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Opening Statement Rep. Elijah E. Cummings, Ranking Member

Hearing on "Obstruction of Justice: Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?"

June 13, 2011

Thank you, and welcome to our panel of distinguished witnesses. We have a valuable opportunity today to examine not only Congress' authority to conduct investigations, but also the historical precedent of committees in exercising that authority.

Today's hearing is being held in the broader context of investigations currently being conducted by two different branches of government. On one hand, the Department of Justice is prosecuting dozens of individuals in federal court, including defendants accused of murdering Border Patrol Agent Brian Terry in Arizona on December 14, as well as 20 other defendants indicted for firearms trafficking and other crimes involving international drug cartels.

On the other hand, in March this Committee launched an investigation into allegations that mismanagement and abuse in ATF gun trafficking investigations may have enabled some of the same crimes. The allegations made to date are very troubling, and new information we have obtained raises additional concerns about the role of various actors involved in these incidents.

I believe the Executive Branch and Congress can and must achieve both of these objectives. The Department's interest in prosecuting these crimes, and the Committee's interest in investigating the management of ATF programs, are not mutually exclusive.

I am particularly mindful that Agent Terry's family has lost someone they held very dear. They deserve not only for the killers and gun traffickers to be brought to justice after the fact. They also deserve direct and straightforward answers from their government about whether more could have been done to prevent his murder.

To answer the question posed by the title of today's hearing, yes, I believe the Department must respond to the Committee's subpoena, even though it was issued unilaterally without Committee debate only 15 days after the Chairman's original request for documents. I believe this Committee has both the authority and the ability to play a constructive role in investigating these matters.

But there is a second question the hearing title also should have posed: Does this Committee have an obligation to proceed responsibly to avoid irreparable damage to the ongoing prosecutions? Again, I believe the answer is yes.

Historically, Congress has taken great care to ensure that its investigations do not harm ongoing criminal cases. In most instances, committees have tailored the scope of their inquiries to avoid impairing open cases. Committees have been meticulous in providing the Department with opportunities to warn them if information they obtain is under seal, relates to grand jury information, identifies cooperating witnesses, may endanger someone's safety, or could impair ongoing criminal investigations if released publicly.

No Member of this Committee wants to risk compromising criminal prosecutions involving alleged murderers and gun traffickers for international drug cartels. That is why these types of reasonable accommodations protect not only the integrity of the criminal investigation, but the integrity of the Committee. Reckless disclosures could complicate a trial and cast a cloud over the Committee's current and future investigations.

I believe both the Executive Branch and Congress have an obligation to help the other achieve their Constitutional responsibilities rather than manufacturing unnecessary conflict.

For the benefit of our witnesses, let me note that the Department has not asserted executive privilege to withhold documents to date. It has produced, or made available for review, more than 1,300 pages. The Department and the Committee have agreed on search terms for electronic searches of responsive e-mails, which are now being conducted for 19 officials approved by Committee staff. Last week, the Committee conducted a six-hour interview of the Special Agent in Charge of ATF's Phoenix Office, and we have scheduled an interview of his supervisor, the ATF Deputy Assistant Director.

These actions demonstrate good faith. At the same time, the Department has expressed serious and legitimate concerns about the scope of documents encompassed by Chairman Issa's subpoena, including records that "identify individuals who are assisting in the investigation," that "identify sources and investigative techniques," that "present risks to individual safety," and that "prematurely inform subjects and targets about our investigation in a manner that permits them to evade and obstruct our prosecutorial efforts."

It is in this area that the Committee stands to benefit most from the expertise of our witnesses. I look forward to hearing about ways other committees have conducted their investigations to obtain the information they needed while accommodating the Department's legitimate interests.

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