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Congress of the United States

House of Representatives

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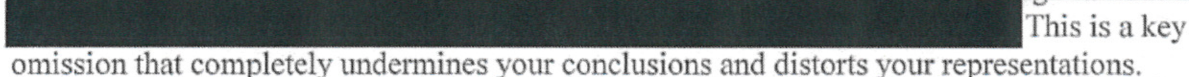
June 5, 2012

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

Dear Mr. Chairman:

I am in receipt of your letters dated May 24, May 30, and June 1, 2012, forwarding copies of six wiretap applications and orders relating to Operation Fast and Furious, all of which are currently under seal by a federal district court in Arizona. After a detailed review, I am concerned that your letters mischaracterize the contents and significance of these documents.

First, your letters omit the critical fact that  This is a key omission that completely undermines your conclusions and distorts your representations.

Second, the undisputed record before our Committee is that senior Department officials did not see these wiretap applications, but that summaries prepared by line attorneys in the Office of Enforcement Operations (OEO) were reviewed by deputy assistant attorneys general. Based on witness statements before our Committee, this was the historical practice of both Democratic and Republican administrations. Without any information to contradict this record, it is inaccurate to assert that senior Department officials were aware of the detailed contents of these wiretap applications.

Third, many of the broad accusations in your letters seem to assume that OEO line attorneys should have had greater knowledge about actions that were occurring on the ground in Arizona. Unlike our Committee, OEO line attorneys did not have the benefit of subsequent interviews, hearings, and documents obtained over the course of a year-long investigation. It is unfair to impute this knowledge to OEO line attorneys, who were charged with determining whether applications were legally sufficient to approve a wire.

I appreciate the recognition in your letters and statements to me that the information in the wiretap applications is protected from disclosure by a federal criminal statute, is currently sealed by a federal district court, and could potentially jeopardize ongoing criminal investigations and prosecutions if released. For these reasons, I request that we take two steps relating to these wiretap applications: (1) that we meet with Justice Department officials to obtain their views on how the potential disclosure of information in the wiretap applications could affect ongoing criminal investigations and prosecutions; and (2) that we consult with the federal district court judge who placed these documents under seal to understand the scope of her orders.

Finally, if one of the goals of the Committee's investigation is to make truly bipartisan legislative changes to the federal wiretap application statute, we must first consult with officials from the previous Administration. As discussed above, the record before the Committee is that the current administration employed the same process to review wiretap applications as the previous administration. In addition, since we now know that gunwalking began under the previous administration, understanding the historical scope of these activities and gaining the perspective of former senior officials will better inform our legislative efforts.

I. YOUR LETTERS OMIT CRITICAL FACTS THAT UNDERMINE YOUR CONCLUSIONS

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[1]

II. SENIOR OFFICIALS DID NOT REVIEW WIRETAP APPLICATIONS

The undisputed record before our Committee is that senior Department officials did not see these wiretap applications, but that summaries prepared by OEO line attorneys were reviewed by deputy assistant attorneys general. Based on testimony before our Committee, this was the historical practice of both Democratic and Republican administrations.

Despite the claims in your letters, nothing in the wiretap applications contradicts the statements by the Attorney General, Assistant Attorney General Lanny Breuer, and Deputy Assistant Attorney General Jason Weinstein that they were unaware of the controversial tactics used in Operation Fast and Furious and that they never authorized the use of gunwalking.

In his transcribed interview with Committee staff, Mr. Weinstein explained that he followed the practice of previous administrations by reviewing summaries of wiretap applications prepared by OEO line attorneys:

> If the Office of Enforcement Operations decides that the wiretap is legally sufficient and meets the statutory requirements, they will prepare a summary memo of the affidavit for higher level review. And they will send the memo and the supporting documentation to our front office where it will be assigned to whichever deputy AG is next available, with the goal of getting these reviewed as efficiently as possible. There are thousands of wiretaps every year. We want to get them reviewed and out to the field if they're approved so they can be used.[2]

Mr. Weinstein also explained that summary memos include limited information necessary to make legal determinations related to the grant of wiretap applications:

> Weinstein: [T]he memos provide just the information that we need to be able to make that legal determination.
>
> Counsel: And what is the, again, the information that you need in order to make the legal determination?
>
> Weinstein: Primarily it's that the phone that is the subject of the proposed wiretap is actually being used in connection with the commission of a crime. … And so the information that is presented to me in the memo is there will be some examples. There might be 30 dirty calls in the affidavit. They'll present two or three as illustrations to me in the memo to demonstrate that. I don't need 30, I just legally need one. So they'll present 2 or 3

[2] House Committee on Oversight and Government Reform, Transcribed Interview of Jason Weinstein, Deputy Assistant Attorney General (Jan. 10, 2012).

illustrative examples of the dirty calls.[3]

Mr. Weinstein also explained why the current and former administrations relied on these summaries:

> In my view, the practice that, as I said has been consistent across administrations of having DAGs primarily rely on the summary memos, provides the information you need to be able to review the wire effectively and make the legal determination we have to make, but to do so efficiently so that we can process these and review them and, if appropriate, approve them as efficiently as possible so they can get back out to the field and they can be used to catch more bad guys.[4]

Mr. Weinstein stated that he reviewed wiretap applications only when summary memos were unclear or when questions remained about the legal determination:

> [M]y practice in every case, in every wiretap I reviewed since I came on the job, is to review the summary memo. And I can probably count on one hand the number of times when there's been something in the memo that was poorly written, that left me confused about the meaning of a dirty call or a legal issue that caused me to have to go to the affidavit.[5]

Mr. Weinstein also stated that he would have raised objections if he had seen anything in the summary memos that was cause for concern:

> [I]f I see something in a summary memo that suggests to me that there are inappropriate tactics being used, whether it is a gun case, or a human smuggling case, or a human trafficking case, then that is something that I would raise an alarm about.[6]

In his interview with Committee staff, Mr. Weinstein stated explicitly that he was unaware that gunwalking occurred in Operation Fast and Furious:

> I did not know at any time during the investigation of Fast and Furious that guns had walked during that investigation. I first heard of possible gunwalking in Fast and Furious when the whistleblower allegations were made public in early 2011.[7]

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

> Had I known about gunwalking in Fast and Furious before the allegations became public, I would have sounded the alarm about it.[7]

III. UNFAIR TO IMPUTE GREATER KNOWLEDGE TO LINE ATTORNEYS

Many of the broad accusations in your letters seem to assume that OEO line attorneys should have had greater knowledge about actions that were occurring on the ground in Arizona. Unlike our Committee, OEO line attorneys did not have the benefit of subsequent interviews, hearings, and documents obtained over the course of a year-long investigation. It is unfair to impute this knowledge to OEO line attorneys, who were charged with determining whether applications were legally sufficient to approve a wire.

During a hearing on November 1, 2011, Assistant Attorney General Lanny Breuer testified that OEO line attorneys are charged with determining whether wiretap applications meet the legal standard for intruding on someone's privacy to monitor their phone calls:

> If I may, Senator, for a moment, I would like to explain what that role is if you would permit me. The Congress made clear in law that wiretaps on telephones are an extraordinarily intrusive technique. They're a technique that I support fully, and that I think are essential in fighting organized crime and transnational organized crime. And they're why, Senator, in my 2.5 years, I have over tripled the number of reviewers who do it.
>
> But as Congress made clear, the role of the reviewers and the role of the deputy in reviewing Title Three applications is only one. It is to insure that there is legal sufficiency to make an application to go up on a wire, and legal sufficiency to petition a federal judge somewhere in the United States that we believe it is a credible request.
>
> But we cannot—those now 22 lawyers that I have who review this in Washington—and it used to only be seven—cannot and should not replace their judgment, nor can they, with the thousands of prosecutors and agents all over the country.
>
> Theirs is a legal analysis: is there a sufficient basis to make this request? We must and have to rely on the prosecutors and their supervisors and the agents and

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[7] *Id.*

> their supervisors all over the country to determine that the tactics that are used are appropriate.[8]

As Deputy Assistant Attorney General Weinstein stated during his transcribed interview with Committee staff:

> Wiretap affidavits routinely make clear that they are presenting only the limited amount of information necessary to allow the reviewer, and ultimately the judge who ultimately makes these decisions, to determine that the phone is being used unlawfully and that a wiretap is appropriate.[9]

Mr. Weinstein also explained that this limited information would make it difficult for OEO attorneys to evaluate the strategic decisions of prosecutors in particular cases:

> There are often entire phases of an investigation that are not addressed in a wiretap affidavit at all because they don't relate to the use of this phone by the criminals that are identified in the affidavit. So we're just not in a position, nor is it our role since we don't—but we're just not in a position from the limited amount of information in a wiretap to know everything that we would need to know about the conduct of the case to be able to review it appropriately.
>
> That is, and should be, fundamentally the job of the supervisory chain in the U.S. attorney's office that is actually prosecuting the case, to be reviewing it and making sure it's being conducted in a way that we would all consider to be appropriate.[10]

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[8] Testimony of Lanny Breuer, Assistant Attorney General, Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism, *Hearing on Combating International Organized Crime: Evaluating Current Authorities, Tools, and Resources* (Nov. 1, 2011).

[9] House Committee on Oversight and Government Reform, Transcribed Interview of Jason Weinstein, Deputy Assistant Attorney General (Jan. 10, 2012).

[10] *Id.*

IV. CONSULTATIONS WITH EXECUTIVE AND JUDICIAL BRANCHES

The federal wiretapping statute, which was passed by Congress and signed by President Lyndon B. Johnson on June 19, 1968, provides for a penalty of up to five years in prison for the unauthorized disclosure of wiretap communications.[11] The statute also prohibits the unauthorized disclosure of wiretap applications made by law enforcement officials to federal judges, who must seal them to protect against their disclosure. The statute states:

> Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction. ... Applications made and orders granted under this chapter shall be sealed by the judge.[12]

Over the course of this investigation, the Department of Justice has clearly warned the Committee about the sensitivity of wiretap applications. On June 14, 2011, the Department wrote:

> The Department has recognized the Committee's legitimate oversight interest in the genesis and strategy pertaining to Fast and Furious. Yet we also have recognized that the Committee's remarkable approach—holding public hearings and releasing documents related to an ongoing criminal investigation and pending criminal cases—could negatively impact our ability to successfully prosecute gun traffickers and violent criminals, and that your subpoena implicates our responsibilities, long recognized by Congress, not to disclose the names of cooperating witnesses, the identities of confidential informants, uncharged targets, the details of investigative techniques and other sensitive law enforcement information and to comply with legal requirements to maintain the secrecy of grand jury materials, sealed court information and other such records.[13]

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[11] Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968, June 19, 1968; 18 U.S.C. § 2511(4)(a) (providing that violators "shall be fined under this title or imprisoned not more than five years, or both"); and 18 U.S.C. §2511(1)(e) (covering any person who "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized" under this chapter).

[12] 18 U.S.C. § 2518(1), 2518(8).

[13] Letter from Ronald Weich, Assistant Attorney General for Legislative Affairs, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (June 14, 2011).

On February 1, 2012, Deputy Attorney General James Cole wrote to you explaining that, although the Department would continue to produce many of the documents demanded by the Committee, it was prohibited from producing wiretap applications or other documents relating to "matters occurring before a grand jury, investigative activities under seal or the disclosure of which is prohibited by law."[14]

On February 2, 2012, the Attorney General testified before the Committee that disclosing the wiretap applications would be "in direct violation of court orders." He stated: "There is a wide variety of things, information that we can share, but I'm not going to go against sealing orders by a court with regard to a wiretap application, and anybody who leaks that material or submits that material for people to examine does so at their peril."[15]

It is incumbent on the Committee to fully weigh the legal and prosecutorial implications of any possible disclosure of information from these documents or the contents within them. In order to determine the most responsible way to treat this information, I request that we take two steps relating to these wiretap applications: (1) that we meet with Justice Department officials to obtain their views on how the potential disclosure of information in the wiretap applications could affect ongoing criminal investigations and prosecutions; and (2) that we consult with the federal district court judge who placed these documents under seal to understand the scope of her orders.

V. BIPARTISAN REFORMS TO THE WIRETAP REVIEW PROCESS

If one of the goals of the Committee's investigation is to make truly bipartisan legislative changes to the federal wiretap application statute, I renew my request that the Committee consult with officials from the previous Administration. As discussed above, the record before the Committee is that the current administration employed the same process to review wiretap applications as the previous administration. In addition, since we now know that gunwalking began under the previous administration, understanding the historical scope of these activities and gaining the perspective of former senior officials will better inform our legislative efforts.

You have stated that one of the key legislative purposes of the Committee's investigation is to consider reforms to the federal wiretap approval process. For example, in your draft contempt citation, you wrote:

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[14] Letter from James Cole, Deputy Attorney General, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (Feb. 1, 2012).

[15] House Committee on Oversight and Government Reform, Testimony of Attorney General Eric H. Holder Jr., *Operation Fast and Furious: Management Failures at the Department of Justice*, 112th Cong. (Feb. 2, 2012) (H.Rept. 112-103).

> [T]he Committee's investigation has highlighted the need to obtain information that will aid Congress in considering whether reconsideration of the statutory provisions governing the approval of federal wiretap applications may be necessary.[16]

You have also stated that you intend to conduct this investigation in a bipartisan manner by examining the actions of officials in previous administrations as well as the current administration. On November 3, 2011, you stated:

> I'm going to be investigating a president of my own party because many of the issues we're working on began on President Bush or even before and haven't been solved.[17]

Based on this commitment, I wrote to you the next day, on November 4, 2011, requesting that the Committee hold a hearing with former Attorney General Michael Mukasey "in order to assist our efforts in understanding the inception and development of so-called 'gun-walking' operations over the past five years."[18] I also described several documents the Committee obtained showing that former Attorney General Mukasey had been briefed personally on botched efforts to coordinate firearms interdictions with Mexican officials in 2007.

After receiving no response for three months, I wrote to you again on February 2, 2012, reiterating my request for a hearing with former Attorney General Mukasey.[19] Earlier that day, Attorney General Holder testified for the sixth time regarding Operation Fast and Furious, and several Members expressed their desire to hear directly from former Attorney General Mukasey about three previous operations run by the Phoenix Field Division of ATF and the Arizona U.S. Attorney's Office dating back to 2006 involving hundreds of weapons. During the hearing, you committed again to a bipartisan approach, stating:

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[16] Draft Resolution of Contempt, House Committee on Oversight and Government Reform (May 3, 2012).

[17] MSNBC (Nov. 3, 2011) (online at http://videocafe.crooksandliars.com/david/darrell-issa-obama-must-answer-several-hundr).

[18] Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa (Nov. 4, 2011) (online at http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5508&Itemid=104).

[19] Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa (Feb. 2, 2012) (online at http://democrats.oversight.house.gov/index.php?option=com_content&view=article&id=5605:oversight-democrats-call-for-public-hearing-with-former-attorney-general-mukasey-on-gunwalking-operations&catid=3:press-releases&Itemid=49).

> We will attempt to glean that information. I don't know if it will be personally having somebody come, but we—we do intend to glean information from prior—prior administrations as to the level of coverage.[20]

To date, you have not held a hearing with former Attorney General Muksaey. Although I continue to believe such a hearing would benefit Committee Members, another alternative would be to conduct a series of meetings with Committee Members to hear directly from various current and former officials with the purpose of weighing possible consensus reforms to the wiretap review process. I request that these meetings begin with former Attorney General Mukasey, followed by other former officials, including:

- Michael Chertoff, who served in the Justice Department under both Democratic and Republican administrations before President George W. Bush appointed him to a seat on the United States Court of Appeals for the Third Circuit; and

- James B. Comey, who served as Deputy Attorney General during the Bush Administration and worked in several U.S. Attorney Offices during the Clinton Administration.

In addition, although Committee staff already conducted a transcribed interview of Jason Weinstein, the Deputy Assistant Attorney General who reviewed some of the wiretap applications in this process, we should also interview Kenneth Blanco, who was appointed Deputy Assistant Attorney General in April 2008 and reviewed other wiretap applications in this case, as well as Alice Fisher, who served as the Assistant Attorney General for the Criminal Division during Operation Wide Receiver.

I continue to hope that we can work together in a cooperative and bipartisan manner that does not compromise ongoing criminal investigations and prosecutions. Thank you for your consideration of this request.

Sincerely,

Elijah E. Cummings
Ranking Member

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[20] House Committee on Oversight and Government Reform, Hearing on Operation Fast and Furious (Feb. 2, 2012).