



FLASH MEMORANDUM

April 14, 2016

**To: Republican Members
Committee on Oversight and Government Reform**

From: Chairman Jason Chaffetz

Re: Preliminary Update—The Fast and Furious Papers

Executive Summary

On January 19, 2016, U.S. District Judge Amy Berman Jackson ordered the Justice Department to produce documents to the Committee related to Operation Fast and Furious. The documents—previously withheld pursuant to the President’s executive privilege claim—detail the Department’s internal deliberations with respect to denying, and eventually admitting, that firearms were trafficked into the hands of Mexican cartel associates during Fast and Furious.

On April 8, 2016, the Department produced 20,500 pages of documents in response to Judge Jackson’s Order.

More than previously understood, the documents show the lengths to which senior Department officials went to keep information from Congress. Further, the documents reveal how senior Justice Department officials—including Attorney General Eric Holder—intensely followed and managed an effort to carefully limit and obstruct the information produced to Congress. Justice Department officials in Washington impeded the congressional investigation in several ways, including:

- Presuming that allegations about gunwalking in Arizona were false and refusing to adjust when documents and evidence showed otherwise.
- Politicizing decisions about how and whether to comply with the congressional investigation.
- Devising strategies to redact or otherwise withhold relevant information from Congress and the public.

- Isolating the fallout from the Fast and Furious scandal to ATF leadership and the U.S. Attorney's Office in Arizona.
- Creating a culture of animosity towards congressional oversight.

Factual Background

On **December 14, 2010**, Customs and Border Patrol Agent Brian Terry, a United States Marine veteran, was killed while on patrol near Nogales, Arizona, just miles from the Mexican border. The only two firearms found at the scene were semi-automatic rifles that were allowed to walk as part of a firearms trafficking case named Operation Fast and Furious. The deadly Fast and Furious operation ultimately was responsible for allowing approximately 2,000 firearms to illegally flow into the hands of Mexican cartel associates.

The case was started by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Phoenix Field Division in 2009. In January 2010, ATF and the United States Attorney's Office for the District of Arizona secured funding through the Justice Department's Organized Crime Drug Enforcement Task Force (OCDETF) program. The OCDETF designation and the use of numerous wiretaps opened the door for significant oversight and supervision by Washington, D.C.-based Justice Department officials.

Congressional Republicans have investigated Fast and Furious since January 2011. Over the course of the investigation, the Justice Department has provided false information, stonewalled document requests, produced scores of blacked-out pages and duplicate documents in order to bolster its page count for public relations purposes, and refused to comply with two congressional subpoenas.

Litigation Background

On **February 4, 2011**, the Justice Department wrote to Congress and denied that law enforcement officers allowed straw purchasers to buy firearms illegally in the United States with the intent to traffic them without apprehension. On **December 2, 2011**—nearly ten months later—the Justice Department retracted that letter and confirmed federal investigators let weapons walk away in the hands of straw purchasers, many of whom entered Mexico during Operation Fast and Furious.

On **October 12, 2011**, the Committee issued a subpoena to then Attorney General Eric Holder to obtain documents and communications related to the Fast and Furious operation. As the investigation proceeded, understanding why, how, and when Justice Department officials determined the February 4 letter was false, and why it took so long for them to correct the record, became a primary focus. The Attorney General refused to produce the documents covered by the subpoena, and the President asserted executive privilege over the documents on **June 20, 2012**.

On **June 28, 2012**, the House of Representatives voted to hold the Attorney General in contempt because the President's assertion of executive privilege was inappropriate and legally deficient. Concurrently, the House passed a civil contempt resolution authorizing a lawsuit

against the Justice Department to obtain the documents. The House of Representatives Office of General Counsel filed the lawsuit against the Justice Department on **August 13, 2012**.

Judge Amy Berman Jackson issued her opinion on **January 19, 2016**.

January 19, 2016 Order and Opinion

The Committee's motion to compel the Justice Department to produce all the documents and communications it withheld pursuant to the President's executive privilege claim asserted that: (1) those records are not deliberative, and therefore not eligible to be withheld under an executive privilege claim; and (2) even if they were, the privilege is outweighed in this instance by the Committee's compelling need for the material.

Judge Jackson ruled executive branch communications regarding how to respond to congressional inquiries and other public relations communications are indeed eligible for executive privilege protection. However, Judge Jackson determined the privilege is outweighed in cases where Congress has a compelling need for the documents.

In this case, Judge Jackson decided the Committee's need for the documents outweighed the Department's need to protect itself from the limited harm that could come from releasing them.

Judge Jackson ordered the Justice Department to produce all documents and communications previously withheld as deliberative, among other things. Judge Jackson's Order stated:

For the reasons stated above, it is ORDERED that plaintiff's motion to compel [Dkt. # 103] is GRANTED insofar as it calls for the production of documents responsive to the October 11, 2011 subpoena that concern the Department of Justice's response to congressional and media inquiries into Operation Fast and Furious which were withheld on deliberative process privilege grounds In all other respects, it is DENIED. Records subject to this order shall be produced to plaintiff by February 2, 2016.

It is further ORDERED that by February 2, 2016, defendant shall produce to plaintiff all segregable portions of any records withheld in full or in part on the grounds that they contain attorney-client privileged material, attorney work product, private information, law enforcement sensitive material, or foreign policy sensitive material. Whether any additional records or portions of records are to be produced is a matter to be resolved between the parties themselves.¹

¹ Order and Opinion of Judge Amy Berman Jackson, Comm. on Oversight and Gov't Reform v. Loretta E. Lynch, Atty. Gen. of the U.S., Civil Action No. 12-1332 (ABJ) (Jan. 19, 2016).

The Committee's Appeal

The House General Counsel filed a notice of appeal of Judge Jackson's decision on behalf of the Committee on **April 8, 2016**. The Committee is seeking the remaining documents responsive to the lawsuit and subpoena that are still being inappropriately withheld by the Justice Department for other reasons.

The Justice Department's Production

Within hours of the notice of appeal being filed, the Justice Department released thousands of documents to the Committee. Assistant Attorney General Peter Kadzik wrote an accompanying letter to the Committee. It stated:

[I]n light of the passage of time and other considerations, such as the department's interests in moving past this litigation and building upon our cooperative working relationship with the committee and other congressional committees, the department has decided that it is not in the executive branch's interest to continue litigating this issue at this time. The Department believes that the information provided to the Committee in the referenced production . . . obviates any need for further litigation on this matter.²

In a story about the document production, *The Hill* wrote: "The decision to hand over documents amounts to an admission of failure for the administration, which had long insisted that many of the records were not eligible for Congress's oversight."³ This is true. It is also true, however, that the Justice Department continues to withhold thousands of documents covered by the Committee's subpoena.

Preliminary Findings

Top Justice Department officials did not take questions from Congress about Fast and Furious seriously. In fact, in response to questions from Congress in January 2011, they presumed gunwalking did not occur and proceeded from there. That pattern persisted throughout the congressional investigation.

- On **January 31, 2011**, U.S. Attorney Dennis Burke wrote to Justice Department officials in Washington to share his concerns about a letter from Senate Judiciary Committee Ranking Member Charles Grassley to ATF Director Kenneth Melson raising questions about whether guns were allowed to traffic into Mexico. Burke wrote: "**Grassley's assertions regarding the Arizona investigation and the weapons recovered at the BP 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.**"⁴

² Letter from Peter Kadzik, Ass't Atty. Gen., to Hon. Jason E. Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform (Apr. 8, 2016).

³ Julian Hattem, *Feds hand over 'Fast and Furious' docs as House appeals for more*, THE HILL, Apr. 8, 2016.

⁴ DOJ-FF-04906.

Deputy Assistant Attorney General Jason Weinstein agreed: “This is a really important briefing for ATF – they need to nail it. . . . I’d be happy to work with ATF on the prep for this if it would be helpful.”⁵

Weinstein then suggested to Assistant Attorney General for the Criminal Division Lanny Breuer that he email Melson “offering any assistance they need for the Grassley briefing.”⁶ Weinstein further advised that “**ATF can and should strongly refute**” that a Fast and Furious weapon was involved in the Brian Terry attack.⁷

- On **Friday, June 17, 2011**, in response to news reports that firearms used in a high-profile kidnapping and murder were linked to Fast and Furious, Associate Deputy Attorney General Matt Axelrod emailed ATF, asking: “Were two F&F guns actually traced to the scene of this kidnapping? Can you run that down for us?”⁸ ATF dismissed the connection by responding that day: “[T]o suggest the guns are linked is like saying there was a murder in southeast three weeks ago. Tonight a car load of guys g[o]t caught with guns in southeast. Ergo the guns are linked to the murder.”⁹

Only after Chairman Issa and Ranking Member Grassley wrote to the Ambassador of Mexico on **June 21, 2011** to ask for further details did Axelrod ask more probing questions of ATF.¹⁰ Subsequently, on **June 22, 2011**, Associate Deputy Attorney General Matt Axelrod emailed senior officials, including Deputy Attorney General Jim Cole: “**I just heard from ATF. Their initial reporting on this was incorrect.** Evidently, when MX law enforcement arrested the kidnapers at their hideout, they seized a number of firearms, two of which tie back to Fast and Furious. **I’ll double check Issa’s letter in the morning, but it appears that the allegations in it (and in the Fox News report) are accurate.**”¹¹

Top Justice Department officials viewed the congressional investigation through a highly political lens. They constantly made decisions about whether and when to turn over documents based on political and public relations considerations.

- On **March 9, 2011**, Assistant Attorney General for Legislative Affairs Ron Weich forwarded a letter from the National Rifle Association to a group of senior Justice Department officials. The letter urged the House Judiciary Committee to hold hearings on ATF firearms trafficking enforcement tactics. Weich stated: “Chutzpah. **The NRA’s now-public involvement in this may be useful** in convincing reporters that this is part of the overall effort to discredit ATF.”¹²

⁵ DOJ-FF-04906.

⁶ DOJ-FF-04906.

⁷ DOJ-FF-04905.

⁸ DOJ-FF-44015—44018.

⁹ DOJ-FF-44015—44018.

¹⁰ DOJ-FF-44015—44018.

¹¹ DOJ-FF-44015—44018.

¹² DOJ-FF-11134.

- On **May 4, 2011**, Attorney General Holder weighed in on the topic of how to respond to a *Wall Street Journal* article about Lanny Breuer’s role in Fast and Furious. He asked a group of top Justice Department officials: “If we go out with something do we make it worse?”¹³ In response to a subsequent email from a Criminal Division lawyer providing additional details about how wiretap applications are reviewed, Holder responded: “**Ok- but everyone get ready- this isn’t about facts.**”¹⁴
- On **June 15, 2011**, Stephen Kelly, the top legislative affairs official for the Federal Bureau of Investigation, emailed top Justice Department officials about whether to provide certain material responsive to the Committee’s subpoena:

[T]his is a **very bad idea. This will become precedent for Sen. Grassley’s office to seek actual documents from DoJ and the FBI** in pending criminal investigations, and there’s a better than 50/50 chance that Sen. Grassley will become Chairman of the Judiciary Committee in the next cycle. If the documents are provided here, we can expect to see specific requests to DoJ and the FBI for documents in pending criminal investigations as a routine matter from Committee chairs, potentially including Sen. Grassley.¹⁵

The FBI’s General Counsel, Valerie Caproni, weighed in on Kelly’s assessment with “I agree.”¹⁶ Lisa Monaco responded to the group, “I have spoken with folks here on this and think for now we will not be providing this[.]”¹⁷

- In determining how the Department would describe in a letter to Chairman Issa the information being withheld, on **September 19, 2011**, DOJ lawyer Paul Colborn suggested “deleting the sentence giving a page count on our memos on memos withholding.”¹⁸ He went on to reason, “I think giving a page count is an inappropriate accommodation at this point. They have no legitimate oversight interest in that information.”¹⁹
- On **October 5, 2011**, DOJ Office of Public Affairs Director Matthew Miller emailed Attorney General Eric Holder:

If I were you, I would want answers from the entire team ([Deputy Attorney General Jim] Cole, [Associate Deputy Attorney General Steven] Reich, on down), on why the Department let Issa decide what to do with these memos. **The whole point of the review is to find things like this and come up with plans for dealing with them.** It should have been obvious that these memos were going to be a huge target, and instead of

¹³ DOJ-FF-00657.

¹⁴ DOJ-FF-00656.

¹⁵ DOJ-FF-43037.

¹⁶ DOJ-FF-43037.

¹⁷ DOJ-FF-43037.

¹⁸ DOJ-FF-60096.

¹⁹ DOJ-FF-60096.

just handing them over, the Department should have put them out to reporters on its own terms, instead of letting Issa do it. Give them to Issa at the same time you give them to the press with an explanation that takes the air out of the balloon. **And if the answer is we owe it to Issa to give him this stuff first – well, that’s obviously ridiculous.**²⁰

Holder forwarded the email to his chief of staff, Gary Grindler, with the comment, “I agree.”²¹

Top Justice Department officials in Washington wanted Congress and the public to have as little information as possible. They carefully chose language to minimize Congress’s and the public’s understanding of the role of the Department’s political staff in Fast and Furious.

- On **March 16, 2011**, an ATF official weighed in on the Justice Department’s response to a letter from House Judiciary Committee Chairman Lamar Smith. Chairman Smith’s letter asked several questions about Operation Fast and Furious, including “How many weapons have been allowed to pass to Mexico under the program known as ‘Fast and Furious’?” The ATF official advised senior Justice Department officials to exclude key information from their response. He wrote: **“We would suggest that you pull the sentence that notes how many weapons we’ve recovered. It squares poorly with how many we haven’t.”**²²
- On **March 31, 2011**, senior Justice Department officials in Washington were discussing an imminent subpoena from Chairman Issa. Assistant Attorney General for National Security Lisa Monaco asked the group: “[W]hat’s the status of the response to [I]ssa that had been discussed to try to buy time?”²³ DOJ Office of Public Affairs Director Matthew Miller subsequently drafted a letter to Chairman Issa. Regarding that draft, DOJ lawyer Paul Colborn wrote to Ron Weich: “Ron, Matt’s draft is not a good letter. Much too weak on the open investigation point and suggesting we’ll provide a ‘substantial’ number of documents while withholding only ‘some’ relating to the investigation into the death of the agent. **Much more likely, it’s the reverse: we’ll provide only some and withhold a substantial number**, and they concern not just the murder investigation but also the longstanding Fast and Furious investigation.”²⁴
- On **May 3, 2011**, top Justice Department officials were discussing whether to give a statement to the *Wall Street Journal* for an impending story on the Fast and Furious investigation. The *Wall Street Journal* was preparing to report that Lanny Breuer’s office approved wiretaps which described questionable investigative techniques in March 2010. DOJ Office of Public Affairs Director Matthew Miller recommended against issuing a statement. In an email to Breuer and other top DOJ officials, he wrote: **“I think people will accuse us of playing with semantics when we say that you did not authorize Fast and**

²⁰ DOJ-FF-61875.

²¹ DOJ-FF-61875.

²² DOJ-FF-12213—12214.

²³ DOJ-FF-21337.

²⁴ DOJ-FF-21335.

Furious, but they find out that CRM [DOJ's Criminal Division] did authorize wiretaps.”²⁵

- Later on **May 3, 2011**, top officials from DOJ's Office of Public Affairs and other top DOJ officials were discussing how to respond to press inquiries about Lanny Breuer's role in authorizing Fast and Furious. Officials from the Criminal Division wanted to issue a definitive denial that Breuer authorized the ATF operation. Office of Public Affairs Director Tracy Schmalzer warned her colleagues: “. . . **we run the risk of seeming disingenuous** to some who will not take our explanation that aspects of the operation are not the same as authorizing the operation.”²⁶ DOJ's statement to the *Wall Street Journal* wound up being misleading and minimized Breuer's role in Fast and Furious: “[The wiretap approvals are] a narrow assessment of whether a legal basis exists to support a surveillance request that ultimately goes before a judge for decision. These reviews are not approval of the underlying investigations or operations.”²⁷
- On **July 6, 2011**, a draft letter to Chairman Issa and Ranking Member Cummings was circulated to senior Justice Department officials. In response, Department official Faith Burton wrote, “**I'd stay away from the representation that we'll fully cooperate in the future . . .**” and removed language from the draft letter.²⁸
- On **August 17, 2011**, Associate Deputy Attorney General Matt Axelrod wrote an email to ATF Assistant Deputy Director of the Office of Public and Governmental Affairs Chris Shaefer. In the email, Axelrod provided feedback in response to a draft external communication related to Fast and Furious. Axelrod advised Shaefer the draft “**wades further than the last version into details and conclusions about Fast and Furious, which strikes us as unwise** given the evolving nature of what we're still learning about the underlying facts and the risk that what you say will be twisted and taken out of context by agency critics.”²⁹

Axelrod further instructed Shaefer to keep his communications about Fast and Furious “high level.”³⁰

The Justice Department's political staff in Washington took steps to isolate the fallout from Fast and Furious to ATF and the U.S. Attorney's Office in Arizona.

- On **August 28, 2011**, Attorney General Holder was strategizing with top officials in Washington about how to announce ATF Director Ken Melson and U.S. Attorney Dennis Burke would resign due to their roles in Fast and Furious. Holder was concerned the news would leak early because Melson had already cleaned out his office. He instructed his staff

²⁵ DOJ-FF-28895.

²⁶ DOJ-FF-28985.

²⁷ Evan Perez, *Lawmakers Step Up Probe of Gun Trafficking Operation*, WALL ST. J., May 4, 2011.

²⁸ DOJ-FF-48038.

²⁹ DOJ-FF-00002.

³⁰ DOJ-FF-00002.

to have someone at ATF “close the door to his office.”³¹ Deputy Attorney General Jim Cole worried announcing Melson’s resignation would create the appearance Melson was the only official being removed. He wrote to Holder: “**The problem with going earlier than Tuesday is that we won’t have Dennis in the package.**”³²

Holder responded: “Let’s hold all until Tuesday as planned.”³³ He replied to his own email: “We have to make known the breadth of the changes- at the top in USAO and ATF. At worker level at USAO and ATF. **No one is a fall guy here.**”³⁴

Further proof of the coordination by main Justice of the Melson and Burke staff changes occurred when Melson emailed a proposed “draft press release” he “would like to issue from ATF.”³⁵ David O’Neil responded to the chain (with Holder cc’ed):

Ken’s message below reads like he may think he’s giving us a heads-up on the message he plans to send on Monday as opposed to asking for clearance. If we haven’t made clear to him that we want to approve/coordinate any messaging about this, we probably should say that OPA is going to revise the first draft he shared and we’ll get back to him with a new one.³⁶

Stuart Goldberg alerted the email chain: “the DAG [Jim Cole] did tell him the change would be announced on Tuesday,” to which Holder questioned “Did Jim say it in Spanish?” Cole responded, “Further proof of the need for a change.”³⁷

Talking points drafted by Ron Weich to communicate to congressional staff made clear both Melson and Burke were intended to be the scapegoats, noting: “These changes will help us move past the controversy that has surrounded Fast and Furious. Ken Melson and Dennis Burke have both acknowledged mistakes in that area, and it will be useful to turn the page from those mistakes.”³⁸

According to Weich, Holder expected to “have these conversations personally,” but Weich believed “there may be a value in keeping the AG a step removed.”³⁹

³¹ DOJ-FF-01272.

³² DOJ-FF-01310.

³³ DOJ-FF-01310.

³⁴ DOJ-FF-01310.

³⁵ DOJ-FF-01268-69.

³⁶ DOJ-FF-01268.

³⁷ DOJ-FF-01267.

³⁸ DOJ-FF-57853.

³⁹ DOJ-FF-57852.

Top Justice Department officials disingenuously relied on the ongoing investigation by the Inspector General to ward off outside investigations.

- On **March 15, 2011**, Justice Department officials in Washington and the U.S. Attorney’s Office in Arizona discussed “noises that they [the Mexican government] are opening a criminal investigation of ATF for Fast and Furious”⁴⁰ DOJ Criminal Division Office of International Affairs Director Molly Warlow advised that the Inspector General’s review “shouldn’t have any interplay at all [with the Mexican government’s investigation], **unless we wanted to (or needed to) invoke that as reason (even if disingenuously) to shelve the Mexican inquiry.** I can see nothing but mischief (and headaches for us) in the mexicans pursuing this, so I would like to see if there is a way we can turn it off, and the sooner the better.”⁴¹

Going Forward

On April 8, 2016, the Committee filed a notice of appeal to the U.S. Court of Appeals for the D.C. Circuit. House General Counsel will file the appeal on behalf of the Committee, pursuant to the Federal Rules of Appellate Procedure. The purpose of the appeal is to obtain the full range of documents for which the Committee issued a subpoena in 2011 and brought this lawsuit in 2012. We expect those documents—which are still being withheld for inappropriate reasons by the Justice Department—will answer some of the outstanding questions about Operation Fast and Furious.

The emails and other internal Justice Department communications described in this memorandum represent a small subset of the 20,500 pages that the Committee received on April 8, 2016. Committee staff are working vigorously to review the entire set of documents that the Justice Department turned over to piece together how and why senior political officials in Washington obstructed the congressional investigation of Fast and Furious. The Committee will supplement the preliminary findings contained in this memorandum with a more complete report as soon as practicable.

⁴⁰ DOJ-FF-12160.

⁴¹ DOJ-FF-12160.

APPENDIX: TIMELINE OF KEY DATES

- December 14, 2010: Border Patrol Agent Brian Terry was fatally shot.
- January 27, 2011: Sen. Charles Grassley wrote a letter to ATF Acting Director Kenneth E. Melson requesting information about the ATF-sanctioned sale of hundreds of firearms to straw purchasers. The letter mentioned a number of allegations that walked guns were found at the scene of the fire fight that killed Border Patrol Agent Brian Terry.
- February 4, 2011: The Justice Department responded to Sen. Grassley and denied that law enforcement officers allowed straw purchasers to buy firearms illegally in the United States and take them into Mexico without being apprehended.
- March 16, 2011: Chairman Issa wrote to then-Acting ATF Director Kenneth E. Melson requesting documents and information regarding Fast and Furious.
- March 22, 2011: President Obama appeared on Univision and spoke about the “gunwalking” controversy. The President said neither he nor Attorney General Holder authorized Fast and Furious. He also stated, “There may be a situation here in which a serious mistake was made, and if that’s the case then we’ll find out and we’ll hold somebody accountable.”
- March 31, 2011: The Committee issued a subpoena to Melson. The Department produced zero pages of non-public documents pursuant to that subpoena until June 10, 2011, on the eve of the Committee’s first Fast and Furious hearing.
- October 12, 2011: Chairman Issa issued a subpoena for documents to the Justice Department. That subpoena, and its successors, is the subject of the ongoing litigation between the Committee and the Justice Department.
- November 8, 2011: Holder stated for the first time in testimony before the Senate Judiciary Committee that “gunwalking” occurred in Fast and Furious.
- December 2, 2011: The Justice Department retracted the February 4 letter and confirmed that federal investigators did in fact permit weapons to enter Mexico during Operation Fast and Furious.
- June 20, 2012: The President asserted executive privilege over some of the documents being withheld by the Attorney General.
- June 28, 2012: The House of Representatives voted (255-67) to hold the Attorney General in contempt because the President’s assertion of executive privilege was invalid, among other reasons. The House also passed (258-95) a civil contempt resolution that authorized a lawsuit against the Justice Department to obtain the documents.

August 13, 2012: The House of Representatives Office of General Counsel filed the lawsuit against the Justice Department.

January 19, 2016: Judge Amy Berman Jackson issued her order and opinion.

April 8, 2016: The House General Counsel filed a notice of appeal of Judge Jackson's order so the Committee can secure the full range of documents for which it brought the lawsuit.

The Justice Department provided 20,500 pages of documents in response to Judge Jackson's order.