

Congress of the United States

Washington, DC 20510

July 5, 2011

VIA ELECTRONIC TRANSMISSION

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

Yesterday, Acting ATF Director Kenneth Melson participated in a transcribed interview regarding Operation Fast and Furious and related matters with both Republican and Democratic staff. He appeared with his personal counsel, Richard Cullen of McGuireWoods LLP. His interview had originally been scheduled through the Justice Department to occur on July 13 in the presence of DOJ and ATF counsel. As you know, however, under our agreement Department witnesses who choose to attend a voluntary interview with their own lawyer are free to exercise that right rather than participate with counsel representing the Department's interests.

After being made aware of that provision of our agreement, Acting Director Melson chose to exercise that right and appeared with his own lawyer. We are disappointed that no one had previously informed him of that provision of the agreement. Instead, Justice Department officials sought to limit and control his communications with Congress. This is yet another example of why direct communications with Congress are so important and are protected by law.¹

¹ Specifically, no officer or employee may attempt to prohibit or prevent "any other officer or employee of the Federal Government from having direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress" about a matter related to his employment or the agency "in any way, irrespective of whether such communication or contact is at the initiative" of the employee or Congress (emphasis added). Moreover, the prohibition also applies to any officer or employee who "removes, suspends from duty without pay ... any other officer or employee of the Federal Government ... by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress." Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3034, § 714 (2010), as continued by §1104 of P.L. 112-10—which extends the funding levels, as well as "the authority and conditions provided in such Acts," through September 30, 2011. *See generally,*

Acting Director Melson's cooperation was extremely helpful to our investigation. He was candid in admitting mistakes that his agency made and described various ways he says that he tried to remedy the problems. According to Mr. Melson, it was not until after the public controversy that he personally reviewed hundreds of documents relating to the case, including wiretap applications and Reports of Investigation (ROIs). By his account, he was sick to his stomach when he obtained those documents and learned the full story. Mr. Melson said that he told the Office of the Deputy Attorney General (ODAG) at the end of March that the Department needed to reexamine how it was responding to the requests for information from Congress.

According to Mr. Melson, he and ATF's senior leadership team moved to reassign every manager involved in Fast and Furious, from the Deputy Assistant Director for Field Operations down to the Group Supervisor, after learning the facts in those documents. Mr. Melson also said he was not allowed to communicate to Congress the reasons for the reassignments. He claimed that ATF's senior leadership would have preferred to be more cooperative with our inquiry much earlier in the process. However, he said that Justice Department officials directed them not to respond and took full control of replying to briefing and document requests from Congress. The result is that Congress only got the parts of the story that the Department wanted us to hear. If his account is accurate, then ATF leadership appears to have been effectively muzzled while the DOJ sent over false denials and buried its head in the sand. That approach distorted the truth and obstructed our investigation. The Department's inability or unwillingness to be more forthcoming served to conceal critical information that we are now learning about the involvement of other agencies, including the DEA and the FBI.

The Role of DEA, FBI, and Other Agencies

When confronted with information about serious issues involving lack of information sharing by other agencies, which Committee staff had originally learned from other witnesses, Mr. Melson's responses tended to corroborate what others had said. Specifically, we have very real indications from several sources that some of the gun trafficking "higher-ups" that the ATF sought to identify were *already known* to other agencies and may even have been paid as informants. The Acting Director said that ATF was kept in the dark about certain activities of other agencies, including DEA and FBI. Mr. Melson said that he learned from ATF agents in the field that information obtained by these agencies could have had a material impact on the Fast and Furious

Government Accountability Office, "Department of Health and Human Services—Chief Actuary's Communications with Congress," B-302911 (Sep. 7, 2004) (discussing the history and background in support of the government-wide prohibition on attempts to prevent direct communications with Congress). As you know, obstructing or impeding a Congressional inquiry is also a criminal violation under 18 U.S.C. § 1505.

investigation as far back as late 2009 or early 2010. After learning about the possible role of DEA and FBI, he testified that he reported this information in April 2011 to the Acting Inspector General and directly to then-Acting Deputy Attorney General James Cole on June 16, 2011.

The evidence we have gathered raises the disturbing possibility that the Justice Department not only allowed criminals to smuggle weapons but that taxpayer dollars from other agencies may have financed those engaging in such activities. While this is preliminary information, we must find out if there is any truth to it. According to Acting Director Melson, he became aware of this startling possibility only after the murder of Border Patrol Agent Brian Terry and the indictments of the straw purchasers, which we now know were substantially delayed by the U.S. Attorney's Office and Main Justice. Mr. Melson provided documents months ago supporting his concerns to the official in the ODAG responsible for document production to the Committees, but those documents have not been provided to us.

It is one thing to argue that the ends justify the means in an attempt to defend a policy that puts building a big case ahead of stopping known criminals from getting guns. Yet it is a much more serious matter to conceal from Congress the possible involvement of other agencies in identifying and maybe even working with the same criminals that Operation Fast and Furious was trying to identify. If this information is accurate, then the whole misguided operation might have been cut short if not for catastrophic failures to share key information. If agencies within the same Department, co-located at the same facilities, had simply communicated with one another, then ATF might have known that gun trafficking "higher-ups" had been already identified. This raises new and serious questions about the role of DEA, FBI, the United States Attorney's Office in Arizona, and Main Justice in coordinating this effort. Nearly a decade after the September 11th attacks, the stovepipes of information within our government may still be causing tragic mistakes long after they should have been broken down.

Efforts to Oust Melson

In the last few weeks, unnamed administration officials have indicated to the press that Acting Director Melson would be forced to resign. According to Mr. Melson, those initial reports were untrue. Regardless of what we might have thought before about how he should handle a request to resign, we now know he has not been asked to resign. We also now have the benefit of hearing his side of the story and will have a chance to examine what he said and compare it to the other evidence we are gathering. However, that will take some time.

Mr. Melson served as the First Assistant to the U.S. Attorney in the Eastern District of Virginia for 21 years, from 1986 to 2007. That is a career position. After the controversy over the firing of the U.S. Attorneys, he took over the Executive Office for U.S. Attorneys (EOUSA). He indicated that he was asked to convert to a non-career Senior Executive Service (SES), a politically appointed position, in order to speed the hiring process, and he agreed. However, his former position at EOUSA is currently filled by a career SES employee, Marshall Jarrett. As you know, for civil servants, the distinction between career and non-career status is significant.

In 2009, he said he was asked to take over as Acting Director of the ATF. Acting Director of the ATF is by its nature a temporary job. According to Mr. Melson, he was willing to serve the Department with the understanding that after a short tenure as Acting Director, he would return to a position as a career senior executive elsewhere within the Department.

However, two days after he told Acting Deputy Attorney General Cole about serious issues involving lack of information sharing, the *Wall Street Journal* reported that unnamed sources said that Melson was about to be ousted.

The revelations about Operation Fast and Furious have focused intense scrutiny on the ATF. It has no doubt taken a toll on the agency and the good people who work there. Much of that damage has occurred because the Department prevented ATF from being more forthcoming and responsive to questions from Congress. This is the context in which Mr. Melson decided to submit to an on-the-record interview with private counsel, pursuant to our agreement with the Department.

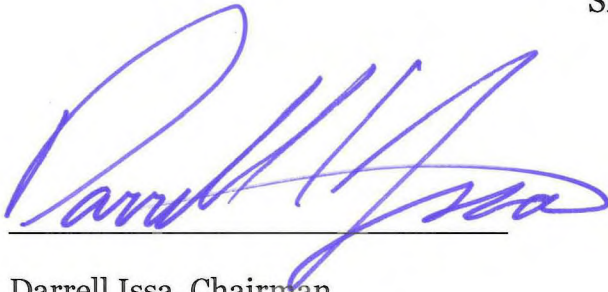
Technically, Mr. Melson no longer enjoys the due process protections afforded to career officials. Given his testimony, unless a permanent director is confirmed, it would be inappropriate for the Justice Department to take action against him that could have the effect of intimidating others who might want to provide additional information to the Committees.

We hope that the Department will take a much more candid and forthcoming approach in addressing these very serious matters with the Committees. If other important fact witnesses like Mr. Melson have a desire to communicate directly with the Committees they should be informed that they are free to do so. They should also be notified that if they are represented by personal counsel, they may appear with personal counsel rather than with Department lawyers.

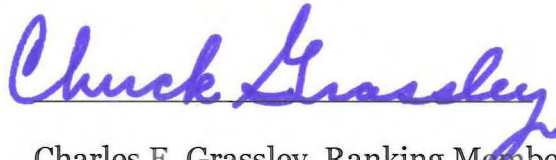
Any decision about Mr. Melson's future with the Department would need to be justified solely on the basis of the facts and the needs of the agency, rather than on his decision to speak to us. We encourage you to communicate to us any additional significant information about any such decision so that we can work together to ensure

that it would not impede our investigation. For now, the Office of Inspector General is still conducting its review, and we are still conducting ours. Knowing what we know so far, we believe it would be inappropriate to make Mr. Melson the fall guy in an attempt to prevent further congressional oversight.

Sincerely,



Darrell Issa, Chairman
Committee on Oversight &
Government Reform
U.S. House of Representatives



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

cc:

The Honorable Elijah E. Cummings, Ranking Member
U.S. House of Representatives, Committee on Oversight & Government Reform

The Honorable Patrick Leahy, Chairman
U.S. Senate, Committee on the Judiciary