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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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June 25, 2012

The President  
The White House  
Washington, D.C. 20500

Dear Mr. President:

On June 19, 2012, shortly after leaving a meeting in the U.S. Capitol, Attorney General Eric Holder wrote to request that you assert executive privilege with respect to Operation Fast and Furious documents he is withholding from this Committee. The next day, Deputy Attorney General James Cole notified me in a letter that you had invoked executive privilege. The Committee received both letters minutes before the scheduled start of a vote to recommend that the full House hold the Attorney General in contempt of Congress for refusing to comply with its subpoena.

Courts have consistently held that the assertion of the constitutionally-based executive privilege — the only privilege that ever can justify the withholding of documents from a congressional committee by the Executive Branch — is only applicable with respect to documents and communications that implicate the confidentiality of the President's decision-making process, defined as those documents and communications to and from the President and his most senior advisors. Even then, it is a qualified privilege that is overcome by a showing of the committee's need for the documents. The letters from Messrs. Holder and Cole cited no case law to the contrary.

Accordingly, your privilege assertion means one of two things. Either you or your most senior advisors were involved in managing Operation Fast & Furious and the fallout from it, including the false February 4, 2011 letter provided by the Attorney General to the Committee, or, you are asserting a Presidential power that you know to be unjustified solely for the purpose of further obstructing a congressional investigation. To date, the White House has steadfastly maintained that it has not had any role in advising the Department with respect to the congressional investigation. The surprising assertion of executive privilege raised the question of whether that is still the case.

As you know, the Committee voted to recommend that the full House hold Attorney General Holder in contempt of Congress for his continued refusal to produce relevant documents in the investigation of Operation Fast and Furious. Last week's proceeding would not have occurred had the Attorney General actually produced the subpoenaed documents he said he could provide. The House of Representatives is scheduled to vote on the contempt resolution this week. I remain hopeful that the Attorney General will produce the specified documents so that we can work towards resolving this matter short of a contempt citation. Furthermore, I am hopeful that, consistent with assertions of executive privilege by previous Administrations, you will define the universe of documents over which you asserted executive privilege and provide the Committee with the legal justification from the Justice Department's Office of Legal Counsel (OLC).

### ***Background***

U.S. Border Patrol Agent Brian Terry was killed in a firefight with a group of armed Mexican bandits who preyed on illegal immigrants in a canyon west of Rio Rico, Arizona on December 14, 2010. Two guns traced to Operation Fast and Furious were found at the murder scene. The Terry family appeared before the Committee on June 15, 2011, to ask for answers about the program that put guns in the hands of the men who killed their son and brother. Having been stonewalled for months by the Attorney General and his senior staff, the Committee issued a subpoena for documents that would provide the Terry family the answers they seek. The subpoena was served on October 12, 2011.

Internally, over the course of the next eight months, the Justice Department identified 140,000 pages of documents and communications responsive to the Committee's subpoena. Yet, the Department handed over only 7,600 of these pages. Through a series of accommodations and in recognition of certain Executive Branch and law enforcement prerogatives, the Committee prioritized key documents the Department needed to produce to avoid contempt proceedings. These key documents would help the Committee understand how and why the Justice Department moved from denying whistleblower allegations to understanding they were true; the identities of officials who attempted to retaliate against whistleblowers; the reactions of senior Department officials when confronted with evidence of gunwalking during Fast and Furious, including whether they were surprised or already aware of the use of this reckless tactic, and; whether senior Department officials are being held to the same standard as lower-level employees who have been blamed for Fast and Furious by their politically-appointed bosses in Washington.

I met with Attorney General Holder on June 19, 2012, to attempt to resolve this matter in advance of the Committee's scheduled contempt vote. We were joined by Ranking Member Elijah Cummings and Senators Patrick Leahy and Charles Grassley, respectively the Chairman and Ranking Member of the Senate Committee on the Judiciary. The Department had previously identified a small subset of documents created after February 4, 2011 — the date of its letter containing the false claim that no gunwalking had occurred — that it would make available to the Committee. The Justice Department described this small subset as a "fair compilation" of the full universe of post-February 4th documents responsive to the subpoena.

During the June 19th meeting, the Attorney General stated he wanted to “buy peace.” He indicated a willingness to produce the “fair compilation” of post-February 4th documents. He told me that he would provide the “fair compilation” of documents on three conditions: (1) that I permanently cancel the contempt vote; (2) that I agree the Department was in full compliance with the Committee’s subpoenas, and; (3) that I accept the “fair compilation,” sight unseen.

As Chairman of the primary investigative Committee of the U.S. House of Representatives, I considered the Attorney General’s conditions unacceptable, as would have my predecessors from both sides of the aisle. I simply requested that the Department produce the “fair compilation” in advance of the contempt vote, with the understanding that I would postpone the vote to allow the Committee to review the documents.

The short meeting in the Capitol lasted about twenty minutes. The Attorney General left the meeting and, shortly thereafter, sent an eight-page letter containing more than forty citations requesting that you assert executive privilege. The following morning, the Deputy Attorney General informed me that you had taken the extraordinary step of asserting the privilege that is designed to protect presidential decision making.

In his letter, the Attorney General stated that releasing the documents covered by the subpoena, some of which he offered to the Committee hours earlier, would have “significant, damaging consequences.”<sup>1</sup> It remains unclear how — in a matter of hours — the Attorney General moved from offering those documents in exchange for canceling the contempt vote and ending the congressional investigation to claiming that they are covered by executive privilege and that releasing them — which the Attorney General was prepared to do hours earlier — would now result in “significant, damaging consequences.”

### ***The Scope of Executive Privilege***

Deputy Attorney General Cole’s representation that “the President has asserted executive privilege over the relevant post-February 4, 2011, documents” raised concerns that there was greater White House involvement in Operation Fast and Furious than previously thought.<sup>2</sup> The courts have never considered executive privilege to extend to internal Executive Branch deliberative documents.

Absent from the Attorney General’s eight-page letter were the controlling authorities from the U.S. Court of Appeals for the District of Columbia. As the court held in the seminal case of *In re Sealed Case (Espy)*:

The privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant

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<sup>1</sup> Letter from U.S. Att’y Gen. Eric H. Holder, Jr. to the President (June 19, 2012), at 2.

<sup>2</sup> Letter from Deputy U.S. Att’y Gen. James Cole to Chairman Issa (June 20, 2012).



responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.<sup>3</sup>

The D.C. Circuit established the “operational proximity test” to determine which communications are subject to privilege. *Espy* made clear that it is “operational proximity to the President that matters in determining whether the president’s confidentiality interest is implicated.”<sup>4</sup>

In addition, even if the presidential communications privilege did apply to some of these subpoenaed documents, *Espy* made clear that “the presidential communications privilege is, at all times, a qualified one,” and that a showing of need could overcome it.<sup>5</sup> Such a need — indeed a compelling one — plainly exists in this case.

The Justice Department has steadfastly maintained that the documents sought by the Committee do not implicate the White House whatsoever. If true, they are at best deliberative documents between and among Department personnel who lack the requisite “operational proximity” to the President. As such, they cannot be withheld pursuant to the constitutionally-based executive privilege. Courts distinguish between the presidential communications privilege and the deliberative process privilege. Both, the *Espy* court observed, are executive privileges designed to protect the confidentiality of Executive Branch decision-making. The deliberative-process privilege, however, which applies to executive branch officials generally, is a common law privilege that requires a lower threshold of need to be overcome, and “disappears altogether when there is any reason to believe government misconduct has occurred.”<sup>6</sup>

The Committee must assume that the White House Counsel’s Office is fully aware of the prevailing authorities of *Espy*, discussed above, and *Judicial Watch v. Dep’t of Justice*.<sup>7</sup> If the invocation of executive privilege was proper, it calls into question a number of public statements about the involvement of the White House made by you, your staff, and the Attorney General.

Finally, the Attorney General’s letter to you cited numerous authorities from prior Administrations of both parties. It is important to note that the OLC opinions provided as authorities to justify expansive views of executive privilege are inconsistent with existing case law.

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<sup>3</sup> *In re Sealed Case* (*Espy*), 121 F.3d 729 (D.C. Cir. 1997).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Congressional Research Service, Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments (Aug. 21, 2008).

<sup>7</sup> 365 F.3d 1108 (D.C. Cir. 2004) (holding that presidential communications privilege only applied to documents “solicited and received” by the President or his immediate advisers).

***Remarks about White House Involvement in Fast and Furious***

For the past sixteen months, Senator Grassley and I have been investigating Operation Fast and Furious. In response to a question about the operation during an interview with Univision on March 22, 2011, you stated that, “Well first of all, I did not authorize it. Eric Holder, the Attorney General, did not authorize it.”<sup>8</sup> You also stated that you were “absolutely not” informed about Operation Fast and Furious.<sup>9</sup> Later in the interview, you said that “there may be a situation here in which a serious mistake was made and if that’s the case then we’ll find out and we’ll hold somebody accountable.”<sup>10</sup>

From the early stages of the investigation, the White House has maintained that no White House personnel knew anything about Operation Fast and Furious. Your assertion of executive privilege, however, renews questions about White House involvement.

White House Press Secretary Jay Carney emphasized your denial that you knew about Fast and Furious. Mr. Carney stated, “I can tell you that, as the president has already said, he did not know about or authorize this operation.”<sup>11</sup> A few weeks later, Mr. Carney reiterated the point, stating, “I think he made clear . . . during the Mexican state visit and the press conference he had then that he found out about this through news reports. And he takes it very seriously.”<sup>12</sup>

In an October 6, 2011 news conference, you maintained that Attorney General Holder “indicated that he was not aware of what was happening in Fast and Furious.”<sup>13</sup> Regarding your own awareness, you went on to state, “Certainly I was not. And I think both he and I would have been very unhappy if somebody had suggested that guns were allowed to pass through that could have been prevented by the United States of America.”<sup>14</sup>

On March 28, 2012, Senator Grassley and I wrote to Kathryn Ruemmler, who serves as your Counsel, to request that she grant our numerous requests to interview Kevin O’Reilly, a member of the White House National Security Staff. We needed Mr. O’Reilly’s testimony to ascertain the extent of White House involvement in Operation Fast and Furious. In her response, Ms. Ruemmler advised us that the e-mail communications between Mr. O’Reilly and William Newell, the Special Agent in Charge of ATF’s Phoenix Field Division, did not reveal “the existence of any of the inappropriate investigative tactics at issue in your inquiry, let alone any decision to allow guns to ‘walk.’”<sup>15</sup> She further emphasized “the absence of any evidence that suggests that Mr. O’Reilly had any involvement in ‘Operation Fast and Furious’ or was aware of

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<sup>8</sup> Interview by Jorge Ramos, Univision, with President Barack Obama, San Salvador, El Salvador (Mar. 22, 2011).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> The White House, Office of the Press Secretary, Press Briefing by Press Secretary Jay Carney (June 17, 2011).

<sup>12</sup> The White House, Office of the Press Secretary, Press Briefing by Press Secretary Jay Carney (July 5, 2011).

<sup>13</sup> Richard Serrano, *Obama Defends Attorney General: Holder Faces Scrutiny over ATF's Fast and Furious Gun Operation*, CHARLOTTE OBSERVER, Oct. 7, 2011.

<sup>14</sup> *Id.*

<sup>15</sup> Letter from Hon. Kathryn Ruemmler, Counsel to the President, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, & Sen. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary (Apr. 5, 2012).

the existence of any inappropriate investigative tactics.”<sup>16</sup> Your assertion of executive privilege renews concerns about these denials.

Earlier this month, when House Judiciary Committee Chairman Lamar Smith asked the Attorney General when the Justice Department first informed the White House about the questionable tactics used in Fast and Furious, he responded, “I don’t know.”<sup>17</sup> He informed Chairman Smith that his focus was on “dealing with the problems associated with Fast and Furious,” and that he was “not awfully concerned about what the knowledge was in the White House.”<sup>18</sup>

Attorney General Holder has assured the public that he takes this matter very seriously, stating that “to the extent we find that mistakes occurred, people will be held accountable.”<sup>19</sup> Yet, he has described the Committee’s vote as “an election-year tactic.”<sup>20</sup> Nothing could be further from the truth. This statement not only betrays a total lack of understanding of our investigation, it exemplifies the stonewalling we have consistently faced in attempting to work with the Justice Department. If the Attorney General had produced the responsive documents more than eight months ago when they were due, or at any time since then, we would not be where we are today.

### ***Moving Forward***

At the heart of the congressional investigation into Operation Fast and Furious are disastrous consequences: a murdered Border Patrol Agent, his grieving family, countless deaths in Mexico, and the souring effect on our relationship with Mexico. Members of the Committee from both sides of the aisle agree that the Terry family deserves answers. So, too, do Agent Terry’s brothers-in-arms in the border patrol, the Mexican government, and the American people. Unfortunately, your assertion of executive privilege raises more questions than it answers. The Attorney General’s conditional offer of a “fair compilation” of a subset of documents covered by the subpoena, and your assertion of executive privilege, in no way substitute for the fact that the Justice Department is still grossly deficient in its compliance with the Committee’s subpoena. By the Department’s own admission, it has withheld more than 130,000 pages of responsive documents.

I still believe that a settlement, rendering further contempt of Congress proceedings unnecessary, is in the best interests of the Justice Department, Congress, and those most directly affected by Operation Fast and Furious. In light of the settled law that confines the constitutionally-based executive privilege to high-level White House communications, I urge

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<sup>16</sup> *Id.*

<sup>17</sup> *Oversight of the U.S. Dep’t of Justice: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. (June 7, 2012) (Test. of U.S. Att’y Gen. Eric H. Holder, Jr.).

<sup>18</sup> *Id.*

<sup>19</sup> Mike Levine, *Guns Groups To Sue over New Obama Regulations, DOJ Vows To “Vigorously Oppose,”* FOXNEWS.COM, Aug. 3, 2011, <http://www.foxnews.com/politics/2011/08/03/guns-groups-to-sue-over-new-obama-regulations-doj-vows-to-vigorously-oppose/#ixzz1yRMujaLY>.

<sup>20</sup> *Congress Contempt Charge for U.S. Attorney General Holder*, BBC NEWS, June 21, 2012, <http://www.bbc.co.uk/news/world-us-canada-18528798>.

you to reconsider the decision to withhold documents that would allow Congress to complete its investigation.

In the meantime, so that the Committee and the public can better understand your role, and the role of your most senior advisors, in connection with Operation Fast and Furious, please clarify the question raised by your assertion of executive privilege: To what extent were you or your most senior advisors involved in Operation Fast and Furious and the fallout from it, including the false February 4, 2011 letter provided by the Attorney General to the Committee? Please also identify any communications, meetings, and teleconferences between the White House and the Justice Department between February 4, 2011 and June 18, 2012, the day before the Attorney General requested that you assert executive privilege.

I appreciate your prompt attention to this important matter.

Sincerely,



Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member  
Committee on Oversight and Government Reform  
U.S. House of Representatives

Senator Charles E. Grassley, Ranking Member  
Committee on the Judiciary  
U.S. Senate

Senator Patrick Leahy, Chairman  
Committee on the Judiciary  
U.S. Senate

The Honorable Kathryn Ruemmler, Counsel to the President