

ISSUE BRIEF

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Showstopper: Department of Justice Report on Operation Fast and Furious

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The Inspector General (IG) of the U.S. Department of Justice (DOJ) has come out with a long-awaited report about Operation Fast and Furious. As described in a previous *Legal Memorandum*, this was an ill-conceived gun-smuggling investigation to identify the kingpins of a firearms trafficking network—and the Mexican cartel leaders behind that network—that resulted in the sale of over 2,000 high-powered weapons to “straw purchasers” for about \$1.5 million in cash.¹ The vast majority of these weapons (only 105 weapons were seized before being transported into Mexico) ended up in the hands of dangerous thugs who used them, predictably enough, to commit murder and mayhem.

Although many of these guns remain unaccounted for, several have shown up at crime scenes. Two

of them were used in the ambush that resulted in the death of U.S. Border Patrol Agent Brian Terry. The report also covers a predecessor to Operation Fast and Furious called Operation Wide Receiver, another terribly executed operation that should have led sensible people to conclude that initiating another gun-walking operation would be a fool’s errand.

Misguided Operation. The 471-page report by IG Michael Horowitz is quite the showstopper.² It criticizes the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the U.S. Attorney’s Office for the District of Arizona, and senior DOJ officials for their roles in this botched investigation and cites “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.”

It also “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” and “found failures by Department officials related to these matters, including failing to respond accurately to a Congressional inquiry about them.”

Attorney General Holder Shockingly Kept in the Dark. The report clears U.S. Attorney General Eric Holder of personal knowledge of Operation Fast and Furious. Although Holder got weekly reports that mentioned Operation Fast and Furious, his top assistants, including “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.”

It is worth noting, though, that the information being referenced pertained only to the link between the weapons found at the Terry murder scene and Operation Fast and Furious, not the foolhardy tactics being employed by the agents.

According to the report, the ATF officials who briefed these senior DOJ officials failed to provide this critical information. This information was, however, included in the wiretap applications that should have been thoroughly reviewed by

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the deputies working for Criminal Division Assistant Attorney General Lanny Breuer. One of those deputies, Jacob Weinstein, who had detailed knowledge about the “obviously flawed” techniques used in Operation Wide Receiver, should have been aware of the risk that similar tactics were being employed in Operation Fast and Furious based on his conversations with ATF officials about that investigation.

The report claims that Attorney General Holder did not become aware of these tactics until three weeks after Congress had been falsely informed by DOJ in a February 4, 2011, letter that guns were not knowingly allowed to “walk” into Mexico, at which point he directed the IG’s Office to investigate the matter. The report also faults DOJ for sending another letter to Congress on May 2, 2011, which “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.”

It is shocking to conceive that the Attorney General of the United States was not made aware of the tactics used in an operation that lasted for months and resulted in the deaths of a federal agent and—according to Mexico’s former Attorney General Victor Humberto

Benítez Treviño—approximately 300 Mexicans.³ At the very least, assuming this is true, the Attorney General was ill-served by some of his most trusted advisers, as well as by some career prosecutors in Phoenix. The report singles out the actions of several officials (one of whom immediately resigned and another of whom retired) and urges Holder to “determine whether discipline or other administrative action...is appropriate.” Some of these individuals should now be disciplined, if not fired.

Continuing Investigations and Executive Privilege. The IG’s Office is continuing its investigation into the serious allegations that Fast and Furious whistleblowers—the unsung heroes in this misadventure—were reassigned to positions within ATF (tantamount to demotions) and subjected to retaliation. And, as if 2,000 high-powered weapons were not enough, the IG’s Office states that it is completing an investigation of “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.”

President Obama has invoked executive privilege to justify withholding responsive documents that were subpoenaed by the House Committee on Oversight and

Government Reform. The House of Representatives has now filed a lawsuit seeking disclosure of these documents (many of which were provided to and reviewed by the IG). It is unclear whether the IG’s report will have an impact on that litigation.

Critics of Operation Fast and Furious Were Right. Responding to the report, Attorney General Holder issued a statement announcing the immediate retirement of former acting ATF Director Kenneth Melson and the resignation of Deputy Assistant Attorney General Jason Weinstein. The statement continues: “It is unfortunate that some were so quick to make baseless accusations before they possessed the facts about these operations—accusations that turned out to be without foundation and that have caused a great deal of unnecessary harm and confusion.”⁴

In reality, however, it looks as though many of the critics of this bungled operation and the resulting cover-up—especially Senator Charles Grassley (R-IA) and Representative Darrell Issa (R-CA)—got it just about right with respect to the most important aspects of this botched and tragic investigative undertaking. A misguided investigation employing exceedingly risky tactics was initiated and allowed to continue for months on end, with guns turning up at more and more crime scenes. Meanwhile, higher-ups within ATF

1. John G. Malcolm, “Operation Fast and Furious: How a Botched Justice Department Operation Led to a Standoff over Executive Privilege,” Heritage Foundation *Legal Memorandum* No. 83 (Jul. 25, 2012), <http://www.heritage.org/research/reports/2012/07/operation-fast-and-furious-botched-justice-department-operation-standoff-over-executive-privilege>.
2. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, OVERSIGHT AND REVIEW DIVISION, A REVIEW OF ATF’S OPERATION FAST AND FURIOUS AND RELATED MATTERS (September 2012), available at <http://www.justice.gov/oig/reports/2012/s1209.pdf> (accessed September 20, 2012). Full disclosure: I worked with Mr. Horowitz in the Criminal Division at DOJ from mid-2001 until 2002, when I was a Deputy Assistant Attorney General and he was Chief of Staff to Assistant Attorney General Michael Chertoff.
3. Deroy Murdock, “Mexican Victims of Fast and Furious,” *Washington Post*, July 10, 2012, <http://www.washingtontimes.com/news/2012/jul/10/mexican-victims-of-fast-and-furious/> (accessed September 20, 2012).
4. Statement by Attorney General Holder on the Office of Inspector General’s Report on Operation Fast and Furious, September 19, 2012, <http://www.justice.gov/opa/pr/2012/September/12-ag-1134.html> (accessed September 20, 2012).

and DOJ ignored the many red flags that emerged and failed to ask even rudimentary questions about what was going on both during the investigation and before sending the February 4, 2011, letter to Congress.

Remedial Measures Provide Little Solace. The report does outline several remedial measures that have already been implemented by DOJ and suggests several more that

DOJ has said it will implement. This is a very positive development, but it will be of little solace for Brian Terry's family and for the families of those in Mexico who were killed with Fast and Furious guns.

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