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September 30, 2013

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20520

Dear Mr. Attorney General:

On September 23, 2013, the Department of Justice sent a letter requesting that the Committee cancel its scheduled interview with Alec Henderson, a survivor of the September 11-12, 2012, attack on U.S. facilities in Benghazi, Libya.¹ The letter, as well as a second letter sent on September 27, 2013,² cited concerns about the Justice Department's ability to successfully prosecute the perpetrators of the Benghazi attack if the Committee interviews Henderson. During the three years of my chairmanship, the Department has raised similar concerns about the Committee's access to witnesses in the course of other investigations. In many instances, subsequent investigation revealed that the Department made false and misleading representations about relevant events and the readiness of witnesses to cooperate on a voluntary basis. In this case, at least two review panels have already interviewed Henderson. Considering the Executive Branch's unwillingness to suggest a reasonable accommodation to allow for constitutionally mandated congressional oversight of the Benghazi attack, and the State Department's record of obstruction in this investigation, I have instructed my staff to proceed with the interview.

The Justice Department raised a similar concern during the investigation of Operation Fast and Furious. It had no merit.

The Committee has investigated the Department of Justice's Operation Fast and Furious, a reckless gun-running sting that resulted in the death of a federal agent. During that investigation, the Department attempted, on multiple occasions, to prevent the Committee from interviewing witnesses that were instrumental in uncovering wrongdoing in an operation that you later acknowledged was "fundamentally flawed." On April 28, 2011, the Department wrote:

¹ Letter from Mr. Peter Kadzik, U.S. Dep't of Justice, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Sept. 23, 2013). [hereinafter Kadzik Sept. 23 Letter]

² Letter from Mr. Peter Kadzik, U.S. Dep't of Justice, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Sept. 27, 2013).

We have recently learned that Committee staff members are in the process of contacting . . . an important witness involved in our pending investigation regarding gun trafficking along the Southwest Border. This investigation, known as Fast and Furious, has resulted in the indictment to date of twenty individuals . . . and our investigation into this activity is continuing. On several occasions in the past, **we have expressed our concerns about the risks posed to the successful prosecution of the pending case and others that may flow from our investigation by the Committee's current efforts to interview witnesses and agents.**³

Several phone calls from the Department's Office of Legislative Affairs ensued. The Department contended that an interview with the witness would potentially compromise the Department's criminal investigation and would be a threat to the witness's safety. The Department never attempted to identify specifics about how this witness would be used in trial, and your staff further claimed that the witness did not want to speak with the Committee.

As the congressional investigation into Fast and Furious continued, however, it became clear that the Department's concerns were unfounded. Instead, it appeared that the Department intended to use them merely as a delay tactic, attempting to thwart the congressional investigation before serious misconduct was uncovered. The witness, who was in fact eager to speak with the Committee, provided crucial information that advanced the Committee's investigation and showed the Department had made a series of mistakes regarding Fast and Furious. Information gleaned from this witness was necessary to help expose publicly the reckless and negligent conduct of senior Department officials.

In the Benghazi investigation, the Department is making a similar argument. The Department's September 23, 2013, letter regarding the Committee's scheduled deposition of Alec Henderson stated:

We are in the midst of preparations for a federal criminal prosecution in order to bring justice to those responsible for this attack We expect that Mr. Henderson will be a key witness for the prosecution in criminal proceedings regarding the attack. **We request that the Committee defer its deposition or interview of Mr. Henderson at this time because it will compromise our ability to use him in our case and pose risks to the success of our prosecution.**⁴

This language mirrors the language that the Department used to attempt to convince the Committee not to speak with key Fast and Furious witnesses. Given the Committee's experience with respect to the Department's attempts to restrict access to witnesses during the pendency of the Fast and Furious investigation, I find it difficult to accept the Department's unsubstantiated assertions.

³ Letter from Hon. Ronald Weich, Ass't Att'y Gen., U.S. Dep't of Justice, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Apr. 28, 2011) (emphasis added).

⁴ Kadzik Sept. 23 Letter (emphasis added).

The Justice Department communicated its concerns more than five weeks after I requested to interview Alec Henderson and just days before Henderson's deposition was scheduled to occur.

On August 14, 2013, my staff contacted the State Department to arrange an interview with Alec Henderson, a first responder in Benghazi during the attack.⁵ The State Department refused to make him available for a voluntary transcribed interview. As a result, on September 19, I issued a subpoena to compel Henderson's testimony. The subpoena requires Henderson to appear for a deposition before the Committee.

By letter on September 23 -- more than five weeks after the Committee made its request to interview Henderson -- the Justice Department informed the Committee for the first time that it has a concern that Henderson's testimony might "compromise" the Department's prosecution of the perpetrators of the Benghazi attack. Had the Justice Department noted these concerns with the Committee sooner, or when other panels were interviewing Henderson, this would have helped alleviate the appearance of an effort to obstruct oversight. The last-minute nature of this letter, however, raises additional concerns that the Justice Department is attempting to assist the State Department's effort to obstruct and delay the Committee's investigation.

At least two panels that reviewed the Benghazi attack have interviewed Henderson.

Henderson has already given testimony to the Benghazi Accountability Review Board (ARB) -- testimony captured in detailed notes taken by ARB members and staff. Henderson has also met with the Independent Panel on Best Practices ("Best Practices Panel"), a panel created at the recommendation of the ARB to review security at U.S. diplomatic facilities around the world.⁶ It is unclear how the Department's concerns about Henderson meeting with the Committee would not also apply to Henderson's meetings with the ARB and the Best Practices Panel. The Justice Department did not prevent Henderson from testifying to the ARB and the Best Practices Panel, and the ARB did not have to issue a subpoena to compel his testimony.

The State Department is withholding documents that would shed light on Henderson's testimony to the Accountability Review Board.

In January 2013, the Committee requested documents related to the ARB, including the notes from Henderson's ARB interview. The State Department withheld Henderson's interview notes, along with all the other documents covered by that request. Eight months after my initial request, I issued a subpoena that compels the State Department to produce the notes from Henderson's interview, along with other documents created or reviewed by the ARB. The State Department refused to turn those documents over, as the subpoena requires, and instead offered to make them available to investigators *in camera*. The Justice Department's Office of Legislative Affairs also suggested that Committee investigators review the notes from

⁵ E-mail from [Committee Staff] to [State Dep't Counsel] (Aug. 14, 2013, 3:16 p.m.).

⁶ Report of the Independent Panel on Best Practices, at B-1.

Henderson's ARB interview. The offer to make these documents available *in camera*, however, was subsequently revoked. To date, neither the State Department nor the Justice Department has proposed any reasonable way to accommodate the law enforcement interest in this matter without completely subjugating the Committee's investigative prerogatives.

Attempts by the Justice Department to limit or restrict Henderson's testimony to Congress may violate federal statutes that prohibit interference with a congressional investigation.

It has also come to my attention that lawyers from the U.S. Attorney's Office will speak with Henderson in advance of his interview with the Committee to advise him as to what he should not say on the record. Any advice to Henderson that extends beyond a recommendation that he answer the Committee's questions completely and truthfully may run afoul of federal statutes that prohibit interference with congressional investigations⁷ and with the rights of federal employees to communicate with Congress.⁸ Furthermore, federal officials who retaliate against or otherwise interfere with employees who exercise their right to furnish information to Congress are not entitled to have their salaries paid by taxpayer dollars.⁹

I am disappointed that the Justice Department has adopted the State Department's posture towards the congressional investigation of the Benghazi attack. For more than one year, the

⁷ 18 U.S.C. § 1505 states, in pertinent part:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress--

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

⁸ 5 U.S.C. § 7211 states:

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

⁹ P.L. 111 -117 § 714 states:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who -

(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or

(2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, stats, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).

The Honorable Eric H. Holder, Jr.

September 30, 2013

Page 5

State Department has withheld documents and limited the Committee's access to witnesses. The Justice Department's eleventh-hour claim that its prosecution might be "compromised" in an attempt to prevent Henderson from testifying before Congress -- but not before the State Department's internal ARB or the independent Best Practices Panel -- raises serious questions about its commitment to a full and complete investigation of the Benghazi attack. The Justice Department's intervention raises additional questions about what the two departments are trying to keep hidden from the public.

The State Department has repeatedly denied the Committee access to documents and witnesses to the attack, instead pointing to the ARB Report as the final word on Benghazi. Without a full and independent review of the full body of evidence, it is impossible for Congress to determine what should be done to prevent similar tragedies in the future. Information about the attack -- information that only eyewitnesses can provide -- is critical to answer the many remaining questions about the attack and to identify ways to strengthen security at U.S. facilities around the world. While the State Department has repeatedly denied the Committee access to relevant witnesses, a series of news stories and books have cited eyewitness accounts.

After carefully considering your stated concerns, I have determined that the Department has not offered a persuasive argument that the Committee should stop or further delay its efforts to speak with Alec Henderson. The Committee will continue to work with the Justice Department to address legitimate concerns about the prosecution of those responsible for the Benghazi attack.

Sincerely,



Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member