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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051

<http://oversight.house.gov>

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The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

You have scheduled a public hearing on Wednesday to obtain testimony relating to allegations of abuse in gun trafficking investigations conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The allegations made to date are very troubling, and new information we have obtained recently raises additional concerns about the role of various actors involved in these incidents. I believe the Committee has the authority and ability to play a constructive role in investigating these matters, and I hope we can work together to do so.

As I have explained previously, however, I have very serious concerns about the manner in which the Committee is proceeding. My concerns relate to the fact that the Department of Justice is conducting two ongoing, open criminal prosecutions involving dozens of defendants who are charged with murder, gun trafficking, and other crimes:

- On December 14, 2010, U.S. Border Patrol Agent Brian Terry was killed in a firefight near Rio Rico, Arizona. On May 6, 2011, a 14-count indictment was unsealed by a federal judge in Arizona charging Manuel Osorio-Arellanes and two other individuals whose names remain under seal with the murder of Agent Terry and other crimes.¹
- On January 25, 2011, the Department announced that a federal grand jury had returned an indictment against 20 individuals alleged to have “conspired to purchase hundreds of firearms, including AK-47s, to be illegally exported to Mexico.” One of those individuals indicted was Jaime Avila, who allegedly purchased two firearms found at the scene of Agent Terry’s death.²

¹ Department of Justice, *Press Release: Manuel Osorio-Arellanes Charged for the Murder of Border Patrol Agent Brian Terry* (May 6, 2011) (online at www.justice.gov/usao/az/PR_05062011_Osorio_Arellanes.html).

² Office of the United States Attorney, District of Arizona, *Grand Juries Indict 34 Suspects in Drug and Firearms Trafficking Organization: Multi-Agency Task Force Rounds Up*

In addition to this public information, there may be other parts of these investigations that we know nothing about, such as continuing undercover operations or plea negotiations with individuals who may be willing to testify against higher-level suspects.

To put it simply, I believe there are two objectives at stake: the Department of Justice is attempting to prosecute and convict multiple individuals for horrific crimes, and the Committee is attempting to conduct oversight of actions by ATF and the Department that are alleged to have enabled some of these same crimes. I believe both goals are legitimate.

The challenge is that when congressional committees embark on investigations while ongoing prosecutions are pending, there is a dangerous potential to compromise criminal prosecutions, especially if a committee is reckless and does not consult with the Department. For these reasons, many congressional committees defer investigations until after prosecutions are complete.³ Some committees have conducted investigations during open federal prosecutions, but in these relatively rare cases, committees generally have worked meticulously with the Department to ensure that their actions do not negatively affect ongoing prosecutions. For example, they have reached agreements to consult with the Department before publicly releasing documents or reports, to refrain from obtaining documents relating to certain sensitive sources or methodologies, and to secure limited information against public release.

Over the past several months, you have repeatedly accused me of “obstructing” the Committee’s investigation. Let me make clear that I am not trying to obstruct it. I am trying to ensure that the Committee achieves its goal in a responsible manner that avoids causing irreparable damage to the prosecution of dozens of defendants. As we prepare for Wednesday’s public hearing, there are several difficult questions that have not been resolved regarding how the Committee will proceed. Three of these questions are set forth below.

Defendants Accused of Illegal Gun Purchases, Money Laundering, and Conspiracy (Jan. 25, 2011) (online at www.justice.gov/usao/az/press_releases/2011/PR_01252011_Press%20Conference.pdf). See also *Indictment, United States v. Avila, et al*, Case No. 2T1-CR-126-JAT (D. Ariz. Jan. 19, 2011).

³ See, e.g., Opening Statement, Chairman Henry A. Waxman, House Committee on Oversight and Government Reform, *Hearing on Private Security Contracting in Iraq and Afghanistan* (Oct. 2, 2007) (<http://webharvest.gov/congress110th/20081217173656/http://oversight.house.gov/story.asp?ID=1511>) (“Yesterday, the FBI announced that it launched a criminal investigation into Blackwater’s actions on September 16. This morning, the Justice Department sent a letter to the Committee asking that in light of this development, the Committee not take testimony at this time about the events of September 16. Our precedent on this Committee is that Congress has an independent right to this information. But in this case, Ranking Member Davis and I have conferred, and we have agreed to postpone any public discussion of this issue as we work with the Department to obtain the information the Committee seeks.”).

Accidental Release of Document Under Seal

One of the most significant unresolved questions is whether you intend to make public for Wednesday's hearing any documents, transcript excerpts, or other information obtained as part of the Committee's investigation, and if so, whether you plan to consult with Justice Department officials first to provide them with an opportunity to warn the Committee if certain information is under seal, relates to grand jury information, might endanger someone's safety, or could impair the conduct of ongoing criminal investigations if released publicly.

As we began this investigation, I wrote to you on several occasions requesting that you consult with the Justice Department prior to releasing any documents or other information. As I stated, I believe the Committee—and not the Department—has the ultimate authority to decide whether to release such information publicly. Consulting with the Department first would protect not only the integrity of the criminal investigation, but the integrity of the Committee. Inadvertent disclosures could complicate a trial and cast a cloud over the Committee's current and future investigations. We, and many of the individuals who provide us with information, may not know the full scope of the investigation or the information to which it relates.

On May 5, 2011, Justice Department officials met with Committee staff to discuss our ongoing investigation. At that meeting, Justice Department officials informed our staffs that you had released a document that was under seal. In other words, a federal district court judge had issued an order prohibiting the public release of that document. Your staff stated that they did not know the document was under seal when they disclosed it to the press, but they discovered the breach soon afterwards. At the end of that meeting, and at the request of the Department, your staff seemed to agree that consultation would help avoid such mistakes in the future.

On April 13, 2011, the Department wrote to the Committee to provide more detail about the extreme sensitivity of some of the documents covered by the subpoena you issued to the Department. The letter stated:

Your subpoena encompasses records that would identify individuals who are assisting in the investigation. ... Similarly, records requested by you would identify sources and investigative techniques that have not yet been disclosed. Disclosure of these types of information may present risks to individual safety in the violent environment of firearms trafficking activities. Disclosure also may prematurely inform subjects and targets about our investigation in a manner that permits them to evade and obstruct our prosecutorial efforts. We realize that the Committee does not intend these results, but these are serious risks, and we have already observed effects on these investigations.⁴

The Committee has now obtained a wide range of additional documents from the Department, from whistleblowers, and from other sources. We have also conducted numerous interviews that have been transcribed. I would like to know whether you plan to consult with the Department before releasing any of this information publicly.

⁴ Letter from Assistant Attorney General Ron Weich to Chairman Darrell E. Issa (Apr. 13, 2011) (emphasis added).

Interview of Trial Witness

A second question is whether you plan to provide the Department with a copy of the transcript of the interview that Committee staff conducted, against the Department's request, of an individual they had identified as a potential witness in an upcoming prosecution trial.

In April, you unilaterally issued a subpoena to obtain testimony from an individual who is scheduled to be a witness at the upcoming criminal trial. After learning about the subpoena from the witness, Department officials expressed significant concern about the Committee's plans to go forward with this interview. During a meeting with Committee staff on May 5, 2011, Department officials requested that the Committee refrain from interviewing any individuals who they plan to call as witnesses. They asked us to attempt to obtain information we needed from other individuals first.

Department officials requested this accommodation because they had significant concerns that interviewing a potential trial witness could cause a number of complications for the trials. For example, showing interviewees new information they have not seen before could cloud their recollection of events or result in inconsistent statements, causing their later testimony at trial to be subjected to attack. Department officials requested that the Committee defer these particular interviews until the conclusion of the prosecution.

If the Committee could not obtain information deemed critical to its investigation from any other source, and if the Committee determined that it had to interview a potential trial witness, Department officials asked that you consult with them beforehand, that you allow the Department to provide input prior to the interview, and that you provide a copy of the interview transcript to the Department so prosecutors could adequately prepare for the upcoming trial.

Despite the Department's serious concerns, Committee staff interviewed the potential trial witness without notifying or providing other Members of the Committee an opportunity to debate this important decision. Now that this interview has occurred, I would like to know whether you intend to provide federal prosecutors with a copy of the interview transcript to help them prepare for trial.

Revelation of Secret Tape Recordings

Finally, I would like to know whether you and Senator Charles Grassley intend to consult with Department officials regarding copies of newly-discovered audio tape recordings of a conversation between two witnesses interviewed by the Committee.

Senator Grassley has been actively engaged in investigating allegations relating to Operation Fast and Furious. I have always had great respect for Senator Grassley, and I admire his long-standing commitment to making government work more efficiently and effectively. During this investigation, he has provided you with several documents he has obtained, and you have allowed his staff to participate fully in all Committee meetings and transcribed interviews.

During one such interview, a government official was asked to describe conversations he had with a second person to explain apparent discrepancies in their statements. This government official described two specific conversations in detail. In response to questioning, he stated that he had secretly recorded one of those conversations. In response to further questioning, he stated that he had provided copies of these secret tapes to Senator Grassley's staff.

Despite the fact that Senator Grassley's staff participated in these interviews, including the specific interview relating to discrepancies in the previous statements, he never mentioned to Committee staff the existence of these tapes, which appear to be direct recordings of one of the conversations at issue. Your staff seemed genuinely surprised by this revelation as well.⁵

I am a strong advocate on behalf of whistleblowers who come forward to report waste, fraud, and abuse, and I do not make any judgments about the propriety of making these tapes or providing them to Congress. Instead, my concerns relate to the difficult ethical and legal questions we now face in light of the revelation that these tapes exist. Since these tapes were recorded by a government official, they potentially could implicate the legal discovery obligations of the Department in their ongoing prosecutions. I would like to know how you, as Chairman, intend to proceed with respect to this newly-discovered evidence, and whether you plan to consult with the Department about this new information.

Conclusion

The circumstances described above are precisely the kinds of situations that warrant caution in the Committee's investigation. Much of the information the Committee has obtained and will obtain is extremely sensitive and could cause irreparable damage if handled recklessly. Consulting with the Department will help fulfill the Committee's goal of conducting responsible oversight and the Department's goal of achieving successful prosecutions.

No Member of this Committee wants to risk compromising criminal prosecutions involving alleged murderers and gun traffickers for international drug cartels. For these reasons, I hope we can resolve these difficult questions quickly to help inform and guide our Members before the hearing on Wednesday.

Sincerely,


Elijah E. Cummings
Ranking Member

⁵ If Senator Grassley's staff had provided copies of these tapes to your staff as part of the Committee's investigation, they would have been considered official Committee records under House Rule X, 9(g), which provides that minority staff "shall be accorded equitable treatment with respect to ... the accessibility of committee records."