
From: Burke, Dennis (USAAZ)
To: Weinstein, Jason (CRM)
Sent: 3/17/2011 9:22:32 AM
Subject: Fw: Plainspoken Response
Attachments: Plainspoken Response to Congressmen and NRA Letters of March 9 2011.wpd

From: Cunningham, Patrick (USAAZ)
Sent: Wednesday, March 16, 2011 06:02 PM
To: Burke, Dennis (USAAZ)
Cc: Scheel, Ann (USAAZ); Hernandez, Rachel (USAAZ); Sherwood, Robert (USAAZ) [Contractor]; Morrissey, Mike (USAAZ); Hurley, Emory (USAAZ); Pimsner, David (USAAZ)
Subject: Plainspoken Response

D: Response in this email for BB reading and in a Word Perfect Doc. PJC

Dear Congressmen and NRA,

The investigation known as the "Fast and Furious" did not involve agents watching as guns crossed into Mexico. The allegations that somehow ATF or DOJ attorneys "may have been complicit in the illegal transfer of firearms into Mexico" or "may have facilitated the transfer of guns to violent drug cartels" are false. The mission of the ATF in Fast and Furious was to seize weapons that have been purchased illegally, prevent their transport to Mexico and to dismantle the entire trafficking organization and not merely arrest straw purchasers.

As an aside, the ATF reports by Special Agent John Dodson attached to Senator Grassley's March 3, 2011, letter as Attachment 1 regarding allegations of guns "walking" are not part of the "Fast and Furious" investigation, but a separate investigation run by Special Agent Dodson himself.

"Fast and Furious" remains an ongoing investigation and an ongoing prosecution. The most important release of information about the case is that which is mandated by constitutional law and controlled by statute during the prosecution of this case. The premature and public disclosure of information will prejudice both the lawful prosecution and the charged defendants. Further, your comments and speculation on possible wiretaps is irresponsible, prohibited by 18 U.S.C. 2518, and directly interferes with the orderly prosecution of pending federal cases.

Regarding your allegation that ATF somehow "intentionally allowed straw buyers for criminal organizations to purchase thousands of guns so that ATF could track them across the border," ATF and the USAO did not encourage any FFL to make unlawful sales. FFLs were not instructed to make sales where they knew or had reason to know the firearm would be involved in a crime or where the transfer was otherwise unlawful. No FFL was given any sort of immunity or government authorization for such sale and therefore any such sale made by the FFLs would constitute a violation of the law.

Just as important is the fact that no FFL was told that they could not sell a firearm where the buyer executed the necessary paperwork, passed the background check or presented a valid concealed weapons permit, and where there was nothing to make the FFL know or have reason to know that the firearm was to be used in a crime or that the transfer was otherwise unlawful.

This fact is important because ATF cannot stop a sale or seize a firearm from a person just because they are a "suspect." Your letters and Senator Grassley's letters all decry that suspects linked

to drug cartels were allowed to buy guns, but refuse to acknowledge the reality that there is a difference between a suspect under investigation and a defendant under indictment. Denying firearms to anyone designated a suspect would be unconstitutional and the most spectacular infringement upon the Second Amendment since the Sullivan Law¹, but you appear unable to recognize this.

Suspects are people under investigation but not yet charged with a crime. Every year, people are identified by state, local, federal, and tribal law enforcement agents as "suspects," are investigated, and are cleared as having not committed a crime. Others are simply not charged because there is insufficient evidence to do so. If ATF must deny firearms to suspects, then the simple act of ATF opening a file and starting an investigation curtails this person's right to possess a firearm. Additionally, by your logic, every time ATF obtains a Form 4473 from an FFL as part of an investigation, that act of requesting the Form 4473 should put the FFL on notice that their customer is the suspect on an ATF investigation causing them to know or have reason to know that any subsequent firearm is to be used in a crime. What you appear to require, perfect interdiction of every firearm sold to people who are under investigation, would create a "No Sell List" of people who have not been convicted of a crime, but to whom no FFL should be allowed to sell. Surely you do not support this form of gun control.

Your allegation that somehow the investigation or program caused a "large flow of weapons across the border to Mexico," is ridiculous. Market forces and illegal arms traffickers delivered those weapons to Mexico and ATF never caused those guns to go into Mexico. Further, your letter mentions the murder scene of Border Patrol Officer Brian Terry and two guns found there. We take this opportunity again to point out that at this point in the investigation and despite testing, neither gun is tied to the Officer Terry Shooting. It is an investigative goal to identify the weapon used in the murder of Agent Terry. Furthermore, there was no lawenforcement surveillance going on at the time of the sale and ATF was not notified of the sale until three days after it took place and the weapons were gone.

With regard to the cooperation provided by FFLs, you should understand that it is common for FFLs to call ATF and advise them of out-of-the-ordinary firearms purchases as the purchase is taking place or after it is completed. What makes these purchases out of the ordinary is the number and type of firearms involved; high-capacity, magazine-fed high power rifles, in quantities of five or more. These FFLs are not induced by federal agents to make these sales, just as they are not dissuaded from completing the transfer of ten or twenty firearms to their customer before making the call to ATF. As you know there is nothing in the federal statutes to prohibit an FFL from selling one hundred Kalashnikov type rifles at a time and unless something is said or done by the purchaser to give the FFL reason to believe the transfer is unlawful, many FFLs will make that lawful sale, and some of these will then call ATF.

If you persist in your allegations that large scale sales were made in this case only as a result of federal encouragement, I suggest that you examine closely the Acquisition and Disposition records of large FFLs in the Southwest for the last ten years or so and look at the number of five, ten, and twenty gun sales that were made to a single buyer in one transaction. We can also provide examples of multiple twenty firearm sales made by FFLs who made no effort to notify ATF of the transactions because they were not legally bound to do so, the firearms all being long guns. The hearings that you are suggesting should likely begin with the subpoena of complete FFLs Acquisition and Disposition records so that you can get a clear understanding of what FFLs do and do not do. Certainly their conduct is not against the law but their A&D records will belie your accusations that large scale sales are a recent phenomenon caused by federal encouragement. This office can also provide examples of FFLs who have refused to make such sales.

The NRA in its March 9, 2011 letter asserts that there are sufficient laws on the books to combat gun trafficking, and that the rights of honest Americans should not be affected by law enforcement efforts. If becoming a suspect is all that is required for a person to forfeit their right to possess a firearm you are making each individual agent the arbiter of who can and cannot have a gun. Please remember that becoming a suspect may involve nothing more that buying five identical guns at a time or buying

them in the company of another person who is under investigation. It may involve nothing more than the recovery of a person's gun at a crime scene after they sold it in a private transaction out of the classified adds. ATF has conducted this investigation in a way that targets the bad guys while still preserving due process, property rights, and the Second Amendment. If you want them to take guns away from any person who is called a suspect, you're going to have to pass a new law that lets them do it.

We have reviewed Mr. Cox's position that there should be no multiple reporting of long gun sales and his example of the innocent purchase of two deer rifles by a law abiding sportsman. It is noted that he has never used as an example the innocent purchase of twenty Kalashnikov type rifles from an FFL who decides not to utter a peep about the sale. If it is outrageous for ATF not to interdict large purchases of long guns, it is equally outrageous for the sale to be made without notice to ATF.

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¹ New York gun control statute.