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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States House of Representatives

COMMITTEE ON THE JUDICIARY

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September 23, 2011

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

Dear Attorney General Holder,

Recent resignations and reassignments at the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and at the United States Attorney's Office that oversaw *Operation Fast and Furious* suggest that there has been, at long last, some accounting for the failed law enforcement operation. I have continuing concerns, however, about the adequacy of these measures and about the appointment of a new acting director who will serve the agency only part-time.

The Department of Justice (Department) recently reassigned the ATF's former Acting Director Kenneth Melson. Dennis Burke, the U.S. Attorney for the District of Arizona, has resigned.

The Department cannot, however, pin this scandal on a few individuals and expect it to be forgotten. *Fast and Furious* was a result of systemic problems at the ATF. Congressional interest will continue until we fully understand who authorized the failed program and how a federal agency could allow such decision-making to occur.

Email exchanges obtained through congressional investigations make clear that the U.S. Attorney's Office in Arizona worked closely with ATF officials. Special agents Bill Newell, Bill McMahon, and David Voth were all intimately involved in a supervisory capacity with the conception, design, and day-to-day operations of *Fast and Furious*. While the lawyers in the U.S. Attorney's Office have been disciplined, the ATF transferred their partners within the bureau to high level positions. The Department insists that these were "lateral transfers," but many observers with knowledge of the ATF characterize them as promotions.

It is similarly difficult to believe that no one at main justice was aware of the long-standing operation. The ATF considered *Fast and Furious* a centerpiece of its enforcement operations. It solicited additional funding from the Department's Organized Crime and Drug

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Enforcement Task Force, worked with the Department to obtain a wire tap, and briefed the Department and even the White House about the operation. The Department's insistence that the ATF never shared the operational details beyond its Phoenix field division is therefore difficult to believe. Resolution of this matter demands a more upfront accounting of the approval process that allowed the strategy to move forward.

In the wake of this scandal, more than ever, the ATF needs strong leadership. Despite this, the Department recently announced that it would appoint Todd Jones as acting director of the ATF and that Mr. Jones would continue to serve in his current role as U.S. Attorney in Minnesota.

Not only is Mr. Jones' role as U.S. Attorney time-intensive, but it also carries legal restrictions on his residency. 28 U.S.C. 545 states that "[e]ach United States attorney shall reside in the district for which he is appointed." Congress has made clear that the Attorney General cannot exempt a U.S. Attorney from these restrictions. Section 213 of the FY2010 Omnibus Appropriations Act stated that:

Notwithstanding any other provision of law, no funds shall be available for the salary, benefits, or expenses of any United States Attorney assigned dual or additional responsibilities by the Attorney General or his designee that exempt that United States Attorney from the residency requirements of 28 U.S.C. 545.<sup>1</sup>

Acting Director Jones will therefore be legally required to maintain his residence in Minnesota for as long as he continues to serve as U.S. Attorney. Minnesota residence requirements likely require that he spend more than half his time in Minnesota.<sup>2</sup> While U.S. Attorneys have served as acting directors of ATF in the past, the currently embattled agency requires more dedicated leadership.

I would be remiss if I did not express my growing concern with the Department's handling of the *Fast and Furious* investigation. This Committee's initial letter regarding the operation was dated March 9. Of the six questions posed, five were unanswered. My follow-up letter, dated May 3, set a deadline of May 20 for response. I still have not received a response.

More troubling, many of the Department's responses have seemed calculated to obscure the facts of *Fast and Furious* from Congress. The Department's initial response to Senator Grassley, dated February 4, 2011, relied on clever wording to obfuscate the Department's conduct and potentially mislead Congress.<sup>3</sup> The Department similarly attempted to distance

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<sup>1</sup> FY2010 Omnibus Appropriations Act, P.L. 111-117 (2009).

<sup>2</sup> Minnesota Administrative Rules, § 8001.0300 Resident and Domicile Defined; Considerations.

<sup>3</sup> The Department's response to Senator Grassley's initial oversight letter has several statements that are likely untrue. In a February 4, 2011 letter to Senator Grassley, the Department wrote:

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.

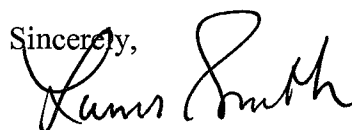
itself from the scandal by arguing that ballistics tests proved that, while two *Fast and Furious* weapons were found at the scene of Agent Brian Terry's murder, neither was used to fire the fatal shot. In fact, the ballistics tests were inconclusive. Further, according to recently released tapes of an ATF agent, it appears that there may have been three *Fast and Furious* guns at the scene, not two.

Following his election in 2008, President Obama promised to usher in a new era of openness and transparency. Despite this promise, the Justice Department has been less than cooperative with this Committee's requests. Moving forward, the Committee expects cooperation in uncovering the facts related to this operation. Please respond to the following questions by October 21, 2011:

1. Is the Department considering additional staff changes at the ATF in response to *Fast and Furious*?
2. How does the Department justify accepting the resignation of the U.S. Attorney while the ATF's managers in charge of *Fast and Furious* appear to have faced no discipline?
3. What role did the Department play in oversight of *Operation Fast and Furious*?
4. Does Todd Jones intend to maintain his residence in Minnesota while serving as acting director of the ATF?
5. Is the Department confident that the ATF can fulfill its mission with a part-time director who is based in Minnesota?
6. Have you issued a waiver of the residency requirement for Todd Jones under 28 U.S.C. § 545? If so, for what period does the waiver extend?<sup>4</sup>

Thank you in advance for your prompt attention.

Sincerely,



Lamar Smith  
Chairman

cc: The Hon. John Conyers, Jr.

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border. Thus, technically, the Department argues that its statement is true. In the same letter to Senator Grassley, the Department wrote, "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico." This statement does not appear to be defensible. According to numerous agents and several ATF documents, ATF made a strategic decision to not interdict weapons.

<sup>4</sup> "Pursuant to an order from the Attorney General or his designee, a United States attorney or an assistant United States attorney may be assigned dual or additional responsibilities that exempt such officer from the residency requirement in this subsection for a specific period as established by the order and subject to renewal." 28 U.S.C. § 545(a).