

Congress of the United States
Washington, DC 20515

July 18, 2011

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

Dear Attorney General Holder:

We received your letter of July 6, 2011.¹ Your letter responded to our letter of the evening before where we informed you that ATF Acting Director Kenneth Melson testified about ATF's Operation Fast and Furious on the 4th of July. We were surprised by the tone of your letter and also by your willingness to mischaracterize Chairman Issa's words. The Department's extraordinary steps to restrict the flow of information to Congress served no one's interest in this case.

In his July 6 letter, the Assistant Attorney General for Legislative Affairs claimed to be "puzzled" by our criticism of the Department's lack of cooperation in this investigation.² Since Senator Grassley personally informed you about Operation Fast and Furious in January of this year, the Department seems to have been unable to fully grasp the magnitude and seriousness of this issue. Acting Director Melson's 4th of July testimony shed new light on what has been going on inside the Department as it comes to grips with what happened in its once prized, multi-agency Operation Fast and Furious case.

The Justice Department prevented Acting Director Melson from communicating with Congress and even his own staff.

The Department has blocked the flow of information from the Acting Director's office. Mr. Melson testified:

[A]fter receiving [Senator Grassley's initial] letter, our first instinct and intuition was to directly march over to Senator Grassley's office and brief him on what Fast and Furious was for purposes of explaining the concept and the role it played and how it got there, and where ATF was going in it. And we expressed that desire to the [Deputy Attorney General]'s office.³

As you know, the Department did not permit Mr. Melson to brief Senator Grassley. Instead, the Department devised a strategy to withhold information from the Senator. Mr. Melson testified further:

¹ Letter from Asst. Att'y Gen. Ronald Weich to Chairman Darrell Issa and Ranking Member Charles Grassley, July 6, 2011, at 1 [hereinafter Letter of July 6].

² *Id.*

³ Transcript, Transcribed Interview of Acting Director Kenneth Melson, July 4, 2011, at 30. [hereinafter Melson Tr.]

I sat in [the office of the Associate Deputy Attorney General with responsibility for ATF] one day when they were writing the letter to Senator Grassley about him being only a ranking member and not the chair of the committee. I sat there across the desk from [him], as I recall, and said, this is really just poking [Senator Grassley] 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 this situation.⁴

Instead of giving Congress information, the Department quarantined ATF and sent officials with no personal knowledge of the facts to deny the whistleblower allegations in a widely attended briefing open to all Senate Judiciary staff on February 10, 2011. Instead of providing Congress answers from the individuals best-positioned to provide them, Mr. Melson and his staff were muzzled. The decision to withhold information at the earliest sign of congressional interest set the Justice Department on a course that required Congress to aggressively pursue testimony and documents elsewhere. As you now know, this was entirely avoidable. The Department's leadership chose to protect its own interests at the expense of exposing the leadership of a subordinate agency to Congressional scrutiny.

While Congress waited, ATF's senior leaders examined how and why Fast and Furious happened. Mr. Melson and his staff identified institutional problems. They concluded that the Phoenix Field Division needed new supervision and reassigned every manager involved in Fast and Furious. Mr. Melson wanted to share this important development with Congress to show that ATF was taking the allegations seriously. The Department resisted. Mr. Melson observed that "[t]he [Deputy Attorney General's] office wasn't very happy with us, because they thought this was an admission that there were mistakes made. **Well, there were some mistakes made.**"⁵

Your Department's leadership chose not to share this information with Congress. Instead, congressional investigators learned of this development directly from ATF agents interviewed without the Department's cooperation in Phoenix and Washington. The Department treated the Fast and Furious inquiry as merely a public relations problem, rather than a legitimate topic in need of congressional oversight and corrective action.

The Department needs to transition out of damage control mode. Just two days after Mr. Melson raised concerns about ATF's failure to communicate with the FBI and DEA about the potential role of paid informants in Fast and Furious—and just one day after the House Committee on Oversight and Government Reform held a hearing that highlighted ATF's missteps—an anonymous source leaked a report to the *Wall Street Journal* that Mr. Melson was about to be ousted. According to the unnamed source, Andrew Traver, head of ATF's Chicago Field Division, would replace him. The rumor mill had Mr. Traver on the job as soon as July 5, 2011:

⁴ *Id.* at 133.

⁵ *Id.* at 70 (emphasis added).

Q You mentioned earlier that after our hearings, hearings on the 15th, you had a meeting with the [Deputy Attorney General James Cole] on the 16th.

A On the 16th.

Q And during that meeting, was there any discussion about whether you would be leaving the agency.

A I think that was the meeting that I asked to have a couple minutes with him, and he and I discussed the reason for Traver coming in.

* * *

Q On Friday night around 7:00 or 8:00 at night *The Wall Street Journal* reported that you were going to be asked to step down.

A Uh-huh.

Q Did that surprise you, given that that you as recently as the day before had a personal interaction with your immediate supervisor, the [Deputy Attorney General James Cole], and you were told that you would be told in person rather than read it in the newspaper.

A Yes, I was surprised at it.

* * *

Q When you had become aware that Mr. Traver was coming to town -- was he coming to meet [Mr. Cole,] the [Deputy Attorney General].

A That's what I understand.

Q Did you hear any rumor that Mr. Traver was telling people that he would be in your office by July 4th.

A That was the rumor that was circulating around ATF headquarters, that he would be in not on the 4th but shortly after the 4th.⁶

Melson's interview with congressional investigators was originally scheduled through the Justice Department to occur on July 13 in the presence of Department lawyers. The Inspector General then scheduled an interview with him for July 7, in advance of his congressional interview.

⁶ *Id.* at 184-188.

However, once Mr. Melson was advised directly by our staff about the option to appear without Department minders, he chose to appear immediately with his own lawyer instead.

Your staff's July 6 letter contains a misinterpretation of our concern about the Department's failure to communicate to Mr. Melson his option to appear outside the presence of Department lawyers. The issue was not whether Mr. Melson had a right to personal counsel, which we presume he knew. The issue was whether he knew that the Department had agreed to allow witnesses to appear *voluntarily* and *without* DOJ handlers. He did not. By contrast, the agent interviews cited in your staff's letter were conducted to satisfy obligations pursuant to House Committee subpoenas and were not agreed to by the Department. Once again, this demonstrates why it is so important that congressional staff have direct communications with agency personnel.

The Department's efforts to isolate Mr. Melson went so far as to prevent him from communicating with his own staff about Fast and Furious. Mr. Melson testified:

Part of the problem, and one of the things that frustrated me was that I have not been allowed to communicate to the troops about anything. So, for example, earlier on, I wanted to do a broadcast that just talked about the case, because everybody was wondering what's this case about? What are you doing at headquarters? How come you were not issuing press releases and how come you were not ordering press conferences and pushing back and things like that? And **I was told not to do that**. Then after we wanted to do several things to talk to our people about what this case was about, what it wasn't about, and you know, where we were going and the fact that we were cooperating as much as we could with the committee and with the Department, but **we were restrained from doing that**. And even after your hearings on the -- was it the 16th or whatever that Wednesday was, we wanted to do the same thing, and they said, well, let us read it first. So we finally drafted something and sent it over to them. I don't know whether we ever got it back, but **it has restrained our ability to work with our people**⁷

In short, we asked to speak to Mr. Melson months ago. Mr. Melson desired to speak as far back as January. Now that he has shared what he knows with Congress, the Department needs to move from spin mode to disclosure mode.

According to the July 6 letter, Main Justice took over the document production process because it "wanted to ensure that the information being provided to the Committee was accurate, complete and timely."⁸ In fact, the Department's management of the process has prevented the Committee from gaining access to documents and information. The Department has repeatedly pointed to the existence of ongoing criminal cases to justify withholding evidence. Yet months

⁷ *Id.* at 110-111 (emphasis added).

⁸ Letter of July 6 at 2.

ago, ATF leadership realized that they could have provided information to Congress if they had been allowed to do so:

[W]e were concerned that the information was not getting to you all. I'm not saying that I would have given you what we call open discovery [B]ut we don't need to talk -- in order to let you know what's going on, we don't need to talk about [hypothetically] what happened on [a particular date] at the 7-11 parking lot on [a particular] Street in Phoenix. We don't have to get into that type of detail to explain what our role was and what the proposed strategy was, and what we did well and what we did badly, and what we won't do again, and what we have done to fix it. And so there were ways in which I think it could have been handled differently.⁹

The Slow Roll

In your July 6 letter, the Department touted the fact that, “To date, hundreds of thousands of pages of documents have been reviewed for responsiveness and over 2000 pages of documents have either been produced to the Committee or made available for review. . . .”¹⁰ It was also noted that the Department has assigned dozens of attorneys to work on our “extremely broad requests for information about the Operation.”¹¹ Contrary to that assertion, however, our requests have been specific and tailored as narrowly as possible to obtain the necessary information. This is no fishing expedition.

We identified several specific documents for immediate production, yet the Department has refused to produce them. For example, we sought a narrow category of records relating to a key December 17, 2009 meeting between ATF, Arizona U.S. Attorney’s Office officials, and a cooperating gun dealer. These documents have yet to be provided or made available for review. The only explanation offered for withholding them has been a vague and undefined assertion that the records are “law enforcement sensitive.” Meanwhile, the Department acknowledges that we are already in possession of many more truly sensitive documents that have not been inappropriately disclosed. The December 2009 meeting is critical because it occurred immediately after an unusual spike of activity by the straw buyers in which just a few of them purchased 212 guns in six days, primarily from one cooperating gun dealer. According to witnesses, that meeting was for the purpose of convincing the gun dealer to continue selling to the suspects and continue providing information to the ATF despite misgivings caused by the high volume of purchases. The Department withheld records about that meeting. Yet, we learned from Mr. Melson that a key record purporting to memorialize that meeting was dated sometime *after* the controversy broke. Creating such a record more than a year after the meeting could suggest an attempt to paper the file with an after-the-fact rationalization rather than an honest attempt to record an accurate and contemporaneous account of the meeting. However, we are unable to fully evaluate these issues because the Department is still withholding the documents.

⁹ Melson Tr. at 134.

¹⁰ Letter of July 6 at 2.

¹¹ *Id.* at 1.

After issuing a subpoena, Chairman Issa wrote numerous letters to ATF and DOJ – dated April 8, April 11, April 20, May 3, May 5, and June 8 – before receiving a single piece of paper responsive to the subpoena that was not already public. It was not until the eve of a hearing in which constitutional law experts testified that contempt proceedings may be necessary that the Department turned over the first non-public documents. On June 10, 2011, we went from having received zero non-public documents to having received just 69 pages of non-public documents. At the time, it seemed like an initial act of good faith. Accordingly, Chairman Issa acknowledged what appeared to be a “breakthrough.” Despite being fully aware of this context, in the July 6 letter your staff chose to cite Chairman Issa’s comment as evidence of the Department’s full cooperation. Acknowledging that the Department had finally provided a few non-public documents is hardly an excuse for withholding the vast majority of documents for months. Nor does it justify continuing to withhold key documents now. It has always been our position that Congress is entitled to receive possession of every single responsive page.

Chairman Issa’s acknowledgment of an initial “breakthrough” came *before* we learned that Mr. Melson had identified for the Deputy Attorney General’s office certain documents, including a particular report of investigation that he characterized as a “smoking gun.”¹² That report is still being withheld. The acknowledgment of a “breakthrough” also came *before* we learned that Mr. Melson identified for the Deputy Attorney General’s office information in the wiretap application that contradicted the Department’s previous public denials. That information is also still being withheld. Thus, we are disappointed that the Department is now throwing those words back at the Chairman publicly while keeping these important facts secret. This is not productive or conducive to arriving at mutually agreeable accommodations of one another’s legitimate interests.

The 2,000 pages of documents made available to date are a tiny fraction – less than one percent – of the documents the Department, by its own admission, has reviewed. This is alarming. If the attorneys working on the Department’s response to the Committee spent less time redacting documents and more time producing them, we would be much closer to understanding the failures in leadership surrounding Operation Fast and Furious.

¹² Melson Tr. at 78-79 (emphasis added). Mr. Melson testified:

I assigned a task force of agents to read through all the [Reports of Investigation or ROIs] to determine whether or not the allegations that were being made by individuals in CBS and Senator Grassley were true or not, because frankly we didn't think they were true.

They did a review of those and found nothing that would indicate that that was true. I then asked them to bring to me all the ROIs that pertained to [one defendant] in particular and **I read through those and found ROIs that indeed suggested that interdiction could have occurred, and probably should have occurred, but did not occur.**

And it was at that point that I took that ROI and gave it to our people and the Department. In fact, we briefed and gave it to [the Associate Deputy Attorney General with responsibility for ATF] in particular, because to me that was a **smoking gun** that we really needed to look at the rest of this particular case.

The FBI's Role

In its July 6 letter, the Department questioned whether information concerning the involvement of other law enforcement agencies should be provided, yet carefully avoided denying the validity of the concerns raised in our letter. Undoubtedly, all relevant information must be provided. Congress expects a full and complete production of documents responsive to the subpoena issued on March 31, 2011—more than 3 months ago—as well as all documents responsive to related letter requests.

Witnesses have testified that some of the very targets of Operation Fast and Furious – the high-level weapons suppliers to the cartels – may have been paid informants. While this is preliminary information, if true, the implications are dramatic. Not only would this mean taxpayer dollars could have funded those helping to arm Mexican drug cartels, it would also mean ATF unwittingly targeted unindictable defendants:

Q [W]e've come to learn, not from you but from other witnesses, plural, that the folks immediately up the line from [the straw purchasers and moneymen] are unindictable folks, because they are working with [government agencies]. Is that consistent with your understanding.

A That's consistent with my understanding, yes.

Q That they may be, in fact, FBI informants and they may be receiving money from the FBI, which presents the remarkable situation that you've got the moneyman in this firearms trafficking matter that is perhaps ATF's biggest case in years, a most sophisticated case, you are trying to track money, you are trying to get the cartel contacts, and all along the money is possibly being supplied by an FBI informant. How does that make you as the head of ATF, the head of an agency, how does that make you -- how does that make you feel.

A Well, it makes me feel very torn. Torn between doing my job as a good citizen . . . on the one hand. And on the other hand, representing my agency and not letting my agency be dragged through the dirt unnecessarily. And so – that's why I raised the issue with the IG. That's why I raised the issue with the [Deputy Attorney General], so that it can be handled appropriately. And that's why I continue to defend ATF as a whole, and hope that its agony right now is not compounded by the acts of other agencies in our government.

* * *

Q So when you shared the information that you obtained with the [Deputy Attorney General], what was the reaction that you got from Mr. Cole.

A His words were, "we'll have to look into this."

Q Does that give you the impression that this was the first time he was learning about it.

A I couldn't draw that conclusion one way or another, although I know that others in the room had been -- I had mentioned that, too, on more than one occasion.

* * *

That's why the issue is so difficult for us in ATF, and why the issue should have been addressed immediately to determine whether there was corrective action that needed to be taken or at least someone informed of what was happening, so we were comfortable in knowing that it wouldn't just unravel at some point and really make us look bad. And the reaction I got from the [Deputy Attorney General]'s office was, oh, we'll get to that after we do the Fast and Furious investigation.¹³

There is no question that this information is relevant to our investigation. Inter-agency cooperation, especially in an Organized Crime Drug Enforcement Task Force (OCDETF) case, is of paramount importance. Any failure to communicate between and among fellow law enforcement agencies is a legitimate subject of public concern and congressional scrutiny. The Department must gather all the relevant documents in its possession related to the role of other law enforcement agencies and provide them without further delay.

The Department's response to this investigation has been a "disaster."

Acting Director Melson was totally frustrated with the Department's handling of the congressional inquiries into Operation Fast and Furious. In his view, the Department was more concerned with protecting its political appointees than with obtaining and sharing the truth. He believed that a more forthcoming approach would have been preferable for all interested parties:

Q. I will represent to you that the Department came and briefed our staff in May.

A. Yes. And that was in May. And in conjunction with ATF. . . .

¹³ *Id.* at 119-123.

- Q. Mr. Hoover and [the Associate Deputy Attorney General with responsibility for ATF] came in, and it was a sense by then that this was a case that perhaps warranted some congressional oversight. I think the terminology shared with us was that maybe there is a there there. And I wonder if you recall at what point the Justice Department realized that indeed this was a matter worthy of congressional interest.
- A. Well, I don't know that I can say precisely when they thought it was of congressional interest. I might characterize it, and I hope I'm not going too far abroad, but I think they were doing more damage control than anything.

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 were running the show.¹⁴

* * *

- Q. What is your -- given your experience with the Justice Department, are you disappointed with the Department as a whole, that this has shaken out as it has.
- A. Well, let me say that I am frustrated and disappointed in the way the whole thing has been handled, unfortunately. Of course, this is unfortunately my first experience with something like this with a congressional investigation.

But I think the way it was handled went sideways and it could have been avoided with perhaps a more thoughtful approach to what was going on instead of such a strident approach to it. I think there could have been accommodations made between the Hill and ATF and DOJ has to how information was shared. **It was very frustrating to all of us, and it appears thoroughly to us that the Department is really trying to figure out a way to push the**

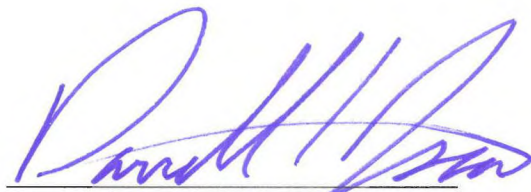
¹⁴ *Id.* at 30-31.

information away from their political appointees at the Department.¹⁵

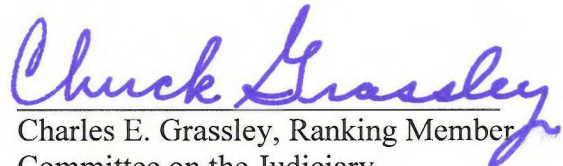
The Department should produce the documents identified by Mr. Melson months ago for the Deputy Attorney General's Office as critical to his understanding that the allegations in this case raise valid concerns. Specifically, the Department should not be withholding what Mr. Melson described as the "smoking gun" report of investigation or Mr. Melson's emails regarding the wiretap applications.¹⁶ Mr. Melson said he reviewed the affidavits in support of the wiretap applications for the first time after the controversy became public and immediately contacted the Deputy Attorney General's office to raise concerns about information in them that was inconsistent with the Department's public denials.¹⁷ The Department should also address the serious questions raised by Mr. Melson's testimony regarding potential informants for other agencies. These steps would be far more productive and would advance the Department's interests more effectively than sending a letter that takes Chairman Issa's words out of context and makes unsupported, self-serving, and conclusory assertions of full cooperation.

We are hopeful that this letter clarifies for you and your staff why we believe the Department's response has been unsatisfactory thus far and how we believe the Department could move forward more productively in the future. This should not be a public relations project. It should be a mutual effort to understand how and why the Department allowed American guns to fall into the hands of Mexican drug cartels with deadly consequences. We look forward to increased cooperation as we continue to investigate this matter.

Sincerely,



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



Charles E. Grassley, Ranking Member
Committee on the Judiciary
U.S. Senate

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

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

¹⁵ *Id.* at 123-124 (emphasis added).

¹⁶ *Id.* at 79.

¹⁷ *Id.* at 36-37.