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# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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June 27, 2012

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LAWRENCE J. BRADY  
STAFF DIRECTOR

The Honorable John A. Boehner  
Speaker of the House  
U.S. Capitol  
Washington, D.C. 20515

Dear Mr. Speaker:

Holding someone in contempt of Congress is one of the most serious and grave actions Congress can take, particularly when it involves the chief law enforcement officer of our nation. The House has never in its history voted to hold a sitting Attorney General in contempt.

There is no doubt that the Constitution gives Congress the right and the responsibility to investigate. This is an integral part of our legislative function, one that I know you take very seriously. But the Constitution also requires something else: it requires Congress and the executive branch to avoid unnecessary conflict and to seek accommodations that serve both of their interests. As Attorney General William French Smith, who served under President Ronald Reagan, stated:

The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.<sup>1</sup>

For the reasons outlined below, I urge you to take a direct and personal role in trying to resolve this issue in a way that honors our Constitutional obligation. As an officer specifically named in the Constitution, you have a responsibility to set aside politics—particularly on an occasion like this. A decision to take such an unprecedented step should not be rushed based on the current record of partisan and unsubstantiated allegations.

This letter is intended to convey information relating to how this investigation has been conducted by the House Committee on Oversight and Government Reform. I hope after reviewing this information you will withdraw the contempt resolution, accept the Attorney General's offer to meet personally, and enter into direct negotiations with him as part of a good faith effort to resolve this matter. In my opinion, the Constitution requires nothing less.

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<sup>1</sup> 5 Op. Off. Legal Counsel 27, 31 (1981).

### **100 Flaws in the Contempt Resolution**

Democrats on the Oversight Committee were outraged when we learned about allegations of gunwalking by ATF, and we supported the Committee's original goal of determining how this tactic was initiated, how it was utilized, and how it may have contributed to the death of Border Patrol Agent Brian Terry. Unfortunately, the investigation conducted by the Committee over the past year and a half has been one of the most partisan investigations in decades.

A fundamental problem with conducting such a partisan investigation is that the results are not even-handed, but instead are skewed, incomplete, and inaccurate. These deficiencies are magnified when we rush from a Committee vote to a Floor vote at breakneck speed with little concern for the facts or the law.

Attached to this letter is a list of 100 errors, omissions, and mischaracterizations in the contempt report that was voted out of our Committee only a week ago today. Although some of these flaws are simply misleading, others are significant legal deficiencies and factual errors that may call into the question the validity of the contempt resolution itself.

For example, the contempt resolution rests on an obvious legal deficiency: it would hold the Attorney General in contempt for failing to produce documents that were never demanded by the Committee's subpoena. The contempt resolution covers the timeframe from February 4, 2011, when the Department of Justice sent a letter to Senator Charles Grassley initially denying gunwalking allegations, to December 2, 2011, when the Department formally withdrew that letter. However, the subpoena never demanded documents created between October 11, 2011, and December 2, 2011. The subpoena was issued on October 11, 2011, and it demanded documents only up to the date it was issued.<sup>2</sup>

There are also basic factual inaccuracies. For example, the contempt report cites as precedent the Committee's investigation of the leak of CIA operative Valerie Plame's covert status, stating that it was "contemporaneous" with the Department of Justice's criminal investigation. The contempt report omits the key fact that the Committee, under then-Chairman Henry A. Waxman, agreed to a Justice Department request for the Committee to delay access to relevant documents until after I. Lewis "Scooter" Libby, Vice President Cheney's chief of staff, was convicted and sentenced for obstructing justice, perjury, and making false statements.<sup>3</sup>

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<sup>2</sup> Subpoena from House Committee on Oversight and Government Reform to Eric H. Holder Jr., Attorney General, Department of Justice (Oct. 11, 2011).

<sup>3</sup> *United States v. Libby*, Crim. No. 05-394 (RBW), Order (D.D.C. July 3, 2007); Letter from Patrick J. Fitzgerald, Special Counsel, Department of Justice, to Rep. Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform (Aug. 16, 2007) (enclosing the "first production of documents responsive to your request").

There are also blatant mischaracterizations. For example, the contempt report states that the Department “has represented on numerous occasions that it will not produce broad categories of documents.” For the past year, however, the Committee has been demanding documents that the Department is prohibited by law from producing, including “records covered by grand jury secrecy rules and federal wiretap applications and related information,” which the Department is “prohibited by law or court orders” from disclosing.<sup>4</sup>

### **The Committee’s Refusal to Call ATF Leadership for Public Hearings**

In one of the most significant flaws of the investigation, the Chairman has refused multiple Democratic requests to hold a public hearing with Kenneth Melson, the former head of ATF—the agency responsible for conducting these misguided operations. The Chairman has also refused a request to hold a hearing with ATF’s Deputy Director, William Hoover. Even though the Attorney General has testified nine times, the Chairman has refused our repeated requests to hold even one hearing with the leaders of ATF.

Chairman Issa asserted during an interview this weekend that a public hearing with ATF leaders was unnecessary because Committee staff held two days of transcribed interviews with Mr. Melson in July 2011.<sup>5</sup> However, the first day of that interview, July 3, 2011, was held in secret. Democratic staff were neither informed nor invited to attend. On the afternoon of July 3, Democratic staff were notified that a transcribed interview would be conducted with Mr. Melson the next morning—July 4. Despite the highly irregular nature of these activities, Democratic staff participated in the July 4 interview.

During the interview, Mr. Melson stated unequivocally that he had never informed senior Justice Department officials, including the Attorney General, about gunwalking during Operation Fast and Furious because he was unaware of it himself.<sup>6</sup> This was significant new information that directly contradicted the Chairman’s repeated assertions that the Attorney General was personally involved in authorizing gunwalking, and it may explain why the Chairman refused to hold a public hearing with Mr. Melson.

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<sup>4</sup> Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Rep. Darrell E. Issa, Chairman, House Oversight and Government Reform (May 15, 2012).

<sup>5</sup> *Fox News Sunday*, Fox News (June 24, 2012) (online at [www.foxnews.com/on-air/fox-news-sunday/2012/06/24/rep-issa-rep-cummings-debate-holder-contempt-congress-vote](http://www.foxnews.com/on-air/fox-news-sunday/2012/06/24/rep-issa-rep-cummings-debate-holder-contempt-congress-vote)).

<sup>6</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Kenneth Melson (July 4, 2011).

This past weekend, our Chairman claimed on national television that he never refused our requests for Mr. Melson to testify at a public hearing.<sup>7</sup> The fact is that Democratic Committee Members asked for a hearing with Mr. Melson—in writing, in person, and at various hearings and business meetings—at least ten times.<sup>8</sup>

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<sup>7</sup> *Fox News Sunday*, Fox News (June 24, 2012) (online at [www.foxnews.com/on-air/fox-news-sunday/2012/06/24/rep-issa-rep-cummings-debate-holder-contempt-congress-vote](http://www.foxnews.com/on-air/fox-news-sunday/2012/06/24/rep-issa-rep-cummings-debate-holder-contempt-congress-vote)).

<sup>8</sup> See, e.g., Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa (Oct. 28, 2011) (“Members also deserve an opportunity to question Mr. Melson directly, especially since he headed the agency responsible for Operation Fast and Furious.”); Letter from Ranking Member Elijah E. Cummings to Committee Members (Jan. 30, 2012) (“the public has not had an opportunity to hear his explanations for why these operations continued for so many years without adequate oversight from ATF headquarters.”); House Committee on Oversight and Government Reform, Hearing on *Fast and Furious: Management Failures at the Department of Justice* (Feb. 2, 2012) (Ranking Member Cummings: “you’ve never once called the former head of the ATF to testify in a public hearing even though ATF was the agency responsible for these reckless programs”); House Committee on Oversight and Government Reform, Hearing on *Fast and Furious: Management Failures at the Department of Justice* (Feb. 2, 2012) (Rep. John Tierney: “I hope we’ve made the point here that what is important is for you to change your mind, hopefully, and allow Mr. Melson to come here and testify in public and answer the questions which have been the core of the matter there”); House Committee on Oversight and Government Reform, Business Meeting (June 20, 2012) (Ranking Member Cummings: “[Chairman Issa] refused to hold a public hearing with Ken Melson ... after Mr. Melson told Committee investigators privately that he never informed senior officials at the Justice Department about gun-walking ... because he was unaware himself.”); House Committee on Oversight and Government Reform, Business Meeting (June 20, 2012) (Rep. Tierney: “There’s no reason why ... Mr. Melson shouldn’t be allowed to testify about who knew what, when and where.”); House Committee on Oversight and Government Reform, Business Meeting (June 20, 2012) (Rep. Welch: “I would say the willful decision to ignore where the facts lead. That’s where they come in play. We have never asked Ken Melson, the former head of the ATF, who was part of this decision—we have never asked him to come before this committee.”); House Committee on Oversight and Government Reform, Business Meeting (June 20, 2012) (Rep. Yarmouth: “We’ve talked about the Melson testimony. Well, the Melson testimony, or lack of it in front of the public, we think is a very important element of this entire issue.”); House Committee on Oversight and Government Reform, Business Meeting (June 20, 2012) (Rep. Maloney: “the chairman has refused requests, including requests today, to hold a public hearing with Mr. Kenneth Melson.”); House Committee on Oversight and Government Reform, Business Meeting (June 20, 2012) (Rep. Eleanor Holmes Norton: “Now my difficulty with the failure to call Mr. Melson so that we could hear from him publicly, with the failure to call the Attorney General is that if we are interested in getting to the bottom of why Brian Terry was murdered, we cannot allow only a partial story to come forward.”).



It appears that the Chairman is protecting ATF leaders from our inquiry and refusing to allow Committee Members to ask direct questions about these operations. Although the Chairman may want to ignore ATF leaders and focus all of his attention on the Attorney General, in my opinion ATF's actions during these operations were fundamentally flawed, and the Committee's investigation will not be viewed as legitimate or credible without their public testimony.

### **The Committee's Refusal to Call Former Attorney General Mukasey to Testify**

Another significant failure of the Committee's investigation has been the Chairman's refusal of multiple requests for former Attorney General Michael Mukasey to testify before the Committee—or even to meet with Committee Members informally—to discuss the origination and evolution of gunwalking operations since 2006.<sup>9</sup>

Documents obtained during the investigation indicate that Mr. Mukasey was briefed personally on botched efforts to coordinate firearm interdictions with Mexican law enforcement officials in 2007 and was informed directly that such efforts would be expanded during his tenure.

A November 16, 2007, memorandum to Attorney General Michael Mukasey that was intended to prepare him for a meeting with Mexican Attorney General Medina Mora described the investigation of Fidel Hernandez as “the first ever attempt to have a controlled delivery of weapons being smuggled into Mexico by a major arms trafficker.” The memorandum warned the Attorney General that “the first attempts at this controlled delivery have not been successful.” Despite these failures, the memorandum sought to expand such operations in the future:

ATF would like to expand the possibility of such joint investigations and controlled deliveries—since only then will it be possible to investigate an entire smuggling network, rather than arresting simply a single smuggler.<sup>10</sup>

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<sup>9</sup> *The Daily Rundown*, MSNBC (Nov. 3, 2010) (online at <http://videocafe.crooksandliars.com/david/darrell-issa-obama-must-answer-several-hundr>); Letter from Rep. Elijah E. Cummings, Ranking Member, House Committee on Oversight and Government Reform, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (June 5, 2012); Letter from Rep. Elijah E. Cummings, Ranking Member, House Committee on Oversight and Government Reform, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (Feb. 2, 2012); Letter from Rep. Elijah E. Cummings, Ranking Member, House Committee on Oversight and Government Reform, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (Nov. 4, 2011).

<sup>10</sup> Department of Justice, *Meeting of the Attorney General with Mexican Attorney General Medina Mora* (Nov. 16, 2007).

Ten days after Attorney General Mukasey was notified about the failed surveillance operations and was asked to expand the use of the cross-border gun operations, ATF agents planned another surveillance operation in coordination with Mexico in the Hernandez investigation. The Committee has not received any evidence indicating that ATF-Phoenix agents were ever able to successfully coordinate with Mexican law enforcement to interdict firearms during the Hernandez investigation.<sup>11</sup>

The Committee has more documentary evidence of former Attorney General Mukasey's direct involvement in these operations than Attorney General Holder's. Although Attorney General Holder has testified nine times before Congress on this matter, the Chairman has refused to bring former Attorney General Mukasey before the Committee even once.

### **The Committee's Record of Unsubstantiated Claims**

The Committee's investigation has also been characterized by a series of unsubstantiated allegations against the Obama Administration that have turned out to be inaccurate.

For example, despite the Chairman's repeated assertions over the past year that knowledge of gunwalking "went all the way to the White House," the Chairman was forced to admit last weekend during an appearance on Fox News Sunday that the Committee has obtained no evidence that White House officials authorized or approved of gunwalking.<sup>12</sup>

Similarly, contrary to the Chairman's repeated assertions that the approval of gunwalking went "all the way to the very top" of the Justice Department, the Committee has obtained no evidence that the Attorney General authorized, approved of, condoned, or was even aware of gunwalking.<sup>13</sup>

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<sup>11</sup> Minority Staff, House Committee on Oversight and Government Reform, *Fatally Flawed: Five Years of Gunwalking in Arizona* (Jan. 2012) (online at [http://democrats.oversight.house.gov/index.php?option=com\\_content&task=view&id=5575&Itemid=104](http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5575&Itemid=104)).

<sup>12</sup> *Special Report*, Fox News (Sept. 13, 2011) (online at [www.youtube.com/watch?v=nUYvVysN3Bo](http://www.youtube.com/watch?v=nUYvVysN3Bo)); *Fox News Sunday*, Fox News (June 24, 2012) (online at [www.foxnews.com/on-air/fox-news-sunday/2012/06/24/rep-issa-rep-cummings-debate-holder-contempt-congress-vote](http://www.foxnews.com/on-air/fox-news-sunday/2012/06/24/rep-issa-rep-cummings-debate-holder-contempt-congress-vote)).

<sup>13</sup> The Roger Hedgecock Show (Apr. 25, 2011) (online at [www.youtube.com/watch?v=alk\\_hbX30k4](http://www.youtube.com/watch?v=alk_hbX30k4)); see also *America Live*, Fox News (June 14, 2011) (online at [www.youtube.com/watch?feature=player\\_embedded&v=cn2gKvEXfOE#!](http://www.youtube.com/watch?feature=player_embedded&v=cn2gKvEXfOE#!)). Minority Staff, House Committee on Oversight and Government Reform, *Fatally Flawed: Five Years of Gunwalking in Arizona* (Jan. 2012) (online at [http://democrats.oversight.house.gov/index.php?option=com\\_content&task=view&id=5575&Itemid=104](http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5575&Itemid=104)).

In another instance, the Chairman appeared on national television on October 16, 2011, and accused the Federal Bureau of Investigation (FBI) of concealing evidence of the murder of Agent Brian Terry by hiding a “third gun” found at the murder scene. The FBI demonstrated quickly that there was no evidence behind this claim, and the Chairman conceded that “we do go down blind alleys regularly.”<sup>14</sup>

The Chairman has also promoted an offensive conspiracy theory that the Obama Administration intentionally designed Operation Fast and Furious to promote gunwalking. He stated in December 2011 that, “very clearly, they made a crisis, and they’re using this crisis to somehow take away or limit people’s Second Amendment rights.” Despite repeating this baseless claim again last weekend, there is no evidence to support it.<sup>15</sup>

To the contrary, Operation Fast and Furious was in fact the fourth in a series of gunwalking operations run by ATF’s Phoenix field division over a span of five years beginning in 2006. Three prior operations—Operation Wide Receiver (2006-2007), the Hernandez case (2007), and the Medrano case (2008)—occurred during the Bush Administration, and all four operations were overseen by the same ATF Special Agent in Charge in Phoenix.<sup>16</sup>

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<sup>14</sup> *Face the Nation*, CBS News (Oct. 16, 2011) (online at [www.cbsnews.com/stories/2011/10/16/ftn/main20121072.shtml](http://www.cbsnews.com/stories/2011/10/16/ftn/main20121072.shtml)); *Justice Department Accuses Issa of “Mischaracterizing” Evidence in Probe of Operation Fast and Furious*, Fox News (Oct. 17, 2011) (online at [www.foxnews.com/politics/2011/10/17/justice-department-accuses-issa-mischaracterizing-evidence-in-probe-operation](http://www.foxnews.com/politics/2011/10/17/justice-department-accuses-issa-mischaracterizing-evidence-in-probe-operation)); House Committee on Oversight and Government Reform, *Hearing on Operation Fast and Furious: Management Failures at the Department of Justice* (Feb. 2, 2012).

<sup>15</sup> *Hannity*, Fox News (Dec. 8, 2011) (online at <http://video.foxnews.com/v/1317212270001/holder-on-the-hot-seat-over-fast--furious>). See also *The Rush Limbaugh Show* (June 20, 2011) (online at [www.rushlimbaugh.com/daily/2011/06/20/on\\_the\\_cutting\\_edge\\_we\\_covered\\_the\\_fast\\_and\\_furious\\_story\\_in\\_march](http://www.rushlimbaugh.com/daily/2011/06/20/on_the_cutting_edge_we_covered_the_fast_and_furious_story_in_march)). *This Week*, ABC News (June 24, 2012) (online at [abcnews.go.com/Politics/week-transcript-rep-darrell-issa/story?id=16611079&singlePage=true](http://abcnews.go.com/Politics/week-transcript-rep-darrell-issa/story?id=16611079&singlePage=true)); Minority Staff, House Committee on Oversight and Government Reform, *Fatally Flawed: Five Years of Gunwalking in Arizona* (Jan. 2012) (online at [http://democrats.oversight.house.gov/index.php?option=com\\_content&task=view&id=5575&Itemid=104](http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5575&Itemid=104)).

<sup>16</sup> Minority Staff, House Committee on Oversight and Government Reform, *Fatally Flawed: Five Years of Gunwalking in Arizona* (Jan. 2012) (online at [http://democrats.oversight.house.gov/index.php?option=com\\_content&task=view&id=5575&Itemid=104](http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5575&Itemid=104)).

Although the Attorney General is willing to continue providing additional documents the Committee seeks, he has asked for a good faith commitment to work towards resolving the contempt dispute—a commitment our Chairman is unwilling to provide.

### Conclusion

Yesterday afternoon, the Administration offered once again to attempt to reach an accommodation with the Committee. In a good faith gesture, they showed our staffs additional internal emails that remain at issue in this contempt dispute, including documents that were not covered by the Committee's subpoena.

These documents are entirely consistent with what we have learned to date: the Attorney General was not aware of gunwalking in Operation Fast and Furious; he took swift action to investigate internally when he found out; and ATF leaders provided inaccurate information as the Department prepared its responses to Congress.

I strongly believe that this contempt dispute can be resolved if you and the Attorney General are committed to doing so. In 2007, House leaders negotiated for more than six months before they brought a resolution to the House floor to hold former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten in contempt. Surely, under your leadership, the House of Representatives can devote more than one week to fulfilling our Constitutional responsibilities.

Sincerely,



Elijah E. Cummings  
Ranking Member

Attachment

cc: The Honorable Nancy Pelosi  
Democratic Leader

The Honorable Darrell E. Issa  
Chairman, Committee on Oversight and Government Reform