

Prepared Statement of Michael R. Bouchard

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**Before the House Committee on Oversight and Government Reform
United States House of Representatives**

**Concerning Operation Fast and Furious and Related Firearms Trafficking
and Straw Purchase Issues.**

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Good morning Representative Cummings and other distinguished members of this committee.

Thank you for the opportunity to appear before you to discuss an important matter that we all care very deeply about - keeping firearms out of the hands of criminals. Today, I am here to identify some of the difficulties which ATF and law enforcement officials face in the identification, apprehension, and prosecution of "firearm traffickers" – people who provide guns to others for criminal misuse.

By way of background, I was a career law enforcement officer. I was a police officer for more than 7 years and spent 20 years with ATF. Before retiring from ATF more than 3 years ago, I held a number of positions including field agent, supervisor, Chief, Arson and Explosives Programs Division, Special Agent in Charge, Baltimore Field Division, Deputy Assistant Director, Office of Strategic Intelligence and Information as well as Assistant Director, Field Operations. My statement and testimony before you today is based on my experience gained while conducting and supervising firearm trafficking investigations and while managing ATF's national field operations which often involved these types of cases.

Congress declared that the purpose of the Federal Firearms Law cited as the Gun Control Act of 1968 (GCA): *"...is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the use of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."*

I can attest to the fact that from the first day on the job when the bureau swears its new special agents and industry investigators to the oath supporting and defending the Constitution of the United States, ATF instills in them the spirit, understanding and respect for what Congress has declared as the purpose to the GCA of 1968. ATF employees are keenly sensitive to the right to bear arms.

While the words in the preamble to the GCA recognize the plain and simple fact that firearms have a legitimate place in our society and provide many benefits, there is also recognition of another fact - when misused in crimes, firearms can have serious and violent consequences.

Therein lays the challenge which I believe underpins this hearing today: To enforce the Federal firearm laws so as to stop armed criminals while at the same time respecting the rights of lawful gun owners. Outside on the streets where armed criminals commit acts of gun violence, there are some “slippery slopes” to navigate in order to properly meet this challenge.

ATF’s main goal is to “protect the public” hopefully by preventing crime, before it occurs.

In the firearms arena, this can mean denying a potential criminal access to firearms through the background checks required by law at the time of purchase and it can mean disrupting and dismantling large and small firearms trafficking schemes which put guns into the hands of violent criminals.

Unfortunately, criminals bent on acquiring guns can be very clever in the methods that they use to circumvent the law and avoid detection. ATF and law enforcement must continually adjust to the criminal’s changing tactics and develop new strategies and tactics of their own.

Speaking of tactics, many times the tactics used by ATF are simultaneously viewed as too aggressive by some and not aggressive enough by others.

In general, on a day to day basis, ATF agents and investigators have been able to effectively prove some of these criticisms to be unwarranted by staying focused and true to the purpose of the GCA in stopping armed criminals while protecting the rights of law abiding citizens. Some time criticism is warranted but it is the exception rather than the rule. In fact, ATF is one of the most productive federal law enforcement agencies in the country, consistently generating the most criminal cases per agent, and producing some of the highest conviction rates in the country.

Generally the Federal Firearm Laws that ATF enforces prohibit such things as:

- Engaging in the business of dealing in firearms without a license.
- Selling or providing firearms to people known or having reasonable cause to believe are prohibited by law from possessing firearms.
- Causing firearms to be shipped by a common or contract carrier for transportation in interstate or foreign commerce to unlicensed persons.
- Knowingly making false statements and entries in records required to be kept pursuant to the law.
- Stealing and possessing stolen firearms which have affected interstate commerce
- Transferring a firearm knowing that it will be used in a crime of violence of drug trafficking crime.

First, there is no specific definition of “firearm trafficking”; the closest related term defined in the Federal Firearms Laws is most likely “engaged in the business” without a license. The term engaged in business is defined to only include persons who devote “time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.” 18 U.S.C. 921(a)(21). The connotative differences in these two terms alone begin to cloud this issue.

It is difficult to quantify how many firearms are “trafficked” each year. ATF typically looks at a number of factors such as comparing where the gun was purchased, where it turned up in a crime, as well as the time frame between when it was purchased and recovered, commonly referred to as “time to crime.” If they see multiple recoveries from the same purchaser, or multiple recoveries

from guns purchased in a specific region, they may delve more closely into the matter.

Every firearm trafficking case differs based on the techniques used by the criminals, the complexity of the trafficking organizations, as well as the geographic area covered by the organization. For the purpose of this hearing, I will concentrate on the complexities of attacking a trafficking organization that supplies Mexican drug cartels.

Any criminal organization has a hierarchy and each assigns specific tasks to its members. Drug cartels assign some individuals to traffic narcotics, assign others to handle drug proceeds and yet others to supply the organization with firearms and explosives.

Firearms and explosives are used to protect the drugs, the proceeds, as well as to attack competitors or the police and military. In many cases, they are used to intimidate the population to ensure the citizens do not inform the police on the illegal activities of the organization.

When a “cell” in a criminal organization is formed to supply firearms, the cell leader creates “layers” of employees under him. Each layer isolates itself and employs even more people. At the lowest level are the gun buyers, often called “straw purchasers.” In traditional trafficking cases where the entire organization remains in the U.S., it is easier to target the entire organization. In cases involving Mexican cartels, the border causes significant complications for investigators, particularly when surveillance and wiretaps are involved.

In cases where firearms are legally sold between countries, the Department of State and the Immigration and Customs Enforcement become involved. ICE and the Customs and Border Patrol are also involved in interdicting the flow of illegal firearms from the United States to other countries such as Mexico.

What inevitably happens in these Mexico trafficking operations is that “straw purchasers” – people who complete the legal U.S. firearms transaction process in order to buy a gun actually intended for other people, wind up violating ATF laws first. In effect, ATF becomes tantamount to the first responder

Legal buyer or straw purchaser?

Straw purchasers typically have no criminal record and buy firearms on behalf of others for various reasons (i.e. profit, coercion, conspiracy, etc). If they buy firearms from Federal Firearm Licensees (FFL’s) they must fill out a Firearms Transaction Record Form 4473. This essentially establishes their eligibility to purchase the firearm. There is a question on the form which asks if they are buying the firearm for themselves or another person. If they answer it is for another person, the sale cannot proceed.

This becomes complicated because it is difficult to know if the person buying the guns from the dealer is a “straw purchaser” i.e, someone who uses someone else’s money to purchase a weapon on behalf of the other person; or whether the person is a “trafficker” i.e, engaging in the business of buying weapons they intend to transfer to others. If it is the former, one buy while lying on the form is a crime, if it is the latter he isn’t violating the law of engaging in business unless he engages in repetitive transactions with a motive of livelihood or profit. Everyone has a tendency to lump all of the purchasers as “straw purchasers” unless you know the arrangement behind it all you don’t know what crime may be occurring. An example of how confusing this can be is: if I buy a gun for a friend as a retirement present, I am not a straw purchaser. If I buy a .22 rifle for my minor son, I am not a straw purchaser. In both case I may intend to later transfer the firearms

to someone else, but at the moment of purchase I am the buyer and will have complete control over what I subsequently do with the weapon. I am a straw purchaser if you supply the money and I never really own the weapon, even though I filled out the form.

If the buyer lies, there is no way for the FFL to know that and most likely the transaction will proceed if all else is in order. Strikingly at this very point in time NO provable crime has occurred unless law enforcement already possesses the evidence to prove the purchaser knowingly provided false information to the FFL that the gun was being purchased for another person.

If the straw purchaser buys the gun from a gun show or from a private individual, regardless of how many they buy, NO crime has been committed because no federal forms were completed even if they bought the guns on someone else's behalf. If a purchaser was just looking for a way to make a few bucks reselling the firearms, there is no crime until repetitive transactions take place. A one-time purchase and resale would not meet the definition of engaged in the business of dealing in firearms without a license. Even proving the element of "with the principle objective of livelihood and profit" is not as cut and dry as one might expect and could require moderate to significant investigative effort to establish the elements of proof.

Perfecting straw purchasing or engaged in the business cases and getting it prosecuted and tried are much different matters. In some jurisdictions these are not looked upon as priority cases because of many factors ranging from local customs and attitudes and to the fact that convictions merit low sentencing guidelines.

Our Crime Solving Success Depends Upon the Generation of Actionable Information

Information is the lifeblood of every investigation. Crime solving success is dependent upon our ability to collect and process data, sometimes involving tiny pieces of the puzzle, and assemble that data into actionable information and investigative leads. Law enforcement relies upon a number of sources involving the three "T"s; Teamwork, Tactics and Technology. When the three "T"s operate together, crime solving is most effective.

This following are examples of what law enforcement relies upon:

Teamwork:

Teamwork involves the coordination of information within ATF and across the entire Federal, state and local law enforcement community. There must be sustainable and standardized processes in place to collect, process and share information about the misuse of firearms across jurisdictions.

Teamwork also involves the entire criminal justice system. Prosecution and sentencing guidelines must recognize societal impact of straw purchases, and dealing in firearms without a license because they can have long lasting effects even after the case is adjudicated.

Teamwork involves lawmakers like you to provide law enforcement with clear laws to enforce carrying appropriate penalties to fit the crime. Law enforcement depends upon on you to appropriate the right number of resources and tools needed to enforce these laws and to sustain their ability to adapt to changing conditions.

Teamwork also involves the support of the firearms industry. I work closely with FFL Guard; an association that helps FFL's comply with the law. Their constituents are constantly seeking

advice on how they can continue to operate as legitimate businessmen who follow the law, while at the same time; they don't want to sell guns to those who put them in the hands of criminals. They work closely with ATF to ensure dealers and law enforcement are working together to prevent firearms from ending up in the hands of criminals.

Another association, the National Shooting Sports Foundation has worked closely with ATF to educate dealers and firearms purchasers in a program called "Don't Lie for The Other Guy." This program trains dealers to recognize the signs of straw purchases and also educates buyers about the risks associated with straw purchases. Together with ATF, they have undoubtedly reduced the number of straw purchases in the United States.

I am confident that the responsible people in the firearms industry are interested in collectively developing our strategies to keep firearms out of the hands of criminals.

Teamwork also involves the public at large.

Tactics:

It is extremely difficult to identify firearms traffickers, particularly when the chain starts with what appears to be a lawful sale to a person who is not prohibited from purchasing or possessing firearms. Ideally, ATF and other law enforcement agencies desire to identify unlawful transfers as soon as they occur. However, that is not always possible. As a result, they often resort to various investigative tactics to determine if a law has been broken.

Thorough investigation, good old fashioned police work is the keystone tactic to conducting a gun trafficking investigation. This requires careful and diligent investigation in order to first establish if a crime in fact has been committed. It is not against the law in most states to make repetitive purchases involving multiple firearms. The key is- how can one differentiate who is a law abiding citizen and who is up to no good. As stated earlier the challenge is to stop armed criminals while respecting the rights of lawful gun owners.

Surveillance and interviews of individuals are essential tactics in firearms trafficking investigations. The goal is to identify all of the co conspirators in an organization and that often involves watching firearms change hands. The most difficult decision is when to end the surveillance and approach the suspects. If sufficient evidence does not exist for a prosecution e.g. an illegal transfer hasn't taken place, or the prosecutor wants to see a certain number of firearms change hands, there is little the law enforcement officer can do. If they are too aggressive, they risk violating the rights of a gun owner.

The use of informants is another tactic relied upon. Usually the investigations can move forward much more quickly because the informant may have quick access to violators and what they are doing. Informants can introduce undercover agents trained and adept at gathering the critical evidence needed to determine and prove a violation. The protection of the informant becomes a matter to be dealt with carefully and professionally.

Another useful tactic is the reporting of multiple sales as required by law of federally licensed dealers. In many cases, this tool can act as an early notice that someone may be involved in trafficking firearms. Without it, ATF may have to wait until the guns are traced in crimes.

Presently, whenever a person buys two or more handguns from an FFL in a 5 business day period, a multiple sales report is sent from the FFL to ATF declaring the sale. With this

information, ATF can make certain inquiries to determine if further investigation is warranted. The purchaser is under no obligation to speak to the agents making inquiry as the fact the sales transaction was completed at least on its face indicated that the FFL believed the legal requirements of the transaction were met. The private sales of handguns are not subject to multiple sales reporting at all. Furthermore, rifles and shotguns are not subject to any multiple sales reporting at this time.

This requires careful and diligent investigation in order to determine if a crime is being committed because the Federal government and most states do not impose limitations as to the number of guns a person may buy. In fact, many people buy large numbers of firearms for their “personal collection” and often sell them through private sales.

Technology.

Crime Gun Tracing, eTrace and NCIC, help police identify purchasers and the unlawful possessors of firearms and help determine patterns and trends which can be of use in developing new tactics and strategies in combating unlawful gun trafficking. This data helps law enforcement understand “who” was involved in the transactional history of the firearm in question. This data however is not tracked in connection with gun sales made between non-licensed individuals causing the trace process to come to a dead end.

There are arguments about how trace data is used because some claim statistics can be manipulated based on the wording in the request for data. Consistency in requests for data requests would serve to ensure the most accurate data is produced.

The National Integrated Ballistics Information Network (NIBIN) relates to bullets and cartridge cases, discharged during crimes. Police rely upon this data to link seized firearms to prior crimes and to link two or more crimes together. NIBIN helps them understand “what” specific crimes a firearm was misused in.

Tools like eTrace for crime gun tracing, NCIC for stolen firearms reporting and recognition, NIBIN for ballistics evidence, CODIS for DNA, and AFIS for fingerprints, can help police identify criminals and prevent them from escaping detection simply by crossing a city, state or international boundary line.

Maximum, utilization of these tools can be accomplished through sustainable operational support and well defined and consistently applied protocols applied regionally by all law enforcement agencies in areas where armed criminals are most likely to be crossing multiple police jurisdictions as criminals have done in the very matters we are discussing today.

The Difficulties of Deciding Which Tactics to Use

When conducting firearms trafficking investigations, investigators can pursue the individual straw purchaser, who operates at the lowest level of the organization, or target higher level individual in the criminal organization. Like drug dealers, straw purchasers are easily replaced by an endless supply of people who are willing to assume the risk.

Not long ago, ATF faced stiff criticism from the Office of Inspector General for concentrating on straw purchasers. It was suggested that ATF limit those cases and target the senior levels of trafficking organizations.

If law enforcement chooses to attack the hierarchy of the organization, they must prove that the firearms purchased by the straw purchaser were delivered to another and on up the chain. The investigators must collect and develop evidence to show that something unlawful occurred in the transfer, possession, and use of those firearms.

If the agent has sights on the higher levels of the organizations, he/ she will have to use a number of tactics such as surveillance, wiretaps, and prove the hierarchy directed the purchase and illegal transfer of firearms for criminal purposes. Attacking the hierarchy is the most efficient and effective way to dismantle a gun trafficking network, it is not without difficulties and risk. In the case of trafficking guns to Mexico, the agents must prove the firearms were intended for the organization and members of the conspiracy acted together to violate the law.

Adjusting Law Enforcement Tactics to Fit the Local Crime Problem

Criminals are often smart and adjust their tactics based on how law enforcement investigates crimes. Having nothing but time and endless resources at their disposal, they can frequently sit back and wait for law enforcement to move elsewhere before they commit their crimes. For example, if traffickers suspect law enforcement has followed a straw purchaser to a location; they will simply leave the guns at a location and not take any action. Since the firearms are not contraband and the straw purchaser is not prohibited from buying guns, no crime has taken place. Although law enforcement officials strongly suspect a crime has occurred, they cannot seize the firearms, or take any action. They can spend endless hours conducting surveillance, or they can take aggressive action against the potential offenders and issue them a warning. They must keep in mind, the same organization will have numerous straw purchasers doing the same thing across a wide spread area.

In the past, in response to rising violent crime, ATF has aggressively approached suspected straw purchasers and used a variety of investigative tactics to prove their cases. In the case of the Richmond Virginia Gun Shows in 2006, ATF's actions drew swift criticism from the gun lobby and Congressional members.

I testified before the House Sub-Committee on Crime, Terrorism and Homeland Security to explain the tactics used by ATF. Those tactics worked and they helped reduce the number of firearm related murders and assaults in Richmond, Virginia. While some tactics were not consistent with ATF's best practices, they were all legal and were enforced equally to avoid any type of "profiling." In fact, the Department of Justice Office of the Inspector General later reported the difficulties ATF faced when approaching straw purchasers, specifically at gun shows.

My point here is that ATF must be vigilant to continually balance the mission to enforce the Federal Firearm Laws so as to stop armed criminals while at the same time fulfilling its mission to respect the rights of lawful gun owners. ATF relies on you and the public to get that right. The key is to ensure that ATF follows the law, treats everyone equally and strives to prevent crimes before they occur. I know from my experience at ATF its people are open to new ideas and ways in which to improve.

These examples provide a brief glimpse into the quandary faced by law enforcement when investigating straw purchasers and suspected firearms traffickers. The guns are not contraband and the buyer most often isn't prohibited from purchasing quantities of guns. The buyer can sell the guns as long as they did not lie on the form 4473 and their actions do not rise to the level of

“engaging in the business without a license”. Generally speaking, the buyer can hold onto those guns and sit back and watch for any law enforcement action. If and when the guns involved in the scheme turn up in crimes and are traced back to the violators, law enforcement can take more additional investigative action (e.g. search and arrest warrants). Meanwhile, until the firearms are moved to through the organization, investigators cannot prove that senior members of the organization conspired with others to perform overt acts in furtherance of the crime (e.g. paying for the firearms, issuing directives, taking possession, etc.) the hierarchy remains in place and are free to backfill those who face arrest.

Weak Penalties Exist for Straw Purchasers and Gun Traffickers.

Even when a case is perfected against a straw purchaser and a federal conviction is obtained, the sentences they receive are extremely weak. Since straw purchasers typically have no previous record, they are not likely to be sentenced to prison for more than six months unless extremely high numbers of firearms are proven to have been trafficked. In those cases, they simply plea to one count and accept their light sentence. The sentencing guidelines do not reflect the seriousness and long lasting effects of the problem of illegally trafficked guns – each one a ticking time bomb held by criminals hiding within in our communities and as the months and years go by, they are used in more violent crimes. In my opinion, straw purchasing of firearms should be treated not as a falsification of a federal form, but as a serious act where a firearm was put into the hands of a criminal. In essence, the straw purchaser is a co conspirator liable for the actions of the others.

Concerns on the Part of Federal Firearms Licensees and Certain Trade Associations

The issue of straw purchasing and firearms trafficking is a matter of concern for many FFL's, as well as trade associations who represent them. The dealers face a dilemma, if they believe a firearm transaction is illegal, they cannot make the sale. However, in many cases, the straw purchase of firearms isn't blatant; in fact it is well hidden.

Commonly, straw purchasers buy quantities of the same type of firearm, or they buy a type of firearm that is often traced back to crimes in that area. The FFL may suspect the person is a straw buyer but can't prove it because buying multiple firearms is not illegal.

If the dealer contacts law enforcement and brings it to their attention, they face the potential loss of business from customers, or they could face serious harm if a trafficking organization believes the dealer tipped police to their activities.

In some cases, ATF may be monitoring the sales and tells the dealer to let the sales take place so they can follow the guns to the responsible parties in the trafficking scheme. This places the dealer in a quandary.

If a large number of guns purchased from a dealer are traced to crimes, the dealer often faces public scrutiny as being a source of crime guns when in fact they unwittingly sold to people they thought were legitimate, or they were working with law enforcement in an investigation.

Conclusion

In conclusion, I want to thank the committee for the opportunity of meeting with you today. While I retired from ATF more than 3 ½ years ago, I still care deeply for the dedicated employees who work there, and I care deeply about the mission they undertake each day. They do their best

every day to keep our country safe. While they occasionally make mistakes and everyone may not always agree with their approaches, they are out there every day, risking their lives to keep guns out of the hands of criminals. I hope your committee can help ATF and the entire law enforcement community, strengthen their ability to combat firearm trafficking organizations. It is obvious that the criminals change their tactics to exploit weaknesses in our laws. I believe we all know it is time that we put ideologies aside and use common sense approaches to attack a problem that affects the security of our country and its neighbors.

As policy makers, you decide what issues merit your attention, and what existing policies need to be adjusted. In my opinion, the most urgent matters facing those charged with investigating gun crimes are:

- Multiple sales reporting on certain long guns (e.g. auto loading rifles) – these guns are the core of the trafficking to Mexico issue.
- The recognition of societal impact of straw purchase & dealing in firearms without a license in the prosecution and sentencing guidelines for use in the field.
- The need for specific a firearm trafficking statute and appropriate penalty.
- The issue of extending current background checks to all sales of firearms at gun shows.
- The effective use of crime solving data collection systems like eTrace and NIBIN by directing all Federal agencies to trace their crime guns through ATF and process them through NIBIN.

I would be happy to answer any questions the committee may have.