

Congress of the United States
Washington, DC 20515

May 18, 2012

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

Dear Attorney General Holder:

We write to express our concerns with the lack of full cooperation from the Department of Justice (“the Department”) with the ongoing Congressional investigation into the operation known as “Fast & Furious” and the related death of Border Agent Brian Terry. While we recognize that the Department has provided some documents in response to some aspects of the October 11, 2011, subpoena from the Chairman of the Oversight & Government Reform Committee (“the Committee”), two key questions remain unanswered: first, who on your leadership team was informed of the reckless tactics used in Fast & Furious prior to Agent Terry’s murder; and, second, did your leadership team mislead or misinform Congress in response to a Congressional subpoena?

We are troubled by the Department’s assertions that the Executive Branch possesses the ability to determine whether inquiries from the Legislative Branch have been fully complied with. As the Supreme Court has noted, each co-equal branch of our Government is supreme in their assigned area of Constitutional duties.¹ Thus, the question of whether the Executive Branch has sufficiently complied with a Congressional subpoena requesting specific information pursuant to Congress’ Article I responsibilities is one only the Legislative Branch can answer.

One fact appears to be undisputed by all concerned: Fast & Furious was a fundamentally flawed operation. It was taken to an extreme that resulted in at least one death of a U.S. Border Patrol agent and unknown other consequences, because U.S. law enforcement agencies allowed thousands of firearms to be illegally “walked” into Mexico and into the hands of drug cartels. Beyond the horrific impact on the Terry family, there is no doubt that this operation has done serious harm to one of the United States’ most important bilateral relationships. It is our hope that, in finding the truth, we can both provide closure to the Terry family, begin to repair our relationship with Mexico, and take steps to make necessary changes at the Department.

Clearly, the Department must take steps to ensure that tragic mismanagement like Fast & Furious does not occur in the future. Unfortunately, without the disclosure of the information requested in the October 11, 2011, subpoena regarding which members of your leadership team were informed of the reckless tactics that were used in the operation, the American people cannot be confident that any remedial steps you implement will accomplish this goal. For example,

¹ United States v. Nixon, 418 U.S. 683 (1974).

your leadership team recently asserted that “Department leadership was unaware of the inappropriate tactics used in Fast and Furious until allegations about those tactics were made public in early 2011.”² Yet, Federal law requires that you, or a member of your leadership team, approve the application to a Federal judge for use of a wiretap.³

In approving such an application, you or your designee would – or should – have reviewed the accompanying materials and affidavits that provided the basis for the wiretap application prior to affixing the Department’s approval to the application. We understand that the Fast & Furious operation may have included seven such wiretaps between March and July 2010. Whether the information used to justify the wiretap application or the information gained from the wiretaps is being used in any ongoing criminal prosecution is immaterial to the question of who on your leadership team reviewed and approved the wiretaps and was therefore privy to the details of the Fast & Furious operation. The assertion that your leadership team could approve wiretaps in 2010 and yet not have any knowledge of the tactics used in Fast & Furious until 2011 simply cannot be accurate and furthers the perception that the Department is not being forthright with Congress.

We would note that correspondence between your Deputy and Chairman Issa raises concerns that further Congressional actions might cause damage between the Legislative and the Executive branch.⁴ We would submit that the damage to that relationship began with a February 4, 2011, letter from the Department to the Congress that was subsequently withdrawn because it provided Congress with false information. The means to repair the damage caused by your Department lies within your powers to work with the Committee to find a mutually satisfactory level of compliance with the subpoena and avoid further confrontation.

While we are disappointed that a Senior Department official would provide false information to Congress, we are also concerned that it took your Department ten months to acknowledge the inaccuracy and ultimately withdraw the letter. In light of the letter and its subsequent withdrawal, it is critical for Congress to understand whether the letter was part of a broader effort by your Department to obstruct a Congressional investigation. We are unaware of any assertions of executive privilege that would prevent compliance with the Congressional subpoena. We are also unaware of any national security concerns or diplomatic sensitivities that would preclude compliance with the subpoena. Finally, as these post-February 4, 2011, communications concern the Department’s response to Congress, their disclosure to Congress would not impact any ongoing criminal investigations or prosecutions.

If the Office of Legal Counsel has provided a legal opinion that takes into account the specific circumstances of this investigation and you are relying on that opinion to maintain your current position, we would request that the opinion be provided to Congress at the earliest possible opportunity. Similar to arrangements previously made between your Department and Congressional investigators, we are confident that you possess adequate means to provide

² Letter from Deputy Att’y Gen. James M. Cole to House Oversight & Government Reform Chairman Darrell Issa, May 15, 2012, at 10 [hereinafter DAG Cole Letter].

³ See 18 U.S.C. § 2516(1).

⁴ DAG Cole Letter at 1.

substantive compliance with a Congressional subpoena while protecting the integrity and confidentiality of specific documents.

We firmly believe and hope that you agree that a mutually acceptable resolution to this matter may yet be achieved. The Terry family deserves to know the truth about the circumstances that led to Agent Terry's murder. The whistle-blowers who brought these issues to light deserve to be protected, not intimidated, by their government. And, the American people deserve to know how such a fundamentally flawed operation could have continued for so long and have a full accounting of who knew of and approved an operation that placed weapons in the hands of drug cartels.

As co-equal branches of the U.S. Government, the relationship between the Legislative and Executive branches must be predicated on honest communications and cannot be clouded by allegations of obstruction. If necessary, the House will act to fulfill our Constitutional obligations in the coming weeks. It is our hope that, with your cooperation, this sad chapter in the history of American law enforcement can be put behind us.

Sincerely,





