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Congress of the United States

House of Representatives

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STAFF DIRECTOR

January 25, 2012

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

Dear Mr. Attorney General:

Last week's revelation that Patrick Cunningham, Criminal Division Chief of the U.S. Attorney's Office for the District of Arizona, was going to assert his Fifth Amendment rights during this week's scheduled deposition was stunning. Mr. Cunningham's position raises new questions about the Department's handling of the congressional inquiry into Operation Fast and Furious. Mr. Cunningham's assertion of the privilege suggests that the Department has jeopardized public safety and the public trust by allowing individuals with potential criminal culpability to remain in positions of authority. Further, Mr. Cunningham's refusal to testify has deprived Congress of important details about not only Operation Fast and Furious but also the Department's botched management of the congressional response.

Since August, the Department has identified Patrick Cunningham as the best person in the U.S. Attorney's Office to provide information about Fast and Furious to the Committee. The Department has refused to make Michael Morrissey and Emory Hurley, both Assistant United States Attorneys supervised by Mr. Cunningham, available to speak with the Committee, citing a policy of not making "line attorneys" available for congressional scrutiny. Mr. Morrissey, however, was Mr. Hurley's direct supervisor, and an integral part of Fast and Furious. Importantly, both Morrissey and Hurley are unique in their possession of key factual knowledge about Fast and Furious not readily available from any other source.

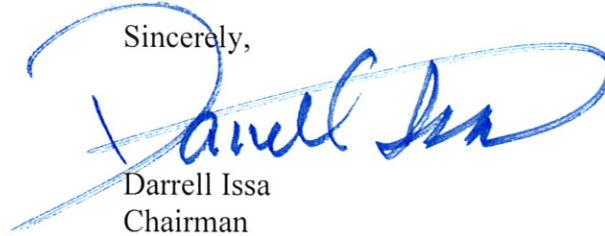
Now that Mr. Cunningham has formally refused to speak with the Committee, the Department must make Mr. Morrissey available as soon as possible. Please notify the Committee no later than Thursday, January 26, 2012, at 5:00 p.m. whether you plan to make Mr. Morrissey available for a transcribed interview. If you choose not to make Mr. Morrissey available, the Committee will be forced to use compulsory process to ensure his presence.

I am also attaching a September 1, 2011 letter that Senator Grassley and I sent to Ann Scheel, Acting U.S. Attorney for the District of Arizona. In that letter, we requested all documents and communications created from October 1, 2009 and the present by Mr. Cunningham, Mr. Morrissey, and Mr. Hurley. The subpoena I authorized and issued to you on

The Honorable Eric H. Holder, Jr.
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October 12, 2011 also required the production of those documents. To date, you have not complied fully with the subpoena with respect to documents, including, but not limited to, e-mails sent and received by Messrs. Cunningham, Morrissey, and Hurley.

Sincerely,

A handwritten signature in blue ink, appearing to read "Darrell Issa", is written over the word "Sincerely,". The signature is fluid and cursive, with a large loop at the end.

Darrell Issa
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

Congress of the United States

Washington, DC 20510

September 1, 2011

The Honorable Ann Birmingham Scheel
Acting U.S. Attorney for the District of Arizona
Two Renaissance Square
40 North Central Avenue, Suite 1200
Phoenix, AZ 85004-4408

Dear Ms. Scheel:

We understand that you are currently the Acting U.S. Attorney for the District of Arizona. As you are undoubtedly aware, many questions about your office's role in Operation Fast and Furious remain unanswered.

The level of involvement of the United States Attorney's Office for the District of Arizona in the genesis and implementation of this case is striking. Operation Fast and Furious was a prosecutor-led Organized Crime Drug Enforcement Task Force (OCDETF) Strike Force case. The congressional investigation has revealed that your office, and specifically Assistant United States Attorney (AUSA) Emory Hurley, played an integral role in the day-to-day, tactical management of the case. In fact, Mr. Hurley served as a prosecutor on this case until very recently.

Witnesses have reported that AUSA Hurley may have stifled ATF agents' attempts to interdict weapons on numerous occasions. Many ATF agents working on Operation Fast and Furious were under the impression that even some of the most basic law enforcement techniques typically used to interdict weapons required the explicit approval of your office, specifically from AUSA Hurley. It is our understanding that this approval was withheld on numerous occasions. It is unclear why all available tools, such as civil forfeitures and seizure warrants, were not used in this case to prevent illegally purchased guns from being trafficked to Mexican drug cartels and other criminals. We have further been informed that AUSA Hurley improperly instructed ATF agents that they needed to meet unnecessarily strict evidentiary standards merely in order to temporarily detain or speak with suspects.

It is essential for Congress to fully understand your office's role in Operation Fast and Furious. Therefore, please provide documents and communications of the following individuals in your office regarding Operation Fast and Furious:

- 1) Dennis Burke, former U.S. Attorney for the District of Arizona
- 2) Ann Scheel, Acting U.S. Attorney for the District of Arizona
- 3) Emory Hurley, Assistant United States Attorney

- 4) Michael Morrissey, Assistant United States Attorney
- 5) Patrick Cunningham, Chief of the Criminal Division
- 6) Robert Sherwood, Spokesperson

The requested documents include e-mails, memoranda, briefing papers, and handwritten notes. They should also include communications between and among the individuals listed above and any ATF or Department of Justice employee regarding Operation Fast and Furious between October 1, 2009 and the present.

In addition, it is imperative that the Committee have an opportunity to discuss the facts above with individuals in your office who are familiar with the details of this operation. It is not our intention to second guess day-to-day decisions of your staff, but rather to make sense of them. The Attorney General has said that "letting guns walk is not something that is acceptable. . . . We cannot have a situation where guns are allowed to walk, and I've made that clear to the United States Attorneys as well as the agents in charge of various ATF offices."¹ Operation Fast and Furious is unique in that guns were allowed to walk with the apparent knowledge of, and authorization by, officials in your office.

Although our staffs spoke two weeks ago with then-U.S. Attorney Dennis Burke, he was unable to answer detailed questions about what his subordinates knew about the case. Given the national and international implications of the Fast and Furious scandal, Congress has an obligation to find out to what extent other individuals in your office were involved. To further that goal, we now request transcribed interviews with the following individuals from your office:

- 1) Emory Hurley, Assistant United States Attorney
- 2) Michael Morrissey, Assistant United States Attorney
- 3) Patrick Cunningham, Chief of the Criminal Division

The Terry Prosecution

Your office's recent court filing in opposition to the rights asserted by the family of slain Border Patrol Agent Brian Terry under the Crime Victims' Rights Act (CVRA) is disquieting.² In Mr. Burke's transcribed interview, he acknowledged that the office had never previously filed such a motion, and he wished he had handled it differently. In the motion, your office asserts: "Defendant Avila's offenses are too factually and temporally attenuated from the murder – if connected at all."³ Your office's filing asked the court to deny the Terry family basic rights as

¹ *Hearing on the FY 12 Dept. of Justice Budget: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the S. Comm. on Appropriations*, 112th Cong. (2011) (testimony of Eric H. Holder, Jr., Att'y Gen. of the United States).

² See 18 U.S.C. § 3771.

³ Pl. Resp. to Mot. to Intervene on Behalf of Victims of a Crime, *U.S. v. Avila, et al.*, No. 11-126 (D. Ariz. Aug. 8, 2011).

crime victims due to the lack of a connection between the cases. Yet in Mr. Burke's transcribed interview, he readily admitted the connection and stated that he believed they *should* be extended rights as crime victims under CVRA, although not as intervening parties. This contradicts the basic premise of your office's opposition brief, namely that the Terry family should not be treated as victims of Avila's crimes.

We find it difficult to understand why anyone would oppose the Terry family's motion on the grounds that there is potentially no connection at all between the case against Mr. Avila and the case against Agent Terry's murderers. As you know, two firearms recovered at the Terry murder scene were traced to a purchase by Jaime Avila on January 16, 2010.⁴ Although it is the general practice of your office to obtain indictments prior to arrest, it was obviously imperative to arrest Mr. Avila immediately upon learning that the trace results linked the weapons he purchased to the murder scene. In fact, Jaime Avila was in custody less than four hours after this trace was completed.⁵ The speed of Avila's arrest contradicts the claims that there was not enough evidence to legally arrest straw purchasers earlier in Operation Fast and Furious. It also shows that your office understood the nexus between Mr. Avila and the Terry murder instantly.

Indeed, ATF immediately prepared a criminal complaint for Mr. Avila stemming from the January 16, 2010 purchase.⁶ That charge was ultimately delayed, however, until it appeared in Count 7 of the January 19, 2011 indictment, which alleges that Mr. Avila purchased these weapons illegally.⁷ Instead, Avila was initially charged with other violations. Your subordinate, AUSA Hurley, apparently engaged in communications about that decision in the hours after Agent Terry's death that both contemplated the connection between the two cases and sought to prevent the connection from being disclosed. According to an ATF e-mail documenting communications with Mr. Hurley, the motivation behind initially charging Avila with firearm offenses unrelated to the weapons found at the murder scene was to not "complicate" the FBI's investigation.⁸ Worse yet, AUSA Hurley signed your office's recent motion to the court denying the connection between the two cases despite apparently working with ATF agents to conceal the connection in the days and weeks following the murder of Agent Terry.⁹

Furthermore, AUSA Hurley has since acknowledged this nexus. In a January 28, 2011 memorandum to Mr. Burke, Mr. Hurley clearly demonstrates his understanding of the connection between Mr. Avila's purchase and its connection to the Terry murder: "The two AK-47 type rifles associated with the U.S. Border Patrol shooting, specifically two ROMARM WASR-10 7.62x39mm rifles . . . were purchased by Jaime Avila, Jr., (AVILA) on Friday, January 16, 2010."¹⁰ Moreover, at the time of Avila's straw purchases, he was known to be working with Uriel Patino. Patino previously purchased weapons that had been recovered in Mexico in connection with drug trafficking organizations as early as November 2009.¹¹ He and

⁴ E-mail from George T. Gillett, Jr. to William D. Newell (Dec. 15, 2010) [Attachment 1].

⁵ E-mail from William D. Newell to David J. Voth, et al. (Dec. 15, 2010) [Attachment 2].

⁶ E-mail from George T. Gillett, Jr. to William D. Newell (Dec. 16, 2010) [Attachment 3].

⁷ U.S. v. Jaime Avila, Jr., et al., No. 11-126 (D. Ariz. Jan 19, 2011).

⁸ E-mail from David J. Voth to William D. Newell, et al. (Dec. 16, 2010) [Attachment 4].

⁹ *Id.*

¹⁰ Memorandum from Emory Hurley to Dennis K. Burke re: Jaime Avila, Jr. (Jan. 28, 2011) [Attachment 5].

¹¹ ATF Firearms Trace Summary, Nov. 30, 2009; ATF Firearms Trace Summary, Nov. 30, 2009 [Attachment 6].

Ms. Ann Birmingham Scheel
September 1, 2011
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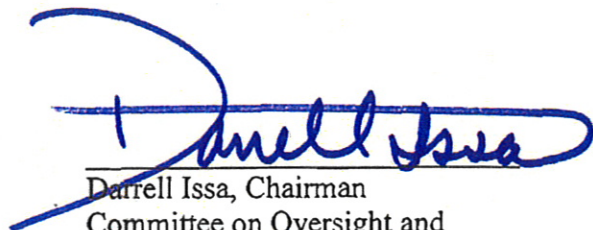
Avila had visited a cooperating gun dealer together on November 24, 2009; the dealer provided contemporaneous notice to ATF, which dispatched surveillance.¹² Clearly, your office and ATF did not suddenly develop probable cause to arrest Avila in the hours after Agent Terry died. Your office could have done so much earlier, perhaps even before Avila purchased the weapons that were later found at the murder scene. In light of this information, it appears that your office has a direct interest in avoiding or minimizing these facts.

Additionally, given your office's entanglement in Operation Fast and Furious, we remain concerned that the current prosecution team on the Terry murder might be hesitant to develop additional evidence on other potential defendants who may have ties to Operation Fast and Furious. Witnesses in the congressional investigation have related that the suspects in the Terry criminal case told law enforcement officers they obtained the weapons found at the murder scene in backpacks that were stashed in a hiding place near the scene. A thorough prosecution would identify the accomplices who placed the weapons-filled backpacks near the scene and bring appropriate charges against them.

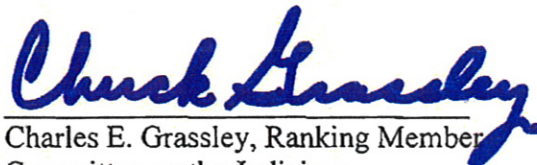
Since your office directed and approved the daily tactical decisions in Operation Fast and Furious, it is hard to avoid the perception that a conflict of interest exists. Your office's unusual intervention in the motion filed by the Terry family heightens that perception.

Please provide the requested documents and information as soon as possible, but no later than noon on September 14, 2011. If you have any questions regarding these requests, please contact Henry Kerner of Chairman Issa's Committee staff at (202) 225-5074 or Tristan Leavitt in Ranking Member Grassley's office at (202) 224-5225. We look forward to receiving your response.

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

¹² ATF Case Management Log, Case 785115-10-[redacted], 11/24/2009; *see also* Testimony of Sen. Charles Grassley before House Oversight and Government Reform Committee, Jun. 15, 2011, at 3.