

# LEGAL MEMORANDUM

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## Congressional Report on Operation Fast and Furious: The Buck Stops... Well... Somewhere Else

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### Abstract

*Representative Darrell Issa and Senator Charles Grassley recently released Part I of a three-part report titled Fast and Furious: The Anatomy of a Failed Operation. The report contains a compelling narrative regarding this botched law enforcement operation. In particular, it exposes the lack of supervision of some terrible on-the-ground decisions—choices that had deadly consequences. Yet horrendous decision-making is only part of the story. Following the death of U.S. Border Patrol Agent Brian Terry, the implicated individuals decided to circle the wagons and, to prevent the disclosure of embarrassing and possibly criminal information, seemingly began a cover-up that persists to this day. The American public and the victims of Operation Fast and Furious deserve better.*

This paper, in its entirety, can be found at <http://report.heritage.org/lm86>

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Part I of a three-part report titled *Fast and Furious: The Anatomy of a Failed Operation*,<sup>1</sup> recently released by Representative Darrell Issa (R-CA) and Senator Charles Grassley (R-IA), contains a compelling narrative regarding this botched law enforcement operation, especially the lack of serious supervision of some terrible on-the-ground decisions that had deadly consequences. The report is relevant to:

- The ongoing congressional investigation regarding Operation Fast and Furious,
- The growing dispute with the Administration over its refusal to comply with congressional subpoenas,
- The subsequent House vote to hold Attorney General Eric Holder in contempt of Congress, and
- The court action to override President Barack Obama's invocation of executive privilege to shield key material from the public and Congress.

In addition, the report contains critical information that the American public needs in order to

### KEY POINTS

- *Fast and Furious: The Anatomy of a Failed Operation* exposes the lack of serious supervision of a botched law enforcement operation and some on-the-ground decisions that had deadly consequences.
- Despite a lack of cooperation by the Department of Justice, the report lays out the chronology of what happened, what went wrong, and how it went wrong.
- Operation Fast and Furious appears to have been an attempt by the Bureau of Alcohol, Tobacco, Firearms and Explosives, supported by senior DOJ officials, to play with the “big boys” by targeting kingpins within the Sinaloa drug cartel.
- DOJ and ATF supervisors seemed not to understand that it was their job to supervise (and stop) this out-of-control investigation.
- Following the death of U.S. Border Patrol Agent Brian Terry, the implicated individuals, to prevent the disclosure of embarrassing and possibly criminal information, seemingly began a cover-up that persists to this day.

untangle the mess that is Operation Fast and Furious.

Since early 2011, Senator Grassley, Ranking Member of the Senate Judiciary Committee, and Representative Issa, Chairman of the House Committee on Oversight and Government Reform, have been leading the investigation into the Fast and Furious operation and its aftermath. Part I of the report chronicles the operation from the perspective of the United States Attorney's Office in Phoenix and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

Were the consequences not so tragic, the report might have the makings of a good Keystone Cops script. Despite being hamstrung by a lack of cooperation by the Department of Justice (DOJ), however, it does an admirable job of laying out the chronology, supported by copious and detailed documentation, of what happened, what went wrong, and how it went wrong.

### **An Agency with an Inferiority Complex**

Operation Fast and Furious was a botched law enforcement initiative in which over 2,000 high-powered weapons were allowed to “walk” into Mexico in an ill-conceived attempt to develop criminal firearms cases against higher-ups within the vicious Sinaloa drug cartel.<sup>2</sup> While many of these guns remain unrecovered, two of them were linked to the murder of U.S. Border Patrol Agent Brian Terry in December 2010, and others were used to kill or wound approximately 300 Mexicans.

The Bureau of Alcohol, Tobacco, Firearms and Explosives has a checkered history, as evidenced by the fiascos at Ruby Ridge and Waco. While agents with the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) command respect within the law enforcement community, ATF agents often do not. The DEA and the FBI are charged with going after the leaders of drug cartels and other drug trafficking organizations, while ATF is supposed to keep guns out of the hands of bad guys.

At its heart, Operation Fast and Furious appears to have been an attempt by certain individuals within ATF, supported by senior DOJ officials, to play with the “big boys” by targeting kingpins within the Sinaloa drug cartel. In doing so, however, ATF abandoned its most basic mission.

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**ATF ALLOWED A SMALL GROUP OF INDIVIDUALS TO BUY A MASSIVE ARSENAL OF OVER 2,000 HIGH-POWERED WEAPONS (DESPITE THE RETICENCE OF COOPERATING FIREARMS DEALERS TO SELL THEM) THAT ENDED UP IN THE HANDS OF RUTHLESS MEXICAN DRUG THUGS WITH PREDICTABLE RESULTS: MAYHEM AND DEATH.**

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Indeed, far from keeping guns from the bad guys, and in the interests of developing a case that would attract tremendous national media attention,<sup>3</sup> ATF allowed a small

group of individuals to buy a massive arsenal of over 2,000 high-powered weapons (despite the reticence of cooperating firearms dealers to sell them) that ended up in the hands of ruthless Mexican drug thugs with predictable results: mayhem and death.

Compounding this colossal exercise of terrible judgment was the fact that supervisors within DOJ and ATF—all the way up the chain of command to the ATF Director and the Deputy Attorney General's Office—seemed not to understand that it was their job to supervise (and stop) those conducting this out-of-control investigation.

As outlined in Part I of the report, amid a sea of red flags that provided ample notice of what was going on, high-level DOJ and ATF officials talked about an “exit strategy” but ultimately did nothing to implement one. In short, they permitted this reckless and feckless operation to continue for months on end. Then, when things went horribly wrong and U.S. Border Patrol Agent Brian Terry was killed—the scores of Mexicans who had already been killed or wounded with Fast and Furious guns did not seem to arouse sufficient concern—the implicated individuals decided to circle the wagons and, to prevent the disclosure of embarrassing and possibly criminal information, seemingly began a cover-up that persists to this day.

### **How the Operation Was Conceived and Executed**

In October 2009, Deputy Attorney General David Ogden, the

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1. JOINT STAFF REPORT FOR REP. DARRELL ISSA AND SENATOR CHARLES GRASSLEY, 112TH CONG., PART I OF III: FAST AND FURIOUS: THE ANATOMY OF A FAILED OPERATION (July 31, 2012), available at <http://oversight.house.gov/wp-content/uploads/2012/07/7-31-12-FF-Part-I-FINAL-REPORT.pdf> (hereinafter Report).

2. See John G. Malcolm, *Operation Fast and Furious: How a Botched Justice Department Operation Led to a Standoff over Executive Privilege*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 83, July 25, 2012.

3. Report at 56.

second-highest-ranking official at the Department of Justice, issued a “Strategy for Combating the Mexican Cartels” in which federal law enforcement agents were advised that the previous strategy of “merely seizing firearms” purchased by “straw buyers” (individuals who may legally purchase firearms for themselves but are instead purchasing them illegally for someone else) would be replaced with a new strategy of gathering information in hopes of dismantling entire firearms trafficking networks.<sup>4</sup> Pursuant to this plan, ATF agents in Phoenix persuaded local gun dealers to cooperate by supplying ATF with real-time information on the straw purchases, even though the agents knew that the guns were being transported into Mexico, destined for the Sinaloa drug cartel.

Shortly after Operation Fast and Furious began, ATF applied to DOJ to have the case designated as an Organized Crime Drug Enforcement Task Force case, and the request was approved by senior DOJ officials. This designation meant that, in addition to ATF, other federal agents from the FBI and the DEA, as well as agents from Immigration and Customs Enforcement (ICE), the principal investigative arm of the Department of Homeland Security, were assigned to the investigation.

Early in the investigation, ATF had identified Manuel Celis-Acosta as the head of the straw purchasing ring, as well as many of the

individuals working for him who were buying the guns. The DEA and the FBI already had a considerable amount of incriminating information about Celis-Acosta and other suspects that the agencies had obtained pursuant to a state wiretap in a separate drug investigation named Operation Flaco Feo, including conversations in which Celis-Acosta admitted receiving money to purchase weapons in Phoenix that were destined for Juarez, Mexico, via El Paso, Texas. This information was provided to ATF officials, who either chose not to act on it or failed to understand the significance of the connections among these individuals until a year later.<sup>5</sup> During that year, the suspects continued to acquire weapons under ATF supervision and to transport these guns into Mexico, where they were turning up at an alarming number of crime scenes.

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**ATF AGENTS IN PHOENIX PERSUADED LOCAL GUN DEALERS TO COOPERATE BY SUPPLYING ATF WITH REAL-TIME INFORMATION ON THE STRAW PURCHASES, EVEN THOUGH THE AGENTS KNEW THAT THE GUNS WERE BEING TRANSPORTED INTO MEXICO, DESTINED FOR THE SINALOA DRUG CARTEL.**

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As part of its strategy of going after the “big fish,” it was ATF’s goal to identify the individuals to whom Celis-Acosta was providing weapons.

Shockingly, while ATF used federal wiretap intercepts—a resource-intensive and time-consuming investigative tool rarely used in firearms investigations—to accomplish this goal, the DEA and the FBI already knew who some of these individuals were, having obtained this information through another investigation they were conducting that was code named Operation Head Shot. It is clear that ATF was informed that some of the targets of Operation Head Shot had purchased weapons from Celis-Acosta; however, it is unclear whether the ATF agents understood that some of the individuals they were targeting in Fast and Furious were the same people that were being targeted in Head Shot.<sup>6</sup>

Subsequently, two of the targets of both Operation Head Shot and Operation Fast and Furious—Jesus Audel Miramontes-Varela, a noted drug kingpin with a long history of violence, and his brother—became FBI confidential informants, a critical piece of information that was not shared with ATF.<sup>7</sup> The report states that the “Committees have received further information on Operation Head Shot that cannot be made public due to its sensitive nature. Many questions still remain.”<sup>8</sup>

**Lack of Adult Supervision**

An early proponent of the new strategy was Bill Newell, Special Agent in Charge of ATF’s Phoenix Field Division. Newell had a history of using risky and reckless

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4. *Id.* at 19.

5. *Id.* at 34–40.

6. *Id.* at 53–54, 76–78.

7. Richard Serrano, *From a Mexican Kingpin to an FBI Informant*, L.A. TIMES, April 21, 2012, available at <http://articles.latimes.com/2012/apr/21/nation/la-na-fbi-informant-20120422>.

8. Report at 79.

“gunwalking” tactics during prior investigations.<sup>9</sup>

In the ATF organizational hierarchy, Newell reported to Deputy Assistant Director William McMahon, who served as the main link between the Phoenix Field Division and ATF Headquarters.<sup>10</sup> Although McMahon knew that no safeguards had been put in place to prevent the guns from being transported into Mexico, he made no effort to shut down the operation, believing that it was not his job to interfere with Newell’s investigation.<sup>11</sup> McMahon has admitted that he rubber-stamped critical documents that came across his desk without even bothering to read them.<sup>12</sup>

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**AN EARLY PROPONENT OF THE NEW STRATEGY WAS BILL NEWELL, SPECIAL AGENT IN CHARGE OF ATF’S PHOENIX FIELD DIVISION. NEWELL HAD A HISTORY OF USING RISKY AND RECKLESS “GUNWALKING” TACTICS DURING PRIOR INVESTIGATIONS.**

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The U.S. Attorney’s Office endorsed and actively supported Newell’s strategy. For example, on January 5, 2010, ATF agents met with Assistant United States Attorney Emory Hurley to discuss the “Manuel Celis Acosta [*sic*]

Trafficking Investigation.”<sup>13</sup> In his memorandum of the meeting, Hurley acknowledged that ATF had already reviewed a number of “dirty” calls from Celis-Acosta through “a state wire case being run out of the DEA wire room.”

However, rather than arresting Celis-Acosta and his cohorts based on this information, ATF wanted to obtain its own federal wiretap. Although Hurley noted that, “In the past, ATF agents have investigated cases similar to this by confronting the straw purchasers and hoping for an admission that might lead to charges,” he preferred to pursue a broader and far riskier strategy. After noting that straw purchasers are replaceable, he wrote:

ATF believes that there may be pressure from ATF headquarters to immediately contact identifiable straw purchasers just to see if this develops any indictable cases and to stem the flow of guns. Local ATF favors pursuing a wire and surveillance to build a case against the leader of the organization.... I concur with local ATF’s decision to pursue a longer term investigation to target the leader of the conspiracy.<sup>14</sup>

After reviewing this memorandum, Hurley’s boss, U.S. Attorney

Dennis Burke, tersely responded, “Hold out for bigger.”<sup>15</sup>

Even before this meeting, beginning in late 2009 and continuing into 2010, several of the cooperating gun dealers began to express discomfort with making repeated sales to individuals whom they suspected or knew were involved in criminal activity. Such concerns were met with false assurances from ATF agents and prosecutors from the U.S. Attorney’s Office that the weapons were being tracked and posed no danger to the public.

These gun dealers, however, were not the only ones who were concerned. Senior ATF officials (whom Newell dismissed as “hand wringers”)<sup>16</sup> were also concerned about the large number of weapons being purchased by straw buyers. ATF Deputy Director William Hoover, who had reprimanded Newell in the past for employing risky tactics, requested an exit strategy as early as March 2010, but it was never implemented.<sup>17</sup>

On several occasions, ATF went so far as to ask ICE agents who wanted to contact and interview some of the straw buyers to “stand down.”<sup>18</sup> Then, on May 29, 2010, Celis-Acosta was stopped attempting to cross the border from Lukeville, Arizona, into Mexico with ammunition in the vehicle. Celis-Acosta admitted that he was headed to Mexico to start up

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9. *Id.* at 140-146.

10. *Id.* at 161-162.

11. *Id.* at 8-9, 166-167.

12. *Id.* at 170-176.

13. *Id.* at 46-49.

14. Report, Appendix III, Attachment 5, p. 2240, available at <http://oversight.house.gov/wp-content/uploads/2012/07/7-31-12-FF-Part-I-FINAL-Appendix-III.pdf>.

15. *Id.* at Attachment 10, p. 2259.

16. Report at 43-45.

17. *Id.* at 191-194, 198-200.

18. *Id.* at 26-28, 50-51.

a drug trafficking business and also provided detailed information about his relationship with Claudio Jamie “Chendi” Badilla, a large-scale trafficker alleged to be the right-hand man for Joaquin “Chapo” Guzman, head of the Sinaloa Cartel.<sup>19</sup>

Celis-Acosta was allowed to continue his trip to Mexico after promising to cooperate and pledging to call the lead Fast and Furious case agent later.<sup>20</sup> He never honored this pledge but, along with other straw buyers who were working for him, was nevertheless allowed to continue buying more firepower for the cartel, even though a plethora of evidence existed to warrant indicting these individuals. The report also states that Celis-Acosta was detained on two other occasions: on April 2, 2010, for drug possession and on October 9, 2010, for discharging a firearm within the limits of a municipality. Again, he was released without being charged with any offense.<sup>21</sup>

### **It Takes a U.S. Agent’s Death to Stop the Operation**

It was not until after Agent Terry’s murder that Operation Fast and Furious finally came to an end. Thus far, the only people charged have been the straw purchasers, most of whom were known to ATF at the beginning of the case. No charges against drug kingpins have been filed related to Operation Fast and

Furious, and it is hard to understand how they might have been, given this operation’s design and the loose controls that surrounded it.

It should be noted that the congressional report is based on incomplete information because the Department of Justice has withheld tens of thousands of pages of documents (some of which are being withheld pursuant to an invocation of executive privilege by President Obama) and has denied access to several key individuals in Operation Fast and Furious, including Hope MacAllister and Tonya English, two of the case agents, and Assistant United States Attorney Emory Hurley, the lead prosecutor.<sup>22</sup> Another key player, Patrick Cunningham, Criminal Division Chief in the Phoenix U.S. Attorney’s Office, invoked his Fifth Amendment right against self-incrimination in refusing to answer any questions.<sup>23</sup> Nonetheless, the evidence recounted in the report is damning enough.

The report further notes that “[t]he full extent of the responsibility of the U.S. Attorney’s Office for the District of Arizona in directing Operation Fast and Furious has yet to be discovered because the Department of Justice has stonewalled the congressional investigation” and makes it clear that the culpability of DOJ officials will be addressed in Part II.<sup>24</sup>

Although there was plenty of blame to go around, Part I singles out five individuals within ATF. In addition to Newell, McMahon, and Hoover, the report blames the fiasco on Acting ATF Director Kenneth Melson, who, despite cooperating with Congress under difficult circumstances, failed to ensure that ATF headquarters personnel adequately supervised the Phoenix Field Division,<sup>25</sup> and Assistant Director Mark Chait, who reported to Hoover, for failing to put a stop to the operation despite having had many opportunities to do so.<sup>26</sup>

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### **NO CHARGES AGAINST DRUG KINGPINS HAVE BEEN FILED RELATED TO OPERATION FAST AND FURIOUS, AND IT IS HARD TO UNDERSTAND HOW THEY MIGHT HAVE BEEN, GIVEN THIS OPERATION’S DESIGN AND THE LOOSE CONTROLS THAT SURROUNDED IT.**

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Senator Grassley and Chairman Issa state that Part II of this report, which will be released shortly, “will look at the devastating failure of supervision and leadership by officials at Justice Department headquarters, principally within the Office of the Deputy Attorney General, and within the Criminal Division,”<sup>27</sup> although some of the

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19. Richard Serrano, *Gun-tracking Operation Caught Top Suspect, Then Let Him Go*, L.A. TIMES, March 19, 2012, available at <http://articles.latimes.com/2012/mar/19/nation/la-na-fast-furious-20120319>.

20. Report at 100–102.

21. *Id.* at 13, 73–74, 125. Celis-Acosta was not indicted until January 19, 2011. *Id.* at 40.

22. *Id.* at 9.

23. *Id.* at 56.

24. *Id.* at 5, 55.

25. *Id.* at 9.

26. *Id.* at 9, 182–188.

27. *Id.* at 5.

evidence likely to be cited in Part II is referenced in Part I.

Part III supposedly “will address the unprecedented obstruction of the investigation by the highest levels of the Justice Department, including the Attorney General himself,” but will be prepared only “after the Justice Department fulfills its obligations to cooperate with the Congress and produce documents.”<sup>28</sup> In that regard, the House Oversight Committee has commenced legal proceedings to challenge the

President’s claim of executive privilege and to enforce the subpoenas that it issued.

### **Plenty of Explanations but Not Much Candor**

On December 17, 2010, two days after Agent Terry’s death, a Texas ATF supervisor wrote to another ATF agent: “Maybe Phoenix should start preparing their explanation for the way that they conducted their straw purchases there. They should probably hire a media expert

anyway to assist them in explaining the 2000 firearms and the possible connection in the murder of a Border Patrol Agent.”<sup>29</sup> Since then, there have been plenty of explanations, but there has not been much candor. The American public and the victims of Operation Fast and Furious deserve better.

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28. *Id.*

29. *Id.* at 133-134.