
From: Cunningham, Patrick (USAAZ)
To: Burke, Dennis (USAAZ); Scheel, Ann (USAAZ); Hernandez, Rachel (USAAZ); Morrissey, Mike (USAAZ)
Sent: 3/25/2011 11:57:14 AM
Subject: Final Draft FW: Six Smith Questions and Proposed Answers

Matt: Below are our proposed answers to the six questions. Bracketed material are facts for you to know and use when you think appropriate. Thanks for your hard work on this case. PJC

1. How many weapons have been allowed to pass to Mexico under the program known as "Fast and Furious"?

Answer:

None. Neither the USAO nor ATF ever allowed weapons to pass to Mexico.

[In fact, as a statement of the problem that the investigation was designed to address, the states of Texas, California, Arizona and New Mexico supply 75% of all the firearms illegally trafficked into the Republic of Mexico. See Approved OCDETF Investigation Initiation Form, page 1 of 7, January 26, 2010.]

Purchasing multiple long guns in Arizona is lawful, transferring them to another is lawful and even sale or barter of the guns to another is lawful. In order to seize and forfeit firearms, the United States must prove by clear and convincing evidence that the particular firearm was involved in a crime, or is intended to be used in a crime of violence. (18 USC 924 (d)). In short, the law does not permit agents to take guns away from anyone who buys ten AKs at a time solely because they bought multiple guns. In instances where ATF observed a sale by a FFL to an individual, ATF agents understood that unless the agents observed illegal conduct, agents could not stop a sale. It bears repeating that, at the time of sale by the FFLs, the determination by the FFLs was that a sale was lawful. Seizure of a firearm from a citizen at that point, before investigation has determined criminal behavior by the citizen, would violate the United States Constitution.

Is the program still active?

The investigation continues, 20 defendants face criminal charges and additional defendants may be charged. In addition, the public release of some of the evidence in this case, and other cases, by third parties has been counter-productive to the investigation and at times misleading. Agents are actively developing leads gained in this investigation to identify and prosecute additional targets.

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?

At the outset, it may be helpful to clarify that "Fast and Furious" is not a program, but rather an extensive, ongoing, criminal investigation of a sophisticated gun-trafficking enterprise. It was approved through the Department's Organized Crime and Drug Enforcement Task Force (OCDETF), consistent with our guidelines for large-scale investigations, on January 26, 2010 by the Phoenix Coordinators Group, and on February 4, 2010 by the Regional Coordination Group in Houston, Texas. Two Interim Reports were submitted on August 24, 2010 and February 20, 2011 to the Regional Coordinator.

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?

[Yes, we note that this case involved the approval by the DAG's Office of nine separate wiretap applications including renewals, and the affidavits in support of the applications each laid out the significant facts and problems developed during the surveillance conducted over the length of the investigation, in order to establish necessity for the wires.]

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?

Matt's answer:

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 analytical functions. 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.

6. Does ATF view the "Fast and Furious" program as a success?
Yes, the investigation has yielded the indictment of 20 unlawful gun traffickers so far, and the recovery of 372 weapons in the United States and 195 weapons in Mexico. The investigation continues. Of course we are prepared to prove the allegations in the indictment and look forward to doing so in the upcoming trials in open court.

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From: Axelrod, Matthew (ODAG)
To: [redacted ATF]; Burke, Dennis (USAAZ) ; Cunningham, Patrick (USAAZ) ; Melson, Kenneth E.; Hoover, William J.
Sent: Wed Mar 23 21:22:02 2011
Subject: RE: Smith letter response
Tomorrow sometime would be great. Thanks, Chris.

Matt

From: [redacted ATF]
Sent: Wednesday, March 23, 2011 9:20 PM
To: Axelrod, Matthew (ODAG); Burke, Dennis (USAAZ); Cunningham, Patrick (USAAZ); Melson, Kenneth E. (ATF); Hoover, William J. (ATF)
Subject: Re: Smith letter response

Matt

What is the timeline for a response to you?

[redacted ATF]
[redacted ATF]

From: Axelrod, Matthew (ODAG)
To: Burke, Dennis (USAAZ) ; Cunningham, Patrick (USAAZ) ; Melson, Kenneth E.; Hoover, William J.; [redacted ATF]
A.

Sent: Wed Mar 23 21:17:04 2011

Subject: Smith letter response

All,

Thanks for your patience on the response to Congressman Smith. We in ODAG are still working on the letter. No final decision has been made about what the letter will look like, but depending on what folks here decide, I may need to incorporate information that addresses the Congressman's six specific questions at the end of the letter. I already have a draft paragraph to address Question #5, which I've reprinted below, but I'm not sure of the answers to the remaining ones. Could you please send me the relevant information? Thanks. I've attached the incoming letter for ease of reference.

Matt

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 analytical functions. 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.

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Matthew S. Axelrod

Associate Deputy Attorney General

Office of the Deputy Attorney General

U.S. Department of Justice

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Overall Message:

Fighting criminal activity along the Southwest Border – including the illegal trafficking of guns to Mexico – has been a priority of this Administration and this Department of Justice.

The mission of ATF and other law enforcement agencies is to stop the flow of illegal weapons and drugs across the Border – and it will continue to be.

I'm not going to comment on the specifics of any operation, but I'm aware of the questions that have been raised by ATF agents. We take those seriously, and that's why the Attorney General has asked the Acting Inspector General to get to the bottom of it.

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On allowing guns to walk -

Keep in mind, it is legal to purchase guns in this country. At any time, a law-abiding citizen can walk into a federal firearms licensee, or licensed gun dealer, and purchase one or more firearms without any special requirement from the federal government. That makes gun investigations by their very nature different from investigations into drugs.

As I said, our mission is to stop the illegal trafficking of guns into Mexico. But in any case, good, smart, effective law enforcement requires nuanced and difficult judgments as we try to catch and interdict people whose only goal is to evade law enforcement.

A. On the issue of "sanctioning" or "encouraging" gun sales-it did not happen:

ATF Agents and Lawyers from the US Attorney's Office did not "encourage" any FFL to "keep selling guns to known straw buyers." In the two meetings with FFLs, attorneys and agents advised the FFLs that the Government cannot advise them to sell multiple guns or advise not to sell multiple guns. The FFLs were advised that those decisions were up to FFLs as are all decisions to sell left up to the FFL to evaluate the sale and determine whether it is lawful. In short, the FFLs were advised that the Government cannot advise FFLs to halt a sale that appears lawful and we cannot authorize a sale that appears unlawful. There was no mistake as to the clarity of the Agents' and Attorneys' message.

FFLs need no encouragement to sell guns as that is their actual business, selling guns. By the time that the government met with the owners, they had made many multiple sales and the guns were gone.

Main Justice position on the issue of Sanctioning or encouraging arms sales, the Quote of Assistant Attorney General Ronald Weich in his February 4, 2011 letter:

"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."

B. On the issue of "walking guns" from lawful sales or the timely seizure of guns:

Neither the USAO nor ATF was engaged in an effort "to let guns flow to straw buyers" or to "walk" guns that could have been lawfully seized. No such permission to "walk" a gun ever happened.

Purchasing multiple long guns in Arizona is lawful, transferring them to another is lawful and even sale or barter of the guns to another is lawful unless the United States can prove by clear and convincing evidence that the firearm is intended to be used to commit a crime. (18 USC 924 (d)). In short, the law does not permit agents to take guns away from anyone who buys ten AKs at a time solely because they bought multiple guns. In instances where ATF observed a sale by a FFL to an individual, ATF agents understood that unless the agents observed illegal conduct, agents could not stop a sale. It bears repeating that, at the time of sale by the FFLs, the determination by the FFLs was that a sale was lawful. Seizure of a firearm from a citizen at that point, before investigation has determined criminal behavior by the citizen, would violate the United States Constitution.

While ATF did not know of the sale by the FFL to [ATF] on January 16, 2010, the Federal Firearms Licensee (FFL or Dealer) possessed facts which made it appear to the FFL that the sale was lawful, as [ATF] affirmatively lied to the FFL and claimed that he was the true purchaser of the firearms. As of January 16,

2010, neither the FFL nor ATF had been notified that any previous purchases by [ATF] had resulted in [ATF] purchased guns being found in the possession of the others or at crime scenes. In other words, while subsequent investigation by ATF led to the charge in the indictment that [ATF] purchase of January 16, 2010 was an illegal straw purchase, that fact was only established much later, based on facts not available to the FFL at the time of the January 16, 2010 sale.

- C. When weapons sales were monitored and those guns later turned up in crime scenes, had ATF somehow "authorized" the sales that ATF could have ordered stopped, or did ATF somehow not seize the guns appropriately or in a timely fashion?:

There seems to be some misconception on the part of the press and members of congress that the minute that ATF suspects that someone is a straw purchaser, agents can arrest that person and seize all of their guns. Such a seizure would be unlawful, and ATF may only seize guns when a lawful basis for seizure can be proven under the US Constitution and statutes passed by Congress. (18 USC 924 (d)).

The question seems to connote that ATF can promulgate a "No Sell" list like a "No Fly List", under which FLLs would be prohibited from selling any guns to any person on the list. ATF has no such power and ATF cannot interfere with the operation of commerce and prohibit a gun store from making a lawful sale to lists of suspects based upon nothing more than mere suspicion. A "No Sell" list, based on suspicion but not probable cause that a crime was committed, would be in violation of the United States Constitution.

- D. Regarding the question "In regards to the guns recovered in Rio Rico after the Terry shooting, when they were purchased from [LES] (Jan, 2010) was there surveillance going on in conjunction with Operation Fast and Furious, or did ATF only become aware after the fact and link it to [LES] after the fact?"

Answer: There was no surveillance going on and the ATF was not notified of the sale until three days after it took place and the weapons were gone.

Further, at this point 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.

- E. Regarding the LA Times and CBS News stories, they do not account for the fact, or rebut in any way, that this District is actively prosecuting unlawful weapons and ammunition traffickers.

In just two recent investigations in Phoenix, 51 defendants in 10 indictments have been charged.

In the Tucson Office alone there are currently five (5) pending indictments charging 23 defendants with attempting to export thousands of rounds of ammunition to Mexico and with weapons offenses.

Each week the USAO announces new indictments charging unlawful trafficking in guns and ammunition.

From: Axelrod, Matthew (ODAG) (SMO)

Sent: Wednesday, March 23, 2011 6:17 PM

To: Burke, Dennis (USAAZ); Cunningham, Patrick (USAAZ); Melson, Kenneth E. (ATF); Hoover, William J. (ATF); [ATF]

[ATF]
Subject: Smith letter response

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