

A Review of ATF's Operation Fast and Furious and Related Matters



(REDACTED)

Office of the Inspector General
Oversight and Review Division
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(Some previously redacted material unredacted)

NOTE

This report was originally issued in September 2012. Redactions in the report were based on the Department's identification of, among other things, Title III electronic surveillance, or federal wiretap, information. At the Inspector General's request, the Department agreed to seek court orders authorizing the unsealing of portions of the redacted wiretap information pertaining to Operations Wide Receiver and Fast and Furious that did not reveal the content of intercepted communications or law enforcement sensitive information, and that did not otherwise affect individual privacy interests (See footnote 1 at page 1). The Department filed such motions in October 2012, and the motions were granted by the United States District Court for the District of Arizona that same month. The OIG is re-issuing its report, A Review of ATF's Operation Fast and Furious and Related Matters, with wiretap information that can now be made public. The following pages in the re-issued report contain material, highlighted in yellow, that was previously redacted:

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CHAPTER ONE INTRODUCTION

On October 31, 2009, special agents working in the Phoenix office of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) received information from a local gun store about the recent purchases of multiple AK-47 style rifles by four individuals. Agents began investigating the purchases and soon came to believe that the men were so-called “straw purchasers” involved in a large-scale gun trafficking organization responsible for buying guns for transport to violent Mexican drug trafficking organizations. This investigation was later named “Operation Fast and Furious.”¹

By the time ATF and the U.S. Attorney’s Office for the District of Arizona (U.S. Attorney’s Office) publicly announced the indictment in the case on January 25, 2011, agents had identified more than 40 subjects believed to be connected to a trafficking conspiracy responsible for purchasing over 2,000 firearms for approximately \$1.5 million in cash. The vast majority of the firearms purchased by Operation Fast and Furious subjects were AK-47 style rifles and FN Herstal 5.7 caliber pistols. During the course of the investigation, ATF agents seized only about 100 of the firearms purchased, the result of a strategy jointly pursued by ATF and the U.S. Attorney’s Office that deferred taking overt enforcement action against the individual straw purchasers while seeking to build a case against the leaders of the organization.

Numerous firearms bought by straw purchasers were later recovered by law enforcement officials at crime scenes in Mexico and the United States. One such recovery occurred in connection with the tragic shooting death of a federal law enforcement agent, U.S. Customs and Border Protection Agent Brian Terry. On January 16, 2010, one of the straw purchasers, Jaime Avila, purchased three AK-47 style rifles from a Phoenix-area gun store. ATF agents learned about that purchase 3 days later and, consistent with the investigative strategy in the case, made no effort to locate Avila or seize the rifles although ATF had identified Avila as a suspect in November 2009. Two of the three rifles

¹ Redactions in this report are based on the Department’s identification of grand jury, Title III electronic surveillance, sealed court, and law enforcement sensitive information, the unauthorized disclosure of which is prohibited by law or could adversely affect an ongoing investigation. At the Inspector General’s request, the Department has agreed to seek a court order authorizing the unsealing of portions of the redacted electronic surveillance information that do not reveal the content of intercepted communications or law enforcement sensitive information, and that do not otherwise affect individual privacy interests. If the court authorizes unsealing, the OIG will publish a revised report with pertinent redactions removed to show the unsealed information. The identities of Mexican government employees and Mexican nationals employed by the ATF in Mexico have also been redacted.

purchased by Avila on January 16 were recovered 11 months later at the scene of the murder of Agent Terry, who was shot and killed on December 14, 2010, as he tried to arrest persons believed to be illegally entering the United States.

The day after and in response to Agent Terry's murder, ATF agents arrested Avila. Several weeks later, on January 19, 2011, the U.S. Attorney's Office indicted 20 Operation Fast and Furious straw purchasers and gun traffickers. As of August 1, 2012, 14 defendants, including Avila, have entered guilty pleas to one or more counts of the indictment.

Although the Federal Bureau of Investigation (FBI) was assigned to investigate the murder of Agent Terry, the senior leadership of ATF and the Department of Justice (Department or DOJ) took little action in the immediate aftermath of Agent Terry's death to learn more about an ATF investigation that involved the trafficking of approximately 2,000 weapons over many months, and how guns purchased by a previously-identified subject of that investigation ended up being recovered at the scene of Agent Terry's murder. Shortly after Agent Terry's death, stories began appearing on the Internet alleging that ATF had allowed firearms to "walk" to Mexico, and that one of those firearms may have been linked to the death of a federal law enforcement officer.

The flaws in Operation Fast and Furious became widely publicized as a result of the willingness of a few ATF agents to publicly report what they knew about it, and the conduct of the investigation became the subject of a Congressional inquiry. On January 27, 2011, Senator Charles E. Grassley wrote to ATF Acting Director Kenneth Melson that the Senate Judiciary Committee had received allegations that ATF had "sanctioned the sale of hundreds of assault weapons to suspected straw purchasers," who then transported the firearms throughout the southwest border area and into Mexico. On February 4, 2011, the Department responded in writing by denying the allegations and asserting that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico." However, after examining how Operation Fast and Furious and other ATF firearms trafficking investigations were conducted, the Department withdrew the February 4 letter on December 2, 2011, because it contained inaccuracies.

Also on January 27, 2011, Senator Grassley's staff brought the allegations of one ATF agent to the attention of the Office of the Inspector General (OIG). We interviewed the agent and began a preliminary inquiry into the matter. On February 28, 2011, Attorney General Eric Holder requested the OIG to conduct a review of Operation Fast and Furious, and we agreed to conduct the review. This report describes the results of the OIG's review.

During the course of our review we received information about other ATF firearms trafficking investigations that raised questions about how those

investigations were conducted. This report describes one of them, Operation Wide Receiver. We plan to issue a separate report on at least one other ATF investigation that involves an individual suspected of transporting grenade components into Mexico, converting them into live grenades, and then supplying them to drug cartels. The OIG also is completing its investigation of an allegation that one or more Department employees provided to a member of the media a copy of a May 2010 undercover operation proposal drafted by one of the ATF agents who publicly testified about his concerns with the conduct of Operation Fast and Furious. Additionally, we are reviewing allegations that two ATF agents who publicly testified about their concerns regarding Operation Fast and Furious were reassigned to positions within ATF that could have subjected them to retaliation. We also will continue to review information that has been provided to us to determine whether other reports are warranted on additional topics related to Operation Fast and Furious, such as information sharing among ATF, the Drug Enforcement Administration (DEA), and the FBI regarding key figures in parallel investigations.

I. Methodology of the Investigation

The OIG's review focused on ATF's handling of Operations Wide Receiver and Fast and Furious. In addition, the OIG reviewed the Department's knowledge about those cases, as well as the Department's statements to Congress about them. To review these issues, the OIG conducted interviews with more than 130 persons currently or previously employed by the Department, ATF, the DEA, the FBI, and the Department of Homeland Security (DHS). We interviewed many of these witnesses on multiple occasions.

We interviewed several senior officials in the Department, including Attorney General Eric H. Holder Jr., Deputy Attorney General James Cole, Assistant Attorneys General Lanny A. Breuer and Ronald Weich, Chief of Staff and Counsel to the Attorney General and former Acting Deputy Attorney General Gary Grindler, and three of the five current or former Deputy Assistant Attorneys General (DAAG) who authorized the wiretap applications in Operations Wide Receiver and Fast and Furious.² We also interviewed several former senior Department officials, including former Attorney General Michael B. Mukasey and former Deputy Attorney General David W. Ogden.

In addition, we interviewed former U.S. Attorneys for the District of Arizona Dennis K. Burke and Paul Charlton, former Criminal Chiefs Patrick

² One of the remaining DAAGs died in 2011. The other, Barry Sabin, told us he would not participate in an interview unless we obtained a court order unsealing the affidavits so that his attorney could be present during the interview. We did not ask the Department to seek such a court order.

Cunningham and Lynette Kimmins, and the Assistant U.S. Attorneys most directly involved in Operations Wide Receiver and Fast and Furious.³

Among the ATF officials we interviewed were former Acting Director Kenneth E. Melson, former Acting Deputy Director William J. Hoover, former Assistant Director for Field Operations Mark Chait, former Deputy Assistant Director William G. McMahon, and Special Agent in Charge of ATF's Phoenix Field Division William Newell. In addition, we interviewed virtually all of the ATF employees in ATF's Tucson and Phoenix Field Offices who worked on Operations Wide Receiver and Fast and Furious. We also interviewed several ATF employees from other offices, including agents in El Paso, Texas; Las Cruces, New Mexico; and the ATF's Mexico City Office.

We were unable to interview several individuals with information relevant to our review. Charles Higman, the Resident Agent in Charge (RAC) in the ATF Tucson Office during Operation Wide Receiver, had direct management responsibility for the case and made several key decisions regarding how it was conducted. Higman retired from ATF in February 2009 and he did not respond to our repeated attempts to contact him. We also were unable to interview the Immigration and Customs Enforcement (ICE) agent who was assigned to Operation Fast and Furious on a full time basis and Darren Gil, the former ATF Attaché to Mexico who retired from the agency in December 2010. Both of these individuals declined through counsel our request for a voluntary interview.

Similarly, Criminal Chief Cunningham, like Burke, declined through counsel our request for a follow-up interview regarding his involvement in the Department's February 4, 2011, letter to Senator Grassley. We also requested an interview with Kevin O'Reilly, a member of the White House's National Security Staff, to ask about communications he had in 2010 with former Special Agent in Charge Newell that included information about Operation Fast and Furious. O'Reilly declined our request through his personal counsel.

We received over 100,000 pages of documents during the course of our review from the Department, ATF, the DEA, FBI, and DHS that we relied upon in drafting this report. These included investigative materials generated in Operations Wide Receiver and Fast and Furious, including documents obtained

³ Although we interviewed former U.S. Attorney Burke concerning his office's role in Operation Fast and Furious, Burke later resigned from the Department and declined through counsel our request for an interview concerning his conduct with respect to the Department's February 4, 2011, letter to Senator Grassley. However, Burke was interviewed by Congressional investigators on this and other topics. At the OIG's request, the staff of the House Committee on Oversight and Government Reform provided a copy of Burke's transcribed interview and we cite to testimony Burke provided to Congressional investigators in this report.

with grand jury subpoenas, as well as all 14 wiretap applications and other court documents filed in the investigations. We also reviewed thousands of e-mails from the accounts of current and former senior Department officials and ATF executives and employees, as well as e-mails from other agencies that were relevant to Operation Wide Receiver or Operation Fast and Furious.⁴ Among the documents we reviewed in connection with the Department's statements to Congress were e-mails, drafts of correspondence, and public testimony, including post-February 4 documents regarding the Department's statements to Congress.

We also requested from the White House any communications concerning Operation Fast and Furious during the relevant time period that were sent to or received from (a) certain ATF employees, including Special Agent in Charge Newell, and (b) certain members of the White House National Security Staff, including Kevin O'Reilly. In response to our request, the White House informed us that the only responsive communications it had with the ATF employees were those between Newell and O'Reilly. The White House indicated that it previously produced those communications to Congress in response to a similar request, and the White House provided us with a copy of those materials. The White House did not produce to us any internal White House communications, noting that "the White House is beyond the purview of the Inspector General's Office, which has jurisdiction over Department of Justice programs and personnel."

II. Organization of this Report

This report is divided into seven chapters, including this Introduction. Chapter Two provides relevant background information about federal firearms regulations, firearms trafficking enforcement, and several Department and ATF memoranda that concern efforts to combat firearms trafficking to Mexico.

Chapter Three describes Operation Wide Receiver, which came to our attention due to allegations that, as in Operation Fast and Furious, ATF agents had failed to seize firearms despite having the legal authority and opportunity to do so. Operation Wide Receiver was conducted by agents in ATF's Tucson office, which is part of ATF's Phoenix Field Division. We describe in detail key events in the investigation. We then provide our analysis of the investigation,

⁴ Because we were aware that AAG Breuer forwarded early drafts of the Department's February 4, 2011, letter to Senator Grassley from his government to his personal e-mail account, we also requested from the Department any personal e-mail communications of certain Department officials that related to Operation Fast and Furious. The Department produced e-mails in response to our request, but we concluded none were relevant to our review.

including the performance of the ATF agents and Department attorneys who were either aware of or involved in it.

Chapter Four describes Operation Fast and Furious, and the operational and oversight roles in the investigation played by the ATF Phoenix Field Division and the U.S. Attorney's Office. This chapter also provides the OIG's analysis of key aspects of the conduct of the investigation, including decisions by ATF and the U.S. Attorney's Office that set the strategy for the case, the issue of whether and when there was probable cause to seize firearms, and ATF's use of cooperating Federal Firearms Licensees (FFLs) to advance the investigation. We also assess the consequences of using court-ordered electronic surveillance and the time it took the government to obtain indictments of Fast and Furious subjects.

In Chapter Five, we describe the information that staff and managers at ATF and DOJ headquarters learned about Operation Fast and Furious from the investigation's inception in late 2009 to January 25, 2011, the date of the press conference announcing the indictment. We also describe the action, and lack of action, by leadership officials in response to the information. We then provide our assessment of how ATF and Department officials executed their management responsibilities based on their knowledge of the investigation.

Chapter Six addresses the Department's response to the January 27 and 31, 2011, letters that Senator Grassley wrote to the ATF raising concerns about ATF's implementation of its Southwest Border firearms interdiction strategy. We describe how the Department formulated its February 4 response to Sen. Grassley and how it subsequently reassessed the representations made in that letter and reached the conclusion that those representations were inaccurate and that letter should be withdrawn. We also provide our analysis of Department officials' statements to Congress in the February 4 letter and subsequent Congressional correspondence and testimony in view of their evolving knowledge of how ATF conducted its firearms trafficking investigations.

In Chapter Seven, we summarize our overall assessment of the conduct of Operations Wide Receiver and Fast and Furious and the Department's statements to Congress concerning these investigations. We also include in this chapter a description of specific remedial measures that ATF and the Department have implemented to address many of the problems that surfaced following Operation Fast and Furious, and provide our recommendations for additional remedial measures. In addition, we set forth our findings concerning individual performance in connection with the activities described in this report.

Appendix A contains the Department's response to our report. Appendices B through F contain correspondence between the Department and Congress that are described in Chapter Six.

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CHAPTER TWO

BACKGROUND INFORMATION

In this chapter we provide background information useful for describing and understanding the conduct of Operations Wide Receiver and Fast and Furious. We first describe relevant aspects of federal firearms regulations, including the Bureau of Alcohol, Tobacco, Firearms and Explosives's (ATF) function as regulator, the role of the federal firearms licensee, and firearms record-keeping and reporting requirements under federal law. We also briefly describe the interplay between federal and state firearms regulations, focusing specifically on the state of Arizona, where Operations Wide Receiver and Fast and Furious were conducted. We also provide some information about firearms laws in Mexico.

We next describe firearms trafficking enforcement. This section describes pertinent ATF investigative guidelines and highlights the role and capabilities of ATF's National Tracing Center. We also summarize the federal criminal statutes commonly used in firearms trafficking investigations such as Operations Wide Receiver and Fast and Furious, and briefly describe ATF special agents' authority to seize firearms as evidence of a crime, to initiate forfeiture proceedings, and through abandonment.

Lastly, we summarize several Department and ATF memoranda that concern efforts to combat firearms trafficking to Mexico that are relevant to our assessment of Operations Wide Receiver and Fast and Furious.

I. Federal Firearms Regulations

A. ATF and the Federal Firearms Licensee

The Gun Control Act of 1968 (18 U.S.C. § 921, et seq.) is the primary federal law that regulates the firearms industry and firearms owners.⁵ ATF, which was established as a separate component within the Department in January 2003, has primary jurisdiction over the administration and enforcement of the Act. ATF accomplishes this through licensing and inspections of gun dealers, or Federal Firearms Licensees. A Federal Firearms

⁵ The other major federal law is the National Firearms Act of 1934, 26 U.S.C. § 5801, et seq. This law limits the availability and taxes the manufacture and distribution of machine guns, short-barreled shotguns, short-barreled rifles, sound suppressors (silencers), and other similar weapons that were prevalent during the Prohibition era. The Act also requires that these weapons be registered with the National Firearm Registration and Transfer Record, and that owners notify the ATF when the weapons are transported across state lines.

Licensee (FFL) is a person, partnership, or business entity that holds a license issued by ATF that allows it to “engage in the business” of dealing, manufacturing, importing, or repairing firearms. Under federal law, a person is “engaged in the business” when he devotes time, attention, and labor to any of these activities with the “principal objective of livelihood and profit through the repetitive purchase and resale of firearms[.]”⁶

ATF’s licensing process is intended to ensure that only qualified individuals receive a license to sell guns. According to materials provided to us by ATF, the application process includes the submission of a completed questionnaire containing information about the applicant, the type of license sought, and the business premises, among other items. Applicants must also submit fingerprint cards for criminal background checks and are advised that they should expect to be contacted by an ATF investigator during the application process.

An applicant who is granted a license receives several agency publications from ATF, including ATF’s Federal Firearms Regulations Reference Guide, Safety and Security Information for Federal Firearms Licensees, and Federal Firearms Licensee Quick Reference and Best Practices Guide. ATF also provides information about various ATF and Department components relevant to FFL operations, and a summary of state firearms laws and ordinances to new licensees.

ATF Industry Operations Investigators are authorized to review FFLs’ records and inventory, to conduct annual warrantless inspections of FFLs to ensure compliance with federal recordkeeping requirements, to obtain an inspection warrant if needed, and to obtain a “reasonable cause warrant” if there is evidence of certain violations. Violations can result in the revocation of an FFL’s license. Investigators also work with ATF special agents in cases where criminal activity is suspected.

B. Recordkeeping Requirements and the Form 4473

There are several federal recordkeeping requirements for FFLs relevant to our review. First, each FFL must maintain an Acquisition and Disposition Record, which is a book or computerized log that records the acquisition (date and source) and disposition (date and transferee) of all firearms transactions involving the FFL. This record is made available to ATF investigators conducting inspections.

⁶ A person who buys or sells firearms in connection with a personal gun collection or as a hobby is not considered “engaged in the business” and therefore does not require a license from ATF. See 18 U.S.C. § 921(a)(21).

Second, federal law requires that FFLs report to ATF whenever they transfer more than one handgun within a 5-business day period to the same, unlicensed individual. *See* 18 U.S.C. § 923(g)(3). These transfers must be reported on an ATF form that includes full identifying information about the purchaser, the firearms, the date of transfer, and the FFL. ATF uses these multiple sales reports to verify gun dealers' records, to detect suspicious activity, and to generate investigative leads. On July 12, 2011, ATF implemented an identical reporting requirement for sales of certain types of rifles.⁷ The reporting requirement applies to sales that occurred on or after August 14, 2011, and is limited to FFLs located in Arizona, California, New Mexico, and Texas.

Third, each FFL, together with the unlicensed purchaser of a firearm, must complete an ATF Form 4473 Firearms Transaction Record, commonly referred to as a Form 4473, for every firearm sale. The completed form must be maintained by the FFL and made available to ATF upon request. The primary purpose of the Form 4473 is to determine whether a buyer is prohibited from lawfully possessing or receiving a firearm. Under current federal law, there are nine categories of persons prohibited from possessing or receiving a firearm, including persons under indictment for or convicted of a felony, persons adjudicated mentally defective or committed to a mental institution, persons convicted of a misdemeanor crime of domestic violence, or persons who are illegally in the United States. *See* 18 U.S.C. § 922(g), (n). The Form 4473 requires the buyer to check a "yes" or "no" box in response to a series of questions that enumerates the nine disqualifying categories.⁸

⁷ The reporting requirement, which was approved by the U.S. Office of Management and Budget, applies to rifles having the following characteristics: (1) semi-automatic, (2) a caliber greater than .22, and (3) the ability to accept a detachable magazine. According to ATF documents, this is the category of firearms most frequently trafficked to Mexico from the United States and includes the weapons primarily sought by Mexican cartels. The OIG's analysis in its September 2010 Project Gunrunner report of ATF data on Mexican crime guns recovered from fiscal year (FY) 2004 through FY 2009 confirmed the increase in the use of long guns by Mexican drug cartels. During this time, the percentage of crime guns recovered in Mexico that were long guns steadily increased each year from 20 percent in FY 2004 to 48 percent in FY 2009. By contrast, handguns represented a steadily decreasing portion of crime guns recovered in Mexico, dropping from 79 percent in FY 2004 to 50 percent in FY 2009. In FY 2009 long guns and handguns were recovered at almost the same rate.

⁸ In addition to completing the Form 4473, FFLs are required to conduct a background check of each potential purchaser through the National Instant Criminal Background Check System (NICS) to verify that the potential purchaser is not prohibited from receiving or possessing a firearm. NICS is a computerized national records system established by the Brady Handgun Violence Prevention Act of 1993. The FBI is responsible for administering NICS, and ATF is responsible for ensuring that FFLs comply with the Brady law and investigating criminal violations of the law.

The Form 4473 also requires the buyer to certify that he is the actual purchaser of the firearm. Question 11.a of the Form 4473 states:

Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.

The Form 4473 also states that an individual is the actual buyer if the purchase is a gift to a third party.

As the Form 4473 indicates, it is unlawful for an individual to purchase a firearm for someone else (unless it is a gift), and an FFL may not sell a firearm to anyone the FFL knows is not the actual purchaser. This aspect of the Form 4473 is important because the individuals investigated in Operation Fast and Furious, and to a lesser extent in Operation Wide Receiver, were not prohibited under federal law from acquiring or possessing firearms; rather, they were investigated by ATF based on evidence indicating they were purchasing the firearms for others. ATF refers to such transactions as “straw purchases” and to the buyers who falsely complete the Form 4473 as “straw purchasers.” ATF defines a straw purchase as “the acquisition of a firearm(s) from a federally licensed firearms dealer by an individual (the ‘straw’), done for the purpose of concealing the identity of the true intended receiver of the firearm(s).”

C. State Regulations and Mexican law

Federal firearms laws regulate interstate and foreign commerce in firearms and assist states in regulating firearms within their borders. However, states may choose to regulate firearms more strictly than federal law as long as those regulations do not affirmatively authorize what federal statutes prohibit.⁹ For instance, federal law does not forbid prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹⁰ Examples of state regulations include requiring a waiting period or license for firearms purchases or limiting the number of firearms that an individual can purchase within a defined time period.

Like several states, Arizona law does not impose any licensing or permit requirements for purchasing firearms, does not limit the firearms an individual may purchase by quantity or time period, and does not require background

⁹ See *Torraco v. Port Auth. of N.Y. and N.J.*, 615 F.3d 129 (2d Cir. 2010).

¹⁰ *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

checks for firearms purchased at gun shows. Several witnesses told us that it is not unusual for individuals to buy multiple firearms during a single visit to an FFL. Some agents told us that they were surprised by the volume of firearms purchasing that occurs in Arizona as compared to their experience in non-Southwest Border states.

The Mexican Constitution states that individuals have the right to possess firearms in their homes for their security and legitimate defense. The right is governed by the Federal Law of Firearms and Explosives, the Mexican equivalent of the United States' Gun Control Act. Mexico has a federal firearms registry for all firearms that are possessed or acquired by citizens. Mexican law prohibits the commercial sale or purchase of a firearm, and requires that all sales go through the government. Also, there are particular types of firearms that can only be possessed by members of the Mexican military, including .223 caliber rifles and 7.62 mm rifles, commonly referred to as AK-47-style rifles. Mexican citizens are allowed to possess smaller caliber pistols and rifles, subject to restrictions on quantity.

II. Firearms Trafficking Enforcement

A. ATF Investigative Guidelines

ATF defines firearms trafficking as the unlawful diversion of firearms “for the purpose of profit, power, or prestige, in furtherance of other criminal acts or terrorism.” A firearms diversion is the movement of a firearm from lawful commerce into the illegal marketplace through an illegal method or for an illegal purpose. ATF’s principal guidance for firearms trafficking investigations is provided in the Firearms Enforcement Program Order, ATF Order 3310.4B, and the Firearms Trafficking Investigation Guide, ATF Publication 3317.1.

The Firearms Enforcement Program Order defines common firearms trafficking terms, establishes general investigative procedures and responsibilities for managers and agents, describes ATF’s regulatory and enforcement relationship with FFLs, and discusses several investigative techniques. The Firearms Trafficking Investigation Guide is described as a comprehensive reference that “serves as a practical instrument to assist criminal investigators in the preliminary identification of illegal firearms trafficking indicators and in the thorough investigation of illegal firearms trafficking violations.” The guide defines common firearms trafficking terms, identifies relevant investigative resources, describes firearms trafficking indicators, summarizes relevant legal information, provides investigative checklists for particular types of trafficking investigations, and suggests measures state and local law enforcement can take to address firearms trafficking.

One of the significant issues in our review of Operations Wide Receiver and Fast and Furious – whether guns were allowed to “walk” – was not specifically addressed by the Firearms Enforcement Program Order or the Firearms Trafficking Investigation Guide. We could not identify any ATF investigative guideline or policy that uses, defines, or otherwise refers to the phrases “gun walking” or “walking guns,” terms that have been used publicly to describe a tactic utilized by ATF agents in Operations Wide Receiver and Fast and Furious.

We asked witnesses during the course of this review whether they were familiar with the phrase “walking guns” and, if so, how they defined it. A few witnesses told us that they had not heard the phrase before allegations about the conduct of Operation Fast and Furious appeared publicly following the shooting death of Customs and Border Protection Agent Brian Terry on December 14, 2010. Most witnesses told us they had heard the phrase and generally described it as occurring in one of two scenarios. In the first scenario – one that all agents we interviewed considered improper – an ATF agent (typically in an undercover capacity) buys a gun for another person, in effect assuming the role of a straw purchaser, but then allows the other person to keep or resell the gun, thereby allowing the gun to “walk.”¹¹ In the second scenario, an ATF agent has probable cause to believe an individual’s receipt, possession, or transfer of a gun is unlawful, but does not interdict and seize the gun despite having the ability and opportunity to do so.

We did not identify any ATF policy in effect at the time of Operations Wide Receiver and Fast and Furious that expressly prohibited either of the “gun walking” situations described to us by witnesses. To the contrary, several witnesses told us that they believed a specific section of the Firearms Enforcement Program Order permitted “walking.” The section is entitled, “Weapons Transfers,” and provides in relevant part:

During the course of illegal firearms trafficking investigations, special agents may become aware of, observe, or encounter situations where an individual(s) will take delivery of firearms, or transfer firearm(s) to others. In these instances, the special agent may exercise the following options:

¹¹ ATF undercover operations, including operations involving the use of firearms, are governed by ATF Order 3250.1B, Undercover Operations. The current guidelines were issued on November 17, 2011, and superseded the previous Informant Use and Undercover Operations guidelines. The current guidelines refer to firearms and other tangible items used in an undercover operation as props and include specific requirements pertaining to their acquisition, retention, and use.

(1) In cases where probable cause exists to believe a violation of law has occurred and the special agent determines there is a need to intervene in the weapons transfer (e.g., the recipient of the firearms is a known felon; it is known the firearms will be used in a crime of violence), the special agent shall do so but should place concerns for public safety and the safety of the involved special agents as the primary determining factor in exercising this option.

(2) In other cases, immediate intervention may not be needed or desirable, and the special agent may choose to allow the transfer of firearms to take place in order to further an investigation and allow for the identification of additional coconspirators who would have continued to operate and illegally traffic firearms in the future, potentially producing more armed crime.

Chapter K, Section 148 (Order 3310.4B).

Several witnesses told us they believed that Subsection 2 of Section 148 gave agents discretion not to intervene during or after weapons deliveries or transfers – even where probable cause exists to believe the activities were unlawful – if the agents determined that allowing deliveries or transfers to take place would advance the interests of the investigation. Other witnesses disputed this interpretation and told the OIG that the language in Section 148 permitting some discretion should be read to include a requirement that agents maintain surveillance of the guns delivered or transferred until the decision is made to interdict. As we discuss in Chapter Four, Section 148 was cited in support of the decision to allow weapons transfers to take place during Operation Fast and Furious.¹²

B. ATF's National Tracing Center

A firearms trace refers to tracking the history of a “crime gun” – a firearm that is illegally possessed, used in a crime, or suspected to have been used in a crime. The history includes identifying the source of the firearm (the manufacturer and/or importer), the chain of distribution (the wholesaler and/or retailer), and the first unlicensed purchaser of the firearm. ATF's National Tracing Center is the only operation in the world that conducts firearms traces. Traces can link a suspect to a firearm in a criminal investigation, identify potential firearms traffickers, and detect domestic and international patterns in the sources and kinds of crime guns.

¹² On November 3, 2011, ATF issued new guidance for firearm transfers that supersedes Order 3310.4B. We summarize this guidance, as well as other recent policies implemented by ATF in response to Operation Fast and Furious, in Chapter Seven of this report.

Trace requests can be made by any federal, state, or local law enforcement agency in the United States or abroad and are submitted by completing a specific ATF form that requires the requester to provide information about the circumstances of the recovery, the agency making the request, the firearm (such as serial number, manufacture, type, caliber, and model), and the possessor of the firearm. If the trace is successful, ATF provides the requester the identity of the first unlicensed buyer of the firearm, the FFL from which the firearm was purchased, and the date of purchase.

Firearms trace requests can be submitted by mail or facsimile. Since January 2005, trace requests can also be submitted through eTrace, a secure, Internet-based system that allows users from accredited domestic and international law enforcement agencies to submit requests, monitor the progress of the trace, and receive results electronically. The National Tracing Center considers eTrace to be the most efficient method for law enforcement to submit trace requests, and to receive and analyze data.¹³

The National Tracing Center also maintains the Suspect Guns Database. This database contains identifying information submitted to the National Tracing Center by ATF agents and investigators about firearms that are suspected of being illegally trafficked but have not been recovered.¹⁴ The information includes the purchaser data associated with the firearm, the purchase date, the identity of the FFL, and the number of the ATF investigation to which the firearm is connected. If a suspect gun is subsequently recovered and traced, the National Tracing Center will notify the investigator who submitted the firearm as a suspect gun of its recovery and provide the investigator with the contact information for the individual who submitted the trace request. In this way, the investigator can gather additional information about the associated crime and the gun's recovery.

If an agent has entered a gun in the Suspect Guns Database, the National Tracing Center will not release information about the gun unless the

¹³ In December 2009, ATF began deploying a version of eTrace – known as Spanish eTrace – in Mexico. This version of eTrace is designed to receive trace requests and provide trace results in Spanish. In connection with the OIG's review of ATF's Project Gunrunner, ATF reported that it had deployed Spanish eTrace to all Spanish-language eTrace users in March 2010, including Mexican federal law enforcement. However, the OIG learned in June 2010 that Mexican laboratories were not using Spanish eTrace. ATF began redeploying Spanish eTrace in Mexico in November 2010 and training Mexican personnel in all 31 states.

¹⁴ ATF's Firearms Trafficking Investigation Guide provides the following example: multiple sales reports and FFL records indicate that an individual purchased 25 firearms, 15 of which have been recovered in crimes and traced; the remaining 10 firearms have not been recovered and are now suspected of being illegally trafficked. These 10 firearms are entered into the Suspect Guns Database.

agent who submitted the suspect gun approves the release. When the National Tracing Center notifies an agent that a trace has been requested on a suspect gun, the agent is required to advise whether the case is active, and if so, whether the trace results should be provided to the requester. This feature is intended to prevent the release of information that might jeopardize an active investigation by, for example, alerting the FFL of a recovery. In instances where the agent instructs the National Tracing Center not to release the trace results, the requester receives a message that the trace could not be completed. This is the response regardless of whether the requester is an ATF or non-ATF employee. As discussed in Chapter Four, the case agents for Operation Fast and Furious routinely entered all guns purchased by subjects in the investigation into the Suspect Gun Database, which had the effect of blocking the National Tracing Center from reporting trace results for these guns to requesters such as other ATF agents or other law enforcement agencies during the course of the Fast and Furious investigation.

C. Applicable Federal Criminal Statutes and Straw Purchasing

There is no federal statute specifically prohibiting firearms trafficking or straw purchasing. Instead, these activities are investigated by agents and charged by prosecutors under a variety of criminal statutes depending on the circumstances of each particular case. ATF's investigative guidelines and the Department's Federal Firearms Manual identify the following statutes as commonly used in straw purchasing cases:

- **18 U.S.C. § 922(a)(1)(A), Willfully engaged in firearms business without a license.** This charge is used against an individual who is not a licensed dealer but who buys and sells guns in a business capacity.
- **18 U.S.C. § 922(a)(6), Knowingly making a false statement or presenting false identification in connection with a firearm purchase.** This charge is used against an individual who makes a false statement or presents false identification that is intended or likely to deceive the FFL with respect to a fact that is material to the lawfulness of the sale, such as information pertaining to the buyer's identity, age, state of residency, or certification that the buyer is not a "prohibited person" under the Gun Control Act.
- **18 U.S.C. § 922(g)(1), Knowing possession of a firearm by a convicted felon.** In the straw purchasing context, this charge is used against an individual with a felony conviction for whom a straw purchaser buys a firearm. As a convicted felon, the

individual is a “prohibited person” under the Gun Control Act and therefore may not possess a firearm.¹⁵

- **18 U.S.C. § 924(a)(1)(A), Knowingly making a false statement.** This charge is used against an individual who knowingly makes a false statement to an FFL or in the records the FFL is required to maintain. For example, this charge is brought against an individual who stated on the Form 4473 that he was the actual purchaser of the firearm, when in fact he was purchasing the firearm for someone else (and not as a gift). Unlike a false statement charged under 18 U.S.C. § 922(a)(6), a false statement charged under § 924(a)(1)(A) need not be “intended or likely to deceive the firearms dealer” nor “material to the lawfulness of the sale” – the only requirement is that the statement is false. According to witnesses we interviewed, this difference makes violations of § 924(a)(1)(A) often easier to prove than a violation of § 922(a)(6).

Operations Wide Receiver and Fast and Furious were investigations of straw purchasers involved in trafficking firearms to Mexico, and the above violations were among those ultimately charged against defendants in both cases. Although false statements violations have a maximum prison sentence of either 5 or 10 years, straw purchasers typically receive lesser sentences under the applicable federal sentencing guidelines because of their lack of criminal history.¹⁶

A false statement charge under §§ 922(a)(6) and 924(a)(1)(A) requires the government to prove that a defendant knew the statement was false, but does not require the government to prove that the defendant knew making the false statement violated the law. To put it more squarely in the context of a straw purchasing case, the government must show that at the time the defendant bought a firearm, he intended to purchase it for another individual (not as a gift) and therefore knew it was false to state that he was the actual purchaser.

¹⁵ Straw purchasing also occurs when the straw purchaser buys a gun for an individual who is not prohibited under the Gun Control Act from possessing a firearm. In Operation Fast and Furious, the straw purchasers were buying guns for an individual who was not prohibited from possessing firearms.

¹⁶ On December 2, 2010, the five United States Attorneys in the Southwest Border states sent a letter to the United States Sentencing Commission requesting that in light of the national security implications of arms trafficking, amendments be made to the firearms trafficking-related guidelines “that would provide modest but meaningful increases in penalties for straw purchasing offenses.” The letter stated, “the sentences received by straw purchasers fail to reflect the seriousness of the crime or the critical role played by these defendants in the trafficking and illegal export of weapons. Simply put, straw purchasing and illegal arms exporting go hand in hand, and both must be addressed together.”

ATF has identified circumstances that it considers indicative of straw purchasing and gun trafficking. These include the following:

- multiple sales by a purchaser who appears on past gun traces,
- sales of five or more firearms to a single buyer,
- sales of multiple firearms at the same FFL on the same day,
- trace requests for firearms purchased as part of a multiple sale,
- trace requests with a “short time-to-crime” (the time that passes between the purchase of a gun and its recovery in connection with a crime),
- sales paid for in cash, and
- multiple sales of guns considered “weapons of choice” for drug trafficking organizations.

ATF lists these and other indicators in the Firearms Trafficking Investigation Guide, and based on interviews we conducted during the course of this review, the indicators are well understood by ATF agents.

ATF also educates FFLs about straw purchasing indicators. As part of the license application process, each FFL receives literature that includes information on that topic. In July 2000, ATF partnered with the National Shooting Sports Foundation to design an educational program to assist FFLs in the detection and possible deterrence of straw purchasing. The program, called “Don’t Lie for the Other Guy,” educates FFLs to better identify potential straw purchasers and publicizes the potential penalties for participating in illegal firearms purchases. The program includes educational seminars and kits for FFLs, and encourages retailers to work closely with their local ATF office to deter straw purchases.¹⁷ In addition, ATF distributed pamphlets to FFLs as part of Project Gunrunner that reminded FFLs about challenges ATF and the industry face from firearms trafficking, reiterated the possible signs of straw purchasing, and encouraged FFLs to report suspicious purchasing activity to ATF.

III. Firearms Seizure and Forfeiture

ATF special agents are authorized by federal law to make seizures of property, including firearms. Property seized by agents generally falls into two

¹⁷ The program’s focus is on preventing prohibited persons under the Gun Control Act from obtaining firearms. However, the straw purchasing indicators apply equally to straw purchases made for non-prohibited persons.

categories: property seized as evidence of a crime and property seized for the purpose of initiating a forfeiture action. ATF also authorizes agents to take custody of property that is abandoned by an owner.

A. Property Seized as Evidence

According to ATF regulations, an agent may seize property solely for its use as evidence where there is probable cause to believe that the property will “aid in a particular apprehension or conviction.” However, if ATF also has a statutory basis to forfeit the firearm, ATF regulations require the agent to seize the property for forfeiture and simultaneously use it as evidence. In addition, property that originally is seized as evidence can subsequently be determined to be subject to forfeiture. If this occurs, the agent is required to initiate forfeiture proceedings.

B. Property Seized for Forfeiture

An agent is authorized to seize property for the purpose of initiating a forfeiture action where there is probable cause to believe the property was used, intended to be used or involved in a violation of federal law for which ATF has primary jurisdiction. The Gun Control Act is one such federal law. Under the Act, firearms and ammunition can be forfeited if there is probable cause to believe they are involved in, used in, or intended to be used in certain violations of the Act. 18 U.S.C. § 924(d). The requisite criminal intent in some of the statutes that can predicate forfeiture is “knowing” and in others is “willful.”¹⁸ The violations we described above that are commonly used in straw purchasing cases are among the violations that can predicate a forfeiture action. 18 U.S.C. § 924(d)(1).¹⁹

Property seized by an agent for forfeiture is forfeited only after the agency completes a legal proceeding that is intended to give individuals with a potential claim to the property an opportunity to contest the forfeiture. The three potential legal forfeiture proceedings are administrative, civil judicial, and criminal judicial.

Administrative forfeiture does not require any action by a federal court. ATF initiates the process by sending a notice of forfeiture to any known

¹⁸ A “knowing” violation of the law occurs when the defendant had knowledge of the facts that constitute the offense (e.g., in a false statements case, the defendant knew that the statement was false). A “willful” violation occurs when the individual was aware that the conduct was unlawful. See *Bryan v. United States*, 524 U.S. 184, 191-99 (1998).

¹⁹ Examples of other violations that can be used to initiate forfeiture proceedings include 21 U.S.C. §§ 801 et seq. (The Controlled Substance Act), 18 U.S.C. § 844 (Explosives), and 18 U.S.C. §§ 2342-2343 (Contraband Cigarettes).

interested parties. The agent who seized the property is responsible for making reasonable and continuing efforts to properly and accurately identify potential claimants. ATF also publishes notice of the forfeiture action in a newspaper of general circulation. If nobody files a claim with ATF contesting the forfeiture, the property is forfeited to the agency and the process ends. However, if an individual files a claim with ATF, the proceeding moves to federal court where the government files a claim against the property. This civil forfeiture proceeding can be pursued independent of any criminal prosecution of the crime that led to the seizure. In the civil proceeding, the government must establish by a preponderance of the evidence that the seized property was used or was involved in a violation of federal law.²⁰

Criminal judicial forfeiture is an action included as part of a prosecution. In this situation, the seized property is included in the indictment that is brought against a defendant. To prevail on a criminal forfeiture, the government must prove by a preponderance of evidence the nexus between the underlying crime and the seized property. Under the Gun Control Act, if the owner or possessor of a firearm is acquitted of charges brought against him, the government must return the seized firearms or ammunition.

C. Abandonment

ATF authorizes agents to take custody of property that has been voluntarily abandoned to the agency by the owner. Under this circumstance, the owner signs an ATF form that includes some personal information and a description of the property. The owner attests by signing the form that he “voluntarily abandon[s] all interest in and rights or claims to the [] property in order that appropriate disposition may be made [by ATF].” The owner also waives any right to receiving notice from ATF of its intent to forfeit the property and any right to challenge the forfeiture.

IV. The Southwest Border and Relevant Department Memoranda and Initiatives

The scale of firearms trafficking from the United States to Mexico is well established. According to various public reports and testimony, violence along the U.S.-Mexico border increased significantly after 2006 in response to the Mexican government’s efforts to combat Mexican drug trafficking organizations. A large number of the weapons used by these organizations originated in the United States, and the types of weapons sought were increasingly powerful and

²⁰ The process for administrative and civil forfeiture proceedings is governed by the Civil Asset Forfeiture Reform Act, 18 U.S.C. § 983.

lethal. The situation continues to pose a national security challenge for Mexico and a significant organized crime challenge for the United States.

We identified several Department and ATF memoranda that described efforts to combat firearms trafficking to Mexico that were drafted prior to and shortly after Operation Fast and Furious was initiated in November 2009. We briefly summarize the memoranda below.

A. April 27, 2009, Guidelines for Consideration of OCDETF Designation for Firearms Trafficking Cases Related to Mexican Drug Cartels

According to the Department's Criminal Division website, the Organized Crime and Drug Enforcement Task Force (OCDETF) Program was established in 1982 to combat organized drug traffickers and is today "the centerpiece of the Attorney General's drug strategy to reduce the availability of drugs by disrupting and dismantling major drug trafficking organizations and money laundering organizations and related criminal enterprises." The program operates nationally and includes participants from the 94 U.S. Attorney's Offices, the Department's Criminal and Tax Division, and the following agencies: ATF, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, the U.S. Coast Guard, the U.S. Immigration and Customs Service, the United States Marshal's Service, and state and local agencies. The OCDETF Program has guidelines that regional coordinating groups apply to investigations that are proposed for OCDETF designation.

On April 27, 2009, the Director for the OCDETF Program issued a memorandum that cited the connection between firearms trafficking and the increasing levels of cartel-related violence, and emphasized the role the OCDETF Program has in the government's efforts to address firearms trafficking to Mexican drug trafficking organizations. According to the memorandum, the program guidelines for OCDETF designation "provide wide latitude for the designation of cases targeting the trafficking of firearms by criminal organizations associated with the Mexican cartels." The memorandum stated, "[i]nvestigations principally targeting firearms trafficking, rather than the underlying drug trafficking, are eligible for OCDETF designation if there is a sufficient nexus between the firearms and a major Mexican drug trafficking organization, provided the investigation otherwise meets OCDETF case standards."

B. June 17 and June 25, 2009, National Firearms Trafficking Enforcement Strategy and Enforcement Plan Memoranda

The Acting Assistant Director for ATF's Field Operations issued two memoranda in June 2009 that addressed firearms trafficking enforcement.

The memoranda were issued to increase ATF's emphasis on firearms trafficking enforcement.

The national implementation plan sought to improve ATF's trafficking enforcement strategy "through increased uniformity and accountability" and by requiring that all field offices pursue firearms trafficking investigations. The plan required each SAC to implement several measures, including designating a Firearms Trafficking Coordinator to be responsible for, among other things, firearms trafficking assessments, liaison with other law enforcement agencies, and coordination with ATF Headquarters and other field offices. The plan also required the SAC to ensure that all special agents are sufficiently trained on the use of ATF's case management system to ensure that information pertinent to firearms trafficking is recorded. In addition, the plan called for each SAC to seek the local U.S. Attorney's Office's support of the enforcement strategy, and to work with area law enforcement counterparts to enhance coordination relating to firearms trafficking matters.

The implementation plan also "re-emphasized" several investigative techniques relevant to firearms trafficking, including investigations of corrupt FFLs and FFL inspections, and enforcement operations at guns shows. The plan also emphasized the aggressive pursuit of straw purchasers and stated that obtaining felony convictions against these individuals prevents them from making future lawful purchases and that straw purchaser prosecutions can lead to more complex investigations of the underlying conspiracies.

C. January 7, 2010, Strategy for Combating the Mexican Cartels

On January 7, 2010, the Deputy Attorney General issued the Department's Strategy for Combating Mexican Cartels (Cartel Strategy). The Cartel Strategy was developed over several months by the Southwest Border Strategy Group, a newly created body that included representation from the Office of the Deputy Attorney General, the Department's Criminal Division, the five Southwest Border states, and several federal agencies, including ATF. According to the January 7, 2010, memorandum, the Cartel Strategy was based on the belief that a large share of the criminal activity occurring along the Southwest Border was perpetrated by a relatively small number of criminal organizations, and that the most effective means of combating the problem was "the use of intelligence-based, prosecutor-led multi-agency task forces, that simultaneously attack all levels of, and all criminal activities of, the operations of the organizations."

The memorandum stated that the Cartel Strategy was not a "radical departure from efforts that are already underway in the Department," but rather was an effort to define a single strategic plan that would be coordinated by the Southwest Border Strategy Group. Among the Cartel Strategy's several key objectives was to reduce the flow of illegal weapons, ammunition,

explosives, and currency from the United States to Mexico. The memorandum stated that ATF intelligence showed that the presence of firearms and explosives trafficking into Mexico had a direct nexus to the cartels' national domestic drug distribution network. The memorandum continued, "given the national scope of this issue, merely seizing firearms through interdiction will not stop firearms trafficking to Mexico. We must identify, investigate, and eliminate the sources of illegally trafficked firearms and the networks that transport them."

D. September 8, 2010, Project Gunrunner – a Cartel-Focused Strategy

On September 8, 2010, ATF issued agency-wide a memorandum and document entitled, "Project Gunrunner – A Cartel Focused Strategy." The strategy document stated that it was drafted to reflect the increased national emphasis on firearms trafficking enforcement related to the Southwest Border, as well as the importance of identifying and prioritizing trafficking investigations with a nexus to Mexican Drug Trafficking Organizations (DTOs) and cartels.

The strategy document called for conducting investigations in "a more creative and comprehensive manner" and through greater use of the OCDETF program. The strategy placed greater emphasis on "multi-defendant conspiratorial cases that focus on persons who organize, direct, and finance cartel-related firearms and explosives trafficking operations." The strategy document did not provide detailed guidance about how field offices should conduct such investigations, but revised how ATF Headquarters monitored and supported them. The strategy document also stated that ATF determined that three particular cartels are most responsible for acquiring firearms in the United States. Based on the geographic area these cartels control in Mexico, as well as tracing data, the Houston and Phoenix Field Divisions were given primary responsibility for investigating trafficking connected to these cartels.

The strategy document identified several of the challenges associated with investigating straw purchasers, including their lack of criminal history and therefore the lack of prosecutorial interest in them, and the reality that straw purchasers are readily replaced by criminal organizations and typically are not subject to significant criminal penalties. The strategy document stated that ATF should continue to investigate straw purchasers to hold them accountable and make them ineligible to purchase or possess firearms in the future, but that agents also should investigate the larger conspiracy and exploit the straw purchasers for information and cooperation that will further the investigative goal of disrupting or dismantling the trafficking organization.

The strategy document also recognized several practical considerations in firearms trafficking investigations that may require concluding the

investigations or changing investigative tactics before identification of persons directly affiliated with the drug trafficking organizations. The strategy document provided two examples: high volume trafficking investigations (a) where numerous diverted firearms purchased by one or two individuals are being used in violent crimes and recovered by law enforcement, or (b) in which ATF cannot reasonably determine over an extended period of time where or to whom the firearms are being trafficked. The strategy document instructed that in such situation, the SACs “must closely monitor and approve such investigations, assessing the risks associated with prolonged investigation with limited or delayed interdiction.”

E. November 2010 OIG Review of ATF’s Project Gunrunner

In November 2010, the OIG issued its report, “Review of ATF’s Project Gunrunner.” That review evaluated the effectiveness of ATF’s implementation of Project Gunrunner, the agency’s national initiative launched in April 2006 to reduce cross-border weapons trafficking.²¹

Our report made 15 recommendations to ATF to help improve its efforts to combat firearms trafficking from the United States to Mexico. Among these was a recommendation that ATF focus on developing more complex conspiracy cases against higher level gun traffickers and gun trafficking conspirators. The review found that a majority of the cases ATF referred for prosecution from FY 2004 to FY 2009 involved one defendant and only 5 percent included more than six defendants. Federal prosecutors told the OIG during its review that larger, multi-defendant conspiracy cases would better disrupt the trafficking organizations, but ATF personnel told us that the approach in Southwest Border field offices was to investigate lower ranking members of trafficking organizations and refer them for prosecution.

ATF concurred with the OIG’s recommendation and stated that it had and will continue to develop complex conspiracy cases. We did not recommend or describe in our report any specific strategies or tactics agents could use to develop such investigations.

²¹ The complete November 2010 report is on the OIG’s website at <http://www.justice.gov/oig/reports/ATF/index.htm>. A draft of the report was provided to ATF in September 2010.

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CHAPTER THREE

OPERATION WIDE RECEIVER

I. Introduction

During the course of our review of Operation Fast and Furious, the OIG received information about several other ATF investigations that possibly used a strategy and tactics similar to those allegedly employed in Operation Fast and Furious, including the tactic of failing to seize firearms despite having a sufficient legal basis to do so. One such case, Operation Wide Receiver, was noteworthy because it informed our understanding of how these tactics were used by ATF more than three years before Operation Fast and Furious was initiated. Further, unlike in Operation Fast and Furious, where some ATF agents told us that they could not arrest straw purchasers because the U.S. Attorney's Office for the District of Arizona had an unreasonable position on the evidence required in order to make an arrest, we found that this issue was not present in Operation Wide Receiver. Additionally, Operation Wide Receiver illustrated the failure of management in ATF's Phoenix Field Division to alert ATF Headquarters to the use of these tactics, and the knowledge of the U.S. Attorney's Office in their use.

Operation Wide Receiver was particularly significant because it took place in part under the supervision of William Newell, the same Special Agent in Charge (SAC) who oversaw Operation Fast and Furious, and because attorneys and officials in the Department's Criminal Division who reviewed Operation Wide Receiver for possible prosecution learned that firearms purchased by subjects during the investigation had "walked." This knowledge of "gun walking" in Operation Wide Receiver by senior officials in the Department's Criminal Division and by ATF was significant to us as we evaluated the ATF's and the Department's response to Congressional inquiries about ATF firearms trafficking investigations along the Southwest Border in the wake of the shooting death of Agent Terry. We therefore decided to review Operation Wide Receiver both to assess the conduct of the investigation and the Department's communications with Congress in the aftermath of the death of Agent Terry.²²

²² In addition, on November 7, 2011, we received a letter from the Chairman of the Senate Judiciary Committee, Senator Patrick Leahy, requesting that we review Operation Wide Receiver. On November 21, 2011, we informed Senator Leahy that Operation Wide Receiver would be included within the scope of our review.

Operation Wide Receiver was conducted in two parts between March 2006 and December 2007 by agents in ATF's Tucson Office, which is part of ATF's Phoenix Field Division. The investigation involved several straw purchasers, one of whom was a subject in both parts of the case. During the course of the investigation, the subjects purchased hundreds of firearms from a Federal Firearms Licensee (FFL) who was working as an ATF confidential informant and who recorded his in-person and telephonic communications with the subjects. Based on these recordings and other evidence – including court-ordered electronic surveillance – ATF agents knew that the subjects were purchasing firearms for other persons, converting firearms to illegal weapons, and transporting firearms to Mexico. However, during the course of Operation Wide Receiver, agents did not arrest any subjects and seized less than a quarter of the more than 400 firearms purchased.

Although investigative activity ceased in Operation Wide Receiver by December 2007, the case sat idle with the U.S. Attorney's Office without any indictments until September 2009, when the Department's Criminal Division assigned a trial attorney to prosecute the case. The trial attorney concluded upon reviewing the case file that ATF had not interdicted the majority of the firearms purchased by the Operation Wide Receiver subjects. She included this information in e-mails to her supervisors and in two prosecution memoranda. In April 2010, Jason Weinstein, a Deputy Assistant Attorney General (DAAG) in the Criminal Division, reviewed the prosecution memorandum for Operation Wide Receiver I and concluded that ATF had allowed guns to "walk."²³ Weinstein briefed Lanny Breuer, the Assistant Attorney General (AAG) of the Criminal Division, about the case and then held a meeting with senior ATF personnel to discuss potential public relations challenges with the prosecution. The subjects were finally indicted in May and October 2010, after a prosecutor from the Criminal Division took over responsibility for the case.

II. Methodology of the OIG's Review

To conduct the Operation Wide Receiver review, we reviewed reports of investigation and other documents from the ATF's investigative file, as well as case notes, memoranda, and affidavits from files maintained by the U.S. Attorney's Office for Operation Wide Receiver and Operation Iron River, an Organized Crime Drug Enforcement Task Force (OCDETF) investigation conducted around the same time. We also reviewed each of the five applications and court orders to conduct electronic surveillance, as well as

²³ Weinstein held previous positions with DOJ, including as an Assistant United States Attorney in New York City and Baltimore. He worked for the DOJ OIG from 1997 to 1999.

consensual recordings made by the cooperating FFL. In addition, we reviewed thousands of e-mail communications of individuals directly involved in the conduct and management of the case and e-mail communications of Department officials in order to determine what, if any, knowledge these officials had about Operation Wide Receiver while the case was being conducted.

We also reviewed a 594-page journal maintained by the cooperating FFL, who made contemporaneous notes about his interactions with the subjects in Operation Wide Receiver and several other investigations, as well as with ATF agents and supervisors. We include information in this chapter from his journal where it is relevant and corroborated by other sources. Additionally, because agency-wide technical issues prevented ATF from preserving e-mails between November 2007 and August 2008, that source of contemporaneous documents was unavailable to us and so we include information from the FFL's journal entries during this period where it is consistent with the general posture of the case.

We interviewed over 40 witnesses as part of the Operation Wide Receiver review. These included the ATF agents and supervisors responsible for the investigation and their chain of command within ATF's Phoenix Field Division. We also interviewed several prosecutors at the U.S. Attorney's Office who had roles in the case, and the Department trial attorney who finally indicted the case in May and October 2010. In addition, we interviewed the Department's Criminal Division officials who in April 2010 had discussions about the tactics employed in Operation Wide Receiver.

Our interviews included several witnesses no longer employed with the federal government, such as former U.S. Attorney Paul Charlton and the prosecutor primarily responsible for the case during 2006 and 2007. We also interviewed former Attorney General Michael Mukasey and members of his staff about what, if any, knowledge they had about Operation Wide Receiver or the tactics used in the investigation.

However, we were unable to interview Charles "Chuck" Higman, a Resident Agent in Charge (RAC) in the Tucson Office who had direct management responsibility for Operation Wide Receiver and who made several key decisions regarding the conduct of the investigation.²⁴ Higman retired

²⁴ ATF Tucson is a resident office of the Phoenix Field Division. During Operation Wide Receiver, the Tucson office had two enforcement groups, each led by a RAC who reported to an Assistant Special Agent in Charge (ASAC) in Phoenix and to the SAC. Higman became a RAC in November 2005 and led the Tucson II group, which was designated as a Violent Crime Impact Team (VCIT) and before 2006 primarily worked with local police to reduce firearms-related violent crime in targeted neighborhoods. Another RAC led the Tucson I group, which

(Cont'd.)

from ATF in February 2009, and he did not respond to our repeated attempts to contact him.

III. Organization of this Chapter

This Chapter is divided into four sections. In the first section, we describe Operation Wide Receiver I, the part of the investigation that was conducted from March to November 2006. This section describes the inception, strategy, and development of the case, and specific examples of the subjects' purchasing activity. This section also describes the involvement of the U.S. Attorney's Office and ATF's Phoenix Field Division in the investigation and why subjects were not prosecuted during this phase of the case.

The next section covers Operation Wide Receiver II, the part of the investigation that was conducted from February to December 2007. We describe the suspected criminal activity that caused agents to resume the investigation and the efforts ATF made to develop the case beyond the straw purchaser level. These efforts included the use of court-authorized electronic surveillance and attempts to coordinate the investigation with the Government of Mexico. We describe the results of these efforts and how the investigation came to a close, again, without any prosecutions.

The third section of this Chapter describes the eventual prosecution of subjects in Operation Wide Receiver. We begin by describing how the case was handled by the U.S. Attorney's Office and why it failed to indict any subjects. We then describe the circumstances of the decision by the Department's Criminal Division to assume responsibility for prosecuting the case, including its judgment by September 2009 that ATF agents "walked" firearms during the investigation. We also summarize the indictments in May and October 2010 and the results of the prosecution.

In the fourth section of this Chapter, we provide the OIG's analysis of the conduct of Operation Wide Receiver.

primarily handled firearms trafficking cases. During Operation Wide Receiver, the ASAC with responsibility for the Tucson office left for a detail in June 2006 and was reassigned to ATF Headquarters during his absence. The subsequent ASAC retired in early 2007 following numerous conflicts with Newell, and after that a series of short-term Acting ASACs oversaw Tucson until the assignment of a permanent ASAC in June 2008. Reflecting this turnover, the Tucson agents we interviewed could not recall who the ASAC was during Operation Wide Receiver.

IV. Operation Wide Receiver I (2006)

A. Inception and Early Investigation of the Case

In late February 2006, the owner of a Tucson-based FFL contacted an agent in ATF's Tucson Office with information that a customer had purchased six AR-15 lower receivers at a gun show the previous weekend and had asked about purchasing 20 additional AR-15 lower receivers that the FFL had on order.²⁵ The FFL told the agent that he suspected the customer – Gregory Gonzalez – was a straw purchaser. The FFL told us that several factors made him suspicious of Gonzalez, including Gonzalez's age (18 years old) and interest in buying all 20 lower receivers that were on order, and that Gonzalez bought the guns with “wads of cash” from his pocket. The FFL also said that he saw Gonzalez on the second day of the gun show, and that Gonzalez had a bag containing an additional seven or eight lower receivers purchased from someone else.

On March 2, 2006, Special Agent Brandon Garcia, then a new agent in ATF's Tucson Office, interviewed the FFL and learned that Gonzalez planned to pick up the 20 AR-15 lower receivers when the FFL received them and had asked the FFL about buying as many as 50 AR-15 lower receivers “each time.” Garcia told us that the FFL had provided leads to ATF in the past, and that his initial impression was that the FFL was a “Good Samaritan informant” with a clean record who “wanted to do the right thing.” Based on the information provided by the FFL, ATF officially opened an investigation the same day.

The FFL received the 20 AR-15 lower receivers on March 7, 2006. That same day, the Assistant U.S. Attorney (AUSA) assigned to the case, Jennifer Maldonado, authorized the ATF to request that the FFL make consensual recordings of his conversations with Gonzalez and others.²⁶ The FFL agreed to ATF's request and on March 15, 2006, recorded a conversation during which

²⁵ AR-15 rifles include a shoulder stock, a receiver, and a barrel. The receiver is formed by two components: an upper receiver or “upper,” to which the barrel is connected, and a lower receiver, which receives the ammunition clip and holds the trigger. *Atl. Research Mktg. Sys. v. Troy*, 616 F. Supp. 2d 157, 160 (D. Mass. 2009). The lower receiver houses the operating parts and identifies the serial number and thus is a “firearm” within the meaning of 18 U.S.C. § 921(a)(3)(B). *See U.S. v. Blankenship*, 552 F.3d 703, 706-07 (8th Cir. 2009). Individuals purchasing lower receivers from an FFL therefore must execute a Form 4473 and pass a background check.

²⁶ No search warrant or other court approval is required for consensual electronic monitoring, but a law enforcement agency must obtain advice from an AUSA that the monitoring is legal and appropriate. Additionally, although not applicable here, consensual monitoring of face-to-face conversations in certain sensitive circumstances requires written approval from the Director or an Associate Director of the Criminal Division's Office of Enforcement Operations (OEO). *See* U.S. Attorney's Manual §§ 9-7.000, 9-7.302.

Gonzalez told the FFL that he would purchase the firearms at a gun show in Mesa, Arizona, on March 18, 2006.

According to ATF records, agents intended to conduct surveillance of Gonzalez's purchase at the gun show using an undercover agent stationed in the FFL's booth and then maintain surveillance of the vehicles agents believed were transporting the firearms. If the vehicles began heading toward the border, ATF planned to notify the Port of Entry (POE) and have Customs and Border Protection (CBP) pull the vehicle aside for a secondary inspection. ATF planned to arrest Gonzalez and obtain a search warrant for his known residences if CBP found the lower receivers at the border. Garcia told us that at this time he was unclear about the direction of the case. He said that based on discussions with some of the senior agents in the office, he thought that Gonzalez would buy the receivers and drive to the border, and ATF would stop him there.²⁷

On March 18, 2006, Gonzalez, accompanied by a man later identified as Ismael Betancourt, arrived at the gun show to buy the 20 lower receivers from the FFL.²⁸ Gonzalez filled out the Form 4473s and paid \$5,300 in cash for the firearms. While waiting for the NICS background check, Gonzalez asked the FFL about ordering 50 more AR-15 lower receivers and the FFL told him that a purchase that large would require a deposit. Gonzalez looked at Betancourt, who nodded his head "yes," and agreed to make a down payment. According to an ATF report of investigation, Gonzalez said that he would contact the FFL at the gun show the next morning to order the receivers "if the money was available." An undercover ATF agent helped load the 20 receivers Gonzalez had already purchased into Betancourt's car. Betancourt then drove off in his car, and Gonzalez drove away in a white truck. Agents followed Betancourt and Gonzalez to a restaurant. Agents did not observe weapons being transferred between the vehicles in the restaurant parking lot, so they continued surveillance of the car when Gonzalez and Betancourt drove in opposite directions after leaving the restaurant. However, agents later lost visual

²⁷ One 20-year veteran of ATF's Tucson office told us that before Operation Wide Receiver, all of ATF's trafficking cases were very similar in their simplicity: ATF would get a tip from an FFL about a buyer who wanted a large number of firearms and information about when the transaction was scheduled to take place, and would set up surveillance and arrest the buyer when he headed southbound or at the border. Sometimes the initial buyer would cooperate with ATF, and agents would arrest the actual buyer when he showed up to take possession of the guns. If the guns went to a stash house, agents would speak with subjects at the stash house or conduct a search of the stash house. This agent told us that ATF interdicted guns as a matter of course and had been "content to make the little cases," but that Wide Receiver represented a "different direction" from ATF's typical practice.

²⁸ Betancourt was not positively identified until May 24, 2006.

contact with the car because Betancourt began “driving erratically” and “dropped” the surveillance.

The next morning, Gonzalez failed to meet the FFL at the gun show to make the down payment, and ATF believed that the surveillance operation had been compromised. On March 20, 2006, Garcia sent an e-mail to RAC Higman, his supervisor, stating that AUSA Maldonado had advised Garcia that “we are good for the 922A6 [false statements charge] for Gonzalez.”²⁹ Maldonado told us she did not recall being asked to determine whether or when subjects in Operation Wide Receiver were eligible to be charged with a violation, but that she “must have said that if [Garcia] said that to [Higman].” Garcia told us that he did not recall any discussions with Maldonado leading up to this e-mail and did not think there was sufficient evidence at that time to prosecute Gonzalez on straw purchaser charges because Gonzalez was driving his work truck that day and could have returned to work while Betancourt took the firearms to Gonzalez’s house. Thus, according to Garcia, it was not clear that Gonzalez actually “transferred” the firearms to Betancourt. Garcia said that he and Higman discussed conducting surveillance to observe a transfer, then interdicting and seizing the firearms and making arrests at the border.

On March 24, 2006, Gonzalez contacted the FFL and told him that he wanted to purchase \$10,000 worth of receivers, which the FFL said would be about 37 receivers. On March 28, 2006, in a phone call consensually monitored and recorded by ATF, Gonzalez told the FFL that he was on his way to Tucson to make a down payment on the receivers. At ATF’s direction, the FFL arranged to meet Gonzalez at a fast-food restaurant and wore a recording device for the meeting. When Gonzalez arrived, he provided the FFL an envelope containing \$2,500 and told him that he needed to keep the total amount of the purchase under \$10,000 so that the Internal Revenue Service (IRS) would not be notified.³⁰ The FFL told Gonzalez that the IRS would not be notified. Gonzalez also told the FFL he wanted to purchase 50 firearms rather

²⁹ Garcia was a trainee when he was assigned to Operation Wide Receiver. Garcia told us that Higman closely supervised the case and had Garcia “on a tight leash for quite a while.” Indeed, agents told us that nothing happened in Operation Wide Receiver without Higman’s approval and that, for example, Higman determined when to end surveillances on particular subjects or stash houses. As noted previously, Higman did not respond to our repeated attempts to contact him for an interview.

³⁰ Businesses receiving cash payments over \$10,000 in a single transaction or two or more related transactions with the same buyer must report the payments to the IRS and the Financial Crimes Enforcement Network (FinCEN) on IRS/FinCEN Form 8300. See 26 U.S.C. § 6050I(a); 31 U.S.C. § 5331; see also Internal Revenue Manual § 9.5.5.3.6. “Structuring” cash transactions to fall under the \$10,000 threshold and thereby cause a business to evade these reporting requirements is prohibited and is a federal felony offense. See 26 U.S.C. § 6050I(f)(1); 33 U.S.C. § 5324(b).

than only 37 and wanted to order an additional 50. In addition, Gonzalez told the FFL that he planned to take the firearms to a shop near Phoenix where they would be converted to fully automatic weapons. The FFL warned Gonzalez that converting the weapons was illegal, but Gonzalez said he just dropped the guns off and stayed out of it and “was clean.”

Gonzalez originally intended to complete the purchase at a gun show on April 1, 2006, but told the FFL in a recorded telephone call that he had to change this to April 2 because his bank could not complete the money transfer in time and he had to travel to San Diego to pick up the money for the purchase. Similar to Gonzalez’s March 18 purchase, ATF agents planned to conduct surveillance of the April 2 purchase. The plan also included coordinating with agents in ATF’s San Diego Office if Gonzalez traveled there to pick up the money and placing a tracking device on his vehicle to help locate the machine gun conversion shop previously mentioned.

We received conflicting information about whether agents intended to take any enforcement action. According to Garcia, agents intended to execute search and arrest warrants if they located the machine shop. However, contemporaneous e-mails indicate that the surveillance was intended to locate the shop and observe Gonzalez deliver the firearms to it, but not to seize the firearms or take other enforcement action. For example, on March 30, 2006, RAC Higman wrote the following in an e-mail to a Supervisory Special Agent in the Phoenix Field Division, which was supporting surveillance of the suspected machine shop:

The bandits have put a \$ deposit toward buying 50 this Sat., and intend on 50 more in the next week or two. We have verified 26 to date; the USAO is on board. We are looking to let these 50 walk while identifying the location/subject who is doing the conversions with an eye to doing Search/Arrest warrant the next go ‘round.

Similarly, a Phoenix Group Supervisor stated in an e-mail on March 30, 2006, to agents assisting the surveillance that, “Our mission is to locate the illegal gun smith. There is no projected enforcement activity or surveillance beyond locating the alleged conversion factory.” In a reply to this e-mail, Higman told Phoenix agents, “We have two AUSA[s] assigned to this matter, and the USAO @ Tucson is prepared to issue Search and Arrest Warrants. We already have enough for the 371 [conspiracy] and 922 a6 [false statements] charges, but we want the Title II manufacturing and distribution pieces also - we want it all.”³¹

³¹ This refers to Title II of the Gun Control Act of 1968, which amended the National Firearms Act (NFA). The NFA regulates certain categories of weapons, including machine guns, (Cont’d.)

In the end, no surveillance was necessary on April 2 because the purchase did not occur. Gonzalez called the FFL and told him that he was having trouble with his bank and did not have the money. After several unsuccessful attempts to complete the sale, the FFL called Gonzalez on April 11 and told him he had two days to get the money, or the FFL would sell the receivers to a dealer in Tucson. As discussed below, this purchase was eventually made to an associate of Gonzalez, Jonathan Horowitz.

Although the FFL had been cooperating with the ATF on the investigation for several weeks, he was not officially opened as a confidential informant (CI) until March 30, 2006. On that day, the FFL was photographed and fingerprinted at ATF's Tucson Office and signed an agreement that specified he would act at ATF's direction, would not participate in unlawful activities unless necessary to the investigation and authorized in advance, and would not undertake publication or dissemination of any information or material from the investigation without authorization from ATF. The agreement also provided that ATF would pay the FFL for any expenses he incurred, but it did not guarantee compensation or a reward for his services.

The ATF informant policy in effect at the time required the SAC of the field division to approve the use of informants who provided information on an ongoing basis. Lester Martz was the SAC of the Phoenix Field Division in March 2006. The informant agreement, however, was signed and witnessed by Tucson agents, and we have been unable to determine whether Martz or other supervisors approved the use of the FFL as an informant.³²

Newell, who became SAC of the Phoenix Field Division in June 2006, told us that he disagreed with the use of an FFL as an informant because there is a conflict of interest where ATF both regulates an FFL and pays him for information. Newell said that he was "less than pleased" and expressed his concerns to the Acting ASAC when he found out that Tucson agents were using the FFL as an informant, but said he did not believe they could change the approach and still make the case because the FFL was also the main witness.

parts designed and intended for use in converting weapons into machine guns, silencers, destructive devices, and short-barreled rifles and shotguns. See 26 U.S.C. § 5845. These weapons must be registered in the National Firearms and Transfer Record, and may only be registered by authorized manufacturers, makers, and importers. See 26 U.S.C. §§ 5801, 5802, 5861. Possession, receipt, manufacturing, transport, or delivery of unregistered NFA weapons is illegal. See 26 U.S.C. §§ 5861, 5872.

³² Martz retired on May 31, 2006, and William Newell reported to Phoenix as Martz's successor as SAC on June 19, 2006.

B. Horowitz and Betancourt Take Over Straw Purchases in April 2006

On April, 12, 2006, the day after the FFL told Gonzalez that he had two days to complete the purchase of the 50 AR-15 lower receivers, an individual named Jonathan Horowitz contacted the FFL and told him that Gonzalez was in trouble with “the boss” for missing a deadline, and that Horowitz would be in charge of purchasing the firearms. The FFL and Horowitz agreed to meet at the FFL’s house on April 13, 2006, to complete the sale. In a phone call to the FFL the next morning, Gonzalez identified Horowitz as one of the people who provided him with money to purchase firearms and complained that “they” were trying to “cut [Gonzalez] out of the deal.”

ATF agents again made plans to conduct surveillance. An undercover agent was placed in the FFL’s house and other agents established surveillance outside. According to ATF reports, the goal of the surveillance was to “facilitate identification of[,] and controlled delivery of firearms to[,] suspected firearms traffickers.” The plan did not include seizing the firearms. Instead, agents planned to install a tracking device on the vehicle transporting the firearms in order to locate the machine gun conversion shop.

On April 13, 2006, Horowitz and Betancourt arrived at the FFL’s house to complete the sale. Horowitz completed the Form 4473s, underwent a NICS background check, and then paid \$10,700 in cash for the 50 AR-15 lower receivers. He and Betancourt loaded the firearms into Betancourt’s car, and agents attached a tracking device to the vehicle when the two went back into the FFL’s house.³³ ATF agents and officers from the Tucson Police Department (TPD) maintained surveillance on Betancourt’s vehicle until approximately 10:00 p.m. that evening, and agents resumed surveillance the next day as Betancourt traveled to various locations. Agents did not locate the machine gun conversion shop and did not take any enforcement action.

According to ATF records, Horowitz and Betancourt made an unplanned visit to the FFL at a gun show on April 22, 2006, and provided him with a \$5,000 down payment for an additional 50 AR-15 lower receivers. Horowitz also asked the FFL about acquiring grenade launchers that would fit under AR-15-type barrels. After several conversations over the next month, Horowitz and the FFL agreed to meet at a gun show in Phoenix, Arizona, on May 21, 2006, to complete the sale of the 50 AR-15 lower receivers.

³³ Agents installed a “bird dog,” a wireless GPS tracking device that emits periodic signals indicating a subject’s location but does not log and maintain data about where the vehicle goes.

ATF agents conducted surveillance of the purchase on May 21, 2006. Betancourt gave the FFL an envelope containing \$8,200 in cash. The FFL helped load the firearms into the back seat and trunk of Betancourt's car, and Horowitz and Betancourt drove away. ATF agents terminated surveillance after Horowitz took the firearms to his house.

During the recorded conversation that took place at the May 21 purchase, Betancourt and Horowitz told the FFL that their "boss" in Tijuana wanted them to convey his thanks for their business relationship and his apologies for any trouble that the FFL may have encountered while dealing with Gonzalez. Despite hearing this statement, Garcia told us he believed that the agents did not have the authority to seize the firearms or make an arrest on that day because Horowitz purchased the firearms and took them to his own house, so agents could not prove that a violation occurred. Garcia told the OIG that the recorded statements Horowitz and Betancourt made about buying the firearms for their "boss" in Tijuana did not have, in his opinion, any legal significance, but did lead agents to suspect a possible connection to the Arellano Felix Organization, a Tijuana-based cartel. We found no evidence that Garcia consulted with the U.S. Attorney's Office in reaching his legal conclusions at that time.

Mark Latham, a more experienced Tucson ATF agent who worked on surveillances and assisted with paperwork in Operation Wide Receiver, held a different view. He told us the recorded statements about taking firearms to Tijuana would have been sufficient for probable cause to arrest the subjects and to seize the weapons. Latham said that Tucson agents believed from the beginning of the investigation that there were possible cartel implications and viewed the case as an opportunity to take down the Arellano Felix Organization. Latham told us that Operation Wide Receiver represented a "change in direction" in which Higman "supervised and directed" agents in implementing the weapons transfer policy in ATF Order 3310.4B, which we described in Chapter Two. According to Latham, that policy enabled agents to "see where the guns go, the people, the places, addresses, vehicles" rather than doing site arrests and immediate "knock and talks" or obtaining immediate arrest and search warrants.³⁴ Latham said agents intended to develop information that would allow them to see the network and connect individuals to the cartel, take the steps necessary to work up to Title III wiretaps, and then start interdicting firearms.

³⁴ A "knock and talk" occurs where an agent has reasonable suspicion to believe an individual is a straw purchaser engaged in firearms trafficking and approaches the individual to ask about the firearms that were purchased.

In fact, around this same time, ATF obtained other evidence potentially linking Horowitz and Betancourt to Mexico and indicating that they received the money used to pay for the firearms from sources there. For example, on May 10, 2006, agents tracked Betancourt's car to Tijuana, Mexico and phone records for Horowitz and Gonzalez revealed numerous phone calls and texts to Mexico. On May 25, 2006, agents conducted a search of Betancourt's trash and discovered a receipt for an \$8,000 withdrawal from a U.S bank dated April 10, 2006, three days before Horowitz purchased the first 50 AR-15 lower receivers from the FFL.³⁵ After this withdrawal, the account had no available credit and a zero account balance. Bank records obtained by ATF indicated a pattern of transactions involving significant funds, potentially confirming earlier statements that the subjects received money from a source in San Diego to purchase firearms for the "boss" in Tijuana.

C. Involvement of the U.S. Attorney's Office and ATF Division Counsel and Discussion of "Walking" Guns in June and July 2006

Maldonado, who handled firearms cases as part of the Project Safe Neighborhoods Unit of the Tucson Office, was the first prosecutor assigned to Operation Wide Receiver. She was responsible for the case until she left the office in November 2007.

Maldonado told the OIG she understood that Operation Wide Receiver was "not just a straw purchaser case," that Gonzalez and Horowitz had engaged in "obvious" straw purchases, and that the investigation intended to get to the "larger fish." She also told us that Tucson agents were not able to realize this goal and she understood that agents were not interdicting firearms because surveillance repeatedly failed. Maldonado compared the investigation to a drug case in which she understood that law enforcement officers can elect not to seize small quantities of drugs so that they can build a larger case and identify upstream conspirators.

According to Maldonado, her involvement in Operation Wide Receiver primarily was limited to obtaining subpoenas for ATF. Indeed, her involvement in Operation Wide Receiver appears to have been extremely limited: her case notes and case-related e-mails were sporadic and sparse, and Garcia told us he had little interaction with her. Consistent with this, Maldonado told us that during a proactive investigation like Operation Wide Receiver her role was not so significant that it would have required the involvement of a supervisor, and

³⁵ Tucson agents later learned that the money used to purchase firearms was flown into Phoenix on a monthly basis by a relative of Betancourt who lived in San Diego or Tijuana, Mexico.

she did not include Operation Wide Receiver in a list of cases prepared for her supervisor, Raquel Arellano, in early January 2007.³⁶ Maldonado also told us that she did not view it as her role to tell ATF how to run the investigation. However, former U.S. Attorney Paul Charlton noted that being a prosecutor “involved telling agents no sometimes.”

Because Maldonado had no experience with electronic surveillance, an AUSA from the OCDETF Unit of the Tucson Office, Dave Petermann, was asked sometime in 2006 to assist her with eventual pen registers and Title III applications, as well as with other court orders.³⁷ Petermann had been an attorney in the Project Safe Neighborhoods Unit (the Unit to which AUSA Maldonado was assigned) before moving to the OCDETF Unit and had prosecuted a firearms trafficking case the previous year based on falsified Form 4473s and the defendant’s confession. Although we found no record memorializing Petermann’s assignment to Operation Wide Receiver, he told us that he was involved in the case periodically until his departure from the office in July 2007. Petermann told us that Maldonado handled the day-to-day work on Operation Wide Receiver but that he met weekly with Higman regarding a separate OCDETF case, Operation Iron River, and discussed Operation Wide Receiver during those meetings. Petermann also told us that his OCDETF supervisor, Anne Mosher, at times voiced concerns about him spending time on a non-OCDETF matter (Operation Wide Receiver was not an OCDETF case), but we received no indication that she had knowledge of or otherwise was involved in Operation Wide Receiver.

During the May 21, 2006, purchase described earlier, Betancourt and Horowitz told the FFL that their “boss” was interested in obtaining from him 10.5 or 11-inch “short” uppers for the AR-15 lower receivers, which they had been purchasing through the Internet. Agents sought to determine whether ATF could allow the FFL to sell these “short” uppers, or whether this would

³⁶ Wide Receiver was one of 93 cases that Maldonado was handling as of January 2007. Witnesses from the Tucson U.S. Attorney’s Office told us that caseloads were high: attorneys handling immigration cases could have as many as 300 to 400 cases, and drug attorneys generally had between 100 and 150 cases. Attorneys handling firearms cases had slightly fewer cases, usually between 75 and 100. Lynette Kimmins, the Tucson Criminal Chief in 2006 and 2007, told us that the office handled 4,000 to 5,000 felony cases per year, including cases charged as felonies that resulted in misdemeanor pleas.

³⁷ Calling data is obtained through the use of pen registers and trap and trace devices. Pen registers record outgoing information about telephone calls, while trap and trace devices record incoming information, such as the originating phone number. See 18 U.S.C. § 3127(3)-(4). These allow real-time electronic monitoring of a telephone user’s calls (excluding content) for a limited time period, usually 60 days. See 18 U.S.C. § 3123(c). To obtain an order for a pen register and trap and trace device, a law enforcement agency must certify to a court of competent jurisdiction that the information likely to be obtained is relevant to an ongoing criminal investigation. See 18 U.S.C. §§ 3123(a), 3122(b)(2), 3127(2) (2012).

result in the sale of a prohibited weapon. Combining an upper receiver under 16 inches in length with an AR-15 lower receiver produces a short-barreled rifle, a firearm that is regulated under the NFA. Even if the parts are not assembled, someone who buys an AR-15 lower receiver and a “short” upper has possession of an NFA firearm if he has actual or constructive possession of both parts, and the pieces can be readily restored to operate.³⁸

On May 31, 2006, in preparation for a meeting with the U.S. Attorney’s Office about this issue, Latham contacted ATF’s Division Counsel in the Phoenix Field Division. Latham stated in an e-mail:

We are now looking at [having the FFL at ATF’s direction] sell[] the straw purchaser 10.5 inch uppers along with the AR-15 lowers [W]e will have to let some of these 10.5 inch uppers and lowers walk, so in essence we will be putting NFA weapons on the street We are looking at this as a long term investigation against the Arellano Felix Organization since the guns are going to [Tijuana] and the investigation will possibly be going to a T-III.

The Division Counsel replied that the sale of the unassembled uppers and the AR-15 lower receivers meet the criteria for possession of an NFA weapon. The Division Counsel continued:

Whether you are authorized to allow an NFA weapon back on the streets is a policy decision, not a legal one. I believe that it is against ATF policy to allow NFA weapons back on the street, but perhaps you can get special permission from HQ and the SAC because this case involves the Arellano Felix Organization, and will also need to show the need for the T-III.

The Division Counsel told the OIG that he did not think that it would be “unethical in the sense of . . . morality” to allow NFA weapons to “walk,” but that it would have been contrary to ATF policy and would have required approval from both the SAC and ATF Headquarters.

On June 13, 2006, Higman, Garcia, and Latham met with AUSAs Maldonado and Petermann to discuss the NFA issue. Petermann told the OIG that Higman said ATF’s legal counsel thought that allowing NFA weapons to walk would be “morally reprehensible or objectionable,” and that this raised “red flags” for him and Maldonado. Handwritten notes taken by Maldonado at this meeting state,

³⁸ See *U.S. v. Kent*, 175 F.3d 870, 873-75 (11th Cir. 1999); see also *U.S. v. LaGue*, 472 F.2d 151, 152 (9th Cir. 1973) (constructive possession sufficient to establish possession of unregistered guns in violation of the National Firearms Act).

Do pen registers to see who [the straw purchasers] are talking to
then: 2 routes possible

(1) they want to cut out the source of supply for uppers - could put
in an undercover to give them uppers. Could help wall off C.I.

Problem: entrapment (easy to defeat - they want it (10 1/2 inch
uppers), they know it's illegal.) (But we've then provided them with
a full NFA weapon.)

** WOULD THIS OFFICE SUPPORT THAT, & LETTING THEM
WALK? 50/mo.

(2) T-3 - one of the 3 on the phone to i.d. where the uppers
[purchased through the Internet] are coming from & where they're
putting them together. That's the violation - NFA.

Maldonado told the OIG that Higman specifically requested at this
meeting that she send the question about allowing NFA weapons to "walk" up
her chain of command. The following day, Maldonado sent an e-mail to the
then-Criminal Chief for the U.S. Attorney's Office, Lynette Kimmins, requesting
a meeting to discuss "office-policy-type questions" raised by Higman. This
meeting apparently did not take place until June 29, 2006.

Kimmins said that she did not specifically recall the substance of the
meeting, but she said that she remembered Petermann and Maldonado telling
her what ATF wanted to do and that there was the potential for "guns going
South." Maldonado told us that she and Petermann presented Higman's
question to Kimmins, and that Kimmins said the decision should be made by
the U.S. Attorney and directed Maldonado to draft a memorandum asking his
position on introducing a source of upper receivers that would be used to make
illegal firearms and then "letting them walk." Petermann told the OIG that they
also discussed the seizure of 17 AR-15 receivers mailed by Betancourt on June
14, 2006. We describe this incident in the next section.

Two weeks later, on July 13, 2006, Maldonado forwarded to Kimmins a
memorandum she drafted to then-U.S. Attorney Charlton that summarized the
June 13 meeting with ATF. The memorandum described Operation Wide
Receiver as an investigation into an organization with possible cartel ties in
which several individuals were "purchasing large quantities of lower receivers,
in bulk," combining these lower receivers with "short" uppers purchased from a
separate source, and potentially distributing illegal firearms into Tijuana,
Mexico. The memorandum stated that the purchasers of the lower receivers
were "clearly not the actual owners of the weapons" and that Tucson agents
wanted to introduce an informant to provide the "short" uppers to "lead to the
discovery of more information as to the ultimate delivery location of these
firearms and/or the actual purchaser. The memorandum also stated that
Higman asked about "the possibility of allowing an indeterminate number of

illegal weapons... to be released into the community, and possibly into Mexico, without any further ability by the U.S. Government to control their movement or future use,” noting that Higman “pointed out that these exact same firearms are currently being released into the community, the only difference being that at this time ATF is only involved in providing the lower receiver.” The memorandum also noted that ATF’s legal counsel had “moral objections” and opposed the proposed method of furthering the investigation.

Kimmins forwarded the memorandum to Charlton the next day and Charlton replied that he was meeting with ATF SAC Newell on the following Tuesday and would discuss the issue with him then. We did not locate any contemporaneous record of conversations between Charlton and Newell about the memorandum or the decision made by the U.S Attorney’s Office. However, according to an entry in the FFL’s journal, an e-mail sent by the FFL to Garcia later in the investigation stated, “I know that the brass didn’t want me to provide the short top ends AND lowers to the guys in Phoenix.”³⁹ The FFL told us he did not sell “short” upper receivers to Horowitz and Betancourt as part of Operation Wide Receiver, and we found no evidence that the plan proposed in the memorandum came to fruition otherwise.

Charlton told the OIG that he did not recall Operation Wide Receiver. Indeed, we found no evidence that Charlton received any information about Operation Wide Receiver other than this memorandum. Neither Kimmins nor Maldonado recalled receiving an answer from Charlton in response to this memorandum, and we have no record of a decision or any subsequent communications about it. Maldonado told us that she surmised that Charlton must not have approved the request because Tucson agents did not introduce an informant to sell uppers.

We provided Charlton a copy of Maldonado’s memorandum and, after reviewing it, he told us that he would not have approved an operation in which ATF allowed an individual acting at its direction to sell weapons to suspected straw purchasers, and then allowed those guns to go to Mexico. Charlton told us, however, that he did not recall the circumstances surrounding the Maldonado memorandum. Charlton also told us that he did not have an independent recollection of receiving or reading the memorandum or meeting

³⁹ As noted, the FFL kept a journal about his interactions with straw purchasers and ATF agents and supervisors during Wide Receiver and several other cases. The FFL told us that he tried to make notes immediately after events took place, and that he never waited more than two or three days to do so. While several agents told us that the FFL “embellished” or “sensationaliz[ed]” some events in his journal, they acknowledged that other information was accurate. As noted above, we include information from his journal where it is relevant and corroborated by other sources or, for the period between November 2007 and August 2008, where it is consistent with the general posture of the case.

with Newell to discuss the investigation. Charlton said that he spoke with Maldonado in 2011, after the allegations about Operation Wide Receiver were reported in the press, and that she assured him the request in the memorandum was not approved. Charlton told us that he had also spoken to Petermann, who assured him that “as a general principle he never let or approved letting guns walk.”

Charlton also told us that he recalled a conversation in which Newell told him about a plan to work with Mexican law enforcement to allow weapons to travel under ATF surveillance from Tucson to the border, where they would be intercepted by Mexican law enforcement. Charlton said that Newell was excited about this plan and thought that he could implement it because of his training and experience in Colombia, where Newell had served as the attaché. Charlton said that Newell’s plan seemed reasonable with a couple of caveats – namely, if you were certain of the surveillance taking place on the U.S. side and were working with vetted law enforcement in Mexico. Charlton told us he did not recall whether this plan was carried out before he left the U.S. Attorney’s Office in January 2007.

Newell also told the OIG that he had no knowledge of the memorandum until the press began reporting about it and did not remember meeting with Charlton about this issue. Newell told us that Higman did not inform him that Higman had asked for an opinion from the U.S. Attorney’s Office about the tactics outlined in the memorandum. Newell said that he received a briefing paper about Operation Wide Receiver shortly after he became the SAC of the Phoenix Field Division in mid-June 2006 and later held a meeting with Higman to discuss the case around September 2006.⁴⁰ According to Newell, there was no discussion in either the briefing paper or the September 2006 meeting about ATF facilitating the sale of illegal firearms. Newell said that Higman told him during the September 2006 meeting that he (Higman) had been in contact with ATF’s Mexico City Office (MCO) to arrange to work with Mexican law enforcement to maintain surveillance of firearms into Mexico, identify the ultimate recipients of the firearms, and establish that the firearms had in fact been trafficked across the border.

Newell also told the OIG that he understood that Tucson agents used standard investigative techniques, including surveillance, to determine what had happened to the firearms and identify the people who were directing and

⁴⁰ The briefing paper described Wide Receiver as an international traffic in arms (ITAR) investigation in which 3 subjects had purchased 126 firearms from an FFL during 4 separate transactions. It stated that one of the subjects had told the FFL that the purchased firearms were transported to his “boss” in Tijuana, Mexico, and that Tucson agents had tracked a target vehicle to Tijuana, highlighting the possible connection between this activity and the Arellano Felix Organization.

financing the straw purchasers. Newell placed the responsibility for agents failing to interdict firearms during Operation Wide Receiver on the U.S. Attorney's Office, telling the OIG that Tucson agents repeatedly were told that there was not probable cause to interdict and seize firearms or to make arrests, and that agents could not take enforcement action without the express approval of the U.S. Attorney's Office. We found no evidence supporting Newell's claim. As discussed above, Maldonado told Garcia that there was "enough" evidence for a false statements charge against Gonzalez as early as March 20, 2006, and we found nothing suggesting that Tucson agents ever sought authorization from the U.S. Attorney's Office to make arrests or interdict firearms in Operation Wide Receiver but were denied.

D. Refusal by San Diego ATF Office to Assist Tucson ATF Office in Delivery of 17 AR-15 Lower Receivers in June 2006

At around the same time ATF agents were engaging the U.S. Attorney's Office about allowing NFA guns to walk, agents were also continuing their efforts to identify additional individuals and locations associated with the activities of Betancourt and Horowitz. On June 14, 2006, Betancourt attempted to ship 17 lower receivers from a UPS store in Phoenix, Arizona, to San Diego, California. The owner of the UPS store, a former federal law enforcement officer, thought the package looked suspicious and opened it. He found that it contained firearms, but still shipped the package because he did not know whether it was unlawful for the sender to mail the items. He subsequently contacted ATF's Phoenix Office.

After learning about this shipment, Higman contacted Shawn Hoben, the RAC of ATF's San Diego Office, and asked him to use an undercover agent to deliver the package to the intended recipient. Higman stated in an e-mail to Hoben, "[W]e believe at this point there is more value in the surveillance, identification of locations, persons, vehicles and asset[s] rather than making sight arrests [W]e'll have probable cause to arrest and indict [the intended recipient] at a later date as this case matures." Hoben told us he refused to allow the delivery because of concerns about losing control of the firearms and the resulting risk to public safety. ATF San Diego instead intercepted the package and ordered it returned to the Phoenix UPS store. ATF Tucson subsequently obtained a search warrant to open the package and seized the firearms. A few weeks later, Horowitz called the FFL to tell him about the seizure, and in mid-July, contacted the FFL to ask about the prices of certain firearms but told him that they were waiting on things to cool down before making more purchases.

An August 2006 briefing paper apparently drafted by Athanasio "Tom" Vlahoulis, an experienced agent in the Tucson Office, stated that the interception of the delivery to San Diego disrupted the investigation. It further stated that it was likely that the firearms previously purchased by Gonzalez,

Horowitz, and Betancourt had been illegally trafficked to Mexico. The briefing paper also stated that “[t]here is currently sufficient documentation to conclude a historical criminal case on individuals involved in the illegal purchase and transfer of firearms identified as of this date.” Despite this belief, ATF agents did not make any arrests or discuss with the U.S. Attorney’s Office the possibility of prosecuting any subjects.

Indeed, ATF Tucson still seemed to be attempting to make a bigger case. In early October 2006, Higman, in a memorandum signed by Newell, requested \$20,000 in funding for pen registers and a Title III wiretap. In October and November 2006, Horowitz and two new associates made several purchases from the FFL, totaling 14 firearms. According to an ATF operational plan for surveillance of an October 7 purchase:

Betancourt has not been heard from and has no money in his bank accounts. Horowitz advised the FFL recently that he is going to cut out the middle man and make a lot of money for himself. It is suspected that Horowitz will now be moving the firearms to Tijuana himself. We are not prepared to make any arrests at this time because we are still attempting to coordinate our efforts with [law enforcement] in Mexico.

In late November 2006, Vlahoulis contacted the MCO about meeting with Mexican law enforcement to “work out some investigative strategy to target the recipients, and also target the organizational entities that are orchestrating this operation and connect the firearms to crimes in Mexico.” Vlahoulis provided the MCO background information about Horowitz and Betancourt, as well as Mexican phone numbers listed in their cell phone records, and MCO personnel provided Tucson agents with information about a vehicle with a license plate from Sonora, Mexico, that was identified after the driver made contact with Betancourt in April 2006. However, the FFL did not make any additional firearms sales to Horowitz or Betancourt after November 2006, and we did not identify further coordination between ATF Tucson and Mexican law enforcement until April 2007, during the second part of Operation Wide Receiver.

V. Operation Wide Receiver II (2007)

A. Resumption of the Case with a New Group of Buyers and Arrest of Gonzalez in February 2007

On February 5, 2007, Gonzalez, the initial straw purchaser in Operation Wide Receiver I, contacted the FFL and said that he had a friend interested in purchasing AK-47s. Although there had been little investigative activity for almost 2 months, the FFL was still serving as a confidential informant at this

time and he notified ATF agents about this contact and recorded his conversations with Gonzalez.

On February 7, 2007, Gonzalez arrived at the FFL's house with three other men and introduced one of them, Carlos Celaya, as the "buyer." Gonzalez filled out the Form 4473s to purchase four AK-47 rifles, and Celaya handed the FFL \$2,200 in cash in payment. During the purchase, Gonzalez and Celaya told the FFL that someone would drive from Mexico to Tucson to pick up the guns and take them back to Mexico, and that guns sometimes were placed in a hidden compartment of the vehicle for transport. Gonzalez also told the FFL that the lower receivers that he and Jonathan Horowitz had purchased in 2006 were taken to Tijuana and converted into fully automatic rifles.

Three ATF agents monitored the February 7 purchase and observed Celaya and two men load the four AK-47s into a white Ford Thunderbird and leave, while Gonzalez remained in the house with the FFL. Agents followed the Thunderbird as it drove through an industrial section of Tucson but stopped when the driver made a U-turn. Agents later saw the car enter and exit the trailer park where Gonzalez lived and then arrive at Celaya's house. Agents discontinued surveillance at that point. Garcia told us that even though Gonzalez openly made a straw purchase in front of the FFL, ATF did not make arrests or seize the weapons because "we needed for these guys to come . . . back to [the FFL] and buy the guns from him where we could record it . . . and monitor it and try to catch them trafficking[.]"

On four separate occasions over the next two weeks, Gonzalez and Celaya bought 10 additional firearms from the FFL, primarily AK-47 and AR-15 semi-automatic pistols and rifles. In recorded meetings with the FFL, neither man made any attempt to hide that the firearms were for buyers in Mexico. For example, on February 11, 2007, Gonzalez bought an AR-15 semi-automatic pistol from the FFL. Because Gonzalez had previously passed the NICS background check, the FFL did not call in his information until later that day. When he ran the background check, however, he realized that Gonzalez was too young to purchase a handgun from a federally licensed dealer.⁴¹ The FFL called Gonzalez and explained the situation, and Gonzalez said he would return the next day with someone who could legally complete the sale. The next day, Celaya completed the paperwork for Gonzalez's AR-15 pistol and

⁴¹ Under the Gun Control Act of 1968, handgun sales are limited to individuals 21 years of age and older. See 18 U.S.C. § 922(b)(1); 27 C.F.R. § 478.99(b). Although some states, including Arizona, have lower age requirements for ownership of handguns, federally licensed dealers must observe the higher age requirement. See ATF Frequently Asked Questions, Conduct of Business – Licensees, at <http://www.atf.gov/firearms/faq/licensees-conduct-of-business.html#age-requirements> (last visited May 15, 2012); see also ARIZ. REV. STAT. ANN. § 13-3109(A).

purchased two other firearms. Gonzalez told the FFL at this sale that all of the firearms they had purchased were “going South.” On February 22, 2007, Celaya told the FFL that he was purchasing an AK-47 semi-automatic pistol to leave with family in Caborca, Mexico, and that he sold firearms to make extra money on the side.

After this purchase, Tucson agents decided to arrest Gonzalez and try to “flip” him, believing that he was likely to know “more of the cartel circle” because he had introduced Celaya and had made statements suggesting that he was “in the know” about what happened to the firearms. Agents confronted Gonzalez on February 27, 2007, when the Pima County Sheriff’s Office conducted a traffic stop of Gonzalez’s vehicle at ATF’s request, detained him, and took him to the ATF office for questioning. In an interview with ATF agents, Gonzalez identified the source of the money used to purchase lower receivers in 2006, told agents that Celaya’s cousin had provided the money for the AK-47 and AR-15 pistols and rifles purchased in February 2007, and said that Celaya and his cousin had found a supplier for grenade launchers that can be attached to AR-15 rifles.⁴²

Garcia and another Tucson agent, Bernardo Arellano, signed up Gonzalez as a confidential informant with the intention of embedding him in the firearms trafficking operation so he could obtain information that would help ATF conduct more effective surveillance. However, Celaya did not call Gonzalez again. Garcia speculated that Celaya realized that he could pass the NICS background check and purchase the guns directly from the FFL without having to pay Gonzalez \$100 per gun, and cut Gonzalez out of future deals and did not call him again. ATF agents then turned their efforts to trying to arrest and “flip” Celaya on charges that carried potentially more jail time than those for a straw purchaser offense, but that effort was also unsuccessful. Agents began efforts to conduct a reverse sting operation in which an undercover agent would sell an inoperative “prop” grenade launcher supplied by ATF to Celaya and arrest him immediately for the NFA violation, a charge that could result in significant jail time and thereby induce him to cooperate. However, Celaya did not pursue the grenade launchers, and this operation did not take place. ATF made no effort to arrest and “flip” Celaya on the straw purchaser charges alone. We found no record that Maldonado or anyone else in the U.S. Attorney’s Office was consulted at this time.

⁴² Celaya later told the FFL that his cousin was José Celaya. To avoid confusion, we refer to José Celaya by his full name, while references to “Celaya” without a first name are to Carlos Celaya.

B. Celaya's Purchasing Activity Continues Unabated as Focus Shifts to a New Subject in April 2007

According to ATF reports, in March 2007, Celaya and two other buyers purchased a total of 33 firearms from the FFL, including AK-47, AR-15, and .38 Super pistols.⁴³ ATF conducted no surveillance of these purchases, despite having advance notice of them. When asked about the lack of surveillance, Garcia told us that these sales should not have happened at all, and that he should have told the FFL earlier in the investigation not to sell firearms if agents could not get out on surveillance. Garcia said that during this time agents had short notice that the subjects were on their way to the FFL's house and could not get out on surveillance every time, and that after this series of purchases Higman "blew a gasket" and told Garcia to instruct the FFL not to make sales unless agents were available to conduct surveillance. Garcia told us that around this time the "investigation was taking a toll on everybody" and that "Wide Receiver was like a bad word in the office because everybody knew it meant working late or whatever." Garcia also stated that agents discussed the need "to start doing something different" because they could not prove the subjects were taking firearms to Mexico based only on the subjects' statements. We found no evidence, however, that ATF agents raised this issue with the U.S. Attorney's Office at that time.

On April 3, 2007, Celaya called the FFL and told him that another individual was interested in purchasing firearms "to take back to Mexico," and they made arrangements to meet at the FFL's house that evening. According to the FFL's journal, Garcia told him in a meeting that day, "We're getting a lot of heat so this probably will be his [Celaya's] last purchase. We just can't keep letting these guns go to Mexico with impunity." Garcia told the OIG that he would not be surprised if he made comments to the FFL in early April 2007 about the need to minimize the number of guns going to Mexico because media reports around that time began criticizing the flow of firearms from the United States to Mexico.

That evening, Celaya arrived at the FFL's residence with a man later identified as Israel Egurrola-Leon and a woman, Siria Valencia.⁴⁴ Egurrola-Leon selected five firearms for Celaya to purchase. Celaya filled out the Form 4473s and passed the background check, and Egurrola-Leon produced \$5,000

⁴³ We identified in other documentation an additional five firearms, for a total of 38 firearms, purchased in March 2007. We were unable to determine the basis for this discrepancy.

⁴⁴ Egurrola-Leon was not identified until a traffic stop in November 2007. ATF reports and other documents refer to him as Jose Ramon Rivera-Balbastro, Israel Rivera, or Israel Burrola.

in a heat-sealed plastic bag to pay for the firearms, giving \$4,230 to the FFL. Egurrola-Leon then paid Celaya \$500 and Valencia \$100, apparently as a fee. ATF and TPD surveilled this purchase and observed the subjects place firearms in a Ford Expedition driven by Egurrola-Leon, then conducted air and ground surveillance of that vehicle until it parked at a house in Tucson. Surveillance was terminated at 9:50 p.m. at Higman's direction.

The focus of the investigation changed as a result of the appearance of Egurrola-Leon. According to the FFL, Higman told him that the plan had been to arrest Celaya that night, but that the appearance of Egurrola-Leon made Higman think that the case could turn into something more. Garcia told us that although they had no information about potential cartel ties at this time, Egurrola-Leon seemed to have "clout" and Higman decided to focus ATF's efforts on him to determine his role in the trafficking conspiracy.

C. Attempts to Coordinate with Mexican Law Enforcement between April and June 2007

Over the next few days in April 2007, Celaya called the FFL several times and told him that Egurrola-Leon wanted to buy 20 .38 Super handguns and 20 AR-15 rifles. The FFL and Celaya scheduled this purchase for the following week, and Tucson agents began efforts to coordinate surveillance of the purchase with Mexican law enforcement through the ATF Mexico City Office (MCO).

At that time, the MCO was staffed by four people: the country Attaché, Eugene Marquez; Assistant Attaché Ramon Bazan; and two Mexican nationals employed by ATF to support the office, [REDACTED] and [REDACTED]. Because the office was small and had responsibility for Mexico, Central America, and the Caribbean, Marquez and Bazan divided the duties between themselves. Marquez managed the budget, handled meetings with the U.S. Embassy and ATF's Mexican law enforcement counterparts, and facilitated the training of Mexican officials in firearms identification and tracing and K-9 explosives detection. Bazan was responsible for operational issues, such as coordinating with ATF field offices on traces and investigative leads. [REDACTED] provided administrative support for the office. [REDACTED], although nominally designated as an "investigative assistant," had no law enforcement training and only minimal English language capability. He was hired by ATF to assist with driving MCO staff, help with firearms traces and paperwork, and act as a liaison with the Mexican government.

On April 6, 2007, Tucson agent Vlahoulis contacted Bazan to coordinate the "delivery of 20 assault rifles" to Mexico. Vlahoulis recounted his conversation with Bazan in an e-mail to Higman, stating,

Ramon [Bazan] advised that [the proposed cross-border delivery of assault rifles] would not be a problem and that it had been done one other time very successfully. I advised him that we did not want a photo op seizure at the border but that we wanted the shipment taken all the way to its destination and exploited on all levels (personnel, telephone and financial) for intelligence and reportable criminal activity. I specifically advised that this matter is only the tip of what we would like to do in the future [REDACTED]

[REDACTED] Ramon advised that he was onboard and would be in touch in a couple of hours.

On April 10, 2007, Vlahoulis stated in an e-mail to Higman and Garcia that Bazan “responded via phone this A.M. and . . . stated that the MCO would coordinate the involvement of Mexican Federal law enforcement and security agencies investigating in Mexico the recipients of the firearms purchased in Tucson.”

Bazan, however, was out of the office that week and instructed [REDACTED], the Mexican national employee at the MCO described above, to arrange coordination with Mexican law enforcement. That same day, [REDACTED] sent an e-mail to Tucson agents stating that he had contacted [REDACTED], an attorney in the Mexican Attorney General’s Office (PGR), and that [REDACTED] had requested information to help identify the traffickers. The next day, [REDACTED] told Tucson agents that [REDACTED] had arranged for Agencia Federal de Investigación (AFI) agents to be “on standby 24 hours along the Mexican border from Tijuana to Agua Prieta, Sonora.”⁴⁵

Despite this e-mail, it is unclear whether [REDACTED] made contact with [REDACTED] at all. Contemporaneous notes maintained by Bazan stated that on or around April 10, 2007, he asked [REDACTED] to coordinate the operation with [REDACTED] office, but when Bazan called [REDACTED] the next day, [REDACTED] had not “done ANYTHING He just makes things up and then uses that (what he made up as a problem) to not do his job.” It is also unclear whether the proposed operation was feasible. Bazan told us that he had spoken to [REDACTED] and two Mexican Customs officials at some point and was told that

⁴⁵ The Mexican Attorney General’s Office, known as the Procuraduria General de La Republica (PGR), is responsible for federal criminal prosecutions in Mexico. The PGR has five specialized units, including the Specialized Unit for the Investigation of Organized Crime (SIEDO), which handles trafficking and organized crime investigations and prosecutions. [REDACTED] was the head of a unit within SIEDO, [REDACTED]. AFI was an investigative agency within PGR with investigative functions similar to the FBI, the DEA, and the U.S. Marshals Service, but it was replaced by the Policia Federal Ministerial (PFM) in mid-2009.

maintaining surveillance for long periods through areas of Mexico with cartel activity was impossible.

Higman informed his supervisors in the ATF Phoenix Field Division about Tucson's efforts to coordinate operations with Mexican officials. He briefed Acting ASAC Matthew Horace on April 6, 2007, and he sent a proposed operational plan to a different Acting ASAC, Adam Price, for approval on April 10, 2007. The operational plan for the April 11 purchase specified that ATF agents would conduct surveillance of suspects to the border, "where Mexican enforcement authorities will follow the firearms to their final destination in Mexico Once the firearms cross into Mexico, the Mexican authorities, along with ATF attaché to Mexico, Ramon Bazan, will take [on scene command] of the surveillance and attempt to identify further parties involved, addresses, telephone numbers, and the FTO's modes of operation." In an e-mail sent to Price the day of the planned operation, Higman emphasized, "[D]ue to the sensitivity and potential international aspect of the planned op for today I will not proceed on this Op without the expressed acknowledgment and concurrence of your office."

Price told us that he approved the operational plan after discussing it with Newell. He said that although ASACs had the authority to approve operational plans, he was a short-term Acting ASAC at the time and would not have approved this operation without involving the SAC. He said he recalled discussing it with Newell, who he said "knew every element and . . . everything about this op[eration]." Newell told us that he did not recall being involved in or briefed about this particular operation, but said that he had discussions with Higman in late 2006 about the possibility of working with Mexico to develop information about the ultimate recipients of the guns purchased by the Operation Wide Receiver I subjects in 2006. Newell also told the OIG that Bazan had told him (Newell) at some point that he (Bazan) and Marquez had spoken to personnel from the U.S. Embassy in Mexico City about coordinating with Mexican authorities in Operation Wide Receiver. Marquez, however, told us that he did not have discussions about Operation Wide Receiver with the U.S. Ambassador or Embassy staff.

On April 11, 2007, Celaya, Egurrola-Leon, and an unidentified man arrived at the FFL's house to purchase the 20 .38 Super pistols that the FFL had ordered for Egurrola-Leon. Egurrola-Leon paid for 10 of the .38 Super pistols with cash he had brought in a "wet wipes" box but discovered that he needed more money to complete the transaction. During the transaction, which was recorded and transcribed, the FFL stated:

I have been doing this a long time And so far I'm not in prison. So, I'm doing something right. But the best way for us to stay out of trouble is for these guns to go as quick as possible to Mexico Once they are in Mexico, it's no longer a problem for

me. It's only if they get, you know if they stay here a week or two weeks or something and then somebody finds them. Then it comes back to me because of the serial numbers on the gun.

Celaya, translating for Egurrola-Leon, then told the FFL that the guns would leave the next day and would be transported in trucks that had secret compartments.

Egurrola-Leon left with the ten pistols he had paid for, placed the firearms in his minivan and drove away. Agents observed him meet with a man driving a Honda Ridgeline, and then return to the FFL's residence with a heat-sealed plastic bag of cash marked "\$15,000." Egurrola-Leon also selected six other firearms to purchase, telling the FFL that two of them were for his personal use. Celaya filled out the Form 4473s for all of the firearms, and Egurrola-Leon paid for them. Celaya also bought two firearms for his personal use. Egurrola-Leon loaded his firearms into a gray minivan that Tucson agents and TPD officers followed but later lost in a subdivision. They continued surveillance in the subdivision but were unable to locate the minivan and discontinued surveillance at noon the next day. Despite the unsuccessful surveillance, Tucson agents provided information about the vehicles associated with Egurrola-Leon to Bazan, who told us he gave it to [REDACTED].

In late April 2007, Egurrola-Leon ordered and made a down payment on 30 more .38 Supers. On May 2, 2007, Celaya told the FFL that Egurrola-Leon had contacted him and said he also wanted to purchase 20 more AK-47s. Celaya arranged for Egurrola-Leon to meet him at the FFL's house on May 7, 2007, to pick up at least 35 firearms. However, according to an ATF report of investigation, the purchase by Celaya for Egurrola-Leon did not occur because Egurrola-Leon was "participat[ing] in a narcotics transaction at his residence with some individuals from Mexico" and could not make it to the FFL's house. Celaya purchased nine firearms for his cousin in Caborca, Mexico. Garcia told us that ATF agents monitored the anticipated purchase for Egurrola-Leon but did not follow Celaya because "we knew all we could know from Carlos And we . . . had already pretty much worn out our welcome in [his] neighborhood." The FFL recorded Celaya's statements and provided them to Garcia the next day. On May 9 and 10, 2007, Celaya told the FFL that he was purchasing firearms for a cousin who was associated with narcotics trafficking in Caborca, Mexico, and who worked closely with the Paez-Soto organization, and indicated that Egurrola-Leon also was connected to the Paez-Soto organization.⁴⁶

⁴⁶ The Paez-Soto organization was the target of Operation Iron River, the OCDETF case that AUSA Petermann was handling. Witnesses described the organization as a "crime family" led by Ignacio "Nacho" Paez-Soto that was associated with the Sinaloa Cartel and allegedly was

(Cont'd.)

Tucson agents made additional efforts in April and May 2007 to develop a relationship with Mexican law enforcement through the MCO. Garcia and Vlahoulis made plans to travel to Mexico to meet with Mexican counterparts and held a conference call with ██████████ of the PGR on May 11, 2007. The OIG did not identify any documents memorializing the substance of this call, and Garcia told us that he did not recall who ██████████ was or what was discussed. After this call, Vlahoulis provided information about the firearms purchased by Celaya and Egurrola-Leon to Bazan and ██████████ to forward to ██████████, stating, “[W]e hope that we can reschedule [a trip to Hermosillo to meet with ██████████] in the next couple of weeks and that the PGR will by that time have information on some of these players.”

Higman described the outlines of a cooperative arrangement between ATF and Mexican law enforcement regarding firearms trafficking to Mexico in a memorandum that requested additional funding for Operation Wide Receiver. SAC Newell signed the memorandum and sent it to ATF Headquarters on May 21, 2007. The funding request stated:

The Tucson II Field Office and Mexico Country Office have a cooperative agreement with Mexican Federal law enforcement authorities to allow the firearms to be transported from the United States into Mexico in anticipation that more prominent individuals will be identified as co-conspirators.

The Tucson II Field Office, TPD [Special Investigation Division (SID)], and the Mexican authorities are providing all available resources for “around the clock” surveillance in an attempt to track the firearms from Tucson, Arizona, to the International border, where surveillance will then be turned over to the ATF Mexico Country [O]ffice and Mexican Federal law enforcement authorities and tracked to further Mexico locations.

To date, the Tucson II Field Office and TPD SID have been unable to surveil the firearms to the International border. From contact with those offices, the Mexican Federal law enforcement authorities understand that surveillance is difficult, and that several firearms will likely make it to Mexico prior to a U.S. law enforcement successful surveillance of the firearms to the international border.

Newell told the OIG that he had discussions with Carson Carroll, the ATF Deputy Assistant Director (West), about coordination with Mexico during Operation Wide Receiver and sent information up the chain to ATF

involved in importing marijuana through the southern Arizona corridor and illegally obtaining and exporting firearms to Mexico. According to press reports, Ignacio Paez-Soto was arrested by the Mexican Federal Police in September 2009.

Headquarters through him. When presented with a copy of the memorandum during his interview with the OIG, Carroll acknowledged that he had approved this request for funding. However, Carroll said that reviewing the Operation Wide Receiver memorandum was “like reading hundreds of this exact same thing” and that it “blends with the numerous others I’ve read of guys going to FFLs, paying money, and picking up weapons.” He also told us that he did not recall any discussions with Newell about the case or about any agreement with Mexican law enforcement to allow weapons to go into Mexico.⁴⁷

Bazan told the OIG that the statements in the memorandum about “around the clock surveillance” seemed to be “stretching,” but that the references to a “cooperative agreement” with Mexican law enforcement and the understanding that guns likely would cross the border before a successful surveillance was conducted were accurate. Bazan said that he had conversations with ██████ long before Operation Wide Receiver about the possibility of weapons being lost during surveillance and crossing the border, and that this risk had to be considered in the context of the large number of firearms illegally smuggled into Mexico every year and the difficulty in proving export violations. Newell told us that the reference in the memorandum to a “cooperative agreement” was based on Garcia’s efforts to coordinate surveillance with Mexico through the MCO, not to any sort of formal agreement between ATF and Mexican law enforcement.

In late May 2007, ATF made another attempt to conduct a coordinated surveillance operation with Mexican law enforcement. As with the earlier attempt in April 2007, ATF planned to follow the suspects to the anticipated border crossing, where Mexican authorities would take over surveillance and follow the firearms to their final destination in Mexico. On May 22, Celaya purchased the 30 .38 Supers previously ordered by Egurrola-Leon, plus 18 additional firearms that Celaya told the FFL were for another man, Rodrigo Rodriguez-Contreras, to transport to Caborca, Mexico.⁴⁸ Celaya filled out the Form 4473s for all 48 firearms. The next day, Celaya and Rodriguez-Contreras purchased another seven firearms from the FFL. Celaya completed the Form

⁴⁷ Carroll told us that agreements with officials outside the United States would have needed to be “pushed up the chain” to ATF’s International Affairs Office, as well as to the Assistant Directors of Enforcement Programs and Services and Field Operations. We found no evidence that this occurred.

⁴⁸ On June 3, 2007, Rodriguez-Contreras was arrested on an alien-in-possession charge. TPD officers responded to a domestic dispute involving Rodriguez-Contreras, and he told them that he was in the country illegally and kept a gun under the driver’s seat of his car for protection. TPD officers searched his car and found a .38 Super pistol that had been purchased from the FFL by Ricardo Mendez on March 20, 2007. On January 22, 2008, Rodriguez-Contreras was sentenced to 12 months and 1 day in prison and 36 months of supervised release.

4473s and Contreras provided the cash payment to the FFL. From May 22 to 25, ATF conducted continuous surveillance of Celaya, Valencia, and Egurrola-Leon, including air surveillance by TPD, but ultimately lost the vehicle that agents believed was transporting the firearms. ATF nevertheless contacted Mexican law enforcement and provided information about the vehicle.

In the weeks after this failed surveillance, ATF continued efforts to identify targets in Mexico by sending Mexican phone numbers called by Celaya to Bazan and to Dennis Fasciani, an Intelligence Research Specialist assigned to ATF Headquarters. In an e-mail to Fasciani, Garcia emphasized the need to develop information on potential Mexican targets: “[f] we do not get some substantial info in the near term, we may be forced to arrest the individuals in the U.S alone and shut down the case due to letting too many guns walk....any info will be helpful as we will provide the Mexicans that we are working with the general info and let them run with it.”

E-mail communications we reviewed from June 2007 indicated that agents in Tucson began to question whether the MCO was passing information to Mexican law enforcement, and, even if it was, whether Mexican law enforcement officials were doing anything with the information. For example, ██████████ forwarded information to contacts in the PGR about Mexican phone numbers and vehicles used by ATF subjects, but there is no evidence that ATF received any information from PGR in response. Garcia told us that he received more information about potential Mexican targets from a DEA intelligence analyst in Mexico, who identified Celaya’s uncle in Caborca, Mexico, and provided information on his vehicles, than he did from Mexican law enforcement officials.

D. Move Toward the Use of Electronic Surveillance in June 2007

After the failed surveillance in late May 2007, ATF agents in Tucson considered other ways to track firearms to Mexico. One proposal was to procure a tracking device small enough to conceal in a handgun. According to the FFL, Garcia called him on May 31 and said, “I just had a meeting with Chuck [Higman]. These guns are getting out of hand and we’re going to have to do something about it. We’re not having luck with our surveillance so we’re trying to figure out an alternative. It looks like we’ll have some sort of tracking device from Raytheon but it won’t be ready until next week so we’ll have to do [the next sale to Celaya] the following week”⁴⁹ However, ATF was unable to obtain a tracking device and this proposal was not pursued further.

⁴⁹ Contemporaneous e-mails reflect efforts by Tucson agents in late May and early June 2007 to obtain a tracking device that could be concealed in the firearms without detection or need for recovery, including a device manufactured by Raytheon.

After ATF Tucson's request for additional operational funds was approved in May 2007, ATF began to pursue court-authorized electronic surveillance. As part of this effort, in June 2007 agents obtained from the federal court the first of 10 orders authorizing the collection of calling data for the cell phones used by Celaya, Egurrola-Leon, and their associates. ATF planned to use the calling data to help establish the need to conduct electronic surveillance of the subjects' telephone conversations. Also in June 2007, ATF began to obtain court authorization for the release of cell site data and real-time GPS mobile tracking information for various cell phones used by Celaya, Egurrola-Leon, and their associates.

After speaking to AUSA Petermann about initiating an application for electronic surveillance, Higman wrote an e-mail on June 26, 2007, to the ATF Southwest Region OCDETF Coordinator that stated, "We have reached that stage where I am no longer comfortable allowing additional firearms to 'walk,' without a more defined purpose. . . . [W]e have reviewed the available Pen data and that material merely confirms already developed info without any substantial additional leads. . . . [T]he sooner we get to the Title III intercepts, the better." Two days after this e-mail, Higman stated in a recorded conversation with the FFL:

[W]e have probably ten people identified, including money people that haven't even met you yet that are indictable right now. None of those people are going to go to trial. They're all gonna plead [I]t's inescapable with the amount of evidence we have on them doing the straw purchases and trafficking firearms into Mexico.⁵⁰

Around this same time, Higman began to explore the possibility of "migrating" Operation Wide Receiver into Operation Iron River, an OCDETF drug case targeting the Paez-Soto organization, based on evidence that the subjects in Operation Wide Receiver were "directly connected" to the OCDETF case. Contemporaneous e-mails indicate that Higman hoped to use OCDETF funds to pay for electronic surveillance of Celaya. Higman learned, however, that ATF could not use OCDETF funds once it had received major case funding. As a result, Operation Wide Receiver remained separate from Operation Iron River.

⁵⁰ After reviewing a draft of the report, Garcia provided comments to the OIG stating that Higman made this comment to the FFL to "put the FFLs mind at ease," as the FFL was "getting cold feet" and was concerned about testifying if the case went to trial.

E. Seizure of 32 Firearms and Recovery of Firearms in Mexico in July 2007

While ATF was making plans to conduct court-authorized electronic surveillance, Operation Wide Receiver subjects continued to purchase firearms. On June 26, 2007, Celaya introduced two new buyers to the FFL, Rigoberto Estrella-Sesma and [REDACTED], during a visit to purchase more firearms. [REDACTED] filled out the Form 4473s for 16 firearms, and Estrella-Sesma paid for them. Celaya told the FFL that Estrella-Sesma planned to “traffic” the firearms to Mexico. During this visit, which the FFL recorded, Celaya also purchased six AK-47s that he said he planned to sell in Caborca, Mexico.

After completing the transaction, [REDACTED] and Estrella-Sesma loaded the firearms that [REDACTED] had bought into a blue minivan, and Celaya loaded his six firearms into his pickup truck. ATF agents followed Celaya’s vehicle to his house and discontinued surveillance at 9:00 p.m. The next day, Celaya contacted the FFL and told him that Estrella-Sesma had \$50,000 and wanted to buy more guns. The FFL and Celaya planned to meet on June 28, but the purchase was delayed when Celaya told the FFL that Estrella-Sesma had received a call from his “boss” and was told the money was to be used for something else.

ATF agents learned that Estrella-Sesma was a convicted felon and an illegal alien, and was therefore prohibited by law from possessing a firearm. ATF decided to conduct a traffic stop after his next purchase. On July 12, 2007, Estrella-Sesma purchased 32 firearms from the FFL and paid with a plastic bag containing more than \$30,000 cash. [REDACTED] completed the Form 4473. Estrella-Sesma placed the firearms in three large duffle bags, which he then loaded into the minivan in which he arrived with [REDACTED]. At ATF’s direction, TPD officers stopped the vehicle after it left the FFL’s residence. Estrella-Sesma, who was driving, fled from the officers and was not apprehended, [REDACTED]. [REDACTED] ATF seized the 32 firearms.

Three days later, on July 15, 2007, Mexican authorities recovered an AK-47 pistol and an AK-47 rifle purchased by Celaya on March 30 and June 26, 2007, respectively, during a raid in Caborca, Mexico. Tucson agents learned of this recovery on July 24, 2007. According to Garcia, despite numerous statements by subjects previously acknowledging that the firearms purchased were being transported to Mexico, this recovery gave ATF its first confirmation that the guns were actually being transported to Mexico. He also said that the seizure of Estrella-Sesma’s guns on July 12 “bought some time” for ATF by giving the FFL an excuse to “lay low” and stop selling guns to the subjects until the electronic surveillance was in place. In late July and early August 2007, at Garcia’s instruction, the FFL deferred Celaya’s requests to purchase firearms and told him to wait until it was safe to purchase more

firearms. The FFL did not make another sale to an Operation Wide Receiver subject until nearly two months later.

F. Approval of the First Title III Application in August 2007

Federal law authorizes the government to conduct electronic surveillance of oral communications for law enforcement purposes. *See* 18 U.S.C. §§ 2510-2522. To obtain approval, the government must submit an application to a federal court showing that there is probable cause to believe “that an individual is committing, has committed, or is about to commit” a specified criminal violation and that there is probable cause to believe that a particular communication “facility,” such as a cellular telephone, is being used by subjects in furtherance of the specified criminal violations. *See* 18 U.S.C. § 2518(3). The application also must demonstrate that “normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or be too dangerous.” 18 U.S.C. § 2518(3)(c). Orders for electronic surveillance are issued for a period not to exceed 30 days, but can be extended with court permission, and surveillance must terminate when the authorized objectives are attained. 18 U.S.C. § 2518(1)(d)(5).

Wiretap applications are supported by an affidavit from an agent or other “investigative or law enforcement officer” that sets forth the facts that establish the probable cause and other criteria required by the statute. *See* 18 U.S.C. § 2518(1). The affidavit is typically drafted by the agent and reviewed by the prosecutor assigned to the case. The prosecutor also is responsible for drafting the application that sets forth the basis for the court’s jurisdiction to authorize the electronic surveillance.⁵¹

In late June 2007, Garcia began drafting an affidavit in support of an application to conduct electronic surveillance of two cell phones used by Celaya. The draft affidavit was submitted to the U.S. Attorney’s Office on June 29, 2007.⁵² Garcia told the OIG that shortly after he completed his first draft

⁵¹ ATF’s Title III applications must go through two separate channels for approval before submission to a district court judge in the relevant jurisdiction to obtain an order authorizing interception. The U.S. Attorney’s Office sends the affidavit to Office of Enforcement Operations (OEO) for review and approval by the Assistant Attorney General or a DAAG in the Criminal Division, and the SAC of the ATF field division conducting the investigation sends a Title III intercept request memo to ATF Headquarters for review by the Office of Chief Counsel and the Office of Field Operations. The Title III application and approval process are discussed in detail in Chapters Four and Five.

⁵² As of March 2007, ATF Tucson had received only \$5,000 in dedicated funding for Operation Wide Receiver, which was inadequate to conduct electronic surveillance. Although the Tucson office received an additional \$26,500 in funding in late May 2007, most of this money was used to obtain calling data. Because the Tucson Office had never before conducted electronic surveillance, agents had to obtain equipment for and staff a designated room for the

(Cont’d.)

of the affidavit, Petermann left the Tucson U.S Attorney's Office, and responsibility for the Title III application was assigned to AUSA Tom Ferraro. Garcia said that he revised the affidavit "10 to 15 times" and discussed it frequently with Ferraro, and that "nobody knew what to do [with the affidavit] because it was guns They only knew how to do wires for dope." Of note, Garcia apparently discussed the application for electronic surveillance with the FFL, telling him about Ferraro's numerous revisions to the affidavit and later having him help generate "dirty calls" between the subjects.⁵³

Contemporaneous e-mails show that Ferraro was closely involved in revising the initial affidavit, and he signed the final affidavit that was submitted to the court. Ferraro, however, told us that he did not recall being involved in the case at that time and was not sure he was ever assigned to Operation Wide Receiver. Although Ferraro acknowledged that he worked on the electronic surveillance applications, which were filed under the name of Operation Wide Receiver, he told us that in his view he was working on Operation Iron River, the OCDETF drug case previously handled by Petermann.

After reviewing a draft of the report, Ferraro submitted comments to the OIG reiterating that he was assigned only to Operation Iron River, which he described as a case distinct from Operation Wide Receiver and that employed different tactics, during the time period in which ATF conducted electronic surveillance. He indicated that he undertook to work on the wiretap affidavit in light of the connection between certain targets of the two Operations. As noted earlier, however, Operations Wide Receiver and Iron River remained separate within ATF because funding restrictions prevented combining them. The U.S. Attorney's Office also maintained separate case files for Operations Wide Receiver and Iron River, both of which we reviewed. The case file for Operation Wide Receiver included all five of the applications for electronic surveillance handled by Ferraro, and contemporaneous e-mails and documents indicating that Ferraro knew ATF Tucson conducted the investigative activity set forth in this report under the Wide Receiver case name and believed at the time that the decision to keep the cases separate was an "administrative fiction" and a "funding mechanism to pay for the wiretap."

activity at an estimated cost of \$121,000. Higman explored various ways to fund electronic surveillance, eventually paying for it with the Tucson office's monthly "agent cashier" budget and at times delaying the payment of other expenses.

⁵³ For example, shortly before ATF Tucson began conducting electronic surveillance, Garcia received a copy of a recorded conversation between the FFL and Celaya and sent an e-mail to the FFL that stated, "[W]e went over not discussing this stuff [with Celaya] until the wire went up...now he is planning on a purchase Tuesday or Wednesday and he has already begun making the calls that I did not want him to make until I could record them... I know it's hard to put him off but don't go into detail setting up a time for a purchase or the guns that you have...that should have been the conversation on Tuesday."

We have been unable to establish whether any supervisor in the Tucson U.S. Attorney's Office reviewed or approved the applications for electronic surveillance. Ferraro's supervisor in the OCDETF Unit in 2007, former Supervisory AUSA Bradley Giles, told us that generally he did not review wiretap affidavits because the attorneys in the OCDETF Unit, including Ferraro, were experienced and well-qualified to handle Title III applications, and he did not want to "bog down" the process with his review because phones were dropped rapidly in most of their investigations. Office of Enforcement Operations (OEO) policy also did not require supervisory approval of affidavits at the time. After reviewing the Operation Wide Receiver case file and wiretap affidavits in preparation for his OIG interview, Giles told us he recalled hearing the case name, as well as having discussed what Ferraro had termed an "administrative fiction" regarding ATF's use of separate funding for Operations Wide Receiver and Iron River, but not the facts of the case or the content of the affidavits. We have no evidence suggesting otherwise. We found no documents or e-mails reflecting supervisory review or approval of any of the affidavits and are unable to reach a conclusion about whether it in fact occurred.

After the 75-page draft affidavit was completed, the application package was submitted for review to the ATF Phoenix Field Division and to OEO on August 10, 2007. On August 21, 2007, a lawyer from OEO reviewed the affidavit and recommended reorganization of and edits to certain sections of it, but stated, "The necessity section looks fine."⁵⁴ OEO approved a revised affidavit on August 23, 2007.

The affidavit disclosed that the [REDACTED] and [REDACTED] contained information about the number of firearms purchased in each transaction, the money provided by sources in Mexico to purchase firearms, statements made by the buyers in recorded conversations that they were buying guns to take to Mexico, and the firearms recoveries in Caborca, Mexico. For example, one paragraph stated that [REDACTED]

⁵⁴ The requirement that other investigative procedures have been tried and failed, or reasonably appear to be unlikely to succeed or to be too dangerous, is referred to as the "necessity" requirement. This requirement ensures that law enforcement agencies use traditional investigative techniques before pursuing court-authorized electronic surveillance but does not require that they exhaust every conceivable technique. *Compare U.S. v. Gonzalez*, 412 F.3d 1102, 1112-13 (9th Cir. 2005) (necessity not established where DEA used pen registers and trap and trace devices for five days and conducted limited physical surveillance), *with U.S. v. Garcia-Villalba*, 585 F.3d 1223, 1228 (9th Cir. 2009) (necessity established where DEA used pen registers and trap and trace devices for 60 days and analyzed two months' worth of toll records). It is particularly relevant here because the necessity section of the initial Wide Receiver affidavit described repeated physical surveillance by ATF agents of the same subjects purchasing large quantities of firearms.

[REDACTED]

Other paragraphs stated that

[REDACTED]

To establish the necessity of the electronic surveillance, the affidavit detailed the failure of ATF's attempts to conduct physical surveillance and the inability to locate a concealable GPS tracking device to track firearms into Mexico. The affidavit also stated,

[REDACTED]

On August 23, 2007, Newell submitted to Carroll a memorandum seeking authorization to submit an application for electronic surveillance for review by the Office of Chief Counsel and approval by a Deputy Assistant Director, attaching the affidavit in support of the application for electronic surveillance. The memorandum described Operation Wide Receiver as an investigation in which the subjects had "unlawfully purchased, transferred or coordinated the purchase of approximately 300 lower receivers, rifles, and pistols," identified the FFL as a confidential informant, and stated that Celaya told the FFL that he received money from and purchased firearms for individuals in Caborca, Mexico. Newell told us that he read the memorandum but not the accompanying affidavit. Carroll told us he had no recollection of Operation Wide Receiver generally or any discussions with Newell about the details of the investigation. An attorney in the Office of Chief Counsel reviewed the materials, provided editing suggestions for the affidavit, and sent it for approval that afternoon. The request was approved the same day.

On August 24, 2007, Barry Sabin, then a DAAG in the Criminal Division, authorized the application, and an approval memorandum was faxed to Ferraro. Shortly thereafter, Ferraro filed the application and a federal district court judge signed the order authorizing interception that afternoon. ATF began intercepting pertinent calls the next day. This was the first of five orders the government obtained in Operation Wide Receiver to conduct electronic surveillance.

G. Straw Purchases During Electronic Surveillance

Two purchases were made by Operation Wide Receiver subjects during the time ATF conducted the court-authorized surveillance. On September 12, 2007, Celaya arranged to purchase more firearms from the FFL. Agents again planned to follow the firearms to the border and hand off surveillance to the Mexican authorities, who would follow the firearms to their final destination in Mexico. The operational plan for this surveillance was provided to the Phoenix Field Division.

On the evening of September 12, Celaya and Siria Valencia arrived at the FFL's house in Celaya's pickup truck and purchased a total of 21 firearms: 10 for José Celaya and 11 for Egurrola-Leon. Although Valencia told the FFL that the firearms would go to Mexico the following day, subsequent investigative activity indicated that [REDACTED]

Higman, Ferraro, and Garcia met before the September 14 surveillance to discuss the direction of the investigation. Contemporaneous e-mails indicate that Higman and Ferraro decided over Garcia's objections to "extend[] this wire and go[] up on two other phones" to try to "roll the investigation into people [who] are primarily dopers" rather than to arrest Celaya. An entry from the FFL's journal the next day quotes Garcia as stating, "To be honest, I don't agree with it, but we're going to try to tie Israel and Siria into this deal I just want to arrest Carlos. We've got way more than we need to convict him, and I'm not sure what else we need." Asked about the FFL's recollection of this, Garcia told the OIG that he wanted to arrest Celaya after the first 30 days of electronic surveillance ended, but that Higman and Ferraro decided to extend the investigation to get more information on Valencia and Egurrola-Leon.

Ferraro told the OIG that, as an OCDETF lawyer, his orientation was to get to the drugs, and that if he was going to stay on Operation Wide Receiver he was going to use electronic surveillance to investigate a drug case. He said that targeting firearms to get to drug trafficking organizations was a technique based on the theory that drug traffickers build "layers of insulation" between themselves and their drugs but eliminate those layers when dealing with money or firearms. According to this theory, targeting illegal firearms purchases would allow law enforcement to penetrate an organization at a higher level than could be achieved by targeting low-level drug trafficking, even though the penalties for firearms violations are less onerous than those for drug violations. In his submission following his review of the draft report, Ferraro acknowledged that there was sufficient evidence to arrest the defendants on gun charges before initiating the wiretap and that the reason for the wiretaps was "to identify others involved in the criminal activity who otherwise would not be identified." He further noted that that his strategy "included acquiring sufficient evidence to tie the gun traffickers' conduct into

the drug conspiracy in order for them to face stiffer sentences,” and that Higman agreed with him.

On September 14, 2007, ATF agents observed a pickup truck driven by Lacarra-Badilla parked in Celaya’s garage for approximately 4 hours. Agents believed that [REDACTED]

[REDACTED] Agents, however, could not maintain surveillance of Celaya’s garage because the location made it difficult to avoid detection and instead did periodic drive-by surveillance in an attempt to observe activity in the garage, the door to which was open. Agents did not see Celaya and Lacarra-Badilla load firearms into the pickup truck.

Agents initially followed Lacarra-Badilla when he left Celaya’s house, but discontinued surveillance when Lacarra-Badilla began driving south toward Nogales, Arizona. Other surveillance units remained at Celaya’s house and watched him pack his car and leave with his wife and child. The investigation indicated that [REDACTED], but ATF did not maintain surveillance of the vehicle.

According to an affidavit Garcia drafted 3 days later to extend the wiretap, the agents’ decision not to maintain surveillance or seize the firearms was intentional:

Since the activation of the interception . . . no seizures have been made. As your Affiant is continuing to collect evidence in an attempt to identify all parties associated with the Firearms Trafficking Organization, any seizures at this time will likely adversely affect the gathering of intelligence that is expected to disrupt and dismantle the organization.⁵⁵

We have been unable to establish whether ATF knowingly allowed Lacarra-Badilla to take firearms into Mexico. Ferraro told us that ATF “followed [the load of guns] to . . . Green Valley . . . and then they let it go,” but he said that Garcia told him that ATF was “working with Mex Feds and that there would be a follow-up investigation in Mexico.” Garcia initially told the

⁵⁵ Shortly after the surveillance, Ferraro and Garcia drafted and submitted an affidavit to OEO seeking a wiretap extension. OEO approved the affidavit on September 25, 2007, and John C. Keeney, a former DAAG in the Criminal Division authorized the application the same day. Shortly thereafter, Ferraro filed the application with the district court, and a federal district court judge signed the order authorizing the extension. After this extension, there were three additional applications for electronic surveillance: a spinoff (*i.e.*, an application targeting a phone identified through electronic surveillance directed at another phone) authorized by DAAG Sigal Mandelker on October 11, 2007; an extension of this spinoff authorized by Keeney on November 8, 2007; and a second spinoff authorized by Sabin on November 19, 2007.

OIG that he did not recall the September 14 surveillance of Lacarra-Badilla but, after reviewing the affidavit and summaries of intercepted calls, disputed Ferraro's characterization of this surveillance and stated that he thought they had stopped following Lacarra-Badilla because they could not confirm that he had the firearms in his truck. This, however, does not explain the failure to continue surveillance to the border either to gain intelligence about where Lacarra-Badilla crossed the border or to hand over surveillance to Mexican authorities. Garcia told us he did not recall whether ATF was working with Mexico at this time, and we found no evidence that ATF alerted border officials or Mexican authorities about the vehicles driven by Celaya and Lacarra-Badilla on September 14, 2007.

[REDACTED]
[REDACTED] Celaya called the FFL several times in late September and early October 2007 and, at ATF's direction, the FFL told Celaya to contact him when he was in possession of the money. ATF received information indicating that [REDACTED]
[REDACTED]

On October 4, 2007, Celaya purchased 36 firearms from the FFL for \$35,300 in cash. During the transaction, which the FFL recorded, Celaya told the FFL that some of the firearms would be transported to Mexico that night and the remainder the next day. ATF agents and TPD officers observed the purchase but then discontinued surveillance after Celaya made contact with Lacarra-Badilla.

Agents reinitiated surveillance of Lacarra-Badilla the next day and followed his vehicle to the Nogales, Arizona, POE. At ATF's request, agents with Customs and Border Protection (CBP) stopped Lacarra-Badilla's vehicle, conducted a secondary inspection, and found 15 firearms hidden in the frame of the vehicle and underneath the rear seat cushion. The CBP agents, instead of ATF, seized and forfeited the firearms in order to avoid disclosing the ATF investigation. In addition, CBP arrested Lacarra-Badilla and charged him with alien-in-possession violations.⁵⁶ Several months later, Higman told his supervisor in Phoenix that ATF requested that CBP seize the guns because, "At this point in the case we were confident that we could not coordinate [with] the

⁵⁶ Under 18 U.S.C. § 922(g), certain categories of persons, including aliens admitted on non-resident visas, are prohibited from shipping, possessing, or receiving any firearms that have been transported in interstate commerce. The U.S. Attorney's Office elected not to charge Lacarra-Badilla with a more serious offense to avoid disclosing information in discovery that could compromise the ATF investigation.

out his inventory and that the FFL would e-mail Egurrola-Leon when he had more firearms available. Garcia noted in the case management log, “[f]irearms are not expected to be sold to Israel [Egurrola-Leon] in the future.” ICE subsequently began a separate investigation into Egurrola-Leon and his involvement in illegal narcotics.” Egurrola-Leon was murdered in Mexico in February 2010.

H. Summary of Firearms Purchases and Seizures

Of the 474 firearms purchased during Operation Wide Receiver, ATF Tucson did not interdict 410 of them. Some of the firearms that were not interdicted were later recovered in the United States and Mexico. For example, 42 firearms purchased during Operation Wide Receiver were recovered in Mexico between January 2007 and August 2011.⁵⁷ In April 2008, a firearm purchased by Gonzalez was one of 60 firearms found at the scene of a gun battle between competing factions of the Arellano-Felix Organization in Tijuana, Mexico, in which 18 people were killed. Another firearm purchased by Gonzalez was recovered around the same time in Tijuana, Mexico, at the scene of an attempted attack on a Mexican police commander as he attended his children’s birthday party.

We found that the vast majority of the firearms that were not interdicted were purchased in transactions demonstrating clear evidence of illegality. This number included 36 firearms that the subjects purchased and took to Mexico while Tucson agents were conducting electronic surveillance, and 59 firearms that were sold to the subjects by the FFL in 8 transactions between February 12 and May 28, 2007, with minimal or no surveillance by ATF.

Tucson agents did interdict and seize firearms purchased during Operation Wide Receiver in limited instances. In addition to the 17 lower receivers intercepted in the June 2006 UPS shipment to San Diego, seizures included 32 firearms during the traffic stop of Estrella-Sesma and [REDACTED] on July 12, 2007, and 15 firearms during the border stop of Lacarra-Badilla on October 5, 2007, after the focus of the investigation had shifted to developing evidence of drug activity.

⁵⁷ Data obtained from ATF’s National Tracing Center indicates that the first recovery in Mexico of firearms purchased during Wide Receiver was in January 2007. However, Tucson agents did not learn that any firearms had been recovered in Mexico until July 24, 2007, and these were firearms purchased by Celaya on March 30 and June 26, 2007. This discrepancy likely results from a delay between when the firearms were recovered and when they were traced.

Firearms Purchases and Seizures

Phase	Purchased	Seized	Total Cost
Wide Receiver I	186	17	\$41,355.00
Wide Receiver II	288	47	\$224,032.75
Total	474	64	\$265,387.75

VI. Prosecution of the Case

A. Handling of the Case by the U.S. Attorney's Office

Between March 2006 and August 2009, Operation Wide Receiver passed through the hands of three prosecutors in the U.S. Attorney's Office, with a fourth prosecutor involved in discussions about the case and in helping obtain court orders. Maldonado was assigned the matter from its outset until she left the office in November 2007, even though Ferraro handled the applications for electronic surveillance and was closely involved in decisions about case strategy beginning in September 2007. Ferraro took over the matter from Maldonado following her departure, and oversaw the end of the investigation, but did not indict the case before he left the U.S. Attorney's Office in late 2008 to become a U.S. Magistrate Judge.⁵⁸ Upon Ferraro's departure, Operation Wide Receiver was transferred to another prosecutor, Serra Tsethlikai, who made little progress on the case.

Despite the turnover in prosecutors, there was discussion within the U.S. Attorney's Office in 2008 about indicting the case. On January 31, 2008, Garcia met with Ferraro and discussed plans to indict the case in the next few months. Garcia delivered a case report to Ferraro on March 6, 2008, that recommended prosecuting 21 subjects in the United States and Mexico on charges including false statements under 18 U.S.C. § 922(a)(6), arms export without a license under 22 U.S.C. § 2278, and conspiracy under 18 U.S.C. § 371.⁵⁹ Garcia and Ferraro discussed the case several times in April and May,

⁵⁸ In his comments to the OIG following his review of the draft report, Ferraro said he had been asked to "babysit" the investigation following AUSA Maldonado's departure until her position in the Project Safe Neighborhoods Unit could be filled.

⁵⁹ ATF recommended prosecuting the primary subjects involved in Wide Receiver I and II; other individuals who made straw purchases during Wide Receiver II, including Rodrigo

(Cont'd.)

and Garcia began trying to obtain the certifications from ICE and the U.S. Department of State that was needed to prove that the subjects were not licensed to export firearms. Ferraro told the OIG that he intentionally delayed the indictment six months to protect the identity of a second confidential informant who was working with ATF and ICE in Operation Iron River.

In late September 2008, Garcia and another agent contacted and interviewed [REDACTED], one of the straw purchasers in Operation Wide Receiver I. [REDACTED]

[REDACTED] Around the same time, however, Ferraro told Garcia that he would be appointed as a U.S. Magistrate Judge in the months to come and would not be indicting the case.

Ferraro told the OIG that he developed concerns about prosecuting the case when he began looking into filing firearms export charges. According to Ferraro, he told Garcia that he wanted to use a Mutual Legal Assistance Treaty (MLAT) to file a formal request for information about the investigation conducted by Mexican law enforcement, but that he understood after talking to Garcia that the only evidence that would have existed would have been reports and information related to weapons seized at crime scenes in Mexico. Ferraro told the OIG that based on this discussion with Garcia, he formed the impression that Tucson agents did not have a relationship with Mexican law enforcement and only had planned to send a list of serial numbers to the ATF attaché in Mexico City and run those numbers when firearms were recovered in Mexico.

Ferraro said that after learning this information from Garcia, he talked to Bob Miskell, then the Criminal Chief in Tucson, and told Miskell that he did not want to indict the case. Miskell confirmed that Ferraro was “unhappy” with the case and thought it would be problematic to prosecute because firearms had gone to Mexico, but that Ferraro never said that he wanted to decline prosecution.

Following Ferraro’s departure from the U.S. Attorney’s Office, Operation Wide Receiver was reassigned to AUSA Serra Tsethlikai in November 2008. Tsethlikai voiced her concern about the case, stating in an e-mail in mid-December 2008, “I reviewed Tom’s prosecutor’s memo. I don’t like the case. I think it is wrong for us to allow 100s of guns to go into Mexico to drug

Rodriguez-Contreras and Rigoberto Estrella-Sesma; and alleged co-conspirators in Mexico and Arizona.

people knowing that is where they are going.” Tsethlikai also met with her supervisors, including then-Tucson Criminal Chief Bob Miskell, and with Tucson ATF agents to express these concerns. Despite her concerns, Tsethlikai agreed to proceed with the case and move toward indictment. However, she did not make significant progress on the case before accepting a detail to another office in August 2009.⁶⁰

In sum, while we found that some of the AUSAs had concerns about the tactics used by ATF during the investigation, we found no evidence to indicate that the U.S. Attorney’s Office had made a decision to refuse to indict the Wide Receiver case because of either the handling of the investigation by ATF or the investigative techniques employed.

B. Assignment of a Criminal Division Prosecutor

In April 2009, Attorney General Eric Holder and Department of Homeland Security (DHS) Secretary Janet Napolitano met with Mexican officials in Cuernavaca, Mexico, to discuss efforts to curb firearms trafficking from the United States to Mexico. During these discussions, Attorney General Holder promised to convene a working group to review and recommend ways to improve efforts to curb firearms trafficking, focusing on investigation and interdiction, training, prosecution, and intelligence-sharing. The recommendations issued by this working group included establishing a coordinated firearms trafficking prosecution strategy and making firearms prosecutions a regional priority along the Southwest border.

As part of this effort, the Criminal Division began pursuing efforts to assign prosecutors from its Gang Unit to firearms cases in Southwest border districts. Kevin Carwile, then the Chief of the Gang Unit, and his Deputy Chief, James Trusty, told the OIG that they offered to have Laura Gwinn, an experienced prosecutor, help Southwest border U.S. Attorney Offices with firearms cases. On July 8, 2009, Trusty sent an e-mail to Gretchen Shappert, the Anti-Gang National Coordinator at the Executive Office for United States Attorneys, asking for her “assistance in coordinating some conversation with USA’s (or Strike Force chiefs) along the SWB, particularly Arizona, New Mexico, and Southern California” to arrange for Gwinn to “prosecute (as either lead or

⁶⁰ After reviewing a draft of the report, Tsethlikai submitted comments stating that she wanted to emphasize that the investigation had stalled when she inherited the case; that when Betancourt re-emerged while she was assigned to the case, she advised Tucson agents that she was prepared to arrest him if he contacted the FFL to purchase firearms, move forward with an immediate complaint, and indict the rest of the case within 30 days; that she voiced her concerns about the tactics used in Operation Wide Receiver to her supervisors; and that during the time that Operation Wide Receiver was assigned to her she had a heavy caseload including multiple jury trials.

as co-counsel) gun trafficking offenses, and she could help the USAO's and DOJ develop a coordinated, consistent approach to these types of cases."

On July 28, 2009, George Gillett, who became an ASAC in Phoenix in June 2008, asked ATF's Tucson Office to compile a list of lingering prosecutions, which he planned to forward to the U.S. Attorney's Office for follow up. On August 3, 2009, Tucson agent James Small sent an e-mail to Gillett identifying Operation Wide Receiver as the only lingering prosecution, stating, "AUSA [Tsethlikai] was also pushing back w/ moral dilemma w/ the G[overnment] allowing the targets to traffic 300+ firearms to Mexico. I advised AUSA that the case was investigated within ATF Trafficking Guidelines and in furtherance of attempting to identify and secure evidence on targets inside Mexico receiving the firearms for the drug cartels." Gillett then forwarded Small's e-mail to Miskell, stating, "[T]hanks for assisting with some of our lingering prosecutions. ... Can you please take a look at the below e-mail and let me know if we can get this moving."

On August 12, 2009, Carwile and Trusty learned from Shappert that an Arizona case involving "300-500 guns" needed a prosecutor, and they asked Gwinn to handle it. On September 2, 2009, Trusty sent an e-mail to Gwinn stating, "Kevin [Carwile] and I had a long chat with Lanny today about [Gang Unit] cases, investigations, etc. He is VERY interested in the Arizona gun trafficking case, and he is traveling out there around 9/21. Consequently, he asked us for a 'briefing' on that case before the 21st rolls around." Gwinn apparently did not prepare a written briefing for Trusty, instead e-mailing him copies of several orders authorizing electronic surveillance and the November 2007 affidavit supporting the fifth wiretap application.

In late September 2009, Gwinn spent a week in Tucson reviewing Operation Wide Receiver for possible prosecution. Gwinn told the OIG that while in Tucson she learned that ATF "let[] 300 or 400 guns get across the border." She sent an e-mail to Trusty about this, and he replied, "If guns getting across is the only problem (and the AUSAs are too busy) we're in good shape. Drug cases learn that hundreds of kilos have gone across into the US, so I don't think missing some seizures is anything fatal." Trusty told the OIG he did not mean to excuse the fact that guns went to Mexico, but that he and Gwinn looked at Operation Wide Receiver to see if it could be indicted and decided that it could.

In late September 2009, Newell asked Gillett to prepare a summary of Operation Wide Receiver to provide to Carwile. After receiving the summary, Newell sent an e-mail to Gillett on September 26, 2009, stating, "Before I give this to Kevin [Carwile] today I want Dennis Burke to be aware of what we've done to try to get this case prosecuted," and asking Gillett to summarize the meetings between ATF Tucson and the U.S. Attorney's Office regarding prosecution of Operation Wide Receiver. Gillett replied:

One of Kevin’s attorney’s [sic] spent most of this past week in Tucson reviewing our case. This was at the request of the USAO in Tucson that wanted an objective, fresh set of eyes to review the case Kevin’s comments were that his attorney felt the case, while not perfect, was prosecutable and straight forward. Unless I’m missing something, if Dennis Burke doesn’t already know about this, it’s because Tucson didn’t keep him in the loop.

Newell replied, “That’s what I am afraid of. I’ll give him a heads-up anyway as a courtesy. I’m trying to establish a straight-forward [sic] relationship with this guy.”

The Gang Unit accepted the case for prosecution in late September 2009. Between September and December 2009, Gwinn traveled to Tucson every other week to prepare the case for indictment. Gwinn initially planned to indict in December 2009 but had to postpone indictment because of delays in obtaining information from the Mexican government about the firearms recovered in Mexico. Gwinn then planned to indict the case after finishing a capital murder trial in early 2010.

C. Reactions to Operation Wide Receiver by the Criminal Division Front Office

Gwinn decided to indict Operation Wide Receiver as two conspiracies and drafted separate prosecution memoranda for Operation Wide Receiver I and II in late 2009 and early 2010. Both prosecution memos detailed the number of firearms purchased and the evidence against each defendant, including information from real-time recordings made of the transactions between the FFL and the subjects, and both noted, “[T]here are many things about this case that could be embarrassing to ATF,” including the fact that that guns “were sold and not accounted for” and likely “are in Mexico killing people.”

In mid-March 2010, Carwile prepared talking points for Jason Weinstein, a DAAG in the Criminal Division, on two firearms trafficking cases in which the Gang Unit was involved, Operation Wide Receiver and a case that was incorrectly identified as Operation Fast and Furious.⁶¹ Carwile described

⁶¹ The talking points incorrectly described Operation Fast and Furious as “an extensive firearms trafficking investigation involving ATF’s Phoenix, Houston and Dallas field offices,” and noted the recovery of approximately 550 firearms in 2008 during two seizures in Mexican border towns (which was before Operation Fast and Furious began). When asked about these talking points by the OIG, Weinstein noted that this description was inaccurate and said that the talking points were actually describing an unrelated project in which a Gang Unit prosecutor attempted to help ATF turn tracing data from the seized firearms into evidence that could be used to build an historical case. Moreover, as discussed in Chapter Five, while prosecutors from the Gang Unit offered to assist on Operation Fast and Furious, the U.S. Attorney’s Office declined the offer.

Operation Wide Receiver in these talking points as an “extensive firearms trafficking case involving ATF, Gang Unit and USAO Tucson. With the help of a cooperating FFL, the operation has monitored the sales of over 450 weapons since 2006, particularly lower receivers of AR-15 rifles.” He then sent the talking points to Weinstein. After receiving the talking points, Weinstein sent an e-mail to Carwile, stating, “I’m looking forward to reading the pros[ecution] memo on Wide Receiver but am curious – did ATF allow the guns to walk, or did ATF learn about the volume of guns after the FFL began cooperating?” Carwile answered (incorrectly), “My recollection is that they learned afterward. The pros memo will be ready soon.”

Trusty sent the prosecution memorandum for Operation Wide Receiver I to Carwile and Weinstein on March 31, 2010. On April 12, 2010, Weinstein sent an e-mail to Carwile and Trusty with his reaction to the prosecution memo:

Been thinking more about “Wide Receiver I.” ATF HQ should/will be embarrassed that they let this many guns walk - I'm stunned, based on what we've had to do to make sure not even a single operable weapon walked in UC operations I've been involved in planning - and there will be press about that. In addition, this diary that casts aspersions on one of the agents is a challenge for the case but also something that is likely to embarrass ATF publicly. For those reasons, I think we need to make sure we go over these issues with our front office and with Billy Hoover before we charge the case. Of course we should still go forward, but we owe it to ATF HQ to preview these issues before anything gets filed.⁶²

Weinstein told the OIG that the description of Operation Wide Receiver in the talking points and the prosecution memorandum of ATF having “monitored” the sale of firearms by the FFL and recorded transactions in real time raised a “red flag” that ATF had allowed guns to “walk.” Weinstein said that this description suggested that ATF had developed evidence that the purchases were illegal, giving agents the legal authority to interdict the firearms the moment the transactions were completed. Weinstein told us that his experience as a violent crime prosecutor gave him a “sensitive radar” for not allowing guns to get into the hands of the wrong people. He said that, as a result, he had a broader definition of “walking” than many people, defining it to

⁶² Information in the FFL’s journal suggested that an ATF agent and a supervisor may have accepted gifts from him. This is the subject of an ongoing investigation by ATF’s Office of Professional Responsibility. In addition, the journal purported to recount a conversation between two Tucson agents in which they made disparaging comments about another agent.

include not only situations where agents had the legal authority and ability to interdict and chose not to, but also a “recklessness” component – that is, if ATF agents were trying to follow and interdict firearms but their tactics were repeatedly unsuccessful, and they did not adapt those tactics, that also was “walking.”

Weinstein and Trusty met with Lanny Breuer, the AAG for the Criminal Division, on April 19, 2010, to brief him about Operation Wide Receiver. According to Trusty, he thought that Operation Wide Receiver potentially was a “black eye” for ATF, and he and Weinstein wanted to brief Breuer so that he would be prepared for eventual press questions. Breuer told the OIG that he learned from Weinstein that ATF had allowed firearms to go into Mexico in Operation Wide Receiver even though there had been legal authority to interdict them, and he said that he and Weinstein found this upsetting given the time they had devoted to dealing with Mexican cartel issues. Breuer also said that he told Weinstein to talk to ATF leadership to make sure that they understood that the Criminal Division planned to move forward with the case, but that the investigation had used “obviously flawed” techniques. Weinstein also told us that Breuer told him to bring the matter to the attention of ATF leadership.

After this meeting, Trusty sent an e-mail to Carwile stating, “[Lanny] wants us to meet with Ken [Melson] and Billy [Hoover] at some point so they know the bad stuff that could come out.” Weinstein and Trusty then made plans to discuss Operation Wide Receiver with William Hoover, then the Acting Deputy Director, and William McMahan, Deputy Assistant Director of Field Operations (West). In an e-mail to Hoover dated April 20 regarding the upcoming meeting, Weinstein stated, “[t]he reason we wanted to meet with you before charging is that the case has 2 aspects that could create media challenges and we wanted to talk through them first.” In an e-mail dated April 28, Weinstein also invited two representatives from the Office of Public Affairs (OPA) to the meeting “to discuss an impending indictment in a gun trafficking case that has some rather significant (and I hope unique) press challenges.”

On April 28, 2010, Weinstein, Trusty, and the two OPA representatives met with Hoover and McMahan. According to Weinstein and Trusty, they briefed Hoover and McMahan on the transactions in Operation Wide Receiver I, including the fact that there was legal authority to interdict the firearms and that the agents consistently failed to do so, and they used the term “walking” to describe the tactics used in the investigation. Notes taken by an OPA representative at the meeting stated, “vast majority walk converted to violent crime.” Weinstein told us that they also discussed a gift that the FFL provided to an agent working on the case that the agent did not report to management and the issues posed by the journal maintained by the FFL. The remainder of the time was spent discussing ways to avoid negative press. Weinstein told the OIG that the focus on managing the “messaging” for the case was not just to

avoid embarrassment for ATF, but also to address concerns that negative press could affect the viability of the prosecution.

When questioned by the OIG, Trusty stated that the meeting was not exclusively about the press scrutiny that ATF would get, but that he would not characterize the discussion at the meeting as “admonishing” ATF or “wagging a finger and saying . . . you must not do this again.” Trusty told us he viewed Operation Wide Receiver as a “rarity.” Weinstein similarly described Operation Wide Receiver as an “extreme aberration” and a “one-off” that had happened years before under a “previous regime.” Weinstein told the OIG that he had no reason to think that Operation Wide Receiver took place with the blessing of ATF Headquarters. He said that he “walked away [from the meeting] . . . with a very strong sense from Mr. Hoover that he had the same reaction that I did, that the tactics were not acceptable and that I had no reason to think, based on his reaction, that these were the kind of things that would be tolerated under his watch.” As a result, he said, they did not discuss whether guns had been allowed to walk in other cases, and Weinstein did not have any follow-up with Hoover or McMahon on this issue.⁶³

Hoover initially told the OIG that he did not recall discussing guns “walking” during the meeting and that they only discussed other issues involving Operation Wide Receiver – namely, that ATF had used an FFL as a confidential informant, which he considered a conflict of interest, and that an agent and a supervisor had accepted gifts from the FFL. Hoover later changed his testimony, telling the OIG that a briefing paper he received about Operation Wide Receiver on April 28, 2010, alerted him that agents were not stopping firearms at every chance, and that he may have discussed this at the meeting with Weinstein and Trusty. McMahon, however, told us he did not recall discussion of guns “walking” at this meeting. McMahon told us that he remembered discussing a possible internal investigation into a gift the agent accepted from the FFL, the timing of indictments in Operation Wide Receiver, and embarrassment about how long it had taken to get the case prosecuted, but said that “gun walking never came up.”

After the meeting, Weinstein sent an e-mail to Breuer informing him that the group had met to “talk about this gun trafficking case with the issues about the guns being allowed to walk for investigative purposes.” Weinstein also wrote that the group thought the best approach was to indict Operation Wide Receiver I and II under seal and then unseal them as part of Project Deliverance “where focus will be on aggregate seizures and not on particulars

⁶³ As described in Chapter Five, Weinstein and McMahon discussed Fast and Furious at or after this meeting.

of any one indictment”.⁶⁴ Two days later, on April 30, Breuer responded by asking Weinstein whether there was “[a]nything I should know about thos [sic]”? Weinstein replied, “As you’ll recall from Jim’s briefing, ATF let a bunch of guns walk in effort to get upstream conspirators but only got straws, and didn’t recover any guns. Some were recovered in [Mexico] after being used in crimes. Billy, Jim, Laura, Alisa and I all think the best way to announce the case without highlighting the negative part of the story and risking embarrassing ATF is as part of Deliverance.”

Breuer told the OIG that his understanding was that Weinstein left the meeting with the view that Operation Wide Receiver was an aberrant situation that had occurred many years earlier, and that the leadership of ATF did not condone it. He said that based on this understanding, he did not tell anyone else within the Department about the tactics used in Operation Wide Receiver and believed at the time that he had appropriately resolved the issue by raising it with ATF leadership.

The impact of Weinstein’s knowledge of the tactics used in Operation Wide Receiver on his understanding of Operation Fast and Furious is discussed in Chapter Five. As discussed in Chapter Six, although Breuer and Weinstein knew that guns were allowed to walk in Operation Wide Receiver, they failed to raise it with others in helping to formulate the Department’s response to a letter sent to Kenneth Melson, ATF’s former Acting Director, by Senator Charles Grassley on January 27, 2011, raising concerns about “an ATF operation called ‘Project Gunrunner.’”

D. Indictments and Sentencing

Operation Wide Receiver I was indicted under seal in May 2010. Gonzalez, Betancourt, and Horowitz were charged with conspiracy to violate 18 U.S.C. § 554, 18 U.S.C. §§ 922(a)(5) and 924(a)(1)(A), and 22 U.S.C. § 2778(b)(2) and (c), and violations of 18 U.S.C. §§ 922(e) and 924(a)(1)(A) and (D). Horowitz pleaded guilty to an information on May 11, 2010. The indictments for Betancourt and Gonzalez were unsealed on November 9, 2010, while Horowitz’s case was unsealed on April 19, 2011. Betancourt and Gonzalez entered guilty pleas on July 13 and October 20, 2011, respectively. Their sentences ranged from 366 days to 30 months in prison.

⁶⁴ Project Deliverance was an interagency, cross-border investigation focused on the transportation networks used by Mexican cartels to distribute narcotics and smuggle weapons and cash across the U.S.-Mexico border. During the 22-month operation, law enforcement officials made 2,266 arrests and seized 501 firearms, in addition to large seizures of drugs and U.S. currency.

Gwinn had planned to indict Operation Wide Receiver II under seal at the same time. According to an e-mail Gwinn sent to Trusty, however, she learned that Celaya was potentially linked to a Tucson stash house involved in Operation Fast and Furious, a Phoenix firearms trafficking investigation targeting “an organization moving guns in the thousands.” Emory Hurley, an AUSA in the Phoenix U.S. Attorney’s Office, told her that he was concerned that indicting Celaya would cause their targets to drop phones, and he asked Gwinn to delay indicting until late July 2010. After discussion with Hoover, Trusty replied by e-mail and stated that he had agreed that Operation Wide Receiver II would “ride shotgun” with Operation Fast and Furious. Hurley’s concerns about disrupting the Phoenix investigation also led Gwinn to delay unsealing the Operation Wide Receiver I indictments.

Gwinn subsequently planned to indict Operation Wide Receiver II under seal in late October 2010, a week before Hurley’s target date for indictments in Operation Fast and Furious. In early October 2010, however, Hurley sent an e-mail to Gwinn stating that he had deferred his target date but that she was “clear to deal with Wide Receiver without adversely affecting Operation Fast and Furious.” Gwinn subsequently included this information in a weekly update, stating that she planned to indict Operation Wide Receiver II on October 27, 2010, and that it would remain under seal until Operation Fast and Furious was ready for takedown.

After reading this update, Weinstein sent an e-mail to Trusty on October 17 asking, “Do you think we should try to have Lanny participate in press when Fast and Furious and Laura’s Tucson case are unsealed? It’s a tricky case given the number of guns that have walked, but it is a significant set of prosecutions” Trusty replied, “I think so, but the timing will be tricky, too. Looks like we’ll be able to unseal the Tucson case sooner than the Fast and Furious It’s not clear how much we’re involved in the main [Fast and Furious] case It’s not going to be any big surprise that a bunch of U.S. guns are being used in [Mexico], so I’m not sure how much grief we get for ‘guns walking.’ It may be more like, ‘Finally they’re going after people who sent guns down there.’”

When questioned about these e-mails, Weinstein and Trusty told the OIG that the “tricky case” was Operation Wide Receiver, not Operation Fast and Furious.⁶⁵ Weinstein said that the concern underlying the statements in these e-mails was that participating in a press release about Operation Wide Receiver would highlight that “the investigation was terrible” and harm the case. As a result, they decided not to issue a press release when Operation Wide Receiver

⁶⁵ AAG Breuer, who was not a recipient of the October 2010 e-mails, told the OIG that he did not recall them.

was later unsealed. Weinstein explained the basis for the decision in a November 13, 2010, e-mail to Mythili Raman, the Chief of Staff and Principal Deputy Assistant Attorney General for the Criminal Division: “Lot of guns allowed to go south and [the unsealed indictments] came out on the same day as [the] IG Report on Gunrunner so Laura, Jim and I agreed the case would be weaved into [an] anti-ATF story.” As discussed in Chapter Five, both Weinstein and Trusty said that they did not have knowledge at this time that Operation Fast and Furious involved similar tactics.

Operation Wide Receiver II was indicted under seal on October 27, 2010. Seven defendants were charged with conspiracy to violate 18 U.S.C. § 554, 18 U.S.C. § 924(a)(1)(A), and 22 U.S.C. § 2778(b)(2) and (c), and violations of 18 U.S.C. § 924(a)(1)(A). Violations of 18 U.S.C. §§ 922(d)(5)(A), 922(g)(5)(A), and 924(a)(2) were included for several of the defendants. The indictments were unsealed on November 9, 2010. Celaya, Gonzalez, and Valencia pleaded guilty in October 2011, and their sentences ranged from 21 to 33 months. Two defendants, Rodriguez-Contreras and Estrella-Sesma, remain fugitives. Ricardo Mendez (who purchased firearms from the FFL in March 2007, as discussed above) was dismissed in November 2011 based on the testimony of a co-defendant who testified that Mendez was not involved in the conspiracy. The last defendant, Emmanuel Castro (who also purchased firearms from the FFL in March 2007), has not yet gone to trial.

After Operation Wide Receiver was indicted, the relationship between Tucson agents, Gwinn, and the FFL began to break down. In April 2010, the FFL received notice that the high number of crime-related traces on firearms the FFL sold during Operation Wide Receiver had resulted in increased scrutiny by ATF’s Industry Operations Division. ATF Tucson subsequently conducted a compliance inspection and cited the FFL for several recordkeeping violations unrelated to Operation Wide Receiver. When the FFL was selected for a “warning conference” to address these recordkeeping issues in October 2010, the FFL sent an e-mail to Tucson agents, asking, “Here’s my question to you and your supervisors... Really? With Operation Wide Receiver still unresolved do you want to give the person who will be your star witness a warning conference?” In April and May 2011, the FFL informed Tucson agents and Gwinn that he would no longer cooperate with the government during trial preparations for Operation Wide Receiver, asserting that Gwinn had instructed Tucson agents not to give him a monetary reward for his work in a different case.

In September 2011, the FFL sent an e-mail to Gwinn stating that he had spoken to Ferraro and learned that Ferraro chose not to prosecute the case because “ATF lied to him and said that the guns were being

followed/interdicted by the Mexican authorities on the other side of the border.”⁶⁶ Ferraro acknowledged having told the FFL that ATF had “lied” to him about Mexican authorities conducting surveillance of or interdicting the firearms that were going south during Operation Wide Receiver, but told us that he assumed that agents had begun with good motives but “didn’t tell everybody” when coordination with Mexico did not come to fruition. Ferraro later told us that he never got the impression that Garcia had really lied to him.⁶⁷

VII. OIG ANALYSIS

A. ATF’s Phoenix Field Division and Tucson II Group

1. The Primary Goal of Operation Wide Receiver Was to Allow Straw Purchases to Continue in Order to Identify and Prosecute the Firearms Trafficking Organization

ATF’s Tucson II group, directed and led by RAC Chuck Higman, conducted Operation Wide Receiver with the primary goal of identifying “money men” and high-ranking cartel members involved in trafficking firearms.

⁶⁶ See also Government’s Response in Opposition to Defendant’s Renewed Motion to Dismiss, *U.S. v. Mendez*, Case No. CR-10-03019-TUC-DCB/CRP (filed Oct. 21, 2011), at 11 (response to defendant’s motion to dismiss based on this e-mail states that Ferraro encountered the FFL at a gun show and criticized ATF’s failure to interdict guns, telling the FFL that he had not prosecuted the case because ATF lied to him, but later told Gwinn that he was “overly harsh” in using the word “lie” in his conversation with the FFL).

⁶⁷ In his comments submitted to the OIG following review of the draft report, Ferraro stated that “ATF had represented to numerous people they had a working relationship with vetted Mexican law enforcement officials” and that “SA Garcia and Mr. Higman both assured [him] this was true, so if they were unable to interdict the firearms before they got to the border, the Mexican officials would move in to continue the investigation.” Ferraro made similar statements to us in his OIG interview. When presented with Ferraro’s testimony, Garcia told us that he did not make any representations to Ferraro about the involvement of the Mexican government and did not think that Higman would have made such statements. Moreover, even if Higman told Ferraro that Mexican officials were involved in the case, it is unclear whether this would have been a misrepresentation. As described above, the operational plan for surveillance of the September 12, 2007, firearms purchase by Celaya stated that Tucson agents planned to follow the firearms to the border and hand off surveillance to Mexican authorities, who would follow the firearms to their final destination in Mexico, and that agents would arrest the subjects using marked police units to perform a traffic stop if Mexican authorities declined or failed to participate. While we have no other information regarding efforts to coordinate the September 2007 operation with Mexican officials, an entry in the FFL’s journal several weeks later quoted an ATF agent as stating,

Tucson agents and management viewed the case as a long-term investigation targeting two Mexican cartels, first the Arellano Felix Organization in Tijuana during Operation Wide Receiver I, and then a “crime family” associated with the Sinaloa cartel during Operation Wide Receiver II. As described above, Tucson agents told us that the goal of the investigation early on was to conduct surveillance to identify where straw purchased firearms were going and target a cartel rather than to arrest individual straw purchasers.

In furtherance of this goal, ATF Tucson declined to arrest the main subjects or to interdict and seize weapons during the investigation despite ample evidence that the purchases were illegal. Evidence of illegality included the use of heat-sealed bundles of cash to purchase large quantities of firearms, open acknowledgement by the subjects that they were purchasing firearms for others, and statements made to the FFL that the firearms would be converted to fully automatic weapons or transported to Mexico. ATF allowed the purchases to continue and conducted surveillance of the buyers and load vehicles to develop information about the trafficking networks. Even when Tucson agents unsuccessfully attempted to coordinate the investigation with Mexican law enforcement, the goal was to maintain surveillance into Mexico and follow the firearms to the ultimate recipient to identify stash houses, trafficking routes, and other participants in the conspiracies, not to interdict the firearms. Tucson agents justified these decisions on the basis that making arrests and interdicting and seizing the firearms would simply result in the shift of straw purchases to other buyers and FFLs, leaving ATF unable to monitor the purchases and develop evidence of the conspiracy.

Higman directly supervised Operation Wide Receiver. As noted, Higman did not respond to our requests for an interview and thus we were unable to obtain directly from him his perspective on the investigation. Contemporaneous e-mails and other evidence, however, make it clear that Higman was not only aware of and endorsed the investigative tactics used in Operation Wide Receiver, including the failure to interdict firearms, but was directly responsible for the use of these tactics. As described above, one agent told us that Higman “supervised and directed” agents in implementing the weapons transfer policy in ATF Order 3310.4B, permitting agents to decline to interdict firearms in furtherance of a broader investigation. Moreover, Higman knew that agents could have made arrests earlier in the investigation, telling the FFL in late June 2007 that the subjects were “indictable right now.”

The SAC of ATF’s Phoenix Division during most of the investigative phase of Operation Wide Receiver was William Newell. Newell also oversaw Operation Fast and Furious, as we describe in Chapter 4. While we have few contemporaneous e-mails between Higman and Newell, other documents and

witness statements show that Newell clearly knew about and agreed with the strategy and tactics used in Operation Wide Receiver, other than the use of the FFL as a paid confidential informant.⁶⁸

As described above, Newell reviewed and signed funding requests for Operation Wide Receiver indicating that the subjects had purchased numerous firearms, and that agents had attempted to coordinate with Mexican law enforcement with the understanding that “several firearms will likely make it to Mexico prior to a U.S. law enforcement successful surveillance of the firearms to the international border.” While these funding requests did not use the term “walking,” they stated that agents had seized only 17 lower receivers even though subjects had purchased large quantities of firearms over many months. The supplemental funding request also described the firearms as having been “unlawfully purchased,” noting that Celaya told the FFL in “monitored contacts” that Celaya received money to purchase firearms from individuals in Caborca, Mexico. Newell also read the memorandum addressed to the Deputy Assistant Director (West) and submitted it to the ATF Office of Chief Counsel seeking approval to conduct electronic surveillance, which similarly indicated that subjects had “unlawfully purchased, transferred or coordinated the purchase of approximately 300 lower receivers, rifles, and pistols” and had made statements that the firearms were transported to Mexico.

We found that these memoranda put Newell on notice of facts indicating that Tucson agents had the legal authority to interdict and seize firearms but did not do so. Newell told us that he understood that the goal of Operation Wide Receiver was to take down a firearms trafficking organization. Newell also told us he thought the Tucson agents’ strategy of targeting the command, control and financing of the firearms trafficking organization was a “good strategy . . . to make the greatest impact on a group like this.” Yet when asked about the tactics used during Operation Wide Receiver, Newell did not admit having contemporaneous knowledge of “walking.” He told us that he defined “walking” to occur only when agents placed ATF property, such as firearms purchased by ATF, in the hands of a suspect, allowed that suspect to leave, and took no steps to arrest or recover the firearms. He said that he considered situations in which agents did not seize firearms when they had probable cause

⁶⁸ Despite this stated objection to the FFL’s status as a confidential informant, after he learned of the FFL’s status, Newell at no time took action to end the relationship even though he knew that all of the firearm sales by the FFL during the course of the investigation were under the authority and control of ATF. Given the control ATF exercised over the FFL as a confidential informant, if Newell had any concerns about the investigative plan, he could have told agents to cease authorizing the FFL to make sales to straw purchasers. Newell took no such action.

to do so to be “failure to interdict” rather than “walking” because the firearms were not provided by ATF.⁶⁹

Newell acknowledged, however, that failing to seize firearms that were sold by a cooperating FFL at ATF’s direction may have been “walking” if agents had probable cause. However, he emphasized that both “walking” and “failure to interdict” contemplate that agents had probable cause to seize the firearms, and he maintained that in Operation Wide Receiver the U.S. Attorney’s Office repeatedly told Tucson agents that there was not probable cause to interdict and seize firearms or to make arrests.

We found no evidence to support Newell’s claim. Indeed, Tucson agents told us that they had no difficulty getting firearms cases prosecuted by the Tucson U.S. Attorney’s Office, and numerous witnesses stated that the Tucson Office did not follow the so-called corpus delicti policy requiring physical recovery of firearms to prosecute straw purchaser cases.⁷⁰ Further, as described above, Maldonado advised Garcia in March 2006, only weeks after the beginning of the investigation, that there was enough evidence to support a false statements charge against Gonzalez under 18 U.S.C. § 922(a)(6). Beyond this, we found that Maldonado had a limited role in the investigation and infrequent contact with Garcia. Additionally, the ATF agents went forward and arrested and “flipped” Gonzalez in February 2007.

In sum, the evidence demonstrated that the decision to not interdict firearms despite having probable cause to do so was a decision made by the ATF Phoenix Field Division, and was intended to advance ATF’s broader goal of

⁶⁹ In his comments submitted to the OIG following review of the draft report, Newell disputed our finding that he was on notice of the tactics being used in Operation Wide Receiver. Newell stated in his comments that he told the OIG during his interview that RAC Higman never informed him that Tucson agents were not making arrests and seizures even when they had the legal authority to do so. Newell also stated that the first funding request memorandum in Operation Wide Receiver that he reviewed stated that agents were pursuing traditional law enforcement techniques in the investigation and discussed coordination with the ATF Mexico Country Office, and did not state that agents were foregoing arrests or seizures or that the informant being used in the case was an FFL. Newell stated that the August 23, 2007, memorandum was the first to indicate the informant was an FFL and detail several instances of straw purchasing activity witnessed by the informant. Newell stated that after learning this information he immediately took steps to express his displeasure about using an FFL as an informant and to gather additional information about the FFL’s role in the investigation. We did not find Newell’s argument regarding his level of knowledge of Operation Wide Receiver persuasive. As the SAC, Newell had a responsibility to be more familiar with the investigation, and we believe that the funding request memoranda conveyed more information about the case than Newell acknowledges.

⁷⁰ We discuss the corpus delicti policy in the Phoenix U.S. Attorney’s Office and its relationship to Operation Fast and Furious in Chapter Four.

identifying additional participants in the conspiracy. It was not the result of any evidentiary shortcomings identified by the U.S. Attorney's Office.

2. Inadequate Attention to Public Safety Considerations

In each phase of the investigation, Tucson agents, directed by Higman, prioritized developing information about the scope of the firearms trafficking conspiracy over taking steps to minimize the risk to public safety. For example, in June 2006, Higman urged the San Diego RAC to allow the surveilled delivery of 17 AR-15 lower receivers intercepted in a UPS shipment so that agents could develop intelligence about the trafficking network, even though Tucson agents had been told that the lower receivers were being combined with "short" uppers to produce illegal short-barreled rifles. When the San Diego RAC cited public safety and refused to allow the use of these tactics, Tucson agents expressed more concern about the resulting disruption to the investigation than the potential danger of not interdicting the firearms.

Similarly, during Operation Wide Receiver II, Tucson agents allowed Celaya to continue purchasing firearms despite his statements that he was using money provided by relatives in Mexico to buy the firearms. In some instances, the agents conducted minimal surveillance of Celaya because the focus of the investigation had shifted to Egurrola-Leon, who the agents thought would yield more information about possible cartel connections. Tucson agents also did not interdict all of the firearms that were purchased after the agents received specific information that the weapons were being purchased for individuals in Mexico, once again deciding to prioritize the integrity of their investigation over taking steps to minimize the risk to public safety. Although Higman stated in a June 2007 e-mail that he was "no longer comfortable allowing additional firearms to 'walk,' without a more defined purpose," we have no evidence that this apparent concern motivated him to reconsider the decision not to interdict firearms. Indeed, after this e-mail expressing concern, Tucson agents continued to use the same tactics and interdicted only 15 of the 57 firearms purchased during electronic surveillance.

In sum, we found that ATF agents failed to adequately assess the risk to the public safety posed by allowing the straw purchasing activity to continue unabated.

3. Flaws in the Conduct of the Investigation

As discussed above, from the very beginning Tucson agents viewed Operation Wide Receiver as a different type of firearms trafficking case, describing it as a "different direction" from previous investigations. Nonetheless, at the direction of Higman, agents also employed many of the same investigative tactics they used in standard firearms investigations in the hope that these would be successful. Agents conducted multiple surveillances

of the suspected traffickers in an attempt to identify suspect vehicles, stash houses, and individuals. However, agents were unsuccessful in their attempts to follow suspect vehicles to the border until late in the investigation because subjects used known counter-surveillance tactics and other practices that made it difficult to conduct effective surveillance.⁷¹ Despite a repeated lack of success, and the continued uninterrupted flow of firearms to Mexico, agents failed to adapt their tactics or to devise ways to interdict and seize firearms without exposing the broader investigation, such as using local law enforcement to stop suspect vehicles and seize the firearms.

ATF Tucson also lacked the resources to effectively investigate a case of the scope and nature envisioned for Operation Wide Receiver. There were seven agents in the Tucson II group during the investigation, resulting at times in an inability to conduct or maintain surveillance. One agent told us that they sometimes conducted surveillances with only three agents because other agents were not available to assist. Moreover, only one of the agents we interviewed had proficiency in Spanish, and that agent often served as the interpreter for unit operations. The lack of Spanish-speaking personnel limited the Tucson agents' ability to understand monitored and recorded contacts with the subjects.

Tucson agents told us they believed that conducting electronic surveillance was critical to allow them to determine when and where the subjects would be taking firearms. However, the office faced challenges funding the electronic surveillance. In addition, agents spent months collecting cell phone toll records before even starting the process to obtain real-time calling data, a prerequisite to establish the need for electronic surveillance. This resulted in part from Tucson agents' and managers' lack of experience conducting complex firearms trafficking investigations. Garcia was a new agent at the time and did not know how to subpoena toll records or obtain calling data, nor did any of the agents in his office have experience with these techniques.

As a result, Garcia worked under Higman's close supervision. Higman, however, was ill-equipped to lead a complicated firearms trafficking case on the Southwest border: much of his experience was at ATF Headquarters in legislative and public affairs and public policy, and his operational experience was primarily with explosives and arson cases on the East Coast. A more experienced Supervisory Special Agent with better knowledge of border issues may have recognized that the type of investigation envisioned exceeded the

⁷¹ Moreover, had agents succeeded in maintaining surveillance to the border, Bazan told us he thought it would have been impossible for Mexican law enforcement to follow the subjects to their ultimate destination through areas of Mexico with significant cartel activity.

resources of his Tucson group and at a minimum required the use of other investigative techniques much earlier in the investigation in order to minimize the danger to public safety.

4. Use of the FFL as a Confidential Informant

Under the direction and control of Tucson agents, the FFL sold large quantities of firearms to the Operation Wide Receiver subjects despite clear evidence that the purchases were illegal, conduct that potentially would have been itself prosecutable had he not been working as a confidential informant.⁷² Tucson agents had the FFL act like a “dirty FFL” to gain the trust of the buyers and lead them to give him information. Indeed, the entire investigation was premised on the ability of Tucson agents to monitor straw purchases made from the FFL, determine where these firearms were going, and identify who was providing the money for them.

ATF’s policy at the time allowed the use of FFLs as confidential informants.⁷³ However, no one appears to have recognized and taken into account the implications of authorizing illegal sales by an FFL or the conflict of interest that arises from the use of an FFL as a paid confidential informant. In addition to its investigative function, ATF regulates, licenses, and audits FFLs. Paying an FFL to act as an informant and facilitate otherwise illegal sales potentially is in tension with ATF’s regulatory function. The use of the FFL in this case illustrates the conflict: the high number of crime-related traces on firearms the FFL sold during Operation Wide Receiver resulted in increased scrutiny by ATF’s Industry Operations Division, and the subsequent inspection and warning conference to address recordkeeping violations strained the relationship with the FFL. Indeed, upon learning that he had been selected for a “warning conference,” the FFL e-mailed the agents and asked, “With

⁷² Criminal charges against FFLs may be brought for recordkeeping violations arising from a dealer making a false statement in a required record or failing to maintain a required record. See 18 U.S.C. §§ 922(m) (false entry in records maintained by a federal firearms dealer), 924(a)(3)(A) (false statement by a federally licensed dealer). An FFL also may be charged with aiding and abetting false statements made in connection with acquisition of a firearm, see 18 U.S.C. § 924(a)(1)(A), or conspiracy to export firearms without a license. See 18 U.S.C. § 371 and 22 U.S.C. § 2778.

⁷³ We note that the Attorney General Guidelines regarding the use of confidential informants requires advance, written authorization by the SAC and the U.S. Attorney for a specified period, not to exceed 90 days, where a confidential informant will commit “Tier 1 Otherwise Illegal Activity,” which includes, among other things, activity that would constitute a misdemeanor or felony if committed by a person acting without authorization and that involves the commission, or the significant risk of the commission, of any act of violence by a person or persons other than the confidential informant. Changes to ATF’s confidential informant policy incorporate the Attorney General Guidelines and are discussed in Chapter Seven.

Operation Wide Receiver still unresolved do you want to give the person who will be your star witness a warning conference?”

Agents also failed to secure the necessary approvals for allowing the FFL to conduct otherwise illegal activity, namely the repeated sales of firearms to known straw purchasers, as a confidential informant. ATF’s confidential informant policy at the time contemplated that ATF could use informants to perform otherwise illegal acts where “absolutely necessary to successfully complete the investigation.” See ATF Order 3250.1A § 6(f). However, such activity required the approval of the relevant Deputy Assistant Director for Field Operations. *Id.* We found no evidence that Tucson agents sought or were granted such approval.

Tucson agents’ operation of the FFL may have run afoul of ATF’s confidential informant policy in several other respects as well. For example, ATF Order 3250.1A §§ 1, 3(a)(20), requires that the use of confidential informants be carefully controlled and closely monitored. Tucson agents failed to do so. As noted above, the FFL sold 59 firearms to the subjects in eight transactions conducted with minimal or no surveillance by Tucson agents. Similarly, Tucson agents allowed the FFL to sell large quantities of firearms out of his house to buyers with suspected cartel ties, at times with no monitoring or surveillance by ATF. While Higman told the FFL that ATF would conduct a threat assessment and potentially relocate him when the case went to trial, the failure to consider and take adequate precautions to ensure his safety during the investigation violated ATF Order 3250.1A § 3(a)(21), which required agents to take into account the risk of physical harm to the FFL and his immediate family. Additionally, agents inappropriately shared information about the case with the FFL, including the use of electronic surveillance. The FFL maintained recordings and detailed notes about the investigation, including what he was told by the agents, on his home computer, where it was potentially vulnerable to being lost or stolen. These actions potentially jeopardized the investigation and placed both him and Tucson agents at risk.

B. Role of the U.S. Attorney’s Office

We found that the participation of the U.S. Attorney’s Office in Operation Wide Receiver was fragmented and ineffective. Attorneys and supervisors in the Tucson U.S Attorney’s Office did not afford Operation Wide Receiver the attention that a proactive, complex firearms trafficking investigation warranted, and therefore missed opportunities to minimize the threat to public safety posed by the investigation.

As discussed above, three AUSAs were involved during the investigative phase of Operation Wide Receiver. All understood the goal of the investigation and knew that Tucson agents were not interdicting firearms but did little mitigate the risks of these tactics. Maldonado, who had primary responsibility

for Operation Wide Receiver until late 2007, lacked experience handling complex investigative cases and had an extremely limited view of her role in the case. As a result, she provided little guidance during the investigation.

There is no record that Petermann technically was assigned to Operation Wide Receiver, and we have no information suggesting that he participated in decisions about the case beyond discussions in June 2006 about Higman's request to introduce a source of "short" uppers. However, he apparently received information from Higman about case developments as the result of his involvement in the Iron River OCDETF case and did not bring to the attention of his supervisors the failure of Tucson agents to interdict firearms.

Ferraro became involved in Operation Wide Receiver in August 2007, after the vast majority of the firearms had been purchased. However, Ferraro had the most active role in the case, having handled five applications for electronic surveillance and been closely involved in the decision to attempt to link subjects in Operation Wide Receiver to drug activity under investigation in the Iron River OCDETF case. Despite this, Ferraro denied to us having been assigned to Operation Wide Receiver, and told us that as far as he was concerned, he was an OCDETF lawyer working on Operation Iron River. Given that contemporaneous documents show that Ferraro knew that ATF Tucson conducted electronic surveillance under the Operation Wide Receiver case name, his statements to us disavowing working on the case indicate either a fundamental misunderstanding of it or a purposeful attempt to distance himself from decisions in which he participated. Moreover, regardless of the case name under which Ferraro believed electronic surveillance was conducted, he was involved in drafting applications for electronic surveillance attesting to the facts used to establish probable cause – namely, the firearms purchases and surveillances that Tucson agents carried out and documented during Operation Wide Receiver that we discuss in this report.

Ferraro told us that he knew that "there were a lot of guns that [had gone] to Mexico" before he took over the case. Indeed, the affidavit prepared for the original application for electronic surveillance in August 2007 – which Ferraro reviewed and helped revise – contained information about the number of firearms purchased on each date, the money provided by sources in Mexico to purchase firearms, statements made by the buyers in recorded conversations that they were buying guns to take to Mexico, and the firearms recoveries in Caborca, Mexico. In addition, an affidavit in support of an extension of the electronic surveillance explicitly stated, "Since the activation of the interception... no seizures have been made. As your Affiant is continuing to collect evidence in an attempt to identify all parties associated with the Firearms Trafficking Organization, any seizures at this time will likely adversely

affect the gathering of intelligence that is expected to disrupt and dismantle the organization.” Ferraro also reviewed and approved this affidavit.⁷⁴ During the conduct of electronic surveillance in September and October 2007 in Operation Wide Receiver, Tucson agents seized only 15 of the 57 firearms sold to subjects in the investigation.

Moreover, while all of the assigned AUSAs involved in Operation Wide Receiver during the investigative phase told us that they thought that Tucson agents were working with Mexican law enforcement in some capacity, none of them could tell us precisely what that entailed. The challenges of coordinating law enforcement operations with Mexico, as well as the need to obtain evidence from Mexico for an eventual prosecution, should have led attorneys and supervisors to ask what coordination was taking place and who in Mexico was involved rather than relying on agents’ vague assurances. We found no evidence that this occurred.

We also found that supervisors in the Tucson U.S. Attorney’s Office did not adequately supervise Operation Wide Receiver. We recognize that caseloads in the office were extremely high, rendering close supervision difficult. However, Operation Wide Receiver was one of the relatively few proactive cases in the Tucson office. Moreover, Tucson managers also understood that Operation Wide Receiver was not a typical firearms case. Former Criminal Chief Kimmins told us that she understood that Tucson agents planned to follow the firearms to the cartels and were working with Mexican authorities to hand off surveillance at the border. As noted above, however, we have been unable to establish whether a supervisor in the U.S. Attorney’s Office reviewed the applications for electronic surveillance which, while not then required by Department policy, would have been appropriate given the nature and sensitivities of the investigation. Under these circumstances, the case should have garnered closer scrutiny from supervisors, greater attention to the risk to public safety posed by the investigation, and a stronger effort to bring the case to indictment in a timely manner.

Finally, we found one occasion where the tactic of allowing firearms sold as part of Operation Wide Receiver to “walk” was described to the U.S. Attorney. Maldonado prepared a memorandum to then U.S. Attorney Paul Charlton dated July 13, 2006, which explicitly described Higman’s request to

⁷⁴ In his comments submitted to the OIG following review of the draft report, Ferraro stated that he tried to counsel Garcia how to make seizures without compromising the investigation by “building a wall” to isolate the seizures. Garcia, however, told us that Ferraro advised him that they had to catch the subjects in the act of trafficking firearms to prove an export violation because “until [the subject] takes them to Mexico, he didn’t take them to Mexico.”

allow the FFL to sell “short” uppers to the Operation Wide Receiver subjects, thereby possibly allowing illegal weapons to be released “into the community, and possibly into Mexico, without any further ability by the U.S. Government to control their movement or future use.” As described above, Charlton told us that although he did not remember the circumstances surrounding the memorandum, he believed he would not have approved the request and Maldonado assured him that the request was not approved. Although Charlton sent an e-mail after receiving the memorandum stating that he planned to meet with Newell several days later and would discuss the issue with him, neither Charlton nor Newell said they recalled any such discussions. However, we found no evidence that Tucson agents allowed short-barreled rifles to “walk” in Operation Wide Receiver.

C. ATF Headquarters’ Knowledge of Operation Wide Receiver

We found little evidence of involvement in Operation Wide Receiver by ATF Headquarters personnel during the investigation. As discussed above, Tucson agents submitted to ATF Headquarters two funding requests and a memorandum seeking authorization to submit an application for electronic surveillance to the district court. All of these memoranda described repeated purchases of large quantities of firearms by subjects in Operation Wide Receiver and referenced statements made to the FFL indicating that they were taking the firearms to Mexico.

SAC Newell signed these documents and submitted them to Carson Carroll, then the Deputy Assistant Director (West) of Field Operations at ATF Headquarters. Carroll told us that he had no recollection of Operation Wide Receiver generally or of any discussions with Newell about it. None of these documents prompted questions from Carroll about the number of firearms purchased, the investigative tactics used to develop evidence of a conspiracy, or the efforts by Tucson agents to coordinate the investigation with Mexican authorities.

After reviewing the supplemental case funding memorandum in his interview with the OIG, however, Carroll told us that the statements about coordination with Mexico concerned him because agreements with officials outside the United States would have required the involvement of ATF’s International Affairs Office, as well as to the Assistant Directors of Enforcement Programs and Services and Field Operations. We found no evidence that this occurred or that others at ATF Headquarters were involved in Operation Wide Receiver during the investigation.

These memoranda appear to have been the primary way by which ATF Headquarters could have learned about the tactics used in Operation Wide Receiver. Operation Wide Receiver was designated and funded as a “major case,” which Newell told us resulted in monitoring of the investigation by ATF

Headquarters. The ATF policy in effect at the time, however, indicates that investigations designated as “major cases” did not undergo substantive review or monitoring.

Under this policy, a panel consisting of the Deputy Assistant Director (Field Operations), the Chief of the Case Management Branch, and several other officials at ATF Headquarters approved major case funding based on a memorandum summarizing the investigation and a review of entries in ATF’s case management database, N-Force. While we have no documents memorializing the basis for approving major case funding in Operation Wide Receiver, Carroll’s inability to recall the case and his statement that he reviewed “hundreds” of similar requests suggests that the approval process was perfunctory. Moreover, while the policy in effect at the time that funding was approved in Operation Wide Receiver, as well as a revised policy adopted in July 2007, required that investigative reports be recorded in N-Force, we saw no provisions in either version of the policy contemplating ongoing, substantive monitoring of major case investigations by ATF Headquarters.

Operation Wide Receiver involved other significant management and oversight failures. At a minimum, decisions to implement an investigative strategy in which agents declined to interdict firearms to focus on developing intelligence and identifying higher-ranking cartel members and the decision to forge a “cooperative agreement” with foreign law enforcement officials should have been vetted through ATF Headquarters, and then followed by aggressive supervision to insure that it actually was working. We found no evidence that any such review or supervision occurred. Our review, however, faced serious informational limitations due to the age of the case, witnesses’ poor memories, and the lack of access to Higman, all of which have hampered our ability to identify precisely why and how these failures occurred. Indeed, we have been unable to identify the genesis of the investigative tactics used in Operation Wide Receiver, or what discussions or approvals, if any, took place at the beginning of the case.

D. Department Leadership Knowledge of Operation Wide Receiver

With the exception of the lawyers in the Criminal Division who reviewed the applications for electronic surveillance, we found no evidence that senior leaders in the Department had knowledge of Operation Wide Receiver before the Department’s Criminal Division assumed responsibility for prosecuting the case in 2009.⁷⁵ With regard to the applications for electronic surveillance,

⁷⁵ The April 2010 response of senior leaders in the Criminal Division to the discovery that firearms had been allowed to “walk” in Wide Receiver and their failure to make sure that ATF did not continue to use improper tactics in firearms trafficking investigations is discussed in Chapter Five.

although a single OEO attorney reviewed all five applications in 2007 and drafted a cover memorandum for each application to facilitate review by a DAAG in the Criminal Division, and three DAAGs then reviewed and approved the applications, we found that neither the OEO attorney nor the DAAGs identified any issues or concerns about the handling of the investigation by ATF.

We also determined that former Attorney General Michael Mukasey was never made aware that ATF, in connection with Operation Wide Receiver, was allowing or had allowed firearms to “walk.” We found that Mukasey was briefed on ATF’s attempts to use controlled deliveries – a law enforcement technique that witnesses told us differs significantly from “walking” in that it involves the delivery of contraband under surveillance or other control by law enforcement agents, with arrests and interdictions at the point of transfer – in a different ATF firearms trafficking investigation involving a lead subject named Fidel Hernandez. While the briefing paper did mention that ATF’s attempts to conduct controlled deliveries had been unsuccessful, we found no basis to conclude that this briefing put Mukasey on notice of Operation Wide Receiver or of “walking” as a tactic employed in ATF investigations.

1. Authorization for Electronic Surveillance

Tucson agents drafted affidavits in support of five applications for electronic surveillance. The U.S. Attorney’s Office submitted these to OEO to obtain authorization from a DAAG to apply for an interception order. An OEO attorney reviewed each affidavit for legal sufficiency and necessity and prepared a cover memorandum for the reviewing DAAG. The cover memoranda provided an overview of the investigation and relevant statutes, the relevant facts establishing probable cause, the need for electronic surveillance, and a recommendation to sign the authorization to apply for a court order. We found no indication that these memoranda caused any of the DAAGs who authorized the applications for electronic surveillance to raise questions about the tactics used in the investigation.

As described above, the affidavit in support of the initial application for electronic surveillance in Operation Wide Receiver contained information about [REDACTED] the number of firearms purchased by the subjects on each date, the money provided to the subjects by sources in Mexico to purchase firearms, the statements made by buyers in recorded conversations about buying guns to take to Mexico, and the firearms recovered in Caborca, Mexico. The affidavit in support of the second wiretap application, which was authorized on September 25, 2007, included an explicit statement that agents were not seizing firearms to avoid “adversely affect[ing] that gathering of intelligence that is expected to disrupt and dismantle the organization.” While the subsequent affidavits were less explicit, the information provided in them nonetheless suggested that ATF had not seized

firearms. For example, the affidavit for the spinoff application authorized on October 11, 2007, stated that [REDACTED]

The August 24, 2007, cover memorandum prepared by the OEO attorney for the initial application included information from this affidavit to establish probable cause. For example, it stated that [REDACTED]

The cover memoranda for subsequent applications included similar information. For example, the memorandum prepared for the first extension of electronic surveillance, dated September 25, 2007, stated that [REDACTED]

The memorandum for the first spinoff application, dated October 11, 2007, noted that [REDACTED]

While these memoranda were reviewed and approved by different DAAGs (see Table 3.1 below), even standing alone they suggested that the subjects were repeatedly buying and transporting firearms to Mexico. Read together, they suggested [REDACTED] purchased large quantities of firearms from the same FFL over many months, using money supplied to him by sources in Mexico associated with narcotics trafficking, and that ATF monitored these purchases but did not arrest him.

Table 3.1

Electronic Surveillance in Operation Wide Receiver

Application	Date Authorized	DAAG	Date of Order
Initial (TT1/TT2)	08/24/07	Barry Sabin	[REDACTED]
Extension (TT1/TT2)	09/25/07	John Keeney	[REDACTED]
Spinoff (TT3)	10/11/07	Sigal Mandelker	[REDACTED]
Extension (TT3)	11/08/07	John Keeney	[REDACTED]
Spinoff (TT4)	11/15/07	Barry Sabin	[REDACTED]

We interviewed former DAAG Mandelker, who reviewed and approved the October 11, 2007, spinoff application.⁷⁶ She told us that generally she relied on the cover memorandum when reviewing an application unless something in the memorandum caused her to question whether the evidence was sufficient to establish probable cause. She said that she would contact OEO and the AUSA who filed the application if she had questions about the sufficiency of the evidence or saw something in an application that was a problem, but she said that generally it was not within her expected role to second guess the way the agency was conducting the investigation as long as the affidavits established probable cause. When asked about the application in Operation Wide Receiver, she said she did not recall the cover memo or the affidavit, nor did she recall ever hearing the case name Operation Wide Receiver.

We conclude that the wiretap affidavits in Operation Wide Receiver included “red flags” that would have caused a prosecutor who was focused on the question of investigative tactics to have questions about ATF’s conduct of the investigation. Although there was sufficient information in the applications to cause a reader to have questions about the investigative tactics being employed by ATF, no one who reviewed them in the Criminal Division at the time of the submissions identified any concerns, and therefore there was no review of the tactics at that time. However, as described in more detail in Chapters Four and Five, we identified possible explanations for the failure to recognize these “red flags,” including that the DAAGs focused solely on legal sufficiency and reviewed the wiretap applications primarily to determine whether the facts established probable cause, that the DAAGs did not review the agent’s affidavits and instead relied entirely upon the OEO cover memorandum, or the DAAGs believed that a high-level official in the U.S. Attorney’s Office had reviewed and approved the application, including the investigative tactics referenced in the affidavit. As we explain in greater detail in Chapter Seven, we believe that DAAGs have an obligation to conduct a review of wiretap applications, including the agent’s affidavit, that is sufficient to enable them to form a personal judgment that the application meets the statutory criteria. While the OEO cover memorandum serves a useful purpose in the review process and can appropriately influence the scope and nature of the DAAG’s review of the affidavits themselves, we do not believe it should supplant such a review.

⁷⁶ Mandelker was the only one of the three Criminal Division DAAGs that we were able to interview. We sought to interview Barry Sabin, who reviewed two of the applications in Wide Receiver. Sabin told us he would not participate unless we obtained a court order unsealing the affidavits so that his attorney could review them and be present during the interview. We did not ask the Department to seek such a court order. See 18 U.S.C. § 2518(8)(b). John Keeney retired in 2010 after serving 59 years in the Department and died in November 2011.

2. Former Attorney General Mukasey

We also sought to determine whether former Attorney General Mukasey knew about the “gun-walking” tactics used in Operation Wide Receiver. We found no evidence that he was made aware of Operation Wide Receiver, or of the investigative tactics that were employed by ATF during that investigation.

We did find that a briefing memorandum was prepared for him in November 2007 that contained information concerning unsuccessful attempts by ATF to conduct cross-border controlled deliveries of firearms in a case involving a subject named Fidel Hernandez. The Hernandez case was unrelated to Operation Wide Receiver but was conducted by the Phoenix Field Division in 2007. Mukasey told the OIG that he did not recall the briefing memorandum, but that he assumed that he had received an oral briefing from his staff before a meeting with the Mexican Attorney General in November 2007. We found no basis to conclude from the circumstances surrounding this briefing that Mukasey had knowledge of Operation Wide Receiver or was informed about the use of “walking” as a tactic employed in ATF investigations.

a. Background on the Hernandez Case

In July 2007, agents in ATF’s Phoenix Division began investigating suspected trafficking to Mexico by several individuals buying firearms from a Phoenix FFL, including Fidel Hernandez and Carlos Morales-Valenzuela.⁷⁷ Phoenix agents conducted surveillance of firearms purchases and used GPS data and information from the FFL to track the subjects. Phoenix agents also attempted to coordinate the investigation with Mexican law enforcement through the MCO, with the goal of “perfect[ing] an international firearms trafficking case culminating with prosecution by the Mexican Attorney General’s Office.”

In late September 2007, Phoenix agents learned that Hernandez had purchased additional firearms and was heading toward the border. Agents contacted the MCO and Mexican law enforcement, planning to have “Mexican AFI folks do a traffic stop in Mexico and get a load of guns.” Phoenix agents, while on the phone with the MCO personnel and AFI, followed the vehicle carrying the firearms and watched it cross the border. Mexican law enforcement officials, however, informed MCO personnel that they did not see

⁷⁷ Our review did not include a full examination of the Hernandez case. Our description of the Hernandez case is based on contemporaneous e-mails and statements from a few knowledgeable witnesses. We note that there also have been allegations that “walking” occurred in another investigation conducted by ATF’s Phoenix Field Division involving straw purchases by Alejandro Medrano, Hernan Ramos, and others, but we also did not include this case in our review.

the vehicle cross even though it was “one of a couple of cars crossing the bridge southbound.” Former Attaché Davy Aguilera later stated in an e-mail that he had learned the operation was compromised by contact with an untrustworthy contact in Mexican law enforcement.

The following week, Phoenix agents learned that the subjects had purchased more firearms. They again coordinated with Mexican law enforcement to attempt another controlled delivery to Mexico. SAC Newell wrote in an e-mail to Carroll, “We are potentially going to give it another shot this weekend. . . . They are up to about 250 of the ‘weapons of choice’ so if this goes we’ll be able to cement our role as the lead firearms trafficking agency on this side of the border[.]” Two days later, Newell stated in an e-mail, “[J]ust got notified that the subjects are heading south with another load of guns - right now. Davy [Aguilera] is at port of entry on Mexican side.” This second attempt at a controlled delivery failed, however, because too many Mexican law enforcement officials showed up at the border and the subjects did not cross.

In late October 2007, ATF Phoenix agents made plans for another controlled delivery. The agents worked with ICE to obtain authority from CBP for the subjects to “pass through” the POE, as well as assistance with surveillance from ICE agents and vetted units in Mexico. This attempt failed when a demonstration in Nogales caused the POEs to be shut down and created a large traffic jam, leading the subjects to make a U-turn and head back to Phoenix. Hernandez and Valenzuela-Morales were arrested by CBP in late November 2007 and admitted in post-arrest interviews that virtually all of the firearms they purchased were for export to Mexico.

Despite the failure of these attempts, ATF officials considered the Hernandez case to be a significant step toward addressing firearms trafficking to Mexico. On November 14, 2007, at the request of Carroll and Hoover, Aguilera prepared a memorandum concerning the case “[f]or [the] meeting with Mex. Attorney General and U.S. Attorney General.” The memorandum summarized the investigation in Hernandez and stated, “[T]his case should be of intense interest at DOJ for use in high-level bi-lateral [Senior Law Enforcement Plenary] meetings regarding the issue of the U.S.’s response to the Government of Mexico’s serious concerns at the highest levels as to our commitment [and] ability to disrupt the illegal flow of firearms to Mexico and specifically violent Mexican drug trafficking organizations.”

b. Preparation of the Briefing Paper for Mukasey

Former Attorney General Mukasey was confirmed by the Senate on November 8, 2007, and was sworn in the next day.⁷⁸ Shortly after becoming Attorney General, Mukasey was scheduled to meet with [REDACTED] on November 16, 2007. Mukasey's staff prepared a background briefing paper to help prepare him for this meeting, addressing efforts to combat cross-border drug trafficking, human smuggling and trafficking, money laundering, and arms trafficking. On November 13, 2007, former Acting DAAG John Roth circulated a draft briefing paper seeking comment from officials within the Criminal Division and Department components, including Carson Carroll, the Deputy Assistant Director (West) of Field Operations at ATF Headquarters. The arms trafficking section of this draft included the following language about the attempted controlled deliveries in the Hernandez case:

Mexico has repeatedly expressed concern regarding the smuggling of weapons from the US into Mexico, which the Government of Mexico asserts has fueled the violence of Mexican drug cartels In response to these concerns, DOJ's ATF has committed significant resources to address the issue of gun smuggling into Mexico

Of particular importance, ATF has recently worked jointly with Mexico on the first-ever attempt to have a controlled delivery of weapons being smuggled into Mexico by a major arms trafficker. While the first attempts at this controlled delivery have not been successful, the investigation is ongoing, and ATF would like to expand the possibility of such joint investigations and controlled deliveries – since only then will it be possible to investigate an entire smuggling network, rather than arresting simply a single smuggler. To that end, it is essential that a Mexican vetted unit be assigned to work with ATF in this regard. ATF's attaché in Mexico City has briefed [REDACTED] on this attempted controlled delivery, and stressed the importance of such a vetted unit being assigned.

Carroll reviewed this draft, then stated in an e-mail to then-Assistant Director for Field Operations Hoover, "It took a while but I just got through this document and I am going to ask DOJ to change 'first ever.' In talking with JJ [Ballesteros] and Vic [Maldonado], there have [been] cases in the past where we have walked guns. I am ok with the rest." Carroll was not referring to

⁷⁸ By that date, the investigative activity in Operation Wide Receiver had largely been completed, and it was ended entirely in early December 2007.

Operation Wide Receiver when he mentioned “past cases,” as he explained in an e-mail to Roth and Bruce Swartz, a DAAG in the Criminal Division, on November 15. In that e-mail, Carroll suggested they change “first ever” to “recent initiative,” because “[A]gents here in this conference . . . who have been with ATF 30 years, say they can remember a couple of attempts of a controlled delivery back in the early 80’s.” Roth and Swartz revised the briefing paper and circulated a final version on November 16, 2007. The arms trafficking section of the final briefing paper stated, “Of particular importance, ATF has recently worked jointly with Mexico on the first attempt in more than 20 years to have a controlled delivery of weapons being smuggled into Mexico by a major arms trafficker.”

Mukasey told us that this meeting with ██████████ was his first foreign contact as the Attorney General, and that his focus was on maintaining the close cooperation with Mexico forged by his predecessor. He told the OIG that he did not recall the briefing paper because his staff likely briefed him orally before the meeting with ██████████. He said he recalled discussing with his staff or with ██████████ expanding the use of e-Trace and the need for vetted law enforcement in Mexico, but did not recall discussing ATF’s attempts to use controlled deliveries or coordinate enforcement operations with Mexico. Mukasey also told us he had no knowledge of specific firearms cases, including Operation Wide Receiver or the Hernandez case.

The DAAGs involved in preparing the briefing paper, John Roth and Bruce Swartz, told us that they did not recall discussions about attempted controlled deliveries or specific firearms trafficking cases with the Attorney General, ATF, or members of the Attorney General’s staff. Former Acting Deputy Attorney General Craig Morford similarly told us that he did not recall discussion of controlled deliveries. We have found no evidence to the contrary.

c. Implications of the November 2007 Briefing

We also considered whether the reference to attempted controlled deliveries in the November 16, 2007, briefing paper put Attorney General Mukasey or others in his office on notice of “gun-walking.” We conclude that it did not.

Although several ATF e-mails used the terms “controlled delivery” and “walk” interchangeably, numerous witnesses told us that these terms refer to different techniques. Mukasey, for example, told us that a controlled delivery occurs where contraband is delivered by an undercover agent or a cooperating courier surrounded by law enforcement, with arrests made as soon as the delivery is completed. Although Mukasey said he did not recall ATF’s attempts to use cross-border controlled deliveries to Mexico, he said he assumed that they would not have relied only on Mexican law enforcement and would have had someone from DEA or ATF in Mexico to ensure control of the delivery. He

told the OIG that “walking” was not a term that he had heard or used in his time as a prosecutor, and that an uncontrolled transfer of firearms was an unacceptable tactic because of the public safety risks. Morford similarly told us that the sentence in the briefing paper about attempted controlled deliveries was not something that would have “jumped out at [him] at the time” because, among other reasons, the reference to a “controlled delivery” would have conveyed that agents were following the transaction and interdicting the firearms at the point of delivery.

Attorney General Holder testified before the House Judiciary Committee on June 7, 2012, that former Attorney General Mukasey was briefed on the transmission of guns to Mexico and “did far less than what I did.” On June 12, 2012, Attorney General Holder testified before the Senate Judiciary Committee, stating, “An [A]ttorney [G]eneral who I suppose you would hold in higher regard was briefed on these kinds of tactics in an operation called Wide Receiver and did nothing to stop them -- nothing. Three hundred guns, at least, walked in that instance.”⁷⁹ We interviewed Attorney General Holder to understand the basis for his testimony. Holder told us that while preparing for his Congressional testimony, he was told that Mukasey had been briefed on the fact that guns were not properly followed in the Hernandez case. Holder acknowledged that the briefing referred to controlled deliveries, and that “gunwalking . . . is the antithesis of controlled deliveries,” in that controlled deliveries assume the use of an undercover agent to deliver the firearms, or the ability to maintain visual or mechanical surveillance of them. He explained that he believed it was not the reference to “controlled deliveries” in the briefing paper that should have concerned Mukasey, but rather that the attempts had failed, and that “that failure resulted in whatever the number of hundred guns getting out.” The briefing paper, however, contained no mention of the number of firearms involved in the attempted controlled deliveries.

Swartz, who remains a DAAG in the Criminal Division and now also serves as Counselor for International Affairs, told us that it was important to consider ATF’s attempts to conduct cross-border controlled deliveries in the context of the “unprecedented cooperation” between the United States and

⁷⁹ Following this testimony, Senator Charles Grassley sent a letter to Holder challenging the Department to produce evidence that Mukasey was briefed on Wide Receiver. In response to this letter, the Department indicated that Holder’s statement that the November 16, 2007, briefing pertained to Wide Receiver was “inadvertent” and that the reference in the briefing paper was to the Hernandez case. The letter also included excerpts from several e-mails suggesting that ATF had not interdicted firearms in the Hernandez case, including one stating, “ATF agents attempted to coordinate with Mexican authorities through ATF attache’s [sic] to apprehend the subjects [including Hernandez] in Mexico. The attempts were unsuccessful. Case agents believe the subjects are continuing to traffick [sic] firearms to Mexico.”

Mexico in 2007. In March 2007, former President George Bush met with Mexican President Felipe Calderon in Merida, Mexico, and issued a joint communiqué committing to increased bilateral cooperation to “target criminal organizations, fight firearms trafficking, which fuels the violence of criminal organizations, as well as drug trafficking . . . and illicit financial activities.” As part of efforts to improve cooperation, Mexico significantly increased extraditions and worked with the United States on a number of cross-border initiatives, including joint prosecutions to allow law enforcement officials to take advantage of more stringent sentences in Mexico. Swartz told us that firearms trafficking from the United States and the resulting gun violence in Mexico was the overriding concern of Mexican officials, and that Mexican officials were very interested in whatever collaborative steps could be taken to address it. Given this concern, he said that ██████████ would have considered the idea of controlled deliveries to be a positive development. While Swartz said that he would not have investigated why attempts to conduct controlled deliveries did not succeed, he said that the reference in the briefing paper to the lack of success would have concerned him in that it reflected the need for vetted units in Mexico to intercept the firearms and suggested that there was more to be done before it could be a workable approach.

Documents reviewed by the OIG show that Mexico’s concerns about cross-border firearms trafficking continued during Attorney General Holder’s tenure. The background briefing paper prepared for Holder’s April 2009 meeting with Mexican President Calderon and other Mexican officials in Cuernavaca, Mexico, stated, “During the last few months an emphasis on increased cooperation on weapons trafficking into Mexico has emerged as a central area of concern for both countries. Weapons smuggled from the United States are widely believed to be fueling the violence among warring drug cartels.”

At the Cuernavaca meeting, Holder and DHS Secretary Napolitano committed to forming a working group to study steps the United States could take to curb illegal firearms trafficking to Mexico. Led by the Department’s Criminal Division, a working group was subsequently created to review and assess enforcement, strategy, training, and resources and to make recommendations to reduce firearms trafficking. Separately, during a joint press conference with President Calderon in April 2009, President Barack Obama asked Attorney General Holder to review firearms enforcement efforts, resulting in creation of a second working group to assess how existing firearms law were being used by prosecutors.

As part of these efforts to address concerns about firearms trafficking, senior leaders in the Department’s Criminal Division advocated exploring the possibility of using cross-border controlled deliveries to address firearms trafficking. An August 2009 memorandum from AAG Breuer to Holder recommended engaging in high-level talks with Mexican authorities about the

possibility of conducting cross-border controlled deliveries of firearms that had been seized during southbound interceptions. On February 4, 2011, during a meeting with Mexican law enforcement, Breuer “suggested allowing straw purchasers [to] cross into Mexico so [Secretariat of Public Security] can arrest and PGR can prosecute and convict.”

When asked about the view of controlled deliveries reflected in these and other documents, Weinstein stated, “I think our view was that... controlled deliveries are a time honored law enforcement technique. They’re infinitely harder when you’re doing them and international borders are involved, but they’re still, if you do it right, they still can be a useful technique.” Breuer told us that his February 4, 2011, statement during the meeting with Mexican officials was a preliminary suggestion and that the decision was made not to pursue it after Anthony Garcia, the Department’s Attaché in Mexico City, expressed concerns about such an approach. Attorney General Holder told us that he did not recall discussions with Breuer about conducting controlled deliveries, but that “the career folks shot down the idea” when Breuer raised it.

Attorney General Holder changed Department policy in March 2011 to require interdiction of firearms in the United States. At Holder’s direction, Deputy Attorney General James Cole issued a directive that tactics allowing firearms to cross the border violated Department policy and would not be tolerated. On March 9, 2011, Cole held a conference call with the Southwest Border U.S. Attorneys and sent an e-mail to them stating, “We should not design or conduct undercover operations which include guns crossing the border. If we have knowledge that guns are about to cross the border, we must take immediate action to stop the firearms from crossing the border, even if that prematurely terminates or otherwise jeopardizes an investigation.” This prohibition includes controlled deliveries coordinated with vetted Mexican law enforcement. Holder told us that given the history of unsuccessful attempts, he does not view controlled deliveries as something worth trying.

VIII. Conclusion

During both parts of Operation Wide Receiver, ATF’s Tucson II group, led by Higman, pursued an investigative strategy that affirmatively authorized illegal firearms sales to be made to straw purchasers and then declined to arrest the straw purchasers or to interdict and seize weapons despite ample evidence that the purchases were illegal. Evidence of illegality included the use of heat-sealed bundles of cash to purchase large quantities of firearms, open acknowledgement by the subjects that they were purchasing firearms for others, and statements made by the subjects to the FFL that the firearms would be converted to fully automatic weapons or transported to Mexico. Instead, ATF allowed the purchases to continue and conducted surveillance of the buyers and load vehicles, with the goal of identifying stash houses,

trafficking routes, and other participants in the conspiracies. ATF Tucson and the ATF Phoenix Field Division gave little to no consideration of the public safety repercussions of allowing firearms to be sold at the direction of the government that were intended for use in Mexico by suspected drug cartel members. This represented an extraordinarily serious failure that resulted in serious harm to the public, both in the United States and Mexico.

During Operation Wide Receiver II, ATF attempted to coordinate several operations with Mexican law enforcement, intending to hand over surveillance of suspects and target vehicles to Mexican law enforcement in an attempt to identify the ultimate recipients of the firearms. These attempts were ultimately unsuccessful, in large part because the ATF agents were unable to maintain surveillance of the suspects to the border. However, even if the ATF agents had been able to conduct surveillance to the border, this would not have resulted in seizures and arrests, as agents made clear that their priority was not “a photo op seizure at the border” but in having the “shipment taken all the way to its destination and exploited on all levels . . . for intelligence and reportable criminal activity.”

We found no evidence that ATF’s seriously flawed investigative strategy and tactics were based on a refusal by the U.S. Attorney’s Office to authorize seizures of firearms, arrests of straw purchasers, or a heightened evidentiary standard for prosecuting firearms cases. Indeed, in the one instance we discovered where ATF asked a prosecutor during the investigative phase of the case whether there was sufficient evidence to support charges against a subject, ATF later made the arrest. Moreover, the evidence suggests that, other than on one occasion involving the request to facilitate the sale of illegal short-barreled rifles, the AUSAs assigned to the case knew of and acquiesced in ATF’s strategy during the investigation, albeit with the apparent understanding that Mexican law enforcement was somehow involved. The decision by ATF to conduct surveillance of the firearms purchases rather than to interdict and seize or arrest thus was based on the desire to target higher-ranking members of the firearms trafficking conspiracy, not on a lack of legal authority to do so.

We further concluded that despite the complexity of the investigation, attorneys and supervisors in the Tucson U.S. Attorney’s Office afforded insufficient attention to the case, missing opportunities to raise questions or to minimize the risk posed by ATF’s investigative tactics.

We also determined that ATF Headquarters did not know during the investigation that Tucson had failed to interdict firearms. The ability of a single field office to conduct an investigation with international consequences illustrates the shortcomings of ATF’s case initiation and monitoring processes. At a minimum, the tactics used in Operation Wide Receiver and the development of a “cooperative agreement” with Mexican law enforcement should have been vetted and approved by ATF Headquarters.

We also found that, with the exception of the DAAGs in the Criminal Division who reviewed the wiretap applications, senior Department leaders had no knowledge of Operation Wide Receiver before the Criminal Division assumed responsibility for prosecuting the case in late 2009. With regard to the three DAAGs in the Criminal Division who reviewed and approved the five wiretap applications, we found no evidence that any of them observed any “red flags” in the agent’s affidavits regarding the investigative tactics being used by ATF. That was likely due, we found, to one or more of the following reasons: a focus on the legal sufficiency of the request rather than the underlying investigative tactics; a failure to read the affidavits and instead rely solely on the OEO summary memorandum; or a belief that a high-level official in the U.S. Attorney’s Office had reviewed and approved the application, including any investigative tactics referenced in the agent’s affidavit. Finally, we concluded that former Attorney General Mukasey was not briefed about Operation Wide Receiver or gun “walking,” but on a different and traditional law enforcement tactic that was employed in a different case.

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CHAPTER FOUR OPERATION FAST AND FURIOUS

I. Introduction

In this Chapter we describe ATF's firearms trafficking investigation known as Operation Fast and Furious, and the operational and oversight roles played by the ATF Phoenix Field Division and the U.S. Attorney's Office for the District of Arizona.⁸⁰ The investigation began at the end of October 2009 when agents obtained information about some suspicious firearms purchases made from a Phoenix-area Federal Firearms Licensee (FFL). By the end of the year, agents had identified a significant firearms trafficking group operating in the Phoenix area that was responsible for the purchase of over 600 firearms for approximately \$350,000. However, for reasons described in this Chapter, ATF and the U.S. Attorney's Office agreed on a longer term investigative strategy that broke from the traditional approach of confronting suspected straw purchasers. Instead, the offices deferred taking action against the subjects who had been identified in order to pursue a larger case, primarily through the use of several wiretaps, that sought to dismantle the entire trafficking group and identify how the firearms were being paid for and transported to Mexico.

The consequences of adhering to this strategy for several months without modification were extraordinary. During the course of the investigation, Operation Fast and Furious subjects were responsible for purchasing nearly 2,000 firearms for \$1.5 million, hundreds of which were recovered in the United States and Mexico. The vast majority of these purchases were made by individuals after ATF agents had identified them as suspects. Yet there were no arrests or indictments in the case until it was learned that two weapons found at the scene of Customs and Border Protection Agent Brian Terry's December 14, 2010, murder had been purchased by an Operation Fast and Furious subject who agents had identified in November 2009, and who had bought the two guns found at scene in January 2010. For the reasons described in this chapter, we concluded that the individuals at ATF and the U.S. Attorney's Office responsible for Operation Fast and Furious failed to conduct the investigation with the urgency, oversight, and attention to public safety that was required by an investigation that involved such extraordinary and consequential firearms trafficking activity.

⁸⁰ In Chapter Five we discuss the roles of ATF Headquarters and Department leadership in connection with the investigation.

II. Methodology

To conduct this review, we examined the reports of investigation, grand jury material, and other documents from the ATF's investigative file, as well as materials from the U.S. Attorney's Office, including the nine applications and court orders to conduct electronic surveillance. In addition, we reviewed thousands of e-mail communications of individuals in Phoenix directly involved in the conduct and management of the case. We also obtained relevant documents from other agencies, including the DEA, FBI, and ICE.

We interviewed over 75 witnesses as part of the Operation Fast and Furious review. These included the ATF agents and supervisors responsible for the investigation and their chain of command within ATF's Phoenix Field Division, as well as several agents who were assigned to work on the investigation at various times and agents assigned to other ATF field offices who had information relevant to our review. We also interviewed the prosecutor at the U.S. Attorney's Office who was responsible for the case and his management, including the former U.S. Attorney and Criminal Chief. In addition, we interviewed personnel at the DEA, FBI, and ICE who possessed relevant information, and the owners of two FFLs who voluntarily provided substantial assistance to ATF during the investigation.

There were several witnesses we were unable to interview. The ICE agent who was assigned to Operation Fast and Furious on a full time basis declined our request for a voluntary interview. Darren Gil, the former ATF Attaché to Mexico who retired from the agency in December 2010, declined through counsel our request for a voluntary interview. We also sought to interview Kevin O'Reilly, an official with the White House National Security Staff, about communications he had in 2010 with Special Agent in Charge William Newell that included information about Operation Fast and Furious. O'Reilly declined through his personal counsel our request for an interview.⁸¹

⁸¹ We sought to interview O'Reilly in light of e-mail communications he had with Special Agent in Charge Bill Newell in 2010. Newell told us that he had known O'Reilly during previous field office assignments and that the two shared information about firearms trafficking issues relevant to their geographic areas of responsibility. According to Newell, O'Reilly was also friends with ATF's White House Liaison and through that relationship O'Reilly would be included on some information sharing between Newell and the ATF Liaison about ATF's efforts on the Southwest Border, and that O'Reilly eventually communicated with Newell directly. Newell told us that he did not have direct contact with the White House other than through O'Reilly. We requested from the White House any communications concerning Operation Fast and Furious during the relevant time period that were sent to or received from (a) certain ATF employees, including Special Agent in Charge Newell, and (b) certain members of the White House National Security Staff, including Kevin O'Reilly. In response to our request, the White House informed us that the only responsive communications it had with the ATF employees were those between Newell and O'Reilly. The White House indicated that it previously

(Cont'd.)

III. Organization of this Chapter

The Chapter is organized into four sections. We describe in Section IV the period from October 2009 to the end of January 2010, which includes the initiation and early investigation of the case. We describe the facts and circumstances that caused agents to open the case and within weeks identify a major firearms trafficking group that was using straw purchasers to buy large quantities of firearms for transport to Mexico. We further describe instances where the government had advance notice, and on occasion surveilled, firearms purchases by subjects of the investigation, and the government's decision to not interdict those firearms. We also describe in this section the substantial cooperation ATF requested and received from an FFL and the ATF's early interaction with the Drug Enforcement Administration (DEA) and Immigration and Customs Enforcement (ICE). In addition, we describe the government's decision to pursue court-authorized electronic surveillance to develop the investigation.

Section V covers the conduct of the investigation during the period from February to July 2010. In this section, we describe the proposal and approval to designate Operation Fast and Furious an Organized Crime and Drug Enforcement Task Force (OCDETF) case, as well as the initiation of the use of electronic surveillance to further the investigation. We also describe the continuing purchasing activity of the subjects of the investigation and the circumstances under which ATF did and did not seize firearms. This section also highlights several significant matters in the case, including concerns some agents had with the conduct of the investigation, the drafting of an exit strategy in April 2010, two contacts the main subject of the investigation had with law enforcement, and concerns expressed to ATF by another FFL about its cooperation in the investigation.

Section VI covers the period from August 2010 to January 2011, which ATF considered the end of the operational phase of the investigation and the movement of the case towards indictment. This section describes some of the investigative activity ATF conducted during this period and the U.S. Attorney's

produced those communications to Congress in response to a similar request, and the White House provided us with a copy of those materials. The White House did not produce to us any internal White House communications, noting that "the White House is beyond the purview of the Inspector General's Office, which has jurisdiction over Department of Justice programs and personnel." The records the White House produced did not contain any communications between Newell and O'Reilly that referred to Operation Fast and Furious by name, and the communications that referred to the "large OCDETF case" – which was Operation Fast and Furious – did not include any information about the case strategy or the tactics agents were using to conduct the investigation. We were unable to further investigate the communications between Newell and O'Reilly because O'Reilly declined our request for an interview.

Office's efforts to indict the case. This section also describes the actions ATF and the U.S. Attorney's Office took in response to learning that two firearms purchased by a subject in Operation Fast and Furious were recovered at the scene of the December 14, 2010, shooting death of Customs and Border Patrol Agent Brian Terry. In addition, we describe the United States Attorney's Office's decision to indict on January 19, 2011, the purchaser of these firearms and other subjects identified during the course of Operation Fast and Furious.

Section VII provides the Office of the Inspector General's (OIG) analysis of key aspects of the conduct of Operation Fast and Furious, including decisions by ATF and the U.S. Attorney's Office that set the strategy for the case, the issue of whether and when there was probable cause to seize firearms, and ATF's use of cooperating FFLs to advance the investigation. We also assess the consequences of using court-ordered electronic surveillance and the time it took the government to obtain indictments of Operation Fast and Furious subjects.

IV. Inception and Early Investigation (October 2009 – February 2010)

A. ATF Establishes a New Firearms Trafficking Enforcement Group in October 2009

Operation Fast and Furious was an investigation in ATF's Phoenix Field Division conducted by "Group VII," one of four criminal enforcement groups in the office, which was responsible for firearms trafficking investigations with a nexus to Mexico. We summarize below how the group was created and initially staffed.

William Newell began his tenure as Special Agent in Charge (SAC) of the Phoenix Field Division in June 2006. Newell told the OIG that he was struck during his early briefings with ATF personnel by the acute challenge the field office faced in combating, with limited personnel, the problem of firearms trafficking to Mexico and California. Newell estimated that the office's territory – which at that time comprised 5 states – had a total of 17 agents distributed across 5 groups, 3 of which were enforcement groups responsible for firearms trafficking as well as other criminal investigations.

Newell told us that one of his primary responsibilities was to implement Project Gunrunner, ATF's national initiative to combat firearms trafficking along the Southwest Border. Newell said that in early 2008, he and a supervisor in the office discussed ideas for addressing firearms trafficking along the Southwest Border. In February 2008, the supervisor drafted a paper entitled, "Border Firearms Interdiction Strike Team – a strategy to target and reduce border related firearms violence." The proposal envisioned creating an investigative team drawn from multiple federal and state law enforcement components.

In April 2008, Newell submitted a request to ATF Headquarters to open a new firearms trafficking group. At about the same time the SAC for the Drug Enforcement Administration's (DEA) Phoenix Office established an OCDETF Strike Force in Arizona to address the threat posed by the Sinaloa drug cartel and Arizona-based traffickers associated with the cartel. Newell's April proposal envisioned locating the group within the proposed OCDETF Strike Force, which was established in August 2008.

In April 2009, approximately eight months after the Phoenix OCDETF Strike Force was established, the Department issued a memorandum entitled "Guidelines for Consideration of OCDETF Designation for Firearms Trafficking Cases Related to Mexican Drug Cartels." The memorandum was written "to emphasize the important role that the OCDETF Program must continue to play with the United States' government-wide effort to stem the southbound smuggling of arms to Mexican drug trafficking organizations." To this end, the memorandum stated that "investigations principally targeting firearms trafficking, rather than the underlying drug trafficking," are eligible for OCDETF designation if there is a sufficient nexus to a Mexican cartel.

This memorandum was issued at about the same time that ATF received additional funding, which allowed Newell to establish Group VII in October 2009. Special Agent Hope MacAllister, then assigned to Group I, served as the Acting Group Supervisor of Group VII until Special Agent David Voth, who had been named Group Supervisor, relocated to Phoenix from ATF's Minnesota office. MacAllister had been an agent for 10 years in the Phoenix Field Division and had significant experience working on firearms trafficking investigations. Newell told us that he selected MacAllister for the position of Acting Group Supervisor based on her experience and his high regard for her performance as an agent since he became SAC.

MacAllister was joined on Group VII by Special Agents Tonya English and Jose Medina. English had graduated from ATF's training academy in March 2008. Her first assignment was to the Phoenix Field Division, where she received on-the-job training for approximately six months by several "training agents" including MacAllister. Medina was a probationary agent who had graduated from ATF's training academy in October 2009, been assigned to the Phoenix Field Division, and begun his on-the-job training with MacAllister.

We asked Newell about the decision to initially staff Group VII with such inexperienced agents. Newell said that the office anticipated receiving a permanent group supervisor for Group VII within two to three months, as well as additional experienced agents through a national announcement seeking voluntary transfers to the group. Newell also told us that he moved English to Group VII from another enforcement group – Group I – that itself had only six agents.

Special Agent David Voth was selected as supervisor for Group VII in August 2009 and reported to the Phoenix Field Division on December 6. At the time of his selection, Voth was assigned to ATF's St. Paul, Minnesota Field Office, where he had worked since transferring to the ATF from the United States Marshal's Service (USMS) in 2001. In the months prior to reporting to the Phoenix Field Division, Voth attended multiple Southwest Border conferences, two of which were also attended by Newell and George Gillett, the Assistant Special Agent in Charge (ASAC) in the Phoenix Field Division who oversaw Group VII. Voth said that he, Newell, and Gillett had multiple conversations during the conferences about investigating firearms trafficking in the Phoenix area and the limited success they felt that the office was having in persuading the U.S. Attorney's Office to bring criminal charges, and in obtaining convictions, in such cases. According to Voth, his conversations with Newell and Gillett and his reading of relevant DOJ and ATF gun trafficking memoranda signaled that Group VII's mission was to dismantle firearms trafficking organizations.

B. U.S. Attorney's Office Reorganizes Firearms Trafficking Responsibilities

Dennis Burke was confirmed as the U.S. Attorney for the District of Arizona in September 2009 and officially arrived in the office on September 17. Burke had previously served in several federal and state positions, including with the United States Senate Judiciary Committee, the Department of Justice, the Arizona Attorney General's Office, and the Department of Homeland Security. Burke also served for two years as an Assistant U.S. Attorney in the District of Arizona.

Burke told us that when he began as the U.S. Attorney, he requested a comprehensive review of the structure and organization of the office. He made several changes as a result of this review, including expanding the office's National Security Section to include border security and immigration matters, as well as firearms violence and southbound gun smuggling. The expanded section was headed by Michael Morrissey. Burke also created two new senior positions in the section to provide policy and trial guidance. Emory Hurley, the prosecutor who would be assigned to Operation Fast and Furious, filled one of the two positions as Senior Advisor and Trial Attorney for Firearms. Hurley had been prosecuting firearms cases since approximately 2002.

Burke brought Patrick Cunningham to the office to serve as the Chief of the Criminal Division. Burke had previously worked with Cunningham at the Arizona Attorney General's office, where Cunningham served as Chief Counsel to several divisions. Cunningham also had previously served as an Assistant U.S. Attorney in the District of Arizona for several years. Cunningham assumed his duties as Criminal Chief in January 2010.

C. ATF Group VII Identifies a Firearms Trafficking Organization and Initiates Operation Fast and Furious in November 2009

Since as early as 2001, the owner of a Phoenix area gun store, which we refer to in this report as FFL1, had voluntarily provided ATF with copies of Form 4473s reflecting completed sales of firearms that the owner of FFL1 considered suspicious based on the circumstances of the sales, such as the types and number of weapons purchased and payments made in cash.⁸² Beginning on October 31, 2009, MacAllister received information from the owner of FFL1 about recent sales of a total of 19 AK-47 style rifles to four young men – Jacob Chambers, [REDACTED]. Several days later, on November 4, 2009, an ATF agent reviewed a Form 4473 provided by FFL1 documenting a November 2 purchase of 6 identical AK-47 style rifles by an individual named Uriel Patino. The agents also learned on November 4 that Patino had purchased two FN Herstal 5.7 caliber pistols from FFL1 on November 1 and four identical pistols from another FFL on November 2.⁸³

Over the next three weeks, Group VII's three agents conducted preliminary background checks on the purchasers through multiple federal and state databases, gathered additional Form 4473s from FFL1 and other Phoenix-area FFLs to identify previous purchases by these individuals, and conducted several surveillances. By November 18, the agents had established sufficient connections between the individuals – for example, [REDACTED] and [REDACTED] listed the same residence on their Arizona drivers' licenses, a residence owned by [REDACTED] – to join them together under a single investigation that would eventually be referred to as Operation Fast and Furious.⁸⁴ MacAllister opened the investigation under her authority as an ATF special agent. As described in Chapter Two, ATF agents are authorized to open a criminal investigation when

⁸² As discussed in Chapter Two, the only federal reporting requirement FFLs had at this time with respect to firearms sales was of multiple sales of handguns to the same individual within a 5-day period. FFLs were not required to report multiple sales of long guns to ATF until July 2011.

⁸³ According to ATF documents, the FN Herstal 5.7 caliber pistol is referred to as a “cop killer” in Mexico because of the reputed ability of rounds fired from the gun to pierce Kevlar vests worn by law enforcement. After AK-47 style rifles, FN pistols were the most commonly purchased firearm by subjects in Operation Fast and Furious.

⁸⁴ The investigation of the first four individuals was initially named “Chambers, Jacob, et al.” The investigation of Patino was initially opened as a separate matter. The merged investigation carried the Chambers case name, but was also referred to as “the Fast and the Furious” no later than February 2010 when agents learned that subjects of the investigation were members of a car club and ATF received approval to conduct the case as an OCDETF investigation. We refer to the Chambers investigation as “Operation Fast and Furious” for purposes of this report.

the agent “plans to devote time and resources associated with a full criminal investigation.” ATF investigative policies also provide that “[d]ivision management will ensure regular communication with the first line supervisors regarding ongoing investigations. Particular attention should be focused on those investigations considered sensitive or complex.”⁸⁵

The firearms purchasing activity identified by Group VII by the middle of November 2009 was dramatic. According to ATF investigative reports and Form 4473s that ATF obtained from FFL1, between September 22, 2009, and November 14, 2009, Chambers, [REDACTED] bought a total of 75 AK-47 style rifles, while Patino purchased 38 firearms between October 30, 2009, and November 6, 2009, from FFL1 and other FFLs. By the end of November, Chambers had purchased an additional 27 firearms from FFL1 and Patino had purchased an additional 39 from FFL1 and another FFL. According to ATF records, these five individuals’ firearms purchases in the month of November cost approximately \$86,000.

The number of individuals involved in what Group VII believed was related purchasing activity also grew quickly. For example, the owner of FFL1 sent ATF, by facsimile, the Form 4473 for a November 6, 2009, purchase of six firearms by an individual named Joshua Moore. When Group VII agents visited FFL1 on November 10, 2009, to obtain copies of additional Form 4473s for Patino, Chambers, [REDACTED], they observed an individual who would later be identified as Moore purchase 10 AK-47 style firearms. Within the week, Group VII learned that Moore and Patino had been seen together on at least two occasions attempting to purchase firearms at a Prescott, Arizona FFL. By the end of November, Moore had purchased a total of 67 AK-47 style rifles – 45 of these from FFL1 – for approximately \$32,000.

In November, ATF also identified a subject named Jaime Avila, whose purchases in January 2010 were recovered on December 14, 2010, at the scene of the fatal shooting of Border Patrol Agent Brian Terry. On November 24, 2009, FFL1 provided Group VII information about purchases being made by Patino and Avila. The purchases were made at different times of the day,

⁸⁵ Investigative reports generated in an investigation must be reviewed and approved by a supervisor. ATF guidelines provide that the Special Agent in Charge is authorized to delegate the approval of reports to a Group Supervisor. However, this authority cannot be delegated to an Acting Group Supervisor or to a Group Supervisor during his probationary period. ATF policy provides for a 1-year probationary period for an employee appointed to a supervisory position. MacAllister approved several reports of investigation in her capacity as the Acting Group Supervisor for Group VII, and Voth approved the reports after he arrived in Phoenix on December 6, 2009, and during the course of the investigation. MacAllister’s approvals while she was Acting Group Supervisor and Voth’s approvals during his probationary period did not appear to be in compliance with ATF policy.

but Patino and Avila were together at the store for each transaction. Patino purchased five AK-47 style rifles for approximately \$3,000, and Avila purchased five FN Herstals for approximately \$5,400. Two ATF agents conducted surveillance on November 24 after Avila's purchase and saw Patino and Avila travel in the same vehicle. Avila was entered as a suspect into ATF's case management system the next day.⁸⁶

Background checks conducted in November 2009 established that the subjects Group VII had identified did not have criminal histories. The agents further determined that the subjects were paying cash for the firearms purchases but did not have identifiable sources of income to support their buying activity.⁸⁷ In addition, review of the Form 4473s established that for each of the sales completed with these subjects, the buyer certified he was the actual purchaser of the firearm, as required by law.

Surveillance conducted during November identified what Group VII believed were two "stash houses" for the firearms being purchased.⁸⁸ The first was a Phoenix residence owned by an individual named Manuel Celis-Acosta, whom agents would soon identify as the primary target of their investigation. The second was American Autobody, an automotive shop located in Phoenix and owned by Hector Carlon. Several witnesses told us that the second location created an acute challenge for agents conducting surveillance because they could not observe activity – such as transfers of firearms – within the shop's garage or on its fenced-in parking lot and therefore could not make informed judgments about which, if any, vehicles to follow when they left the auto body shop.⁸⁹

⁸⁶ Agents also identified a subject named Dejan Hercegovac, who purchased 25 AK-47 style rifles from FFL1 during three separate transactions on November 25, 2009. During the third transaction, Hercegovac traded some previously-purchased rifles with side-folding stocks for rifles with under-folding stocks. After completing this trade, an employee of FFL1 realized that one of the returned rifles had been purchased by Patino the previous day, November 24. The owner of FFL1 contacted MacAllister on November 27 with this information, and ATF received the firearm from the FFL1 as evidence of Hercegovac's association with Patino. In light of the fact this incident did not result in a firearm being taken from a subject nor reduce the number of Operation Fast and Furious-related firearms being trafficked, we did not credit it as a seizure.

⁸⁷ For example, records checks with the Arizona Department of Economic Security (DES) showed that Moore had no reported employment income or wages in the first quarter of 2009, and Patino had no reported employment income or wages as of the third quarter of 2009.

⁸⁸ Officers from the Phoenix Police Department assisted Group VII with surveillance in Operation Fast and Furious.

⁸⁹ Agents who conducted surveillance during the investigation told us that the driving behavior of the subjects under surveillance also contributed to the difficulty of surveillance in and after November. At times, the witnesses said, the subjects operated the cars at erratic

(Cont'd.)

Group VII also learned in November 2009 that some of the firearms purchased by subjects of the investigation had been recovered in Mexico. For example, on November 20, 2009, Mexican soldiers stopped a truck in Naco, Sonora, a city on the border about 220 miles southeast of Phoenix, and seized 42 guns and a significant amount of ammunition. The seizure included firearms purchased by three individuals already identified by Group VII, including 19 bought by Patino and [REDACTED] on November 6 and 14, 2009, within two weeks of being recovered in Mexico. Additional tracing revealed that most of the other seized firearms had been purchased from Phoenix-area FFLs in November by nine individuals not previously identified by Group VII. Agents from ICE interviewed the driver of the truck, who reportedly claimed to have been “set up” by Mexican customs officials and refused to cooperate.

Photo 4.1: Naco, Sonora Recovery



Source: ATF

SAC Newell sent an e-mail to U.S. Attorney Burke on November 24, 2009, informing him of this seizure. The following day, Newell sent a follow-up e-mail to Burke and Assistant U.S. Attorney Hurley to alert them that some of the firearms had been purchased by subjects in a case assigned to MacAllister. The e-mail also stated that “[w]e are advising ICE to stand down on their current practice activity in Arizona in order not to compromise our case.”

rates of speed (alternating between extremely fast and slow), weaved in and out of traffic, frequently reversed course, and regularly made excessive turns through neighborhoods. Multiple agents likened the driving style to counter surveillance and said it demonstrated the individuals were sophisticated with respect to law enforcement tactics.

Newell further indicated that ATF would be meeting with ICE the following Monday, November 30, to discuss the matter.

That same day Hurley wrote in an e-mail to Burke that ATF needed to “fend off any premature interview attempts by other ICE agents” because “the greatest risk to the larger [Fast and Furious] investigation will be tipping our hand to the suspects too soon.” Hurley also told Burke that he thought the case was an opportunity for the agencies “to make good on what they have been telling us about cooperating and doing what’s best for the case.” Hurley stated that it would take time to build the investigation into an indictable case and that “[w]e will not be able to see the purchasers arrested immediately.” Burke asked in reply whether the tension and potential conflict between ATF and ICE was prevalent in every district and whether their respective headquarters were aware of the issues. Hurley told him that based on what he had heard from other districts and attorneys in the Department, “it is likely a nation-wide rivalry based on overlapping jurisdictions, competition for resources, and a desire for autonomy in investigations (no agent wants to be told that they must involve another agency to go forward on a particular type of case).”

In an e-mail to SAC Newell and ASAC Gillett dated November 27, 2009, MacAllister expressed sentiments similar to Hurley’s with respect to not conducting interviews. She explained that she chose not to interview any of the suspected straw purchasers tied to the Naco, Sonora seizure because “at this point in the investigation we are actively identifying much larger players in the organization and contacting any of the purchasers at this point in time will adversely affect the success of this investigation.” ASAC Gillett replied to MacAllister, “that is fine and totally your call.”

MacAllister also contacted Hurley for assistance with the financial investigation of the subjects and to obtain telephone calling information. MacAllister told us that she contacted Hurley because she had worked with him on previous cases. MacAllister said that aside from assistance with the financial investigation, Hurley did not provide any guidance in November 2009 about the conduct of Operation Fast & Furious.

The day after the scheduled November 30 meeting between ATF and ICE (which Newell had referenced in his earlier e-mail to Burke), Burke e-mailed Hurley to ask about the status of the case. Hurley told him that a file had been opened and that he was assisting with efforts to start linking the subjects together. Hurley also told him that MacAllister believed there might be as many as 15 straw purchasers and that she needed to identify the trafficker for whom they were buying and develop evidence to prove the connection to the straw purchasers. Hurley advised Burke that he and his Section Chief, Michael Morrissey, had spoken with MacAllister and ASAC James Needles on November 30 about “some of the 9th Circuit hurdles we have to overcome. We

have assured [MacAllister] that we will work with her to find creative ways to overcome the *corpus delicti* challenges that accompany these straw purchasing cases.”⁹⁰ Hurley concluded by noting that “[t]he odds are that this will be a hub-and-spokes conspiracy and we will need to indict and secure the cooperation of the straw buyers before we are able to indict the trafficker(s).” Burke responded, “Excellent, excellent, and excellent. Whatever you need to keep this moving forward, let me know.”

Also in November, Group VII entered all firearms purchased by the subjects into the ATF’s Suspect Gun Database (previously described in Chapter Two). MacAllister told us that this measure was taken to better track firearms that were recovered during the course of the investigation. MacAllister further requested that ATF’s National Tracing Center not release trace results information to requesters, an option that was available to all case agents with respect to firearms they enter into the Suspect Gun Database. When we asked MacAllister about this request, she said she was aware from previous cases that requesting agents sometime received trace information and then contacted the purchaser of the firearm. MacAllister said she did not want this to occur in the early stage of Operation Fast and Furious. MacAllister told us she understood that a requester, even if not provided the identity of the purchaser and the FFL, would receive from the National Tracing Center the case agent’s name and contact information. An official from the National Tracing Center told the OIG, however, that when a case agent blocks release of trace results, the requester is told only that the trace results have been “delayed.” According to that National Tracing Center official, the requester only receives the case agent’s name and contact information if the requester calls the National Tracing Center and asks why the trace was delayed.

MacAllister also said that any ATF agent could find the case agent’s name and contact information by opening the agency’s electronic case management system and entering the serial number of the recovered firearm. An ATF official responsible for the electronic case management system told the OIG that in fact this would be possible. However, other federal law enforcement agencies, such as the DEA and ICE, and state and local law enforcement, do not have access to the ATF case management system.

In sum, by the end of November 2009 – just 30 days after agents were contacted by FFL1 about suspicious purchases – Group VII had identified a large firearms trafficking group. According to a summary of the case drafted by MacAllister on December 1, 2009, that was sent to Newell, Group VII had identified 341 firearms purchased by this organization from five Phoenix-area

⁹⁰ We discuss in Section IV.G. of this chapter the issues involving *corpus delicti* and the prosecution of firearms cases by the U.S. Attorney’s Office for the District of Arizona.

FFLs for approximately \$190,000. According to MacAllister's summary, Group VII intended to identify the main target of the investigation and any additional subjects, obtain and analyze telephone calling data, and continue the financial investigation of the subjects.⁹¹

The investigative plan did not include seizing guns or approaching subjects. There also was no discussion about taking any action to try to limit the substantial purchasing activity by the subjects of the investigation. To the contrary, according to Newell's annotation to the case summary, the approach was "to further establish the structure of the organization and establish illegal acts before proceeding to an overt phase . . . [a] strictly straw purchasing case in this Federal Judicial District is very hard to pursue but we are keeping the [United States Attorney's Office for the District of Arizona] fully informed of this case on a regular basis." Newell sent the summary of the case, and information about the November 24 seizure in Naco, Sonora, to McMahon on December 2, 2009, telling him that he would keep him posted about the case, "but for now we've got it handled."

Newell told us that he recalled discussing with Gillett in December what approach to take in the case. Newell told us that the question was whether agents should approach the subjects they had identified and try to make arrests – if the U.S. Attorney's Office would support that – or "do we conduct an investigation to determine who is actually behind all this, who is actually orchestrating this, financing this. And that was the judgment call we made. And that was the judgment call that I agreed with."

D. Purchases Continue in December and January as Additional Subjects are Identified

During December 2009 and January 2010, Operation Fast and Furious expanded rapidly in nearly every respect, including the firearms purchasing activity by straw purchasers, the number of related firearms recovered in Mexico and the United States, the hours of surveillance conducted by ATF and local law enforcement, and the investigative techniques used to monitor subjects of the investigation.

Group VII continued to receive Form 4473s from FFL1 and several other Phoenix-area FFLs for the firearms being purchased by Operation Fast and Furious subjects. In December, Patino purchased 66 firearms, all from FFL1,

⁹¹ Newell forwarded MacAllister's December 2009 summary to ATF Deputy Assistant Director McMahon. Officials at ATF Headquarters also received information about Operation Fast and Furious in several briefings in December 2009 and January 2010. In Chapter Five, we describe the information conveyed at these briefings and how officials responded to the significant purchasing and trafficking activity by the subjects of the investigation.

for over \$44,000; in January 2010, he purchased 53 firearms for over \$44,000, including the purchase of a .50 caliber Barrett rifle for nearly \$9,000.⁹² In December 2009, Moore purchased 53 firearms for over \$31,000, including 20 purchased from FFL1 on December 10. Chambers purchased 15 firearms in December, including 10 AK-47 style rifles for over \$5,000 from FFL1 on December 11.

According to ATF records, two FFLs that provided substantial assistance to ATF during the investigation – FFL1 and a second FFL, which we refer to in this report as FFL2 – gave Group VII advance notice of purchases on six occasions in December 2009. In each instance, Group VII conducted surveillance at the FFL and attempted to follow the purchasers and the firearms, but took no efforts to try to seize the firearms or make arrests.

For example, on December 3, 2009, MacAllister received information from FFL1 that Moore – who paid cash for 61 AK-47 style rifles in the month of November – was in the store asking about prices for guns. Approximately one hour later, MacAllister received information from FFL1 that Moore had returned to the store and was purchasing 20 AK-47 style rifles. MacAllister and a team of agents and local law enforcement officers went to FFL1 to conduct surveillance. According to the report of the surveillance, Moore was observed with an FFL1 employee placing multiple cardboard rifle boxes into Moore's vehicle. Members of the surveillance team then followed Moore to the auto body shop previously identified as a possible stash house. There, Moore and four others transferred the cardboard rifle boxes from Moore's vehicle to a second vehicle in the parking lot. Surveillance continued on this second vehicle when it left the auto body shop. The second vehicle eventually entered a residential neighborhood and surveillance was terminated when the vehicle could not be located.

Four days later, on December 7, FFL1 contacted MacAllister about another possible sale involving an individual – a new straw purchaser later identified as Sean Steward – who was at the store making inquiries about purchasing 20 AK-47 style rifles. According to an ATF report, Steward told the store that he needed to get the money to pay for the firearms and would return that day. FFL1 also informed another Group VII agent on December 7 that Moore, who had already been identified as a subject in the case, called to ask about the 20 AK-47 style rifles in inventory. ATF agents continued to conduct

⁹² A .50 caliber rifle must be fired mounted on a tripod, fires belt-fed ammunition, weighs over 100 pounds, and is over 5 feet long. According to ATF documents, the purchase of this weapon significantly increases a trafficking organization's firepower and its financial investment in weapons.

surveillance at FFL1, but Steward and Moore did not return to the store that day.

On the morning of December 8, MacAllister went to FFL1 and was informed that a caller inquired about the store's inventory of AK-47 style rifles. The incoming telephone number was from Celis-Acosta's residence, which had already been identified by agents as a possible stash house. Shortly thereafter, Steward arrived to purchase the 20 AK-47 style rifles. A United Parcel Services truck delivered an additional 20 AK-47 style rifles while Steward was at the store and, according to the ATF report of this incident, Steward told FFL1 that he would return later in the day and purchase those firearms as well.

Agents maintained surveillance of Steward after he left FFL1 and eventually observed him transfer boxes containing the firearms from his vehicle to another. Agents also conducted surveillance of Steward when he returned to FFL1 accompanied by two other individuals to purchase the additional 20 AK-47 style rifles. The firearms were placed in the bed of a truck – not Steward's vehicle – and the three individuals left FFL1. At ATF's request, Phoenix police officers conducted a traffic stop of the vehicle in order to identify its occupants, one of whom was Celis-Acosta. The officers asked the occupants about the firearms that were visible in the back of the vehicle. Steward told the officers that he purchased the firearms and that they belonged to him. The officers did not seize the firearms or issue a traffic citation. Surveillance was continued after this stop, and agents eventually observed the firearms being transferred into Celis-Acosta's residence.

Under circumstances that we describe later, 8 of the 40 firearms purchased by Steward on December 8 were seized by police officers in Douglas, Arizona (adjacent to the Mexican border) later that same day. ATF reviewed records on December 9 from the Arizona Department of Economic security that showed Steward had a reported income totaling \$4479 for the first quarter of 2009. Steward went on to purchase approximately 200 firearms in December, all but one from FFL1, for over \$110,000. This total included 43 firearms purchased on a single day, December 14 (four of these firearms were recovered in Mexico just four days later). Steward purchased another 42 firearms in January 2010 for over \$25,000.⁹³ ATF did not take any measures to disrupt

⁹³ According to ATF documents, on January 20, 2010, Steward called the owner of FFL1 and told the owner that he (Steward) had recently received a strange phone call from someone who asked if this was FFL1 and then hung up. Steward told the owner that he believed the call came from a government agency and that, because of the call, he was going to stop buying firearms. ATF records show that Steward purchased no firearms in January after this telephone call. However, he resumed buying firearms in May 2010 and purchased a total of 51 firearms in May, June, and December of that year. Voth told us that the call was placed by one of the agents on Group VII who, intending to contact FFL1 to obtain some Form 4473s, mistakenly called the number on a sales sheet that the agent was looking at.

Steward's purchasing activity following the events on December 8 or at any other time until agents interviewed him at his residence in November 2010. Steward was not arrested until the Fast and Furious case was indicted on January 19, 2011.

On December 11, FFL1 notified Group VII that Chambers – who paid cash for 37 firearms in the month of November despite having no reported income as of February 2009 – was at the store purchasing multiple guns. Group VII sent a surveillance team to the store, which followed Chambers for approximately 1½ hours until it saw him park in the driveway of Manuel Celis-Acosta's residence, at which time surveillance was terminated.

Less than 30 minutes later, FFL1 informed MacAllister that Patino was in the store purchasing firearms. By this time, Group VII was aware that Patino had purchased approximately 60 firearms and had a reported income totaling approximately \$6300 for the second quarter of 2009. A surveillance team was sent to FFL1, where it found Patino and Kristi Ireland, who was later identified as Patino's girlfriend. The surveillance team observed Patino place several boxes from the store into his vehicle and leave the parking lot. The team followed Patino, lost surveillance when he pulled into the parking lot of a home repair store, but regained it approximately 10 minutes later when he was seen at Celis-Acosta's residence. There, an individual exchanged an "unidentified object" with Patino, who then left the residence. Patino returned to the neighborhood a short time later and parked in front of a different residence. Surveillance was terminated after Patino left the neighborhood with an unidentified individual from the residence and the team was unable to maintain visual contact with Patino's vehicle.

MacAllister told us that the purpose of these surveillances was to observe where the firearms were being taken, how they were being transported, and what additional individuals were involved in the trafficking. The purpose, she said, did not include taking overt enforcement action with respect to the firearms or the purchasers. She also told us that the stop of Steward on December 8 by Phoenix police officers illustrated how straw purchasers were likely to respond to law enforcement questioning and why approaching subjects could be ineffective.⁹⁴ Given this decision to not approach subjects or take enforcement action, the occasions where ATF received post-sale notice of

⁹⁴ We found MacAllister's sweeping conclusion to be unpersuasive. Though some Operation Fast and Furious subjects denied being straw purchasers when interviewed by agents beginning in October 2010, most subjects who were interviewed incident to their arrests following the January 2011 indictment confessed to being straw purchasers and identified co-conspirators. Moreover, in this instance, the purpose in stopping Steward was to identify the vehicle's occupants and not to obtain an admission or to seize firearms, or to even give a speeding ticket.

suspicious firearms purchasing activity did not represent lost opportunities to interdict. Thus, for example, when ATF learned on January 19 that Jaime Avila – a recruit of Patino’s – had purchased three AK-47 style rifles from FFL1 on January 16 (one day after Patino’s 10-gun purchase from FFL1), ATF took no action as to Avila. Indeed, it was not until December 15, 2010, after two of the three guns purchased by Avila on January 16 were found at the scene of Agent Terry’s murder, that ATF and the U.S. Attorney’s Office decided to question and then arrest Avila about his straw purchasing activity.⁹⁵ We describe in Section IV.G. below the tactical and legal reasons for this approach, according to ATF and the U.S. Attorney’s Office.

In addition to the evidence agents were obtaining through surveillance, ATF also learned in December 2009 and January 2010 of additional recoveries of firearms tied to Operation Fast and Furious subjects in Mexico and the United States. For example, on December 9, 2009, one day after the Douglas seizure of firearms which had been purchased earlier in the day by Steward, the Mexican Army recovered 900 pounds of cocaine, 132 pounds of methamphetamine, \$2 million in U.S. currency, and 48 firearms (46 AK-47 style rifles) in Mexicali, Mexico, a town approximately 240 miles southwest of Phoenix. Twenty of the recovered firearms had been purchased by Operation Fast and Furious subjects Chambers, Moore, ██████████ between October 21 and November 19, 2009. According to an ATF report, Mexican authorities believed the firearms were destined for the Sinaloa Cartel to help replenish the loss of hundreds of firearms to the Mexican government and to sustain the drug cartel’s fight with a rival cartel. ATF and the U.S. Attorney’s Office took no action with regard to the straw purchasers of the 20 firearms recovered in Mexico. ATF records indicate that Chambers purchased another 10 firearms on December 11 and Moore purchased another 21 firearms in March 2010, including two .50 caliber rifles.⁹⁶

⁹⁵ The government’s response to Agent Terry’s murder is discussed further in Section III of this chapter, and in Chapter Five.

⁹⁶ Gillett kept Newell informed of recoveries such as this and the progress of the case. For example, he informed Newell on December 17 that the firearms from a recent seizure in Mexico were linked to MacAllister’s case and that in the previous week subjects had purchased 175 firearms.

Photo 4.2: Mexicali, Mexico Seizure



Source: ATF

Nine days later, on December 18, 2009, Mexican law enforcement agents recovered five firearms in Tijuana, Mexico, four of which had been originally purchased by Steward. Two more of Steward's purchases were recovered as part of a 14-gun seizure by the Mexican Army in Tijuana, Mexico, on January 8, 2010. The recovered firearms connected to Steward were part of the 43 firearms he purchased from FFL1 over the course of a single day on December 14, 2009. For reasons we describe in Section IV.G., the recoveries of firearms purchased by Steward in or near Mexico on December 8, December 18, and January 8, did not prompt ATF and the U.S. Attorney's Office to take any enforcement action as to Steward.

Still more of Steward's purchases were recovered near the Mexican border five days later, on January 13, 2010, when the El Paso, Texas, Police Department, without the knowledge or involvement of ATF Phoenix, searched a "stash house" believed to contain illegal narcotics and firearms and recovered 40 AK-47 style rifles that had been purchased by Steward on December 24, 2009, just one week after the December 18 recovery in Tijuana of firearms connected to Steward.

Following the El Paso seizure on January 13, Newell sent an e-mail to Deputy Assistant Director McMahon stating that ATF Phoenix believed the El Paso stash house might be a "way station" for firearms from the Phoenix area before being transported to Mexico. Newell also stated, "we are working this 'fast and furious', the good news being we got another 42 off the street and can keep our case going. Hopefully the big bosses realize we are doing everything possible to prevent guns going to Mexico while at the same time trying to put

together a phenomenal case. Good news too is now we have another Federal venue should the [U.S. Attorney's Office] here punt."⁹⁷ We found that Newell's statement to McMahon that "we got another 42 off the street" conveyed a misleading impression about the activities of Group VII in light of the fact it played no role in the El Paso seizure. We also found that Newell's representation to McMahon that "we are doing everything possible to prevent guns going to Mexico" created a misleading impression because, as outlined above and indicated in our analysis section, ATF Phoenix and the U.S. Attorney's Office had for legal and tactical reasons decided to undertake a longer term investigative strategy to dismantle the organization, a strategy that deferred overt action against the individual straw purchasers.

E. Connections to DEA and ICE Operations in Late 2009 and January 2010

Beginning in late November 2009, agents from ATF's Phoenix Field Division had multiple contacts with agents with the DEA and ICE related to Operation Fast and Furious. The DEA provided particularly significant information to ATF that might have enabled ATF to identify a [REDACTED] of the Celis-Acosta trafficking organization during a firearms purchase on December 22. However, ATF failed to conduct surveillance of the transaction because it was too close to the holidays and ATF apparently did not have personnel available to staff the operation. We describe these contacts and events below.

1. DEA Provides Significant Information to ATF

Near the end of November 2009, MacAllister sent an e-mail to a DEA agent assigned to the DEA's Yuma, Arizona office with whom MacAllister was working on another case. The e-mail requested that the DEA agent run six telephone numbers associated with straw purchasers in Operation Fast and Furious against a DEA database that is regularly used to "deconflict" investigations. By checking the database, the requesting agent can learn whether a telephone number also appears in another investigation and, if it does, then coordinate with the agent responsible for the other case. The DEA

⁹⁷ ATF's El Paso Field Division initiated an investigation based on this seizure. [REDACTED]

agent told us that she checked the database several days after MacAllister's request but did not receive any positive hits.

Also in November 2009, DEA agents in Phoenix working on an OCDETF drug trafficking case received information about a possible firearms deal between some of the individuals DEA was investigating, including a drug courier in Phoenix named Manuel Marquez. According to DEA, the negotiations on the deal fell apart. Then, on or about December 10, 2009, DEA received information that Marquez planned to meet an individual concerning AK-47 type rifles. The task force officer assigned to the DEA case conducted surveillance of Marquez talking to an individual later identified as Jacob Chambers (a subject in Operation Fast and Furious).

On December 14, 2009, a DEA analyst in Phoenix checked the DEA database with a telephone number subscribed to by Jacob Chambers. The database showed that this number had been previously checked in November 2009 in connection with the ATF investigation. The DEA then contacted ATF to schedule a "deconfliction" meeting on December 15, 2009.

The December 15 meeting was attended by Voth, MacAllister, and English from ATF; and by the case agent, the acting group supervisor, the task force officer, and an analyst from the DEA. According to the DEA case agent and task force officer, they provided the ATF agents a summary of the DEA's case and a timeline of when they started receiving information about possible gun trafficking. They identified the key players in the DEA's case, how Chambers fit in, and what the task force officer observed during the December 10 surveillance.

During the meeting, the ATF agents told the DEA representatives that they had already identified Chambers in their case and that he worked for an individual named Manuel Celis-Acosta. This information was significant to the DEA because they were aware that Marquez had connections to someone else named "Manuel" who the DEA had not yet identified. The ATF agents also told the DEA representatives that agents had actually observed the DEA task force officer during his December 10 surveillance of Marquez and Chambers because ATF had stationary video surveillance equipment at the location.⁹⁸ The DEA agents volunteered to provide ATF with all current and future information about gun trafficking the DEA had from its case. The DEA case agent told us that ATF did not provide an overview of its investigation during this meeting,

⁹⁸ According to ATF documents, the first installation of this equipment was on December 10 and was placed near the Acosta residence, which by that time had been identified as a possible stash house for firearms being purchased by Operation Fast and Furious subjects.

but also said he did not ask for one because his primary interest in having the meeting was to pass on to ATF the gun trafficking information.

MacAllister said DEA agents stated during the meeting that they anticipated taking their case down in late January or early February, and that Marquez would be charged. MacAllister said that based on this, she did not feel ATF had the option to contact Marquez because it would interfere with the DEA's case. However, she also told us that she did not make an explicit request to contact Marquez and that she was not aware that anyone else from ATF did at that time. Several DEA agents who attended the December 15 meeting told the OIG that they did not ask ATF to delay or defer action until the DEA's case concluded. The case agent said that the DEA shared the information with the ATF with the expectation that ATF would act on it. The case agent also told us that Marquez and Celis-Acosta were small pieces of the DEA's case and that he was therefore not concerned how ATF's actions might affect the DEA's investigation. The case agent said he requested only that ATF notify the DEA if it took action with respect to Marquez, and that the DEA be included in any surveillance conducted of a particular residence of interest to the DEA.⁹⁹ Following the December 15 meeting, the DEA analyst placed all of the information the DEA had from its case regarding gun trafficking on MacAllister's thumb drive.¹⁰⁰

ATF ASAC Gillett did not attend the December 15 meeting but told us that he spoke to the DEA ASAC and was asked that ATF not take any action based on the information DEA was providing, and not use the information in any ATF affidavits. The DEA ASAC, however, told us that he did not make any such request. As described later in this Chapter, ATF in fact used the DEA information in each of the nine affidavits filed in federal court in support of wiretap applications, including the first application filed in March 2010.

The day after the December 15 meeting, the DEA task force officer contacted MacAllister to inform her of a possible transfer of firearms involving significant subjects in the DEA investigation that was considered in furtherance of the drug conspiracy. The DEA and ATF set up surveillance teams, but they did not observe a transfer take place that day. Two days later, the DEA began to receive information indicating that another transaction, this

⁹⁹ ATF agents did not interview Marquez until May 10, 2011.

¹⁰⁰ The DEA analyst told us that the calling information was provided to MacAllister again on January 4, 2010, after MacAllister called and stated that she had misplaced the original thumb drive. Then, during the week of January 13, Voth requested the information through the DEA supervisor. The information was placed on a disc and placed in an envelope for Voth. The DEA analyst told us that she e-mailed Voth and the DEA supervisor that the disc was ready, and later confirmed that the envelope was picked up.

one involving 32 AK-47 style rifles, was being planned by Celis-Acosta, Marquez, and an individual referred to as [REDACTED]. The information revealed that Celis-Acosta had the firearms stored at an unknown location, and that Marquez was going to put Celis-Acosta in contact with [REDACTED] who wanted to purchase the weapons. The plan was for Celis-Acosta to drive the guns from Phoenix to El Paso and deliver them to [REDACTED] who in turn would transport the guns to Mexico.

On December 19 the DEA task force officer contacted MacAllister to provide her with the information and tell her that it appeared the transaction would take place in the next day or two. The task force officer said that MacAllister replied that it was too close to the holidays and she could not get personnel to staff a surveillance. MacAllister told us that because of the time of year, the office was “pretty short on bodies,” and also said that although the information indicated that Celis-Acosta was going to El Paso, it did not include details about when or where he was meeting [REDACTED]. The DEA task force officer stated that because the transaction involved firearms only and not drugs, the DEA did not itself take any action on the information.

As a result, there was no surveillance by law enforcement of the possible delivery from Celis-Acosta to [REDACTED] on December 22, which the DEA subsequently learned in fact took place in El Paso. According to the DEA task force officer, this was the last information the DEA received about gun trafficking involving Celis-Acosta. However, ATF learned in March 2010 from another DEA office the full true name of [REDACTED] and that he and [REDACTED], whose full true name was also identified, had been the subjects of a joint DEA-Federal Bureau of Investigation (FBI) drug trafficking investigation out of [REDACTED] that was initiated on December 4, 2009. The DEA office that provided this information advised ATF that it believed these [REDACTED] individuals had received firearms from Celis-Acosta. ATF did not appreciate the significance of this connection until March 2011 when it learned that [REDACTED] in fact was, together with the [REDACTED] of the Celis-Acosta firearms trafficking group.¹⁰¹

2. Contact with ICE

ATF’s first contact with ICE resulted from the November 20, 2009, recovery of 42 firearms in Naco, Sonora. Nineteen of the guns seized had been purchased by two Fast and Furious subjects on November 6 and 14, 2009. As

¹⁰¹ The failure to appreciate the significance of the connection between these individuals and the Celis-Acosta group earlier than March 2011 is troubling and raises questions about how information was shared among various offices of ATF, the DEA, and FBI, at this stage and at other points during the investigations. We continue to review materials relevant to these issues in order to assess whether further investigation is warranted.

we described above, agents from ICE interviewed the driver of the truck, who reportedly claimed to have been “set up” by Mexican customs officials and refused to cooperate. ATF Phoenix learned through queries of the Suspect Gun Database that some of the firearms were linked to Operation Fast and Furious. As noted previously, SAC Newell told U.S. Attorney Burke and AUSA Hurley that “we are advising ICE to stand down on their current proactive activity in Arizona in order not to compromise our case.”

Several days later, on November 30, 2009, ATF Phoenix personnel held a deconfliction meeting with agents from ATF’s Tucson office and representatives from ICE and the United States Marshals Service, relating to the Naco seizure. According to MacAllister, the purpose of the meeting was to receive any information about the November 20 Naco recovery, and for ATF to generally describe its investigation. MacAllister said that the ICE representatives agreed to her request that agents not pursue any further leads on the recovery connected to ATF’s investigation without first notifying MacAllister. We asked MacAllister whether anyone on the call questioned how ATF was conducting its investigation, and she told us she could not recall any such questions being asked.

Also on November 30, 2009, MacAllister contacted an ICE agent in Phoenix with whom she had previously worked regarding the seizure in Naco but who had not been at the November 30 meeting. According to the ICE agent, MacAllister told him that she was working on a big straw purchaser case in which guns were being transported to Mexico. The ICE agent told us that MacAllister wanted to coordinate efforts at the ports of entry so that ATF would take over any seizures related to her case and ICE would not conduct any independent investigations.¹⁰² The ICE agent said he told MacAllister that he would have to talk to ICE management and that in his experience a conspiracy investigation run by one office uses law enforcement efforts by other offices to help build the case.¹⁰³ According to this agent, “because someone else does casework doesn’t mean that it’s going to kill your overall, your overarching conspiracy investigation.”

¹⁰² ATF is responsible for investigating criminal and regulatory violations of federal laws relating to firearms, explosives, arson, alcohol, and tobacco smuggling. See 28 U.S.C. § 599A(b)(1), ATF also has responsibility under the Arms Export Control Act for investigating the importation of items listed on the U.S. munitions list. See 28 CFR Part 0.130(c). However, ICE is responsible for violations under the Arms Export Control Act that relate to the exportation, transit, or temporary import or export of any such items. See 22 CFR Part 127.4.

¹⁰³ As we discuss in our analysis section, The Office of the Inspector General for the Department of Homeland Security (DHS-OIG), the parent agency for ICE, is conducting a review of ICE’s involvement in and knowledge of Operation Fast and Furious.

The next contact with ICE also resulted from a seizure of firearms that were connected to Operation Fast and Furious. As described previously, on December 8, 2009, officers from the Douglas, Arizona Police Department, acting on a tip from a confidential informant, seized nine AK-47 style rifles during a traffic stop. The firearms were found hidden beneath the vehicle's rear bumper. These were among the 20 firearms that Sean Steward purchased earlier that same day from FFL1.¹⁰⁴ The Douglas Police Department referred the matter to ICE for additional investigation and possible prosecution.

The ICE agent who had previously spoken to MacAllister attempted to trace the weapons that were seized. Because the firearms had been entered into ATF's Suspect Gun Database, and because MacAllister had requested that the National Tracing Center not release the trace results to the requester, the ICE agent did not receive the information. MacAllister, however, was notified of the trace request and she called the ICE agent. According to the ICE agent, MacAllister told him the firearms were tied to her case and asked that ICE not conduct any further investigation. The ICE agent also said MacAllister asked whether ATF could take custody of the firearms. The ICE agent told her that ICE's Douglas office would retain custody for possible future prosecution.

The two agreed to meet the next day to discuss the situation. The meeting was attended by MacAllister, Voth, and two agents from ICE's Phoenix office (one being the agent MacAllister had contacted). According to MacAllister's written summary of the meeting, she and Voth advised the ICE agents of the ATF's investigation and requested that ICE be an active participant in the case. The ICE agents provided MacAllister and Voth a copy of the ICE report about the seizure and said they would provide a copy of the police department's report when ICE received it. MacAllister told us that she also asked to be present during ICE's interview of the individuals who had transported the firearms and was assured that she would be included.

Within days of this meeting, the two ICE agents and officers with the Douglas Police Department interviewed the confidential informant whose information had led to the December 8 seizure. MacAllister was not advised of the interview. According to the ICE agent, the informant said he had made himself available to a gun smuggling group in Mexico to transport guns from the U.S. to Mexico and that he would be willing to cooperate with law enforcement. The informant believed there were several stash houses in the Phoenix area being used for the trafficking, but did not know the identities of conspirators located in Mexico. This information from the informant prompted ICE agents in the Douglas office to develop an operation in which the informant

¹⁰⁴ As we described earlier, ATF had conducted surveillance of this purchase as well as another 20-gun purchase Steward made from FFL1 later in the day.

would drive to Phoenix to pick up firearms in a vehicle with a GPS tracking device attached. The agents expected that the operation would identify individuals and residences involved in firearms trafficking.

The ICE agent informed MacAllister of this proposed operation during a telephone call on December 17, 2009. According to an e-mail MacAllister sent to Gillett and Voth summarizing the call, she told the ICE agent that all the firearms seized on December 8 were purchased by a subject in ATF's case, and she offered to assist with the operation if it occurred in order to avoid any conflicts with ATF's investigation. According to the ICE agent, however, MacAllister was not interested in pursuing the operation for fear of compromising her ongoing investigation. On this same day, SAC Newell sent an e-mail to the DEA's Special Agent in Charge in Phoenix claiming that ICE was trying to "muscle their way into our case."

Gillett told us that after receiving this information from MacAllister, he spoke to the ASAC of the ICE office in Douglas and explained to him that ATF had an active investigation related to the guns ICE had seized. Gillett said he told the official that ATF was concerned that ICE's proposed operation might compromise ATF's case. The matter was subsequently addressed at a January 2010 meeting attended by Gillett and Voth from ATF; a case agent, supervisor, and incoming Deputy SAC from ICE; and Emory Hurley from the U.S. Attorney's Office. The DEA supervisor for the ongoing OCDETF investigation described earlier also attended.

According to Gillett, the participants at the January 2010 meeting agreed that any future operational activities would be fully coordinated among the agencies. The DEA supervisor who attended told us that he recalled someone from ICE expressing concern about whether firearms were being seized and Gillett telling the group that ATF never had the opportunity to intercept guns. The DEA supervisor told us that he referenced the December 22, 2009, delivery of firearms that DEA had told ATF about, and questioned why ATF felt the firearms had to get to the border before they could be seized. He said the other attendees ignored his comments. Hurley told us that he did not recall any concerns being raised about firearms seizures, nor did he recall any discussion about the use of a confidential informant connected to the case in Douglas, Arizona.

The operation that was proposed by the ICE Douglas office never materialized. The ICE agent told us that ATF and the U.S. Attorney's Office requested that ICE not pursue any follow-up on the Douglas seizure and ICE management agreed. The ICE agent told us that following this meeting, he informed his supervisor that he did not want to be involved with ATF's investigation. He told us that he viewed the case as "train wreck."

The ICE agent we interviewed ceased to have any direct involvement with Operation Fast and Furious after the January 2010 meeting. ICE's Phoenix office assigned another agent to serve as point of contact for ATF, and eventually detailed this agent to ATF's Group VII to work on the investigation full-time.¹⁰⁵ Prior to joining ICE, this agent had worked with ATF as an Industry Operations Investigator. As described in Chapter Two, these investigators perform ATF's regulatory functions by, for example, conducting FFL inspections.

F. FFL1's Cooperation Increases and Request for Meeting with the Government on December 17

December 2009 and January 2010 also marked a significant expansion of FFL1's cooperation with Operation Fast and Furious. Like other FFLs, FFL1 continued to provide ATF with copies of Form 4473s of individuals identified by ATF. In addition, the owner of FFL1 carried purchased firearms to the buyers' vehicles in order to try to identify other individuals in the vehicles and obtain license plate numbers. He also contacted ATF when particular individuals came into the store, and permitted ATF to place a camera in the store to record firearms transactions and other activities. In addition, the owner of FFL1 agreed to use an ATF-provided recording system to record his telephone calls with particular Fast and Furious subjects.

According to ATF records, by December 31, 2009, the suspected straw purchasers in Operation Fast and Furious had bought 619 firearms from FFL1 for over \$335,000. The owner of FFL1 told the OIG that in his previous experiences providing ATF information about what he considered suspicious sales, ATF would investigate and close the cases within 30 to 45 days. With respect to the information he began providing and ATF began requesting in October 2009, he did not see any indication that the investigation was coming to a close. To the contrary, the owner of FFL1 told the OIG that he grew concerned as he observed purchases being made by the same individuals:

I had no reason to question or doubt what was going on until these purchases started significantly to a point of just dramatically increasing, where I'm getting every other day folks coming in wanting amounts of 10, 20 of these weapons. Now, let me say, this is unprecedented. In my 20 years, I had never experienced this. And it was alarming. And I constantly was in contact with Agent MacAllister to make her aware of things. And all the while, she

¹⁰⁵ The ICE agent who was assigned to ATF's Group VII declined our request for a voluntary interview.

assured me in no uncertain terms [that] we're on top of it, we're surveilling them.

The owner of FFL1 contacted MacAllister in early December 2009 and requested a meeting to address his concerns. The meeting was held at FFL1 on December 17 and was attended by the owner of FFL1, MacAllister, Voth, and Hurley. The owner of FFL1 said that he asked how long ATF wanted him to continue making sales to the suspected straw purchasers, and was told that his level of cooperation was unprecedented for an FFL and that the government would like him to continue cooperating by continuing to make sales.

MacAllister, Voth, and Hurley each disputed the owner of FFL1's recollection of what was discussed at the December 17 meeting. They denied giving the owner of FFL1 direction about whether to make sales and denied telling him that ATF was interdicting the firearms he was selling to the suspected straw purchasers. According to Hurley, he told the owner of FFL1 only that: "we're glad that you're continuing to work with ATF. We're glad that you are making phone calls. I can't give you legal advice but if you're making lawful sales and a lawful sale seems to be unusual, please continue to call ATF. You know, please give ATF whatever information they are looking for." Hurley said that he also told the owner of FFL1, "[U]nless you're making an unlawful sale, you're not implicating yourself by giving them [ATF] information. But I can't tell you who to sell to just like I can't tell you who you can't sell to."

Voth wrote a report dated April 6, 2011, which memorialized the meeting on December 17, 2009. Voth told us that he did not intend to write a report of the meeting because he did believe this was the type of event that ATF policy required to be memorialized in a report of investigation.¹⁰⁶ Voth told us he prepared the report at the direction of a Michael Morrissey, a supervisor at the U.S. Attorney's Office, because an indicted Operation Fast and Furious subject notified prosecutors that he intended to assert an entrapment defense.

Voth's report stated that the owner of FFL1 requested the December 17 meeting because he was concerned that he was "endangering himself or implicating himself in a criminal investigation." The report further stated, "[the owner of FFL1] was advised they could not tell him who he could or could not sell firearms to and that they could not instruct him to make a sale in violation of law or to refuse to make a lawful sale." However, according to the report, the owner of FFL1 was told the information he was providing, particularly with respect to long gun sales, was "very important and useful to ongoing ATF

¹⁰⁶ ATF's policy on Law Enforcement Investigative Reports states that agents should use reports of investigation as, among other purposes, "the primary reporting vehicle for all investigative and reportable matters and all investigations assigned a case number." ATF Order 3270.10C, Chapter B.

investigations.” Additionally, the owner of FFL1 was advised that it would be useful to ATF if he also obtained telephone numbers and vehicle and license plate information from these purchasers, even though an FFL was not required by law to obtain that information from the purchaser. The report stated that neither the owner of FFL1 nor any other FFL1 employee expressed any reluctance about cooperating.

Following the December 17 meeting, the owner of FFL1 agreed to ATF’s request that he record telephone calls between himself and particular straw purchasers discussing possible firearms sales. The owner of FFL1 began recording calls on January 5, 2010, and recorded a total of 32 calls through August 23, 2010 – 23 with Patino and 9 with Steward. The recordings were periodically picked up from FFL1 by an agent in Group VII, who then listened to and summarized each call in an ATF report. The owner of FFL1 also continued to occasionally provide ATF agents with advance notice of sales to particular straw purchasers in which he was aware ATF was interested.

A typical recording was of a call to or from Patino or Steward regarding the type, cost, availability, or purchase of particular firearms. For example, on January 5, 2010, the owner of FFL1 called Steward to discuss FFL1’s inventory of AK-47 style rifles. Steward had purchased 21 firearms the previous day. The owner of FFL1 told Steward that the store had received 20 additional AK-47 style rifles and asked how many Steward was interested in. Steward told the owner of FFL1 that he was waiting on some money, but that when it arrived he would buy whatever AK-47 style rifles FFL1 had in inventory. The owner of FFL1 also asked Steward whether he was interested in purchasing some AK-47s with [REDACTED], and said that he might be able to sell these for a lower price.

In another call, on January 19, 2010, the owner of FFL1 told Steward that he was holding 63 of the “under folders,” referring to collapsible stock rifles. The owner of FFL1 told Steward that he had to begin selling the guns because he had to pay the wholesaler. Steward replied that he was driving back from New Mexico and would stop by the store. The owner of FFL1 responded that he would be in town until January 21 and needed to sell some of the rifles right away. In two early morning calls with Patino on January 26, 2010, the owner of FFL1 said that he was holding 43 under folders for Patino. The owner of FFL1 also asked Patino if he would purchase a couple of [REDACTED] and quoted the price he was willing to accept. Patino said he needed ten of the underfolders. In the second call, the owner of FFL1 again told Patino it would be great if he would buy one of the [REDACTED] along with the underfolders.

The above examples are representative of the recorded conversations the owner of FFL1 had with Patino and Steward, with the exception of the owner of FFL1’s particular interest in selling to them a [REDACTED] rifle. We asked

Voth and MacAllister, specifically with respect to the recorded calls but also more generally with respect to the extent of the owner of FFL1's cooperation, whether they believed the owner of FFL1 pursued and completed sales with Patino, Steward, and other straw purchasers as arms-length business transactions, or whether he made the effort in order to advance ATF's investigation. In other words, we questioned whether the interests of ATF's investigation caused the owner of FFL1 to sell firearms he otherwise would not have sold, as the owner of FFL1 told us he did. Voth and MacAllister each rejected this possibility.

Voth told us that the owner of FFL1 was in the business of selling firearms and needed no encouragement from ATF to do so. Voth cited to us ATF statistics indicating that FFL1 was the highest volume seller of firearms in the state of Arizona during 2007-2009, and that more guns were traced to FFL1 during that period than to any other FFL. With respect to the recorded calls, Voth said the owner of FFL1 was a businessman trying to clear inventory from his store through lawful sales, and that his conversations with Steward or Patino were no different than they would be in the absence of an investigation. Voth told us that to his knowledge ATF personnel did not ask the owner of FFL1 to solicit business, and did not give the owner of FFL1 any instructions about what to say during the telephone calls; ATF personnel told the owner of FFL1 only that it would be helpful if some of the conversations were recorded.

Like Voth, MacAllister maintained that she did not encourage or direct the owner of FFL1 to solicit or make sales that he otherwise would not have made. She also told us that the owner of FFL1's specific efforts [REDACTED] was made at ATF's request, [REDACTED]

[REDACTED] MacAllister told us that she knew Patino and Steward were continuing to make purchases at FFL1 and that she asked the owner of FFL1 [REDACTED]

107 [REDACTED]

With respect to the telephone calls that the owner of FFL1 recorded, MacAllister told us that in general she did not request that the owner of FFL1 initiate contact with a subject about possible firearms purchases. She said the only exceptions to this might have occurred when she asked the owner of FFL1 to [REDACTED], or when the owner of FFL1 told her about a conversation with a subject that was not recorded and

107 [REDACTED]

MacAllister requested that he contact the subject again so the conversation could be recorded. MacAllister also told us that on some occasions the owner of FFL1 asked whether he should return a call that he had received from a subject about possible firearms purchases, and MacAllister responded that he should. These communications notwithstanding, MacAllister maintained that the owner of FFL1's interactions with Operation Fast and Furious subjects occurred in the ordinary course of the owner of FFL1 operating his business.

Hurley also disputed any claim that the government gave the owner of FFL1 authority to sell firearms to whomever the ATF was investigating without regard to whether the sale was suspicious:

As far as a meeting to encourage [the owner of FFL1] to make particular sales, nobody needed to encourage him to make sales. As far as telling him it was okay to sell whatever he wanted, we never told him it was okay to sell whatever you want or that it was okay to sell to certain people regardless of quantity. He still needs to make the decision on a case-by-case basis whether he's going to sell.

Hurley told us there are gun stores in Arizona, like FFL1, that have a history of calling ATF after making a suspicious sale. Hurley said he did not know whether these stores' motivation was to "cover themselves" or for "good will," but said it was "coincidental that they tend to make the call after the check has cleared or after the money is in the register." Hurley said that the owner of FFL1 had for years called ATF after completing a big sale, and that he did not just start doing this in Operation Fast and Furious.

We asked SAC Newell whether he was aware of the assistance FFL1 was providing ATF during Operation Fast and Furious. Newell told us that he knew at the time that FFL1 was providing ATF with Form 4473s, recording telephone calls, and allowing ATF to place a camera inside the store. He said that in his experience FFL1's level of cooperation was unusual, but he distinguished FFL1 – which he and others referred to as a "source of information" – from an ATF confidential informant by the fact that the owner of FFL1 was not receiving compensation for his cooperation. He also said that a confidential informant acts at the direction of ATF and agrees to abide by ATF policies regarding its activities, whereas a source of information provides information voluntarily and does not act at ATF's direction.¹⁰⁸

¹⁰⁸ The ATF guidelines in effect during Operation Fast and Furious defined confidential informants as, "persons who assist enforcement efforts, providing information and/or lawful services related to criminal or other unlawful activity to ATF that otherwise might not be available, in return for money or some other specific consideration. Informants shall work

(Cont'd.)

Newell said he believes that the owner of FFL1 was working voluntarily with ATF and that ATF agents never requested him to do anything he was not willing to do. Newell told us he would not have approved using FFL1 as a confidential informant and that it was never discussed.¹⁰⁹ Despite FFL1's close work and substantial cooperation with ATF agents throughout the Operation Fast and Furious investigation, and ATF's reliance on him during the course of its investigation, Newell said that at times he was uncomfortable with ATF's relationship with FFL1 because of the high volume of firearms the store sold, and that this prompted him to request that FFL1 be inspected by ATF regulators every year that he was the SAC. FFL1 in fact was inspected in September 2006, June 2008, and September 2009. Despite Newell's asserted discomfort with FFL1, he did not take any action to curb ATF's relationship with the store during the Operation Fast and Furious investigation.

According to ATF records, FFL1 sold 1,420 firearms for over \$890,000 to Operation Fast and Furious subjects from November 2009 to July 2010, which accounted for nearly 80 percent of all known sales to Fast and Furious subjects during that period. Patino and Steward were responsible for purchasing 864 of the firearms from FFL1, and had purchased over 75 percent of these (656) before April. In the last section of this Chapter, we assess FFL1's cooperation with ATF in the investigation, and explain our finding that the extent and nature of ATF's requests for cooperation created at least the appearance that sales to particular Operation Fast and Furious subjects were made with ATF's approval and authorization.

G. Government Adopts Longer Term Strategy that Defers Overt Enforcement Action

By the end of 2009, ATF had identified 19 suspected straw purchasers who had bought approximately 690 firearms over the previous four months – primarily AK-47 style rifles – for over \$350,000, much of it cash. Four of the buyers – Patino, Steward, Moore, and Chambers – were responsible for over 70 percent of the purchases. The investigation also had established connections among the purchasers based on observations from surveillance, reviews of calling records, and the discovery of some subjects' memberships in a car club. According to a briefing paper ATF's Phoenix Field Division submitted to ATF

under the directions and control of ATF special agents.” ATF Order 3250.1A, Chapter A, Section 2(a).

¹⁰⁹ As discussed in Chapter Three, ATF used an FFL as a confidential informant in Operation Wide Receiver. Newell told us that he would not have approved this, but that the decision was made prior to his becoming the SAC. Newell said the arrangement raised significant conflict of interest issues because ATF was regulating the same FFL that it was paying to provide information in a criminal investigation. He said that he did not believe this is something ATF should be doing.

Headquarters, the “pace of firearms procurement by this straw purchasing group from late September to early December 2009 defied the ‘normal’ pace of procurement by other firearms trafficking groups investigated by this and other field divisions.”

In addition, agents had observed at least three transfers of firearms from Operation Fast and Furious subjects to unidentified third parties, identified two suspected stash houses in Phoenix where firearms were observed being dropped off, and learned of several recoveries of firearms purchased by subjects at locations in Mexico and Arizona shortly after they had been bought. The agents also knew by the end of December 2009 that the investigation’s top subject, Manuel Celis-Acosta, was in contact with targets of a DEA Mexican drug trafficking investigation to arrange for the purchase and delivery of firearms.

The conduct agents documented and observed to this point of the investigation exhibited each of the straw purchasing indicators we described in Chapter Two, including sales paid for in cash, multiple sales to a purchaser who appears on past gun traces, sales of five or more firearms to a single buyer, sales of multiple firearms at the same FFL on the same day, trace requests with a “short time-to-crime,” and multiple sales of guns considered “weapons of choice” for drug trafficking organizations. In addition, the agents had information about individuals who appeared to be financing and coordinating the delivery of at least some of the firearms purchased.

We asked Newell, Voth, MacAllister, and other witnesses who supported Operation Fast and Furious why under these circumstances ATF did not seek to arrest any of the subjects, or detain or interview them in order to develop additional evidence, as well as why ATF agents did not seize any of the firearms the subjects were purchasing. These witnesses told us that the goal of the investigation was to dismantle a firearms trafficking network and not simply eliminate some straw purchasers, and that to accomplish that goal they adopted an approach that was nontraditional for ATF. As detailed below, the witnesses described several factors – legal, tactical, and strategic – that they stated contributed to this approach.

However, for reasons discussed in our analysis, we found that the decision of ATF and the U.S. Attorney’s Office to not take action against straw purchasers earlier in the investigation was primarily the result of tactical and strategic decisions by the agents and prosecutors, rather than because of any legal limitation on their ability to do so.

1. Corpus Delicti

Several ATF management officials and agents told us that the investigative approach in Operation Fast and Furious was taken in part

because of a legal issue known as “corpus delicti.” The “corpus delicti” issue is a short-hand way to describe an apparent dispute between the U.S. Attorney’s Office and ATF regarding the evidence that was required to prosecute a straw purchasing case under 18 U.S.C. § 924(a)(1)(A). ATF agents told us that they believed the U.S. Attorney’s Office, particularly its Phoenix office, would not prosecute such a case unless the firearm was available as evidence during the trial. ATF agents therefore believed that if the firearm was not recovered during the investigation, or if it was recovered but could not be obtained by the agent (as with recoveries in Mexico), the U.S. Attorney’s Office would decline the case. As described more fully below, prosecutors from the U.S. Attorney’s Office agreed that corpus delicti was a legal issue that they grappled with, but denied that they would decline a case simply because the gun was not available for trial. Indeed, as noted previously, Hurley referenced the issue in his e-mail on December 1 to Burke about the status of the investigation but told Burke that he and his Section Chief, Michael Morrissey, had assured ATF that the office would “find creative ways to overcome” the issue.

“Corpus delicti” is a Latin term that means “body of the crime” and is defined in the law as “the fact of a crime having actually been committed.” The current doctrine of corpus delicti holds that a defendant’s admission or confession of a crime is not by itself sufficient to establish beyond a reasonable doubt that the crime occurred.¹¹⁰ To satisfy corpus delicti, the government also must provide some independent corroboration to demonstrate a crime actually was committed.

Hurley told us that the application of corpus delicti to straw purchaser cases was first raised by another prosecutor within the U.S. Attorney’s Office in approximately April 2007. In that instance, agents had obtained an admission from a defendant that he was not the actual purchaser of the firearm, but the agents did not have the gun the defendant had purchased. The prosecutor questioned whether the defendant’s admission coupled with the Form 4473 documenting the purchase was sufficient to file charges.

An appellate attorney in the office quickly researched the issue and, in a brief e-mail, wrote that a confession coupled with the Form 4473 was not enough. The appellate attorney concluded, “it seems to me that evidence showing falsity (i.e., that the person doing the purchase is not in fact the real purchaser) is also necessary.”

¹¹⁰ See, e.g., *United States v. Delgado*, 545 F.3d 1195, 1206 (9th Cir. 2009), citing *United States v. Corona-Garcia*, 210 F.3d 973, 978 (9th Cir. 2000) (“Although the government may rely on a defendant’s confession to meet its burden of proof, it has nevertheless been long established that, in order to serve as the basis for conviction, the government must also adduce some independent corroborating evidence.”)

This guidance caused Hurley to adopt his own informal policy that he would not prosecute a false statements case under Section 924(a)(1)(A) if the only evidence was an admission by the defendant and the Form 4473 documenting the firearms purchase. According to Hurley, he never required an agent to recover the actual firearm as evidence. However, Hurley said, if the agent did not have the firearm, the agent had to find some other evidence to corroborate the admission. For example, Hurley told the OIG, an agent could search a defendant's residence – preferably within days of a purchase – under the theory that the firearms' absence corroborated the defendant's admission that the guns were bought for someone else. Moreover, Hurley said that the firearm need not be physically present in the courtroom. Hurley told us that if the firearm was in Mexico, the agent could view it and photograph it and then testify about it at trial.

MacAllister told us that she attended a conference in early 2009 where the corpus delicti issue was discussed as part of a case study. She said that some of the prosecutors involved in the case study believed that the Form 4473 could be used to satisfy corpus delicti, and that additional evidence was not necessary. MacAllister said that a prosecutor from Arizona was also present at this conference, shared her experience prosecuting cases in Phoenix, and noted that the Form 4473 alone was insufficient in Arizona.

We interviewed a prosecutor in the Arizona U.S. Attorney's Office who told us that he was responsible for most of the office's firearms prosecutions between 2003 and 2005. He told us that in his experience it was sufficient to prosecute a case with only the defendant's admission and the testimony of an employee from the FFL that made the sale along with the Form 4473. The prosecutor said that after he stopped prosecuting firearms cases in 2005, he received calls from ATF agents who expressed frustration with Hurley and the perception that the evidentiary threshold required to prosecute firearms violations had been raised.

According to several ATF agents, the U.S. Attorney's Office had for several years declined to prosecute straw purchaser cases because of its position that the corpus delicti rule was satisfied only if the firearms were recovered and physically available for trial. The Division Counsel for ATF's Phoenix Office told us that in late 2009, after receiving repeated complaints from agents, SAC Newell asked him to address the issue with the U.S. Attorney's Office. The Division Counsel spoke to Hurley and drafted a memorandum in February 2010 to Hurley's supervisor, Michael Morrissey, who was chief of the section in the U.S. Attorney's Office with primary responsibility for prosecuting firearms cases. The memorandum described ATF's view of the law of corpus delicti and the types of evidence it believed satisfied the elements of a straw purchasing case under Section 924(a)(1)(A). The memorandum disputed the position that the actual firearm had to be recovered or produced at trial in order to prosecute such a case. The memorandum also stated that if

a firearm was recovered in Mexico, it should be sufficient under the federal rules of evidence for an agent to personally photograph the firearm and be available to testify at any trial.

Representatives from the two offices met in May 2010 to discuss the issue. The meeting was attended by the ATF Division Counsel and Criminal Chief Pat Cunningham and Section Chief Morrissey from the U.S. Attorney's Office, as well as Hurley. The representatives from the U.S. Attorney's Office told us the meeting demonstrated that the offices were already largely in agreement about what the doctrine of corpus delicti required. Morrissey said that he agreed with the ATF Division Counsel that the actual firearm was not required to prosecute a straw purchaser case. From Morrissey's perspective, whatever dispute existed with ATF was settled by the May 2010 meeting.

The Division Counsel told us that after the May 2010 meeting the offices largely agreed on what the doctrine of corpus delicti required, and that the issue had been resolved. However, he said that the offices were far apart before the meeting, and that Morrissey told him after the meeting that the U.S. Attorney's Office had previously applied corpus delicti to straw purchaser cases too restrictively.

We found that for purposes of understanding Operation Fast and Furious, the corpus delicti issue had limited relevance to the question of why there were so few seizures and no arrests during the course of the investigation. As we discuss in our analysis, ATF and the U.S. Attorney's Office undertook a strategy that deferred approaching or taking enforcement action against individuals in order to develop evidence through wiretaps that would enable dismantling the entire trafficking ring. Thus, even in those situations where weapons were recovered and there was no corpus delicti issue, such as the seizure on December 8 by the Douglas police of firearms purchased by Steward earlier that day and other seizures we describe later in this report, the government did not pursue a straw purchaser case. In other words, even if ATF's asserted historical frustration with the U.S. Attorney's Office's position on corpus delicti contributed to the decision to pursue a nontraditional strategy in Operation Fast and Furious, the issue does not explain the adherence to the strategy as the case developed and the evidence of substantial trafficking activity swiftly mounted.

2. Risk that Confronting or Arresting Straw Purchasers or Seizing Firearms Would Harm the Broader Investigation

As noted above, all of the indicators for straw purchasers were present from the outset of Operation Fast and Furious for many subjects, but ATF and the U.S. Attorney's Office continued the investigation without taking overt enforcement action against any of the subjects.

Most ATF agents we interviewed took the position that an agent who has probable cause to believe an individual is a straw purchaser engaged in firearms trafficking is duty bound to promptly seize the guns bought by that individual, even if the purchaser is not arrested at the time of the seizure.¹¹¹ These agents also told us that this technique is effective in stopping gun trafficking, partly because straw purchasers do not have criminal records and are often willing to cooperate with law enforcement by identifying other individuals involved in the trafficking or by working as an informant in order to avoid being criminally prosecuted. Further, these agents told us that in situations where an agent has only reasonable suspicion to believe an individual is a straw purchaser engaged in firearms trafficking, rather than probable cause to arrest or to seize the firearm, the agent should approach the individual and ask about the firearms that were purchased. This tactic is commonly referred to as “knock and talk.” According to these agents, even if the individual does not admit to straw purchasing, the individual is less likely to make straw purchases again if there is reason to believe that law enforcement is aware of the activity.¹¹²

Other witnesses, including Newell, Gillett, Voth, and MacAllister, told us that approaching suspected straw purchasers is ineffective as an investigative tactic in dismantling gun trafficking organizations, particularly in the State of Arizona. According to these witnesses, straw purchasers have become increasingly sophisticated about law enforcement and when confronted with questions about firearms they have purchased are unlikely to admit they are straw purchasers. Instead, they are more likely to tell law enforcement agents that the guns are theirs and that they use them for activities such as hunting or shooting in the desert.¹¹³ The most probable result, therefore, of confronting straw purchasers to seek admissions, according to these agents, is that the straw purchasers deny their involvement and the trafficking organization is put

¹¹¹ ATF’s policy on “Weapons Transfers” in effect during Operation Fast and Furious described agents’ ability to seize firearms when they observed transfers based on “probable cause” to believe a criminal violation had occurred, and not on whether there was a prosecutable case.

¹¹² We note that in Operation Fast and Furious, given all of the evidence that was available to the agents by January for at least some of the subjects, such as the largest volume purchasers such as Steward, we believe it was unnecessary for ATF agents to obtain a confession in order to prosecute those individuals.

¹¹³ As described earlier, MacAllister told us she believed the December 8, 2009, stop of Steward during which he told the police officers the firearms in the vehicle were his, validated ATF’s investigative approach in Operation Fast and Furious of not confronting subjects. MacAllister also told us that Steward maintained his denials even when he was interviewed by ATF agents on January 25, 2011, shortly after his arrest.

on notice that law enforcement is aware of its activities. Once put on notice, the organization is likely to move its operations to new straw purchasers and possibly different FFLs, and the trafficking of firearms continues unabated and undetected.

These ATF agents also stated that, even when an agent has probable cause to seize firearms and make an arrest, a sophisticated subject will take his chances with the minor punishment typically imposed for false statements instead of providing information about the individuals with whom he is working. Moreover, these agents said that when straw purchasers are willing to cooperate, they frequently know little, if anything, about the individuals for whom they are working.

For these reasons, witnesses supportive of Operation Fast and Furious told us that in their view the more effective approach, and the one more likely to have a significant effect on firearms trafficking, is to investigate suspected straw purchasers covertly in order to identify through surveillance and other techniques additional subjects – especially those who are funding the purchases and transporting the firearms – toward the goal of dismantling the entire organization. This was the approach adopted in Operation Fast and Furious and the tactics included gathering telephone records and financial information, conducting background checks, obtaining documentary evidence of past purchases, placing surveillance cameras at select locations, conducting physical surveillance, leveraging cooperation from FFLs, and most significantly, conducting court-authorized electronic surveillance. Witnesses told us that conducting the investigation in this manner was a tactical decision and that it differed from ATF’s traditional approach of automatically confronting subjects with the hope of obtaining admissions.

The adherence to this tactical decision failed to adequately consider the risk to public safety. As outlined below, it had the effect of allowing individuals who were known straw purchasers, and who we believe could have been arrested, to continue to purchase substantial numbers of firearms even though agents knew that many of the firearms were being transported to Mexico by violent drug trafficking organizations, and were being recovered at crime scenes in the United States and Mexico. We found ATF and the U.S. Attorney’s Office failed to take adequate measures to minimize the risk to public safety as it conducted the Operation Fast and Furious investigation.

3. Challenges in Prosecuting Non-Prohibited Purchasers

We also were told that a principal challenge faced by prosecutors and agents in Operation Fast and Furious was the fact that the subjects identified early in the investigation were not prohibited under federal law from purchasing or possessing a firearm. It is legal for a non-prohibited individual in Arizona to purchase an unlimited number of firearms from an FFL at any

time. It also is legal for a non-prohibited person to pay for firearms in cash and to then transfer, sell, or barter those firearms to a non-prohibited third party. Hurley told us that the challenge in a straw purchasing case under 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A) – the statutes commonly used against suspected straw purchasers – is to develop evidence demonstrating that at the time the firearms were purchased, the subject was not buying them for himself. As stated by Hurley’s supervisor, “[p]roving the inner workings of a potential defendant’s state of mind at the time of purchase, without a confession by a defendant, is incredibly difficult.”

The same challenge exists with respect to forfeiture actions under 18 U.S.C. § 924(d), a federal law that authorizes the government to seize and forfeit a firearm for, among other things, a knowing violation of Sections 922(a)(6) or 924(a)(1)(A). *See* 18 U.S.C. § 924(d)(1). An agent must have probable cause to believe a criminal violation has occurred in order to arrest an individual or seize that individual’s firearm. With respect to an arrest, the government then has the burden of proving the alleged violation beyond a reasonable doubt. With respect to most forfeitures, including those predicated on a knowing violation of Sections 922(a)(6) and 924(a)(1)(A), the government has the burden of proving the alleged violation by a preponderance of the evidence.

According to Voth and MacAllister, the evidentiary threshold required by the U.S. Attorney’s Office to establish probable cause with respect to straw purchasers who were not prohibited parties was a contributing factor in ATF’s decision not to arrest subjects or seize firearms early in Operation Fast and Furious. Voth told us that based on his experience before coming to Phoenix in 2009, he believed the circumstantial evidence gathered by the end of December – the volume of guns purchased, the connections among the straws, the recoveries of firearms in Mexico, the executed Form 4473s – was sufficient to seize guns from some subjects and even consider bringing charges against them. According to Voth, Hurley’s position was that additional evidence was needed to demonstrate that the purchasers’ actual intent at the time of the sales was to buy the guns for third parties. Voth said Hurley told him that the fact of recoveries in Mexico was not useful because of the corpus delicti issue, and a subject’s historical purchasing activity could not be used to prove that a future purchase was unlawful.

MacAllister told us that based on her experience as an agent in Phoenix and in working with Hurley, she believed an admission was required for establishing probable cause to seize firearms where the subjects were not prohibited parties. MacAllister said evidence such as recoveries in Mexico and the subject’s previous purchasing activity can be considered but are not on their own a sufficient basis for seizing subsequent purchases. Thus, for example, MacAllister said she did not believe there was probable cause to seize the 20 AK-47 style rifles Moore purchased from FFL1 on December 3, 2009,

even though MacAllister knew that Moore had purchased 61 AK-47 style rifles the previous month and even though ATF agents saw Moore transfer the guns to unknown third parties. According to MacAllister, an admission from Moore was needed before the guns could be seized.¹¹⁴

MacAllister, however, said that she made a tactical decision early in the investigation not to approach subjects to seek admissions, despite her belief that a seizure required a confession. She told us this was based on her experience that approaching a subject like Moore would not have advanced the goal of the investigation to identify additional conspirators in the trafficking network, both because approaching the suspect could have put the network on notice that law enforcement was aware of its activities and because a suspect like Moore would have been unlikely to admit that he illegally purchased the firearms.

Hurley told the OIG that he recalled discussing probable cause with MacAllister early in the investigation and told her then that a mere transfer of firearms, without more, from the purchaser to someone else – even shortly after the purchase – was not enough to establish probable cause where neither party was prohibited by law from buying or possessing the firearms. But Hurley said he did not advise MacAllister or others whether they had probable cause to seize weapons at times such as the December 3, 2009, purchase by Moore. According to Hurley, his discussions with MacAllister as the case developed focused on whether there was sufficient evidence to forfeit firearms at trial, and not the distinct question of whether the agents had enough probable cause to seize them. Hurley said the discussions about evidence concerned how to build the investigation into a prosecutable case.

We asked Hurley whether he felt the evidentiary obstacles ATF agents described to us with respect to non-prohibited purchasers, as well as the corpus delicti issue described earlier, made it less likely that agents would approach individuals they suspected of straw purchasing to seek admissions, and use that as a basis to seize firearms. Hurley replied, “[t]hat’s one of those questions that I think winds up being more the agent’s lane of traffic than ours.” Hurley said that while his role was to give advice about how to seize guns without violating the Constitution, the agents’ role was to make a tactical decision about whether or not to approach a suspected straw purchaser. Hurley told the OIG that he deferred to the agents on whether to develop evidence by confronting individuals or conducting surveillance.

¹¹⁴ Several ATF agents we interviewed told us that under circumstances like these they felt they had probable cause to seize the firearms without an admission. We agree with these agents and, as discussed in the analysis section of this chapter, believe there was sufficient probable cause to seize firearms in Operation Fast and Furious considerably earlier than when agents actually did.

4. Department and ATF Firearms Trafficking Strategy

In Chapter Two we summarized several Department and ATF efforts to combat firearms trafficking to Mexico that some witnesses told us influenced the conduct of Operation Fast and Furious. These included the publication in April 2009 of OCDETF guidelines stating that firearms trafficking investigations were eligible for OCDETF designation and funding; the establishment in August 2009 of a Phoenix OCDETF Strike Force; the establishment in October 2009 of Group VII; and the issuance in January 2010 of the Department's "Strategy for Combating the Mexican Cartels" memorandum.¹¹⁵

As noted above, the stated goal in Operation Fast and Furious was to dismantle an entire firearms trafficking network, not just arrest individual straw purchasers. As Hurley stated in a January 5, 2010, memorandum to his direct supervisor, Michael Morrissey, he and the agents wanted to develop a case against the "hub" of the network so that the "spokes" could not simply be replaced as needed and continue to traffic firearms. Voth described the focus to us as "short term versus long term," meaning the investigation sought to "take off the people responsible for creating the straw purchasers as opposed to the actual straw purchaser[s]." According to Voth and other witnesses, this approach, if successful, would serve the "greater good" by dismantling an organization that trafficked firearms to Mexico, instead of simply charging straw purchasers who could be readily replaced by others unknown to law enforcement.

In short, these and other witnesses told us that they believed the organization-level approach adopted in Operation Fast and Furious was both consistent with public safety and motivated by and consistent with the firearms trafficking strategy emphasized by the Department and ATF in 2009 and 2010. We disagree, and for reasons described in the analysis section of this chapter, found that the manner in which Operation Fast and Furious was conducted failed to adequately consider the public safety, and also do not believe that the policy memoranda cited above can be fairly read as an endorsement of how the investigation was conducted.

¹¹⁵ Witnesses also cited the OIG's November 2010 report on ATF's Project Gunrunner and its recommendation that ATF develop more complex conspiracy cases against higher level gun traffickers and other conspirators. A draft of this report was provided to ATF in September 2010. In light of the timing of this report, it could not have influenced how ATF and the U.S. Attorney's Office conducted Operation Fast and Furious – the case began on October 31, 2009, and ATF considered the investigative phase of the case completed by September 2010. Further, the OIG's report did not recommend or describe any specific strategies or tactics agents could use to develop more complex investigations.

H. The Decision to Pursue a Wiretap and the Meeting Between ATF and the U.S. Attorney's Office on January 5, 2010

Several witnesses, including Newell, Gillett, Voth, MacAllister, and Hurley, identified one or more of the factors described above as contributing to the decision that a wiretap would be the most effective technique for obtaining evidence sufficient to dismantle the Celis-Acosta firearms trafficking group. This desire to use a wiretap reflected what we found to be the ATF and U.S. Attorney's Office's consistent focus on obtaining evidence about the scope of the trafficking organization, a focus that we concluded gave inadequate attention to the public safety consequences of this longer term approach because it did not include reassessments of the state of the evidence as the case progressed to consider whether any overt enforcement action should be taken.

We found that from the earliest stages of the investigation, there was a desire by investigators to use a wiretap to develop the case despite the substantial evidence that had been gathered. Before reporting to Phoenix in December 2009, Voth stated in multiple e-mail communications his interest in using a wiretap in a Group VII investigation. Voth also told us that he recalled the topic was discussed shortly after he arrived in Phoenix during a meeting he attended with Hurley and MacAllister in the context of whether using a wiretap might have made one of MacAllister's earlier cases prosecuted by the State Attorney General's Office more successful. Other documents and interviews revealed that Group VII contemplated using a wiretap in Operation Fast and Furious within several weeks of the case being initiated and agents' observations of what they believed was a firearms trafficking network.

Indeed, on January 4, 2010, the day before a status meeting between ATF and the U.S. Attorney's Office, Voth provided Gillett a draft briefing paper that stated, "[o]ur goal is to secure a Federal T-III audio intercept to identify and prosecute all of the tentacles of this larger organization[.]" The briefing paper also stated that although the group of straw purchasers that had been identified so far was significant, it did not represent "the command and control elements of a Mexican DTO [drug trafficking organization]" and arresting these individuals "is not going to disrupt or dismantle the transportation and distribution cells of the organization, nor is it most likely going to lead to the prosecution of the leaders of the cartels or their principal facilitators."

According to the briefing paper, the strategy was "to allow the transfer of firearms to take place in order to further the investigation and allow for the identification of additional coconspirators who would continue to operate and illegally traffic firearms to Mexican DTO producing more armed violence along

the Southwest Border.” This language closely tracked the language in ATF’s firearms transfer policy described in Chapter Two.¹¹⁶

Representatives from ATF and the U.S. Attorney’s Office met on January 5, 2010, and agreed to seek authority for a wiretap. The meeting was attended by ASAC Gillett, Group Supervisor Voth, case agent MacAllister, and AUSA Hurley. Hurley summarized the meeting in a memorandum dated the same day to his supervisor, Mike Morrissey, and Voth added a summary of the meeting to the draft briefing paper described above, which he provided to SAC Newell and was dated January 8.

Hurley’s memorandum and ATF’s briefing paper each summarized the evidence gathered in the case to date, including the identification of Celis-Acosta as the center of the trafficking network, the substantial numbers of firearms purchased, the large number of recoveries in the United States and Mexico, the connections among the subjects, and the DEA information showing a connection to Mexican drug trafficking.

According to both documents, representatives at the January 5 meeting reviewed the evidence and determined that there was not yet a prosecutable case against any of the subjects, and that the government would seek a federal court order for a wiretap. Hurley told us that ATF did not believe it had enough evidence at that time to prosecute the Celis-Acosta group and that based on what ATF presented, he agreed with that assessment. Hurley said ATF presented a sufficient need for a wiretap and because Hurley was assigned to the case, he agreed to pursue one. Hurley also said that he thought the wiretap was the best investigative tool to identify the larger players in the conspiracy, but that he did not think a wiretap would be appropriate for developing a case against just the first-level straw purchasers.

Morrissey provided Hurley’s January 5 memorandum to U.S. Attorney Burke that day. In an e-mail forwarding the memorandum, Morrissey told Burke that the investigation was a “promising guns to Mexico case (some weapons already seized and accounted for)” and the ATF Phoenix Field Division agreed with “our strategy” to not simply conduct a small straw purchaser investigation, but that “ATF headquarters may want to do a smaller straw purchaser case.” Morrissey recommended, “[w]e should hold out for the bigger

¹¹⁶ ATF Order 3310.4B, Section 148(a)(2) provided where special agents were aware of, observed, or encountered deliveries or transfers of firearms, “immediate intervention may not be needed or desirable, and the special agent may choose to allow the transfer of firearms to take place in order to further an investigation and allow for the identification of additional coconspirators who would have continued to operate and illegally traffic firearms in the future, potentially producing more armed crime.” Actions taken under Section 148(a)(2) did not require supervisory approval.

case, try to get a wire, and if it fails, we can always do the straw buyers.” Burke replied, “Hold out for bigger. Let me know whenever and w/whomever I need to weigh in.” We found no evidence that Burke or Morrissey questioned the claim in the memorandum that there was not yet a prosecutable case against, at a minimum, the most prolific straw purchasers, or raised any concerns about the risk to public safety posed by the government continuing to allow the traffickers to purchase large volumes of firearms.

SAC Newell reported the results of the January 5 meeting to Deputy Assistant Director McMahon at ATF Headquarters in an e-mail that same day. Newell stated that the U.S. Attorney’s Office wanted to proceed with electronic surveillance before conducting any “overt investigative activity,” and that “they agree that right now we have very little to prosecute especially considering the issues with prosecuting straw purchasers in the State and 9th Circuit.” Newell stated that “[e]ven though I don’t like it I have to agree and we are doing everything possible to slow these guys down.”¹¹⁷ We found that despite Newell’s statement to McMahon that he “didn’t like it,” the decision was consistent with the approach taken in the case by ATF before the January 5 meeting, that is, deferring any overt action against first-line straw purchasers in order to build a case against the larger organization. Additionally, as with Newell’s statement in his January 13 e-mail to McMahon following the El Paso seizure (referenced above), we did not find any basis for Newell’s assertion that ATF was “doing everything possible to slow these guys down.” None of the ATF agents we interviewed identified any steps taken at this time to significantly disrupt the gun purchasing activity.

ATF Phoenix’s January 8 briefing paper, which Deputy Assistant Director (DAD) McMahon received as well, noted that “our strategy is to allow the transfer of firearms to continue to take place, albeit at a much slower pace,” and that the strategy was “in compliance with ATF [§§] 3310.4(b) [sic] 148(a)(2).” The briefing paper included the statement, similar to the one in Newell’s e-mail to McMahon on January 5, that there had been successful efforts since early December to “slow down” the pace of purchases and that these would continue, “but not to the detriment of the larger goal of the investigation.” The briefing paper also said that the purchasing activity from September to December 2009 “defied the ‘normal’ pace of procurement” by other trafficking groups, and that this ‘blitz’ created a situation where measures had to be enacted in order to slow this pace down in order to perfect a criminal case.”

¹¹⁷ In Chapter Five, we describe McMahon’s and other ATF Headquarters officials’ knowledge of Operation Fast and Furious.

We asked Newell and Gillett what efforts ATF was making at this stage in the investigation to slow down the pace of purchases. They told us that they understood this referred to instances where agents requested FFLs to delay the delivery of firearms to subjects so that agents could be in place to conduct surveillance. Neither Newell nor Gillett, however, were aware of any efforts to slow the actual purchasing activity, and Voth and MacAllister told us that they too were not aware of any such efforts.¹¹⁸ In addition, Hurley told us that he did not recall any conversations with agents about being more aggressive with subjects in order to slow the purchasing activity. Newell told us that it was not his intention to convey that ATF was slowing the actual number of purchases.

We also asked witnesses who attended the January 5 meeting, and others who supported how Operation Fast and Furious was conducted, whether there was any discussion about the public safety aspects of the case, namely whether ATF had identified but intended to defer disrupting a group of individuals responsible for purchasing hundreds of weapons, some of which had already been recovered in the United States and in Mexico. Witnesses did not identify specific discussions about public safety, but rather told us that they believed the public safety was best served by the approach taken in Operation Fast and Furious.

In general, these witnesses said the comparatively small number of firearms they believed could be seized from a few individual straw purchasers was a fraction of the firearms that they thought could be prevented from being trafficked to Mexico in the future if they were able to dismantle the organization for which the straw purchasers were working. MacAllister stated, "I think taking down the organization, public safety-wise lends itself to a bigger, a larger effect in public, for public safety versus taking, trying to look at one straw purchaser, or trying to prosecute one straw purchaser." Voth stated, "[b]ut as far as, as the public safety . . . there's a couple of different things. One is, if we take off, you know, any one straw purchaser because they bought five guns on this day, let's say, but the organization still exists, and they're all buying five guns, you know, the organization is still sending many guns down the range. Or, you know, we can work the entire organization, we're [] going to have a bigger, bigger benefit."

¹¹⁸ The first draft of the January 8, 2010, briefing paper stated that one of the investigative techniques being used was "[e]stablishing and maintain [sic] working relationships with FFLs involved in this investigation to include requesting that they 'slow down' their on-hand inventory of AK-47 type firearms." The final version of the briefing paper stated, "[i]t should be noted that since early December efforts to 'slow down' the pace of these firearms purchases have succeeded and will continue but not to the detriment of the larger goal of the investigation."

Both Gillett and Voth said that Hurley stated at the January 5 meeting that his concern was not with the firearms that were going to be purchased by the group during the investigation, but rather with the many more the group would purchase in the future if it was not shut down by a successful prosecution. Hurley told us that he did not recall making this or any similar statement. He also said that the comment did not make sense to him because “I wouldn’t have wanted the guns to go to Mexico for the simple, practical purpose that once they’re in Mexico they’re unavailable to you as evidence.” Gillett told us that the underlying discussion was that the firearms were going to be purchased by the Operation Fast and Furious subjects someplace, so they “might as well do it where we quasi-control it, and hopefully gather evidence for a successful prosecution.”

Newell told us that his impression of the case around that time was that agents had identified some young individuals who were purchasing a lot of guns, but that there were multiple layers to the activity. He said that approaching these individuals risked their replacement by others unknown to ATF, and that it was unlikely they had information about the actual decision-makers. According to Newell, “the idea was if we can get enough information to charge the organization, cut off the head of the snake, if you will,” and that “if we get Acosta, we get the main individuals that are actually financing or directing or orchestrating this, that’s what will have the lasting and biggest impact.”

V. OCDETF Designation and Use of Electronic Surveillance (February 2010 - July 2010)

In February 2010, Operation Fast and Furious was designated an OCDETF investigation, and in March 2010 ATF began to conduct electronic surveillance of telephone numbers associated with particular subjects in the case. The electronic surveillance continued through the middle of August 2010 and was supported by physical surveillance conducted by agents from Group VII, with substantial assistance from ATF agents detailed from other offices and local law enforcement officers. From ATF’s perspective, the operational phase of Operation Fast and Furious was coming to a close by the end of July 2010.

In this section, we describe the process to obtain the OCDETF designation and the approval to conduct electronic surveillance, and summarize several other investigative techniques agents used in the investigation from February 2010 to July 2010. We also provide examples of surveillances conducted during this period, and describe the circumstances under which ATF agents began to interdict and seize firearms purchased by Operation Fast and Furious subjects. In addition, we highlight examples of surveillance where interdiction did not occur and describe agents’ explanations for this.

Also during this time period, significant tension and dysfunction developed in Group VII relating to the conduct of Operation Fast and Furious. We describe in this section the various explanations witnesses gave us for this development and how ATF management responded.

A. Investigation Designated an OCDETF Case in February

As we described in Chapter Two, the Department issued a memorandum in April 2009 stating that investigations that principally targeted firearms trafficking were eligible for OCDETF designation. Newell told us that, in his experience, ATF had not prior to this time sought this designation for its firearms trafficking cases and that he viewed Operation Fast and Furious as an opportunity to benefit from the advantages offered by an OCDETF designation. OCDETF is particularly useful as a funding mechanism for resource intensive investigations such as Operation Fast and Furious that anticipate using wiretaps and that will require substantial hours of physical surveillance.

The decision to seek OCDETF designation for Fast and Furious was reached in December 2009. The proposal was drafted by co-case agent Tonya English and was reviewed at ATF by Voth and ATF's OCDETF Coordinator for the Southwest Border, and at the U.S. Attorney's Office by Hurley. We found no evidence that approval from ATF Headquarters or by Justice Department Headquarters was required or obtained. The proposal was submitted to and approved by the OCDETF District Committee on January 26, 2010.

The proposal stated that the case was a joint ATF-ICE investigation, with part-time support from the Internal Revenue Service (IRS) and the DEA.¹¹⁹ The case prosecutor was identified as Emory Hurley. The proposal included a description of the straw purchasing activity that caused ATF to open the investigation, the evidence linking the Celis-Acosta firearms trafficking organization to drug trafficking, the impact the disruption or dismantlement of the Celis-Acosta organization would have on firearms and drug trafficking, and the case objectives and anticipated investigative techniques. The information about the drug trafficking organization that DEA was investigating and its connection to ATF's straw purchasers was based on information provided to ATF by the DEA.

¹¹⁹ The proposal provided a breakdown of the personnel committed to the investigation: 6 full-time and 4 part-time agents from ATF; 1 full-time agent from ICE; 1 part-time agent from IRS; 1 part-time agent from the DEA; and 5 part-time officers from the Phoenix Police Department. The IRS agent assisted the financial aspects of the investigation. The DEA's assistance included providing a wire room facility and linguists for ATF's wiretaps, and having an agent available to query DEA databases with telephone numbers submitted by ATF. The Phoenix Police Department assisted with surveillance. The ICE agent was the only non-ATF agent assigned to Operation Fast and Furious on a full-time basis.

The proposal also stated that “ATF agents believe that a Phoenix-based firearm trafficking group is actively purchasing firearms using bulk narcotics proceeds. The firearms are then being trafficked into Mexico using non-factory compartments in various vehicles through various Ports of Entry (POE’s) in Arizona and Texas.” Voth told us the statement about how the firearms were being transported into Mexico was not based on anything observed to this point in Operation Fast and Furious; rather, it was based on ATF’s “general assumption on the border that guns are being smuggled into Mexico.” The proposal also stated that the investigation had the potential to significantly reduce the trafficking of firearms and narcotics proceeds through Phoenix, and that the goal of the investigation was to identify and arrest members of the targeted drug trafficking organization and seize the group’s assets. The proposal identified the various seizures that had taken place to date, but did not state that ATF had no role in those seizures or that ATF’s strategy, as described in the January 8 briefing paper, was to allow the transfer of firearms to take place without taking enforcement action. As we described earlier, the U.S. Attorney’s Office, a partner to the OCDETF proposal, concurred with the strategy of pursuing a longer term investigation to dismantle the trafficking organization and deferring the smaller straw purchaser cases.

The proposal for Operation Fast and Furious was one of several presented to the OCDETF Southwest Border Regional Committee in early February 2010. English gave a presentation that provided an overview of the case, including a general description of the targets of the investigation, which included Celis-Acosta and several straw purchasers, and the organizational structure. The presentation also included a summary of ATF’s investigation to date and described several recoveries in Mexico of firearms purchased by ATF subjects. The presentation stated that nearly \$500,000 had been spent by subjects to date and also identified the number of firearms purchased by each subject. Like the proposal, the presentation did not include any information about ATF’s strategy with respect to interdictions.

The review committee, comprised of representatives from the U.S. Attorney’s Office, ATF, the DEA, the FBI, ICE, the IRS, the USMS, and the Arizona Department of Public Safety, formally approved Operation Fast and Furious as an OCDETF investigation on February 4, 2010. The ATF representative on the committee was ASAC Gillett. By the end of the month, ATF submitted its first OCDETF funding request for the investigation.¹²⁰

¹²⁰ According to its Deputy Director, Thomas Padden, the Executive Office of OCDETF at DOJ Headquarters did not have a role in authorizing Operation Fast and Furious as an OCDETF investigation. He told us that the Executive Office did not make any authorizations or approvals on the case.

As required for all OCDETF cases, ATF submitted interim reports to the Southwest Border Regional Committee every six months that described the status and progress of the case, including the number of straw purchasers identified as subjects, the number of firearms recovered in the United States and Mexico connected to the investigation, and any significant investigative actions (such as notable electronic surveillance interceptions and seizures). The interim reports did not identify the total number of firearms purchased by the subjects during the investigation. The last interim report reviewed by the OIG was submitted in September 2011. Operation Fast and Furious remains an active OCDETF case.

By the time Operation Fast and Furious was approved as an OCDETF case in February 2010, Group VII had already physically moved its operations from ATF to the offices of the Phoenix OCDETF Strike Force. Neither this move nor the OCDETF designation changed how Group VII conducted Operation Fast and Furious, with the exception that the investigative activities were funded by the OCDETF program.

B. Applications and Orders for Tracking Devices and Electronic Surveillance

During the same time period in which English was drafting and presenting the OCDETF proposal for Operation Fast and Furious, MacAllister was drafting affidavits in support of the government's applications to federal court for authorization to place a tracking device [REDACTED] particular Fast and Furious subjects, as well as separate applications to conduct electronic surveillance of the communications of particular subjects.

1. Tracking Devices Used in January Through March

Federal law authorizes the government to install mobile tracking devices to follow the movement of a person or object. 18 U.S.C. § 3117. The U.S. Attorney's Office filed applications in January, February, and March 2010, seeking court authorization [REDACTED]

[REDACTED] The applications stated that there was probable cause to believe particular individuals would commit criminal offenses involving false statements in the acquisition of firearms (18 U.S.C. §§ 922(a)(6), 924(a)(1)(A)), unlicensed dealing in firearms (18 U.S.C. § 922(a)(1)(A)), and the unlawful export of munitions (18 U.S.C. § 2778). The applications also stated that there was probable cause to believe that the installation of the tracking device [REDACTED] [REDACTED] would lead to evidence of the criminal violations and identification of other individuals and locations involved in the activity.

Each application included an affidavit from MacAllister that described the target individuals' past firearms purchases, information about any

recoveries or seizures of the purchased firearms, and information about the individuals' reported income. For example, the January affidavit stated that Steward had purchased 240 firearms for approximately \$125,000 from three different FFLs since December 2009, that there had been multiple short time-to-crime recoveries of some of these firearms, and that according to the Arizona Department of Economic Security, Steward had a reported income of \$4,497 for the first quarter of 2009. Similar information was stated with respect to Patino, Moore, Chambers, and Celis. The applications also described recorded telephone conversations some of these subjects had with FFL1 about making arrangements to purchase firearms. The court approved each of the government's three applications.¹²¹

MacAllister told us the tracking device was intended to help ATF determine how firearms were being transported to Mexico. One of the principal obstacles to using the tracker was the fact that [REDACTED]

[REDACTED] ATF overcame this obstacle [REDACTED]

[REDACTED] and as described below, one tracker led to the sole ATF-initiated seizure in the investigation before June 2010. [REDACTED]

ATF was apparently aware of the trackers' limitations. When Newell asked Gillett for an update on the February tracker (described further below), he noted that he had told ATF Headquarters that there was plenty of surveillance but that [REDACTED]

¹²¹ ATF also used tracking devices in March 2010 on three different vehicles on at least three occasions. MacAllister told us the devices were helpful at times when a subject's vehicle was not visible to agents, but in general the value was limited because of the limited battery life of the devices. Notably, the tracking device showed that Patino was traveling to El Paso and ATF actually conducted surveillance on two occasions, hoping to observe Patino pick up money. ATF would learn after the January 2011 indictment of Patino and other Operation Fast and Furious subjects that Patino made multiple trips to El Paso in connection with his firearms trafficking.

[REDACTED]

The sale that led agents to the first ATF-initiated seizure came on February 13, 2010, when Patino purchased a .50 caliber rifle and 10 AK-47 style rifles from FFL1. [REDACTED]

[REDACTED] Agents followed [REDACTED] to a residence in Phoenix, where it remained for several days. On February 20, 2010, [REDACTED] was followed to Tucson, then Selis, Arizona, and finally onto the Tohono O’odham Indian reservation. There, the [REDACTED] a vehicle that was traveling south on a road that led to the Mexican border. This movement was significant because the reservation straddles the border between the United States and Mexico and there is no border crossing station.

According to the surveillance report, agents following the vehicle observed it make evasive maneuvers before stopping in front of a residence. Border Patrol agents made contact with the occupants – two females – who initially claimed they knew nothing about the vehicle. Two ATF agents from the Tucson office participating in the surveillance then examined the vehicle and seized 41 firearms, most of which were AK-47 style rifles, from inside the vehicle. Thirty-seven of the AK-47 style firearms had been purchased by Patino on four separate occasions in January and February 2010.

Photo 4.3: Tohono O’odham Indian Reservation Seizure



Source: ATF

The ATF Tucson agents interviewed the two occupants at the scene and learned that the driver had a felony record for drug smuggling. The driver told

the agents that both before and after serving time in prison she drove vehicles to Mexico for an individual she identified by first name. She said that on this occasion, she at first thought that she was transporting cash, as she had done many times before, but realized after she got into the vehicle that she was transporting firearms for the first time. The driver said the firearms were placed in the vehicle by an individual whose name she did not know. The passenger told the agents that she did not know firearms were in the vehicle and claimed she was traveling to Mexico to get chimichangas.

[REDACTED]

Several days before the Tohono O’odham seizure, U.S. Attorney Burke e-mailed Hurley and his supervisor, Mike Morrissey, for an update on the Celis-Acosta investigation. Hurley replied that [REDACTED]

[REDACTED] The U.S. Attorney’s Office learned about the February 20 Tohono O’odham seizure on February 22, when Newell sent an e-mail to Burke and Hurley describing the circumstances surrounding a different seizure in Mexico unrelated to Operation Fast and Furious. In his e-mail, Newell also referenced the 42-firearm seizure that agents had made two days earlier, on Saturday, that was part of Operation Fast and Furious. Burke replied, “What happened last Saturday w/ the 42 AK-47s? Do we have that case?” Hurley responded that he had not yet heard about the seizure, but that if the guns were linked to Operation Fast and Furious, the case was theirs. Burke then replied that Hurley should contact Criminal Chief Cunningham to schedule a briefing for Burke by the two of them about Operation Fast and Furious and stated, “This is great stuff.”¹²² As we describe below, Burke received a briefing in mid-March around the time the first wiretap was approved.

¹²² On February 26 and 27, 2010, Newell e-mailed Burke and Hurley about two large recovery incidents in Mexico and stated that he believed each would have firearms traced back to Operation Fast and Furious. In the February 26 e-mail, he stated, “FYI – big Mexican Army seizure last night in Sinaloa from ‘Chapo’ Guzman’s guys. Seems something big is brewing down there which is why there’s been such a flurry of gun purchasing activity of late in our area, as clearly seen in SA Hope MacAllister’s ‘Fast and Furious’ OCDETF Strike Force case.”

Newell separately emailed Burke later on February 22 about the status of Operation Fast and Furious, including that the firearms trafficking group had purchased about 800 weapons to date. That email was followed by a conversation on the same day between Newell and Burke about the case and Newell told Gillett and Voth in an e-mail that Burke was “taken aback” by some of the facts of the case, including the fact that 800 guns had been purchased by subjects of the investigation. In the e-mail, Newell stated he was going to set up a meeting with Burke to discuss the case and “several other cases I feel he is being misled [sic] about.” Burke told Congressional investigators that he did not recall what he might have been “taken aback” about relating to Fast and Operation Furious and did not recall a meeting between just him and Newell to discuss that issue or whether he was being misled by his staff.

As noted above, the evidence the government relied upon to obtain court approval for the tracking devices included historical purchasing activity, firearms recoveries in Mexico, and the subjects’ lack of financial resources. We asked Hurley whether this evidence could also have been used to establish probable cause to seize firearms from those same subjects. Hurley told us that he thought that argument could be made for subjects whose purchases fit this pattern. But Hurley also said the tracking devices served the tactical purpose of identifying where the firearms were going, where they were being kept, and who else was involved. In addition, Hurley said that defending the seizure of such firearms might from an “academic” perspective be defensible, but that at time in the investigation – January and February 2010 – he did not believe there was a prosecutable case against the purchasers. Hurley also said that he thought prevailing at a civil forfeiture hearing regarding such firearms would have been difficult because of the need to prove that at the time of the sale the purchaser intended to buy the firearms for someone else.

However, Hurley also told us that the goal of the investigation was to arrest more than one straw purchaser, and that arresting someone even as significant as Patino was not going to achieve ATF’s objective of dismantling the organization. As we discuss further in the analysis, we concluded that it was that goal, and the consistent belief it would be compromised by taking overt action, that drove the lack of seizures and arrests. We found that the evidence was more than sufficient to take such action early in the investigation had ATF and the U.S. Attorney’s Office wanted to do so.

2. Electronic Surveillance Begins in March

For reasons we described in Section IV of this Chapter, ATF and the U.S. Attorney’s Office decided to seek a wiretap in order to prosecute the entire Celis-Acosta firearms trafficking organization as well as to identify how the purchases were being financed and how the firearms were being transported to Mexico.

Federal law authorizes the government to conduct electronic surveillance of oral communications for law enforcement purposes. *See* 18 U.S.C. §§ 2510-2522. To obtain approval, the government must submit an application to a federal court showing that there is probable cause to believe that a particular “facility,” such as a cellular telephone number, is being used by subjects in furtherance of specified criminal violations. 18 U.S.C. §§ 2518(1)(b)(i), (iv). Notably, the application must describe “whether or not other investigative procedures have been tried and failed,” are reasonably unlikely to succeed, or are too dangerous to use. 18 U.S.C. § 2518(1)(c). Orders for electronic surveillance are issued for a period not to exceed 30 days, but can be extended with court permission, and surveillance must terminate when the authorized objectives are attained. 18 U.S.C. § 2518(1)(d)(5).

Wiretap applications are supported by an affidavit from an agent or other “investigative or law enforcement officer” that sets forth the facts that establish the probable cause required by the statute. 18 U.S.C. § 2518(1). The affidavit is typically drafted by the agent and reviewed by the prosecutor assigned to the case. The prosecutor also is responsible for drafting the application that sets forth the basis for the court’s jurisdiction to authorize the electronic surveillance.

An application cannot be filed in court until a Deputy Assistant Attorney General or the Assistant Attorney General in the Department’s Criminal Division approves it.¹²³ The Department’s procedures require that each application and supporting affidavit, which is provided by the responsible U.S. Attorney’s Office, be reviewed by an attorney in the Department’s Office of Enforcement Operations (OEO). The U.S. Attorney’s Office for the District of Arizona during this time period did not have a formal process for reviewing draft applications to conduct electronic surveillance. One supervisor told us, for example, that his practice was to review the applications of relatively new attorneys to ensure they met the standards of the judicial district, but that he would not review the applications of more experienced attorneys.¹²⁴ As

¹²³ The wiretap statute provides that applications may be authorized by the Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any Acting Assistant Attorney General, or any Deputy Assistant Attorney General or Acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specifically designated by the Attorney General. 18 U.S.C. § 2516(1). Attorney General Holder has specially designated Deputy Assistant Attorney Generals in the Criminal Division, among others, to authorize wiretap applications. Office of the Attorney General, Order No. 3055-2009, February 26, 2009. We further describe in Chapter Five the Criminal Division’s review of the wiretap applications in Operation and Fast and Furious.

¹²⁴ By memorandum dated March 19, 2012, the Department now requires that supervisors in U.S. Attorney’s Offices review and approve applications to conduct electronic surveillance before the materials are submitted to the Department.

described below, the Operation Fast and Furious applications received minimal review in the U.S. Attorney's Office.

The OEO attorney assigned to handle the application coordinates with the prosecutor in the U.S. Attorney's Office any necessary changes or additions to the affidavit. After the affidavit is put in final form, the OEO attorney prepares a memorandum that summarizes and analyzes the relevant facts and legal issues pertinent to surveillance, and that discusses the application's compliance with the requirements of the statute. This memorandum is sent to the Deputy Assistant Attorney General who has been assigned to review the application, along with the agent's affidavit and a draft approval letter.¹²⁵ After the designated Deputy Assistant Attorney General authorizes the application, OEO transmits to the prosecutor an authorization letter that is included with the application filed in federal court. According to OEO guidance, most original applications require approximately one week to review and process from the time the affidavit is received.

The review process for wiretap applications at ATF during Operation Fast and Furious required the relevant field division to provide the draft affidavit to ATF Headquarters, where it was reviewed by the Office of Chief Counsel and the Office of Field Operations. The Office of Field Operation's review addressed administrative considerations such as whether resources were available to support implementation of the wiretap, and the Office of Chief Counsel's review addressed the legal sufficiency of the application. Upon completion of their review, the Assistant Director for the Office of Field Operations would send a memorandum to the Assistant Attorney General for the Department's Criminal Division requesting authorization to proceed with the application.¹²⁶

On February 5, 2010, MacAllister provided Hurley a draft of her affidavit. Numerous revisions were made over the next several weeks, and the application and affidavit were submitted to OEO on March 4, 2010. Similar to the applications for the tracking devices, the wiretap affidavit provided a detailed picture of the investigation conducted up to that date, including the numbers of firearms acquired by the ██████████ organization and specific examples of subjects' purchasing activity and firearms recoveries in the United States and Mexico. The affidavit also detailed the intercepted telephone calls the DEA had provided that connected ATF's subjects to DEA's drug trafficking

¹²⁵ Although the approval letter is in the name of the Assistant Attorney General, except in limited circumstances, such as with a roving wiretap, a Deputy Assistant Attorney General is authorized to approve the letter on behalf of the Assistant Attorney General. As a result, the Assistant Attorney General rarely reviews wiretap applications and generally only in those limited circumstances where approval by the Assistant Attorney General is required.

¹²⁶ The Department eliminated this requirement in June 2010.

investigation. MacAllister stated in her affidavit that she believed the facts contained in the document showed there was probable cause to believe the subjects had been and continued to be involved in violations of federal law.

As we did with respect to the evidence used in support of the tracking device applications, we asked Hurley whether agents could have relied upon the evidence used in the electronic surveillance affidavits to seize firearms from particular Operation Fast and Furious subjects. Hurley said that the probable cause used to obtain the wiretap did not equate to probable cause to seize every gun a subject bought. Similar to his statement about the evidence contained in the tracking device applications, Hurley said seizures would have to rely on a pattern of purchasing activity that fit the conspiracy.

With respect to the government's need for the wiretap, the affidavit stated that the technique was the only means of investigation that was likely to expose the overall scope and extent of the criminal organization being investigated. According to the affidavit, the government was not aware of any reliable cooperating defendant or confidential informant and did not believe the use of an undercover agent was viable because [REDACTED]

The affidavit also stated that physical surveillance had had limited value in the case, and that prolonged surveillance was likely to compromise the investigation. The affidavit said that [REDACTED]

The affidavit also stated that the execution of a search warrant would not be successful because it would compromise the investigation, would not identify co-conspirators, and would not be of significant evidentiary value because ATF did not believe [REDACTED]

With respect to interviews of subjects, the affidavit stated that these were unlikely to produce sufficient information about the identities of all individuals involved in the conspiracy or the disposition of sales proceeds, and would likely compromise the investigation.¹²⁷

¹²⁷ On February 5, 2010, Voth sent a memorandum, which Newell had approved, to McMahon requesting authorization to seek an order for a wiretap. [REDACTED] the memorandum stated, "[i]t is our belief that the interception of wire communication is the only investigative technique that has a reasonable likelihood to success [sic] in securing evidence needed to prove beyond a reasonable doubt that the target subjects and other [sic] not yet identified are acting as part of a firearms trafficking organization, are engaged in the straw purchase of firearms, and are engaged in the possession and distribution of firearms to Mexican Drug Cartels and are supplying these firearms in furtherance of drug trafficking crimes, and the laundering of monetary proceeds."

On March 5, 2010, the OEO attorney assigned to the application e-mailed Hurley a list of questions based on the initial review of the materials. The questions pertained to both technical and substantive issues. These included the need to indicate whether a particular source of information was reliable, how certain subjects and locations were identified, evidence that the targeted telephone number recently had contact with another “dirty” telephone, and whether any of the subjects had been arrested, interviewed, or were cooperating with law enforcement after firearms were recovered in their possession. Hurley, with MacAllister’s assistance, responded to the questions.

On March 10, 2010, OEO provided to a Deputy Assistant Attorney General (DAAG) in the Criminal Division a memorandum that summarized the application and affidavit, both of which were also provided. The DAAG approved the application that same day. Shortly thereafter, Hurley filed the application in federal court, the district court judge signed the order that day, and ATF began intercepting communications on March 16, 2010. In an e-mail to U.S. Attorney Burke advising him that the application had been approved, Hurley’s supervisor (Morrissey) stated that conducting electronic surveillance in a firearms case was “unusual” and “aggressive,” and that “[h]opefully we will do it more in the future, but [Hurley] is the trailblazer.” Burke replied to Morrissey and Cunningham, “Frickin’ love it!!”. Morrissey forwarded Burke’s message to Hurley and stated, “You’ve made the US Attorney happy.”

From March 15 to August 2, 2010, ATF and the U.S. Attorney’s Office submitted a total of nine wiretap applications in Operation Fast and Furious, two of which were requests to extend surveillance on particular telephone numbers after the 30-day authorization period expired.¹²⁸ There was limited management review of the applications within the ATF Phoenix Field Division and the U.S. Attorney’s Office. ASAC Gillett told us that it was possible he reviewed a draft of MacAllister’s first affidavit, but that he did not review the others filed during his oversight of the investigation. ASAC Jim Needles, who assumed oversight of the case in approximately June 2010, told us he approved only the final affidavit.

At the U.S. Attorney’s Office, Burke told us that he did not review the applications and there is no indication that Criminal Chief Cunningham did either. Hurley’s supervisor Morrissey told us that he reviewed the first draft application, but did not believe he reviewed any of the subsequent eight applications. In addition, some of the applications were reviewed by an

¹²⁸ We interviewed the OEO attorney who reviewed the Fast and Furious electronic surveillance applications and two of the three Deputy Assistant Attorney Generals who approved the applications on behalf of the Department. The third Deputy Assistant Attorney General was John C. Keeney, who passed away in 2011. We describe their review of the applications in Chapter Five.

attorney in the office's OCDETF section. This was the first case in which Hurley filed a wiretap application and he told us that the purpose of the review by this attorney was similar to the review conducted by OEO – that is, to review the application for legal sufficiency. We did not find evidence that anyone in these offices, or at the Department or ATF Headquarters, asked questions about what steps agents were taking to address the purchasing activity described in the applications as additional wiretaps were pursued.

Newell and Voth told us that they were frustrated with the time OEO took to review and approve the applications and attributed some of the time needed to complete the Operation Fast and Furious investigation to these purported delays. Voth also told us that he was frustrated with the time it took Hurley to send the application to OEO, and said Hurley was “ineffective and inefficient in the wiretap process.” Voth said that his experience with the U.S. Attorney's Office for the District of Minnesota was that it took approximately 2 weeks to get an application drafted and approved, and the surveillance initiated. Voth told us that in Phoenix it took anywhere from 6 to 8 weeks.

We reviewed records that documented the review process and found that with one exception, OEO did not take longer than 8 days to approve and return the Fast and Furious-related applications to the U.S. Attorney's Office, and in most instances took less time than the one week OEO estimates is typically needed to review applications. The one application that took longer than usual – approximately two weeks – sought surveillance authority for two telephone numbers and prompted questions from the OEO reviewer about the sufficiency of the evidence showing that one of the telephone numbers was being used in the furtherance of criminal violations.¹²⁹ We found the delay in obtaining approval for the first application was attributable to ATF and the U.S. Attorney's Office. As noted above, MacAllister provided Hurley a draft affidavit on February 5, 2010, but the materials were not sent to OEO until March 4, 2010, after revisions between ATF and the U.S. Attorney's Office.

Hurley told us that he provided Burke a briefing around March 11, 2010, that included information about Operation Fast and Furious and another case. He said the purpose of the meeting was to provide Burke a better understanding of firearms trafficking in Arizona. Hurley said with respect to Operation Fast and Furious that he would have mentioned the number of subjects and the pending wiretap application. He said the briefing also included a broader conversation about FFLs in Phoenix and the type of

¹²⁹ In response to complaints from ATF, DAAG Jason Weinstein contacted OEO personnel in May 2010 about the high priority of Operation Fast and Furious and arranged for expedited review of the applications. We further describe Weinstein's knowledge of Fast and Furious in Chapter Five.

cooperation they provide ATF, and some of the history of the relationship between ATF and the U.S. Attorney's Office. Hurley said that Burke did not raise any concerns about Operation Fast and Furious at this meeting, nor did management express concerns at any point about the conduct of the case.

Hurley updated Burke about the status of the initial wiretap in a memorandum dated March 23, 2010. The memorandum summarized the case to date and stated that the case was "a sensitive, ongoing OCDETF wire investigation" that targeted an individual who used straw purchasers to obtain "large quantities" of firearms to be trafficked to Mexico. According to the memorandum, the objective of the electronic surveillance was to "identify all of the major players in the conspiracy and discover the methods and means used to cross guns into Mexico." The memorandum stated that the first attempt was proving unsuccessful because it appeared the subject had stopped using the targeted cell phone. The memorandum also noted that the subjects had already purchased more than \$500,000 in firearms. Morrissey told us that Hurley also briefed him, Burke, and Cunningham around this time about how the first wiretap was not successful because the subject discontinued using the targeted cell phone shortly after ATF began intercepting calls.

We found no evidence that Burke, Cunningham, or Morrissey raised any questions in light of this memorandum about whether agents were seizing firearms or whether there was any effort to confront or arrest straw purchasers, or whether these kinds of measures should be taken to disrupt the ongoing trafficking activity that was creating a risk to public safety.

We asked witnesses whether the effort to obtain approval for and the use of the wiretaps affected decisions about approaching subjects or attempting to seize firearms. Several witnesses told us that it did. Gillett said the priority was to "get up on this wiretap and not blow any of these things or have this network shut down after this amount of effort." English told us that early in the case ATF had identified some telephone numbers used by subjects and that approaching them at that point might have caused them to discontinue using those cell phones, thereby making the electronic surveillance they anticipated conducting less effective.

The concern about subjects changing phones affected decision-making both before and after the wiretaps commenced. English also said that in her opinion the concern about compromising the electronic surveillance sometimes took priority over attempts to make seizures. Several other agents who worked on Fast and Furious at various times also told us that they believed the fear of "burning the wire" drove decision-making about whether to approach subjects and to seize guns.

In contrast, MacAllister said the use of the wiretaps did not influence decision-making about whether to approach subjects. She said that for her the

decision to not approach subjects was based on past experience that the tactic simply did not work. With respect to not seizing firearms, MacAllister told us those decisions were driven by the lack of probable cause to make seizures. Voth told us that the decision to not approach subjects was due to the belief the tactic did not work, not the fear that it might affect the wiretaps.

C. Investigation Continues to Uncover Significant Trafficking Activity

1. Subjects' Purchasing Activity Continues

While Group VII was seeking and obtaining OCDETF designation and wiretap authority for Operation Fast and Furious, several subjects in the investigation continued to purchase firearms at a remarkable pace. According to ATF records, Patino purchased a total of 99 firearms in the month of February for over \$76,000, all paid in cash. This included 40 AK-47 style rifles purchased from FFL1 over a 3-day period and a single Barrett .50 caliber rifle for over \$9,000. Patino's purchasing increased in March: 197 firearms for over \$143,000 in cash, including 63 AK-47 style rifles purchased from FFL1 over a 3-day period and 2 Barrett .50 caliber rifles for over \$9,000 each. Patino spent another \$71,000 in April for a total of 35 firearms, including 4 more Barrett .50 caliber rifles, and \$43,000 in May for a total of 69 firearms.

Patino was not alone. Montelongo paid nearly \$6,000 for 10 firearms in February, and then over \$60,000 for 53 firearms in March, including 2 Barrett .50 caliber rifles purchased for over \$18,000. ATF records indicate that Moore did not purchase any firearms in January or February, but spent over \$40,000 in March on 21 firearms, including 3 Barrett .50 caliber rifles. Jaime Avila spent over \$17,000 in the months of April and May for a total of 21 firearms. Other significant purchasers included Hercegovac, identified by ATF in November 2009, who spent over \$18,000 on two Barrett .50 caliber rifles in March; and Julio Carrillo, who also purchased two Barrett .50 caliber rifles for over \$18,000 in March just days after being identified in the investigation.

In sum, Operation Fast and Furious subjects spent over \$608,000 for more than 600 firearms from February 1, 2010, to May 31, 2010. As in the prior months, the firearms were primarily cartel "weapons of choice," paid for in cash, and bought primarily from FFL1. In addition, over 83 firearms purchased by Operation Fast and Furious subjects were recovered in the United States and Mexico during this period.

With the exception of the firearms seizure on the Tohono O'odham Indian reservation described earlier, the investigative tactics used in Operation Fast and Furious during February to May 2010 did not include any overt action, such as subject interviews, seizures, search warrants, or arrests, despite the

mounting evidence obtained through the wiretaps, surveillance, recoveries, and ongoing purchases.

MacAllister maintained that neither seizures nor arrests were possible without an admission from the subject that the firearms were bought for a non-prohibited third party. She told us that based on her regular communications with Hurley about the case, as well as with her supervisors, she was confident that there was not enough evidence to prosecute any of the subjects. MacAllister said concerns about violating subjects' Second Amendment and Fourth Amendment rights were raised repeatedly in conversations about seizing firearms. However, she also acknowledged that it was a tactical decision not to take steps to obtain the piece of evidence she believed was necessary to seize firearms, that is, an admission.

Newell and Voth told us that ATF wanted to seize firearms, but agents were constrained by the legal threshold imposed by the U.S. Attorney's Office with respect to establishing a subject's specific intent to purchase the firearms for a non-prohibited third party, an issue we discussed earlier in Section IV. Voth told us that he did not consider the goal of dismantling the Celis-Acosta trafficking group mutually exclusive of making a lawful arrest or a seizure when the opportunity arose and that such opportunities existed but were not pursued in Operation Fast and Furious because of Hurley's legal advice. Voth said agents did not call Hurley during each surveillance to determine whether a lawful seizure could be attempted, but said this was unnecessary because the sets of circumstances agents observed were consistent with those that Hurley had previously opined were legally insufficient for seizure. Voth told us that he grew increasingly frustrated during the investigation with ATF's inability to seize firearms based on Hurley's legal guidance, and that he would have seized firearms in Operation Fast and Furious regardless of how it affected the strategy of trying to dismantle the larger organization.

Contrary to these claims, Voth wrote the following in an April 3, 2010, e-mail to Hurley and Gillett that he told us was intended to convey his frustration with getting the wiretaps approved:

I hope this e-mail is well received in that it is not intended to imply anything other than that the violence in Mexico is severe and without being dramatic we have a sense of urgency with regards to this investigation. Our subjects purchased 359 firearms during the month of March alone, to include numerous Barrett .50 caliber rifles. I believe we are righteous in our plan to dismantle this entire organization and to rush in to arrest any one person without taking into account the entire scope of the conspiracy would be ill advised to the overall good of the mission. I acknowledge that we are all in agreement that to do so properly requires patience and planning. In the event however that there is anything we can do to

facilitate a timely response or turnaround by others we should communicate our sense of urgency with regard to this matter.

Voth also told us that he could not recall concerns being raised about the number of guns being purchased. He also said that despite there not being any doubt by the end of 2009 that subjects like Steward were straw purchasers, taking action against them would not have addressed the larger trafficking by the organization that was the target of the investigation.

As we detail below, we found little contemporaneous evidence to support Voth's claim that he was in favor of making seizures during the course of the Operation Fast and Furious investigation, or that he grew increasingly frustrated by ATF's inability to do so in that case. To the contrary, the great weight of the evidence we reviewed indicated that Voth's April 3 e-mail to Hurley and Gillett accurately reflected the strategy in Operation Fast and Furious to defer seizing firearms and arresting subjects, an approach that did not include any steps to slow or disrupt the illegal firearms trafficking and that inadequately considered the potential harm to the public as the case progressed.¹³⁰

Indeed, Newell told us that he was never presented with a concern about the lack of seizures, and that he in fact was comfortable during the investigation with its progress. Newell also said that in retrospect he would have liked to have been provided more specific information about surveillances and that he has since reviewed some reports from the case that raised questions in his mind about why there was no interdiction. However, he said this issue was not raised in briefings he received from Voth and Gillett during the pre-indictment phase of the investigation and that he believed, based on representations he said were made to him by Gillett and Needles, that agents were seizing firearms at every opportunity they legally could. Gillett, who supervised the case until April 16, 2010, told us that seizing firearms was not

¹³⁰ In one of the few communications we identified where Voth addressed probable cause to seize, he took exception to an agent in another office who, in connection with an 80-gun seizure that included 57 from Fast and Furious, asked Voth, "[a]re you planning to stop these guys any time soon? That's a lot of guns that have been seized. Are you just letting these guns walk?" Voth replied, "[h]ave I offended you in some way? Because I am very offended by your e-mail." Voth stated that without probable cause and concurrence from the U.S. Attorney's Office, "it is highway robbery if we take someone's property." He also described a recent incident (not related to Operation Fast and Furious) in which agents stopped an individual after he purchased a .50 caliber rifle for over \$10,000. After a field interview, the prosecutor (Hurley) told the agents there was not probable cause to seize. Voth stated, "any ideas on how we could not let that firearm 'walk' . . .?" Voth added, inaccurately, "we have stopped 'some' of these guys and seized hundreds (plural) of firearms in this case to date." We did not find this e-mail persuasive evidence that Voth was frustrated with the conduct of Operation Fast and Furious.

aggressively pursued early in the case, and that no one ever came to him and said that agents needed to be more aggressive. In fact, as we described earlier, agents were not seizing guns at all during that period with the exception of the February 2010 seizure on the Tohono O'odham Indian reservation. Additional seizures were not made until June 2010, after Needles began supervising the case.

Hurley said he primarily spoke to MacAllister and co-case agent English about the case, and occasionally to other agents from Group VII. Hurley said he recalled having conversations with agents about what they anticipated observing during an upcoming surveillance. Hurley told us that during these meetings, he advised the agents about what kinds of evidence would be required to both seize the firearms and insure that the firearms would ultimately be forfeited to the government. He said that probable cause was not discussed during those meetings because the evidence to support probable cause might not be sufficient to insure the firearms could be forfeited.

Hurley also said that with one exception, he could not recall having conversations with agents as surveillance was being conducted. He told us that whether to approach a subject during surveillance was a tactical call left to the judgment of the agents at the scene.¹³¹ Hurley also said he could not recall any conversations with ATF agents or managers about whether to change tactics in Operation Fast and Furious because of, for example, firearm recoveries in Mexico, nor could he recall hearing any complaints about how the investigation was being conducted, other than some frustration about the time it took to get the wiretaps approved. We did not find any evidence that contradicted Hurley.¹³²

Morrissey, Hurley's supervisor, told us that it was his expectation and understanding that ATF agents would seize firearms during Operation Fast and

¹³¹ Hurley said he recalled one specific instance where agents contacted him during a traffic stop of a vehicle ATF personnel conducted in August 2010. The stop was conducted in order to question the driver about a .50 caliber rifle that he had just purchased. Hurley said there was insufficient probable cause to seize the weapon and told us that ATF agents at the scene, which included MacAllister, agreed. Voth told us that he told Hurley that he disagreed with Hurley's assessment; he said he thought that the \$13,000 price paid for the weapon, combined with the knowledge that the buyer did not have a job, was sufficient to give the agents probable cause to seize it.

¹³² After reviewing a draft of this report, Voth submitted examples of actions he took that he asserted illustrated his frustration with Hurley's legal advice. As an example, Voth stated that in April 2010, after agents learned that Patino was on food stamps, he asked the U.S. Attorney's Office whether Patino could be arrested for fraud in light of the hundreds of thousands of dollars he had spent on firearms. He stated the office responded that an arrest could not be made. Voth said he made the same request of the Arizona Attorney General's Office and the U.S. Department of Agriculture, and received the same response.

Furious whenever possible, and that he was not aware of any instance where Hurley rejected an ATF agent's request to seize a firearm, with the exception we described in footnote 131. Morrissey also told us that in the summer of 2010 he began to question why ATF was apparently failing to identify how firearms were getting to Mexico, which he understood to be an investigative goal of the case. He said he discussed this with Hurley late in the summer and that this led to the decision by the early fall to bring the case to a conclusion.

2. ATF Conducts Surveillance of Straw Purchases and Transfers

Group VII conducted surveillance of firearms purchases by Operation Fast and Furious subjects on approximately 25 occasions from February 1, 2010, to May 31, 2010, and of these, agents observed firearms being transferred to third parties on 10 occasions. Subjects purchased a total of 190 firearms during these surveillances, the vast majority of which were bought by Patino. Despite the accumulation of even more substantial evidence that the subjects were engaged in trafficking firearms, the only ATF-initiated seizure of firearms during this 4-month period, as noted above, was the February 20, 2010, 41-gun seizure on the Tohono O'odham Indian reservation. We describe below the circumstances of several surveillances during this period that did not result in seizures.

On March 16, 2010, ATF received information that Patino inquired with FFL2 about purchasing a .50 caliber rifle. Agents conducted surveillance and were able to observe Patino exit the store with Moore, another Operation Fast and Furious subject. Moore, who actually bought the rifle and completed the Form 4473, was carrying the case containing the rifle. The case was placed in Patino's vehicle and agents conducted surveillance as the two drove to FFL1. There, agents observed Patino leave the store three times carrying several boxes containing AK-47 style rifles and place them in his vehicle. As agents maintained surveillance on Patino and Moore after departing FFL1, they were advised that Acosta was nearby and that Patino and Moore might be going to his location. Agents in fact did observe the two go to that location and pull into a parking lot. Agents observed Patino and Moore at the rear of Patino's vehicle with the hatch open. Patino and Moore met with several unknown individuals who appeared to be looking at and removing some of the boxes from Patino's vehicle, and placing them into other vehicles. Agents also learned that Celis-Acosta was at the location. Agents did not follow any of the other vehicles that left the parking lot, and instead maintained surveillance on Patino's vehicle.

Agents continued surveillance as he drove to another location. At some point, agents were able to observe boxes inside Patino's vehicle obscuring the view of the rear window. Agents followed the vehicle to a location where, despite some difficulties, they were able to get a quick view of several unknown individuals at the rear of Patino's vehicle, which was backed into a driveway

near a garage. Agents tried to follow Patino's vehicle when it left, but soon lost sight of it. Agents subsequently went to Celis-Acosta's house and returned to the house where Patino's vehicle had backed into the driveway and gathered license plate numbers of several vehicles parked nearby. Agents also obtained the Form 4473s of the FFL1 purchase, which indicated that Moore had purchased 5 AK-47 style rifles for \$3,000 cash, and Patino had purchased 10 identical firearms for \$6,000 cash.

Voth summarized this incident in an e-mail to Gillett on March 19 to update him on the week's events. The e-mail stated that since March 15, Operation Fast and Furious subjects had purchased 105 firearms from local FFLs, including 3 Barrett .50 caliber rifles. Similar to other communications informing Gillett of activity in the case, Voth did not express any frustration about not being able to seize any of the purchases and transfers being observed.

On April 14, 2010, FFL1 contacted ATF to advise that Patino had made a partial payment of \$18,000 cash for the purchase of three .50 caliber rifles. ATF requested that FFL1 segregate Patino's down payment from the other currency on hand and place it in a sealed plastic bag. The following day, MacAllister and an officer with the Phoenix Police Department arrived at FFL1 with a police dog trained to detect the odors of chemicals associated with certain narcotics. According to the ATF report, the dog detected the suspicious odor in a cabinet that contained the currency Patino used for the partial payment. Also on April 15, Patino paid in cash the remaining \$9,740 balance.

On April 16, 2010, ATF agents conducted surveillance at FFL1 of Patino and his girlfriend, who also was present on April 14 and who carried the purse from which Patino withdrew the cash used for the partial payment. Agents observed Patino enter FFL1 and then exit a short time later to load into his vehicle the three "pelican cases" that contained the .50 caliber rifles. Agents maintained surveillance of Patino after he departed FFL1 and observed him transfer at least one of the pelican cases to a vehicle registered to Celis-Acosta. ATF agents discontinued surveillance of Patino and followed this second vehicle to a mobile home, where at least one pelican case was observed being moved from the vehicle to the residence. The owner of the residence had been arrested in April 2010 with Celis-Acosta and another individual during a traffic stop.

We asked MacAllister and Hurley why, given all that was known about Patino at this time in the investigation, ATF did not interdict the three .50 caliber rifles he purchased on April 16. On that day, ATF knew that since November 2009, Patino had purchased over 490 firearms for over \$380,000, and ATF knew that at least 63 of these firearms had already been recovered in Mexico and the United States, including 37 of those seized on the Tohono O'odham reservation.

MacAllister told the OIG that “what we believe and what we can prove without [Patino’s] help are two different things.” She said that ATF began using a police dog in March 2010 trained to detect the odor of certain chemicals associated with narcotics to get the agents closer to establishing probable cause to seize firearms. However, she also told us that at this time in the case ATF was still not seizing weapons without admissions – admissions that for tactical reasons agents were not seeking. MacAllister said that based on her conversations with the U.S. Attorney’s Office about the case, she did not believe at the time of Patino’s April 16 purchase that there was sufficient probable cause to seize firearms and prosecute the subjects despite the additional circumstantial evidence established by the dog alert.

Hurley told the OIG that he could “make the argument” that there was probable cause to seize the .50 caliber rifles, but that he did not know about the sale until after it happened and that agents had not asked him for contemporaneous advice about whether they could seize the guns.

We also reviewed several examples of ATF surveillances conducted after consensual recordings [REDACTED] that indicated an Operation Fast and Furious subject was being asked to purchase firearms for a third party. Agents conducted surveillance of the subject in these instances and in some cases observed a transfer of firearms between the subject and a third party, or observed activity indicating that a transfer took place even though the firearms themselves could not actually be seen (for example, the subject’s vehicle parked with its trunk backed up to the trunk of the third party’s vehicle, a brief period passed, and the third party departed the location). However, the surveillance teams did not seize any firearms observed during these surveillances, did not conduct overnight surveillance of locations where firearms were brought, and did not conduct any traffic stops of vehicles to identify the third parties who were observed receiving or were believed to have received firearms.

As an example, on April 27, 2010, agents conducting surveillance of Patino [REDACTED] Agents then observed Patino drive directly to FFL1 and, after leaving the store, load 10 pistol cases into his vehicle. An agent entered the store after Patino departed and obtained copies of the Form 4473s and receipts. They showed that Patino had purchased 10 FN Herstal pistols for over \$11,000, paid for in cash. Agents continued to conduct surveillance on Patino and observed him meet with another individual and transfer all 10 of the pistol cases to that individual’s truck. Patino was also observed giving the individual an unknown quantity of cash. Agents discontinued surveillance of Patino after the vehicles left the location, and attempted to follow the truck. According to the investigative report, the individual drove in a manner that made it appear that he was trying to evade surveillance, and surveillance was

discontinued. The truck was observed about 20 minutes later at Patino's residence.

[REDACTED]

Agents conducting surveillance subsequently observed Patino and another Operation Fast and Furious subject, Jacob Montelongo, at FFL2. Patino purchased a .50 caliber rifle and Montelongo purchased six FN Herstal pistols.

[REDACTED]

Agents subsequently observed a vehicle previously identified driving near the residence park in Patino's driveway. The vehicle departed approximately one minute later. Agents briefly followed the vehicle, but terminated surveillance "due to counter surveillance measures being deployed."

In late May, agents obtained through investigative efforts uncorroborated information that one of the third parties who had ordered and received firearms from a straw purchaser was a convicted felon. The day after agents obtained this information, the wiretap and physical surveillance indicated that this individual had ordered additional firearms and made arrangements for their delivery. Yet the agents did not take any enforcement action against the individual on that day.¹³³

In another example, on May 20, 2010, [REDACTED]

[REDACTED] Voth told us that that they discussed the situation with Hurley and he agreed there was sufficient probable cause to seize the firearms and that the plan was to make the seizure after Patino transferred the guns to the third party. MacAllister told the OIG that agents planned to "at least stop" the vehicle once it left the parking lot, but said she did not remember if she

¹³³ As we describe in Section I.H. below, ATF agents confirmed the individual's criminal status on June 4, 2010, by reviewing court documents and conducted a traffic stop of him on that day. However, the guns that the felon had ordered from a straw purchaser in late May were not in his car when he was stopped, so ATF agents never seized them.

talked with Hurley in advance of the surveillance. As we noted earlier, Hurley told us that he could not recall any instances before June 2010 where agents asked him in advance of surveillance whether there was probable cause to seize firearms.

The surveillance team monitored the parking lot where the transfer was expected to occur and observed Patino provide to the third party what was believed to be the three firearms. After the third party's vehicle left the parking lot, the surveillance team attempted but was unable to locate it despite receiving a description of the vehicle over the radio and information about its general direction.¹³⁴

D. Tensions in Group VII

Just prior to and during this time period, tension developed within Group VII that some witnesses told us was attributable to the conduct of Operation Fast and Furious and that others said was caused by personality conflicts. By March of 2010, several experienced agents had been added to Group VII. Most of these agents came to Phoenix from other offices in response to a national announcement by ATF seeking voluntary transfers to offices along the Southwest Border to work on firearms trafficking investigations. The first of the new agents to report was John Dodson, who joined Group VII in the first week of December 2009. Dodson was followed by Olinda Casa in late December 2009, Mark Sonnendecker in mid-February 2010, and Larry Alt in early March 2010. In addition, one agent already working in Phoenix and another who was detailed to Phoenix from Tucson began providing support to Group VII and the Operation Fast and Furious investigation in March 2010.

The new agents had varying degrees of involvement with Operation Fast and Furious, but were uniformly critical of the decisions to not approach subjects and to not seize firearms. They told us that in their experience approaching suspects was an effective tactic for gathering evidence about others involved in firearms trafficking, including the financiers of the weapons purchases. The agents said they did not understand how conducting surveillance of purchases and transfers without taking any overt enforcement action was a viable, or responsible, approach to developing the case.

¹³⁴ Despite the failure to seize the firearms [REDACTED] [REDACTED] Voth reported the incident as “[g]ood news” in an e-mail to ASAC Needles the next day providing an update [REDACTED] Voth [REDACTED] reported that agents observed the transfer take place. The e-mail did not mention any failed effort to seize the firearms.

Dodson told us that his frustration with the case began within weeks of his arrival in Phoenix in December 2009, during one of the first surveillances he assisted. Dodson said he and Casa conducted surveillance of a purchase at FFL1 by one of the subjects who had already made dozens of earlier purchases, and were prepared to interdict and seize the firearms.¹³⁵ Dodson said he was instructed to “stand down” and not take any enforcement action. Dodson said he could not recall who gave him this instruction, but that it would have been Voth, MacAllister, or English. Dodson told us that during the time he participated in surveillances for Operation Fast and Furious, which ended in approximately July 2010, all he did was watch and sometimes photograph the subjects making purchases as well as some transfers of firearms.

Dodson told us that he asked Voth, MacAllister, or English on several occasions why firearms were not being seized in the case. According to Dodson, he was told that he did not understand gun trafficking in Phoenix, that they did not have to explain the approach to him, and that they knew how to handle the case. Dodson said that he became so frustrated with the case by approximately May 2010 that he confronted MacAllister in the common area of the Group VII office space and asked her whether she was prepared to attend an agent’s or law enforcement officer’s funeral. Dodson said that either MacAllister, English, or Voth responded to this and other statements he made critical of the case by saying something similar to, “if you’re going to make an omelet, you’ve got to scramble some eggs,” which Dodson interpreted to mean the ends justify the means. MacAllister told us that she “vaguely” recalled Gillett saying something like that during a group meeting, but that she thought it was in response to a comment by Casa. MacAllister added that she could not remember to what Gillett was referring, but also said she agreed with the sentiment that ATF needed to focus on dismantling organizations and not simply on the straw purchasers. With respect to Dodson asking whether she was prepared to attend an agent’s or law enforcement officer’s funeral, MacAllister said she did not specifically recall this but did recall him making a statement about being able to stand in front of Congress and explain the conduct of the case. Alt said that he also remembered Gillett saying something to that effect and that it was said in response to a comment by Dodson. Gillett, however, told us that no one, including Dodson, ever complained or raised concerns about the tactics in the case until after the shooting death of Border Patrol Agent Terry.¹³⁶

¹³⁵ Casa told us that the first surveillance he participated in was in March 2010. We reviewed the Operation Fast and Furious surveillance reports and found that Casa and Dodson first conducted surveillance together on February 15, 2010.

¹³⁶ During the course of our review of Operation Fast and Furious, several witnesses told us about an investigation Dodson conducted in which he sold firearms in an undercover
(Cont’d.)

Casa shared Dodson's criticism of the case and told us that he recalled frustration "boiling over" in March 2010 when it became evident to him that ATF was "letting all these guns out" despite sufficient evidence to take enforcement action. Casa said he witnessed Dodson's statement about attending the funeral of a law enforcement officer and told us that there were daily conversations about how no action was being taken to stop the purchases and that ATF was "enabling traffickers." Casa told us that he had specific conversations with Voth and MacAllister on the subject.

Casa also told us that on several occasions he called MacAllister or Voth during surveillance, told them that a subject had just purchased some firearms, and asked whether he should have Phoenix Police Department officers attempt to interdict the subjects. Casa told us that the response on each occasion was negative, and that when he questioned the decision the next day, he generally was not provided an explanation. Casa said that he requested and was denied permission to conduct a stop or seizure on approximately six occasions. He said he was never told or given the impression that there was not probable cause to make the requested seizures. Casa said

capacity to the subject of the investigation. According to investigative reports we reviewed, in late April 2010, Dodson became aware of allegations that ██████████ was paying others to purchase firearms on his behalf from a cooperating defendant. On two occasions in May, an informant working with Dodson made straw purchases of a total of six firearms for ██████████ at ██████████ request. In late May, Dodson proposed a plan to Voth whereby Dodson would act in an undercover capacity as a straw purchaser and provide firearms to ██████████. The plan explicitly provided that ██████████ would be allowed to walk with the firearms. Voth told us he opposed the plan, which Needles approved.

On June 1, 2010, Dodson purchased six AK pistols from two licensed gun retailers then sold the six pistols to ██████████. After the sale was complete, other ATF agents followed ██████████ to a gated storage facility and then terminated their surveillance. In August 2010 ██████████ told Dodson he was no longer in the business of obtaining firearms from straw purchasers and reselling them for profit. In October 2010, Dodson met with ██████████, identified himself as an ATF agent and interviewed him, and ██████████ told Dodson he no longer possessed the six AK pistols. Dodson then closed the case and ██████████ was not arrested.

Dodson told the OIG that he and other agents had joked that ATF should sell the guns directly to ██████████ and then decided to propose the operation. According to Dodson, he and the other agents thought that the proposal would be rejected and that when the managers saw such a plan in "black and white" they would be shocked into realizing what they were doing in Operation Fast and Furious. Dodson also told us that after his plan was approved he reluctantly went forward with it and that he still regretted delivering the AK pistols and letting them "walk."

As noted in Chapter One, the OIG is completing its investigation of an allegation that Department employees provided to a member of the media a copy of the May 2010 ██████████ undercover proposal memorandum. Shortly after this investigation was initiated, Burke admitted to the OIG that he provided the memorandum to a reporter at the reporter's request.

he stopped assisting Operation Fast and Furious in approximately May 2010, calling it a “happy divorce” because of his impression that Voth and MacAllister no longer wanted him working on the case.

Other agents told us they shared Dodson’s and Casa’s concerns, but did not raise them to Voth or MacAllister. They told us that many of the agents detailed to Phoenix as part of the Gun Runner Impact Team (GRIT) initiative in May 2010 also disagreed with what appeared to be a strategy to not interdict and seize firearms.¹³⁷ One GRIT agent told us that he was not aware of a single GRIT detailee who agreed with how the case was conducted, and said there was consensus that it was not how ATF operates. This agent said that MacAllister told him firearms were not being interdicted in the case because the subjects in Phoenix were different than in other parts of the country. We also interviewed an officer from the Phoenix Police Department who participated on some Operation Fast and Furious surveillances. He told us that he recalled agents starting to complain in the spring of 2010 about firearms not being interdicted. The officer described the issue as a “hot topic” that “everybody was talking about.”

The investigation, however, was not without supporters within ATF Phoenix. The two agents already assigned to Phoenix who started to work on Operation Fast and Furious in March 2010 supported the strategy in the case to develop a prosecutable case against the trafficking organization. These agents told us that they were familiar with the challenges of straw purchaser investigations, including the Phoenix U.S. Attorney’s Office’s resistance to prosecuting such cases and the potential ineffectiveness of confrontational interviews. One agent also told us that it was well known by agents in the ATF Phoenix office that the U.S. Attorney’s Office imposed a very high legal threshold for interdictions. On the other hand, this agent also told us that she understood it was a strategic decision in this case to forego interdictions and arrests of straw purchasers because the goal of the case was to also prosecute individuals higher-up in the organization.

The agents who supported the investigation also described a dysfunctional work environment in Group VII, but these agents attributed the discord to conflicts some agents had with Voth, MacAllister, and English that reflected both personality differences and disagreements over work assignments, but not disagreements about tactics.

¹³⁷ Under the GRIT initiative, ATF sent temporary “surges” of agents to Southwest Border offices to conduct firearms trafficking cases. Group VII received several of the GRIT detailees sent to Phoenix and used them briefly to assist with surveillance on Operation Fast and Furious.

Voth told us that disagreements about how the wire room would be staffed prompted him to send an e-mail to Group VII on Friday, March 12, 2010, calling for a group meeting. The e-mail stated:

It has been brought to my attention that there may be a schism developing amongst the group. This is the time we all need to pull together not drift apart. We are all entitled to our respective (albeit different) opinions however we all need to get along and realize that we have a mission to accomplish.

I am thrilled and proud that our Group is the first ATF Southwest Border Group in the country to be going up on a wire. On that note I thank everyone for their efforts thus far and applaud the results we have achieved in a short amount of time.

. . .

We need to resolve our issues at this meeting. I will be damned if this case is going to suffer due to petty arguing, rumors or other adolescent behavior.

I don't know what all the issues are but we are adults, we are all professionals, and we have an exciting opportunity to use the biggest tool in our law enforcement toolbox. **If you don't think this is fun you're in the wrong line of work – period!** This is the pinnacle of domestic law enforcement techniques. After this the tool box is empty. Maybe the Maricopa County jail is hiring detention officers and you can get paid \$30,000 (instead of \$100,000) to serve lunch to inmates all day.

. . .

We need to get over this bump in the road once and for all and get on with the mission at hand. This can be the most fun you have with ATF, the only one limiting the amount of fun we have is you!

(Emphasis in original.) This meeting held the following Monday deteriorated into a yelling match between two of the agents about work schedules. According to the individuals who attended the meeting, concerns about the lack of seizures or arrests were not discussed.

We asked Voth, MacAllister, and English about their knowledge of any concerns raised by Group VII agents regarding the conduct of Operation Fast and Furious with respect to seizing firearms. MacAllister said Dodson told her he wanted to interdict more firearms and also told her that there would be a Congressional inquiry into the investigation. She said that in response she told Dodson about the challenges agents in Phoenix faced with straw purchasers and what she felt was necessary to establish probable cause to seize firearms. MacAllister said she also told Dodson that she would be willing to consider suggestions he might have about developing probable cause, but did not recall

him offering any. MacAllister said she did not tell Voth or Gillett about Dodson's statements.

MacAllister also said she recalled two particular instances involving Casa in which the conduct of the case was at issue. The first occurred on a surveillance on April 27, 2010, during which a dispute arose between Casa and English about the wisdom of making a traffic stop of a subject who had just purchased some firearms. The second instance related to Gillett's "scrambled eggs" comment. MacAllister recalled that Casa was upset after the meeting with the sarcasm of the comment. However, as we noted above, MacAllister said she could not recall what Gillett was responding to in making this comment. With respect to Group VII dynamics, MacAllister acknowledged to us that there were personality clashes.

English also told us that she recalled Dodson stating to MacAllister in March 2010 that the office might have to eventually answer to Congress about the conduct of the case, and understood that Dodson felt they should be seizing firearms. English said that she recalled MacAllister responding that there was insufficient evidence to seize firearms at that point but that she was open to any suggestions he might have. English told us that she was not aware of anyone other than Dodson raising concerns about seizing firearms.

Voth told us that no agent in Group VII complained to him about the lack of seizures, nor did he recall MacAllister bringing any such complaints to his attention. Voth also told us that he did not recall any conversations in which – as claimed by Dodson and Casa – he told an agent that he did not have to provide an explanation regarding the goals or strategy of the case.

We reviewed the e-mail communications of the Group VII agents to see if the agents who told us they raised oral concerns about the conduct of the case to Voth and MacAllister also made any written complaints. We did not identify any e-mail communications of this nature sent to Voth or MacAllister, nor did we identify any e-mailed complaints or concerns about the case regarding the lack of seizures to the SAC or to the ASAC. Newell and Gillett both told us that they were not aware of any such concerns raised by agents during the conduct of the investigation.

By approximately May 2010, several of the agents who had worked on Operation Fast and Furious when they first joined Group VII ceased having significant involvement with the case and began to work on other Group VII investigations. The investigative work on Operation Fast and Furious from that point forward was handled primarily by MacAllister, English, the ICE agent detailed to Group VII, and the two Phoenix agents who joined the group in March 2010. The Phoenix Police Department continued to provide substantial assistance with physical surveillance. The GRIT agents assigned to Group VII in May 2010 provided some early surveillance support, but both Voth and

MacAllister told us that this was ineffective because of the older equipment the agents were provided and their lack of familiarity with the Phoenix area. These GRIT agents consequently were assigned to other cases.¹³⁸

E. ATF Phoenix Field Division Drafts an Exit Strategy in April

In March 2010 Deputy Director Hoover received a detailed briefing about Operation Fast and Furious that left him sufficiently concerned about the size of the case to require that the Phoenix Field Division draft an exit strategy that established a time line for completing the investigation. As we describe in Chapter Five, Hoover's direction was communicated to Newell by Deputy Assistant Director McMahon.

Newell did not provide the exit strategy until April 27, when McMahon e-mailed Newell about the request. Newell replied to McMahon:

I have already discussed an exit strategy and will have that today as well. The issue has been getting a rolling T-III approved. We are getting great conversation on the wire we [sic] flip the switch but only for a couple of days due to the delays in getting the approvals and the pre-paid phone issue. I don't like [Headquarters] driving our cases but understand the "sensitivities" of this case better than anyone. We don't yet have the direct link to a DTO that we want/need for our prosecution, the T-IIIs are our best shot. Once we establish that link we can hold this case up as an example of the link between narcotics and firearms trafficking which would be great on a national media scale but if the Director wants this case shut down then so be it.

Newell forwarded this e-mail to Douglas Palmer, the acting ASAC for Group VII, and stated:

Do not forward. Keep this between us. My response speaks for itself but I too have been getting close to asking for an "exit strategy" on Fast and Furious. At some point, regardless of the T-

¹³⁸ In late summer 2010, Dodson was detailed to Group II and ceased having involvement with Operation Fast and Furious. Dodson was subsequently assigned to the FBI's Joint Terrorism Task Force in Phoenix in October 2010. We did not investigate as part of this review whether these personnel moves were in retaliation for Dodson raising concerns about the conduct of Operation Fast and Furious, although the OIG is investigating other issues involving possible retaliation against Dodson. As we indicated in Chapter One, on January 27, 2011, Sen. Grassley's staff brought Dodson's concerns to the attention of the Office of the Inspector General (OIG) after Dodson indicated that he was unsuccessful in his efforts to contact our office. Dodson made a significant contribution to bringing to light the flaws in Operation Fast and Furious that are described in this report.

III issue, we need to take action just because of the amount and type (.50 cal, 8mms, etc.) of guns being purchased. Get with Dave [Voth] and start planning a rough timeline of when to seek either Grand Jury subpoenas for some of the “weak links” in this case (young female straws who bought early on), etc. I foresee us taking enforcement action in June/July so that gives them another 60-90 days. I’m not sure I can keep [Headquarters] at bay any longer than that.

Newell’s e-mail did not indicate that, as he asserted to us, the lack of enforcement action to date was attributable to legal obstacles erected by the U.S. Attorney’s Office. In fact, Newell’s e-mail indicated that the lack of action was attributable to issues with the wiretap, which as we described earlier, related to delays in getting the applications reviewed and approved.

Voth drafted an exit strategy that same day in just a few hours. MacAllister told us that she did not help Voth draft it and could not recall what input she provided. She also said that she wondered why it had been requested, but did not ask and was not told. There is no indication that Voth consulted with Hurley on the strategy.

Newell e-mailed the completed document to McMahon that same day and sent it to Burke as an “FYI.” Newell also went to the airport that night to meet with Burke, who was departing for a trip to Mexico City. Newell spoke to Burke about ATF’s concerns about the wiretap delays, and followed up with an e-mail two days later stating, “Need help with OEO!!”¹³⁹ As we noted earlier, just a few days later, ATF’s concerns received the attention of Deputy Assistant Attorney General Jason Weinstein, who contacted OEO personnel in early May about the high priority of Operation Fast and Furious and arranged for expedited review of the applications. We further describe Weinstein’s knowledge of Operation Fast and Furious in Chapter Five.

According to the exit strategy prepared by Voth, the goal of the case was to intercept conversations of Celis-Acosta engaging in firearms trafficking with known and unknown subjects. The document described Patino and the other subjects as the “lowest rung on the preverbal [sic] criminal firearms trafficking organizational ladder,” and stated that if Patino was arrested for the firearms he purchased to that point, “we will only minimally impact the organization before Patino is replaced by another member of the organization.” The document stated that without the actual oral communications showing that Celis-Acosta was directing the activities of Patino and others, there was only circumstantial evidence. However, the document also stated that “every call we

¹³⁹ However, as we noted previously, our review indicated that OEO had responded to the U.S. Attorney’s Office in a timely manner.

have intercepted thus far [REDACTED]

The exit strategy document also described some of the frustrations with the wiretaps, such as the interrelated issues of the targets regularly switching telephones and the perceived delays in getting the wiretap applications approved. In addition, the document described the difficulty in identifying and tracking the financial source for the organization and noted that subjects had purchased over \$900,000 in firearms during a 6-month period. The document said the financial component of the investigation was moving slowly because of the time required to obtain financial records. The document did not describe any efforts to seize firearms or arrest subjects, or any frustration about the inability to take such enforcement action. To the contrary, the document reaffirmed the strategy established in December 2009 to defer overt action as additional evidence was gathered.

The exit strategy memorandum included 30-, 60-, and 90-day goals, but stated that the 90-day goal appeared reasonable. The 90-day goal anticipated intercepting communications of a member of a drug trafficking organization within Mexico who tied that organization to the firearms trafficking conspiracy, and securing indictments against the subjects of the investigation. As we discuss further in Chapter Five, Deputy Director Hoover and Acting Director Melson did not review the exit strategy until 2011, after the Fast and Furious investigation was publicly announced on January 25, 2011.

F. Celis-Acosta has Direct Contact with Law Enforcement in April, May, and August

For several months after first identifying Celis-Acosta in December 2009, agents did not observe him during surveillances, although records revealed he had been crossing back and forth into Mexico.¹⁴⁰ However, in April, May, and August 2010, Acosta had contacts with law enforcement, one of which was with MacAllister.

¹⁴⁰ According to records provided by the El Paso Intelligence Center (EPIC), Celis-Acosta crossed into the United States from Mexico on 15 occasions between December 17, 2009, and August 1, 2010 (no crossings indicated after that date). ATF had a "Lookout" on Celis-Acosta that resulted in his vehicle being subjected to a secondary inspection on two occasions. Celis-Acosta was also subjected to a secondary inspection on three other occasions based on officer suspicion. The result of each of these inspections was negative. The EPIC information also indicated that Patino, the most prolific Operation Fast and Furious purchaser, did not make any crossings from Mexico into the United States since at least August 2009.

The first occurred on April 2, 2010. Without ATF advance knowledge, Phoenix Police Department officers stopped a vehicle containing Celis-Acosta and two other Operation Fast and Furious subjects because the vehicle was operating without headlights. Prior to the stop, and while following the vehicle, officers observed an object later determined to be a firearm thrown from the vehicle. The firearm had been purchased by Patino a week earlier, on March 26. The officers recovered two additional handguns, a cell phone, and substance suspected to be cocaine during a search of the vehicle. The officers arrested one occupant for aggravated driving under the influence, one occupant for carrying a concealed weapon without a permit, and Celis-Acosta for possession of narcotics.¹⁴¹

The contacts list on the recovered cell phone included a telephone number for an individual identified as [REDACTED] a name that ATF agents first heard from the DEA in December 2009 and [REDACTED]

[REDACTED]

The second contact occurred on May 29, 2010, when Border Patrol agents at the Lukeville, Arizona POE stopped a vehicle driven by Celis-Acosta, with two passengers, for inspection. The agents queried a database with the names of the occupants, determined that Celis-Acosta was under investigation for firearms trafficking, and contacted an agent with ICE who in turn contacted MacAllister.

While the Customs and Border Protection agents awaited instruction, they conducted an inspection of the vehicle and located underneath the spare tire in the trunk a drum magazine loaded with 74 rounds of AK-47 ammunition. The inspection also found nine cellular phones and some other documents. At the request of ICE and ATF, the individuals were read their Miranda rights. Celis-Acosta reportedly waived his rights.

MacAllister and the ICE agent assigned to the Operation Fast and Furious investigation traveled to Lukeville and interviewed Celis-Acosta. MacAllister said she represented to Celis-Acosta that she was an ICE agent

¹⁴¹ The Maricopa County prosecutor's office did not file charges against Celis-Acosta. The individual arrested for carrying a concealed weapon pled guilty to a misdemeanor and was fined, and the charges against the driver are still pending.

because “he seemed much more comfortable with ICE than he did with some other federal agencies.” MacAllister did not tell Celis-Acosta that he had been under investigation for firearms trafficking for several months.

According to the ATF report, Celis-Acosta denied knowing the ammunition was in the vehicle but said that it would have his fingerprints on it because he had been hunting with the magazine drum the previous week. Celis-Acosta further stated that one of the cell phones in the vehicle was his. MacAllister told us that Celis-Acosta also said that he had bought firearms in the past from a Phoenix FFL. However, based on her impression that Celis-Acosta was not forthcoming during the interview, MacAllister “didn’t feel a need to dig into his firearms activity.”

MacAllister told us that she spent some time trying to decide what to do with Celis-Acosta. She said that after Customs and Border Protection indicated it was not going to arrest Celis-Acosta, she contacted Hurley to discuss whether there was enough evidence for ATF to charge him with a crime. According to MacAllister, there was some question whether there was a chargeable crime in light of his purported lack of knowledge that the ammunition was in the vehicle and the fact that the vehicle was not his. Ultimately, a decision was made to not arrest Celis-Acosta and to release him.

Prior to releasing Celis-Acosta, MacAllister gave her telephone number to him. MacAllister told us she later made an unsuccessful attempt to contact Celis-Acosta at the telephone number he provided, though it was a phone she knew he did not use often. She did not get a response and told us that she was not surprised that Celis-Acosta never contacted her. Celis-Acosta was included in the indictment of Operation Fast and Furious subjects on January 19, 2011, but was not located by law enforcement and remained a fugitive until he was arrested on February 2, 2011.

On June 3, 2010, Newell wrote an e-mail to McMahon regarding the May 29 stop of Celis-Acosta. The e-mail indicated that criminal charges were not being brought “due to [the] ‘knowledge’ requirement of Arms Export Control Act violation, Acosta can claim ignorance as to existence of drum magazine which is what I would do and [the U.S. Attorney’s Office] won’t touch it as a result, can’t blame them for that.” He went on to report that Celis-Acosta had not called MacAllister, but noted “we are aware of his whereabouts” and that agents were maintaining surveillance on him and Steward. Newell concluded by reporting that there was an upcoming meeting at the U.S. Attorney’s Office “to begin plans to shut [the] case down by approaching several straw purchasers, Grand Jury subpoenas, etc.”

Celis-Acosta had a third contact with law enforcement on August 7, 2010, when Border Patrol agents in Deming, New Mexico stopped a vehicle in which Celis-Acosta was an occupant. According to the incident report, the stop

was made based on suspicion of immigration violations. Celis-Acosta reportedly acted belligerently during the incident by cursing and claiming the Border Patrol agents had no right to stop the vehicle. Celis-Acosta, along with the other occupants, claimed to be a U.S. citizen when he in fact was a Lawful Permanent Resident. The agents conducted a consensual search of the vehicle and discovered a small amount of marijuana. Celis-Acosta admitted to previously having marijuana in the vehicle and was issued a citation for this by a sheriff's deputy at the scene. Celis-Acosta also claimed to have an outstanding felony warrant for another narcotics charge, but the agents' records checks did not reveal any warrants. Celis-Acosta also said he had purchased some firearms knowing he should not have because of the felony warrant he said was outstanding, and said that he would dispose of the guns. There were no firearms in the vehicle.

G. FFL2 Expresses Concerns and Requests Meeting with the Government in May

In May 2010 Voth and Hurley met with the owner of FFL2 in response to the owner's concerns about the store's cooperation with ATF's investigation. We described in Section IV of this Chapter that in December 2009 the owner of FFL1 requested a similar meeting with ATF and the U.S. Attorney's Office. The owner of FFL1 told us that he asked for the meeting, which took place on December 17, because of his growing concern that the same individuals were making repeated multiple gun purchases from his store and he saw no indication that ATF's investigation of these buyers was coming to close.

The owner of FFL2 told the OIG that his store's cooperation with ATF began in late November 2009, when agents contacted him to request Form 4473s for particular individuals of interest to ATF. The owner agreed to assist and the store created a one-page "Project Gunrunner Compliance" form that FFL2 employees would complete and fax to ATF whenever one of these individuals purchased firearms. The form listed several key indicators of unlawful transactions, such as whether the purchase was of a large number of the same model firearm, the purchaser had made similar purchases on multiple occasions, the purchases were paid for in cash, and the purchaser did not try to negotiate the price of the firearms. The store employee would check the boxes next to the indicators that applied to the transaction being reported to ATF.

The owner of FFL2 said his concerns grew as months passed and the same individuals continued purchasing the same weapons. He told us that he knew these individuals were straw purchasers and could not understand why

they were not being arrested.¹⁴² Like the owner of FFL1, the owner of FFL2 told us his previous experience with ATF was that after the store provided agents with the name of a suspicious purchaser, the individual was not seen again. The owner of FFL2 said he did not know what ATF did after it received the name, but that he would often get subpoenaed months later to testify at the trial of that suspicious purchaser.

The owner of FFL2 expressed his concerns to Voth in April 2010. Voth replied to the owner by e-mail dated April 13:

I understand that the frequency with which some individuals under investigation by our office have been purchasing firearms from your business has caused concerns for you. I totally understand and am not in a position to tell you how to run your business. However, if it helps put you at ease we (ATF) are continually monitoring these suspects using a variety of investigative techniques which I cannot go into detail. We are working in conjunction with the United States Attorney's Office (Federal Prosecutors) to secure the most comprehensive case involving the different facets of this organization. If it puts you at ease I can schedule a meeting with the Attorney handling the case and myself to further discuss this issue. Just know that we cannot instruct you how to run your business but your continued cooperation with our office has greatly aided the investigation so far.

The owner of FFL2 replied that he was going to draft a letter of understanding "to alleviate concerns of some type of recourse against us down the road for selling these items." The owner stated that the store did not want to be viewed as "selling to bad guys."

The owner of FFL2 met with Voth and Hurley on May 13, 2010, and told us that he raised his concerns at the meeting about FFL2's cooperation and requested a letter of understanding.¹⁴³ The owner of FFL2 said Voth and

¹⁴² The owner of FFL2 identified several indicators that caused him to conclude the individuals were straw purchasers: multiple purchases of the same firearms without additional accessories, sales were usually large cash transactions, limited conversation between the buyer and the store employee, sales were for full retail price (suggesting they were not being resold), and no attempt to negotiate prices. The owner of FFL2 also said that the FFL2 is a "high-end" gun club and retail store that offered amenities most stores do not, and that the individuals ATF was interested in were younger and appeared less affluent than FFL2's usual customers.

¹⁴³ According to ATF records, as of the date of this meeting FFL2 had sold 11 .50 caliber rifles to Operation Fast and Furious subjects and had several sales involving multiple FN 5.7 caliber pistols. ATF records show that Operation Fast and Furious subjects purchased

(Cont'd.)

Hurley did not offer to provide such a letter, but instead stated that they could not tell him who he could or could not sell firearms to and could not instruct him to make a sale in violation of the law or to refuse to make a lawful sale.

The owner of FFL2 said Voth and Hurley also told him that the firearms being sold were being addressed with investigative techniques that they could not discuss. The owner told us that he understood this to mean ATF was taking some type of enforcement action to prevent the firearms from being transported into Mexico or their use against law enforcement. Voth and Hurley also said that they could not instruct FFL2 whether or not to complete particular sales, and that all sales had to comport with governing statutes and regulations.

The owner of FFL2 told us that neither Hurley nor Voth made an explicit request that he continue to sell to persons he suspected of straw purchasing, but the owner said he believed from the context of the meeting and prior statements that this is what they wanted him to do. According to the owner of FFL2, he would not have continued to sell to the individuals identified by ATF if he did not have this belief. The owner also said he continued to assist ATF without a letter of understanding because he feared potential retaliation from ATF because the agency controlled his license to sell firearms.

The owner of FFL2 also told us that either at the May 13 meeting or sometime before, he told Voth that FFL2 would not assist ATF unless the owner was assured that the firearms sold to subjects in the investigation would not be allowed to enter Mexico or be allowed to fall into the hands of individuals that could use them against law enforcement. The owner said Voth assured him that the investigation would be conducted in a manner to prevent that. Voth told us that the owner did not make the statement to him about guns entering Mexico or being used against law enforcement, and that he did not make any assurance to the owner about the conduct of the investigation.

Voth did not memorialize his report of the meeting on May 13, 2010, until April 6, 2011, the same day he drafted the report memorializing the December 17, 2010, meeting with FFL1. The report was in all material respects identical to the FFL1 report. Hurley wrote about the meeting in a March 2, 2011, memorandum to Burke, Cunningham, and Morrissey because he understood “that there may be some new inquiry” about the meeting. The memorandum stated that the owner of FFL2 understood ATF “could not direct him to make a sale in violation of the law or refuse a lawful sale,” and that “nothing about the meeting was coercive towards FFL2 and never did anyone

a total of 87 firearms from FFL2 for nearly \$250,000. Subjects did not purchase AK-47 style rifles from FFL2.

from FFL2 express any reluctance towards the requested cooperation.” In their interviews with the OIG, Hurley’s and Voth’s statements about the May 13 meeting were consistent with their memoranda.

The owner of FFL2 continued to cooperate with ATF after the May 13 meeting, but reiterated his concerns on June 17, 2010, when he watched a news report about firearms and the border that he said disturbed him. He wrote in an e-mail to Voth, “[w]hen you, Emory and I met on May 13th I shared my concerns with you guys that I wanted to make sure that none of the firearms that were sold per our conversation with you and various ATF agents could or would ever end up south of the border or in the hands of the bad guys. I guess I am looking for a little bit of reassurance that the guns are not getting south or in the wrong hands.” We did not find a reply e-mail from Voth.

A notable example of FFL2’s continued cooperation with the investigation – and another instance where we questioned why ATF did not make a seizure – occurred in July 2010 when, following discussions with MacAllister, the store shaved the firing pin of a .50 caliber rifle that had been ordered by an Operation Fast and Furious subject. This modification disabled the firearm. MacAllister told the OIG that she asked the gun store to shave the firing pin after receiving information indicating one Operation Fast and Furious subject was purchasing the gun for another subject. MacAllister said she could not recall whether the idea to shave the firing pin originated with ATF or FFL2.

After the subject bought the firearm, ATF requested local law enforcement officers to conduct a traffic stop to identify the occupants of the vehicle. MacAllister told us that because the subject told officers the gun was his and that he had purchased it, there was not sufficient probable cause to seize the firearm at that time. ATF was again contacted about this firearm in September 2010 by a gun repair shop when the firearm was brought to the store for repairs due to the shaved firing pin. An ATF agent went to the store, reviewed the repair invoice, saw that the firearm was brought in by an individual who was not the original purchaser but was someone from whom this same ATF agent had previously seized a .50 caliber rifle, and took custody of the firearm.¹⁴⁴

We asked MacAllister why she believed there was sufficient evidence to shave the firing pin in order to render the rifle inoperable, but not to seize the firearm during the traffic stop that occurred shortly after the transaction was completed. She said that she did not think there was enough information

¹⁴⁴ As we discuss below, this individual was connected to Avila and made admissions to the ATF agent when questioned about the disabled rifle. [REDACTED]

about the purchase at that time to seize the gun, and that when she talked to Hurley about what could be done about the purchase, he agreed that shaving the firing pin was acceptable even though the evidence was insufficient to make a seizure. MacAllister told us that if there had been sufficient cause to seize the gun, the firing pin would not have been shaved because they probably would have seized it.

Hurley told us that while he could not recall the particular underlying facts associated with this transaction, he recalled advising ATF that shaving the firing pin was acceptable. He said this advice would have been based on a judgment at that time that there was also probable cause to seize the firearm. Hurley said he would not have authorized shaving the firing pin if there had not been probable cause to seize the weapon. Hurley said he recalled a conversation with ATF agents in which they discussed concern about the risk of losing the gun, but also discussed that the sale was of interest to the investigation because it would possibly connect others to the conspiracy.

A second notable example of FFL2's cooperation with ATF occurred in August 2010, when the store manager contacted Voth to ask how FFL2 should handle a potential order from Patino. The manager sent Voth an e-mail on August 25, 2010, advising that Patino wanted to purchase 20 of a particular model of firearm. The manager stated that FFL2 only had four in inventory and would need to order the additional 16 to make the sale. The manager stated, "I am requesting your guidance as to whether or not we should perform the transaction, as it is outside of the standard way we have been dealing with him." Voth provided the following response:

Thank you very much for contacting us regarding Mr. Patino and this order/inquiry. We (ATF) are very much interested in this transaction and would like to coordinate (with your cooperation) the delivery of these firearms to Mr. Patino under our direction; i.e. date, time, etc. Be assured no enforcement action will take place on or near the [FFL2] property. We have other matters pressing but late next week (Thursday/Friday) would be good timing for us. Another technique to allow for greater control would be if you are willing to request a partial down payment from Mr. Patino for a "*special order*." This tends to increase [sic] the individual's future compliance when they are already financially invested in the situation.

In summary our guidance is that we would like you to go through with Mr. Patino's request and order the additional firearms he is requesting, and if possible obtain a partial down payment. This will require further coordination of exact details but again we (ATF) are very much interested in this transaction and appreciate your ([FFL2]) willingness to cooperate and assist us.

Special Agent Hope MacAllister (CC'd in this e-mail) is the ATF case agent for this investigation. Please coordinate this delivery of these firearms to Mr. Patino through her [. . .] or by contacting me when she is not available.

Thanks again for your cooperation and support of our joint mission.

In another e-mail later that day, Voth asked the manager to coordinate with ATF when Patino made the down payment because ATF wanted to bring to the store a police dog trained to detect the odors of chemicals associated with certain narcotics drug. This never occurred, however, because the sale never took place.

We asked Voth why, in light of his assertion that he had previously advised FFL2 that ATF could not provide guidance about whether a sale should or should not be made, he would tell FFL2 in this instance that ATF wanted it to complete the sale. Voth told us that by this time in the investigation, Hurley had concluded that there was sufficient probable cause to seize firearms from individuals like Patino involved in the trafficking conspiracy. He said that he spoke with Hurley about this particular situation and that he (Voth) viewed the arrangement as a controlled delivery that ATF intended to seize. Voth said he should have stated in his e-mail to the manager that ATF could not advise the FFL about whether it should make the sale.

We found that Voth's request to the manager of FFL2 on this occasion reflected ATF's influence over the FFLs, and its interest throughout the case that FFL2 and FFL1 continue making sales to the Operation Fast and Furious straw purchasers because doing so advanced ATF's investigative interests. For reasons we discuss in our analysis, we do not believe the arrangement between ATF and these FFLs was appropriate or responsible.

H. ATF Initiates Several Seizures in June and July and the Investigative Phase of Case Draws to a Close

For the first several months of Operation Fast and Furious, ASAC Gillett supervised Group VII and therefore the investigation. On June 6, 2010, supervision of Group VII was transferred to the other ASAC in the Phoenix office, James Needles. Needles' supervision commenced within weeks of a request from ATF Headquarters that Phoenix draft an "exit strategy" for the case, and Newell's own acknowledgement that given the volume and type of firearms being trafficked it was time to begin taking enforcement action in the investigation.

Needles told us that that when he became the ASAC responsible for Operation Fast and Furious, SAC Newell instructed him to transition the case from the investigative to the prosecutive phase. Needles told us that he

directed the agents, including Voth, to be more aggressive by conducting interviews and seizing firearms when there was an opportunity to do so, and requested that MacAllister draft a list of potential charges against the subjects. Needles said the feeling was that the wiretaps had been given enough time to produce evidence and that it was time to bring the case to a close. Needles told us that the decision to be more aggressive with subjects was not based on concerns about how the case had been conducted prior to that time, but instead characterized the change as a shift in strategy. Needles said the feeling was that there was sufficient evidence to charge people at that point, and therefore seizing some firearms and trying to get some people to cooperate would not compromise the investigation.

The subjects' firearms purchasing activity in June and July 2010 remained significant. Patino purchased another 49 firearms in June for nearly \$38,000, and 44 firearms in July for over \$31,000. Steward, after purchasing no firearms in February and March, and only 8 in May, purchased 42 firearms in June for nearly \$30,000, including a Barrett .50 caliber rifle. Avila spent \$23,000 in June on 15 firearms, including over \$18,000 for two Barrett .50 caliber rifles. Alfredo Celis, identified in the investigation in December 2009, purchased 51 firearms in June 2010 for over \$37,000, including a Barrett .50 caliber rifle; and Jacob Montelongo, identified by agents in January 2010, purchased 14 firearms in June for over \$26,000, including two Barrett .50 caliber rifles.¹⁴⁵

According to the OIG's review of ATF records, ATF agents initiated 4 interdictions in June and July 2010 that resulted in the seizure of 52 firearms.¹⁴⁶ The first occurred on June 4, 2010, when agents seized two handguns from an individual who, as described earlier in Part II.C., agents had determined had prior felony convictions and therefore could not lawfully

¹⁴⁵ There was a total of 37 .50 caliber rifles purchased by Operation Fast and Furious subjects from November 13, 2009, to August 31, 2010. ATF records indicate that agents took custody of four: one on July 13 during a search warrant executed by the Phoenix Police Department based on an anonymous tip that office received; one on August 8 when an FFL did not transfer the rifle to an Operation Fast and Furious subject because there was an outstanding warrant for his arrest (the rifle had originally been purchased by another subject); one on August 31 after the FFL contacted ATF about the purchase of the rifle by an Operation Fast and Furious subject and agents contacted the buyer, who admitted to straw purchasing and abandoned the rifle to ATF; and one on September 17 when agents were notified by an FFL that an individual – the same subject who abandoned the .50 caliber to agents on August 31 – had brought a .50 caliber rifle in for repairs.

¹⁴⁶ Internal ATF records claim credit for 3 additional interdictions that resulted in the seizure of 32 additional firearms during this time period. However, the OIG reviewed these and other records and determined that these additional seizures resulted from seizures made by other law enforcement agencies, and therefore we did not count them as "ATF-initiated" seizures.

possess any firearms. The individual was arrested at the scene for driving on a suspended license. ATF included him among the subjects referred to the U.S. Attorney's Office for prosecution in Operation Fast and Furious, but he was not part of the January 19, 2010, indictment.

The next ATF-initiated seizure occurred on June 30, 2010, when agents observed an Operation Fast and Furious subject Alfredo Celis purchase 20 AK-47-style rifles from FFL1. After a police dog detected the odor of chemicals associated with narcotics on the \$11,000 cash used to make the purchase, MacAllister consulted with Hurley, who said he believed there was probable cause to seize the firearms. ATF then requested that the Phoenix Police Department conduct a traffic stop of the vehicle. The officers made the stop based on the vehicle's expired license plate and seized the firearms despite Celis's claim that the guns were his and that he had bought them to go hunting. The officers released Celis. Following the traffic stop, the officers transferred custody of the firearms to ATF. According to English, Celis subsequently contacted the police department to request that the firearms be returned, and was told they would not be.¹⁴⁷ The January 19, 2011, indictment of Operation Fast and Furious subjects included Celis and this June 30 purchase.

ATF initiated a similar seizure on July 8, 2010, of 10 AK-47 style rifles that had been purchased by Patino at Celis-Acosta's direction and transferred to a vehicle driven by two individuals. Phoenix Police Department officers stopped the vehicle and learned that the driver was a previously deported felon. The passenger was Francisco Ponce, a previously identified Operation Fast and Furious subject who had himself bought over 20 firearms. Ponce was carrying a concealed weapon permit and was released. Ponce and the 10 guns that were seized from the vehicle were included in the January 19, 2011, Operation Fast and Furious indictment.

ATF seized another 20 firearms on July 12, 2010, when after observing a transfer between a subject and some unknown individuals at the subject's residence, ATF requested that police officers from the City of Peoria conduct a traffic stop of the unknown individuals' vehicle. When officers attempted to stop the car, a chase ensued and shortly thereafter the vehicle crashed into a brick wall. One occupant escaped and the other was given a ticket and complaint for speeding, failing to obey an officer, trespassing, and failing to remain at the scene of an accident. The officers seized the 20 AK-47 style rifles and 2 pistols found in the vehicle.

¹⁴⁷ MacAllister cited this subject's conduct in support of her contention that straw purchasers in Phoenix are trained how to respond to law enforcement and are less likely than in the past to admit they were buying firearms for another party.

According to Voth, Needles never told him to be more aggressive about seizing firearms and the increase in interdictions and seizures in June and July 2010 was based on the totality of the evidence that existed at that time. Voth told us that the wiretap produced evidence of the purchaser's intent that was sufficient to satisfy the U.S. Attorney's Office's legal threshold for seizing firearms. MacAllister also told us that seizures conducted in June 2010 and thereafter were attributable to the totality of the evidence, including that obtained from the electronic surveillance.

However, there were other purchases surveilled during this period that agents did not interdict, despite the totality of evidence the existed at that time. For example, on July 6, 2010, agents conducted surveillance of Patino as he purchased firearms from FFL1 in order to observe to whom Patino transferred the guns. Prior to the purchase, [REDACTED]

[REDACTED] Patino was observed arriving at FFL1 with his girlfriend approximately one hour later. There, agents observed Patino place 10 long gun boxes into his vehicle and depart. [REDACTED]

Officers assisting the surveillance subsequently observed a vehicle back up to the rear of Patino's vehicle and both rear compartment doors open. The officers were unable to observe the transfer, but one minute later, both vehicles left and the officers followed Ponce to a residence, where they observed him open the rear door of the vehicle but could not see the activity. The vehicle left the residence about 15 minutes later and the officers conducted a traffic stop. Ponce identified himself, said he worked as a bouncer, and that he had \$6500 in the vehicle and was going to Lowe's. Ponce was carrying a handgun, but had a permit. [REDACTED]

[REDACTED] Several minutes later, he was observed arriving at Celis-Acosta's residence.

The month of July also included a reminder to ATF and the U.S. Attorney's Office of the destination and purpose of the firearms Operation Fast and Furious subjects were trafficking. According to an ATF investigative report, on July 1, 2010, approximately a dozen firearms were recovered in Sonora, Mexico "in the aftermath of a violent shootout between two rival Mexican drug cartels which resulted in twenty-one deaths (some news and law enforcement sources list the death toll up to twenty-nine killed)." One of the firearms recovered from the scene was purchased by Operation Fast and Furious subject Joshua Moore on November 11, 2009; another was purchased by an individual who ATF identified as a subject as a result of this recovery.

On July 15, Newell sent an e-mail to Burke and Hurley advising them of the incident, noting that 21 people had been killed and that “[f]irearms come from our area and ATF traces link one, maybe more, to our ‘Fast and Furious’ case.” Newell also attached a 13-slide PowerPoint presentation prepared by Mexican federal police that described the shootout and included graphic photos from the scene of bullet-ridden vehicles and those killed or arrested.

Photos 4.4 and 4.5: Sonora, Mexico Seizure



Source: ATF

VI. Operation Fast and Furious Moves Toward Indictment (August 2010 - January 2011)

Management in ATF’s Phoenix Field Division told the OIG that the end of July was the point when the activity in Operation Fast and Furious began to transition from investigation to indictment. From August to December 2010

the purchasing activity of subjects in Operation Fast and Furious dropped dramatically. ATF agents involved in the case conducted very limited surveillances of purchases during this time period. ATF seized several firearms during this period and in October 2010 began to conduct interviews of some Operation Fast and Furious subjects. Still, no arrests were made and no indictment was filed until January 19, 2011.

On December 14, 2010, Customs and Border Protection Agent Brian Terry was shot and killed near Rio Rico, Arizona. Two firearms seized at the scene of the shooting had been purchased by Operation Fast and Furious subject Jaime Avila on January 16, 2010. On December 15, 2010, a day after Agent Terry's death, ATF agents arrested Avila and charged him with making false statements on a Form 4473 for a firearms purchase he made in June 2010. This charge was subsumed by the January 19, 2010, indictment of Avila and 19 other subjects from Operation Fast and Furious.

In this section we describe some of the investigative activity ATF conducted during this period, the transition of the case towards indictment, and the explanations we were provided for the time it took to obtain the indictment. We also discuss the impact that the shooting of Agent Terry had on the timing of the indictment.

A. Purchasing and Investigative Activities Decline

The purchasing activity by Operation Fast and Furious subjects slowed dramatically in August 2010 and essentially stopped thereafter. ATF records show that 77 firearms were purchased by subjects in August. Of those, 49 were purchased by an individual first identified as a subject that month and 14 were purchased by Patino. A total of two firearms were purchased in September, both by Patino, and seven in October – six by Patino and one by another subject. MacAllister told us that she thought the drop in activity was attributable to Celis-Acosta becoming more involved in drug trafficking. We took note of the fact that the drop followed the seizures by ATF in June and July.

ATF's investigative activity also slowed in August. The final period of electronic surveillance commenced on August 3, 2010, but was short-lived because the subject apparently had discontinued use of the targeted cell phone. This surveillance was terminated on August 16, 2010. With respect to seizures, Voth told us that by the first week of August, Hurley had given ATF agents what Voth characterized as "blanket probable cause" to make seizures of firearms purchased by Operation Fast and Furious subjects, though he said he could not recall whether Hurley provided this guidance directly to him or to MacAllister. Hurley told us that he did not recall providing any "blanket probable cause" and said that he was not aware of any change in interdiction strategy after the last wiretap concluded in August. However, Hurley said the

investigation had progressed to a point by August, and possibly earlier, where if a subject's firearms purchases reflected the previous pattern with respect to the model type and quantity, the firearms could be seized without an admission.

There were five seizures between August and October 2010. On August 19, 2010, agents seized nine AK-47 style rifles from an individual ATF had identified as a suspected straw purchaser earlier in the month. At ATF's request, officers with the City of Glendale Police Department conducted a traffic stop and MacAllister interviewed the individual and the other occupant of the vehicle (who ATF also had identified earlier in the month). The purchaser said he was planning to sell the guns over the internet to help his mother financially and admitted he had previously bought and sold approximately 29 firearms. MacAllister advised him of the laws concerning unlicensed dealing and seized the firearms. The individual was then released but was later among those indicted on January 19, 2011.

On August 31, 2010, an ATF agent received information from FFL2 that an individual had just purchased a .50 caliber rifle for over \$9,000. This was the same individual who, on August 5, had bought two rifles that were recovered on August 18 as part of large seizure by the Phoenix Police Department. The ATF agent believed the individual might be a straw purchaser and contacted the individual about the .50 caliber rifle. The individual agreed to meet with the agent and abandoned the gun to the agent at that time. He also told the agent that childhood friend Jaime Avila had recruited him 2 months earlier to buy firearms "to be used in the drug war in Mexico." The individual said that straw purchasers had been paid \$70 per pistol, \$100 per rifle, and \$500 per .50-caliber rifle. The agents made no attempt to locate and question Avila in response to these statements.

Then, in September 2010, this same individual attempted to get the .50 caliber rifle with the shaved firing pin repaired that had been purchased previously from FFL2 by an Operation Fast and Furious suspect. The ATF seized the rifle and the individual told ATF agents that he brought the rifle in for repairs at the request of an assistant to a Sinaloa cartel leader. Despite this individual's connection to two Operation Fast and Furious subjects, his admission about engaging in straw purchasing activity, and his connection to the Sinaloa cartel, agents did not arrest him. [REDACTED]

B. Delays in Moving the Case to Indictment

As noted above, Newell told us that in approximately July 2010 he concluded there was sufficient evidence to move the case to indictment and that he directed ASAC Needles, who began overseeing Operation Fast and

Furious in June 2010, to begin that transition. Needles said the assessment of the wiretaps at that point was that they were not producing the evidence that ATF had hoped they would about how the firearms were being paid for and transported to Mexico. Needles told us the consensus among him and Newell, and McMahon at ATF Headquarters, was, “let’s go with the evidence we have and the charges we have and start talking to these people and seeing what information they’re going to give us and where that’s going to lead us.” Needles said he did not discuss this with MacAllister but did with Voth, who he told us was in complete agreement with moving the case toward indictment.

The U.S. Attorney’s Office had similar discussions in the summer of 2010. Morrissey told us that it appeared to him that the wiretaps had failed to identify how firearms were being transported to Mexico, which he understood was one of the investigative goals, and that he had discussions with Hurley and Burke about bringing the investigation to a close. Burke told us that he agreed with this assessment. Hurley told us that at the same time he and agents on the case were discussing the possibility of pursuing an eighth wiretap, he understood that there were conversations between ATF Headquarters and SAC Newell about stopping the wiretaps and moving the case toward indictment. He told us that it was his impression “that everybody who was looking at it was getting the feeling like there wasn’t going to be a likely benefit to pursuing line number eight.” He said that he did not disagree with the decision.

Newell e-mailed Burke on July 14, 2010, about some recent seizures in the investigation and to schedule a briefing about the case in August. Several days later, on July 19, Voth e-mailed Hurley and MacAllister that the “[t]he case is progressing nicely and [he is] very pleased with how things are turning out,” and that Needles had requested that they meet “to discuss how we envision the indictment phase taking shape.”

The timing of the indictment became very much a moving target. Based on our interviews and review of contemporaneous documents, it appears that discussions in August between ATF and the U.S. Attorney’s Office created some expectation that an indictment might be filed by September or October 2010. This did not occur, and the first firm date for an indictment and press conference was December 7. However, this date also passed without an indictment, and the next proposed target date – which appeared in an e-mail from Cunningham to Burke on the same day of Agent Terry’s murder, but before the shooting – was the first or second week of January 2011. Under circumstances we describe later, the case was ultimately indicted on January 19, 2010.

Newell and Needles said that during this fall 2010 period, officials at ATF Headquarters contacted the Phoenix Field Division regularly to inquire about the status of the indictment.¹⁴⁸ For example, in an e-mail to McMahon on October 19, Newell informed McMahon that the U.S. Attorney's Office had pushed back the indictment date to December 7, "saying they need this time to 'prepare'. I have a meeting scheduled with [Burke] to discuss but they aren't budging so there's not much we can do." Newell then noted for McMahon that the Operation Wide Receiver indictment was on hold until the Operation Fast and Furious case was indicted "since they are connected." After Assistant Director Mark Chait, McMahon's supervisor, learned about the delay, he wrote an e-mail on October 29 to Newell with a copy to McMahon, stating "I'm concerned that we are not shutting down the activity waiting on an indictment." That same day, Newell forwarded Chait's e-mail to ASAC Needles and instructed Needles to speak with Voth and that they needed to provide Newell with a status report on purchases made by suspects over the past 30 days. Later that same day, Needles replied and told Newell that of the 42 straw purchasers identified to date, only 1, Patino, had made any purchases during that time period. He stated that the purchase was on October 8, and that all five firearms were immediately seized.¹⁴⁹ Needles further indicated that the subjects had been flagged in the National Instant Criminal Background Check System and that ATF would be notified of any purchases.¹⁵⁰

Newell forwarded Needles' e-mail to McMahon, stating that it confirmed what Newell previously told McMahon and Chait about the purchases slowing. Newell also told him that one of the reasons for this change was that Celis-Acosta was involved in a shooting incident at his home that local officers responded to, and that agents had been successful over the last several months "seizing guns before they head south" after responding to calls from cooperating FFLs.

We identified several factors that contributed to the delay in obtaining the indictment. The first related to the financial component of the investigation. Hurley also told us that by August the subjects likely to be indicted were sufficiently established that he sought ex parte orders from the

¹⁴⁸ We further describe these officials' frustration and their efforts to hasten the indictment in Chapter Five.

¹⁴⁹ MacAllister told us that the basis for this seizure was that Patino admitted to using a false address on the Form 4473. MacAllister said she did not know whether she would have had the guns seized without this admission, and told us she probably would have consulted with the U.S. Attorney's Office.

¹⁵⁰ The National Instant Criminal Background Check System, or NICS, is administered by the FBI and used by FFLs to determine whether a prospective buyer is eligible to buy firearms or explosives.

court for tax return information. Hurley said the analysis of that information was important for the money laundering charges that he anticipated including in the indictment. This information and analysis was also important for the potential forfeiture of property from the subjects, such as residences and vehicles. The tax return information was not obtained until November, and some not until December.

Second, ATF and the U.S. Attorney's Office continued to have discussions through September and October about the number of subjects to include in the indictment. Hurley stated in an August 16, 2010, memorandum to Burke, described further below, that the first indictment in Operation Fast and Furious would focus on the top 10 or 12 subjects in the trafficking conspiracy. Newell told us that ATF initially sought to include approximately 40 subjects, but that the U.S. Attorney's Office pushed back on that figure and ATF agreed in approximately September to keep the indictment to about 20 subjects. Hurley stated to a colleague in a September 21 e-mail that he was hoping to indict the 10 most culpable defendants in late October, but that ATF expanded this group to 15. He told the colleague that this change might add some time for ATF to prepare the necessary translations of intercepted telephone calls and for him to review this and other materials, but that he was still hoping for a "late October/early November GJ date." Hurley wrote this same colleague in October that he had revised his target indictment date to December 7, a date that as noted above was also missed.

Third, Hurley might not have received from ATF a complete set of the reports of investigation and translations of intercepted telephone calls until October 5, 2010. Hurley told us that he recalled that was the date MacAllister provided him a thumb drive containing the information. MacAllister also told us the thumb drive was provided on that date and recalled that it was in response to a request from Hurley. Hurley said the materials totaled over 3,000 pages and took a substantial amount of time to review. However, MacAllister also told us that she also provided Hurley a disc in June 2010 that contained the first 300 reports of investigation in the case to facilitate the move towards an indictment, which she expected would come by the end of the year.¹⁵¹ As we discuss below, it appears possible that the disc MacAllister described was provided to another prosecutor who expressed an interest in assisting Hurley on the case.

¹⁵¹ On June 8, 2010, ATF had provided to Hurley by e-mail a 48-page "overt acts" document that had been prepared by an agent on Group VII. The document, which was intended to help Hurley draft the indictment, listed what ATF considered overt acts in furtherance of the criminal conspiracy committed by 31 subjects in the case from September 22, 2009, to June 6, 2010.

Fourth, Hurley told us that he was occupied by several other matters through at least October 2010, including some emergency issues related to an immigration bill being litigated in the federal district court and other cases of his own. Despite Hurley's workload, no other prosecutor worked on Operation Fast and Furious during this period, even though one was available. As described in Chapter Three, Department Trial Attorney Laura Gwinn was assigned in 2009 to prosecute subjects from Operation Wide Receiver. Gwinn first reached out to Hurley in March 2010 to discuss whether indicting the Operation Wide Receiver subjects would cause any problems in Operation Fast and Furious, and had subsequent communications on that subject with Hurley. On June 17, 2010, following the first Operation Wide Receiver indictment in May, Gwinn's supervisor in the Department's Criminal Division contacted the U.S. Attorney's Office about any other cases Gwinn could help staff. The U.S. Attorney's Office responded that she could "begin working with Hurley on the wire" – Operation Fast and Furious – and take the lead on another matter.

Gwinn told us that she was never really sure if she was assigned to the Operation Fast and Furious case, but was merely waiting for word from Hurley on whether he needed help. However, she contacted him on June 22 about her "assignment to 2 cases with you," and followed up the next day with the offer to begin reviewing any materials he was willing to send her. She again reached out Hurley on July 16 about her travel plans to Phoenix and stated, "[i]f you have additional documents re the wiretap (10 day reports ROIS etc.) that I can peruse it be helpful. Or any writing tasks that need to be done." Then, on July 29, 2010, Gwinn e-mailed Hurley to ask whether MacAllister had been able to place the reports of investigation on a disc so that Gwinn could begin reviewing the materials. Gwinn specifically asked whether she could help Hurley draft the prosecution memorandum or an indictment, and suggested "if you have any transcripts/call line sheets that I could start digesting, that would be great, too." Hurley replied that he did not yet have the disc but expected it the following week, and that he was busy with the final Operation Fast and Furious wiretap application and another matter. He identified some other cases that he said he hoped Gwinn would be able to handle, at least one of which Gwinn in fact began working on in August.

On August 18, 2010, Gwinn again inquired with Hurley about whether MacAllister had provided him the disc containing the Operation Fast and Furious reports. We could not locate a reply from Hurley, but Gwinn told us that she in fact did receive two discs from MacAllister and that she reviewed the materials.¹⁵² The next month, Gwinn contacted Hurley again and stated

¹⁵² As we discuss further in Chapter Five, Gwinn told us that it was apparent to her when she reviewed the reports that ATF agents were not seizing weapons in Operation Fast and
(Cont'd.)

that she hoped she could provide some assistance on the Celis-Acosta case while she was in the Phoenix area because she did not have enough work to keep her busy the entire week. As noted earlier, Hurley told Gwinn in reply that ATF was still putting together binders on each defendant and had expanded the list of indictees to 15, but that he was still hoping to indict the case in late October or early November. Gwinn responded, “[a]s you know, I am eager to assist you with anything that would be helpful to you on Celis-Acosta, so feel free to assign tasks to me!”

Hurley told us that he did not recall Gwinn having any involvement with Operation Fast and Furious, nor did he recall her requests for the reports of the investigation in the case. He said another of his cases was transferred to Gwinn (as we noted above) and that this allowed him to spend more time on Operation Fast and Furious. As we discuss in the analysis, we believe failing to use Gwinn, or any other available prosecutor, on Operation Fast and Furious in light of Hurley’s workload and the substantial volume of investigative material in the case was a significant mistake.

In mid-July 2010, Newell made arrangements to provide Burke a briefing about ATF OCDETF Strike Force cases. Newell told Burke in an e-mail that:

you need to know what this ATF Strike Force is doing, one case in particular – “Fast and Furious.” For instance, in just the past 24 hours and in 3 separate incidents they have seized over 100 guns, 225 rotary drum magazines (fire 75 rounds of AK47 ammo each) and ammo. In the past 30 days it’s been double that. This is the biggest case this group is working on but they have several other cases that aren’t far behind.

Burke replied, “Awesome! Listo para ti.”

The briefing took place on August 17, 2010. The day before this briefing, Hurley provided Burke with a memorandum updating him on the status of Operation Fast and Furious. Hurley stated in the memorandum that “we currently anticipate taking the investigation down in October,” that Celis-Acosta remained the primary target of the investigation, and that the first indictment would focus on the top 10 or 12 subjects in the trafficking conspiracy. Hurley’s memorandum also stated that the investigative team was still conducting surveillance on one telephone, but that it appeared the subject had discontinued the use of the number and that the surveillance would be

Furious despite having probable cause to do so. She said that she assumed this was a strategy that had been discussed and agreed to by ATF and the U.S. Attorney’s Office. She did not discuss her views of the case with anyone in Phoenix or with her supervisors at in the Department’s Criminal Division.

terminated. He stated that agents also were trying to identify another number for the subject and anticipated seeking another wiretap on that line in order to focus on what Hurley described as the “drug trafficking side of the organization.” Burke told us that he did not recall the memorandum giving him any expectation for the timing of the indictment.

Hurley’s memorandum concluded by stating that the investigation had so far interdicted approximately 200 firearms and that “agents have pursued interdiction of the firearms transferred to the conspirators where possible. Agents have not purposely let guns ‘walk.’ Interdiction in some cases has been hampered by counter surveillance used by the targets.” Hurley told us that he included this in the memorandum because, on the previous day, Voth told him about an e-mail that Voth had received from an agent about a recent seizure. The agent questioned whether Phoenix was going to stop any subjects soon or if it was “just letting these guns walk.”¹⁵³

Burke told us that he attended the briefing with Hurley, and possibly Morrissey. The briefing addressed Operation Fast and Furious and several other cases. Burke said what struck him most about the information pertaining to Operation Fast and Furious was the number subjects that were involved in the trafficking and that ATF knew how many were involved, and the challenges of investigating straw purchasers that are easily replaced. He told us that he asked Newell and Voth at the briefing whether interviews of the subjects had been or were being conducted. Burke said the response he got back was that not much would be learned from such interviews and that taking that step would tip off other subjects to ATF’s knowledge of their activities.

MacAllister told us that during the period between the last wiretap in August and Agent Terry’s murder in December, her time was occupied with completing Operation Fast and Furious investigative reports and serving as the ATF case agent on a significant weapons trafficking case. She told us that she could not recall ever checking in with Hurley during this time on the status of Operation Fast and Furious, but assumed he was working on the indictment. Co-case agent English told us that from the time the wiretap ended in August, it took agents two months to gather all of the necessary investigative records for Hurley and to be able to direct him to particularly significant information in that material.

Hurley noted in a November e-mail to his management that agents were approaching subjects to see if they could be developed as cooperators. English told us that interviews were conducted with subjects who ATF believed were

¹⁵³ We described Voth’s response to this e-mail earlier in footnote 130.

less likely to report the contact to Celis-Acosta. Beginning in late October 2010, agents conducted interviews of several Operation Fast and Furious subjects, one of whom admitted to being a straw purchaser. After the January 19, 2011 indictment, most of the subjects who were interviewed incident to their arrests admitted being straw purchasers and identified co-conspirators in the firearms trafficking.

As the case was moving toward indictment, ATF continued to receive information about recoveries of firearms purchased by Operation Fast and Furious subjects. For example, a rifle purchased by Steward was recovered on September 18, 2010, at the scene of a confrontation between the Mexican military and an armed group. Two rifles purchased by Alfredo Celis were among the 20 recovered on September 24 at the scene of a similar confrontation. A rifle purchased by Patino was among the firearms recovered on September 28 at the scene of a gun battle between the Mexican Marines and members of the Gulf Cartel. On November 27, the Mexican military, after stopping a suspicious vehicle and tracking the driver as he ran to a house, recovered 10 firearms, 7 of which has been purchased by Chambers.

On November 4, 2010, after a gun battle, Mexican police arrested eight members of the Sinaloa drug cartel in connection with the kidnapping and slaying of the brother of the former Chihuahua state attorney general.¹⁵⁴ Two of the firearms recovered at the scene of the gun battle traced back to Operation Fast and Furious – one purchased by Steward, and the other by Patino. On November 15, 2010, ATF Phoenix learned of this recovery and the connection to Operation Fast and Furious from an analyst at ATF Headquarters. Voth informed Newell of the recovery on November 15, and then informed ATF's Acting Attaché in Mexico City.

On November 16, ATF advised Hurley of the recovery and connection to Operation Fast and Furious. Hurley in turn informed Burke and other managers in the U.S. Attorney's Office and stated that "ATF provided this information to keep this office from being surprised by any official inquiry, not because they thought it changed the posture of the case." Several days later, in an e-mail exchange with a colleague about enforcing gun sale laws at FFLs and gun shows, Burke noted that his office was about to indict a wiretap case that was going to bring a lot of attention to straw purchasing of assault weapons. He stated, "[s]ome of the weapons bought by these clowns in Arizona have been directly traced to murders of elected officials in Mexico by the Cartels, so Katie-bar-the-door when we unveil this baby."

¹⁵⁴ According to the Analyst Chief in ATF's Mexico City Office, the brother was killed by strangulation.

C. Murder of Agent Terry

On December 14, 2010, four Customs and Border Protection agents, including Brian Terry, were conducting law enforcement operations near Rio Rico, Arizona, approximately 18 miles north of the United States-Mexico border, when they spotted at least five suspected aliens, at least two of whom were carrying rifles. The suspected aliens refused the agents' demand that they drop their weapons, and a shootout occurred. Agent Terry was shot in the exchange and died soon afterward. One of the suspects was shot and taken into custody at the scene. Five suspects, including the suspect who was shot, were subsequently charged with Terry's murder or other related crimes. Three suspects remain at large and are fugitives.

Law enforcement officers and agents searched the scene of the shooting and recovered, among other items, two AK-47 style rifles. A trace of the serial numbers showed that the firearms had been purchased by Jaime Avila on January 16, 2010, from FFL1.¹⁵⁵ As described in Section IV of this chapter, ATF agents first identified Avila as a suspected straw purchaser involved with other subjects in Operation Fast and Furious on November 24, 2009, and added him as a suspect in ATF's case management system on November 25, 2009. Between December and June 2010, Avila purchased an additional 47 firearms for approximately \$50,000. Avila had no reported wages or income for the first three quarters of 2010 and approximately \$10,000 in 2009.

According to ATF records, agents never received advance notice of any of Avila's purchases, but they did conduct surveillance on Avila on November 24, 2009, shortly after he purchased five FN 5.7 pistols. During that surveillance, ATF agents were able to link Avila, for the first time, to another suspect in the case – Patino. ATF did not learn about Avila's January 16 purchases until three days later on January 19, 2010.¹⁵⁶

After ATF learned of the connection between the Terry shooting and Operation Fast and Furious, agents reviewed the Form 4473s that Avila had executed between November 2009 and June 2010. At approximately 8:00 p.m. on December 15, agents drove to the address Avila provided on the forms in order to make contact with him. The current residents at the address told the

¹⁵⁵ The FBI tested the two firearms recovered at the scene of the shooting and was unable to determine whether or not either gun was used to shoot Agent Terry.

¹⁵⁶ Avila's purchase that day included a total of three AK-47 style rifles. According to co-case agent English, Avila purchased the firearms from FFL1 on Saturday evening, January 16, and FFL1 faxed ATF the Form 4473 on January 17. The following day was Martin Luther King Day and therefore case agents did not see the Form 4473 until January 19. The Form 4473 provided to the OIG for this purchase does not contain any markings that indicate the date on which it was faxed to ATF.

agents they had lived there since April 2010 and that they did not know Avila.¹⁵⁷ Agents then traveled to the address listed for Avila with the Arizona Department of Transportation and spoke with Avila's father and sister. Avila arrived at the residence a short time later and the agents told him they wanted to talk to him about firearms he had purchased.

The agents and Avila discussed Avila's current residence and employment status. With respect to purchasing firearms, Avila initially stated that that he had only purchased three AK-47 style rifles and that he sold those to a friend. After further questioning, Avila stated that he had purchased approximately 40 firearms and admitted that they had been purchased for someone else. He further stated that he had been paid approximately \$50 for each firearm purchased. The agents asked him additional questions about the money he used to purchase firearms and then showed him the Form 4473 for the January 16, 2010, purchase. Avila said he recalled filling out the form and that he had purchased the guns for another person who had given him the money, but could not specifically recall making the January 16 purchase. Agents also showed Avila the Form 4473 for a purchase of three pistols on June 15, 2010, and Avila stated that the written numbers on the form did not look like his and said that his identification had been stolen at some point and his vehicle broken into.¹⁵⁸ Agents reiterated that Avila should be truthful, and Avila responded that it might be better to be locked up because people might now be looking for him, and also stated that he would not provide the agents with the names of these individuals. After the interview concluded, Avila was arrested, read his Miranda rights, and transported to the Maricopa County jail.

The U.S. Attorney's Office drafted a complaint charging Avila with knowingly making false statements in connection with firearms purchases on June 12, 2010 (3 pistols), and June 15, 2010 (3 pistols and 1 .50 caliber rifle), in violation of 18 U.S.C. § 924(a)(1)(A). The complaint charged that Avila represented on the Form 4473s that he lived at an address that he in fact knew he did not. The complaint did not include Avila's January 16, 2010, purchase. Hurley told us that this was because he was advised the FBI wanted to preclude the possibility that Avila might plead guilty to those charges and thereby insulate himself from liability for Terry's death, should any evidence connecting him to the murder be discovered. The complaint was filed on the

¹⁵⁷ The complaint filed against Avila stated that the property was sold at a public auction on April 5, 2010.

¹⁵⁸ According to the ATF report, the handwritten numbers on the June 15, 2010, Form 4473 appeared to be written by the same individual who wrote the numbers on the January 16, 2010, Form 4473. The report also stated that the vehicle break-in occurred after June 15, 2010.

afternoon of December 16, 2010. Avila made his initial appearance before the court, waived his probable cause hearing, and was released on conditions.

Witnesses from the U.S. Attorney's Office told us that the Terry murder had no effect on the timing of the indictment for Operation Fast and Furious. Morrissey told us that given the volume of information ATF sent Hurley in October 2010, completing the indictment by January was a significant accomplishment for what Morrissey said was the most complex gun indictment he had ever seen. Cunningham said the actual drafting of the indictment began in October when Hurley received the ATF reports and that prior to this, Hurley was consulting with other attorneys about how best to charge the drug and money laundering counts. As we noted earlier, Hurley told us he had done some work on the draft indictment before the Terry shooting, but did not complete a rough draft until afterward.

On December 15, 2010, after the Terry shooting, Criminal Chief Cunningham e-mailed U.S Attorney Burke with proposed dates for the indictment (as early as January 19), the executions of search and seizure warrants, and the press announcement for the case. Hurley told us that it took him approximately one month to draft the indictment. English, the agent who testified before the grand jury, said she spent a week straight in Hurley's office to compile the charging document against the 20 defendants.

A week after Agent Terry's murder, Newell provided Deputy Assistant Director McMahon some figures reflecting recoveries of Operation Fast and Furious firearms. According to data compiled by Voth, there were approximately 241 firearms recovered in Mexico and 350 in the United States. Newell stated to McMahon:

For what it's worth and since I don't like the perception that we allowed guns to "walk," I had David Voth pull the numbers of the guns recovered in Mexico as well as those we had a direct role in taking off here in the US. Almost all of the 350 seized in the US were done based on our info and in such a way to not burn the wire or compromise the bigger case. The guns purchased early on in the case we couldn't have stopped mainly because we weren't fully aware of all the players at that time and people buying multiple firearms in Arizona is a very common thing.

In fact, the OIG identified only 105 firearms that were seized by ATF agents or by other law enforcement officers at ATF's request. In addition, regardless of what time period Newell intended when he referred to firearms "purchased early on in the case," we have described several instances in this Chapter where ATF agents had sufficient cause to seize firearms, but did not. We also note that Newell did not attribute the lack of more seizures to the legal standard imposed by the U.S. Attorney's Office. To the contrary, Newell's e-

mail to McMahon reaffirmed that the actions taken, or not taken, by agents during the case were driven by the imperative to not “compromise the bigger case.”¹⁵⁹

On January 19, 2011, a Federal Grand Jury returned an indictment against 20 Operation Fast and Furious subjects and related individuals. The indictment included charges of conspiracy, dealing in firearms without a license, making false statements in the acquisition of firearms, and several drug and money laundering counts. Because the indictment included charges against Avila, the government moved to dismiss the December 16, 2010, charges previously filed against him. On January 21, 2011, the court approved four applications for search warrants for locations associated with the firearms trafficking conspiracy.

The indictment remained sealed until January 25, 2011, in order to preserve operational security and agent safety as arrests and searches were conducted. The arrest operation involved agents and officers from multiple federal and local law enforcement agencies. The four search warrants were executed early in the morning on January 25. Arrests followed, and by the end of the day 18 of the 20 defendants had been apprehended and made their initial court appearances. Celis-Acosta was among the two defendants not located that day. A fugitive warrant was issued and Celis-Acosta was arrested on February 2, 2011, in El Paso, Texas. As of August 1, 2012, 14 defendants, including Avila, have entered guilty pleas to 1 or more counts of the indictment.

Officials from the U.S. Attorney’s Office, ATF, the DEA, and IRS also held a press conference on January 25 to announce the Operation Fast and Furious indictment and arrests, as well as several other firearms trafficking indictments.¹⁶⁰ At the conclusion of the prepared remarks, a member of the media in attendance reportedly asked whether agents allowed firearms to enter

¹⁵⁹ This was not the only time ATF Phoenix provided inaccurate information about seizures made in the case. For example, in July 2010, the ATF’s then-Assistant Attaché to Mexico inquired about the number of .50 caliber rifles Patino had purchased because one had just been recovered in Mexico that was used to shoot at members of the Mexican military. The Assistant Attaché asked, “How many 50 cal did this guy buy? Is he still buying guns? And r u guys taking off any guns before they get here.” The agent who was serving as acting supervisor in Voth’s absence replied that Patino had purchased five to eight .50 caliber rifles, that he was still purchasing but at a slower pace, and that agents were seizing guns every chance they could. He also stated, inaccurately, “[i]n recent weeks, we have seized hundreds of guns from the suspects in this case.”

¹⁶⁰ As we describe further in Chapter Five, neither the Attorney General nor the Assistant Attorney General for the Criminal Division, Lanny Breuer, attended the press conference.

Mexico as part of the investigation. SAC Newell responded, “Hell, no,” but said subjects sometimes defeated the surveillance and that firearms could end up in Mexico that way.

D. Summary of Firearms Purchases and Seizures

ATF maintained detailed records of the volume and cost of firearms purchased by Operation Fast and Furious subjects, as well as any recoveries of these firearms in the United States and Mexico. We have provided some of this information at various points in this chapter. According to the records we reviewed, the subjects purchased 1,961 firearms from October 2009 to December 2010 for \$1,475,948. The top seven subjects were responsible for nearly 80 percent of the purchases. The distribution among the top seven purchasers is shown below. The table also indicates how many of these individuals’ purchases were recovered as of February 2012.

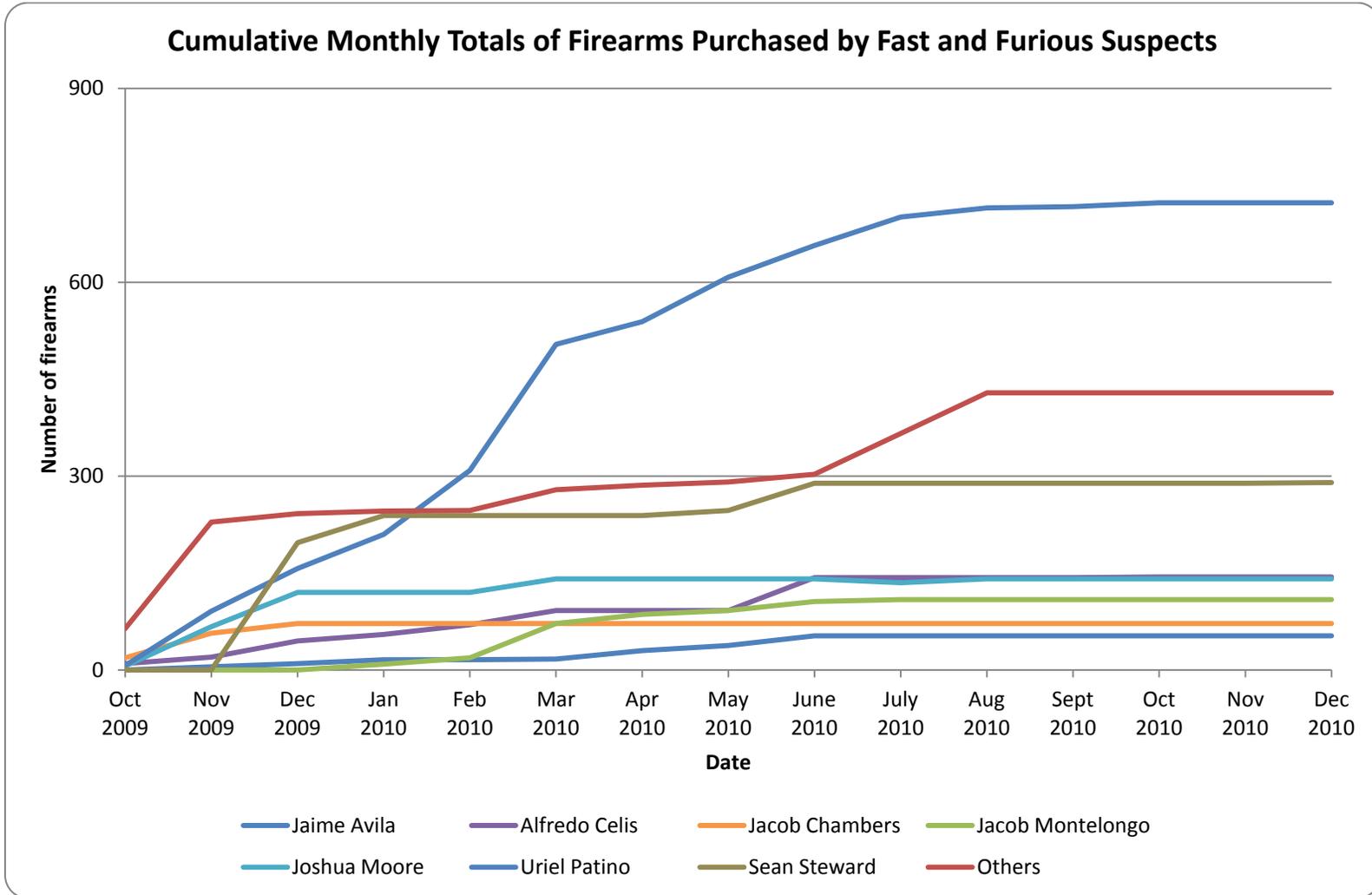
Table 4.1: Purchases from October 2009 to December 2010 and Recoveries through February 2012

Subject	Number of Firearms Purchased	Total Cost	Number of Firearms Recovered
Uriel Patino	723	\$575,411	184
Sean Steward	290	\$175,308	113
Alfredo Celis	144	\$90,131	75
Joshua Moore	141	\$107,972	50
Jacob Montelongo	109	\$145,294	20
Jacob Chambers	72	\$27,751	34
Jaime Avila	53	\$54,968	8
Others	429	\$299,113	226
Total	1,961	\$1,475,948	710

Source: ATF

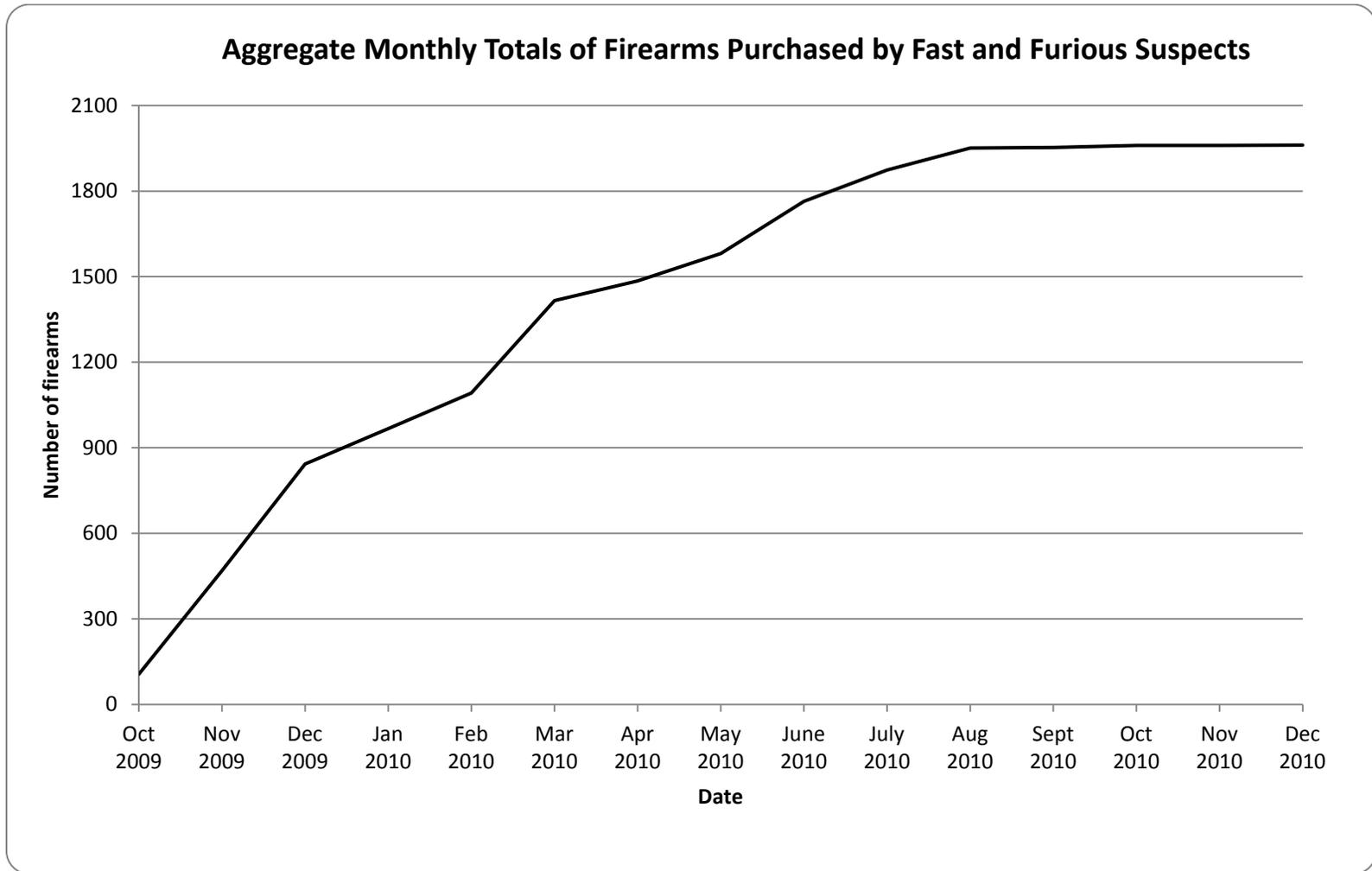
The monthly distribution of purchases is illustrated in the charts below. Chart 4.1 illustrates the cumulative monthly totals for each of the top seven purchasers and the remainder of the purchasers (designated “others”) and Chart 4.2 illustrates the aggregate purchases by month.

Chart 4.1: Cumulative monthly purchases from October 2009 to December 2010



Source: ATF

Chart 4.2: Aggregate monthly purchases from October 2009 to December 2010



Source: ATF

As noted, the ATF also maintained records about the recovery of firearms in the United States and Mexico. In preparation for the January 2011 press conference announcing the indictments in Operation Fast and Furious and several other investigations, ATF prepared a map reflecting the distribution of the 372 firearms recovered in the United States and the 195 recovered in Mexico that ATF had documented by that time. We reproduce that map on the next page as Map 4.1.¹⁶¹ As part of our review, we sought to determine the number of seizures during the course of the investigation that Group VII initiated or seizures that were made at the direction of Group VII. We concluded that ATF-initiated seizures totaled 105 firearms – we described the circumstances of most these incidents earlier in this chapter. The information is summarized below in Table 4.2.

¹⁶¹ During the course of our review, the ATF provided the OIG updated recovery figures. According to that data, by February 2012, an additional 118 firearms were recovered in Mexico and 25 in the United States.

Map 4.1: Operation Fast and Furious Recoveries



Source: ATF

Table 4.2: ATF Group VII-initiated seizures

Purchaser	2010									
	20-Feb	4-Jun	30-Jun	8-Jul	12-Jul	3-Aug	19-Aug	31-Aug	17-Sep	8-Oct
Avila Davila, Erick									1	
Celis, Alfredo			20							
Fernandez, Jonathan							9			
[REDACTED]								1		
Moore, Michael						1				
Patino, Uriel	37	1		10						5
[REDACTED]					20					
Total	37	1	20	10	20	1	9	1	1	5

Source: OIG analysis of ATF data

VII. OIG Analysis

In this section we analyze key aspects of the conduct of Operation Fast and Furious, including early decisions by ATF and the U.S. Attorney's Office that set the strategy for the case, the issue of whether and when there was probable cause to seize firearms, and ATF's use of cooperating FFLs to advance the investigation. We also assess the consequences of using court-ordered electronic surveillance and the time it took the government to obtain indictments of Operation Fast and Furious subjects. We address individual performance issues in Chapter Seven.

We found that what began as an important and promising investigation of serious firearms trafficking along the Southwest Border that was developed through the efforts of a short-staffed ATF enforcement group quickly grew into an investigation that lacked realistic objectives, did not have appropriate supervision within ATF or the U.S. Attorney's Office, and failed to adequately assess the public safety consequences of not stopping or controlling the alarming purchasing activity that persisted as the investigation progressed. Both ATF and the U.S. Attorney's Office focused almost from the outset on a longer-term investigative approach that prioritized obtaining court-authorized electronic surveillance in order to gather evidence about the trafficking conspiracy and to identify the individuals who were financing the purchases and transporting the weapons to Mexico. We found that the wiretap was pursued to the exclusion of, instead of in combination with, additional tactics that could have deterred some of the purchasing activity and resulted in more firearms seizures and arrests. As a consequence, in the months prior to and after the wiretap was in place, the purchasing activity by Operation Fast and Furious subjects continued unabated, individuals who had engaged in serious and dangerous criminal conduct remained at large, and the public was put in harm's way.

We were not persuaded by ATF's claim that the U.S. Attorney's Office would not permit agents to seize firearms during most of the investigation because there was a lack of probable cause. We concluded that the prosecutor assigned to Operation Fast and Furious had an exceedingly conservative and questionable view of the evidence required to establish probable cause to seize and forfeit firearms, and that he, like the agents, did not propose arresting any of the straw purchasers for their trafficking activity during the investigation despite sufficient evidence to do so. However, the prosecutor acknowledged to us that there were instances both before (at least with respect to Patino) and after the wiretaps began in March 2010 where agents could have made a case for seizing firearms. We did not find persuasive evidence that agents sought to seize firearms or make arrests during the investigative stage of the case and were rebuffed by the prosecutor, or that absent one incident with a .50 caliber rifle purchased by an individual not connected to Operation Fast and Furious,

ATF agents or management complained during the investigation to anyone at the U.S. Attorney's Office about unreasonable evidentiary requirements for making seizures or effecting arrests in the investigation. We found that the lack of seizures and arrests was primarily attributable to the pursuit of a strategic goal shared by both the ATF and the U.S. Attorney's Office – to eliminate a trafficking organization – and the belief that confronting subjects and seizing firearms could compromise that goal.

We also concluded that ATF's use of cooperating FFLs in this investigation was problematic because, at a minimum, it created at least the appearance that the FFLs were continuing to sell firearms to Operation Fast and Furious subjects in order to further ATF's investigation. We were not persuaded by the position of ATF and the U.S. Attorney's Office that the FFLs viewed the sales as legitimate transactions, and that the government did not implicitly encourage the sales to continue. We believe that at a minimum the government's requests for substantial assistance and its equivocal explanations about what it was doing with respect to the firearms being sold reasonably led the FFLs to believe that ATF and the U.S. Attorney's Office were taking steps to prevent the weapons' unlawful transfers and might have caused them to complete sales they otherwise would not have.

In addition, we found that while there were plans to indict the Operation Fast and Furious subjects several times before the shooting death of Agent Terry, that tragedy created urgency in the U.S. Attorney's Office that did not previously exist with respect to Operation Fast and Furious and likely hastened obtaining the indictment.

In sum, while we found no evidence that the agents and prosecutors responsible for Operation Fast and Furious had improper motives or were trying to accomplish anything other than dismantling a dangerous firearms trafficking organization, we concluded that the conduct and supervision of the investigation had significant flaws. We were most troubled by the fact that an investigation of this scope and nature did not receive greater review or scrutiny in light of the substantial resources devoted to it, the extraordinary purchasing activity by a large number of subjects, and the conspicuous lack of ATF-initiated enforcement action. Indeed, no one responsible for the case at either ATF Phoenix Field Division or the U.S. Attorney's Office in Arizona raised a serious question or concern about the government not taking earlier measures to disrupt a trafficking operation that continued to purchase firearms with impunity for many months. Similarly, we did not find persuasive evidence that any supervisor in Phoenix, at either the U.S. Attorney's Office or ATF, raised serious questions or concerns about the risk to public safety posed by the continuing firearms purchases or by the delay in arresting individuals who were engaging in the trafficking. This failure reflected a significant lack of oversight and urgency by both ATF and the U.S. Attorney's Office in Phoenix,

and a disregard by both for the safety of individuals in the United States and Mexico.

A. Investigative Goal and Strategy

We found that in the earliest weeks of the investigation that would become Operation Fast and Furious, ATF agents pursued a strategy that broke from the traditional approach of confronting suspected straw purchasers. As we discussed in Chapter Three, this was similar to what we found in Operation Wide Receiver, although in Operation Fast and Furious, unlike in Operation Wide Receiver, the U.S. Attorney's Office was an equal partner in supporting this strategy. This alternative approach involved agents developing the investigation through surveillance and the collection and review of phone, financial, and other records in order to build a case against the subjects who were purchasing the firearms as well as the larger organization that was financing the activity and transporting the weapons to Mexico. According to case agent MacAllister, who also served as Acting Supervisor for Group VII until Voth arrived the first week of December 2009, this approach was informed by her experience that confronting a subject about suspicious firearms purchases was unlikely to elicit an admission or gain the subject's cooperation, and would only serve to notify the subject and any co-conspirators that law enforcement was aware of their activities. In this regard, MacAllister had the full support of her management in Phoenix.¹⁶²

The investigation began with promise. Based on information provided by FFL1 in late October 2009 about some suspicious firearms purchases, the three agents assigned to Group VII gathered evidence through documents and surveillance that showed what appeared to be a significant firearms trafficking group operating in the Phoenix area. In fact, within 30 days of receiving the Form 4473s from FFL1, ATF agents had identified approximately a dozen related subjects responsible for purchasing at least 341 firearms – nearly all AK-47 style rifles or FN Herstals – for approximately \$190,000, paid in cash. The agents also identified a residence and business being used as drop locations for the firearms being purchased. In addition, agents learned early in the investigation that firearms purchased by this group were being recovered in Mexico and were advised with respect to one seizure that Mexican authorities believed the firearms were going to the Sinaloa cartel and that its leader was “arming for war.”

¹⁶² After reviewing a draft of this report, MacAllister submitted comments that disputed some of the report's characterizations and conclusions. With respect to the investigative approach taken in Operation Fast and Furious, MacAllister stated that it was part of the overall ATF Southwest Border strategy to deal with an international criminal enterprise engaged in firearms trafficking and that it was inaccurate and unfair to assign to her responsibility for designing the investigative approach.

Despite this rapid accumulation of evidence, the December 1, 2009, briefing paper MacAllister drafted for ATF Phoenix management described an investigation that would proceed with more surveillance and more phone records and financial analysis. The plan stated explicitly that the investigation would not proceed to an “overt phase” until the structure of the organization and illegal activities were further established.

This approach was evident in the response to a 42-gun seizure on November 20, 2009, in Naco, Sonora that included 19 guns that had been purchased by Operation Fast and Furious subjects less than 3 weeks earlier. Hurley stated in a November 25, 2009, e-mail to U.S. Attorney Burke that ATF needed to “fend off any premature interview attempts by other ICE agents” because “the greatest risk to the larger [Fast and Furious] investigation will be tipping our hand to the suspects too soon. . . . This case will take time to build into an indictable case.” Similarly, MacAllister explained in a November 27, 2009, e-mail to SAC Newell and ASAC Gillett that she chose not to interview any of the suspected straw purchasers tied to the seizure because “at this point in the investigation we are actively identifying much larger players in the organization and contacting any of the purchasers at this point in time will adversely affect the success of this investigation.” As we recounted earlier in this chapter, ASAC Gillett replied to MacAllister, “that is fine and totally your call.”

MacAllister did not discuss the merits or risks of this approach with Phoenix management, though it was clear through the communications described in Section IV of this chapter that ASAC Gillett and SAC Newell were aware that this was how MacAllister intended to conduct the investigation and were supportive of the approach. For example, as described in Chapter 5, ATF Headquarters’ Office of Strategic Information and Intelligence (OSII) provided analytical assistance to the case. When an official at ATF Headquarters who attended a December 15, 2009, briefing that included Operation Fast and Furious mentioned the possibility of needing to shut the case down, Gillett contacted the official and told him – misleadingly, we believe – that “we will slow the purchasers down as much as possible.” Newell told us that he spoke with Deputy Assistant Director for Field Operations McMahon about the official’s concerns and explained to him that the case was just getting started and that they were trying to understand what they were dealing with. Newell also e-mailed OSII Deputy Assistant Director Martin and described the official who raised concerns as “one of the ‘hand wringers’ on this deal [who was] asking why we weren’t shutting this deal down now.” Newell informed Martin that he had his ASAC “counsel” the official as to why Phoenix was not going to close down the investigation and that the official should not worry about issues that he had no control over or “say in for that matter.”

The strategy of deferring overt action against any individual subject until additional evidence was gathered against the larger organization was

highlighted in numerous records we reviewed. For example, following the January 5, 2010, meeting between ATF and the U.S. Attorney's Office to discuss the case, Morrissey stated to Burke in an e-mail that ATF agreed with "our strategy" to not simply conduct a small straw purchaser investigation, but to instead "hold out for the bigger case, try to get a wire, and if it fails, we can always do the straw buyers." Burke replied, "hold out for bigger." Newell also e-mailed his management after this meeting and informed Deputy Assistant Director McMahon that the U.S. Attorney's Office wanted to proceed with a wiretap before conducting any "overt investigative activity," and that "they agree that right now we have very little to prosecute. . . ." Newell stated that Phoenix was "doing everything possible to slow these guys down[,] the same misleading statement that Gillett made to ATF Headquarters approximately two weeks earlier and that Newell again made to McMahon approximately one week later.¹⁶³

ATF's January 8, 2010, Operation Fast and Furious briefing paper, in language that purposefully tracked ATF's weapons transfer policy, stated that the strategy in the case was "to allow the transfer of firearms to take place, albeit it at a much slower pace, in order to further the investigation and allow for the identification of additional coconspirators who would continue to operate and illegally traffic firearms to Mexican DTO producing more armed violence along the Southwest Border." According to the briefing paper, there had been successful efforts since early December to "slow down" the pace of purchases and that these would continue, "but not to the detriment of the larger goal of the investigation." However, as described earlier in this chapter, we found no evidence that ATF Phoenix agents or supervisors were making efforts at this time to slow the subjects' purchasing activity.

In April 2010, Voth wrote an e-mail to Hurley and Gillett that Voth told us was intended to convey his frustration with the time it took to get the wiretaps approved. The e-mail stated:

Our subjects purchased 359 firearms during the month of March alone, to include numerous Barrett .50 caliber rifles. I believe we are righteous in our plan to dismantle this entire organization and

¹⁶³ Newell reported to the Deputy Assistant Director on January 13, 2010, about a 42-gun seizure by the El Paso Police Department. Newell stated in his e-mail, "we are working this 'fast and furious', the good news being we got another 42 off the street and can keep our case going. Hopefully the big bosses realize we are doing everything possible to prevent guns going to Mexico while at the same time trying to put together a phenomenal case." As we stated in Section IV, we found no basis for Newell's statement to McMahon that "we got another 42 off the street," given that Group VII played no role in the El Paso seizure. Additionally, we found no evidence that ATF Phoenix, or the U.S. Attorney's Office, had taken any action by this date to "prevent guns going to Mexico," as Newell told McMahon.

to rush in to arrest any one person without taking into account the entire scope of the conspiracy would be ill advised to the overall good of the mission. . . .

Just two weeks later, pursuant to Deputy Director Hoover's request, Voth drafted an exit strategy document that stated the goal of the case was to intercept conversations of Celis-Acosta engaging in firearms trafficking with known and unknown subjects. Voth described Patino and the other subjects as the "lowest rung on the preverbal [sic] criminal firearms trafficking organizational ladder," and stated that if Patino was arrested for the firearms he purchased to that point, "we will only minimally impact the organization before Patino is replaced by another member of the organization." From November 1, 2009, to April 28, 2010 – the date the exit strategy was drafted – Patino had purchased 531 firearms for over \$410,000.

In sum, we believe it is clear that the investigative goal and strategy in Operation Fast and Furious, endorsed by ATF's Phoenix Field Division and the U.S. Attorney's Office in Arizona, was to defer action against individual straw purchasers and pursue a larger case that dismantled the local trafficking group and possibly identified how the firearms were being paid for and transported to Mexico. As we discuss below, we were not persuaded by claims that this approach was solely grounded in disputes about the sufficiency of evidence to take earlier action.

1. Use of the Wiretap

The wiretap became the centerpiece of the strategy described above because ATF Phoenix agents believed it was more likely to produce direct evidence of the trafficking conspiracy than the traditional approach of confronting subjects about their activities. The idea of using a wiretap in a Group VII case was suggested by Voth before he arrived in Phoenix on December 6, 2009, and was shortly thereafter viewed as the direction the case would take. According to Hurley, at his January 5, 2010, meeting with Gillett, Voth, and MacAllister to discuss the status of the investigation, the ATF presented a case for the need to use a wiretap in order to reach the individuals involved in the conspiracy above the straw purchaser level. Hurley agreed with ATF's assessment.

We found the decision to proceed with a wiretap notable. As described above, Group VII was staffed by only four agents – including one who had graduated from the ATF training academy in November 2009, another who had graduated in March 2008, and a third who had arrived in Phoenix just weeks earlier – and the timing and availability of additional resources was uncertain. The demands of keeping pace with the activity in Operation Fast and Furious were already taxing, and it was not the only investigation Group VII agents were responsible for. In addition, the agents had already found it very difficult

to conduct effective surveillance of Operation Fast and Furious subjects for a variety of reasons, including the difficulty of maintaining line of sight, the counter surveillance techniques used by subjects, and the inability to observe what happened to firearms once they entered garages or residences.

We are aware these were among the reasons a wiretap was sought, but also believe these were considerations that should have been examined more critically and realistically. The primary objectives of the wiretap were to develop sufficient evidence for a prosecutable case against the entire Celis-Acosta organization and to learn how the weapons were being paid for and transferred out of Phoenix. The most effective way to accomplish these objectives was to conduct physical surveillance in tandem with the wiretap interceptions. In light of the significant number of subjects identified by that time, the finite and already overextended agent resources, and the substantial surveillance challenges, harder questions should have been asked about whether and how ATF's Phoenix office could incorporate the wiretap with other investigative techniques in order to minimize the risk to public safety posed by the volume of sales to the straw purchasers.

In deciding to seek a wiretap, ATF agents and attorneys in the U.S. Attorney's Office knew that the investigation would continue for at a minimum several weeks, and more likely, several months. By January 8, 2010, the Operation Fast and Furious subjects had purchased almost 500 firearms for approximately \$270,000 since the case began on October 31, 2009 – and an additional 150 firearms for approximately \$80,000 had been purchased during the month prior to opening of case – and there had been short time-to-crime recoveries of some of those firearms in the United States and Mexico. It was also known through the DEA information that Celis-Acosta in fact was trafficking firearms to Mexico – this was not a mere suspicion.

In light of the decision by ATF and the U.S. Attorney's Office to not seize firearms or make arrests during this stage of the investigation seeking a wiretap meant that straw purchasing activity would continue unabated for many more months. Under these circumstances, we believe there should have been careful consideration and discussion by senior management officials at ATF and the U.S. Attorney's Office about whether and how to deter future purchasing activity given that arrests were not anticipated in the near future. We found that this did not occur. In fact, according to Gillett and English, and to a lesser extent MacAllister, the decision to seek a wiretap made it less likely that ATF agents, or police officers acting at ATF's request, would initiate contact with Operation Fast and Furious subjects because doing so might have alerted the subjects that law enforcement was aware of their activities, thereby causing them to discontinue using phones ATF was interested in or ceasing activity that ATF sought to observe.

According to several ATF agents, one explanation for not discussing at the meeting on January 5, 2010, or at other times during the investigation, whether and how to deter future purchasing activity was tied to the issue of whether there was sufficient probable cause to seize firearms. As we discuss in the next section, we considered this explanation and ultimately found it unpersuasive. Rather, we believe the record in Operation Fast and Furious demonstrates that a wiretap was pursued for the reasons stated in Voth's draft January 2010 briefing paper: "[o]ur goal is to secure a Federal T-III audio intercept to identify and prosecute all of the tentacles of this larger organization," and that although the group of straw purchasers that had been identified was significant, it did not represent "the command and control elements of a Mexican DTO" and arresting these individuals "is not going to disrupt or dismantle the transportation and distribution cells of the organization, nor is it most likely going to lead to the prosecution of the leaders of the cartels or their principal facilitators."

The view that merely arresting straw purchasers at that stage in the investigation was insufficient to fully dismantle the Celis-Acosta trafficking organization, and that a wiretap was needed to accomplish more, was shared by Newell, Gillett, Voth, and MacAllister at the ATF, and Hurley, Morrissey, and Burke at the U.S. Attorney's Office. We found that the strict adherence to this view, and the failure to reassess and possibly shut down the case as weeks and months passed and the evidence of firearms trafficking mounted, was a significant flaw in the Operation Fast and Furious investigation.

2. Role of Probable Cause in Developing Case Strategy

Newell and Voth insisted to us that the lack of seizures and arrests during the course of Operation Fast and Furious was attributable to Hurley's refusal, based on a restrictive view of probable cause, to allow agents to seize firearms. While we found the statements from witnesses on the subject of probable cause at times difficult to untangle, we were not persuaded by Newell's and Voth's claim given the totality of the evidence and do not believe that ATF was drawn reluctantly into a longer-term investigation solely because of legal obstacles the U.S. Attorney's Office erected in firearms trafficking cases. We found that Hurley's questionable early legal guidance about probable cause dovetailed with ATF's tactical approach in the case, namely to allow straw purchases to continue without disruption, and that both ATF and the U.S. Attorney's Office failed to reassess the case as it became clear that Hurley's early legal guidance no longer reflected the totality of the evidence being gathered by agents.

Hurley told us that he recalled discussing with MacAllister early in the investigation that something more than the evidence known at the time was needed to make seizures because transfers of firearms by non-prohibited purchasers was not, without more, sufficient. He said that under those

circumstances, he believed an admission from the subject was needed. Hurley said that agents did not call him as the case progressed to ask whether there was sufficient evidence under particular circumstances to seize firearms, and he never gave the agents an edict that they could not take that action. Rather, he said the conversations he recalled concerned what the next steps in the case should be in light of what the agents were observing, not whether the agents were allowed to seize guns. However, we believe that in light of the substantial evidence that was being gathered and the increasing risk to public safety, it was as much Hurley's responsibility to affirmatively raise questions about conducting seizures and making arrests, as it was the agent's responsibility to make inquiries of him and raise any concerns to management.

Hurley said the first time he recalled agents asking whether they could seize Operation Fast and Furious-related firearms was in connection with a June 30, 2010, seizure of 20 guns from an Operation Fast and Furious subject.¹⁶⁴ Hurley said the decisions ATF agents made with respect to approaching subjects during the investigation reflected tactical judgments about the most effective way to determine how firearms were crossing the border and who was placing the orders, and that he did not play a role in making those tactical calls.

MacAllister told us she believed, based on her previous experience working with Hurley and the guidance he provided in Operation Fast and Furious, that a non-prohibited party had to admit to involvement in straw purchasing before an agent could seize firearms in the party's possession. MacAllister said she was aware that other indicia of straw purchasing were probative, but felt that that without an admission, a seizure could not be made. While it surely was reasonable for MacAllister to rely on Hurley's views on probable cause, we found that MacAllister had made the tactical decision in Operation Fast and Furious not to confront subjects to solicit admissions in order to avoid tipping off subjects to the investigation so that a larger case could be built.

We also found that Hurley's focus with respect to the sufficiency of evidence in firearms cases was on what he believed was needed to prevail in court, whether at a criminal trial or a forfeiture hearing, and that Hurley and the agents infrequently discussed the related but distinct question of what constitutes mere probable cause to seize or arrest in specific instances.¹⁶⁵

¹⁶⁴ Hurley told us that he advised the agents that it was permissible to seize these firearms. He said he could not recall the specific conversation, but believes the discussion would have been about the number and type of firearms purchased and whether there was pertinent information from the wiretap.

¹⁶⁵ As noted in Section I of this chapter, ATF's policy on "Weapons Transfers" in effect during Operation Fast and Furious described agents' ability to seize firearms when they

(Cont'd.)

However, what we found in Operation Fast and Furious was that Hurley's questionable early legal guidance that an admission was required to seize guns dovetailed with MacAllister's judgment that approaching suspected straw purchasers was an ineffective tactic. As discussed later, we believe these problematic legal and tactical views should have been regularly reassessed and reconsidered by MacAllister, Hurley, and their respective supervisors as the evidence of firearms trafficking and the risk to public safety mounted.

Both Newell and Voth told us that Hurley's position on probable cause impeded ATF's ability to seize guns for months, until he at last relented in June 2010 and deemed that there was sufficient evidence for agents to seize firearms that fit a pattern of purchasing activity by a subject that had been previously observed or documented. We expected, based on these statements, to see substantial contemporaneous evidence of a dispute between ATF and the U.S. Attorney's Office about the ability to seize firearms from Operation Fast and Furious subjects, and possibly even about making arrests. We did not find this. To the contrary, the message in internal briefing papers and communications to ATF Headquarters was that ATF Phoenix and the U.S. Attorney's Office were in agreement about how to proceed. There was no mention of disagreement or tension between the offices related to seizing firearms or making arrests. In fact, Newell told us that he was never presented with a concern about the lack of seizures, and that he was comfortable during the investigation with its progress. Gillett similarly told us that no one ever said to him that the agents should be more aggressive and, with the exception of the time it took to obtain the wiretap, that he was not frustrated with Hurley.¹⁶⁶

Further, we were not persuaded that ATF was prevented from taking enforcement action throughout most of the case by a single prosecutor's legal guidance. Hurley told us that in his experience ATF agents were not hesitant to voice their displeasure or frustrations with the U.S. Attorney's Office.

observed transfers based on "probable cause" to believe a criminal violation had occurred, and not on whether there was a prosecutable case. With respect to initiating a prosecution, the United States Attorneys' Manual – a reference guide for attorneys responsible for prosecuting violations of federal law – states that "as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." USAM, Section 9-27-220, Comment B.

¹⁶⁶ After reviewing a draft of this report, Voth submitted comments in which he asserted that he in fact did challenge his management in Phoenix about the U.S. Attorney's Office's restrictive interpretation of the law, but was told it had been a frustration for ATF for years and that the office simply had to abide by it. Voth also stated that he pushed back against the U.S. Attorney's Office's restrictive views by, for example, pursuing the use of civil asset forfeiture in the Fall of 2010 to seize firearms.

Indeed, Newell, Voth, and ASAC Needles (who began supervising Group VII in June 2010) did just that during the course of the investigation with respect to what they perceived as unreasonable delays in getting the wiretaps approved and in bringing the indictment against Operation Fast and Furious subjects. In addition, Newell personally and through his Division Counsel worked to resolve ATF's disagreement with the U.S. Attorney's Office's application of the corpus delicti doctrine to firearms trafficking cases. The absence of a similar record with respect to Hurley's alleged persistent denial of ATF's requests to seize weapons in Operation Fast and Furious is compelling.¹⁶⁷

We found that whatever concern Newell may have had about probable cause in Operation Fast and Furious, he did not raise it with Hurley or senior managers in the U.S. Attorney's Office. Similarly, we did not find persuasive evidence that Voth raised such concerns with Hurley, with the exception of an incident unrelated to Operation Fast and Furious in which Hurley advised that agents could not seize a .50 caliber rifle. We believe the briefing papers, the exit strategy, and various e-mail communications strongly indicate that little consideration was given to confronting or arresting first-line straw purchasers or seizing firearms earlier and more frequently because ATF agents and the prosecutor in the U.S. Attorney's Office believed that these actions would not advance the goal of dismantling a large trafficking organization.

3. Failure to Exploit Information

We found that a consequence of the government's strategy in Operation Fast and Furious to defer overt action and pursue a wiretap was that opportunities to advance the investigation were not fully exploited. We believe that one of the most significant examples of this occurred with respect to the information the DEA provided ATF in December 2009.

Two weeks after completing the December 1 briefing paper, and also after agents had identified Celis-Acosta as the likely leader of the trafficking group, the DEA provided ATF information that seemed to be precisely what agents were seeking in order to build their investigation. As we described in Section IV of this chapter, in early December 2009 a connection was identified between ATF subject Jacob Chambers and a Phoenix-area drug courier named Manuel Marquez who was a subject in an ongoing DEA drug trafficking investigation. The DEA developed information about a possible firearms deal between these two individuals and contacted ATF.

¹⁶⁷ After reviewing a draft of this report, both MacAllister and Voth submitted comments that stated it was unfair to suggest that had agents continued to challenge the U.S. Attorney's Office's view of probable cause, this effort would have been successful and resulted in an altered case strategy.

On December 15, 2009, Voth, MacAllister, and English met with agents from the DEA. The discussion at that meeting revealed that the DEA had information connecting Celis-Acosta to Marquez. The DEA provided ATF records it had about firearms trafficking and agreed to provide any future information it obtained from its case. The DEA also informed ATF that it expected to conclude its case in late January or early February 2010 and that it expected Marquez would be charged.

In the days following this meeting, the DEA notified ATF about two possible firearms transfers. ATF agents participated with the DEA on the surveillance of the first incident but no transfer occurred. The second incident involved three individuals: Celis-Acosta, who was going to obtain some firearms and deliver them to El Paso; an individual identified as [REDACTED] who was going to pay for the firearms and transport them from El Paso to Juarez, Mexico; and Marquez, who brokered the transaction. The DEA referred the information to ATF because Celis-Acosta was ATF's main target. However, ATF did not conduct surveillance of this transaction because, according to MacAllister, the office was short staffed due to the holiday season and because she did not believe there was specific information about when or where in El Paso the delivery would occur. On approximately January 4 and 13, 2010, the DEA provided ATF with records that included the details of the December 2009 planning and delivery of the firearms from Celis-Acosta to [REDACTED]

We found that the DEA information presented ATF with a very significant early opportunity to build its case to higher levels of the conspiracy that should have been pursued. Agents had already successfully identified numerous suspected straw purchasers working with Celis-Acosta, and had established that they were purchasing guns at a brisk pace. The information from the DEA identified [REDACTED] as a possible source of Celis-Acosta's funds and as an individual who transported firearms to Mexico, and Marquez as a broker for the Celis-Acosta/[REDACTED] relationship. In addition, the information established a direct connection between ATF's firearms trafficking group and drug traffickers. Yet, ATF did not seek to take any action with respect to Marquez either before or after the DEA concluded its case, and rejected an opportunity to observe Celis-Acosta transfer firearms to a third party purchaser in El Paso who intended to transport the weapons to Mexico.

MacAllister told us that because the DEA was taking its case down soon and anticipated charging Marquez, she did not feel ATF had the option to contact him. ASAC Gillett told us that the DEA ASAC requested that ATF not take any action based on the information the DEA was providing, and not use the information in any ATF affidavits. SAC Newell said that he understood the DEA requested that any ATF actions be coordinated with the DEA. We did not find these explanations persuasive.

First, although she told us she felt the option was not available, MacAllister also said she never actually asked the DEA whether it would object to ATF contacting Marquez. Moreover, even after MacAllister learned in early February 2010 that the DEA case had concluded she still did not consider contacting Marquez, who at that time might have been amenable to cooperating in light of the pending drug charges against him. Marquez's defendant status could have provided ATF agents the sentencing leverage that some told us was often lacking in interviews of suspected straw purchasers.

Second, the DEA ASAC denied that he requested through Gillett that ATF not use or take investigative action based upon the information the DEA had provided, and MacAllister used some of the information about Marquez, as well as other DEA targets, in the affidavit she drafted in support of the first Operation Fast and Furious wiretap application. In fact, the DEA provided MacAllister in late January the affidavits it submitted in support of the DEA's wiretap applications to help MacAllister draft her affidavit. MacAllister also continued to use the DEA information in subsequent Operation Fast and Furious wiretap applications by, for example, adding ██████████ as a potential interceptee and describing the details of the December 2009 firearms transaction between Celis-Acosta and ██████████

Third, the DEA agents who attended the December 15, 2009, meeting told us that they did not ask ATF to delay or defer any actions in its investigation until the DEA case concluded and that they expected ATF would act on the information it was being provided. The DEA case agent told us that Marquez and Celis-Acosta were small pieces of the DEA's case and that he was therefore not concerned how ATF's actions might affect the DEA's investigation. We believe that the DEA's sharing of information, particularly the advance notice about the Marquez-brokered delivery of firearms from Celis-Acosta to ██████████, demonstrated that the DEA would not have objected to ATF taking some action with respect to Marquez.

In sum, we believe that by failing to exploit the DEA information, ATF missed an early opportunity to develop its investigation up the organizational ladder of the group that agents had identified. After receiving the information from the DEA, ATF focused on getting OCDETF approval for its case and obtaining its own wiretaps. We found that after eight additional months of investigation and the use of substantial government resources, ATF was not substantially closer to identifying how the trafficking was being financed or how the firearms were being transported to Mexico than it had been after the DEA provided this information.

As we noted in Section IV of this Chapter, the DEA provided ATF information in March 2010 that identified the full true name of ██████████ and that indicated he and ██████████, whose full true name was also identified, had been the subjects of a joint DEA-FBI drug trafficking

investigation out of ██████████ that was initiated on December 4, 2009. The DEA office that provided this information advised ATF that it believed these ██████████ individuals had received firearms from Celis-Acosta. ATF did not appreciate the significance of this connection until March 2011 when it learned that ██████████ in fact was, together with the ██████████ ██████████ Celis-Acosta firearms trafficking group. The failure to appreciate the significance of this connection earlier is troubling and raises questions about how information was shared among various offices of ATF, the DEA, and FBI, at this stage and at other points during the investigations. We continue to review materials relevant to these issues in order to assess whether further investigation is warranted.

We saw some similar issues with coordination and information sharing between ATF and ICE, and noted instances in Section IV of this chapter where ATF appeared to resist ICE conducting any independent or coordinated investigations that were related to Operation Fast and Furious through recovered firearms. In light of ICE's jurisdiction over export violations involving munitions and firearms, close coordination with ICE would seem essential in an investigation that purported to target a cartel in Mexico and had as a goal identifying the crossing mechanism the cartel was using to obtain firearms from the United States. We question whether adding a single ICE agent (who was a former ATF employee) to the Operation Fast and Furious investigation was sufficient to ensure or promote this coordination. The DHS OIG, the parent agency for ICE, is conducting a review of ICE's involvement in and knowledge of Operation Fast and Furious. We look forward to working with that office to identify potential areas of improvement in the coordination and cooperation between ATF and ICE in law enforcement operations along the Southwest Border.

B. Sufficiency of Evidence to Seize Firearms

We found that the evidence described and relied upon in the tracking device and wiretap applications submitted to the court during Operation Fast and Furious demonstrated that agents had probable cause to seize firearms considerably earlier than June 2010, the point at which Voth and MacAllister told us ATF began to seize firearms based upon the totality of the evidence. Each of the government's January, February, and March 2010 applications for court approval ██████████ stated that there was probable cause to believe at that time that particular Operation Fast and Furious subjects were committing criminal offenses involving false statements in the acquisition of firearms (18 U.S.C. §§ 922(a)(6), 924(a)(1)(A)), unlicensed dealing in firearms (18 U.S.C. § 922(a)(1)(A)), and the unlawful export of munitions (18 U.S.C. § 2778). The circumstantial evidence relied upon by the government included past firearms purchases, recoveries or seizures of some of these firearms, the purchasers' reported income, and, in

some instances, descriptions of recorded telephone conversations with FFL1 about making arrangements to purchase firearms.

For example, the government's January 2010 application stated that Steward had purchased 240 firearms since December 2009 for approximately \$125,000, even though his reported income for the first quarter of 2009 was \$4,497. The application also described several instances where firearms that Steward purchased were recovered within days of the purchase, including the seizure by officers in Douglas, Arizona, that we described in Section IV of this chapter. The application included similar information about Patino (159 firearms since October 2009 for \$104,000, despite a reported income of \$6,257 for the second quarter of 2009), Moore (116 firearms since October 2009 for nearly \$65,000, despite a reported income of \$3,638 for 2009), Chambers (68 firearms since September 2009 for nearly \$40,000, with no reported income), and Celis (40 firearms since October 2009 for over \$35,000). This information was repeated in the government's February and March 2010 applications.

The government in its March 2010 wiretap application and in the eight that followed relied upon similar circumstantial evidence – as well as direct evidence obtained from the DEA and from surveillances conducted by agents – to establish probable cause to believe that the targeted telephone numbers were being used “to facilitate, to accomplish and to commit” various criminal offenses, including those identified above in the tracker application. The wiretap applications also included numerous examples of agents observing subjects purchase firearms, and in several instances, transferring the firearms to other individuals.

For example, according to the second wiretap affidavit (approved by court on

[REDACTED]

Similarly, according to the fifth electronic surveillance affidavit (approved by court on

[REDACTED]

[REDACTED]

Similarly, according to this same affidavit, [REDACTED]

[REDACTED]

[REDACTED]

As we described in Section V of this chapter, we asked Hurley whether he believed agents could have relied upon the type of circumstantial evidence set forth in the applications to seize firearms. We found the essence of Hurley's responses to be that agents could have seized firearms where the purchaser was one of the individuals described in those applications and the purchase at issue exhibited the same pattern as prior suspected unlawful purchases, that is, the method of payment, the type and quantity of guns bought, and possibly the circumstances surrounding the purchase (such as the presence of other subjects or a transfer to a third party). We reviewed several examples of surveilled purchases with Hurley, including Patino's April 16 purchase of three

.50 caliber rifles, and he told us that he believed the argument could be made that there was probable cause to seize the firearms.¹⁶⁸

We concluded that the tracker and wiretap applications demonstrated that there was probable cause considerably earlier than June 2010 to seize firearms, both for the very instances described in the applications as well as for others exhibiting comparable facts and circumstances. We did not, however, seek to establish the first or the total number of instances in Operation Fast and Furious where agents had probable cause and the opportunity to seize firearms. According to ATF records, ATF agents, often assisted by Phoenix Police Department Officers, conducted surveillance of approximately 47 purchases involving 550 firearms. We concluded that there were seven instances where agents seized firearms during surveillance, and that a total of 102 firearms were seized. This data is not dispositive on the question of how many times ATF agents did not seize firearms despite having the probable cause and opportunity to do so – and we described several examples in this chapter where we concluded this occurred – but we believe the data provides some perspective about the number of firearm that potentially fell into this category.

In finding that there was sufficient evidence to seize firearms and make arrests in the case considerably earlier than June 2010, we rejected Hurley's and MacAllister's narrow view of probable cause and the quality and quantity of evidence that was necessary to take enforcement action against investigative subjects. We also did not find persuasive Newell's and Voth's contention that the lack of seizures prior to June 2010 was attributable to a stifling probable cause standard erected by the U.S. Attorney's Office. For reasons discussed earlier, we believe ATF did not pursue seizures or arrests earlier in the case because of the concern that these actions might compromise the larger investigative goals.

¹⁶⁸ Hurley also said that while seizing firearms based on this kind of information might from an "academic" perspective be defensible, he did not believe that even as late as February 2010 there was a prosecutable case against the purchasers. Hurley also said he thought that prevailing at a civil forfeiture hearing would have been difficult because of the need to prove the subject's intent at the time of the purchase. When we recounted Patino's purchasing activity during the investigation and the other indicia of straw purchasing associated with Patino (cash payments, lack of reportable income, weapons of choice, short time-to-crime recoveries), Hurley told us that agents probably could have made the case for arresting him prior to the first wire in March 2010, but he also said that the goal of the investigation was to arrest more than one straw purchaser and that arresting Patino was not going to result in dismantling the entire organization, which Hurley said is what ATF was attempting to do. He said his understanding was that arresting a subject like Patino would have been tantamount to bringing the investigation to a close. We concluded that this was the real reason that arrests and seizures did not occur.

C. Failure to Supervise and Reassess the Investigation

We believe that having embarked on a strategy that had as its centerpiece a wiretap for a case that by December 2, 2009, had identified the purchase of 341 firearms for approximately \$190,000, by January 8, 2010, approximately 650 firearms for over \$350,000, and by March 5, 2010, 1026 firearms for over \$600,000 – sales that bore all the indicia of straw purchases – it was imperative that ATF and the U.S. Attorney’s Office closely monitor, reassess, and if warranted, conclude the investigation. This should have included consideration of whether, in light of persistent high volume purchasing, additional recoveries of Operation Fast and Furious-related firearms in the United States and Mexico, and ineffective surveillance, overt steps such as interviews, seizures, search warrants, or arrests were warranted, both because the evidence supported it and the public safety demanded it. We found it extraordinary that this did not prompt more action than the handful of seizures that were conducted beginning in June 2010.

The key aspects of the investigation that we believe should have prompted reexamination of the objectives and strategy were sufficiently well known by individuals responsible for the case at the ATF Phoenix office and the U.S. Attorney’s Office. In the ATF Phoenix office, the case agents and the group supervisor knew the facts of the investigation intimately, as is evident upon reading the documents they drafted and reviewed, including reports of investigation, case briefing papers, GPS tracker and wiretap applications, and regular e-mail communications. ASAC Gillett received the December 2009 and January 2010 briefing papers, attended the OCDETF presentation for the case in February 2010, told us he believed he reviewed the first wiretap application, and received regular updates from Voth about activities in the case relating to purchases, surveillances, and recoveries. SAC Newell also received the December and January 2010 briefing papers and received regular updates of case activity from Gillett as well as Voth. Through these records, many of which were described earlier in this chapter, those responsible for the investigation knew that trafficking involved several hundred firearms costing hundreds of thousands of dollars, that firearms were being recovered in the United States and Mexico, and that the activity was continuing unabated.

In the U.S. Attorney’s Office, Hurley received early investigative reports, reviewed affidavits, and prepared applications, all of which spelled out in detail the subjects’ ongoing purchasing activity, and had regular conversations with MacAllister about the case. Section Chief Morrissey, Hurley’s supervisor, received Hurley’s January 5 and March 12, 2010, memoranda about the case, both of which described the scope of the conspiracy. Morrissey also reviewed the first and possibly the second wiretap applications. Although neither Criminal Chief Cunningham nor U.S. Attorney Burke appeared to have reviewed the wiretap applications, they did receive Hurley’s January and March memoranda about the case. Burke also received periodic information about

the case from Newell, such as e-mails describing significant recoveries in Mexico and the United States.

In short, we believe the knowledge at ATF Phoenix and the U.S. Attorney's Office about the scope of the conspiracy being investigated and the threat it posed to public safety was sufficient to trigger regular and careful reexamination of the investigation. In this regard, we did not consider ATF's April 2010 "exit strategy" an example of this. The document, completed just hours after a request from ATF Headquarters, was not drafted in consultation with the U.S. Attorney's Office, included unrealistic objectives, and did not in any manner address what we believe any meaningful reassessment should have – how to respond to the unabated purchasing activity. In fact, the document asserted, "[i]f we arrest Uriel Patino for the firearms he has straw purchased thus far we will only minimally impact the organization before Patino is replaced by another member of the organization." Thus, the exit strategy merely reaffirmed the continuation of an investigative strategy in place since December 2009.

We acknowledge the assertion by some witnesses that the public safety was served by using the wiretaps to develop evidence to dismantle a dangerous firearms trafficking network. Under this view of the case, while low-level straw purchasers might traffic some firearms in the short term, eliminating the organization would prevent the future trafficking of many more firearms. However, we believe that whatever merit there may have been to deferring contact with straw purchasers during the course of the investigation, it should have yielded to the risk to public safety created by the conduct of Patino, Steward, and others. The individuals within the ATF and U.S. Attorney's Office responsible for Operation Fast and Furious failed to make this necessary evaluation.

D. Use of Cooperating FFLs

We concluded that ATF used its long-standing relationship with and cooperation from FFL1 to advance the investigative interests of Operation Fast and Furious, and did so in a manner that risked compromising public safety and at a minimum created the perception that FFL1 was selling firearms with ATF's approval. We reached a similar conclusion with respect to FFL2 and found that in at least one instance, ATF agents affirmatively requested that the store proceed with a sale. In making this finding, we were not persuaded by the contention of several individuals that the FFLs must have thought it was lawful to make sales to Patino, Steward, and other individuals who were clearly of interest to the ATF. We believe that the government's requests for substantial assistance from the FFLs and statements to the FFLs that it was monitoring the purchasers could have led the FFLs to reasonably assume ATF was taking steps to prevent the weapons' unlawful transfers and might have caused them to complete sales they otherwise would not have. In short, we do

not believe the arrangement between ATF and the FFLs in Operation Fast and Furious was appropriate or responsible.¹⁶⁹

As we found in Chapter Three, there is a potential conflict between the ATF's regulatory and criminal enforcement functions with respect to FFLs when the ATF seeks their assistance in an investigation. The conflict was manifested in Operation Wide Receiver where ATF paid an FFL to act as an informant by providing ATF with copies of pertinent Form 4473s, recording in-person and telephonic conversations with subjects, and continuing to make sales to subjects. SAC Newell told us that he disagreed with using an FFL as a confidential informant and would not have approved the arrangement in Operation Wide Receiver, which was in place before he became SAC. Yet Newell allowed a similar arrangement to persist in Operation Fast and Furious. Although FFL1 and FFL2 were not paid for their cooperation and did not officially act at ATF's direction, they (particularly FFL1) provided assistance comparable to that provided in Operation Wide Receiver. This should have prompted management in ATF Phoenix to consider terminating the assistance or at least to exercise strong oversight. Newell and his subordinate supervisors did neither.

We described in this chapter the cooperation FFL1 and FFL2 provided during the course of Operation Fast and Furious. Both provided ATF with Form 4473s of completed sales that ATF was interested in and gave agents advance notice of some purchases. In fact, the owner of FFL2 told us that agents' requests were so frequent that it created a one-page "Project Gunrunner Compliance" form for its employees to complete and fax to ATF for certain individuals' transactions. FFL2 also provided ATF copies of the store's video recordings of some purchases, and FFL1 permitted ATF agents to place a video camera inside the store so agents could observe transactions in real time. In addition, both FFL1 and FFL2 agreed on several occasions to segregate the cash that subjects used for purchases to allow ATF agents to bring in a police dog trained to detect the odors of chemicals associated with certain narcotics.

¹⁶⁹ Our concerns with the conduct of the investigation in this case are not intended to suggest that we believe there are no circumstances under which the government could appropriately seek the cooperation of an FFL. Indeed, FFLs that voluntarily notify ATF agents about suspicious customers or sales provide critical intelligence about potential firearms trafficking. This is precisely the type of voluntary activity that is appropriate to encourage. However, significant concerns emerge when ATF obtains cooperation from an FFL that may result in the FFL making sales it believes are potentially illegal because the FFL is under the impression that ATF is approving or encouraging such sales, particularly in the absence of a written understanding or agreement. As we discuss in Chapter Seven, we believe that ATF must have formal guidance and policies in place for situations where cooperation beyond merely providing information is offered by or sought from an FFL.

But ATF agents' requests for assistance went still further. From January to August 2010, the owner of FFL1 used an ATF-provided recording system to record 32 telephone calls he had with Patino (23) and Steward (9) that generally concerned the type, cost, availability, or purchase of particular firearms. In addition, in connection with each of the three instances that ATF attached a tracking device to an AK-47 style rifle, agents provided the owner the altered firearm and asked that he include it with the sales to particular subjects. Two of these devices were inserted into AK-47 style rifles with synthetic stocks, and not the metal "under folders" the subjects typically were buying. Consequently, when the owner of FFL1 discussed possible sales with Steward and Patino in January 2010, he tried to pique their interest in the synthetic stock models by, for example, offering to sell them at a lower price.

ATF agents also made additional requests of FFL2. On at least one occasion, MacAllister requested that FFL2 disable a .50 caliber rifle ordered by an Operation Fast and Furious subject by shaving the firing pin. In another instance, Voth requested that FFL2 proceed with a sale to Patino that required FFL2 to increase its inventory of a particular firearm. As we described in Section V, Voth said that he made this request because ATF intended to seize the firearms from Patino and also told us that the transaction never took place.

In light of the extent and nature of ATF's requests for cooperation, we did not find persuasive ATF's and the U.S. Attorney's Office's position that because the FFLs continued to complete sales to subjects, they must have made an independent determination that the sales were lawful. As we described in Chapter Two, ATF has a national program to educate FFLs about the indicia of straw purchasing – which of course was precisely the activity FFL1 and FFL2 were seeing and reporting to the ATF on a regular basis with respect to Operation Fast and Furious subjects. Further, we do not believe the requests ATF made to the FFLs with respect to particular individuals – such as to provide the records of all pertinent sales, record telephone calls, sell a particular style of AK-47, or segregate the cash – could reasonably be interpreted by the FFLs as anything other than indications that the sales to Operation Fast and Furious subjects were not legitimate.

We also found that the extent and nature of the government's requests for cooperation from FFL1 and FFL2 created at a minimum the appearance that sales to particular Operation Fast and Furious subjects were made with the government's approval. As we described earlier in the chapter, recollections differed about what precisely was conveyed at the December 2009 and May 2010 meetings with FFL1 and FFL2, respectively. We determined that it was unnecessary to resolve that conflict because we concluded that by emphasizing to the FFLs the value of their cooperation and by seeking additional cooperation that could only be satisfied by completing sales, the government at least inferentially suggested that it wanted the sales to Operation Fast and Furious subjects to continue.

In making this finding, we considered that ATF's efforts to observe, surveil, and document purchases by Operation Fast and Furious subjects were central to the investigative goal of identifying additional members of the conspiracy and how the firearms were being paid for and transported to Mexico. In FFL1 and to a lesser extent FFL2, ATF had cooperative FFLs that facilitated ATF's efforts. Indeed, the advantage of having cooperative FFLs assisting the investigation was highlighted in ATF's January 8, 2010, briefing paper: "Our relationship is good with the FFLs involved thus far, [sic] if we cut off our group they may find other FFLs not as friendly and our intelligence will become exponentially more difficult to acquire." In short, the success of ATF's investigative strategy depended on continued sales made by cooperative FFLs like FFL1 and FFL2.

We also found that given the facts known to ATF agents no later than mid-December 2009 about the volume and pace of sales, the recoveries of firearms in Mexico and the United States, and the DEA information establishing that Celis-Acosta in fact was trafficking firearms, ATF had an obligation as a law enforcement agency and to the public to manage its relationship with the cooperating FFLs responsibly. We do not believe it did. Both FFL1 and FFL2 personnel expressed concerns to ATF about their cooperation in the investigation. FFL2 raised particular concerns that it was "not viewed as selling to bad guys," and that the firearms were "not getting south or in the wrong hands." In one response to the owner and the manager of FFL2, Voth stated that he could not tell him how to run his business, but went on to assure him that "if it helps put you at ease we (ATF) are continually monitoring these suspects using a variety of investigative techniques which I cannot go into detail" and stated their "continued cooperation with our office has greatly aided the investigation." The owner told us that Voth and Hurley provided similar assurances at the May 13, 2010, meeting the owner requested to discuss his concerns about FFL2's assistance with the investigation. Both FFLs told us that their interactions with ATF left them with the impression that ATF was taking enforcement action against the guns being sold. Moreover, one of the FFLs told us that he continued to cooperate with ATF because the agency controlled his license and he feared potential retaliation.

However, Voth, MacAllister, and Hurley knew that no enforcement actions were taking place and also knew that the sales being made to Operation Fast and Furious subjects were unlawful. We believe that some of the statements to the FFLs and the requests for assistance made it more likely that these FFLs would continue selling firearms to Operation Fast and Furious subjects. In doing so, the government appeared to encourage the FFLs to continue selling firearms to persons the ATF agents knew were involved in

trafficking firearms to Mexican cartels, without taking appropriate enforcement action to minimize the public safety risks of such sales.¹⁷⁰

E. Delay in Indictment of Operation Fast and Furious Subjects

When ATF and the U.S. Attorney's Office decided by August 2010 that the investigation should be brought to a close, the potential public harm from the subjects did not end. They could still buy and traffic firearms or engage in other unlawful activities, such as the drug dealing ATF knew some subjects were involved in. Thus, it was incumbent on ATF and the U.S. Attorney's Office to make arrests or to bring the indictment as quickly as possible. We found no such urgency.

Instead, we found that the U.S. Attorney's Office had no plans to arrest any of the subjects prior to the date when the larger case was ready to be presented for indictment, even though the Office was aware that it would likely take considerable time to prepare that larger case for indictment. The initial tentative plans were to indict Operation Fast and Furious subjects in September or October, which was then pushed back to early December 2010, but the U.S. Attorney's Office did not meet any of these targets for several reasons. These reasons included the decision to include in the indictment money laundering charges that required additional financial investigation and analysis, the time it took to obtain a complete set of investigative reports, Hurley's work on other matters, and the failure to assign additional prosecutors to the case. We found that the murder of Agent Terry on December 14, 2010, finally produced the sense of urgency to indict the case that did not previously exist.

As we described in Section VI of this chapter, the U.S. Attorney's Office and ATF each arrived at the judgment near the end of the summer 2010 that the wiretaps were not producing evidence about how the firearms were being paid for and transported to Mexico and that it was therefore time to bring Operation Fast and Furious to a close and move toward indictment. In addition, ATF Phoenix was receiving pressure from ATF Headquarters to indict the case.

Beginning in approximately July, Hurley said he began talking with agents about what subjects should be included in the indictment. He said that his office felt a manageable number was 10 defendants, but that ATF wanted

¹⁷⁰ After reviewing a draft of this report, Voth and Hurley each submitted comments that disputed our analysis of the government's communications with the FFLs. Voth's comments observed that FFL1 issued a press release on February 1, 2011, stating that in its experience, ATF conducts itself "in a very professional and proper manner." The press release also stated that FFL1 was not aware of any impropriety by ATF.

additional subjects included and the number eventually reached 20. Hurley also said once it was clear who the top players in the indictment would be, he filed an ex parte order with the court for financial information. This was done in August. Hurley felt the inclusion of money laundering charges, as well as drug charges, would help with forfeiting assets and obtaining stiffer sentences.

Although there were some communications suggesting a late September or October indictment, these targets did not seem to reflect the reality of the work being done to get to indictment. There were limited communications between the agents and Hurley about the status of the case. In fact, MacAllister said she could not recall any meetings with Hurley during this time to work on the indictment, and English told us that it took agents two months to gather all of the reports and other records for Hurley. In addition, agents were still completing investigative reports and MacAllister was involved in the trial of another weapons trafficking case. Hurley, too, was busy through at least through October with other matters.

Hurley also said that he did not receive a complete set of reports of investigation and other materials he needed to complete the indictment, including the translations of intercepted telephone calls, until the first week of October 2010. He said this batch of material totaled over 3,000 pages. Hurley told us he did not recall receiving a first installment of reports of investigation that MacAllister believes she provided to him in June. MacAllister provided Department Trial Attorney Laura Gwinn two discs in July and August 2010 that contained the first 300 and 350 reports, respectively, and we believe it is possible that MacAllister considered this production as being to Hurley as well as to Gwinn.

But we found little basis to believe that had Hurley in fact taken possession of the two discs provided to Gwinn, he would have prepared the indictment earlier. As noted, Hurley's time was occupied by other matters and he was waiting on the financial analysis. However, we found the production of the reports highly significant to the question of why additional prosecution resources were not added to the case when it entered the indictment phase. The case spanned 8 months and 9 wiretaps, involved dozens of potential defendants and approximately 2,000 firearms, and required the review of thousands of pages of investigative reports. We found it incredible that Hurley did not seek additional assistance, and that his management did not realize this was needed. Even more troubling was that this occurred when a capable and motivated Department prosecutor – Laura Gwinn – repeatedly indicated her availability to assist the case. Hurley said that one of his other cases was transferred to Gwinn, but that he did not recall any of her offers to help on Operation Fast and Furious or her requests for the reports of investigation. We believe the failure to utilize Gwinn or another prosecutor to move the case more expeditiously toward indictment reflected a lack of urgency to bring the Operation Fast and Furious defendants to trial.

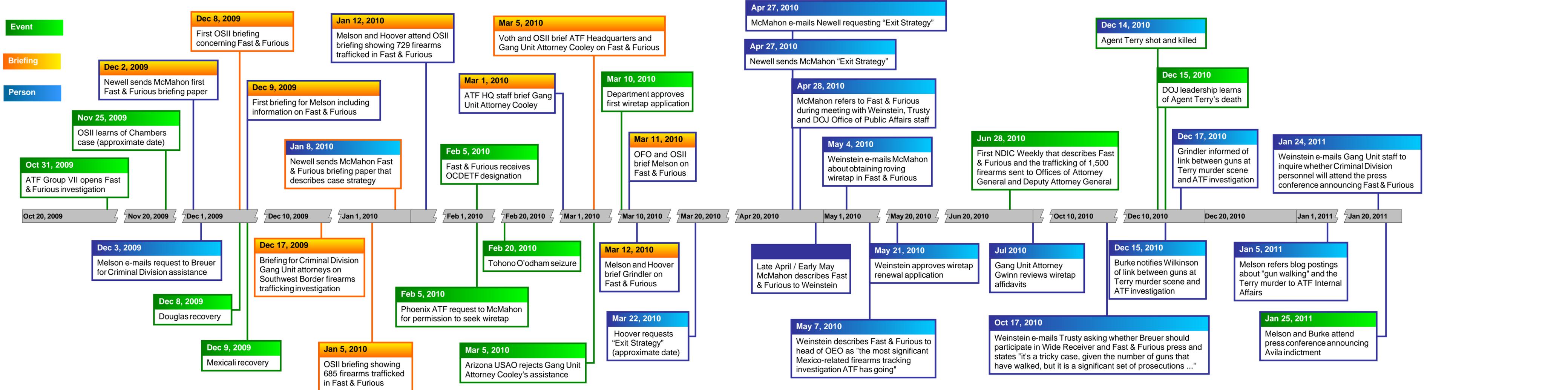
As we described in Section VI of this chapter, December 7, 2010, was the first specific target date we identified for indictment. However, that goal was not met because, at least in part, the analysis of the financial data to support the money launderings charges and some additional search warrants and seizures were not yet completed. The new goal for the indictment and press conference was the first week of January 2011, a target Cunningham related to Burke in an e-mail in the early afternoon of December 14, 2010. Hurley at that time did not have the Operation Fast and Furious indictment in draft form and told us he had only a list of defendants and compilation of possible charges.

Late in the evening on that same day, Agent Terry was murdered and firearms found at the scene were linked to straw purchaser Jaime Avila. ATF agents arrested Avila on firearms charges on December 15 and Hurley filed a criminal complaint the next day. Cunningham also e-mailed Burke on December 15 with a plan to indict the Operation Fast and Furious case on January 19, followed by the execution of arrest and search warrants, and some civil seizure warrants. In the month that followed, the work on the Operation Fast and Furious indictment was intense. Hurley told us he had agents in his office all the time and co-case agent English, [REDACTED], described spending a week straight in Hurley's office to prepare the indictment. The grand jury returned the indictment on January 19, 2011.

Managers at the U.S. Attorney's Office told us that Agent Terry's murder had no effect on the timing of the Operation Fast and Furious indictment, and Hurley told us that he was not pressured to complete the indictment sooner than he would have in the absence of the tragedy. While some evidence supports these assertions, including contemporaneous records that reflect an expectation before Agent Terry's murder that the indictment might come in early January, we found that as of December 14, Hurley and the U.S. Attorney's Office were far from being ready to indict a case of this magnitude by early January. Moreover, the lack of urgency in the preparations up to December 14 led us to conclude that it was unlikely that an indictment would have been ready that soon absent Agent Terry's tragic death. We found that the tragedy led to the intense pace of activity that ensured that the indictment was brought on January 19. We believe that given the danger to the community posed by these subjects and the crimes they were alleged to have committed, the U.S. Attorney's Office should have demonstrated urgency for bringing charges in this case sooner.

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CHAPTER 5 - THE ROLE OF ATF AND DOJ HEADQUARTERS IN OPERATION FAST AND FURIOUS



CHAPTER FIVE

THE ROLE OF ATF AND DOJ HEADQUARTERS IN OPERATION FAST AND FURIOUS

In this chapter, we describe the information that ATF Headquarters' personnel and Department leadership learned about Operation Fast and Furious from the investigation's inception in late October 2009 to January 25, 2011, the date of the press conference announcing the investigation. We also describe the action, and lack of action, by leadership officials in response to the information.

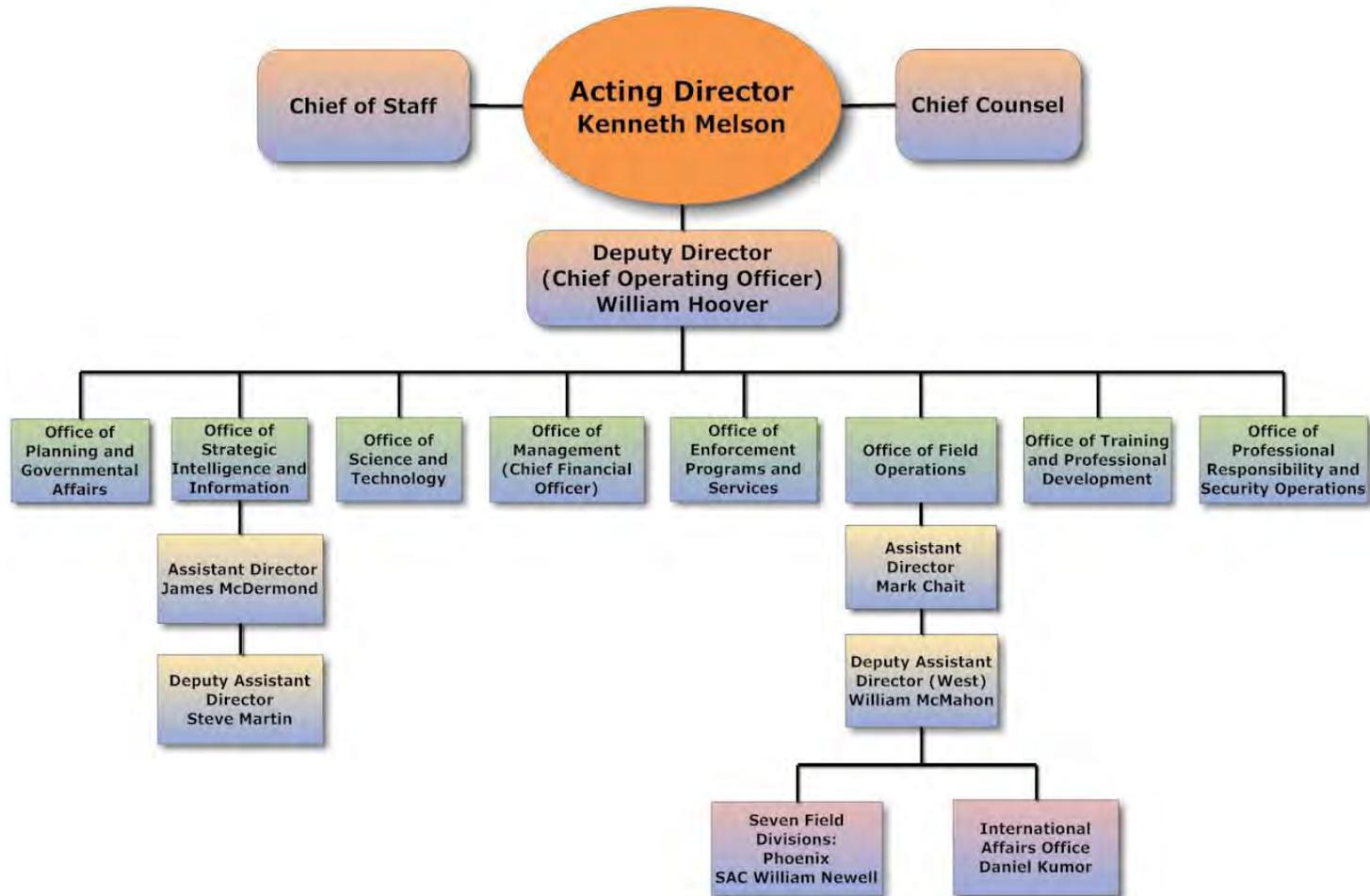
I. Background

The leadership of ATF includes a Director, Deputy Director, Assistant Directors of eight offices, a Chief of Staff, and a Chief Counsel. An organization chart of ATF that was applicable during the pendency of Operation Fast and Furious appears on the next page.

The Office of Field Operations is the largest office and has primary responsibility for administering ATF's 25 field divisions and Office of International Affairs. The Office of Strategic Intelligence and Information collects and analyzes information and produces intelligence products.

Diagram 5.1

Bureau of Alcohol, Tobacco, Firearms and Explosives



II. Early Developments in Operation Fast and Furious

A. November to December 2009: ATF Headquarters Personnel Receive Information about Firearms Seizures Connected to Operation Fast and Furious

As noted in Chapter Four, the Operation Fast and Furious investigation was opened by ATF Group VII in late October 2009.¹⁷¹ Our investigation indicated that ATF Headquarters personnel first learned of the investigation in late November 2009.

On November 20, 2009, a member of ATF's Southwest Border Field Intelligence Team in the Office of Strategic Intelligence and Information (OSII) received information about the seizure that day of 42 firearms in Naco, Sonora, Mexico. Thirty-seven of the seized firearms were traced by Immigrations and Custom Enforcement (ICE) agents back to purchases in Phoenix, Arizona. When OSII staff conferred with Special Agent Hope MacAllister in ATF's Phoenix Field Division on November 25 to discuss the Naco seizure, they learned about MacAllister's newly opened investigation.

Office of Field Operations Assistant Director (AD) Mark Chait and Deputy Assistant Director (DAD) William McMahon also began receiving information about the case during this time period. ATF e-mails reflect that on November 24 and 25, 2009, Phoenix Field Division Special Agent in Charge (SAC) William Newell informed Chait and McMahon about the Naco seizure. In an e-mail to McMahon on November 25, Newell stated, "Just found out Friday's 42 gun seizure in Naco directly links to an ongoing ATF Phoenix case by SA Hope MacAllister, Organized Crime and Drug Enforcement Task Force (OCDETF) Strike Force. We are advising ICE to stand down on their current proactive activity in Arizona in order not to compromise our case." In an e-mail to Newell the same day, Chait stated that he "wanted to make sure we put all resources on this." Newell responded: "On it, it's part of an active Phoenix case belonging to SA Hope MacAllister."

On December 2, Newell provided McMahon with additional details about the investigation in an e-mail accompanying a 5-page memorandum about the case. Newell's e-mail stated that the investigation was evolving daily but that "we've got it handled." The attached memorandum included an organization chart identifying 21 subjects, many with multiple firearms purchases, including 73 by Uriel Patino, 58 by Jacob Chambers, 46 by Joshua Moore, and

¹⁷¹ As discussed in Chapter Four, within ATF, the investigation was initially referred to as the "Chambers, Jacob, et al." case.

5 by Jaime Avila.¹⁷² The memorandum stated that several of the 42 firearms recovered at Naco were purchased by suspected straw purchasers in the investigation, and that agents had identified a total of 341 firearms with a cash value of approximately \$190,000 that subjects of the investigation had purchased. It also identified surveillances that agents had conducted of some of these purchases and stated that ATF had established working relationships with several Federal Firearms Licensees (FFL) who were notifying ATF of suspect orders for firearms.

The memorandum did not identify any ATF efforts to seize firearms or indicate an intention to do so in the foreseeable future. Newell concluded the memorandum by stating:

[W]e need to further establish the structure of the organization and establish illegal acts before proceeding to an overt phase. A strictly straw purchasing case in this Federal Judicial District is very hard to pursue but we are keeping the USAO fully informed of this case on a regular basis.

McMahon told us that he recalled receiving this memorandum, but that he did not think he would have forwarded it to anyone because it “was just an initial update on a brand new case.”

ATF executives in the Office of Field Operations also received information about firearms recoveries connected to the investigation in regular weekly briefings conducted by OSII. These briefings, which OSII developed to assist intelligence sharing with the Office of Field Operations, were typically attended by the leadership of the Office of Field Operations (DAD McMahon and AD Chait), and occasionally by Acting Director Kenneth Melson and Deputy Director William Hoover.¹⁷³

The weekly briefings included intelligence information derived from firearms trace reports and sales records analyses. Although the meetings covered other topics, they sometimes included information specific to Operation Fast and Furious. For example, during a weekly briefing conducted on December 8, 2009, OSII presented details about the November 20 Naco seizure described above. The briefing slides regarding this seizure showed that 11 of the firearms recovered were purchased by Patino. The briefing also included a list of eight multiple-sales reports for Patino between November 2, 2009, and

¹⁷² As we discuss later in this Chapter, in January 2010 Avila purchased two of the firearms that were found in December 2010 at Agent Terry’s murder scene.

¹⁷³ ATF provided us with sign-in sheets for briefings that occurred in the OSII Sensitive Compartmented Information Facility (SCIF). We note in the descriptions of these meetings when documents reflect the attendance of ATF senior leadership officials.

November 21, 2009, and presented information regarding a seizure in Agua Prieta, Sonora, Mexico on November 25, 2009, that included the recovery of 26 firearms at a large drug lab, 1 of which traced back to a purchase by Patino.¹⁷⁴ According to sign-in sheets, McMahon attended the briefing.

Similarly, during a regular weekly briefing on December 15, 2009, OSII presented the Office of Field Operations with information regarding the December 8, 2009, seizure of nine firearms in Douglas, Arizona, that had been purchased the same day by Sean Steward.¹⁷⁵ The slide regarding this seizure showed that Steward had purchased 40 AK-47 style rifles from FFL1 on December 8, 2009, and that 8 of these firearms were recovered by Customs and Border Protection (CBP) at the Douglas Port of Entry.¹⁷⁶ The December 15 briefing also included information about a large firearms recovery in Mexicali, Mexico, on December 9, 2009. The slides from this presentation showed that 48 firearms, \$2 million, 500 kilos of cocaine, and 85 pounds of methamphetamine had been recovered by the Mexican Army in Mexicali and that 8 of the 12 suspects detained during this seizure were associated with the Sinoloa Cartel. The presentation also showed that 17 of these 48 firearms were purchased by Operation Fast and Furious subjects. The sign-in sheet reflects that McMahon attended this briefing as well.

The mounting number of firearms traced back to Operation Fast and Furious caught the attention of ATF's Southwest Border Interdiction Coordinator, Ray Rowley. Rowley told us that he expressed concern within ATF Headquarters that too many firearms were being trafficked in Operation Fast and Furious and that the case should be concluded. Although Rowley could not recall exactly when he began expressing his concerns, e-mail records show that his concerns had reached ATF's Phoenix Field Division by early afternoon on December 17, 2009.

On that day Phoenix Assistant Special Agent in Charge (ASAC) Gillett reported in an e-mail to SAC Newell that OSII staff had told Voth that Rowley had "received a briefing on the investigation this week and mentioned the possibility of needing to shut the investigation down due to the large number of guns that have already been trafficked." Gillett also informed Newell that he had contacted Rowley and assured him that "we will slow the purchasers down as much as possible." As we described in Chapter Four, we found that this

¹⁷⁴ The location of this seizure was mistakenly referred to in the briefing as Nogales.

¹⁷⁵ This event is described in greater detail in Chapter Four. It is also described later in this chapter as it relates to the wiretap applications.

¹⁷⁶ The ninth firearm was later traced back to Steward as well. The slide incorrectly identified the date of the seizure as December 9.

assurance was misleading because ATF agents took no steps to slow the purchasing activity of the straw purchasers.

Gillett told us that he spoke to Rowley for approximately 10 minutes and that this was the only telephone call the two had about the investigation. Rowley said that Gillett informed him that he would pass his concerns on to Newell and others on the investigation, but that he did not recall hearing anything further.

Newell responded in an e-mail to Gillett and wrote, “Well done, thank you. I will address Ray’s concerns with McMahon.” Newell told us that he did speak with McMahon and explained to him that the case was just getting started and that they were trying to understand what they were dealing with. Newell also e-mailed OSII DAD Steven Martin the next day and described Rowley as “one of the ‘hand wringers’ on this deal [who was] asking why we weren’t shutting this deal down now.” Newell informed Martin that he had Gillett “counsel” Rowley as to why the Phoenix Field Division was not going to close down the investigation and that Rowley should not worry about issues that he had no control over or “say in for that matter.”

B. Request for Assistance from the Criminal Division

Also in December 2009, ATF initiated discussions with the Department’s Criminal Division about Southwest Border gun trafficking investigations and prosecutions generally. These discussions resulted in two Criminal Division attorneys receiving information about Operation Fast and Furious that month. Melson told the OIG that in early December he asked Assistant Attorney General (AAG) Lanny Breuer to assign a Department prosecutor to assist ATF in developing intelligence-led, multi-district gun trafficking cases along the Southwest Border. Melson told us that his proposal was not connected to the seizures in Operation Fast and Furious, but was motivated by his awareness of the large volume of firearms seizures along the Southwest Border. Melson e-mailed Breuer on December 3 with his request and Breuer responded the next day that he believed the proposal was a “terrific idea” and that the Organized Crime and Gang Section (Gang Unit) would assign an attorney to help coordinate the effort.

A few days later, on December 9, 2009, Melson received a briefing from OSII. Our investigation indicated that this was the first briefing he received related to Operation Fast and Furious. Melson told us that the briefing included information about a seizure that had some connection to the investigation that later became known as Operation Fast and Furious. According to Martin, the briefing was about the first large seizure related to the investigation, which, as discussed above, was the Naco seizure. Martin said the briefing was followed the next day by discussions among OSII and Office of

Field Operations personnel to develop a plan for briefing the Criminal Division attorneys.

As a result of Melson's request to Breuer for assistance, Gang Unit Chief Kevin Carwile was assigned to follow up with ATF. Carwile said that in mid-December 2009 he met with Melson and several aides from his office at ATF Headquarters. According to Carwile, at the meeting Melson sought assistance from the Division in developing a criminal enterprise approach to firearms trafficking cases. Carwile said that he understood that Melson also had some specific cases in mind for prosecutorial assistance but that Melson was not familiar with the details of those cases. Similarly, Melson told us he believed he also asked for a prosecutor to assist with straw purchasing cases because those cases were not a high priority for some U.S. Attorney's Offices. Daniel Kumor, Chief of ATF's International Affairs Office, also told us that at the meeting ATF sought to enlist the support of the Criminal Division in order to put pressure on some of the U.S. Attorney's Offices on the Southwest Border to prosecute firearms trafficking cases.¹⁷⁷

Carwile said he told Melson at the meeting that the Gang Unit could provide support. After the meeting, Carwile assigned Gang Unit Trial Attorney Joe Cooley to provide assistance to ATF. Cooley told the OIG that he understood from Carwile that ATF was not satisfied with the way that U.S. Attorney's Offices on the border were handling firearms cases. AAG Breuer told us that he did not recall if he knew at the time that a Gang Unit lawyer was assigned to the matter. He said that he now understands that Cooley was assigned to assist the ATF in developing the "more comprehensive effort" regarding firearms trafficking cases, but that the effort did not "come to fruition." He also said he now understood that Cooley also may have received a general briefing on Operation Fast and Furious, but ultimately the U.S. Attorney's Office wanted to handle the case.

On December 17, 2009, Carwile and Cooley attended a briefing by OSII at ATF Headquarters. According to ATF documents, ATF representatives at the

¹⁷⁷ Weinstein told the OIG that during the period December 2009 and January 2010, Melson made two requests of Breuer: for assistance in developing multi-district gun trafficking investigations and for an attorney to work on two or three high-priority firearms trafficking cases on the Southwest Border that were not being worked on or led by U.S. Attorney's Offices. According to the Criminal Division's weekly report to the Attorney General and Deputy Attorney General for the week of January 4, 2010, Breuer met with Melson on January 5 to initiate a new "CRM/ATF Firearms Trafficking Project" targeting firearms linked to Mexican Drug Trafficking Organizations. After reviewing a draft of this report, Melson told the OIG that he did not attend the briefing and cited the *Outlook* invitation for the briefing that did not include him. According to Melson, Hoover and Chait represented ATF at the meeting.

meeting included Melson, Hoover, Chait, McMahon, Martin, Rowley, and Kumor. Carwile and Cooley told the OIG that although they did not have a recollection of attending a briefing on this particular date, they both remembered attending meetings at ATF Headquarters in December 2009 that addressed firearms trafficking on the Southwest Border.

At the briefing, OSII staff used seizure and recovery information to exemplify how firearms traffickers were supplying drug cartels in Mexico and, in the case of Operation Fast and Furious, to support the Sinaloa Cartel. The briefing included information about a large seizure in Reynosa, Mexico, of approximately 400 firearms, which was not related to Operation Fast and Furious, as well as information about firearms linked to Operation Fast and Furious subjects. The OSII analyst who made the presentation told us that the briefing was not about Operation Fast and Furious but that it was mentioned as an “up and coming” case where a lot of firearms were being acquired.

Two link analysis charts were presented at the briefing. One identified 27 Operation Fast and Furious straw purchasers and suspected straw purchasers associated with firearms recoveries in Naco and Mexicali in Mexico, and in Douglas, Nogales, and Phoenix, Arizona.¹⁷⁸ The slide did not indicate the total number of firearms purchased or recovered in Operation Fast and Furious, nor did it include any information regarding the direction, strategy, or tactics in the case. The second link analysis showed the two largest Gulf Cartel seizures in 2008, the Reynosa seizure and another seizure in Miguel Aleman, Mexico.

According to Melson, McMahon, and Martin, the meeting’s purpose was to “get DOJ attorneys involved” in a discussion of taking a national focus on leads developed from large Mexican seizures. Similarly, Chait said he recalled attending a meeting with Carwile and Cooley where they discussed using a Department attorney to take a “holistic” approach to prosecutions that may have crossed judicial lines; and Hoover said he remembered being involved in discussions with Melson in December about a significant seizure in Reynosa, Mexico, of firearms linked to purchases made in multiple ATF field divisions, which prompted Melson’s interest in obtaining Criminal Division assistance in looking at gun trafficking on a national level. Melson, Martin, and McMahon also stated that the briefing’s scope included the Reynosa seizure and the ongoing Operation Fast and Furious case.

¹⁷⁸ We refer to “straw purchasers” because we believe the evidence by this date established probable cause to believe that the leading suspects identified by ATF, such as Patino and Steward, were committing crimes.

Cooley told us that he understood from his meeting with ATF in December that there had been two major gun seizures that occurred in Mexico, one involving 400 guns, and that the vast majority of the weapons had been traced to guns purchased in the United States. He said that the issue presented to him was how to do more proactive work with such seizure information in order to target firearms trafficking organizations.

According to e-mail records, following the December 17 briefing, Cooley had multiple conversations about firearms cases on the Southwest Border with Kevin O’Keefe, Chief of ATF’s Criminal Intelligence Division, including a conference call with O’Keefe and Carwile on December 30. Cooley requested information at that time about these cases. At the start of January 2010 Cooley informed O’Keefe that he would like to focus on “the AZ case” (Operation Fast and Furious) initially, but that he would be leaving for Texas to prepare for a trial that started in February. Cooley did leave thereafter for Texas for his trial, and did not return to the Operation Fast and Furious investigation until the beginning of March.¹⁷⁹

C. January to February 2010: ATF Headquarters Learns About Additional Firearms Recoveries, Case Strategy, and Pursuit of a Wiretap

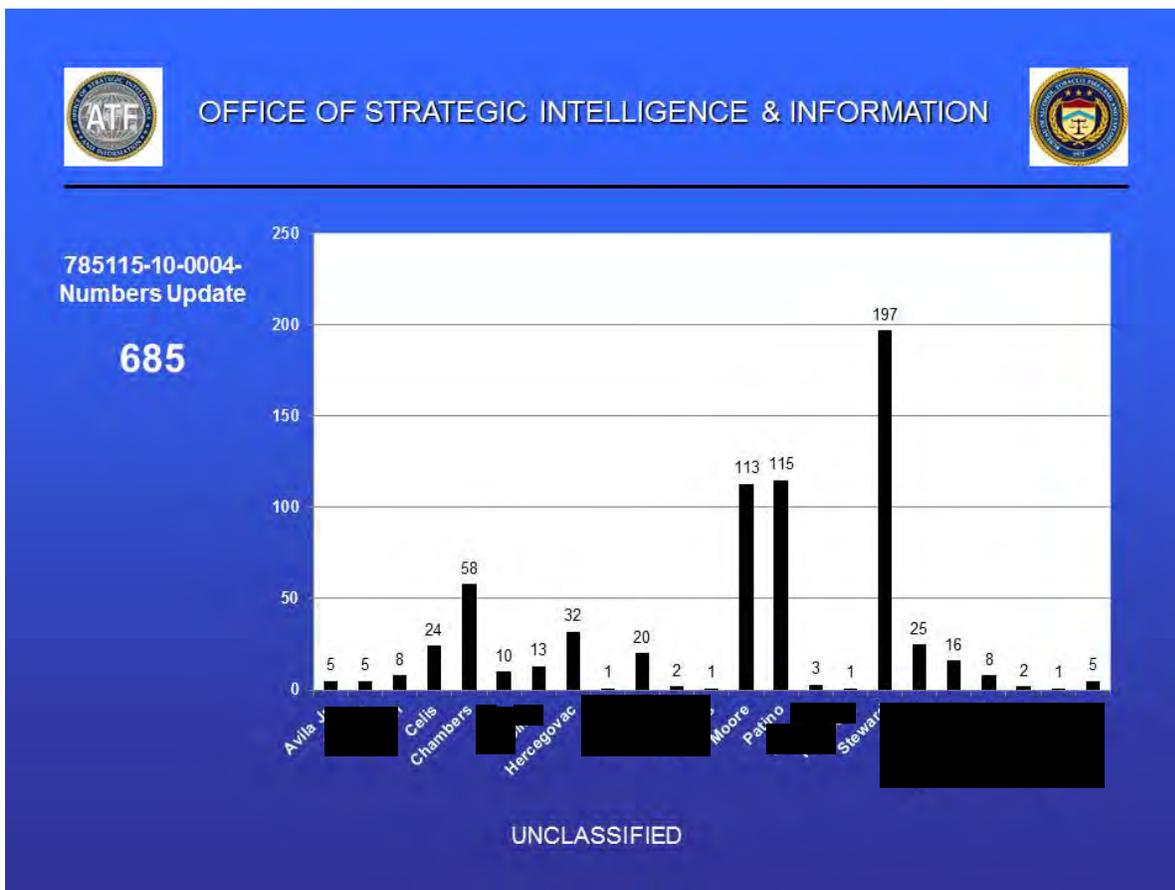
Rowley was not the only ATF official who raised concerns about the large number of firearms that had been trafficked in Operation Fast and Furious. Assistant Director for OSII James McDermond told the OIG that the number of recoveries in the case caused him to request Chait’s presence at OSII’s regularly scheduled briefing for the Office of Field Operations on January 5, 2010, so that they could discuss the investigation. McDermond said that others in attendance included Chait, McMahon, Martin, Kumor, and Rowley.

OSII’s January 5 presentation included 29 PowerPoint slides. One of the slides, reproduced below, provided an update on the number of firearms that each of 23 Operation Fast and Furious straw purchasers and suspected straw purchasers had acquired. The number of firearms totaled 685, with Steward, Patino, and Moore having purchased 197, 115, and 113 firearms, respectively.¹⁸⁰

¹⁷⁹ As we described in Chapter Four, the U.S. Attorney’s Office for the District of Arizona had opened the Operation Fast and Furious matter by late November, and U.S. Attorney Burke was enthusiastic about the case, telling his lead prosecutor, Emory Hurley, “Whatever you need to keep this moving forward, let me know.”

¹⁸⁰ OSII’s briefings on January 5 and 12, 2010, showed that Jaime Avila had purchased five firearms.

Presentation Slide 5.1



A second slide, shown below, showed an analysis of 13 purchasers who had purchased firearms in a Southwest Border state that had been recovered outside the United States less than 30 days after the purchase. This list of 13 purchasers included 8 who were associated with Operation Fast and Furious, including Patino and Moore.

Presentation Slide 5.2


OFFICE OF STRATEGIC INTELLIGENCE & INFORMATION


ATF – transforming into an Intelligence-Led Organization

Firearms SOLD in a SWB State
 RECOVERED outside the U.S./Traced by a FPA*
 During the period 06/28/09 – 01/02/10

Time to Crime
<30 days
75 / 4,424

5. 31 total purchasers – 13 were multiple purchasers for 57 firearms

- a. Average age: 25 ... over half (7) of the purchasers were 19-21 years of age
- b. 11 of the 13 purchasers (85%) were in AZ
- c. 55 of the 57 firearms were rifles and purchased in AZ

Firearms	State	Purchaser	Age	N-Force?
12	AZ	PATINO, Uriel	23	Y
6	AZ		21	N
6	AZ		19	Y
5	AZ		20	Y
4	AZ		19	Y
4	AZ		26	Y
4	AZ		23	Y
3	AZ		20	Y
3	AZ	MOORE, Joshua	21	Y
3	AZ		25	N
3	TX		35	Y
2	AZ		52	Y
2	TX		20	Y
57			25	

¹ purchased at 3 FFLS

² purchased at 2 FFLS

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OSII DAD Martin’s notes from the briefing indicated that the firearms purchased included models popular with the Sinaloa Cartel. Martin also wrote in his notes, “FAs [firearms] walking.” When we asked Martin what he meant by this, he stated that he was worried that the firearms were leaving the FFL and then disappearing. Martin stated that he was concerned about public safety because “when AK-47s and 5.7 millimeter firearms go south to Mexico, they’re usually used to shoot somebody, and they’re not for collectors.”

McMahon said he did not recall this specific briefing, but acknowledged that OSII provided the Office of Field Operations with weekly briefings. When we showed McMahon the slide showing 685 firearms and asked him if he recalled having a particular reaction to this information he replied, “Yeah, absolutely. I mean, the numbers of guns that were involved in this was staggering.” We asked McMahon if any steps were taken in the Office of Field Operations in light of this information. He replied:

No, normally you just get updates, what’s going on and how close are we . . . what have you done to get the case together. . . . I may have even tasked OSII with getting us some more information, maybe not with just the purchase numbers but recoveries.

We also asked McMahon if he understood by the time of this briefing that part of the case strategy was to allow the firearms purchasing to proceed without ATF confronting the straw buyers. He replied, "Yes." He said he concurred with that approach because ATF "didn't have a case to do anything other than that in Phoenix," meaning that he thought ATF did not have a legal basis to intervene.

McDermond told us that after the January 5 meeting he asked Chait, McMahon, Martin, Kumor, and Rowley to stay behind. McDermond said he then asked Chait, "[W]hat's going on? . . . Something's not right here." McDermond said that Chait replied, "Jim, you never worked one of these cases, so you don't understand."¹⁸¹ According to McDermond, Chait then excused himself to go to another meeting.

DAD Martin also said he recalled questioning the Office of Field Operations representatives after the meeting. Martin said that after the analysts left the meeting, he asked Chait and McMahon what the plan was and did not receive a response from them. Martin said he asked whether they were allowing guns to go into Mexico, and Kumor replied, "We can't do that . . . the Ambassador won't allow this." He also stated that he recalled that Rowley asked the Office of Field Operations representatives, "[H]ow long are you going to let this go on?" and that the representatives did not say anything to allay Rowley's concerns.

Kumor and McMahon also said they recalled Rowley expressing concerns about the investigation, although they could not recall specifically when he did so. McMahon told us that during this time period, Rowley was "pretty adamant" about the fact that the investigation involved a lot firearms. McMahon said that when Rowley raised these concerns at meetings, the conversation would turn to how Operation Fast and Furious was "totally different" from other cases because the activity was in Arizona and their experiences as agents in New York or Virginia did not apply to circumstances there. Rowley told the OIG that there were no attempts "to engage me in a serious discussion about the concerns that I had."

Chait told the OIG that he recalled attending "one or more" OSII briefings on recoveries in Operation Fast and Furious. Unlike McMahon, however, Chait told us that no one ever expressed any concerns to him about the number of firearms that were being trafficked. Chait also said he did not believe it was appropriate to infer from the large numbers of firearms that were trafficked in the case that agents were cutting off surveillances and allowing firearms to

¹⁸¹ McDermond was retired from the U.S. Secret Service after 22 years as a Special Agent and supervisor.

cross the border, because the numbers could reflect traces to historical purchases by a large number of straw purchasers.

McMahon told us that he was also concerned about the volume of firearms in the case. He said that his reaction to the large number of firearms involved in the case was to try to conclude it promptly. McMahon told us that he had “constant” conversations with Chait, Hoover, and sometimes with Melson about how to “bring the case down.” McMahon stated, “I think we were always thinking . . . we’re going to be taking this case down in the next week or so, and then the next thing you know it’s eight months later.” However, as we describe later in this chapter, McMahon was aware that one of the significant reasons for the delay in concluding the case was the decision by the U.S. Attorney’s Office and ATF, with Headquarters’ approval, to seek nine wiretaps between March and July 2010.

McMahon told the OIG that at the time he believed Operation Fast and Furious was “an excellent case” and he was “excited” that it was targeting a firearms trafficking organization rather than individual straw purchasers. His primary contact in Phoenix was Newell, who shared this view. According to McMahon, he and Newell discussed the case strategy early on. McMahon told us that he initially spoke with Newell about “identifying some weak links in the straw purchasing chains” and trying to pressure the straw purchasers to cooperate. He said that Newell responded that the U.S. Attorney’s Office did not favor that approach, that it would jeopardize investigation of the larger firearms trafficking organization, and that his agents were close to identifying other conspirators.

On January 5, the same day as the OSII briefing at ATF Headquarters, ATF Phoenix agents Gillett, Voth, and MacAllister met with Assistant U.S. Attorney (AUSA) Emory Hurley to discuss the Operation Fast and Furious investigation. That evening, Newell e-mailed McMahon to report on the case. He wrote that the U.S. Attorney’s Office wanted ATF “to proceed with getting up on a wire before conducting any overt investigative activity,” and that the U.S. Attorney’s Office agreed that there was “very little to prosecute on” at present.¹⁸² Newell informed McMahon, “Even though I don’t like it I have to agree. . . .” He continued, “[W]e are doing everything possible to slow these guys [referring to the straw purchasers] down.”

¹⁸² As we described in Chapter Four, the case’s posture was similarly described by AUSA Hurley, who prepared a memorandum for his supervisor, Michael Morrissey, on January 5. Hurley’s memorandum noted: “ATF [Phoenix] 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.” Hurley told the OIG that he understood that deferring contact with straw purchasers in Operation Fast and Furious differed from ATF’s past practices.

McMahon told us that he did not know if he had learned of the specific methods that the agents were using at the time to slow down the purchases, but he said he assumed that they were doing “everything possible” and stated, “I just left it at that.” McMahon also stated that he concurred with the decision to defer confronting the straw purchasers and to pursue a wiretap, though he believed at the time that indictments would follow immediately after the wiretap ended.

On January 8, 2010, Newell submitted his second Operation Fast and Furious briefing memorandum to McMahon. The memorandum recounted key facts about the investigation, including straw purchases of more than 650 firearms, cash payments of approximately \$350,000 for the firearms, the 5 firearms recoveries to date, and the investigative techniques that were being employed.¹⁸³

The memorandum also described the January 5 meeting with AUSA Hurley, and stated that “a determination was made that there was minimal evidence at this time to support any type of prosecution; therefore, additional firearms purchases should be monitored and additional evidence continued to be gathered.” In a section of the memorandum entitled “Investigative Strategy,” Newell stated that the “ultimate goal” of the investigation was the use of a wiretap to identify and prosecute members of a drug trafficking organization and to provide information to law enforcement in Mexico. With respect to future firearms purchases, the memorandum stated:

Currently our strategy is to allow the transfer of firearms to continue to take place, albeit at a much slower pace, in order to further the investigation and allow for the identification of additional co-conspirators It should be noted that since early December efforts to “slow down” the pace of these firearms purchases have succeeded and will continue but not to the detriment of the larger goal of the investigation.

The memorandum also referred to the pace of purchasing by the straw buyers as a “blitz” and said it “created a situation where measures had to be enacted in order to slow the pace down in order to perfect a criminal case.”

As described in Chapter Four, we found no evidence that ATF agents took any steps to slow down the pace of purchasing activity by Operation Fast and Furious subjects.

¹⁸³ The investigative techniques described in the memorandum included use of physical surveillance; pole cameras; pen registers; consensual monitoring; vehicle, telephone, business, and public records analysis; grand jury subpoenas; GPS tracking devices; and firearms traces.

McMahon told the OIG that he did not remember reviewing the January 8 memorandum though he believed he received it. He stated, however, that if he had reviewed the memorandum, it would have been a “red flag” to him because the memorandum made clear that ATF agents knew that those acquiring the firearms were committing illegal acts and the agents were allowing that conduct to continue. According to McMahon, he never discussed with Newell a strategy to allow the unlawful transfer of firearms. McMahon stated that no one ever told him that agents had probable cause to conduct seizures but were refraining from doing so.

Chait stated that he did not believe that he received the January 8 memorandum. McMahon’s e-mail account did not reflect that he forwarded it to Chait. Chait said that McMahon never discussed the strategy described in the memorandum with him, and he said he did not believe the strategy was sound because it failed to account adequately for public safety. Chait told us that he believed that Newell should have discussed the contents of the memorandum with McMahon and not have assumed that he received it and that “there was understanding.”

Through January 2010, government agencies (other than ATF) continued to seize and recover firearms acquired by straw purchasers who were subjects in Operation Fast and Furious. On January 8, 2010, the Mexican Army seized 14 firearms in Tijuana, Mexico, that had been purchased by Sean Steward, 1 of the leading Operation Fast and Furious straw purchasers and who had purchased the 9 firearms seized in Douglas, Arizona, on December 8.

On January 12, 2010, Melson, Hoover, and Chait received information at an OSII weekly briefing about the mounting volume of firearms recoveries linked to the investigation. The presentation at the briefing included 15 PowerPoint slides. One of the slides provided updated information on firearm recoveries linked to Operation Fast and Furious. The slide identified 729 firearms that had been acquired by 24 persons, including 221 by Steward, 135 by Patino, and 113 by Moore:

Presentation Slide 5.3


OFFICE OF STRATEGIC INTELLIGENCE & INFORMATION


		Suspect Gun (TOTAL)	
		20	
Avila Jr	Jamie	5	
		5	(5) seized in Naco
		8	
		24 *trace	(4) Mexicali
Chambers	Jacob	58	
		10 * trace	(3) seized in Mexicali (2) seized in Naco
		13	
Hercegovac	Dejan	32	
		1 * Trace	(1) Naco
		20	
		2 * Trace	(1) Naco
		1 *Trace	
Moore	Joshua	113 *Trace	(5) Mexicali (1) Naco
Patino	Uriel	135	
Polanco	Jose	3 *Trace	(1) NACO (1) Phoenix 11/19/09)
		1 *Trace	(1) Naco
Steward	Sean	221 *	(4) 12/18/09 Tijuana, Baja Cali Seizure
		25 *trace	(5) Naco (1) Mexicali
		16	
		8 *trace	(6) Mexicali
		2 *trace	(2) Mexicali
		1 * trace	(1) Mexicali
		5 *trace	(1) Mexicali
TOTAL		729	UNCLASSIFIED

785115-10-0004-UPDATES

Caliber	QTY
410	1
40	1
50	3
57	47
762	678
Grand Total	729

Melson said that the information presented in the briefing showed that Operation Fast and Furious was a significant case for ATF but he did not recall his specific reaction to the information or whether he requested any follow-up to it. Melson also said that he expected Hoover, Chait, and McMahon to supervise the investigation and to be aware of how it was being handled, and that Chait probably should have made inquiries about what was being done with regard to Patino and Steward. Chait said he recalled that in January 2010, there were “one or more OSII briefings on recoveries, [and] at least one where they talked about some of the guns were related to the Fast and Furious case”

Hoover said he did not recall attending the briefing or seeing the information on Operation Fast and Furious, though he agreed he must have been present given his name was on the attendance sheet. He told us that the information would have prompted him to ask several questions about the investigation, including whether the firearms purchases were historical, whether agents had advance notice of the purchases and were conducting surveillance of them, and whether agents had performed any field

interrogations of the suspects. However, Hoover said that he did not recall taking any actions regarding Operation Fast and Furious in light of the January 12 briefing and we found no evidence that he did.

The next day, January 13, 2010, the El Paso Police Department raided a “stash house” for drugs, currency, and firearms, and officers recovered 40 AK-47s that once again Steward had purchased. McDermond told the OIG that the El Paso recovery was significant because it was the first time ATF noticed Operation Fast and Furious firearms exiting the United States outside of Arizona. The same day, Customs and Border Protection officers arrested an individual trying to cross into Mexico with another two firearms that Steward previously had purchased.

Newell e-mailed McMahon on January 14 to notify him of the El Paso recoveries. Despite the lack of any involvement by ATF in these recoveries, Newell stated to McMahon that “we are working this ‘fast and furious’, the good news being we got another 42 off the street and can keep our case going. Hopefully the big bosses realize we are doing everything possible to prevent guns going to Mexico while at the same time trying to put together a phenomenal case.” As we described in Chapter Four, we found no basis for Newell’s statement to McMahon that “we got another 42 off the street,” given that ATF played no role in the El Paso seizure. Additionally, we found no evidence that ATF Phoenix had taken any action by this date to “prevent guns going to Mexico,” as Newell told McMahon. To the contrary, we found that ATF Phoenix and the U.S. Attorney’s Office had affirmatively decided not to take action against straw purchasers, even when they had advance knowledge of impending purchases, in order to avoid having the subjects learn about the investigation.

At its weekly briefing to the Office of Field Operations on January 19, OSII staff presented a slide with information on the 10 firearms seizures and recoveries linked to subjects in Operation Fast and Furious since late November 2009, as well as an updated organization chart of the suspects in the case. At this briefing, OSII staff identified Steward as one of the top three straw purchasers in the case.

As we described in Chapter Four, however, ATF did not seek to arrest Steward or any of the other leading straw purchasers in the case such as Patino, or Patino’s colleague Avila, until a year later. Instead, consistent with the case strategy outlined on January 8, 2010, Phoenix ATF and the U.S. Attorney’s Office focused much of their attention during January and February 2010 on the substantial paperwork necessary to obtain a wiretap, including an initial 61-page affidavit from MacAllister.

On February 5, 2010, ATF’s Phoenix Field Division submitted a memorandum to McMahon requesting authorization to seek Title III

interception of telephone communications in Operation Fast and Furious. The memorandum provided a brief overview of the investigation. It identified the five straw purchasers who were the initial subjects of the investigation and noted that others had since been identified, including Avila in November 2009. It also summarized the December 8, 2009, firearms purchase by Steward and subsequent recovery of nine of these weapons in Douglas, Arizona. The affidavit of SA MacAllister was listed as an attachment to the memorandum, but was sent separately by Federal Express due to its length. McMahon told the OIG that he approved the authorization request on Chait's behalf without reading the underlying affidavit and that no one ever informed him that he had a responsibility to review wiretap affidavits from the field divisions that he oversaw.¹⁸⁴

On February 20, 2010, Newell e-mailed DAD McMahon advising him of the seizure of 42 firearms that day from 2 females who were driving towards the border with Mexico from the Tohono O'odham Indian Reservation.¹⁸⁵ McMahon promptly e-mailed this information to Chait, who informed Deputy Director Hoover the next day. Chait described the seizure to Hoover as a "key takedown" in Operation Fast and Furious. ATF included a 1-paragraph description of the seizure in its weekly report to the Office of the Attorney General and Office of the Deputy Attorney General for the week of March 1, 2010. The description did not mention "Operation Fast and Furious" by name and did not identify the investigative techniques being employed in the case other than use of a GPS tracking device.

Chait and McMahon stated that the Tohono O'odham seizure was an example that agents were exercising their authority to seize firearms in the case, and they assumed that agents were seizing firearms in other circumstances where they could. However, we found no evidence to indicate

¹⁸⁴ Chait told the OIG that while ATF policies do not require DADs to review the supporting agent affidavit, he expected his DADs to review it if they had time, consistent with the demands of their other duties. Two DADs in the Office of Field Operations told us that it was their practice to review the wiretap affidavits from the field offices they supervised, with the depth of that review informed by their previous knowledge of the case and their confidence in the Field Division's SAC. As DAD for ATF's Western Division, McMahon had access to all nine wiretap applications in Operation Fast and Furious that ATF submitted to the Criminal Division. He initialed transmittal memoranda on Chait's behalf from the Office of Field Operations to the Criminal Division for four of the wiretap applications.

¹⁸⁵ As described in Chapter Four, through mid-February 2010, all of the firearms seizures and recoveries in Operation Fast and Furious were made by law enforcement entities other than ATF acting without intelligence from ATF. The February 20 Tohono O'odham seizure, which is described in detail in Chapter Four, was the first ATF-initiated seizure resulting from the investigation, and did not occur until approximately 4 months after the case was initiated. ATF's second seizure in the case would not occur until another 4 months had passed, in June 2010.

that either Chait or McMahon made any attempt to confirm this assumption, which, had they done so, they would have learned was incorrect. They also stated that they were unaware until 2011 that agents had been breaking off surveillances and failing to interdict firearms when they had authority to seize them. Hoover said that he assumed as well after seeing photographs of the Tohono O'odham seizure that agents were initiating seizures. He also stated that he assumed from the briefing slides he saw in March 2010 showing firearms seizures at various locations that ATF had provided information that prompted the seizures. Hoover said that McMahon and Chait told him in approximately April 2010 that agents were stopping the firearms whenever they had the opportunity.

McMahon also said that there was an assumption “across the board” at ATF Headquarters that, “if there was an opportunity to seize weapons, then we were going to seize them.” McMahon said that Newell’s statement in the January 14 e-mail, “Hopefully the big bosses realize that we are doing everything possible to prevent guns from going into Mexico,” was a message that “absolutely” reverberated around ATF Headquarters. We found no evidence, however, that Chait and McMahon asked questions during the investigative phase of Operation Fast and Furious to determine whether ATF agents were in fact seizing weapons at every opportunity, or whether they were otherwise conducting the investigation in a manner that minimized the risk to public safety.

III. March and April 2010: Briefings for Senior Leaders of ATF and the Department, the Exit Strategy, the Initial Wiretap Applications, and the Involvement of the Criminal Division

As Operation Fast and Furious continued into the Spring of 2010, ATF’s senior management learned even more information about the investigation’s scale and attendant risks. During March 2010 they received important briefings about Operation Fast and Furious, one of which resulted in a request from Hoover for an “exit strategy” in the investigation.

Melson and Hoover also delivered a high-level presentation about the investigation to Acting Deputy Attorney General Gary Grindler during one of ATF’s regularly scheduled monthly briefings with him. We describe these events below, as well as the initial applications for wiretaps and ATF’s discussions concerning Operation Fast and Furious with DAAG Jason Weinstein in late April and early May 2010.

A. ATF Briefings on March 1 and March 5 for Criminal Division Prosecutor and the Rejection by the U.S. Attorney's Office of Criminal Division Assistance

By the end of February 2010, Gang Unit prosecutor Cooley had completed his trial in Texas, and he reinitiated contact with ATF about his work on firearms trafficking cases along the Southwest Border. On March 1, ATF Headquarters' staff briefed Cooley about firearms trace information related to Operation Fast and Furious and to firearms purchases in Texas. Cooley said that ATF provided him with contact information for AUSA Hurley and the case agents, and he e-mailed them on March 1 to let them know he had been assigned by his supervisors to provide assistance. ASAC Gillett responded to Cooley the same day that a briefing concerning Operation Fast and Furious was scheduled at ATF Headquarters on March 5 and invited him to attend.

Newell told the OIG that he "pushed for" the March 5 briefing because he wanted ATF Headquarters to be fully informed about Operation Fast and Furious. According to Newell, "I wanted to be . . . very clear. This is what we're looking at. This is what we're doing. This is our plan. So that if anybody had an issue with it, speak now or forever hold your peace." However, Chait told the OIG that he thought the purpose of the briefing was that Newell wanted to show that they were "going to take out a big organization." Chait said that he did not believe that as a result of the briefing his office approved the Operation Fast and Furious case strategy because shortly after this briefing "we asked to close the case. Get us a closing strategy." As we describe below, however, Chait did not request an exit strategy in the case; Hoover did, but not until later in March.

Witnesses' recollections varied as to who attended the March 5 briefing, and we were not provided a sign-in sheet for it. From the witness accounts, we concluded that the attendees included the leadership of the Office of Field Operations (McMahon and Chait), Cooley, and by videoconference several SACs from ATF field offices on the Southwest Border, including Newell.¹⁸⁶ No one was present from the U.S. Attorney's Office for the District of Arizona, even though it had been handling the matter for several months and was actively working on finalizing the first wiretap application in the case. Melson was unable to attend. Both Melson and Hoover received separate briefings later in

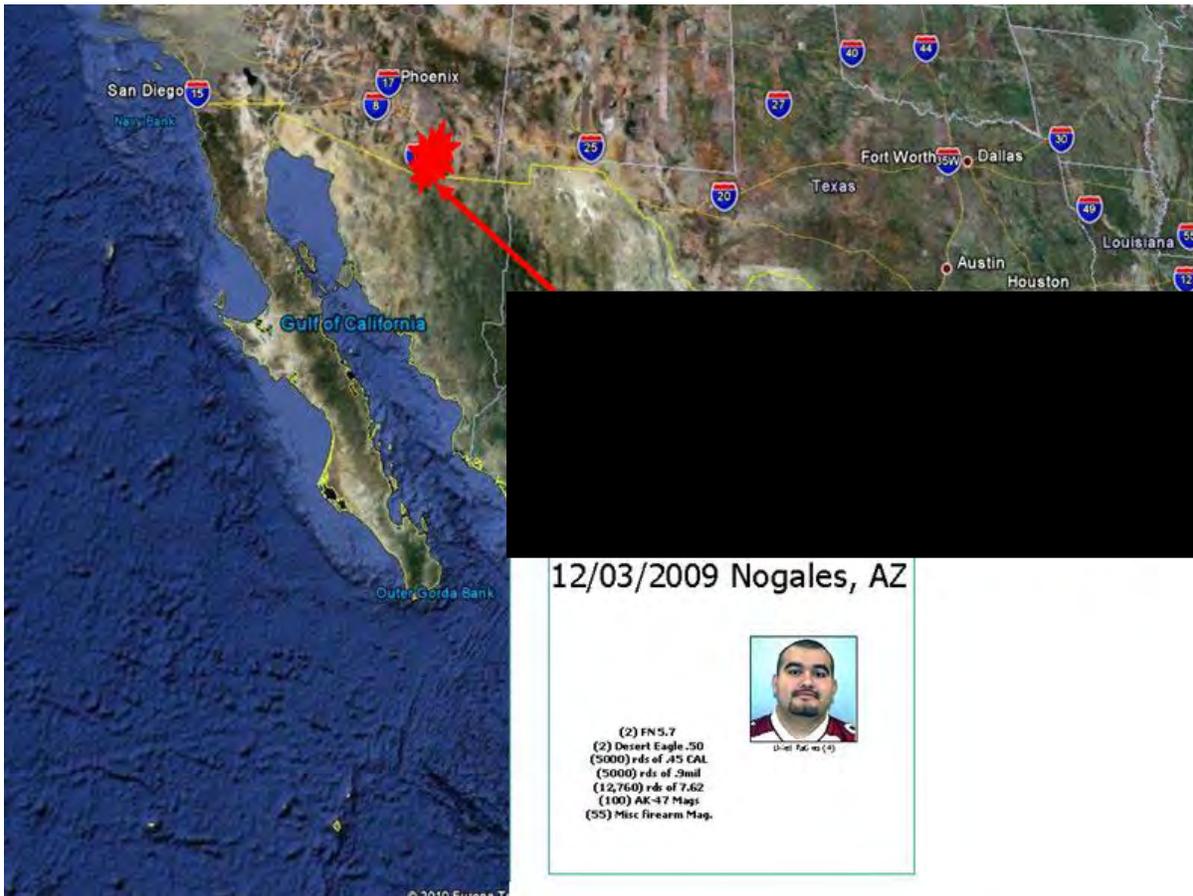
¹⁸⁶ Hoover told the OIG that he did not recall attending the March 5 briefing, though other ATF Headquarters staff stated that he was present and Hoover's Outlook Calendar shows he was invited to the meeting. Although we could not determine whether Hoover was physically present on March 5, we confirmed that he received the PowerPoint presentation from the meeting from Chait on March 10, which contained critical information about Operation Fast and Furious.

the month, and Chait e-mailed Hoover a copy of the March 5 briefing slides on March 10, 2010.

The briefing lasted approximately 90 minutes and was presented by Group VII Supervisor Voth and an analyst from OSII. It included presentation of 28 PowerPoint slides that summarized key facts about the investigation: the structure of the firearms trafficking organization; the total number of firearms purchased (1026); the number of firearms each straw purchaser had acquired (e.g., Patino – 313, Steward – 241, Moore – 116, Chambers – 68, and Avila - 17); and the total cost of the purchases, which was approximately \$650,000.¹⁸⁷ The briefing also provided descriptions of 17 separate firearms recoveries dating from October 2010 through the end of February 2011 at 10 locations, 5 of which were in Mexico, as well as photographs of firearms transfer locations. A slide describing one of the recoveries associated with Patino appears below:

¹⁸⁷ Patino alone was identified as having spent approximately \$215,000 on firearms.

Presentation Slide 5.4



A total of 257 firearms were recovered at these 10 locations, and 199 of them were attributed to Operation Fast and Furious straw purchasers. The presentation also identified four other ATF investigations as “associated cases,” including Operation Wide Receiver, which we discussed in Chapter Three.¹⁸⁸

The witnesses had differing recollections of the attendees’ reaction to the information presented during the briefing. The OSII analyst who presented part of the March 5 briefing said that an attendee from ATF’s Dallas Field Division voiced concern that too many firearms were involved in the case. Cooley also told us that someone from ATF raised a concern that there were already 1,000 guns on the street in the case. Chait, McMahon and Newell, in contrast, told us that they did not recall anyone voicing concern about the number of firearms that were involved in the case. McMahon said that

¹⁸⁸ As we discuss in Chapter Three, agents learned in early 2010 that a subject in Wide Receiver potentially was linked to a Tucson stash house involved in Operation Fast and Furious.

“everyone accepted the fact that we have this big case and there’s a lot of guns.”

Cooley said that in response to the comment that there were already 1,000 guns on the street, he remarked that “if you want to go up on the [wiretap] . . . we’re going to have to let this thing ride out for a bit.” He told the OIG he understood ATF had decided to use a wiretap in the case and he agreed that they should do so if the goal was to target the organization. Cooley told us that in the context of the discussion about dismantling the entire organization, he stated that individual straw purchasers were “fungible” and that they should focus on targeting the organization.

The OSII analyst who provided part of the March 5 briefing said that he thought it was obvious from the information presented at the briefing that agents were not seizing guns, and he interpreted Cooley’s comments at the meeting to indicate that this was an acceptable practice. However, the analyst told us that he did not raise any concern or objection in response to Cooley’s comments, nor did anyone else. Cooley told us that what he meant by his “ride out a bit” comment was that in using a wiretap, ATF would have to allow the straw purchasers to continue to buy, but that they would also have to continue to be aggressive in seizing weapons through techniques such as “wall stops” or stash house raids.¹⁸⁹ Cooley told the OIG, “You certainly don’t allow any weapons to cross the border if you have any way of stopping it.”

Cooley also told us that the number of guns in the case seemed high and indicated to him that the case involved a very serious trafficking organization and needed to be addressed in a “fast and efficient manner.” He said that the timeframe he was contemplating was approximately two weeks to obtain authorization for the wiretap, a few weeks for the wiretap to function, and then “take what we can” and close down the case. Cooley also said he approached this meeting as a prosecutor assigned to the case, not as an advisor. As we describe below, however, Cooley did not become involved in the case because Hurley rejected his offer of assistance.

The March 4 and 11 weekly updates from the Gang Unit to Deputy Assistant Attorney General Weinstein mentioned that Cooley had been briefed on the *Fast and Furious* case.¹⁹⁰

¹⁸⁹ “Wall stop” is a term used to describe enforcement action taken by law enforcement agencies other than the investigating agency in order to protect the investigation.

¹⁹⁰ One of the reports briefly stated that Cooley had attended a briefing on March 1, 2010, “on developments in Operation *Fast and Furious* and various firearms trafficking investigations based in Phoenix, AZ.” The other report stated that Cooley attended a briefing on March 5, 2010, regarding “Operation *Fast and Furious*, an extensive firearms trafficking

(Cont’d.)

Documents show that Newell anticipated Criminal Division assistance following Cooley's appearance at the March 5 briefing. He sent an e-mail to Gillett immediately after the briefing instructing him to prepare a prosecution plan that ATF could show to Cooley. Newell informed Gillett that he wanted to work with Cooley because "[t]hat way we'll already have Main Justice buy-in and they'll [the USAO] know it here."

However, the following week Cooley ceased preparing to work on Operation Fast and Furious after he had a short conversation with AUSA Hurley and learned that Hurley did not want his assistance. Hurley told us that he spoke to his supervisor, Michael Morrissey, about Cooley's offer of assistance. Hurley said Morrissey asked him how busy he was at that time, and Hurley told him that he was not too busy. Morrissey responded that it did not appear Hurley needed assistance on Operation Fast and Furious, and Hurley communicated this to Cooley. Hurley also told us that his impression was that the Arizona U.S. Attorney's Office did not want to accept assistance from Main Justice because it somehow might make the Office look bad. Cooley notified his supervisor, Kevin Carwile, about his conversation with Hurley shortly thereafter.

On March 15, 2010, Weinstein e-mailed Carwile and asked him to send Weinstein "the names of the cases ATF HQ asked us to get involved in but which had in fact been shopped to the field." Carwile responded on March 16 that Cooley had been briefed on the Operation Fast and Furious matter, stating: "That is when he learned the USAO now had the case and was about to go up on a wire. We offered to help but they said they had it under control."

Weinstein told the OIG that there was nothing to do after Hurley rebuffed Cooley's offer of assistance because when a U.S. Attorney's Office does not want or need Criminal Division assistance "[w]e don't force our way in." He said that the Division does not oversee the U.S. Attorney's Offices and must be invited by them to assist with their cases. Weinstein stated that he had not understood until he received Carwile's e-mail that the U.S. Attorney's Office had a prosecutor assigned to the case already and believed that someone had misinformed Melson in December 2009 that an Assistant United States Attorney was not handling the case.

Melson and McMahon told the OIG they were frustrated with the Criminal Division's failure to take a leadership role following Melson's request for assistance. Melson said that "to my disappointment, [the Criminal Division

investigation based in Phoenix, Arizona," and that ATF planned to use a wiretap in the case. The reports were addressed to DAAG Weinstein, Principal Deputy Assistant Attorney General and Chief of Staff Mythili Raman, and Deputy Chief of Staff Steven Fagell.

staff] didn't grab and take a hold of it." McMahon said that he understood that the Criminal Division was not willing to "push" its way onto the U.S. Attorney's case because the Criminal Division did not believe that was its proper role.

B. Acting Director Melson's Briefing on March 11

Melson told the OIG that he had been unable to attend the March 5 briefing and that his staff wanted to provide him with a concise summary of Operation Fast and Furious. He said that he received a briefing on the investigation on March 11, 2010, from Kevin O'Keefe, the Chief of ATF's Criminal Intelligence Division. According to O'Keefe, Hoover attended the briefing with representatives of the Office of Field Operations and OSII, and Hoover's Outlook Calendar shows that he was invited to the briefing. Hoover, however, told us that he does not recall attending the briefing and has no notes from it. O'Keefe said that he provided Melson with a paper copy of the PowerPoint presentation from the March 5 briefing and went over each slide with him. E-mails regarding the briefing describe it as an abbreviated version of the March 5 presentation.¹⁹¹

Melson stated that he did not recall receiving information during this briefing about the "specific strategies" that the ATF agents were using in Operation Fast and Furious, but he remembered asking questions about various investigative techniques. ATF e-mails following the March 11 briefing show that Melson's inquiries included questions about money transfers, the use of mail covers, a seizure in Nogales, and the internet address for the pole cameras the agents were using. These inquiries did not address the fate of the firearms that ATF agents were observing during their surveillances or otherwise raise questions about the risk to the public safety.

Melson told the OIG that even though Operation Fast and Furious was one of ATF's largest firearms trafficking cases, and the number of firearms and amount of money involved in the investigation was increasing, he did not have

¹⁹¹ After reviewing a draft of this report, Melson told the OIG that he received less information at this briefing than that presented at the March 5 briefing. He noted that the ATF SACs who participated in the March 5 briefing did not raise any concerns to him about the information presented in the briefing, and that the OIG found no evidence that Gang Unit Attorney Cooley, who attended the March 5 briefing, had knowledge about the actual investigative techniques that ATF was employing and its failure to seize firearms when it could lawfully do so. Melson said that no one informed him of any problems either during his briefing on March 11 or as a result of the March 5 briefing. As we describe above, some attendees at the March 5 briefing, including an ATF SAC, voiced concerns during the briefing about the number of firearms in Operation Fast and Furious. In our analysis, we recognize that Melson was ill-served by the Office of Field Operations and SAC Newell, and that he should have received better information about Operation Fast and Furious. Our criticisms of Melson are discussed later in this Chapter and in Chapter Seven.

questions about how the Phoenix Field Division was managing the case. According to Melson, there was no reason to ask such questions because he had no basis to suspect that anything was going wrong in the investigation. He also said he could not recall whether he asked for any actions to be taken given the content of the briefing.

Melson also told the OIG that he was not informed of the agents' failure to interdict firearms, and it did not occur to him to ask whether they were "letting guns go." Although he was briefed on the large number of firearms purchased in the case, the small percentage of firearms recovered, and the even smaller percentage of ATF-initiated seizures, Melson said that he assumed that agents were seizing firearms when they could. As with Chait and McMahan, we found no evidence to indicate that Melson made any attempt to confirm this assumption and that had he assessed the matter, he would have learned it was incorrect.

Both Melson and Hoover said that they did not recall anyone raising concerns to them during any briefings prior to 2011 about the tactics that were being used in the investigation. Hoover said that he had "no idea" that agents were following subjects to locations after they had purchased firearms and then dropping the surveillance, and that if he had known he would have stopped it and shut the case down immediately.

However, McDermond told the OIG that both before and after the March briefings he expressed concern to Melson and Hoover about the large number of firearms acquired by the straw purchasers. He said that they told him that "this is going to be a great case" and that "we're trying to get the DTO [drug trafficking organization]."¹⁹² Melson told us that he did not recall McDermond telling him about his concerns, and he believed that if McDermond had expressed concerns to him he would have acted on them.¹⁹³ Hoover told us he did not recall McDermond or Rowley raising concerns about the number of firearms in the case before the "March time frame," and that he did not have a sense before then that any particular straw purchasers had bought large quantities of firearms.

¹⁹² Newell also told us that he spoke to Melson during a visit to Phoenix in the summer of 2010 and told him that one of the issues in the Operation Fast and Furious would be the amount of firearms in the case.

¹⁹³ After reviewing a draft of this report, Melson stated that McDermond, Martin, and Rowley never expressed concerns to him about Operation Fast and Furious despite the fact that he maintained "an open door" policy where staff could approach him directly with their concerns.

C. ATF's Briefing for the Acting Deputy Attorney General on March 12

By mid-March 2010, the significance of Operation Fast and Furious to ATF's senior leadership had increased to the point that ATF chose to describe the case to Acting Deputy Attorney General Gary Grindler during ATF's regularly scheduled monthly meeting with him on March 12. Grindler had become Acting Deputy Attorney General in February 2010, and he told the OIG that the March 12 meeting was his first monthly meeting with ATF and the first time he had heard of the investigation and the title "Fast and Furious." He said that the purpose of the monthly meetings was to afford ATF's leaders an opportunity to report on key issues that they wanted to bring to his attention.

The meeting agenda identified Operation Fast and Furious as the "Phoenix Case – Update on a significant firearms trafficking case." The case was listed fourth on a list of seven discussion items. According to Grindler, the entire meeting was scheduled for 45 minutes and may have exceeded that time by a few minutes. Grindler said he could not recall how much time ATF devoted to Operation Fast and Furious during the briefing, but since there was only 45 minutes for seven agenda items he said that it "wasn't a lot of time." Similarly, Hoover told the OIG that the briefing for Grindler was not "in-depth" and that it was given "at a 50,000-foot level."

Melson and Hoover gave Grindler a packet of charts and diagrams at the briefing that presented an overview of the investigation.¹⁹⁴ The briefing materials included information about the number of firearms that the straw purchasers had acquired (1,026), their cost (over \$600,000), and the location of various firearms recoveries that were linked to Operation Fast and Furious. However, there was no indication during the presentation that ATF played any role in the recoveries, or that two FFLs were cooperating with ATF as part of the operation. As in Melson's briefing the day before, one of the charts showed that Patino had purchased 313 firearms, Steward had purchased 241, Moore had purchased 116, and Chambers had purchased 68.

Grindler told us that he was aware at the time that there were almost 60,000 traces performed on firearms seized in Mexico in 2009, and that tens of thousands of firearms had been seized there. He said that he did not recall having a concern about the volume of firearms that had been purchased in Operation Fast and Furious, and that if anyone had identified the volume as a concern he would have made a note about it. Melson stated that he did not

¹⁹⁴ According to Melson, Hoover made the presentation because Operation Fast and Furious was an ongoing investigation and Hoover had operational knowledge of it. Hoover, however, said he did not recall whether he made the presentation to Grindler.

recall whether he highlighted for Grindler the number of firearms and amount of cash involved in the case, but said that the figures were significant in that they showed the size and scope of the case and not that there were problems with it.

Grindler's notes from the briefing also refer to "long rifles - multiple sales issues," that the firearms purchases were "all cash," and, on a photograph of firearms that had been seized, Grindler wrote that weapons had been tracked to several "stash houses." Grindler said that the ATF officials discussed with him their desire to require FFLs to report multiple sales of long guns, and said he could not recall why he made a notation that the firearms purchases had been made in cash. Melson told the OIG that Grindler's briefing included the long gun reporting issue because ATF expected to send him a memorandum later that month about it.¹⁹⁵ After examining his notes Grindler said that ATF officials told him that ATF had used trackers to follow firearms.

¹⁹⁵ Two weeks following Grindler's briefing, on March 26, 2010, and again on December 6, 2010, Melson sent the Department a memorandum requesting that ATF be permitted to issue demand letters to FFLs in select states requiring them to provide ATF with reports of multiple sales or other dispositions within any 5 consecutive business days of two or more rifles with the following characteristics: (a) semi-automatic; (b) a caliber greater than .22; and (c) the ability to accept a detachable magazine ("long guns"). Both memoranda explained that "multiple sales reports of the specified rifles will enable ATF to uncover more illegal activity and develop better intelligence about trafficking patterns," and included a list of seven cases that ATF described as illustrating the potential benefit to ATF of collecting the requested information. After reviewing a draft of this report, Department officials stated that both memoranda were returned to ATF by staff in the Deputy Attorney General's Office without formal action or approval. The first memorandum was returned with a request for revisions, and the second with instructions for ATF to resubmit it after complying with requirements of the Office of Management and Budget. The memoranda did not refer to Operation Fast and Furious by name, but stated:

Phoenix Field Division: On or about November 1, 2009, individuals in the Phoenix, Arizona area began to illegally purchase firearms, firearm magazines and/or ammunition to be transported to Mexico. Case agents identified 25 individuals who purchased in excess of 1130 firearms in the Phoenix area with over-the-counter cash transactions. Twenty-two of these individuals purchased firearms that were recovered in Mexico in the possession of drug traffickers affiliated with the Sinaloa Cartel. Over 50 firearms purchased by two of these individuals were recovered in stash locations or during a crossing along the border in Arizona and Texas and were destined for delivery to drug trafficking organizations in Mexico. There was an extremely short time span, ranging from one (1) day to less than a month, between the purchases of all firearms and the recoveries. The majority of the firearms were purchased at an FFL involving transactions of five to ten rifles at a time.

We found other instances late in the investigation where ATF used Operation Fast and Furious to exemplify the need in its view for a long gun reporting requirement. On July 14, 2010, Chait e-mailed Newell requesting information concerning Operation Fast and Furious

(Cont'd.)

Melson told the OIG that the purpose of Grindler's briefing was to inform the Acting Deputy Attorney General about an investigation in Phoenix that involved a significant number of firearms and cash. He said that he did not raise concerns about the investigation during the briefing. He said that by the time of Grindler's briefing he did not perceive that there were problems in Operation Fast and Furious and none had been brought to his attention. He stated that if he had understood that there were problems with the case he would have had specific discussions about them with staff in the Office of the Deputy Attorney General.

Hoover also said that he did not recall identifying any problems to Grindler, and that he did not believe he, Hoover, was aware of any problems in the investigation at that time. Grindler told us that if Melson or Hoover had concerns about the investigation he "absolutely" would have expected them to say something to him about their concerns.

Melson also told us that he believed there was nothing presented during the briefing to Grindler from which Grindler could have assumed what tactics agents were using in the investigation and their purpose. Hoover also said that the case strategy and tactics in Operation Fast and Furious were not discussed and that he could not have described them during the briefing because he did not know that information at the time. Similarly, Grindler told us that he did not recall discussing investigative techniques in the case except as reflected in his briefing materials and notes, which as noted describe the results of firearms traces (persons linked with seizures) and the tracking of certain weapons.¹⁹⁶

because "we are looking at anecdotal cases to support a demand letter on long gun multiple sales." Newell also included the investigation in talking points for the press conference on January 25, 2011, where he, along with Burke, announced the indictments in several gun trafficking cases, including Operation Fast and Furious. The following day Chait e-mailed Newell requesting sales information from the investigation and stated that "this case could be a strong supporting factor if we can determine how many multiple sales of long guns occurred during the course of the case."

Melson told the OIG that the impetus for the long gun reporting requirement came from him, though he could not recall the date that he asked his staff to pursue the matter. He also stated that when he discussed the long gun reporting requirement with staff at ATF Headquarters, "[n]o one ever suggested that [Operation Fast and Furious] was being done for purposes of supporting our position on the long guns," and that he did not make any decisions concerning the case in order to increase the likelihood that the long gun reporting requirement would be implemented. We found no evidence that contradicted Melson's statements to us concerning the long gun reporting requirement; and no evidence that ATF Phoenix initiated the investigation in order to facilitate efforts to obtain long gun legislation.

¹⁹⁶ Former Associate Deputy Attorney General Edward Siskel also attended this briefing. Siskel told us that although he did not remember the briefing, he did not dispute that

(Cont'd.)

Grindler, Melson, and Hoover all stated that the issue of “gun walking” was not mentioned during the briefing. Grindler told the OIG that at the time of the briefing he did not know whether ATF had advance notice of any of the purchases that were identified in ATF’s presentation to him, and he said he would not have assumed that ATF was doing anything other than attempting to interdict firearms. Grindler said that it would have surprised him if ATF was failing to interdict firearms and he would have recorded that in his notes. He stated that he understood ATF to be building its case by tracing weapons seized or recovered in Mexico back to their purchases in the United States. Grindler’s stated understanding of the case was similar to what Hoover told us was his understanding at the time of the briefing – that the seizures and recoveries being reported reflected historical purchases. Hoover said that it was not until after the briefing that he learned that ATF agents in fact had advance notice or contemporaneous knowledge of certain purchases by suspects in the investigation.

Grindler told us that he did not make any decisions during the briefing and that he never authorized any aspect of the case during his tenure as Acting Deputy Attorney General.

Grindler also told the OIG that he did not recall discussing Operation Fast and Furious at other meetings or ATF briefings he attended in 2010. We found no evidence to indicate that Grindler received any additional briefings about Operation Fast and Furious, or information about the strategy and tactics used in the investigation while it was ongoing.¹⁹⁷ As we discuss below, Grindler received various Weekly Reports in the summer of 2010 that contained passing references to Operation Fast and Furious but provided no details regarding the strategy or tactics used in the operation. In addition, as described in Chapter Four, after the shooting of Agent Terry, Grindler received an e-mail dated December 17, 2010, that referred to the connection between the Operation Fast and Furious investigation and the two firearms found at the scene of the murder. As we discuss below, Grindler took no action in response to learning that information.

he was there because he has notes from the meeting. Siskel also told us that although he did not remember the briefing, he is “confident that had . . . inappropriate tactics been described in this meeting, I would have remembered something like that. And I don’t remember that.”

¹⁹⁷ In his submission to the OIG following his review of the draft report, Grindler noted that during his tenure as Acting Deputy Attorney General, he had at least 10 regular meetings with ATF leadership and that based on a review of the agendas for those meetings and his notes, Operation Fast and Furious was only mentioned at the briefing on March 12, 2010.

D. Hoover's Request for Exit Strategy

Hoover told us he did not recall attending the briefing on March 5 or the briefing for Melson on March 11, although his Outlook Calendar indicates that he was invited to the meetings and as mentioned earlier other witnesses placed him at both of these briefings. He said that after the March 5 meeting, Chait told him there were “a lot of guns being moved out of this Fast and Furious case” and that Chait’s comment prompted the briefing of Melson and Hoover later in March.

Hoover said he recalled receiving a briefing on Operation Fast and Furious on March 22, 2010, from the Office of Field Operations, and that he recalled seeing at that briefing the slides that ATF had used in its March 5 briefing.¹⁹⁸ He stated that he could not recall if Melson attended the March 22 briefing with him.

Hoover told us he asked Chait and McMahon at the briefing whether the firearms purchases referenced in the presentation were historical, meaning that ATF learned about them after the fact, or whether agents were aware of them by the time that they occurred. He said he was told that “it was a mix.” Hoover also stated that prior to receiving this information in March he believed that agents were being notified after-the-fact of the firearms purchases and did not have advance notice of them.

Hoover also stated that prior to the briefing he received in March he believed that the volume of firearms purchases in the case was attributable to the large number of straw purchasers. He said he was unaware that a few straw purchasers, such as Patino, had purchased so many firearms, and that the new information he received at the briefing was a “red flag” for him.¹⁹⁹

Hoover told us that the high volume of firearms acquired by some of the straw purchasers, combined with the fact that agents in some circumstances had advance notice of the purchases, prompted him to ask for an exit strategy at the end of the briefing. Hoover’s notes from the briefing show that he wrote down “Strategy?” which he said indicated that he asked for the exit strategy.

¹⁹⁸ As noted previously, on March 10, Chait e-mailed the slides from the March 5 presentation to Hoover.

¹⁹⁹ Hoover’s recollection of events fails to account for his participation in the March 12 briefing of Acting Deputy Attorney General Grindler, which included presentation of the same information concerning the volume of firearms in the investigation (including by individual straw purchasers such as Patino) that prompted his request for an exit strategy. It also fails to account for his attendance at the OSII briefing on January 12, which also included similar information. Hoover said that he did not recall attending that briefing, nor did he recall attending the briefings on March 5 and March 11.

Hoover stated that he had never requested agents to prepare an “exit strategy” for an investigation prior to Operation Fast and Furious.

Melson said that he was not present when Hoover requested the exit strategy, and did not believe that he became aware of his request until after allegations in the case became public. Melson said that he learned afterwards that Hoover requested the “exit strategy” because the case had become too large and needed to be brought down and that Hoover delivered that message to Chait and McMahon. He also stated that Chait should have requested the exit strategy before Hoover.

McMahon said he was not sure he was present when Hoover asked for the exit strategy or if Chait informed him of the request, but said he recalled being told of the need to obtain an exit strategy. Chait told us that he thought Hoover asked for the exit strategy during the March 11 meeting. According to Chait, he and Hoover had a conversation during the meeting about the need for an exit strategy, and Chait then asked McMahon to get it done. Chait also said he recalled reminding McMahon about it when it had not arrived.

Our review determined that ATF Headquarters did not receive the exit strategy until April 27, more than 4 weeks after Hoover told us he requested it. McMahon told the OIG that he telephoned Newell immediately after receiving the request and informed Newell of the need to prepare the strategy. However, we found that McMahon sent an e-mail to Newell on April 27 stating that “[w]e need to begin working on an exit strategy for this case. Let me know what your plans are for taking this case down to include the timing.” McMahon said that he believed that his decision to e-mail Newell probably was prompted in part by his learning that he needed to attend a briefing on April 28 with DAAG Weinstein to discuss media issues related to the take down of Operation Wide Receiver and Operation Fast and Furious.²⁰⁰

After receiving McMahon’s request, Newell responded within a matter of minutes that he had already discussed an “exit strategy” and would send it to him that day, which he did. However, Newell expressed mixed sentiments to McMahon about ending the investigation until the wiretaps had produced evidence connecting the firearms with drug trafficking: “[W]e can hold this case up as an example of the link between narcotics and firearms trafficking which would be great on a national media scale but if the Director wants this case shut down then so be it.”

²⁰⁰ We describe the events surrounding this April 28 meeting in Chapter Three and later in Chapter Five.

Following this exchange with McMahon, Newell wrote an e-mail that day to his acting ASAC regarding the need for an exit strategy, stating, “I too have been close to asking for an “exit strategy” on Operation Fast and Furious. At some point, regardless of the T-III issue, we need to take action just because of the amount and type (.50 cal, 8mms, etc) of guns being purchased.” He also informed the Acting ASAC that he did not think he could keep ATF Headquarters “at bay” longer than another 60-90 days.

ATF e-mail shows that Voth prepared the strategy in a few hours and that Newell forwarded it to McMahon on the evening of April 27. The 3-page document identified “target goals” for 30, 60, and 90-day intervals that included obtaining intercepts of two telephones and arrests by day 90. It also stated that “straw purchasers in this case continue to purchase firearms almost daily.”

McMahon said that he was not satisfied with the exit strategy because it was not well-defined and was “very open-ended,” but he did not return it to Newell for revisions. Instead, he said he forwarded the document to Chait and to Hoover because he wanted them to have it. ATF e-mails show that McMahon did not send the exit strategy to Chait until May 3, 2010; we found no evidence that McMahon sent it to Hoover.

Melson and Hoover each told us that they did not read the exit strategy memo until the following year, after the investigation already had been concluded. Hoover told us that he did not believe that he needed to micromanage McMahon and Chait and that he trusted them to oversee the investigation. Melson said that, when he finally did read it, he was disappointed with the exit strategy and wished he had seen it at the time. He stated that it lacked specific goals, objectives, and timeframes.

Our investigation identified four later OSII briefings in March and April 2010 that presented updated firearms purchase information for Operation Fast and Furious. Sign-in sheets indicate that Hoover attended an OSII weekly briefing on March 23, 2010, just one day after the briefing for him described above, that identified an additional 105 firearms traced back to Operation Fast and Furious, including three .50 caliber rifles.

We did not identify other ATF Headquarters briefings concerning the investigation during the remainder of 2010.

E. Discussions between Hoover, McMahon, and DAAG Weinstein about Operation Fast and Furious from April 28 to Early May 2010

As we described in Chapter Three, in early April 2010, Weinstein learned after reading the prosecution memorandum in Operation Wide Receiver that ATF had allowed guns to “walk” in that case, which Weinstein defined to

include choosing not to interdict firearms despite having the legal basis and ability to do so. On April 12, 2010, Weinstein sent an e-mail about the gun-walking issue in Operation Wide Receiver to Carwile and Carwile's deputy James Trusty, and he and Trusty then briefed AAG Breuer about the matter on April 19, 2010. Breuer requested that Weinstein arrange a meeting with ATF leadership to make sure they understood that the Criminal Division would move ahead with the case but that the investigation had used "obviously flawed" techniques. On April 28, 2010, Weinstein and Trusty, along with two representatives from the Department's Office of Public Affairs (OPA), met with Hoover and McMahon.

Two days before the meeting, on April 26, McMahon received from SAC Newell a 1-page update memorandum on Operation Fast and Furious which Voth had authored. Newell's cover e-mail noted, among other things, that "[t]hey are having a tough time due to the pre-paid phones being used. By the time they get AUSA and OEO approval for a specific phone the suspects are almost done with that phone." The attached 1-page memorandum noted that, to date, over 1,300 firearms had been purchased by subjects of the investigation, and that over \$900,000 in cash had been paid for those firearms. The report further stated that approximately 150 of the 900 firearms "have been recovered in Mexico or near the Mexican Border . . . with a short time-to-crime; some as little as one day."

Then, on the morning of April 28, prior to his meeting with Weinstein and Trusty, McMahon responded to Newell's e-mail on April 27 attaching the exit strategy for Operation Fast and Furious (which we discuss above). In the e-mail, McMahon asked Newell about the status of the wiretap affidavits in Operation Fast and Furious. Newell wrote back stating that the fourth wiretap had been approved and that "I went to the airport last night to meet with the USA [Burke] as he was waiting for his flight to Mexico City. I briefed him in detail on our T-III issues and he's going to get with OEO and the Chief Judge." McMahon responded, "10-4. Do you have a recent briefing paper (overview) of 'Wide Receiver'? I have to participate in a briefing with DOJ this morning on this case. I need something ASAP. Sorry." Newell replied with a 3-paragraph summary of Operation Wide Receiver indicating that the case would be indicted in two phases, the first on May 12 and the second later in May or June. The summary made no mention of any problems in the case.

According to witness statements and notes taken at the April 28 meeting involving Hoover, McMahon, Weinstein, Trusty, and the two OPA representatives, the meeting included discussion of the gun "walking" issue in Operation Wide Receiver. As we described in Chapter Three, Trusty told us that the discussion of gun-walking was not in the nature of "finger-wagging" or admonishment of ATF. Although Weinstein told us he described the improper tactics, he said that he did not have to go into detail about the issue because he understood from Hoover's reaction that he "immediately got why it was so

troubling.” The meeting also included discussion of issues in Operation Wide Receiver arising from use of an FFL as a confidential informant and an agent’s acceptance of a gift from the FFL, as well as concerns about potentially negative press coverage and the timing of the indictments in Operations Wide Receiver I and II.

We found that there also was a brief discussion about Operation Fast and Furious during the meeting. One of the OPA representatives at the meeting told the OIG that two cases were discussed during the meeting. She said that based on subsequent press reports and a reference to “Fast and Furious” in her notebook, she understood that Operation Fast and Furious was one of the two cases, but she did not recall any specific comments regarding that investigation. She said that the discussion at the meeting centered on “press options” related to the announcement of these cases. She also said she recalled that there were a lot of guns involved in the cases, although she did not recall any mention of difficulties or challenges related to either improper tactics or the number of guns in the operations.

McMahon also told us that he recalled that issues related to the timing of the indictments in Operation Wide Receiver led to some discussion about Operation Fast and Furious at this meeting. He said he remembered discussing that they would bring Operation Fast and Furious down “quickly” and that Operations Wide Receiver and Fast and Furious “aren’t great cases because of the length of time and the number of guns involved.” McMahon said that although Operation Wide Receiver did not have as many guns as Operation Fast and Furious, the cases were similar in that it took “years” to prosecute the cases. When asked whether he raised a public relations issue about that during the meeting, McMahon said he was “sure that came up because we were always talking about the length of time it took to get these people off the street and then make arrests.”

Trusty said that he had a vague memory that the ATF officials referred to Operation Fast and Furious during the meeting. He said the case was described as a gun trafficking case where they were doing wiretaps, and that it involved “a lot of . . . high-level defendants and a lot of guns.” Trusty said that he understood that the Operation Fast and Furious case was a bigger case than Operation Wide Receiver, but that he did not remember “hearing anything about guns getting away” or that “guns are walking” in that investigation. Trusty said the only negative he recalled about Operation Fast and Furious was a vague recollection that the AUSA in Phoenix was moving slowly. He also said it sounded like a case he would like to assign Gang Unit staff to if he could.

Hoover told us that he had no recollection of a discussion of Operation Fast and Furious at this meeting. He said he recalled discussing Operation

Wide Receiver and the possibility of including that case with Project Deliverance.

Weinstein said there was no discussion during the meeting of “gun walking” in cases other than Operation Wide Receiver. He said that he “walked away [from the meeting]... with a very strong sense from Mr. Hoover that he had the same reaction that I did, that the tactics were not acceptable and that I had no reason to think, based on his reaction, that these were the kind of things that would be tolerated under his watch.” As a result, he said, they did not discuss whether guns had been allowed to walk in other cases, and Weinstein did not have any follow-up with Hoover or McMahon on this issue.

Weinstein told us he believed that McMahon approached him after the meeting to inform him that ATF had another firearms case in Phoenix that, like Operation Wide Receiver, involved many firearms that had been trafficked. Weinstein said he could not recall whether McMahon used the name “Fast and Furious” during their discussion. According to Weinstein, McMahon said that ATF expected the case to “come down” within the next 30 days and that they could expect to receive some of the same questions about the two investigations due to the large number of firearms involved. He also told us that McMahon’s description of the case was “completely different” from Operation Wide Receiver and that McMahon “seemed to be under the impression that it was a case in which they were aggressively seizing guns.” He said that he understood McMahon to be saying that due to the volume of firearms that were being trafficked agents would not be present in every instance to seize them, and they would have to answer questions about “the guns they didn’t get.” In a prepared statement that he brought with him to the OIG interview, Weinstein also told the OIG that McMahon’s “brief description of the case, one in which agents were being aggressive about interdicting guns and were using wiretaps to enhance their ability to do so, was in sharp contrast with the tactics used years earlier in Wide Receiver, and only served to reinforce [Weinstein’s] view that Wide Receiver was an extreme aberration. . . .”

In e-mails to Breuer reporting on this April 28 meeting, Weinstein did not mention Operation Fast and Furious. On April 28, Weinstein sent an e-mail to Breuer stating:

Jim T and I met with Billy Hoover and with [the OPA personnel] to talk about this gun trafficking case with the issues about the guns being allowed to walk for investigative purposes. Can fill you in tomorrow in more detail but we all think the best move is to indict both Wide Receiver I and Wide Receiver II under seal and then

unseal as part of Project Deliverance, where focus will be on aggregate seizures and not on particulars of any one indictment.²⁰¹

Breuer responded to this e-mail on April 30, and asked Weinstein whether there was “[a]nything I should know about [those]?” Weinstein replied shortly thereafter, telling Breuer:

As you’ll recall from [Trusty’s] briefing, ATF let a bunch of guns walk in an effort to get upstream conspirators but only got straws, and didn’t recover many guns. Some were recovered in MX after being used in crimes. Billy[Hoover], Jim[Trusty], [the OPA personnel] and I all think the best way to announce the case without highlighting the negative part of the story and risking embarrassing ATF is part of Deliverance.

Breuer told the OIG that he could not recall when in 2010 he first learned about Operation Fast and Furious, but he said he was sure that it was not before the end of April 2010. He stated that he did not know about the inappropriate tactics in Operation Fast and Furious until after ATF agents made public allegations in early 2011. Breuer also said that he was not briefed on the investigation during 2009 and 2010, and he did not authorize any of its operations. We found no evidence that Breuer was briefed on or authorized the strategy and tactics pursued in the investigation.²⁰²

McMahon reported on the April 28 meeting to Chait the same day, and like Weinstein did with Breuer, he did not mention anything about Operation Fast and Furious. He sent an e-mail to Chait stating that “[t]he briefing with DOJ on Wide Receiver went ok. I will brief you tomorrow on the details. Some surprises but nothing terrible.”

Following their meeting on April 28, Weinstein and McMahon continued to communicate about Operation Fast and Furious. McMahon told us that he approached Weinstein shortly before May 4 to discuss delays with OEO’s approvals of the wiretaps. On May 4, Weinstein e-mailed McMahon to ask him if Weinstein should talk to OEO about the possibility of obtaining a roving

²⁰¹ As we noted in Chapter Three, Project Deliverance was an interagency, cross-border investigation focused on the transportation networks used by Mexican cartels to distribute narcotics and smuggle weapons and cash across the United States-Mexico border.

²⁰² As described in the next section, although transmittal memoranda concerning the wiretap applications were addressed to Breuer and sent under his name, the applications were reviewed and authorized by Criminal Division DAAGs. Breuer did not review or authorize the applications.

wiretap in the investigation.²⁰³ Weinstein's e-mail did not address the issue of delays by OEO in approving the wiretaps. McMahon responded on May 6 that his agents did not believe a roving wiretap was feasible but that they would appreciate assistance in expediting OEO's review of the wiretap applications.

On May 7, Weinstein exchanged e-mails with the head of OEO regarding the wiretap applications. In his e-mail, Weinstein stated:

The USAO in AZ and ATF are working on a case ATF calls 'Operation Fast and Furious,' which is a T-III investigation of a gun-trafficking ring responsible for sending well over 1,000 guns across the SWB into Mexico They have been working up the chain, and their wire target has not made it easy, apparently dropping a series of phones after about 30-45 days of use each.

In the e-mail, Weinstein asked the head of OEO about the possibility of obtaining a roving wiretap, and also asked:

To the extent a roving is not an option, is there a way to expedite the handling of the spins in this case so the agents are better positioned to keep up with the wire targets? This is perhaps the most significant Mexico-related firearms-trafficking investigation ATF has going, and it would be a great achievement if ATF were able to get far up the chain of the organization I know that every case is obviously significant, but any assistance you can provide to this case would be much appreciated. Thanks!²⁰⁴

In response to this e-mail, the head of OEO stated that he would prioritize the investigation, and provided Weinstein with a contact in OEO to discuss the possibility of a roving wiretap with the AUSA.

²⁰³ A "roving wiretap" is a wiretap that is specific to a particular criminal subject rather than to a particular wire or electronic communications device. "Roving wiretaps" also can include oral communications, i.e. a roving bug.

²⁰⁴ Weinstein told the OIG that he wanted to assist with the wiretaps to increase firearms interdictions. According to Weinstein, "the one contribution we could make was at least help them, do everything we could to help them keep pace with the criminals that they were trying to track so we could maximize our chances of intercepting the guns." Weinstein also described to the OIG another case that he believed was a "good example" of using "real time information" from a wiretap to maximize opportunities to interdict firearms, and told us that Breuer had requested that the wiretaps be expedited for that purpose in that case. After reviewing a draft of this report, Weinstein stated that "his efforts to expedite the wiretaps in Fast and Furious were not unique to that case" and that he "would have sought to help in the same manner if the same concerns had been raised by any agency or U.S. Attorney's Office about a priority case."

Later that day, Weinstein e-mailed McMahon to inform him that he had contacted OEO and had “very good news.” Weinstein and McMahon spoke by phone and, according to McMahon, Weinstein’s “good news” was that a single attorney in OEO would be reviewing all future wiretap applications for the investigation, thereby avoiding delays caused from a new OEO attorney learning about the case.

Two weeks later, on May 21, OEO sent to Weinstein for his review and approval an application for a wiretap in connection with Operation Fast and Furious. While it was the fifth wiretap application in the investigation, it was the first that Weinstein had been asked to review. Weinstein signed the approval letter that same day.

Less than two weeks later, on June 1, Weinstein received another wiretap application for review and approval by OEO that related to the Operation Fast and Furious investigation. Weinstein again signed the approval letter and sent AUSA Hurley an e-mail on June 1 telling him that he just approved the application request. Weinstein wrote: “How is the case going? I spoke to OEO a couple of months ago about the high priority of this investigation and arranged for expedited review of your renewals and spins – I hope you’re finding faster turnaround times for the last few” Hurley responded with a brief, positive description of the work being done by OEO and the agents on the wires, and noted that the agents “are identifying participants in the gun trafficking that would never have been identified without the wire.” Weinstein replied, “[T]hat’s great – best of luck, and let us know if we can do anything to help.” Weinstein authorized his final wiretap in Operation Fast and Furious on June 23, 2010.

We asked Weinstein whether his review of the wiretap applications was affected in any way by the fact that he had learned that ATF had “walked” guns in Operation Wide Receiver. Weinstein answered, “No.” He told us:

Wide Receiver I viewed as an extreme aberration from three years earlier. . . . And it was such an aberration that frankly, you know, it wasn’t the kind of thing that I could imagine being repeated. And when I raised it with the number two guy at ATF, his reaction was consistent with my own, and based on his reaction, I was pretty confident that it wasn’t the kind of thing that was going to be repeated.

We found no evidence that Weinstein ever asked ATF officials whether agents in Operation Fast and Furious were using the same flawed strategy and tactics that had been employed in Operation Wide Receiver.

F. Review of the Wiretap Applications

Between March 10, 2010, and July 30, 2010, the U.S. Attorney's Office for the District of Arizona submitted, and three different DAAGs for the Criminal Division approved, nine requests for authorization to intercept wire communications in Operation Fast and Furious. In this section we describe the statutory and procedural framework for the review of applications for authority to conduct electronic surveillance. We also summarize the contents of the wiretap applications and affidavits submitted in Operation Fast and Furious. We then describe what the ATF and OEO attorneys and the DAAGs who reviewed the applications told us about their review process.

1. Review Process

Federal law authorizes the government to conduct electronic surveillance of oral communications for law enforcement purposes. *See* 18 U.S.C. §§ 2510-2522. To obtain approval, the government must submit an application to a federal court showing that there is probable cause to believe "that an individual is committing, has committed, or is about to commit" a specified criminal violation and that there is probable cause to believe that a particular communication "facility," such as a cellular telephone, is being used by subjects in furtherance of the specified criminal violations. 18 U.S.C. § 2518(3). The application also must demonstrate that "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or be too dangerous." 18 U.S.C. § 2518(3)(c). Orders for electronic surveillance are issued for a period not to exceed 30 days, but can be extended with court permission, and surveillance must terminate when the authorized objectives are attained. 18 U.S.C. § 2518(1)(d)(5).

Wiretap applications are supported by an affidavit from an agent or other "investigative or law enforcement officer" that sets forth the facts that establish the probable cause and other criteria required by the statute. 18 U.S.C. § 2518(1). The affidavit is typically drafted by the agent and reviewed by the prosecutor assigned to the case. The prosecutor also is responsible for drafting the application that sets forth the basis for the court's jurisdiction to authorize the electronic surveillance.

An application cannot be filed in court until the Department's Criminal Division approves it. The Department's procedures require that each application and supporting affidavit, which is provided by the responsible U.S. Attorney's Office, be reviewed by an attorney in OEO. During the time period in which the draft applications for Operation Fast and Furious were submitted, the Department did not have a policy requiring U.S. Attorney's Offices to

require supervisory approval of wiretap applications before they were sent to OEO.²⁰⁵ As we described in Chapter Four, the U.S. Attorney's Office for the District of Arizona did not have a formal process for supervisory review of draft applications to conduct electronic surveillance, and the wiretap applications for Operation Fast and Furious received minimal supervisory review there.

The Department's procedures also required submission of the draft application and affidavit to the Washington, D.C., office of the investigative agency handling the case. The review process for wiretap applications at ATF in effect at the time required the relevant field division to provide the draft affidavit to ATF Headquarters, where it was reviewed by the Office of Chief Counsel and the Office of Field Operations. The Office of Field Operations' review addressed administrative considerations such as whether resources were available to support implementation of the wiretap, and the Office of Chief Counsel's review addressed the legal sufficiency of the application. Upon completion of their review, the Assistant Director for the Office of Field Operations would send a memorandum to the Assistant Attorney General for the Department's Criminal Division requesting authorization to proceed with the application.²⁰⁶ ATF policy required review of the application by the Assistant Director for the Office of Field Operations. However, we found that AD Chait did not review the applications for Operation Fast and Furious.²⁰⁷ DAD McMahon signed on Chait's behalf authorization requests for four of the applications without reading the draft affidavits.

²⁰⁵ By memorandum dated March 19, 2012, the Department now requires that supervisors in U.S. Attorney's Offices review and approve applications to conduct electronic surveillance before the materials are submitted to the Department.

²⁰⁶ The Department eliminated this requirement in June 2010.

²⁰⁷ ATF's policy concerning requests for wiretaps, ATF Order 3530.2, was established in 1989 and had not been updated by 2010 to account for changes in ATF's organization. With respect to review requirements, the policy stated: "The application for authorization to seek an interception order shall be prepared by the supervising attorney and addressed to the Assistant Attorney General, Criminal Division, Department of Justice, and shall be forwarded through channels from the Associate Director (Law Enforcement) (ADLE). A copy of the application and affidavit will be stored in the designated Systems and Records Branch file, after ADLE review." According to ATF officials, the Assistant Director of the Office of Field Operations took the place of the Associate Director of Law Enforcement, and there was no delegation from the Assistant Director of the requirement to review the application and affidavit.

We found that neither Chait nor McMahon reviewed the wiretap applications. Chait told the OIG that they did not "pass through" his office and he did not believe that he authorized them. He said that he expected the DADs to read the affidavits "as best they can," but "because they're under such crunch time, . . . there's nothing in our orders that says that the DAD has to review the Title III." McMahon told us that it was not his practice to review wiretap affidavits that came through his office and that he was not aware that he was supposed to review them.

The OEO attorney who receives an application coordinates with the prosecutor handling the case regarding any changes or additions to the affidavit. After the affidavit is put in final form, the OEO attorney provides a memorandum addressed to the Assistant Attorney General for the Criminal Division that summarizes and analyzes the relevant facts and legal issues pertinent to surveillance, and that discusses the application's compliance with the requirements of the statute. This memorandum, along with the draft approval letter, application, affidavit, and court order, is sent for review to an official designated by the Attorney General to authorize electronic surveillance applications.²⁰⁸ The Assistant Attorney General does not actually receive applications and, with certain exceptions, is not required by law to review them.²⁰⁹

After the designated official authorizes the application, OEO transmits to the prosecutor an authorization memorandum that is included with the application that is filed in federal court.

2. Content of the Wiretap Applications

Longstanding Department procedures prescribe the content of wiretap applications and affidavits to ensure they meet the criteria of necessity and probable cause established by the federal wiretap statute, 18 U.S.C. § 2510, et seq., and relevant Department policies regarding the interception of electronic communications. Consistent with these procedures, each of the affidavits submitted in support of the Operation Fast and Furious wiretap applications included language stating that the information presented was not a comprehensive summary of the investigation and was limited to those facts that supported the wiretap request.

As described in Chapter Four, the first application and affidavit for electronic surveillance in Operation Fast and Furious were submitted to OEO on March 4, 2010, and approved on March 10. The March 10 affidavit provided a detailed picture of the investigation conducted up to that date, including the numbers of firearms acquired by the [REDACTED] organization, and specific examples of subjects' purchasing activity and firearms recoveries

²⁰⁸ The wiretap statute explicitly assigns review and approval of electronic surveillance applications to the Attorney General, but allows the Attorney General to delegate this review and approval authority to a small number of designated officials, including DAAGs in the Criminal Division. 18 U.S.C. § 2516(1). Attorney General Holder has specially designated DAAGs in the Criminal Division, among others, to authorize wiretap applications. Office of the Attorney General, Order No. 3055-2009, February 26, 2009.

²⁰⁹ For example, the Assistant Attorney General or the Acting Assistant Attorney General for the Criminal Division must review and approve applications for "roving" wiretaps. 18 U.S.C. § 2518(11); U.S. Attorney's Manual 9.7.100.

in the United States and Mexico. The March 10 affidavit stated that [REDACTED]

It also stated that [REDACTED]

It further stated that 81 of the 852 firearms had been recovered in Mexico between September 23, 2009, and January 27, 2010, and that the recoveries occurred anywhere from 1 day to 49 days after the firearm was purchased in Arizona. [REDACTED]

We found that the affidavits described specific incidents that would suggest to a prosecutor who was focused on the question of investigative tactics that ATF was employing a strategy of not interdicting weapons or arresting known straw purchasers. For example, the March 10 affidavit described [REDACTED]

The affidavit recounted that [REDACTED]

The affidavit also described [REDACTED]

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We found that a reader of this series of events in the affidavit would infer that ATF was not taking enforcement action to arrest [REDACTED] or interdict the weapons he was purchasing.

Similarly, the May 21 affidavit described events from which a reader who was reviewing for a purpose beyond establishing the statutory requirements

²¹⁰ The affidavit incorrectly identified [REDACTED]

would infer that ATF was not taking enforcement action against straw purchasers. Like the March 10 affidavit, this affidavit began by recounting [REDACTED] Thus, the affidavit indicated that [REDACTED]

The affidavit reported that ATF had identified 24 straw purchasers and that from September 23, 2009, to March 23, 2010, 302 of the 1,500 firearms had been recovered. Of those 302 recovered firearms, 182 were recovered in Mexico while 116 were recovered in the United States but near the Mexican Border. Additionally, the affidavit stated that the firearms were recovered anywhere from 1 day to 105 days after being purchased in Arizona.

[REDACTED]

The affidavit went on to describe with greater particularity [REDACTED]

The affidavit noted that [REDACTED]

The affidavit also noted that [REDACTED]

The affidavit further noted [REDACTED]

The affidavit also described [REDACTED]

It stated that [REDACTED]

It also recounted that [REDACTED]

Although the affidavit stated that [REDACTED] it also stated that [REDACTED]

Significantly, the affidavit stated that [REDACTED]

Thus, although the affidavit was silent on [REDACTED]

3. Review of the Operation Fast and Furious Applications by OEO and the DAAGs

We found that one OEO staff attorney and one ATF staff attorney reviewed all nine wiretap applications in Operation Fast and Furious and the supporting affidavits. These attorneys told us that their review was focused on an assessment of the application's legal sufficiency under governing wiretap authorities. They stated that the information presented in the applications is not designed to furnish a comprehensive overview of the case that would allow them to make informed judgments about agents' conduct, and their review does not involve assessment or authorization of operational aspects of the underlying investigation. The OEO attorney also told us that he had not received training in how to evaluate such issues in gun trafficking cases.

Our examination of then-applicable wiretap resource materials (for example, the various checklists used in OEO for reviewing wiretap applications) confirmed that the focus of the OEO attorneys' reviews was to evaluate whether the application met the statutory criteria of probable cause and necessity.²¹³ Each of the affidavits that ATF submitted in support of the Operation Fast and Furious wiretap applications included language stating that **the information presented in the affidavit was not a comprehensive summary of the investigation and was limited to those facts that supported the wiretap request.**

In addition, our examination of the OEO cover memoranda prepared for the Operation Fast and Furious applications showed that the memoranda focused on information related to the legal requirements needed to obtain a wiretap. Each of the memoranda presented a brief overview of the investigation and potential statutory violations, as well as information about the use of the target telephones and an assessment of probable cause. Each memorandum also contained summary conclusions regarding whether the information in the affidavits met the statutory requirements of necessity and minimization. Each memorandum concluded with a recommendation that the Criminal Division authorize the application.

We interviewed DAAGs Blanco and Weinstein about their review of the wiretap applications in Operation Fast and Furious. Blanco reviewed and approved the first wiretap application on March 10, as well as a wiretap on July 1, 2010. As noted previously, Weinstein reviewed and approved three

²¹³ Memorandum from Matthew W. Friedrich, Acting Assistant Attorney General, Criminal Division, "Recent Changes Regarding the Office of Electronic Operation's (OEO) Electronic Surveillance Unit (ESU)," July 11, 2008 (Attachment C – Title III Wire Affidavit Checklist for Law Enforcement Agents).

wiretap applications in connection with Operation Fast and Furious, on May 21, June 1, and June 23, 2010.²¹⁴

Both Blanco and Weinstein told the OIG that their role in reviewing the wiretap application process was to assess the legal sufficiency of the application. In addition, they told us that they did not supervise the AUSAs in the field or review the applications for operational tactics or judgments in the case. Weinstein said that they were not in a position to do so because the application did not contain “every material fact about the case,” but rather, only “the information necessary . . . to establish probable cause and necessity.” He said that the DAAGs’ review was, “not in any way perceived to be a supplement for or a replacement for supervisory review.”

DAAGs Blanco and Weinstein also stated that in reviewing wiretap applications, they rely on information presented in OEO’s cover memorandum and read the affidavits supporting the applications only if the memoranda fails to furnish sufficient information or raises concerns. Weinstein said that in the “rare” case where something in the memorandum was confusing or unclear, he would consult the affidavit. Similarly, Blanco said that unless something in the memorandum gave him pause, he would read the memorandum only.

They also said it would be impossible for them to review all of the affidavits they receive. According to Weinstein, in the 3 years he had held the position he had reviewed “high triple digits” of applications. He said that there were some days when he would review 2 or 3, and other days when he has reviewed nearly 20.

Weinstein told us he did not read the wiretap affidavits in Operation Fast and Furious, and Blanco told us he did not recall reading them.

IV. Events from the Summer 2010 to Agent Terry’s Murder

A. Criminal Division Assistance is Again Rejected by the U.S. Attorney’s Office

As described more fully in Chapter Three, in 2009 the Criminal Division offered the assistance of Gang Unit prosecutors to the Southwest Border districts. As a result, Laura Gwinn began work on investigations in Arizona, including Operation Wide Receiver out of Tucson. In May 2010, Gwinn was prepared to indict the second set of Operation Wide Receiver defendants. She

²¹⁴ The remaining four wiretap applications, dated April 15, May 6, May 14, and July 30, 2010, were reviewed by DAAG Keeney, who is now deceased. As noted in Chapter Three, Keeney also approved wiretap applications in connection with Operation Wide Receiver.

conferred with Hurley about the timing of these indictments and any impact they might have on Operation Fast and Furious. Hurley requested that she defer arrests and indictments in Operation Wide Receiver to avoid compromising the investigation in Operation Fast and Furious.²¹⁵

In mid-June, Gang Unit Chief Kevin Carwile inquired whether the Arizona U.S. Attorney's Office had any other cases that Gwinn could help them prosecute. The U.S. Attorney's Office responded that Gwinn could assist Hurley on the Operation Fast and Furious wiretaps and take the lead on another case. Gwinn travelled to Phoenix, and by the end of July she reported in an e-mail to her immediate supervisor, James Trusty, that she was "still trying to 'learn' the case through review of wire-tap applications, a running log of overt acts and discussions with the lead attorney." Gwinn told us she understood that Operation Fast and Furious was "a big sprawling case" and that for one person to complete all of the paperwork and related tasks was difficult. She said that Hurley appeared overworked and she wanted to help him.

Gwinn told us that Hurley "rebuffed" her offers of assistance and that it was "clear" by mid to late August that Hurley was not going to let her be involved in the case. As described in Chapter Four, Hurley told the OIG that Gwinn did not work on Operation Fast and Furious and that he could not recall her offers to assist. Gwinn said she believed Hurley did not want her involved with the case in part because he viewed gun trafficking as his "fiefdom." As a result, Gwinn said, she never became a member of the prosecution team, did not participate in drafting the indictment, and offered no legal advice.

While both Gwinn and Hurley said that Gwinn's participation in Operation Fast and Furious was very limited, e-mail records show that she attended a meeting in June. Gwinn told the OIG that the meeting included Hurley and several ATF agents and focused on whom to indict, the timing of the indictment, and a wiretap in the case. Gwinn also obtained copies of ROIs from MacAllister and read and took notes from them. Gwinn's notes from the ROIs describe numerous surveillances and weapons transfers. She also reviewed the wiretap affidavits.

We asked Gwinn whether her review of the wiretap affidavits and ROIs caused her concern. Gwinn stated that based on review of these materials, she developed concerns similar to those she had developed regarding Operation Wide Receiver. She said that she knew after reviewing the ROIs and affidavits

²¹⁵ The second set of Operation Wide Receiver defendants were indicted under seal in October 2010.

that ATF was “observing guns being bought, and being taken, and being transferred.” She told us that it was her impression that ATF was intentionally not interdicting firearms in order to advance a strategy that targeted the gun trafficking organization (as opposed to individual straw purchasers). Gwinn said she did not recall discussing the case strategy with Hurley and the case agents.

Gwinn said that she did not inform her supervisors about her concerns because by the time she reviewed the ROIs and affidavits, it was late in the investigation and it was clear the Gang Unit was not going to be involved in the case. She also said that she assumed that decisions about the case were being made in conjunction with supervisors in the U.S. Attorney’s Office and the ATF. She said that she would have expected the supervisors in Phoenix to get updates at least every couple of weeks on a case of this magnitude. She said, “I would have thought, when you’re talking about . . . going up on six, seven lines, at some point a supervisor, somebody would be [asking], “[W]hy do we keep doing these wiretaps? Where are we at on this?”²¹⁶

Trusty also told us that Gwinn did not discuss with him “gun walking” in Operation Fast and Furious, and said he would have remembered the discussion if it had occurred.

Criminal Division e-mails in October 2010 and January 2011 indicate that there was some confusion as to the level of involvement Gwinn had on Operation Fast and Furious. As we described in Chapter Three, Gwinn had planned to indict Operation Wide Receiver II under seal in late October 2010, a week before Hurley’s target date for indictments in Operation Fast and Furious. In early October 2010, however, Hurley told Gwinn that he had deferred his target date and that she could move forward on Operation Wide Receiver without adversely affecting Operation Fast and Furious.” Gwinn subsequently stated in a weekly update that she planned to indict Operation Wide Receiver II on October 27, 2010, and that it would remain under seal until Operation Fast and Furious was ready for takedown.

After reading this update, Weinstein sent an e-mail to Trusty on October 17 asking whether Breuer should “participate in press when Fast and Furious and Laura’s Tucson case are unsealed? It’s a tricky case, given the number of guns that have walked, but it is a significant set of prosecutions” Weinstein told us that the “tricky case” he was referring to was Operation Wide Receiver. Trusty responded on October 18:

²¹⁶ Although this may have been a reasonable assumption, as we describe in Chapter Four, it was a mistaken one.

I think so, but the timing will be tricky, too. Looks like we'll be able to unseal the Tucson case sooner than the Fast and Furious (although this may be just the difference between Nov and Dec). It's not clear how much we're involved in the main F and F case, but we have Tucson and now a new, related case with approx 9 targets. It's not going to be any big surprise that a bunch of US guns are being used in MX, so I'm not sure how much grief we get for "guns walking." It may be more like, "Finally, they're going after people who sent guns down there" ²¹⁷

Four days later, in response to a question from an OPA representative as to whether Operation Wide Receiver was being prosecuted jointly with the Arizona U.S. Attorney's Office, Trusty e-mailed Gwinn, Sweeney, and one of Sweeney's colleagues that "Laura [Gwinn] is in the mix on two other AZ cases involving gun trafficking ('Fast and Furious') with hopes that there will be a December takedown."

Trusty also described his expectations for Gwinn's role in Operation Fast and Furious in an e-mail to Weinstein on January 24, 2011, the day before the announcement of the Operation Fast and Furious indictment. In the e-mail that same day, Weinstein asked Trusty whether the Criminal Division would be attending the Operation Fast and Furious press conference or participating in a press release. Trusty responded that the Criminal Division would not participate in the press conference but would participate in the press release because "we anticipate that Laura Gwinn will be a part of the F&F prosecution, although she's been more of a consultant up til this point. I talked with their 1st Assistant late last week and he was already assuming she'd be at trial table for F&F."

Trusty told the OIG that he wanted the Gang Unit to be part of Operation Fast and Furious and believed he had an agreement with the leadership of the Arizona U.S. Attorney's Office to have Gwinn participate in the prosecution, but that Hurley did not accept her offers of assistance. He said that as a result the underlying problem for the Gang Unit was that "we weren't on the case" and therefore could not affect it.

B. Submission of Weekly Reports to the Offices of Attorney General and Deputy Attorney General

We determined that the Offices of the Attorney General and Deputy Attorney General received several weekly reports during 2010 from ATF, DOJ's

²¹⁷ As we discuss in Chapter Three, Weinstein and Trusty stated that the reference to "guns walking" was related to Operation Wide Receiver.

Criminal Division, and the National Drug Intelligence Center (NDIC) that either mentioned “Operation Fast and Furious” by name or referred to activity in the investigation. The majority of these reports were submitted during the summer 2010. We did not find in any of the weekly reports any reference to ATF agents breaking off surveillances, failing to interdict firearms, or other problems with the investigation.

Between June 28, 2010, and August 9, 2010, NDIC provided seven weekly reports to the Offices of the Attorney General and Deputy Attorney General that referred to Operation Fast and Furious by name. Six of these reports described the work of an NDIC Document and Media Exploitation Team (DOMEX).²¹⁸ ATF requested this team to identify assets, cash payments, and money laundering activities; assist with weapons tracking; and conduct “link analysis” of organizations identified in the investigation. The NDIC reports stated that straw purchasers in the case had acquired 1,500 firearms that were supplied to Mexican drug trafficking cartels.

In addition, in July 2010 ATF submitted a weekly report that described the recovery of 73 firearms from a business in Phoenix and stated that traces on the firearms indicated that they had been acquired by known straw purchasers in Operation Fast and Furious. The report stated, “[t]his recovery adds to the total of 169 firearms recovered the previous 25 days as part of the Southwest Border firearms trafficking investigation.” In addition, three Criminal Division weekly reports referred to plans to indict certain persons but keep the indictment under seal until Operation Fast and Furious was ready for “takedown.”²¹⁹ Another ATF report described the seizure of firearms on the Tohono O’odham Indian Reservation, without mentioning Operation Fast and Furious by name.

Acting Deputy Attorney General Grindler told the OIG that he had no recollection of having reviewed any weekly report concerning Operation Fast

²¹⁸ The DOMEX also provided quarterly reports to the Executive Office of OCDETF. We determined that these reports did not describe “gun walking” tactics or problems in Operation Fast and Furious.

²¹⁹ Two entries were identical and provided: “*Tucson Gun Trafficking* (D. Ariz.): On October 27, the Organized Crime and Gang Section (OCGS) plans to indict eight individuals under seal relating to the trafficking of hundreds of firearms to Mexico. The sealing will likely last until another investigation, Phoenix-based ‘Operation Fast and Furious,’ is ready for takedown.” The third entry provided: “*Tucson Gun Trafficking* (D. Ariz) On October 27, the Organized Crime and Gang Section (OCGS) indicted eight individuals under seal relating to the trafficking of 228 firearms to Mexico. The sealing will likely last until another investigation, Phoenix-based ‘Operation Fast and Furious,’ is ready for takedown.”

and Furious or of his staff highlighting such information for his review.²²⁰ We asked Grindler about the NDIC reports that referred to the acquisition of 1,500 firearms. He told us that he did not believe his staff should have highlighted the 1,500 firearm figure to him unless they believed it indicated a problem. He also said that he personally did not think that the 1,500 figure by itself suggested a problem in the investigation because he was aware that the number of firearms going from the United States to Mexico was “dramatically high” in 2009 and 2010.

According to Attorney General Holder, the Office of the Attorney General typically receives over a hundred pages of “weekly reports” each week from the various divisions and components within DOJ. These reports are reviewed by staff in the Offices of the Attorney General and Deputy Attorney General. Kevin Ohlson, former Chief of Staff to Attorney General Holder during 2009 and 2010, told us that the weekly reports describe significant developments or events within the Department but for security reasons they did not contain sensitive or urgent information.

The Attorney General also told us that he had recently reviewed the weekly reports that refer to Operation Fast and Furious and said he believed that he did not see them at the time that his office first received them. He said that his staff reviews the weekly reports and highlights information for him that they believe warrants his attention. He stated that he did not recall his staff bringing anything to his attention from the reports regarding Operation Fast and Furious and he said he believed that they made the appropriate determination because the reports were unremarkable.

We also asked the Attorney General about the NDIC reports that referred to the acquisition of 1,500 firearms. He said that the amount of firearms the straw purchasers had acquired was not insignificant, but without identification of the problematic tactics that were used in Operation Fast and Furious, the reports did not warrant his attention.

C. The End of the “Investigative Phase” in Operation Fast and Furious and Delay of the Indictment

During the summer of 2010 the attention of ATF’s agents and their supervisors, including those at Headquarters, turned to obtaining an indictment. As noted above, the Phoenix Field Division’s “exit strategy” for

²²⁰ After reviewing a draft of this report, Grindler stated that the seizures described in ATF weekly reports, and an ATF e-mail he received on August 20, 2010 that reported on weapons seizures by a Gunrunner Impact Team in Phoenix, corroborated his understanding “that ATF was focused on interdicting and seizing weapons in the United States before they reached Mexico.”

Operation Fast and Furious that was drafted on April 27 had established a goal of 30 to 90 days, or no later than approximately late July 2010, to conclude the case and initiate arrests. However, as discussed below, the first arrest in Operation Fast and Furious did not occur until December 15, the day after Agent Terry was shot, and an indictment was not returned until January 19, 2011.

Melson, Hoover, Chait, and McMahon told the OIG that by late summer 2010 they became increasingly frustrated with the failure of the U.S. Attorney's Office to bring an indictment in Operation Fast and Furious. ATF e-mails beginning in July 2010 show multiple inquiries from its senior leadership about the status of the indictment. For example, on July 14, 2010 Melson e-mailed Chait and Hoover and asked: "When will we be taking Fast and Furious down? An awful lot of guns seem to be flowing south."²²¹ Melson told the OIG that by the end of July 2010 he understood that apart from arrests, Operation Fast and Furious was at its conclusion and he began asking about the indictment "pretty frequently." Melson told us that he asked the Office of Field Operations representatives about the status of the case at weekly staff meetings and that the timing of the indictment kept moving from month to month.

Newell told the OIG that by October 2010 "Headquarters [was] calling me nonstop" because the case had not been indicted. According to McMahon, the U.S. Attorney's Office was giving Newell "excuse after excuse" for why the indictment had to be delayed.

When we asked Melson what steps he took to address the delays in the indictment, he said that because the delays in bringing the indictment were a "significant frustration" to him, he probably raised his concerns about the U.S. Attorney's Office with Grindler. However, Melson also said that he did not have a specific recollection of raising the issue with Grindler, and Grindler said he did not recall discussions about Operation Fast and Furious other than at the March 12, 2010, briefing that ATF provided him. Hoover said he did not recall discussing with Melson the need to inform Grindler about delays with the case. However, Hoover told us that he believed he raised the issue of the delay in the indictments in late summer or early fall 2010 to Ed Siskel, the former Associate Deputy Attorney General who handled the ATF portfolio during 2010. Siskel stated that he did not recall discussions with Melson or Hoover concerning Operation Fast and Furious other than at Grindler's briefing, including any discussions about delays in the case. We found no e-mails or other evidence showing that Melson or Hoover raised the issue of delays caused by the U.S.

²²¹ As described in greater detail in Chapter Four, by mid-July 2010, over 1,600 firearms had been purchased by straw buyers while Operation Fast and Furious was ongoing.

Attorney's Office in Operation Fast and Furious with either Grindler or staff in the Office of the Deputy Attorney General.

Melson told us that he told his staff to ask U.S. Attorney Dennis Burke whether ATF could be of assistance and he offered to send ATF attorneys to work as Special AUSAs on the case. Melson also told us that he did not contact Burke directly about his concerns "because that is going around your supervisors," and he communicated through Chait to Newell to complain to the U.S. Attorney's Office.²²² Burke told us, however, that other than the corpus delicti issue, he never heard of complaints from ATF about the U.S. Attorney's Office's handling of gun trafficking investigations and no one ever complained to him about the timing of the indictment. According to Burke, Newell was "always very positive" about the case.

In early November 2010, Melson brought his concerns over the delays with the indictment to the attention of DAAG Weinstein. In an e-mail to the Criminal Division's Deputy Chief of Staff on November 8, Weinstein wrote:

Ken [Melson] is also frustrated by the pace of the USAO in AZ in bringing charges in the "Fast and Furious" gun-trafficking case (multiple wires, huge # of guns) – the AUSA has apparently told the agents that it will take a couple of months to draft the indictment; it appears that the AUSA on the case is not the fastest worker, and Laura Gwinn, our prosecutor on the case, is going to try to push things along, including by offering to draft the indictment.

Weinstein told the OIG that his reference to Gwinn as "our prosecutor on the case" was made in error. Because the case belonged to the U.S. Attorney's Office, Weinstein said, he did not understand why Melson brought the issue of delays to the Criminal Division instead of calling the U.S. Attorney. Weinstein said he could not recall any meetings or follow-up on the issue, and we found no evidence that Weinstein raised the issue directly with AAG Breuer or the U.S. Attorney's Office in Arizona.

²²² According to Newell, in September 2010, while in Phoenix for a press conference on the GRIT operation, Melson asked Burke about the date of the Operation Fast and Furious indictment. Melson told the OIG that he did remember asking Burke during his trip when the indictment would be ready, but said that he would not have tried to "push" Burke over the matter. After reviewing a draft of this report, Melson told the OIG no deadlines for the indictment had passed by the time of his visit and that ATF was expecting the indictment in September or October. However, Newell told the OIG that he asked Melson to ask Burke about the indictment and that when Melson did so, Burke, according to Newell, "put it off" until October due to workload considerations.

We found no evidence that Melson's concerns had any impact on the timing of the indictment in Operation Fast and Furious and, instead, the next significant development in the case was Agent Terry's tragic death and the discovery of Operation Fast and Furious weapons at the murder scene.

V. Response to Agent Terry's Murder

On the evening of December 14, 2010, CBP Agent Brian Terry was shot near Rio Rico, Arizona, while conducting border patrol operations. He was transported for emergency medical services but succumbed to his injuries.

Our investigation determined that Burke received an e-mail from the Department of Homeland Security at approximately 3:30 a.m. on December 15, 2010, notifying him of an agent's murder. The Attorney General and Acting Deputy Attorney General received notification of the murder at approximately 10:00 a.m. the same day from e-mails that DOJ staff forwarded to them from Burke.

At approximately 11:00 that morning, Holder e-mailed Grindler, Wilkinson, and three other staff members to ask whether more details about the shooting were available. Wilkinson informed Holder that he would "look into it," and a few minutes later sent an e-mail to Burke asking him to "provide any additional details as they become available to you."

Holder told the OIG that he did not recall receiving more information other than the basic fact of the shooting, though he said it was possible he may have had a conversation with Wilkinson about it. Wilkinson told us that he did not recall having any such conversations with Holder. We found that Wilkinson forwarded to Holder during the afternoon of December 15 three e-mails from the Arizona U.S. Attorney's Office that furnished additional information about the shooting and Agent Terry. These e-mails provided further details about the circumstances surrounding the firefight that resulted in Agent Terry's death and law enforcement's efforts to find and arrest the suspects.

Information soon became available that linked two weapons at the Terry murder scene to Operation Fast and Furious.²²³ Burke learned of this connection on the evening of December 15 and e-mailed Wilkinson, stating "[t]he guns found in the desert near the murder [sic] BP officer connect back to the investigation we were going to talk about – they were AK-47s purchased at

²²³ We discuss the link between the weapons purchased by Jaime Avila and those found at the Terry murder scene and Operation Fast and Furious in greater detail in Chapter Four.

a Phoenix gun store.” Wilkinson told us that he did not recall advising the Attorney General of this information, and we found no evidence that he did so.

McMahon was notified by Newell of the connection on the night of December 15 by e-mail, which McMahon then forwarded to Chait. Hoover e-mailed Melson at approximately 4:00 a.m. on December 16 to advise Melson that Hoover had received a call from Chait the prior evening informing Hoover that two weapons found at the scene of the shooting were traced back to Operation Fast and Furious. Later on December 16, McMahon sent to Hoover and Chait two briefing papers that they had requested. The first was a December 3 briefing paper. The second was a supplemental briefing paper created on December 16 and that focused on Avila specifically.

Grindler was informed about the link on December 17, 2010, when Senior Counsel to the Deputy Attorney General Brad Smith sent an e-mail to Grindler and three members of his staff that furnished updates on several ATF issues and informed him of the recovery of two AK-47 firearms from the Terry murder scene that had been traced to Avila, a straw purchaser in Operation Fast and Furious, and of Avila’s subsequent arrest. Smith received this information on December 16 from Hoover, along with the two memoranda that Hoover had received from McMahon earlier that same day. Smith prefaced the e-mail to Grindler, “We do not believe anything requires immediate action from our office, but we wanted to make sure you were aware of the issues.” After first describing ATF’s progress on requiring FFLs to report sales of multiple long guns to a single purchaser through a “demand letter,” Smith wrote:

Second, you may recall that a CBP border patrol agent was killed on Tuesday in a firefight in Arizona involving [sic] along the Mexican border. Two of the weapons recovered from the scene (AK-47 variants) have been linked to Jaime Avila, Jr., a “straw firearms purchaser” that ATF and USAO for Arizona have been investigating since November 2009 as part of its larger “Fast and Furious” operation. (It is not clear if the shots that killed the CBP agent came from the weapons linked to Avila.) ATF agents, assisted by ICE, USMS, and Phoenix police, arrested Avila on Wednesday for falsification of ATF forms, and in a subsequent interview, he admitted to serving as a straw purchaser. The attached background papers, which ATF prepared, provide additional details on the case, if you are interested.

Smith attached to his e-mail to Grindler the two ATF briefing papers on Operation Fast and Furious that Hoover had sent to him. The first was the December 3 briefing paper which provided background about the investigation, including the fact that from October 2009 to October 2010 the agents had documented purchases in excess of 1,900 firearms for approximately \$1.25 million in cash. It also noted that firearms purchasing and trafficking activity

by the organization targeted in Operation Fast and Furious had “subsided significantly” since October 2010 “due to several factors not the least of which are the many proactive measures taken by the agents assigned to Phoenix Group VII.”²²⁴ Finally, it indicated that the U.S. Attorney’s Office was planning to indict 42 individuals in January 2011. The other briefing paper was the December 16 memorandum which contained information about Avila’s firearms purchases, including the fact that he was known to have purchased 52 firearms since November 2009 through mid-June 2010, and that these firearms included the 2 AK-47 variants Avila had purchased on January 16, 2010, that were found at Agent Terry’s murder scene. The briefing paper also indicated that when confronted by ATF agents on December 15, 2010, following the shooting of Agent Terry, Avila admitted to being a straw purchaser and was arrested.

Grindler told the OIG that he did not recall taking any action with respect to the Terry murder, and did not recall having conversations with his staff or the Attorney General after receiving the e-mail from Smith. He said that by the time he received Smith’s e-mail he was confident that the investigation of Agent Terry’s murder was being taken “extraordinarily seriously,” the FBI was involved, an AUSA had been assigned to the matter, and Avila had been arrested.²²⁵ Grindler told us that he “absolutely thought” that part of the FBI investigation would address how weapons from ATF’s case made it to the Terry shooting scene, and he believed he would be receiving reports on the case. He said that he did not recall the FBI providing him with any updates on the case while he was the Acting Deputy Attorney General.²²⁶

²²⁴ After reviewing a draft of this report, Grindler and other Department officials pointed out in comments to the OIG that ATF consistently described Operation Fast and Furious as a successful operation that prevented firearms from reaching Mexico, including in the briefing papers attached to Smith’s December 17 e-mail. Those papers provide that ATF agents had been able to “identify a large number of additional co-conspirators and disrupt the illegal activities of this firearms trafficking organization by seizing numerous firearms and narcotics” and that “throughout the course of the investigation numerous seizures were made by other State, local and Federal law enforcement agencies at the direction of the Phoenix Group VII in order to ensure the seized firearms did not reach their intended destination” According to Grindler, “[t]his account suggests a well-functioning operation, not the use of flawed tactics that should have raised concerns.”

²²⁵ After reviewing a draft of this report, Grindler commented that “the information we received indicated that the murder investigation was proceeding expeditiously, that a number of people had already been arrested and that significant personnel from the FBI, ATF, United States Attorney’s Office and DHS (CBP) were dedicated to investigating Agent Terry’s murder and that updates would be provided by the USAO.”

²²⁶ In his submission to the OIG after reviewing the draft report, Grindler noted that no one in the Department, including at ATF, at the U.S. Attorney’s Office, and the five individuals in the Department’s senior leadership who knew about the issue, raised any concerns with him

(Cont’d.)

Approximately two weeks after Agent Terry's death, James Cole was appointed by President Obama to be Deputy Attorney General, and Grindler moved from his position as Acting Deputy Attorney General to the position of Chief of Staff to the Attorney General.²²⁷

Smith told us that at the time he believed that the situation was "under control" and that ATF and the Arizona U.S. Attorney's Office were preparing to indict the case. He said that based on his review of the briefing papers attached to his December 17 e-mail it appeared that there was "a coordinated plan on when to target and bring down particular individuals" and as a result he did not have concerns that additional steps needed to be taken. Smith said he did not recall having any conversations with Grindler or other Department officials about the information concerning Operation Fast and Furious contained in the December 17 e-mail.

Attorney General Holder told the OIG that he did not learn of the link between the firearms recovered at the Terry murder scene and Operation Fast and Furious until 2011. Holder stated that he probably learned about the link in February 2011, after he received Senator Grassley's January 27 and 31, 2011, letters and first learned of Operation Fast and Furious. We found no evidence that the Attorney General was told by anyone at the Department, or by anyone at ATF, about the connection prior to Senator Grassley's letter on January 27, 2011.

Holder told us that he would not have expected to be informed about the link between the weapons found at Terry's murder scene and Operation Fast and Furious absent some knowledge that "inappropriate tactics" were used in the investigation. Kevin Ohlson, Holder's Chief of Staff at the time of the December shooting, told us that he could not recall being informed about the link but believed that the Attorney General should have been informed about it because it was a significant development in the murder investigation.

Holder also stated he did not recall taking action in response to Agent Terry's murder other than to request more information about the circumstances surrounding the shooting and to consider attending Agent Terry's funeral. Holder stated that he was not informed of the information contained in Smith's e-mail to Grindler, and he said if he had known he would have expected the U.S. Attorney's Office and agents to be asking questions about the connection between Operation Fast and Furious and the firearms found at Agent Terry's murder scene. Holder stated that he would think that

in December 2010 following Agent Terry's murder about the linkage between the weapons found at the shooting scene and Operation Fast and Furious.

²²⁷ Cole was confirmed by the Senate as Deputy Attorney General on June 28, 2011.

the Office of the Deputy Attorney General also would be asking questions about the investigation. He stated, "I think that people would have been looking at this in the Deputy's Office, again my assumption, with that thought process, that would probably have never entered their minds that those guns might have gotten on the scene, might have been involved in the death of Brian Terry as a result of an inadequate underlying . . . surveillance."²²⁸

We found no evidence that Holder or Grindler asked specific questions about the circumstances surrounding Agent Terry's murder until February 10, 2011. On February 9, 2011, Senator Grassley sent Attorney General Holder a letter that, like his January 27 letter, raised questions about the firearms found at the Terry murder scene:

ATF agents told my staff that the agency allowed the sale of assault rifles to known and suspected straw purchasers for an illegal trafficking ring near the southwest border. Authorities allegedly recovered two of those weapons at the scene of a fire near the southwest border on December 14, 2010. Customs and Border Protection Agent Brian Terry lost his life in that fire and may have been killed with one of those two rifles. That is why I requested nearly two weeks ago that the ATF brief my staff as soon as possible.

Late on February 9, Wilkinson e-mailed Senator Grassley's letter to Grindler. The next morning Grindler responded to Wilkinson, "We need to dig into this situation. ODAG needs to be pushing ATF on what took place here. I would like to know more about it. Let's discuss it at the 8:45 meeting."²²⁹

Later that day, Grindler wrote to Monaco and Wilkinson regarding the letter from Sen. Grassley:

Two issues the AG is particularly concerned with are (1) the statement that at least one gun dealer wanted to stop participating in sales like those to Avila sometime around October 2009 with ATF allegedly encouraging the dealer to continue to sell to suspected traffickers; and (2) the assertion that there has been no contact with the victim's family. The AG agrees that the family deserves answers.

²²⁸ The evidence shows that ATF did not have Avila's January 16, 2010, purchase under surveillance, and learned about it on January 19, 2010. However, ATF by that date had identified Avila as a suspected straw purchaser and knew about his affiliation with Patino.

²²⁹ After reviewing a draft of this report, Grindler informed the OIG that his response to Senator's Grassley letter "underscore[s] how I reacted when made aware of credible allegations of potential misconduct."

Following a briefing by the Department for Sen. Grassley on February 10, 2011, and an additional letter to the Department from Sen. Grassley on February 16, 2011, Grindler wrote to Breuer, Weinstein, and Criminal Division Chief of Staff and Principal Deputy Assistant Attorney General Mythili Raman with two additional questions from the Attorney General:

So ATF did NOT persuade a reluctant dealer to participate – bottom line?

Do we have info on whether a gun sold in the operation was used in the shooting?

We discuss in detail in Chapter Six the response that Grindler received to this inquiry.

As we also discuss in Chapter Six, Attorney General Holder and other senior Department leaders in the Office of the Deputy Attorney General, including Grindler, were not told about ATF's use of flawed tactics in Operation Wide Receiver until several months after Agent Terry's shooting. Holder told us that knowledge of Operation Wide Receiver at the time of Agent Terry's death "certainly would raise . . . your sensitivity. It happened once before." He stated that "if you had that knowledge and if you remembered it at the time, let's see with an agent dead here and we got some guns connected to an investigation on Wide Receiver, what happened there . . . , you might start asking questions like that."

Breuer said that he did not recall what actions he took after learning of Agent Terry's death and did not believe he had any conversations with Burke, the Office of the Deputy Attorney General, or the Office of the Attorney General about Agent Terry's shooting. Breuer stated that he believed that the Arizona U.S. Attorney's Office was responsible for prosecution of the persons responsible for Terry's murder. Breuer indicated that he was not made aware at the time of the connection between the guns found at the site of the murder and Operation Fast and Furious, and we found no evidence to the contrary.

We also found no evidence that anyone at the Department was in contact with senior leadership at the Department of Homeland Security following Agent Terry's death.²³⁰ This was true even after the Department learned of the connection between the Operation Fast and Furious investigation and the firearms found at the scene of Agent Terry's murder.

²³⁰ As an agent with the CBP, Agent Terry worked for the Department of Homeland Security, not the Justice Department. Melson told us that he notified the head of CBP of the link between the weapons found at the Terry murder scene and Operation Fast and Furious when he learned of the connection.

Finally, shortly after Agent Terry was shot, information appeared on the internet alleging that ASAC George Gillett approved more than 500 firearms being “walked” to Mexico in ATF cases in Phoenix and Tucson and that one of the firearms was rumored to have been used in the killing of a Border Patrol agent in Nogales, Arizona. Melson told the OIG that he was assured by four or five supervisors that the “gun walking” alleged on the internet did not happen. In addition, Melson sought ATF Chief Counsel Stephen Rubenstein’s views on whether the public posting of the information violated ATF policies. Rubenstein informed Melson by e-mail on January 5, 2011, that such a disclosure potentially would violate ATF policies concerning the disclosure of information to the public. Melson thereafter informed Rubenstein that he would refer the matter to Internal Affairs. We describe in Chapter 6 other information that appeared on the internet following Agent Terry’s murder and before Sen. Grassley’s January 27, 2011, letter to Melson that concerned ATF allowing guns to “walk.”

VI. The January 25, 2011, Press Conference Announcing the Avila Indictment

On January 25, 2011, the Arizona U.S. Attorney’s Office issued a press release announcing indictments in 5 cases against 34 defendants accused of illegally trafficking firearms from the United States to Mexico, including 20 defendants linked to Operation Fast and Furious. Burke and Newell held a press conference the same day about the indictments.

Attorney General Holder did not attend the press conference, although according to Burke, he learned from Newell that ATF made some “overtures” to have him appear there. On December 14, 2010, Burke e-mailed Cunningham that the “AG’s office is now expressing interest in the AG coming out” for the press conference. On December 21, Burke sent an e-mail to the Attorney General’s Deputy Chief of Staff, Monty Wilkinson, stating that he would not recommend that the Attorney General announce the case and that he could explain his views in detail at Wilkinson’s convenience. According to Burke, his opposition to Holder’s attending the press conference was not related to the case but reflected Burke’s assessment that he would have limited opportunities to request the Attorney General’s presence in Arizona. Burke told us he discussed the issue with Wilkinson and told him that “if . . . I’m going to get one shot to have an AG come out to Arizona, this is not what I would pick.” Burke said that he recommended to Wilkinson that Holder visit Arizona to tour the border or to visit Indian country.

Wilkinson told the OIG that he did not recall discussing the issue with Burke or with the Attorney General, and Attorney General Holder stated that the issue was never raised with him. We found no evidence to suggest otherwise.

AAG Breuer did not attend the press conference and told the OIG that he was never asked to participate in it. However, Criminal Division e-mails show that Trusty and Weinstein considered having a Criminal Division representative attend the press conference. On January 24, 2011, Weinstein e-mailed Gang Unit staff to inquire whether a press conference would be held and whether Criminal Division personnel would attend. Trusty responded that “we decided not to scramble out to this press conference,” but that if Weinstein felt strongly about the issue he was willing to attend it. According to Weinstein, the Criminal Division did not participate in the press conference because its role was limited to only one of the five cases (the Flores case) that were indicted. He said that because the Flores case was an “add-on” to the press conference, and the Criminal Division was not involved in the main case announced at the conference, it would have been unusual for Division personnel to attend the conference.

Weinstein also asked in his January 24 e-mail whether the case that was being unsealed with Operation Fast and Furious (Flores) was one that the Criminal Division inherited “after a lot of guns had been permitted to walk?” Trusty responded that there was “no information suggesting that law enforcement let guns walk” We asked Weinstein whether any concerns about Operation Fast and Furious or the Flores case caused him not to send a Criminal Division representative to the press conference. He responded “No,” and stated that at that point in time there was no reason for the Criminal Division to be “keeping its distance” from Operation Fast and Furious, and that “if we knew about the gun walking, we would have tried to stop it, not join it” (i.e., attempted to jointly prosecute the case with the Arizona U.S. Attorney’s Office).

The Criminal Division did, however, contribute a statement from Breuer that was included in the U.S. Attorney’s Office press release and provided as follows:

These indictments are important steps in the Justice Department’s effort to curb gun trafficking along the Southwest Border,” said Assistant Attorney General Lanny A. Breuer of the Criminal Division. “The Criminal Division is working hard with its partners in the U.S. Attorneys’ Offices and colleagues in Mexico to find and prosecute those who seek to transport weapons illegally across our borders.

The press release also stated that the five indicted cases “are being prosecuted by the United States Attorney’s Office for Arizona and by Trial Attorney Laura Gwinn of the Department of Justice’s Criminal Division’s Gang Unit.” Breuer said he did not recall whether he reviewed the press release before it was issued, but said if he did “it would have been a pretty limited involvement.”

VII. OIG Analysis

We found no evidence that Attorney General Holder was informed about Operation Fast and Furious, or learned about the tactics employed by ATF in the investigation, prior to January 31, 2011. We found it troubling that a case of this magnitude and that affected Mexico so significantly was not directly briefed to the Attorney General. We would usually expect such information to come to the Attorney General through the Office of the Deputy Attorney General. However, as discussed below, neither ATF nor the U.S. Attorney's Office sufficiently advised the Office of the Deputy Attorney General about the investigation itself or of any operational concerns regarding the investigation.

We also concluded that although Holder was notified immediately of Agent Terry's shooting and death, he was not told in December 2010 about the connection between the firearms found at the scene of the shooting and Operation Fast and Furious. We determined that Holder did not learn of that fact until sometime in 2011, after he received Sen. Grassley's January 27 letter. Both Acting Deputy Attorney General Grindler and Counsel to the Attorney General and Deputy Chief of Staff Wilkinson were aware of this significant and troubling information by December 17, 2010, but did not believe the information was sufficiently important to alert the Attorney General about it or to make any further inquiry regarding this development.

In addition, we found that Acting Deputy Attorney General Grindler was briefed on Operation Fast and Furious in March 2010 by Acting Director Melson and Deputy Director Hoover. However, we found that ATF's leadership provided him with a relatively brief high-level overview that highlighted the case as a significant investigation but did not identify any questions or concerns about it. Moreover, despite the fact that Hoover developed significant concerns about the case within weeks of this briefing, ATF leadership provided no further briefings to Grindler about Operation Fast and Furious in 2010.

We determined that several lawyers in the Department's Criminal Division had some knowledge about Operation Fast and Furious during 2010. The most senior of these lawyers, DAAG Weinstein, obtained information about the case during that time period but did not recognize any of the "red flags" which indicated that "gun walking" might have been occurring. We found that given his level of knowledge about the investigation and his familiarity with the "gun walking" tactics employed by ATF in Operation Wide Receiver, Weinstein was the most senior person in the Department in 2010 who was in a position to identify the similarity between the inappropriate tactics used in Operations Wide Receiver and Fast and Furious.

We also found that Assistant Attorney General Breuer, who learned in April 2010 about the "gun walking" tactics used in Operation Wide Receiver, did not learn about Operation Fast and Furious and the allegations about the

use of improper investigative tactics in that investigation until after Sen. Grassley's January 27 letter. His lack of knowledge about Operation Fast and Furious in 2010 was primarily due, we found, to Weinstein's failure to inform him about the case.

We further determined that ATF Headquarters' oversight of Operation Fast and Furious was seriously deficient. Deputy Director Hoover, Assistant Director Chait, and Deputy Assistant Director McMahon all failed to adequately respond to indications and warnings early in the investigation that heightened scrutiny at the Headquarters level was needed to ensure public safety. Acting Director Melson should have recognized by no later than mid-March 2010, when he both received and delivered briefings on the investigation, that ATF staff were likely mismanaging the case. We believe that by the first months of 2010 ATF Headquarters' deference to the Phoenix Field Division imperiled the agency's obligation to protect the public. ATF's senior leadership, including Acting Director Melson, should have recognized that its agents were failing to take adequate enforcement action as straw purchasing activity continued at an alarming pace, and should have instituted measures to promptly conclude the case, even if over the objections of the U.S. Attorney's Office. We determined that ATF's leadership failed to seek timely closure of the investigation, even after Hoover recognized the need to conclude the investigative phase of Operation Fast and Furious. Although we found no evidence that ATF Headquarters' executives had improper motives or were seeking through their work on Operation Fast and Furious anything other than to dismantle a dangerous firearms trafficking organization, our investigation found that their oversight of the investigation was seriously deficient.

Finally, we believe that Melson and Hoover failed to appropriately respond to the troubling information they learned in December 2010 about the connection between the two guns found at the scene of Agent Terry's murder and Operation Fast and Furious. While they promptly requested information following the discovery, and promptly notified the Office of the Deputy Attorney General about the information, they failed to initiate a review of the matter.

Below we describe these problems and other issues related to ATF and DOJ Headquarters' role in Operation Fast and Furious.

A. Information Provided to the Offices of the Attorney General and the Deputy Attorney General

Our investigation examined whether staff in the Office of the Attorney General, including Attorney General Holder, received information concerning Operation Fast and Furious prior to Sen. Grassley's letter dated January 27, 2011.

1. Attorney General Holder

Attorney General Holder told the OIG that he did not hear of Operation Fast and Furious until late January or early February 2011, and was not aware of concerns with the tactics in the investigation until February. He said that he visited Sen. Grassley in the Senator's office on January 31, 2011, and Sen. Grassley handed him two letters that referenced Project Gunrunner. Holder told us that he became familiar with the phrase "Fast and Furious" after visiting with Sen. Grassley.

We found no evidence that Department or ATF staff informed Holder about Operation Fast and Furious prior to 2011. Melson stated that he did not inform Holder about the investigation, and Burke said he did not recall doing so.²³¹ Melson also stated that the Department was not involved in formulating any of the tactical decisions in the investigation. Holder said that Melson did not identify to him any problems about Operation Fast and Furious in 2009 and 2010.

Our investigation did not identify evidence that contradicted Holder's statements to us regarding his knowledge of Operation Fast and Furious and the use of "gun walking" tactics in that investigation. As we describe below, we identified information regarding Operation Fast and Furious that reached the Office of the Attorney General in 2010 but not Attorney General Holder himself. However, we found no evidence that this information included the inappropriate tactics at issue in Operation Fast and Furious.

²³¹ Holder visited Arizona on March 24 and 25, 2010, to attend a U.S. Attorney's National Conference, a Financial Fraud Enforcement Task Force meeting, and a gathering of tribal leaders. In preparation for Holder's visit, Burke received a 1-page write-up about Operation Fast and Furious that Hurley drafted. The Arizona U.S. Attorney's Office also sent a list of significant cases to the Executive Office for U.S. Attorneys on March 19, 2010, in anticipation of Holder's visit. The list did not include Operation Fast and Furious. Burke stated to Congressional investigators that he recalled attending meetings with Holder, including a 10-minute meeting with Holder and Wilkinson to discuss the work of Burke's office and other meetings that Holder was going to attend during his visit to Arizona. Burke said that he had no recollection of discussing Operation Fast and Furious with Holder, though he said he may have mentioned to him that "we have a gun trafficking case that's a T-3." He stated that if he did make such a comment, "that would have literally been the extent of it" due to time limitations. The First Assistant United States Attorney also attended some meetings with Holder and Burke. She stated that she did not recall hearing any mention of Operation Fast and Furious.

2. Weekly Reports to the Offices of the Attorney General and Deputy Attorney General

We found that the Offices of the Attorney General and Deputy Attorney General received 11 weekly reports in 2010 from ATF, DOJ's Criminal Division, and the National Drug Intelligence Center (NDIC) that referred to Operation Fast and Furious by name. For example, six of seven NDIC reports included among several other entries a summary of the support that NDIC had provided Operation Fast and Furious. The summary, which was identical in six of the reports except for certain dates, stated that Celis-Acosta and the straw purchasers in Operation Fast and Furious were responsible for trafficking 1,500 firearms to Mexican drug cartels.²³² Attorney General Holder told the OIG that he did not believe that he reviewed these reports at the time that his office received them and that his staff did not bring them to his attention. Former Acting Deputy Attorney General Grindler stated that he had no recollection of having reviewed any weekly report concerning Operation Fast and Furious or of his staff highlighting such information for his review.

We found no evidence that these weekly reports were forwarded to the Attorney General or Deputy Attorney General. Our examination of the entries concerning Operation Fast and Furious in the weekly reports above revealed that they did not refer to agents' failure to interdict firearms or include information that otherwise provided notice of the improper strategy and tactics that ATF agents were using in the investigation. While the NDIC reports' reference to 1,500 firearms that had been trafficked to Mexican drug cartels was important, the reports did not state or suggest that the ATF had advance knowledge of the firearms purchases or otherwise knowingly allowed the guns to cross the border.

²³² An example of one of the NDIC entries appears below:

(LOU-LES) Document and Media Exploitation Support to the Organized Crime Drug Enforcement Task Force: From July 6 through July 9, the National Drug Intelligence Center Document and Media Exploitation Team at the Phoenix Organized Crime Drug Enforcement Task Force (OCDETF) Strike Force will support the Bureau of Alcohol, Tobacco, Firearms, and Explosives' Phoenix Field Division with its investigation of Manuel Celis-Acosta as part of OCDETF Operation Fast and Furious. This investigation, initiated in September 2009 in conjunction with the Drug Enforcement Administration, Immigration and Customs Enforcement, and the Phoenix Police Department, involves a Phoenix-based firearms trafficking ring headed by Manuel Celis-Acosta. Celis-Acosta and 25 straw purchasers are responsible for the purchase of 1,500 firearms that were then supplied to Mexican drug trafficking cartels. They also have direct ties to the Sinaloa Cartel which is suspected of providing \$1 million for the purchase of firearms in the greater Phoenix area.

3. Acting Deputy Attorney General Grindler

Unlike Attorney General Holder, Acting Deputy Attorney General Grindler received an ATF briefing from Melson and Hoover on Operation Fast and Furious in March 2010, while investigative activity in the case was ongoing. We found, however, that the briefing failed to alert Grindler to problems in the investigation. In addition, despite the significance of the investigation and the concerns about it that Hoover said he developed within weeks of this briefing, we found no evidence that ATF provided any updates or briefings to Grindler in any future meetings.

The March 12 briefing was Grindler's first monthly meeting with ATF as Acting Deputy Attorney General. We found that the discussion of Operation Fast and Furious at the meeting was relatively brief. The report on the investigation was placed in the middle of the agenda – listed as fourth of seven items – for what was a 45- to 60-minute briefing. As a result, we found that the briefing on Operation Fast and Furious was likely only 5 to 10 minutes, and the participants told us that it was only a high-level overview of the investigation.

Melson and Hoover presented the case to Grindler as a significant case and did not identify any questions or concerns for him about the investigation. The briefing documents consisted of various charts about Operation Fast and Furious that showed significant firearms purchases and recoveries in Mexico. The documents revealed that as of February 27, 2010, 1,026 firearms had been purchased with over \$600,000 cash by 27 straw purchasers, and that firearms had been traced back to the case from 10 different recovery sites located in the United States and Mexico. Grindler's notes reflect that the briefing also included discussion of the tracking of certain weapons. Thus, while we would have expected Grindler or his staff to have asked probing questions about the investigation given the number of firearms and amount of cash involved, we believe that the limited information presented at the briefing was not sufficient to put him on notice of ATF's failure to interdict firearms that it could have legally seized. Indeed, Grindler, Melson, and Hoover all told the OIG that the briefing did not include a detailed discussion of the case strategy or tactics, and did not include any mention of "gun walking."

Grindler told us that he understood from the briefing that ATF was building its case by tracing weapons seized or recovered in Mexico back to their purchases in the United States. He stated that the volume of firearms involved in the investigation did not signal to him that there were problems in the case given what he knew about the high volume of firearms seized in Mexico and traces performed on those firearms in 2009.

We concluded that by the time they presented this briefing to Grindler, Melson and Hoover had received sufficient information about the scope and

significance of Operation Fast and Furious that they themselves should have been asking probing questions about the strategy in the case and whether efforts were being made to minimize the risk to public safety. We concluded that they failed to do so. As a result, they provided incomplete information about Operation Fast and Furious to the Acting Deputy Attorney General. Moreover, even as they developed increasing concerns about the investigation in 2010, and despite its significant impact on Mexico, Hoover and Melson failed to provide any updated briefings to Grindler.

4. Information Provided to the Department Following Agent Terry's Shooting

While we found that the Offices of the Attorney General and the Deputy Attorney General were not presented with sufficient information by ATF prior to Agent Terry's shooting on December 14, 2010, to alert them to the serious problems in Operation Fast and Furious, we found that neither office took appropriate action after learning that firearms found at the scene of the shooting were connected to the Operation. We believe that an aggressive response to the information was required, including prompt notification of the Attorney General and appropriate inquiry of ATF and the U.S. Attorney's Office. However, we found that senior officials who were aware of the information, including Grindler, took no action whatsoever.

We concluded that Attorney General Holder should have been informed by no later than December 17, 2010, that two firearms recovered at the Terry murder scene were linked to an ATF firearms trafficking investigation.

As described previously, U.S. Attorney Burke informed Counsel to the Attorney General and Deputy Chief of Staff Monty Wilkinson late on December 15 of the connection between the firearms found at the Terry murder scene and the Fast and Furious investigation. However, Wilkinson told us that he did not recall advising Holder about this information. We found that although Wilkinson forwarded to Holder during the afternoon of December 15 three e-mails from the U.S. Attorney's Office providing further details about the shooting and law enforcement efforts to find and arrest the suspects, he did not notify the Attorney General of the revelation that two weapons found at the murder scene were linked to a suspect in an ATF firearms trafficking investigation. Holder told us that he did not learn of this connection until early 2011, around the time he first became aware of Operation Fast and Furious.

Grindler learned about the connection between firearms found at the scene and Operation Fast and Furious on December 17 in an e-mail from Senior Counsel Brad Smith. Smith alerted him to the connection in the body of the e-mail, and attached two briefing memoranda, one concerning Operation Fast and Furious and one concerning Avila's history of firearms purchases. We concluded that as Acting Deputy Attorney General, Grindler should have

recognized that the circumstances of Agent Terry's murder implicated significant Department interests. In sum, a federal law enforcement agent had been murdered and two of the firearms found at the scene were illegally purchased by a straw purchaser who had been under ATF investigation at the time of the purchase (which had occurred nearly a year earlier). These facts alone, we found, should have prompted Grindler to ask questions about the case and to inform Attorney General Holder of the alarming information.

The memoranda that were attached to the Smith e-mail revealed that the Avila weapons purchases were part of a much larger firearms trafficking investigation involving over 1,900 firearms bought in cash – facts that should have prompted further inquiry about the circumstances of Agent Terry's murder.

Grindler told the OIG that he could not recall having conversations with anyone in the Office of the Attorney General about this matter, and we found no evidence that he did. Grindler also told us that he expected the FBI, which was responsible for investigating the Terry murder, to address the presence of weapons from an ATF investigation at the murder scene. He stated that he believed the Terry murder investigation was being taken “extraordinarily seriously,” in part because Avila had been arrested, and that he expected he would receive updates on the case. Grindler stated that in fact he did not receive updates, and the evidence suggests that Grindler did not seek any additional information about the matter until February 10, 2011. We believe that Grindler's reliance on the FBI was misplaced given that it did not have the responsibility to determine whether errors in ATF's investigation led to the weapons ending up at the murder scene or why ATF failed to take law enforcement action against Avila for nearly one year and did so only after Agent Terry's murder. We also believe that Grindler should have ensured that the Department of Homeland Security was informed about the linkage.²³³

When we asked Holder whether he believed that his staff should have informed him sooner about the connection between Operation Fast and Furious and the firearms found at the scene of the Terry shooting, he said that he would not have expected to receive that information absent some indication that “inappropriate tactics” had been used in the investigation. However, Holder's Chief of Staff at the time of the Terry murder, Kevin Ohlson, told us

²³³ After reviewing a draft of this report, Grindler stated that “the Customs and Border Patrol were integrally involved in the initial response to the murder clearly indicates that DHS would have received the same information that was being passed to the Office of the Deputy Attorney General.” We believe that given this information connected a Justice Department firearms investigation to the shooting death of a DHS law enforcement agent, the Department's leadership should have ensured that the DHS's leadership knew about the information at the earliest possible time.

that he believed this information was significant and that it should have been brought to the Attorney General's attention. We agree. We believe that Wilkinson and Grindler should have notified Holder that the firearms found at the Terry murder scene were linked to an investigation being carried out by a Department component. Whether and what kind of follow up should have occurred was a decision that the Attorney General should have been in a position to make, but he was not because he was not given the requisite information.

Lastly, had the Department's senior leadership taken immediate action after learning that weapons found at the scene of a federal law enforcement agent's murder were linked to a straw purchaser in an ATF firearms trafficking investigation, the Department likely would have gathered information about Operation Fast and Furious well before it received the inquiry from Sen. Grassley about the very same issue in late January 2011. The Department, however, did not do so. As a result, when Sen. Grassley's letter arrived on January 27, 2011, the Department was caught unprepared and, as we discuss in Chapter Six, rushed to send out a response letter in one week.

B. Information Provided to the Criminal Division

In this section we provide our conclusions regarding the information about Operation Fast and Furious that reached Criminal Division personnel while the investigation was ongoing in 2009 and 2010 and their responses to learning that information.

1. Gang Unit Prosecutors

We found that attorneys from the Criminal Division's Gang Unit received information about Operation Fast and Furious during briefings in December 2009 and March 2010, at a meeting involving ATF leadership and the Criminal Division in April 2010, and in the case of one Gang Unit prosecutor (Laura Gwinn) through the review of materials from the case file during the summer of 2010. Despite its repeated efforts to become involved in the investigation, however, we found that the Criminal Division's Gang Unit never assumed responsibility for the case due to the decision by the Arizona U.S. Attorney's Office to refuse the Criminal Division's offer of assistance.

In response to Director Melson's request to AAG Breuer in December 2009 to assign a prosecutor to assist ATF in developing multi-district gun trafficking cases along the Southwest Border, Gang Unit Chief Carwile was directed to assign an attorney to help coordinate the effort. As a result, Carwile and the attorney he assigned to the matter, Cooley, attended a briefing at ATF Headquarters on December 17, 2009, and Cooley attended two additional

briefings in early March 2010, all of which included some discussion of Operation Fast and Furious.²³⁴

Although the December 17 briefing included significant information about Operation Fast and Furious and firearms recoveries linked to straw purchasers in the investigation, it did not include references to or discussions about the failure of ATF to seize firearms when they had the opportunity and legal authority to do so. Additionally, none of the ATF personnel in attendance during the briefing raised any concerns about the operation. Further, the information was presented as part of a larger discussion of firearms recoveries along the Southwest Border and we found no evidence that the briefing included discussion of the direction, strategy, or tactics used in Operation Fast and Furious. As a result, we found that neither Carwile nor Cooley had a sufficient basis to conclude that ATF had allowed firearms to “walk” based solely on this briefing.

Cooley, however, also received briefings about Operation Fast and Furious on March 1 and March 5 at ATF Headquarters. These briefings included information about the total number of firearms purchased by that date (which was 1,026) and the 17 separate firearms recoveries in the United States and Mexico that traced back to the investigation. Witnesses told us that these briefings did not include a discussion of the failure by ATF to seize firearms where it had the opportunity and legal authority to do so. However, witnesses told us that at the March 5 briefing one of the ATF participants raised a concern about the high number of guns involved in the investigation. In this context, Cooley told us that he informed attendees at the briefing that if they wanted to use a wiretap, they would have to let “this thing ride out a bit.” He also told us that in the context of a discussion about dismantling the entire organization, he stated that individual straw purchasers were “fungible.”

An OSII analyst at the meeting told us he was concerned by Cooley’s comments because he thought it was obvious from the information presented at the briefing that agents were not seizing guns, and he interpreted Cooley to be saying that this was an acceptable practice. However, the analyst told us that he did not raise any concern or objection in response to Cooley’s comments, nor did anyone else. Cooley told us that what he meant by the “ride out a bit” comment was that in proceeding with the plan to use a wiretap, ATF would have to allow the straw purchasers to continue to buy firearms, but would also have to continue to be aggressive in seizing weapons through

²³⁴ At the start of January 2010, Cooley expressed an interest in focusing initially on Operation Fast and Furious. However, Cooley spent most of January and February in or preparing for a trial in Texas, and did not return his attention to Operation Fast and Furious until the beginning of March.

techniques such as “wall stops” or stash house raids. The investigative approach did not, in Cooley’s view, prevent ATF from at the same time interdicting firearms. Cooley said that “you certainly don’t allow any weapons to cross the border if you have any way of stopping it.” He also told us that he believed that in using a wiretap, they would have to act with a sense of urgency because of the risk that guns would “slip through.”

Based on this evidence, we concluded that in making the “ride out a bit” comment Cooley was not endorsing the strategy and tactics that ATF had used in the investigation up to that point, although he did support the plan to use a wiretap in the case to target the organization rather than individual straw purchasers. Moreover, within 2 weeks of this March meeting, the Arizona U.S. Attorney’s Office had objected to the Criminal Division’s participation in the investigation and as a result Cooley had no further contact with the case. We found no evidence that Cooley had knowledge about the actual investigative techniques that ATF was employing and its failure to seize firearms where it could lawfully do so.

Gang Unit Deputy Chief Trusty also gained some information about Operation Fast and Furious in the spring of 2010. As we described in Chapter Three, Trusty attended the April 28 meeting during which Weinstein discussed the gun-walking issue in Operation Wide Receiver with Hoover, McMahon, and two representatives of the Department’s Office of Public Affairs. We concluded from the participants’ description of and notes taken at this meeting, and from the e-mails about the meeting, that it was largely focused on the timing of the indictments in Operation Wide Receiver and how to address press issues arising from the fact that guns had “walked” in the investigation, as well as issues arising from the ATF’s use of an FFL as a confidential informant and an agent’s acceptance of a gift from the FFL.²³⁵

However, we also concluded that McMahon discussed Operation Fast and Furious with Weinstein and Trusty at that meeting. McMahon stated that he recalled that issues related to the timing of the indictments in Operation Wide Receiver led to some discussion about Operation Fast and Furious at this meeting. Weinstein said he understood from the discussion that McMahon thought ATF was aggressively seizing guns in Operation Fast and Furious, but

²³⁵ After reviewing a draft of this report, Weinstein disagreed with our characterization of the April 28 meeting as focused on these issues. According to Weinstein, he addressed the inappropriateness of “gun walking” first and that it was not necessary to do an extended admonishment of Hoover because it was obvious, from Hoover’s words and reactions, that Hoover shared Weinstein’s concerns and seemed as upset about the gun-walking as Weinstein had been. Weinstein also noted that Breuer testified both that Weinstein had told Breuer this was the rationale for the meeting and that Weinstein had reported back to Breuer on this issue after the meeting.

that due to the volume of firearms that were being trafficked agents would not be present in every instance to seize them, and they would have to answer questions about “the guns they didn’t get.” Trusty told us that he also understood the case had a “lot of guns in it” and that Operation Fast and Furious was a bigger case than Operation Wide Receiver, but said he did not remember hearing anything about guns “getting away” or “walking” in the case.

We were troubled given the context of the meeting that neither Weinstein nor Trusty asked more questions about Operation Fast and Furious to ensure that their understanding was correct that the case did not involve tactics like those used in Operation Wide Receiver, and that they did not convey in forceful terms the Criminal Division’s view that such tactics were unacceptable and would not be condoned. As we discuss below, we were particularly concerned with Weinstein’s failure to probe the matter given his position and responsibilities as a Deputy Assistant Attorney General and the fact that this meeting was the result of concerns that he had raised about Operation Wide Receiver. However, we found that the discussion of Operation Fast and Furious during this meeting was insufficient, standing alone, to place Weinstein and Trusty on notice that ATF agents were purposefully failing to interdict firearms in that investigation.²³⁶

Finally, we found that Gang Unit prosecutor Laura Gwinn developed concerns about Operation Fast and Furious in the summer of 2010 when she was reviewing materials from the Operation Fast and Furious case file as part of her efforts to assist Hurley. Gwinn told the OIG that after reading the ROIs and wiretap affidavits it was her impression that ATF purposefully was not interdicting firearms in order to gain more information about the firearms trafficking organization that ATF was investigating. Gwinn said that, contrary to what she did in Operation Wide Receiver, she did not inform her supervisors about her concerns because by the time she developed them it was clear that the Gang Unit was not going to be involved in the case. She also said that based on her experience in the Gang Unit, she assumed that the strategy of “purposefully not interdicting firearms” would have been vetted and approved by the supervisory chain within the U.S. Attorney’s Office.

While it was not unreasonable for Gwinn to believe that supervisors in the U.S. Attorney’s Office and ATF in Phoenix were managing the case, we believe she should have alerted her supervisor of her concerns about the case, especially given the significance of the “gun walking” issue and her

²³⁶ However, as we discuss in the next section, Weinstein also received additional information about Operation Fast and Furious from McMahan and from his review of wiretap applications.

understanding of its significance in connection with her responsibility for prosecuting Operation Wide Receiver.

2. Authorization of the Wiretap Applications and DAAG Weinstein's Failure to Recognize "Gun Walking"

In order to ensure accountability for the use of such an intrusive investigative technique affecting Fourth Amendment rights, Congress substantially restricted in the federal wiretap statute the power to authorize electronic surveillance.²³⁷ The statute explicitly assigns review and approval of electronic surveillance applications to the Attorney General, but allows the Attorney General to delegate this review and approval authority to a small number of designated high-level Department officials, including Deputy Assistant Attorneys General for the Criminal Division.²³⁸

ATF and the Arizona U.S. Attorney's Office submitted nine wiretap applications to the Criminal Division for review and approval from March through July 2010 in the Operation Fast and Furious investigation. The Table below presents information about the review of these applications.

²³⁷ See USAM 9-7.00.

²³⁸ 18 U.S.C. § 2516(1). Attorney General Holder has specially designated the Assistant Attorney General and the Deputy Assistant Attorneys General (DAAGs) in the Criminal Division, including those who serve in those positions in an acting capacity, to authorize applications for wiretap orders. Office of the Attorney General, Order No. 3055-2009, February 26, 2009.

Table 5.1

Electronic Surveillance in Operation Fast and Furious			
Application	Date Authorized	DAAG	Date of Order
Initial (TT1) [REDACTED]	3/10/2010	Kenneth Blanco	[REDACTED]
Spin-off (TT2/TT3) [REDACTED]	4/15/2010	John Keeney	[REDACTED]
Spin-off (TT4) [REDACTED]	5/6/2010	John Keeney	[REDACTED]
Spin-off (TT5) [REDACTED]	5/14/2010	John Keeney	[REDACTED]
Renewal (TT2) [REDACTED]	5/21/2010	Jason Weinstein	[REDACTED]
Spin-off (TT6) [REDACTED]	6/1/2010	Jason Weinstein	[REDACTED]
Extension (TT2) [REDACTED]	6/23/2010	Jason Weinstein	[REDACTED]
Spin-off (TT7) [REDACTED]	7/1/2010	Kenneth Blanco	[REDACTED]
Extension (TT7) [REDACTED]	7/30/2010	John Keeney	[REDACTED]

A single OEO staff attorney and his assigned supervisor evaluated the applications (as did an attorney in ATF's Office of Chief Counsel) before they were sent to a DAAG for review and approval. We determined that three DAAGs - Blanco, Keeney, and Weinstein - authorized the nine wiretap applications in Operation Fast and Furious. In each case, the OEO staff attorney prepared a cover memorandum for the DAAG that provided background information about the investigation and evaluated the legal sufficiency of the request for a wiretap.

In light of the explicit statutory assignment of responsibility for authorizing wiretap applications, we were troubled by DAAG Blanco's and Weinstein's statements to us that they did not read the wiretap applications and affidavits in Operation Fast and Furious. Both told us that in authorizing wiretap applications, they generally rely on information in OEO's cover memoranda and read the affidavits supporting the applications only if the memoranda fail to furnish sufficient information or raise concerns. Weinstein said that it was rare for him to review the affidavit.

We believe DAAGs should conduct a review of wiretap applications and affidavits that is sufficient to enable them to form a personal judgment that the application meets the statutory criteria. While the OEO cover memorandum serves a useful purpose in the review process and can appropriately influence

the scope and nature of the DAAG's review of the affidavits themselves, we do not believe it should supplant such a review.

We further found that, given DAAG Weinstein's heightened awareness of the "gun-walking" issues in Operation Wide Receiver and his knowledge of Operation Fast and Furious, his review of the first OEO cover memorandum that he received should have caused him to read the affidavit and ask questions about the operational details of Operation Fast and Furious. We found that, in this respect, Weinstein was in a unique position among the Criminal Division reviewers of the wiretap applications in Operation Fast and Furious.

Weinstein first authorized a wiretap application in Operation Fast and Furious on May 21, 2010. As we described in Chapter Three, just two months before that application reached his desk, Weinstein made inquiries about the "gun-walking" issue in Operation Wide Receiver after reviewing a set of talking points prepared by Carwile. The talking points, sent to Weinstein in mid-March 2010, described Operation Wide Receiver as an:

extensive firearms trafficking case involving ATF, Gang Unit and USAO Tucson. With the help of a cooperating FFL, the operation has monitored the sales of over 450 weapons since 2006, particularly lower receivers of AR-15 rifles."

Weinstein told us that "the use of the word 'monitor' in that context is what raised a red flag" for him. After reviewing the talking points, Weinstein sent an e-mail to Carwile, stating:

I'm looking forward to reading the pros memo [prosecution memorandum] on Wide Receiver but am curious – did ATF allow guns to walk, or did ATF learn about the volume of guns after the FFL began cooperating?

Later, after reviewing the prosecution memorandum, Weinstein sent an e-mail on April 12, 2010, to Carwile and Trusty stating in part:

Been thinking more about "Wide Receiver I." ATF HQ should/will be embarrassed that they let this many guns walk - I'm stunned, based on what we've had to do to make sure not even a single operable weapon walked in UC operations I've been involved in planning - and there will be press about that.

As we also described in Chapter Three, Weinstein thought the issue was so significant that he and Trusty briefed AAG Breuer about it on April 19, 2010. Breuer told us that given the time they had devoted to addressing Mexican cartel issues, he and Weinstein were upset that ATF had allowed firearms to go into Mexico even though there had been legal authority to interdict them. As a result, Weinstein and Trusty met with Hoover and McMahon on April 28, 2010,

a meeting that according to Weinstein was intended specifically to discuss the “gun walking” problems in Operation Wide Receiver.

Weinstein also learned information about the extent and significance of Operation Fast and Furious in the three weeks between the April 28 meeting and his review of the May 21 wiretap application. As we described earlier in this chapter, we found that at the April 28 meeting about the gun-walking issue in Operation Wide Receiver, McMahon told Weinstein that he could expect to receive similar questions about Operation Fast and Furious because of the large amount of firearms involved in that case.

In the week following the April 28 meeting, Weinstein had additional conversations with McMahon about Operation Fast and Furious. In response to a complaint from McMahon about delays with OEO’s approval of the wiretaps, Weinstein sent an e-mail to McMahon on May 4 asking whether McMahon would like him to talk with OEO about obtaining a roving wiretap, which is viewed as a more invasive wiretap and therefore requires the personal approval of the Assistant Attorney General of the Criminal Division. McMahon responded on May 6 and told Weinstein that the agents did not believe they could meet the elevated standard required for a roving wiretap. McMahon indicated that Weinstein could help the investigation by asking OEO for quicker turnaround on the regular wiretap applications. The next day, Weinstein wrote to the director of OEO to seek faster response times from OEO for the wiretap applications. In his e-mail, he described Operation Fast and Furious as “perhaps the most significant Mexico-related firearms-trafficking investigation ATF has going” and that it was targeting “a gun-trafficking ring responsible for sending well over 1,000 guns across the SWB [Southwest Border] into Mexico.”²³⁹

Just two weeks after this e-mail exchange, and about three weeks since his meeting with ATF leadership about the problem of allowing firearms to walk in Operation Wide Receiver, Weinstein received the materials for the May 21 application for electronic surveillance. The application sought renewal of a wiretap order for a phone used by [REDACTED] the 5-page OEO cover memorandum described as [REDACTED]

²³⁹ After reviewing a draft of this report, Weinstein provided comments to the OIG noting that he had told the OIG during his interview that the fact that a large number of firearms have been trafficked in a case does not by itself indicate “gun walking.” Weinstein also stated in his comments that “the sheer number of guns involved in the case [Operation Fast and Furious] was not an indicator of gun-walking, particularly since it included a large number of “historical” guns that were purchased before the wiretaps began and in circumstances where the agents had no prior knowledge of the sale. . . the number of guns involved reflected the scope of the problem of gun-trafficking to Mexico and the significance of the investigation and targets.”

It also stated that

The OEO cover memorandum also provided as an example

The OEO cover memorandum went on to note that,

The 5-page OEO cover memorandum included only three paragraphs outlining the use of the target phones to support the probable cause finding. The first paragraph described

The second paragraph described

Although the memorandum was silent as to whether the agents made efforts to seize the weapons, the third paragraph stated that

In addition, the May 21 OEO cover memorandum was accompanied by an earlier undated OEO cover memorandum, stamped "Prior," that pertained to the first request for electronic surveillance on the same cellular phone used by This 7-page memorandum stated that

The "Prior" memorandum also stated that between October 30, 2009, and March 19, 2010, 65 of the firearms had been recovered, with 22 of those recoveries having occurred in Mexico. It also stated that

The memorandum described

The "Prior" memorandum also recounted that

Although the memorandum stated that it also stated that

Significantly, the memorandum stated that

We believe that the information contained in these OEO memoranda was similar to that which caused Weinstein to question whether agents in Operation Wide Receiver had allowed guns to “walk.” When we asked Weinstein about the Operation Wide Receiver issue, he told the OIG that the description in the talking points and the prosecution memo of ATF having “monitored” the sale of firearms by the FFL and recorded transactions in real time suggested that ATF had developed evidence that the purchases were illegal, giving agents the legal authority to interdict the firearms the moment the transactions were completed. He said this description raised a “red flag” that ATF had allowed guns to “walk.” The information in the May 21 OEO cover memorandum, as well as the undated OEO memorandum stamped “Prior,” similarly suggested that ATF agents had monitored purchases that they knew were illegal, and allowed a known straw purchaser to continue his illegal activities for a gun trafficking organization that sold weapons to Mexico.

Moreover, although the memoranda did not describe the full scope of the investigation, Weinstein already knew when he received the memoranda that Operation Fast and Furious targeted “a gun-trafficking ring responsible for sending well over 1,000 guns across the SWB [Southwest Border] into Mexico.” Even given his practice of rarely reading wiretap affidavits, under these circumstances we believe Weinstein should have learned enough from the OEO memoranda to both cause him to read the affidavit and to ask ATF or U.S. Attorney’s Office personnel further questions about the investigation to ensure that ATF was not again conducting an investigation that failed to interdict weapons that agents had observed being bought by known straw purchasers.

Weinstein told us that his experience with Operation Wide Receiver did not cause him to look beyond the OEO cover memorandum in authorizing the May 21 Operation Fast and Furious wiretap application because he believed that the tactics employed in Operation Wide Receiver were an “extreme aberration” that occurred under the prior administration and he could not imagine that they would be repeated. He also stated that he understood from McMahon’s description of Operation Fast and Furious that McMahon was under the impression that agents were aggressively seizing guns. In addition, Weinstein told us that the information in the May 21 OEO cover memorandum provided evidence to him of what he was looking for – probable cause that the phone in question had been used for criminal purposes. He also stated that the memorandum’s silence on the efforts to interdict was not unusual because such memoranda are not written to provide all the facts about the investigation.

We did not find this explanation persuasive. In short, given Weinstein’s awareness of the gun-walking issue, his knowledge about Operation Fast and Furious, and his experience with law enforcement issues arising from the flow of guns to violent Mexican cartels, the information in the OEO cover

memorandum should have been a “red flag” to him to examine Operation Fast and Furious more closely.

3. Assistant Attorney General Breuer

We found no evidence to suggest that AAG Breuer was aware in 2009 or 2010 that Phoenix ATF and the Arizona U.S. Attorney’s Office had adopted a strategy in Operation Fast and Furious of not interdicting firearms. Moreover, Breuer did not supervise Operation Fast and Furious and did not authorize any activities in the investigation.

At Melson’s request, Breuer agreed in December 2009 to assign a Criminal Division prosecutor to assist with cases along the Southwest Border, including development of intelligence-led multi-district firearms trafficking prosecutions. However, we found no evidence that Breuer was made aware of the then-captioned Chambers case in conjunction with offering this assistance. In addition, although Criminal Division weekly reports for the Offices of the Attorney General and Deputy Attorney General in October and November 2010 made passing references to Operation Fast and Furious, they did not describe problems in the investigation.²⁴⁰ Breuer also received two weekly reports from the Gang Unit that mentioned Operation Fast and Furious, but they too did not identify problems in the investigation. One of the reports briefly stated that Cooley had attended a briefing on March 1, 2010, “on developments in Operation *Fast and Furious* and various firearms trafficking investigations based in Phoenix, AZ.” The other report stated that Cooley attended a briefing on March 5, 2010, regarding “*Operation Fast and Furious*, an extensive firearms trafficking investigation based in Phoenix, Arizona,” and that ATF planned to use a wiretap in that case.

As we described earlier in this Chapter, ATF and the U.S. Attorney’s Office submitted several applications for electronic surveillance in Operation Fast and Furious to the Department’s Criminal Division beginning in March 2010. We found that Breuer had no role in authorizing these wiretap applications. Instead, consistent with the statutory designation and the Attorney General’s delegation of authority, the wiretap applications in Operation Fast and Furious were authorized by three Deputy Assistant Attorneys General. We found no evidence that Breuer received any of the nine affidavits, or that he reviewed the applications or took any actions concerning them.

²⁴⁰ These reports referred to the indictment of eight individuals under seal in a case originating from Tucson (the Flores case) and stated that the indictment likely would remain sealed until Operation Fast and Furious was ready for “takedown.” Breuer told us he did not recall reviewing these reports.

As we described in Chapter Three, in April 2010 Breuer learned from Weinstein and Trusty that ATF had intentionally failed to interdict firearms in Operation Wide Receiver. At Breuer's request, Weinstein and Trusty met with Hoover and McMahon on April 28, 2010, to discuss the flawed tactics, and Weinstein reported to Breuer in an e-mail after the meeting that they had discussed the "case with the issues about the guns being allowed to walk" and agreed that the best approach would be to indict the case under seal and later unseal them with a different matter.

We also found that McMahon mentioned Operation Fast and Furious to Weinstein during or after this April 28 meeting. According to both Weinstein and McMahon, during or shortly after the meeting they discussed a case in Phoenix (Operation Fast and Furious) that, like Operation Wide Receiver, involved a lot of firearms and took a long time to prosecute. However, Weinstein's e-mails to Breuer summarizing the April 28 meeting did not refer to the discussion of Operation Fast and Furious. We found no evidence that Breuer learned about "gun walking" allegations in Operation Fast and Furious until public revelations in 2011. We discuss in Chapter Six Breuer's failure in January and February 2011 to connect the gun-walking issue in Operation Wide Receiver to the allegations concerning Operation Fast and Furious that Senator Grassley raised in his January 2011 letters to the Department.

C. ATF Headquarters' Oversight of Operation Fast and Furious

Our investigation identified serious failures by the leadership of ATF in supervising Operation Fast and Furious. We determined that ATF's senior leaders, including Acting Director Melson, Deputy Director Hoover, Assistant Director Chait, and Deputy Assistant Director McMahon, failed to properly oversee the investigation and did not sufficiently evaluate the risk to public safety that the investigation's strategy and tactics presented. We found that Hoover, Chait, and McMahon received information early in the development of Operation Fast and Furious that should have caused them to ask questions about the investigation's strategy and tactics and exercise heightened scrutiny of the investigation. We found that Melson was similarly at fault by no later than mid-March 2010. We also concluded that all four senior leaders had sufficient knowledge about the investigation to understand the imperative of bringing it to a swift conclusion, yet failed to ensure that this happened. Moreover, even after Agent Terry was murdered in December 2010 and the firearms found at the scene were connected to Operation Fast and Furious, Melson and Hoover took no significant action within the Department other than to ask for information about Avila's role in the investigation.

We also found that Melson and Hoover were poorly served by the leadership of the Office of Field Operations in Operation Fast and Furious. Because of their inattentive approach to oversight and failure to adequately advise their superiors about the investigation, McMahon and Chait deprived

Melson and Hoover of important opportunities to more fully evaluate the case early in its development and to address the flawed strategy that the agents were implementing.

In sum, we found that Operation Fast and Furious received little to no supervision by ATF Headquarters despite its connection to a dangerous narcotics cartel in Mexico, the serious risk it created to public safety in the United States and Mexico, and its potential impact on the country's relationship with Mexico.

We discuss the most significant of these issues and others involving ATF Headquarters in greater length below.

1. Oversight Failures in January 2010

As described above, leaders at ATF's Headquarters, including Melson, Hoover, Chait, and McMahon, first received briefings about Operation Fast and Furious in December 2009. Information presented in those briefings caused some Headquarters' officials, including ATF's Southwest Border Interdiction Coordinator Rowley and OSII Assistant Director McDermond, to raise concerns about the investigation.

We found that McDermond's concerns caused him to ask Chait to attend the OSII briefing on January 5, 2010. McMahon also attended the briefing, which revealed that 685 firearms had been trafficked in the case and that Steward, Patino, and Moore had purchased 197, 115, and 113 firearms, respectively. According to ATF officials we interviewed, these figures were exceptionally large for an ATF firearms investigation. McMahon told us the figures at the January 5 briefing were "staggering." McMahon and Chait also were aware at the time of the briefing of the numerous firearms recoveries outside the United States that had been traced back to suspected straw purchasers in the case, such as the recovery of 17 of 48 firearms in Mexicali, Mexico in early December 2010, and that the firearms that the straw purchasers were acquiring were the weapons of choice for drug cartels.

We found no evidence, however, that McMahon or Chait took any actions in response to the January 5 briefing to more closely monitor the investigation, assess risks to public safety, and frame issues in the case for future decision. This was true despite AD McDermond's request to Chait to attend the briefing over concern about the number of firearms recoveries, as well as questions from Martin and Rowley that challenged the Office of Field Operations' approach to the investigation. Although Chait told us that no one ever expressed any concerns to him about the number of firearms that were being trafficked, McDermond and Daniel Kumor, Chief of ATF's International Affairs Office, informed us that they were present when such concerns were expressed in Chait's presence.

During our interview, McMahon said that following the January 5 briefing there should have been a larger discussion with the Phoenix Field Division and a risk assessment of the investigation completed. We found no evidence that McMahon or Chait made any effort to ensure that such a risk assessment discussion occurred. McMahon also said that the focus of the investigation was on taking down a large firearms trafficking organization and that in the process “[w]e lost sight of public safety.”

We believe that McMahon and Chait should have responded to the January 5 briefing by seeking an immediate explanation from Newell about the case strategy and what the Phoenix Field Division intended to do to either prevent the leading straw purchasers from acquiring even more weapons or to interdict them following their purchase. After receiving this information, the Office of Field Operations should have worked with Newell to formulate a recommended approach that fully accounted for the benefits and risks in the investigation, including the risk to public safety, and vetted it with Deputy Director Hoover. This did not happen. Indeed, we found no evidence that it was even contemplated by Chait or McMahon.

Moreover, we determined that McMahon, who was Newell’s direct supervisor and primary point of contact at ATF Headquarters, failed to evaluate and share critical information about Operation Fast and Furious with Chait, Hoover, and Melson early in the investigation. For example, on January 8, 2010, Newell sent McMahon a memorandum that expressly stated that ATF Phoenix had adopted a strategy in the investigation “to allow the transfer of firearms to continue to take place, albeit at a much slower pace, in order to further the investigation and allow for the identification of additional co-conspirators. . . .” Newell’s memorandum communicated to McMahon what would become the key failing of the investigation: allowing guns to flow unimpeded to violent criminals. Yet McMahon told us he did not even read the contents of the memorandum, and his e-mail account did not reflect that he forwarded the memorandum to Chait despite its significance. Further, Chait said he did not believe that he received it at the time. When we asked Chait about McMahon’s conduct, he faulted Newell for not telephoning McMahon to confirm that he received the e-mail that attached the memorandum. We found this criticism misplaced and believe that Newell should have been able to rely on McMahon to read the e-mails and briefing memoranda that he sent and to disseminate them within ATF Headquarters as appropriate.

McMahon also stated that he was aware of and concurred with Newell’s strategy to defer overt investigative activity in order to build a case against the firearms trafficking organization and that Newell convinced him that approaches such as McMahon’s suggestion to confront some of the straw purchasers early in the investigation were not appropriate. According to McMahon, Newell told him that confronting the straw purchasers would jeopardize the investigation of the larger firearms trafficking organization, that

the U.S. Attorney's Office did not favor that approach, and that his agents were close to identifying other conspirators. McMahon said he also accepted Newell's explanations about Hurley's interpretation that probable cause was lacking to seize firearms. However, this approach utterly failed to consider the ever increasing danger to the public as more guns were sold to straw purchasers without interdiction. If the leadership of the ATF Phoenix Field Division did not recognize this risk, it was McMahon's responsibility to do so. Moreover, if there was resistance from the U.S. Attorney's Office on authorizing arrests, McMahon and others in ATF Headquarters should have elevated the issue within the U.S. Attorney's Office and within the Department.

We found that McMahon did not challenge Newell's explanations. Overall, we found he failed to exercise any meaningful oversight of Newell's activities in Operation Fast and Furious. McMahon told us that "my management style was to allow the SACs to run their divisions, update me, I would help them get the resources they need." This approach, we believe, was not consistent with McMahon's position as Newell's supervisor and responsibilities as a Deputy Assistant Director in the Office of Field Operations.

ATF's Headquarters leadership missed another opportunity to influence the direction of Operation Fast and Furious following an OSII briefing on January 12, 2010. ATF records show that Chait, Hoover, and Melson attended the briefing, which showed that the number of trafficked firearms had escalated to 729, that Steward and Patino had acquired 221 and 135 weapons respectively, and that firearms from Operation Fast and Furious had been recovered at multiple crime scenes. Hoover, who said he did not remember attending this briefing although the sign-in sheet confirmed his presence, told us that the information would have "raised questions" with him, such as whether agents had advance notice of the firearms purchases. He said that he did not recall taking any actions in light of the January 12 briefing. We believe this briefing should have prompted Hoover, McMahon, and Chait to carefully assess how the Phoenix Field Division was managing the investigation, the risks that the continued investigation posed, and ATF's dealings with the Arizona U.S. Attorney's Office.

Melson said that the number of firearms identified at the January 12 briefing was a "red flag" that highlighted the seriousness of the case, but that his expectation following the briefing was that Hoover, Chait, and McMahon were supervising it and were aware of how it was being handled.

McDermond also stated that in approximately this time period, as well as after the briefings in March 2010, he expressed frustrations to both Melson and Hoover about the increasing number of firearms in the investigation. Melson said he did not recall hearing concerns from McDermond. Hoover said that McDermond and Rowley raised concerns with him during the March time period about the firearms that were being trafficked in the case. We found no

evidence that either Hoover or Melson took any action in response to the questions that McDermond raised, or that Hoover responded to Rowley's concerns. Rowley stated that there were no attempts "to engage me in a serious discussion about the concerns that I had."

2. Failure to Respond to the Lack of ATF Initiated Firearms Seizures

Despite the contents of the January 12 briefing, Hoover told us that he did not learn until March 2010 that agents in some circumstances had advance notice of firearms purchases, which he said he learned from Chait and McMahon. He said that this fact, combined with the high number of firearms in the case, prompted him to request an "exit strategy" (which we discuss below). Melson and Chait told the OIG that they were not aware until 2011 that agents had advance notice of purchases described in the various briefings that they received. In addition, Melson, Hoover, Chait, and McMahon each said that they were not aware until 2011 that agents had failed to seize firearms when they had probable cause to do so.

We found these explanations troubling because they demonstrated that these leaders failed to exercise their responsibility to understand and oversee the investigative tactics that were being employed by a field division in a major investigation. Moreover, the information was readily available to them. For example, McMahon had known from a briefing paper that Newell sent to him on December 2, 2009, that FFLs were notifying ATF in advance of orders for firearms and that agents were conducting surveillance of the purchases. Similarly, in an e-mail to McMahon on January 5, 2010, Newell informed him that ATF was "to proceed with getting up on a wire before conducting any overt investigative activity." This decision included not confronting the leading straw purchasers in the case, some of whom had acquired more than 100 firearms by that date. Hundreds more firearms were acquired by numerous straw purchasers during the period that the wiretaps were being sought and operated.²⁴¹

Moreover, these leaders should have anticipated that agents would have advance knowledge about future firearms purchases given the wide array of proactive investigative techniques that the agents in Phoenix were using, including physical surveillance, pole cameras, consensually monitored

²⁴¹ We found that neither McMahon nor anyone else at ATF Headquarters considered the potential danger to the public that arose from allowing straw purchasing to continue without overt enforcement action while nine wiretap applications were sought and operated over the following seven months. We further determined that no one at Headquarters suggested the possibility of proceeding with a wiretap while simultaneously making efforts to disrupt illegal activity through carefully managed overt enforcement action.

telephone calls, and cooperating sources. As a result, there should have been at least some recognition that agents would have advance notice of weapons purchases. At a bare minimum, the information about these investigative techniques should have prompted ATF's leadership to ask at least some basic questions about the investigation earlier than Hoover eventually did.

More significantly, the explanations offered by Melson, Hoover, Chait, and McMahon for their lack of knowledge demonstrated that they failed to recognize and react to the lack of ATF enforcement activity in the investigation. Given the level of proactive investigative activity in the case and the volume of firearms purchases that was being reported, they should have expected to see numerous ATF-initiated seizures, either by ATF agents themselves or in coordination with federal, state, or local law enforcement. Instead, from the opening of the investigation in October 2009 until June 2010, ATF initiated only a single seizure - the Tohono O'odham seizure in February 2010 which was carried out by Border Patrol agents. The lack of ATF-initiated seizures should have alerted ATF executives to the problem that agents were deferring enforcement activities.²⁴² We found no evidence, however, that ATF executives inquired at any time about the lack of ATF-initiated seizures in the case. Instead, we found that they simply assumed, without inquiring, that agents were seizing firearms when they could.

Hoover told us that after he saw the photograph of weapons from the Tohono O'odham seizure that he "thought okay, well then we are interdicting guns and we're stopping these things when we have the opportunity to stop them. And then, so, I just assumed that that was taking place." He also stated that he assumed from the briefing slides he saw in March 2010 showing firearms seizures at various locations that ATF had provided information that prompted the seizures. With the exception of the Tohono O'odham seizure, this turned out to be false.

Hoover said that McMahon and Chait told him in approximately April 2010 that agents were stopping the firearms whenever they had the opportunity. Given the volume of firearms involved, and the concerns that caused Hoover to request an exit strategy (which we discuss further below), we believe Hoover should have done more than simply accept what McMahon and Chait told him without any further follow up. The significance of his failure to do so became more apparent when we determined that Chait's and McMahon's knowledge was not based on inquiries they had made about the issue or discussions about seizure activity with agents in the Phoenix Field Division.

²⁴² After reviewing a draft of this report, Melson told the OIG that he believed it was significant that he was unaware in 2009 and 2010 of ATF's prior history of "gun walking" in Operation Wide Receiver.

Chait told us that he thought agents were seizing weapons because of the number of recoveries and assumed “that where there’s opportunity, they’re taking action.”

Melson also failed to ask sufficient questions about the lack of ATF initiated seizures and made the same faulty assumptions about the investigation. He was aware from briefings he received in January and March 2011 that the number of firearms that were being trafficked in the case was exceedingly high. While Melson asked detailed questions at his March 11 briefing about particular investigative techniques, such as use of pole cameras, we found no evidence that he inquired about more obvious considerations such as public safety and the approach to firearms seizures. We determined that the reason Melson was not suspicious about the handling of the investigation was precisely because he had failed to ask rudimentary questions about how the investigation was being implemented. Like Hoover, Chait, and McMahan, Melson assumed too much and believed that agents were seizing firearms when they could.

Most significantly, the ever widening gap as time went on between the number of firearms bought by straw purchasers and the number of firearms seized or recovered (whether or not by ATF) should have made it clear to Melson, Hoover, Chait, and McMahan that no matter what they were being told by the ATF Phoenix Field Division or what they had assumed, there was a significant issue with the conduct of the investigation and that ATF was not taking adequate enforcement action. No one, however, in ATF’s senior leadership seemed to notice.

McMahan (like Newell and Voth) told us that public safety is well-served by targeting firearms trafficking organizations that support the market in illegal firearms and that removing individual straw purchasers who can be quickly replaced does little to stem the overall flow of illegal weapons. We do not believe that this perspective excuses or justifies a failure to adequately protect the public from firearms traffickers associated with a dangerous narcotics cartel. We reject the view that a federal law enforcement agency should facilitate such a threat to public safety with no attempt to mitigate the ongoing danger, in order to advance a larger law enforcement purpose. We found it deeply troubling that so many supervisors in ATF articulated such a viewpoint to us.

3. The Impact of Newell’s Incomplete and Misleading Information

Newell sent two e-mails to McMahan in January 2010 that mischaracterized agents’ efforts to disrupt the straw purchases. On January 5, 2010, he wrote that his agents were “doing everything possible to slow these guys [the straw buyers] down,” followed by an e-mail on January 14 that

“[h]opefully the big bosses realize we are doing everything possible to prevent guns going into Mexico while at the same time trying to put together a phenomenal case.” As we described in Chapter Four, ATF’s agents in Phoenix told us they were not slowing the subjects’ purchasing activity in January and beyond for fear of jeopardizing the anticipated wiretap and due to Hurley’s legal advice. Newell’s e-mails conveyed a misleading impression that agents were slowing purchases and interdicting firearms when in fact they were not.

Newell also told the OIG that he “pushed for” the March 5 briefing because he wanted ATF Headquarters to be fully informed about Operation Fast and Furious and to understand that “[t]his is our plan. So that if anybody had an issue with it, speak now or forever hold your peace.” ATF’s presentation on March 5, however, omitted key details about “the plan” that would have alerted ATF executives to problems. Although Voth presented the briefing, Newell failed to highlight for the briefing attendees that the case strategy that the ATF Field Office had adopted in early January involved allowing the transfer of firearms to continue, that the straw purchasers had acquired nearly 300 firearms since early January, that ATF had no immediate plans to change that strategy (ATF’s next seizure was not until June), that ATF had advance notice of many purchases, and that ATF had initiated only one of the 17 seizures and recoveries described at the briefing. We believe that the deficiencies in the investigation and the urgency needed to resolve them was not evident from Newell’s behavior.

Newell also provided information to McMahan after the murder of Agent Terry that we found conveyed a misleading impression about the activities of Group VII. In January 2011 he e-mailed McMahan talking points for the Operation Fast and Furious press conference that month. Newell informed McMahan:

[T]hroughout the course of the investigation numerous seizures were made by other State, local and Federal law enforcement agencies at the direction of Phoenix Group VII in order to ensure the seized firearms did not reach their intended destination but also to ensure the leadership of this firearms trafficking organization was not “tipped off” to the proactive measures taken while the larger conspiracy case was being prepared for the USAO. To date 350 firearms have been taken into ATF custody as a result of these combined efforts. (Emphasis added).²⁴³

²⁴³ Newell had made a similar representation to McMahan previously. On December 21, 2010, he e-mailed McMahan stating that “I had David Voth pull the numbers of the guns recovered in Mexico as well as those we had a direct role in taking off here in the US. Almost all of the 350 seized in the US were done based on our info and in such a way to not burn the wire or compromise the bigger case.”

We do not believe that Newell's representation to McMahon about the frequency of seizures and number of firearms seized at ATF's direction was accurate. As we noted earlier in this Chapter and in Chapter Four, we concluded that ATF did not direct seizures besides the Tohono O'odham seizure for the first 7 months of the investigation (prior to June 2010). According to our review of ATF's data, ATF Group VII initiated 10 seizures that accounted for 105 firearms, less than one-third the number that Newell claimed.²⁴⁴

We do not believe, however, that this receipt of incomplete and misleading information from Newell provides an excuse for McMahon, Chait, and Hoover not taking steps to better inform themselves about Operation Fast and Furious prior to early March. Newell was not their exclusive source of information on matters related to Operation Fast and Furious. The number of weapons and the amount of cash involved, the increasing difference as the investigation continued between the number of firearms purchased and the number seized, and their knowledge of firearms issues and operational duties should have prompted them to ask probing questions about the strategy and tactics in the investigation and to ensure that the Phoenix Field Division was conducting the investigation in a way that protected public safety.

4. Hoover's Failure to Oversee the "Exit Strategy"

We found that at Hoover's request the Phoenix Field Division developed an "exit strategy" for Operation Fast and Furious, which it forwarded to McMahon on April 27, 2010 – more than a month after Hoover said he requested it and after the straw purchasers in Operation Fast and Furious had acquired 1,514 firearms. We determined that the request for an exit strategy was long overdue. We also found that the strategy drafted by ATF Phoenix was poorly conceived and failed to address issues that were relevant to a prompt conclusion of the investigation. Moreover, ATF's leadership, having asked for the strategy, failed to adequately oversee its implementation.

²⁴⁴ After reviewing a draft of this report, Newell submitted comments disputing our findings that e-mails he sent to McMahon on January 5 and 14, 2010, and in January 2011 were misleading. With respect to the January 5 e-mail, Newell stated the "slowing down" comment was in reference to his understanding of the FFLs' willingness to delay completing sales to subjects to give agents an opportunity to establish surveillance. With respect to the January 14 e-mail, Newell stated that he believed at the time that agents were doing everything possible to prevent firearms from going to Mexico, including pursuing a wiretap and placing a tracking device [REDACTED]. Newell also noted that both the December 1, 2009, and January 8, 2010, Operation Fast and Furious briefing papers he submitted to McMahon outlined all of the investigative steps that were being taken in the investigation. With respect to the January 2011 e-mail to McMahon, Newell stated that the information he conveyed was provided to him by Voth and that Newell believed the information was accurate.

Hoover told us that he asked for the exit strategy following a March 2010 briefing due to the large numbers of firearms that were being acquired by some of the straw purchasers, and because ATF agents in some circumstances had advance notice of the firearms purchases. We found that Hoover requested the strategy no later than March 22, 2010. Hoover's notes show that he received a briefing that day from the Office of Field Operations and wrote "Strategy?", and Hoover told us that he requested the exit strategy at the time he recorded the notes. According to Hoover, he requested the Office of Field Operations to "expedite as much as they could what was happening in this investigation."

Despite this request from the Deputy Director, McMahon did not send Newell an e-mail asking for an exit strategy until April 27, over 4 weeks after Hoover requested it. McMahon, however, told us that he called Newell about the request immediately after being asked to obtain the exit strategy. Chait said he had to remind McMahon about the need to obtain the strategy after it was not forthcoming from Newell. McMahon also said that he believed that his decision to e-mail Newell on April 27 was prompted in part by his learning that he needed to attend a briefing on April 28 with Weinstein to discuss Operation Wide Receiver.

We found that the Office of Field Operations' response to Hoover's request for the exit strategy, as with other aspects of the case, lacked urgency and demonstrated disregard for the public safety. We believe it should not have taken more than four weeks to obtain the exit strategy. Chait should have more closely monitored the collection of the strategy and McMahon should have acted faster to obtain it from Newell.

Even more disturbing, once McMahon received the exit strategy, no one at ATF Headquarters took decisive action to implement it. McMahon told us that he forwarded the exit strategy to Chait and Hoover after he received it from Newell. Although we found that McMahon e-mailed the strategy to Chait, we found no record that he forwarded the document to Hoover. Hoover told us that he did not read it until 2011 and that he trusted Chait and McMahon "to do their job to oversee the investigation" and that he should not have had to "micromange" their implementation of the exit strategy.

Hoover's assumption again proved to be faulty as the Office of Field Operations did not ensure that the investigation was concluded promptly. We found that Hoover's failure to follow up on his request for an exit strategy was a serious management failure on his part. Hoover told us that this was the first time he had asked for an exit strategy during his 20+ years at ATF, which we found to be an indication of his serious concern about the ongoing risks associated with the investigation. Yet, Hoover took no action to see if a strategy was ever prepared, or if anyone had taken any steps to implement it. As it turned out, the "exit strategy" that Hoover asked for never was implemented

and the first arrest did not occur until December, immediately after Agent Terry's murder.

Melson said he was not aware until 2011 that Hoover had requested an exit strategy, although he was aware by the summer of 2010 that the indictment was overdue. Melson e-mailed Chait and Hoover in July to ask: "When will we be taking Fast and Furious down? An awful lot of guns seem to be flowing south." However, we found no evidence that Melson ever contacted Burke and expressed dissatisfaction that Hurley was taking too long to bring an indictment. Melson told us that he would not have tried to "push" Burke over the indictment and that he communicated through Chait and Newell to complain to the U.S. Attorney's Office. However, Burke told us that other than the corpus delicti issue, he never heard of complaints from ATF about the U.S. Attorney's Office's handling of gun trafficking investigations. According to Burke, Newell was "always very positive" about the case.

Melson said that he had a "significant frustration" with delays in the case and that he probably raised concerns about the U.S. Attorney's Office with Acting Deputy Attorney General Grindler, though he did not have a specific recollection of doing so. Hoover told us that he had no recollection of having any discussions with Melson about elevating his concerns to Grindler or the Office of the Deputy Attorney General. Hoover told the OIG, however, that he raised the issue of delays with the indictment with Edward Siskel, an assistant to Grindler who covered ATF matters for most of 2010, in the late summer or early fall of 2010. Neither Grindler nor Siskel said they recalled discussions with Melson concerning Operation Fast and Furious other than at Grindler's briefing on March 12, 2010. In addition, Siskel told us that he did not recall anyone from ATF expressing concerns to him about the pace of the prosecution in Operation Fast and Furious or hearing of any concerns about the Arizona U.S. Attorney's Office.

We believe that Melson should have discussed his concerns about delays in Operation Fast and Furious with Burke, and if that effort proved unproductive, with the Office of the Deputy Attorney General. The only complaint Melson made to the Department that we were able to confirm did not occur until November 2010. At that time Melson complained to DAAG Weinstein in the Criminal Division, a component with no jurisdiction over the Arizona U.S. Attorney's Office.

5. Chait and McMahon's Failure to Review the Wiretap Applications and Affidavits

We found that ATF policy required the Assistant Director of the Office of Field Operations to review wiretap applications and affidavits, and that this responsibility had not been delegated to other ATF staff. Chait did not comply with this policy, and his description to us of the wiretap review process within

ATF demonstrated that he believed that DADs should complete this function as time permitted.²⁴⁵ Neither Chait nor McMahon reviewed the wiretap applications in Operation Fast and Furious.

Although McMahon has stated that he regretted not reviewing the wiretap applications, we found no ATF policy that imposed a duty on Deputy Assistant Directors (DAD) in the Office of Field Operations to review them. We found that McMahon initialed transmittal memoranda on Chait's behalf from the Office of Field Operations to the Criminal Division for four of the wiretap applications, and as DAD for ATF's Western Division he had access to all nine applications that ATF submitted to the Criminal Division.²⁴⁶ Other Office of Field Operations DADs we interviewed stated that it was their practice to review the wiretap affidavits from the field offices that they supervised. Hoover told us that a DAD should take steps to assure himself that the affidavit is appropriate for transmittal to the Department.

We believe that given the practice at ATF to have DADs review wiretap affidavits and given the particular circumstances present in Operation Fast and Furious, McMahon should have scrutinized the affidavits, especially their descriptions concerning probable cause. He did not do so, however, even though he told us that he was aware of "red flags" in the investigation by March 10, 2010 - the date of the first wiretap application - and that he considered the level of criminal activity in the case to be "huge." However, McMahon told us that it was not his practice to review wiretap affidavits that came through his office, and that his interest was in "just trying to move the process along so that we could get that wiretap up so that we can maybe bring this case to closure. . . . I didn't want to . . . impede[] us going forward with the wiretaps."

Given McMahon's knowledge of and concern about the scope of the investigation, we believe that McMahon should have reviewed the wiretap

²⁴⁵ After reviewing a draft of this report, Chait, through his counsel, informed the OIG that "[a]lthough we were unable to identify any written delegation of review authority, such a delegation constructively has been in effect, and in operational practice, since at least 2001." Chait also noted that the ATF order that established the requirement for the Assistant Director to review wiretap applications did not preclude delegation of that responsibility to others. We are not persuaded by Chait's interpretation given that the terms of the ATF order impose a duty on the Assistant Director to review wiretap applications and that the order does not contemplate redelegation of such authority. Moreover, as we stated above, ATF informed the OIG that there was no delegation from the Assistant Director of the requirement to review the application and affidavit.

²⁴⁶ McMahon told us that with the exception of one affidavit in Operation Fast and Furious, he did not recall receiving the wiretap applications. He stated that if ATF's procedures required DAD review, then he would have expected to have received the wiretap applications and for someone to have informed him that he should review them.

affidavits and inquired with Newell about those instances where incomplete surveillances and firearms transfers are described, as well as the lack of seizures. After reviewing several of the affidavits during one of our interviews with him, McMahon told us he would have had questions for Newell about them. For example, after reviewing the affidavit associated with the May 21, 2010, application (which also was the first wiretap application authorized by DAAG Weinstein), McMahon stated that he believed that there was probable cause to seize the firearms that were described in a portion of the affidavit

²⁴⁷ We found that McMahon's failure to review the affidavits at the time of the applications deprived him of important information in his supervision of the investigation.

²⁴⁷ The May 21, 2010, OEO cover memorandum that was reviewed by Weinstein summarized

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CHAPTER SIX

THE DEPARTMENT'S STATEMENTS TO CONGRESS CONCERNING ATF FIREARMS TRAFFICKING INVESTIGATIONS

On January 27, 2011, Senator Charles E. Grassley, Ranking Member of the Senate Judiciary Committee, wrote to ATF Acting Director Kenneth Melson raising concerns about “an ATF operation called ‘Project Gunrunner.’” Among the concerns described in the letter were allegations that ATF had “sanctioned the sale of hundreds of assault weapons to suspected straw purchasers” who then transported these weapons throughout the southwest border area and into Mexico, and that two of these weapons were used in a firefight that resulted in the death of Customs and Border Protection (CBP) Agent Brian Terry. Senator Grassley requested a briefing on Project Gunrunner no later than February 3, 2011. Sen. Grassley sent another letter on January 31 raising concerns about how an official in the ATF’s Phoenix Field Division had “questioned” one of the ATF special agents who provided information to Sen. Grassley’s staffers about Project Gunrunner.

On February 4, 2011, before providing the requested briefing, the Department responded in writing by denying the allegations. The response stated that Sen. Grassley’s allegation that ATF “sanctioned” or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico was false. The response also asserted that “ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.” In the course of evaluating information from ATF and the U.S. Attorney’s Office for the District of Arizona over the next several months about Operation Fast and Furious and other gun trafficking investigations, the Department concluded that the February 4 response “contains inaccuracies,” and formally withdrew it on December 2, 2011.

In this chapter we describe how the Department formulated its February 4 response to Sen. Grassley denying the allegations in the January 27 letter. We also describe how the Department reassessed its representations to Congress in the February 4 letter and subsequently reached the conclusion that those representations were inaccurate and that the February 4 letter should be withdrawn. In sum, we concluded that the Department officials who had a role in drafting the February 4 letter should have done more to inform themselves about the allegations in Sen. Grassley’s letter and should not have relied solely on the assurances of senior officials at ATF and the U.S. Attorney’s Office that the allegations were false.

We also describe the Department’s response on May 2 to a follow-up letter from Senator Grassley, and testimony to Congress on June 15 concerning the Department’s evolving position on the allegations in Sen.

Grassley's January 2011 letters. We found that the statement in the May 2 letter – “It remains our understanding that ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico” – reasonably could have been understood by Congress and the public as at least a partial reaffirmation of the February 4 letter. However, we concluded that when the letter was drafted, Department officials knew or should have known based on information available to them that the February 4 letter contained inaccurate information and could no longer be defended in its entirety. Similarly, we found that the Department should not have provided testimony on June 15 before the House Committee on Oversight and Governmental Reform in a manner that created ambiguity and uncertainty regarding whether the Department was still defending its February 4 letter.

I. Senator Grassley's January 27, 2011, Letter to Acting Director Melson

On January 27, 2011, Sen. Grassley, the Ranking Member of the Senate Judiciary Committee, wrote to Melson about “serious concerns that ATF may have become careless, if not negligent” in implementing “Project Gunrunner.” Sen. Grassley wrote:

Members of the Judiciary Committee have received numerous allegations that the ATF sanctioned the sale of hundreds of assault weapons to suspected straw purchasers, who then allegedly transported these weapons throughout the southwestern border area and into Mexico. According to the allegations, one of these individuals purchased three assault rifles with cash in Glendale, Arizona on January 16, 2010. Two of the weapons were then allegedly used in a firefight on December 14, 2010 against Customs and Border Protection (CBP) agents, killing CBP Agent Brian Terry. These extremely serious allegations were accompanied by detailed documentation which appears to lend credibility to the claims and partially corroborates them.

Sen. Grassley's letter concluded with a request that ATF supervisors provide his staff with a briefing on Project Gunrunner by February 3, 2011.²⁴⁸ Although the letter nowhere mentioned Operation Fast and Furious, witnesses told the OIG that ATF and the Department understood Sen. Grassley's references to Project Gunrunner to mean Operation Fast and Furious. For example, Office of Legislative Affairs (OLA) Special Counsel Faith Burton told the OIG that it became clear to the Department that Sen. Grassley was

²⁴⁸ Sen. Grassley's January 27, 2011, letter is attached to this report as Appendix B.

specifically interested in Operation Fast and Furious rather than the broader southwest border firearms interdiction strategy known as Project Gunrunner. However, as we discuss in our analysis, the Department responded to Sen. Grassley's allegations with broadly worded assertions that included within their scope all ATF firearms interdiction efforts, not just those made in Operation Fast and Furious.²⁴⁹

Shortly after ATF received the letter, ATF's Chief of Legislative Affairs Gregory Rasnake spoke with a staff member for Sen. Grassley. According to an e-mail from Rasnake to ATF Deputy Director William Hoover, Melson, and officials in OLA, the staff member "claim[ed] to have 'documentation' that confirms their concerns," and emphasized the importance of receiving a briefing by February 3. The e-mail reflects that the staff member itemized four issues that he wanted addressed in the briefing: two issues concerned the relationship between ATF and an unspecified FFL; one concerned the weapons found at Agent Terry's murder scene; and one was a request for an "overview of Project Gunrunner."

Melson requested Rasnake to ask Sen. Grassley's office for the documentation referenced in the letter. After discussing Melson's request with James McDermond, who was then ATF's Assistant Director for Public and Government Affairs, Rasnake responded to Melson that ATF could not request the documentation from Grassley because it would be viewed as "impolite." Rasnake advised Melson that the "likelihood that they would give it to us is so remote, that I suggest it is not worth the risk of offending them[.]"

Melson told the OIG that after receiving the January 27 letter he also asked Burton if he could meet with Sen. Grassley to "open up a line of communication and talk to them about what the issue is, and so we can get answers for him even though it was an ongoing case, you can get answers, and you can talk about investigative methodologies which don't harm the ongoing case." Melson stated that Burton told him that it would be against Department policy to discuss an open investigation and that he could not meet with Sen. Grassley.

After reviewing a draft of this report, Burton told us that she does not recall the details of her meeting with Melson, but she understood that Melson wanted to meet with Senator Grassley. Burton emphasized that she would not

²⁴⁹ The Department did not begin to make clear the distinction between Project Gunrunner and Operation Fast and Furious until April 4, 2011, in a letter from Assistant Attorney General Weich to Chairman of the House Committee on the Judiciary Lamar Smith. In a footnote, the Department wrote, in relevant part: "Operation Fast and Furious, which is one law enforcement investigation, should not be confused with Project Gunrunner, which is the broader initiative to deal with weapons trafficking along the Southwest Border generally."

have told Melson that he could not talk to the Senator. Rather, she said, she may have told him that before he spoke to Sen. Grassley, the Department would need to confer with the U.S. Attorney's Office in Phoenix to decide how to handle possible disclosure of non-public information concerning a pending criminal case such as Operation Fast and Furious.

Rasnake forwarded Sen. Grassley's letter to Assistant Attorney General for Legislative Affairs Ronald Weich and other officials in OLA and the Office of the Deputy Attorney General on the afternoon of January 27. Rasnake also sent OLA the list of issues that Sen. Grassley's staffer wanted addressed in the briefing.

According to Burton, ATF referred Sen. Grassley's letter to the Department because the letter "impacted larger Department equities," principally the ongoing Fast and Furious criminal investigation, and therefore ATF was obliged to have the Justice Department review it.

Weich asked that the letter be logged in and assigned to ATF to draft a response for OLA's signature. ATF's Office of General Counsel prepared a draft response and sent it to Burton on February 1, and Hoover separately sent the draft to Criminal Division Deputy Assistant Attorney General (DAAG) Jason Weinstein. ATF's draft response sought to assure Sen. Grassley that the briefing it would provide would "put to rest" Sen. Grassley's concerns about how ATF had implemented Project Gunrunner. Unlike the letter eventually drafted by the Department, ATF's draft did not include any statements about ATF's efforts to interdict weapons. The ATF's approach to the response is consistent with what Hoover told the OIG: ATF wanted to meet directly with Sen. Grassley and his staffers because "we obviously don't know what they know." Hoover said he was told by either Burton or Senior Counsel to the Deputy Attorney General Brad Smith that the Department would be handling all contacts with Sen. Grassley and his staff.

There is no indication that ATF's draft response was further circulated at Main Justice or considered in developing the Department's response to Sen. Grassley. Rather, OLA, with substantial participation from officials at Main Justice, the Arizona U.S. Attorney's Office, and ATF Headquarters, assumed responsibility for drafting the response.

II. The Justice Department's February 4, 2011, Response to Senator Grassley

The Department sent its response to Sen. Grassley's January 27 letter (and a subsequent letter from Sen. Grassley dated January 31 that is discussed below) on February 4, 2011. During the days between January 27 and February 4, several iterations of the proposed response were circulated for review and comment among dozens of officials in the Criminal Division, the

Office of the Deputy Attorney General, the U.S. Attorney's Office in Phoenix, and at ATF Headquarters. This effort was coordinated largely by Burton.

Burton told the OIG that her area of responsibility in OLA was primarily to respond to requests for information to the Department from Congressional oversight committees. Burton stated that she had no familiarity with Project Gunrunner or Operation Fast and Furious when she first became involved in drafting the Department's response to Sen. Grassley. She said that after receiving inquiries such as Sen. Grassley's, she typically meets with knowledgeable officials from the Department's divisions and components to gather relevant information before developing a draft response, and then circulates the draft back to the officials for comment. She said that it is not unusual for these officials to then edit the draft directly at this point. She stated that before the final response is sent out, "everybody who knows or is responsible for information that's in that letter signs off on it." As described below, this is the process that was followed in drafting the February 4, 2011, letter.

We found that the following officials had direct and substantial participation in formulating the Department's February 4 response to Sen. Grassley's allegations: Burton, an OLA line attorney who assisted her, Weich, Weinstein, Smith, U.S. Attorney for the District of Arizona Dennis Burke, Hoover, and Melson. We also reviewed the conduct of other senior officials who either had a minimal role or no role at all in drafting the February 4 letter but who were knowledgeable about how the Department responded to Sen. Grassley's January 2011 letters or were involved in the decision to withdraw the February 4 letter in December 2011. These officials include Attorney General Eric Holder, Deputy Attorney General James Cole, Chief of Staff to the Attorney General Gary Grindler, and Assistant Attorney General for the Criminal Division Lanny Breuer.

A. Initial Effort to Gather Information on January 27 and 28

Upon receiving Sen. Grassley's January 27 letter, officials in both the U.S. Attorney's Office and at ATF immediately gathered information about the conduct of Jaime Avila, who had purchased the two weapons found at the Terry murder scene.

This was not, however, the first time that such an effort had been undertaken. As we outlined in Chapters Four and Five, immediately following Agent Terry's murder on December 15, and the discovery that two firearms found at the scene were connected to Operation Fast and Furious, both the U.S. Attorney's Office in Arizona and ATF's Phoenix Field Division undertook an immediate review of Avila's straw purchasing activity, which resulted in Avila's arrest on December 15. On December 16 and 17, memorandums were provided to the leadership of both ATF and the Department that summarized

the Fast and Furious investigation and the details of Avila's straw purchasing activity. However, despite learning about this connection between firearms found at the scene of Agent Terry's murder and an ongoing ATF firearms trafficking investigation, the leadership of ATF and the Department took no further action to understand how this connection came about.²⁵⁰ As a result, when Sen. Grassley's letter arrived on January 27, the leadership at ATF Headquarters and at the Department knew no more on that date about the link between Operation Fast and Furious and the firearms at the Terry murder scene than they did on December 17. Thus, instead of being able to draw upon information gathered over the intervening weeks, the Department and ATF in effect were starting from scratch in preparing to respond to Sen. Grassley.

Concerning ATF, this failure was even more acute because Acting Director Melson was aware, shortly after Agent Terry's murder, about a posting on a website alleging a possible link between the firearms found at the scene of the Terry shooting and an ATF investigation. The website posting also indicated that Assistant Special Agent in Charge (ASAC) George Gillett was involved in the case and that 500 firearms had been allowed to "walk" into Mexico. Upon learning of the posting, Melson asked ATF Chief Counsel Stephen Rubenstein whether the public posting of the information may have violated ATF policy. Rubenstein informed Melson by e-mail on January 5, 2011, that such a disclosure would violate ATF policies. Melson responded, "Thanks, Steve. I am going to forward this to [Internal Affairs]." Melson told the OIG that he was assured by "four or five supervisors . . . that it did not happen," meaning that the information in the posting was incorrect.²⁵¹

²⁵⁰ As we indicated in Chapter Five, while Acting Director Melson and Deputy Director Hoover of ATF, and Acting Deputy General Grindler and a staff member in the Office of the Attorney General were aware of this information, no one shared it with Attorney General Holder.

²⁵¹ Other stories about ATF allowing firearms to "walk" had appeared on websites following Agent Terry's murder and before Sen. Grassley's January 27 letter to Melson. ATF Headquarters officials were aware of these stories. For example, on January 20, 2011, Associate Chief Counsel Barry Orlow wrote to Hoover, Rubenstein, Office of Field Operations Assistant Director Mark Chait, and other senior officials about an "Open Letter to Senate Judiciary Committee staff on 'Project Gunwalker'" that appeared on the examiner.com website. Orlow's e-mail message contained a link to the website and stated, in part:

The letter states "ATF employees are looking to come forward and provide testimony and documentation about guns being illegally transported to Mexico, with management cognizance" and that "In order for these people to come forward, they require whistle-blower protection."

Five days later, Chait and Deputy Assistant Director William McMahon received an article from Office of Field Operations DAD Michael Boxler that appeared on various websites entitled, "Did U.S. agency smuggle guns to Mexico to justify its budget?" Among the allegations reported in the story were that ATF officials "intentionally arranged to have hundreds of firearms 'walked'

(Cont'd.)

On the evening of January 27, 2011, the U.S. Attorney's Office Criminal Division Chief Patrick Cunningham requested Emory Hurley, the Assistant U.S. Attorney (AUSA) assigned to the Operation Fast and Furious investigation, to write a memorandum documenting Avila's firearm purchases "as quickly as possible." Hurley was later told that he was asked to draft the memorandum so that Burke "would have a[n] . . . accurate accounting of Jaime Avila's purchase history with regard to the Fast and Furious investigation." Hurley, with the assistance of ATF Phoenix Field Division Group VII Supervisor David Voth, drafted the memorandum on January 28, and circulated it to ATF Special Agent Hope MacAllister and Voth to review for accuracy. Hurley told the OIG that he did not recall that MacAllister or Voth made any corrections.

Hurley's 3-page memorandum to Burke provided detailed information about all 17 of Avila's known weapons purchases through his arrest on December 15, 2010. The memorandum stated that Avila had purchased three AK-47-type rifles, including the two weapons found at the Terry murder scene, on January 16, 2010, and that ATF was not notified of the purchase until January 19, 2010. The memorandum noted that Avila's first known firearms purchase occurred on November 24, 2009, and that "[o]n that day he was in the company of another Fast and Furious suspect, Uriel PATINO." The memorandum stated that "[o]n November 25, 2009, ATF entered AVILA in the ATF case management system as a suspect in the investigation."

Similarly, on the evening of January 27, Melson requested Hoover and Office of Field Operations Assistant Director Mark Chait to gather "all the material (documents) including all reports tantamount to the case record on the defendant who sold the weapons involved in the shooting with the CBP." Voth forwarded numerous Reports of Investigation (ROI) and other documents concerning Avila to Special Agent in Charge (SAC) William Newell, who then forwarded them to Deputy Assistant Director for Field Operations William McMahon at ATF Headquarters.²⁵² McMahon told the OIG that he reviewed these materials before forwarding them to Chait. Chait told the OIG that he recalled receiving these materials from McMahon, but added that he did not believe he read them at that point and was not certain when he did read them. We found no e-mail records indicating that Chait forwarded these ROIs to

across the U.S. border into Mexico," and that the officials "instructed U.S. gun dealers to proceed with questionable and illegal sales of firearms to suspected gunrunners." Chait responded to the official who sent him the article, "I have seen this . . . the facts are untrue."

²⁵² McMahon stated that he was not allowed to access Fast and Furious documents, including the ROIs, in N-Force because access was restricted to those on the 6(e) list. McMahon stated that he and others at ATF Headquarters were not granted access to these case materials through N-Force until sometime after the Department had responded to Sen. Grassley.

Hoover or Melson. However, after reviewing a draft of this report, Chait's attorney told the OIG that on January 28 Chait provided both Hoover and Melson hardcopies of the Avila ROIs, along with a forensics report, in binders that he prepared. Melson told us that the first time he read any ROIs from the case was after February 4 and probably sometime in the beginning of March 2011. However, after reviewing a draft of this report, he told the OIG that he was travelling for at least two weeks between February 4 and March 1, 2011.

Chait told the OIG that although the request for documents from the Phoenix Field Division was limited to information about Avila, he believed that McMahon was also asking Newell, Needles, and Voth broader questions about the Fast and Furious investigation and Grassley's allegation that ATF had "sanctioned the sale of hundreds of assault weapons to suspected straw purchasers." According to Chait, the Phoenix Field Division was "regularly" telling ATF Headquarters that it had not sanctioned sales or "coerced" FFLs to sell weapons to straw purchasers. Newell told the OIG that Chait called him "20, 30 times a day" with questions during this period. Newell stated that he understood Sen. Grassley's allegations to be that ATF "had let guns walk and that in essence that we had provided guns to the suspects," which he told Chait was false.

McMahon stated that did not recall whether he discussed these broader issues with Newell before the February 4 response, but said "there was a point where I actually had to say Bill, are you sure that this did not happen." McMahon said he could not recall whether he asked this direct question to Newell before or after the February 4 response was issued.

Newell's e-mails from the period of January 27 through February 4, 2011, reflect that he was receiving information from his subordinates about Avila and the whistleblower who had met with Sen. Grassley's staffers and passing that information along to ATF Headquarters. In forwarding the ROI to McMahon that referred to Avila's purchase of the 3 AK-47 style rifles on January 16, 2010 (ROI 67), Newell wrote in a January 27 e-mail:

As you can see it was due to an SA's following up on another straw purchaser's activity that we came across this info, 3 days after the sale. Buying 3 AKs does not rise to the level of initiating a criminal investigation especially when at the time we were not aware of Avila's role. It was after the fact when he started buying more guns and was seen with Patino that we considered him part of this same organization. After the sale.

Newell's e-mail was inaccurate. ATF knew about Avila's role in Operation Fast and Furious prior to January 16 due to his November 2009 weapons purchases and association with Patino. Specifically, an earlier ROI documented Avila and Patino's November 24, 2009, purchase of five firearms

each (ROI 12). According to the ROI, “while the firearms were purchased at different times of the day both PATINO and AVILA were together during both transactions.” The ROI also stated that ATF surveillance confirmed that Avila and Patino were traveling together in the same vehicle. Newell received this earlier ROI on January 28 and forwarded it, along with 30 other documents about Avila, to McMahon later that day without correcting his earlier incorrect information about Avila. As Hurley’s January 28 memorandum indicated, Avila was entered as a suspect in ATF’s case management system the day after he was seen purchasing weapons with Patino. McMahon forwarded both of Newell’s e-mails – the January 27 message with the inaccurate information about Avila and the January 28 e-mail with the ROIs that showed the information to be inaccurate – to Chait, who according to Chait’s attorney, provided the hardcopies of the ROIs to Melson and Hoover.

Although Hurley had not created his memorandum summarizing Avila’s purchases until the next day, Newell had access to the ROIs described above and other information in ATF’s databases concerning Avila on January 27, when he first wrote to McMahon. Records show that Newell would have known no later than January 28 that ATF had designated Avila a suspect on November 25, 2009. Voth sent the Hurley memorandum to Newell for review on January 28. In addition, Voth wrote to Newell on January 28 that “Jaime Avila was first entered into N-Force as a suspect (11/25/2009).”²⁵³

As noted, Newell sent ROI 12 to McMahon, who forwarded it to Chait, on January 28, so ATF Headquarters also had information showing that Newell’s statement about Avila the day before was not accurate.

The OIG found no e-mail discussions prior to February 4 between Newell and either McMahon or Chait about the broader allegations in Sen. Grassley’s January 27 letter. However, Newell clearly expressed his position to McMahon in a February 10, 2011, e-mail that followed ATF’s receipt of a February 9 letter from Sen. Grassley concerning the same allegations. Newell wrote:

. . . I believe we have provided all the information that answers these questions or “allegations”. Nothing has changed in our firm stance which is we NEVER “sanctioned” the sale of “suspected straw purchased” firearms; we NEVER instructed the FFL to allow this; and we NEVER knowingly allowed guns to “walk” to Mexico. What does concern me greatly is the obvious unauthorized release

²⁵³ In fact, Newell had received information much earlier than January 28, 2011, about Avila’s status as a suspect in the investigation. A February 5, 2010, memorandum from Voth to McMahon requesting authorization to seek Title III electronic surveillance of telephonic communications was routed through and approved by Newell. That memorandum states that ATF identified Avila as a straw purchaser in November 2009.

of internal ATF documents and other sensitive information about an on-going case involving Grand Jury information. (Emphasis in original).

On January 28, 2011, at least one meeting was held among ATF and OLA officials to discuss Sen. Grassley's January 27 letter. According to Burton's contemporaneous handwritten notes, she, Rasnake, and Melson attended one meeting, and two additional OLA officials may have joined them in a second meeting. Burton stated that Hoover may have attended one of these meetings as well, although her notes do not reflect whether he did. Burton's notes from January 28 and another meeting she had on February 1, 2011, are important because Burton and others relied on the notes in drafting the February 4 response, and the Department quoted from the notes in its December 2 letter withdrawing the response to demonstrate that it had relied upon the statements of Melson and Hoover in preparing the response.²⁵⁴

Burton's notes from January 28 state that "100's of guns made it to Mexico." They also reflect that ATF "knew the straw purchasers were part of crim enterprise to get guns to Mex" and "we were following this to get to the top" but that "we also didn't know they were straw purchasers at the time" and that "we didn't let guns walk." Concerning Sen. Grassley's allegation that the ATF "let guns go to Mexico," the notes state that "ATF had no probable cause to arrest the purchaser or prevent action." The notes further state that the two firearms found at the scene of the Terry shooting "were purchased by a suspect in the case" but that there was no forensic evidence linking the weapons to the shooting and that the "forensics are inconclusive."

Melson told us that the conflicting statements about whether or not investigators knew that the gun buyers, including Avila, were straw purchasers at the time of sale may have resulted from inaccurate or inconsistent information that he received from his subordinates. He also suggested that the statements reflected a "definitional issue," stating that "they had identified the guy as purchasing some weapons but had not necessarily determined that he was a straw purchaser, even in the broad sense of the term, just that he bought some guns, I think."

Burton told us that she did not know specifically which ATF official made the statements recorded in her notes, and that her practice is to indicate the speaker of a statement only if someone else disagrees with it. Melson told us that he recalled that Rasnake did most of the speaking during meetings with

²⁵⁴ See December 2, 2011, Letter from Deputy Attorney General James Cole to Chairman Darrell E. Issa and Ranking Member Charles E. Grassley at p. 2. The letter is attached to this report as Appendix F.

OLA officials, and that he had no recollection of making several specific statements recorded in Burton's notes. However, he told us that he did state words to the effect, "We didn't let guns walk." He stated that he understood the term "walk" to mean ATF providing weapons to suspects.

Smith also spoke by phone with Melson on January 28 and took notes of the conversation. Smith had been assigned to the Office of the Deputy Attorney General and given the "ATF portfolio" about 7 weeks earlier. According to Smith's notes, Melson told him that "our field office is gathering a file" and that "I will look at it personally." Melson told us that he asked to review the files personally because he had heard through blogs and other sources that his subordinates had been misrepresenting and "filtering" information to him, although he added that he never found an instance in which this had occurred.

Smith's notes also state that Melson said, "Agents assured me that we [did not] know the guy was a straw purchaser at the time of purchase," a reference Smith understood to be to Avila. As we discuss in Chapter Five, however, Smith wrote an e-mail to then-Acting Deputy Attorney General Grindler on December 17, 2010, to advise him that the weapons found at Agent Terry's murder scene were bought by a suspect in Operation Fast and Furious. In that e-mail, Smith wrote that Avila was "a 'straw firearms purchaser' that ATF and USAO [U.S. Attorney's Office] have been investigating since November 2009 as part of its larger 'Fast and Furious' operation." Smith told us that he did not remember this information when he later assisted in drafting the February 4 response to Sen. Grassley.

Although not reflected in his notes, Smith told the OIG that he recalled that Melson "was very adamant in indicating that the allegations were false, that ATF never knowingly allowed guns to walk across the border to Mexico where they had probable cause to make the stop." Smith stated that Melson told him the allegations were false because they were contrary to ATF policy – not based on Melson's personal knowledge of how Operation Fast and Furious had been conducted. Melson told the OIG that he had made the statement to Smith based both on ATF policy and assurances from the Phoenix Field Division, as relayed to him through McMahan, Chait, and Hoover, whom he described as the "operational people in our office."

B. Senator Grassley's Meeting with the Attorney General on January 31 and his January 31 Letter to Acting Director Melson

Sen. Grassley followed up his January 27 letter with another letter to Melson on January 31. The follow-up letter alleged that an official in the ATF's Phoenix Field Division had "questioned" one of the ATF special agents who provided information to Sen. Grassley's staffers about Project Gunrunner. The

letter warned Melson against interfering with ATF employees' right to furnish information to Congress and asked that he ensure that "ATF employees are aware of their rights and whistleblower protections and that ATF managers are accountable for respecting any protected disclosures."²⁵⁵

Also on January 31, Sen. Grassley had a meeting with Attorney General Holder. During the meeting, Sen. Grassley provided Holder with both the January 27 and 31 letters. Holder told the OIG that he did not recall what Sen. Grassley may have said about the letters during the meeting. Weich, who also attended the meeting, wrote in an e-mail message that afternoon to two of Holder's aides that Sen. Grassley had complained to Holder about intimidation of a whistleblower and asked Holder to "look into it." According to Weich's e-mail, Holder told Sen. Grassley that he would. Neither Weich nor Holder recall any substantive discussion with Sen. Grassley that day about the allegations in the January 27 letter concerning ATF's failure to interdict weapons bought by suspected straw purchasers.

Senior Department officials we interviewed told us that the portion of the February 4 response to Sen. Grassley that addressed the whistleblower issues in Sen. Grassley's January 31 letter played no role in the Justice Department's eventual decision to withdraw the February 4 response.

C. The Department Drafts a Response to Sen. Grassley's Letters

Below we describe how the Department drafted its response to Sen. Grassley's January 27 and January 31 letters. This process was generally coordinated through OLA. Weinstein, Burke, Hoover, Melson, and officials from the Office of the Deputy Attorney General had substantive participation in formulating the response, either by proposing language or by approving drafts.

1. Weinstein and Burke React to Sen. Grassley's Letters

On the evening of January 31, 2011, Burke received both of Sen. Grassley's letters from the U.S. Attorney's Office Public Information Officer, who received them from a local newspaper reporter seeking a comment from Burke about Sen. Grassley's allegations. Burke forwarded both letters to Weinstein, stating in his e-mail, "Grassley's assertions regarding the Arizona investigation and the weapons recovered at the [CBP] Agent Terry murder scene are based on categorical falsehoods. I worry that ATF will take 8 months to answer this when they should be refuting its underlying accusations right now." Weinstein told us this was the first time he saw the letters.

²⁵⁵ Sen. Grassley's letter is attached to this report as Appendix C.

Weinstein forwarded the letters to Assistant Attorney General Lanny Breuer without comment a few minutes later. Breuer wrote back to Weinstein to ask, “What’s this about? What did Grassley say?” Breuer told us that his response to Weinstein meant that he either was unable to read the letters or had not read the letters at that time, and that he did not recall when he in fact read the letters. Weinstein replied to Breuer:

He suggests that ATF only prosecuted straws in the Fast and Furious case as opposed to higher-level members of the organization; he said that ATF “sanctioned” sales to straw purchasers in that case; and he asserts that one of the weapons from that case was used to kill CBP agent Brian Terry.

The best briefer on Fast and Furious really is the AUSA on the case, who is very sharp. Otherwise it should be someone like Bill Newell, the Phx SAC and soon-to-be Mexico Attache, who is fantastic and knows the case really well, or Billy Hoover.

As a mitzvah for ATF, I was going to suggest that you might send a brief email to Ken, offering any assistance they need in preparing for the Grassley briefing.

Weinstein then responded to Burke that he agreed with Burke, and that he would be happy to work with ATF on preparing to brief Sen. Grassley’s staffers.²⁵⁶ Weinstein quickly wrote to Burke again, asking, “[By the way], the assertion that one of the F&F [Operation Fast and Furious] guns killed Terry is just false, right?” Burke responded:

Purchased at [FFL1] before the investigation began.

New (warped) standard – you should have stopped this gun from going to Mexico even before your investigation began, even though the sale is legal, even though the dealer has no reporting requirement, even though the dealer never even volunteered this info.

Weinstein conveyed Burke’s inaccurate information about the timing of Avila’s gun purchases in another e-mail message to Breuer, stating, “The weapon used to kill agent Terry was purchased from the FFL before the Fast and Furious investigation ever began – so ATF can and should strongly refute that.”

²⁵⁶ Weinstein had been scheduled to accompany Breuer, Burke, and Associate Deputy Attorney General Deborah Johnston to Mexico for meetings with government officials from February 1 through 3, but was unable to go for personal reasons.

Burke's statement that Avila had purchased the weapons found at the Terry murder scene "before the investigation began" was incorrect. Weinstein told us that he did not know that the statement was incorrect when he conveyed the information to Breuer. Burke's statement is contradicted in Hurley's January 28, 2011, memorandum to Burke concerning Avila's history of gun purchases during the Fast and Furious investigation. As noted, the memorandum specifically stated that Avila was entered into ATF's case management system "as a suspect in the investigation" in November 2009, nearly 2 months before he purchased the weapons later found at the Terry murder scene.²⁵⁷ Burke also incorrectly stated in his e-mail that "the dealer never even volunteered this info." As Hurley's memorandum to Burke stated, "This notification [of Avila's weapons purchase] came only through the cooperation of the FFL, as this long gun only purchase would not trigger any affirmative reporting requirement."

Hurley sent Burke an "electronic copy of the January 28 memo" on February 10, 2011. However, the OIG reviewed e-mails, a voicemail message, and other material that strongly suggests that Burke received and read Hurley's January 28 memorandum on January 28, prior to his e-mail exchange with Weinstein on the evening of January 31.²⁵⁸ In a voicemail message from Cunningham to Hurley earlier that day, Cunningham had asked Hurley to meet with either him or Burke "about our inquiry last week on ATF." In his message, Cunningham stated that Burke "very much appreciated your material. The memo that you did and all the stuff that you assembled . . . was indeed very helpful." In any event, as discussed in Chapter Five, Burke had been aware as of December 15, 2010, that the weapons found at the Terry murder scene "connect[ed] back" to Operation Fast and Furious. Additionally, when Burke was interviewed by congressional staffers on December 13, 2011, he stated that he assumed he would have read Hurley's memorandum when he received it, "especially in light of its content."

Based on the evidence, it appears that Burke had received and read the Hurley memorandum by January 31, when he conveyed the incorrect information to Weinstein, and that he was sufficiently aware of the information contained in it from other sources, such as from the press conference he held

²⁵⁷ Moreover, just a few days earlier, on January 25, 2011, Burke held a press conference to announce the Operation Fast and Furious indictment and his office issued a press release stating: "The Avila indictment alleges that from approximately September 2009 to December of 2010, the defendants conspired to purchase hundreds of firearms, including AK-47s, to be illegally exported to Mexico."

²⁵⁸ Burke resigned as U.S. Attorney in August 2011 and, through counsel, declined the OIG's request to be interviewed about his involvement in drafting the February 4, 2011, letter to Sen. Grassley.

to announce the Operation Fast and Furious indictments just 6 days earlier. Burke acknowledged in his December 2011 interview with congressional staffers that his statement that Avila had purchased the weapons before the investigation began was “inaccurate,” but said that it was not intentional. He further stated that his incorrect statement “reflects that I didn’t fully know the facts at that time.”²⁵⁹

Weinstein stated that he learned the next day in a conversation with Hoover that Burke’s statement that Avila purchased the weapons before the investigation began was incorrect. Weinstein told the OIG that he would not have expected Burke to know “the details of even a purchase of significance like that” or when the purchase was made, and did not give Burke’s error much weight. Weinstein also stated, “I would expect him to know whether the people he was employing were leading an investigation in which they were trying to get guns or not trying to get guns, and I’d focus more on that.” He stated that “the rest of Burke’s point [in the January 31 e-mail] was reasonable,” and that Burke’s error did not diminish Weinstein’s overall confidence in Burke’s assurances that Sen. Grassley’s allegations were false. He told us that his continued confidence in Burke was supported by the fact that Hoover and Melson also were providing the same assurances that guns were not being allowed to “walk.”

Weinstein also said he believed that “at some point this got cleared up for Mr. Burke and he continued to assert and insist in fact that . . . the Grassley letter was false and that our letter wasn’t strong enough.” However, as

²⁵⁹ We noted three other incidents that are relevant to our assessment of Burke’s conduct. [REDACTED]

Second, on August 11, 2011, the OIG initiated an investigation of an allegation that a Department employee provided to a member of the media a copy of a May 2010 undercover operation proposal drafted by ATF Special Agent John Dodson. Burke subsequently admitted to the OIG that he provided the memorandum to a reporter at the reporter’s request.

Lastly, the OIG interviewed members of Agent Terry’s family and learned that Burke provided the family members with inaccurate information about Agent Terry’s shooting. Specifically, members of the family told the OIG that in a meeting with Burke on March 10, 2011, he told them that the weapons found at Agent Terry’s murder scene were sold out of a Texas shop, not an Arizona shop. But on December 15, 2010, Burke wrote an e-mail message to Monty Wilkinson in the Office of the Attorney General that “[t]he guns found in the desert near the murder [sic] [CBP] officer connect back to the investigation we were going to talk about – they were AK-47s purchased at a Phoenix gun store.”

discussed below, Burke again inaccurately stated on February 4 that Avila had purchased the weapons found at the Terry murder scene before the Operation Fast and Furious investigation began. We found that Burke's inaccurate statements so clearly demonstrated a willingness to make assertions without regard for obvious and undisputed facts that Weinstein should have scrutinized with care any further representations Burke made concerning Operation Fast and Furious.

When we asked Weinstein whether he ever told Breuer that the information he had forwarded to him on January 31 about Avila's weapons purchase occurring before the investigation began was incorrect, Weinstein replied, "I'm sure I did. I just don't remember when or how." Breuer told us that he did not know at the time that the information Weinstein had forwarded to him about Avila's weapons purchase was incorrect. Breuer stated that, as with other information about the case, he learned about this later through "public revelations."

2. The February 1, 2011, Conference Calls

On the afternoon of February 1, 2011, Burton participated in two conference calls to discuss the allegations in Sen. Grassley's letters. The first call was with Hoover and Weinstein, and the second was with only Weinstein. According to e-mail records, Burke was scheduled to participate in the first call, but was unable to because he was just arriving in Mexico City. Burton took handwritten notes during both conference calls. Burton's notes include, in part, the following statements from her conference call with Hoover and Weinstein:

- "ATF doesn't let guns walk";
- "We always try to interdict weapons purchased illegally";
- "We try to interdict all that we being [sic] transported to Mexico";
- "On 11/24/09 he [Avila] was known to be a straw, but we were not aware of his 1/16/10 purchase until afterwards"; and
- "We don't know that these weapons left the US".

Burton's notes are significant because the Department cited several excerpts from them in the December 2 letter explaining how it came to include inaccurate information in its February 4 letter.²⁶⁰

²⁶⁰ The Department's December 2, 2011, letter withdrawing the February 4 letter attributes statements excerpted from Burton's January 28 and February 1 notes to either Melson or Hoover.

Burton said that she did not remember whether these statements in her notes from the February 1 meeting with Weinstein and Hoover had been made by Weinstein, Hoover or both. As with Burton's handwritten notes from January 28, 2011, Burton's practice was not to identify specific speakers unless there was disagreement about what was being stated. Burton told us that she uses her notes as the "building blocks" for drafting letters, and that her intent is to write down verbatim what is stated as best she can. She stated that "you have to know exactly what they are saying and ask questions as needed so you can try and get your arms around . . . what the facts are, then draft a response accordingly."

Weinstein described the telephone call with Hoover and Burton as a "three-way conversation" and told us that "all of the substantive information" in Burton's notes was provided by Hoover.

The OIG showed Hoover a copy of Burton's notes from his February 1 conversation with Weinstein and her. Hoover stated that Burton's notes accurately captured what had been said during the telephone call. He told the OIG that he thought Weinstein was the one who said that "ATF doesn't let guns walk," and that he (Hoover) made the other statements quoted above.²⁶¹ After reviewing a draft of this report, a Department official stated that prior to issuing the December 2 letter, she asked Hoover by telephone whether he had made the statements in Burton's notes and that Hoover said he had. Another Department official said he asked Weinstein who had made the statements, and that Weinstein answered that Hoover had made them.

Hoover told the OIG that at this time, he understood the term "walk" or "gun walking" to mean when ATF places firearms in the hands of a suspect, and that based on this definition, he agreed with the statement that "ATF doesn't let guns walk."²⁶² He stated that he and Weinstein did not discuss what the term "walking" meant in their discussions about responding to Sen. Grassley's letters.

Following this conversation with Hoover and Weinstein, Burton spoke again with Weinstein. According to Weinstein, the purpose of this second call was for Weinstein to help Burton "interpret" what had been discussed during the prior conversation. During this second telephone conversation with only

²⁶¹ Hoover said that he would not have referred to ATF as "ATF," but rather as "we."

²⁶² Hoover stated that he learned some time later that the Department had a much broader definition of "gun walking" than the definition he and other ATF officials used. After reviewing a draft of this report, Melson told the OIG that Hoover instructed him on the narrower definition of gunwalking, which according to Melson "colored my analysis of the allegations initially."

Weinstein, Burton's notes included a statement that "[Defendants] in case [34] are not all straw [purchasers]. ATF tried to work up chain. 2 top honchos. ■■■■■ Goal always was to take down the [organization] – not just go after straws." The notes then reflect that Weinstein said, "interdict whenever poss before" and "Going after higher level with direct ties to Sinaloa cartel. They didn't sanction the sale but tried to build a case." Additionally, Burton's notes included the following statement:

Straw purchaser of that gun later became a [defendant] but wasn't known to be a sp [straw purchaser] at the time of the purchase. He's now been indicted in F&F [Fast and Furious].

This statement indicating that Avila was not known to be a straw purchaser at the time of purchase conflicted with Burton's notes from the earlier conversation with Hoover in which she wrote that Hoover said Avila was "known to be a straw" on November 24, 2009.²⁶³ Weinstein told us that he understood Hoover to mean in this earlier conversation that Avila was only a suspected straw purchaser, and that he could not yet be proved to be a straw purchaser, at the time of the purchase. Weinstein stated that "[Burton] wrote it, not me," and that he would have written the notes differently. When we showed Hoover a copy of Burton's notes from her discussion with Weinstein, he told the OIG that this version of the statement was not accurate and could not be reconciled with what he had told Burton during the first conversation.

According to Hoover, Burton's notes from her call with Weinstein also included statements that went beyond the scope of what the three had discussed earlier. For example, the notes state "ATF didn't sanction sp [straw purchasers] [and] allow them to go to Mexico – [h]undreds of guns were recovered; others weren't interdicted." Hoover said he did know what was meant by the statement.

As the notes also show, and as Weinstein confirmed to us, Weinstein also suggested who from ATF could brief Sen. Grassley's staffers, and that Weinstein "could go" to the briefing as well.²⁶⁴

²⁶³ This statement is, however, consistent with Brad Smith's notes of January 28 from his conversation with Melson, in which he wrote "Agents assured me that we [did not] know the guy was a straw purchaser at time of purchase."

²⁶⁴ On the evening of February 1, Breuer e-mailed Weinstein to ask him to "Let me know what is going on with this" and to thank Weinstein for "getting involved." Weinstein replied that Burton had drafted a response, which he "revised to make a little tougher." He added that ATF would provide a briefing on Project Gunrunner, adding, "I don't think they'll ask us to participate, but if they do, are you okay with my going?" Breuer replied, "Sure but you probably shouldn't unless absolutely necessary." Weinstein, along with ATF Chief of the

(Cont'd.)

Weinstein told the OIG several times that he found Hoover and Burke's assurances about Sen. Grassley's allegations and the Department's proposed response compelling. He stated that "the assurances that we got in the course of putting the letter together from Mr. Hoover and Mr. Burke and their staffs were so categorical and emphatic and repeated and unequivocal that the allegations in the letter were false and that the information in Grassley's letter were false and that the information in our draft was accurate, that I believed the information they were providing to us. And so I believed that every word of our letter was accurate."

Weinstein cited his own experience as a basis for his confidence in Burke's assurances, stating, "I can't emphasize enough that in my experience both working for a number of different U.S. Attorneys and now in my job dealing with them all the time, it's my experience that U.S. Attorneys don't make representations to Main Justice about factual matters unless they're pretty damn sure that they're right."²⁶⁵ He also stated that the initial version of the February 4 letter was drawn from information provided by ATF, and that Hoover and his staff endorsed every subsequent draft of the letter that they reviewed.

In contrast with Weinstein's stated reliance on Hoover and Burke for information about Operation Fast and Furious, as discussed in Chapter Three, Weinstein was personally aware that ATF had failed, in Operation Wide Receiver, to interdict weapons that had been purchased illegally despite the legal authority and the ability to do so.²⁶⁶ Burton stated that during meetings with Weinstein about Sen. Grassley's letters and throughout Weinstein's involvement in drafting the response, he never mentioned Operation Wide Receiver or the fact that ATF's Phoenix Field Division had failed to interdict weapons purchased illegally in that investigation. Weinstein told the OIG that Operation Wide Receiver "had not come to mind as being possibly relevant to this response" because he believed Sen. Grassley's allegations were limited to Operation Fast and Furious. He described his awareness of Operation Wide Receiver during his work on the February 4 letter as residing between two extreme points:

Firearms Operations Division Stuart Lowrey, briefed Sen. Grassley's staffers on February 10, 2011. Burton and McDermond also attended the briefing.

²⁶⁵ Weinstein specifically cited his experience with Burke, stating that "unlike Hurley and Newell for whom I had limited encounters from which I drew grand conclusions, I had . . . a lot of experience with Dennis [Burke]."

²⁶⁶ As discussed in Chapter Three, Breuer also was aware that these tactics had been employed by ATF in Operation Wide Receiver.

One, is that I actually did that analysis and decided unilaterally not to bring it to anyone's attention. That didn't happen. The other is that I had a complete bout of amnesia and forgot the existence of Wide Receiver. That didn't happen either. I'm somewhere in the middle. I remembered, I wasn't an amnesiac, I remembered that there was a case called Wide Receiver in which guns walked which I had reacted very strongly earlier and brought to ATF's attention. But I was so focused on the Fast and Furious allegations and the insistence by the people that did the case that they weren't, this wasn't a gun walking case and I had viewed Wide Receiver as just ancient and aberrant. I just didn't think about Wide Receiver as we were responding to this. Had I thought about it, I'm quite certain that I wouldn't have taken it upon myself to do that analysis. I would have invited other people to participate in it and make their own judgment. But I didn't think about it.

He added that he considered Operation Wide Receiver to be an "aberration" that happened under a different "regime" – meaning a different U.S. Attorney, and a different Director and Deputy Director of ATF. Weinstein told the OIG that his view of Operation Wide Receiver as an aberration was based on his 15 years of experience as a prosecutor.²⁶⁷

Weinstein stated that he was unaware that Operation Wide Receiver had been conducted under Bill Newell, the same SAC who oversaw Operation Fast and Furious. When asked whether the fact that Operation Wide Receiver had been run out of the same ATF field division as Operation Fast and Furious made the use of the same tactics more likely, Weinstein said it did not. He stated that he viewed Operation Wide Receiver as "such an extreme aberration that I would have been more likely to believe that aliens had come down and seized these guns than that the agents had let them go." He also said that "employing the use of those tactics is so irresponsible and is so aberrational that . . . I just wouldn't have thought that anyone would employ that same set of tactics that I'd never encountered before or again."

As we discuss later in this chapter, Weinstein did not share his knowledge of ATF's use of flawed tactics in Operation Wide Receiver with senior Department management until early March 2011, when he learned of

²⁶⁷ As recently as January 24, 2011, 3 days before Sen. Grassley's first letter, Weinstein had written to Criminal Division colleague James Trusty to ask whether the Operation Fast and Furious indictment was being unsealed along with the case "we made with the cooperating FFL, where we inherited it after a lot of guns had been permitted to walk . . . ?" Weinstein told the OIG that the case he was referring to was Operation Wide Receiver. In fact, Operation Fast and Furious was unsealed along with a different investigation due to the use of a common weapons drop location.

additional, more recent “gun walking” incidents. He stated that these incidents prompted him to tell senior management “not only that we needed to tell Congress about those cases since they were on our watch, but that there was also this earlier case.”²⁶⁸

Burton, Weich and other senior Department officials, including Attorney General Holder, Deputy Attorney General Cole and Principal Associate Deputy Attorney General Lisa Monaco stated that they did not learn about Operation Wide Receiver until after the February 4 letter was issued. We discuss the relevance of Operation Wide Receiver to the February 4 letter later in this chapter.

3. Disagreement Over Scope of the Response to Sen. Grassley’s Allegations

Burton produced the first draft of the Department’s response to Sen. Grassley’s letters on February 1, 2011. This draft contained the earliest version of two sentences that appeared in the final February 4 letter to Sen. Grassley, the first of which Cole described to us as “ambiguous,” and the second of which senior Department leadership would later conclude was not accurate. The first of these two sentences, as it appeared in the first draft, stated:

We want to assure you that, contrary to the allegations reported in your letter, ATF has not “sanctioned” the sale of assault weapons to suspected straw purchasers, who then transported the weapons throughout the southwest border area and into Mexico.

After noting the Department’s “long-standing policy against the disclosure of non-public information about pending criminal investigations,” the second sentence stated:

We can advise you, however, that ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

²⁶⁸ A March 21, 2011, e-mail message from Weinstein to Associate Deputies Attorney General Deborah Johnston and Matthew Axelrod stated that there was “some agreement that we should try to add some language to our congressional responses that captures, with appropriate disclaimers, the fact that to date ATF has discovered only a few (non-F&F) instances where agents intentionally let guns ‘walk.’” The e-mail message did not explicitly reference Operation Wide Receiver. As we discuss later in this chapter, Breuer also failed to inform the Department’s leadership of his knowledge of Operation Wide Receiver until well after February 4.

This language – “ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico” – remained intact throughout the drafting process and was most frequently cited by Department leadership, including Attorney General Eric Holder and Deputy Attorney General Cole, as the inaccuracy that caused the Department to withdraw the letter on December 2, 2011. Burton told the OIG that she based this statement on her notes from earlier that day. Burton’s first draft made no mention of the Terry shooting or the specific guns found at the murder scene.

On the evening of February 1, Burton forwarded her draft to Weinstein to get his comments before circulating it to ATF Headquarters and the U.S. Attorney’s Office. She stated that Weinstein “joined in” the drafting process because he had experience prosecuting gun trafficking cases and working with ATF, and that as a Deputy Assistant Attorney General, Weinstein was at an “appropriate . . . policy level to deal with Congressional issues of this nature.” She added that, given the 3-hour time difference between Washington, D.C., and Phoenix, it was “helpful to have someone here who could help us figure out how best to respond.”

Weinstein’s comments to Burton’s first draft, along with his subsequent e-mails to Burton and others, show that Weinstein believed the response should more forcefully rebut what he perceived to be Sen. Grassley’s allegation concerning the weapons recovered at the Terry murder scene, which he characterized as “the most salacious and damaging to ATF, both short- and long-term.” ATF Office of Legislative Affairs Chief Rasnake wrote to Weinstein to thank him for his support. Weinstein replied, “Thanks. My boss and I are fervently supportive of ATF, and these allegations are infuriating.”

As described below, Weinstein’s desire to vigorously address the issue of the weapons found at the Terry murder scene was shared by Burke and others, but was at odds with Burton’s view of the letter’s purpose and how it should be written. This debate over whether and to what extent the Department should address in its response the link between the weapons found at the Terry murder scene and Operation Fast and Furious came to dominate the drafting and editing process.

On February 2, Burton circulated her first draft of the response to Weinstein, Burke, Melson, and others. In her transmittal e-mail, Burton wrote that the draft was “intended to clarify the record and the boundaries of the briefing” that Sen. Grassley’s staffers had requested. Burton told the OIG that by sending the letter to Sen. Grassley before the briefing, the Department could establish that the briefing would be about Project Gunrunner generally, and not about any specific investigation or about the Terry shooting. She stated that Grassley’s senior staffer was skilled and experienced, and that it would be “unwise and unfair to go up there with a briefing that wasn’t going to meet his expectations without telling him in advance.”

Weinstein circulated his edits to the first draft within a few minutes after Burton circulated her draft, indicating in his transmittal e-mail that the Department should “consider making a more forceful rebuttal” to Sen. Grassley’s allegations. In his edits he proposed including language “to the effect that any suggestion that ATF ‘sanctioned’ the purchase of the guns found at the Terry shooting, or any unlawful purchases of firearms, is false.” Weinstein told us that he proposed this language based on the categorical assurances he had been receiving from Hoover and others that ATF had not sanctioned any unlawful purchases of weapons, a point he believed needed to be made more forcefully. Weinstein wrote to Burke to ask him to send an e-mail to Johnston and Smith in the Office of the Deputy Attorney General saying that Burke agreed that the response needed to be more forceful. Weinstein added, “Your push on this will carry a lot of weight.” Weinstein then separately contacted Smith and Johnston to inform them that he was “pushing back against OLA’s desire to say as little as possible” in the letter. Weinstein was referring to Burton’s reluctance to include any details about pending investigations, including the investigation of Agent Terry’s murder.

By the afternoon of February 2, the draft responses were being forwarded to several officials in OLA, ATF Headquarters, and the U.S. Attorney’s Office. The OIG’s review of e-mails during this period showed that in addition to Melson and Hoover, other officials within the ATF Director’s Office, the Office of Public and Government Affairs, and the Office of Field Operations were also receiving drafts. Officials in the Office of Field Operations who received draft responses included Chait and McMahan. Chait and McMahan were the Phoenix Field Division’s principal points of contact and therefore were among the officials at ATF Headquarters who were most familiar with Operation Fast and Furious. As was the case throughout the drafting process, none of these ATF Headquarters officials offered substantive comments or edits. We also found no record of the Department’s draft responses ever being forwarded to anyone in the Phoenix Field Division for comment prior to February 4, when the final signed letter was sent to Sen. Grassley.²⁶⁹

²⁶⁹ As Deputy Assistant Director for ATF’s western field divisions, McMahan generally served as the primary point of contact between the Phoenix Field Division and Headquarters. When asked why he did not forward the February 2 draft response or subsequent drafts to Newell, McMahan stated, “I probably stopped forwarding things like that to him because this would just spin him up even more. You know, I just try to . . . manage him, kind of, kind of keep it a little bit more calm.” Newell told the OIG that he never saw a draft of the February 4 letter before it was issued. A review of Newell’s e-mail indicates that Newell received a copy of the Department’s final signed response to Sen. Grassley on February 7, 2011, from Burke. Newell replied to Burke that he had not seen the final response but had “heard about it from my HQ [Headquarters].”

Also on February 2, Weinstein forwarded a draft of the response with his most recent edits to Breuer, who was in Mexico, and to the Criminal Division's Principal Deputy Assistant Attorney General and Chief of Staff Mythili Raman. In his e-mail message Weinstein wrote, in part:

Just an update – Faith [Burton] and I are going back and forth on a letter to Grassley which would go out today. I am trying to make it as strong as possible. She's now accepted my first round of edits, but this next round is more aggressive.

Later that evening, Weinstein forwarded an updated version of the draft to Breuer and Raman. Breuer forwarded this draft to his personal e-mail account. He told the OIG that he finds it difficult to read documents on his Blackberry and he sometimes forwards them to his personal account so he has the option to read them later on a larger screen. He stated that it was "highly unlikely" that he reviewed this or any other draft of the response to Sen. Grassley that Weinstein forwarded to him, and that he did not recall reading the final February 4 letter until after it had been sent.²⁷⁰ The OIG found no e-mail messages from Breuer in which he proposed edits, commented on the drafts, or otherwise indicated that he had read them.

At the U.S. Attorney's Office, Burke had begun forwarding drafts to Cunningham, Hurley, and others. Hurley stated that he read Sen. Grassley's January 27 letter to allege that ATF had sanctioned the sale of the two weapons found at the Terry murder scene that traced back to Avila. He stated that he would have preferred that the response simply recite Avila's history of weapons purchases, including when ATF learned of these purchases, in order to "set the record straight" with regard to the two weapons found at the scene. Hurley told us that he could not recall whether he shared this specific comment with others in the office as the draft response was being reviewed.

Hurley also said he would not have made a "blanket" assertion that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico." He said that the sentence was too broad and subject to differing interpretations. For example, he said that people could challenge the accuracy of the sentence on the ground that ATF had not assigned more agents to more fully cover the surveillance of the suspects in Operation Fast and Furious, and therefore could not be said to have "made every effort." He added that he did not spot this problem with the sentence when he first reviewed the letter because he was only focused on those portions

²⁷⁰ In addition to the two February 2 drafts, Breuer also received a version of the response that was signed by Weich on February 3 but not sent out. He also received the final, signed February 4 letter on the evening it was sent out.

of the response that pertained directly to Operation Fast and Furious, and therefore did not raise the issue.

According to an e-mail from the First Assistant U.S. Attorney to Burke and Cunningham, Hurley also wanted the response to include language about FFL1's cooperation in the investigation to show that the FFL was "not upset with us." Cunningham replied that it was a good idea, but added, "Too late to perfect letter – it needs to go out for Friday [February 4, 2011] papers."

On February 2, officials in the U.S. Attorney's Office proposed one major edit to the letter. After Burke asked Cunningham, Hurley, and others to review the most recent draft, Cunningham proposed specific language aimed at refuting what he interpreted to be Sen. Grassley's allegations:

Regarding the allegations repeated in your letter that ATF in any way "sanctioned", had knowledge of, or permitted weapons purchased on January 16, 2010 in Arizona to reach the Republic of Mexico is categorically false. The Department of Justice continues to investigate the murder of CBP Agent Brian Terry and intends to bring a criminal case in short order.

Cunningham noted in his e-mail to Hurley, Burke, and others in the office that the Washington Post had begun reporting on the link between the guns found at the Terry murder scene and Operation Fast and Furious. Hurley wrote back that he "like[d] the stronger and more specific statement about the January 16 purchase." Having already circulated his proposed language, Cunningham then asked, "And it's absolutely True, correct?" Hurley confirmed that Cunningham's proposed language was accurate. The Public Affairs Officer for the U.S. Attorney's Office also commented that he approved of the proposed language, stating, "The truth is we don't know what atf might have been up to in other states, but we know about our case. And we should push back with specifics to protect the integrity of our case."

Burke forwarded Cunningham's proposed language to Burton. Burke separately wrote to Johnston, Smith, and Weinstein that he would "like an audience with you [presumably the Office of the Deputy Attorney General] if OLA balks at this language. We need to be forceful. His letter is outrageous and getting legs." Johnston at this point suggested that Monaco and Stuart Goldberg, the Chief of Staff to newly appointed Deputy Attorney General James Cole, be "looped in."²⁷¹ Smith responded that he was planning to meet with

²⁷¹ Cole was appointed Deputy Attorney General on December 29, 2010, and began serving in that position on January 3, 2011. He was confirmed by the Senate on June 28, 2011. Goldberg served as Cole's Chief of Staff until he was appointed Principal Associate Deputy Attorney General on July 27, 2011.

Monaco about the letter later that afternoon. Johnston replied, “Great. Burke is rightfully ballistic about this.”²⁷² Johnston told the OIG that while she was in Mexico with Burke at this time, he told her he was upset that Sen. Grassley had alleged that ATF was responsible for the weapons found at the Terry murder scene even though ATF was not aware at the time of purchase that the weapons had been sold to Avila.

Smith also wrote to Burton urging her to include language “to rebut directly the implication in Grassley’s January 27 letter that ATF ‘sanctioned’ the purchase of the firearms linked to the Terry murder.” Smith added that he understood the phrase “ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico” to be an implicit refutation of the allegation that ATF had sanctioned the sale of the weapons found at the Terry murder scene. He wrote that the Department’s response should “take on” the allegation directly. Smith’s message represents the only reference to the phrase “ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico” that the OIG found throughout the editing process. As noted, Attorney General Holder, Deputy Attorney General Cole, and other senior Department officials cited this phrase as the primary inaccuracy in the February 4 letter and their reason for withdrawing it.

After Burton pointed out that Sen. Grassley had not alleged that the weapons found at the Terry murder scene had been transported into Mexico, Weinstein reformulated Cunningham’s proposed language to state that “the allegation, described in your January 27 letter, that ATF ‘sanctioned’ the sales of assault weapons that may have been used in the killing of Customs and Border Protection Agent Brian Terry is categorically false.”

Burton resisted adding new language about Terry, writing to Weinstein and Burke that it “goes too far.” In the ensuing e-mail exchanges, Weinstein and Burke debated with Burton about whether Sen. Grassley had explicitly alleged that ATF had “sanctioned” the sale of the weapons used to kill Terry. Burton told the OIG that she did not read Sen. Grassley’s January 27 letter to allege that, yet understood why Weinstein and Burke did. She told us that she

²⁷² In a separate exchange involving Weinstein, Johnston wrote, “The truth of the matter is if Congress had renewed the assault rifles ban these weapons could not have been purchased,” and suggested adding that point to the response to Sen. Grassley. Weinstein responded that OLA was not likely to agree to do so, adding: “In any event, the assault weapons ban was painfully easy to circumvent. . . . [S]o hard to say those weapons, or weapons just like them, would not have been available.” Johnston told the OIG that she made the suggestion about including the assault weapons ban issue in the response to Sen. Grassley based on her personal views.

was “trying to counsel to hold back to the extent of responding to what’s really on the table and not . . . going beyond that.”

Notwithstanding Burton’s objections to Weinstein’s language about Terry, the language remained in the draft that was circulated at the end of the day on February 2 within the Department, ATF Headquarters, and the U.S. Attorney’s Office. This draft also included the same two sentences, modified only slightly, from the first version of the letter that Burton had circulated the day before. At this stage of the drafting process, the two sentences appeared in the draft response as follows:

More generally, ATF has not “sanctioned” the sale of assault weapons to suspected straw purchasers, who then transported the weapons throughout the southwest border area and into Mexico. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

Hoover wrote to tell Weinstein, Burton, Burke, and Smith that ATF was “fine with this letter.” Rasnake also wrote to Burton to tell her that he had communicated with Sen. Grassley’s senior staffer, who was insisting on receiving the Department’s response on February 3. Rasnake wrote, “The Senator is getting heat from the Press which will only escalate tomorrow (the deadline).”

4. Increased Involvement of the Office of the Deputy Attorney General in Finalizing the Response

During February 3 and through February 4, when the Department’s response to Sen. Grassley was issued, Burton remained the primary coordinator of the editing and review process, and continued circulating drafts to ATF Headquarters and the U.S. Attorney’s Office. Weinstein told us that as other officials in the Office of the Deputy Attorney General and OLA began to review and edit the Department’s response, he disengaged from the process.

On February 3, Assistant Attorney General for Legislative Affairs Weich began editing the draft he had received the day before. He reorganized several paragraphs, but his edits were not substantive in nature and did not change the two sentences that the Department later cited in its December 2 letter withdrawing the February 4 letter. As with prior revisions, Burton circulated this latest draft to Hoover, Burke, Weinstein, and Smith, and to others in OLA.

Chief of Staff to the Attorney General Gary Grindler, who had received Sen. Grassley’s letters but was not being forwarded drafts of the response, wrote to Monaco to suggest that “someone in the ODAG [the Office of the

Deputy Attorney General] review the ATF's response" to Sen. Grassley.²⁷³ Monaco responded that Brad Smith was engaged on the matter.

At Monaco's request, Smith forwarded her the most recent draft to review. Monaco wrote back that she was "by no means conversant with all the facts here," but was "concerned about the tone" of the draft. She proposed two edits that reflected a more cautious approach to the Department's response. First, she objected to the phrase "categorically false" in the sentence inserted by Weinstein to rebut what Weinstein perceived as Sen. Grassley's allegation that ATF had "sanctioned" the sale of the weapons used to kill Terry. Second, Monaco suggested changing the phrase "ATF *has not* 'sanctioned' the sale of assault weapons to suspected straw purchasers" to "ATF *does not* 'sanction' the sale of assault weapons to suspected straw purchasers." (Emphasis added.) Monaco told the OIG that she suggested this second edit because she believed that the response would be more accurate if it were drafted "on a policy level . . . rather than on a case specific situation where we . . . might not know the facts yet."

Smith responded to Monaco that "[w]e have flagged some of these concerns in the past . . . and have been assured that we're okay." Monaco nonetheless asked Smith to brief her on the facts of the case. Monaco told the OIG that Smith told her that he had been in contact with unspecified prosecutors in the U.S. Attorney's Office in Phoenix, and that they had told Smith they had reviewed "the file" and based their assurances to him on that review. Monaco stated that Smith did not elaborate on what files had been reviewed.

As Smith and Monaco met to discuss the Department's proposed response to Sen. Grassley, officials at ATF Headquarters continued pressing Burton to finalize the letter. Rasnake wrote to Burton and Weich that "Grassley's office is telling media that '*there may be something to this*' because ATF is not answering," and to ask whether the letter would be going out that day. (Emphasis in original.) Burton responded, "OLA hopes to do that." A few minutes later, Rasnake wrote Burton and Weich again to ask whether ATF could go ahead and send out the letter under Melson's signature, adding that the staffer was "very 'concerned' that he has not heard from us yet." A few minutes after that, Hoover sent an e-mail to Burton and Weich also asking if Melson could sign the letter. Weich first responded to Hoover:

²⁷³ Grindler served as Acting Deputy Attorney General from February 4, 2010, until January 2, 2011. He then served as Principal Associate Deputy Attorney General until January 17, 2011, when he became Chief of Staff to Attorney General Holder.

We are working on the reply, including the process of clearing it with leadership offices. The letter should go out over my signature so that the full authority of the Department stands behind our position. We will get it out as soon as possible. No need to panic and no need to react to whatever Grassley's press guy might be whispering to reporters.

Weich then responded to Rasnake:

No – see my last e-mail. Let's calm down and we'll get this out in a timely, effective way.

Monaco, who also received Weich's responses, wrote to Weich to note her concurrence that the letter should come from Main Justice. She also informed Weich that she had a few questions for Smith about the letter.²⁷⁴

During the early evening of February 3, and apparently in the belief that Monaco's questions and concerns had been addressed, OLA proceeded to put the draft letter into "final" for Weich's signature. After Weich signed the letter, Burton sent it to Rasnake to forward to Sen. Grassley's staffer. However, Monaco and Goldberg had additional questions about the letter, and asked Brad Smith to continue working on it. Learning of this, Burton sent an urgent e-mail to Rasnake to tell him not to send out the letter. The February 3 letter was not sent.

Smith told us that Monaco's primary concern revolved around the following sentence in the February 3 version of the letter:

At the outset, we want to assure you that the allegation, described in your January 27 letter, that ATF "sanctioned" the sales of the assault weapons that may have been used in the killing of Customs and Border Protection Agent Brian Terry, is false.

Smith wrote to Hoover and Burke to explain that Monaco and Goldberg interpreted this sentence to mean that "we could prove definitively that the guns involved in Terry's killing weren't acquired by one of the straw purchasers targeted as part of Project Gunrunner." Monaco told the OIG that Smith's e-mail accurately summed up her concern as to that issue.²⁷⁵

²⁷⁴ Monaco also told Weich that she wanted to delete the word "categorically" from the letter even though it "may ruffle feathers." Weich replied, "I think that word came from [Weinstein or Burke], both of whom are convinced that ATF is in the right here, but why take a chance."

²⁷⁵ Monaco also wanted to confirm that the response to Sen. Grassley did not include information about the case that went beyond what was included in the indictment.

Smith learned from ATF that the FBI's forensic analysis of the two weapons was "inconclusive." However, in his e-mail to Hoover and Burke, Smith stated that he disagreed with Monaco's reading of the sentence. He interpreted the sentence only to mean that "ATF never 'sanctioned' the sale of any of the weapons used in the Brian Terry killing to a straw purchaser." In an effort to resolve confusion over how the letter could be interpreted, Smith combined Burton's general statement that "ATF has not 'sanctioned' the sale of assault weapons to suspected straw purchasers, who then transported the weapons throughout the southwest border area and into Mexico" with the more specific point that ATF did not sanction the straw purchase of the particular guns found at the Terry murder scene. The resulting sentence appeared in the second paragraph of an updated draft of the letter as follows:

At the outset, the allegation (described in your January 27 letter) that ATF has or would "sanction" the sale of assault weapons to any straw purchasers who transport weapons into Mexico – let alone any straw purchasers who may be linked to the killing of Customs and Border Protection Agent Brian Terry – is false.

Smith's edit affected the Department's draft response in two ways. First, by changing "suspected straw purchasers" to "straw purchasers," the sentence could be read to apply only to *known* straw purchasers. Second, by removing "southwest border area," the sentence now meant literally that ATF had not sanctioned the sale of assault weapons to straw purchasers who themselves transport weapons into Mexico. Weapons purchased by the suspected straw purchasers in Operation Fast and Furious were recovered both in Mexico and throughout the southwest border area. In fact, the weapons purchased by Jaime Avila on January 16, 2010, were recovered at the Terry murder scene in Rio Rico, Arizona.

Smith told the OIG that he made these changes on his own initiative, and did not recall doing so for the purpose of narrowing the Department's response to a more factually defensible position. Rather, Smith told us that he understood the allegation in Sen. Grassley's letter to be that ATF sanctioned the sale of weapons to straw purchasers who transported them throughout the Southwest border area and *then* into Mexico. Smith stated that at the time he was making these revisions he was not aware that guns purchased in Operation Fast and Furious had been recovered both inside the United States and in Mexico, and did not recall that the weapons from the Agent Terry murder scene were recovered inside the United States.²⁷⁶

²⁷⁶ As we describe in Chapter Five, Smith wrote to then-Acting Deputy Attorney General Grindler and others on December 17, 2010, to inform them that two weapons recovered from the scene of Agent Terry's murder "have been linked to Jaime Avila, Jr., a 'straw
(Cont'd.)

Monaco told the OIG that she did not recall ever discussing these specific edits with Smith or reviewing them as track changes from the prior draft. She stated that Smith would not have been required to have her review the edits prior to circulating them because she was confident that he was regularly consulting with ATF and the U.S. Attorney's Office about the response. She stated that her discussions with Smith about Sen. Grassley's allegations focused on whether ATF had "let guns go to Mexico," and not whether they also had been transported throughout the southwest border area. However, she told us that these discussions did not amount to a suggestion from her to delete the reference to the southwest border area from the response.

Smith sent his revised draft in track changes to Burke and Hoover. Burke responded that he agreed that the prior draft had been confusing with respect to the "sanction" language. He again asked that Cunningham's original proposed language (first suggested on February 2 and excerpted above) be used, and complained that Cunningham's original language "was watered down over several rewrites." Burke added, "An eventually indicted defendant bought the guns traced to the murder scene – prior to the investigation, without ATF knowledge, and not discovered til at least 3 days after the purchase. Grassley is wrong and at best imposing an unobtainable standard on ATF."

Burke's continued assertion that Avila purchased the weapons before the Operation Fast and Furious investigation began was inaccurate. Avila was among the group of original suspects in the Fast and Furious investigation.

Hoover also wrote to Smith to express his agreement with Burke, stating, "I think Dennis has nailed this." Hoover acknowledged to the OIG that Burke's statement about Avila's purchase of the weapons before the investigation began was incorrect and that he had failed to catch this incorrect statement when he wrote to Smith.²⁷⁷

firearms purchaser' that ATF and USAO for Arizona have been investigating since November 2009 as part of its larger 'Fast and Furious' operation." The e-mail noted that the firefight that led to Agent Terry's death occurred in Arizona.

²⁷⁷ Also on February 3, Hoover received a memorandum drafted by Gary Styers, a special agent in ATF's Dallas Field Division, to Special Agent in Charge Robert Champion. Styers had been detailed to Phoenix from May through August 2010 as part of the Gun Runner Impact Team (GRIT) and had limited involvement with the Fast and Furious investigation assisting with surveillance operations. Styers' memorandum documented his communication with staffers of Sen. Grassley, who contacted him on February 2. According to the memorandum, Styers told the staffers of one incident in which agents were setting up to observe a transfer of firearms, but while repositioning, lost track of the vehicle containing the transferred firearms. He also told the staffers that he had never seen firearms cross the border into Mexico. Lastly, he told the staffers that "it is unheard of to have an active wiretap investigation without full time dedicated surveillance units on the ground." Based on our

(Cont'd.)

5. The Justice Department Issues its Response to Sen. Grassley

According to e-mail records, on the morning of February 4, two versions of the draft response were circulating within the Department. One version, discussed above, contained Smith's edits of the previous evening. A later version suggests that Smith agreed to Burke's renewed request to incorporate Cunningham's proposed language from two days earlier, and that Smith changed the first sentence of the second paragraph as follows:

At the outset, the allegation (described in your January 27 letter) that ATF "sanctioned" weapons purchased in Arizona on January 16, 2010, to reach the Republic of Mexico is false.

According to an e-mail from an OLA line attorney to Burton and Weich, the OLA line attorney figured out that two versions of the sentence were being reviewed simultaneously by officials in OLA and the Office of the Deputy Attorney General.²⁷⁸ The OLA line attorney noted in her e-mail that in Smith's most current version he had adopted some of Burke's proposed language and had dropped any mention of Agent Terry. She told us that she then tried to reconcile the two versions of the sentence from Smith's two drafts, and to make the letter more "concise." In making these edits, she decided to omit both the reference to Agent Terry and to the date on which Avila purchased the weapons found at the murder scene. The line attorney's edits resulted in the following language, which remained unchanged in the final 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. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

The line attorney stated that she did not recall why she deleted the references to Agent Terry and to January 16 or whether it was done for any particular purpose. She told us that she understood from internal discussions about the allegations that ATF had not allowed straw purchasers to take weapons to Mexico, and that she was trying to convey this understanding in a more

review of Hoover's e-mails, he did not forward this memorandum to any other officials in ATF Headquarters or at the Department.

²⁷⁸ The OLA line attorney had begun working at the Justice Department on January 28, 2011, and her first assignment was to assist Burton in responding to Sen. Grassley's letters. She told us that she had no substantive knowledge of the Fast and Furious investigation.

concise fashion. Burton praised the edit and sent the revised version to Brad Smith, who obtained Monaco's approval of the change.

The revised draft was cleared by the Office of the Deputy Attorney General, and Burton circulated it one last time to Burke, Hoover, Weinstein, Weich, Monaco, and others. Neither Attorney General Holder nor Deputy Attorney General Cole reviewed the final February 4 letter before it was sent, nor did anyone from the Office of the Attorney General.²⁷⁹ After reviewing the draft, Weinstein wrote to Burke, "Just curious why they took out specific reference to Terry?" Burke responded, "Who knows. It's all very perplexing. Every version gets weaker."

Weich signed the letter and it was e-mailed to Sen. Grassley's staff at approximately 6:00 in the evening on February 4.²⁸⁰

III. The Justice Department's Decision to Withdraw its February 4 Response

In this section we describe the Department's examination of Operation Fast and Furious during the first several months of 2011 and the growing awareness of senior Department officials that ATF had used flawed tactics in Operation Fast and Furious and other firearms trafficking investigations. We also describe other statements by Department officials to Congress about the assertions in the February 4 letter, followed by a description of the Department's decision in late 2011 to formally withdraw the February 4 letter and produce internal documents purporting to explain how the February 4 letter came to be drafted.

A. The Department Initiates an Examination of Operation Fast and Furious

1. The February Letters from Sen. Grassley, the CBS News Story, and the Weinstein Summary E-Mail

On February 9, 2011, Sen. Grassley wrote to Attorney General Holder to express dissatisfaction with the Department's response to his request for a briefing:

²⁷⁹ However, officials in both the Offices of the Deputy Attorney General and the Attorney General received copies of the signed February 3 letter that was never sent out.

²⁸⁰ The February 4, 2011, letter from Ronald Weich to Sen. Grassley is attached to this report as Appendix D.

Unfortunately, the reaction to my request has, so far, been little more than delay and denial. I finally received a letter at close of business on Friday, February 4, in response to my request. It came not from the ATF, but from the Justice Department. In that letter, the Department categorically denied that the ATF “knowingly allowed the sale of assault weapons to a straw purchaser” The Department said the ATF “makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.”

Sen. Grassley’s letter continued, “However, as I explained in my initial letter to Acting Director Melson, the allegations I received are supported by documentation.” Sen. Grassley’s February 9 letter included nine attachments, consisting primarily of ATF documentation of Jaime Avila’s weapons purchases. In addition, Sen. Grassley noted that the indictment of Avila and others stated that approximately 769 firearms had been purchased and only 103 had been recovered. Sen. Grassley asked, “So, where are the other approximately 666 weapons referenced in the indictment? Why has the ATF not seized them?” The letter also indicated that whistleblowers had alleged that at least one FFL “wanted to stop participating in sales like those to Avila sometime around October 2009.” The letter concluded with an excerpt from an e-mail that Sen. Grassley had received from Agent Terry’s stepmother that noted, among other things, a lack of contact by the government since Agent Terry’s murder. In the closing paragraph Sen. Grassley wrote, “The Terry family deserves answers.”

On the night of February 9, Wilkinson summarized Sen. Grassley’s letter to Grindler in an e-mail message: “Difficult to read on BB. Appears to be a 24 page letter taking issue with our response to his first two letters on this issue.” The next morning, Grindler responded to Wilkinson,

Monty: We need to dig into this situation. ODAG needs to be pushing ATF on what took place here. I would like to know more about it. Let’s discuss at the 8:45.

Later that day, Grindler wrote to Monaco and Wilkinson:

Two issues the AG is particularly concerned with are (1) the statement that at least one gun dealer wanted to stop participating in sales like those to Avila sometime around October 2009 with ATF allegedly encouraging the dealer to continue to sell to suspected traffickers; and (2) the assertion that there has been no

contact with the victim's family. The AG agrees that the family deserves answers.²⁸¹

On February 10, 2011, Weinstein and the Chief of ATF's Firearms Operations Division Stuart Lowrey provided a briefing to Sen. Grassley's staffers. Weinstein and Lowrey told the OIG that the briefing was intended to provide general information about the challenges encountered in gun trafficking investigations and prosecutions. Burton, who attended the briefing, told us that the Department did not agree to provide information about specific pending investigations, and told the staffers in advance of the briefing that it would not do so.

On February 13, 2011, Breuer sent an e-mail message to Grindler summarizing the February 10 briefing. The e-mail message stated, in part:

From talking to Jason, my understanding is that OLA made the judgment not to address any of the specific allegations in Sen. Grassley's letters during the briefing. . . . During the Q&A at the briefing, Sen. Grassley's staffers asked a number of specific questions about the AZ investigation, which our folks declined to answer, with one exception. A staffer asked whether as part of the AZ case, ATF ever encouraged a reluctant FFL to continue unlawful sales. Jason and the ATF reps. responded that based on their knowledge of the case, they were unaware of that ever having happened in this investigation.

²⁸¹ On February 12, Monaco forwarded to Grindler an e-mail message from Brad Smith stating that he was told the answer to the first of Attorney General Holder's concerns was "no," and as to the second issue, ATF had told him that ATF had not and typically would not engage Terry's family, and would defer to Customs and Border Protection or the FBI on this matter. Grindler forwarded Smith's e-mail message to Holder, writing, "This does not provide a complete or detailed answer. You will need to be prepared to address Grassley's assertions at your hearings. We are working on it." Several weeks later, following a letter dated March 16, 2011, from Chairman Issa to Acting Director Melson complaining about the Department's failure to provide responses to questions about Project Gunrunner and Operation Fast and Furious, Grindler expressed concern with the Department's progress in gathering information. In a March 17, 2011, e-mail message to Holder, Grindler wrote, in relevant part:

I remain concerned that we are not dealing with this situation as aggressively as we should. I think ODAG should assign someone to work on this (they probably have already done this) and get directly involved with ATF in looking at what is going on and what our response should be to the allegations. I just don't think we can wait on OIG to complete an investigation. I know that Jim [Cole] spoke with the border USAs and then sent a follow-up email to them making your position on this clear, but I am not sure that is all we should be doing.

A review of the e-mail records indicates that Weinstein drafted this e-mail for Breuer two days earlier, and that both Raman and Breuer reviewed it before Breuer sent it to Grindler unchanged.

On February 16, 2011, Sen. Grassley again wrote to Attorney General Holder, this time to request specific documents concerning Operation Fast and Furious and to inquire about ATF's contact with the FFLs. Regarding the February 10 briefing, Sen. Grassley wrote, "When asked whether ATF had encouraged any gun dealer to proceed with sales to known or suspected traffickers such as Avila, the briefers said only that they did not have any 'personal knowledge' of that."

That same day, Grindler wrote to Breuer, Raman, and Weinstein:

Questions from the AG:

So ATF did NOT persuade a reluctant dealer to participate – bottom line?

Do we have info on whether a gun sold in the operation was used in the shooting?

After confirming with Burke, Newell, and Chait that a draft of the below response was accurate, Weinstein responded to Grindler:

Per ATF and USAO:

(1) Bottom line is that ATF did NOT persuade a reluctant dealer to participate.

(2) Two of the guns sold during the investigation were found near the scene of the shooting of Agent Terry. These guns had been purchased about 11 months earlier, by a person later determined to be part of the trafficking ring. ATF was not notified of the sales until after they had been completed.

If you need more info, I can provide additional details about the two guns and about ATF's/USAO's dealings with the gun dealers in this case.

Grindler wrote back to Weinstein, Breuer, and Raman, "I would like more information including what is meant by 'ATF was [not] notified of the sales until after they had been completed.'" According to Weinstein's e-mail records, he spoke to Grindler directly about Grindler's request for this additional information.

Sen. Grassley's February 16 letter was followed by several others over the next few months from Sen. Grassley, Chairman Darrell Issa, Chairman Lamar Smith, and other Members of Congress seeking information about Operation Fast and Furious. Before responding to the factual assertions in these letters,

they were more closely scrutinized by Department and ATF officials than were the allegations in Sen. Grassley's January 27 and 31 letters, involving what Lowrey described as a "line by line analysis" of each statement before responding.

Amid these congressional inquiries, the news media also began focusing attention on Operation Fast and Furious, including a CBS broadcast on February 23, 2011, reporting that ATF had "facilitated the delivery of thousands of guns into criminal hands." That same day, Grindler forwarded to Holder a summary of the broadcast entitled "CBS News Uncovers Gunrunning Scandal Within the ATF."²⁸² Holder replied to Grindler and Deputy Attorney General Cole, "Ok. We need answers on this. Not defensive bs – real answers."

Cole told the OIG that the mounting Congressional challenges to the position the Department took in its February 4 letter to Sen. Grassley, possibly the CBS broadcast, and Holder's directive to get answers, led him to talk to ATF about "what was going on." He stated that he also asked Weinstein to meet with him because he was told that Weinstein "would have the most knowledge about it," but that Weinstein told him "he didn't know very much." Cole told us that he asked Weinstein to gather more information.

Weinstein stated that on or about February 24, Cole and Goldberg told him to gather information about how Operation Fast and Furious had been conducted. He stated that he was given 24 hours to do so, and was not told why he was given this assignment. Weinstein told the OIG that he told the Deputy Attorney General that "the only thing I think I can do in 24 hours is I could talk to the AUSA. So if it's all right with you I'll talk to the AUSA. I'll write up what he says and I'll send it to you. And they said that was fine." Weinstein said that he discussed the investigation for 2 1/2 hours by telephone with Hurley and Cunningham, and based on that conversation compiled a 5-page e-mail about Operation Fast and Furious and sent it to Goldberg, Wilkinson, and Counselor to the Attorney General Molly Moran on February 26, 2011. Wilkinson forwarded the e-mail to Holder and Grindler the next day.

Prior to sending the e-mail on February 26 to Goldberg, Wilkinson, and Moran, Weinstein e-mailed a draft to Breuer and Raman earlier in the day. Breuer replied that the draft was "just excellent." A few minutes later he sent another note to Weinstein and Raman that read, "An interesting read." Raman made a suggestion about the tone of the message, which she believed used too many "superlatives" to describe AUSA Hurley and an ATF agent. A review of the final e-mail indicates that Weinstein adjusted the language based on

²⁸² A transcript of this broadcast may be found at http://www.cbsnews.com/2100-18563_162-20035609.html.

Raman's suggestion. Shortly after sending the draft e-mail to Breuer and Raman, Weinstein sent another note to Breuer and Raman that read, "Lanny, once this goes up, and I'll cc you on the final one, that should provide a vehicle for you to communicate the message that we should be out of this going [forward]." Breuer responded, "Okay. Thanks." Weinstein copied both Breuer and Raman when he sent the final e-mail message to Goldberg and the other officials. We found no evidence that Breuer followed up as Weinstein suggested.

Weinstein told the OIG that the e-mail summarized the investigation based primarily on information provided to him by Hurley (rather than Cunningham) and about which Weinstein said he had no "independent knowledge."²⁸³ The e-mail began by noting that "given the scope and complexity of the investigation, it is not possible for anyone to develop a sufficiently granular understanding of the facts and day-to-day conduct of the investigation in 24 hours. . . . The information that follows was provided by Emory and Pat during our call." The final summary described the use of seven wiretaps in the investigation, applications for three of which had been reviewed and authorized by Weinstein.²⁸⁴ Weinstein's summary did not indicate that he had authorized three of the wiretap applications referenced in his summary, or that he was familiar with the Fast and Furious investigation as a result of discussions he had with McMahon in April and May 2010. Rather, the summary concluded by noting:

[T]his was an extraordinarily complex case, and I can give you only a higher-altitude view of [Operation Fast and Furious], based on the information provided by the USAO and ATF. But based on my conversation yesterday with the AUSA and Crim Chief, and based on prior conversations with Dennis Burke and with the ATF SAC, this investigation was conducted – and the decisions about when to seize guns were made – thoughtfully, carefully, and strategically.

Weinstein told the OIG that in order to gather information relevant to Sen. Grassley's allegations, he asked Hurley to focus on those transactions that ATF and the U.S. Attorney's Office knew about prior to the purchase. Specifically, Weinstein stated that he asked Hurley whether there were any purchases for which it was known in advance through a wire conversation that

²⁸³ After reviewing a draft of this report, Department officials cited Weinstein's February 26 e-mail summary as an example of the assurances that the U.S. Attorney's Office continued to provide to the Department about how Operation Fast and Furious had been conducted.

²⁸⁴ In fact, including one renewal and two extension applications, a total of nine wiretap applications had been submitted to the Criminal Division for authorization to file with the court.

there was probable cause to believe that the sale would be illegal. Weinstein stated that Hurley “did not know the answer off the top of his head,” and the e-mail noted that the U.S. Attorney’s Office would be providing this information at a later time. Weinstein told us that he was surprised by this because “the calls that give you probable cause before the guy walks in the door are . . . one of the things you’re hoping and praying to get through the wire.” He added that “the significance of [Hurley’s] failure to know that didn’t register with me until later,” when Weinstein read the ROIs about prospective purchases in the case in July 2011.

Weinstein’s February 26 e-mail summary identified five “important components of the investigative strategy,” and then went into greater detail on each of the components. The “important components” were:

- “Trying to flip straw purchasers was considered to be an extremely low-percentage, and highly risky, move”;
- “FFLs were asked to cooperate but were told NOT to complete suspicious or potentially illegal sales” (emphasis in original);
- “ATF attempted to interdict every gun it had the legal authority to seize, and attempted to interdict newly purchased guns at the first legally permissible moment”;
- “No guns were allowed to cross the border into Mexico, and there were no disputes between agents, AUSAs about whether particular guns could be interdicted”; and
- “No evidence on which to prosecute Jaime Avila until after Terry murder.”

Regarding the third bullet point about interdicting firearms, Weinstein told the OIG that what Hurley described to him during their conversation was “the opposite of gun walking.” The text under this bullet point indicated that, “[d]uring most of the investigation, the team was getting only historical information about completed gun sales” The text went on to state that if information was obtained through surveillance, the pole camera, or wiretaps “that those guns were on the move . . . ATF responded by attempting to seize the guns.” This portion of the summary continued by noting that “[l]ater in the investigation, primarily through the wires, there were times when ATF had some prospective information that a purchase was going to be made.” The text went on to state that Weinstein did not know if there were situations where the agents knew “from the wires that the purchase was going to be a straw purchase, such that there might have been PC [probable cause] to interdict the guns as soon as the purchaser left the store. I have asked the USAO that

question, and they are going to get back to me.”²⁸⁵ However, Weinstein’s summary continued by stating that:

[t]he AUSAs’ directive to the agents was that they could interdict the guns the minute they could show that these guns – which were quite expensive – were in the hands of someone other than the purchaser. So in those instances, ATF surveilled the purchaser from the store and attempted to follow him to the third party who would receive the guns. The minute the guns changed hands – typically in parking lots or other neutral locations – the investigators attempted to seize them. In most cases they used state or local officers to do these interdictions, in order to avoid revealing the federal investigation and jeopardizing the wires.

Based on the facts outlined in Chapter Four, we found that these assertions were not accurate.

As for the fourth bullet point, regarding not allowing guns to cross into Mexico, the summary indicated that “[t]he team made it an imperative to try to seize any guns they knew were headed for the border. They say, categorically, they never knowingly allowed any guns to go to Mexico.” This bullet point also noted that the agents and prosecutors were in agreement regarding whether firearms could be interdicted, and stated that the AUSAs authorized every seizure that the agents sought to do, except one. Even with regard to that one, the summary reflected that after the AUSA and agent consulted, they agreed that there was no legal basis to seize the firearms. We were troubled by the assertions in this bullet point, based on the facts outlined in Chapter Four, because they gave a misleading impression that agents and prosecutors had made it an “imperative” to seize firearms during the investigation.

As for the fifth bullet point, the summary indicated that as of January 19, Avila “was believed to be a straw purchaser, but there was no evidence at that time, and as indicated above, the tactical judgment had been made that the straws in this case were particularly unlikely to flip.” Once more, we found this representation to be inaccurate. By January 19, 2010, there was indeed evidence to support the conclusion that Avila was a straw purchaser, including his connection to Patino and his multiple purchases of firearms with cash despite having insufficient income to support such purchases.

²⁸⁵ However, the OEO cover memorandum for the first wiretap application Weinstein authorized for Operation Fast and Furious (the May 21, 2010, application) described [REDACTED]

[REDACTED] As we describe in Chapter Five, Weinstein told us that he did not review the agent affidavits in support of the Operation Fast and Furious wiretap applications he authorized but that he did review the OEO cover memoranda for those applications.

As noted, Weinstein concluded his summary by stating that “based on my conversation yesterday with the AUSA and [Criminal Division] Chief, and based on prior conversations with Dennis Burke and with the ATF SAC, this investigation was conducted – and the decisions about when to seize the guns were made – thoughtfully, carefully, and strategically.”²⁸⁶ As described below, several months later, Weinstein sent an e-mail to the Department’s senior officials indicating that he had learned additional facts that he said caused him to reach a different conclusion.

2. The Referral to the OIG, and the Department’s March and April 2011 Correspondence with Congress

On the evening of Monday, February 28, 2011, Deputy Attorney General Cole contacted the Department of Justice Acting Inspector General and told her that the Attorney General was referring the Fast and Furious matter to the OIG for investigation.²⁸⁷ Two days later, on March 2, the Department sent a letter to Sen. Grassley responding to his February 9 and February 16 letters. In the response, Assistant Attorney General Weich informed Sen. Grassley, among other things, that the Attorney General had asked the Acting Inspector General “to evaluate the concerns that have been raised about ATF investigative actions” The letter provided no substantive comments in response to Sen. Grassley’s letter.²⁸⁸

On March 3, 2011, Sen. Grassley responded to the Department’s March 2 letter by attaching additional documentary evidence which he described in his letter as demonstrating “that ATF allowed illegal firearm purchases by suspected traffickers in hopes of making a larger case against the cartels.” The attached ROIs concerned three straw purchases that were unrelated to the Fast and Furious investigation. Sen. Grassley asserted that this evidence demonstrated that the Department’s claims in the February 4 letter were not accurate, and he asked the Department to explain how those claims “can be squared with the evidence.”

²⁸⁶ Weinstein told us that he did not recall speaking with Newell about Operation Fast and Furious until after the February 4 letter had been issued.

²⁸⁷ The OIG’s involvement in the investigation actually preceded this request from the Attorney General. On January 27, 2011, Senator Grassley’s staff brought the allegations of an ATF agent to the attention of the OIG. We interviewed that agent on February 23, 2011 and began a preliminary inquiry into the matter.

²⁸⁸ However, the earlier drafts of what became the March 2 letter took a very different approach than did the Department’s final letter. The draft letter, even up to March 1, included the following sentence: “ATF does not ‘sanction’ the illegal sale of assault weapons to straw purchasers nor does it direct FFLs to engage in transactions that are known to be illegal at the time that they occur.” That statement was deleted from the letter that the Department sent out on March 2.

Also on March 3, Brad Smith advised Chief of Staff to the Deputy Attorney General Stuart Goldberg in an e-mail message that CBS News intended to run a story that evening saying that the Department, and in particular the Criminal Division, was slow to take down the straw purchasing operation connected to Agent Terry's murder and "endorsed a strategy of allowing guns to enter Mexico." The message also stated:

Last night, ATF found a document indicating that, on at least one occasion, an ATF agent witnessed a suspected straw purchaser resell firearms, but for reasons that remain unclear . . . broke off surveillance of the straw and did not take him into custody following the transaction. As described to us, this document appears contrary to statements from ATF last month indicating that its agents arrested suspects [sic] straws along the Southwest Border as soon as they had concrete evidence indicating the suspect straws were engaged in illegal firearms trafficking.

Goldberg forwarded Smith's e-mail to Deputy Attorney General Cole, who responded, "We obviously need to get to the bottom of this."

The next day, March 4, Sen. Grassley wrote to Melson regarding the murder of ICE Agent Jaime Zapata on February 15, 2011, and the reported connection of a firearm used in the shooting to an ATF investigation. Sen. Grassley asked several questions in his letter about the matter, and requested a response by March 7.

A few days later, on March 8, 2011, the Department responded to Sen. Grassley's letters of March 3 and March 4. In his brief letter, Assistant Attorney General Weich indicated that both of Sen. Grassley's letters had been referred to the OIG, and Weich noted that the Attorney General had asked the OIG "to evaluate concerns raised about Project Gunrunner." Once again, the letter did not respond substantively to Sen. Grassley's inquiries.

The Department took a similar approach in responding to a March 9 letter from Chairman of the House Committee on the Judiciary Lamar Smith and other members of the committee to Attorney General Holder seeking additional information about Operation Fast and Furious. In the response, dated April 4 and signed by Weich, the Department provided general information about the investigation, its approval as a multi-agency Organized Crime and Drug Enforcement Task Force (OCDETF) program, the January 2011 indictment, and the use of the eTrace database. The letter also stated:

Allegations have been raised about how this investigation was structured and conducted. As you note, at the request of the Attorney General, the Acting Inspector General is now investigating those allegations.

Once again, the letter provided no substantive information in response to the questions about Fast and Furious.

Burke was angered by the Department's approach to responding to Congress. In an e-mail message dated March 15, 2011, Burke made known to Weinstein, Burton, and an OLA line attorney his displeasure with the Department's responses to congressional inquiries by deferring to the OIG's pending investigation. After receiving a copy of Chairman Smith's March 9 letter to Attorney General Holder, Burke wrote:

These Members should just saddle themselves up to the defense counsel[s] table for the gun traffickers in our on-going case. Seriously, if you all send another mealy-mouth response kicking this to the IG, you will have assisted these Members in negatively impacting, to a significant degree, an existing indictment and thereby our ability to successfully prosecute these criminals.

If that is your course of inaction, I will send my own response informing them of their interference [with] this prosecution and their despicable misinformation propaganda campaign of the [CBP] Agent Terry murder case.

On March 9, the Department also had received a letter regarding Project Gunrunner from Sen. Patrick Leahy, Chairman of the Senate Judiciary Committee. The Department responded to Sen. Leahy on April 18, and once more referenced the OIG's pending investigation and made no substantive comment regarding the matter.

As we describe below, however, the Department later addressed Sen. Grassley's January 2011 allegations in a substantive manner on May 2 while responding to an April 13 letter from Sen. Grassley.

3. The Office of the Deputy Attorney General Reviews the ATF ROIs in March

In addition to asking Weinstein in late February to gather information regarding Fast and Furious, the Office of the Deputy Attorney General took other steps to examine the conduct of the investigation. Associate Deputy Attorney General Matthew Axelrod told us that Deputy Attorney General Cole asked him in March to "get up to speed quickly" on Operation Fast and Furious. Axelrod stated that he was not given a specific reason for this assignment, but that he was aware there had been media reports about Operation Fast and Furious and that it was a "hot topic." Axelrod had moved from the Criminal Division to the Office of the Deputy Attorney General in mid-March 2011. He told us that he had his first "in-depth" discussion about

Operation Fast and Furious with Brad Smith on March 8, and thereafter became deeply involved in the assignment.²⁸⁹

Axelrod made a series of requests to ATF and the U.S. Attorney's Office for ROIs and other documents related to the case. According to an internal ATF e-mail circulated among Melson, Hoover, Chait, McMahon, and others, as of March 17, 2011, Axelrod had requested the following information, with the status of ATF's response to each request indicated at the end of each request in parenthesis:

- Identification of any investigation in which ATF had ever "watched guns cross the border (including in controlled deliveries or attempted controlled deliveries) into Mexico" (in progress);
- In Operation Fast and Furious, all ROIs, including ROIs or other explanations supporting each instance in which ATF had observed a purchase of a firearm followed by a transfer, and had not intervened to prevent further distribution of the firearms (in progress);
- All Title III affidavits (still needed);
- The indictment (done); and
- A copy of ATF's Weapons Transfer Policy (ATF Order 3310.4B)(done).²⁹⁰

An internal ATF follow-up e-mail dated March 21, 2011, shows that Axelrod had "spent the weekend reading the first 370 ROIs," and based on that review requested additional documents from ATF, including attachments to and missing pages from the ROIs he had reviewed. Axelrod told us that he asked for the ROIs because "that would be a good way for me to learn . . . the facts of the investigation." The March 21 e-mail also reflects that Axelrod requested copies of "any briefing papers on the case," noting parenthetically that "DAD McMahon allegedly has a couple."

By March 24, 2011, Axelrod had reviewed most of the ROIs from Operation Fast and Furious and had separated several of them into two categories: those documenting ATF's surveillance both of the weapons

²⁸⁹ Axelrod's involvement in the review of Operation Fast and Furious ended in June 2011, when Associate Deputy Attorney General Steve Reich assumed this responsibility.

²⁹⁰ Melson was copied on this e-mail and replied that he wanted copies of all the information requested by Axelrod.

purchase from the FFL and a transfer to a third party soon thereafter; and those in which the Title III electronic surveillance combined with ATF surveillance potentially gave probable cause to arrest pursuant to 18 U.S.C. § 924(a)(1)(A).

Axelrod stated that the primary question he was focused on answering through his review was “whether ATF had knowingly permitted guns to cross the border into Mexico” in Operation Fast and Furious. He said that this was “collectively” understood by ATF, the U.S. Attorney’s Office and the Department to be the “key allegation” by Congress. After reviewing a draft of this report, Department officials told the OIG that their understanding of what was the “key allegation” was based on correspondence from Members of Congress and other congressional statements, such as press releases. For example, Department officials cited a March 24 press release from Sen. Grassley that began, “Senator Chuck Grassley continues to press the administration for answers about the policy that allowed guns to ‘walk’ over the Mexican border.”²⁹¹

Axelrod stated that based on his preliminary review of the ROIs, Title III applications, and other material, “I didn’t see any evidence yet that the core allegation that they had knowingly permitted guns to cross into Mexico was accurate.” However, he told us that his review of these materials raised additional questions about whether ATF had interdicted weapons where it had probable cause to do so. He stated that he was never able to “firmly resolve all those questions because . . . there was conflicting information.”

Axelrod told us that his review of Operation Fast and Furious was not linked to the issue of whether the statements in the Department’s February 4 letter to Sen. Grassley were accurate, stating, “the issue on the table wasn’t hey we’ve sent a letter to Senator Grassley a month ago and now folks are concerned about whether it’s accurate or not and can [you] look at that.”²⁹²

Axelrod said that he discussed at least one ROI with Cole, Goldberg, and Monaco, and may have described others. These ROIs documented circumstances that raised questions for Axelrod about whether ATF had failed to seize or interdict weapons when it may have had probable cause to do so.

²⁹¹ However, Sen. Grassley also issued other press releases that focused on other aspects of the allegations in his January 27 letter. For example, on April 14, he issued a press release that described his concern with information purporting to show that “ATF instructed gun dealers to engage in suspicious sales despite the dealer’s concerns.”

²⁹² As discussed below, however, Axelrod did have discussions about the accuracy of the February 4 letter after the Department received a letter from Sen. Grassley on April 13, 2011, asking whether the Department continued to stand by its assertion that “ATF did not sanction or otherwise knowingly allow the sale of assault weapons to straw purchasers.”

Cole stated that he did not personally review the ROIs, but that if something “particularly noteworthy” was found, he would get briefed on it. He said that their analysis focused on whether there was both probable cause and the ability to interdict the weapons that had been purchased by suspects in the investigation. Cole stated that Axelrod identified “a number of incidences where surveillance broke off.” Our review indicates that Axelrod was particularly concerned with incidents in which ATF agents conducted surveillance of firearms purchases and the subsequent transfer of the firearms to third parties without seizing or interdicting the firearms.

Cole also had several conversations with Melson about Operation Fast and Furious during the March and April 2011 period. Cole told us that initially Melson assured him that “everything was fine” with the investigation. Cole stated that Melson then began to qualify these assurances by stating that there was no legal basis to stop the straw purchasers, and that “if we had better laws, we could have stopped them.” Cole said that he learned either through Melson or Axelrod that in one incident, ATF had broken off surveillance on straw purchasers because the agents did not have their protective gear and could not leave their vehicle to continue the surveillance. He said that this story then “started to morph into . . . well, they did have their protective gear, but it was too difficult to put it on, so they didn’t pursue it.” Cole referred to this incident in an August 26, 2011, memorandum for the Attorney General entitled “Change in Leadership at ATF,” which stated in part:

In early March, Mr. Melson told us about a single Report of Investigation (ROI) that described a failure to interdict weapons by ATF, but he told us that that failure to interdict resulted from a variety of reasons unrelated to the allegations about the problems with the investigation. Only after we conducted our own review of the ROIs did we learn that, far from being the only ROI, there were numerous instances in which ATF had not interdicted weapons or made arrests despite having had an apparent lawful basis to do so.

Cole told the OIG that his confidence in ATF leadership was further undermined by his review of e-mails indicating that Melson and Hoover had asked for an “exit strategy” for the investigation in March of 2010, and that they knew months later that weapons had continued to flow into Mexico. According to Cole, Melson and Hoover acknowledged that they “probably should have done more to bring it down,” but claimed that ATF was not making arrests “because the U.S. Attorney’s Office in Phoenix wouldn’t give them the green light” to do so. However, Cole told the OIG that “if you’ve got an operation and guns are going across the border, and you think you ought to take it down for that reason, you should take it down, you should stop it.”

B. Acting Director Melson Reviews the Title III Affidavits in March and Concludes that the February 4 Letter is Inaccurate

Melson independently reached his own conclusion about the accuracy of the Department's February 4 letter after reviewing the Title III affidavits for Operation Fast and Furious. Melson told us that while onboard a flight on March 30, 2011, he read the wiretap affidavits for the first time and concluded that the February 4 letter contained inaccurate statements. Melson said that he found particularly troubling the statement in the February 4 letter that Sen. Grassley's allegation "that ATF 'sanctioned' or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico – is false." He explained that although the statement was "technically true," Congress "wanted us, or the Department, to give them a broader answer." He stated that the affidavits documented instances in which guns had crossed into Mexico and were tied back to purchases for the purpose of establishing probable cause that "these guys were taking guns to Mexico." Melson summarized his concerns as follows: "We can't say on one hand, Judge, there's probable cause to believe that these guys are doing that, and on the other hand saying we never did it. So, you know, it was just too close for my comfort."

Melson stated that he told Burke of his concerns in the airport during a layover in Phoenix.²⁹³ Burke told us he recalled the conversation with Melson in the airport, and said that Melson was "astounded" by the fact that one potential interceptee under the Title III application had been permitted to cross into Mexico and back into the United States multiple times. Burke had not read the Title III affidavits as of that point in time, and said that he later found the reference to the border crossings that Melson had identified. Burke stated that he then contacted Newell and told him he thought that Melson was "misunderstanding" the issue. According to Burke, Newell said that his office was discussing the Title III affidavits with Melson to explain them "from our [the Phoenix Field Division's] perspective."

In addition to telling Burke of his concern upon reading the Title III affidavits on March 30, 2011, Melson immediately sent an e-mail, entitled "Hold the presses," to Hoover, Rasnake, Acting Chief of Staff Pelletiere, Office of Public Affairs Chief Scot Thomasson, and Special Assistant to the Director Jeffrey Sarnacki advising them of his concerns. Among other things, Melson said in his email, "[w]e also have to change the statement Matt is working on for Mexico, and the statement in the first Grassley response that was actually sent." At the time, the Department also was preparing to respond to the letter

²⁹³ Burke was on the same flight as Melson.

dated March 9, 2011, from Members of the House Judiciary Committee, including Chairman Smith, concerning the Fast and Furious investigation.

Rasnake forwarded Melson's e-mail to Assistant Director for Public and Governmental Affairs James McDermond and Acting Deputy Assistant Director for the Office of Field Operations (Western Region) Mark Potter and wrote, "Wow." Pellettiere responded to Melson about 30 minutes later and noted that "I have not returned the proposed language for Mexico to Matt yet. The proposed response to Mr. Smith does not address these issues in any form." Melson responded to Pellettiere, "But our statement about the straws not taking the guns over the border may not be correct." As Pellettiere indicated, the Department's response to Chairman Smith and other Members of the House Judiciary Committee, which was dated April 4, 2012, did not respond substantively to the questions asked about the Fast and Furious investigation and instead noted that the OIG was investigating the allegations that had been made.

Just ten minutes after writing his "Hold the presses" e-mail message to ATF colleagues, Melson wrote to Associate Deputy Attorney General Axelrod to advise him of his concerns. However, rather than title his e-mail, "Hold the presses," Melson simply entitled his e-mail to Axelrod "F and F." Additionally, instead of describing his concerns about the February 4 response to Sen. Grassley, as he had done for his ATF colleagues, Melson simply said to Axelrod, "you need to read the [Title] III affidavit, still under seal. Changes some things." Melson thereafter sent at least two additional e-mails to Axelrod referencing the paragraphs in the wiretap affidavit dated July 2, 2010, which concerned him. Axelrod told us that he had already read the Title III applications by the time he received Melson's e-mails on March 30 and 31. He stated that Melson never told him that the Title III applications caused him to have specific concerns regarding the February 4 letter. Axelrod said that he understood Melson's messages to indicate that "he was beginning to come to sort of where I was, which is that there are questions. There are some things here that bear further investigating to figure out what had happened."

Axelrod also noted that Melson later approved a May 2, 2011, letter from the Department to Sen. Grassley that reaffirmed the assertion that "ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico."²⁹⁴

²⁹⁴ We discuss the Department's May 2 letter below.

C. Weinstein and the Office of the Deputy Attorney General Learn of Other Flawed ATF Investigations

Weinstein told us that in March 2011 he learned of other incidents, unrelated to Fast and Furious, in which ATF may have facilitated the transfer of weapons to gun traffickers. Weinstein told the OIG that on March 4, he, Goldberg, and Hoover were planning to brief Attorney General Holder on ATF's E-Trace system, but that the briefing was cancelled. He stated that in the hallway outside the Attorney General's conference room, he heard Hoover "describing to Stuart Goldberg that they have now found two or three" firearms trafficking incidents that were not related to Operation Fast and Furious. In e-mails to Goldberg (on March 9) and Grindler (on March 10), Weinstein wrote, "When we were talking to Billy in the hall the other day, he mentioned 2 or 3 incidents in which an ATF agent (inexplicably) sent a CI [confidential informant], posing as a straw, in to a store to make a purchase and then had the CI hand those guns off to a trafficker."²⁹⁵ Weinstein stated that he understood that the weapons were not seized in these incidents.²⁹⁶

Weinstein told us that at this point he still believed that guns had not been allowed to "walk" in Operation Fast and Furious. These unrelated incidents, however, were significant for him "because now there were cases that occurred on the watch of people who were running ATF under this administration." Weinstein told the OIG that "once I . . . learned that there were cases on our watch in which guns had walked, my orientation was that that needed to be disclosed to Congress." In a March 21, 2011, e-mail to Johnston, Axelrod, Raman, and other Criminal Division officials, Weinstein wrote that there appeared to be senior management agreement that "we should try to add some language to our congressional responses that captures, with appropriate disclaimers, the fact that to date ATF has discovered only a few (non-F&F) instances where agents intentionally let guns 'walk.'"

Weinstein also told us that his knowledge of these incidents changed the way he viewed Operation Wide Receiver. As noted earlier in this chapter, Weinstein had been aware of Operation Wide Receiver since April 2010, but told us he did not raise it with anyone at the Department during the drafting of the February 4 response to Sen. Grassley because it "had not come to mind as

²⁹⁵ Weinstein told us that he sent this e-mail to Goldberg and Grindler because they were recipients of his February 26, 2011, e-mail message that described Operation Fast and Furious in some detail, and he did not want these officials to think that he had omitted this information from that earlier message.

²⁹⁶ After reviewing a draft of this report, Department officials noted that the "2 or 3 incidents" related to one case that had also been described in Sen. Grassley's March 3, 2011 letter.

being possibly relevant to this response,” and in any event considered it an aberrant investigation that had been conducted under the prior administration. However, Weinstein stated that “once I discovered that Wide Receiver wasn’t aberrant, my view was we’ve got to tell Congress, especially to the extent that gun walking had occurred on our watch.” Weinstein said that he advocated to Associate Deputy Attorney General Steven Reich to tell Congress about it following Reich’s arrival at the Department in June 2011. After reviewing a draft of this report, the Department commented that it “did, in fact, offer a briefing that summer to Committee staff regarding Wide Receiver but the Committee staff declined the offer.” Weinstein also said he recalled that CBS had run a story that made reference to Operation Wide Receiver at this time.²⁹⁷

Cole stated that by the summer of 2011, in addition to realizing that Operation Fast and Furious was flawed, he also learned of Operation Wide Receiver, and other ATF investigations. He stated that these investigations contributed to the conclusion that ATF had not made every effort to interdict weapons purchased illegally, as the Department had represented to Sen. Grassley in its February 4 letter.

Cole did not identify a specific piece of information that marked the point at which his confidence in the February 4 letter shifted to doubt. Rather, he

²⁹⁷ CBS reporter Sharyl Attkisson e-mailed the Department’s Office of Public Affairs Director Tracy Schmaler on March 8, 2011, to ask about allegations that prior to Operation Fast and Furious ATF “knowingly allowed weapons to get into the hands of suspected cartel suppliers similar to the allegations in Fast and Furious,” including in an operation called Wide Receiver. CBS ran the story on March 8, 2011. On March 9, Schmaler e-mailed officials in the Office of the Deputy Attorney General and the Office of the Attorney General, including Goldberg, Monaco, Smith, Grindler, and Wilkinson, to summarize the story. The e-mail contained an excerpt from Attkisson’s interview of an ATF agent in which Attkisson stated that “multiple sources tell cbs news the questionable tactics were used in more than one operation and date as far back as 2008 in the tucson area. One case was called ‘wide receiver.’”

That same day, a colleague of Schmaler’s in the Office of Public Affairs (who had attended the meeting with ATF officials on April 28, 2010, with Weinstein and Trusty that is described in Chapter Three) forwarded a portion of Schmaler’s e-mail to Raman, Weinstein, and James Trusty, stating, “Here’s the tease CBS apparently did last night about their continuing coverage – note mention of wide receiver.” Hoover forwarded a web posting of Attkisson’s report to Brad Smith and Monty Wilkinson on March 10, writing in his e-mail message, “I hope the AG understands that we did not allow guns to ‘walk’.” Wilkinson forwarded this message to Attorney General Holder, who replied, “Do they really, really know?” Despite this email traffic, we saw no substantive reaction within the Department at the time to the media reports about Operation Wide Receiver until after an Associated Press story about that investigation ran in October 2011, which we discuss below.

After reviewing a draft of this report, Department officials cited Hoover’s March 10 e-mail to Smith and Wilkinson as an example of how Department officials continued to receive assurances from component officials, including senior component officials such as Hoover, after February 4 that ATF had not allowed firearms to “walk.”

stated that the process of realizing that the letter was inaccurate to a “sufficient degree” to warrant its withdrawal was a “gradual” one.

As facts about these other ATF investigations became known to Department leadership, Weinstein told the OIG that by August 2011 he also no longer believed that Operation Fast and Furious had been the well-run investigation he believed it to be when he was asked to gather information about it in February. On August 4, 2011, Weinstein sent an e-mail to Goldberg and others stating that based on his review of ROIs and the recent Congressional testimony of William Newell and other ATF officials, his initial assessment of Operation Fast and Furious “would be different.”

D. The Department Publicly Disavows the February 4 Letter

The review of Operation Fast and Furious that the Department conducted, coupled with revelations of other flawed investigations, led senior Department leadership to realize that the February 4 letter to Sen. Grassley contained inaccuracies. The concerns about the accuracy of the February 4 letter were reflected in the Congressional testimony of Weich, Breuer, and Attorney General Holder in June and November of 2011.

1. The Department’s May 2 Letter to Sen. Grassley and Weich’s June 15 Congressional Testimony

On April 13, 2011, Sen. Grassley wrote to Attorney General Holder to again express frustration with the Department’s failure to provide requested documents. Sen. Grassley wrote that this “failure to cooperate is especially troubling in light of the February 4, 2011, reply to my initial letter.” The letter asked for a written response to the following question:

Do you stand by the assertion in the Department’s reply that the ATF whistleblower allegations are “false” and specifically that ATF did not sanction or otherwise knowingly allow the sale of assault weapons to straw purchasers? If so, please explain why in light of the mounting evidence to the contrary.

Attached to the April 13 letter were several e-mail exchanges between a cooperating FFL and Group VII Supervisor David Voth from April and June 2010. In the e-mails, the FFL repeatedly sought assurances that none of the weapons he was selling were to “bad guys” or were reaching Mexico. In one message, Voth replied that “if it helps put you at ease we (ATF) are continually

monitoring these suspects using a variety of investigative techniques which I cannot go into detail.”²⁹⁸

Weich, on behalf of the Department, responded to Grassley on May 2, 2011, stating in part:

You have asked whether it remains our view that “ATF did not sanction or otherwise knowingly allow the sale of assault weapons to straw purchasers.” In fact, my letter, dated February 4, 2011 said: “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.” It remains our understanding that ATF’s Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico. You have provided us documents, including internal ATF emails, which you believe support your allegation. As you know, we have referred these documents and all correspondence and materials received from you related to Operation Fast and Furious to the Acting Inspector General, so that she may conduct a thorough review and resolve your allegations. While we await her findings, the Attorney General has made clear to prosecutors and agents working along the Southwest Border that the Department should never knowingly permit firearms to cross the border.

Early drafts of the May 2 letter indicate that Department leadership considered taking a different approach in responding to Sen. Grassley’s April 13 letter. OLA initially intended to remark only on Sen. Grassley’s truncated recitation of the Department’s February 4 letter:

You have asked whether it remains our view that “ATF did not sanction or otherwise knowingly allow the sale of assault weapons to straw buyers.” That is an incomplete quote from my letter dated February 4, 2011. My letter stated, “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.” Thereafter, you provided to us documents, including internal ATF e-mails, in support of your allegations, which the Attorney General referred to the Acting Inspector General. The statement in my letter to you was true to the best of my knowledge at the time, and

²⁹⁸ This FFL’s concerns about his role in the investigation and his interactions with Voth and AUSA Hurley are described in Chapter Four.

in the course of her investigation the Acting Inspector General[] will thoroughly review the documents that you have provided to us since that time.

Axelrod, Burton, Weich, Goldberg, Cole, and Office of Public Affairs Director Tracy Schmaler provided comments and edits to the draft, resulting in the final version that stated:

It remains our understanding that ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico.

A review of e-mail records documenting the drafting of the May 2 letter that were provided to the OIG shows that this sentence was included in an e-mail from Goldberg that was initially sent only to Schmaler on April 29. Goldberg's email presented Schmaler with "options 1 and 2." Option 1 was a paragraph that included the sentence "It remains my understanding that ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico." Option 2 was the same paragraph but without the sentence. Schmaler replied:

As a general matter not wild about restating the sentence if we're not going to go [with] version #1 . . . and I'm not up on all the latest, but I got the sense we couldn't be that definitive or weren't sure we could. Version #2 is problematic – we restate the sentence – don't clarify or refute. Seems the worst option in my view. I sent edits to matt earlier that notes the recitation of quote in Grassley's letter was incomplete, doesn't restate it, but makes clear that we are aware of the concerns raised by ATF agents and that's why AG referred. Happy to discuss in more detail.

Goldberg then sent the two options, along with Schmaler's reply, to Axelrod. Axelrod forwarded the revised draft letter incorporating the sentence from option 1 (slightly modified to begin, "It remains our understanding . . .") to Burton and Weich. The draft was also sent to Deputy Attorney General Cole and Principal Associate Deputy Attorney General Monaco, and to two officials in the Office of the Attorney General, Molly Moran and Monty Wilkinson, who provided no response.

Axelrod told the OIG that at this point his focus continued to be on the allegation that ATF had knowingly allowed straw purchasers to take firearms into Mexico, and that he did not consider Sen. Grassley's April 13 letter to accurately recite the statement in the Department's February 4 letter about

this allegation.²⁹⁹ He stated that the May 2 letter was the Department's response to Sen. Grassley's accusation that the Department had made an inaccurate statement to Congress. Axelrod summarized to the OIG this portion of the May 2 letter as follows:

This is what we told you, and it remains our understanding that that is accurate. But there [are] questions about what happened here. There are things that, well, and we referred them to the IG to ask the IG to look at it. But based on what we've seen so far, we, we haven't seen evidence that ATF knowingly permitted straws to take guns to Mexico.

Axelrod added that the issue of whether ATF had knowingly permitted guns to go to Mexico was important, stating:

[I]t matters whether ATF knowingly permitted guns to go into Mexico . . . because . . . the stuff I'm hearing from Arizona about oh the law is different out here. You don't understand. It's hard to prove what's in a straw purchaser's mind. All of that falls away when you're talking about guns crossing the border into Mexico. That sort of debate, discussion I was having with, with Arizona would have been moot if ATF had let guns go into Mexico.

Weich, who also worked on the May 2 letter, explained the sentence and his subsequent testimony about it as follows:

Well, well, the question is, did the straw buyers, themselves, take the guns into Mexico or did the buyers pass them on to others. By the time of May 2nd, and on many instances over the course of the period from February 4th to December when the letter is withdrawn, by this time we had doubts about the, our denial of the allegations in Senator Grassley's letter. And we said that in various ways, including in my [June 15, 2011] testimony. I said we're not clinging to the . . . denial in the February 4th letter. In this letter, we're doing just that. We're seeing kind of, you know, the words were carefully chosen here. It . . . remains our understanding that ATF's Operation Fast and Furious did not do this. And what we sort of quickly say, you have provided us

²⁹⁹ The statement Axelrod was referring to was: "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." The May 2 letter to Sen. Grassley was silent about the Department's assertion in the February 4 response that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico."

documents, including internal emails, which you believe support your allegation and, as you know, we referred them to the Office of the Inspector General. So we were conveying in this paragraph, look, we think that we were right on February 4th but we're not sure and that's why we've sought an independent review. . . . So in all sorts of ways, we were conveying our uncertainty, including in this letter.

When asked whether the statement in the February 4 letter denying that ATF had knowingly allowed the sale of firearms to a straw purchaser who then transported them into Mexico was intended as a “literally true” statement, Weich responded that he was not as involved with drafting the February 4 letter as he was with drafting the May 2 letter, and thus was “not equipped to say but could be.”³⁰⁰ Weich added, “By the time of May 2nd, yes. We were very much trying to do that, to be very careful to defend what we could . . . defend with certainty and then make clear that we have our doubts and that’s why the Inspector General was reviewing.”

After reviewing a draft of this report, Weich further explained the statement in the May 2 letter as responding to Sen. Grassley’s direct request for a substantive response to his April 13 letter by providing a “status report” on the Department’s position at that time. He added that the Department also wanted to memorialize its position before the Attorney General’s forthcoming testimony before the House Oversight and Government Reform Committee on May 3 and the Senate Judiciary Committee on May 4.

After the sentence from option 1 was incorporated into the draft response, Axelrod sent the draft to Melson, Hoover, Burke, and others for concurrence on April 29, stating, “I want to make sure that we are on 100% solid ground saying that ‘It remains our understanding that ATF’s Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico.’” Both ATF and the U.S. Attorney’s Office approved the draft.³⁰¹

On May 1, Weich wrote to Burton to ask whether the sentence “It remains our understanding that ATF’s Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico” was “based on the distinction between Fast and Furious and other ATF operations.” Burton

³⁰⁰ As discussed above, the edits that resulted in this narrow statement in the February 4 letter were made primarily by Brad Smith, who told the OIG that he had not intended to create a statement that could be defended as true only in a literal sense.

³⁰¹ Criminal Chief Patrick Cunningham proposed changing the language from “straw buyers” to “suspected straw buyers.” Deputy Attorney General Cole rejected this proposed edit, and Goldberg concurred with Cole. The May 2, 2011, letter to Sen. Grassley is attached to this report as Appendix E.

responded on May 2 that according to Axelrod, the sentence “pertains to F&F, and we haven’t checked all other ATF operations.” A few hours later, the signed May 2 letter was sent by e-mail to Sen. Grassley and Sen. Leahy.

After reviewing a draft of this report, Department officials stressed to the OIG that between February 4 and May 2, they continued to receive and rely upon assurances from component officials, including senior component officials, that ATF had not knowingly allowed firearms to be transported into Mexico in Operation Fast and Furious. Among the documents cited in support of this assertion was an e-mail from Burke to Weinstein forwarding a message written by Patrick Cunningham. Cunningham’s message attached a document entitled “Plainspoken Response to Congressmen and NRA Letters of March 9, 2011,” which stated in part:

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.

Department officials also cited a draft letter from Melson to a senior Mexican government official that was forwarded to Cole, Goldberg, Schmalzer, Weinstein, and others for review on April 20. The draft stated, in part:

At no time did ATF agents observe weapons from Operation Fast and Furious cross into Mexico.

Department officials stated that the sentence “It remains our understanding that ATF’s Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico” was an effort to distinguish between ATF knowingly allowing firearms to go to Mexico versus negligently allowing firearms to go to Mexico. These officials also stated that the sentence was intended to correct the record following the incomplete quote of the Department’s February 4 letter in Sen. Grassley’s April 13 letter, and to show that the Department still believed that ATF had not knowingly allowed firearms to cross into Mexico in Operation Fast and Furious.

The approach taken by the Department in its May 2 response letter to Sen. Grassley differed in a significant way from its four previous response letters to Congress regarding Operation Fast and Furious. As outlined above, the Department’s March 2 and March 8 letters to Sen. Grassley, its April 4 letter to the Chairman and Members of the House Judiciary Committee, and its April 18 letter to the Chairman of the Senate Judiciary Committee all noted that Attorney General Holder had referred the matter to the OIG and provided no substantive response. By contrast, the May 2 letter provided at least a partial substantive response, and did so in a way that we found could be read

as crafting a statement that was true only in a literal sense and that reaffirmed, at least in part, the Department's February 4 letter.

Department officials discussed the May 2 letter in connection with preparing for the Attorney General's forthcoming congressional testimony on May 3 and 4. Specifically, on the morning of May 3, Chief of Staff Grindler asked Axelrod in an e-mail message, "How do we explain being somewhat definitive ('it remains our understanding') on the question whether ATF knowingly allowed straw purchasers to take guns to Mexico and defer to the OIG on the other factual questions?" Axelrod replied:

I would try to avoid having him engage in the specifics. But if pressed, he could say that taking guns to MX is a separate crime. If a straw were to try to cross the border with a gun and ATF knew, they wouldn't let it happen (unless they were coordinating with MX authorities, which happened in a handful of non-Fast and Furious cases). It's a bright line. The question of whether ATF allowed sales to straws will take longer to investigate, since it's not always so clear that someone is a straw rather than a lawful gun buyer.

Axelrod's response to Grindler thus provided a suggestion as to how the Attorney General could explain why the recently issued May 2 letter provided a substantive response as to one issue and a deferral to the OIG as to other issues. The Attorney General was not asked to provide such an explanation in his May 3 or 4 testimonies.³⁰²

On May 3, the day after receiving Weich's May 2 letter, Sen. Grassley and Chairman of the House Committee on Oversight and Government Reform Darrell Issa responded in a joint letter to Attorney General Holder, writing, "we were surprised and disappointed to see the Department repeat, in slightly different language, its denial" of the January 2011 allegations. The May 3 letter continued:

In its latest denial, the Department seems to focus more on whether ATF knew guns were being trafficked to Mexico than

³⁰² However, in his opening statement in the May 4 hearing, Sen. Grassley referred to the May 2 letter, stating in relevant part:

According to Monday's letter, quote, "ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico," end of quote. It is particularly disturbing that the department would renew its denial at this late date in light of the growing evidence in support of the allegations. Documents and witness testimony show that the AFT [sic] allowed the sale of semi-automatic weapons to many straw purchasers, even after it knew that the guns they previously purchased were recovered in Mexico.

whether the ATF knew they were being purchased by straw buyers. While it might be typical in Washington for lawyers to narrowly parse statements and argue over fine distinctions to confuse the issue, those are not the kind of answers we believe the Justice Department should give to Congress when asked straightforward questions about such a serious matter as this one.

Below his signature, Sen. Grassley handwrote a post script to Attorney General Holder:

You should check to see if you are getting accurate information from your staff.

You might be ill-served.

As noted, Weich told the OIG that by the time of the May 2 response, “we had doubts about . . . our denial of the allegations in Senator Grassley’s [January 27] letter.” He stated that the wording of the May 2 response was “carefully chosen,” and was intended to convey that “we think that we were right on February 4th but we’re not sure and that’s why we’ve sought an independent [OIG] review.”

Weich stated that the Department again sought to signal its uncertainty about the accuracy of the February 4 letter through his testimony before the House Committee on Oversight and Governmental Reform on June 15, 2011. During that hearing, Weich was asked several questions about substantive aspects of Operation Fast and Furious, such as who had authorized the program. In responding to such questions, Weich declined to provide substantive answers, frequently citing the ongoing OIG review or his lack of personal knowledge. However, when asked about the statement in the February 4 letter that ATF did not allow the sale of firearms “to a straw purchaser who then transported them into Mexico” and the statement in the May 2 letter that “[i]t remains our understanding that ATF’s Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico,” Weich testified:

Those particular statements remain true for the technical reason that the committee’s report issued last night described. The straw purchasers don’t take guns to Mexico. And in any event, ATF doesn’t sanction or approve of the transfer of weapons to Mexico.

When asked later in the hearing about the Department’s February 4 and May 2 letters, Weich testified:

As the committee’s report pointed out, there is a technical explanation for why the allegation that ATF sanctioned the sale of guns to straw purchasers who then transported them to Mexico is not an accurate statement, and so we said that it was false.

However, serious allegations have come to light, including the testimony of the agents here today, that cause Attorney General Holder to want there to be an independent review of this matter, and he has initiated that review. So we are not clinging to the statements in those letters.

The context of the testimony makes clear that Weich's statement "we are not clinging to the statements in those letters" was a reference to the Department's February 4 and May 2 letters.³⁰³

2. Breuer's Testimony on November 1

On November 1, 2011, Breuer testified before the Subcommittee on Crime and Terrorism, Senate Judiciary Committee, regarding international organized crime.³⁰⁴ In advance of his testimony, on October 31, Breuer released a public statement commenting upon Operation Wide Receiver and his failure to disclose his knowledge of that investigation prior to the Department's February 4 letter. Breuer stated that "the leadership of ATF and the U.S. Attorney's Office in Arizona repeatedly assured individuals in the Criminal Division and the leadership of the Department of Justice" that Sen. Grassley's allegations in his January 27 letter were untrue. Breuer's statement continued:

As a result, I did not draw a connection between the unacceptable tactics used by the ATF years earlier in Operation Wide Receiver and the allegations made about Operation Fast and Furious, and therefore did not, at that time, alert others within Department leadership of any similarities between the two. That was a mistake, and I regret not having done so.

³⁰³ A transcript of Weich's testimony is available at <http://oversight.house.gov/wp-content/uploads/2012/04/6-15-11-Full-Committee-Hearing-Transcript.pdf>. The report to which Weich referred in his testimony is entitled "The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents," a joint staff report prepared by Chairman Issa and Sen. Grassley and issued on June 14, 2011. The report stated that the argument that ATF did not sanction the sale of weapons to straw purchasers who then transported them into Mexico "relies on the fine distinction that it was not the straw purchasers themselves who physically crossed the border with the weapons, but rather the unknown third parties to whom they transferred the firearms." Joint Staff Report at 50.

³⁰⁴ Breuer's testimony came after an October 4, 2011, Associated Press story about Operation Wide Receiver entitled, "Bush-era probe involved 'letting guns walk'." The story outlined information about Operation Wide Receiver and also noted the October 2010 e-mail exchange between DAAG Weinstein and the Deputy Chief of the Criminal Division's Gang Unit, James Trusty, regarding the possibility of Breuer attending the press conference to announce the indictments. (This e-mail exchange is discussed in Chapter Five.) The Associated Press story was sent by e-mail to Attorney General Holder, who, even though he had seen a March 2011 CBS report about Operation Wide Receiver, responded, "WOW."

During the hearing, Sen. Grassley asked Breuer whether the statement in the Department's February 4 letter that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico" was "absolutely false" in light of the tactics used in Operation Wide Receiver. Breuer responded, "Yes, Senator. What I – ." Sen. Grassley then interjected, "That is all I need to know, if that's correct."

Breuer completed his response in a written submission, stating in relevant part:

In recent weeks, I have seen reports suggesting that, during my November 1, 2011 testimony, I acknowledged knowing that the February 4 letter was inaccurate at the time it was submitted. I want to make clear that such an interpretation of my testimony is absolutely incorrect. . . . [A]s I have stated, knowing what I know now was a pattern of unacceptable and misguided tactics used by the ATF, I regret not having drawn a connection between the allegations relating to Operation Fast and Furious and the inappropriate tactics used years earlier in Operation Wide Receiver.

Breuer told the OIG that although he was in Mexico when the February 4 letter was being drafted, he "wished . . . that a light bulb had gone off and said, well you know, there was that screwed up case years earlier." Breuer went on to state that the relevance of Operation Wide Receiver to Operation Fast and Furious would have been "tenuous, but it would have suggested that at least on one other occasion in the agency's history when involved in a gun trafficking case, agents lost track of guns, and we're aware that guns were ending up in Mexico."

Breuer told the OIG that the first draft of his statement to Congress acknowledging responsibility for failing to raise Operation Wide Receiver to Department leadership was prepared by the Office of the Deputy Attorney General, and that he then worked on the statement with his staff in the Criminal Division. He stated that he wanted to "take as much responsibility as I could," adding that he believed "there was an expectation that I would step up to the plate, and I was willing to do it."

3. Attorney General Holder Acknowledges the February 4 Letter is Inaccurate in his Testimony on November 8

Attorney General Holder testified on November 8, 2011, before the Senate Judiciary Committee about a wide range of matters. When Sen. Grassley asked him about the Department's February 4 letter, Holder stated:

There was information in that letter that was inaccurate. The letter could have been better crafted, we were relying on – in the

crafting of that letter people were relying on information provided to them by people who were, we thought, in the best position to know what was accurate. People in the U.S. Attorneys' Office, people at ATF, people who themselves have now indicated in their congressional testimony before the House that they were not aware of the tactics that were employed. As a result of that, the information that is contained in the February 4th letter to you was not in fact accurate. And that is – I regret that.

Holder's November 8 testimony represented the first explicit public acknowledgement by a Department official that the February 4 letter was not accurate.

E. Senior Department Officials Conclude that the February 4 Letter Should be Withdrawn

On November 9, 2011, Chairman Issa wrote to Weich to request information specifically related to the drafting of the February 4 letter, including a list of individuals who helped write it, draft versions of the letter, and all communications, including e-mails, referring or relating to the development of the letter. As noted in the November 9 letter, this request covered some of the same materials sought through an October 12, 2011, House of Representatives subpoena to Holder.

Ultimately, on December 2, 2011, the Department issued a letter withdrawing its February 4, 2011, response to Sen. Grassley. Attached to the December 2 letter were 1,364 pages of what the Department labeled "highly deliberative materials" – primarily internal e-mails and early drafts of the February 4 letter – purporting to show how inaccurate information came to be included in the letter.

Regarding the timing of the decision to withdraw the February 4 letter, Attorney General Holder told the OIG that "it was a process when we finally got to the point where we said . . . no matter how you look at this, we have to correct the record. We have to . . . do what I think is a relatively extraordinary thing and say what we told you back then is simply not consistent with the facts . . . as we now know them."

We asked Cole why it took the Department until December to withdraw the February 4 letter. He stated that although doubts about the letter began to surface in March 2011, he first wanted to make sure that all relevant documents were reviewed to "have as good an understanding of the facts as I can possibly have." Cole stated that before taking the "fairly dramatic step" of telling Congress that the letter contained false information, he wanted to make sure that there was nothing in the records to change his view before committing to the withdrawal. According to Cole, gathering the documents for

review took a long time because ATF's production of documents to Congress "had not gone well" initially, and the Department had to devote considerable resources to the effort.³⁰⁵

Cole noted that as the process progressed, the Department was not affirmatively asserting to Congress that the letter was accurate, but rather was taking steps to indicate to Congress that it had some concerns with the letter. Cole cited Weich's testimony as an example of how the Department gave "very strong indications" of its concerns.

Lastly, Cole stated that in deciding to withdraw the letter, he and others also decided to provide Congress the documents showing how inaccurate statements came to be included. He stated that the document production was a "big step" because the Department generally doesn't disclose internal deliberative materials, and the vetting process involved a "fair amount of work."

Grindler told the OIG that before the final decision to withdraw the letter had been made, there was a division of thinking within the Department leadership about this issue. Grindler stated that some officials believed that the Department "had already essentially communicated that we weren't standing by that letter," and that it was therefore unnecessary to withdraw it.

Margaret Richardson, a Deputy Chief of Staff and Counselor in the Office of the Attorney General who helped draft the December 2 letter, told the OIG that by the time of the Attorney General's testimony on November 8, there were "signals" from Congress that members believed that "it was time for us to withdraw the [February 4] letter." She added that "ultimately the decision was made to provide all of the documents that went into the drafting so that it would be clear not only that we were withdrawing it but that there was no intent to mislead Congress in the drafting of it."

F. The Department Formally Withdraws the February 4 Letter and Produces Internal Documents to Congress

By a letter dated December 2, 2011, to Sen. Grassley and Chairman Issa, Deputy Attorney General Cole wrote that:

facts have come to light during the course of this investigation that indicate that the February 4 letter contains inaccuracies. Because

³⁰⁵ According to the Department's comments after reviewing a draft of this report, ATF had primary responsibility for the production of documents to Congress during this period. Axelrod told the OIG that he was involved in this production process until June 2011. He stated that he was reviewing the documents being produced to Congress pursuant to the March 31, 2011, subpoena as part of his review of Operation Fast and Furious.

of this, the Department now formally withdraws the February 4 letter.

Cole further wrote:

Under the unique circumstances, we have concluded that we will make a rare exception to the Department's recognized protocols and provide you with information related to how the inaccurate information came to be included in the letter.³⁰⁶

Cole told the OIG that the final decision to withdraw the February 4 letter and produce the documents was made by Attorney General Holder, in consultation with Grindler, Goldberg, himself, and other senior Department officials. He stated that he could not recall there being any opposition to the decision within the Department.

1. Specific "Inaccuracies" Cited by Department Leadership

Although the December 2, 2011, letter withdrew the February 4 letter, it did not specifically identify which portions of the February 4 letter were inaccurate. However, during interviews with the OIG, senior Department officials pointed to two sentences in the February 4 letter, one of which they stated was inaccurate, and a second sentence that Deputy Attorney General Cole characterized as "ambiguous." These were the same two sentences repeatedly referred to by Sen. Grassley in numerous letters to the Department in 2011:

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. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

The December 2 letter contained the above excerpt from the February 4 letter, but did not directly characterize it as inaccurate. Rather, the excerpt was used to show the language that resulted after "drafts of the letter were sent to the leadership of ATF and the U.S. Attorney's Office for review and comment, and thereafter circulated within those offices for review and comment by others."

³⁰⁶ DAG Cole's December 2, 2011, letter to Chairman Issa and Sen. Grassley is attached to this report as Appendix F.

Cole told the OIG that the second of these sentences “is probably the greatest inaccuracy in the letter, the most glaring inaccuracy, based on what we started to find out.” Grindler said that the general consensus among Department leadership was that this sentence was inaccurate after officials came to realize that ATF possibly had not interdicted weapons when it could have and that “surveillances had been dropped.”

In addition to Operation Fast and Furious, Cole cited Operation Wide Receiver and three other ATF weapons trafficking investigations as reasons why this sentence was not accurate. Holder also told us that Operation Wide Receiver factored into why he regarded the second sentence to be inaccurate.

Regarding the first of the two sentences, Cole stated that it was more “ambiguous” than the second sentence. He said he did not believe that ATF “knowingly” allowed the sale of weapons to a straw purchaser for transportation into Mexico. He noted, however, that even if a straw purchaser had not himself transported the weapons into Mexico, the straw purchasers were involved in a “joint aiding and abetting activity, and could well be drawn within the ambit of that sentence.” He added that it was “close enough, we’re not going to quibble, we’re withdrawing the letter.”

Grindler stated that he did not have sufficient knowledge of the facts to state whether this first sentence was inaccurate, but noted that if the straw purchasers handed the weapons off to others for transportation into Mexico, the sentence was “literally correct.”

2. Responsibility for Including Inaccurate Information in the February 4 Letter

By releasing the internal materials to Congress, according to the December 2 letter, the Department leadership sought to highlight that, in responding to the allegations in Sen. Grassley’s letters:

Department personnel, primarily in the Office of Legislative Affairs, the Criminal Division and the Office of the Deputy Attorney General, relied on information provided by supervisors from the components in the best position to know the relevant facts: ATF and the U.S. Attorney’s Office in Arizona, both of which had responsibility for Operation Fast and Furious. Information provided by these supervisors was inaccurate. We understand that, in transcribed interviews with congressional investigators, the supervisors have said that they did not know at the time the letter was drafted that information they provided was inaccurate.

The letter then described how inaccurate information flowed from the component supervisors to the officials at Main Justice by providing excerpts from Burton’s handwritten notes. As discussed earlier in this chapter,

Burton's notes memorialized her conversations on January 28 with Melson and others, and on February 1 with Hoover and Weinstein. The December 2 letter pointed out that certain statements in Burton's notes "track almost verbatim the inaccurate information included in the [February 4] letter." Among the excerpts from Burton's notes was the statement that "ATF doesn't let guns walk." After reviewing a draft of this report, a Department official stated that prior to issuing the December 2 letter, she asked Hoover by telephone whether he had made the statements in Burton's notes and that Hoover said he had. Another Department official said he asked Weinstein who had made the statements, and that Weinstein answered that Hoover had made them. However, in Hoover's later interview with the OIG, Hoover stated that he thought Weinstein had made the statement. In drafting the December 2 letter, Department officials would not have known that conflicting information would later emerge from Hoover about the source of this statement.

In effect, the December 2 letter placed responsibility for the inaccuracies in the February 4 letter with Melson, Hoover, and Burke – the supervisors at ATF Headquarters and the U.S. Attorney's Office who were "in the best position to know the relevant facts." Cole stated that he believed that this allocation of responsibility was appropriate. As to those at the Department who drafted the letter, Cole stated that they bore no responsibility for the inaccuracies because they "reach[ed] out to those who should know." He stated that it would not be incumbent on officials in the Office of the Deputy Attorney General or OLA to call a line attorney in the U.S. Attorney's Office to gather the necessary information.

Concerning the component supervisors, Cole stated that if they did not have the information, they supervise those who do, and he would have expected them to "go down and talk to the line people." Cole emphasized that with respect to the February 4 letter "we were getting a very consistent story from both ATF and the U.S. Attorney's Office, the entities that were responsible for this."

We asked Cole why the December 2 letter stated only that the component supervisors *testified* that they did not know the information they provided was inaccurate, and stopped short of representing conclusively that they in fact did not know the information was inaccurate. Cole responded that he was "[l]eaving that as an open question."

Other officials had different views about the allocation of responsibility for the February 4 letter. Holder told the OIG that the Department as a whole, including those at Main Justice in Washington who drafted the letter, bore responsibility to the extent that there was not a process in place to produce an accurate letter. However, he stated that it was logical for the officials at Main Justice to believe that the information they received from Phoenix was accurate.

Weich stated that it was entirely appropriate for Burton to rely on the representations of the component heads in drafting the letter. At the same time, however, he said that the Department had “accept[ed] the information uncritically,” and in the future should “be more questioning” of those providing information.

Weich told the OIG that the Department “could have done better,” and cited three specific ways in which it could have done so. First, he said that the Department could have asked Sen. Grassley for the documentation that purportedly corroborated in part the allegations in the January 27 letter.³⁰⁷ Second, he said that the Department could have spoken with the whistleblowers referred to in Sen. Grassley’s letter in an effort to get “firsthand information” from them about the allegations.³⁰⁸ Third, Weich stated that the February 4 response was rushed due to pressure from Burke and ATF Headquarters. He stated that had more time been taken in preparing the response, more facts may have surfaced that “might have colored the response.”

Aspects of Weich’s critique of the Department’s handling of the February 4 response are addressed in a January 26, 2012, memorandum from the Deputy Attorney General to heads of Department components and all U.S. Attorney’s Offices concerning gathering information in response to Congressional inquiries. This memorandum, summarized in Chapter Seven, reinforces the obligation of each component to undertake “rigorous efforts to obtain accurate and complete information from employees with the best knowledge of matters relevant to the congressional inquiry.” Both Holder and Cole stated that this memorandum was issued as a result of the Department’s handling of the February 4, 2011, letter.

³⁰⁷ Burton told the OIG that she did not recall whether she asked Sen. Grassley’s office for documents, but if she did, she did not remember whether she requested them before finalizing the February 4 letter. An OLA line attorney who worked with Burton on the letter said she did not recall making such a request or any discussion about requesting them.

³⁰⁸ As alluded to in Sen. Grassley’s January 31, 2011, letter, and according to an undated ATF memorandum, on January 28, 2011, ASAC George Gillett met with John Dodson, one of the whistleblowers who had been in contact with Sen. Grassley’s staffers, to learn the details of Dodson’s communications with the staffers. The memorandum stated that Gillett instructed Dodson to provide a detailed account of his communications in writing, but that Dodson wanted to seek legal counsel first. The memorandum also indicated that Newell had directed Gillett to determine whether Dodson had provided any grand jury material to Sen. Grassley’s staffers.

IV. OIG Analysis

A. Introduction

Sen. Grassley's letter dated January 27, 2011, to Melson contained exceptionally serious allegations about how ATF implemented its gun trafficking interdiction strategy along the southwest border. The letter stated that members of the Judiciary Committee had received allegations that ATF had "sanctioned" the sale of hundreds of assault weapons to suspected straw purchasers, who then transported these weapons throughout the southwestern border area and into Mexico. The letter further stated that two of these weapons were allegedly used in a firefight against CBP agents, killing Agent Terry. According to the letter, these allegations were partially corroborated by detailed documentation.

The Department responded to Sen. Grassley on February 4, 2011, stating in relevant part:

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. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

On December 2, 2011, after more thoroughly examining Sen. Grassley's allegations, the Department concluded that the February 4 letter "contains inaccuracies" and withdrew it. Deputy Attorney General James Cole wrote that in responding to the allegations in Sen. Grassley's letters:

Department personnel, primarily in the Office of Legislative Affairs, the Criminal Division and the Office of the Deputy Attorney General, relied on information provided by supervisors from the components in the best position to know the relevant facts: ATF and the U.S. Attorney's Office in Arizona, both of which had responsibility for Operation Fast and Furious.

Below we assess the results of our investigation of how the February 4 letter came to be written. For the reasons discussed in Chapters Three and Four, we determined that ATF did not make every effort during Operation Wide Receiver and Operation Fast and Furious to interdict weapons purchased illegally and prevent their transportation to Mexico. Thus, we agree with the Department that the February 4 letter contained inaccuracies.

We also agree that Department officials relied on information provided by senior component officials that was not accurate. In preparing the February 4 response to the allegations in Sen. Grassley's January 27 letter, the primary

sources of information to Department officials about Operation Fast and Furious were Burke, Melson, and Hoover. As we discuss in Chapters Four and Five, these component officials failed to exercise appropriate oversight of the investigation, and to some extent were themselves receiving incorrect or incomplete information from their subordinates about it. These deficiencies contributed substantially to the provision of inaccurate information to Department officials who were responsible for responding to Congressional inquiries.

We believe that the Department should be able to rely on the representations of its senior component officials in responding to Congressional inquiries, as it did here. However, the Department is ultimately responsible for representations that it makes to Congress. Department officials made judgments about what the allegations in Sen. Grassley's letters meant, what the scope of the response should be, what type and amount of information was sufficient to review in preparing the response, and when the response should be sent. Department officials drafted, edited, approved, and signed the letter. In sum, we found that a poorly executed information gathering and drafting process and questionable judgments by Department officials contributed to the inclusion of inaccurate information in the February 4 letter, and therefore the Department shares responsibility for issuing an inaccurate letter with the component officials they relied upon for information.

We also concluded that by the date of its May 2 letter to Sen. Grassley, senior Department officials responsible for drafting the letter knew or should have known that ATF had not made "every effort to interdict weapons purchased illegally and prevent their transportation to Mexico," either in Operation Fast and Furious or other firearms trafficking investigations, and that the February 4 letter contained inaccuracies. We therefore concluded that the Department knew or should have known that the February 4 letter could no longer be defended in its entirety when Department officials wrote to Sen. Grassley on May 2.

Indeed, we noted that the Department, in its responses to Congressional questions about the Fast and Furious investigation following its February 4 letter (on March 2, March 8, April 4, and April 18), appropriately refused to make any substantive comments about the investigation in light of the additional information it had learned and its referral of the matter to the OIG in February. Given that senior Department officials' confidence in the accuracy of the February 4 letter was decreasing rather than increasing as their internal review progressed, we found it troubling that the Department's May 2 response letter to Sen. Grassley included a substantive statement – albeit a qualified one – regarding the Fast and Furious investigation.

We believe that the problems posed by both the February 4 and May 2 letters were made evident by Weich's June 15 Congressional testimony in

which he stated that the Department's denial that ATF had knowingly allowed straw purchasers to transport guns into Mexico remained accurate for a "technical reason."

B. Misplaced Reliance on ATF and the U.S. Attorney's Office for Information

The allegation in Sen. Grassley's January 27 letter that ATF had sanctioned the sale of hundreds of assault weapons contained the implication that among these weapons were two that may have been used in a firefight that resulted in the death of a federal law enforcement officer. We do not believe that the gravity of this allegation was met with an equally serious effort by the Department to determine whether ATF and the U.S. Attorney's Office had allowed the sale of hundreds of weapons to straw purchasers. This was particularly the case in this instance because the Department knew that hundreds of assault weapons had indeed been sold to straw purchasers during the Fast and Furious investigation and that two of those firearms had in fact been found at the scene of Agent Terry's murder.

As we discuss in Chapter Five, we believe that the Department's initial handling of the information it received in mid-December 2010 – that Agent Terry had been killed and that two weapons found at the murder scene traced back to an ATF firearms trafficking investigation – was inadequate. The Department did not make a serious effort until February 2011 to fully understand the circumstances that led to this link between the ATF investigation and the presence of weapons at the murder scene that had been bought by a suspect in the investigation. For the same reasons that we believe the Department's response to this significant incident was inadequate in December 2010, we believe that the Department should have independently assessed the facts surrounding the related allegations by Sen. Grassley in late January 2011, rather than relying on ATF's and the U.S. Attorney's Office's assurances that they were baseless.

In reaching our conclusions we considered the role of the OLA as the Department's liaison to Congress. One of OLA's core functions is to respond on behalf of the Department to inquiries from members of Congress or their staff. Weich told us that OLA has about 25 personnel and receives "hundreds" of Congressional inquiries each week. Given its relatively limited resources and the volume of Congressional correspondence it must process, OLA generally must rely on knowledgeable Department officials for information to provide Congress with accurate and timely responses.

We believe that as a general proposition, this approach is reasonable and in most instances necessary. As many Department witnesses told us, OLA cannot undertake an independent review of each matter that is the subject of a congressional inquiry. For example, Weich told us that in congressional

communications, OLA allows the subject matter experts in the various components to provide relevant facts while OLA provides the “legislative perspective.” This is so because in addition to resource constraints, OLA does not possess subject matter expertise on all of the Department’s various law enforcement and other activities, and must therefore consult with and be able to rely upon those who do.

While deferring to components is generally a reasonable approach, in a unique circumstance such as this, where a credible allegation has been made regarding potentially serious misconduct involving those components, deference to officials close to the activity at issue should be tempered by the recognition that those officials are also invested in a positive portrayal of the activity and their alleged involvement in it. As such, officials who should be knowledgeable and forthcoming about the activity may be inclined, perhaps even unintentionally, to shade or ignore unhelpful facts when providing information about their conduct to senior Department officials. This is particularly true where, as here, Congress seeks specific information concerning allegations of improper activities. Yet, as detailed above, the Department accepted too readily the assurances of officials from the components at which the allegations were aimed in drafting its February 4 letter.

Concerning the Department’s February 4 response, OLA Special Counsel Faith Burton was given primary responsibility for coordinating the response to Sen. Grassley’s January 27 and 31 letters. As would be expected, Burton had no familiarity with Operation Fast and Furious or any specific ATF investigation. To prepare the response, Burton followed the process she generally followed for responding to other congressional inquiries. She first met with component officials who were expected to be familiar with the subject matter in order to gather relevant information. She next developed a draft response, and then circulated the draft to the officials for comment. Component officials were asked for comments, to make edits, and ultimately to approve the response.

During this process, Burton took appropriate steps to consult with a senior Criminal Division official, DAAG Jason Weinstein, whom she regarded as highly knowledgeable about the issues at hand. Burton told us that Weinstein was an experienced prosecutor who had worked with ATF and was familiar with gun trafficking investigations. Burton conveyed to the OIG that she held Weinstein in high professional regard, and told us that she valued his assistance in drafting the letter.

We concluded that during the drafting process Weinstein advocated for ATF and the U.S. Attorney’s Office rather than responsibly gathering information about their conduct of the Fast and Furious investigation. Weinstein told the OIG that he advocated for two Department components that

“are telling me that . . . they’re getting unfairly and inaccurately trashed by a member of Congress.” However, we found that he did so despite indications during the fact-gathering and letter-drafting process that should have alerted him to the fact that U.S. Attorney Dennis Burke, who provided emphatic assurances about ATF’s conduct, was an unreliable source of information. Moreover, Weinstein urged Burton to adopt an aggressive posture in the drafting of the response and sought to enlist the support of Burke and others in arguing against Burton’s more measured approach to the letter. We believe that Weinstein’s staunch support of ATF led him to lose perspective and provide Burton with information that distorted what a senior component official (Hoover) had told them about Avila’s status as a straw purchaser in November 2009.

The only other official at the Department who was substantially involved in the drafting process between January 27 and February 4 was Senior Counsel Brad Smith from the Office of the Deputy Attorney General. However, Smith had been assigned the ATF portfolio for the Office of the Deputy Attorney General only approximately 7 weeks before the response to Sen. Grassley was drafted and, like Burton, was unfamiliar with Operation Fast and Furious and ATF weapons trafficking investigations generally. Moreover, during the drafting process, Smith failed to recall important facts about Operation Fast and Furious contained in material that he personally had passed along to the Acting Deputy Attorney General several weeks earlier in connection with the murder of CBP Agent Brian Terry. Despite this lack of substantive knowledge about ATF’s firearms trafficking activities or the allegations in Sen. Grassley’s letter, Smith made critical edits to the draft response toward the end of the drafting process. We concluded that Smith did not know enough about the investigation or the allegations to warrant making such important edits to the response, although we note that these edits were incorporated into drafts that were approved by senior Department and component officials before the letter was issued.

As a result of the failure by Weinstein, Smith, and others in the Department involved in the drafting process to gain a responsible level of knowledge about how Operation Fast and Furious was conducted, OLA was left to rely on ATF and the U.S. Attorney’s Office for information. These were the very components that were subject to Sen. Grassley’s serious allegations, and as we conclude below, officials in these components provided demonstrably inaccurate and conflicting information to Department officials about Operation Fast and Furious as the February 4 letter was being drafted.

C. The Flawed February 4 Letter Drafting Process

1. The Scope of the Response

In his January 27 letter, Sen. Grassley indicated that he was “specifically writing” about “an ATF operation called ‘Project Gunrunner.’” “Project Gunrunner” was a broad initiative by ATF to address weapons trafficking along the southwest border. Operation Fast and Furious was a part of the Project Gunrunner initiative, as were numerous other investigations. Despite the fact that Sen. Grassley’s letter referred to Project Gunrunner, and did not mention Operation Fast and Furious, Burton and Weinstein told the OIG that they understood Sen. Grassley’s concerns to be about Operation Fast and Furious. In fact, Weinstein told the OIG that the Department’s February 4 letter was intended to be limited to Operation Fast and Furious.

However, we found no evidence to indicate that this important definitional issue was discussed in any meaningful way during the Department’s drafting process. Moreover, the Department’s February 4 letter was completely silent on that point, and thereby failed to indicate whether its response was broadly intended to apply to “Project Gunrunner,” as Sen. Grassley’s letter referenced, or whether it was limited to Operation Fast and Furious, as Weinstein told us. As a result of this failure, we found that a reader of the letter would likely conclude that the Department’s sweeping denial applied to all cases under the umbrella of “Project Gunrunner,” and not just Operation Fast and Furious. This was, in our view, a serious drafting flaw.

Moreover, the letter from Sen. Grassley on January 27 contained not just a broad allegation but also a more specific allegation. The letter broadly alleged that “ATF sanctioned the sale of hundreds of assault weapons to suspected straw purchasers, who then allegedly transported these weapons throughout the southwestern border area and into Mexico.” The letter also more specifically alleged that one of the suspected straw purchasers bought three assault rifles, two of which “were then allegedly used in a firefight on December 14, 2010 against Customs and Border Protection (CBP) agents, killing CPB Agent Brian Terry.” It was the Department’s sweeping response to the first allegation – that “ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico” – that senior Department officials most readily found inaccurate once ATF’s interdiction efforts were scrutinized. Yet, in formulating the Department’s response, Weinstein, Burke, Hoover, and other officials focused their attention and discussion almost exclusively on the more specific allegation concerning the link between ATF’s actions and weapons found at Agent Terry’s murder scene. E-mail messages between and among these officials reflect their preoccupation with this allegation, which Weinstein described as “the most salacious and damaging to ATF, both short- and long-term.”

Upon receiving Sen. Grassley's January 27 letter, both ATF and the U.S. Attorney's Office immediately concentrated their information-gathering efforts on Operation Fast and Furious suspect Jaime Avila and his history of weapons purchases, including his January 16, 2010, purchase of the two assault weapons found at Agent Terry's murder scene. Melson asked his subordinates for "all the material (documents) including all reports tantamount to the case record on the defendant who sold the weapons involved in the shooting with the CBP." ATF e-mails indicate that the Phoenix Field Division did not gather the full investigative file for Melson as he requested. SAC William Newell responded on January 27 and 28 by sending to ATF Headquarters all ROIs and other materials related only to Avila. Melson never followed up on his request for "all the material," and in fact told us that he did not review any of the ROIs, including those pertaining to Avila, until March 2011. On the evening of January 27, 2011, the U.S. Attorney's Office Criminal Division Chief Patrick Cunningham requested AUSA Hurley to write a memorandum for Burke documenting Avila's firearm purchases "as quickly as possible."

Officials at the Department, and in particular Weinstein, reinforced and perpetuated this narrow focus on Avila. Burton argued that the Department's response should not address the pending Terry murder investigation, and sought to dissuade Weinstein from adding language about it. Weinstein rejected Burton's concerns, and separately urged Burke and an official in the Office of the Deputy Attorney General to press for a more "forceful rebuttal" of what he perceived to be the allegation that concerned the Terry murder. He also engaged in protracted e-mail discussions with Burke and Burton about the precise meaning of the allegation concerning the weapons at the Terry murder scene, including whether it meant that the weapons had been used to kill Agent Terry and whether the weapons had been transported to Mexico.

Finally, Burton's and Smith's notes from discussions with Melson, Hoover, Rasnake, and Weinstein reflect that specific information about the Avila weapons purchases was discussed at length. Also discussed were the inconclusive results of the forensic testing of the weapons to determine whether they were used to murder Agent Terry, and whether the weapons had ever been transported to Mexico.

The other portions of the notes that pertain to the allegations in the January 27 letter consist primarily of broad policy statements and assurances that ATF interdicts illegally purchased weapons. Burton relied on one such statement - "We always try to interdict weapons purchased illegally" - in writing "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico" in the February 4 letter. This language appeared in the first draft of the letter and remained unchanged through the final signed version. Except for a single passing reference to this sentence in a February 3 e-mail from Smith to Hoover and Burke, we found no

indication that it was ever discussed during the editing process. As noted, this statement inaccurately characterized ATF's weapons interdiction efforts.

The evidence shows that Department officials' efforts to respond to Sen. Grassley revolved almost entirely around what Burke and Weinstein perceived to be the most damaging aspect of the allegations in his letter: that ATF sanctioned the sale of weapons used in a firefight that resulted in the death of Agent Terry. Confident that ATF did not know about the purchase of the weapons found at the Terry murder scene until after the purchase, and therefore had not "sanctioned" the sale, 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.

Records we reviewed show that Department officials deliberated extensively over the wording of this sentence. Due to last minute edits by Office of the Deputy Attorney General and OLA officials, specific references to Agent Terry and Avila's January 16, 2010, purchase of the weapons found at the murder scene were struck from the sentence in the final response. However, the sentence revealed a fundamental failure on the part of the Department to appreciate the full scope of the allegation, which focused as much on allowing straw buyers to purchase weapons as it did on allowing the transporting of the weapons throughout the southwest border area and into Mexico.

While Department officials devoted considerable attention to the specific allegation about Agent Terry's death, they paid virtually no attention to the more general allegation that ATF sanctioned the sale of hundreds of assault weapons to suspected straw purchasers. Consequently, ATF's activities concerning the purchase and transport of hundreds of weapons in Operation Fast and Furious and other investigations were not scrutinized before the February 4 letter was sent. We believe that the Department should not have included such a sweeping and categorical statement, based solely on a senior ATF official's comment, in its response to the allegations in Sen. Grassley's letters without attempting to confirm its accuracy.

As discussed below, the failure to ensure the accuracy of the representations in the February 4 letter was particularly troubling in light of documentation readily available to the Department officials involved in drafting the letter and problematic factual representations from ATF and U.S. Attorney's Office officials that they received during the drafting process.

2. Inaccurate Information from Component and Department Officials

We found numerous instances in which various officials provided factually erroneous information to the Department officials who were drafting the February 4 response.

This inaccurate information was significant because it pertained to Avila and his role in Operation Fast and Furious, and was therefore relevant to the allegation in Sen. Grassley's January 27 letter that ATF Headquarters, U.S. Attorney's Office, and Department officials considered most important. Weinstein, who stated that he relied on component officials for information about Operation Fast and Furious, yet realized that Burke had provided inaccurate information on a key point, should have understood this to be an indication that Burke was not a reliable source of information about the investigation generally, but did not.

a. Burke's Inaccurate Statements

On January 31, 2011, in response to a question from Weinstein about the weapons linked to the Terry murder, Burke wrote:

Purchased at [FFL1] before the investigation began.

New (warped) standard – you should have stopped this gun from going to Mexico even before your investigation began, even though the sale is legal, even though the dealer has no reporting requirement, even though the dealer never even volunteered this info.

In fact, Avila purchased the two assault weapons found at the Terry murder scene on January 16, 2010, many weeks after Operation Fast and Furious had begun and Avila had been designated as a suspect by ATF in its case management system. Accordingly, Burke's statement that Avila had purchased the weapons found at the Terry murder scene "before the investigation began" was incorrect.

Burke acknowledged in a December 2011 interview with congressional staffers that his statement that Avila had purchased the weapons before the investigation began was "inaccurate," but said that he did not make the

inaccurate statement intentionally. He told the staffers that his inaccurate statement reflected that he “didn’t fully know the facts at that time.”³⁰⁹

As described earlier in this chapter, evidence we reviewed strongly suggests that on January 28, prior to making the statements in his January 31 e-mail to Weinstein, Burke received and read a memorandum from Hurley, the lead prosecutor in the case, detailing Avila’s weapons purchases. The memorandum specifically stated that Avila was entered into ATF’s case management system “as a suspect in the investigation” in November 2009, nearly 2 months before he purchased the weapons later found at the Terry murder scene. Moreover, just a few days earlier, Burke had held a press conference announcing the Fast and Furious indictment, which made clear that the investigation began before January 2010. Yet, Burke repeated this same inaccurate information – that Avila bought the guns traced back to the murder scene before the investigation began – on February 4, in an e-mail he sent at 12:14 a.m. to Hoover, Smith, Burton, and Weich.

Weinstein quickly learned that the representation Burke made to him in the January 31 e-mail was incorrect. Weinstein and Burton had a telephone conversation with Hoover on February 1. Burton’s notes reflect that during the conversation, Hoover stated that on November 24, 2009, Avila was “known to be a straw.” Weinstein told the OIG that he understood from this conversation that Burke’s statement the day before that Avila purchased the weapons before the investigation began was incorrect. Weinstein said, however, that Burke’s error did not diminish his confidence in Burke’s assurances that Sen. Grassley’s allegations were wrong. Weinstein stated that he would not have expected Burke to know “the details of even a purchase of significance like that,” but would have expected Burke to know whether his prosecutors “were trying to get guns or not trying to get guns.”

We believe this was a mistake on Weinstein’s part. Given Weinstein’s and Burke’s intense focus on the allegation that pertained to Avila’s purchase of weapons found at the murder scene, Burke’s inaccurate statement about a fact that was fundamental to this issue should have alerted Weinstein to be cautious about Burke’s reliability. It also should have caused Weinstein to ask more probing questions about Burke’s more general representations regarding the conduct of Operation Fast and Furious.

³⁰⁹ The OIG was unable to interview Burke regarding the February 4 letter because Burke resigned as U.S. Attorney in August 2011 and, through counsel, declined the OIG’s subsequent request to be interviewed about his involvement in drafting that letter.

b. Weinstein’s Inaccurate and Incomplete Characterization of Information about Avila

Rather than credit Hoover’s statement to Burton and him that ATF knew Avila was a straw purchaser as of November 24, 2009, Weinstein distorted it. Following the February 1 conversation with Hoover and Burton, Weinstein met again with Burton to help her “interpret” what had been discussed with Hoover. Burton’s notes of this second conversation show that Weinstein inaccurately characterized Hoover’s statement about Avila’s status as a suspect as follows:

Straw purchaser of that gun later became a [defendant] but wasn’t known to be a sp [straw purchaser] at the time of the purchase. He’s now been indicted in F&F.

Weinstein told us that he understood Hoover to mean in the earlier conversation that Avila was only a suspected straw purchaser, and that he could not yet be proved to be a straw purchaser at the time of the purchase. Yet, when shown a copy of Burton’s notes from the earlier conversation, Hoover told us that the statement about Avila was not accurate and could not be reconciled with what he had said (also as recorded by Burton). As noted, Avila was entered into ATF’s case management system as a suspect in Operation Fast and Furious in November 2009, before he purchased the weapons found at the murder scene. We determined that Weinstein’s interpretation of what Hoover said about Avila’s status at the time of the purchase in January 2010 conflicted with Hoover’s original characterization.³¹⁰

Weinstein told us that “neither Faith [Burton] or I had substantive knowledge of the facts that would have allowed us to prepare a response” to Sen. Grassley. He said he relied upon Hoover and Burke’s emphatic and categorical assurances that the information in Sen. Grassley’s January 27 letter was false, and that the Department’s response was accurate. We were therefore concerned that rather than relying on Hoover’s factual statement about Avila’s status as a suspect, Weinstein interpreted it in a way that conflicted with Hoover’s statement, and made other substantive statements to Burton about the investigation that went beyond the scope of their conversation with Hoover on February 1.

It appeared to the OIG that Weinstein’s actual role in the drafting process went beyond his portrayal of it as merely helping to collect information and

³¹⁰ We found it significant that Burton recorded Hoover as stating that Avila was “known” to be a straw purchaser in November 2009 and not merely “suspected” of being one. As noted, Hoover told the OIG that Burton accurately captured what had been stated during the February 1 conversation.

draft the Department's response. E-mail records and the testimony of witnesses we interviewed showed Weinstein to be a staunch supporter of ATF and its law enforcement mission, and that he described himself as such. We believe that in his zeal to protect ATF's interests, Weinstein lost perspective and provided Burton with distorted information about Hoover's view of Avila's status as a straw purchaser. Thus, in helping to draft the Department's response to the very serious allegations leveled at ATF, we believe Weinstein failed to act in the best interests of the Department by advocating for ATF rather than responsibly gathering information about its activities.

A similar issue concerning Weinstein's characterization of information about the firearms found at the Agent Terry murder scene arose after the February 4 letter was issued. In connection with a February 16 letter from Sen. Grassley seeking information about Avila, Weinstein (along with Breuer and Raman) was asked by Grindler, on behalf of the Attorney General, "Do we have info on whether a gun sold in the operation was used in the shooting [of Agent Terry]?" After consulting with Burke and Newell, Weinstein replied in relevant part:

Two of the guns sold during the investigation were found near the scene of the shooting of Agent Terry. These guns had been purchased about 11 months earlier, by a person later determined to be part of the trafficking ring. ATF was not notified of the sales until after they had been completed.

Similar to his interpretation of Hoover's statement to Burton, Weinstein's e-mail suggested that Avila was not even a suspect when he purchased these guns.³¹¹ Unlike Weinstein's interpretation of information that Hoover provided to Burton and that Burton recorded in her notes, this e-mail response was drafted directly by Weinstein, and was for the purpose of providing information to the Attorney General. We note that both the Burton notes and the e-mail to Grindler involved a matter that Weinstein regarded as the basis for the most damaging allegation against ATF in Sen. Grassley's letters.

c. Conflicting Information from Melson and Hoover

Smith's notes show that Melson told him on January 28, 2011, that "Agents assured me that we [did not] know the guy was a straw purchaser at time of purchase." According to both Smith and Melson, the "guy" was a reference to Avila.

³¹¹ As described earlier in this report, Avila was entered into ATF's case management system as a suspect on November 25, 2009, after ATF surveillance confirmed that he purchased firearms with another suspected straw purchaser the day before.

However, as indicated above, Burton's notes show that Hoover correctly told Burton and Weinstein on February 1, 2011, that Avila was "known to be a straw" as early as November 24, 2009. Later that day, as described above, Weinstein met with Burton and revised Hoover's statement to read that Avila "wasn't known to be a [straw purchaser] at the time of the purchase."

The OIG was unable to determine whether Burton or Smith compared the information they received from Hoover and Melson and had an opportunity to detect the conflict in the information about Avila. It is also possible that Burton would not have perceived a conflict in the information because Weinstein's interpretation of Hoover's statement aligned with Smith's notes of what Melson said about Avila. In either event, the conflicting evidence is an indication of the poor execution of the information gathering process, particularly with regard to a fact that was undisputed and widely known within ATF and the U.S. Attorney's Office – that Avila was a straw purchaser – and had been made known to Smith himself on December 17, 2010, following Agent Terry's murder.

d. Newell's Inaccurate Information

Newell also provided inaccurate information to ATF Headquarters about Avila. In a January 27, 2011, e-mail to McMahon, Newell wrote that ATF was not aware of Avila's "role" in the investigation in January 2010. He also wrote that Avila was first seen purchasing weapons with another major straw purchaser, Patino, after he had bought the weapons found at the Terry murder scene, and it was only at that point that he was considered part of the same organization. However, an early ROI from the case shows that Avila and Patino each bought 5 firearms during 2 separate purchases on November 24, 2009, and were together for both purchases. As noted above, Avila was entered into ATF's case management system the next day.

Newell received this earlier ROI on January 28 and forwarded it that same day to McMahon along with 30 other ROIs about Avila, without correcting the erroneous information about Avila in his January 27 e-mail. McMahon forwarded Newell's January 27 and January 28 e-mails to Chait. Chait did not forward the information in Newell's e-mail further up the supervisory chain to Hoover. According to Chait's counsel, Chait provided both Hoover and Melson with binders containing the Avila ROIs. Although McMahon and Chait saw drafts of the February 4 letter, neither made substantive comments. Hoover, who did have a substantive role in approving the letter, did not receive this inaccurate information from Newell, and in fact provided accurate information to Department officials about Avila.

Thus, we found that Newell's provision of inaccurate information to ATF Headquarters did not have any direct effect on the drafting the February 4 letter. Moreover, because Newell followed this inaccurate information with a

document showing the information to be inaccurate, it appears unlikely to us that Newell deliberately sought to mislead officials at ATF Headquarters about what the Phoenix Field Division knew about Avila. However, we found that Newell was negligent in failing to respond accurately to his supervisor's inquiry because the information that was requested was readily available to him and because the statement that he did make was wholly inaccurate and had no support in any ATF records we reviewed.

We also note that neither ATF Headquarters nor Department officials ever provided any drafts of the Department's February 4 response to Newell or others in the Phoenix Field Division before the letter was sent to Sen. Grassley. While we believe as a procedural matter that it was a mistake not to provide these field division officials with an opportunity to comment on the proposed response, the evidence that we developed during our review suggests that these officials would not have identified any inaccuracies in it because they maintained they were taking appropriate action during the investigation in every respect.³¹²

3. Failure to Review Material Relevant to the Allegations

In his January 27, 2011, letter to Acting Director Melson, Sen. Grassley wrote that the allegations his office received "were accompanied by detailed documentation which appears to lend credibility to the claims and partially corroborates them."

Upon receiving the letter, Melson asked Rasnake to request the documents from Sen. Grassley. Rasnake discussed Melson's request with McDermond, and concluded that Sen. Grassley's staff was unlikely to provide the documents, and that it was "not worth the risk of offending them[.]" ATF Headquarters did not request the documents.

Concurrently with ATF's decision not to request documents from Sen. Grassley, ATF forwarded the January 27 letter to OLA. Although ATF prepared a draft response and sent it to Department officials for review on February 1, e-mail records and statements from OLA and ATF officials indicate that OLA had already assumed responsibility for drafting the response.

³¹² As discussed earlier, the information that the Phoenix Field Division was asked to provide in connection with drafting the February 4 response was primarily related to Avila's firearms purchases. It cannot be known whether requests to that office for a broader array of information about Operation Fast and Furious and other firearms trafficking investigations ultimately would have resulted in providing more accurate information to Congress on February 4.

Weich told us that it is not unusual for members of Congress to choose not to share documents it may have concerning matters that it inquires about, but that it would not have been inappropriate to ask Sen. Grassley for the documents he referred to in his January 27 letter. Burton told us that she did not recall whether she asked Sen. Grassley's office for documents, but if she did, she did not remember whether she requested them before finalizing the February 4 letter. The OLA line attorney who worked with Burton on the February 4 response stated that she did not recall making such a request or any discussion about requesting them.

Under the circumstances – the serious nature of the allegations, the fact that Sen. Grassley wrote that there was “detailed documentation which appears to lend credibility to the claims and partially corroborates them,” and the demonstrably inaccurate information provided by Burke – we believe that the Department officials who drafted the response should have reviewed materials from the Operation Fast and Furious investigation before responding. It would not have been necessary to depend on Sen. Grassley for access to this information, which as was learned later, came from ATF's and the U.S. Attorney's Office's own files, e-mails, and databases.

As discussed above, the limited review of materials concerning Avila at the U.S. Attorney's Office and ATF's Phoenix Field Division was inadequate to inform the Department's response to the full scope of Sen. Grassley's allegations. At the same time, we do not believe Department officials needed to conduct an exhaustive review of the entire investigative file to understand the allegations before responding to them. Rather, officials with responsibility for drafting and approving the response could have reviewed basic materials about the investigation, such as briefing papers, summaries, and other documents that would have familiarized them with the scale of the investigation and the investigative techniques being employed.³¹³

Knowledge of the disparity between the number of weapons purchased by suspected straw purchasers and the number of the weapons recovered or seized during the investigation alone may have caused Department officials to respond in a more measured manner. Similarly, the high volume of weapons purchased and the unusually long duration of the investigation may have raised questions about whether suspicious purchases were occurring with ATF's knowledge but without adequate efforts to interdict the weapons, as Sen. Grassley's allegations plainly implied. These questions, in turn, may have led to a review of the Title III affidavits, and to ROIs documenting ATF's

³¹³ Smith, Burton, and Weich first received the Operation Fast and Furious indictment on the morning of February 4.

relationship with the cooperating FFLs and weapons purchases for which ATF had advance notice.

It is of course impossible to know whether a review of these materials would have resulted in a more accurate response. But our review of how the February 4 response was drafted suggests that the lack of familiarity with the investigation played a role in the ill-conceived wording of the response. Smith's and the OLA line attorney's edits to the statement initially intended to address the allegation about the weapons at the Terry murder scene resulted in the clumsy and only marginally responsive denial that ATF "knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico" – a denial that did not address the issue of whether ATF knowingly allowed straw purchasers to buy weapons at all.³¹⁴ Smith told us that when he was making edits to the response he was unaware that weapons purchased in the investigation were being recovered in the United States as well as in Mexico, and that Agent Terry had been killed in the United States.³¹⁵ The OLA line attorney told us that she understood from internal discussions about the allegations that ATF had not allowed straw purchasers to take weapons to Mexico, and that she was trying to convey this understanding in a more concise fashion in her edits.

We concluded that Smith and the OLA line attorney were not knowledgeable about Operation Fast and Furious and should not have been speaking for the Department about it by making substantive changes to the draft response letter, although we note that their edits were incorporated into drafts that were approved by senior Department and component officials. We also concluded that the statement in the February 4 letter that ATF had not "sanctioned' or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico" was not the result of a narrowly crafted denial of the allegations or an attempt to create a literally

³¹⁴ A similarly narrow statement in the Department's May 2, 2011, letter to Sen. Grassley resulted in criticism from Sen. Grassley in his May 3, 2011, response. In this exchange, Sen. Grassley observed that the Department was defending its February 4 letter by narrowly arguing, "It remains our understanding that ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico." Sen. Grassley characterized the Department's position as an attempt to "argue over fine distinctions to confuse the issue." We believe that Sen. Grassley's letters to the Department reflect multiple concerns, including whether ATF had allowed known or suspected straw purchasers to buy weapons at all. The Department's emphasis in its letters to Congress on ATF's lack of knowledge that the assault weapons bought by straw purchasers were being transported to Mexico arguably can be traced back to Brad Smith's decision on February 3 to remove "southwest border area" from the February 4 response.

³¹⁵ Smith stated that he did not recall these facts as he was helping to draft the letter, even though on December 17, 2010, he had sent an e-mail message to then-Acting Deputy Attorney General Grindler that included these facts.

true statement. Rather, we concluded it was the byproduct of rushed and sloppy drafting by uninformed and misinformed officials.

When Department and ATF officials began to closely review Operation Fast and Furious in March 2011, it did not take long for them to read the Title III affidavits and ROIs from the case and determine that there were questions that needed to be resolved about Operation Fast and Furious. By this time, based on what they were learning about Operation Fast and Furious and other ATF firearms investigations, senior officials, including Cole and Weich, began having doubts about some of the statements in the February 4 letter. Melson read the Title III affidavits on an airplane flight, and immediately raised concerns. Axelrod read most of the ROIs from the case over a weekend, and immediately asked questions of the U.S. Attorney's Office about potentially problematic investigative steps in Operation Fast and Furious.

Despite Weich's efforts to slow the response drafting process, we found that Department officials ultimately did not take sufficient time to obtain and review the "detailed documentation" cited by Sen. Grassley in his January 27 letter, as well to determine whether ATF or the U.S. Attorney's Office had documentation in their possession that was relevant to the allegations. This was, in our view, a significant flaw in the drafting process for the February 4 response.

4. Knowledge of Operation Wide Receiver

As we describe in Chapter Three, Weinstein became aware in April 2010 that ATF had failed to interdict illegally purchased weapons in Operation Wide Receiver. According to Weinstein, after he informed Breuer of this, Breuer told him to bring the matter to the attention of ATF leadership.³¹⁶ Weinstein, an official from the Criminal Division's Gang Unit, and two public affairs officials discussed Operation Wide Receiver with Hoover and McMahon in April 2010, after the investigative phase of Operation Wide Receiver had concluded.

At the Department, Breuer, Weinstein, and a few other Criminal Division officials knew about Operation Wide Receiver. As Breuer would later testify to Congress, he made a mistake by not telling senior Department leadership about the problems with Operation Wide Receiver when he learned of them in April 2010, and for failing to draw a connection between those problems and the allegations concerning the conduct of Operation Fast and Furious in January and February 2011.

³¹⁶ However, as we concluded in Chapter Three, the focus of the meeting was on managing media challenges surrounding the indictments in Operation Wide Receiver.

Shortly before becoming involved in responding to Sen. Grassley's January 27 and 31 letters, Weinstein discussed Operation Wide Receiver in connection with Operation Fast and Furious. In a January 24, 2011, e-mail to Trusty about the unsealing of the indictment in Operation Fast and Furious, Weinstein also referred to Operation Wide Receiver, describing it as the case "we made with the cooperating FFL, where we inherited it after a lot of guns had been permitted to walk[.]"

Yet Weinstein told us that when he became involved a few days later in drafting the Department's response to Sen. Grassley's January 27 and 31 letters, he "wasn't thinking about Wide Receiver at all." He stated that he did not "make the connection" between that investigation and Sen. Grassley's allegations, which he said he understood to pertain to Operation Fast and Furious. Weinstein described his conscious awareness of Operation Wide Receiver at the time of Sen. Grassley's letters as being between a unilateral decision not to bring it to anyone else's attention and a "complete bout of amnesia" in which he forgot the existence of the case entirely. Weinstein stated that he did not make a relevancy calculation about Operation Wide Receiver at the time, but in any event did not believe it was relevant to the January 2011 allegations being raised by Sen. Grassley. He stated that if he had thought about Operation Wide Receiver, he would have "invited people to . . . make their own judgment" about its relevancy to the allegations, but that he did not think about it.

In describing why he thought it was appropriate not to have made the connection between Operation Wide Receiver and the more recent allegations, Weinstein told us that he viewed Operation Wide Receiver as an "aberration" that occurred under different ATF and U.S. Attorney's Office leadership. He stated that it was only when he subsequently learned that similar tactics had been employed "on our watch" that he believed Congress should be told about Operation Wide Receiver.

We were not persuaded by Weinstein's assertion that Operation Wide Receiver was properly viewed as an "aberration" that had no relevance to the allegations. Both investigations had the same strategic goal – to follow guns up an organizational chain to build a large gun trafficking case. Both investigations involved many of the same issues and tactics, including the use of physical and electronic surveillance; the use of cooperating FFLs; and the bulk purchase of weapons by suspected straw purchasers and the transportation of those weapons throughout the southwest border area and into Mexico. Additionally, both investigations were run out of the Phoenix Field Division under the same SAC, although Weinstein told the OIG that he was not aware of this fact until after the February 4 letter was drafted.

We reject the notion that Operation Wide Receiver lacked relevance because it was carried out under different leadership at the U.S. Attorney's

Office and ATF Headquarters. As Weinstein knew from having been an AUSA for many years, while U.S. Attorneys and the ATF Director may change with administrations, the career line agents and prosecutors do not, thus ensuring institutional continuity and accountability. Dismissing the relevance of a similarly flawed investigation because it happened under another administration's "watch" is not what we believe should be expected of a senior Department official.

Weinstein also told us that in his view, Operation Wide Receiver did not make the February 4 letter inaccurate. That, of course, was not his decision to make, and senior Department officials reached a different conclusion than Weinstein after they learned about Operation Wide Receiver and its significance to the accuracy of the February 4 letter. Attorney General Holder stated that if Weinstein had shared his knowledge about Operation Wide Receiver, the February 4 letter may have been written in a more "nuanced" way and not been as "forward leaning."³¹⁷ Weich told the OIG that while he was sympathetic to Weinstein's claim that he had simply failed to "make the connection" between Operation Wide Receiver and Operation Fast and Furious, it was indisputable that the information would have changed the way he would have approached the February 4 letter.

Because of her role in coordinating the drafting process, we found Burton's observations on this point particularly significant. Burton did not learn of Operation Wide Receiver until several weeks after the February 4 letter was issued. She told the OIG that it was impossible to speculate on whether the letter would have been written differently had she known. However, she stated that with knowledge of Operation Wide Receiver, Sen. Grassley's allegations "wouldn't have been as unheard of as it seemed at the time." She added that Operation Wide Receiver "would have been relevant to the questions we were asking internally."

Breuer stated that the relevance of Operation Wide Receiver to Operation Fast and Furious would have been "tenuous, but it would have suggested that at least on one other occasion in the agency's history when involved in a gun trafficking case, agents lost track of guns, and we're aware that guns were ending up in Mexico."

As noted earlier in this chapter, in a written statement provided in connection with his November 1, 2011, testimony before Congress, Breuer publicly apologized for not "drawing a connection" between Operation Wide

³¹⁷ Holder similarly stated that knowledge of Operation Wide Receiver "certainly would raise . . . your sensitivity" in connection with learning of the circumstances of Agent Terry's death in December 2010, and that "you might start asking questions" about those circumstances.

Receiver and the allegations about Operation Fast and Furious. Breuer stated that it was a mistake not to have alerted others in the Department to the similarities between the two investigations, and that he regretted not doing so. We agree that Breuer should have informed senior Department leadership that ATF had used tactics similar to those alleged in Sen. Grassley's letters in a prior investigation. Moreover, given Weinstein's far greater involvement than Breuer's in drafting the February 4 response, and his more extensive knowledge of both Operation Wide Receiver and Operation Fast and Furious, we were troubled by Weinstein's failure to recognize in his interviews with the OIG the relevance of Operation Wide Receiver to the January 2011 allegations.

We believe that knowledge of ATF's use in Operation Wide Receiver of the same type of investigative tactics at issue in Sen. Grassley's letters would have been highly relevant to the Department's drafting process. We believe Weinstein should have drawn a connection between the two investigations so that he could have told others working on the response about it and let those individuals make their own judgments about its relevance in responding to Sen. Grassley.

D. The Department's Post-February 4 Statements to Congress and the Withdrawal of the February 4 Letter

As described in this chapter, the Department withdrew the February 4, 2011, letter on December 2, 2011. Prior to withdrawing the letter, Department officials made written and oral statements to Congress about the February 4 letter that we believe were in tension with what they learned through their otherwise responsible (albeit belated) post-February 4 effort to understand ATF's investigative activities in Operation Fast and Furious.

Most notably, in responding to a question from Sen. Grassley to Attorney General Holder on April 13, 2011, as to whether the Department stood by "the assertion . . . that the ATF whistleblower allegations are 'false' and specifically that ATF did not sanction or otherwise knowingly allow the sale of assault weapons to straw purchasers," Weich, on behalf of the Department, wrote in a letter dated May 2:

It remains our understanding that ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico.

Department officials told us that this substantive response was motivated by two factors. First, officials stated that, in his April 13 letter, Sen. Grassley had meaningfully changed the Department's original response in its February 4 letter and that they wanted to correct the record on this point. Second, officials said that they wanted to respond to what they believed to be the crux of the allegation in Sen. Grassley's January 27 letter: that ATF had

knowingly allowed straw purchasers to take firearms into Mexico. As we described earlier in this chapter, Department officials considered two options in responding to Sen. Grassley's truncated recitation of the February 4 letter. One of these options was to correct the misquoted language without further substantive comment. Internal e-mails, and the final May 2 letter itself, shows that Department officials decided to both correct the record and restate a portion of its February 4 response, but in a far narrower way.

The Department's reformulated assertion that "ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico" differed from the February 4 statement in two fundamental respects. First, it did not address the portion of the statement in the February 4 letter denying that "ATF 'sanctioned' or otherwise knowingly allowed the sale of assault weapons to straw purchasers." Second, the May 2 statement for the first time limited the Department's denial of gunwalking to Operation Fast and Furious.

Deputy Attorney General Cole and other Department officials told the OIG that they disagreed with the suggestion that the May 2 letter was deliberately drafted to state a literal truth – that ATF had not knowingly allowed *straw buyers* (as distinguished from third parties) to take firearms into Mexico. Rather, the officials stated, they sought in the letter to distinguish between ATF *knowingly* allowing firearms to go to Mexico versus *negligently* allowing firearms to go to Mexico.

We believe that the Department should not have made this statement in its May response to Sen. Grassley. Regardless of whether there was any intent to draw a distinction between straw purchasers and third parties, senior Department officials knew or should have known that while ATF may not have allowed straw purchasers to buy firearms so that they themselves could take the guns to Mexico, ATF had in many instances allowed straw purchasers to buy firearms knowing that a third party would be transporting them to Mexico. The review of the Operation Fast and Furious case file that had been conducted by Department officials to this point, including the Title III affidavits, indicated that suspects were buying guns for the purpose of getting them into Mexico. Moreover, ATF was aware from later seizures that some of those firearms did in fact end up in Mexico. Thus, the May 2 letter was true only in the most literal sense, even if it was not intended to be read that way.

The Department also limited its narrowly drawn denial to Operation Fast and Furious, something it did not do when it used similar wording in its February 4 denial. According to an e-mail from Burton to Weich about this limitation, officials had not yet "checked all other ATF operations," and thus would have been uncertain whether the Department could make the same denial as to other ATF investigations covered under the allegations in Sen. Grassley's letters and its February 4 response. Under these circumstances, we believe the Department should not have resorted to a narrowly worded denial of

such a serious allegation, particularly when officials in the Office of the Deputy Attorney General knew or should have known by that date that they could not reaffirm the accuracy of the entire February 4 letter.³¹⁸

Lastly, after reviewing a draft of this report, Department officials told the OIG that from late February through at least May 2 they continued to receive assurances from component officials, including senior component officials, that ATF had not knowingly allowed firearms to cross into Mexico. They indicated that sometimes these assurances took the form of statements that ATF had not let guns “walk” and had not “watched” or “observed” firearms enter Mexico. These officials said that assurances were also provided in the form of descriptions from the components about how Operation Fast and Furious had been conducted. We noted, however, that during this same period, based on what they were learning about Operation Fast and Furious and other ATF firearms investigations, senior Department officials, including Cole and Weich, began having doubts about some of the statements in the February 4 letter – statements that had been based on the assurances of these same senior component officials. We therefore question the significance or relevance of these ongoing assurances to the increasingly skeptical Department officials who issued the May 2 letter.

³¹⁸ By May 2, officials in the Office of the Deputy Attorney General, including those who helped draft the May 2 letter, were aware of several facts that placed in serious doubt assertions in the Department’s February 4 letter. In March, Axelrod reviewed ROIs from Operation Fast and Furious that he told us raised questions about whether ATF had interdicted firearms purchased by straw purchasers at every opportunity when it had probable cause and the ability to do so. On March 3, Smith wrote to Goldberg to advise that “[l]ast night, ATF found a document indicating that, on at least one occasion, an ATF agent witnessed a suspected straw purchaser resell firearms, but for reasons that remain unclear . . . broke off surveillance of the straw and did not take him into custody following the transaction.” Smith wrote that the document “appears contrary to statements from ATF last month indicating that its agents arrested suspects [sic] straws along the Southwest Border as soon as they had concrete evidence indicating the suspect straws were engaged in illegal firearms trafficking.” According to Weinstein, on March 4 he heard Hoover describe to Goldberg “2 or 3 incidents in which an ATF agent (inexplicably) sent a CI [confidential informant], posing as a straw, in to a store to make a purchase and then had the CI hand those guns off to a trafficker,” a description that Weinstein reiterated to Goldberg in a March 9 e-mail. (After reviewing a draft of this report, Department officials noted that the “2 or 3 incidents” related to one case that had also been described in Sen. Grassley’s March 3, 2011 letter.) On March 21, Weinstein wrote to Axelrod that there was “some agreement that we should try to add some language to our congressional responses that captures, with appropriate disclaimers, the fact that to date ATF has discovered only a few (non-F&F) instances where agents intentionally let guns ‘walk.’” On March 30 and 31, Axelrod received a series of e-mail messages from Melson about concerns Melson had after reviewing the Title III affidavits. Deputy Attorney General Cole told the OIG that through his discussions with Melson in March and April 2011 he learned of at least one incident (already described above) in which ATF had broken off surveillance on straw purchasers because the agents did not have their protective gear and could not leave their vehicle to continue the surveillance.

We believe that to Congress and the public, the Department's May 2 letter reasonably could be understood as at least a partial reaffirmation of the February 4 letter at a time when Department officials knew or should have known that the February 4 letter contained inaccurate information. We believe that the better practice would have been to continue to refrain from making substantive statements about both the February 4 letter and the investigation, like the four prior letters to Congress, or to state that there were significant concerns about the accuracy of the February 4 letter and that Department officials would not respond to further inquiries about Operation Fast and Furious until they determined the actual facts.

Similarly, during his testimony to Congress on June 15, AAG Weich appeared at times to be defending portions of the February 4 letter, while at other times to be distancing the Department from it. For example, with regard to the letter's statement that ATF did not allow the sale of firearms "to a straw purchaser who then transported them into Mexico," he testified that "[t]hose particular statements remain true for the technical reason that the . . . straw purchasers don't take guns to Mexico. And in any event, ATF doesn't sanction or approve of the transfer of weapons to Mexico." However, in response to another Member's questions, Weich stated that "we're not clinging to the statements in those letters."

The OIG recognizes the difficult situation Weich was in during his testimony because as AAG for Legislative Affairs, he was not in a position to provide informed responses to the substantive questions that were being asked about the details of Operation Fast and Furious. However, as to the Department's position about the accuracy of the February 4 and May 2 letters – a subject on which Weich could be expected to provide authoritative responses – we believe that Weich's testimony sent a confusing message to Congress and the public about whether the Department's leadership was embracing in full the February 4 and May 2 responses as accurate.

On behalf of the Department, Deputy Attorney General Cole ultimately withdrew the February 4 letter on December 2, 2011. The December 2 letter correctly stated that the February 4 letter included "inaccuracies" that resulted from reliance on information provided by senior officials at ATF and the U.S. Attorney's Office. For the reasons discussed above, we concluded that the Department officials who included this inaccurate information in the February 4 letter share responsibility with these component officials for issuing an inaccurate letter to Congress.

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CHAPTER SEVEN CONCLUSIONS

In this chapter we summarize the OIG's overall assessment of the conduct of Operations Wide Receiver and Fast and Furious and the Department's statements to Congress concerning these investigations. We include a description of specific remedial measures that ATF and the Department have implemented to address many of the problems that surfaced following Operation Fast and Furious, as well as our recommendations for additional remedial measures. Finally, we present our findings concerning individual performance in connection with the activities described in this report.

I. Conduct of Operation Wide Receiver and Operation Fast and Furious

In Chapters Three and Four, we described in detail the conduct of Operations Wide Receiver and Fast and Furious and the basis for our conclusions that the investigations were seriously flawed in several respects, most significantly in their failure to adequately consider the risk to public safety in the United States and Mexico. We believe that the irresponsible handling of these two investigations revealed several systemic problems. We summarize below what we found were the key features and failings in the investigations, and the reforms ATF and the Department have instituted to minimize or prevent these problems from recurring. We also make recommendations for additional remedial measures that we believe are necessary to address the issues we identified.

A. Systemic Issues

1. Lack of Sufficient Controls and Inadequate Attention to Public Safety

Operations Wide Receiver and Fast and Furious sought to identify the higher reaches of firearms trafficking networks by deferring any overt enforcement action against the individual straw purchasers – such as making arrests or seizing firearms – even when there was sufficient evidence to do so. Underlying this strategy was the belief that by conducting physical and electronic surveillance of the subjects, as well as collecting documentary evidence of their activities, the agents would learn how the firearms were being purchased and transported to Mexico. Each investigation also had aspirations of identifying and prosecuting the cartel leaders in Mexico ultimately responsible for the trafficking.

However, this strategy was implemented by ATF and the U.S. Attorney's Office without adequate regard for the risk it posed to public safety in the

United States and Mexico. We found that in Operation Fast and Furious, the calculation was made early in the investigation that dismantling a firearms trafficking organization and disrupting its future trafficking capability better served the public safety than seizing some firearms and arresting mere straw purchasers. We disagreed with the apparent judgment that these two objectives were incompatible, and found that once the strategy was adopted, it should have included constant reassessment of the state of the evidence as the number of illegally purchased firearms and the corresponding risk to the public increased. This did not happen in either investigation.

In addition to the sheer volume of firearms purchasing activity in the investigations, the challenges agents faced in conducting surveillance should have called into question the wisdom of a longer-term approach whose success was dependent on being able to observe how the firearms were crossing into Mexico. Both investigations struggled with surveillance due to limited resources. In addition, subjects often used counter surveillance techniques and maintaining effective but inconspicuous surveillance in certain areas (like residential neighborhoods) was difficult.

These challenges were known early in each case. ATF's Phoenix Field Division initially ran Operation Fast and Furious with a squad of three agents, and even after an influx of additional resources still struggled to conduct effective surveillance; in Operation Wide Receiver, the Tucson office used a squad of seven agents, yet ATF agents did not attempt to coordinate with Immigration and Customs Enforcement (ICE) until the conclusion of the firearms part of the investigation. In both investigations, it was not until conducting post-arrest interviews of key subjects that agents learned how the firearms were getting out of Phoenix in Operation Fast and Furious and out of Tucson in Operation Wide Receiver.

The risk to public safety was immediately evident in both investigations. Almost from the outset of each case, ATF agents learned that the purchases were financed by violent Mexican drug trafficking organizations and that the firearms were destined for Mexico. We believe the limitations and the ineffectiveness of the surveillance should have prompted ATF and U.S. Attorney's Office personnel responsible for conducting and supervising the case to assess whether they could responsibly conduct investigations as large as Operations Wide Receiver and Fast and Furious under these circumstances.

In both investigations, the ATF offices in Phoenix and Tucson relied on the weapons transfer policy in effect at the time, ATF Order 3310.4B, to justify the decision to forego interdicting firearms. Indeed, in Operation Fast and Furious, an early briefing paper explicitly cited the provision and closely tracked its language in describing the case strategy of allowing firearms transfers to continue. Several ATF officials told us that Order 3310.4B can be read to permit not seizing firearms under certain circumstances, such as where

the investigation targets cross-border trafficking organizations, but also said this was not the intent of the policy and that it has not been ATF's practice to allow firearms to "walk" without considering public safety. We concluded that to the extent ATF policy allowed firearms purchases to continue unabated without significant supervisory review and approval in Operations Wide Receiver and Fast and Furious, the policy was seriously deficient and reflected a lack of internal controls. We also concluded that the speculative long term gain of foregoing enforcement action should have yielded to the immediate risk to public safety, both in the United States and Mexico, created by the subjects' substantial trafficking activities.

In early spring 2011, in the course of reviewing its responses to Congress regarding Operation Fast and Furious, the Department also began to examine the lack of sufficient policies and controls regarding gun trafficking investigations. As a result, Attorney General Holder changed Department policy to require Department law enforcement agencies to interdict firearms in the United States where there was lawful authority to do so. In addition, at Holder's direction, on March 9, 2011, Deputy Attorney General (DAG) Cole issued a directive to Southwest Border U.S. Attorneys stating that tactics allowing firearms to cross the border violated Department policy and would not be tolerated, including "controlled deliveries" that were coordinated with Mexican law enforcement.

Implementing this directive, ATF's Assistant Director for Field Operations Mark Chait disseminated written guidance regarding firearms trafficking investigations to all ATF special agents on March 17, 2011. The memorandum states that ATF and DOJ policy on firearms trafficking prohibits planning or conducting undercover operations in which firearms cross the border. The memorandum explicitly states that if law enforcement officials have any knowledge that guns are about to cross the border, they must take immediate action to prevent that from occurring, even if it means jeopardizing an investigation. The memorandum also states that field divisions should ensure that ATF officials coordinate with the appropriate U.S. Attorney's Office "to ensure a mutual understanding of the criteria for both prosecutions and seizures."

Additionally, in a memorandum issued November 3, 2011, ATF officially clarified its policy regarding firearms transfers during a firearms trafficking investigation. The memorandum described ATF policy regarding both "uncontrolled firearms transfers," which occur when the government becomes aware of a suspicious firearm transaction but is not actively involved in the transfer, and "government controlled firearms transfers," which occur when the government controls the delivery of a firearm to a person believed to be unlawfully acquiring or possessing the firearm.

With respect to uncontrolled transfers, the policy memorandum states that when contacted regarding a suspicious person or transaction, the agent should advise the Federal Firearms Licensee (FFL) to follow applicable law and that they are under no obligation to transfer a firearm to a customer and should use their best judgment as to whether to do so. The memorandum also stresses that when an agent has a legal basis to make an arrest or seize a firearm, the agent must take all reasonable steps to prevent the firearm's criminal misuse, taking into consideration public and officer safety. The memorandum identifies the actions available to an agent under these circumstances: 1) intervene to stop a transfer they believe is illegal, 2) arrest the suspect, 3) take the firearms into custody, or 4) conduct continuous on-site physical surveillance to identify additional suspects before taking enforcement action – surveillance that may not cease until enforcement action is taken. The memorandum contains no exemption from the requirements and states, "Perfecting a criminal prosecution must never be more important than protecting public safety."

[REDACTED]

The memorandum specifies that "any exceptions to this policy must be approved in writing and in advance of the operation by the Director."

2. Inappropriate Use of Cooperating FFLs to Advance the Investigation

Agents in Operation Wide Receiver and Operation Fast and Furious used the substantial cooperation of FFLs to advance the investigations. In Operation Wide Receiver, ATF agents formally opened an FFL as a confidential informant and paid the owner of the FFL for his cooperation. As a confidential informant, and under the direction and control of Tucson agents, the FFL sold large quantities of firearms to the Operation Wide Receiver subjects despite direct evidence that the purchases were illegal. Indeed, the ATF agents in Tucson had the FFL act like a "dirty FFL" to gain the trust of the subjects in order to elicit inculpatory information. We found that the entire investigation was premised on the ability of Tucson agents to monitor straw purchases made from the FFL, determine where these firearms were going, and identify who was providing the money for them.

In Operation Fast and Furious, agents in Phoenix used the office's long-standing relationship with and cooperation from FFL1, and to a lesser extent FFL2, to advance the goals of the investigation. The owner of FFL1, which was responsible for 65 percent (over \$985,000) of the sales to Operation Fast and Furious subjects, agreed to place a video camera in his store, record his

telephone calls with Patino and Steward relating to firearms transactions, and include in several sales a particular model AK-47 style rifle that was equipped with an ATF tracking device. FFL2 voluntarily provided video recordings of some purchases, and agreed at ATF's request to disable a .50 caliber rifle purchased by an Operation Fast and Furious subject and to increase its inventory of a particular type of firearm to satisfy an order made by Patino (the sale never took place). Both FFLs also provided ATF with Form 4473s of completed sales of interest to ATF, gave agents advance notice of some purchases, and agreed on several occasions to segregate the cash that subjects used for purchases to allow ATF to expose the cash to police dogs trained to detect the odors of chemicals associated with certain narcotics.

Similar to Operation Wide Receiver, the agents' efforts in Operation Fast and Furious to observe and document purchases by subjects were central to the goal of identifying additional members of the conspiracy and how the firearms were being paid for and transported to Mexico. In FFL1 and FFL2, ATF had cooperative FFLs that facilitated ATF's efforts by continuing to make sales to subjects. For the reasons we explained in Chapter Four, we found that even though these FFLs were not under the direct supervision and control of ATF agents as the FFL was in Operation Wide Receiver, the extent and nature of ATF's requests for cooperation from FFL1 and FFL2 created at least the appearance that sales to particular Operation Fast and Furious subjects were made with ATF's approval and authorization.

The arrangement between ATF and the FFLs in Operation Wide Receiver and Operation Fast and Furious implicated two significant concerns. First, we believe there is a potential conflict between the ATF's regulatory and criminal law enforcement functions with respect to FFLs when the ATF seeks their ongoing and extensive assistance in an investigation. Operation Wide Receiver put this tension in stark relief. In that case, the high number of crime-related traces on firearms the FFL sold during the investigation resulted in increased scrutiny of the FFL by ATF's Industry Operations Division, and the subsequent inspection and warning conference to address unrelated recordkeeping violations strained ATF's relationship with the FFL.

Second, the relationships with the FFLs in these two investigations created at least the appearance that ATF agents approved or encouraged sales of firearms that they knew were unlawful and that they did not intend to seize. In Operation Wide Receiver, agents clearly sanctioned the unlawful sale of firearms; in Operation Fast and Furious, we found that agents emphasized to the cooperating FFLs the value of their cooperation and sought additional cooperation that could be satisfied only by completing sales, at least giving the impression to these FFLs that ATF wanted the sales to continue.

Given that these sales involved illegal straw purchases, we believe ATF agents should have been required to obtain high-level review and approval

before seeking the type of cooperation from the FFLs we described in Chapters Three and Four.

Our concerns with the conduct in Operations Wide Receiver and Fast and Furious are not intended to suggest that there are no circumstances under which the government could appropriately seek the cooperation of an FFL. Indeed, FFLs that voluntarily notify ATF agents about suspicious customers or sales provide critical intelligence about potential firearms trafficking. This is precisely the type of voluntary activity that is appropriate to encourage. However, significant concerns emerge when ATF obtains cooperation from an FFL that results in the FFL making sales it believes are potentially illegal because the FFL is under the impression that ATF is approving or encouraging such sales, particularly in the absence of a written understanding or agreement. We believe that ATF must have formal guidance and policies in place for situations where cooperation beyond merely providing information is offered by or sought from an FFL.

ATF revised its policies regarding undercover operations and the use of confidential informants in November 2011. ATF established an Undercover Review Committee to assess sensitive and significant cases involving undercover operations and a Confidential Informant Review Committee (CIRC) to consider issues involving the use of high level or long term or other sensitive category confidential informants. As part of the attempt to address the problems inherent in ATF's interactions with FFLs in Operations Wide Receiver and Fast and Furious, ATF's revised confidential informant policy now explicitly precludes, absent extraordinary circumstances, the use of licensees as confidential or paid informants if they are in an industry over which ATF has jurisdiction.

The revised confidential informant policy also incorporates the Attorney General Guidelines regarding authorization of confidential informants' otherwise illegal activity. In particular, the revised policy requires advance, written authorization by the Special Agent in Charge (SAC) and the U.S. Attorney for a specified period, not to exceed 90 days, where a confidential informant will commit "Tier 1 Otherwise Illegal Activity," which includes, among other things, activity that would constitute a misdemeanor or felony if committed by a person acting without authorization and that involves the commission, or the significant risk of the commission, of any act of violence by a person or persons other than the Confidential Informant. "Tier 2 Otherwise Illegal Activity" (i.e., illegal activity that does not fall under the definition of Tier 1 and would qualify as a misdemeanor or felony) must be authorized in writing by the SAC for a specific period, not to exceed 90 days. The SAC who authorizes Tier 1 or Tier 2 Otherwise Illegal Activity must make and document a finding in the informant's files that the authorization is necessary either to obtain information or evidence essential for the success of an investigation that is not reasonably available without such authorization, or to prevent death,

serious bodily injury, or significant damage to property, and that the benefits to be obtained from the informant's participation in the otherwise illegal activity outweigh the risks. Where otherwise illegal activity has been authorized, ATF must take all reasonable steps to supervise closely the illegal activities of the informant, minimize the effects of the activity on innocent individuals, and ensure that the informant does not profit from his participation in the activity.

3. Lack of Meaningful Oversight by ATF Headquarters

As discussed in Chapters Three and Five, both Operation Wide Receiver and Operation Fast and Furious suffered from a lack of meaningful oversight from ATF Headquarters. Although ATF had procedures in place for the conduct of sensitive investigations, the criteria for designating a "sensitive investigation" were both too narrow and overly vague. See ATF Order 3210.7C, Chapter C. For example, ATF policy defined "sensitive investigations" to include "incidents that might have diplomatic or international implications" and "any incident, investigation, or involvement that is likely to cause contact with headquarters by the news media or a major political figure," without further guidance regarding what other situations might qualify as "sensitive." Moreover, the policy did not specify that investigations involving the use of an FFL as an informant, coordination with a foreign government, or the use of novel investigative tactics would qualify as "sensitive." Despite this lack of guidance, ATF policy placed the responsibility to recognize and report sensitive situations on Special Agents, requiring them to report it to the Division Director (now referred to as the Special Agent in Charge), who was then required to report it to the appropriate Headquarters Division Chief. The policy stated that a sensitive investigation, incident, or involvement reported to ATF Headquarters "may" require monitoring but did not require subsequent monitoring or oversight.

Although both Operations Wide Receiver and Fast and Furious should have qualified as "sensitive" investigations given the "international implications" involving Mexico and their non-traditional strategies and tactics, neither case received the type of oversight from ATF Headquarters the procedures seemed to contemplate. We also did not see any indication that Tucson or Phoenix agents ever considered designating either operation as "sensitive."

Moreover, while Operation Wide Receiver was designated and funded as a "major case," ATF's major case policy at the time provided no mechanism for substantive approval or monitoring of the investigation by Headquarters personnel. Nor did agents involved in Operation Wide Receiver seek approval for engaging in coordination with Mexico, resulting in a surprising lack of Headquarters involvement. Sufficient information was available in Operation Fast and Furious to prompt questions by responsible Headquarters officials about the investigative tactics used and the corresponding risk to public safety

– and several officials in OSII and the Southwest Border Interdiction Coordinator did in fact raise questions about the investigation based on the number of firearms involved – yet ATF leadership repeatedly failed to act in a timely fashion on this information.

ATF began a new Monitored Case Program in July 2011, which was “designed to ensure close investigative, operational, and strategic coordination” and to enhance communication between field offices and ATF Headquarters regarding ATF’s most sensitive cases. According to the memorandum describing the program, it was implemented to keep ATF executive leadership officials fully informed regarding certain cases. The memorandum establishes guidelines for determining whether a case should be designated for the program. The criteria for cases included in the monitoring program range from specific matters, such as those with a documented international crime nexus, investigations regarding complex straw purchasing schemes involving the purchase or trafficking of more than 50 weapons, and investigations that involve long term and other undercover operations; to general matters, such as investigations that an SAC or Headquarters executive deems appropriate to designate as a monitored case.³¹⁹

The memorandum also describes the procedures field divisions are required to follow when investigations or inspections evolve into cases appropriate for the case monitoring program. Field divisions are required to prepare for ATF Headquarters a briefing paper providing an overview of the matter, including describing investigative techniques used, the evidence and factual corroboration, and verified intelligence. Among other issues, the briefing paper also must include the numbers of suspects or defendants and any affiliation with criminal organizations, the nature and number of violations found, the number of “unaccounted for” firearms, and a description of proposed future investigative or inspection plans.

According to the memorandum, once the briefing paper is sent to ATF Headquarters Investigative Support Branch, which coordinates the program, a reviewer is assigned to the case and receives the same access to ATF’s N-Force database as the case agents. The memorandum also prescribes regular monthly briefings regarding cases in the program to field office and division management and in turn to the appropriate Deputy Assistant Director (DAD). Importantly, the memorandum requires SACs to telephonically notify the DAD

³¹⁹ ATF issued a revised Monitored Case Program on August 29, 2012. According to the issuing memorandum, the program had evolved since July 2011 to focus on more sensitive and high-risk investigations and inspections. The memorandum restates those policies and procedures from the July 2011 memorandum that remain in effect, describes the changes to the criteria used to identify monitored cases, and defines additional requirements for documenting monitored cases.

“each time there is a significant activity [described further as ‘significant search or arrest warrants, major undercover deal, significant activity or advancement in the case, significant changes to strategy’] that is unanticipated or a change to the scope of an investigation or inspection in a monitored case.” The DADs are then required to provide monthly monitored case briefings to the Acting Director (AD), the Deputy Director, and the AD for Field Operations.

4. Issues Regarding Coordination with Other Law Enforcement Agencies

In Chapter Four, we described how ATF missed an early opportunity to advance its investigation up the organizational ladder of the trafficking group it had identified when it failed to exploit information provided by the DEA’s Phoenix Office in December 2009 from one of its OCDETF investigations. After receiving the information from the DEA and failing to follow up on it, ATF focused on getting OCDETF approval for its case and obtaining its own wiretaps. We found that after eight additional months of investigation and the use of substantial government resources, ATF was not substantially closer to identifying how the trafficking was being financed or how the firearms were being transported to Mexico than it was after receiving the information from the DEA.

As we also described in Chapter Four, unknown to ATF at the time, one of the individuals identified in the DEA information provided in December 2009 was, together with ██████████ of the straw purchasers working for Manuel Celis-Acosta, the leader of the group being investigated in Operation Fast and Furious. In March 2010, ATF agents learned the full true names of these ██████ individuals and that they had been the subjects of a joint FBI-DEA drug trafficking case out of ██████████ that was initiated on December 4, 2009. The DEA office that provided ATF this information advised that it believed these ██████ individuals had received firearms from Celis-Acosta. However, it was not until one year later, in March 2011, that ATF agents discovered the significance of these individuals’ connection to Operation Fast and Furious. The failure to discover this connection earlier is troubling and raises questions about how information was shared among various offices of ATF, the DEA, and the FBI at this stage and at other points during the investigations. We continue to review materials relevant to these issues in order to assess whether further investigation is warranted.

We also saw coordination and information sharing issues between ATF and ICE, and noted instances in Chapter Four where ATF resisted ICE conducting any independent or coordinated investigations that were related to Operation Fast and Furious through recovered firearms. In light of ICE’s jurisdiction over export violations involving munitions and firearms, close coordination with ICE was essential in an investigation that purported to target a cartel in Mexico and had as a goal identifying the crossing mechanism the

cartel was using to obtain firearms from the United States. We question whether adding a single ICE agent (who was a former ATF employee) to the Operation Fast and Furious investigation was sufficient to ensure or promote this coordination. The Office of the Inspector General for the Department of Homeland Security, the parent agency for ICE, is conducting a review of ICE's involvement in and knowledge of Operation and Fast and Furious.

5. Recommendations

Although we believe that the policies that ATF has instituted to address problems identified in Operation Fast and Furious are significant and helpful, we believe that more needs to be done to ensure that ATF exercises adequate oversight of its operations and institutes controls that account for public safety. Our investigation made clear that the failures within ATF, which included a long term strategy in Operation Fast and Furious that was fully supported by the U.S. Attorney's Office, were systemic and not due to the acts of only a few individuals.

Indeed, ATF's new policies underscore the agency's delay in completing its integration into the Department and in implementing controls to protect the public that are used in other Department law enforcement components. For example, we find it remarkable that ATF did not until recently utilize review committees to evaluate its undercover operations and the use of high-level and long-term confidential informants. We also are concerned that ATF and the Department have not devoted sufficient attention to ensuring that ATF's policies scrupulously adhere to requirements found in the Attorney General's Guidelines and other Department policies. ATF, for example, did not revise its confidential informant policies to conform to the Attorney General's Guidelines Regarding the Use of Confidential Informants until last year – eight years after ATF joined the Department. Moreover, the Department has not yet amended the Attorney General's Guidelines to expressly cover ATF.

In light of Operation Fast and Furious and the results of other OIG reviews, we believe that more rigorous oversight of ATF is necessary. The OIG looks forward to future reviews of ATF that will improve its effectiveness and accountability. Accordingly, the recommendations we provide below should be seen as an initial starting point for needed reforms.

Recommendation 1: The Department should examine ATF's policies on law enforcement operations to ensure that they are in compliance with Department guidelines and policies.

Recommendation 2: The Department should examine ATF's case review procedures to verify that they are consistent with procedures adopted in other Department law enforcement components to ensure that matters involving "sensitive circumstances," "special requirements," and "otherwise illegal

activity” are sufficiently evaluated. The Department should assess ATF’s implementation of these procedures to ensure that they are effective and consistently applied.

Recommendation 3: The Department should work with ATF to develop guidance on how to conduct enterprise investigations against gun trafficking organizations consistent with lessons learned from Operation Fast and Furious.

Recommendation 4: The Department should review the policies and procedures of its other law enforcement components to ensure that they are sufficient to address the concerns we have identified in the conduct of Operations Wide Receiver and Fast and Furious, particularly regarding oversight of sensitive and major cases, the authorization and oversight of “otherwise illegal activity,” and the use of informants in situations where the law enforcement component also has a regulatory function.

Recommendation 5: The Department should maintain a regular working group involving leadership from its component law enforcement agencies to ensure appropriate coordination among them on significant law enforcement policies and procedures, case deconfliction mechanisms, and law enforcement initiatives.

We request that the Department update the OIG on its progress in implementing these recommendations within 90 days from the date of this report, including a timeline for completing its work on the recommendations.

Upon completion of our ongoing work that we described in Chapter One, as well as our review of the report of the Office of Inspector General for the Department of Homeland Security on ICE’s role in Operation Fast and Furious, we will consider whether further recommendations are necessary.

6. Department Review of Wiretap Applications

We reviewed the wiretap affidavits in both Operation Wide Receiver and Operation Fast and Furious and concluded that the affidavits in both cases included information that would have caused a prosecutor who was focused on the question of investigative tactics, particularly one who was already sensitive to the issue of “gun walking,” to have questions about ATF’s conduct of the investigations. For example, as we discussed in Chapters Five and Six, both ATF Acting Director Ken Melson, a former federal prosecutor, and Criminal Division prosecutor Laura Gwinn had concerns about “gun walking” when they reviewed the affidavits. However, we also learned during our review that none of the 5 Deputy Assistant Attorneys General (DAAG) who reviewed the 14 wiretap applications in connection with Operations Wide Receiver and Fast and Furious identified any issues or raised any concerns about the information contained in the applications.

We interviewed three of the five Criminal Division DAAGs who reviewed wiretap applications in Operation Fast and Furious and Operation Wide Receiver.³²⁰ All three of those DAAGs told us that they focused their attention on whether the applications were legally sufficient. They also told us that it was their practice to read the agent's affidavit in support of a wiretap application only if they had a concern after reading the OEO attorney's cover memorandum. Indeed, DAAG Weinstein told us he did not review the affidavits in Operation Fast and Furious, and Blanco and Mandelker told us they did not recall reading the affidavits in support of the applications they reviewed for Operations Fast and Furious and Wide Receiver, respectively.

In light of the explicit statutory assignment of responsibility for authorizing wiretap applications, we were concerned by the DAAGs' statements to us regarding their practices regarding review of wiretap applications. We believe DAAGs should conduct a review of wiretap applications and affidavits that is sufficient to enable them to form a personal judgment that the application meets the statutory criteria. While we appreciate that the OEO cover memoranda serve a useful purpose in the review process and can appropriately influence the scope and nature of the DAAG's review of the affidavits themselves, we do not believe they should supplant such review.

During Fall 2011, the Criminal Division began making changes in the way that U.S. Attorneys' Offices, OEO supervisors, and DAAGs review wiretap applications. Supervisory AUSAs are now formally required to review and approve applications before they are sent to OEO. According to DAG Cole, this requirement provides a good check to ensure that supervisors in the U.S. Attorney's Office are aware of the operational details in an investigation. In addition, OEO supervisors and DAAGs have been directed to increase their efforts to contact supervisory AUSAs directly when review of the application raises concerns about the operational tactics used in an investigation. Cole told us that the policy was not designed to have OEO supervisors and the DAAGs review the operational aspects of an investigation, but rather to have the OEO Director follow up with the supervisory AUSA if reviewers come across red flags in an application package. Criminal Division AAG Breuer described the new requirement as providing "an extra level of sensitivity" to red flags that the USAO might have missed.

³²⁰ We were unable to interview the two other DAAGs who reviewed wiretap applications in Operation Fast and Furious and Operation Wide Receiver. As noted previously, DAAG Keeney, who reviewed applications in both cases, passed away in 2011. DAAG Sabin, who reviewed Operation Wide Receiver applications, requested as a condition of the interview that we ask the court to unseal the wiretap applications so that Sabin's attorney could review them and we did not ask the Department to make such a request of the court.

We believe these changes are appropriate and necessary. However, in light of our findings, we recommend the following:

Recommendation 6: The Department should require that high-level officials who are responsible for authorizing wiretap applications conduct reviews of the applications and affidavits that are sufficient to enable those officials to form a personal judgment that the applications meet the statutory criteria.

B. Individual Performance

In this section, we assess the performance of each of the Department employees who were most involved in Operation Wide Receiver and Operation Fast and Furious. We address individual performance issues for events after January 25, 2011, in Section II below.

1. ATF Phoenix Field Division

ATF's Phoenix Field Division, together with the U.S. Attorney's Office, bore primary responsibility for the conduct of Operations Wide Receiver and Fast and Furious. While we found no evidence that the agents responsible for the cases had improper motives or were trying to accomplish anything other than dismantling a dangerous firearms trafficking organization, we concluded that the conduct and supervision of the investigations was significantly flawed. For reasons described in Chapters Three and Four, the Phoenix and Tucson offices adopted and adhered to a strategy that deferred taking overt action against subjects, even when evidence of the illegality of the purchasing activity was overwhelming, and we concluded, did so without adequate consideration of how that strategy placed the public at risk and what measures could be taken to minimize that risk. Further, as the case progressed, there was no discussion about whether the goals of the investigation should yield to what should have been an imperative to end the firearms trafficking taking place.

a. Special Agent Garcia

Brandon Garcia, the case agent in Operation Wide Receiver, was a first-year agent at the time the investigation began. He had no experience with firearms trafficking investigations and was closely supervised and directed by Resident Agent in Charge (RAC) Higman, who made operational decisions during the investigation. Indeed, Garcia told us that Higman had him "on a tight leash for quite a while." While Garcia admitted that he made several errors stemming from his inexperience at the time, such as failing to exercise sufficient control over the FFL who was serving as a confidential informant, we found that Garcia opposed the decision in September 2007 by Higman and the assigned prosecutor, Thomas Ferraro, to extend and expand electronic surveillance and try to "roll the investigation into people [who] are primarily dopers" rather than to end the investigation and make arrests. We determined that Garcia was poorly supervised by Higman, who himself lacked the

judgment and operational experience to lead an investigation like Operation Wide Receiver, and that Garcia did not have adequate guidance in conducting the investigation.

b. Former Resident Agent in Charge Higman

Charles “Chuck” Higman, a RAC in ATF’s Tucson Office, directly supervised Operation Wide Receiver. Higman was closely involved in the day-to-day conduct of the case and made the operational decisions in the investigation, including determining when to end surveillance. Indeed, agents told us that nothing happened in Operation Wide Receiver without Higman’s approval. Higman thus was directly responsible for the investigative tactics used in Operation Wide Receiver, including the failure to interdict firearms. As described in Chapter Three, one agent told us that Higman “supervised and directed” agents in implementing the weapons transfer policy in ATF Order 3310.4B, permitting agents to decline to interdict firearms in furtherance of a broader investigation. Contemporaneous documents show that Higman knew that agents could have made arrests earlier in the investigation and instead made the decision to forego immediate arrests and interdictions to develop evidence of the firearms trafficking network.³²¹

Based upon our interviews and review of relevant documents, we determined that Higman lacked the operational experience to conduct a complex firearms trafficking investigation and failed to adequately consider the public safety risks of the tactics used. We also concluded that Higman failed to provide responsible supervision of the investigation.

c. Special Agent MacAllister

MacAllister initiated the investigation that would become Operation Fast and Furious on approximately October 31, 2009. Through her efforts and those of two inexperienced agents, ATF identified a group of individuals that by December 2 was responsible for purchasing 341 firearms from Phoenix-area FFLs for about \$190,000 in cash. The subjects and purchases bore all the indicators of straw purchasing and firearms trafficking. By the middle of December 2009, MacAllister also knew that the main target of her investigation was linked to subjects in an OCDETF drug trafficking case being run by the DEA and was provided specific information from the DEA about that link and even the opportunity – which she did not take – to attempt to observe a firearms transfer between her main subject and the individual financing the purchase. By the end of December, the Operation Fast and Furious subjects

³²¹ As we noted in Chapter Three, Higman retired from ATF in February 2009, and he did not respond to our repeated attempts to contact him.

had purchased a total of 650 firearms for over \$350,000, and the recoveries in the United States and Mexico continued.

Instead of taking action against the subjects by leveraging the early evidence ATF had amassed, MacAllister, with the full support of her management and the U.S. Attorney's Office, adopted a longer-term strategy that was predicated in part on the belief that approaching the subjects was unlikely to develop the evidence required to dismantle the entire trafficking network. MacAllister said that in her experience, subjects such as those identified in Operation Fast and Furious were unlikely to admit they were doing anything illegal and unlikely to cooperate with law enforcement, and that therefore approaching the subjects would have only accomplished alerting them to ATF's awareness of their activities. MacAllister also believed, based on her own view and previous work with AUSA Hurley, that she needed an admission from the subjects in order to seize any firearms or make an arrest.

MacAllister's tactical judgment and belief about the need for admissions dovetailed to create a situation where she did not believe it would be effective to approach the subjects – the only action she thought might elicit the probable cause needed to make seizures or arrests. The consequence of MacAllister's view was starkly illustrated when she told us she did not think the evidence was sufficient in April 2010 to seize the three .50 caliber rifles Patino bought during a single visit to an FFL for approximately \$27,000 cash, despite his prior purchasing activity and the fact that a narcotics dog alerted on the \$18,000 down payment and Patino was observed transferring at least one of the rifles to a third party.

We recognize that Phoenix management was fully supportive of MacAllister's efforts in Operation Fast and Furious and that it was reasonable for MacAllister to rely on Hurley's legal advice. We nevertheless were troubled by the lack of urgency in MacAllister's tactical approach in the circumstances of Operation Fast and Furious, and by her understanding of the evidence required for enforcement action in the case. Even if MacAllister had limited success in the past building firearms cases by confronting subjects, we believe the volume of the purchasing activity she was observing and documenting in Operation Fast and Furious on almost a daily basis should have caused her to reconsider any concern that overt action might compromise the case sooner than she desired. To the extent MacAllister had questions or doubts about her legal authority in light of the growing body of evidence, MacAllister should have consulted with the Assistant U.S. Attorney. If the AUSA refused to proceed in light of the evidence, it would then have been incumbent on MacAllister to raise the issue with her supervisors. We do not believe that allowing the purchasing activity to continue unabated was a responsible option.

In sum, we concluded that MacAllister's early decisions in the case and her failure to reassess the investigative approach as the case progressed

reflected a lack of urgency that was incompatible with the risk to public safety the Operation Fast and Furious subjects were creating.

d. Former Group Supervisor Voth

Voth arrived at the Phoenix Field Division as the permanent supervisor for Group VII on December 6, 2010, and was responsible for providing the first-level management and oversight on Operation Fast and Furious. Given the volume of firearms trafficking occurring in the investigation and the challenges agents and prosecutors described regarding straw purchaser cases in Arizona, Operation Fast and Furious needed strong and responsible supervision. While we recognize that Voth was a first-time Group Supervisor in a new office, we concluded that he failed to provide responsible supervision of the investigation.

In January 2010, within weeks of arriving in Phoenix, Voth drafted a briefing paper on the case that affirmed the approach that had been undertaken to that point with the support of management. That briefing paper described an investigation in which 650 firearms had already been purchased for over \$350,000, and that had as its goal obtaining a wiretap to develop evidence to dismantle the trafficking organization, despite the significant resource limitations of which Voth and his management were aware. The strategy explicitly deferred taking action against straw purchasers and anticipated that the firearms trafficking already observed would continue for an indeterminate period of time. Whatever merit Voth believed there was in this approach, we believe that under the circumstances in Operation Fast and Furious, he had a responsibility as the Group Supervisor to have regularly reassessed the approach and considered whether measures could be taken to disrupt or stop the subjects' firearms trafficking. Voth failed to do this.

Voth told us that the strategy set forth in the January 2010 briefing paper was adopted because it was only through a wiretap that ATF could obtain the evidence required by the U.S. Attorney's Office to prosecute the case. Voth also told us that he believed there was sufficient probable cause early in the case to seize firearms and make arrests, but that this was not done because AUSA Hurley told agents there was not enough evidence to take these actions until late in the investigation. Voth said this was a source of frustration for him during the case.

For reasons we described in Chapter Four, we were not persuaded by Voth's assertions. We concluded that the investigative goal and approach in Operation Fast and Furious, which Voth reaffirmed on multiple occasions during the course of the case, drove the lack of overt action against the straw purchasers, including making seizures and arrests. We did not find persuasive evidence to support Voth's claim that this approach and ATF's continued adherence to it in the face of alarming purchasing activity was solely grounded in disputes with Hurley's legal guidance during the case. In fact, if Voth truly

felt the frustration during the case that he asserted to us with respect to seizures and arrests, his deficiencies as a supervisor were even more significant because we did not find persuasive evidence that his managers at ATF or those responsible for the case at the U.S. Attorney's Office were made aware of these misgivings. Instead, Voth's communications to these individuals reflected his full support for the case and his belief that "we are righteous in our plan to dismantle this entire organization and to rush in to arrest any one person without taking into account the entire scope of the conspiracy would be ill advised to the overall good of the mission."

e. Former Assistant Special Agent in Charge Gillett

Gillett was the ASAC responsible for overseeing Operation Fast and Furious from approximately October 31, 2009, when MacAllister opened the case, through mid-April 2010. During the period of Gillett's oversight, Operation Fast and Furious subjects purchased approximately 1,300 firearms for over \$1,000,000, yet agents made no arrests and just a single seizure. Instead, ATF Phoenix adhered to a strategy that deferred overt action against the straw purchasers because doing so might compromise a larger case against the trafficking organization. We were critical of Gillett's oversight as ASAC because in ATF's pursuit of this goal, we believe he either lost sight of the immediate public safety risk being created by the straw purchaser's unabated firearms trafficking, or truly believed that the uncertain success of a long-term, resource intensive strategy outweighed the imperative of ensuring public safety. In either case, we found Gillett's supervision and judgment in Operation Fast and Furious seriously deficient.

Gillett approved of MacAllister's decision in November 2009 to not interview the subjects whose 19 guns were recovered in Mexico within 2 weeks of being purchased. In an e-mail explaining that decision, MacAllister told Gillett she wanted to identify "larger players in the organization" and believed that confronting the subjects too early would "adversely affect the success of the investigation." In response, Gillett told MacAllister, "that is fine and totally your call." Gillett reaffirmed his support for this approach when in mid-December he contacted an official who, after receiving a briefing about Operation Fast and Furious, mentioned the possibility of needing to shut the case down due to the large number guns being trafficked. Gillett contacted the official, and according to Gillett's e-mail summarizing the call, told him – misleadingly, we believe – "that we will slow purchasers down as much as possible, but we have not identified the network yet. The result [of arresting purchasers now] will be that the responsible conspirators will have new straw-purchasers operational before we complete the booking paperwork." This approach in the case – one that deferred action against the straw purchasers while a case against the organization was built despite 650 firearms having already been purchased for over \$350,000 – found expression in ATF's January 8, 2010, briefing paper that Voth drafted and Gillett revised. That briefing

paper stated the strategy was “to allow the transfer of firearms to continue to take place in order to further the investigation[.]”

According to Gillett, Operation Fast and Furious was a different type of investigation, where instead of investigating firearms violations from the straw purchaser angle, ATF would innovatively use wiretaps to develop evidence to support the prosecution of an entire trafficking network. Gillett described this as the “common sense” answer to ATF’s past frustrations with the U.S. Attorney’s Office’s strict evidentiary requirements in firearms cases, and ATF and Department policy memoranda that emphasized developing complex cases that pursued organizations and not just straw purchasers. However, we concluded that these explanations did not excuse adhering to a strategy that deferred overt action even as the evidence of firearms trafficking rapidly mounted and the risk to public safety continued.

As discussed in Chapter Four, Gillett told us ATF was frustrated with what it believed was the U.S. Attorney’s Office’s position that agents had to obtain the firearms recovered in Mexico in order to prosecute the original purchasers. However, firearms purchased by several Operation Fast and Furious subjects were recovered in the United States as well as Mexico, yet ATF did not seek to arrest and prosecute any of these straw purchasers even when ATF had the recovered firearms in its possession. We also understood that ATF was frustrated by the U.S. Attorney’s Office’s unwillingness to prosecute individuals when the only evidence of straw purchasing was a mere transfer of the firearms between non-prohibited parties. However, this situation was far different than the compelling evidence that agents established in the early weeks and months of Operation Fast and Furious, evidence that we believe should have been acted on earlier through seizures and possibly arrests. Moreover, if Gillett had concerns with the position of the U.S. Attorney’s Office he should have raised them with the leadership of that office. Gillett told us, however, that he was not frustrated with Hurley during Operation Fast and Furious, with the exception of the time it took to get the wiretap applications approved, and that he was pleased that the U.S. Attorney’s Office was willing to work with ATF on a complex investigation.

We also found that it was not reasonable for Gillett to interpret ATF and Department policy memoranda as supportive of a strategy that deferred overt action against subjects as they continued to traffic hundreds of firearms with impunity. Gillett highlighted in particular the statement in the Department’s January 7, 2010, “Strategy for Combating the Mexican Cartels” memorandum that, “merely seizing firearms through interdiction will not stop firearms trafficking to Mexico. We must identify, investigate, and eliminate the sources of illegally trafficked firearms and the networks that transport them.” This is one sentence of a 9-page document that “set[] forth policy considerations that will guide the Department” in disrupting and dismantling Mexican drug cartels. Former Deputy Attorney General David Ogden, the Department official

responsible for the “Cartel Strategy” memorandum, told us that it was not intended to address or modify particular tactics that ATF used in conducting gun trafficking investigations. He said language about seizing firearms was a broad policy statement and not a comment on the merits or wisdom of tactics pursued in any particular case and that he would not have favored any investigation that resulted in firearms crossing the Mexican Border. We believe that this is the proper view of the Cartel Strategy and that decisions about what tactics to employ to effectuate the strategy rest with field offices that conduct the investigations. In Operation Fast and Furious, the Phoenix Field Division failed to do this responsibly.

In short, we concluded that Gillett endorsed a strategy in Operation Fast and Furious that lacked adequate measures to minimize the risk to public safety in the United States and Mexico created by the subjects’ trafficking and that did not include any plan to reassess the decision to allow transfers of firearms to continue. In doing so, Gillett failed to provide responsible supervision of Operation Fast and Furious.

f. Former Special Agent in Charge Newell

Special Agent in Charge (SAC) William Newell became SAC of the Phoenix Field Division in June 2006. As discussed in Chapter Three, Newell told us that he understood the goal of Operation Wide Receiver was to take down a firearms trafficking organization, and that he agreed with the Tucson agents’ strategy of targeting the command, control, and financing of the organization.

Newell reviewed and signed funding requests for Operation Wide Receiver indicating that the subjects had purchased numerous firearms and had told the FFL in monitored conversations that the firearms were for buyers in Mexico, and that agents had forged a “cooperative agreement” with Mexican law enforcement to continue surveillance of the firearms into Mexico.

We found that these memoranda put Newell on notice of facts indicating that Tucson agents had the legal authority to interdict and seize firearms in Operation Wide Receiver but did not do so. While Newell told the OIG that the Tucson U.S. Attorney’s Office told Tucson ATF agents that there was not probable cause to interdict and seize firearms or to make arrests in Operation Wide Receiver, we found no evidence to support Newell’s claim. Additionally, although Newell told us that he disagreed with the use of the FFL as a paid confidential informant in Operation Wide Receiver, we concluded that he made no effort to end the relationship or to instruct the FFL to refrain from making additional sales to straw purchasers. We concluded that Newell, as SAC, was ultimately responsible for the failures in Operation Wide Receiver.

SAC Newell also bore ultimate responsibility for the failures in Operation Fast and Furious, particularly in light of his close involvement with the office’s

highest profile and most resource-intensive case. Like Gillett, Newell supported the strategy adopted in the case, and was also acutely aware that its most challenging aspect was the large volume of firearms being trafficked. Further, like Gillett, Newell did not consider any measures to minimize the risk to the public created by the Operation Fast and Furious subjects or prompt reassessment of the strategy despite the compelling evidence the investigation accumulated.

Newell acknowledged to us that reassessments should have occurred and that he should have asked more questions during the case. We of course agree, but do not believe this judgment requires the benefit of hindsight. Newell was sufficiently familiar with the case from the outset – and remained knowledgeable as the case progressed through briefing papers, the exit strategy, and regular communications from Gillett and Voth – to put him on notice that the investigation required close oversight and constant reevaluation. We concluded this did not occur because Newell viewed Operation Fast and Furious as a high profile investigation that could illustrate the connection between firearms and drug trafficking, and that was following a strategy he fully supported. We believe the multiple flaws in the case described in Chapter Four were readily apparent as the case was being conducted. Newell simply failed to take measures to address them.

We also were not persuaded by Newell's contention that the case strategy was driven by AUSA Hurley's restrictive view of the evidence required to prosecute firearms cases. This is not because we found Hurley's legal views reasonable. To the contrary, Hurley's legal view of the sufficiency of the evidence at various points during Operation Fast and Furious to seize firearms or make arrests struck us as unduly conservative, and we believe that agents had a legal basis to take enforcement action against subjects at points that are probably earlier than Hurley would identify. However, we were not persuaded by Newell's contention that the case strategy was driven by Hurley because we do not believe, at least as to Operation Fast and Furious, that Newell and his office were drawn reluctantly into a longer-term investigation just to satisfy Hurley.

We concluded that from the earliest weeks of the case, and throughout the investigation, ATF was committed to and comfortable with a strategy that deferred overt action for an indeterminate period. If Newell believed that Hurley's legal advice was an obstacle to a more appropriate investigative approach that included firearms seizures and possibly arrests, Newell's responsibility as the SAC was to raise the issue with a senior official at the U.S. Attorney's Office or ATF Headquarters. Newell, however, never contended in any of the briefing papers he sent to Headquarters or in his dealings with the U.S. Attorney's Office that Hurley's interpretation of probable cause had relegated his agents to observer status as they conducted surveillance of purchases. While Hurley's view of what evidence was needed for a

prosecutable case may have been consistent with this approach, we do not believe it was the sole explanation for ATF's approach to the investigation.

Newell fully supported the strategy in Operations Fast and Furious. In fact, when ATF Headquarters personnel raised concerns, as started to occur in December 2009 when Rowley began asking questions about the large number of firearms being trafficked in the investigation, Newell's response was immediate and defensive.³²² He e-mailed Martin and described Rowley as "one of the 'hand wringers' on this deal [who was] asking why we weren't shutting this deal down now." Newell informed Martin that he had Gillett "counsel" Rowley as to why the Phoenix Field Division was not going to close down the investigation and that Rowley should not worry about issues that he had no control over or "say in for that matter."

We also found instances where Newell furnished incomplete information, and at times made statements that conveyed a misleading impression to ATF Headquarters on matters related to Operation Fast and Furious. Newell sent two e-mails to McMahon in January 2010 that mischaracterized agents' efforts to disrupt the straw purchases. On January 5 he wrote that his agents were "doing everything possible to slow [the straw buyers] down." On January 14, Newell described to McMahon a recent seizure in El Paso involving Fast and Furious firearms and stated, "[h]opefully the big bosses realize we are doing everything possible to prevent guns going into Mexico while at the same time trying to put together a phenomenal case." As we described in Chapter Four, ATF's agents in Phoenix told us they were not slowing the subjects' purchasing activity in January and beyond for fear of jeopardizing the anticipated wiretap and due to Hurley's legal advice. Newell's e-mails conveyed a misleading impression that agents were slowing purchases and interdicting firearms when in fact they were not.

Newell also told us that he "pushed for" the March 5, 2010, briefing because he wanted ATF Headquarters to be fully informed about Operation Fast and Furious and to understand that "[t]his is our plan. So that if anybody had an issue with it, speak now or forever hold your peace." ATF's presentation, however, omitted key details about "the plan" that would have alerted ATF executives to problems. Although Voth presented the briefing, Newell did not highlight for the briefing attendees that the case strategy the ATF Field Office adopted in early January involved allowing the transfer of firearms to continue, that the straw purchasers had acquired nearly 300 firearms since early January, that ATF had no immediate plans to change that

³²² As Newell once stated to McMahon, "I don't like [Headquarters] driving our cases. . . ." He also informed a staff member in April 2010 that he did not think he could keep ATF Headquarters "at bay" longer than another 60-90 days.

strategy (ATF's next seizure was not until June), that ATF had advance notice of many purchases, and that ATF initiated only one of the 17 seizures and recoveries described at the briefing.

After Agent Terry's murder on December 14, Newell again provided McMahon information about the case that we found conveyed a misleading impression about the activities of Group VII. Newell told McMahon that he did not like "the perception that we allowed guns to 'walk,'" and that he had Voth collect the data on firearms recoveries in Mexico and those "we had a direct role in taking off here in the US." Newell told McMahon that "[a]lmost all of the 350 seized in the US were done based on our info and in such a way to not burn the wire or compromise the bigger case." As we reported in Chapter Four, we concluded that seizures initiated by Group VII agents totaled only 105 firearms.

We believe that Newell's statements in these e-mails and the incomplete information at the March 5 briefing conveyed the misleading impression that agents were aggressively dealing with the firearms traffickers and that he had the case under control.

After reviewing a draft of this report, Newell submitted comments disputing our conclusion that the information he provided was at times misleading. He stated that the e-mails he sent in January 2010 were accurate as he understood the case, and that he believed the FFLs were delaying sales and that agents were doing everything possible to prevent firearms from going to Mexico. He also did not concur that the March 5 briefing was lacking in information. With respect to the January 2011 e-mail to McMahon, Newell stated that the information he conveyed was provided to him by Voth and that Newell believed it was accurate.

We are not persuaded by Newell's arguments because the information he communicated was inaccurate and consistent with what we believe was a tendency for him to overstate or omit important information about the investigation. In fact, his agents in January 2010 were not "doing everything" to slow firearms purchases or transfers to Mexico – they were not confronting subjects, seizing firearms, or making arrests. Newell knew this was not happening for the sake of the case against the trafficking organization. Newell also misunderstood our point about the March 5 briefing. We do not dispute that Newell provided substantial information about the investigation to McMahon, and that the March 5 briefing included the presentation of many facts about the investigation. Our point is that Newell did not fully disclose the most troublesome aspects of the case to the assembled executive staff.

Overall, we found that SAC Newell's conduct with respect to Operations Wide Receiver and Fast and Furious was irresponsible, and that he failed to provide the leadership and judgment required of a Special Agent in Charge.

2. United States Attorney's Office for the District of Arizona

We concluded that the U.S. Attorney's Office for the District of Arizona shared equal responsibility for the conduct of Operations Wide Receiver and Fast and Furious. As noted earlier with respect to the agents involved with the cases, we found no evidence that the prosecutors had improper motives or were trying to accomplish anything other than dismantling a dangerous firearms trafficking organization. However, as summarized below, we concluded that the conduct and supervision of the investigations was significantly flawed.

a. Tucson Office

We found that the participation of the U.S. Attorney's Office in Operation Wide Receiver was fragmented and ineffective. Attorneys and supervisors in the Tucson U.S. Attorney's Office did not afford Operation Wide Receiver the attention that a proactive, complex firearms trafficking investigation warranted, and therefore missed opportunities to minimize the threat to public safety posed by the investigation. As discussed in Chapter Three, Jennifer Maldonado, the AUSA assigned to Operation Wide Receiver during the investigative phase of the case, lacked experience handling proactive cases, had a narrow view of her responsibilities as the assigned prosecutor, and had little involvement in or knowledge of the day-to-day activities in the investigation.

The other AUSAs brought in to assist Maldonado with electronic surveillance – first David Petermann, then Tom Ferraro – had more experience but did not attempt to change ATF's investigative strategy or tactics. Ferraro later told his supervisor he was "unhappy" with the case because firearms had gone to Mexico without having been interdicted by Mexican law enforcement officials, contrary to what Ferraro told the OIG he had believed was happening in the case. However, Ferraro did not ask questions during the investigation about the nature and scope of ATF's cooperation with Mexico, nor did he ensure that Tucson agents interdicted firearms in the absence of such cooperation. Only 15 of the 57 firearms sold while Ferraro was assigned to the case were interdicted. Serra Tsethlikai, the fourth AUSA assigned to the case, made little progress on it, and the case languished until a Criminal Division prosecutor was assigned in September 2009.

We also found that supervisors in the Tucson U.S. Attorney's Office did not adequately supervise Operation Wide Receiver. We believe that the case should have garnered closer scrutiny from supervisors, greater attention to the risk to public safety posed by the investigation, and a stronger effort to bring the case to indictment in a timely manner.

b. Assistant U.S. Attorney Hurley

As the lead and only prosecutor assigned to Operation Fast and Furious, Hurley shared first-line responsibility with the case agent for ensuring that the case was conducted responsibly. We believe that in light of the nature and scope of the subjects' firearms trafficking, the investigation required constant reevaluation as the evidence accumulated to determine whether overt action should be taken against any of the subjects, both because the evidence supported it and the public safety demanded it. As we discussed in Chapter Four, Hurley failed to do this.

According to an e-mail Hurley sent to U.S. Attorney Burke in November 2009 about a significant seizure of Operation Fast and Furious-related firearms, Hurley believed it would take time to time to build the investigation into an indictable case and that “[w]e will not be able to see the purchasers arrested immediately.” Similar to MacAllister, Hurley felt “the greatest risk to the larger [Operation Fast and Furious] investigation will be tipping our hand to the suspects too soon.” Hurley agreed with the ATF that the traditional approach of confronting straw purchasers and hoping they would admit illegal activity was unlikely to be effective, and that even if an admission were obtained for a prosecution, that individual would be easily replaced and the members of the conspiracy would be put on notice that law enforcement was aware of their activities. Hurley supported the approach “to pursue a longer term investigation to target the leader of the conspiracy” knowing that by January 2010 subjects were responsible for the purchase of 600 firearms, that there were firearms recoveries in Mexico and the United States, and that the “hub” of the conspiracy (Celis-Acosta) was directly linked to a DEA drug trafficking investigation.

Our primary criticism of Hurley is that he did not adequately evaluate the risk to the public safety at the outset of the investigation and, like others responsible for the case, did not reevaluate the longer term investigative approach as hundreds more firearms were trafficked. He failed to consider whether steps should be taken to deter the activity even if they might bring the case to a quicker resolution, such as confronting particular straw purchasers with the evidence against them or obtaining search warrants at locations agents had already identified as stash houses. We believe the evidence was sufficient well before the first wiretap in March 2010 was obtained to take these steps or consider charges against the top straw purchasers. Even if Hurley was not confident that such a case would be successful, we believe the circumstances were such that these reservations should have been secondary to the imperative of finding ways to disrupt the large scale trafficking being observed (such as through seizures) other than simply waiting to see what kind of evidence the wiretaps produced. We found the lack of urgency in this regard troubling.

Hurley told us that he deferred to agents on the tactical decision of whether to approach subjects, but also said that his impression was that an earlier arrest of Patino, for example, would have been tantamount to ending the case. Hurley said no one suggested any change in the case in response to the trafficking being observed. Hurley also said that he was not asked to make arrests, nor did he receive complaints about not being able to seize firearms. We found no persuasive evidence to contradict this.

However, we do not believe that Hurley can rely on the failure of others to raise these suggestions or issues to excuse his own failure to consider the same. Through the applications to conduct electronic surveillance and to insert tracking devices in AK-47 style rifles, Hurley possessed detailed knowledge of the available evidence and the magnitude of the trafficking. We do not believe Hurley's responsibility for the conduct of the case in light of this information was limited to filing pleadings with the court and dispensing legal advice when requested. We concluded that Hurley's knowledge of the facts of the investigation and the clear public safety risk being created by subjects in Operation Fast and Furious should have prompted him to affirmatively raise the issue to ATF and to his supervisors.

We found that the lack of urgency in concluding the investigation also was manifest in the time it took to indict the subjects. As described in Chapter Four, when ATF and the U.S. Attorney's Office decided by August 2010 that the investigation should be brought to a close, the potential public harm from the subjects did not end. They could still buy and traffic firearms or engage in other unlawful activities, such as the drug dealing ATF knew some subjects were involved in. Thus, it was incumbent on ATF and the U.S. Attorney's Office to make arrests or to bring the indictment as quickly as possible. Under these circumstances, we believe that Hurley and his management should have recognized the need to add additional resources to this phase of the case to ensure that it was prioritized. They did not, and we believe failing to do so was a contributing factor to the multiple delays in obtaining the indictment.

c. Section Chief Morrissey

Section Chief Morrissey was Hurley's immediate supervisor and, like Hurley, supported the approach in Operation Fast and Furious to pursue a longer term investigation that targeted the leader of the firearms trafficking conspiracy. Morrissey recommended to Burke in an e-mail in January 2010 that, "[w]e should hold out for the bigger case, try to get a wire, and if it fails, we can always do the straw purchasers." As we noted earlier and recounted in Chapter Four, the significant scope of the trafficking activity in terms of the number of straw purchasers and the volume of purchases was already known by that time, as was the leader's direct link to a DEA drug trafficking investigation. The decision to pursue a wiretap meant that the subjects would continue purchasing and trafficking firearms as the government gathered what

it hoped was sufficient evidence to dismantle the straw purchasing ring, and would be free to engage in other unlawful activity if they wished to do so.

Under these circumstances, we believe it was incumbent on Morrissey to exercise close supervision over this proactive investigation in order to stay informed about the progress of the case so he could assess whether there should be any alterations to the strategy. We concluded that Morrissey failed to provide responsible supervision of Operation Fast and Furious. We recognize that as the office's Senior Advisor and Trial Attorney for Firearms, Hurley's assessment in his January 2010 memorandum that there were "no chargeable offenses against any of the players" and that he supported pursuing "a longer term investigation to target the leader of the conspiracy" was entitled to some deference. However, Morrissey also knew from Hurley's memorandum that hundreds of firearms had already been trafficked in the case and that a plan to seek a wiretap indicated that trafficking was expected to continue. Morrissey also reviewed a draft of at least the first wiretap application, which would have informed him that the leader of the conspiracy was responsible for using straw purchasers to buy 852 firearms for approximately \$500,000, and that nearly 100 were recovered in Mexico with short time-to-crime figures. The application also would have informed Morrissey that four straw purchasers (Steward, Patino, Chambers, and Moore) were already responsible for 601 of the total firearms purchased for over \$370,000, and that several of these purchases were made during ATF surveillance. Morrissey also stated in an e-mail to the U.S. Attorney that using a wiretap in a firearms trafficking investigation was "unusual, and aggressive," and characterized Hurley as a "trailblazer."

We found no evidence indicating that this information caused Morrissey or anyone else in the U.S. Attorney's Office to question Hurley about whether ATF agents were seizing firearms when they had the opportunity to do so. Morrissey told us that he assumed agents were doing this, and had been informed through Hurley's January 2010 memorandum that there had been seizures in the case, and was also told by Hurley in February 2010 about the seizure on the Tohono O'odham Indian Reservation. However, given the volume of purchasing related in the wiretap application, the briefings he had received, and the expectation that the wiretaps would provide additional evidence to support seizures, we believe Morrissey should have asked for regular updates on purchases and seizures in the case. Had he asked, Morrissey would have learned that there were no Group VII-initiated seizures in March, April, or May despite the evidence warranting them, and this might have prompted at least a conversation with Hurley about the state of the evidence in the case and the tactical judgments being made by agents during surveillances.

Indeed, Morrissey told us that if he could do things over, he would have recommended confronting some of the subjects, even if not to arrest, because

that tactic can help build a case. Morrissey also told us that there came a time in the case that some individuals, like Patino, should have been specifically deterred. We agree, but also believe that these judgments do not require the benefit of hindsight – they are judgments that could have, and should have, been made during the investigation.

Morrissey said that by late summer of 2010 he had discussions with Hurley and U.S. Attorney Burke about bringing the case to a close because the wiretaps did not appear to be helping identify how weapons were getting to Mexico. Morrissey told us, “even in a large and sophisticated investigation which this was, you have to acknowledge when investigative goals are not being met.” This is precisely the kind of reassessment we believe should have been done, but was not, earlier and regularly in the case because of the sheer volume of the firearms being trafficked. The fact that Morrissey told us he was not aware of the purchase figures for Patino as the case was being conducted indicated to us that Morrissey did not exercise the kind of supervision that likely would have prompted questions about tactics that he recognized when looking back on the case.

We also found that as Hurley’s supervisor, Morrissey should have been more cognizant of the need to staff the investigation with additional resources, even if Hurley did not seek or want assistance, especially after ATF and the U.S. Attorney’s Office decided to transition the case toward indictment. The case spanned 8 months and 9 wiretaps, involved dozens of potential defendants and approximately 2,000 firearms, and required the review of thousands of pages of investigative reports. It was not reasonable to expect that Hurley could alone produce a draft indictment as expeditiously as we believe should have occurred in Operation Fast and Furious. The failure to adequately staff the case was a significant mistake.

d. Former Criminal Chief Cunningham

Cunningham joined the U.S. Attorney’s Office as Criminal Chief on January 11, 2010, over two months after Operation Fast and Furious had been initiated and just several days after ATF and the U.S. Attorney’s Office had decided to pursue a wiretap in the investigation. Cunningham told us that when he arrived at the office, he received a general briefing about that investigation and others by outgoing Acting Criminal Chief Joe Lodge. Cunningham said Lodge told him that Operation Fast and Furious was assigned to an experienced prosecutor who had the case under control. Cunningham also told us that he knew the case was supervised by Morrissey, whom he knew and thought highly of. Cunningham said that for these reasons, he focused his attention on other priority matters during the first several months in the office.

However, by March 2010, Cunningham had received sufficient information about the investigation to put him on notice about the nature and scope of the case. On February 22, Cunningham learned the details of ATF's 41-gun seizure on the Tohono O'odham Indian Reservation that were linked to Operation Fast and Furious, the case in which Hurley was drafting a wiretap application. This incident prompted Burke to request a briefing on Operation Fast and Furious from Hurley, Morrissey, and Cunningham as "[s]oon as we can." When the Criminal Division approved the application on March 10, Cunningham received Morrissey's e-mail about the approval that stated that using a wiretap in a firearms case was "unusual, and aggressive," and that Hurley was a "trailblazer." Cunningham also appeared to have attended a briefing provided by Hurley the next day for U.S. Attorney Burke. Hurley told us that he would have mentioned at this briefing the number of subjects in the case and the pending wiretap application. In addition, Cunningham told us that he received Hurley's March 23 memorandum to Burke that summarized the status of the investigation. This document described the objective of the investigation to "identify all of the major players in the conspiracy and discover the methods and means used to cross guns into Mexico," and stated that the subjects had already purchased more the \$500,000 in firearms. The memorandum also stated that additional wiretaps were anticipated, and that agents also were using other innovative strategies, such as placing tracking devices in firearms purchased by subjects.

In short, the information about Operation Fast and Furious that Cunningham received described a significant and innovative investigation of an active firearms trafficking group that had already spent \$500,000, and that agents intended to continue investigating through wiretaps in order to identify key figures in the conspiracy and determine how firearms were being transported into Mexico. We believe this information was sufficiently significant to prompt greater engagement in the case by Cunningham, including asking questions about plans for enforcement action against any of the subjects and, if none, the public safety implications of that approach. The fact that Cunningham told us that he was not aware of the number of firearms purchased, and did not ask, confirmed to us that his oversight of the investigation was deficient.

e. Former U.S. Attorney Burke

Former U.S. Attorney Burke, as the chief federal law enforcement officer for the District of Arizona, was ultimately responsible for his office's involvement in Operation Fast and Furious. We believe that Burke received sufficient information about the nature and scope of the investigation that he should have ensured the case received close supervision that included regular reassessments of the state of the evidence and the measures that were being or should have been taken to address the risk to public safety created by the subjects' ongoing firearms trafficking. We concluded that Burke failed to

exercise responsible oversight and failed to provide the leadership and judgment required of a United States Attorney.

Burke began his tenure as U.S. Attorney in September 2009 and began receiving information about Operation Fast and Furious in November when Newell informed him about a large seizure of firearms in Mexico connected to the ATF investigation. Hurley told Burke in an e-mail at that time that the recovery was associated with several straw purchasers ATF was investigating, but that it “will take time to build into an indictable case” and that “[w]e will not be able to see the purchasers arrested immediately.” This was also the message conveyed to Burke on January 5, 2010, when Morrissey forwarded to him the memorandum drafted by Hurley summarizing his meeting with ATF about the case. Hurley stated that ATF had identified a “hub-and-spokes” conspiracy involving at least 15 straw purchasers already responsible for purchasing more than 600 firearms, 100 of which had been recovered in Mexico and the United States. Hurley also stated that the available evidence did not yet support chargeable offenses against any of the subjects, described the challenges of investigating a firearms trafficking conspiracy, and stated that he concurred with ATF’s decision to pursue a longer term investigation to target the leader of the conspiracy. Morrissey also told Burke in the e-mail forwarding the memorandum that “[w]e should hold out for the bigger case, try to get a wire, and if it fails, we can always do the straw buyers.” Burke’s response reflected unqualified support: “Hold out for bigger. Let me know whenever and w/whomever I need to weigh-in [sic].”

Burke did not express any concerns about the consequence of this longer term approach – that the subjects would continue trafficking firearms for the foreseeable future – and did not ask any questions about measures that might be taken to deter the activity. Burke expressed similar unqualified support when he learned about the Tohono O’odham seizure in February 2010 (“This is great stuff!”) and when he was informed in March 2010 that the first wiretap in the case had been approved (“Frickin’ love it!!”). Burke still did not express concerns about the public safety implications of the investigation, or ask questions about what agents were doing to disrupt any of the activity that clearly was continuing.

Burke acknowledged to us that he should have asked more questions about the case, and that just because Newell and Hurley were telling him that everything was going well in the investigation, this should not have caused Burke to take the case “off the dashboard.” Burke called this case a “big management lesson.” We agree, but similar to Newell’s and Morrissey’s observations about Operation Fast and Furious, do not believe this assessment requires the benefit of hindsight. We found that Burke failed to ask the kinds of questions about the investigation that might have revealed the deficiencies that we have described in this report. Indeed, his e-mails reflect that he largely provided unqualified support for the investigation. Even after Burke told us he

spoke to Morrissey in approximately August 2010 about bringing the case to a close, we did not see evidence that Burke took action to create any urgency in his office to get the case indicted swiftly.

3. ATF Headquarters

a. Former Deputy Assistant Director McMahon

Of all ATF Headquarters executives, McMahon was most familiar with Operation Fast and Furious during 2009 and 2010 and was best situated to influence its development. His duties included oversight of the Phoenix Field Division and its investigations, he was Newell's primary point of contact at ATF Headquarters regarding the investigation, and, as we discovered, he played a pivotal role in determining whether certain key information about it was disseminated to his supervisors.

We determined that McMahon's oversight of the Phoenix Field Division's handling of Operation Fast and Furious was wholly inadequate. We found that he did not attempt to oversee the investigation in an active way even though he described it to us as ATF's most significant firearms trafficking investigation on the Southwest Border. Although his initial instincts in the case were to have agents interrogate some of the leading straw purchasers, he capitulated to Newell's multi-layered explanation about why that was a bad idea and then failed to revisit the issue again and press Newell on the point. Overall, McMahon seemed reluctant to bring his years of agent experience to bear on the case and instead was content to support Newell. That approach was a mistake in Operation Fast and Furious.

We believe that McMahon should have reacted to the information that he received about the investigation in December 2009 and January 2010 by fully evaluating the risks to public safety that Newell's strategy of "allowing firearms purchases to continue" created. McMahon was aware in early December 2009 that Operation Fast and Furious involved hundreds of firearms, that the pace of purchasing activity was extraordinary, and that agents had advance notice of firearms purchases and were conducting surveillance of them. He attended the OSII briefing on January 5, 2010, that showed that the firearms involved in the case exceeded 650, one straw purchaser had acquired nearly 200 firearms, and another 2 had acquired more than 100 each. Despite these facts, we found that ATF had no seizures or contacts with any of the straw purchasers during the first 100 days of the investigation.

McMahon concurred with this approach and was willing to accept that agents could watch month after month as straw purchasers acquired hundreds of firearms and that, despite months of investigative activity, probable cause was lacking to seize firearms – all according to Newell. McMahon should have

exercised judgment independent of Newell's, worked with Chait to formulate a strategy that protected the public, and sought Hoover's concurrence with it.

McMahon also failed to share important information about the investigation with Chait and Hoover. He omitted reading and disseminating the January 8 memorandum from Newell that spelled out the flawed case strategy, and failed to highlight to other senior executives that agents had advance notice of firearms purchases. Chait told us that he believed throughout the investigation that agents were learning of the purchases after the fact, and Hoover did not ask about the issue until mid-March 2010, which contributed to his asking for the exit strategy.

We also found that McMahon's oversight of the exit strategy was lacking. Chait told us that he had to remind McMahon to request the strategy, which McMahon did the day before the April 28 meeting with the Department's Criminal Division to discuss Operation Wide Receiver. We believe he also failed to encourage Newell to confront the U.S. Attorney's Office over delays and to frame the issue for his supervisors that would have resulted in the issue being elevated within ATF and if necessary to the Office of the Deputy Attorney General.

McMahon also missed opportunities to identify problems in the investigation through review of the wiretap applications. Although we determined that he did not have a duty under ATF's outdated wiretap policies applicable at the time to review the applications, other DADs told us it was their practice to review the agent affidavits. After we showed McMahon the affidavits he told us that he would have questioned Newell about their contents.

b. Former Assistant Director Chait

Chait was the Assistant Director for the Office of Field Operations which, as we described in Chapter Five, failed to exercise adequate oversight of Operation Fast and Furious. Although we believe that McMahon committed serious errors and at times failed to inform Chait and other ATF executives about significant developments in Operation Fast and Furious, we found that Chait also shares substantial responsibility for the significant lapses in ATF Headquarters' oversight.

Chait should have demonstrated better leadership after receiving the OSII briefings on January 5 and 12, 2010, and sought information from Newell about the case strategy and Newell's intentions. We reject the notion that Chait suggested to us that ATF's practice of decentralized administration should excuse the lack of oversight that he demonstrated in Operation Fast and Furious. Given the intensity of the firearms trafficking that was described to Chait in briefings, he should have undertaken with McMahon and Newell a

thorough assessment of the risks to the public safety that the case presented, vetted the results of that assessment with Deputy Director Hoover, and proposed a strategy to quickly conclude the investigation. Thereafter he should have monitored the investigation and reevaluated its progress at frequent intervals. We also believe that he should have known from the totality of circumstances in the investigation that agents had advance notice of firearms purchases and were refraining from taking enforcement action. Chait should have asked more questions, better recognized problems, and introduced a sense of urgency to resolve them and to conclude the investigation.

We further determined that Chait should have better overseen procurement of the exit strategy that Hoover requested from the Phoenix Field Division and ensured that it was promptly implemented. He also did not evaluate the wiretap applications and affidavits as ATF policy required. As with other aspects of Operation Fast and Furious, Chait was not diligent in ensuring that these important functions were performed.

c. Former Deputy Director Hoover

Our conclusions regarding Deputy Director Hoover are the same in many respects as for Melson. As Deputy Director, Hoover functioned as ATF's Chief Operating Officer and was the most senior agent in ATF. He directly oversaw the Office of Field Operations and therefore had management responsibilities concerning ATF's investigations.

We believe that Hoover, like Melson, was ill-served by Newell, Chait, and McMahan, and should have been provided more complete information about the investigation earlier in its development. He also should have been afforded an opportunity to authorize the case strategy in light of its inherent risks to public safety.

We also determined, however, that Hoover should have paid much closer attention to Operation Fast and Furious following the OSII briefing that he received with Melson and Chait on January 12, 2010, and that he should have asked probing questions earlier than he did regarding whether agents had advance notice of firearms purchases and were refraining from taking enforcement action. Hoover told us that he asked McMahan and Chait whether agents had advance notice of firearms purchases about the time that he asked for the exit strategy, which would have been mid-March 2010. He also said he assumed without asking that ATF agents were responsible in part for the many seizures and recoveries that were being reported to ATF Headquarters. Hoover, however, assumed too much and failed to ask important questions about the case until too late. He also failed to respond adequately to the concerns that McDermond and Rowley expressed to him about the volume of firearms in the case.

Hoover should have better informed himself about the investigation and asked for and received an exit strategy months earlier than April. (As we explained above, Chait should have preempted such a request). He also should have assumed some responsibility for ensuring that the strategy was prepared and for overseeing its implementation once it did arrive. We believe that Hoover's engagement on these issues was especially important given that he was aware by late April 2010 of "gun walking" problems in Operation Wide Receiver, for which Newell as SAC was responsible. We believe these facts counseled in favor of close supervision of Newell's implementation of the exit strategy. Instead, we found that the exit strategy did not reach ATF Headquarters until more than a month after Hoover asked for it, and he did not read it until 2011. Overall, we found Hoover's oversight of Operation Fast and Furious was seriously deficient.

As with Melson, Hoover's failure to adequately inform himself about Operation Fast and Furious resulted in his presenting Acting Deputy Attorney General Grindler with an incomplete briefing on Operation Fast and Furious in March 2010. Hoover also failed to provide any updated briefings to Grindler even after developing significant concerns about the case.

We found that Hoover's response to Agent Terry's murder was deficient. We believe that he should have sought detailed information about the investigation after he learned about the connection between the firearms found at the murder scene and Operation Fast and Furious. If he had done so, he would have discovered from reviewing the materials that "gun walking" occurred in the investigation and would have been better prepared to answer questions from the Department in January and February 2011.

d. Former Acting Director Melson

Melson was the Acting Director of ATF while Operation Fast and Furious was planned and executed. During his tenure he was responsible for the performance of ATF and, given this fact, he is accountable for the agency's handling of Operation Fast and Furious.

We determined that Melson was not well served by Deputy Director Hoover, by senior leaders in ATF's Office of Field Operations, and by SAC Newell. We found that at the outset of the investigation, DAD McMahon and staff in ATF's Phoenix Field Division decided issues that impinged on the integrity of ATF's commitment to protect the public without the involvement of either Deputy Director Hoover or Melson. We believe that Melson was entitled to expect much more from the Office of Field Operations than McMahon and AD Chait delivered. As we described in Chapter Five, McMahon and Chait's oversight of the investigation was inadequate and contributed to Melson's failure to recognize problems with the investigation in a timely fashion.

In evaluating Melson's conduct, we also believe it is significant that Melson was not the confirmed Director of ATF, and that he was not the nominee for the permanent Director position. His appointment as Acting Director was an interim assignment which he had held for only six months when Operation Fast and Furious was opened in the Phoenix Field Division. While these facts do not excuse Melson's performance concerning Operation Fast and Furious, we believe that they are noteworthy in assessing his role in ATF's handling of the investigation.

We are critical of Melson in several important respects. First, we believe that as an experienced federal prosecutor, he should have recognized by the time of his briefing on Operation Fast and Furious in March 2010 that the fundamentals of the investigation (the amount of time the investigation had been open, the level of proactive investigative activity, and the number of firearms that were involved) pointed toward needed enforcement action – at a minimum ATF-initiated seizures – that were lacking and therefore required explanation. Melson made too many assumptions about the case and what should have been occurring in Phoenix. Melson should have asked basic questions about the investigation, including how public safety was being protected. The bare representation that agents were seizing firearms at every opportunity should not have foreclosed questioning about what was happening with all of the firearms that were being trafficked and what agents were doing during their surveillances. The purported lack of probable cause simply was not a credible explanation by March 2010. Melson should have recognized that, learned more about the investigation, and responded accordingly. We believe that his oversight of Operation Fast and Furious was deficient.

Second, Melson participated in an incomplete briefing for Acting Deputy Attorney General Grindler in March 2010 concerning Operation Fast and Furious. We determined that by the time of this briefing Melson had received sufficient information about the scope and significance of Operation Fast and Furious that he should have been asking probing questions about the strategy in the case and whether efforts were being made to minimize the risk to public safety. As a result of his failing to do so, he provided incomplete information about Operation Fast and Furious to Grindler. Moreover, even as he developed increasing concerns about the investigation in 2010, and despite its significant effect on Mexico, he failed to provide any additional briefing to Grindler about the investigation.

Third, we believe that Melson was ineffective in addressing concerns he had over delays with closure and indictment of the case. He never complained to Burke, and we found no e-mails or other documents corroborating his statement that he may have complained to staff in the Office of the Deputy Attorney General. Although we acknowledge that Melson took some steps to mitigate the delays, such as offering to send ATF attorneys to Phoenix, asking Chait about the status of the case, and contacting the Criminal Division about

his concerns, we believe that Melson's omissions perpetuated an approach towards Operation Fast and Furious that lacked sufficient urgency.

Finally, even after Agent Terry was murdered in December 2010 and the firearms found at the scene were found to be connected to Operation Fast and Furious, Melson took no significant action within ATF other than to ask for information about Avila's role in the investigation. We believe Melson should have initiated a review of the investigation after he learned about the connection.

4. Department Leadership

a. Attorney General Holder

We determined that Attorney General Holder did not learn about Operation Fast and Furious until late January or early February 2011 and was not aware of allegations of "gun walking" in the investigation until February. We found no evidence that Department or ATF staff informed the Attorney General about Operation Wide Receiver or Operation Fast and Furious prior to 2011. We concluded that the Attorney General's Deputy Chief of Staff, the Acting Deputy Attorney General, and the leadership of the Criminal Division failed to alert the Attorney General to significant information about or flaws in those investigations.

Although the Office of the Attorney General received various weekly reports from components in the Department that mentioned Operation Fast and Furious, we found that Attorney General Holder did not personally review these reports at the time that his office received them and that his staff did not highlight them for his review. Moreover, we determined that these reports did not refer to agents' failure to interdict firearms or include information that otherwise provided notice of the improper strategy and tactics that ATF agents were using in the investigation. Although the National Drug Intelligence Center reports (NDIC) referred to 1,500 firearms that Celis-Acosta and straw purchasers had trafficked to Mexican drug cartels, the reports did not state or suggest that ATF had advance knowledge of the firearms purchases or otherwise knowingly allowed the guns to cross the border.

b. Former Deputy Chief of Staff Wilkinson

We found that Former Deputy Chief of Staff Wilkinson learned from U.S. Attorney Burke on December 15, 2010, that two firearms recovered at the Terry murder scene were linked to an ATF firearms trafficking investigation, but failed to notify the Attorney General of this fact. Holder told us that he did not learn of the link until early 2011, around the time he first became aware of Operation Fast and Furious. Wilkinson should have promptly informed the Attorney General of the link given that the information implicated significant Department interests.

c. Former Acting Deputy Attorney General Grindler

ATF provided then Acting Deputy Attorney General Grindler with a short briefing on Operation Fast and Furious during a meeting that lasted approximately one hour or less on March 12, 2010, and that addressed six other agenda items. Melson and Hoover presented the case to Grindler as a significant case but did not identify any questions or concerns for him about the investigation. We believe that the limited information presented at the briefing was not sufficient to put Grindler on notice of ATF's failure to interdict firearms that it could have legally seized.

Like the Office of the Attorney General, the Office of the Deputy Attorney General received weekly reports from Department components that referred to Operation Fast and Furious. We found that Grindler had no recollection of having reviewed any weekly report concerning Operation Fast and Furious or of his staff highlighting such information for his review. As stated above, we determined that these reports did not refer to agents' failure to interdict firearms or include information that otherwise provided notice of the improper strategy and tactics that ATF agents were using in the investigation.

We determined that Grindler learned on December 17, 2010, of the link between weapons found at the Terry murder scene and Operation Fast and Furious but did not inform the Attorney General about this information. We believe that he should have informed the Attorney General as well as made an appropriate inquiry of ATF or the U.S. Attorney's Office about the connection. Grindler told us that he was relying on the FBI to investigate the homicide and that would include investigation of the weapons in question. We found that Grindler's reliance on the FBI was misplaced given that it did not have the responsibility to determine whether errors in ATF's investigation led to the weapons ending up at the murder scene or why ATF failed to take law enforcement action against Avila for nearly one year and did so only after Agent Terry's murder. We also believe that Grindler should have ensured that the Department of Homeland Security was informed about the linkage.

d. Assistant Attorney General Breuer

We determined that Breuer did not authorize any of the investigative activities in Operation Fast and Furious, including wiretaps. Breuer did not review the wiretap applications and took no actions concerning them. We also found no evidence indicating that AAG Breuer was aware in 2009 or 2010 that ATF agents in Operation Fast and Furious were failing to interdict firearms. Breuer told us that he did not learn about "gun walking" allegations in Operation Fast and Furious until public revelations in 2011.

However, as we described in Chapters Three and Five, in April 2010 Breuer learned about Operation Wide Receiver and that ATF had allowed guns

to “walk” in that case. Breuer told us that upon learning this information, he told Deputy Assistant Attorney General Weinstein to talk to ATF leadership to make sure that they understood that the Criminal Division planned to move forward with the case, but that the investigation had used “obviously flawed” techniques. Given the significance of this issue and the fact that ATF reports to the Deputy Attorney General, we believe Breuer should have promptly informed the Deputy Attorney General or the Attorney General about the matter in April 2010. Breuer failed to do so.

e. Deputy Assistant Attorney General Weinstein

We found that given his level of knowledge about Operation Fast and Furious and his familiarity with the “gun walking” tactics employed by ATF in Operation Wide Receiver, Deputy Assistant Attorney General Weinstein was the most senior person in the Department in April and May 2010 who was in a position to identify the similarity between the inappropriate tactics used in Operations Wide Receiver and Fast and Furious.

As we described in Chapters Three and Five, Weinstein learned in early April 2010 after reviewing the prosecution memorandum in Operation Wide Receiver that ATF had allowed guns to “walk” in that case, which Weinstein defined to include choosing not to interdict firearms despite having the legal basis and ability to do so. According to Weinstein, after he informed Breuer of this, Breuer agreed that Weinstein should bring the matter to the attention of ATF leadership. Breuer also told us that he told Weinstein to talk to ATF leadership to make sure that they understood that the Criminal Division planned to move forward with the case, but that the investigation had used “obviously flawed” techniques.

Weinstein, an official from the Criminal Division’s Gang Unit, and two public affairs officials met with Hoover and McMahon on April 28, 2010, after the investigative phase of Operation Wide Receiver had concluded. As we described in Chapter Three, the Gang Unit official told us that the discussion of “gun walking” during that meeting was not in the nature of “finger-wagging” or admonishment of ATF. In addition, although Weinstein told us he described the improper tactics, he said that he did not have to go into detail about the issue because he understood from Hoover’s reaction that he “immediately got why it was so troubling.” Based on contemporaneous e-mails and the notes and statements of those who attended the meeting, we concluded that Weinstein did not admonish ATF for the failure to interdict firearms in Operation Wide Receiver or otherwise convey in forceful terms the Criminal Division’s view that such tactics were unacceptable and would not be condoned. We found that the discussion at the meeting focused instead on how to avoid negative press for ATF arising from the fact that guns had “walked” in the investigation, as well as issues arising from the ATF’s use of an

FFL as a confidential informant and an agent's acceptance of a gift from the FFL.

We further found that at the April 28 meeting, McMahon told Weinstein that ATF had another case – Operation Fast and Furious – that, like Operation Wide Receiver, involved a high volume of firearms that had been trafficked. Weinstein told us that he understood from the discussion that ATF had been aggressively seizing guns in that investigation but that ATF would have to answer questions about the guns they did not seize. We found, however, that Weinstein failed to ask questions about Operation Fast and Furious to ensure that his understanding was correct that the case did not involve tactics like those used in Operation Wide Receiver. We also found that when he reported back to Breuer about the April 28 meeting, Weinstein told Breuer about the discussion involving Operation Wide Receiver but did not mention Operation Fast and Furious.

Following their meeting on April 28, Weinstein and McMahon continued to communicate about Operation Fast and Furious, and Weinstein learned enough about the investigation to ask OEO about the possibility of obtaining a roving wiretap in the case and to describe it in an e-mail on May 7 to the head of OEO as an “investigation of a gun-trafficking ring responsible for sending well over 1,000 guns across the SWB into Mexico” and “perhaps the most significant Mexico-related firearms-trafficking investigation ATF has going.”

Yet, Weinstein told us that when he received the first wiretap application he was asked to review for Operation Fast and Furious just two weeks later, on May 18, 2010, he did not review the agent's affidavit in support of the application. Moreover, although Weinstein told us that he reviewed the OEO cover memoranda accompanying that application, he failed to recognize that the memoranda clearly suggested that ATF agents had monitored purchases of firearms that they knew were illegal, and allowed a known straw purchaser to continue his illegal activities for a gun trafficking organization that sold weapons to a drug cartel in Mexico. We found that given Weinstein's heightened awareness of the “gun walking” issues in Operation Wide Receiver and his knowledge of Operation Fast and Furious, his review of the first OEO cover memorandum that he received should have caused him to read the affidavit and ask questions about the operational details of Operation Fast and Furious.

II. Department's Statements to Congress Concerning ATF Firearms Trafficking Investigations

A. Summary of the Department's Statements to Congress

In Chapter Six we examined the Department's statements to Congress, in letters and the testimony of officials, about ATF's firearms trafficking

investigations. The focus of our review was the Department's February 4, 2011, response to allegations in letters from Sen. Charles Grassley that ATF had "sanctioned the sale of hundreds of assault weapons to suspected straw purchasers" who then transported these weapons throughout the Southwest Border area and into Mexico, and that two of these weapons were used in a firefight that resulted in the death of Customs and Border Protection Agent Brian Terry. In its February 4 response the Department denied that ATF "sanctioned' or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico," and also asserted that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico."

Our review of this February 4 letter focused on the officials who had direct and substantial participation in formulating the Department's February 4 response to Sen. Grassley's allegations: Office of Legislative Affairs (OLA) Special Counsel Faith Burton, an OLA line attorney who assisted her, Assistant Attorney General for Legislative Affairs Ron Weich, Weinstein, Office of the Deputy Attorney General Senior Counsel Brad Smith, U.S. Attorney for the District of Arizona Dennis Burke, ATF Deputy Director Hoover, and Acting Director Melson. We also reviewed the conduct of other senior officials who either had a minimal role or no role at all in drafting the February 4 letter but who were knowledgeable about how the Department responded to Sen. Grassley's January 2011 letters or were involved in the decision to withdraw the February 4 letter in December 2011. These officials include Deputy Attorney General James Cole, Chief of Staff to the Attorney General Gary Grindler, and Assistant Attorney General for the Criminal Division Lanny Breuer.

We found that Attorney General Holder had no involvement in drafting or reviewing the February 4 letter that he decided to withdraw in December 2011 after concluding that it contained inaccuracies. Although Holder received directly from Sen. Grassley the January 27 and 31 letters containing allegations that ATF had sanctioned the sale of assault weapons to straw purchasers, we determined that Holder had no part in the fact-gathering, editing, or approval process that led to the Department's issuance of an inaccurate response on February 4.

Subsequent to sending the February 4 letter and after the Department had examined the conduct in Operation Fast and Furious and other ATF firearms trafficking investigations, Department officials dramatically narrowed their statements to Congress about these activities. Most notably, in a May 2 letter to Sen. Grassley, the Department wrote, "It remains our understanding that ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico." In testimony before the House Committee on Oversight and Governmental Reform on June 15, 2011, Assistant Attorney General for Legislative Affairs Ronald Weich stated that there was a "technical

explanation for why the allegation that ATF sanctioned the sale of guns to straw purchasers who then transported them to Mexico is not an accurate statement,” and that the Department was no longer “clinging to the statements” in its prior letters.

On December 2, 2011, the Department formally withdrew the February 4 letter, stating that it “contains inaccuracies.” The December 2 letter stated that the Department officials who drafted the letter “relied on information provided by supervisors from the components in the best position to know the relevant facts: ATF and the U.S. Attorney’s Office in Arizona, both of which had responsibility for Operation Fast and Furious,” and that information provided by these supervisors was inaccurate.

Below we summarize our conclusions related to the drafting of the February 4 letter and Department officials’ subsequent statements to Congress about the assertions in that letter. We also discuss a memorandum issued by the Deputy Attorney General on January 26, 2012, that seeks to address problems that the Department identified following the controversy about the February 4 letter.

B. The Flawed February 4 Letter Drafting Process

As stated in the December 2 letter, Department officials in the Office of Legislative Affairs, the Criminal Division, and the Office of the Deputy Attorney General relied on information provided by senior U.S. Attorney’s Office and ATF Headquarters officials in drafting its February 4 response to Sen. Grassley. We concluded that the Department officials who drafted the February 4 letter were provided inaccurate information from senior component officials, but that due to other flaws in the drafting process, the Department officials who drafted the letter share responsibility with these component officials for issuing a letter that contained inaccurate information to a Member of Congress. We first summarize the inaccurate information that these senior component officials provided to Department officials and then summarize our assessment of the performance by Department officials that also contributed toward issuing the inaccurate February 4 letter.

In preparing the February 4 response, the primary sources of information to Department officials about Operation Fast and Furious were Melson, Hoover, and Burke.

Melson assured Office of the Deputy Attorney General Senior Counsel Brad Smith on January 28 that ATF “never knowingly allowed guns to walk across the border to Mexico where they had probable cause to make the stop.” For the reasons discussed in Chapter Four, we concluded that this was not accurate. Melson told the OIG that he had made the statement to Smith based both on ATF policy and assurances from the Phoenix Field Division, as relayed

to him through McMahon, Chait, and Hoover. Melson also told Smith that ATF did not know Avila was a straw purchaser when he purchased the firearms found at Agent Terry's murder scene on December 15, 2010. This was also an inaccurate statement. Melson told Smith that he made this statement based on the assurances of subordinates. We believe Melson did receive and pass along to Department officials inaccurate information from his subordinates. However, by the time he had received the allegations in Sen. Grassley's January letters he knew enough about the investigation to have concerns about it and should have asked more probing questions regarding the conduct of the investigation before assuring Department officials that the allegations were untrue.

Hoover met and was in frequent contact with Burton, Weinstein, and other Department officials as the February 4 letter was being drafted. According to Weinstein and Burton, Hoover provided emphatic assurances during this time that ATF had not allowed firearms to "walk" to Mexico. As with Melson, we believe that Hoover should have been better served by his subordinates, both at Headquarters and in the Phoenix Field Division as the Department sought information from him to respond to the allegations in Sen. Grassley's letters. However, we also believe that Hoover by this point possessed sufficient knowledge about the investigation to have concerns about it, and therefore should not have provided sweeping assurances to Burton and Weinstein that ATF "always tries to interdict weapons purchased illegally" and to "interdict all [firearms] that are being transported to Mexico."

Burke had significant involvement in shaping the Department's February 4 letter to Sen. Grassley. Although Burke was in Mexico on official business from February 1 through 3, e-mail records show that he remained in steady contact with Weinstein, Burton, Hoover, and other officials who were drafting and editing the letter. Burke assured Department officials that Sen. Grassley's allegations were false. Burke also told Weinstein that Avila purchased the firearms found at Agent Terry's murder scene before Operation Fast and Furious began. This was inaccurate because Avila had been designated as a suspect in the investigation nearly two months before he purchased these firearms. The evidence that we reviewed strongly suggests that by the time Burke made this inaccurate statement, he had received information showing that Avila had been a suspect from the inception of Operation Fast and Furious in November 2009.³²³ Burke acknowledged in his December 2011 interview

³²³ Burke resigned as U.S. Attorney in August 2011 and, through counsel, declined the OIG's request to be interviewed about his involvement in drafting the February 4, 2011, letter to Sen. Grassley. In Chapter Six we noted three other incidents that are relevant to our assessment of Burke's conduct. One of these incidents concerns Burke's statements to the Terry family, members of whom told the OIG that in a meeting with Burke on March 10, 2011, he told them that the weapons found at Agent Terry's murder scene were sold out of a Texas

(Cont'd.)

with congressional staffers that his statement that Avila had purchased the weapons before the investigation began was “inaccurate,” but said that it was not intentional. He further stated that his incorrect statement “reflects that I didn’t fully know the facts at that time.” We believe that Burke’s actions with respect to the February 4 letter were irresponsible.

We found that Department officials also contributed to the inclusion of inaccurate information in the February 4 letter through a poorly executed information gathering and drafting process and questionable judgments, and therefore these officials share responsibility for issuing an inaccurate letter with the component officials they relied upon for information.

We believe that as a general proposition, when Department officials – typically in the Office of Legislative Affairs – respond to Congressional inquiries, they should be able to rely on knowledgeable component officials for information. While deferring to components is generally a reasonable approach, in a circumstance such as this, where a credible allegation has been made regarding potentially serious misconduct involving those components, deference to officials close to the activity at issue should be tempered by the recognition that those officials are also invested in a positive portrayal of the activity and their alleged involvement in it. As such, officials who should be knowledgeable and forthcoming about the activity may be inclined, perhaps even unintentionally, to shade or ignore unhelpful facts when providing information about their conduct to senior officials.

We found that in drafting the February 4 response to the extremely serious allegations in Sen. Grassley’s letters, Department officials too readily accepted the assurances of officials at ATF and the U.S. Attorney’s Office, and failed to develop an independent understanding of the information that was relevant to the allegations. As Weich told the OIG, the Department “accept[ed] the information uncritically,” and in the future should “be more questioning” of those providing information.

The Department’s failure to adequately gather and understand the relevant information manifested itself in several ways. As a threshold matter, the Department’s response was flawed in its scope. In his January 27 letter, Sen. Grassley stated that he was “specifically writing” about “an ATF operation

shop, not an Arizona shop. Yet, on December 15, 2010, Burke wrote an e-mail message to Monty Wilkinson in the Office of the Attorney General stating that “[t]he guns found in the desert near the murder [sic] [CBP] officer connect back to the investigation we were going to talk about – they were AK-47s purchased at a Phoenix gun store.” Another is Burke’s admission to the OIG that he provided to a member of the media a copy of ATF Special Agent Dodson’s May 2010 undercover proposal, as we discussed in Chapter Four.

called ‘Project Gunrunner.’”³²⁴ Although Weinstein and OLA Special Counsel Faith Burton told us that they understood Sen. Grassley’s concerns to be about Operation Fast and Furious, the response they helped to draft mentioned no specific investigation, and we therefore found that a reader of the letter would likely conclude that the Department’s sweeping denial of the allegations applied to all cases under the umbrella of “Project Gunrunner,” and not just Operation Fast and Furious. This was, in our view, a serious drafting flaw.

Moreover, Burke, Hoover and Melson limited their information-gathering efforts primarily to the issue of the two AK-47 style firearms that had been purchased by Avila and found at the scene of Agent Terry’s murder on December 15, 2010. Officials at the Department, and in particular Weinstein, reinforced and perpetuated this narrow focus on the portion of the allegation that concerned the two firearms purchased by Avila, which Weinstein described in an e-mail message as “the most salacious and damaging to ATF, both short- and long-term.” While the link between these firearms and the ATF investigation was among the allegations in Sen. Grassley’s letters, it was not the only allegation. Yet, we found that officials involved in drafting the February 4 letter paid virtually no attention to the broader allegation that “ATF sanctioned the sale of hundreds of assault weapons to suspected straw purchasers, who then allegedly transported these weapons throughout the southwestern border area and into Mexico.” Consequently, based on Hoover’s statements (as recorded by Burton in her notes) that “We always try to interdict weapons purchased illegally” and “We try to interdict all that we [sic] being transported to Mexico,” the February 4 letter stated:

ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

It was this statement in particular, which appeared in the first draft of the letter and remained unchanged through the signed version that was sent to Sen. Grassley, that Department officials later concluded was inaccurate and caused the Department to withdraw the February 4 letter.

Second, as discussed above, we found that component officials provided factually erroneous information to the Department officials who were drafting the February 4 response. This inaccurate information was significant because it pertained to Avila and his role in Operation Fast and Furious, and was therefore relevant to the allegation in Sen. Grassley’s January 27 letter that ATF Headquarters, U.S. Attorney’s Office, and Department officials considered most important. The inaccurate information was also significant because it

³²⁴ “Project Gunrunner” was a broad initiative by ATF to address firearms trafficking along the southwest border. Operation Fast and Furious was a part of the Project Gunrunner initiative, as were numerous other investigations.

was demonstrably false and should have served as an indication that the officials who provided it were not a reliable source of information about the investigation.

Specifically, in response to a question from Weinstein to Burke on January 31 about the firearms linked to the Terry murder, Burke wrote that they were “[p]urchased at [FFL1] before the investigation began.” In fact, Avila purchased the two assault weapons found at the Terry murder scene many weeks after Operation Fast and Furious had begun and Avila had been designated as a suspect by ATF in its case management system. Weinstein conveyed this inaccurate information to Breuer, although Weinstein stated that he did not know the information was inaccurate at the time.³²⁵

During a February 1 conversation with Hoover and Burton, Weinstein learned from Hoover that Avila was “known to be a straw” as of November 24, 2009, and that Burke had therefore provided inaccurate information. Yet, Weinstein told the OIG that Burke’s provision of inaccurate information did not diminish his confidence in Burke’s assurances that Sen. Grassley’s allegations were wrong. Weinstein stated that he would not have expected Burke to know “the details of even a purchase of significance like that,” but would have expected Burke to know whether his prosecutors “were trying to get guns or not trying to get guns.” We believe this was a mistake on Weinstein’s part, and that Burke’s provision of inaccurate information about an issue Weinstein viewed as critical should have caused Weinstein to ask more probing questions about Burke’s other representations regarding the conduct of Operation Fast and Furious.

Weinstein also told the OIG that he relied on and had confidence in Hoover’s assurances that the allegations in Sen. Grassley’s letter were wrong. Yet, rather than rely on Hoover’s statement to Burton and him in their February 1 conversation that ATF knew Avila was a straw purchaser as of November 24, 2009, Weinstein interpreted this statement for Burton in a way that conflicted with what Hoover had told them earlier.

³²⁵ We found that Breuer had no direct involvement in drafting, editing, or approving the Department’s inaccurate February 4 letter to Sen. Grassley. Breuer was in Mexico from February 1 through 3, and during this period received updates from Weinstein about Sen. Grassley’s January 2011 letters and how Department officials intended to respond to the allegations contained in the letters. Breuer received at least two versions of the draft response while in Mexico, which he forwarded to his personal e-mail account, but told us that it was “highly unlikely” that he reviewed them or any other version of the letter until after the final draft was sent on February 4. The OIG found no e-mail messages from Breuer in which he proposed edits, commented on the drafts, or otherwise indicated that he had read them.

Specifically, following the February 1 conversation with Hoover and Burton, Weinstein met with just Burton to help her “interpret” what had been discussed with Hoover. According to Burton’s notes of this second conversation, Weinstein told Burton that what Hoover had meant by his statement was that Avila “later became a [defendant] but wasn’t known to be a sp [straw purchaser] at the time of the purchase.” Weinstein told us that he understood Hoover to mean in the earlier conversation that Avila was only a suspected straw purchaser, and that he could not yet be proved to be a straw purchaser, at the time of the purchase. When we showed Hoover a copy of Burton’s notes from her meeting with Weinstein, he told the OIG that this version of the statement was not accurate and could not be reconciled with what he had said (as recorded by Burton in her notes). We determined that Weinstein’s interpretation of what Hoover said about Avila’s status at the time of the purchase in January 2010 conflicted with Hoover’s original statement.

We found that Weinstein stated the information about Avila in a similar way in a February 16 e-mail to Grindler, who was seeking information for Attorney General Holder about “whether a gun sold in the operation was used in the shooting [of Agent Terry].” Weinstein wrote to Grindler, in relevant part:

Two of the guns sold during the investigation were found near the scene of the shooting of Agent Terry. These guns had been purchased about 11 months earlier, by a person later determined to be part of the trafficking ring. ATF was not notified of the sales until after they had been completed.

Similar to his interpretation of Hoover’s statement to Burton, Weinstein’s e-mail suggested that Avila was not even a suspect when he purchased these guns.

Weinstein described his role in the drafting process as helping to collect information and draft the Department’s response. However, it appeared to the OIG that Weinstein’s participation went beyond this description. E-mail records and the testimony of witnesses we interviewed showed Weinstein to be a staunch supporter of ATF and its law enforcement mission, and that he described himself as such. We believe that in his zeal to protect ATF’s interests, Weinstein lost perspective and provided Burton – and later Grindler – with distorted information about ATF’s view of Avila’s status as a straw purchaser. Thus, in helping to draft the Department’s response to the very serious allegations leveled at ATF, we believe Weinstein failed to act in the best interests of the Department by advocating for ATF rather than responsibly gathering information about its activities.

We also found that the information Melson provided to the Department about Avila was inaccurate and conflicted with Hoover’s statement to Burton and Weinstein. According to notes taken by Smith, Melson told Smith on January 28 that “Agents assured me that we [did not] know the guy was a

straw purchaser at time of purchase.” According to both Smith and Melson, the “guy” was a reference to Avila.

A third way in which Department officials failed to develop an adequate understanding of the facts at issue in Sen. Grassley’s letters was their failure to review basic materials about Operation Fast and Furious and other ATF investigative activities prior to responding to the allegations in Sen. Grassley’s letters. Department officials were informed in Sen. Grassley’s January 27 letter that the allegations his office received “were accompanied by detailed documentation which appears to lend credibility to the claims and partially corroborates them.” Yet we found no indication that these officials sought to obtain and review materials on which the allegations may have been based.

Under the circumstances – the serious nature of the allegations, the fact that Sen. Grassley wrote that they were supported by documentation, and the demonstrably inaccurate information provided by Burke – we believe that the Department officials who drafted the response should have reviewed materials from the Operation Fast and Furious investigation before responding to Sen. Grassley. It would not have been necessary to depend on Sen. Grassley for access to this information, which as was learned later, came from ATF’s and the U.S. Attorney’s Office’s own files, e-mails, and databases.

Further, we do not believe Department officials needed to conduct an exhaustive review of the entire investigative file to understand the allegations before responding to them. Rather, officials with responsibility for drafting and approving the response could have reviewed basic materials about the investigation, such as briefing papers, summaries, and other documents that would have familiarized them with the scale of the investigation and the investigative techniques being employed.³²⁶

It is of course impossible to know whether a review of these materials would have resulted in a more accurate response. But our review of how the February 4 response was drafted suggests that the lack of familiarity with the investigation played a role in the ill-conceived wording of the response. For example, Smith made important edits to the response that resulted in a clumsy and only marginally responsive denial that ATF “knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico” – a denial that did not address the issue of whether ATF knowingly allowed straw purchasers to buy weapons at all. Smith told us that when he was making edits to the response he was unaware that weapons purchased in the

³²⁶ Smith, Burton, and Weich first received the Operation Fast and Furious indictment on the morning of February 4.

investigation were being recovered in the United States as well as in Mexico, and that Agent Terry had been killed in the United States.³²⁷

A fourth critical deficiency in the Department's knowledge of relevant information resulted from the failure by Breuer and Weinstein to draw a connection between the allegations in Sen. Grassley's letters and their knowledge of Operation Wide Receiver, an investigation in which ATF employed similarly flawed tactics. At the Department, Weinstein, Breuer, and a few other Criminal Division attorneys knew about Operation Wide Receiver. However, unlike these other officials, Weinstein knew about Operation Fast and Furious from his discussions with McMahon in April and May 2010 and his review and authorization of three wiretap applications in connection with that investigation, and was directly and substantially involved in drafting the Department's February 4 response.

Breuer testified to Congress on November 1, 2011, that he made a mistake by not telling senior Department leadership about the problems with Operation Wide Receiver when he learned of them in April 2010, and for failing to draw a connection between those problems and the allegations concerning the conduct of Operation Fast and Furious in January and February 2011. We agree with this assessment.

Weinstein, by contrast, told the OIG that Operation Wide Receiver "had not come to mind as being possibly relevant to this response" because he believed Sen. Grassley's allegations were limited to Operation Fast and Furious. He said that he did not make a relevancy calculation about Operation Wide Receiver at the time, but in any event did not believe it was relevant to the allegations raised by Sen. Grassley. He stated that if he had thought about Operation Wide Receiver, he would have "invited people to . . . make their own judgment" about its relevancy to the allegations, but that he did not think about it.

Weinstein also stated that he considered Operation Wide Receiver to be an "aberration" that happened under a different "regime" – meaning a different U.S. Attorney, and a different Director and Deputy Director of ATF. He stated that it was only when he subsequently learned that similar tactics had been employed "on our watch" that he believed Congress should be told about Operation Wide Receiver.

³²⁷ Smith stated that he did not recall these facts as he was helping to draft the letter, even though about six weeks earlier on December 17, 2010, he had sent an e-mail message to then-Acting Deputy Attorney General Grindler that included these facts.

We were not persuaded by Weinstein’s assertion that Operation Wide Receiver was properly viewed as an “aberration” that had no relevance to the allegations. Operation Wide Receiver and Operation Fast and Furious (which Weinstein believed the allegations to concern) had many similarities. Both investigations had the same strategic goal – to follow guns up an organizational chain to build a large gun trafficking case. Both investigations involved many of the same issues and tactics, including the use of physical and electronic surveillance; the use of cooperating FFLs; and the bulk purchase of weapons by suspected straw purchasers and the transportation of those weapons throughout the Southwest Border area and into Mexico. Additionally, both investigations were run out of the Phoenix Field Division under the same SAC, although Weinstein told the OIG that he was not aware until after the February 4 letter was drafted that the same SAC oversaw both investigations.

We similarly reject the notion that Operation Wide Receiver lacked relevance because it was carried out under different leadership at the U.S. Attorney’s Office and ATF Headquarters. As Weinstein knew from having been an AUSA for many years, while U.S. Attorneys and the ATF Director may change with administrations, the career line agents and prosecutors do not, thus ensuring institutional continuity and accountability. Dismissing the relevance of a similarly flawed investigation because it happened under another administration’s “watch” is not what we believe should be expected of a senior Department official.

Finally, several Department officials told the OIG that knowledge of Operation Wide Receiver would have been relevant to the drafting of the response to Sen. Grassley. Breuer and Burton both made the point that the allegations in Sen. Grassley’s letter would have been viewed differently had it been known that ATF had conducted a similarly flawed operation before. Weich, who signed the February 4 letter on behalf of the Department, told the OIG that it was indisputable that the information about Operation Wide Receiver would have changed the way he would have approached the February 4 letter.

C. The Department’s Post-February 4 Statements to Congress

The Department received several letters from Members of Congress after issuing its February 4 response. In responses to these subsequent inquiries about Operation Fast and Furious on March 2, March 8, April 4, and April 18, the Department declined to provide substantive comments about the investigation in light of its February referral of the matter to the OIG. However, in responding to an April 13 letter from Sen. Grassley to Attorney General Holder asking whether the Department stood by “the assertion . . . that the ATF whistleblower allegations are ‘false’ and specifically that ATF did not sanction or otherwise knowingly allow the sale of assault weapons to straw purchasers,” Weich, on behalf of the Department, wrote in a May 2 response:

You have asked whether it remains our view that “ATF did not sanction or otherwise knowingly allow the sale of assault weapons to straw purchasers.” In fact, my letter, dated February 4, 2011 said: “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.” It remains our understanding that ATF’s Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico. You have provided us documents, including internal ATF emails, which you believe support your allegation. As you know, we have referred these documents and all correspondence and materials received from you related to Operation Fast and Furious to the Acting Inspector General, so that she may conduct a thorough review and resolve your allegations. While we await her findings, the Attorney General has made clear to prosecutors and agents working along the Southwest Border that the Department should never knowingly permit firearms to cross the border.

Department officials told us that this substantive response was motivated by two factors. First, officials stated that in his April 13 letter, Sen. Grassley had meaningfully changed the Department’s original response in its February 4 letter and that they wanted to correct the record on this point. Second, officials said that they wanted to respond to what they believed to be the crux of the allegation in Sen. Grassley’s January 27 letter: that ATF had knowingly allowed straw purchasers to take firearms into Mexico.

The Department’s reformulated assertion that “ATF’s Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico” differed from the February 4 statement in two fundamental respects. First, it did not address the portion of the statement in the February 4 letter denying that “ATF ‘sanctioned’ or otherwise knowingly allowed the sale of assault weapons to straw purchasers.” Second, the May 2 statement for the first time limited the Department’s denial of “gun walking” to Operation Fast and Furious.

Deputy Attorney General Cole and other officials told the OIG that they disagreed with the suggestion that the May 2 letter was deliberately drafted to state a literal truth – that ATF had not knowingly allowed *straw buyers* (as distinguished from third parties) to take firearms into Mexico. Rather, the officials stated, they sought in the letter to distinguish between ATF *knowingly* allowing firearms to go to Mexico versus *negligently* allowing firearms to go to Mexico.

We believe that the Department should not have made this statement in its May 2 response to Sen. Grassley. Regardless of whether there was any

intent to draw a distinction between straw purchasers and third parties, senior Department officials knew or should have known by the time the letter was drafted that while ATF may not have allowed straw purchasers to buy firearms so that they themselves could take the guns to Mexico, ATF had in many instances allowed straw purchasers to buy firearms knowing that a third party would be transporting them to Mexico. The review of the Operation Fast and Furious case file that had been conducted to this point by Department officials, including the Title III affidavits, indicated that suspects were buying guns for the purpose of getting them into Mexico. Moreover, ATF was aware from later seizures that some of those firearms did in fact end up in Mexico. Thus, the May 2 letter was true only in the most literal sense, even if it was not intended to be read that way.

The Department also limited its narrowly drawn denial to Operation Fast and Furious, something it did not do when it used similar wording in its February 4 denial. According to an e-mail from Burton to Weich about this limitation, officials had not yet “checked all other ATF operations,” and thus would have been uncertain whether the Department could make the same denial as to other ATF investigations covered under the allegations in Sen. Grassley’s letters and its February 4 response. Under these circumstances, we believe the Department should not have resorted to a narrowly worded denial of such a serious allegation, particularly when officials in the Office of the Deputy Attorney General knew or should have known by that date that they could not reaffirm the accuracy of the entire February 4 letter.

Lastly, after reviewing a draft of this report, Department officials told the OIG that from late February through at least May 2 they continued to receive assurances from component officials, including senior component officials, that ATF had not knowingly allowed firearms to cross into Mexico. They indicated that sometimes these assurances took the form of statements that ATF had not let guns “walk” and had not “watched” or “observed” firearms enter Mexico. These officials said that assurances were also provided in the form of descriptions from the components about how Operation Fast and Furious had been conducted. We noted, however, that during this same period, based on what they were learning about Operation Fast and Furious and other ATF firearms investigations, senior Department officials, including Cole and Weich, began having doubts about some of the statements in the February 4 letter – statements that had been based on the assurances of these same senior component officials. We therefore question the significance or relevance of these ongoing assurances to the increasingly skeptical Department officials who issued the May 2 letter.

We believe that to Congress and the public, the Department’s May 2 letter reasonably could be understood as at least a partial reaffirmation of the February 4 letter at a time when Department officials knew or should have known that the February 4 letter contained inaccurate information. We believe

that the better practice would have been to continue to refrain from making substantive statements about both the February 4 letter and the investigation, like the four prior letters to Congress, or to state that there were significant concerns about the accuracy of the February 4 letter and that Department officials would not respond to further inquiries about Operation Fast and Furious until they determined the actual facts.

Similarly, during his testimony to Congress on June 15, AAG Weich appeared at times to be defending portions of the February 4 letter, while at other times to be distancing the Department from it. For example, with regard to the letter's statement that ATF did not allow the sale of firearms "to a straw purchaser who then transported them into Mexico," he testified that "[t]hose particular statements remain true for the technical reason that the . . . straw purchasers don't take guns to Mexico. And in any event, ATF doesn't sanction or approve of the transfer of weapons to Mexico." However, in response to another Member's questions, Weich stated that "we're not clinging to the statements in those letters." While we recognize that Weich, as AAG for Legislative Affairs, was not in a position to provide informed responses to the substantive questions that were being asked about the details of Operation Fast and Furious, we believe that Weich's testimony sent a confusing message to Congress and the public about whether the Department's leadership was embracing in full the February 4 and May 2 responses as accurate.

On behalf of the Department, Deputy Attorney General Cole ultimately withdrew the February 4 letter on December 2, 2011. The December 2 letter correctly stated that the February 4 letter included "inaccuracies" that resulted from reliance on information provided by senior officials at ATF and the U.S. Attorney's Office. For the reasons discussed above, we concluded that the Department officials who included this inaccurate information in the February 4 letter share responsibility with these component officials for issuing an inaccurate letter to Congress.

D. Deputy Attorney General Cole's January 26, 2012, Memorandum

The Department recently clarified how its components are to handle congressional requests for information. In a memorandum dated January 26, 2012, DAG Cole instructed the components to assign an appropriate senior manager to assume responsibility for submitting or reviewing draft responses to ensure that all appropriate units and sections have provided the necessary information and that all relevant questions or concerns are answered. The memorandum states that the senior manager is responsible for ensuring that the response is thoroughly fact checked and vetted before it is shared outside the component. The memorandum also requires senior managers to solicit information directly from employees with detailed personal knowledge of the subject matter at issue.

The memorandum states that even if the employees with the most relevant information may have already made disclosures protected by the Whistleblower Protection Act, the Act does not prohibit seeking relevant information from them as long as it is clear that the questioning is to learn the relevant facts in order to respond accurately to a congressional inquiry. The memorandum also states that if the congressional inquiry relates to the actions of certain individuals, those individuals should not participate in questioning the employees who are believed to have made protected disclosures. The memorandum instructs that if any employees express concern about retaliation, they should be advised to contact the Office of Special Counsel.

The memorandum stresses that although the Department strives to respond to Congress promptly and meet requested deadlines, the Department's top priority is to ensure the accuracy and completeness of the information it ultimately provides.

We believe that the January 26 memorandum appropriately emphasizes the importance of providing accurate responses to Congress, and outlines procedures within the components that, if adhered to, should help achieve this objective. We also believe the Department's memorandum appropriately highlights the importance of complying with the Whistleblower Protection Act when seeking information to respond to congressional inquiries. In that regard, we believe the Department needs to ensure that all employees who have contact with whistleblowers for this purpose understand the requirements of the Whistleblower Protection Act.

As we noted in Chapter Six, the Department reasonably should be able to rely on its components to provide accurate information in preparing responses to Congressional inquiries. At the same time, we believe that the inaccuracies in the Department's February 4 response to Congress resulted from deficiencies at senior levels in the Department as well as within the components. The Department officials who drafted the response readily accepted the assurances of component officials whose conduct was the subject of the very serious allegations in Sen. Grassley's letters. These assurances were accepted even in the face of inaccurate and inconsistent information from component officials.

The responsibility for the accuracy of the representations contained in letters from the Department ultimately rests with Department leadership, and cannot be delegated to component officials even though these officials may have more familiarity with the subject matter. Accordingly, in addition to the proscriptions in DAG Cole's memorandum, we believe that Department leadership must also carefully review the information it receives from the components for consistency and completeness, and should not hesitate to press component officials for additional information, including supporting documentation, when necessary to ensure accurate responses to Congress.

III. Conclusion

Our review of Operation Fast and Furious and related matters revealed a series of misguided strategies, tactics, errors in judgment, and management failures that permeated ATF Headquarters and the Phoenix Field Division, as well as the U.S. Attorney's Office for the District of Arizona. In this report, we described deficiencies in two operations conducted in ATF's Phoenix Field Division between 2006 and 2010 – Operation Wide Receiver and Operation Fast and Furious. In the course of our review we identified individuals ranging from line agents and prosecutors in Phoenix and Tucson to senior ATF officials in Washington, D.C., who bore a share of responsibility for ATF's knowing failure in both these operations to interdict firearms illegally destined for Mexico, and for doing so without adequately taking into account the danger to public safety that flowed from this risky strategy. We also found failures by Department officials related to these matters, including failing to respond accurately to a Congressional inquiry about them.

Based on our findings, we made six recommendations designed to increase the Department's involvement in and oversight of ATF operations, improve coordination among the Department's law enforcement components, and enhance the Department's wiretap application review and authorization process. The OIG intends to closely monitor the Department's progress in implementing these recommendations.

Finally, we recommend that the Department review the conduct and performance of the Department personnel as described in this report and determine whether discipline or other administrative action with regard to each of them is appropriate.

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APPENDIX A



Office of the Deputy Attorney General
Washington, D.C. 20530

September 18, 2012

Michael E. Horowitz
Inspector General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 4706
Washington, D.C. 20530

Re: Report Relating to ATF's Operation Fast and Furious and Related Matters

Dear Mr. Horowitz:

This letter conveys final comments of the United States Department of Justice (the Department) on the Office of the Inspector General's (OIG) report entitled "A Review of ATF's Operation Fast and Furious and Related Matters."

In February 2011, the Attorney General referred allegations concerning the conduct of ATF's Operation Fast and Furious to your office. In addition, the Department undertook its own internal review of the matter and ultimately determined that: (1) Operation Fast and Furious was one in a series of Arizona-based ATF investigations dating back to 2006 that involved the use of inappropriate strategies and tactics; and (2) senior Department leaders did not know or approve of the flawed strategy or tactics used in Operation Fast and Furious.

In fact, as a result of the Department's review, the Attorney General conveyed to Congress in early October 2011 his belief that "[n]otwithstanding the seriousness of the problem faced on the Southwest Border, there is no doubt that Operation Fast and Furious was fundamentally flawed" and that "the desire to bring cartel leaders to justice does not and cannot justify losing track of dangerous weapons." (*Letter from Attorney General Eric H. Holder, Jr. to Congressional Leaders at 2* (Oct. 7, 2011)) And, as your report notes, shortly thereafter the Attorney General told Congress that the Department's February 4, 2011 letter to Senator Grassley contained information that was inaccurate. (*Report at 388*)

Your report confirms many of the fundamental conclusions that the Department had reached about these matters -- conclusions that led the Department to implement policy reforms and stronger internal controls to ensure that the failures identified in Operation Fast and Furious and in earlier ATF investigations like Operation Wide Receiver do not recur. Your report also highlights some of these key reforms, including the instruction I sent at the direction of the Attorney General to prosecutors and law enforcement components shortly after the referral of this matter to your office. That instruction made clear that Department policy prohibits the design or conduct of undercover operations which include weapons crossing the border. (*Report at 421*) Your report also highlights the numerous policy

enhancements that ATF has already implemented related to firearms transfers, undercover operations and the use of confidential informants. (*Report at 421-425*) These changes in ATF policy were designed to ensure greater accountability in the conduct of the agency's sensitive law enforcement operations.

Furthermore, your report notes that the Criminal Division's Office of Enforcement Operations (OEO) has revised its procedures for approving requests for electronic intercepts to include the requirement that supervisors in the relevant U.S. Attorney's Office certify that they have read the requests and agree with them. (*Report at 430*) Additionally, as you note, the Director of OEO has been instructed to communicate to supervisory officials in the relevant U.S. Attorney's Offices any concerns about operational tactics that are raised by the Criminal Division's review of an application for an electronic intercept. (*Report at 430*)

Your report further makes clear that the Department has clarified its procedures for responding to congressional requests for information and has reminded Department personnel that while meeting external deadlines is a factor, it is more important to ensure the accuracy and completeness of information provided to Congress. (*Report at 469-470*) Finally, significant personnel changes in the relevant Department components have occurred. These changes will help ensure that the mistakes of operations like Fast and Furious and Wide Receiver are not repeated.

In the remainder of this letter, we address some of the findings and conclusions in your report with which we concur while noting some aspects of the report with which we do not agree.

**The OIG's Report Confirms that the Inappropriate Strategy and Tactics Used
In Operation Fast and Furious Were Field-Driven and Had Their Genesis
in Operations and Prosecutions Dating Back to 2006**

Your report finds that the failed strategy and inappropriate tactics used in Operation Fast and Furious: (1) originated in the field in Arizona; and (2) had their genesis in a 2006 Arizona-based operation known as Operation Wide Receiver. The "OIG received information about several other ATF investigations that possibly used a strategy and tactics similar to those allegedly employed in Operation Fast and Furious, including the tactic of failing to seize firearms despite having a sufficient legal basis to do so. One such case, Operation Wide Receiver, was noteworthy because it informed our understanding of how these tactics were used by ATF more than three years before Operation Fast and Furious was initiated." (*Report at 27*)

Thus, "ATF's Phoenix Field Division, together with the U.S. Attorney's Office, bore primary responsibility for the conduct of Operations Wide Receiver and Fast and Furious." (*Report at 431*) Both investigations were "seriously flawed in several respects, most significantly in their failure to adequately consider the risk to public safety in the United States and Mexico." (*Report at 419*)

Your conclusions regarding the origins of these tactics also correct several mischaracterizations that have been made about these operations. It is now clear that:

- The Department's 2010 memorandum entitled "Strategy for Combating the Mexican Cartels," *did not* lead to the use of inappropriate strategies or tactics in Operation Fast and Furious. That memorandum and other Department policy directives cannot "fairly [be] read as an endorsement of" the strategy or tactics adopted in Operation Fast and Furious. (*Report at 142*)
- Operation Fast and Furious *was not* an effort by Department leaders to provide a basis for the passage of more stringent gun control laws. "We found no evidence . . . that ATF Phoenix initiated the investigation in order to facilitate efforts to obtain long gun legislation." (*Report at 262-263 n.195*)

The OIG's Report Confirms that Senior Department Leadership Did Not Know About Or Approve the Inappropriate Strategy or Tactics Used in Operation Fast and Furious

Your report confirms that the inappropriate strategy and tactics used in Operation Fast and Furious were not conceived of, nor directed by, the Attorney General, then-Acting Deputy Attorney Gary Grindler or Assistant Attorney General for the Criminal Division Lanny Breuer, and were not even known by them until after allegations were made public in early 2011.

- **Attorney General Holder:** "We found no evidence that Attorney General Holder was informed about Operation Fast and Furious, or learned about the tactics employed by ATF in the investigation, prior to January 31, 2011." (*Report at 297*) The report adds that former Acting ATF Director "Melson stated that he did not inform Holder about the investigation, and [former Arizona U.S. Attorney] Burke said he did not recall doing so. Melson also stated that the Department was not involved in formulating any of the tactical decisions in the investigation." (*Report at 299*)
- **Former Acting Deputy Attorney General Grindler:** "Unlike Attorney General Holder, Acting Deputy Attorney General Grindler received an ATF briefing from Melson and Hoover on Operation Fast and Furious in March 2010, while investigative activity in the case was ongoing. We found, however, that the briefing failed to alert Grindler to problems in the investigation." (*Report at 301*) More specifically, the OIG concluded that "the limited information presented at the briefing was not sufficient to put [Grindler] on notice of ATF's failure to interdict firearms that it could have legally seized. Indeed, Grindler, Melson, and Hoover all told the OIG that the briefing did not include a detailed discussion of the case strategy or tactics, and did not include any mention of 'gun walking.'" (*Report at 301*) OIG also concluded that "even as they developed increasing concerns about the investigation in 2010, and despite its significant impact on Mexico, Hoover and Melson failed to provide any updated briefings to Grindler." (*Report at 302*)
- **Assistant Attorney General Breuer:** "We found no evidence to suggest that AAG Breuer was aware in 2009 or 2010 that Phoenix ATF and the Arizona U.S. Attorney's Office had adopted a strategy in Operation Fast and Furious of not interdicting firearms." (*Report at 310*) Moreover, you "found no evidence that Breuer learned about 'gun walking' allegations in Operation Fast and Furious until public revelations in 2011." (*Report at 315*)

Your findings also reaffirmed that:

- Weekly reports submitted by various Department components to the Offices of the Attorney General and Deputy Attorney General *did not* contain information that would have put officials in those offices on notice of the inappropriate strategy or tactics used in Operation Fast and Furious. (*Report at 264, 453*) Information regarding Operation Fast and Furious contained in those weekly reports was not brought to the attention of the Attorney General or Acting Deputy Attorney General.
- Funding of Operation Fast and Furious under the Department's Organized Crime Drug Enforcement Task Force (OCDETF) program *did not* equate with senior Department leaders knowing about or approving of the strategy and tactics used in the operation. Indeed, "[w]e found no evidence that approval from ATF Headquarters or by Justice Department Headquarters was required or obtained. The proposal [for OCDETF funding] was submitted to and approved by the OCDETF District Committee on January 26, 2010." (*Report at 148*)

The OIG's Report Recognizes That the Department Implemented Appropriate Policy Reforms And Stronger Internal Controls; The Department Agrees With the Report's Recommendations 1-6 And Will Implement Them to the Extent It Has Not Already Done So

The report recognizes the significant policy reforms and stronger internal controls that the Department has already put in place to ensure that the inappropriate strategy and tactics used in operations like Fast and Furious and Wide Receiver are not used again in the future. In assessing the overall impact of these changes, the report finds that "the policies that ATF has instituted to address problems identified in Operation Fast and Furious are significant and helpful. . . ." (*Report at 428*) The Department agrees with the report's Recommendations 1-6 and intends to implement them to the extent it has not already done so.

The steps taken by the Department and ATF even prior to receiving your conclusions include:

- **No Guns Crossing the Border:** On March 9, 2011, at the Attorney General's instruction, I "issued a directive to Southwest Border U.S. Attorneys stating that tactics allowing firearms to cross the border violated Department policy and would not be tolerated, including 'controlled deliveries' that were coordinated with Mexican law enforcement." (*Report at 99, 421*) This directive "require[s] Department law enforcement agencies to interdict firearms in the United States where there [is] lawful authority to do so." (*Report at 421*)
- **New ATF Firearms Transfer Policy:** On "November 3, 2011, ATF officially clarified its policy regarding firearms transfers during a firearms trafficking investigation." (*Report at 421*) The policy reminds agents that interdiction or other forms of early intervention may be necessary to prevent the criminal acquisition, trafficking, or misuse of firearms, and that during the course of an investigation, protecting public safety should be the paramount consideration. The new policy states, "[p]erfecting a criminal prosecution must never be more important than protecting public safety." (*Report at 422*)
- **Monitored Case Program:** On July 19, 2011, ATF announced the implementation of a new Monitored Case Program "designed to ensure close investigative, operational, and strategic coordination and to enhance communication between field offices and ATF Headquarters regarding ATF's most

sensitive cases.” (*Report at 426*) This program was updated on August 29, 2012, to ensure focus on more sensitive and high-risk investigations and inspections.

- **Confidential Informants and Undercover Operations:** In November 2011, ATF revised its policies governing the use of confidential informants and undercover operations. (*Report at 418*)¹ In part, the revised policies establish review committees to scrutinize the use of such tactics in sensitive cases. The confidential informant policy also contains a new provision that, as you recognize, “explicitly precludes, absent extraordinary circumstances, the use of [federal firearms] licensees as confidential or paid informants. . . .” (*Report at 424*)

- **Deconfliction and Information Sharing:** In July 2011, ATF issued a memorandum to all Special Agents in Charge (SACs) reinforcing the importance of deconfliction and information sharing in every investigation and requiring the use of available deconfliction databases in every investigation.

The report also describes as “appropriate and necessary” steps that the Criminal Division has taken to refine its wiretap authorization process. (*Report at 430-431*) These steps include:

- **Enhanced Awareness of Operational Tactics:** Direction in the fall of 2011 to supervisors in the Criminal Division’s Office of Enforcement Operations (OEO) and to Criminal Division Deputy Assistant Attorneys General (DAAGs) to increase their efforts to ensure that supervisory officials in the relevant United States Attorney’s Office are notified when the Criminal Division’s reviews of wiretap applications raise concerns about operational tactics being used in a matter.

- **Enhanced Communication and Review Regarding Wiretap Applications:** Direction to the Director of OEO to communicate any such concerns – whether they originate in OEO or with a Criminal Division DAAG – to supervisory officials in the relevant U.S. Attorney’s Office if they arise. In addition, OEO now requires two levels of supervisory review (as opposed to one) in cases involving multiple extensions of Title III wiretaps.

- **Requirement of Express Supervisory Attorney Approval of Wiretap Application:** As of March 19, 2012, Department policy requires that all Title III submissions be approved by a supervising attorney other than the attorney submitting the application. That supervisory attorney must sign the Title III cover sheet, demonstrating that he or she has reviewed the affidavit, application, and draft order included in the submission packet, and that, in light of the overall investigative plan for the matter, and taking into account applicable Department policies and procedures, he or she supports the request and approves of it. USAM 9-7.110(D)

The Report also acknowledges the additional steps that the Department has taken to ensure the provision of accurate information to Congress:

¹ The policy on confidential informants was again updated on July 2, 2012.

- **Responding to Congressional Inquiries:** On January 26, 2012, I issued a directive regarding the handling of congressional requests for information. The directive instructs each component to undertake rigorous efforts to obtain precise factual information from employees with the best knowledge of the matters relevant to the congressional inquiry including, in appropriate circumstances and following appropriate procedures, from those who may have made protected disclosures to Congress on the subject. The January 26 directive also recognizes that while meeting external deadlines is a factor, it is more important to ensure the accuracy and completeness of information provided to Congress. The “January 26 memorandum appropriately emphasizes the importance of providing accurate responses to Congress, and outlines procedures within the components that, if adhered to, should help achieve this objective.” *(Report at 470)*

Finally, the Attorney General and I have overseen significant personnel shifts in the leadership of both ATF and the U.S. Attorney’s Office in Arizona. Acting Director Melson and Deputy Director Hoover were replaced with Acting Director Jones and Deputy Director Brandon. U.S. Attorney Burke has been replaced by U.S. Attorney Leonardo. Other personnel moves have occurred as well and those changes should further ensure appropriate accountability.

The OIG’s Report Confirms That the Department Relied on Inaccurate Information Provided to it By the Relevant Components During the Drafting of its February 4, 2011 Letter; The Department Does Not Agree That it Should Have Undertaken An Independent Review of the Facts Before Responding

Your report confirms that, in drafting its February 4, 2011 letter to Senator Grassley, “Department officials relied on information provided by senior component officials that was not accurate.” *(Report at 395)* However, the report concludes that the Department should not have relied on this information and that a flawed drafting process contributed to inaccuracies in the letter. *(Report at 396, 460-464)* While we recognize that the drafting process itself was not without flaws, we do not agree that the Department erred in relying on leaders of ATF and the U.S. Attorney’s Office believed to be in the best position to know the actual facts or, as the report suggests, that the Department had a duty to conduct an independent factual inquiry into Operation Fast and Furious before responding to Senator Grassley. *(Report at 464)*

The report recognizes that “as a general proposition, when Department officials – typically in the Office of Legislative Affairs – respond to Congressional inquiries, they should be able to rely on knowledgeable component officials for information.” *(Report at 460)* Despite this, the report argues that the Department should have undertaken an independent fact-finding process before responding to Senator Grassley. *(Report at 460-464)* We do not agree that the reasons identified in the report compelled deviating from what the OIG acknowledges should be the Department’s general practice of relying on information provided by officials of components with knowledge of the issues in dispute. In particular, we note that while Senator Grassley referred in his January 27 letter (to which our letter of February 4 responded) to unspecified documents that “partially corroborate[d]” the allegations being made, he did not provide any actual documentary support until February 9, 2011, at which time the report reflects that the Department recognized the need to “dig in” to the allegations. *(Report at 395, 362)*

Reliance by the Department on component leaders to either know the facts themselves or confer with subordinates who do is both reasonable and necessary to the Department's ability to function. But, if Department officials in Washington had discounted the information provided by the component leaders and decided to speak directly to lower-level staff in the relevant components, the resulting letter *would not necessarily have changed*. As the report acknowledges, "the evidence that we developed during our review suggests that [lower level] officials would not have identified any inaccuracies in [the draft letter to Senator Grassley] because they maintained they were taking appropriate action during the investigation in every respect." (*Report at 408*) And, if the Department had gone yet a step further and undertaken an independent review of the case file in Operation Fast and Furious before responding to Senator Grassley, the report concedes that "[i]t is of course impossible to know whether a review of these materials would have resulted in a more accurate response." (*Report at 410*)

**The Department's May 2, 2011 Letter Corrected a Reformulation
of the Department's Prior Statement Regarding Operation Fast and Furious, Made Clear the
Department's Understanding of Whether Guns Had Knowingly Been Permitted to Cross the
Border, And Noted a Referral of the Entire Matter to the OIG**

The OIG believes that the Department should not have responded substantively to Senator Grassley's April 13, 2011 letter, concluding that the better practice would have been to state only that all questions about Operation Fast and Furious had been referred to the Inspector General, as in prior letters. (*Report at 417*) The Department disagrees and believes that its answer to that letter was appropriate and necessary under the circumstances.

Throughout the relevant period, the Department understood the central allegation regarding Operation Fast and Furious to be that ATF had an intentional plan or policy of knowingly permitting guns to cross the border into Mexico. A Department official told your office that the primary question for the Department during this time "was 'whether ATF had knowingly permitted guns to cross the border into Mexico' in Operation Fast and Furious," because "this was 'collectively' understood by ATF, the U.S. Attorney's Office and the Department to be the 'key allegation' by Congress." (*Report at 373*) Two other officials in the Office of the Deputy Attorney General, as well as an attorney in the Office of Legislative Affairs, described a similar understanding. (*Report at 358-359, 410*)

That allegation was of particular concern to the Department because the export of weapons is a separate federal crime and one that would not have depended on difficult reassessments of precisely when probable cause to interdict weapons existed at a particular point in time. Indeed, the morning after the May 2 letter was sent, a Department official explained this very point regarding the letter, saying that "taking guns to MX is a separate crime" and:

[i]f a straw were to try to cross the border with a gun and ATF knew, [ATF agents] wouldn't let it happen (unless they were coordinating with MX authorities, which happened in a handful of non-Fast and Furious cases). It's a bright line. The question of whether ATF allowed sales to straws will take longer to investigate, since it's not always so clear that someone is a straw rather than a lawful gun buyer. (*Report at 385*)

The need to address this allegation in the May 2 letter arose because of the way in which Senator Grassley's April 13 letter reformulated the Department's previous assertions. In its February 4 letter, the Department denied that ATF had "'sanctioned' or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico." In his April 13 letter, Senator Grassley reformulated that sentence to read that we had "specifically denied 'that ATF 'sanctioned' or otherwise knowingly allowed the sale of assault weapons' to straw purchasers.'" Senator Grassley then asked whether we stood by the reformulated and truncated assertion. In its May 2 response, the Department first pointed out how the April 13 letter changed what we had said in February. Having noted the reformulation, the Department believed it was appropriate to state its current understanding about the corrected statement, *i.e.*, that "[i]t remains our understanding that ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico." Finally, the letter indicated that the entire matter concerning Operation Fast and Furious, which would include whether ATF had interdicted weapons at the earliest possible time consistent with applicable law, had been referred to the OIG so your office could "conduct a thorough review and resolve [those] allegations."

The Department was on solid ground in stating its understanding that ATF had not knowingly permitted guns to cross the border into Mexico in Operation Fast and Furious. First, leading up to the May 2 letter, the Department was specifically assured that such an allegation was untrue. In late February 2011, the Arizona U.S. Attorney's Office, including the line prosecutor on the case, told a Department official that "[n]o guns were allowed to cross the border into Mexico" (*contained in February 27, 2011 email from Jason Weinstein to various Department officials*). On April 19, 2011, the Arizona Criminal Chief wrote "that ATF and the USAO never 'knowingly allowed guns to enter Mexico . . .'" The Criminal Chief added, "we feel we know our case completely and this never happened." (*April 19, 2011 email from Patrick Cunningham to various Department officials*). Likewise, on April 20, 2011, a draft letter prepared by Acting ATF Director Melson for Mexico's Attorney General was sent to the Department and included the statement: "[a]llegations in the media and elsewhere suggest that Operation Fast and Furious was a failed effort. To the contrary, the investigation has dismantled a large, complex, international firearms trafficking case, and the investigation has not concluded. Without the perseverance of this multi-agency task force, this sophisticated criminal network would still be trafficking hundreds of weapons into Mexico today and in the future." The draft added that "[a]t no time did ATF agents observe weapons from Operation Fast and Furious cross into Mexico." (*Draft Letter from Kenneth Melson contained in April 20, 2011 email from Deborah Johnston to various Department officials*).

Second, in addition to these assurances, by May 2 the Department had information from its independent review of Operation Fast and Furious that included review of case-related materials like reports of investigation and T-III information. The Department official who undertook that review told your office that he "'didn't see any evidence yet that the core allegation that [ATF] had knowingly permitted guns to cross into Mexico was accurate.'" (*Report at 373*) To be sure, as your report recognizes, the Department understood that there were questions about other aspects of Operation Fast and Furious, particularly whether ATF had interdicted weapons during the operation at the earliest possible moment consistent with applicable law. Like the OIG, the Department "found the statements from witnesses on the subject of probable cause at times difficult to untangle." (*Report at 216*) By May 2, the Department had not resolved the question whether ATF had interdicted weapons at the earliest

possible moment. The Department's May 2 letter did not address that subject substantively and instead referenced the referral of the matter to your office. But with respect to the allegation that the Department did address in its May 2 letter – whether guns had knowingly been permitted to cross the border into Mexico – the Department believed it understood the facts and that the allegation was not accurate.

Third, before sending the May 2 letter, the Department sent a draft to the leadership of ATF and the Arizona U.S. Attorney's Office with a request that the letter be "vet[ted] for complete accuracy." The Department also asked for assurance that it was "on 100% solid ground saying that 'It remains our understanding that ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico.'" (*Report at 383*) The leaders of ATF and the U.S. Attorney's Office approved the May 2 letter before it was sent. (*Report at 383*)

We also note that, contrary to the report's concern that Congress could have been confused by the May 2 letter (*Report at 385-386*), the record makes clear that Congress was not, in fact, confused. Indeed, the day after the Department sent that letter, Chairman Issa and Senator Grassley noted that the Department's letter "seems to focus more on whether ATF knew guns were being trafficked to Mexico than whether the ATF knew they were being purchased by straw buyers." (*Letter from Chairman Darrell Issa and Senator Charles E. Grassley to Attorney General Holder at 2 (May 3, 2011)*) Thus, Chairman Issa and Senator Grassley understood that the Department was saying that guns were not knowingly permitted to cross the border but that other questions had been referred to your office.

In sum, while the OIG believes that the Department should not have responded substantively to Senator Grassley's April 13 letter, the Department concluded that it was necessary and appropriate both to answer Senator Grassley's reformulation of what we had said in our February 4, 2011 letter to him, as well as to provide our then-current understanding regarding whether guns had knowingly been permitted to cross into Mexico.

Conclusion

The Department appreciates the effort that the OIG has invested in this matter. The Department remains firmly committed to disrupting and dismantling organizations that illegally traffic weapons across our borders. The conclusions of your report will contribute to achieving that goal in a manner that also properly safeguards the public.

Sincerely,



James M. Cole

APPENDIX B

United States Senate

WASHINGTON, DC 20510

January 27, 2011

Via Electronic Transmission

Kenneth E. Melson
Acting Director
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue, NE
Washington, DC 20226

Dear Acting Director Melson:

It is my understanding that the ATF is continually conducting operations along the southwestern United States border to thwart illegal firearm trafficking. I am specifically writing you concerning an ATF operation called "Project Gunrunner." There are serious concerns that the ATF may have become careless, if not negligent, in implementing the Gunrunner strategy.

Members of the Judiciary Committee have received numerous allegations that the ATF sanctioned the sale of hundreds of assault weapons to suspected straw purchasers, who then allegedly transported these weapons throughout the southwestern border area and into Mexico. According to the allegations, one of these individuals purchased three assault rifles with cash in Glendale, Arizona on January 16, 2010. Two of the weapons were then allegedly used in a firefight on December 14, 2010 against Customs and Border Protection (CBP) agents, killing CBP Agent Brian Terry. These extremely serious allegations were accompanied by detailed documentation which appears to lend credibility to the claims and partially corroborates them.

On Tuesday, according to press reports, the ATF arrested 17 suspects in a Project Gunrunner bust. William Newell, the Special Agent in Charge of the ATF's Phoenix Field Office was quoted as saying, "We strongly believe we took down the entire organization from top to bottom that operated out of the Phoenix area." However, if the 17 individuals were merely straw purchasers of whom the ATF had been previously aware before Agent Terry's death, then that raises a host of serious questions that the ATF needs to address immediately.

As you know, the Department of Justice Office of Inspector General (OIG) released a review of ATF's Project Gunrunner in November of 2010, in which the OIG concluded that Project Gunrunner has been unsuccessful, in large part because:

Project Gunrunner's investigative focus has largely remained on gun dealer inspections and straw purchaser investigations, rather than targeting higher-level traffickers and smugglers. As a result, ATF has not made full use of the

intelligence, technological, and prosecutorial resources that can help ATF's investigations reach into the higher levels of trafficking rings.¹

Therefore, in order to gain a more complete understanding of ATF activities in Project Gunrunner, I request that you arrange for my staff to be briefed by knowledgeable ATF supervisors no later than February 3, 2011. Please contact Jason Foster or Brian Downey at (202) 224-5225 to schedule the briefing. All formal correspondence should be sent electronically in PDF format to Brian_Downey@judiciary-rep.senate.gov or via facsimile to (202) 224-3799.

Sincerely,



Charles E. Grassley
Ranking Member

¹ *Review of ATF's Project Gunrunner, Evaluation and Inspections Report I-2011-001*, November 2010, available at <http://www.justice.gov/oig/reports/ATF/e1101.pdf>

APPENDIX C

United States Senate

WASHINGTON, DC 20510

January 31, 2011

Via Electronic Transmission

Kenneth E. Melson
Acting Director
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue, NE
Washington, DC 20226

Dear Acting Director Melson:

As you know, I wrote to you on Thursday, January 27, regarding serious allegations associated with Project Gunrunner and the death of Customs and Border Protection Agent Brian Terry. Although the staff briefing I requested has not yet been scheduled, it appears that the ATF is reacting in less productive ways to my request. I understand that Assistant Special Agent in Charge (ASAC) George Gillette of the ATF's Phoenix office questioned one of the individual agents who answered my staff's questions about Project Gunrunner. ASAC Gillette allegedly accused the agent of misconduct related to his contacts with the Senate Judiciary Committee. This is exactly the wrong sort of reaction for the ATF. Rather than focusing on retaliating against whistleblowers, the ATF's sole focus should be on finding and disclosing the truth as soon as possible.

Whistleblowers are some of the most patriotic people I know—men and women who labor, often anonymously, to let Congress and the American people know when the Government isn't working so we can fix it. As such, it would be prudent for you to remind ATF management about the value of protected disclosures to Congress and/or Inspectors General in accordance with the whistleblower protection laws. Absent such a clear communication from you, ATF management might be able to intimidate whistleblowers to prevent them from providing information to Congress.

As you may be aware, obstructing a Congressional investigation is a crime.¹ Additionally, denying or interfering with employees' rights to furnish information to

¹ 18 U.S.C. § 1505 states, in pertinent part:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress--

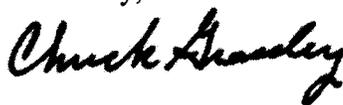
Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

Congress is also against the law.² Federal officials who deny or interfere with employees' rights to furnish information to Congress are not entitled to have their salaries paid by taxpayers' dollars.³ Finally, ATF personnel have Constitutional rights to express their concerns to Congress under the First Amendment.

ATF employees have the right to talk to Congress and to provide Congress with information free and clear of agency interference. Further, these employees have the right to be free from fear of retaliation or reprisal for doing so. Please ensure that ATF employees are aware of their rights and whistleblower protections and that ATF managers are accountable for respecting any protected disclosures.

If you have any questions please contact my Committee staff, Jason Foster at (202) 224-5225. Any formal correspondence should be sent electronically in PDF searchable format to Brian_Downey@judiciary-rep.senate.gov.

Sincerely,



Charles E. Grassley
Ranking Member

cc: The Honorable Eric H. Holder, Jr.
Attorney General of the United States

² 5 U.S.C. § 7211 states:

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

³ P.L. 111 -117 § 714 states:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who -

(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or

(2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).

APPENDIX D



Office of the Assistant Attorney General

Washington, D. C. 20530

February 4, 2011

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Grassley:

This responds to your letters, dated January 27, 2011 and January 31, 2011, to Acting Director Kenneth Melson of the Department's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), regarding Project Gunrunner. We appreciate your strong support for the Department's law enforcement mission.

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. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico. Indeed, an important goal of Project Gunrunner is to stop the flow of weapons from the United States to drug cartels in Mexico. Since its inception in 2006, Project Gunrunner investigations have seized in excess of 10,000 firearms and 1.1 million rounds of ammunition destined for Mexico. Hundreds of individuals have been convicted of criminal offenses arising from these investigations and many others are on-going. ATF remains committed to investigating and dismantling firearms trafficking organizations, and will continue to pursue those cases vigorously with all available investigative resources.

In this vein, the suggestion that Project Gunrunner focuses simply on straw purchasers is incorrect. The defendants named in the indictments referenced in your January 27 letter include leaders of a sophisticated gun trafficking organization. One of the goals of the investigation that led to those indictments is to dismantle the entire trafficking organization, not merely to arrest straw purchasers.

I also want to assure you that ATF has made no attempt to retaliate against any of its agents regarding this matter. We recognize the importance of protecting employees from retaliation relating to their disclosures of waste, fraud, and abuse. ATF employees receive annual training on their rights under the Whistleblower Protection Act, and those with knowledge of waste, fraud, or abuse are encouraged to communicate directly with the

The Honorable Charles E. Grassley
Page Two

Department's Office of Inspector General. These protections do not negate the Department's legitimate interest in protecting confidential information about pending criminal investigations.

We also want to protect investigations and the law enforcement personnel who directly conduct them from inappropriate political influence. For this reason, we respectfully request that Committee staff not contact law enforcement personnel seeking information about pending criminal investigations, including the investigation into the death of Customs and Border Patrol Agent Brian Terry. Like you, we are deeply concerned by his murder, and we are actively investigating the matter. Please direct any inquiry into his killing to this office.

The Department would be pleased to provide a briefing to Committee staff about Project Gunrunner and ATF's efforts to work with its law enforcement partners to build cases that will disrupt and dismantle criminal organizations. That briefing would not address the on-going criminal investigation referenced in your letter. As you know, the Department has a long-standing policy against the disclosure of non-public information about pending criminal investigations, which protects the independence and effectiveness of our law enforcement efforts as well as the privacy and due process interests of individuals who may or may not ever be charged with criminal offenses.

We hope that this information is helpful and look forward to briefing Committee staff about Project Gunrunner. Please do not hesitate to contact this office if we may provide additional assistance about this or any other matter.

Sincerely,



Ronald Weich
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Chairman

APPENDIX E



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 2, 2011

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

This responds to your letter of April 13, 2011, referencing the allegations you have raised about the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF's) Project Gunrunner and Operation Fast and Furious, and requesting that the Senate Judiciary Committee receive access to the ATF documents reviewed by the House Committee on Oversight and Government Reform.

You have asked whether it remains our view that "ATF did not sanction or otherwise knowingly allow the sale of assault weapons to straw purchasers." In fact, my letter, dated February 4, 2011 said: "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." It remains our understanding that ATF's Operation Fast and Furious did not knowingly permit straw buyers to take guns into Mexico. You have provided to us documents, including internal ATF emails, which you believe support your allegation. As you know, we have referred these documents and all correspondence and materials received from you related to Operation Fast and Furious to the Acting Inspector General, so that she may conduct a thorough review and resolve your allegations. While we await her findings, the Attorney General has made clear to prosecutors and agents working along the Southwest Border that the Department should never knowingly permit firearms to cross the border.

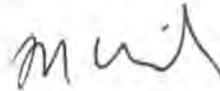
Your letter also asks whether the Department will provide the Senate Judiciary Committee with access to the documents made available to the House Committee on Oversight and Government Reform. While we appreciate your interest in this matter, the Executive Branch over many Administrations has taken the position that only a chairman can speak for a committee in conducting oversight and we work to accommodate legitimate oversight needs of congressional committees as articulated in letter requests from chairmen. The Department's responses to such requests are sent to both the chairman and the ranking minority member, and

The Honorable Charles E. Grassley
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documents made available in response to a chairman's request may be reviewed by all members and staff on that committee. As we explained in our April 18, 2011 letter to Chairman Leahy, a copy of which was provided to you, there are ongoing criminal investigations in Arizona, as well as an indicted criminal case set for trial in June in which 20 people have been charged with gun trafficking, drug trafficking and money laundering crimes. We recognize the importance of congressional oversight and have continued to be as responsive as possible to Chairman Issa without jeopardizing important law enforcement efforts that are directed at stemming the violence in the United States and Mexico emanating from the drug cartels in Mexico. We are confident you understand the critical need of the Department to protect the pending criminal trial and ongoing investigation of alleged gun traffickers, drug traffickers, and money launderers along the Southwest Border.

We hope that this information is helpful. Please do not hesitate to contact this office if we can provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'R Weich', is positioned above the typed name.

Ronald Weich
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Chairman

APPENDIX F



Office of the Deputy Attorney General
Washington, D.C. 20530

December 2, 2011

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and
Government Reform
U.S. House of Representatives
Washington, DC 20515

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman and Ranking Member Grassley:

This supplements the Department's November 16, 2011 response to Chairman Issa's November 9, 2011 letter to Assistant Attorney General Ronald Weich seeking highly deliberative internal communications relating to the drafting of our February 4, 2011 letter to Ranking Member Grassley regarding Operation Fast and Furious.

The Department has a long-held view, shared by Administrations of both political parties, that congressional requests seeking information about the Executive Branch's deliberations in responding to congressional requests implicate significant confidentiality interests grounded in the separation of powers under the U.S. Constitution. As indicated in congressional testimony by senior Department officials on several occasions, however, facts have come to light during the course of this investigation that indicate that the February 4 letter contains inaccuracies. Because of this, the Department now formally withdraws the February 4 letter.

Under these unique circumstances, we have concluded that we will make a rare exception to the Department's recognized protocols and provide you with information related to how the inaccurate information came to be included in the letter. As a result, we are delivering today to your respective offices 1364 pages of material related to that topic.¹ We want to emphasize that our decision in this instance to provide highly deliberative materials is *sui generis*.

The Attorney General has made clear, both in testimony before the Senate Judiciary Committee last month and in a letter dated October 7, 2011, that Operation Fast and Furious was

¹ These documents bear limited redactions, typically information relating to Department employees, such as their cell phone numbers. In addition, we have redacted text from documents that does not relate to how the inaccurate information came to be included in the February 4 letter. The nature of specific redactions is indicated by a redaction code ("RC") set forth in the enclosed list. In response to requests from Chairman Smith and Chairman Leahy, the documents we deliver to you will also be delivered to the House and Senate Committees on the Judiciary.

fundamentally flawed and that its tactics must never be repeated. We have already provided Congress with extensive information about the strategy and tactics underlying that investigation.

We believe that the documents provided today highlight two points regarding the drafting of the February 4 response. First, to respond to the allegations contained in Ranking Member Grassley's letters, Department personnel, primarily in the Office of Legislative Affairs, the Criminal Division and the Office of the Deputy Attorney General, relied on information provided by supervisors from the components in the best position to know the relevant facts: ATF and the U.S. Attorney's Office in Arizona, both of which had responsibility for Operation Fast and Furious. Information provided by those supervisors was inaccurate. We understand that, in transcribed interviews with congressional investigators, the supervisors have said that they did not know at the time the letter was drafted that information they provided was inaccurate. Second, there was significant concern about how much information properly should be shared with Congress regarding the open Fast and Furious investigation and open investigation of the murder of Customs and Border Protection Agent Brian Terry. The documents reflect this concern in the drafting of the February 4 letter.

Ranking Member Grassley's January 27, 2011 letter said, in its first paragraph, that "I am specifically writing you concerning an ATF operation called 'Project Gunrunner.'" His January 31, 2011 letter also cited "serious allegations associated with Project Gunrunner and the death of Customs and Border Protection Agent Brian Terry." While these letters referred to Project Gunrunner – the name of the broad, overall ATF effort to stem the illegal cross-border flow of weapons – the allegations actually related to Operation Fast and Furious, which was a particular ATF operation in Arizona. Following the receipt of the incoming letters, the Department convened a series of calls in an effort to learn the facts about Operation Fast and Furious. Participants in these calls included the then-Acting Director of ATF and the Agency's then-Deputy Director. Notes of these conversations reflect that then-ATF leadership indicated to the staff of the Department that:

- "we didn't let [] guns walk[;]"
- "we . . . didn't know they were straw purchasers at the time[;]"
- "ATF had no probable cause to arrest the purchaser or prevent action[;]"
- "ATF doesn't let guns walk[;]"
- "we always try to interdict weapons purchased illegally[;] and
- "we try to interdict all that we being [sic] transported to Mexico[.]"

HOCR DOJ 003744; HOCR DOJ 003745; HOCR DOJ 003935. In particular, the portion of the notes that indicate that "we always try to interdict weapons purchased illegally" and "we try to interdict all that we being [sic] transported to Mexico" track almost verbatim the inaccurate information included in the letter that the Department sent to Ranking Member Grassley. Our final letter read as follows:

ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

[Letter from Assistant Attorney General Ronald Weich to The Honorable Charles E. Grassley dated February 4, 2011, at 1.] That language was in an early draft of the response prepared by the Department and remained virtually unchanged throughout the drafting process. HOCR DOJ 004049-004050.

The leadership of the U.S. Attorney's Office in Arizona communicated that the allegations in Ranking Member Grassley's letters regarding the Arizona investigation and the guns recovered at the scene of Agent Terry's murder were untrue. One of the central allegations in the January 27 incoming letter was that ATF had "sanctioned" the sale of two weapons that were recovered at the Terry murder scene. In response, on January 31, 2011, the then-U.S. Attorney wrote to others in the Department that:

Grassley's assertions regarding the Arizona investigation and the weapons recovered at the BP Agent Terry murder scene are based on categorical falsehoods.

HOCR DOJ 003938-003939. He asked that the following language be included in the response to Ranking Member Grassley:

'Regarding the allegations repeated in your letter that ATF in any way "sanctioned", had knowledge of, or permitted weapons purchased on January 16, 2010 in Arizona to reach the Republic of Mexico is categorically false.'

HOCR DOJ 004166-004167.

The documents produced today also reflect that the drafters of the February 4 letter were focused on how much should be said about the open Fast and Furious investigation and the investigation into the murder of Agent Terry. One view was that the "[g]oal would [be] to put on the record whatever we can say about the pending matter, without opening the door re info we're not prepared to publicly disclose; . . ." HOCR DOJ 004100. The other view was ". . . I fully appreciate the concerns about commenting on ongoing cases – both present and future – but I think the Department should consider making a more forceful rebuttal to the allegations here, which are terribly damaging to ATF." *Id.* Over a period of days, drafts of the letter were sent to the leadership of ATF and the U.S. Attorney's Office in Arizona for review and comment, and thereafter circulated within those offices for review and comment by others. *See, e.g.*, HOCR DOJ 004100-004102; HOCR DOJ 004122-004124; HOCR DOJ 004132-004134; HOCR DOJ 004144-004146. After a series of edits on February 4 and the re-circulation of drafts to the leadership of ATF and the U.S. Attorney's Office, the final letter provided, in part, that:

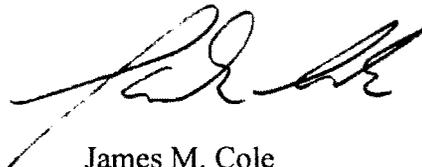
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At the outset, the allegation described in your January 27 letter—that ATF ‘sanctioned’ or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico—is false. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

HOGR DOJ 004868-004870

We trust that you will find this information useful and we look forward to continuing to work with you on this matter.

Sincerely,



James M. Cole
Deputy Attorney General

cc: The Honorable Patrick Leahy, Chairman
U.S. Senate Committee on the Judiciary

The Honorable Elijah E. Cummings, Ranking Member
U.S. House Committee on Oversight and Government Reform

The Honorable Lamar Smith, Chairman
U.S. House Committee on the Judiciary

The Honorable John Conyers, Ranking Member
U.S. House Committee on the Judiciary

