The Heritage Foundation
LEADERSHIP FOR AMERICA

LEGAL MEMORANDUM

No. 83 | JULY 25, 2012

Operation Fast and Furious: How a Botched Justice Department Operation Led to a Standoff over Executive Privilege

John G. Malcolm

Abstract
The damage from the ATF's Operation Fast and Furious is staggering: A federal border patrol agent and hundreds of Mexican citizens are dead, killed with guns that were allowed to "walk" into the hands of a powerful drug cartel. While the Department of Justice initially told Congress that its agents did not allow guns to walk into Mexico, the truth came out: Gunwalking was at the heart of Operation Fast and Furious. For his refusal to produce thousands of pages of documents subpoenaed by Congress, Attorney General Eric Holder was held in contempt. Whether President Barack Obama's assertion of executive privilege over some of these documents is proper remains to be seen, but the American people and the victims' families deserve some answers.

This paper, in its entirety, can be found at **http://report.heritage.org/lm83**

Produced by the Center for Legal & Judicial Studies

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Operation Fast and Furious began as an ill-conceived law enforcement initiative. Now the program and its aftermath have become a serious scandal involving hundreds of deaths and, possibly, lying to Congress and obstruction of a congressional investigation.

On June 28, 2012, following an assertion of executive privilege by President Barack Obama to shield further information from disclosure, the U.S. House of Representatives voted to hold Attorney General Eric Holder in contempt of Congress for failing to provide key documents in response to subpoenas issued in connection with its investigation into Operation Fast and Furious. Holder is the first Attorney General in United States history to be held in contempt. How did a Department of Justice (DOJ) firearms trafficking investigation culminate in the Attorney General being held in contempt of Congress, and what does it all mean?

The Birth of Operation Fast and Furious

In October 2009, Ken Melson, then Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), submitted a "weekly report" to Attorney

Talking Points

- A federal agent and hundreds of Mexican citizens were killed with guns that were allowed to "walk" into the hands of a powerful drug cartel as part of ATF's Operation Fast and Furious.
- The Department of Justice told Congress that agents did not knowingly allow guns to walk into Mexico; nearly ten months later, DOJ admitted that this was not true.
- Congress needs to consider whether to amend existing law to ensure that this never happens again.
- Congress also should protect the integrity of its fact-gathering process and investigate the following: whether congressional witnesses testified truthfully and whether agency officials knowingly or recklessly made false statements or attempted to obstruct the inquiry by retaliating against cooperating whistleblowers.
- Avoiding the disclosure of embarrassing information or wrongdoing is not a sufficient reason to withhold information.

General Holder, noting that "several potential traffickers or suspicious purchasers" had been identified through "firearms compliance investigations" at two large gun dealerships. The report states that over the previous year, these suspects had purchased approximately 140 guns, some of which had been recovered in Arizona, Guatemala, and Mexico.[1]

That same month, senior Department of Justice officials in the Office of the Deputy Attorney General[2] (ODAG) met to discuss the mounting violence in Mexico and decided to try a new strategy aimed at eliminating gun-trafficking pipelines: directing federal law enforcement officers along the Southwest border to shift their focus away from seizing firearms from criminals as soon as possible and focus instead on identifying members of trafficking networks. ODAG shared this strategy with the heads of many DOJ components, including ATF.[3]

In November 2009, members of the ATF Phoenix Field Division, led by Special Agent in Charge (SAC) Bill Newell,[4] implemented this new strategy by allowing U.S.-based "straw purchasers" (individuals who are legally entitled to purchase firearms for themselves) associated with the powerful Sinaloa drug cartel to continue to acquire firearms from federally licensed firearms dealers and allowing those guns to "walk" across the border into Mexico (hence the term "gunwalking"). This investigation came to be known as Operation Fast and Furious.

ATF AGENTS HOPED THE WEAPONS COULD BE TRACED AND LINKED TO CARTEL OPERATIVES INCLUDING HIGH-LEVEL FINANCIERS, SUPPLIERS, AND POSSIBLY EVEN KINGPINS. YET, ACCORDING TO WHISTLEBLOWERS, ATF AGENTS NEVER MADE ANY ATTEMPT TO TRACK THE GUNS UNTIL THEY TURNED UP AT CRIME SCENES.

The operation's stated goal was for ATF agents to follow the paths of these guns from straw purchasers through middlemen and into the hierarchy of the Sinaloa cartel. They hoped the weapons could be traced and linked to cartel operatives including high-level financiers, suppliers, and possibly even kingpins. Yet, according to whistleblowers, ATF agents never made any attempt to track the guns until they turned up at crime scenes. There is some dispute as to whether any attempt was made to place GPS tracking devices in the guns; however, it seems clear that any effort to do so was minimal.[5]

On December 3, 2009, Melson sent an e-mail to Assistant Attorney General Lanny Breuer, the head of DOJ's Criminal Division, suggesting that he was interested in taking "a little different approach" by treating evidence from large weapons seizures in Mexico as one big case and inquiring whether Breuer was interested in assigning an attorney from the Criminal Division to work with ATF "to develop multi-division/district cases." Breuer responded the next day that this was a "terrific idea," and a trial attorney from DOJ's Gang Unit was subsequently assigned to work on the matter.[6]

In January 2010, the ATF Phoenix Field Division applied to DOJ for Operation Fast and Furious to be designated as an Organized Crime Drug Enforcement Task Force (OCDETF) case, a request which was approved.[7] Created during the Reagan Administration, the OCDETF program is designed to throw the coordinated muscle of DOJ's component investigative agencies—especially the FBI, Drug Enforcement Administration, and ATF, as well as agents from the Department of Homeland Security—at organized drug trafficking networks. A case gets designated as an OCDETF case only after senior DOJ officials review a detailed application outlining the investigative strategy to be employed and determine that the investigation should be treated as a high priority deserving a commitment of significant resources.

1. *See* Mike Levine, *Fast and Furious Documents: What Do They Show?* Fox News (June 25, 2012), http://www.foxnews.com/politics/2012/06/25/fast-and-furious-documents-what-do-show/.
2. The Deputy Attorney General is the second highest-ranking official at the Department of Justice.
3. H.R. Rep. No. 112-546, at 9, *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt546/pdf/CRPT-112hrpt546.pdf.
4. Richard Serrano, *ATF's Gun Surveillance Program Showed Early Signs of Failure*, L.A. Times, Aug. 11, 2011, *available at* http://articles.latimes.com/2011/aug/11/nation/la-na-atf-guns-20110811.
5. Levine, *supra* note 1; Cristina Rayas Cronkite, *ATF Agents, Terry Family Blast "Gun-Walking" Investigation*, Tucson Sentinel, June 16, 2011, *available at* http://www.tucsonsentinel.com/local/report/061611_atf_congress/atf-agents-terry-family-blast-gun-walking-investigation/.
6. Levine, *supra* note 1.
7. Serrano, *supra* note 4.

Because of the investigation's importance, senior ATF Special Agent John Dodson, who later became a whistleblower, was transferred to Phoenix to help oversee the case.[8]

Starting in March 2010, senior DOJ officials received monthly briefings on the investigation's progress from, among others, Acting ATF Director Kenneth Melson.[9] Moreover, from March 10, 2010, through July 1, 2010, federal prosecutors in Arizona filed seven wiretap applications in federal court, each of which contained significant details about operational tactics and specific information about straw purchasers in Operation Fast and Furious.[10] Before being filed in federal court, each application had been reviewed by DOJ's Office of Enforcement Operations and then reviewed and authorized by one of the high-level deputies working directly under Breuer.

The Operation Goes Very Wrong

In late 2009 or early 2010, some of the agents involved with Operation Fast and Furious began to object to some of the investigative techniques being used, including gunwalking. Some of the cooperating gun store owners also told ATF agents that they were uncomfortable making repeated sales to individuals they suspected or knew were involved in criminal activity. The ATF agents and prosecutors from the U.S. Attorney's office repeatedly assured these store owners that the weapons were being tracked and that their sales not only posed no danger to the public, but also would assist law enforcement in bringing dangerous criminals to justice.[11]

ON DECEMBER 15, 2010, U.S. BORDER PATROL AGENT BRIAN TERRY, A 40-YEAR-OLD FORMER MARINE, WAS KILLED IN A FIREFIGHT WHILE ON PATROL; TWO OF THE GUNS INVOLVED IN THE SHOOTING WERE TRACED TO OPERATION FAST AND FURIOUS.

On October 21, 2010, Sinaloa drug cartel members kidnapped Mario Gonzalez Rodriguez, the brother of former Chihuahua State Attorney General Patricia Gonzalez Rodriguez. On November 5, his tortured body was discovered in a shallow grave. Following a shootout in which Rodriquez's suspected kidnappers were apprehended, Mexican police seized 16 weapons, two of which were traced to Operation Fast and Furious.[12]

On December 15, 2010, U.S. Border Patrol agent Brian Terry, a 40-year-old former Marine, was killed in a firefight while on patrol; two of the guns involved in the shooting were traced to Operation Fast and Furious. Soon after Terry's death, ATF agents approached Senator Charles Grassley (R–IA), Ranking Member of the Senate Committee on the Judiciary, seeking his help to stop the operation.[13]

On January 25, 2011, Arizona U.S. Attorney Dennis Burke announced the indictment of 20 individuals connected with Operation Fast and Furious and provided the first public details of the investigation. DOJ officials had discussed bringing Holder to Phoenix for the press conference; however, in the aftermath of Terry's death, the task of attending the press conference with Burke fell to SAC Newell, who, when asked whether ATF had allowed guns to walk, surprised his colleagues by stating, "Hell, no."[14]

Congress's Initial Investigation and the Alleged Cover-Up

On January 27, 2011, Senator Grassley began his inquiry into Operation Fast and Furious by sending a request for information to Acting Director Melson; Grassley was joined in that effort shortly thereafter by House Oversight and Government Reform Committee Chairman Darrell Issa (R–CA).

On February 4, 2011, in response to Grassley's request, Assistant Attorney General for Legislative Affairs Ronald Weich wrote a letter asserting that any claim "that ATF

8. Memorandum from Darrell Issa to the House Committee on Oversight and Government Reform (May 3, 2012), *available at* http://oversight.house.gov/wp-content/uploads/2012/05/Update-on-Fast-and-Furious-with-attachment-FINAL.pdf.
9. Levine, *supra* note 1.
10. H.R. Rep. No. 112-546.
11. Levine, *supra* note 1; Memorandum from Darrell Issa to the House Committee on Oversight and Government Reform, *supra* note 8.
12. Deroy Murdock, *Mexican Victims of Fast and Furious*, Wash. Post, July 10, 2012, *available at* http://www.washingtontimes.com/news/2012/jul/10/mexican-victims-of-fast-and-furious/; Memorandum from Darrell Issa to the House Committee on Oversight and Government Reform, *supra* note 8.
13. Sari Horwitz, *A Gunrunning Sting Gone Fatally Wrong*, Wash. Post, July 25, 2011, *available at* http://www.washingtonpost.com/investigations/us-anti-gunrunning-effort-turns-fatally-wrong/2011/07/14/gIQAH5d6YI_story.html.
14. Memorandum from Darrell Issa to the House Committee on Oversight and Government Reform, *supra* note 8.

'sanctioned' or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them to Mexico—is false. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico."[15] As the investigation into Operation Fast and Furious has revealed, Weich's statements were not true.

In the ensuing months, Melson met secretly with Grassley and Issa and told them that, rather than getting to the bottom of what went wrong, the priority at DOJ seemed to be protecting senior officials from political fallout.[16] Other whistleblowers described facing a hostile climate at work since their decisions to speak up and suffering reprisals including transfers (which some, including Melson, who was among the transferees, considered demotions) and discovering that deeply personal information unrelated to their jobs had been dug up and provided to reporters.[17]

Shortly after resigning in August 2011, former U.S. Attorney Burke admitted that he leaked a memorandum from ATF Agent Dodson to a reporter in which Dodson requested using some of the tactics he later criticized, a seeming attempt to embarrass and retaliate against Dodson.[18] One witness stated that he overheard chief ATF spokesman Scot Thomasson saying, "We need to get whatever dirt we can on these guys [the whistleblowers] and take them down."[19]

IT WAS NOT UNTIL NOVEMBER 8, 2011—NINE MONTHS AFTER THE FALSE DOJ STATEMENTS WERE FIRST MADE—THAT HOLDER ADMITTED DURING TESTIMONY THAT, IN VIOLATION OF DOJ POLICY, GUNWALKING HAD IN FACT BEEN USED IN OPERATION FAST AND FURIOUS.

It was not until November 8, 2011—nine months after the false DOJ statements were first made—that Holder admitted during testimony that, in violation of DOJ policy, gunwalking had in fact been used in Operation Fast and Furious. Furthermore, it was not until December 2, 2011, that DOJ sent a letter to Congress rescinding its February 4 written denial and acknowledging that Operation Fast and Furious was "fundamentally flawed."

In total, over 2,000 weapons—mostly AK-47s, which are civilian versions of military assault rifles—were allowed to "walk" into Mexico as part of Operation Fast and Furious.[20] Mexican Attorney General Marisela Morales told the *Los Angeles Times* that she first learned about Operation Fast and Furious from news accounts. "In no way would we have allowed it," she said, "because it is an attack on the safety of Mexicans."[21] Former Mexican Attorney General Victor Humberto Benítez Treviño estimates that approximately 300 Mexicans were killed or wounded by Operation Fast and Furious guns, which have been found in the vicinity of at least 200 crime scenes.[22]

Even ATF's Acting Attaché in Mexico, Carlos Canino, was kept in the dark about this operation. Testifying in July 2011 before the House Committee on Oversight and Government Reform, Canino noted that "U.S. law enforcement and our Mexican partners will be recovering these guns for a long time to come as they continue to turn up at crime scenes in Mexico and the United States." Canino also stated that he was infuriated "that people—including my law enforcement, diplomatic and military colleagues—may be killed or injured with these weapons" and noted that the "Sinaloa cartel may have received almost as many guns [as] are needed to arm

15. Letter from Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, to Charles Grassley, Ranking Minority Member of the Senate Committee on the Judiciary (February 4, 2011), *available at* http://www.grassley.senate.gov/about/upload/Judiciary-ATF-02-04-11-letter-from-DOJ-deny-allegations.pdf.
16. Memorandum from Darrell Issa to the House Committee on Oversight and Government Reform, *supra* note 8.
17. *Id.*
18. Ray Stern, *Dennis Burke, Former Arizona U.S. Attorney, Accused of Retaliating Against ATF Agent Who Blew Whistle on Fast and Furious Scandal*, Phoenix New Times Blog (Nov. 10, 2011), http://blogs.phoenixnewtimes.com/valleyfever/2011/11/dennis_burke_former_arizona_us.php.
19. Matthew Boyle, *Issa, Grassley Release Details About Fast and Furious Whistleblower Retaliation, Cover-up*, Daily Caller (June 29, 2012), http://dailycaller.com/2012/06/29/issa-grassley-release-details-about-fast-and-furious-whistleblower-retaliation-cover-up/.
20. Horwitz, *supra* note 13.
21. Ken Ellingwood et al., *Mexico Still Waiting for Answers on Fast and Furious Gun Program*, L.A. Times, Sept. 19, 2011, *available at* http://articles.latimes.com/2011/sep/19/world/la-fg-mexico-fast-furious-20110920.
22. Murdock, *supra* note 12.

the entire [U.S. Army's 75th Ranger] regiment."[23]

THE "SINALOA CARTEL MAY HAVE RECEIVED ALMOST AS MANY GUNS [AS] ARE NEEDED TO ARM THE ENTIRE [U.S. ARMY'S 75TH RANGER] REGIMENT."

As of July 2011, 227 Operation Fast and Furious guns had been recovered in Mexico and 363 in America; the rest remain unaccounted for.[24] Remarkably, it also seems that two of the targets of Operation Fast and Furious are probably unindictable, having been paid informants of, and designated as national security assets by, the FBI—information that should have been shared within the task force overseeing the investigation.[25]

In January 2012, Patrick Cunningham, Chief of the Criminal Division in the Arizona U.S. Attorney's Office and the individual who was allegedly tasked with investigating ATF whistleblower allegations, resigned and invoked his Fifth Amendment right against self-incrimination.[26] Several senior DOJ officials who attended Operation Fast and Furious briefings now claim that they cannot recall key details about what they knew and, in some instances, what they did.[27]

Congress's Interest in Getting Answers

Given the multitude of questions surrounding Operation Fast and Furious, it makes sense that both Congress and the American public are demanding answers. In furtherance of its legislative functions, Congress's inquiry might prompt it, among other things, to:

- Reassess whether funds that it appropriated to DOJ and ATF were well spent or whether additional restrictions should be placed on such funds in the future;
- Examine whether members of the executive branch violated existing law with regard to the conception and implementation of Operation Fast and Furious (for a variety of reasons, including possible grounds for impeachment);
- Assess whether the conduct uncovered might warrant additions or modifications to existing federal law, including whether reconsideration of the statutory provisions governing the approval of federal wiretap applications may be necessary;
- Assess whether ATF, as currently structured, has the ability to carry out its statutory mission and whether DOJ has the ability to supervise it; and
- Assess how and why the interagency task force failed in terms of sharing critical information and whether such failures warrant a statutory "fix."

Congress also has an inherent right to protect the integrity of its own legislative fact-gathering process and therefore has the right, if not the duty, to investigate whether witnesses perjured themselves during congressional hearings. Congress also has an obligation to consider whether executive branch officials knowingly or recklessly made false statements to Congress, such as those contained in DOJ's letter of February 4, 2011, or attempted to obstruct a congressional inquiry by retaliating against cooperating whistleblowers.

In connection with its investigation, the House Oversight and Government Reform Committee has issued subpoenas to DOJ requesting documents in 22 categories.[28] To date, DOJ has not produced any documents in 12 of those categories; nor has it said that it does not have any responsive documents in its possession in those categories. Many of the documents withheld relate to such fundamental questions as who at DOJ knew (or should have known) about the tactics being used in Operation Fast and Furious; how DOJ came to its ultimate conclusion that Operation Fast and Furious was

23. Philip Klein, *ATF Official in Mexico "Infuriated" by Operation Fast and Furious*, San Francisco Examiner, July 26, 2011, *available at* http://www.sfexaminer.com/blogs/beltway-confidential/2011/07/atf-official-mexico-infuriated-operation-fast-and-furious.
24. Horwitz, *supra* note 13.
25. Memorandum from Darrell Issa to the House Committee on Oversight and Government Reform, *supra* note 8.
26. Elizabeth Murphy, *Arizona U.S. Attorney Office Criminal Chief Resigns Amid Fast and Furious Probe*, Main Justice (Jan. 31, 2012), http://www.mainjustice.com/2012/01/31/arizona-u-s-attorney-office-criminal-chief-resigns-amid-fast-and-furious-probe/; H.R. Rep. No. 112-546.
27. Memorandum from Darrell Issa to the House Committee on Oversight and Government Reform, *supra* note 8.
28. H.R. Rep. No. 112-546.

"fundamentally flawed" and what it has done about it; who authorized or was involved in the retaliatory efforts against whistleblowers; and how and where the information exchange among members of the task force broke down.

According to Chairman Issa, DOJ has identified approximately 140,000 pages of responsive documents but has turned over only 7,600 pages,[29] a small fraction of what it produced in connection with prior investigations. Some of the documents that DOJ has produced have been so heavily redacted as to be unintelligible or unhelpful.

In an attempt to partially resolve matters before a contempt vote against Attorney General Holder, Chairman Issa informed him that if DOJ at least produced the responsive documents in its possession that were created after February 4, 2011—documents related to DOJ's response to Congress and to the whistleblower allegations—the chairman would cancel the committee's scheduled meeting on June 20 to vote on a resolution holding Holder in contempt. However, Chairman Issa never abandoned his request that DOJ provide the rest of the responsive documents.

The President Invokes Executive Privilege

In a bit of a bait and switch, Attorney General Holder informed the President that the committee had limited its request to the post–February 4 documents and asked the President, in a letter dated June 19, to invoke executive privilege with respect to those documents, which Holder claims "were created after the investigative tactics at issue in [Operation Fast and Furious] had terminated and in the course of the Department's deliberative process concerning how to respond to congressional and related media inquiries into that operation."[30] The next day, Deputy Attorney General James Cole informed Chairman Issa in a letter that "the President has asserted executive privilege over the relevant post-February 4, 2011, documents."[31]

DOJ HAS IDENTIFIED APPROXIMATELY 140,000 PAGES OF RESPONSIVE DOCUMENTS BUT HAS TURNED OVER ONLY 7,600 PAGES, A SMALL FRACTION OF WHAT IT PRODUCED IN CONNECTION WITH PRIOR INVESTIGATIONS.

Documents for Which No Claim of Executive Privilege Has Been Asserted. The House resolution finding Attorney General Eric Holder in contempt of Congress cited his refusal to turn over subpoenaed documents, which would include those that were not the subject of any claim of privilege and those that Congress believes were being withheld pursuant to an improper claim of privilege. Thus, there can be no reasonable claim that the House has abandoned its request for any of the estimated 132,000 pages of outstanding documents.

Nevertheless, Chairman Issa should reiterate his committee's insistence that DOJ turn over the documents that are responsive to its subpoenas and for which the President has not invoked executive privilege. Whether the President would assert executive privilege with respect to these documents, or a portion of them, is unknown at this point.

What is necessary to establish the Administration's good faith, however, is some reasonable and prompt response to the outstanding requests. It is not at all unusual when congressional requests are initiated for the Administration to probe the requester's purposes and determine whether there is some way to satisfy the congressional purpose short of full compliance. In such discussions and negotiations between the political branches, there is a continuum between good-faith cooperation or compromise and bad-faith refusal to accommodate the legitimate needs of the other branch.

The Supreme Court has on several occasions recognized Congress's broad power to look into executive branch actions as auxiliary to its legislative function. As the Court said in *McGrain v. Daugherty* (1926):

> [T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.... A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and

29. Letter from Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, to President Barack Obama (June 25, 2012), *available at* http://images.politico.com/global/2012/06/issaobamaltr.pdf.
30. Letter from Eric H. Holder, Jr., Attorney General, to President Barack Obama (June 19, 2012), *available at* http://www.foxnews.com/politics/interactive/2012/06/20/attorney-general-holder-letter-to-president-obama-requesting-executive/.
31. Letter from James Cole, Deputy Attorney General, to Darrell Issa, Chairman of the House Committee on Oversight and Government Reform (June 20, 2012), *available at* http://graphics8.nytimes.com/packages/pdf/national/20120621-holder/062011Letter.pdf.

> where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.[32]

Yet Congress has no power to micromanage the President's execution of the laws, and it must also respect the President's chain of command and need for frank and confidential advice.

The general principle that flows from the separation of powers embodied in the Constitution is that each branch owes a duty of comity to the legitimate needs of the other branches. Neither the executive branch nor the legislative branch should automatically prevail in disputes over information requests, but certain corollaries flow from the general principle. For example, Congress should accept different types of information than was requested if such information reasonably satisfies its legitimate legislative functions, especially if the executive has a good reason to withhold the remaining documents or witnesses. On the other hand, when a congressional committee has established its legitimate legislative purpose, a purposeful delay by the executive to respond or a blanket refusal to comply without sufficient accommodations or other information is generally not justified.

As between Congress and the executive branch, various other factors suggest the presence or absence of good-faith negotiations or accommodations. The relative importance or needs of each branch must be taken into account. For instance, a minor concern from the executive branch should yield to a substantial legislative need, and vice versa. Moreover, a simple desire to prevent embarrassment or shield wrongdoing is never a sufficient justification to withhold information when Congress has a legitimate legislative need, and blanket refusals to comply with information requests without adequate detail to evaluate the reason for the refusal suggest bad faith.

THE GENERAL PRINCIPLE THAT FLOWS FROM THE SEPARATION OF POWERS EMBODIED IN THE CONSTITUTION IS THAT EACH BRANCH OWES A DUTY OF COMITY TO THE LEGITIMATE NEEDS OF THE OTHER BRANCHES.

Putting aside the detailed claims and counterclaims of each branch regarding each information request in Congress's investigation of the Operation Fast and Furious scandal, it is incumbent on the Administration to respond with more particularity with respect to all of the outstanding documents and information requests. It is clear that Congress does have several important legislative purposes for its investigation, and the particular facts of the Operation Fast and Furious scandal (both in its operation and in the misstatements to Congress) provide strong justification for Congress to secure the information. Either the executive branch should produce relevant documents or the President should invoke executive privilege as to the portions of them that he can legitimately withhold.

Documents for Which a Claim of Executive Privilege Has Been Asserted. Although the President has now asserted executive privilege with respect to documents created after February 4, DOJ has not produced a privilege log delineating with particularity why the allegedly privileged documents are being withheld. Such a document could serve as a basis for negotiation and compromise with the committee and, failing that, would provide the committee with sufficient information to test the validity of the privilege claim in a court of law.

Historically, challenges to executive privilege rarely reach the courts. The vast majority of disputes over access to information have been resolved through political negotiations. While reviewing courts have expressed reluctance to balance claims of executive privilege against a congressional demand for information, they have acknowledged that they will do so if the political branches have tried in good faith but have failed to reach an accommodation. The President has denied having personally authorized Operation Fast and Furious, but that does not mean that his invocation of executive privilege with respect to the documents that are being withheld is necessarily improper, because there are several species of executive privilege.

Starting with George Washington, Presidents have occasionally asserted a right to preserve the confidentiality of documents and other information in their possession when faced with legislative demands for such records; however, it was not until *United States v. Nixon* (1974), that the Supreme Court determined that there was a constitutional basis for an assertion of executive privilege grounded in "the supremacy of each branch within its own assigned area of constitutional duties" and in

32. 273 U.S. 135, 168 (1927).

the separation of powers. The *Nixon* Court recognized the importance of the President's receiving candid advice and that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with the concern for appearances and for their own interests to the detriment of the decisionmaking process."[33]

Although a President's communications with his close advisers were considered "presumptively privileged," the Court rejected the contention that the privilege was absolute and unreviewable. In that case, the Court held that President Nixon's assertion of a generalized need for confidentiality could not be used to shield wrongdoing and had to yield to the Watergate Special Prosecutor's need for audiotapes of Oval Office conversations that the President had with his colleagues in connection with criminal charges that had been brought against members of the President's Administration.

The general principle that executive privilege cannot be used to shield wrongdoing may well be at issue in the Operation Fast and Furious investigation, especially since misstatements were made to Congress and not corrected for many months. In short, Congress has a right to probe the President's rather broad and imprecise claim of privilege.

Cases after the Watergate era have distinguished between the "presidential communications privilege" and the "deliberative process privilege." Both are forms of executive privilege designed to protect the confidentiality of executive branch decision making and must be asserted by the President, but they are not equal in their breadth or strength.

The presidential communications privilege, which requires a high showing of need by Congress or the courts to overcome, applies only to direct decision making by the President and covers communications made or received by the President or by presidential advisers in the course of preparing advice for the President—even if those communications are not made directly to him. Recognizing the danger to open government if the privilege were to be extended too broadly, the D.C. Circuit in *In re Sealed Case (Espy*) stated:

> Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies.... Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers.[34]

The privilege has been limited largely to those White House staff members in "operational proximity" to direct presidential decision making. Although difficult to discern, it does not appear as though President Obama is relying upon this privilege with respect to the Operation Fast and Furious documents, or at least not many of them.

The deliberative process privilege, on the other hand, is rooted in the common law and applies to decision making by executive officials other than the President. This more limited privilege, which requires less of a showing of need to overcome, allows the government to withhold "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[35] It is this privilege upon which the President appears to be relying with respect to the Operation Fast and Furious documents.

THE GENERAL PRINCIPLE THAT EXECUTIVE PRIVILEGE CANNOT BE USED TO SHIELD WRONGDOING MAY WELL BE AT ISSUE IN THE OPERATION FAST AND FURIOUS INVESTIGATION, ESPECIALLY SINCE MISSTATEMENTS WERE MADE TO CONGRESS AND NOT CORRECTED FOR MANY MONTHS.

In *Espy,* the D.C. Circuit recognized that, with respect to both privileges:

> [C]ourts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence. But this balancing is more ad hoc in the context of the deliberative process privilege, and includes consideration of additional factors such as whether the government is a party to the litigation. Moreover, the privilege disappears

33. United States v. Nixon, 418 U.S. 683, 705 (1974).

34. 121 F.3d 729 (D.C. Cir. 1997).

35. *Id*. at 737.

> altogether when there is any reason to believe government misconduct occurred. On the other hand, a party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials.[36]

"The deliberative process privilege," the *Espy* court further stated, "does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations."[37] Moreover, "where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government."[38]

In 2007, the House Committee on the Judiciary initiated an investigation after DOJ requested and received the resignations of nine U.S. Attorneys. The White House offered to produce communications between presidential advisers and DOJ, but the committee insisted on the production of purely internal White House communications, which strike closer to the core of the President's express constitutional powers and are entitled to greater deference than the documents being sought in the Operation Fast and Furious investigation. When the White House refused to comply, the House voted to hold White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolton in contempt.[39]

That case involved a congressional investigation into whether the President acted properly in asking for the resignations of individuals who were politically appointed executive branch employees pursuant to a power vested exclusively in the President under the Appointments Clause in the Constitution. The current investigation, on the other hand, involves the death of a federal agent, the deaths of scores of Mexican citizens, over 2,000 weapons "walking" into Mexico without the Mexican government's knowledge, and potential retaliation against individuals assisting Congress's investigation—all clearly matters of congressional concern.

In the investigation surrounding the dismissal of the U.S. Attorneys, the President and Congress eventually reached an acceptable compromise in which the committee was permitted to review all of the subpoenaed documents with "the exception of 4 pages of particularly sensitive privileged material" that were described to committee staff.[40] The President waived executive privilege with respect to the remainder of the documents.

Where There Is Smoke...

Given the significance of Congress's inquiry, the President should waive the privilege unless the communications in question were directly to, or came directly from, him. Avoiding the disclosure of factual and potentially embarrassing information or wrongdoing is not a sufficient reason to withhold information from Congress.

Whether this is what the Administration is attempting to do or whether the President's invocation of executive privilege is proper with respect to the Operation Fast and Furious documents cannot be determined because of the Administration's failure to provide detailed and specific information about the documents. Usually, however, where there's smoke there's fire, and the American people and the families of Brian Terry and the other victims of Operation Fast and Furious deserve answers.

*—**John G. Malcolm** is a Senior Legal Fellow in the Center for Legal & Judicial Studies at The Heritage Foundation.*

36. *Id.* at 746.
37. *Id.* at 737.
38. *Id.* at 738.
39. For a chronology of the events related to this event, see Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008), *available at* http://www.ogc.house.gov/Link%202.pdf.
40. Agreement Concerning Accommodation Between the House Judiciary Committee and the Bush Administration, *available at* http://judiciary.house.gov/hearings/pdf/Agreement090304.pdf. It was also agreed that Ms. Miers and White House Deputy Chief of Staff Karl Rove would be interviewed about the matter but that counsel would direct them not to respond when the questions related to communications to or from the President.