> ATF appears to have acted with the full knowledge and approval of the Justice Department. Hundreds of these firearms later turned up at crime scenes on both sides of the border, including at the murder scene of Customs and Border Protection Agent Brian Terry.

At first, ATF and the Justice Department repeatedly denied the allegations, asserting that they were “false.” However, now that I have presented extensive documentary evidence supporting the claims, Attorney General Holder has asked the Justice Department’s Office of Inspector General (DOJ-OIG) to conduct a review. Unfortunately, there are three reasons that the public may be unable to trust that the DOJ-OIG is completely disinterested and independent.

First, the position of Justice Department Inspector General is currently vacant. The Acting Inspector General just recently took over for Glenn Fine. Thus, the office is without a Presidentially-appointed and Senate-confirmed leader. In my experience, acting inspectors general tend to function as caretakers of the office. They are not necessarily equipped to take on an entrenched bureaucracy and challenge senior officials with the tough questions necessary to get to the bottom of a controversy as

---

<sup>1</sup> John Solomon, David Heath, and Gordon Whitkin, “ATF Let Hundreds of U.S. Weapons Fall into Hands of Suspected Mexican Gunrunner,” *The Center for Public Integrity* (Mar 3, 2011), <http://www.publicintegrity.org/articles/entry/2976>.

serious and far-reaching as this one. That would be especially true if the acting inspector general is seeking the nomination to fill the position on a long-term basis.

Second, the DOJ-OIG was aware of the allegations long before the Attorney General's request and did nothing. Agent [ATF] had already contacted the DOJ-OIG in December, just after Agent Terry's death. He received no reply. After contacting my office, Agent [ATF] contacted DOJ-OIG again, and still received no reply. No one from the office contacted him to gather information about his allegations until after my staff contacted the Acting Inspector General directly on February 1, 2011. Given that the DOJ-OIG initially failed to follow-up, it might have an incentive to minimize the significance of the allegations in order to avoid the appearance that its own inaction contributed to the problem in the last few months.

Third, I understand that ATF officials have cited a DOJ-OIG report critical of Project Gunrunner<sup>2</sup> as one of the factors that prompted the shift to a riskier strategy of letting guns be trafficked rather than arresting straw buyers. DOJ-OIG may be sensitive to the appearance that its previous criticism created the conditions under which ATF and DOJ felt pressured to take risks in order to make a "big case" against the cartels. Again, that could create an incentive to minimize the significance of the allegations.

For these reasons, the DOJ-OIG does not appear to be completely disinterested in the outcome of its review. Without a greater level of independence, it will be difficult for the public to have faith in the impartiality and integrity of the result. Therefore, I request that the Acting Inspector General recuse her office and that a disinterested inspector general's office be selected to conduct the review.

In addition, I request that the scope of the inquiry be expanded beyond the underlying decision to allow guns to "walk." The investigation should also carefully examine the circumstances surrounding false and misleading statements to Senate Judiciary Committee staff and to me in response to questions about these allegations over the past several weeks.

---

<sup>2</sup> Department of Justice Office of Inspector General, *Review of ATF's Project Gunrunner, Evaluation and Inspections Report I-2011-001* (November 2010), <http://www.justice.gov/oig/reports/ATF/e1101.pdf>. ("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.")

Attached for your reference are copies of my correspondence with the ATF and the Justice Department, beginning on January 27, 2011. Please provide a written reply no later than March 15, 2011. Thank you for your prompt attention to this extremely important matter.

Sincerely,



Charles E. Grassley  
Ranking Member  
Committee on the Judiciary

cc: Attorney General Eric Holder  
U.S. Department of Justice

Acting Inspector General Cynthia A. Schnedar  
U.S. Department of Justice

Acting Director Kenneth Melson  
Bureau of Alcohol, Tobacco, Firearms, and Explosives

Attachments

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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

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TED DEUTCH, Florida  
LINDA T. SANCHEZ, California  
DEBBIE WASSERMAN SCHULTZ, Florida

March 9, 2011

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
Washington, D.C. 20530

Dear Attorney General Holder,

We write to express our concerns about allegations that the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) Operation Gunrunner may have been complicit in the illegal transfer of firearms into Mexico. According to media reports, the Phoenix-based program known as "Fast and Furious" intentionally allowed straw buyers for criminal organizations to purchase thousands of guns so that ATF could track them across the border.

We find it ironic that the government allowed guns to be trafficked into Mexico as part of a program designed to stop guns from being trafficked into Mexico. We are also troubled that ATF engaged in activities that may have facilitated the transfer of guns to violent drug cartels while simultaneously attempting to restrict lawful firearms sales by border-area firearms dealers. In December, ATF sought to impose additional reporting requirements on semi-automatic rifles, a proposal that we strongly oppose.

The program resulted in a large flow of weapons across the border to Mexico. According to the Center for Public Integrity, ATF allowed nearly 2,000 guns—valued at over one million dollars—to cross the border to known criminal organizations.<sup>1</sup> As would be expected, many of the guns were used in violent crimes. Worse, two guns from the program were found at the murder scene of Customs and Border Protection Agent Brian Terry in December.

<sup>1</sup> John Solomon, David Heath, and Gordon Wilkin, *ATF Let Hundreds of U.S. Weapons Fall into Hands of Suspected Mexican Gunrunners*, The Center for Public Integrity (March 3, 2011), available at <http://www.publicintegrity.org/articles/entry/2976/>.

2011 MAR 10 AM 11:10  
DEPT OF JUSTICE  
EXECUTIVE SECRETARIAT

ATF's strategy to allow weapons to flow into the hands of criminals carried serious and obvious risks. More disturbing, however, is that ATF appears to have accepted these risks without due regard for the consequences

ATF initiated Operation Gunrunner after the Department of Justice Inspector General (IG) criticized the ATF's gun tracing ability. In a 2010 report, the IG wrote:

Despite the increased activity related to Project Gunrunner, ATF is not using intelligence effectively to identify and target firearms trafficking organizations operating along the Southwest border and in Mexico. Moreover, ATF's expansion of its automated system (eTrace) to trace guns seized in Mexico has yielded very limited information of intelligence value.<sup>2</sup>

In addition, there seems to have been little effective coordination between ATF and the Department as a whole. While guns continued to cross the border, the Department was apparently slow to approve wiretaps and to bring prosecutions. Internal ATF documents show that ATF's supervisors became increasingly concerned about the pace of the investigations. It was only this January, 15 months after ATF initiated the program and a month after agent Terry's murder, that the Department finally issued its first indictment based on evidence from the program.

We commend your request that the Department's Inspector General investigate these allegations. In the meantime, we ask that the Department respond to the following questions:

1. How many weapons have been allowed to pass to Mexico under the program known as "Fast and Furious"? Is the program still active?
2. Who at ATF Headquarters approved the program?
3. Who in the U.S. Attorney's Office for the District of Arizona approved the program? On what authority did the Office approve the program?
4. Did ATF or the U.S. Attorney's Office in Phoenix coordinate the "Fast and Furious" program with the Department? Did the Department approve the strategy?
5. What changes or improvements has ATF made to its eTrace program and its ability to use intelligence to target gun trafficking organizations in general?
6. Does ATF view the "Fast and Furious" program as a success?

Thank you for your attention to this matter. We respectfully request that the Department respond to these questions by Friday, March 18, 2011.

Sincerely,

---

<sup>2</sup> Review of ATF's Project Gunrunner, U.S. Dept. of Justice Office of the Inspector General, p. vi (2010), available at <http://www.justice.gov/oig/reports/ATF/e1101.pdf>.

James Smith

Robert

Tom Marino

Frey Cordy

Judy Goshes

Elton Gallegly

ATMM

Jim Lamm

Paul E. Ryan

Tim Griffin

Scott Starks

Bob Goodlatte

Howard Coble

Steve King

cc: The Honorable John Conyers, Jr.

**Myles, Tonia (JMD)**

---

**From:** Admin. Assistant  
**Sent:** Thursday, March 10, 2011 9:21 AM  
**To:** DOJExecSec (JMD)  
**Cc:** Tolson, Kimberly G (JMD); Wells, Barbara A (JMD)  
**Subject:** FW: Letter to General Holder  
**Attachments:** 3.9.11 HJC Gunrunner Letter.pdf  
  
**Importance:** High

Pls log the attached ltr. Thanks.

**From:** Agrast, Mark D. (SMO)  
**Sent:** Wednesday, March 09, 2011 7:13 PM  
**To:** Admin. Assistant; Admin. Assistant  
**Cc:** Weich, Rob (SMO); Burton, Faith (SMO); Gaston, Molly (SMO)  
**Subject:** FW: Letter to General Holder

Admin. Assistant

Please log in and assign.

Mark

**From:** Lynch, Caroline [<mailto:Caroline.Lynch@mail.house.gov>]  
**Sent:** Wednesday, March 09, 2011 5:30 PM  
**To:** Agrast, Mark D. (SMO)  
**Cc:** Hertling, Richard; Jezierski, Crystal  
**Subject:** Letter to General Holder

Mark – attached please find a letter to General Holder. Thanks.

*Caroline G. Lynch*  
Chief Majority Counsel  
Subcommittee on Crime, Terrorism & Homeland Security  
House Committee on Judiciary  
B-370 Rayburn House Office Building  
Washington, D.C. 20515  
(202) 225-5727  
(202) 225-3672 (fax)



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## United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*  
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

March 9, 2011

The Honorable Eric Holder Jr.  
Attorney General  
United States Department of Justice  
950 Pennsylvania Ave, N.W.  
Washington, DC 20001

Dear Attorney General Holder:

I forward to you the enclosed letter from the National Rifle Association requesting examination of the Bureau of Alcohol, Tobacco, and Firearms (ATF) activities related to "Project Gunrunner." I understand that Senator Grassley has been making inquiries, as well. He raised the matter today in an oversight hearing with Secretary Napolitano.

I write to ask whether components of the Department have reviewed this matter and the status of any such inquiries. I also inquire with respect to the operation and whether it remains ongoing.

Sincerely,

  
PATRICK LEAHY  
Chairman

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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## United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

BILLY A. COHEN, *Chief Counsel and Staff Director*  
KERRAN L. DAVIS, *Republican Chief Counsel and Staff Director*

March 15, 2011

### Via Electronic Transmission

The Honorable Michele M. Leonhart  
Administrator  
U.S. Drug Enforcement Administration  
U.S. Department of Justice  
700 Army Navy Drive  
Arlington, VA 22202

Dear Administrator Leonhart:

Since January, I have been investigating the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) operation called "Fast and Furious"—part of the broader "Project Gunrunner" initiative. According to several agents, ATF leadership encouraged gun dealers to engage in sales of multiple weapons to individuals suspected of illegally purchasing for resale to Mexican cartels.

I understand from documents and other information provided that Drug Enforcement Administration (DEA) Agents were aware of Operation Fast and Furious and possibly deeply involved in the operation. Reportedly, DEA funds were used to facilitate operations in ATF's Operation Fast and Furious.

Accordingly, in order to get a better understanding of DEA's involvement with Operation Fast and Furious please provide all records relating to communications between supervisors and DEA headquarters regarding DEA's involvement. Additionally, I request that you arrange for knowledgeable DEA supervisors to brief members of my staff no later than March 25, 2011.

I would appreciate a response to this letter no later than March 18, 2011. If you have any questions about this request, please contact Brian Downey at (202) 224-5225. Thank you for your prompt attention to this important matter.

Sincerely,



Charles E. Grassley  
Ranking Member

cc: The Honorable Eric H. Holder, Jr.  
Attorney General, United States Department of Justice

PATRICK J. LEAHY, VERMONT, CHAIRMAN

HERB KOHL, WISCONSIN  
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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRIEF A. COHEN, *Chief Counsel and Staff Director*  
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

March 15, 2011

### Via Electronic Transmission

The Honorable John T. Morton  
Director  
U.S. Immigration and Customs Enforcement  
U.S. Department of Homeland Security  
500 12<sup>th</sup> Street, SW  
Washington, DC 20536

Dear Director Morton:

Since January, I have been investigating the Bureau of Alcohol, Tobacco Firearms, and Explosives (ATF) operation called "Fast and Furious"—part of the broader "Project Gunrunner" initiative. According to several agents, ATF leadership encouraged gun dealers to engage in sales of multiple assault weapons to individuals suspected of illegally purchasing for resale to Mexican cartels.

I understand from documents in my possession that Immigration and Customs Enforcement (ICE) Agents were aware of Operation Fast and Furious and possibly deeply involved in the operation. On March 9, at an oversight hearing of the Department of Homeland Security, I questioned Secretary Napolitano regarding possible ICE participation in Operation Fast and Furious. Secretary Napolitano indicated that she was unaware of a specific ICE Agent being part of ATF's operation.

Accordingly, to get a better understanding of ICE's involvement with Operation Fast and Furious please provide all records relating communications between ICE supervisors and ICE headquarters regarding ICE's involvement. Additionally, I request that you arrange for knowledgeable ICE supervisors to brief members of my staff no later than March 25, 2011.

I would appreciate a response by no later than March 18, 2011. If you have any questions about this request, please contact Brian Downey at (202) 224-5225. Thank you for your prompt attention to this important matter.

Sincerely,



Charles E. Grassley  
Ranking Member

cc: The Honorable Janet Napolitano  
Secretary, United States Department of Homeland Security

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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## United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

BRIAN A. CARRIN, *Chief Counsel and Staff Director*  
KELAN L. DAVIS, *Republican Chief Counsel and Staff Director*

March 16, 2011

### Via Electronic Transmission

The Honorable Alan D. Bersin  
Commissioner  
U.S. Customs and Border Protection  
U.S. Department of Homeland Security  
1300 Pennsylvania Avenue, NW  
Washington, DC 20229

Dear Commissioner Bersin:

Since January, I have been investigating the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) operation called “Fast and Furious”—part of the broader “Project Gunrunner” initiative. According to several agents, ATF leadership encouraged gun dealers to engage in sales of multiple weapons to individuals suspected of illegally purchasing them for resale to Mexican cartels. Specifically, I am seeking information on whether CBP officials had an opportunity to seize weapons from straw purchasers on two specific occasions.

First, on March 8, 2011, federal authorities indicted 11 defendants, including the Mayor and the Police Chief of a small town in New Mexico, for conspiring to smuggle weapons from the United States into Mexico.<sup>1</sup> According to the indictment, on January 14, 2010, [ATF] [ATF] and [ATF] were pulled over near the border and were found in possession of eight weapons, including three AK-47-type pistols.<sup>2</sup> Also according to the indictment, two of the weapons were later smuggled to Mexico, where they were found this month, March 2011.<sup>3</sup> I understand that CBP may have been the agency that conducted the vehicle stop referenced in the indictment and that some of the weapons may have been connected to Operation Fast and Furious. However, CBP allegedly let the individuals go, perhaps because it failed to determine that the weapons or individuals were connected to ATF operation at the time of the vehicle stop.

Second, CBP officials allegedly stopped [ATF] near the border in the spring or summer of 2010. He allegedly had the two WASR-10 rifles in his possession that were later found at the scene of Agent Brian Terry’s murder, along with over thirty additional weapons. CBP officials contacted ATF or an Assistant United States Attorney who allegedly instructed CBP to allow [ATF] proceed without seizing the weapons.

<sup>1</sup> Indictment, filed March 8, 2011, *United States v. Villalobos*, Case 2:11-cr-00487. (Attachment 1)

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.*

In order to ascertain the extent to which these accounts are accurate, please ensure that CBP officials are prepared to answer questions about these two incidents in addition to questions about the use of force policy at the staff briefing scheduled for this Friday. If you have any questions about this request, please contact Brian Downey at (202) 224-5225. Thank you for your prompt attention to this important matter.

Sincerely,

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley  
Ranking Member

Attachment

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

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LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

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JOHN A. YARMUTH, KENTUCKY  
CHRISTOPHER S. MURPHY, CONNECTICUT  
JACKIE SPEIER, CALIFORNIA

March 16, 2011

Mr. Kenneth E. Melson  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms and Explosives  
99 New York Avenue, NE  
Washington, DC 20226

Dear Acting Director Melson:

Recent media reports have raised grave questions about your department's handling of operations involving gun trafficking into Mexico. In the aftermath of the tragic killings of Border Patrol Agent Brian Terry and Immigration and Customs Enforcement Agent Jaime Zapata, it is imperative that you act decisively to assuage the public's deep suspicions that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has a policy of permitting – and even encouraging – the movement of guns into Mexico by straw purchasers. The presence of these guns may have subsequently led to the deaths of hundreds of people on both sides of the border, including Agents Terry and Zapata.<sup>1</sup>

It has been brought to my attention that you are not cooperating with congressional inquiries about Project Gunrunner and Operation Fast and Furious. Last week, Senator Charles Grassley expressed frustration at ATF's responsiveness in a letter to the Department of Justice (DOJ): "I'm still asking questions and we're getting the runaround from the Justice Department, [t]hey're stonewalling. And the longer the wait, the more they fight, the more egg that they're going to have on their face."<sup>2</sup>

Operation Fast and Furious is part of ATF's Project Gunrunner program designed to prevent illegal guns from crossing the border into Mexico. ATF implemented the plan in June 2007 and outlined four key areas of Gunrunner: expansion of gun tracing in Mexico, international coordination, domestic activities, and intelligence.

<sup>1</sup> Kim Murphy and Ken Ellingswood, *Mexico Lawmakers Demand Answers about Guns Smuggled under ATF's Watch*, L.A. TIMES, Mar. 11, 2011, <http://www.latimes.com/news/nationworld/nation/la-naw-mexico-guns-20110311,0,6476764,full.story>.

<sup>2</sup> William Lajeunesse, *ATF, DOJ Launch Damage Control Effort over Growing Project Gunrunner Scandal*, FOXNEWS, Mar. 9, 2011, [http://www.foxnews.com/us/2011/03/09/project-gun-runner-scandal-border/?test=latestnewsrunner Scandal](http://www.foxnews.com/us/2011/03/09/project-gun-runner-scandal-border/?test=latestnewsrunner%20scandal).

A November 2010 DOJ Office of the Inspector General (OIG) report detailed many shortcomings with the program, especially its inability to find and arrest higher-level traffickers.<sup>3</sup> With direct approval from ATF headquarters in Washington, a special ATF strike force let federally licensed gun shops sell about 1765 firearms to straw buyers for the drug cartels over a 15 month span beginning in October 2009.<sup>4</sup> Some 797 of the guns were recovered as a result of criminal activity on both sides of the border, including two at the site of the killing of Agent Terry.

At the same time of the release of the OIG report – and perhaps influenced by it – ATF formalized its policy of letting American guns reach the drug cartels.<sup>5</sup> Field agents vociferously objected, aghast at the prospect of high-caliber weapons being allowed to enter Mexico.<sup>6</sup> Senior Agent **ATF** was one of those agents who came forward to complain that the ATF had allowed the guns to be “walked” into Mexico.<sup>7</sup> ATF even videotaped suspected drug cartel suppliers as they loaded AK-47 type assault rifles into their cars and permitted them to transport those firearms across the border.<sup>8</sup> ATF officials failed to report this to Mexican authorities<sup>9</sup> and eventually lost track of hundreds of these guns.<sup>10</sup> Unsurprisingly, these weapons began showing up at crime scenes both in Mexico and the U.S. Notably on December 14, 2010, two “walked” rifles turned up at Agent Terry’s murder site.

Senator Grassley requested specific documents about this policy but, thus far, has received nothing from ATF or DOJ. In fact, Special Agent In Charge (SAC) William D. Newell has steadfastly denied that this policy even exists, as has DOJ.<sup>11</sup> When confronted by documentary evidence from Senator Grassley’s office, however, Attorney General Holder asked the Justice Department’s Office of Inspector General (DOJ-OIG) to conduct a review. Such a review by the Acting Inspector General, however, is inadequate. As Senator Grassley wrote to Kevin Perkins, Chair of the Integrity Committee of the Council of Inspectors General on Integrity and Efficiency, “the DOJ-OIG does not appear to be completely disinterested in the outcome of its review. Without a greater level of independence, it will be difficult for the public to have faith in the impartiality and integrity of the result.”<sup>12</sup>

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<sup>3</sup> Department of Justice Office of Inspector General, Review of ATF’s Project Gunrunner, Evaluation and Inspection Report I-2011-001 (Nov. 2010), <http://www.justice.gov/oig/reports/ATF/e1101.pdf>.

<sup>4</sup> John Solomon, David Heath, and Gordon Whitkin, *ATF Let Hundreds of U.S. Weapons Fall into Hands of Suspected Mexican Gunrunners*, CENTER FOR PUBLIC INTEGRITY, Mar 3, 2011, <http://www.publicintegrity.org/articles/entry/2976/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Sharyl Atkisson, *Agent: I Was Ordered To Let U.S. Guns into Mexico*, CBS NEWS, Mar. 3, 2011, <http://www.cbsnews.com/stories/2011/03/03/eveningnews/main20039031.shtml>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Murphy & Ellingwood, *supra* note 1.

<sup>11</sup> Solomon, *et al.*, *supra* note 4.

<sup>12</sup> Letter from Sen. Charles Grassley, Ranking Member, S. Jud. Comm., to Kevin L. Perkins, Chair, Integrity Comm., Council of Inspectors General on Integrity and Efficiency (Mar. 8, 2011).

I wholeheartedly agree with this sentiment. Given the entanglement of the DOJ-OIG report with the policy change, it has become clear that the Acting Inspector General cannot conduct an objective and independent inquiry sufficient to foster public confidence. Only a full congressional investigation can achieve this result and restore the public's faith in the workings of the ATF. Therefore, I am requesting that you provide the following documents and information:

1. Documents and communications relating to the genesis of Project Gunner and Operation Fast and Furious, and any memoranda or reports involving any changes to either program at or near the time of the release of the DOJ-OIG report about Project Gunrunner in November 2010.
2. A list of individuals responsible for authorizing the decision to "walk" guns to Mexico in order to follow them and capture a "bigger fish."
3. Following the fatal shooting of Agent Brian Terry, did ATF conduct an investigation of the circumstances of his killing? Did you determine whether the two guns found at the crime scene were permitted to cross into Mexico?
4. Is ATF aware what weapon was responsible for the death of Agent Brian Terry?
5. All documents, including e-mails, relating to communications between the ATF and the Federal Firearms Licensee (FFL) who sold weapons to [ATF] including any Report of Investigation (ROI) or other records relating to a December 17, 2009 meeting "to discuss his role as an FFL during this investigation."
6. A copy of the presentation, approximately 200 pages long, that the Group 7 Supervisor made to officials at ATF headquarters in the spring of 2010.
7. All documents, including e-mails, relating to communications regarding Operation Fast and Furious between ATF headquarters and Special Agent in Charge (SAC) William D. Newell, Assistant Special Agents in Charge Jim Needles and George Gillette, Group Supervisor [ATF] or any Case Agent from November 1, 2009 to the present. The response to this request should include a memorandum, approximately 30 pages long, from SAC Newell to ATF headquarters following the arrest of [ATF] and the death of Agent Brian Terry.
8. All documents and communications related to complaints or objections by ATF agents in Phoenix about letting straw buyers with American guns enter Mexico.

The Committee on Oversight and Government Reform is the principal oversight Committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

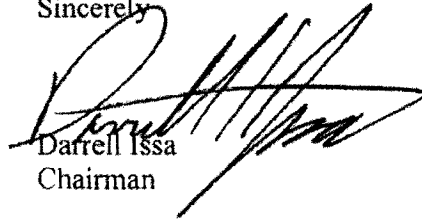


Mr. Kenneth E. Melson  
March 16, 2011  
Page 4

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on March 30, 2011. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment to this letter provides additional information about responding to the Committee's request.

If you have any questions about this request, please contact Ashok Pinto or Henry Kerner of the Committee Staff at (202) 225-5074. Thank you for your attention to this matter.

Sincerely

A handwritten signature in black ink, appearing to read "Darrell Issa", written over a horizontal line.

Darrell Issa  
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

ONE HUNDRED TWELFTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

Majority (202) 225-5074  
Minority (202) 225-5051

**Responding to Committee Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

#### Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.



Office of the  
Inspector General

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

March 16, 2011

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

Dear Senator Grassley:

This is in response to your letter of March 8, 2011, to Kevin L. Perkins, in his capacity as Chair of the Integrity Committee of the Council of Inspectors General on Integrity and Efficiency (CIGIE). You expressed concern that the Department of Justice's Office of Inspector General would not be able to apply a publicly acceptable level of independence and objectivity in carrying out a review that the Attorney General had requested it to perform regarding an operation of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

In accordance with the Integrity Committee's rules, because this matter involved the DOJ-OIG, Mr. Perkins, as an official of the FBI and other Justice Department staff recused themselves from any involvement in this matter. Accordingly, as the Committee's senior member, I am acting as Chairperson for this case.

At a special meeting called on March 14, 2011, to consider the issues identified in your letter, the membership concluded unanimously that neither the Committee's authorizing statute nor its internal rules and procedures apply to the matters you identified. The Committee's jurisdiction, as defined by section 7(d)(1) of the Inspector General Reform Act of 2008 (Public Law 110-409, October 14, 2008), is to "receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General and staff members." In this context, the Committee has consistently interpreted its mandate to extend only to questions of improper or wrongful conduct on the part of individuals occupying positions of significant responsibility in Inspector General offices, and then, as required by the statute, make recommendations, where appropriate, to the Chair of the CIGIE. However, your statement of reasons why "the public may be unable to trust that the DOJ-OIG is completely disinterested and independent" appears to involve concerns of an institutional or organizational nature, about which the Committee is not empowered to act. Furthermore, the IC has no authority to mandate the recusal of an Office of Inspector General.

However, as the name Integrity Committee implies, scenarios may occur from time to time that cause the membership to comment in a manner that goes beyond the chartered structure. Your stated reservations about the suitability of the DOJ-OIG to properly investigate the Project Gunrunner case present one of those instances.

While that office is currently headed by an acting Inspector General, the organization, managed for many years by former Inspector General Glenn Fine, has established itself as a model of independence, objectivity, and above all, integrity in every aspect of its daily pursuits. It fully earned an unquestioned reputation for successfully addressing highly difficult and sensitive cases, and deserves the trust and confidence of the public. Further, its prior involvement in a review of a portion of the same ATF program can properly be viewed, not as an impediment to objectivity, but rather as an opportunity for the DOJ-OIG staff to have obtained familiarity with the subject-matter and working environment that would be used advantageously in the investigation requested by the Attorney General. Thus, although an Inspector General from another agency could feasibly conduct this work, it would face a learning curve that might involve some delay in completing the assignment. Finally, it appears that the belief DOJ-OIG was not responsive to disclosures made by an ATF agent may have been initially reached without obtaining information from that office.

If you have any questions or need further information, please do not hesitate to contact me on (202) 606-1200.

Sincerely,



Patrick E. McFarland  
Inspector General



U.S. Department of Justice

Office of the Inspector General

March 21, 2011

The Honorable Charles E. Grassley  
Ranking Member, Committee on the Judiciary  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senator Grassley:

The Department of Justice (DOJ or Department) Office of the Inspector General (OIG) recently initiated a review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) firearms trafficking investigation known as Operation Fast and Furious, and other investigations with similar objectives, methods, and strategies. I am writing to inform you of the scope and preliminary objectives of our review, and to respond to the request in your March 8, 2011 letter to the Integrity Committee of the Council of Inspector General on Integrity and Efficiency (CIGIE) that the DOJ OIG be recused from this review.

The preliminary objectives of our review are to examine the development and implementation of Operation Fast and Furious and other firearms trafficking investigations; the involvement of the Department (including ATF, the Criminal Division, and U.S. Attorneys' Offices) and other law enforcement or government entities in the investigations; the guidelines and other internal controls in place and compliance with those controls during the investigations; and the investigative outcomes. We believe our review will address many of the important issues you have raised about Operation Fast and Furious.

In your letter to the CIGIE Integrity Committee, you requested that the OIG be recused from conducting this review and that another Inspector General's office handle the investigation. I have carefully considered your letter, but firmly believe there is no basis for the DOJ OIG to recuse itself from this review. The DOJ OIG is the most appropriate Inspector General's office to conduct this review. Our investigative team is composed of senior attorneys, including former prosecutors, law enforcement agents, and analysts. The OIG's significant investigative experience and extensive knowledge of Department components and operations makes it uniquely capable of conducting a review of Operation Fast and Furious and similar operations.



You expressed three concerns in requesting our recusal. The first is that the OIG does not have a Presidentially-appointed and Senate-confirmed leader. However, my status as an Acting Inspector General does not in any way compromise the independence of the OIG or otherwise impede our capability to conduct this or any other review. Acting Inspectors General have often been called upon to conduct high profile reviews and investigations, and have responded with tough, independent reports containing significant findings and recommendations for the affected agencies.<sup>1</sup> I can assure you that under my leadership the OIG will continue to conduct hard-hitting and vigilant investigations in carrying out our important oversight responsibilities.

The second concern you raised is that the OIG was "aware of the allegations long before the Attorney General's request and did nothing." I first learned of the allegations about Operation Fast and Furious when a member of your staff contacted me on January 27, 2011. I immediately looked into the concerns raised by your staff member and found that the OIG had no record of receiving a complaint on this matter. I gave your staff member the contact information for an individual in the OIG front office to convey to any complainant who wanted to contact us about this matter. We subsequently were contacted by an ATF Special Agent and promptly followed up by interviewing the agent regarding the agent's concerns about Operation Fast and Furious.<sup>2</sup>

The third concern you raised as a basis for the OIG's recusal is your understanding that ATF officials have cited an OIG report on Project Gunrunner as one of the factors that prompted the ATF to "shift to a riskier strategy of letting guns be trafficked rather than arresting straw buyers." The report you reference, *A Review of Project Gunrunner*, was issued by our office in November 2010. We did not recommend in that report that ATF shift its strategy to "letting guns be trafficked rather than arresting straw buyers."

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<sup>1</sup> For example, our previous Inspector General, Glenn Fine, served as Acting Inspector General prior to his confirmation as the Inspector General and issued several important reports during his tenure as Acting Inspector General. See, e.g., *An Investigation of the Immigration and Naturalization Service's Citizenship USA Initiative*, July 2000; *An Investigation of Misconduct and Mismanagement at ICITAP, OPDAT, and the Criminal Divisions Office of Administration*, September 2000.

<sup>2</sup> The OIG's public webpage at <http://www.justice.gov/olig/> provides several means of reporting allegations of waste, fraud, abuse, or misconduct, including a hotline number, an e-mail address, an on-line submission form, and a fax number. We discussed with the ATF Special Agent the efforts made to contact our office so that we could identify and correct any deficiencies in our intake process.

Rather, the OIG made a total of 15 recommendations in that report to help ATF improve its implementation of Project Gunrunner, including a recommendation that ATF focus on developing more complex conspiracy cases against higher level gun traffickers and gun trafficking conspirators. Our report also recommended that ATF send guidance to field management, agents, and intelligence staff encouraging them to participate in and exploit the resources and tools of the Organized Crime Drug Enforcement Task Force, as directed in the Deputy Attorney General's cartel strategy.

Our report, however, did not review what strategies ATF should employ in pursuing more complex cases, nor did it address what internal controls the ATF should have in place to minimize the risk associated with its investigative strategies. Thus, while our prior work gives us familiarity with Project Gunrunner that we will draw upon, it did not address the issues that we will examine in our review of Operation Fast and Furious.

In addition, ATF first became aware of our findings and recommendations in the Project Gunrunner review on September 3, 2010, when we provided a draft of the report to ATF for factual accuracy and sensitivity review prior to publication. Our understanding is that Operation Fast and Furious was initiated in late 2009 and that the investigative strategy employed in this operation was implemented shortly thereafter, well before the OIG began to formulate any recommendations relating to Project Gunrunner.

For all of these reasons, I believe the DOJ OIG is best situated to conduct a thorough, objective, and independent review of Operation Fast and Furious. I expect that we will address many of the important issues you have raised, and at the same time provide guidance to the Department about the conduct of this operation and how to address any deficiencies we identify.

If you have any questions about this letter or these issues, please contact me or Senior Counsel Jay Lerner at (202) 514-3435.

Sincerely,



Cynthia A. Schnedar  
Acting Inspector General

PATRICK J. LEAHY, VERMONT, CHAIRMAN

HERB KOHL, WISCONSIN  
DIANNE FEINSTEIN, CALIFORNIA  
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## United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

BRIAN A. GARDNER, *Chief Counsel and Staff Director*  
KEVIN L. DAVIS, *Republican Chief Counsel and Staff Director*

March 28, 2011

### Via Electronic Transmission

Kenneth E. Melson  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
99 New York Avenue, NE  
Washington, DC 20226

Dear Acting Director Melson:

On March 4, 2011, I wrote you regarding questions surrounding the February 15 murder of U.S. Immigration and Customs Enforcement (ICE) Agent Jaime Zapata in Mexico. I have yet to receive a reply.

In my last letter, I referenced the March 1 DOJ press release regarding ATF and their next-door neighbor Kelvin Morrison. They were arrested on charges related to trafficking firearms to a Mexican drug cartel and indicted on March 23. According to the release, all three defendants had been suspects in an ATF undercover operation in early November 2010. In that operation, ATF and Morrison provided 40 firearms to an ATF informant. The press release indicates, "The meeting [between the informant and the suspected traffickers] was arranged related to an investigation of Los Zetas," a Mexican drug trafficking cartel.<sup>1</sup>

The DOJ's press release appears to be the first public acknowledgement that one of the firearms used in the murder of Agent Zapata had been traced back to ATF. Specifically, the press release stated:

[A]ccording to one affidavit filed in the case, one of the three firearms used in the Feb. 15, 2011, deadly assault of ICE Special Agent Jaime Zapata that was seized by Mexican officials has been traced by ATF to ATF ATF allegedly purchased that firearm on Oct. 10, 2010, in the Dallas/Fort Worth metroplex, prior to law enforcement's awareness of the purchase. Ballistic testing

<sup>1</sup> Press Release, Department of Justice, March 1, 2011, available at <http://dallas.fbi.gov/dojpressrel/pressrel11/dl030111.htm>.

conducted by Mexican authorities on this firearm indicated it was one of the three firearms used during the deadly assault on Special Agent Zapata's vehicle.<sup>2</sup>

The DOJ's press release gives the impression that law enforcement officials were unaware of ATF activities in October 2010 when he allegedly purchased the weapon that was later used to kill Agent Zapata.

The press release leads the reader to believe that law enforcement had no reason to suspect ATF was a straw purchaser until sometime between October 10 and early November, when he was the subject of the undercover operation. According to the release:

The investigation *now has also revealed* that on Aug. 7, 2010, a Romarm, model WASR, 7.62 caliber rifle was discovered by law enforcement officers in LaPryor, Texas, near the U.S./Mexico border. Trace results indicated that Morrison purchased this firearm on July 30, 2010, from a FFL [federal firearms licensee]. According to the affidavit, between July 10, 2010, and Nov. 4, 2010, Morrison purchased 24 firearms from FFLs.<sup>3</sup>

This portion of the DOJ's press release appears designed to give the impression that the August 7 discovery by unspecified "law enforcement officers" and subsequent trace results linking the weapon to Morrison became known only after the October 10 purchase of the murder weapon.

However, I have learned that ATF agents actually observed a cache of weapons being loaded into a suspect vehicle on July 29, 2010, but did not maintain surveillance on that vehicle.<sup>4</sup> The very next day, Morrison purchased the firearm that was later "discovered," in August.<sup>5</sup> In fact, it was actually seized along with 22 other AK-style firearms in the very suspect vehicle that ATF agents had witnessed being loaded with weapons on July 29.<sup>6</sup> When the vehicle was stopped en route to Eagle Pass, Texas on August 7, the weapon purchased by Morrison on July 30 was recovered, *along with two weapons purchased by Ranferi Osorio*.<sup>7</sup> All of these facts were apparently known to federal authorities contemporaneously, and yet none of them are included in the Justice Department's craftily-worded press release.

The March 8 letter I received from Department of Justice (DOJ) Assistant Attorney General Ronald Weich is not an adequate response to my March 4 letter, which was addressed specifically to you. Therefore, please provide your direct response to the questions in my letter, along with the documents previously requested. In particular, please prioritize any documents responsive to paragraph (5), which called for all records relating to when law enforcement first became aware of the trafficking activities of ATF and ATF and Kelvin Morrison.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (Emphasis added.)

<sup>4</sup> ATF Management Log, Case 785096-10-[redacted], Case Title "[redacted] Firearm Traffickers (SWB Gunrunner)." (Attachment 1)

<sup>5</sup> ATF Firearms Trace Summary, Sep. 17, 2010. (Attachment 2)

<sup>6</sup> *Supra* note 4.

<sup>7</sup> ATF Firearms Trace Summary, Sep. 15, 2010; ATF Firearms Trace Summary, Sep. 17, 2010. (Attachment 3)

Should you have any questions regarding this letter, please contact Tristan Leavitt at (202) 224-5225.

Sincerely,

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive style with a large, prominent "C" and "G".

Charles E. Grassley  
Ranking Member

Attachment

# Attachment 1

Management Log for Case: 785096-10-████

Case Title: █████ ATF (SWB GUNRUNNER)

Date: █████

User: █████

<u>Log Date</u>	<u>Log Type</u>	<u>Mgmt Log Text</u>
07/28/2010	CASE OPENED	<h1>ATF</h1>
07/28/2010	████ AUTHORIZED	
07/28/2010	INVESTIGATIVE ACTI	
07/28/2010	INVESTIGATIVE ACTI	
07/29/2010	INVESTIGATIVE ACTI	
07/29/2010	INVESTIGATIVE ACTI	
07/29/2010	INVESTIGATIVE ACTI	
07/29/2010	INVESTIGATIVE ACTI	
07/29/2010	INVESTIGATIVE ACTI	
07/30/2010	INVESTIGATIVE ACTI	
08/07/2010	INVESTIGATIVE ACTI	
11/09/2010	INVESTIGATIVE ACTI	
01/14/2011	INVESTIGATIVE ACTI	
03/01/2011	DIVISION REVIEW	

# Attachment 2



DEPARTMENT OF JUSTICE  
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES

NATIONAL TRACING CENTER

Phone:(800) [REDACTED] Fax:(800) [REDACTED]

Print Date: [REDACTED]



**FIREARMS TRACE SUMMARY**

**ATF**

# Attachment 3

DEPARTMENT OF JUSTICE  
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES  
NATIONAL TRACING CENTER

Phone:(800) [REDACTED] Fax:(800) [REDACTED]

Print Date: [REDACTED]



**FIREARMS TRACE SUMMARY**

**ATF**

FOR OFFICIAL USE ONLY

DEPARTMENT OF JUSTICE  
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES  
NATIONAL TRACING CENTER

Phone:(800) [REDACTED] Fax:(800) [REDACTED]

Print Date: [REDACTED]



**FIREARMS TRACE SUMMARY**

**ATF**

FOR OFFICIAL USE ONLY

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

DAN BURTON, INDIANA  
JOHN L. MICA, FLORIDA  
TODD RUSSELL PLATTS, PENNSYLVANIA  
MICHAEL R. TURNER, OHIO  
PATRICK MCHENRY, NORTH CAROLINA  
JIM JORDAN, OHIO  
JASON CHAFFETZ, UTAH  
CONNIE MACK, FLORIDA  
TIM WALBERG, MICHIGAN  
JAMES LANKFORD, OKLAHOMA  
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SCOTT DESJARLAIS, M.D., TENNESSEE  
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DENNIS A. ROSS, FLORIDA  
FRANK C. GUINTA, NEW HAMPSHIRE  
BLAKE PARENTHOLD, TEXAS  
MIKE KELLY, PENNSYLVANIA

LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAILINGS (202) 225-5074  
FACSIMILE (202) 225-3974  
MOBILE (202) 225-5054  
<http://oversight.house.gov>

ELIJAH E. CUMMINGS, MARYLAND  
RANKING MINORITY MEMBER

EDOLPHUS TOWNS, NEW YORK  
CAROLYN B. MALONEY, NEW YORK  
ELEANOR HOLMES NORTON,  
DISTRICT OF COLUMBIA  
DENNIS J. KUCINICH, OHIO  
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WILLIAM LACY CLAY, MISSOURI  
STEPHEN F. LYNCH, MASSACHUSETTS  
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MIKE QUIGLEY, ILLINOIS  
DANNY K. DAVIS, ILLINOIS  
BRUCE L. BRALEY, IOWA  
PETER WELCH, VERMONT  
JOHN A. YARMUTH, KENTUCKY  
CHRISTOPHER S. MURPHY, CONNECTICUT  
JACKIE SPEIER, CALIFORNIA

March 29, 2011

The Honorable Hillary Rodham Clinton  
Secretary  
U.S. Department of State  
Harry S. Truman Building  
2201 C Street, NW  
Washington, DC 20520

Dear Secretary Clinton:

On March 4, 2011, Senator Charles E. Grassley wrote to you requesting basic information about the connection between Operation "Fast and Furious," conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the December 14, 2010 firefight that claimed the life of Border Patrol Agent Brian Terry.<sup>1</sup> I understand that you have yet to respond and are likely to refuse Senator Grassley's request for information without a letter from the Chairman of the Senate Judiciary Committee. This refusal is mystifying in its own right, given Senator Grassley's standing as the Ranking Member of that Committee. More inexplicably, your refusal stands in stark contradiction to the promise of transparency promoted by President Obama. During Sunshine Week last year, the President stated that he had "recommit[ed] [his] administration to be the most open and honest ever."<sup>2</sup>

Given the gravity of this matter, this refusal is simply unacceptable. Therefore, I am joining Senator Grassley's request for any and all records relating to a meeting involving the then-U.S. Ambassador to Mexico Carlos Pascual with Assistant Attorney General Lanny Breuer, Mr. Breuer's deputy, and other officials in Mexico City in the summer of 2010 regarding "on-going investigations" related to Project Gunrunner and its "Fast and Furious" component. The records sought include meeting minutes, briefing notes, e-mails and cables relating to any such meeting or meetings that may have occurred from June through September 2010. Additionally, please explain in detail the reasons behind your refusal to answer the Senator directly.

<sup>1</sup> Letter from Sen. Charles Grassley, Ranking Member, S. Jud. Comm., to Hon. Hillary R. Clinton, Sec'y, U.S. Dep't of State (Mar. 4, 2011).

<sup>2</sup> The White House, Office of the Press Secretary, Statement from the President on Sunshine Week (Mar. 16, 2010), <http://www.whitehouse.gov/the-press-office/statement-president-sunshine-week>.

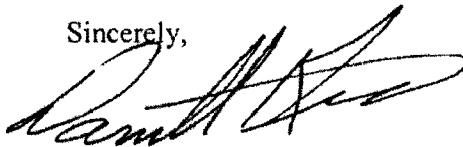
The Honorable Hillary Rodham Clinton  
March 29, 2011  
Page 2

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on April 12, 2011. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment to this letter provides additional information about responding to the Committee's request.

If you have any questions about this request, please contact Ashok Pinto or Henry Kerner of the Committee Staff at (202) 225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa  
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Member

The Honorable Charles E. Grassley, Ranking Member  
U. S. Senate Committee on the Judiciary

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Majority (202) 225-5074  
Minority (202) 225-5051

### Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.



17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

#### Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

**SUBPOENA**

**BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE  
CONGRESS OF THE UNITED STATES OF AMERICA**

Kenneth E. Melson, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives *SERVE: Faith  
To* Burton, U.S. Dep't of Justice

You are hereby commanded to be and appear before the Committee on Oversight and Government Reform

of the House of Representatives of the United States at the place, date and time specified below.

- to testify touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

- to produce the things identified on the attached schedule touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2157 Rayburn House Office Building, Washington, DC 20515

Date: April 13, 2011

Time: 5:00 p.m.

To Any authorized staff member

\_\_\_\_\_ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States,  
at the city of Washington, this 31st day of March 2011.

Attest:

James P. Nease  
Clerk

[Signature]  
Chairman or Authorized Member

**PROOF OF SERVICE**

---

Subpoena for Kenneth E. Melson, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives SERVE: Faith Burton, U.S. Dep't of Justice

Address U.S. Department of Justice, 950 Pennsylvania Avenue, NW

Washington, DC 20530

before the Committee on Oversight and Government Reform

*U.S. House of Representatives*  
*112th Congress*

---

Served by (print name) Steve Castor

Title Chief Counsel, Investigations

Manner of service \_\_\_\_\_

Date \_\_\_\_\_

Signature of Server \_\_\_\_\_

Address 2157 Rayburn House Office Building

Washington, DC 20515

## SCHEDULE

In accordance with the attached schedule instructions, produce all documents in unredacted form described below:

1. Documents and communications relating to the genesis of Project Gunrunner and Operation Fast and Furious, and any memoranda or reports involving any changes to either program at or near the time of the release of the Department of Justice (DOJ) Office of the Inspector General report about Project Gunrunner in November 2010.
2. Documents and communications relating to individuals responsible for authorizing the decision to “walk” guns to Mexico in order to follow them and capture a “bigger fish.”
3. Documents and communications relating to any investigations conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) or any other DOJ component following the fatal shooting of Agent Brian Terry, including information pertaining to two guns found at the crime scene that may have been connected to Project Gunrunner.
4. Documents and communications relating to any weapons recovered at the crime scene or during the investigation into the death of Agent Brian Terry.
5. Documents and communications between ATF and the Federal Firearms Licensee (FFL) who sold weapons to [ATF] including any Report of Investigation (ROI) or other records relating to a December 17, 2009 meeting “to discuss his role as an FFL during this investigation.”
6. A copy of the presentation, approximately 200 pages long, that the Group 7 Supervisor made to officials at ATF headquarters in the spring of 2010.
7. Documents and communications relating to Operation Fast and Furious between and among ATF headquarters and Special Agent in Charge William D. Newell, Assistant Special Agents in Charge Jim Needles and George Gillette, Group Supervisor [ATF] [ATF] or any Case Agent from November 1, 2009 to the present. The response to this component of the subpoena shall include a memorandum, approximately 30 pages long, from SAC Newell to ATF headquarters following the arrest of [ATF] and the death of Agent Brian Terry.
8. Documents and communications relating to complaints or objections by ATF agents about: (1) encouraging, sanctioning, or otherwise allowing FFLs to sell firearms to known or suspected straw buyers, (2) failure to maintain surveillance on known or suspected straw buyers, (3) failure to maintain operational control over weapons purchased by known or suspected straw buyers, or (4) letting known or suspected straw buyers with American guns enter Mexico.

### Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
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5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.





U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2011

The Honorable Darrell E. Issa  
Chairman  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Issa:

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.

We were therefore surprised and disappointed when shortly after we notified your staff of our intent to work with the Committee, you nevertheless issued a subpoena a few hours later. Despite this unnecessary step on your part, we will review the subpoena and work with the Committee to address your concerns.

As the Attorney General has said, it is an important mission of the Department of Justice to stop the flow of guns into Mexico. He has asked the Department's Inspector General to investigate this matter and has also reiterated to Department personnel that they are not to knowingly allow any guns to be illegally transported into Mexico. We look forward to continuing to work with you on this matter.

Sincerely,

Ronald Weich  
Assistant Attorney General

cc: The Honorable Elijah Cummings  
Ranking Minority Member

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

DAN BURTON, INDIANA  
JOHN L. MICA, FLORIDA  
TODD RUSSELL PLATTS, PENNSYLVANIA  
MICHAEL R. TURNER, OHIO  
PATRICK McHENRY, NORTH CAROLINA  
JIM JORDAN, OHIO  
JASON CHAFFETZ, UTAH  
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PAUL A. GOSAR, D.D.S., ARIZONA  
RAUL R. LABRADOR, IDAHO  
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BLAKE FARENTHOLD, TEXAS  
MIKE KELLY, PENNSYLVANIA

LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074

FACSIMILE (202) 225-3974

MINORITY (202) 225-9651

<http://oversight.house.gov>

ELIJAH E. CUMMINGS, MARYLAND  
RANKING MINORITY MEMBER

EDOLPHUS TOWNS, NEW YORK  
CAROLYN B. MALONEY, NEW YORK  
ELEANOR HOLMES NORTON,  
DISTRICT OF COLUMBIA  
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JOHN I. TIERNEY, MASSACHUSETTS  
WM. LACY CLAY, MISSOURI  
STEPHEN F. LYNCH, MASSACHUSETTS  
JIM COOPER, TENNESSEE  
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MIKE QUIGLEY, ILLINOIS  
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CHRISTOPHER S. MURPHY, CONNECTICUT  
JACKIE SPEIER, CALIFORNIA

April 1, 2011

The Honorable Darrell E. Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to memorialize my serious concerns with the unilateral subpoena you issued last night to the Department of Justice, despite my objection. I am providing copies of this letter to all Members of the Committee because they were not informed about the objections raised by the Department of Justice before you issued the subpoena and were not provided an opportunity to deliberate on this significant action by the Committee.

On March 16, 2011, you sent a letter to the Department of Justice requesting a wide range of documents relating to operations by the Bureau of Alcohol, Tobacco, Firearms, and Explosives involving gun trafficking into Mexico. You requested the production of all of these documents in two weeks.<sup>1</sup>

Yesterday, the Department of Justice notified the Committee that it was working rapidly to comply with this request and was collecting responsive documents to be produced to the Committee. The Department raised serious concerns, however, about producing certain documents relating to two active, ongoing criminal investigations, one of which has already resulted in a 53 count indictment of at least 20 individuals alleged to have "conspired to purchase hundreds of firearms, including AK-47s, to be illegally exported to Mexico."<sup>2</sup>

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<sup>1</sup> Letter from Chairman Darrell E. Issa to Kenneth Melson, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives (Mar. 16, 2011) (online at [http://oversight.house.gov/images/stories/Other\\_Documents/2011-03-16\\_DEI\\_to\\_Melson-ATF\\_-\\_Mexico\\_gun\\_trafficking\\_due\\_3-30.pdf](http://oversight.house.gov/images/stories/Other_Documents/2011-03-16_DEI_to_Melson-ATF_-_Mexico_gun_trafficking_due_3-30.pdf)).

<sup>2</sup> Office of the United States Attorney, District of Arizona, *Grand Juries Indict 34 Suspects in Drug and Firearms Trafficking Organization: Multi-Agency Task Force Rounds Up Defendants Accused of Illegal Gun Purchases, Money Laundering, and Conspiracy* (Jan. 25, 2011) (online at [www.justice.gov/usao/az/press\\_releases/2011/PR\\_01252011\\_](http://www.justice.gov/usao/az/press_releases/2011/PR_01252011_)).

The Department also raised concerns about producing documents relating to the ongoing criminal investigation into the death of U.S. Border Patrol Agent Brian Terry on December 14, 2010.

Previous Committee chairmen have handled such concerns with great care. For example, during the Department's criminal investigation into fatal shootings by Blackwater contractors in Nisoor Square, Iraq, the Committee worked very carefully with the Department to obtain the information it needed without negatively impacting ongoing prosecutions.<sup>3</sup>

Last night, however, you issued a unilateral subpoena over the Department's objection, over my objection, and without any knowledge or debate by other Members of our Committee. You took this step without meeting with the Department to determine whether an accommodation might have satisfied both the Committee's legitimate interest in conducting appropriate oversight and the Department's legitimate interest in achieving successful prosecutions.

Today, the Justice Department wrote a letter to you with the following statement:

Yesterday, we informed Committee staff that we intended to produce a number of responsive documents within the next week. As we explained, there are some documents that we would be unable to provide without compromising the Department's ongoing criminal investigation into the death of Agent Brian Terry as well as other investigations and prosecutions, but we would seek to work productively with the Committee to find other ways to be responsive to its needs.<sup>4</sup>

This type of intrusion into ongoing criminal investigations is exactly what I hoped to avoid when I wrote you on January 24, 2011, to request that you honor the historical practice of both Republican and Democratic chairmen of this Committee to obtain (1) the concurrence of the Ranking Minority Member or (2) a Committee vote when issuing controversial subpoenas.<sup>5</sup>

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Press%20Conference.pdf); *See also*, Indictment, *United States* **ATF**, Case No. **ATF** (D. Ariz. Jan. 19, 2011).

<sup>3</sup> *See, e.g., Transcript*, Hearing on Private Security Contracting in Iraq and Afghanistan, Committee on Oversight and Government Reform, U.S. House of Representatives (Oct. 2, 2007).

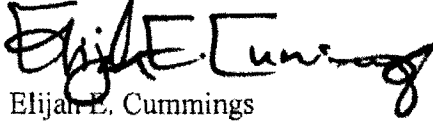
<sup>4</sup> Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice to Chairman Darrell Issa (April 1, 2011).

<sup>5</sup> Letter from Ranking Member Elijah Cummings to Chairman Darrell Issa, (Jan. 24, 2011) (online at [http://democrats.oversight.house.gov/images/stories/2011\\_0124\\_Cummings\\_to\\_Issa\\_access\\_to\\_records.pdf](http://democrats.oversight.house.gov/images/stories/2011_0124_Cummings_to_Issa_access_to_records.pdf)).

The Honorable Darrell E. Issa  
Page 3

Compromising the potential prosecution and ultimate conviction of international criminals would be inexcusable. Before taking any further steps, I urge you to join me in meeting with Department officials personally in order to fully understand the potential ramifications of these actions.

Sincerely,

A handwritten signature in black ink, appearing to read "Elijah E. Cummings". The signature is stylized and cursive.

Elijah E. Cummings  
Ranking Member

cc: Members, Committee on Oversight and Government Reform



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 4, 2011

The Honorable Lamar Smith  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter, dated March 9, 2011, which asked a number of questions about the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) investigation known as Operation Fast and Furious. An identical letter has been sent to all signatories of your letter.

Mexican drug cartels are a significant organized crime threat, both to the United States and to Mexico. According to the Department's 2010 National Drug Threat Assessment, these cartels present the single greatest drug trafficking threat to the United States. Mexican cartels use violence to control drug trafficking corridors, through which drugs flow north into the United States while guns and cash flow south to Mexico. For calendar year 2009, the Mexican government reported 9,635 murders in Mexico resulting from organized crime and drug trafficking – an increase of 50% from the number of murders in 2008 and three times the 2,837 killed in 2007. In part because Mexican law severely restricts gun ownership, Mexico's drug traffickers routinely smuggle weapons purchased in the United States into Mexico.

Stopping the flow of weapons across the border into Mexico is a challenging task given the resources of the cartels and the cartels' use of sophisticated trafficking organizations to move firearms across the border. These trafficking organizations typically involve the use of straw purchasers, who purchase the weapons not for themselves, but with the purpose of transferring them to others who then facilitate their movement across the border to the cartels. Among the challenges in investigating a trafficking organization is developing sufficient evidence to prove that particular firearm purchases are, in fact, unlawful straw purchases. As you know, it is legal for a non-prohibited person to purchase an unlimited number of firearms from a licensed gun dealer and then to sell or barter those firearms to another person.

Operation Fast and Furious is an ongoing criminal investigation of an extensive gun-trafficking enterprise.<sup>1</sup> It was opened over a year ago and approved by the ATF Phoenix Field Office and the United States Attorney's Office for the District of Arizona (USAO) in the normal

<sup>1</sup> Operation Fast and Furious, which is one law enforcement investigation, should not be confused with Project Gunrunner, which is the broader initiative to deal with weapons trafficking along the Southwest Border generally. As was recently noted by the Congressional Research Service, "[a]s of March 2010, Project Gunrunner had led to the arrest of 1,397 defendants – 850 of which had been convicted – and the seizure of over 6,688 firearms." Congressional Research Service Report RL32724, *Mexico-U.S. Relations: Issues for Congress*, February 15, 2011, at 19.

The Honorable Lamar Smith  
Page Two

course, consistent with established procedures for such matters. The investigation was subsequently approved by the multi-agency Organized Crime and Drug Enforcement Task Force (OCDETF) Program. The purpose of the investigation is to dismantle a transnational organization believed to be responsible for trafficking weapons into Mexico, in part by prosecuting its leadership. The investigation is led by a dedicated team of USAO prosecutors and ATF agents. With regard to your question about the results and status of the investigation, to date, these efforts have resulted in an indictment charging 20 defendants with federal firearms offenses and the investigation is continuing.

Allegations have been raised about how this investigation was structured and conducted. As you note, at the request of the Attorney General, the Acting Inspector General is now investigating those allegations. The Attorney General has also made it clear to the law enforcement agencies and prosecutors working along the Southwest Border that the Department should never knowingly permit firearms to cross the border.

You have also asked for information about eTrace, an important tool in ATF's work to dismantle gun trafficking. eTrace is an Internet-based system that allows participating law enforcement agencies to submit firearm traces to the ATF National Tracing Center. Authorized users can receive firearm trace results electronically, search a database of all firearm traces submitted by their individual agency, and perform analyses. In the last year, eTrace has gained strong new features. eTrace now accommodates data in Spanish, gives translations, and allows users to better sort and search additional data elements and images to improve weapons tracing. In the next 24 months, planned enhancements to eTrace will improve ATF's ability to monitor and map gun tracing data in real time and to share information with other federal agencies, as well as with state and local law enforcement.

Unfortunately, at this time, we are not in a position to answer your questions in greater detail. The Department has a long standing policy against the disclosure of non-public information about ongoing criminal investigations. This policy is based on our strong interest in protecting the independence and effectiveness of ongoing law enforcement efforts. We are, however, in the process of working with Chairman Issa to provide documents concerning this matter and would be willing to work with you and your staff in the same manner. Through this process we hope to find ways to be responsive to your needs that are consistent with the Department's need to maintain the confidentiality of ongoing investigations.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

cc: The Honorable John Conyers, Jr.  
Ranking Minority Member

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**United States Senate**

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

BRYANT A. COHEN, *Chief Counsel and Staff Director*  
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

April 8, 2011

**VIA ELECTRONIC TRANSMISSION**

Kenneth E. Melson  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
99 New York Avenue, NE  
Washington, DC 20226

Dear Acting Director Melson:

Attached is an email released through the Freedom of Information Act (FOIA).<sup>1</sup> It appears to contain proposed guidance to ATF employees about how to respond to contacts from my office. The guidance instructs ATF employees that they “are in no way obligated to respond” to questions from Congress. It also attempts to prevent direct communications with my office by instructing that ATF employees “should refer congressional staff who seek information from you to the ATF’s office of congressional affairs.” The guidance further attempts to prevent direct communications with my office by claiming that ATF employees “are not authorized to disclose non-public information.”

It is unclear from the email released through FOIA whether this guidance was actually communicated to ATF employees. However, it is of grave concern because, as you know, such attempts to prevent direct communications with Congress are not a lawfully authorized activity of any officer or employee of the United States whose salary is paid with appropriated funds.<sup>2</sup> Specifically, no officer or employee may attempt to prohibit or prevent “any other officer or employee of the Federal Government from having *direct* oral or written communication or *contact* with any Member, committee, or subcommittee of the Congress” about a matter related to his employment or the

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<sup>1</sup> Attachment 1.

<sup>2</sup> Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3034, § 714 (2010), as continued by §101 of continuing resolutions P.L. 111-242, 124 Stat. 2607 (2010) and P.L. 112-6, 125 Stat. 23 (2011)—which extends the funding levels in the 2010 appropriations bills, as well as “the authority and conditions provided in such Acts,” through April 8, 2011.

agency “in any way, *irrespective of whether such communication or contact is at the initiative*” of the employee or Congress (emphasis added).<sup>3</sup>

I wrote to you on January 31 to ensure you were aware of these provisions and to express concerns that without proper guidance, managers might inappropriately intimidate employees to discourage them from speaking with Congress and thus unlawfully interfere with a Congressional inquiry.<sup>4</sup> In order for Congress to exercise its oversight authority and act as a check on Executive power, it is crucial that agency employees are free to communicate directly with Members and Committee staff. Direct contact means contacts that do not necessarily involve Congressional liaison or agency management. Without such direct, unfiltered communications, Congress would still be unaware of, and unable to inquire about, the serious allegations involving the death of Border Patrol Agent Brian Terry and the sales of weapons to known and suspected gun traffickers.

I have a long experience of witnessing retaliation against whistleblowers. Sometimes it is explicit and immediate. Often it is subtle and delayed until after public scrutiny has faded. Unfortunately, it is so frequent that employees fear that even truthful answers to direct factual questions from Congress will get them in trouble. That is why I am committed to maintaining the confidentiality of those employees who wish to cooperate with a Congressional inquiry or report problems anonymously. Direct contact with Congress of the sort protected by the law serves as an extra level of protection against retaliation and is obviously essential where an employee seeks confidentiality.

However, in some cases, agency employees choose to disclose their direct contacts with Congress, despite the potential consequences. As I explained in my January 31 letter, one employee chose to disclose his protected contacts with my staff and was immediately questioned about the content of those communications. I was concerned about that because forcing an employee to reveal the details of such communications would intrude on the integrity of the Congressional inquiry and offend the comity between the Branches that flows from the separation of powers under the Constitution.

Now, a second agency employee has chosen to disclose that he has had protected contacts with Congress. George Gillett, through and in conjunction with his legal counsel, is cooperating with this investigation. Mr. Gillett is the Assistant Special Agent in Charge of the ATF's Phoenix field division, and Committee staff's direct contacts with him are an essential component of our inquiry. He has participated in two preliminary meetings jointly with Senate Judiciary Committee staff and House Oversight and Government Reform Committee staff. As you know, retaliation for such communications is prohibited by law.

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<sup>3</sup> *Id.*

<sup>4</sup> 18 U.S.C. § 1505 (providing criminal penalties for obstructing or impeding the power of Congressional inquiry).



On one previous occasion when an agency sought to compel an individual to disclose the content of his communications with Congress, I was prepared to introduce a resolution authorizing the Senate Legal Counsel to seek legal remedy in the courts. Fortunately, in light of that draft resolution, the Executive Branch withdrew its attempt to compel discovery of communications between a whistleblower and Congress.<sup>5</sup>

In this current inquiry, a similar attempt was also abandoned. The first ATF agent to disclose that he had direct contacts with Congress was ordered to describe the content of his communications in writing. However, shortly after my January 31 letter, I was pleased to learn that the order was withdrawn. I appreciate the agency's willingness to respect Congressional prerogatives and avoid interfering with a Congressional inquiry. Similarly, the agency should avoid intruding into our investigative process by seeking to learn the content of ASAC Gillett's communications with Congress.

In light of the attached email, I have renewed concerns that the guidance being given to employees may be inconsistent with the law.<sup>6</sup> Therefore, please provide written answers to the following questions:

1. Was the attached guidance distributed, either in writing or otherwise, to ATF field offices or other ATF personnel?
2. Was any guidance on contacts with Congress distributed, either in writing or otherwise, to ATF field offices or other ATF personnel? If so, please provide a copy.
3. What steps have you taken or do you plan to take to ensure that employees are aware of their right to communicate directly with Congress if they so choose?

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<sup>5</sup> See S. PRT. 110-28, § VIII.D.2 "Attempt to Compel Disclosure of Confidential Communications with Congress," p. 103, 641, 652 ("Nothing in this agreement shall require [the production of] any communications with, or documents that were created for, any Senate Committees (or the staff or members thereof)"). See also S. HRC. 109-898, at 39-41, 470-471, responses to questions for the record to Dec. 5, 2006, Senate Judiciary Committee hearing at 8.

<sup>6</sup> See generally, Government Accountability Office, "Department of Health and Human Services—Chief Actuary's Communications with Congress," B-302911 (Sep. 7, 2004) (discussing the history and background in support of the government-wide prohibition on attempts to prevent direct communications with Congress) (Attachment 2).

Please reply no later than April 14, 2011. If you have any questions about this request, please contact Jason Foster at (202) 225-5225. Thank you for your cooperation.

Sincerely,



Charles E. Grassley  
Ranking Member

**Attachments**

cc: Chairman Patrick Leahy, Senate Committee on the Judiciary  
Chairman Darrell Issa, House Committee on Oversight and Government Reform

# Attachment 1

[REDACTED]  
From: [REDACTED]  
Sent: Saturday, February 05, 2011 12:25 PM  
To: Hoover, William J.; [REDACTED]  
Subject: Fw: Need quick guidance [REDACTED]

Are/Have we sent some kind of guidance to the Field along these lines?

\*\*\*\*\*  
NOTICE: This e-mail message and any attached files are intended solely for the use of the addressee(s) named above in connection with official business. This communication may contain Controlled Unclassified Information that may be statutorily or otherwise prohibited from being released without appropriate approval. Any review, use, or dissemination of this e-mail message and any attached file(s) in any form outside of ATF or the Department of Justice without express authorization is strictly prohibited.

ATF  
From: [REDACTED] (SMO) ATF ATF ATF ATF  
To: Hoover, William J.; [REDACTED] ATF  
Cc: [REDACTED] (SMO); [REDACTED] (SMO); [REDACTED] (OLA); [REDACTED] (CRM); [REDACTED] (USAAZ) ATF  
Sent: Thu Feb 03 18:44:26 2011  
Subject: FW: Need quick guidance [REDACTED]

I'd recommend something along these lines if agents ask for guidance about how to respond to contacts from Senator's Grassley's staff -

During the last week in January, Senator Grassley wrote to ATF, reporting allegations that ATF had sanctioned the sale of assault weapons to suspected straw purchasers and that these weapons were used in the killing of Customs and Border Protection Agent Brian Terry. The Department has sent a written response to Senator Grassley, advising him that these allegations are not true. In further response to his requests, we expect to schedule a briefing by appropriate ATF representatives with staff for Senator Grassley and other Members of the Senate Judiciary Committee in the near future about Project Gunrunner and ATF's effort to work with its law enforcement partners to build cases that will disrupt and dismantle criminal organizations.

As always, you are in no way obligated to respond to congressional contacts or requests for information and generally, consistent with ATF policy, you should refer congressional staff who seek information from you to ATF's office of congressional affairs. You are not authorized to disclose non-public information about law enforcement matters outside of ATF or the Department of Justice to anyone, including congressional staff. This is important to protect the independence and effectiveness of our law enforcement efforts as well as the privacy and due process interests of individuals who are involved in these investigations.

If you have information about waste, fraud, or abuse within ATF - or any actions by Department employees that you believe constitute professional misconduct, you are encouraged to report that information to your supervisors and/or the Department's Office of Inspector General.

*[Handwritten signature]*  
046

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# Attachment 2



G A O

Accountability • Integrity • Reliability

United States Government Accountability Office  
Washington, DC 20548

B-302911

September 7, 2004

The Honorable Frank R. Lautenberg  
The Honorable Tom Daschle  
The Honorable Edward M. Kennedy  
The Honorable Jack Reed  
The Honorable Jon S. Corzine  
The Honorable John F. Kerry  
The Honorable Patrick J. Leahy  
The Honorable Debbie Stabenow  
The Honorable Tim Johnson  
The Honorable Mark Pryor  
The Honorable Maria Cantwell  
The Honorable Joseph I. Lieberman  
The Honorable Carl Levin  
The Honorable Paul Sarbanes  
The Honorable Barbara A. Mikulski  
The Honorable Charles Schumer  
The Honorable John Edwards  
The Honorable Hillary Rodham Clinton  
United States Senate

Subject: *Department of Health and Human Services—Chief Actuary's  
Communications with Congress*

By letter dated March 18, 2004, you asked for our legal opinion regarding a potential violation of the prohibitions in the Consolidated Appropriations Act of 2004 and the Consolidated Appropriations Resolution of 2003 on the use of appropriated funds to pay the salary of a federal official who prohibits another federal employee from communicating with Congress. Pub. L. No. 108-199, Div. F, tit. VI, § 618, 188 Stat. 3, 354 (Jan. 23, 2004); Pub. L. No. 108-7, Div. J, tit. V, § 620, 117 Stat. 11, 468 (Feb. 20, 2003). Specifically, you ask whether alleged threats made by Thomas A. Scully, the former Administrator of the Centers for Medicare & Medicaid Services (CMS), to CMS Chief Actuary Richard S. Foster to terminate his employment if Mr. Foster provided various cost estimates of the then-pending prescription drug legislation to members of Congress and their staff made CMS's appropriation unavailable for the payment of Mr. Scully's salary.

As agreed, this opinion relies on the factual findings of the Office of Inspector General (OIG) for the Department of Health and Human Services (HHS), who conducted an independent investigation into whether Mr. Foster was prohibited from communicating with congressional offices and whether he was threatened with dismissal if he did so.<sup>1</sup> *Tom Scully and Chief Actuary - Information*, Report of the Office of Inspector General, Department of Health and Human Services, July 1, 2004 (OIG Report). The OIG concluded that CMS did not provide information requested by members of Congress and their staff, that Mr. Scully ordered Mr. Foster not to provide information to members and staff, and that Mr. Scully threatened to sanction Mr. Foster if he made any unauthorized disclosures. OIG Report, at 4.

As we explain below, in our opinion, HHS's appropriation, which was otherwise available for payment of Mr. Scully's salary, was unavailable for such purpose because section 618 of the Consolidated Appropriations Act of 2004 and section 620 of the Consolidated Appropriations Resolution of 2003 prohibit the use of appropriated funds to pay the salary of a federal official who prevents another employee from communicating with Congress.<sup>2</sup> While the HHS Office of General Counsel and the Office of Legal Counsel for the Department of Justice raised constitutional separation of powers concerns regarding the application of section 618, in our view, absent an opinion from a federal court concluding that section 618 is unconstitutional, we will apply it to the facts of this case.

## Background

In December 2003, Congress passed and the President signed into law the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, which added a prescription drug benefit to the Medicare program. Pub. L. No. 108-173, 117 Stat. 2066 (Dec. 8, 2003). During the previous summer and fall as Congress debated various proposals, several members of Congress and committee staff asked Mr. Foster, a career civil servant and the Chief Actuary for CMS, to provide estimates of the cost of various provisions of the Medicare bills under debate.<sup>3</sup> OIG Report, at 2-3.

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<sup>1</sup> We advised your staff that we would, as appropriate, rely on the factual findings of the OIG. Letters to Senator Frank R. Lautenberg and additional requestors from Gary L. Kepplinger, Deputy General Counsel, GAO, April 15, 2004. In addition, the Office of the Inspector General agreed to allow us access to their investigative workpapers. This opinion is based on the factual findings contained in the OIG Report and the supporting workpapers. While this opinion relies on the factual findings of the OIG, it does not adopt or rely upon any legal conclusions reached by the OIG, HHS, or OLC.

<sup>2</sup> For ease of reference, we will refer to the identical prohibitions in the Consolidated Appropriations Act of 2004 and the Consolidated Appropriations Resolution of 2003 as "section 618."

<sup>3</sup> Congress established the position of Chief Actuary in statute in 1997. Balanced Budget Act, Pub. L. No. 105-33, tit. IV, subtitle G, ch. 4, § 4643, 111 Stat. 487 (Aug. 5, 1997) (codified at 42 U.S.C. § 1317). The statute directs the Chief Actuary to carry out his duties "in accordance with the professional standards of actuarial independence." 42 U.S.C. § 1317(b)(1). The Act also directs that the Chief Actuary is to be appointed based on "education, experience [and] superior expertise in the actuarial sciences" and could be removed "only for cause." *Id.* The Balanced Budget Act conference report cites the long history and tradition of a "close and confidential working relationship" between the Social Security and Medicare actuaries and the congressional committees of jurisdiction. H.R. Conf. Rep. No. 105-217, at 837 (1997). The report then states that the "independence of the Office of the

Members and staff also made requests for technical assistance, including requests that Mr. Foster perform analyses of various provisions of the Medicare legislation. *Id.*

Mr. Foster did not respond to several of these requests because Thomas Scully, CMS Administrator and Mr. Foster's supervisor, stated that there would be adverse consequences if he released any information to Congress without Mr. Scully's approval.<sup>4</sup> *OIG Report*, at 3. Mr. Foster stated that the first time he felt his job was threatened was in May 2003 when he provided information on private insurance plan enrollment rates to the Majority Staff Director of the House Ways and Means Committee and Mr. Scully rebuked him for doing so. *Id.* Later, on June 4, 2003, at Mr. Scully's request, Mr. Scully's special assistant instructed Mr. Foster not to respond to any requests for information from the House Ways and Means Committee and warned him that "the consequences of insubordination are extremely severe." *Id.* Mr. Foster interpreted this statement to mean that Mr. Scully would terminate his employment at CMS if he released any information to Congress without Mr. Scully's approval.<sup>5</sup> *Id.* at 4.

The *OIG Report* concluded that, because of Mr. Scully's prohibition, Mr. Foster did not respond to several congressional requests for cost estimates and technical assistance, including requests from the minority staff of the House Ways and Means Committee for the total estimated cost of the legislation and for analyses of premium support provisions in the bill, and requests from Senators Mark Dayton and Edward Kennedy for premium estimates.<sup>6</sup> *Id.* at 2-3.

There is no indication in the *OIG Report* that Mr. Scully objected to Mr. Foster's methodology or to the validity of his estimates. Rather, Mr. Foster testified before the House Ways and Means Committee that Mr. Scully determined which information to release to Congress on a "political basis." *Board of Trustees 2004 Annual Reports: Hearing Before the House Comm. on Ways and Means*, Federal News Service, Mar. 24, 2004. Furthermore, Mr. Scully never objected to Mr. Foster and his staff performing the analyses required to respond to congressional requests; he simply objected to certain analyses being released to Congress. During the same time period, Mr. Foster provided similar analyses to the Office of Management and Budget.

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Actuary with respect to providing assistance to the Congress is vital," and that "reforming the Medicare and Medicaid programs is greatly enhanced by the free flow of actuarial information from the Office of the Actuary to the committees of jurisdiction in the Congress." *Id.* at 837-8.

<sup>4</sup> HHS paid Mr. Scully's salary during this time period from its "Program Management" appropriations account. Pub. L. No. 108-199, Div. E, tit. II, 188 Stat. 3, 244 (Jan. 23, 2004); Pub. L. No. 108-7, Div. G, tit. II, 117 Stat. 11, 316 (Feb. 20, 2003).

<sup>5</sup> Third parties also confirmed Mr. Scully's threats. For example, Mr. Scully told the Minority Staff Director for the Ways and Means Subcommittee on Health that he would "fire [Foster] so fast his head would spin" if he released certain information to Congress. *OIG Report*, at 3.

<sup>6</sup> Senator Max Baucus made a similar request for premium estimates. Mr. Foster stated that Mr. Scully directed him to brief Senator Baucus's staff, but he never received approval to respond to Senators Dayton and Kennedy. *OIG Report*, at 2-3.



## Discussion

At issue here is the prohibition on using appropriated funds to pay the salary of a federal official who prohibits or prevents another federal employee from communicating with Congress. Specifically, this prohibition states:

“No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.”

Pub. L. No. 108-199, Div. F, tit. VI, § 618, 188 Stat. 3, 354 (Jan. 23, 2004); Pub. L. No. 108-7, Div. J, tit. V, § 620, 117 Stat. 11, 468 (Feb. 20, 2003).

### Legislative History of Section 618

The governmentwide prohibition on the use of appropriated funds to pay the salary of any federal official who prohibits or prevents or threatens to prohibit or prevent a federal employee from contacting Congress first appeared in the Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 640, 111 Stat. 1272, 1318 (1997). In 1997, the Senate passed a prohibition that applied only to the Postal Service, while the House of Representatives passed a governmentwide prohibition.<sup>7</sup> The conference report adopted the House version, and a governmentwide prohibition has been included in every Treasury-Postal appropriations act since fiscal year 1998. H.R. Conf. Rep. No. 105-284, at 50, 80 (1997).

This provision has its antecedents in several older pieces of legislation, including the Treasury Department Appropriation Act of 1972, the Lloyd-La Follette Act of 1912, and the Civil Service Reform Act of 1978. The legislative history of these antecedents informs our analysis of section 618 because of the similarity of wording of these provisions and the references that the sponsors of later provisions made to earlier acts.

Prior to fiscal year 1998, the Treasury-Postal appropriations acts annually contained a nearly identical prohibition applying only to the Postal Service. This provision first appeared in the fiscal year 1972 Treasury Department Appropriation Act in response

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<sup>7</sup> Compare S. 1023, 105th Cong. § 506 (1997), with H.R. 2378, 105th Cong. § 505 (1997).

to a 1971 Postal Service directive restricting postal employees' communications with Congress. Pub. L. No. 92-49, § 608 (1971). The Postmaster General's directive, which was printed in the *Congressional Record*, stated that, "In order to avoid the possibility for incorrect information and misinterpretation, it is critical that the Postal Service speak to the Congress with only one voice. Accordingly, I am directing that the Congressional Liaison Office be the sole voice of the Postal Service in communicating with the Congress." 117 Cong. Rec. 151 (1971). The directive spelled out specific procedures to implement this order, and directed postal employees to "immediately cease [any] direct or indirect contacts with congressional officers on matters involving the Postal Service," and in the future, forward any congressional communications to the Liaison Office and coordinate any direct contacts with a congressional office with the Liaison. *Id.* The directive ended with the disclaimer that the new procedures "do not affect the right of any employee to petition, as a private citizen, his U.S. Representative or Senators on his own behalf." 117 Cong. Rec. 152 (1971).

Representative William Ford sponsored this prohibition as an amendment to the 1972 appropriations act. 117 Cong. Rec. 22443 (1971). He complained that the directive declared it a violation of the rules of the Postal Service "for any employee either individually or through his organization to contact any member or any committee" of Congress. *Id.* Representative John Saylor also objected to the directive for "cutting the ties between postal employees and their representatives" and for "abridg[ing] a fundamental right of American citizens." 117 Cong. Rec. 151 (1971). Saylor also cited two newspaper editorials about the directive, which called it a "gag rule" and noted the postal union's concern that the directive violated their constitutional rights to petition Congress. 117 Cong. Rec. 152 (1971). One of the editorials cited the conflict between the directive's order that all employees were to cease contacts with members of Congress and the disclaimer that the directive preserved employees' right to petition Congress. *Id.*

Postmaster General Blount discussed this issue at both the House and Senate Appropriations Committee hearings on the Postal Service's fiscal year 1972 budget request. At the House Appropriations Committee hearing, Representative John Myers asked Blount if it was true that postal employees were prohibited from communicating with their member of Congress under any circumstance. Blount responded that was not the case and noted that his directive simply said "that we are going to centralize our communications with Members of Congress." *Treasury, Post Office, and General Government Appropriations for Fiscal Year 1972, Hearing Before the House Comm. on Appropriations, 92nd Cong. 63 (1971).* He stated, "as a matter of operations and technique . . . we will centralize the requests and problems of Congress in our congressional liaison department and we will then be able to control our responsiveness to the Members." *Id.* Blount also mentioned that it was "very clearly spelled out . . . that all the employees have a constitutional right to petition Members of Congress . . . about their own matters but as far as the Postal Service is concerned, if I am going to be held responsible for it by the Members of Congress and by the American public, I have to have control of it." *Id.*

At the Senate Appropriations Committee hearing, Senator Joseph Montoya complained that prior to the directive, members of Congress "could call the Postal

Department on any matter involving a constituent and get a ready answer from the Department . . . [but now] if we have an inquiry to the regional office or to a local postmaster, they must refer it straight to Washington under this regulation and it causes unnecessary delay.” *Treasury, Post Office, and General Government Appropriations for Fiscal Year 1972, Hearing Before the Senate Comm. on Appropriations*, 92nd Cong. 1435 (1971). Senator Montoya added, “I can call any other department in the Government and call the man in charge, the man at the wheel, and he will give me an answer. But I can’t do this with the Post Office Department.” *Id.* at 1438.

Blount responded to such criticisms, “It is difficult to control our responses [to members of Congress] if these responses go out from some 30,000 post offices around the country.” *Id.* at 1435. He stated that the Post Office “is a vast department . . . and it is difficult to be certain that our replies always comply with the policies of the Postal Service, and that is the reason we took this action.” *Id.* at 1438. Blount emphasized again that the directive “has to do with the official postal matters only . . . and has nothing to do with the employees’ rights to contact Members of Congress. We so stated in the regulation itself . . . [but] it has been misinterpreted by others.” *Id.* at 1435. Senator Montoya concluded his questioning about the directive by stating his intention to add language to the Postal appropriations committee report that would prohibit the Post Office from restricting its employees from communicating with members of Congress. *Id.* at 1439.

In introducing his amendment to the 1972 Treasury Department Appropriation Act, Representative Ford noted that “the law that this amendment attempts to enforce has been on the books . . . since 1912.” 117 Cong. Rec. 22443 (1971). Ford was referring to a provision in the fiscal year 1913 Post Office Appropriation Bill, commonly known as the Lloyd-La Follette Act, that states, “The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.” Post Office Appropriation Act, Pub. L. No. 336, ch. 389 § 6, 66 Stat. 539, 540 (Aug. 24, 1912). The committee report accompanying the House version of the bill stated that the provision was intended to “protect employees against oppression and in the right of free speech and the right to consult their Representatives.” H.R. Rep. No. 62-388, at 7 (1912).

Congress enacted the Lloyd-La Follette Act in response to two executive orders issued by Presidents Theodore Roosevelt and Howard Taft. Several congressmen referred to these orders as “gag rules” and quoted the text of the orders in the *Congressional Record*.<sup>8</sup> Both the House and the Senate had a vigorous floor debate

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<sup>8</sup> See, e.g., 48 Cong. Rec. 4513 (1912). President Roosevelt’s executive order reads as follows: “All officers and employees of the United States of every description, serving in or under any of the executive departments or independent Government establishments, and whether so serving in or out of Washington, are hereby forbidden, either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatever, either before Congress or its committees, or in any way save through the heads of the departments or independent Government establishments in or under which they serve, on penalty of dismissal from the Government service.” Exec. Order No. 1142 (1906). President Taft’s order reads as follows: “It is hereby ordered that no bureau, office, or division chief, or subordinate in any

on this provision, as well as a related section of the bill allowing postal employees the right to unionize.<sup>9</sup> The majority of the debate focused on preserving the constitutional rights of federal employees.<sup>10</sup> Representative Thomas Reilly stated his opposition to the gag order because it prevented federal employees from “uttering any word of complaint even against the most outrageous treatment.” 48 Cong. Rec. 4656 (1912). He hoped that the Act would ensure the rights of employees to discuss “conditions of employment, hours of labor, and matters affecting the working and sanitary conditions surrounding their employment” with Congress.<sup>11</sup> *Id.*

Members of Congress also raised concerns that the executive orders would foreclose an important source of information for Congress. As Senator James Reed stated, the executive orders instructed federal employees “not [to], even at the demand of Congress or a committee of Congress or a Member of Congress, supply information in regard to the public business.” 48 Cong. Rec. 10673 (1912). Representative James Lloyd argued that the representatives of the American people “should have the right to inquire as to any of the conditions of government and the method of conducting any line of departmental business.” 48 Cong. Rec. 5634 (1912).

Other members of Congress disagreed and argued that the provision would undermine discipline in the Postal Service.<sup>12</sup> However, after a lengthy debate Congress approved the Lloyd-La Follette Act, and the President signed it into law as part of the Post Office Appropriation Act. Pub. L. No. 336, 66 Stat. 539 (Aug. 24,

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department of the Government, and no officer of the Army or Navy or Marine Corps stationed in Washington, shall apply to either House of Congress, or to any committee of either House of Congress, or to any Member of Congress, for legislation, or for appropriations, or for congressional action of any kind, except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of Congress, or any committee of either House of Congress, or any Member of Congress, except through, or as authorized by, the head of his department.” Exec. Order No. 1514 (1909).

<sup>9</sup> See 48 Cong. Rec. 4512-3, 4656-7, 4738-9, 5223-4, 5235-6, 5633-6, 10670-7, 10728-33, 10793-804 (1912).

<sup>10</sup> See, e.g., 48 Cong. Rec. 4513 (1912) (statement of Rep. Gregg) (stating that the provision was “intended to protect employees against oppression and in the right of free speech and the right to consult their representatives”); 48 Cong. Rec. 5635 (1912) (statement of Rep. Goldfogle) (stating that “[w]hether the citizen holds office under the Government or not, his right to petition for a redress of grievances should not, and constitutionally speaking, can not be interfered with”).

<sup>11</sup> Several congressmen spoke about the dangerous working conditions faced by railway mail clerks and emphasized that the provision would ensure that such conditions were brought to the attention of Congress. See, e.g., 48 Cong. Rec. 10671 (1912) (statement of Sen. Ashurst) (quoting an article from *La Follette's Weekly*); 48 Cong. Rec. 10674 (1912) (statement of Sen. Warren).

<sup>12</sup> See, e.g., 48 Cong. Rec. 100676 (1912) (statement of Senator Bourne) (stating that “the right of the individual employee to go over the head of his superior . . . on matters appertaining to his own particular grievances, or for his own selfish interest, would be detrimental to the service itself . . . [and] would absolutely destroy the discipline necessary for good service”). The Senate Appropriations Committee also disapproved of the provision. S. Rep. No. 62-955, at 21 (1912) (stating that “good discipline and the efficiency of the service requires that [federal employees] present their grievances through the proper administrative channels”).

1912). In 1978, a nearly identical version of the Lloyd-La Follette Act was enacted as part of the Civil Service Reform Act. Pub. L. No. 94-454, 92 Stat. 1138, 1217 (Oct. 13, 1978) (codified at 5 U.S.C. § 7211).<sup>13</sup>

Congress expressed many of the same concerns that surrounded enactment of the Lloyd-La Follette Act during debate surrounding the whistleblower provisions in the Civil Service Reform Act, which prohibit federal agencies from taking any personnel action in response to a federal employee's disclosure of a violation of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a danger to public health or safety. 5 U.S.C. § 2302(b)(8). For example, the Senate Committee on Governmental Affairs noted:

“Federal employees are often the source of information about agency operations suppressed by their superiors. Since they are much closer to the actual working situation than top agency officials, they have testified before Congress, spoken to reporters, and informed the public . . . Mid-level employees provide much of the information Congress needs to evaluate programs, budgets, and overall agency performance.”

Senate Comm. on Governmental Affairs, 95th Cong., *The Whistleblowers*, 40 (Comm. Print 1978). These concerns led to the enactment of the first whistleblower protections and the codification of the Lloyd-La Follette Act. Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 2302, 7211, 92 Stat. 1217 (Oct. 13, 1978).

#### Application of the Prohibition to the Inspector General's Findings

As noted above, section 618 prohibits an agency from paying the salary of any federal officer or employee who prohibits or prevents, or threatens to prohibit or prevent, another officer or employee from communicating with members, committees or subcommittees of Congress. The OIG report concluded that Mr. Scully both prohibited and threatened to prohibit Mr. Foster from communicating with various members of Congress and congressional committees on issues that pertained to his agency and his professional responsibilities. OIG Report, at 4. In May 2003, Mr. Scully rebuked Mr. Foster for providing information requested by the Majority Staff Director for the House Ways and Means Committee. *Id.* at 3. In June 2003, Mr. Scully's special assistant, pursuant to Mr. Scully's direction, instructed Mr. Foster not to respond to any requests for information from the House Ways and Means Committee. Because of Mr. Scully's actions, we view HHS's appropriation as unavailable to pay his salary. Pub. L. No. 108-199, Div. F, tit. VI, § 618, 188 Stat. 3, 354 (Jan. 23, 2004); Pub. L. No. 108-7, Div. J, tit. V, § 620, 117 Stat. 11, 468 (Feb. 20, 2003).

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<sup>13</sup> Section 7211 states: “The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.” There are no federal judicial decisions interpreting section 7211, aside from cases ruling that it does not imply a private cause of action, *Nixon v. Fitzgerald*, 457 U.S. 731 (1981), and that it does not apply to government contractors, *Bordell v. General Electric Co.*, 732 F. Supp. 327 (1990).

As the legislative history of section 618 demonstrates, Congress intended to advance two goals: to preserve the First Amendment rights of federal employees and to ensure that Congress had access to programmatic information from frontline employees. Mr. Scully's actions implicate the latter of these goals. Congressional offices had asked Mr. Foster for information and for technical and analytic assistance that concerned the cost and impact of proposed Medicare legislation under debate in both the House and the Senate. OIG Report, at 2-3. Many members considered such information critical to their consideration of the Medicare Prescription Drug, Improvement, and Modernization Act, a historic piece of legislation with significant implications for federal fiscal policy.<sup>14</sup> This information is a prime example of the programmatic information from frontline federal employees upon which Congress focused in enacting the Lloyd-La Follette Act and its subsequent incarnations.

According to the OIG's findings, congressional offices were interested in the total estimated cost of the legislation, premium estimates, the data underlying certain premium estimates, and a technical analysis of the premium support provisions in the Medicare legislation. OIG Report, at 2-3. This information was typical of the regular, ordinary work product of Mr. Foster and the Office of the Chief Actuary, and as the frontline employee, he was competent to provide the information to Congress. See H.R. Conf. Rep. No. 105-217, at 837 (1997) (stating that the actuary has an important role in "developing estimates of the financial effects of potential legislative and administrative changes in the Medicare and Medicaid programs"). Mr. Foster was more knowledgeable about the estimates than other officials within HHS and thus was able to provide information so that Congress could evaluate the Medicare program and budget. See Senate Comm. on Governmental Affairs, 95th Cong., *The Whistleblowers*, 40 (Comm. Print 1978).

Thus, the legislative history of section 618 and its predecessors suggest that Mr. Scully's bar on Mr. Foster responding to congressional requests is a prime example of what Congress was attempting to prohibit by those provisions. Accordingly, Mr. Scully's actions fall squarely within section 618, and HHS's appropriation was unavailable for the payment of his salary.

#### Constitutional Issues Raised by HHS and OLC

While the OIG Report concluded that Mr. Scully had indeed threatened Mr. Foster if he communicated with Congress, it also contained in its attachments, legal opinions by the HHS Office of General Counsel and by the Office of Legal Counsel (OLC) for the Department of Justice. Memo from Katherine M. Drews, Associate General Counsel, HHS, to Lewis Morris, Counsel, HHS OIG, May 12, 2004 (Drews Memo); Letter from Jack L. Goldsmith III, Assistant Attorney General, to Alex M. Azar II, General Counsel, HHS, May 21, 2004 (Goldsmith Letter). These legal opinions state that the application of section 618 to the present case would be unconstitutional. Drews Memo, at 3-5; Goldsmith Letter, at 2-4.

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<sup>14</sup> See, e.g., 150 Cong. Rec. S2761 (daily ed. Mar. 12, 2004) (statement of Senator Tom Daschle); 150 Cong. Rec. S3911-2 (daily ed. Apr. 7, 2004) (statement of Senator Bob Graham).

Laws passed by Congress and signed by the President come to us with a heavy presumption in favor of their constitutionality.<sup>15</sup> B-300192, Nov. 13, 2002. We have long observed that it is not our role to adjudicate the constitutionality of duly enacted legislation. B-245028.2, June 4, 1992; B-215863, July 26, 1984. We apply the laws as we find them absent a controlling judicial opinion that such laws are unconstitutional. B-300192, Nov. 13, 2002. Indeed, even in such cases, we will construe a statute narrowly to avoid constitutional issues. *Id.* Here, no court has found section 618 or its predecessors unconstitutional. Likewise, the courts have never held unconstitutional the Whistleblower Protection Act, which authorizes federal employees to disclose violations of law, gross mismanagement, the gross waste of funds, abuses of authority, and threats to public health or safety. 5 U.S.C. § 2302(b)(8).

HHS and OLC first argue that section 618 is unconstitutional because it could force the disclosure of privileged, classified, or deliberative information. Drews Memo, at 4-5; Goldsmith Letter, at 2-3. Constitutional concerns could be raised if Congress were to attempt to force the disclosure of classified or national security information, given the President's role as Commander in Chief.<sup>16</sup> However, Mr. Foster was not asked for classified information.

Similarly, Mr. Foster was not asked for information subject to a claim of deliberative process privilege.<sup>17</sup> To invoke the deliberative process privilege, the material must be both pre-decisional and deliberative, requirements that stem from the privilege's purpose of granting officials the freedom "to debate alternative approaches in private." *In re: Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The deliberative process privilege does not apply to the information requested of Mr. Foster because it was neither pre-decisional nor deliberative. The Administration had already formulated its Medicare prescription drug plan and had released it to the public and to the Congress in March 2003. *See Framework to Modernize and Improve Medicare*, White House Fact Sheet, March 4, 2003. Thus, the information requested from Mr. Foster in June through November 2003, which involved cost estimates and data formulated after the Administration's release of its Medicare plan, was not part of the

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<sup>15</sup> The Supreme Court also begins with the presumption that a statute is constitutional. *See, e.g., United States v. Morrison*, 529 U.S. 598, 607 (2000) (holding that "due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds").

<sup>16</sup> *See Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (stating that the Constitution grants the President authority to classify and control access to national security information); *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671 (D.D.C. 1988), *vacated and remanded*, *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989); Memorandum Opinion for the General Counsel, Central Intelligence Agency, *Access to Classified Information*, OLC Opinion (Nov. 26, 1996) (asserting that granting individual federal employees the right to disclose intelligence and other national security information would threaten the President's constitutional role as Commander in Chief).

<sup>17</sup> Traditionally, courts have allowed the executive branch to withhold documents from the public and in litigation that would reveal advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. *In re: Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (addressing scope of privilege in context of grand jury investigation).

deliberative process for the Administration's proposal. Furthermore, some of the information that Mr. Scully prohibited Mr. Foster from communicating to congressional offices, including the House Ways and Means Committee's request of June 13, 2003, for an analysis of the premium support provisions, was not preexisting data. Such information cannot be considered deliberative because the analysis was not preexisting nor was it tied to any decision-making process at CMS. Thus, HHS's and OLC's arguments that section 618 is unconstitutional because it could force the disclosure of classified or privileged information are inapplicable to the facts of this case.

HHS and OLC also argue that section 618 unconstitutionally limits the President's ability to supervise and control the work of subordinate officers and employees of the executive branch. Drews Memo, at 4-5; Goldsmith Letter, at 2-3. In making this argument, HHS and OLC fail to balance the President's constitutional interest in managing the official communications of the executive branch with Congress's equally important need for information in order to carry out its legislative and oversight responsibilities. As OLC itself has recognized, Congress has "important oversight responsibilities and a corollary interest in receiving information [from federal employees] that enables it to carry out those responsibilities." *Whistleblower Protections For Classified Disclosures: Hearing Before the House Permanent Select Committee on Intelligence*, 105th Cong. (May 20, 1998) (statement of Randolph Moss, Deputy Assistant Attorney General, Office of Legal Counsel). As the Attorney General has pointed out, Congress's interest in obtaining information from the executive branch is strongest when "specific legislative proposals are in question." 43 Op. Att'y Gen. 327 (Oct. 13, 1981).

HHS and OLC have overstated section 618's threat to the President's constitutional prerogatives.<sup>18</sup> Executive agencies have the right to designate official spokesmen for the agency and institute policies and procedures for the release of agency information and positions to Congress and the public.<sup>19</sup> Separation of powers concerns could be raised if Congress, by legislation, were to dictate to the executive branch who should communicate the official positions of the Administration, given the President's constitutional duty to "recommend to [Congress's] consideration such measures as he shall judge necessary and expedient."<sup>20</sup> U.S. Const. Art. II, § 3.

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<sup>18</sup> Section 618 does not prohibit agencies from requiring their employees to report on their communications with Congress and from requesting that agency congressional liaisons be included in employees' discussions with Congress, nor does it require executive branch employees to initiate congressional contacts or even to respond to congressional inquiries.

<sup>19</sup> For example, section 301 of Title 5, U.S. Code, commonly known as the Housekeeping Statute, delegates to the head of an agency the right to prescribe regulations for "the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." However, the Housekeeping Statute is explicit in that it does not "authorize withholding information from the public." This second sentence of § 301 was added in 1958 because Congress was concerned that the statute had been "twisted from its original purpose as a 'housekeeping statute' into a claim of authority to keep information from the public and, even, from the Congress." H.R. Rep. No. 85-1461 (1958).

<sup>20</sup> See also *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. Off. Legal Counsel 30 (Feb. 22, 1984) (asserting that requiring an executive branch agency to submit legislative proposals directly to Congress without Presidential



Federal agencies and employees making separate legislative recommendations to Congress, without coordination with the President, could interfere with the President's constitutional duty, on behalf of the executive branch, to judge which proposals are "necessary and expedient" and make such recommendations to Congress. 8 Op. Off. Legal Counsel 30. Designating an official agency or executive branch spokesman would be entirely appropriate in the case of legislative recommendations or a statement of the Administration's official positions. However, Mr. Foster was not asked for a CMS policy position or legislative recommendation, but rather for specific and limited technical assistance.<sup>21</sup>

Thus, while certain applications of section 618 could raise constitutional concerns, application of section 618 to the facts of this case does not raise such concerns, because Mr. Foster was asked for estimates, technical assistance, and data, rather than any information which could be considered privileged.<sup>22</sup> Furthermore, Congress was considering extensive changes to Medicare, and members requested cost estimates and analyses to inform debate on this legislation and to carry out the legislative powers vested by the Constitution. U.S. Const. Art. I, § 1. Indeed, if some of the Chief Actuary's estimates had been disclosed in a timely matter, Congress would have had better information on the magnitude of the legislation it was considering and its possible effect on the nation's fiscal health.<sup>23</sup>

Mr. Scully's prohibitions, therefore, made HHS's appropriation, otherwise available for payment of his salary, unavailable for such purpose, because his actions are covered by section 618 of the Consolidated Appropriations Act of 2004 and section 620 of the Consolidated Appropriations Resolution of 2003. Because HHS was prohibited from paying Mr. Scully's salary after he barred Mr. Foster from communicating with Congress, HHS should consider such payments improper.<sup>24</sup>

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review would be unconstitutional); *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. Off. Legal Counsel 632 (Nov. 5, 1982) (asserting that requiring an executive branch agency to submit budget requests or legislative proposals directly to Congress without presidential review would be unconstitutional).

<sup>21</sup> Indeed, the two OLC opinions cited in the Goldsmith Letter (and cited in the prior footnote) deal with budget or legislative proposals and thus are inapplicable to the present case.

<sup>22</sup> OLC admits in its opinion that it did not review the specific information requested of Mr. Foster and thus "cannot opine on the privileged status" of the information.

<sup>23</sup> See, e.g., GAO, *Fiscal Year 2003 U.S. Government Financial Statements: Sustained Improvement in Federal Financial Management Is Crucial to Addressing Our Nation's Future Fiscal Challenges*, GAO-04-477T (March 3, 2004) (describing the drug benefit as "one of the largest unfunded commitments ever undertaken by the federal government").

<sup>24</sup> Section 618 and the legislative history surrounding similar provisions provide no guidance as to what time period an agency is prohibited from paying the salary of an official who prohibits a federal employee from contacting Congress. Federal salaries are obligated when earned and are earned on a biweekly pay period basis. See 24 Comp. Gen. 676, 678 (1945) and 5 U.S.C. § 5504. Given the continuing nature of Mr. Scully's prohibition, we recommend that HHS treat as an improper payment Mr. Scully's salary beginning with the pay period when his initial prohibition to Mr. Foster was made until his departure from CMS.

Therefore, we recommend that HHS seek to recover these payments, as required by 31 U.S.C. § 3711.<sup>25</sup>

### **Conclusion**

As a result of Mr. Scully's prohibition on Mr. Foster providing certain information to Congress, HHS's appropriation was unavailable to pay Mr. Scully's salary because section 618 of the Consolidated Appropriations Act of 2004 and section 620 of the Consolidated Appropriations Resolution of 2003 bar HHS from using appropriated funds to pay the salary of an official who prohibited another federal employee from communicating with Congress on an issue related to his agency. While certain applications of section 618 could raise constitutional concerns, we have applied the prohibition to the present facts, given the narrow scope of information requested and Congress's need for such information in carrying out its legislative duties, as well as the fact that no court has held section 618 unconstitutional.

Sincerely yours,

Anthony H. Gamboa  
General Counsel

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<sup>25</sup> HHS should keep the House and Senate Appropriations Committees, as well as its oversight committees, apprised of the actions it takes to recover these improper payments.

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April 8, 2011

Kenneth E. Melson  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
99 New York Avenue, N.E.  
Washington, DC 20226

Dear Acting Director Melson:

Recent media reports have given rise to grave concerns over Project Gunrunner and Operation Fast and Furious, conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Over the past few months, Senator Charles Grassley, the Ranking Member of the Senate Judiciary Committee, wrote you multiple letters asking for documents and information about these programs. I wrote to you on March 16, 2011, requesting substantially similar information by March 30, 2011. You failed to comply with the March 30th deadline, and on March 31, 2011, the Committee issued a subpoena for those documents.

The public deserves assurances that its government is not allowing guns bought by Mexican drug cartels to be "walked" across the border into Mexico. To determine whether this occurred, the Committee is entitled to receive all relevant materials that would aid its investigation. At present, I am not confident that ATF will produce all documents of probative value to enable the Committee to exercise its legitimate oversight responsibilities.

Therefore, I now request that all types of documents and essential communications between and among ATF employees related to the planning and implementation of Project Gunrunner and Operation Fast and Furious be preserved. So that ATF can produce a full and complete record of those documents to the Committee in response to current and future document requests, please take the following steps:

1. Preserve all documents and records, including e-mail, electronic documents, and data ("electronic records") **created since July 1, 2009** related to the planning and implementation of Project Gunrunner and Operation Fast and Furious. For the purposes of this request, "preserve" means taking reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of electronic records, as well as negligent or intentional handling that would make such records incomplete or inaccessible;

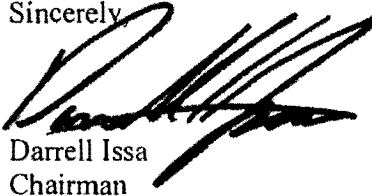
Mr. Kenneth E. Melson  
April 8, 2011  
Page 2

2. Exercise reasonable efforts to identify and notify former employees and contractors, subcontractors and consultants who may have access to such electronic records that they are to be preserved; and
3. If it is the routine practice of any agency employee or contractor to destroy or otherwise alter such electronic records, either halt such practices or arrange for the preservation of complete and accurate duplicates or copies of such records, suitable for production if requested.

I request that you respond in writing **no later than April 18, 2011**, to confirm receipt of this letter. Your response should also advise the Committee of actions ATF has taken and will take to comply with the Committee's subpoena and this document preservation request. I am skeptical about ATF's response to the subpoena because I understand that individuals who likely have documents responsive to the subpoena have not been contacted or instructed to gather and forward these documents. A copy of the schedule of documents is attached. Please note that you should take no action related to the documents of the Office of the Inspector General in responding to this request.

If you have any questions, please contact Ashok Pinto or Henry Kerner of the Committee staff at (202) 225-5074. Thank you for your attention to this matter.

Sincerely



Darrell Issa  
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Member  
  
The Honorable Charles E. Grassley, Ranking Member  
U. S. Senate Committee on the Judiciary

## SCHEDULE

In accordance with the attached schedule instructions, produce all documents in unredacted form described below:

1. Documents and communications relating to the genesis of Project Gunrunner and Operation Fast and Furious, and any memoranda or reports involving any changes to either program at or near the time of the release of the Department of Justice (DOJ) Office of the Inspector General report about Project Gunrunner in November 2010.
2. Documents and communications relating to individuals responsible for authorizing the decision to "walk" guns to Mexico in order to follow them and capture a "bigger fish."
3. Documents and communications relating to any investigations conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) or any other DOJ component following the fatal shooting of Agent Brian Terry, including information pertaining to two guns found at the crime scene that may have been connected to Project Gunrunner.
4. Documents and communications relating to any weapons recovered at the crime scene or during the investigation into the death of Agent Brian Terry.
5. Documents and communications between ATF and the Federal Firearms Licensee (FFL) who sold weapons to [ATF] including any Report of Investigation (ROI) or other records relating to a December 17, 2009 meeting "to discuss his role as an FFL during this investigation."
6. A copy of the presentation, approximately 200 pages long, that the Group 7 Supervisor made to officials at ATF headquarters in the spring of 2010.
7. Documents and communications relating to Operation Fast and Furious between and among ATF headquarters and Special Agent in Charge William D. Newell, Assistant Special Agents in Charge Jim Needles and George Gillette, Group Supervisor [ATF] [ATF] or any Case Agent from November 1, 2009 to the present. The response to this component of the subpoena shall include a memorandum, approximately 30 pages long, from SAC Newell to ATF headquarters following the arrest of [ATF] and the death of Agent Brian Terry.
8. Documents and communications relating to complaints or objections by ATF agents about: (1) encouraging, sanctioning, or otherwise allowing FFLs to sell firearms to known or suspected straw buyers, (2) failure to maintain surveillance on known or suspected straw buyers, (3) failure to maintain operational control over weapons purchased by known or suspected straw buyers, or (4) letting known or suspected straw buyers with American guns enter Mexico.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 8, 2011

The Honorable Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter dated March 16, 2011, and your subpoena issued on March 31, 2011, to Kenneth Melson, Acting Director of the Department's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Your letter and subpoena requested documents and other information concerning, among other things, the pending criminal investigation undertaken by ATF known as Operation Fast and Furious and the pending criminal investigation into the shooting death of Customs and Border Protection (CBP) Agent Brian Terry.

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. Committee staff informed us that, for now, they do not want us to produce such documents. Our search for records responsive to your letter and the subpoena is continuing and we will supplement this response when additional information becomes available.

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 long-standing 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. The enclosed May 17, 2000 letter from Attorney General Reno to Senator Hatch, then-Chairman of the Senate Judiciary Committee, provides a fuller statement of the rationale for this policy, as well as its lengthy and nonpartisan

history. Within those constraints, we would appreciate the opportunity to confer with Committee staff to explore other options to accommodate your interests and look forward to working with you regarding the information you seek.

Your letter also asks certain questions, and reflects certain assumptions, concerning Operation Fast and Furious that we are presently unable to address because they relate directly to an ongoing investigation. We can say, however, that Operation Fast and Furious is a criminal investigation of an extensive gun-trafficking enterprise.<sup>1</sup> The purpose of the investigation is to dismantle a transnational organization believed to be responsible for trafficking weapons into Mexico, in part by prosecuting its leadership. The investigation is led by a dedicated team of United States Attorney's Office prosecutors and ATF agents. These efforts have already resulted in an indictment charging 20 defendants with federal firearms offenses, and the investigation is continuing.

Mexican drug cartels are a significant organized crime threat, both to the United States and to Mexico. According to the Department's 2010 National Drug Threat Assessment, these cartels present the single greatest drug trafficking threat to the United States. Mexican cartels use violence to control drug trafficking corridors, through which drugs flow north into the United States, while guns and cash flow south to Mexico. Drug-related violence in Mexico was increasing at an alarming rate well before the inception of Operation Fast and Furious. For calendar year 2009, the Mexican government reported 9,635 murders in Mexico resulting from organized crime and drug trafficking – an increase of 50 percent from the number of murders in 2008 and three times the 2,837 killed in 2007. In part because Mexican law severely restricts gun ownership, Mexico's drug traffickers routinely smuggle weapons purchased in the United States into Mexico.

Stopping the flow of weapons across the border into Mexico is a challenging task given the resources of the cartels and the cartels' use of sophisticated trafficking organizations to move firearms across the border. These trafficking organizations typically involve the use of straw purchasers, who purchase the weapons not for themselves, but with the purpose of transferring them to others who then facilitate their movement across the border to the cartels. Among the challenges in investigating a trafficking organization is developing sufficient evidence to prove that particular firearm purchases are, in fact, unlawful straw purchases. As you know, it is legal for a non-prohibited person to purchase an unlimited number of firearms from a licensed gun dealer and then to sell or barter those firearms to another person.

Allegations have been raised about how Operation Fast and Furious was structured and conducted. As you note, at the request of the Attorney General, the Department of Justice's Office of the Inspector General (DOJ-OIG) is now investigating those allegations. Your letter asks about DOJ-OIG's ability to handle this inquiry in an independent and objective manner.

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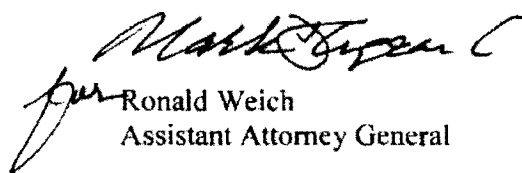
<sup>1</sup> Operation Fast and Furious, which is one law enforcement investigation, should not be confused with Project Gunrunner, which is the broader initiative to deal with weapons trafficking along the Southwest Border generally. As was recently noted by the Congressional Research Service, "[a]s of March 2010, Project Gunrunner had led to the arrest of 1,397 defendants – 850 of which had been convicted – and the seizure of over 6,688 firearms." Congressional Research Service Report RL32724, *Mexico-U.S. Relations: Issues for Congress*, February 15, 2011, at 19.

The enclosed letter to Senator Grassley, dated March 16, 2011, from the acting Chairperson of the Integrity Committee of the Council of Inspectors General on Integrity and Efficiency (CIGIE), responds to similar questions raised by Senator Grassley. CIGIE's response to Senator Grassley describes DOJ-OIG as "a model of independence, objectivity, and above all, integrity in every aspect of its daily pursuits." The response goes on to state that DOJ-OIG has "fully earned an unquestioned reputation for successfully addressing highly difficult and sensitive cases, and deserves the trust and confidence of the public. Further, its prior involvement in a review of a portion of the same ATF program can properly be viewed, not as an impediment to objectivity, but rather as an opportunity for the DOJ-OIG staff to have obtained familiarity with the subject-matter and working environment that would be used advantageously in the investigation requested by the Attorney General."

Finally, your letter asks about the shooting death of CBP Agent Brian Terry. The Department, with the Federal Bureau of Investigation leading the effort, is investigating the shooting death of Agent Terry. ATF has assisted in that investigation and the United States Attorney's Office has assigned senior prosecutors to the case. 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 and in the enclosed Attorney General Reno letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional information regarding this, or any other, matter.

Sincerely,

  
Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member





Office of the  
Inspector General

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

March 16, 2011

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

Dear Senator Grassley:

This is in response to your letter of March 8, 2011, to Kevin L. Perkins, in his capacity as Chair of the Integrity Committee of the Council of Inspectors General on Integrity and Efficiency (CIGIE). You expressed concern that the Department of Justice's Office of Inspector General would not be able to apply a publicly acceptable level of independence and objectivity in carrying out a review that the Attorney General had requested it to perform regarding an operation of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

In accordance with the Integrity Committee's rules, because this matter involved the DOJ-OIG, Mr. Perkins, as an official of the FBI and other Justice Department staff recused themselves from any involvement in this matter. Accordingly, as the Committee's senior member, I am acting as Chairperson for this case.

At a special meeting called on March 14, 2011, to consider the issues identified in your letter, the membership concluded unanimously that neither the Committee's authorizing statute nor its internal rules and procedures apply to the matters you identified. The Committee's jurisdiction, as defined by section 7(d)(1) of the Inspector General Reform Act of 2008 (Public Law 110-409, October 14, 2008), is to "receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General and staff members." In this context, the Committee has consistently interpreted its mandate to extend only to questions of improper or wrongful conduct on the part of individuals occupying positions of significant responsibility in Inspector General offices, and then, as required by the statute, make recommendations, where appropriate, to the Chair of the CIGIE. However, your statement of reasons why "the public may be unable to trust that the DOJ-OIG is completely disinterested and independent" appears to involve concerns of an institutional or organizational nature, about which the Committee is not empowered to act. Furthermore, the IC has no authority to mandate the recusal of an Office of Inspector General.

However, as the name Integrity Committee implies, scenarios may occur from time to time that cause the membership to comment in a manner that goes beyond the chartered structure. Your stated reservations about the suitability of the DOJ-OIG to properly investigate the Project Gunrunner case present one of those instances.

Honorable Charles E. Grassley

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While that office is currently headed by an acting Inspector General, the organization, managed for many years by former Inspector General Glenn Fine, has established itself as a model of independence, objectivity, and above all, integrity in every aspect of its daily pursuits. It fully earned an unquestioned reputation for successfully addressing highly difficult and sensitive cases, and deserves the trust and confidence of the public. Further, its prior involvement in a review of a portion of the same ATF program can properly be viewed, not as an impediment to objectivity, but rather as an opportunity for the DOJ-OIG staff to have obtained familiarity with the subject-matter and working environment that would be used advantageously in the investigation requested by the Attorney General. Thus, although an Inspector General from another agency could feasibly conduct this work, it would face a learning curve that might involve some delay in completing the assignment. Finally, it appears that the belief DOJ-OIG was not responsive to disclosures made by an ATF agent may have been initially reached without obtaining information from that office.

If you have any questions or need further information, please do not hesitate to contact me on (202) 606-1200.

Sincerely,

  
Patrick E. McFarland  
Inspector General



Office of the Attorney General  
Washington, D. C. 20530

May 17, 2000

The Honorable Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to the Committee's subpoena, received on May 12, 2000, seeking certain Department records relating to Loral Space and Communications Ltd. ("Loral") and Hughes Electronics Corporation ("Hughes"). We intend to cooperate fully with the part of the subpoena seeking documents on the *closed* investigation of the Campaign Finance Task Force ("CFTC") regarding the Presidential waiver in 1998 to permit Loral to export a satellite to the Peoples' Republic of China ("PRC"). We cannot, however, comply with the part of the subpoena seeking the files of the United States Attorney's Office for the District of Columbia ("U.S. Attorney's Office") for its *open* criminal investigation into the separate matter of the role Loral and Hughes played in a possible technology transfer to the PRC in 1996 following the failure of a satellite launch from the PRC earlier that year.\*

Providing *open* criminal investigative files to Congress would undermine public and judicial confidence in the criminal justice process and would be in complete contravention of the Department's policy of declining congressional requests for non-public information about pending investigations. This policy is neither new nor partisan. It is based on the longstanding belief of top Department officials, both Democrat and Republican alike, that the Department's ability to discharge its responsibilities for the fair administration of justice would

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\* The closed CFTC investigation and the open U.S. Attorney's Office investigation have always been completely separate. The U.S. Attorney's investigation is directed only towards the possible technology transfer in 1996 and not to any matters concerning the 1998 waiver or the possible impact of campaign contributions on the granting of waivers to launch satellites or on which agency should have jurisdiction over licensing decisions for satellite launches. The Department has already provided the Committee with more than 400 pages of documents relating to the CFTC investigation, including all documents we have identified that are responsive to subparagraph B of the Committee's subpoena, and we are continuing to search for responsive documents.

be compromised by the disclosure to Congress of open investigative files. Almost 60 years ago, Attorney General Robert H. Jackson, relying on positions taken by many of his predecessors, informed Congress that:

It is the position of the Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y. Gen. 45, 46 (1941) ("Jackson Op.").

The rationale underlying this policy was further explicated in a 1986 published opinion of the Office of Legal Counsel ("OLC") issued by Charles J. Cooper, OLC's Assistant Attorney General during part of the Reagan Administration. See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76-77 (1986). Mr. Cooper noted in his opinion that providing a congressional committee with confidential information about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases. *Id.* at 76, citing Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, OLC, Re: Submission of Open CID Investigation Files, at 2 (Dec. 19, 1969) ("[T]he Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."). Moreover, providing open investigative files in response to a congressional subpoena could give rise to a claim, by defense counsel or others, of improper congressional influence over the criminal justice process should it turn out that an indictment was returned in the matter after Congress had obtained access to the files.

The danger of such congressional influence was one of the principal reasons the Framers of the Constitution enshrined the concept of the separation of powers in the Constitution. The Framers of the Constitution regarded the combination of the powers of government as "the very definition of tyranny." The Federalist No. 47, at 301 (Madison) (Clinton Rossiter ed., 1961). They were particularly concerned about the threat of combining the power to legislate and the power to execute the law. They agreed with Montesquieu that "there can be no liberty" "[w]hen the legislative and executive powers are united in the same person or body." *Id.* at 303.

The disclosure of the files of the U.S. Attorney's Office's open criminal investigation, which is apparently what is sought by the Committee's subpoena, would be extremely damaging

from a law enforcement perspective as well. Such a disclosure would reveal the investigative reports and other evidence that has been collected in the investigation, as well as the internal documents setting out investigative strategies and plans. These materials would provide a "road map" of the ongoing investigation to the targets of the investigation and to anyone else with access to them. As Attorney General Jackson observed:

Disclosure of the [law enforcement] reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or a prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

Jackson Op. at 46.

The Committee's subpoena would also require the Department to produce grand jury material covered by the non-disclosure provision of Rule 6(e) of the Federal Rules of Criminal Procedure. As you know, the production of any such material would be in violation of the law. Thus, while we would obviously remove grand jury material from the scope of any production, the remaining documents that were responsive to the Committee's subpoena would still provide a "road map" of a portion of the Department's criminal investigation.

We have received no statement on behalf of the Committee as to why it believes it has a need for documents relating to this ongoing criminal investigation. We understand that proponents of the subpoena may contend that the U.S. Attorney's Office is not investigating quickly enough, or that it does not intend to seek an indictment even if the evidence and Principles of Federal Prosecution support one. This speculation is entirely without merit, as the U.S. Attorney's letters to Senator Specter, dated April 21 and May 10, 2000, have previously explained. In any event, the Framers sought to avoid such contemporaneous second-guessing of the executive branch by the legislative branch through the separation of powers principle. In light of that principle and the dangers to the criminal justice system it is designed to forestall, we cannot conceive of any interest that would justify providing the files of an ongoing criminal investigation to Congress.

In closing, I appreciate the fact that you have expressed a willingness to consider an accommodation "for structuring the production of the open case materials so as to have as little impact on the open case as possible." When it comes to *ongoing* criminal investigations, however, I do not believe that an accommodation along the lines you might envision is possible

that would not do violence to the paramount interests set forth above. Nonetheless, as always, I would be happy to discuss this matter with you further and consider alternative ways of satisfying your oversight needs.

Sincerely,

A handwritten signature in black ink, appearing to read "Janet Reno", written in a cursive style.

Janet Reno

cc: Honorable Arlen Specter  
Honorable Robert G. Torricelli  
Honorable Charles E. Grassley

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LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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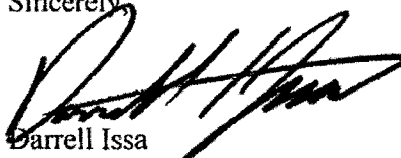
April 11, 2011

Mr. Kenneth E. Melson  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
99 New York Avenue, N.E.  
Washington, DC 20226

Dear Acting Director Melson:

We received the Department's letter dated April 8, 2011, regarding the Committee's investigation of Project Gunrunner and Operation Fast and Furious. Absent a valid assertion of executive privilege over the materials sought, I expect you to produce the things identified in the March 31, 2011, subpoena's schedule by the return date.

Sincerely,

  
Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member  
The Honorable Charles E. Grassley, Ranking Member,  
U.S. Senate, Committee on the Judiciary



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 12, 2011

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

Dear Senator Grassley:

This responds to your letter to Michele Leonhart, Administrator of the Department's Drug Enforcement Administration (DEA), dated March 15, 2011, requesting documents and a briefing about DEA's role in an ongoing law enforcement operation known as Operation Fast and Furious. The Department's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is the lead law enforcement agency for that investigation.

Operation Fast and Furious is an ongoing criminal investigation of an extensive gun-trafficking enterprise. The investigation was approved by the multi-agency Organized Crime and Drug Enforcement Task Force (OCDETF) Program. OCDETF seeks to combine the resources and expertise of member agencies, which include DEA and ATF, to disrupt and dismantle organizations responsible for illegal narcotics trafficking, weapons trafficking, and money laundering. Through the OCDETF Program, the DEA Phoenix Division has been indirectly involved in Operation Fast and Furious. Upon invitation from ATF, DEA participated in the press conference held in Phoenix on January 25, 2011, along with ATF, the Internal Revenue Service, and the United States Attorney's Office.

DEA is not in a position to provide records or a briefing about the continuing investigation at this time, consistent with the Department's long-standing policy regarding the confidentiality of on-going criminal investigations. This policy is based upon our strong interest in protecting the independence and effectiveness of our law enforcement efforts.

Generally speaking, however, when another Department component leads an OCDETF investigation, DEA works cooperatively to support drug-related aspects of the investigation. Such cooperation means that DEA may share investigative expertise, report leads, and provide manpower to assist in an investigative or enforcement operation as requested by the lead investigative agency.



The Honorable Charles E. Grassley  
Page Two

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'RW', is positioned below the word 'Sincerely,'.

Ronald Weich  
Assistant Attorney General

cc: The Honorable Patrick Leahy  
Chairman



United States Department of State

Washington, D.C. 20520

APR 12 2011

Dear Mr. Chairman:

We are in receipt of your letter of March 29, 2011, requesting records pertaining to Assistant Attorney General Breuer's meetings with Ambassador Carlos Pascual in Mexico on Project Gunrunner between June and September, 2010. In that letter, you requested that we provide responsive documents by no later than April 12.

Our review of documents has thus far identified only the attached cable. Although this cable falls outside your requested date range, we are providing it in its entirety. Please be assured we will continue our review of Department of State records for responsive documents.

Please note that the enclosed document is a Department cable that, although unclassified, should be treated as sensitive information, and as such, we strongly request that this document not be publicly released -- in full, in part, or summarized -- without providing the Department a more extensive opportunity to review and, if necessary, redact such sensitive information.

Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

Joseph E. Macmanus  
Acting Assistant Secretary  
Legislative Affairs

Enclosure:

As stated.

The Honorable  
Darrell Issa, Chairman,  
Committee on Oversight and Government Reform,  
House of Representatives.

**From:** Hall, Jessica P (Mexico City)  
**Sent:** 10/19/2010 1:49:15 PM  
**To:** svcSMARTBTSTPOP3  
**Subject:** USG and GOM EXPLORE WAYS TO COMBAT ARMS TRAFFICKING  
**Attachments:** Metadata.dat

UNCLASSIFIED



**MRN:** 10 MEXICO 4906  
**Date/DTG:** Oct 19, 2010 / 191749Z OCT 10  
**From:** AMEMBASSY MEXICO  
**Action:** WASHDC, SECSTATE ROUTINE  
**E.O.:** 13526  
**TAGS:** PGOV, PREL, SNAR, MX  
**Captions:** SENSITIVE, SIPDIS  
**Subject:** USG and GOM EXPLORE WAYS TO COMBAT ARMS TRAFFICKING

1. (SBU) SUMMARY. On October 5, the Embassy and GOM held a bilateral workshop, organized with support from the Department of Justice, devoted to identifying ways to increase cooperation in the fight against arms trafficking and money laundering. On the arms trafficking portion, delegations from State, DOJ, ATF, ICE, DEA, and CBP came from the U.S. to discuss with their Mexican counterparts a range of issues, including: flows of firearms into Mexico; smuggling techniques; border interdictions of firearms and explosives; E-trace implementation; information sharing; and prosecutorial challenges related to firearms trafficking. ATF Director Kenneth Melson and Mexican Attorney General **State/Privacy** signed an E-trace MOU. U.S. Assistant Attorney General Lanny Breuer and Chavez signed an Asset Forfeiture Sharing Agreement. The workshop provided a valuable forum for GOM and USG officials to exchange views on how to impede the flow of guns into Mexico. A summary of the money laundering portion will be reported septel. END SUMMARY.

BOTH SIDES REITERATE URGENCY OF ISSUES

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2. (SBU) In opening remarks to participants, Undersecretary of North America from the Secretariat of Foreign Relations (SRE), **State/Privacy**, and Ambassador Pascual underscored the importance and urgency of dealing with arms trafficking and money laundering. Ventura noted that President Calderon had identified security as the most important

issue in the bilateral relationship. Ventura called on both sides to be "self critical" and engage in a frank discussion. The Ambassador said that both countries took these issues seriously in a spirit of co-responsibility. He noted the robust participation on both sides and cited the draft OIG report on ATF's Gunrunner Project as a sign of the importance the USG places on addressing arms trafficking to Mexico. BR

Methods of Arms Trafficking "Not Well Understood"

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3. (SBU) Deputy Director of Mexico's intelligence services (CISEN), Gustavo Mohar, acknowledged that arms trafficking was not a new phenomenon in the bilateral relationship but asserted that it has taken on greater significance for Mexico's national security. He recommended conducting a study that would focus on four areas that are not well understood: 1) the volume of arms and manner in which they are trafficked; 2) arms trafficking on Mexico's southern border; 3) traffickers of grenades and anti-personnel mines; 4) traffickers of firearm components. Mohar emphasized that the results of such a study would be improved bilateral efforts to keep illegal U.S. weapons out of the hands of Mexican criminals.
  
4. (SBU) ATF Phoenix Field Division Special Agent in Charge William Newell stressed the importance that ATF places on the issue of arms trafficking to Mexico as evidenced by the many ATF agents who spend 100% of their time on issue. Newell emphasized the importance of strategic and technical intelligence to help put distinct pieces of the puzzle together to help build cases and prevent guns from reaching Mexico. ATF Director Melson noted that much of our information about gun flows to Mexico depends on GOM gun trace requests, but that even if we don't know exact numbers, we realize the problem is serious.

Border Interdiction Efforts Yield Modest Results

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5. (SBU) Customs and Border Protection (CBP) Assistant Commissioner Donna Bucella explained that since March 2009 CBP had stepped up southbound inspections and has further coordinated with Mexico Customs under Operation Sovereign Resolve. However, the quantity of weapons intercepted remained few. For example, during part of 2010, CBP seized one firearm for every 12,000 southbound inspections. Bucella attributed these shocking low arms seizure numbers to the impressive adaptability of criminal groups and the need for greater law enforcement intelligence.
  
6. (SBU) Representatives from the Federal Police (SSP) and the Attorney General's Office (PGR) sought clarity on how to share information with U.S. authorities and how to get information from U.S. law enforcement actions. They noted, for example, that the penalty for illegal

possession of a firearm was less than the penalty for illegally introducing a firearm into Mexico, but to prove the latter, PGR needs more information. Both sides agreed that building greater confidence was a necessary first step toward sharing more information.

#### E-Trace Implementation

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7. (SBU) As a result of an MOU between ATF and PGR to be signed later in the day, Newell noted that ATF would begin training classes of 25-30 GOM officials at the end of November on its firearms tracing tool e-Trace. He noted that e-Trace can often indicate when an individual purchased several firearms simultaneously. Newell showcased several emblematic arms trafficking cases that came out of e-Trace. He stressed, however, that e-Trace was just one of many tools and that an e-Trace request accompanied by comprehensive interview results and situational intelligence was far more useful than a simple serial number search.
8. (SBU) PGR noted the importance of timely information on gun buyers to building cases as well as alerting authorities when a mass-purchaser enters Mexico. They noted the value e-Trace had already provided and welcomed the added speed that the five Spanish-language licenses would have in giving PGR more direct access to e-Trace.

#### Prosecutorial Challenges Remain on Both Sides

---

9. (SBU) Deputy Attorney General Jason Weinstein identified several challenges facing federal prosecutors in pursuing arms trafficking cases in the United States. First, there is no requirement that Federal Firearms Licenses (FFLs) report multiple simultaneous rifle (including assault-type weapons) purchases, as in the case with pistols. Second, non-FFL gun sellers at gun shows are not required to keep the same paper trail that can help prosecutors as FFLs are. Third, according to Weinstein, Congressional budget appropriations restrictions on ATF prevent it from inspecting a gun dealer more than once per year. Fourth, there are no statutes directed specifically at firearms trafficking or "straw purchasing" for someone else. Instead, prosecutors are forced to pursue crimes based on "selling a gun without a license" or "making a false statement in acquiring a firearm." Fifth, the penalties for these crimes are relatively light, making it less likely defendants will cooperate.
10. (SBU) Officials from SRE and PGR's organized crime unit agreed with USG officials on the need to have a more formal mechanism by which to share information valuable to prosecutors of arms trafficking cases. They also welcomed our efforts to continue training for prosecutors as part of the Merida Initiative.

Break-Out Session to Define Next Steps  
-----

11. (SBU) Conference participants agreed to an unplanned breakout session the following day in order to lay out specific dates for next steps. Participants agreed that by October 20 ATF will provide a schedule for Spanish e-Trace training. On November 8 the first Spanish e-Trace training class will begin and starting in January, ATF will hold classes every three weeks with roughly 30 students in each class. The participants also laid out specific tasks for officials to focus on in order to increase bilateral cooperation, including improving techniques for inspection and deactivation of grenades, reducing information gaps between weapons buyers and seizures, and better understanding of legal requirements for successful prosecution in Mexico and in the United States.

**Signature:** PASCUAL

---

**Drafted By:** MEXICO:Schiffer, Gregory (Mexico City)  
**Cleared By:** Austin, Hugh (Mexico City)  
DHS:Gilbert, Robert W (Mexico City)  
DEA:Evans, Joseph E (Mexico City)  
ATF: [redacted] ATF (Mexico City)  
DOJ:Snyder, Christopher A (Mexico City)  
ICE:Miles, Jere

**Approved By:** Department of State:Feeley, John D (Mexico City)  
**Released By:** MEXICO:Hall, Jessica P (Mexico City)  
**Info:** NATIONAL SECURITY COUNCIL WASHINGTON DCROUTINE ;  
DEPT OF HOMELAND SECURITY WASHINGTON DCROUTINE ;  
DEPT OF JUSTICE WASHINGTON DCROUTINE ;  
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ROUTINE ; CIA WASHINGTON DCROUTINE ; DEA HQS WASHINGTON DCROUTINE ;  
US CUSTOMS AND BORDER PROTECTION WASHINGTON DCROUTINE ;  
SECDEF WASHINGTON DCROUTINE ; JOINT STAFF WASHINGTON DCROUTINE ;  
ATF INTEL WASHINGTON DCROUTINE ; EPIC EL PASO TXROUTINE ;  
HQ ICE IAO WASHINGTON DCROUTINE ; DIR ONDCP WASHINGTON DCROUTINE ;  
WASHDC, USAIDROUTINE ; ALL US CONSULATES IN MEXICO COLLECTIVEROUTINE

**Attachments:** Metadata.dat

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**Action Post:**  
**Dissemination Rule:** Archive Copy

UNCLASSIFIED



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 13, 2011

The Honorable Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter to Kenneth Melson, Acting Director of the Department's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), dated April 11, 2011, which states that you expect production of the documents today, which is the subpoena's return date, unless there is an assertion of executive privilege. Your subpoena calls for a wide ranging group of documents, and as we have previously advised you, our search for responsive documents is continuing and some of the subpoenaed documents relate to ongoing law enforcement investigations, including our investigation of the murder of a federal law enforcement agent. We trust that you will await the results of our continuing document search and appreciate the risks to our law enforcement efforts that are presented by demands for documents from pending criminal investigations. We are continuing to confer with your staff in an effort to accommodate your oversight needs for information, consistent with our law enforcement responsibilities. Indeed, we made available documents for review prior to today's return date.

Our letter of April 8th offered Committee staff access to law enforcement sensitive documents responsive to your letter, and they have now reviewed the documents we have located to date. As our letter further explained, we are not in a position to disclose non-public information or documents relating to on-going criminal investigations, based upon the Department's long-standing policy relating to such matters. This policy is essential to our law enforcement mission and based on our strong interest in protecting both the independence and effectiveness of our law enforcement efforts. The letter enclosed with our last response, from Attorney General Reno to Senator Hatch, then-Chairman of the Senate Judiciary Committee, provides a fuller statement of the rationale for our policy, as well as its lengthy and nonpartisan history. The letter reads, in part:

Providing *open* criminal investigative files to Congress would undermine public and judicial confidence in the criminal justice process and would be in complete contravention of the Department's policy of declining congressional requests for non-public information about pending investigations. This policy is

neither new nor partisan. It is based on the longstanding belief of top Department officials, both Democrat and Republican alike, that the Department's ability to discharge its responsibilities for the fair administration of justice would be compromised by the disclosure to Congress of open investigative files. . . .

.....

The rationale underlying this policy was further explicated in a 1986 published opinion of the Office of Legal Counsel ("OLC") issued by Charles J. Cooper, OLC's Assistant Attorney General during part of the Reagan Administration. See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76-77 (1986). Mr. Cooper noted in his opinion that providing a congressional committee with confidential information about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases. Id. at 76, citing Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, OLC, Re: Submission of Open CID Investigation Files, at 2 (Dec. 19, 1969) ("[T]he Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."). Moreover, providing open investigative files in response to a congressional subpoena could give rise to a claim, by defense counsel or others, of improper congressional influence over the criminal justice process should it turn out that an indictment was returned in the matter after Congress had obtained access to the files.

Letter from Attorney General Reno to Chairman Hatch, dated May 17, 2000.

In addition to the foregoing concerns, we believe that the disclosure of non-public information about the pending investigations here presents risks to those specific law enforcement efforts and to individuals involved in them. Your subpoena encompasses records that would identify individuals who are assisting in the investigation and whose cooperation may never become public. The risk of their identification – even the knowledge that the information they provide may be disclosed – discourages cooperation by them and others whose assistance is important to the success of our law enforcement efforts. Similarly, records requested by you would identify sources and investigative techniques that have not yet been disclosed. Disclosure of these types of information may present risks to individual safety in the violent environment of firearms trafficking activities. Disclosure also may prematurely inform subjects and targets about our investigation in a manner that permits them to evade and obstruct our prosecutorial efforts. We realize that the Committee does not intend these results, but these are serious risks, and we have already observed effects on these investigations.



The Honorable Darrell Issa  
Page 3

Based upon conversations with Committee staff, we want to explore other options for accommodating your interests in strategic and policy decisions relating to our law enforcement efforts along the Southwest Border. While our search for responsive documents is continuing, we remain ready and willing to confer further with staff about possibilities for meeting your oversight needs, consistent with our law enforcement interests and long-standing policy. We request that you defer the issue of subpoena compliance while we explore these options and continue our search for documents.

Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'R Weich', written in a cursive style.

Ronald Weich  
Assistant Attorney General

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member

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## United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*  
KORAN L. DAVIS, *Republican Chief Counsel and Staff Director*

April 13, 2011

### VIA ELECTRONIC TRANSMISSION

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Attorney General Holder:

At approximately 1:30 p.m. yesterday, my staff learned that the Justice Department was making four documents available at 2:00 pm for Chairman Darrell Issa's staff to review regarding the controversy over ATF's Project Gunrunner, Operation Fast and Furious, and the death of Border Patrol Agent Brian Terry. These documents are among those I requested in February of this year. Yet, the Justice Department refused to make them available for my staff to review. In fact, the Justice Department has produced not one single page of documents in response to my inquiries.

Thus far, I have not requested that Chairman Leahy join in any document requests, consider any subpoenas, or schedule any hearings into this matter in the Senate Judiciary Committee. Any such request would be unnecessary and duplicative of the process on the House side, so long as any documents provided there are also provided to the Senate Judiciary Committee at the same time.

The Department's failure to cooperate with my requests is especially troubling in light of the February 4, 2011, reply to my initial letter. In that reply, the Justice Department took the position that those allegations were "false" and specifically denied "that ATF 'sanctioned' or otherwise knowingly allowed the sale of assault weapons" to straw purchasers. The letter further claimed that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico."

I already provided evidence contradicting that denial in my February 9 and March 3 letters. In addition, attached you will find further documentation undermining the Department's assertion. Specifically, the documents are emails between ATF officials and a Federal Firearms Licensee (FFL) in Arizona. These emails demonstrate that ATF instructed gun dealers to engage in suspicious sales despite the dealers'

concerns. The emails refer to meetings between the FFL and the U.S. Attorney's office to address the concerns being raised by the FFL. ATF supervisor [ATF] wrote on April 13, 2010:

I understand that the frequency with which some individuals under investigation by our office have been purchasing firearms from your business has caused concerns for you. ... However, if it helps put you at ease we (ATF) are continually monitoring these suspects using a variety of investigative techniques which I cannot go into [in] detail.<sup>1</sup>

In response, the gun dealer expresses concern about potential future liability and sought something in writing to address the issue explicitly:

For us, we were hoping to put together something like a letter of understanding to alleviate concerns of some type of recourse against us down the road for selling these items. We just want to make sure we are cooperating with ATF and that we are not viewed as selling to bad guys.<sup>2</sup>

Following this email, the ATF arranged a meeting between the FFL and the U.S. Attorney's office. According to the FFL, the U.S. Attorney's office scheduled a follow-up meeting with the FFL, but asked that the FFL's attorney not be present.<sup>3</sup>

At the meeting on May 13, 2010, the U.S. Attorney's office declined to provide anything in writing but assured the gun dealer in even stronger terms that there were safeguards in place to prevent further distribution of the weapons after being purchased from his business.<sup>4</sup> As we now know, those assurances proved to be untrue. On June 17, 2010, the gun dealer wrote to the ATF to again express concerns after seeing a report on Fox News about firearms and the border:

The segment, if the information was correct, is disturbing to me. When you, [the Assistant U.S. Attorney], 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 want to help ATF with its investigation but not at the risk of agents' safety because I have some very close friends that are U.S. Border Patrol agents in southern AZ[.]<sup>5</sup>

---

<sup>1</sup> Email from ATF Group VII Supervisor [ATF] to Cooperating FFL, Apr. 13, 2010 (Attached).

<sup>2</sup> Email from Cooperating FFL to ATF Group VII Supervisor [ATF] Apr. 13, 2010 (Attached).

<sup>3</sup> Telephone interview with Cooperating FFL, Apr. 5, 2011.

<sup>4</sup> *Id.*

<sup>5</sup> Email from Cooperating FFL to ATF Group VII Supervisor [ATF] Jun. 17, 2010 (Attached).

Incredibly, the FFL sent this email six months before guns from the same ATF operation were found at the scene of Border Patrol Agent Brian Terry's murder. So, not only were the ATF agents who later blew the whistle predicting that this operation would end in tragedy, so were the gun dealers—even as ATF urged them to make the sales.

Furthermore, according to the FFL, there were "one or two" occasions on which his employees actually witnessed and recorded with surveillance cameras an exchange of money between the straw purchaser and another individual on the premises.<sup>6</sup> Despite this actual knowledge of a straw purchase, the dealer said ATF officials wanted him to proceed with the transaction.<sup>7</sup> However, his employees refused to process the sale.<sup>8</sup>

In light of this new evidence, the Justice Department's claim that the ATF never knowingly sanctioned or allowed the sale of assault weapons to straw purchasers is simply not credible. As you know, I have multiple document and information requests pending with various components of the Justice Department. Unfortunately, however, it appears that senior Department officials are not allowing the components to respond fully and directly.

Please provide written answers to the following questions by no later than April 20, 2011:

1. Do you stand by the assertion in the Department's reply that the ATF whistleblower allegations are "false" and specifically that ATF did not sanction or otherwise knowingly allow the sale of assault weapons to straw purchasers? If so, please explain why in light of the mounting evidence to the contrary.
2. Will you commit to providing the Senate Judiciary Committee with documents, or access to documents, simultaneously with the House Committee on Oversight and Government Reform? If not, please explain why not.

---

<sup>6</sup> Telephone interview with Cooperating FFL, Apr. 5, 2011.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

If you have any questions regarding this request, please have your staff contact Jason Foster at (202) 224-5225. Thank you for your prompt attention these important issues.

Sincerely,

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley  
Ranking Member

Attachment

cc: Chairman Patrick Leahy  
U.S. Senate Committee on the Judiciary  
  
Chairman Darrell Issa  
U.S. House Committee on Oversight and Government Reform

**Ongoing ATF investigation**

6 messages

**ATF**

@usdoj.gov>

Tue, Apr 13, 2010 at 9:24 AM

Cc: ATF Agent @usdoj.gov>, ATF Agent @usdoj.gov>, ATF Agent @usdoj.gov>

**ATF**

**ATF**

**ATF**

Tue, Apr 13, 2010 at 1:29 PM

@usdoj.gov> ATF Agent @usdoj.gov> ATF Agent @usdoj.gov> ATF Agent @usdoj.gov>

**ATF**

**ATF**

ATF

[REDACTED]

[REDACTED]

[REDACTED]

Mail Delivery Subsystem <mailer-daemon@googlemail.com>

Tue, Apr 13, 2010 at 1:29 PM

To: [REDACTED]

Delivery to the following recipient failed permanently:

[REDACTED]

Technical details of permanent failure:

Message rejected. Please visit [http://www.google.com/mail/help/bulk\\_mail.html](http://www.google.com/mail/help/bulk_mail.html) to review our Bulk Email Senders Guidelines.

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

**ATF**

ATF

@usdoj.gov>

ATF Agent

@usdoj.gov>

ATF Agent

@usdoj.gov>

@usdoj.gov>

**ATF**

Respectfully,



**ATF**

[REDACTED]

Tue, Apr 13, 2010 at 1:31 PM

**ATF**

message

From: [REDACTED]  
Date: Tue, Apr 13, 2010 at 1:29 PM  
Subject: Re: Ongoing ATF investigation

To: ATF [REDACTED]@usdoj.gov  
Cc: ATF [REDACTED] ATF Agent [REDACTED]@usdoj.gov, ATF Agent [REDACTED]  
<[REDACTED]@usdoj.gov>, ATF Agent [REDACTED]@usdoj.gov, [REDACTED]  
ATF [REDACTED]

[REDACTED]

**ATF**

[REDACTED]@usdoj.gov

Thu, Apr 15, 2010 at 9:23 AM

ATF Agent [REDACTED]@usdoj.gov, ATF Agent [REDACTED]  
[REDACTED]@usdoj.gov, ATF Agent [REDACTED]@usdoj.gov

**ATF**

**ATF**

**ATF**

**ATF**

Group Supervisor

Phoenix Group VII

602- [REDACTED]

---

From: **ATF** [REDACTED]  
 Sent: Tuesday, April 13, 2010 1:30 PM  
 To: **ATF** [REDACTED]  
 Cc: **ATF Agent** [REDACTED]; **ATF Agent** [REDACTED]; **ATF Agent** [REDACTED]; **ATF** [REDACTED]  
 Subject: Re: Ongoing ATF investigation

**ATF**

**ATF**

Thu, Apr 15, 2010 at 10:39 AM

[REDACTED]@usdoj.gov>  
 [REDACTED] ATF Agent [REDACTED]@usdoj.gov>, [REDACTED] ATF Agent  
 [REDACTED]@usdoj.gov>, [REDACTED] ATF Agent [REDACTED]@usdoj.gov>

**ATF**

Thank you for the kind words and the continued support. We will continue handling the transactions as we have in the past until we meet. If there is anything you need in the interim please don't hesitate to ask.

See you soon.

Respectfully,

**ATF**

[REDACTED] 2/14/2011

**Fox News report**

3 messages

**ATF**

@usdoj.gov>

Thu, Jun 17, 2010 at 11:56 AM

I hope this email finds you well.

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. If possible please email me back and share with me any reassurances that you can.

As always thank you for your time and I send this email with all respect and a hart felt concern to do the right thing.

Respectfully,

**ATF**

[Redacted signature block]

[Redacted signature block]

**ATF**

@usdoj.gov>

Fri, Jun 18, 2010 at 2:25 PM

[Redacted signature block]

**ATF**

Thanks for reaching out to me with your concerns. I would be happy to stop by and speak with you. If possible I have [redacted] next Tuesday, June 22, 2010. Any chance you are available that day around 10:00-10:30 am?

Thanks,

**ATF**

From: [redacted] ATF [redacted]  
Sent: Thursday, [redacted] ATF [redacted]  
To: ATF [redacted]  
Subject: Fox News report

[redacted]

**ATF**

Mon, Jun 21, 2010 at 9:34 PM

[redacted]@usdoj.gov>

I am back intown. If you are still free to meet on the 22nd [redacted] around 10 and there for a few hours. Please stop by if you are available, if not let me know when we can reschedule.

Thank you,

**ATF**

Sent from my Verizon Wireless BlackBerry

From: ATF [redacted]@usdoj.gov>  
Date: Fri, 18 Jun 2010 17:25:25 -0400  
To: ATF [redacted]  
Subject: RE: Fox News report

[redacted]

[redacted]

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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951  
<http://www.house.gov/judiciary>

April 14, 2011

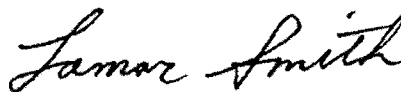
The Honorable Eric Holder, Jr.  
Attorney General  
U.S. Department of Justice  
Washington, DC 20530-0001

Dear Attorney General Holder,

I understand that the Department of Justice has provided the House Committee on Oversight and Government Reform (OGR) access to certain documents related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives's Project Gunrunner pursuant to that Committee's subpoena issued to the Department on April 1, 2011. On March 9, 2011, pursuant to this Committee's oversight responsibilities concerning the Department and its component agencies, I, along with 13 Members of the Judiciary Committee, wrote the Department seeking information about Project Gunrunner. Accordingly, I request that the Department provide the Judiciary Committee access to all documents that have been made available for OGR's review.

Please contact Bart Forsyth at (202) 225-5101 with any questions and to make arrangements for review of the documents.

Sincerely,



Lamar Smith  
Chairman

cc: The Hon. John Conyers, Jr.





U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 19, 2011

The Honorable Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

We are advised that the Committee has issued a subpoena for documents and testimony at a public hearing to a cooperating witness in the trial currently scheduled for June 7, 2011, in United States v. [REDACTED] ATF [REDACTED] LOA), an indicted federal case in Phoenix, Arizona charging twenty defendants with an array of firearms, drug, and money laundering offenses. Neither the individual's cooperation with our ongoing investigation nor his identity as a trial witness has been disclosed in the judicial proceedings to date. We were advised by his attorney that, prior to the issuance of the subpoena, your staff was informed that the individual is a cooperating witness in a pending federal criminal case and that he was concerned that his appearance at a public congressional hearing might jeopardize his physical safety. We understand that your staff indicated that he could submit to an interview rather than appear at a public hearing at this time.

Committee staff's plan to obtain testimony or information from a cooperating witness in an indicted federal criminal case awaiting trial, whether in a public hearing or a nonpublic interview, implicates the serious concerns that the Department has expressed to you in recent weeks. We have previously informed the Committee, in response to your requests for information about these ongoing criminal matters, that any disclosure of non-public information about the pending investigations at issue would present risks to specific law enforcement efforts and to cooperating witnesses. We stated in our letter dated April 13, 2011, that among those risks was the fact that the identification of cooperating witnesses "– even the knowledge that the information they provide may be disclosed – discourages cooperation by them and others whose assistance is important to the success of our law enforcement efforts."

We understand that the Committee wants to get to the bottom of the allegations that as part of the Fast and Furious investigation the ATF knowingly allowed guns to enter Mexico. The Department wants to find out what happened in this regard as well. That is why the Attorney General referred this matter to the Department's Office of the Inspector General, an independent and nonpartisan office that will examine the facts and report its findings. We are not ignoring the allegations that have been raised. Nor are we questioning the Committee's

The Honorable Darrell Issa  
Page Two

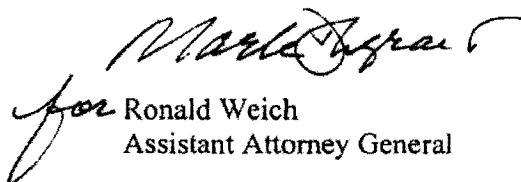
responsibility to conduct oversight of this matter. However, we are concerned about the timing of the Committee's oversight.

The Fast and Furious investigation has produced the indictment of 20 alleged gun traffickers. The Department believes that a successful prosecution is an important part of fighting the violence in Mexico and in the United States that emanates from the Mexican cartels. By conducting oversight of this matter now, rather than at the conclusion of the investigations and prosecutions, the Committee risks compromising this prosecution and ongoing investigations of other alleged firearms traffickers, drug dealers, and money launderers. In addition, congressional oversight relating to the investigation risks jeopardizing the physical safety of our witnesses and discouraging the cooperation of others whose assistance could be vital.

Therefore, we respectfully ask that the Committee refrain from contacting or subpoenaing the witnesses and cooperators involved in either the indicted criminal case or the continuing criminal investigations while these criminal matters remain pending.

The Department appreciates your interest in this matter and shares your desire to resolve these allegations. We will be happy to discuss this important matter with you or your staff further, so that we may explore ways to accomplish this goal without jeopardizing successful prosecutions and investigations in this important area.

Sincerely,

  
for Ronald Weich  
Assistant Attorney General

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member



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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

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April 20, 2011

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

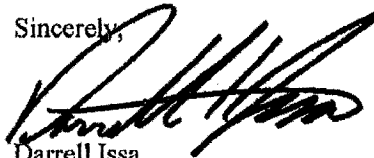
Dear Attorney General Holder:

Late on Friday April 15th, the Department of Justice (DOJ) notified the Committee of its apprehension regarding the safety and security of a witness it described as a "cooperating witness" in a pending federal criminal investigation. According to information provided by the Department, you believe the Committee may attempt to contact this witness as part of our investigation into the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Project Gunrunner and Operation Fast and Furious.

When it comes to the safety of potential witnesses, we are as concerned as you. Please take every measure necessary to ensure the safety of any witness that the Department believes to be in danger. The Department has expertise when it comes to providing security, and we hope you will take this matter seriously. The Department owes all of its cooperating witnesses a duty of care.

Congress cannot abdicate its constitutional responsibility to engage in Executive Branch oversight based on notifications of potential threats to cooperating witnesses. Placing such obstacles to legitimate congressional inquiries could easily be interpreted as an attempt to obstruct our investigation. I trust you will do everything in your power to ensure the safety of all witnesses without interfering with our right to contact them.

Sincerely,



Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Charles E. Grassley, Ranking Minority Member,  
U.S. Senate Committee on the Judiciary