

The Law

Obama's Executive Privilege and Holder's Contempt: "Operation Fast and Furious"

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In his first use of executive privilege, President Barack Obama on June 20, 2012, denied Congress access to documents related to the "Fast and Furious" operation carried out by the Alcohol, Tobacco, and Firearms (ATF) agency. The program permitted more than two thousand assault guns to leave the United States and enter Mexico, leading to the deaths of hundreds of Mexicans. Initially, the Justice Department denied that ATF ever intended to have guns flow to Mexico. Ten months later the department conceded that its statement was "inaccurate." Congressional efforts to obtain agency documents resulted in a House contempt citation against Attorney General Eric Holder, prompting Obama to invoke executive privilege.

The issue of weapons flowing from the United States into Mexico predates President Barack Obama. The administration of George W. Bush created a program called "Operation Wide Receiver." The purpose was to monitor "straw buyers"—customers who purchase guns for someone else. Instead of immediately seizing the weapons, Alcohol, Tobacco, and Firearms (ATF) decided to follow the guns to major crime syndicates. The strategy: let straw buyers lead ATF to firearms traffickers and Mexican drug cartels. The program was finally closed down after ATF concluded it lost track of too many guns. For reasons never fully explained, ATF in the Obama administration decided to renew this failed program under the name "Fast and Furious."

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“Operation Wide Receiver”

In 2006, ATF agents in Phoenix, Arizona, initiated Operation Wide Receiver. With the assistance of local gun dealers, the agents watched straw buyers purchase guns with the intent to transfer them to other parties. After numerous unsuccessful efforts to interdict the weapons at the Mexican border, the lead ATF agent in charge of this program concluded a year later that “We have reached that stage where I am no longer comfortable allowing additional firearms to ‘walk’ ” (*Fatally Flawed* 2012, 2). In late 2007, the operational phase of this program was terminated. In the Obama administration, a Justice Department (or DOJ) prosecutor reviewed the file for Operation Wide Receiver in 2009 and remarked that “a lot of guns seem to have gone to Mexico” and “a lot of those guns ‘walked’ ” (*Fatally Flawed* 2012, 2). Details on Wide Receiver are provided in a September 2012 report by the Office of Inspector General (OIG) in the Justice Department (U.S. Justice Department 2012, 27-101).

Given the evident difficulty of tracking weapons from gun shops to the border and into Mexico, hoping to trace guns to drug cartels, why would this type of program be revived by the Obama administration? What safeguards could avoid the problems experienced by the Bush administration? When reports of gunrunning gained public attention, the Obama administration initially denied that guns had walked to Mexico. Independent investigations by members of Congress and the media forced the administration to admit that its denials were false.

“Operation Fast and Furious”

On January 27, 2011, Senator Charles E. Grassley wrote to Kenneth E. Melson, ATF acting director. Grassley said it was his understanding that ATF continued to conduct operations “along the southwestern United States border to thwart illegal firearm trafficking” (Grassley 2011a, 1).¹ He wrote about an ATF operation called “Project Gunrunner,” an effort to deal with weapons trafficking along the border. Operation Fast and Furious, begun on October 31, 2009, was a related law enforcement effort to track and control guns (U.S. Justice Department 2012, 330-31).

Grassley expressed concern that ATF “may have become careless, if not negligent, in implementing the Gunrunner strategy.” He told Melson that members of the Senate Judiciary Committee had received reports that ATF had “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” (Grassley 2011a, 1). Grassley said that one of those 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” (Grassley 2011a, 1).

1. This letter and many other documents, including selections from congressional hearings and transcribed interviews, are available at <http://oversight.house.gov/documents-in-support-of-civil-action-by-oversight-committee-vs-eric-holder>.

In a follow-up letter of January 31 to Melson, Grassley objected that an ATF agent in the Phoenix office had questioned one of the agents who responded to inquiries from Grassley's staff about Project Gunrunner. According to Grassley, ATF "accused the agent of misconduct related to his contacts with the Senate Judiciary Committee" (Grassley 2011b, 1). Grassley advised Melson not to retaliate against whistleblowers and "to remind ATF management about the value of protected disclosures to Congress and/or Inspectors General in accordance with the whistleblower protection laws" (Grassley 2011b, 1). Citing 18 U.S.C. § 1505 and 5 U.S.C. § 7211, he told Melson that obstructing a congressional investigation is against the law. Grassley also called attention to section 714 of Public Law 111-117, which withholds federal funds to pay the salaries of officials who deny or interfere with the rights of federal employees to furnish information to Congress (Grassley 2011b, 1-2).

Under ATF policy, weapons should be interdicted before falling into the hands of criminals. Instead, despite the protests of many ATF agents, the weapons were allowed to reach Mexico and be used by drug cartels. After the death of Border Agent Terry on December 14, 2010, Attorney General Eric Holder took steps to close down Fast and Furious. Two months later, on February 28, he ordered the inspector general in the Justice Department to conduct an investigation.

An Ill-Advised DOJ Letter

On February 4, 2011, Assistant Attorney General Ronald Weich, head of the Office of Legislative Affairs in the Justice Department, responded to the two letters Grassley sent to Melson. Weich stated that Grassley's claim that ATF had "sanctioned" or "otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico—is false" (Weich 2011a, 1). That blunt statement lacked any qualifications such as "According to information we have received from our ATF office in Phoenix." The DOJ decided to respond quickly to Grassley without asking him for the documentation he possessed. In time, it became necessary to retract the letter, but it took the DOJ 10 months to do that.

From the beginning, Main Justice wondered how to handle possible evidence that Grassley possessed about gunrunning. Gregory Rasnake, ATF's chief of legislative affairs, e-mailed Weich on January 27, 2011, at 4:14 p.m.: "They claim to have 'documentation' that confirms their concerns" (HOCR DOJ 003637).² On that same day, Rasnake was asked by Melson, "Can you ask them for documentation?" Rasnake received advice from James McDermond, ATF's assistant director for public and government affairs: "They will never share the documentation at this time" (HOCR DOJ 003660). Rasnake responded: "No way. We can't even ask" (HOCR DOJ 003662). McDermond agreed: "I concur with the fact that we can't ask" (HOCR DOJ 003665). What prevented them from asking?

2. These e-mails are part of 1,364 documents that the Justice Department made available to the House Oversight Committee to explain how the February 4, 2011, letter to Senator Grassley was drafted. The easiest way to identify these documents is by the number assigned to them. HOCR stands for House Committee on Oversight and Government Reform. "DOJ" stands for Department of Justice.

Rasnake e-mailed Melson on January 27, at 5:31 p.m.: “The bottom line is we couldn’t even ask them for it. It would be viewed as impolite. You see—they have no reason to share. . . . The likelihood that they would give it to us is so remote, that I suggest it is not worth the risk of offending them” (HOCR DOJ 003673). The only way to determine whether Grassley was willing to share his documentation was to ask him. A remark by Rasnake to Melson is revealing: “My initial thoughts were to hide and punt, but after my conversation with Grassley’s staffers—I don’t believe that dog is gonna hunt” (HOCR DOJ 003673). If Grassley’s staffers were that able and determined, the wiser course would be to ask for their evidence. Perhaps Rasnake and McDermond worried that Grassley had reliable evidence about gunrunning, making it difficult to prepare a strong letter of rebuttal. Having decided it was not “worth the risk of offending” Grassley by asking for documentation, Main Justice deeply offended Grassley and Congress by releasing the February 4 letter.

The letter requires a careful reading. Following the language that Grassley used in his letter to Melson, Weich said that straw purchasers did not transport weapons into Mexico. Quite likely they did not. Their function was to purchase weapons and give them to other parties, who would transport the weapons to Mexico. In a subsequent letter to Senator Patrick Leahy two months later, on April 18, Weich made that distinction clear by referring to straw purchasers “who purchase the weapons not for themselves, but with the purpose of transferring them to others who then facilitate their movement across the border to the cartels” (Weich 2011b, 1).

Nothing in the February 4 letter denied that guns flowed to Mexico or that straw buyers played a key role. Weich added: “ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico” (Weich 2011a, 1). The phrase “every effort” did not rule out the possibility that weapons purchased in U.S. gun shops ended up in Mexico. As more was learned about *Fast and Furious*, it became clear that ATF knowingly and consciously allowed weapons to flow from the United States to Mexico.

Why was the February 4 letter signed by Weich? Grassley sent his letter to Melson. As ATF acting director, Melson had substantial knowledge about the program. The Office of Legislative Affairs did not. A Justice Department e-mail on February 3 asked if the letter would go out “under Director Melson’s hand.”³ The value of an Office of Legislative Affairs (OLA) letter is that it allows the DOJ to speak with a single voice. That purpose is undercut with qualifiers, reservations, equivocation, and hedging. Speaking decisively with a single voice allows the DOJ to put a dispute behind it, but only when the letter is accurate and informed.

When the draft letter was delayed and could not be released on February 3, as hoped, William Hoover, assistant director for field operations (ATF), e-mailed Main Justice at 4:16 p.m.: “we are happy to put the letter in final [form] and send to the Senator under Ken’s signature” (HOCR DOJ 004552). Weich e-mailed William Hoover, assistant director for field operations (ATF): “The letter should go out over my signature so that the full authority

3. These and other e-mails are available at <http://www.cq.com/doc/congressionaltranscripts-3972816> (subscription required).

of the Department stands behind our position” (HOCR DOJ 004560). Looking back, Main Justice would have been better off had the letter gone out under Melson’s name. It would look like a Phoenix cover-up, not obstruction by Main Justice.

Many ATF officials were prepared to vigorously defend their agency. Dennis Burke, U.S. attorney in Phoenix, e-mailed Main Justice on February 3, 6:55 p.m., urging that it get the letter to Grassley that day: “Please send soon. Every version gets weaker. We will be apologizing to him by tomorrow” (HOCR DOJ 004624). An apology would indeed come, but not until 10 months later. Burke e-mailed Melson on February 3, at 8:05 p.m.: “I am personally outraged by Senator Grassley’[s] falsehoods. It is one of the lowest acts I have ever seen in politics” (HOCR DOJ 004647). Several officials in Main Justice also defended ATF and wanted to strongly rebut Grassley. Jason Weinstein, deputy assistant attorney general in the Criminal Division, e-mailed Hoover on February 1, 2:15 p.m., stating that Lanny Breuer, assistant attorney general of the Criminal Division, “is one of ATF’s biggest supporters—he has encouraged me to do whatever we can to help” (HOCR DOJ 004026). Weinstein e-mailed Rasnake on February 2, 1:36 p.m.: “My boss and I are fervently supportive of ATF, and these allegations are infuriating” (HOCR DOJ 004212).

The OIG report, released on September 19, 2012, noted that “We believe that in his zeal to protect ATF’s interests, Weinstein lost perspective” and provided distorted information. In helping to draft the February 4 letter, he “failed to act in the best interests of the Department by advocating for ATF rather than responsibly gathering information about its activities” (U.S. Justice Department 2012, 406).

Deciding Whether to Withdraw the Letter

The February 4 letter, highly suspect when issued, declined in credibility with each passing week. On February 23, a CBS broadcast reported that ATF had facilitated the delivery of thousands of guns into criminal hands. In response, Holder advised his chief of staff, Gary Grindler, and Deputy Attorney General James Cole: “Ok. We need answers on this. Not defensive bs—real answers” (U.S. Justice Department, 2012, 365). Apparently a substantive, informed challenge by Grassley—the ranking member of Senate Judiciary—could be pushed aside, but a television program could not.

On February 28, Holder ordered the inspector general to begin an investigation of *Fast and Furious*. On March 2, Weich wrote to Grassley that Holder had asked the inspector general “to evaluate the concerns that have been raised about ATF investigative actions” (U.S. Justice Department, 2012, 369). In a public statement on March 9, Holder explained that “[Q]uestions [that] have been raised by ATF agents about the way in which some of these operations have been conducted . . . have to be taken seriously, and on that basis, I’ve asked the Inspector General to look into that” (Cole 2012a, 10). No longer was the DOJ relying solely on statements from Phoenix supervisors and U.S. attorneys. ATF agents were supplying more reliable information.

By March 30, Phoenix supervisors concluded that the February 4 letter contained inaccuracies, especially after reviewing material in wiretap affidavits. They took the

initiative to recommend to Main Justice that it should read the affidavits but did not connect that advice to particular deficiencies in the February 4 letter (U.S. Justice Department 2012, 375-76).

Weich wrote to Grassley on May 2 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 2011d, 1). “Did not knowingly” is a far cry from denying that assault weapons had walked. OIG criticized the May 2 letter: “Regardless of whether there was an 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” (U.S. Justice Department 2012, 413). OIG further noted that “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” (U.S. Justice Department 2012, 468).

The May 2 letter advised Grassley that his letters to Melson had been referred to the inspector general “so that she may conduct a thorough review and resolve your allegations” (Cole 2012a, 10). No longer was the DOJ referring to those allegations as clearly “false.” On May 4, at a Senate Judiciary Committee hearing about whether ATF had interdicted weapons, Holder said, “I frankly don’t know. That’s what the [Inspector General’s] investigation . . . will tell us” (Cole 2012a, 11). After those concessions, why not withdraw the February 4 letter?

On June 13, the House Oversight Committee heard testimony from four witnesses on this question: “Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?” The witnesses—Morton Rosenberg, Todd Tatem, Charles Tiefer, and myself—agreed that the committee possessed that authority even when the Justice Department claimed that the documents requested by the committee involved the “deliberative process,” active litigation files, and pending or ongoing executive investigations (U.S. Congress, 2011a). Two days later, the committee listened to ATF agents describe how the agency failed to track weapons bought at gun shops by straw buyers (U.S. Congress, 2011b).

Weich told the House Oversight Committee on June 15 that “allegations from the ATF agents . . . have given rise to serious questions about how ATF conducted this operation,” adding: “we are not clinging to the statements” in the February 4 letter (U.S. Congress 2011b, 170, 173). That was helpful in casting doubt on the February 4 letter, but it was not retracted. In November, both Holder and Assistant Attorney General Lanny Breuer testified before the Senate Judiciary Committee in separate hearings that the February 4 letter “inadvertently included inaccurate information” (Cole 2012a, 11). Still, nothing was done to withdraw it.

During a hearing before the Senate Judiciary Committee on November 8, Holder made a midcourse correction. He had told Congress on May 3, 2011, that he “probably heard about Fast and Furious for the first time over the last few weeks” (Markon 2011, A2). At the Senate hearing, Holder amended his recollection, saying he had heard about

the program at the beginning of the year. "I should probably have said a couple of months" (Markon 2011, A2). Mistakes like that occur, but why not correct them at the earliest opportunity—within a matter of days—instead of letting six months go by? Also at that hearing, Holder stated that information in the February 4 letter "was inaccurate" (U.S. Justice Department 2012, 388).

The Retraction Letter

On December 2, 2011, the Justice Department finally decided to withdraw the February 4 letter. Deputy Attorney General James M. Cole wrote to Darrell Issa, chairman of the House Oversight Committee: "As indicated in congressional testimony by senior Department officials on several occasions, . . . 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" (Cole 2011, 1).

If previous testimony highlighted the need to withdraw the letter, why not retract it then? In drafting testimony for senior DOJ officials, it must have been obvious that the letter was not tenable. Why not admit inaccuracies at the earliest possible date? Was the purpose to avoid agency embarrassment? The DOJ's reputation would not be enhanced by a prolonged unwillingness to admit error. When the DOJ misled Congress on February 4 and demonstrated it was unwilling—or unable—to correct the record in a timely manner, its later announcement that it fully complied with committee subpoenas lacked credibility.

The December 2 letter is strangely constructed. Instead of saying "we want to acknowledge that a previous statement by us was in error and we apologize," the letter begins with a defensive tone. It states that Issa earlier sought "highly deliberative internal communications" relating to the drafting of the February 4 letter to Grassley. The next paragraph discusses the DOJ's "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" (Cole 2011, 1). The letter therefore starts not with an apology but with a strong justification for the DOJ's decision to withhold documents from Congress. Only then does it transition awkwardly to the next sentence: "As indicated in congressional testimony by senior Department officials on several occasions, . . ."

Cole explained that "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" (Cole 2011, 1). No doubt assembling those pages was time consuming, but surely the DOJ saw the inaccuracies at an earlier date. Why not send a letter to the committee acknowledging the error and promise to collect the necessary documents as quickly as possible?

The fourth paragraph in Cole's letter begins: "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 fundamentally flawed and that its tactics must never be repeated" (Cole 2011, 1-2). Why include that sentence? It states, or restates, what was already known. Was the purpose to somehow defend the DOJ's record on Fast and Furious? Whatever the justification, it was irrelevant in a letter whose supposed objective was to admit that information provided to Congress was inaccurate.

Paragraph 5 attempts to explain how the February 4 letter was drafted. Cole states, "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" (Cole 2011, 2).

That argument is unpersuasive. Main Justice said it relied on information from officials in Phoenix because they were "in the best position to know the relevant facts." They were also in the best position to deny fault, dissemble, and obstruct the inquiry. The Justice Department should have been wary of claims coming from a field office in deep trouble. It was a mistake to rely solely on ATF supervisors and U.S. attorneys. As Weich told the House Oversight Committee on June 15, 2011, information obtained from ATF agents produced an entirely different picture of gunrunning (Cole 2012a, 11; U.S. Congress 2011b, 170). At a minimum, the DOJ could have told Congress on February 4, "Based on information we have received from our field office," followed by "However, the Department is continuing to conduct a full investigation to ensure accuracy." It was reckless to send Grassley a letter claiming to know the whole truth.

Cole's December 2 letter to Issa explained that the February 4 letter was drafted by those in the Justice Department who had "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" (Cole 2011, 2). Whatever the merit of those concerns, it does not justify giving false information to Congress.

The retraction letter advised Issa that ATF supervisors made six claims to the Justice Department: (1) "we didn't let guns walk"; (2) "we . . . didn't know they were straw purchasers at the time"; (3) "ATF had no probable cause to arrest the purchaser or prevent action"; (4) "ATF doesn't let guns walk"; (5) "we always try to interdict weapons purchased illegally"; and (6) "we try to interdict all that we being [sic] transported to Mexico" (Cole 2011, 2). Cole did not say so, but all six claims are false. He noted that the February 4 letter included this sentence: "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico." "Every effort" does not mean success. Clearly, ATF allowed guns to walk. Cole added, "That language was in an early draft of the response prepared by the Department and remained virtually unchanged throughout the drafting process" (Cole 2011, 3). Why say that? The language was false and misleading in early drafts, middle drafts, and the final version.

Continuing, Cole advised Issa that the leadership of the U.S. attorney's office in Arizona maintained that the allegations in Grassley's letters regarding the Arizona investigation and the guns recovered at the scene of Agent Terry's murder "were untrue" (Cole 2011, 3). Why trust implicitly in ATF officials in Arizona? According to Cole, Main Justice was pressured by Arizona to make "a more forceful rebuttal to the allegations here, which are terribly damaging to ATF" (Cole 2011, 3). No doubt they were damaging to ATF. Instead of providing reliable information to Congress, the DOJ chose to trust assertions by ATF supervisors and U.S. attorneys. The result: Main Justice damaged itself. Remarkably, nothing in the four-page letter from Cole to Issa expressly identifies the portions of the February 4 letter that were "inaccurate."

Scope of Congressional Oversight

On March 16, 2011, Chairman Issa of the House Oversight Committee wrote to Acting Director Melson, referring to the "public's deep suspicions" that ATF "has a policy of permitting—and even encouraging—the movement of guns into Mexico by straw purchasers" (Issa 2011a, 1). To Issa, an investigation by the OIG in the Justice Department "cannot conduct an objective and independent inquiry sufficient to foster public confidence." Only a full congressional investigation, he said, could restore "the public's faith in the workings of the ATF" (Issa 2011a, 3). To that end, he requested documents and information on Project Gunrunner and Operation Fast and Furious to be provided to the committee no later than March 30, 2011 (Issa 2011a, 3-4). A series of committee subpoenas, including March 31 and October 11, 2011, were issued to obtain agency documents and testimony.

On April 19, 2011, Weich wrote to Issa to express caution about planned committee hearings and a subpoena for documents and testimony. Without questioning the committee's responsibility to conduct oversight on Fast and Furious, Weich noted that the Justice Department had indicted 20 alleged gun traffickers and that congressional oversight "risks compromising this prosecution and ongoing investigations of other alleged firearms traffickers, drug dealers, and money launderers." He asked that the committee refrain from contacting or subpoenaing the witnesses and cooperators involved in the indictments or the continuing criminal investigations (Weich 2011c, 1-2).

Weich wrote to Grassley on May 2, 2011. Grassley had asked the Justice Department to provide the Senate Judiciary Committee with the documents made available to the House Oversight Committee. Weich noted it was departmental policy 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" (Weich 2001d, 1). DOJ responses are sent to both the chairman and the ranking minority member to be reviewed by all members and staff on that committee (Weich 2001d, 1-2). In short, Grassley would receive nothing from the Justice Department. He would have to rely on the willingness of the House Oversight Committee to share materials with him.

Access by House Oversight was at issue when its staff went to the Justice Department on May 4, 2011, to review 400 pages of documents *in camera*. They discovered that the documents were partially, and in some cases almost completely, redacted. Issa wrote to Holder that documents sought by the committee's subpoena "are not permitted to have any redactions," especially when viewed on an *in camera* basis at the DOJ. Issa asked Holder to "produce all documents responsive to the Committee's subpoena forthwith" (Issa 2011b, 1).

Weich's letter to Issa on June 14, 2011, acknowledged that the House Oversight Committee had a "legitimate oversight interest in the genesis and strategy pertaining to Fast and Furious" (Weich 2011e, 1). At the same time, Weich explained the difficulties that faced the Justice Department: a million pages of records potentially within the scope of the committee subpoena, the need to hire a document processing company and information technology vendors to put the materials in a format capable of being electronically reviewed, and DOJ's concern that public hearings by the committee "negatively impact our ability to successfully prosecute gun traffickers and violent criminals" (Weich 2011e, 1). Yet DOJ agreed to deliver documents to the committee relating to "open criminal matters" (Weich 2011e, 2).

In a public hearing on June 15, 2011, the House Oversight Committee heard three ATF special agents give testimony "highly critical of the ATF" (Issa 2011c, 1). Issa wrote to William J. Hoover, ATF deputy director, to warn that the agents "should not face reprisals of any kind for their testimony," nor should other ATF employees who cooperate with Congress face retaliation (Issa 2011c, 1). Issa noted that retaliation can take many forms, including disciplinary actions, less desirable duties, and transfers to other locations that affect "personal families and uproot lives." Such actions "debilitate agency morale" (Issa 2011c, 1). Issa told Hoover that several ATF agents had already experienced retaliation for reporting their misgivings about Fast and Furious within the chain of command and had, after expressing unease with the program, received negative performance evaluations (Issa 2011c, 2).

On July 4, 2011, House Oversight interviewed ATF Acting Director Melson. Attendees included majority and minority committee counsel, two minority staff from the Senate Judiciary Committee (including an investigator for Senator Grassley), and two attorneys who accompanied Melson. When asked about the need for congressional oversight, Melson replied:

My view is that the whole matter of the Department's response in this case was a disaster. That as a result, it came to fruition that the committee staff had to be more aggressive and assertive in attempting to get information from the Department, and as a result, there was more adverse publicity towards ATF than was warranted if we had cooperated from the very beginning. And a lot of what they did was damage control, after a while. Their position on things changed weekly and it was hard for us to catch up on it, but it was very clear that they [Main Justice] were running the show (Melson 2011, 31).

Melson said he was aware that the Justice Department was drafting a letter to Senator Grassley, advising him that he would not receive materials because he was only a ranking member and not the chair of Senate Judiciary. Melson told a colleague, "this is

really just poking him in the eye. What's the sense of doing this? Even if you say you can't give it to him, he's going to get it through the back door anyhow, so why are we aggravating the situation [?]" (Melson 2011, 126-27).

On October 11, 2001, Weich summarized for Issa the Justice Department's compliance with the committee subpoena of March 31, 2011. The committee received 2,050 pages of records. In addition, committee staff from House Oversight reviewed 1,195 pages at the DOJ. Weich explained that the disclosure to the committee of certain documents would be prohibited by statute, including records before a grand jury and investigative activities under court seal. Also withheld were certain confidential investigative and prosecutorial documents and internal communications that implicate, he said, separation of powers principles (Weich 2011f, 1-2).

Investigation by *Fortune* Magazine

In early 2012, *Fortune* magazine initiated an investigation that took six months. It reviewed more than 2,000 pages of confidential ATF documents and conducted 39 interviews, including seven law-enforcement agents with direct knowledge of Fast and Furious (Eban 2012a, 2). The results appeared to dismiss the positions advanced by the House Oversight Committee, Senator Grassley, and ATF agents. The article, written by Katherine Eban, claimed that the public case that ATF "walked guns is replete with distortions, errors, partial truths, and even some outright lies" (Eban 2012a, 2). Her study concluded that "there's a fundamental misconception at the heart of the Fast and Furious scandal. Nobody disputes that suspected straw purchasers under surveillance by the ATF repeatedly bought guns that eventually fell into criminal hands" (Eban 2012a, 2). However, the February 4 letter challenged that very point and it took the Justice Department 10 months to admit that it had misled Congress and the public.

Eban further states, "Issa and others charge that the ATF intentionally allowed guns to walk as an operational tactic. But five law-enforcement agents directly involved in Fast and Furious tell *Fortune* that the ATF had no such tactic. They insist they never purposefully allowed guns to be illegally trafficked" (Eban 2012a, 2). Her preoccupation with "intent" and "purpose" lost sight of an obvious fact that the Justice Department denied over a long period of time: guns were walking in large numbers with the agency's knowledge.

The subtitle of the article underscores its focus on intent: "A *Fortune* investigation reveals that the ATF never intentionally allowed guns to fall into the hands of Mexican drug carters. How the world came to believe just the opposite is a tale of rivalry, murder, and political bloodlust" (Eban 2012a, 1). This language ignored what House Oversight and Senator Grassley discovered, with the assistance of agency whistleblowers. The primary purpose was to determine if Fast and Furious allowed weapons from U.S. gun shops to reach Mexico. The Justice Department disputed that allegation. The facts proved otherwise. Eban acknowledged that, "[a]s political pressure has mounted, ATF and Justice Department officials have reversed themselves. After initially supporting Group VII agents [in the Phoenix ATF office] and denying the allegations, they have

since agreed that the ATF purposely chose not to interdict guns it could have seized” (Eban 2012a, 2). That admission undermines her argument about intent and purpose. The House Oversight Committee prepared a 49-page report that analyzes the deficiencies of Eban’s study.⁴

After release of the OIG report, Eban claimed that a “preliminary reading . . . appears to corroborate” her findings “that there was no conspiracy to walk guns, no higher-up plan to do so and that walking guns was not the goal of the investigation” (Eban 2012b, 1). However, previously she admitted that ATF “purposely chose not to interdict guns it could have seized.” Contrary to her claim, OIG’s report concluded that ATF was fully aware that guns were walking because the agency deliberately decided not to arrest straw buyers and seize their weapons (U.S. Justice Department 2012, 434).

Moving Toward Contempt

On January 31, 2012, Issa wrote to Holder to establish new deadlines for documents. In referring to his committee subpoena of October 11, 2011, he concluded that the Justice Department was “actively engaged in a cover-up” and set a new deadline of February 9, 2012, to produce the requested documents (Issa 2012a, 4). Failure to provide the documents, Issa said, would lead the committee to find Holder in contempt. By May 3, Issa was circulating a draft contempt citation (Horwitz 2012, A2). A letter from Speaker John Boehner to Holder on May 18 warned of the risk of contempt (Boehner 2012, 3).

Issa wrote to Holder on June 13, narrowing the categories of materials needed by the committee (Issa 2012b, 1). Two days later, Issa referred to this “subset of post-February 4 documents” to be delivered before the committee’s scheduled consideration of contempt at 10:00 a.m. on June 20 (Issa 2012c, 1). Receipt of those documents, Issa said, would be sufficient to postpone contempt proceedings while the committee reviewed the materials. This effort at accommodation failed. In a letter to President Obama, Issa said he met with Holder on June 19 at the U.S. Capitol, along with Ranking Member Elijah Cummings and Senators Leahy and Grassley.

The meeting lasted about 20 minutes. Holder agreed to provide Issa with a “fair compilation” of documents on three conditions: (1) that Issa permanently cancel the contempt vote, (2) agree that the Justice Department was in full compliance with the committee’s subpoenas, and (3) accept the documents—in Issa’s words—“sight unseen” (Issa 2012d, 3). Issa explained to Obama that he considered the conditions stipulated by Holder as “unacceptable, as would have my predecessors from both sides of the aisle” (Issa 2012d, 3). On a 23-17 party-line vote, the House Oversight Committee found Holder in contempt (Yager 2012, 1). Even after that vote, Issa urged Obama to direct Holder to produce the subset of materials to avoid a House vote on the contempt motion scheduled for June 28 (Issa 2012d, 6-7).

4. Available at the beginning of Appendix 3 at <http://oversight.house.gov/report/fast-and-furious-the-anatomy-of-a-failed-operation-part-1-of-3/> (accessed October 16, 2012).

After Issa refused Holder's offer of June 19, Holder immediately wrote to Obama that same day requesting him to assert executive privilege (Holder 2012, 1). Deputy Attorney General Cole notified Issa the next day that Obama had invoked executive privilege over the post-February 4, 2011, documents (Cole 2012b, 1). The claim of executive privilege is analyzed in the next section. Understanding that the House was scheduled to vote on the contempt citation on June 28, Cole ended his letter to Issa by offering to "work toward a mutually satisfactory resolution of this matter" (Cole 2012b, 4).

On June 28, eight days after the committee action on contempt, the House voted 255 to 67 to support a resolution finding Holder in contempt. The relatively few votes against the resolution reflected the decision of 109 members to leave the chamber and not vote (U.S. Congress 2012, H4417). Seventeen Democrats voted in favor of the resolution (O'Keefe and Horwitz 2012, A5). Those Democrats faced tough election races and saw no political benefit in defending Obama (Helderman and O'Keefe 2012, A3). Newspaper coverage described the vote as the "first time in American history that Congress has imposed the sanction on a sitting member of a president's cabinet" (Weisman and Savage 2012, A3). That statement is correct, but many cabinet members have been held in contempt by congressional committees. In all of those cases, the prospect of a floor vote was sufficient pressure on the executive branch to release documents and reach an accommodation (Fisher 2004, 111-34).

Obama's Executive Privilege

There are many interesting issues about President Obama invoking executive privilege. You might think he signed a document and gave reasons. He did not. Instead, Deputy Attorney General Cole wrote to Chairman Issa on June 20 stating, "the President has asserted executive privilege over the relevant post-February 4, 2011, documents" (Cole 2012b, 1). Cole noted that the House Oversight Committee was "now focused" on documents produced after February 4, 2011 (Cole 2012b, 2). He said the Justice Department shared with the committee internal documents concerning the drafting of the February 4 letter. He now argued that any effort to compel production of internal executive branch documents generated in the course of the "deliberative process" would have "significant, damaging consequences" (Cole 2012b, 4). Cole instructed Issa that release of the documents would "inhibit the candor" of future executive branch deliberations and "significantly impair" the executive branch's ability to respond to congressional oversight (Cole 2012b, 4). Any compelled disclosure, Cole argued, "would be inconsistent" with the separation of powers and "potentially create an imbalance" between the executive and legislative branches (Cole 2012b, 4).

That analysis is not credible. When Holder met with Issa on June 19 at the U.S. Capitol, he indicated a willingness to produce a "fair compilation" of post-February 4 documents if Issa, without seeing the documents, agreed to permanently cancel the contempt vote. Holder was prepared to release documents to Issa on the internal "deliberative process" within the executive branch. In making his offer, did Holder intend to

“damage” the executive branch, “inhibit” the candor of future executive branch deliberations, “significantly” impair the capacity of the executive branch to respond to congressional oversight, act inconsistently with the doctrine of separation of powers, and “create an imbalance” between the two elected branches? Obviously not.

Holder’s June 19 letter to Obama relied heavily on a Justice Department legal opinion issued in 1981, involving a strikingly similar dispute. In response to a House subpoena for executive documents, Attorney General William French Smith urged President Ronald Reagan to invoke executive privilege, which he proceeded to do. A subcommittee responded by holding Secretary of the Interior James Watt in contempt. Smith claimed the documents needed to be withheld to protect the deliberative process, especially “predecisional, deliberative memoranda” (Smith 1981, 329). In the same manner, Holder advised Obama that the documents subpoenaed by House Oversight “were generated in the course of the deliberative process” (Holder 2012, 2). Yet Congress often gains access to predecisional, deliberative memoranda in the executive branch. Both Smith and Holder gave such documents to congressional committees and were prepared to surrender others to reach an accommodation. Holder told Obama that House Oversight received “all documents” that involved the preparation of the February 4 memo from Weich to Grassley. Writing to Issa on June 20, 2012, Cole said the Justice Department had given his committee “1,364 pages of deliberative documents” (Cole 2012b, 3). When committees receive some deliberative documents but not others, they wonder if the materials withheld are embarrassing or incriminating.

On another point, Smith argued that Congress is more entitled to documents if part of a “legislative task” and “considerably weaker” for legislative oversight (Smith 1981, 331). Congressional oversight, he insisted, “is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws” (Smith 1981, 331). Similarly, in his letter to Obama, Holder relied on the supposed distinction between “a *legislative* function” and legislative oversight (Holder 2012, 5, emphasis in original). He cited Smith’s language about the legitimacy of congressional oversight only when facilitating the task of enacting, amending, or repealing laws (Holder 2012, 5).

The first major congressional investigation—General Arthur St. Clair’s military defeat in 1792—was not conducted for the purpose of passing legislation. It was purely a matter of oversight. The House received all the documents it requested (Fisher 2004, 10-11). The Supreme Court in *Watkins v. United States* (1957) recognized that the power of Congress to conduct investigations is not restricted to legislative tasks. It includes “probes into departments of the Federal Government to expose corruption, inefficiency, or waste.”⁵ Congress could easily neutralize the Smith/Holder theory by introducing a bill whenever it wants to conduct oversight.

In response to Smith’s position in 1982, a House subcommittee voted 11-6 to hold Watt in contempt. The parent House Committee on Energy and Commerce voted 23-19 for contempt. Through this pressure the subcommittee members were able to review the disputed documents. Mark L. Marks, ranking Republican on the subcommittee, attributed the impasse to “an irrational decision made by the White House, put into effect by

5. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

a President who I cannot believe understood the ramifications of what he was doing” (Fisher 2012a, 35; U.S. Congress 1982, 386).

Holder advised Obama that releasing certain Fast and Furious documents to the committee would “inhibit the candor” required for executive branch deliberations (Holder 2012, 2). This conventional argument is vastly overplayed. Nothing prevents executive officials from speaking frankly and honestly to the president and agency heads. The problem is usually the opposite: a calculated decision to withhold candor in favor of being a “team player.” President Lyndon B. Johnson escalated the ruinous war in Vietnam without pushback from his subordinates (Janis 1982, 97-130). No one used candor to tell Obama on his second day in office that signing an executive order to “close” the detention center in Guantánamo within a year was likely to backfire and cost him politically.

The deliberative-process privilege, always of questionable merit, has lost even more credibility in recent years. Presidents, including George W. Bush and Barack Obama, work closely with the press to explain how decisions on national security and domestic policy are reached. Bob Woodward was invited into the White House to write several books about military decisions by Bush and Obama (Woodward 2002, 2004, 2008, 2010). On each occasion he told readers what was said in the highly confidential Situation Room, located in the lower level of the White House. He gained access to classified documents, “secure” phone conversations, and “secure” videos. A three-page article in the *New York Times* on May 29, 2012, provided a front-row seat to explain how Obama decides which individuals to kill with armed drones. The story was based on information provided by three dozen current and former Obama advisors (Becker and Shane 2012, A1).

Obama’s decision to invoke executive privilege, based on the legal arguments that Holder presented, was seriously undermined by the OIG report, which immediately resulted in 300 additional documents being shared with the House Oversight Committee. There is every reason to expect much larger numbers of documents to be released to Congress, directly contradicting the legal positions offered by Holder and Cole.

Civil Action by the House

Under 2 U.S.C. § 194, once the House or the Senate holds someone in contempt, the U.S. attorney “shall” bring the matter before a grand jury for possible prosecution. However, Deputy Attorney General Cole advised Senator Grassley that U.S. Attorney Ronald C. Machen, Jr. for the District of Columbia would not pursue criminal prosecution against Holder. Cole explained that Holder’s response to the subpoena issued by the House Oversight Committee “does not constitute a crime in light of the President’s assertion of executive privilege” (Cole 2012c, 1). Cole cited several earlier precedents, dating to 1984, where the Justice Department did not consider itself compelled to take a case to a grand jury if the president invoked executive privilege.

Anticipating that decision by the DOJ, on the same day the House cited Holder for contempt, it passed a resolution authorizing the House to initiate or intervene in judicial proceedings on behalf of the House Oversight Committee to seek declaratory judgments

affirming Holder's duty to comply with the subpoena on *Fast and Furious*. Representative Daniel Lungren explained: "Since we have been given every sense from the Justice Department that it would be folly, in a sense, to suggest that they would carry out the actions that we just voted upon against the Attorney General, this is the method by which we can achieve that which we are required to do" (U.S. Congress 2012, H4418).

On August 13, 2012, the House brought a civil action against Holder. It asked the district court to reject Obama's claim of executive privilege and order the administration to release the subset of documents sought by the committee (Margasak 2012, 2). The complaint filed by the House stated that the breadth of executive privilege advanced by Holder "would cripple congressional oversight of Executive branch agencies, to the very great detriment of the Nation and our constitutional structure" (Complaint 2012, 3). Without the subset of documents on actions taken after February 4, 2011, the complaint stated that House Oversight could not complete its investigation of obstruction by the administration (Complaint 2012, 11).

On October 15, 2012, the Justice Department filed a memorandum in district court requesting that it dismiss the House action. The DOJ brief contemplates a drastically reduced role for committee investigations. Under the reasoning of the brief, a committee seeking agency documents would have to work through the full statutory process such as adding punitive language to an appropriations bill. That would require action by both chambers and perhaps an override of a presidential veto. Another DOJ recommendation: "tie up nominations," but that is available to the Senate, not the House. It also suggests that a committee "can bring its case to the people through the electoral process," "make its case to the public," override presidential vetoes, and adjourn. It is unclear why any of those actions would help a committee obtain documents for oversight purposes, particularly in a timely manner (Fisher 2012b).

Conclusions

It is not unusual for federal agencies to experience embarrassments. The best response is to admit error and get the story behind you. Take some well-deserved bruises and move forward. Don't make public claims unless you have full confidence in them. If there are two sides to an issue, don't present one. It is surprising how many agencies fail to do that. Instead, they cut corners and release part of the information, hoping to minimize the damage to their organization. But additional details are bound to come from legislative oversight, media investigations, and agency whistleblowers. The crisis then escalates from agency embarrassment to deception, dishonesty, and obstruction of justice.

Once the Justice Department recognized the failings of *Fast and Furious*, it was not enough to stop the program, admit its deficiencies, and order the Inspector General to conduct an inquiry. The Justice Department understood that the House Oversight Committee had legitimate grounds for pursuing its investigation. A striking error by the DOJ was to accept biased, self-serving information supplied by the Phoenix office. Main Justice did not have adequate understanding in late January and early February when it

drafted the February 4 letter to Senator Grassley. There was no reason to release a letter pretending to have such certitude. Officials within Main Justice should have looked at the draft and not merely added qualifications but decided, given the uncertainties, that a poorly written response to Grassley would almost certainly have a backlash. It was necessary to honor Grassley's request for a briefing on *Fast and Furious*. There was no need to send him a letter within a matter of days. The OIG report concluded that the February 4 letter "was the byproduct of rushed and sloppy drafting by uninformed and misinformed officials" (U.S. Justice Department 2012, 411).

Once that misguided letter left the building, the attention would no longer be on a botched and cancelled program. Within a matter of weeks, Main Justice recognized that the letter was highly misleading and needed to be corrected. A quick admission was required, but the DOJ did not do that. Perhaps the release of additional documents, either through the civil action initiated by the House or through other disclosures, will help explain why the DOJ seemed frozen in its tracks in making the necessary retraction.

During Senate hearings in 1975, Antonin Scalia offered his thoughts about executive privilege while serving as head of the OLA. When Congress and the executive branch collide on access to agency documents, he said the outcome is likely to lie in "the hurly-burly, the give-and-take of the political process between the legislative and the executive. . . . [W]hen it comes to an impasse the Congress has means at its disposal to have its will prevail" (Scalia 1975, 87). Those "means" are highly dependent on the skills and political judgments exercised by lawmakers and their committees.

Legislative leverage is maximized when a committee conducting oversight acts with bipartisan support. In 2007 and 2008, the House Judiciary Committee conducted an investigation into charges of partisan use of U.S. attorneys. The inquiry was of extreme importance. There were reports of members of Congress contacting U.S. attorneys to pressure them to prosecute particular individuals. Other evidence pointed to the Bush administration hiring and firing U.S. attorneys for political reasons. Legislative oversight was essential, but Democrats on House Judiciary pursued their investigation without the support of Republican lawmakers (House Judiciary 2009, 35-42)

Similarly, with *Fast and Furious*, the House Oversight Committee never formed a united front. This time a Republican-led effort attracted little backing from the Democrats. Although the Justice Department regarded the committee inquiry as legitimate, Democrats on the committee chose to support the administration over their own legislative, committee, and constitutional duties. The same lack of bipartisan spirit existed in the Senate. Senator Grassley, as ranking member of the Senate Judiciary Committee, could not attract the support of the Democrats. This made the efforts of Issa and Grassley appear to be partisan, particularly when the contempt action coincided with the presidential campaign. But foot-dragging by the Justice Department caused the dispute to take center stage in mid-2012. Democrats had their own partisan motivations. Did their steady support for the DOJ and the White House actually benefit Holder and Obama? The cost to the Justice Department, ATF, and the administration was heavy. The political price might have been far less had Democrats worked with Republicans to get the full story out early instead of allowing it to fester over a two-year period.

Finally, the contempt power of Congress has been greatly weakened when applied against the executive branch. In the past, a committee action holding an executive official (even a Cabinet head) in contempt was sufficient leverage to force the administration to release documents (Fisher 2004, 111-34). Beginning with the Anne Gorsuch contempt in 1982, the executive branch refused to take a contempt action to a grand jury (Fisher 2004, 126-28). The same failure to prosecute a contempt citation occurred in 2008 with Harriet Miers and Joshua Bolten as part of the U.S. attorney's inquiry (Rozell 2010, 175-76). A third precedent is now added with Eric Holder. Forcing Congress to file a civil action results in substantial delays with no assurance that the courts will defend congressional interests (Rosenberg 2009, 14-18).

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