

# ALSTON & BIRD LLP

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June 14, 2011

**VIA Email:** [ATF]

[ATF]

Associate Chief Counsel (Field Operations and Information)  
Bureau of Alcohol, Tobacco, Firearms and Explosives  
99 New York Avenue, NE, Room 6E-441  
Washington, DC 20226

Dear [ATF]

Thank you for your letter of today. I find it strange that, hours before his scheduled testimony, this is the first communication that ATF has had with Special Agent [ATF] regarding his purported obligation of confidentiality. Mr. [ATF] spoke publicly about the matters being investigated by the House Committee on Oversight and Government Reform months ago; and the hearing at which Mr. [ATF] will testify has been noticed for almost a week.

Mr. [ATF] will appear before the Committee pursuant to a Congressional subpoena (attached) and intends to respond truthfully to any questions asked. If ATF does not recognize the validity of a subpoena to one of its Special Agents, or wishes to restrict the scope of the subpoena or limit the topics about which Mr. [ATF] is compelled to testify, it seems that ATF should raise that matter with the Committee itself, not with its own employees.

I do not intend to minimize or ignore the fact that there are always complex separation of powers issues whenever Congressional oversight occurs. However, given that Special Agent [ATF] is under Congressional subpoena, and given that it is unlawful to pay the salary of any federal employee who seeks to prevent or limit another federal employee from communicating with Congress,<sup>1</sup> I know that you are not seeking to prevent Special Agent [ATF] from testifying or otherwise attempting to "chill" his testimony.

Therefore, it seem to me that your letter implicates the question of whether, with respect to particular questions, the Executive Branch's right to secrecy and confidentiality

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<sup>1</sup> Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3034, § 714 (2010), as continued by subsequent continuing resolutions.

Barry S. Orlow  
June 14, 2011  
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trumps the Legislative Branch's right to conduct oversight of how ATF spends its appropriated funds. While I'm sure we could both exchange letters resembling law review articles to attempt to determine whether some questions might generate competing constitutional claims of co-equal branches of government, it is not Special Agent's **ATF** responsibility to resolve a question that has vexed constitutional scholars for over two hundred years in the hours remaining before the hearing.

I am therefore copying Chairman Issa on this letter and suggest that you direct any proposed restrictions on Special Agent **ATF** testimony to the Chairman or his staff. Unless some other arrangement is reached between ATF and the Committee, Special Agent **ATF** will comply with the subpoena issued to him and answer the questions he is asked.

Sincerely,



Robert N. Driscoll

RND:dm

Enclosure

cc: Chairman Darrell Issa, Oversight and Government Reform Committee

LEGAL02/32687058v1

**SUBPOENA**

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

Special Agent ATF  
To SERVE: Robert N. Driscoll, Esq.

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: Room 2154, Rayburn House Office Building, Washington, DC 20515

Date: June 15, 2011

Time: 10:00 a.m.

- 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: \_\_\_\_\_

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

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

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 3rd day of June, 2011.

Attest:

Larry P. Haas  
Clerk

[Signature]  
Chairman or Authorized Member

**PROOF OF SERVICE**

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Subpoena for Special Agent ATF  
SERVE: Robert N. Driscoll, Esq.

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Address Alston & Bird LLP, The Atlantic Building, 950 F Street, NW  
Washington, D.C. 20004-1404

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before the Committee on Oversight and Government Reform

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

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Served by (print name) Stephen Castor

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Title Chief Counsel, Investigations

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

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Date \_\_\_\_\_

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

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Address \_\_\_\_\_

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