

Congress of the United States
Washington, DC 20515

October 20, 2011

The Honorable Robert S. Mueller, III
Director
Federal Bureau of Investigation
953 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Mr. Mueller:

The murder of Border Patrol Agent Brian Terry on December 14, 2010, is what motivated brave law enforcement agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to risk their careers and blow the whistle on Operation Fast and Furious. The Justice Department's false denials to Congress are what motivated them to speak out and testify publicly. A growing collection of documents and credible testimony has put the lie to those denials. It is in this context and because of this obstruction of our previous inquiries that we are now asking you to provide more than just conclusory statements by your Office of Congressional Affairs regarding the state of the evidence in the investigation of Agent Terry's murder.

Out of deference to the FBI's ongoing criminal inquiry, we have delayed asking the Bureau direct questions about the case for nearly ten months. However, Congress has a right and a duty to conduct oversight of federal law enforcement operations. It is a fundamental aspect of our Constitutional system of checks and balances. Agencies like the FBI can wield tremendous power and influence over individual citizens. With that power and influence comes responsibility, and nothing exempts the Bureau from accountability to Congress as well as to the courts.

While we are sensitive to the issues raised by asking questions about an ongoing case, Congress has frequently judged it necessary and has been successful in obtaining such information. The September 11th attacks, the Anthrax attacks, the sieges at Ruby Ridge and Waco, and ABSCAM are just a few of the most high-profile examples in modern times where Congress sought and obtained information related to ongoing criminal matters.¹ We are not required to wait years for lengthy court proceedings to gather information that we deem necessary to carry out our duties under the Constitution.

As you know, two weapons recovered at the scene of Agent Terry's murder have been traced to Fast and Furious. Yet the FBI has released very little information about the

¹ For additional examples, *see generally*, CRS Report RL34197, *Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice* (2008).

circumstances surrounding the fatal shooting. Anonymous Justice Department sources initially told the press that the two Fast and Furious guns had been ballistically excluded as the murder weapon and that the murder weapon had not been recovered. However, we obtained a copy of the report, and in actuality, it does not exclude the Fast and Furious guns. Rather, it is inconclusive. So, apparently someone from the Justice Department attempted to deceive the press.

The lack of answers being given to Agent Terry's family about the circumstances surrounding his death and the delay in bringing his murderers to justice only compounds their anguish. After ten months of FBI investigation, Agent Terry's family and the American public deserve to know more about the status of the inquiry, the state of the evidence, and any connections to Operation Fast and Furious.

Although the Justice Department eventually released limited details about the two Fast and Furious weapons at the crime scene through the unsealing of a search warrant affidavit and the indictment, it only did so after the public controversy had erupted and documents describing the weapons and their serial numbers had been attached to Senator Grassley's initial letters asking about Fast and Furious.

Yet neither the search warrant affidavit nor the unsealed indictment describes the total number of weapons recovered at the scene.² The search warrant affidavit merely indicates that "one of the Border Patrol Agents, utilizing thermal binoculars, observed *at least two* of the suspected aliens carrying rifles."³ It further states that when the one defendant in custody was interviewed, he "stated that he was traveling with four individuals" and that "all of the individuals were armed."⁴ As for the indictment, it merely alleges that the defendants "did knowingly use and carry two" assault rifles.⁵ It does not describe how many weapons were recovered by either Border Patrol or FBI authorities who arrived later at the scene.

So, from the limited information officially released about the circumstances, it appears that the illegal aliens who shot at Agent Terry may have been armed with a total of five rifles. And until recent public statements, it was unclear how many guns the FBI had recovered at the scene. According to documents we have obtained, we know that the two Fast and Furious rifles were part of a lot of three, all purchased at the same time over a year earlier. These circumstances naturally raise questions regarding the whereabouts of that third Fast and Furious

² Application and Affidavit for Search Warrant, Dec. 29, 2010, Case Number 10-10251M, D. Ariz. (Attachment 1); Superseding Indictment, Unsealed Apr. 20, 2011, Case Number 10-10251M, D. Ariz. (Attachment 2).

³ Affidavit for Search Warrant, *supra* note 2 (emphasis added).

⁴ *Id.*

⁵ Superseding Indictment, *supra* note 2.

gun, whether the other firearms were also connected to Fast and Furious, and the current location of all the firearms involved.

At Agent Terry's funeral, border patrol agents told his mother that three weapons were recovered at the scene. Recent news reports about taped conversations also indicated there were three weapons involved, although only two appeared to be connected to Fast and Furious.⁶ The conversation between an ATF agent and a cooperating gun dealer is as follows:

Agent: Well, there were two—

Dealer: There were three weapons.

Agent: There was actually three weapons.

Dealer: I know that. Three weapons recovered.

Agent: And, yes, they had the serial numbers for all three.

Dealer: So, that is correct. Is that—

Agent: And two of them came from this store.

Dealer: I understand that, yeah.

Agent: There's an SKS that I don't think came from — it was something else, from Texas or something.

Dealer: No, we're talking about the AKs.

Agent: No, the two AKs came from the store.⁷

On another portion of the recording, the agent claims that neither of the Fast and Furious guns from the cooperating dealer's store was the one that shot Agent Terry. This exchange also suggests the presence of other guns at the scene:

Dealer: [My attorney] was told in no uncertain terms the statement that DoJ said was false because guns [from my store] were part of it. I mean, I didn't even want to go —

⁶ Recording between ATF agent and federal firearms licensee, Mar. 17, 2011.

⁷ *Id.*

Agent: That's true. That's true, and I can tell you that's why he made the statement. The guns from your store were at the scene.

Dealer: Yeah.

Agent: They were not the gun, to the best of anybody's knowledge, that shot the Border Patrol agent.⁸

Additionally, several internal emails between ATF personnel initially indicated confusion over whether there were two or three weapons being traced. Given all these circumstances, it is reasonable to ask the FBI to clarify what it has learned about how many guns were possessed by the illegal aliens shooting at our Border Patrol agents and the current location of each of those firearms.

The FBI briefed our staff on October 5, 2011, on other matters potentially related to Fast and Furious. That briefing was the first time to our knowledge that the FBI asserted that it recovered two, and only two, guns. The Department's public statement on Monday evening that the FBI lab item labeled "K-1" was a blood sample was the first such explanation that we were aware of.

However, given that the ballistics report is inconclusive as to whether or not either Specimen K-2 or K-3 (the Fast and Furious weapons recovered from the scene) killed Agent Terry, we have the following questions:

- 1) Please explain why the ballistics test was inconclusive.
- 2) Despite the inconclusive ballistics test, are there other indications from the evidence or circumstances that would suggest that one of the Fast and Furious guns recovered at the scene was likely the murder weapon?
- 3) Despite the inconclusive ballistics test, are there other indications from the evidence or circumstances that would suggest that one of the Fast and Furious guns recovered at the scene was *not* likely the murder weapon?
- 4) Can the FBI conclusively rule out the possibility that Specimens K-2 or K-3 killed Agent Terry?
- 5) Does the FBI believe that a third weapon killed Agent Terry? If so, what steps has the FBI taken to locate that weapon and what is the status of the FBI's search?

⁸ *Id.*

- 6) How many total weapons does the evidence indicate were in the possession those encountered by Agent Terry's Border Patrol unit?
- 7) How many total shots and of what type does the evidence indicate were fired by those encountered by Agent Terry's Border Patrol unit? How many and of what type were fired?
- 8) What time did the FBI arrive on the scene?
- 9) Which other state, local, or federal agencies were already present when the FBI arrived?
- 10) What time did the first ATF personnel arrive at the scene?
- 11) When and how were the trace requests for weapons recovered at the scene submitted to ATF?
- 12) Has the FBI submitted any other trace requests to ATF in connection with the Terry murder case? If so, please describe the circumstances in detail, providing the serial number and date of each request.
- 13) Has the FBI submitted any trace requests to ATF in any of its other cases where the gun was connected to Fast and Furious? If so, please describe the circumstances in detail, providing the serial number and date of each request.
- 14) How many total suspects does the evidence indicate were encountered by Agent Terry's Border Patrol unit?
- 15) How many of those suspects are currently at large? What steps has the FBI taken to apprehend them and what is the status of the FBI's search?
- 16) According to press reports, three illegal immigrants were taken into custody "near the scene of the shootout" but were later "cleared by federal authorities," released, and deported to Mexico.⁹ Please explain the circumstances of their arrest and why they were released.

In order to fully understand the context and meaning of the ballistics report and the circumstances surrounding the collection of forensic evidence related to Agent Terry's untimely demise, the House Committee subpoena requires production of all documents and communications between and among FBI employees in Arizona and the FBI Laboratory,

⁹ Amanda Lee Myers and Jacques Billeaud, *Man Indicted in Arizona Border Agent's Killing*, ASSOCIATED PRESS, May 6, 2011.

including but not limited to employees in the Firearms/Toolmark Unit, referring or relating to the firearms recovered during the course of the investigation of Brian Terry's death.

Additionally, we now reiterate our previous request made more than three months ago on July 11, 2011, for all documents and communications between and among the following officials relating to Operation Fast and Furious and the investigation into Brian Terry's murder:

- 1) Nathan Gray, Former Special Agent in Charge, Phoenix Field Division
- 2) Annette Bartlett, Assistant Special Agent in Charge, Phoenix Field Division
- 3) Stephen Cocco, Acting Special Agent in Charge, Phoenix Field Division
- 4) Steven Hooper, Assistant Special Agent in Charge, Phoenix Field Division
- 5) John Iannarelli, Assistant Special Agent in Charge, Phoenix Field Division
- 6) John Strong, Assistant Special Agent in Charge, Phoenix Field Division
- 7) David Cuthbertson, Special Agent in Charge, El Paso Field Division
- 8) The Case Agent from the Tucson office in charge of the Brian Terry murder investigation
- 9) Erich Smith, Firearms/Toolmarks Unit

We request that you provide these documents as soon as possible, but by no later than noon on November 2, 2011.

Finally, this investigation will be more productive and beneficial for both the Bureau and Congress if there is mutual respect for the legitimate roles and responsibilities of both institutions, consistent with the principle of comity between our separate branches of government. That sort of respect is not fostered by the presumption that every question or document request is equivalent to an "accusation."

It is not our goal, intent, or Constitutional function to make accusations or attempt to prove them. Yet that presumption has been implicit in interactions with your staff and in official public statements from the Justice Department. For example, a spokesperson earlier this week dismissed any questions about these matters as a "false accusation" that "maligms the dedicated agents investigating the murder of Agent Terry." Nothing could be further from the truth. Our oversight efforts seek to ensure public confidence in federal law enforcement by providing an independent check on its operations in a matter of great controversy, such as this one. So, rather

than presuming the worst about our motives and interpreting our questions as accusations, it would be more productive to simply answer them.

If you have any questions regarding these requests, please contact Tristan Leavitt in Ranking Member Grassley's office at (202) 224-5225 or Henry Kerner of Chairman Issa's Committee staff at (202) 225-5074. We look forward to receiving your response.

Sincerely,



Darrell Issa, Chairman
Committee on Oversight and
Government Reform
United States House of Representatives



Charles E. Grassley, Ranking Member
Committee on the Judiciary
United States Senate

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives

The Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate