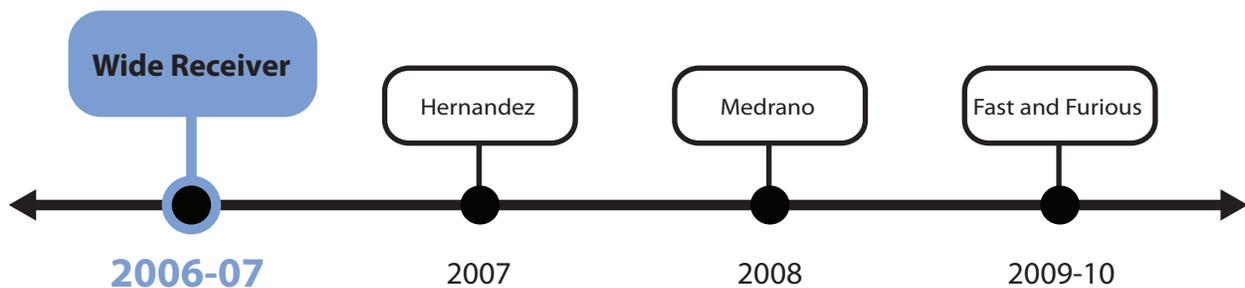


IV. FINDINGS

A. ATF PHOENIX FIELD OPERATIONS INVOLVING “GUNWALKING”

Documents obtained by the Committee and transcribed interviews conducted by Committee staff have identified a series of gunwalking operations conducted by ATF’s Phoenix Field Division. Beginning in 2006, each of these investigations involved various incarnations of the same activity: ATF-Phoenix agents were contemporaneously aware of suspected illegal firearms purchases, they did not typically interdict the weapons or arrest the straw purchasers, and those firearms ended up in the hands of criminals on both sides of the border.



1. Operation Wide Receiver (2006-07)

Operation Wide Receiver began in early 2006 when ATF agents in Tucson opened an investigation of a suspected straw purchaser after receiving information from a cooperating gun dealer. Documents indicate that agents worked closely with this dealer, including by contemporaneously monitoring firearms sales to known straw purchasers without arrests or interdiction, and that they sought authorization for the expansion of this operation from then-U.S. Attorney for the District of Arizona, Paul Charlton.

The evidence also indicates that, between March 2006 and mid-2007, ATF agents had contemporaneous knowledge of planned sales of firearms to known straw purchasers and repeatedly designed surveillance operations of these illegal firearms purchases without effectuating arrests. According to documents obtained by the Committee, agents avoided interdicting weapons despite having the legal authority to do so in order to build a bigger case. Despite repeated failed attempts to coordinate surveillance with Mexican law enforcement, the ATF agents continued to attempt these operations.

Although the operational phase of the investigation ended in 2007, the case was not prosecuted for more than two years, during which time no arrests were made and the known straw purchasers remained at large. A prosecutor from the Criminal Division of the Department of Justice who was assigned to Operation Wide Receiver in 2009 and reviewed the case file raised concerns that many guns had “walked” to Mexico.

ATF-Phoenix monitored gun dealer selling to straw buyers

In March 2006, ATF-Phoenix agents received a tip from a Federal Firearms Licensee (FFL) in Tucson, Arizona, that a suspected straw purchaser had purchased six AR-15 lower receivers and placed an order for 20 additional lower receivers.²⁶ The agents opened an investigation of the purchaser because the nature of the transaction suggested a possible connection to illegal firearms trafficking.²⁷

Some military-style firearms consist of an upper and lower receiver, with the lower receiver housing the trigger mechanism, and the upper receiver including the barrel of the firearm. According to a memorandum from the U.S. Attorney’s Office, ATF had information that the suspects were obtaining both receivers and assembling them to create illegal firearms.²⁸ The firearms were illegal because the barrels were 10.5 inches in length, and rifles with barrels shorter than 16 inches must be registered and licensed with ATF.²⁹

According to summaries prepared subsequently by a Department of Justice attorney prosecuting the case, “The FFL agreed to work with ATF to target the persons who were interested in purchasing large quantities of lower receivers for AR-15s.” Specifically, “The FFL agreed to consensual recordings both of the purchases and phone calls.”³⁰ Soon thereafter, ATF-Phoenix briefed prosecutors in the Arizona U.S. Attorney’s Office that several suspicious individuals were purchasing “large quantities of lower receivers” from a Tucson FFL.³¹

In a June 22, 2006, memorandum, the Special Agent in Charge of ATF-Phoenix explained that the three suspects in the case had purchased a total of 126 AR-15 lower receivers. According to the memo, one of the suspected straw purchasers “advised the CS [confidential source] that he takes the firearms to a machine shop at or near Phoenix, AZ and they are converted into machine guns.” The ATF agents also suspected that these firearms were making their way to Mexico and into the hands of a dangerous drug cartel. Specifically, the Special Agent in Charge wrote that, “ATF just recently tracked the vehicle to Tijuana, Mexico,” and one suspected straw purchaser “stated that these straw purchased firearms are going to his boss in Tijuana, Mexico where some are given out as gifts.”³²

ATF agents learned that the suspected straw purchasers were seeking a new supplier of upper receivers:

The purchasers have asked the FFL to provide the uppers to them as well, indicating that they are not pleased with their current source for the uppers. The FFL has expressed reluctance to the purchasers regarding selling them both the lowers and the 10.5 inch uppers, as that would look very suspicious as if he was actually providing them with an illegal firearm. The purchasers are well aware that it is illegal to place a 10.5 inch upper on the lowers they are purchasing from the FFL. The FFL has indicated that he could try to find another 3rd party source of uppers for the purchasers.³³

According to legal research provided by ATF counsel to attorneys in the U.S. Attorney's Office, it is illegal to possess both the upper and lower receivers, even if they are not assembled: "The possessor does not have to assemble the lower and the upper so long as the firearm is in actual or constructive possession of the offender, and can be 'readily restored' to fire."³⁴

Despite evidence that the suspects illegally possessed both upper and lower receivers, were assembling them, and were transporting them to Mexico, ATF did not arrest the suspects. On March 31, 2006, the Resident Agent in Charge of the Tucson office—a local office that reports to the Special Agent in Charge of the Phoenix Field Division—wrote an email explaining that they had enough evidence to arrest the suspects, but that they were waiting to build a bigger case. He wrote:

We have two AUSA assigned to this matter, and the USAO @ Tucson is prepared to issue Search and Arrest Warrants. We already have enough for the 371 and 922 a6 charges, but we want the Title II manufacturing and distribution pieces also—we want it all.³⁵

ATF-Phoenix sought U.S. Attorney's approval to walk guns

The evidence indicates that, rather than arrest the straw buyers, the ATF Phoenix Field Division sought the approval of the U.S. Attorney's Office to let the guns walk in June 2006. The prosecutors handling the case wrote a memorandum to Paul Charlton, U.S. Attorney for the District of Arizona, which outlined the request. They wrote:

ATF is interested in introducing a CI [confidential informant] to act as this source of uppers. This would further the investigation in that it would provide more solid evidence that the purchasers are in fact placing illegal length uppers on the lowers that they are purchasing from the currently-involved FFL. It may also lead to discovery of more information as to the ultimate delivery location of these firearms and/or the actual purchaser.³⁶

ATF-Phoenix and the Arizona U.S. Attorney's Office both understood that ATF was already letting firearms walk by working with a cooperating FFL to provide "lower receivers" to straw purchasers trafficking them to Mexico. According to the prosecutors' memorandum to U.S. Attorney Charlton:

[The ATF Agent] pointed out that these same exact firearms are currently being released into the community, the only difference being that at this time ATF is only involved in providing the lower receiver. We know that an illegal upper is being obtained from a third party, but the government is not currently involved in that aspect.³⁷

The memo to U.S. Attorney Charlton then relayed ATF-Phoenix's request:

The question was posed by RAC [Resident Agent in Charge] Higman as to the U.S. Attorney's Office's position on the possibility of allowing an indeterminate number of illegal weapons, both components of which (the upper and the lower) were provided to the criminals with ATF's knowledge and/or participation, to be released into the community, and possibly into Mexico, without any further ability by the U.S. Government to control their movement or future use.

The memo further stated that the proposed tactics were controversial and opposed by ATF's legal counsel:

[The ATF agent] indicated that ATF's legal counsel is opposed to this proposed method of furthering the investigation, citing moral objections. Recognizing that it will eventually be this office that will prosecute the individuals ultimately identified by this operation, RAC Higman has requested that we ascertain the U.S. Attorney's Office's position with regard to this proposed method of furthering the investigation.³⁸

When the Chief of the Criminal Division in the U.S. Attorney's Office sent the prosecutor's memo to U.S. Attorney Charlton, she accompanied it with an email in which she stated that it "does a very good job outlining the investigation and the potential concerns. This is obviously a call that needs to be made by you Paul."³⁹ U.S. Attorney Charlton responded the next day: "Thanks—I'm meeting with the ATF SAC [Special Agent in Charge William Newell] on Tuesday and I'll discuss it with him then."⁴⁰

Although the Committee has obtained no document memorializing the subsequent conversation between U.S. Attorney Charlton and the Special Agent in Charge, documents obtained by the Committee indicate that ATF-Phoenix went forward with their plans to observe or facilitate hundreds of firearms purchases by

the suspected straw purchasers without arrests. Committee staff did not conduct a transcribed interview of Mr. Charlton.



United States Attorney's Office
District of Arizona

Memorandum

To: Paul K. Charlton, United States Attorney for the District of Arizona
From: Jennifer J. Maldonado, Assistant U.S. Attorney
David P. Petermann, Assistant U.S. Attorney
Subject: Operation Wide Receiver, Policy Question
Date: July 13, 2006

ATF Tucson Team Chief RAC Chuck Higman, along with ATF Tucson Agent Latham, met with AUSAs Maldonado and Petermann on June 13, 2006 with regard to the status of the investigation. The question was posed by RAC Higman as to the U.S. Attorney's Office's position on the possibility of allowing an indeterminate number of illegal weapons, both components of which (the upper and the lower) were provided to the criminals with ATF's knowledge and/or participation, to be released into the community, and possibly into Mexico, without any further ability by the U.S. Government to control their movement or future use. Higman pointed out that these same exact

ATF-Phoenix continued to walk guns after consulting with U.S. Attorney

In October 2006, ATF agents planned a surveillance operation to observe a suspect purchase AR-15 lower receivers and two AR-15 rifles, determine if the suspect was going to make additional purchases, and identify any of his associates.⁴¹ The Operational Plan noted:

It is suspected that [the suspect] will now be moving the firearms to Tijuana himself. We are not prepared to make any arrests at this time because we are still attempting to coordinate our efforts with AFI [Agencia Federal de Investigación] in Mexico. ... If it is determined that [the suspect] has spotted the surveillance unit, surveillance will be stopped immediately.⁴²

Documents indicate that ATF agents observed the suspect purchase five AR-15 lower receivers and terminated surveillance after three hours.⁴³ Notes taken after the investigation explained that the surveillance included audio recordings of the suspect stating that he "is now personally transporting the firearms to Tijuana, Mexico himself."⁴⁴

On December 5, 2006, Special Agent in Charge Newell wrote that another key suspect in the Wide Receiver investigation had recently "purchased a total of ten (10)

AR-15 type lower receivers on two separate purchases.”⁴⁵ He also wrote that, during those transactions, the suspect told the confidential source that he was taking the firearms to Mexico and would soon be ordering an additional 50 lower receivers.⁴⁶ Special Agent in Charge Newell wrote that the Tucson field office was planning to secure the cooperation of Mexican authorities:

The Tucson II Field Office has maintained contact with the ATF Mexico City Country Office in an effort to secure the cooperation and join investigation with the Agencia Federal de Investigación (Mexico). Three Tucson II Field Office SA have obtained official U.S. Government passports in anticipation of a coordination meeting with the AFT early during calendar year 2007.⁴⁷

On February 23, 2007, ATF agents planned to conduct a traffic stop of one suspected straw purchaser “with the assistance of the Tucson Police Department.”⁴⁸ Although the Operational Plan indicated that “[p]robable cause exists to arrest [the suspect],” the agents’ goal was to lawfully detain him at the traffic stop and bring him to the ATF office for questioning.⁴⁹ According to a memorandum from Special Agent in Charge Newell, between February 7 and April 23, 2007, the suspect and co-conspirators together purchased and ordered 150 firearms, including AK-47 and AR-15 rifles and pistols.⁵⁰ Although ATF apparently had probable cause for arrest, on February 27, 2007, the subject was interviewed by ATF agents and released.⁵¹ The documents do not indicate why he was not arrested and prosecuted at that time.

ATF agents unsuccessfully attempted to coordinate with Mexico

The documents indicate that, although ATF had sufficient evidence to arrest the suspected straw purchasers, the agents continued to press forward with plans to attempt coordinated surveillance operations with Mexico. In April 2007, the ATF agents in charge of Operation Wide Receiver were unsure whether they could successfully coordinate surveillance with their Mexican counterparts. On April 10, 2007, the case agent for Wide Receiver wrote to a Tucson Police Department (TPD) officer:

Assuming that the MCO [ATF’s Mexico Country Office] can coordinate with the Mexican authorities, we anticipate that Tucson VCIT will hand off his surveillance operation at the U.S. / Mexican border. No ATF SA or local officers working at our direction will travel into Mexico. Through MCO we have requested that the Mexican authorities pick up the surveillance at the border and work to identify persons, telephone numbers, “stash” locations and source(s) of money supply in furtherance of this conspiracy.⁵²

According to an ATF Operational Plan, just one day later, ATF agents and Tucson Police officers conducted surveillance and recorded the “planned arrival of [the suspect] and other persons at the FFL.”⁵³ The Operational Plan stated that U.S. law enforcement would watch the “firearms cross international lines and enter Mexico. ... If the Mexican authorities decline or fail to participate in this operation the firearms traffickers will be arrested prior to leaving the United States.”⁵⁴ Although the agents obtained an electronic record of the sale and initiated surveillance, the plan failed according to a summary prepared by one agent:

ATF agents in conjunction with TPD VCIT Task Force Officers conducted a surveillance of suspected firearms traffickers in furtherance of this investigation. Suspects purchased 20+ firearms which totaled over \$35,000.00 in retail cost. The surveillance successfully obtained electronic evidence of the transaction, further identified the traffickers and additional suspect vehicles. The traffickers were followed to a neighborhood on the Southside of Tucson and then later lost. The suspects are planning on making a purchase of 20-50 M4 rifles and are negotiating this next deal. The investigation continues.⁵⁵

Despite the surveillance of the straw purchase and other evidence collected during the April 11, 2007, operation, the suspects were not arrested even after they were later located. Instead, more operations were planned.

An April 23, 2007, memo from Special Agent in Charge Newell to the Chief of Special Operations requesting additional funding for Operation Wide Receiver documented the failure to coordinate surveillance with Mexican law enforcement and public safety risks associated with continuing on that course:

To date, the Tucson II Field Office and TPD SID have been unable to surveil the firearms to the International border. From contact with those offices, the Mexican Federal law enforcement authorities understand that the surveillance is difficult and that several firearms will likely make it to Mexico prior to a U.S. law enforcement successful surveillance of firearms to the international border.⁵⁶

Two weeks later, on May 7, 2007, ATF agents and Tucson Police conducted surveillance of another “planned arrival” of a suspected straw purchaser and his associates at an FFL.⁵⁷ The Operational Plan shows that ATF agents had advance notice that the suspect had contacted the FFL to arrange the purchase of more than 20 firearms, planned to purchase the firearms from the FFL later in the day, and had made arrangements for a vehicle to transport the weapons into Mexico that night.⁵⁸ The Operational Plan indicated that “[i]f the Mexican authorities decline or fail to participate, the firearms traffickers will be arrested prior to leaving the

United States.”⁵⁹ ATF agents contacted Mexican law enforcement in advance of the operation and they agreed to assist with surveillance of the suspects if they entered Mexico.⁶⁰ According to a subsequent summary of these events:

[The suspects] were scheduled to purchase the ordered firearms. [Redacted] cancelled at the last minute, but [the suspect] purchased 15 firearms and was surveilled to his residence at [redacted]. Surveillance was discontinued the following day due to neighbors becoming suspicious of surveillance vehicles.”⁶¹

The suspects were not arrested, the firearms were not interdicted, and the investigation continued in anticipation of the suspects’ next major purchase.

ATF agents expressed concern about gunwalking

Agents in ATF’s Phoenix Field Division began to express concern that Operation Wide Receiver was not yielding the desired results. In a June 7, 2007, email, one special agent on the case wrote to his supervisor:

We have invested a large amount of resources in trying to get the load car followed to Mexico and turning it over to PGR [Mexican federal prosecutors] and are preparing to expend even more. We already have numerous charges up here and actually taking in to Mexico doesn’t add to our case specifically at that point. We want the money people in Mexico that are orchestrating this operation for indictment but obviously we may never actually get our hands on them for trial, so the real beneficiary is to PGR.⁶²

Despite the agent’s concerns, Operation Wide Receiver remained on the same course with another “planned arrival” attempted on June 26, 2007.⁶³ The Operational Plan indicated that ATF agents had advance notice that the suspect had been in contact with the FFL, that the suspect was “extremely anxious” to purchase more firearms, and that firearms are to be purchased and then continue to “unknown locations throughout Tucson and Southern Arizona.”⁶⁴ Documents show that ATF agents and Tucson police were unable to follow the firearms to the Mexican border.⁶⁵

In an email sent on June 26, 2007, as the surveillance operation was set to begin, the ATF case agent for Operation Wide Receiver expressed reluctance about the repeated failures to coordinate surveillance of firearms traffickers with Mexican law enforcement.⁶⁶ He wrote to a prosecutor at the Texas U.S. Attorney’s Office:

We anticipate surveillance this evening where the subject(s) of interest are scheduled to purchase approx. \$20K of associated firearms for

further shipment to Caborca, Mx, and we are coordinating with the Mexican authorities in the event that the surveillance is successful. We have reached that stage where I am no longer comfortable allowing additional firearms to 'walk,' without a more defined purpose.⁶⁷

Criminal Division took over prosecution and found gunwalking

In late 2007, the operational phase of Operation Wide Receiver was terminated, and the case was passed to the U.S. Attorney's Office for prosecution. The case then sat idle for nearly two years without indictments or arrests. The first prosecutor assigned to the case became a magistrate judge, and the second prosecutor did not open the case file for more than six months.⁶⁸

In 2009, the Department of Justice's Criminal Division in Washington, D.C. offered to assign prosecutors to support firearms trafficking cases in any of the five border-U.S. Attorneys' offices.⁶⁹ The U.S. Attorney's Office in Arizona accepted the offer and asked for assistance with the prosecution of targets in Operation Wide Receiver.⁷⁰ In September 2009, the Criminal Division assigned an experienced prosecutor to take over the case.⁷¹

After reviewing the investigative files from 2006 and 2007, the Criminal Division prosecutor quickly realized that there were serious questions about how the case had been handled. On September 23, 2009, she wrote an email to her supervisors giving a synopsis of the case and its problems: "In short it appears that the biggest problem with the case is its [sic] old should have been taken down last year AND a lot of guns seem to have gone to Mexico."⁷²

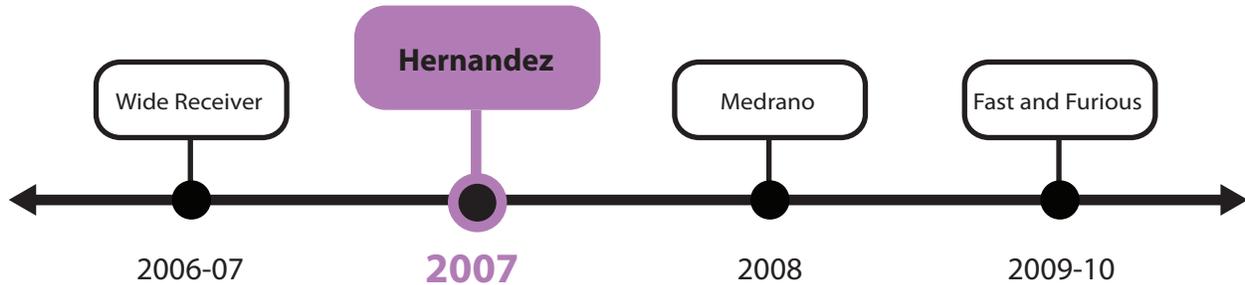
As she prepared the case for indictment, she continued to update her supervisors as new details emerged from the case file. On March 16, 2010, she sent an email to her supervisor:

It is my understanding that a lot of those guns "walked." Whether some or all of that was intentional is not known. The AUSA seemed to think ATF screwed up by not having a mechanism in place to seize weapons once they crossed the border.⁷³

The prosecutor also found evidence that guns involved in Operation Wide Receiver were connected to crime scenes in Mexico. She wrote that "13 of the purchased firearms have been recovered in Mexico in connection with crime scenes, including the April 2008 Tijuana gun battle" and that "[t]wo potential defendants were recently murdered in Mexico."⁷⁴

The Criminal Division proceeded with prosecutions relating to the investigation. In May 2010, one suspect pleaded guilty to forfeiture charges pre-

indictment while two additional co-conspirators were indicted in federal court.⁷⁵ On October 27, 2010, seven additional suspects were indicted in the District of Arizona on gun-trafficking related charges.⁷⁶



2. The Hernandez Case (2007)

According to documents obtained by the Committee, agents in the ATF Phoenix Field Division unsuccessfully attempted a second operation in the summer of 2007 after identifying Fidel Hernandez and several alleged co-conspirators as suspected straw purchasers seeking to smuggle firearms into Mexico. Despite failed attempts to coordinate with Mexican authorities, ATF agents sought approval from the U.S. Attorney’s Office to expand so-called “controlled deliveries.” In addition, documents obtained by the Committee indicate that then-Attorney General Michael Mukasey was personally briefed on these failed attempts and was asked to approve an expansion of these tactics. During the course of the investigation, Hernandez and his co-conspirators reportedly purchased more than 200 firearms.

ATF-Phoenix watched guns cross border without interdiction

According to their Operational Plan, ATF-Phoenix Field Division agents initiated a firearms trafficking investigation in July 2007 against Fidel Hernandez and his associates who, between July and October 2007, “purchased over two hundred firearms” and were “believed to be transporting them into Mexico.”⁷⁷ ATF analysts discovered that “Hernandez and vehicles registered to him had recently crossed the border (from Mexico into the U.S.) on 23 occasions” and that “four of their firearms were recovered in Sonora, Mexico.”⁷⁸

According to contemporaneous ATF documents, ATF-Phoenix unsuccessfully attempted a cross-border operation in September 2007 in coordination with Mexican law enforcement authorities:

On September 26 and 27, 2007, Phoenix ATF agents conducted nonstop surveillance on Hernandez and another associate, Carlos Morales. ATF had information that these subjects were in possession