



Department of Justice

STATEMENT OF

**RONALD WEICH
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS
U.S. DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES**

AT A HEARING ENTITLED

“OPERATION FAST AND FURIOUS: RECKLESS DECISIONS, TRAGIC OUTCOMES”

PRESENTED

JUNE 15, 2011

**STATEMENT FOR THE RECORD OF
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Introduction

Good morning, Mr. Chairman and Members of the Committee. I am pleased to be here today to discuss the Department's continuing efforts to respond to the Committee's subpoena concerning ongoing criminal investigations by the Department's Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") and the Federal Bureau of Investigations ("FBI"), and pending criminal prosecutions brought by the Office of the U.S. Attorney for the District of Arizona.

Let me say at the outset that the Department is fully committed to working in good faith with you to accommodate the Committee's legitimate oversight interests in this matter, and I hope that the Committee will similarly continue to engage in good faith with the Department in a manner that recognizes the challenges and important confidentiality interests presented where congressional oversight involves open criminal investigations. It is always difficult when the interests and principled exercise of the prerogatives of the Legislative and Executive branches come into potential conflict. That is why the Constitution envisions, as the Court of Appeals for the D.C. Circuit has recognized, that the branches will engage in a process of accommodation to avoid such conflicts. As Attorney General William French Smith has said, the accommodation process is not, and must not be, simply an exchange of concessions or a test of political strength, but rather it is the obligation of each branch to make a principled effort to acknowledge and, if possible, to meet the legitimate needs of the other branch. It is in this spirit of principled engagement that I come before you today.

As the Committee is aware, many of the subpoenaed documents concern an open criminal investigation conducted by the Department named Operation Fast and Furious, as well as the open investigation and pending prosecution in connection with the shooting death of Customs and Border Protection ("CBP") Agent Brian Terry. Operation Fast and Furious is a criminal investigation—led by U.S. Attorney's Office prosecutors and ATF agents—aimed at dismantling a significant transnational gun-trafficking enterprise and the network of those who support the enterprise's criminal efforts, an investigation which has led already to the indictment of 20 defendants. CBP Agent Terry was shot and killed on December 14, 2010, while on duty near Rio Rico, Arizona. The death of CBP Agent Brian Terry was a tragic loss and our prayers go out to his family, his friends, and his colleagues in law enforcement. The Department, in an effort led by the FBI and the U.S. Attorney's Office, already has indicted at least one of the people involved in his murder, and that suspect remains in federal custody. The investigation

actively continues into others who were involved and the Department has been in frequent contact with members of the Terry family as well as the CBP agents who were at the scene of this tragic murder. We understand and were pleased to hear at the hearing Monday the Committee's commitment not to compromising the investigation of Agent Terry's murder, or the broader gun trafficking investigation, through its oversight activities.

The purpose of my testimony today is to describe the Department's continuing efforts to respond to the Committee's subpoena in a manner that satisfies the Committee's core oversight interests in this matter while also safeguarding the important interests of the Department and the criminal justice system that are implicated by oversight of open criminal investigations.

Accommodating the Needs of Coordinate Branches

Let me start by making clear that the Department recognizes the important role of congressional oversight, including oversight of the Department's activities. The Department appreciates that oversight is a necessary underpinning of the legislative process. Congressional committees, such as this one, need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary either to rectify practical problems in current law or to address problems not covered by current law. We have found that oversight can shed valuable light on the Department's operations and in that way assist our leadership in addressing problems that might not otherwise have been clear.

At the same time, it bears emphasis that attempts to conduct congressional oversight of ongoing criminal investigations are highly unusual. Our policy with respect to all congressional oversight is uniform: it is the policy of the Executive Branch, at the instruction of the President, to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. However, as the Department's Office of Legal Counsel under President Reagan explained in 1986, "the policy of the Executive Branch throughout our Nation's history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances." *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 76 (1986) ("*Congressional Requests*"). This policy, as I will describe in more detail, is vital to the Department's law enforcement mission, as it is designed to fulfill the Department's constitutional and statutory obligations to preserve the independence, integrity, and effectiveness of law enforcement investigations and the criminal justice process more generally. I should add that this policy is nonpartisan: administrations of both parties have relied upon it for decades and it has been supported by top Department officials, both Democrats and Republicans alike.

In response to your subpoena, the Department has been striving to reconcile these dual principles by accommodating the Committee's oversight interests while protecting important law enforcement confidentiality interests. Striking this delicate balance takes time and effort. It is most certainly not the case, as some have suggested, that the Department is refusing to comply with the Committee's subpoena. To the contrary, the Department has been working diligently to satisfy the Committee's core oversight interests, without compromising the important purposes underlying the Department's policy against the disclosure of open criminal investigative files.

This approach to responding to the Committee's subpoena, which attempts to balance and accommodate the respective interests of the coordinate branches, is in no sense shirking the Department's duty to respond to Congress, but is precisely part of the give and take that the Constitution demands, as the Court of Appeals for the District of Columbia Circuit explained decades ago in the seminal oversight case of *United States v. AT&T Co.*, 567 F.2d 121 (D.C. Cir. 1977).

The Department's Accommodation of the Committee's Subpoena

With that basic framework of the accommodation process in mind, I want to speak more directly about how the Department has been working in good faith to accommodate the Committee's oversight interests with respect to the specific open criminal matters that are the subject of the subpoena. The starting point for our approach to accommodation in this matter is an agreement by the Department that the Committee has a reasonable and legitimate oversight interest in information shedding light on the genesis and strategy of the Fast and Furious operation. The Department agrees with the Committee that documents explaining, at a broad level, the inception of the operation may be made available to the Committee. The Department also agrees with the Committee that it has a reasonable and legitimate oversight interest in certain information relating to the basic strategies underlying the operation—namely, the decisionmaking and responsibility for strategic decisions, if any, regarding the timing of arrests in connection with the alleged sale of firearms to individuals suspected of being straw purchasers, the legal basis to seize such firearms, and any efforts to track the firearms to those higher up the chain of command in firearms and drug trafficking enterprises. It is our understanding that these topics lie at the core of the Committee's oversight interests.

I should pause at this point to emphasize that it is a crucial mission of the Department to stop the flow of firearms into Mexico, a task that presents challenges under existing federal gun statutes. We continue to work with our law enforcement counterparts here and in Mexico to stem the flow of weapons, cash, and drugs across our borders and to interdict people whose only goal is to evade law enforcement. The Attorney General accordingly has taken very seriously allegations that firearms sold to suspected straw purchasers by Federal Firearms Licensees were intentionally allowed "to walk" into Mexico. He has referred this matter to the Department's Office of the Inspector General, an independent and nonpartisan office that is examining the facts and will report its findings. The Attorney General also has reiterated to Department law enforcement personnel that they are not knowingly to allow any firearms to be illegally transported into Mexico for any reason. Although the Department is in the process of fully investigating and addressing these matters internally, we recognize that the Committee also has a legitimate oversight interest in understanding the genesis and inception of the Fast and Furious operation, as well as the basic strategies driving that operation. We fully share the Committee's stated interest in getting to the bottom of the allegations.

With that description of the core oversight interests of the Committee in mind, the Department to date has been focused on identifying documents responsive to those needs. Although the breadth of the Committee's subpoena (which includes the entire nationwide program, Project Gunrunner, of which Operation Fast and Furious is just one part), the nature of the relevant record-keeping systems, and the inherent sensitivities relating to open criminal

investigations and pending prosecutions have presented considerable challenges to the Department in responding to the subpoena as promptly as we would hope in the ordinary case, the Department has made and will continue to make a substantial amount of pertinent information available to the Committee. Indeed, given the breadth of the subpoena, we were pleased to hear the Chairman state at Monday's hearing that the Committee would like to hear from the Department regarding our concerns. We would like to continue to work with the Committee to discuss these concerns and to narrow the subpoena as appropriate.

As I have stated, however, the Department has made a good deal of information available to the Committee already notwithstanding the challenges posed by the subpoena. For example, in early May 2011, after an initial document review, the Department provided the Committee with 92 pages of documents responsive to the subpoena, and also made available more than 450 pages of documents for review by Committee staff. At that time, the Department also briefed Committee staff regarding the Fast and Furious operation, and the Department was able to learn more about what particular information the Committee seeks.

Since that briefing, ATF has collected and has been in the process of reviewing the emails of three key officials at ATF's field office in Phoenix. The Department produced last week to the Committee an additional 69 pages of documents and made available for review another 88 pages, a clear sign that the accommodation process is ongoing. Beyond that category of documents, the Department is continuing a broader search for responsive documents at both ATF headquarters and its field offices. Recognizing the Committee's keen interest in this matter, in order to expedite that review, the Department has taken the extraordinary step of retaining an outside contractor, at a substantial cost, to assist us in building a database of the emails of 19 individuals at ATF in whom the Committee has indicated a primary interest. This database includes the emails of the three key ATF officials referenced above. The Department worked with Committee staff regarding search terms that will likely identify documents responsive to the Committee's needs. The outside contractor just recently completed loading the emails into its system and ATF attorneys have now begun the review process. Searches of this magnitude take a lot of time and require diverting officials from performing their core law enforcement duties. Indeed, just the 19 selected user accounts contain over 724,000 e-mails and attachments. I am confident, however, that further information will be made available to the Committee resulting from these efforts as expeditiously as possible. Finally, the Department has also collected thousands of documents flagged as potentially responsive to the subpoena by various officials within ATF. Over two dozen lawyers at ATF and the Department are currently reviewing those documents, and, as a result of this separate review, the Department produced or made available an additional 169 pages of documents to the Committee this week. I expect that such rolling productions will continue.

I should emphasize that, although the accommodation process is still ongoing, the Department's response to the subpoena to date has been significant, especially in view of the unusual nature of—and serious challenges presented by—congressional oversight of open criminal investigations. In total, the Department has physically produced more than 580 pages of documents to the Committee and has made available more than 900 additional pages for review. In addition, the Department made one ATF official available for an interview with Committee staff, and we hope we will be able to schedule more interviews in the upcoming weeks. In

addition, Committee staff has requested—and the Department has agreed to provide—additional briefings on three specific topics of interest to the Committee. The Department, of course, always stands ready to explore other alternatives for satisfying the Committee’s legitimate oversight needs.

I understand that concerns have been raised that many of the documents that the Department has made available to the Committee to date have been made available only for review by Committee staff, without copies of the documents also being provided. Let me explain our practice in that regard. The documents that are made available for review contain law enforcement sensitive material, and the Department needs to take steps to prevent their public disclosure. For that reason, it is necessary and appropriate to make them available only for review by Committee staff at this time. The inadvertent disclosure of these documents at this time could, for the reasons I explain below, compromise the independence, integrity, or effectiveness of open criminal investigations or other law enforcement interests. I should be clear, however, that this process of review is without prejudice to the Committee’s prerogative to request copies of specific documents that it deems particularly pertinent to its oversight interests. If the Committee does so, the Department will promptly and in good faith consider whether it can provide copies of such documents to the Committee, consistent with vital law enforcement interests.

The Department’s Compelling Need to Withhold Core Investigative Documents

I must stress that the Department will not be able to make available to the Committee all documents encompassed by the subpoena. In the course of locating documents responsive to the Committee’s subpoena, we have identified certain confidential, core investigative and prosecutorial documents, the disclosure of which, in the Department’s judgment, would compromise the independence, integrity, or effectiveness of the open criminal investigations and would undermine the Department’s ability to discharge its responsibilities for the fair administration of justice. The Department, consistent with its longstanding policy, is not in a position to make such documents available to the Committee. Seventy years ago, Attorney General Robert H. Jackson, relying on positions taken by 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) (“*Investigative Reports*”).

I hope that an explanation of the reasons for this policy will underscore for the Committee why the policy is so central to the Department’s law enforcement mission. The most basic justification for the policy follows from the Constitution’s careful separation of legislative and executive powers, the purpose of which is to protect individual liberty. As Charles J.

Cooper, the Assistant Attorney General heading the Department's Office of Legal Counsel during the Reagan Administration, explained in 1986, providing a congressional committee with sensitive, Executive Branch information about an ongoing law enforcement investigation would put Congress in an inappropriate position of exercising influence over or pressure on the investigation or possible prosecution. *See Congressional Requests*, 10 Op. O.L.C. at 76. Such congressional influence—and, indeed, the mere public perception of such influence—could significantly damage law enforcement efforts and, in criminal matters, shake public and judicial confidence in the criminal justice system. Congressional oversight of open investigations risks compromising the core principle that decisions about criminal investigations and prosecutions must be made without reference to political considerations.

Equally important, the Department's policy reflects the reality that the disclosure of information regarding open law enforcement investigations risks compromising the effectiveness of such investigations themselves by, among other things, providing a "road map" of the investigation to subjects and targets of the investigation and discouraging the cooperation of existing and potential witnesses, informants, or other cooperators. Disclosure of information regarding open criminal investigations could disclose the identity of individuals assisting in the investigation, as well as the investigative techniques being employed and evidence that has been gathered. Such disclosures could inform subjects and targets about investigations in a manner that permits them to evade and obstruct the Department's investigative and prosecutorial efforts. As Attorney General Jackson warned, disclosure of open investigative files could "seriously prejudice law enforcement," as "[c]ounsel 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." *Investigative Reports*, 40 Op. Att'y Gen. at 46.

These concerns, unfortunately, are not merely theoretical. The Committee's oversight activities in this matter has already risked undermining, albeit unintentionally, the independence, integrity, and effectiveness of the Department's criminal investigations. In connection with its oversight of the Fast and Furious operation, the Committee issued a subpoena for documents and testimony at a public hearing to a cooperating witness who was, at the time, scheduled to be a witness in a trial scheduled for this month involving 20 defendants charged with an array of firearms, drug, and money laundering offenses. At the time of the subpoena, neither the individual's cooperation with the investigation nor his identity as a trial witness had been disclosed in the judicial proceedings. This manner of oversight risks compromising the investigation and prosecution of alleged firearms traffickers, drug dealers, and money launders by deterring current and potential cooperators. One defendant, in declining the opportunity to participate in a proffer session with the United States Attorney's Office, specifically advised the prosecutors through his lawyer that he was declining the opportunity because he feared that any investigative report written about his proffer session would be made public. The Department has grave concerns about this approach to oversight, and I wish respectfully to repeat our request that the Committee refrain from contacting or subpoenaing witnesses and cooperators involved in either the indicted criminal case or continuing criminal investigations while these matters remain pending.

Having set forth the justifications for the Department's policy regarding the disclosure of open criminal investigate files, I should add an important point regarding the doctrine and the practice of executive privilege. I am aware that witnesses at the Committee's hearing on Monday raised a question about why the Department has not requested that the President assert executive privilege in response to the Committee's subpoena. To be sure, executive privilege is available to safeguard open law enforcement investigations. See Letter for the President from Michael B. Mukasey, Attorney General, *Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff* (July 15, 2008) available at <http://www.justice.gov/olc/2008/agletterereclaim07-15-08final.pdf> ("The President may invoke executive privilege to preserve the integrity and independence of criminal investigations and prosecutions."). Consistent with the Constitution's implied mandate that Congress and the Executive Branch work to accommodate the needs of the other in these situations, however, it is the typical practice of the Executive Branch to avail itself of every opportunity to accommodate Congress's needs to the fullest extent possible consistent with the confidentiality interests that are protected by executive privilege before asking the President to invoke the privilege, which is a last resort. This practice of accommodation does not in any way mean that the Department cannot or should not rely upon the interests protected by executive privilege when making judgments about appropriate disclosures during the process of accommodation. Any other approach would rapidly and prematurely escalate most oversight disagreements into constitutional confrontations, countermanding the teaching of the Court of Appeals for the District of Columbia Circuit in *AT&T*. Here the Department's efforts to gather and process potentially responsive documents are not complete, and the accommodation process is ongoing. In that context, it would not be responsible to escalate prospective disagreements into constitutional confrontations without first fully engaging in the process of accommodation.

Finally, let me say a few words about the testimony the Committee received on Monday from Professor Charles Tiefer, Mr. Morton Rosenberg, Mr. Todd Tatelman, and Mr. Louis Fisher. The upshot of that testimony was that Congress has a legitimate oversight interest over the Department, even with respect to ongoing investigations, and that the Department has on certain occasions provided Congress with law enforcement materials. Although I will not engage here in a detailed assessment of these assertions, I wish to make three general observations in response. First, in both their written and oral testimony, the witnesses acknowledged that disagreements between Congress and the Executive Branch should be resolved through a process of accommodation, which often involves balancing the competing interests of each branch and a good deal of give and take. We agree. As I have explained, the Department to date has made substantial efforts at accommodation, but the voluminous and sensitive character of many of the documents has impacted the substantial review process necessary to respond to the subpoena consistent with the Department's constitutional and statutory mandates.

Second, the Department acknowledges as a general matter that Congress's oversight authority with respect to the Department may, in certain circumstances, implicate open matters. That congressional oversight authority, however, must also account for, and in some cases yield to, the legitimate confidentiality interests of the Department and the criminal justice system, especially in circumstances in which oversight relates to open criminal investigations. The D.C. Circuit's decision in *AT&T* drives home the point that our coordinate branches must work to

accommodate the legitimate interests of the other. That process of accommodation, as I have emphasized, is ongoing, making clear that the Department understands that the Committee has some legitimate interests regarding the Department's basic policy and strategy decisions here, even though that oversight may touch upon open investigations.

Lastly, the historical precedents discussed by the witnesses, as I understand them, simply did not involve disclosure by the Department of sensitive information relating to active, ongoing criminal investigations of the type directly sought by the subpoena here. Those precedents therefore supply no reasonable basis for insisting that the Department disavow its longstanding policy—a policy applied across the political administrations of each party—in this matter. *See generally* Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 Notre Dame L. Rev. 1373, 1388-1410 (2002) (discussing the limited utility of the precedents relied upon by in Congressional Research Service reports).

Conclusion

In concluding my testimony, I would like to emphasize again that the Department recognizes that the process of congressional oversight is an important part of our system of government. At the same time, congressional oversight that implicates ongoing criminal investigations is highly unusual, and presents sensitivities not raised in the ordinary case of oversight of the Executive Branch. Despite the unique challenges posed by oversight of open criminal matters, I remain optimistic that the Department, working closely with and in consultation with this Committee, will be able to satisfy the Committee's core oversight interests in this matter, while also safeguarding the independence, integrity, and effectiveness of the Department's ongoing criminal investigations. The Department stands ready to continue to work diligently with the Committee toward satisfying the respective interests of our coordinate branches.

Thank you again for inviting me here today to testify. I would be happy to answer your questions.