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House of Representatives

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MEMORANDUM

To: Members, Committee on Oversight and Government Reform
From: Darrell Issa, Chairman
Date: May 3, 2012
Re: Update on Operation Fast and Furious

Since February 2011, the House Oversight and Government and Government Reform Committee has been conducting a joint investigation with Senate Judiciary Committee Ranking Member Chuck Grassley (R-IA) of reckless conduct in the Justice Department's Operation Fast and Furious. The committee has held three hearings, conducted twenty-four transcribed interviews with fact witnesses, sent the Department of Justice over fifty letters, and issued the Department of Justice two subpoenas for documents. The Justice Department, however, continues to withhold documents critical to understanding decision making and responsibility in Operation Fast and Furious.

This memo explains key events and facts in Operation Fast and Furious that have been uncovered during the congressional investigation; remaining questions that the Justice Department refused to cooperate in helping the Committee answer; the ongoing relevance of these questions; and the extent of the harm created by both Operation Fast and Furious and the Department's refusal to fully cooperate. The memo also explains issues for Committee Members to consider in making a decision about holding Attorney General Eric Holder in contempt of Congress for his Department's refusal to provide subpoenaed documents.

Attached to this memo for review and discussion is a draft version of a contempt report that the Committee may consider at an upcoming business meeting.

Introduction to Fast and Furious

In the aftermath of a federal agent's death, on February 4, 2011, the United States Department of Justice sent a letter to Congress denying whistleblower allegations that the Justice Department had facilitated the illegal transfer of weapons to Mexican drug cartels. The Justice Department insisted that federal authorities always make, "every effort to interdict weapons that have been

purchased illegally and prevent their transportation to Mexico,” and rejected accusations that two assault rifles found at the Arizona desert murder scene of a U.S. Border Patrol agent resulted from a Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) case known as Operation Fast and Furious.

Nearly ten months later, on December 2, 2011, the Justice Department sent Congress a new letter rescinding the previous written denial and acknowledging that Operation Fast and Furious was “fundamentally flawed.”

The Congressional investigation into this dangerously flawed operation has focused on ensuring accountability for reckless conduct that contributed to deaths and continues to jeopardize public safety. More than a year later, the family of a murdered Border Patrol agent, federal agents facing retaliation for blowing the whistle on reckless conduct, and the citizens of one of America’s most important and growing trade partners continue to demand the full truth. The Justice Department’s refusal to fully cooperate with this investigation has outraged many Americans and left Congress with the choice of challenging or accepting the Justice Department’s insistence that it only face an internal investigation of itself.

While field operations for Fast and Furious began in September 2009 and ended in January 2011, the scandal began to unravel in the early morning hours of December 15, 2010, when a warrior and patriot lost his life defending the United States.

A Tragic Death Leads to Whistleblowers

Late in the evening of December 14, 2010, Border Patrol Agent Brian Terry, a native of Michigan and Marine veteran, was on patrol with three other agents in Peck Canyon, near Rio Rico, Arizona. The agents spotted a group of five suspected illegal aliens – at least two were carrying rifles. As the agents approached, at least one of the suspects fired at them. The agents returned fire. In the midst of the gunfight, Agent Terry was struck by a bullet. Most of the suspected aliens fled the scene, though one of them had been wounded and was unable to flee. Though Agent Terry was fully conscious after being wounded, his bleeding could not be stopped and he died in the desert during the early morning hours of December 15 while the group waited for medical assistance to arrive.

When help finally did arrive, investigators recovered two AK-47 variant rifles at the scene. Traces conducted later that day showed the two weapons had been bought on January 16, 2010, by a then 23 year old – Jaime Avila of Phoenix, Arizona. The traces also showed investigators something else.

ATF had entered Avila as a suspect into the database more than a year earlier on November 25, 2009, as part of Operation Fast and Furious – the Department of Justice’s largest ongoing firearms trafficking case at the time. Avila was a low-level straw-buyer in a weapons trafficking organization – a seemingly legal purchaser of firearms who conducted transactions with the illegal motive of buying them for someone else. In Avila’s case, the real purchaser of the weapons he procured was a Mexican drug cartel.

In the wake of the Terry murder, law enforcement agents quickly located and arrested Avila. The U.S. Attorney's Office in Arizona indicted Avila on three counts of "lying and buying"—charges made primarily on the grounds that he had falsely indicated that weapons had been purchased for his own use.

The news of Terry's death quickly made its way back to the ATF agents working on Operation Fast and Furious. This news was the nightmare agents working the case had long dreaded, even expected. Two ATF agents, John Dodson and Larry Alt, described their feelings:

Agent Dodson:

We knew Jaime Avila was a straw purchaser, had him identified as a known straw purchaser supplying weapons to the cartel And then in May, we had a recovery where Border Patrol encounters an armed group of bandits and recovered an AK variant rifle ... purchased during the time we were watching Jaime Avila, had him under surveillance, and we did nothing.

Then on December 14th, 2010 Agent Brian Terry is killed in Rio Rico, Arizona. Two weapons recovered from the scene . . . two AK variant weapons purchased by Jaime Avila on January 16th, 2010 while we had him under surveillance, after we knew him to be a straw purchaser, after we identified him as purchasing firearms for a known Mexican drug cartel.

Agent Alt:

I have loved working for ATF since I have been hired here. I came here to retire from ATF I am not -- I am embarrassed here. I regret the day that I set foot into this field division because of some of the things that a few people have done and ... the impact it has had on the public and safety and Agent Terry.

Although agents indicated they had already complained to supervisors that the reckless tactics used would result in tragedies, Agent Terry's senseless death left the impression on some agents that more needed to be done. These agents again appealed to unsympathetic supervisors, but pleas fell on deaf ears and efforts to look outside ATF for help began. One agent indicated that he tried to alert the U.S. Department of Justice Inspector General's office as a whistleblower but got nowhere.

By January 2011 – just a month after Agent Terry's tragic murder – blogs, media outlets, and a United States Senate office had picked up on the agents' concerns and helped bring their allegations about Operation Fast and Furious to a national audience. On February 4, the Department of Justice, insinuating that the whistleblowers were lying, formally denied the allegations in a letter to Congress.

Fast and Furious Conceived

The ATF Phoenix Field Division began Operation Fast and Furious in the fall of 2009 after suspicious weapons purchases led agents to the discovery of an apparent Phoenix-based arms trafficking syndicate. Having been encouraged to devise grander strategies to stop the transfers of weapons to Mexican drug cartels, the Phoenix based agents devised a strategy that went beyond simple arrests or weapons confiscations. They would allow the U.S.-based associates of a Mexican drug cartel to continue acquiring firearms uninterrupted. In doing so, they hoped the weapons, after they were recovered at crime scenes in Mexico, could be traced and linked to cartel operatives including possible high-level financiers, suppliers, and possibly even king-pins.

The operation sought to achieve its lofty goals by focusing on the ringleader of the weapons smuggling syndicate they had identified: Manuel Celis-Acosta. Celis-Acosta was using a then-unknown number of straw-purchasers, including Jamie Avila, to purchase weapons.

In January 2010, ATF partnered with the U.S. Attorney's Office for the District of Arizona and applied to Justice Department headquarters in Washington for funding through the Department's Organized Crime Drug Enforcement Task Force (OCDETF) program. As senior Justice Department officials in Washington felt the operation had great promise, it won approval and additional funding. Operation Fast and Furious was reorganized as a Strike Force including agents from ATF, FBI, the Drug Enforcement Administration (DEA), and the Immigration and Customs Enforcement (ICE) component of the Department of Homeland Security. ATF Agent John Dodson, who would later help blow the whistle on what occurred, was among the agents transferred to Phoenix to help with the operation as a result of the designation.

The Strike Force designation also meant that the U.S. Attorney's Office – rather than ATF – would run Fast and Furious. At the time, the U.S. Attorney's Office in Arizona was led by Dennis Burke, a new political appointee who had previously served as Chief of Staff to then Arizona Governor and now Homeland Security Secretary Janet Napolitano. Earlier in his career, Burke had worked with former White House Chief of Staff Rahm Emanuel on gun control legislation as a U.S. Senate staff member.

The newly organized Strike Force, led by the U.S. Attorney's office, gave Operation Fast and Furious a chance to utilize sophisticated law enforcement techniques such as federal wire intercepts – more commonly known as wiretaps. The use of advanced techniques like wiretaps, which require a court order, also meant that Justice Department officials in Washington, D.C., would have to play a critical role. Federal law requires certain senior officials to review evidence and certify the necessity of wiretaps and other techniques.

During Fast and Furious, ATF agents were directed to monitor actual transactions between Federal Firearms Licensees (gun stores) and straw purchasers like Jamie Avila. After the purchases, ATF sometimes conducted surveillance of these weapons with assistance from local police departments. Such surveillance included following the vehicles of the straw purchasers. Frequently, the straw purchasers transferred the weapons they bought to stash houses. In other instances, they transferred the weapons to third parties.

To achieve the goal of letting weapons lead law enforcement to senior criminal figures, Operation Fast and Furious embraced a controversial tactic that outraged some veteran ATF agents: gunwalking. In Operation Fast and Furious, it was not that some weapons *got away* from agents, but rather that agents were purposefully directed to *allow* the flow of guns from straw purchasers to third parties. Instead of trying to interdict the weapons, ATF purposely avoided contact with known straw purchasers or curtailed surveillance, allowing the guns to fall into the hands of criminals and bandits on both sides of the border. ATF agents have explained that this practice was at odds with their core training. As one agent explained:

When we should have done something and it wasn't, you have let it walk. There has to be an active decision . . . a choice is made to allow it to walk. It is not like something got away from you or you lost it. If a suspect beats you in a foot chase and he gets away, you didn't let him walk, you just lost the chase. So that's what walking is.

During Operation Fast and Furious, law enforcement agents assigned to the task force allowed approximately 2,000 illegally purchased weapons walk away from gun stores. In some instances over the year and a half that Fast and Furious was conducted in the field, gun store owners expressed concern to ATF that they felt uncomfortable making repeated sales to individuals they suspected or knew were involved in criminal activity. ATF agents and prosecutors from the U.S. Attorney's office repeatedly reassured store owners that weapons were being actively tracked and their sales not only posed no danger to the public, but would actually assist law enforcement in bringing dangerous criminals to justice. They were never told of the operation's real strategy and were encouraged to continue making sales to known straw-buyers and contacting ATF with details after sales occurred.

Extent of Fast and Furious' Failure Known at Its Conclusion

Shortly after Operation Fast and Furious began in the fall of 2009, ATF had identified a number of suspected low-level straw-purchasers and the smuggling syndicate's ringleader, Manuel Celis-Acosta. Although some field agents and officials in Washington had long ago begun to feel uncomfortable with Operation Fast and Furious, it was not until after the death of Border Patrol Agent Brian Terry that its field operations finally ended.

Washington-based Justice Department officials had earlier discussed bringing Attorney General Eric Holder to Phoenix for a triumphant press conference with Arizona U.S. Attorney Dennis Burke to herald the conclusion of the Department's flagship firearms trafficking case. In the aftermath of Agent Terry's death, the task of announcing indictments at a press conference fell to ATF Phoenix Division Special Agent in Charge William Newell and Burke. Holder did not attend.

At the press conference on January 25, 2011, Newell triumphantly announced the indictment of twenty members of an arms trafficking syndicate that had been supplying weapons to the Sinaloa

Cartel – Mexico’s largest and most powerful cartel led by the notorious Joaquin “El Chapo” Guzman. The indictments included the syndicate’s ringleader, Manuel Celis-Acosta and nineteen low-level straw-buyers. What Newell did not mention, however, was that agents were aware of Celis-Acosta’s role almost from the beginning, as well as that of his lower-level subordinates who had also been indicted. Newell also did not discuss Operation Fast and Furious’ other shocking failures, of which by this time he was also aware.

Following Celis-Acosta’s arrest, ATF finally had the chance to confront the syndicate’s ringleader with the trouble he faced and begin the deal making process intended to ensnare his higher level cartel associates – the links that ATF believed could fulfill the goals of bringing senior figures in the Sinaloa Cartel to justice.

When Celis-Acosta informed ATF of the names of the two cartel contacts for whom he had been working, agents quickly came to learn that these two U.S.-based cartel contacts were already known to the Department of Justice. The DEA and FBI had jointly opened a separate investigation specifically targeting these two cartel associates, and, by January 2010, had collected a wealth of information on them - including their dealings with Manuel Celis-Acosta.

In exchange for one associate’s guilty plea to a minor charge of “Alien in Possession of a Firearm,” both of these cartel associates became FBI informants and were considered essentially unindictable well before Operation Fast and Furious concluded. One ATF official would later say that the discovery that the primary targets of their investigation were not indictable was a “major disappointment.” Adding to the information-sharing failure, DEA had actually provided Celis-Acosta’s cartel connection to ATF in December 2009 in an effort to ensure that ATF’s efforts in Operation Fast and Furious were not duplicative.

Newell shocked colleagues by telling the public the exact opposite of what had occurred in the operation. As reports about gunwalking had surfaced after Agent Terry’s death, when asked at the press conference whether ATF had allowed guns to walk, Newell offered a memorable response: “Hell, no.” ATF agents who blew the whistle on Operation Fast and Furious have described their reaction to this denial in no uncertain terms:

ATF Agent Peter Forcelli:

I was appalled, because it was a blatant lie.

ATF Agent Larry Alt:

Candidly, my mouth fell open. I was asked later by the public information officer for our division . . . and I told him that I thought that – I was just astounded that he made that statement.

The Department of Justice's Contempt Against the American People

Much of Operation Fast and Furious remained a mystery when the Department of Justice forcefully dismissed whistleblower accusations and denied that anything improper had occurred to Congress on February 4, 2011. Why, after all, would anyone be so stupid as to think arming drug cartels was a good idea?

A congressional investigation and reports by journalists utilizing whistleblowers and other sources have shed immense light on what occurred and why. Little of what is known today, however, came as a result of formal Justice Department disclosures. Instead, most of the information about what happened has come from whistleblowers and other sources with documentation that investigators have used to piece together the facts and confront officials who had responsibilities in Operation Fast and Furious.

Still, some important areas remain cloaked in secrecy:

- **How did the Justice Department finally come to the conclusion that Operation Fast and Furious was “fundamentally flawed”?**

On February 4, 2011, the Department of Justice denied whistleblower allegations that guns in Operation Fast and Furious had been allowed to “walk” to Mexico and defended the Operation itself. Ten months later, on December 2, 2011, the Justice Department formally withdrew this denial and acknowledged that Fast and Furious was “fundamentally flawed.” In responding to Congress, however, the Justice Department has taken the position that it will not share its internal deliberations related to Operation Fast and Furious that occurred after it denied anything inappropriate occurred on February 4, 2011. This position effectively denies Congress and the American people information about:

- The Justice Department switching its view from denying whistleblower allegation to admitting they were true.
- Hiding the identity of officials who led the charge to call whistleblowers liars and retaliated against them.
- The reactions of top officials when confronted with evidence about gunwalking in Fast and Furious, including whether they were surprised or were already aware.
- The Justice Department’s assessment of responsibility for officials who knew about reckless conduct or were negligent.
- Whether senior officials and political appointees at fault in Operation Fast and Furious were held to the same standards as lower level career employees whom the Department has primarily blamed.

While the Department of Justice claims that divulging this information would have a “chilling effect” on future internal deliberations, virtually any agency could use this bland argument on nearly any topic. Congress, under both Democratic and Republican leadership, has never recognized internal agency discussions as privileged and protected. This claim by the Department of Justice is also at odds with a previous decision to make internal deliberations available to Congress in the midst of a 2007 investigation into the dismissals of several U.S. Attorneys.

No one disputes that the Justice Department has this critical information – the Justice Department’s flimsy rationale for withholding this information is simply about avoiding accountability for what occurred.

- **What senior officials at the Department of Justice were told about or approved the controversial gunwalking tactics that were at the core of the operation’s strategy?**

Operation Fast and Furious was not a local effort. It was the Justice Department’s flagship arms trafficking investigation for a year and a half. Justice Department headquarters in Washington approved it as part of the Department’s Organized Crime Drug Enforcement Task Force (OCDETF) program that put it under the control of the Arizona U.S. Attorney’s office. The OCDETF designation also meant Fast and Furious would be able to use advanced investigative techniques, such as wiretaps, which by law required senior headquarters officials to review operational details.

Although they helped write the February 4, 2011, letter to Congress denying that ATF allowed gunwalking to occur, some senior officials – after being confronted with evidence – have had to acknowledge that they did know about gunwalking. They have, however, consistently denied that they knew critical details about *the gunwalking that took place in Operation Fast and Furious*.

These denials are peculiar because top officials across the Justice Department received briefings on Operation Fast and Furious that included both information on surveillance techniques and the fact that hundreds of weapons were turning up at crime scenes in Mexico. Adding to suspicion that senior Justice Department officials knew far more than they have admitted, the Justice Department has refused to turn over documents from the field that were supplied to senior officials in Washington. While the Department has argued that turning over such materials to Congress could jeopardize prosecutions, it has offered no mutually agreeable accommodation for reviewing them – such as making them available to be reviewed but not copied, or giving Congress a complete list and brief description of responsive documents. After repeated false denials about Operation Fast and Furious, the Justice Department’s unwillingness to work with Congress casts doubt on its motives.

- **How did inter-agency cooperation in a nationally designated Strike Force fail so miserably in Operation Fast and Furious?**

Operation Fast and Furious tried to use outrageous gunwalking tactics in an effort to identify top cartel associates. Although the operation let nearly 2,000 weapons walk out of Phoenix area gun stores to the Sinaloa Cartel in furtherance of this goal, it never had a chance of success. While some senior Justice Department officials, including Assistant Attorney General Lanny Breuer, head of the Department's Criminal Division, embraced the view that gunwalking could be justified, even they would now have to agree that Fast and Furious never had a chance. The reason: the Justice Department already knew about the cartel contacts for Manuel Celis-Acosta's smuggling syndicate, and the contacts were on their way to becoming essentially unindictable FBI informants. Even more blatant, the DEA had told ATF about Celis-Acosta's cartel connections at the beginning of Fast and Furious as these contacts were targets of a separate investigation.

The reforms born out of the tragic September 11th terrorist attacks were designed to put a stop to the problem of federal agencies "stove-piping" information. In a Strike Force operation like Fast and Furious that was specifically designed by the Justice Department to bring together resources from its component agencies including ATF, FBI, DEA, and Justice Department headquarters, the failure of coordination and information sharing in Operation Fast and Furious indicates a likelihood of monumental management dysfunction. To date, the Justice Department has not indicated what official had the responsibility to coordinate and de-conflict law enforcement efforts across agencies.

A core goal of congressional oversight is to identify agency mismanagement and ensure that appropriate legislative or administrative adjustments are implemented. Until now, the Justice Department's desire to protect senior officials from embarrassment from Operation Fast and Furious has superseded its willingness to work cooperatively with Congress to address a massive information sharing and agency coordination problem that Congress and the Bush Administration worked together to solve a decade ago.

Despite a subpoena, the Justice Department has refused to produce documents related to how this clear failure occurred through multiple agencies and the involvement of top Justice Officials who had responsibilities to monitor multi-agency efforts. While the Justice Department has maintained that it is concerned about exposing cartel associates with informant status to scrutiny, the Department has rebuffed Committee efforts to examine the decisions and failures of officials without looking at the informants themselves. The fact that the Committee has already learned the identity of the associates and the outrageous crimes they committed before being given informant status, stands in contrast to the Department's suggestion that its reason for non-cooperation is the informants' well-being.

When the Committee issued a subpoena to U.S. Attorney General Eric Holder on October 12, 2011, for Justice Department documents, the Committee specified 22 categories of documents it required the Department to produce. Department representatives specifically confirmed their

understanding of each category. To date, the Department has not produced any responsive documents for 12 of the 22 categories. The Department has not completely fulfilled any of the 10 categories for which documents have been produced.

For over a year, the Department has issued false denials, given answers intended to misdirect investigators, sought to intimidate witnesses, unlawfully withheld subpoenaed documents, and waited to be confronted with indisputable evidence before acknowledging uncomfortable facts. The Justice Department's demonstrable contempt for the congressional investigation has inflicted harm on the people of two nations seeking the truth – and very pointedly on the family of fallen Border Patrol Agent Brian Terry and ATF whistleblowers who now face retaliation in the wake of their own heroic efforts to expose wrongdoing.

Answers for the Family of Border Patrol Agent Brian Terry

Three days after his murder in Arizona, on December 18, 2010, Brian Terry's body arrived back in Michigan for burial. His family waited on the tarmac in Detroit. Bagpipes played as Brian's casket was unloaded from the plane, then loaded into a hearse for a police escort to the funeral home. This was not the holiday homecoming that the Terry family had envisioned for Brian. In the words of his family:

Brian did ultimately come home that Christmas; we buried him not far from the house that he was raised in just prior to Christmas day. The gifts that Brian had picked out with such thought and care began to arrive in the mail that same week. With each delivery, we felt the indescribable pain of Brian's death, but at the same time also remembered his amazing love and spirit.

One month later, federal officials offered the Terry family scant details about Brian's death and refused to answer many questions. Brian's brother and stepmother walked out of the meeting with law enforcement officials, believing that the government was not being honest with them about Brian's death.

The following week, it became clearer to the Terry family why the Department of Justice had acted evasively. News reports began to emerge that the weapons found at Brian's murder scene had linked back to something they had never heard of before: Operation Fast and Furious. As Brian Terry's mother explained, "[We] never really got a call about anything like that until it was brought out in the newspapers . . . I was – just flabbergasted. I didn't believe it at first."

The Terry family wanted answers, but no one in federal law enforcement would help. Brian's cousin, a Secret Service agent, testified at a June congressional hearing that "there is a level of frustration for the family." Terry's mother, when asked what she would say to the person who authorized Operation Fast and Furious, responded, "I don't know what I would say to them, but I would like to know what they would say to me."

In August 2011, the Terry family made a motion to intervene as crime victims under the Crime Victims' Rights Act as a party in the case against Jamie Avila, the straw-purchaser of the

weapons found at the scene of Agent Terry's murder. Inexplicably, the Justice Department filed a highly unusual motion against the Terry family, claiming that the defendant's "offenses are too factually and temporally attenuated from the murder – if connected at all." Only after months of pressure from Congress and the public did the Department finally withdraw its objection to the Terry family's motion.

In October 2011, the Terry family again wrote to Congress seeking answers and explaining that the "family remains unsatisfied with the answers provided by government officials to date, not only about the genesis and operation of Fast and Furious, but what actually occurred precipitating Brian's death."

Three weeks later, Attorney General Eric Holder testified before the Senate Judiciary Committee. Instead of providing answers, the Attorney General's testimony brought additional pain to the Terry family when, despite evidence to the contrary, he stated, "it's unfair to assume that mistakes from Fast and Furious directly led to the death of Agent Terry." He also declined to apologize to the Terry family when asked by a Senator if he believed he should do so.

The testimony was certainly not what the Terry family had hoped to hear. Brian's mother "sat in a chair and cried" upon watching it, the family said. Brian's father said, "I think they are liars and I would tell them that. What would I say to Eric Holder? They would not be nice words." Brian's father also said, "Nobody wants to outlive their son. It's just hard. I can't sleep, just thinking about him – I love him very much."

In March 2012, as more details emerged about how a lack of coordination within the Justice Department had further botched Fast and Furious, the Terry family again learned these new facts through media reports – not from Department officials. This information "sickened" the family, who observed that had "this simple piece of information been shared among the different law enforcement agencies in Arizona . . . U.S. Border Patrol Agent Brian Terry would still be alive."

While the Justice Department's admissions have largely come as a result of being confronted with indisputable facts, the painfully slow process of getting the truth has been a continuing frustration for the Terry family. They still do not have the all the facts about the circumstances surrounding Brian Terry's murder.

In life, many of Brian's friends knew him as "Superman." The local gym in Arizona where Brian worked out had to order special, 150 lb. dumbbells for him, due to his impressive strength. The dumbbells arrived at the gym the week following Brian's death, and now sit in a corner of the gym, in a shrine to Brian, not for use by others.

In death, Brian, a Marine veteran, stands as a hero who gave his life for his country. The tragic circumstances surrounding his murder, however, remain unresolved due to the Justice Department's stubborn refusal to provide critical documents and fully cooperate with the investigation of Operation Fast and Furious. As Brian's sister said of his family's desire to know the full truth, "Brian was about making a difference and justice. And I just feel that this country owes it to him, because he spent his whole life fighting for this country some way or another."

Whistleblowers Left to Twist in the Wind

ATF agents distraught in the aftermath of Agent Terry's death started blowing the whistle in an effort to stop the reckless tactics of Operation Fast and Furious and reveal what had happened. ATF Special Agent John Dodson was the first to contact Congress, reaching out to the office of Senator Chuck Grassley in January 2011 with allegations of gunwalking.

Upon learning of Agent Dodson's contact with Senator Grassley's staff in late January 2011, ATF officials were clearly displeased. They ordered him to write a memo to ATF leadership detailing exactly what he told Senator Grassley's staff. His supervisors called him on his cell phone, his home phone, and even contemplated personally visiting his home late Friday night in an attempt to manage the impact of his allegations. Only after Senator Grassley learned of this harassment and wrote to the Justice Department the following Monday did ATF leadership drop its demand for Dodson to write a summary of his contact with Senator Grassley's staff. Under federal law, no one can interfere with such an effort to contact Congress.

One confidential witness told Congress that he overheard Scot Thomasson, chief ATF spokesman, say early on in the congressional inquiry into Fast and Furious: "We need to get whatever dirt we can on these guys [the whistleblowers] and take them down." The actions of the Department of Justice towards the whistleblowers over the next year indicate that these words were part of a concerted effort at retaliation.

On June 29, 2011, a reporter asked the Committee to comment on documents he had received related to Agent John Dodson during the time period when Fast and Furious occurred. The Department of Justice had yet to provide these documents to the Committee pursuant to the March 31, 2011, subpoena of ATF, but had apparently provided them to a reporter in an attempt to undermine Dodson's credibility. The Committee worked with the reporter and his news organization to examine the claims the documents purportedly supported and made the argument that the documents were part of an underhanded strategy to smear a whistleblower. The news organization eventually decided against running the story.

Congressional investigators later determined that the individual who was behind the leaked documents was the U.S. Attorney for the District of Arizona, Dennis Burke – the Obama Administration political appointee who led the office in charge of Operation Fast and Furious. Burke later testified that the reporter contacted him, and that he believed the reporter had already seen the documents or had them read to him from someone else in the Department of Justice. Instead of e-mailing the documents to the reporter in Washington, Burke, who was in Arizona at the time, e-mailed them to a friend of his in Washington, who then printed out the documents and then delivered them to the reporter personally. These efforts successfully kept Burke's fingerprints off of the leak until he publicly admitted his role more than two months after his August 2011 resignation as blame for Fast and Furious spread.

Since Dodson became a whistleblower, ATF has transferred him to Greenville, South Carolina, where he currently serves as an investigative agent. A confidential witness has told the

Committee that ATF made the unusual decision not to reimburse him for \$30,000 in moving expenses. The real motive for this decision remains unknown.

On April 25, 2011, Committee investigators subpoenaed another whistleblower, Special Agent Larry Alt, to provide testimony about Operation Fast and Furious. Agent Alt notified his superiors about his impending testimony. The next day, ATF Internal Affairs notified Alt that they wanted to talk with him about another matter. On May 5, 2011, Agent Alt met with ATF internal affairs investigators about allegations that Alt downloaded two prohibited applications to his government-issued phone. The total cost of these applications was eight dollars.

Agent Alt adamantly denied knowingly downloading the applications. Internal Affairs investigators searched Alt's phone and were unable to find either of them. The applications were also not compatible with the make and model of the phone issued to Alt. The timing of the Internal Affairs investigation into Larry Alt, and the apparent lack of evidence regarding the allegations against him, makes the motivation for the inquiry suspect at best. Alt was prevented from transferring offices and his eligibility for promotions and pay raises barred during the pendency of the investigation – all supposedly over eight dollars in phone applications.

Special Agent Peter Forcelli, a Group Supervisor in the ATF Phoenix Field Division, also experienced retaliation by the Department of Justice for his role in blowing the whistle on Fast and Furious. During his June 15, 2011 testimony before Congress, Special Agent Forcelli testified candidly about the difficulties he encountered in getting the U.S. Attorney's Office in Arizona to prosecute certain ATF cases. The Justice Department confirmed Agent Forcelli's concerns by transferring three high-profile cases involving ATF out of that U.S. Attorney's Office.

During Agent Forcelli's June 15 testimony, the Chief of the Criminal Division of the Arizona U.S. Attorney's Office, Patrick Cunningham – who had been tasked by the Department of Justice with examining the truthfulness of the whistleblowers' allegations – was at ATF headquarters in Washington, D.C. mining Forcelli's testimony for inaccuracies. Cunningham alleged to senior officials that Forcelli was being untruthful during his testimony. Over the next several months, the Justice Department began publicizing documents relating to cases Forcelli had previously investigated at ATF in an effort to smear his character and integrity as a Special Agent. These cases had nothing to do with Fast and Furious.

In August 2011, the Office of the Inspector General began investigating Forcelli about one of the cases that the Department had publicized. In preparation for an interview with the OIG, the Arizona U.S. Attorney's Office created a memo, dated August 10, 2011, about a meeting its prosecutors had had with Forcelli three months earlier. The memo, written well-after-the-fact, characterized him as "visibly angry" during the earlier interaction.

In the midst of this saga, during a phone call with the U.S. Attorney's Office in August 2011, prosecutors notified Agent Forcelli that any contact between him and any prosecutor in the U.S. Attorney's Office would need to be reported up the chain of command. Such a policy made it practically impossible for Agent Forcelli to work with federal prosecutors in Arizona.

Due to this situation, ATF transferred Forcelli from the ATF Phoenix Field Division to ATF headquarters. Despite facing a considerable loss in the sale of his house Forcelli pulled his two children out of school and moved with his family to Virginia in March 2012 to assume a desk job.

In addition to stark individual experiences, the ATF whistleblowers have collectively described a climate of hostility and fear of reprisals since their decisions to speak up about Operation Fast and Furious. Some have even learned that deeply personal information, unrelated to their jobs, has been dug up and placed in the hands of reporters and others. During a November 2011 hearing, Senator Chuck Grassley asked Attorney General Holder to reveal the identity of a Justice Department official who had been caught participating in the leaking of documents to smear an ATF whistleblower. Instead of naming the official at the hearing, Holder decided to protect his identity and refused to answer the question.

Brave whistleblowers at ATF, and gun store owners who were lured by federal authorities into making repeated sales to criminals during Operation Fast and Furious, must live in fear as a result of retaliation by Justice Department officials who have yet to be publicly exposed for their role in Operation Fast and Furious. Until the truth is exposed about responsibility for bad decisions and a lack of leadership in Operation Fast and Furious, whistleblowers who came to Congress will continue to face fear of reprisals.

The Relationship with Mexico

Ciudad Juarez, across the border from El Paso, Texas, is the most dangerous city in the world. Fourteen hundred people were murdered in Juarez in 2008 – three times more than the highest number in any U.S. city – and this number increased to over 2,600 murders in 2009. On October 20, 2009, Ciudad's Juarez's leading newspaper proclaimed in wonderment: "Not One Person Murdered Yesterday." *That day*, however, nine murders occurred in Juarez.

In 2010, there were over 3,000 murders in the city. The violence in Juarez, and across Mexico, was increasing.

Ciudad Juarez is considered "ground zero" in the drug war. Control of the trafficking routes in Juarez affords easy access to the United States. In 2008, the Sinaloa Cartel, headed by Joaquin "El Chapo" Guzman, moved into Juarez in an attempt to wrest control of the lucrative routes from the Juarez cartel. Forbes magazine labeled Guzman as its 55th most powerful person in the world, and Guzman once paid some \$2.5 million in bribes to prison officials to make a daring escape from a maximum security Mexican prison.

In 2010, Guzman's regional enforcer in Juarez for the Sinaloa Cartel was Jose Antonio Torres Marrufo, also known as "El Jaguar." El Jaguar has a history of violent acts against those who crossed the Sinaloa Cartel. He orchestrated an attack on a drug treatment clinic center in Juarez where he suspected rival cartel members were hiding. El Jaguar's hooded gunmen forced clinic

patients into a corridor, lined them up, and shot 18 of them. As an ominous threat to members of the rival Juarez cartel, El Jaguar's men once skinned a rival cartel member's face and stitched it onto a soccer ball.

Three months into Operation Fast and Furious, El Paso had emerged as a central hub for the transport of weapons being smuggled by Manuel Celis-Acosta's syndicate. Since the beginning of Fast and Furious, ATF intelligence analysts had noticed an eastern shift in weapons crossing the border – from Tijuana and Arizona to El Paso and Juarez. ATF leadership knew that Fast and Furious weapons were heading to the Sinaloa Cartel, and Attorney General Holder was sent several memos in 2010 notifying him that the Sinaloa Cartel was buying them. As one ATF agent in Mexico who understood what was occurring observed, “Chapo is arming for war.”

By the spring of 2010, six months after Fast and Furious began and intense weapons purchases by the Sinaloa Cartel, El Jaguar's men had won the battle with the Juarez Cartel and took control of trafficking routes through Ciudad Juarez.

In October 2010, cartel members kidnapped Mario Gonzalez Rodriguez, the brother of the Attorney General for the Mexican state of Chihuahua, where Juarez is located. The cartel posted a video of the kidnapped Rodriguez online, in which he alleged, under duress, that his sister had ordered killings at the behest of the Juarez cartel. The video went viral and became a major news story in Mexico. Two weeks later, Mexican authorities found Rodriguez's body in a shallow grave. In a subsequent shootout with cartel members responsible for the murder, police arrested eight and recovered sixteen weapons. Two of these weapons traced back to Operation Fast and Furious.

Although the Department of Justice learned that these weapons traced back to Fast and Furious almost immediately, no one informed the Mexican government. Not until congressional investigators were on the verge of learning the truth about the connection did an ATF agent in Mexico finally tell the Mexican Attorney General in June 2011 – seven months after Rodriguez's murder.

In May 2011, cartel members fired a powerful Barrett .50 caliber rifle at a Mexican Federal Police helicopter in the state of Michoacan, forcing it to make an emergency landing. The attack wounded two of the officers on board. A subsequent raid on those responsible for shooting down the helicopter resulted in the deaths of 11 cartel members and the arrest of 36 more. A cache of more than 70 rifles were recovered at the scene, including several that traced back to Operation Fast and Furious.

Though the President of Mexico, Felipe Calderon has been outspoken about demanding the United States curb the flow of its firearms into Mexico, he has taken a diplomatic approach in responding to Fast and Furious given the U.S. role as a key trading partner for Mexico. The United States is the largest source of foreign direct investment in Mexico, and the United States is, by far, Mexico's largest trading partner – over 80% of Mexican exports are sent to the United States. Mexico's continued growth also has great potential to help increase U.S. exports that create American jobs.

Other Mexican officials, though, have been more pointed with their deep concerns about what the Justice Department allowed to occur. The president of the Mexican Congress, the Chamber of Deputies, has said that Fast and Furious was “a serious violation of international law.” The Chairman of the Justice Committee in the Chamber of Deputies commented that there were “150 cases of injuries and homicides” from weapons that ATF agents allowed to walk into Mexico. And over a year after Fast and Furious was first exposed, the program still remains on the minds of the Mexican press. In April, the very first question from the Mexican press during a trilateral joint press conference with President Calderon, President Obama, and Prime Minister Stephen Harper of Canada was about the trafficking of weapons from the U.S. to Mexico.

The people of Mexico have suffered tremendous loss due to cartel violence. A U.S. operation – kept secret from Mexican authorities – that sought to arm cartels has created justifiable outrage among our neighbors to the south who seek the truth about what happened and who was responsible.

Congress Faces a Choice as Integrity Questions Loom Over Justice Department

The congressional investigation into Operation Fast and Furious has yielded significant results. It forced the Department of Justice to withdraw its false denial of whistleblower allegations. Dennis Burke – the U.S. Attorney for Arizona who headed the office that led Operation Fast and Furious – was forced to resign. Attorney General Eric Holder now admits the operation was “fundamentally flawed” and that guns from the operation will continue to show up at crime scenes in Mexico and the United States “for years to come.” Attorney General Holder has also committed to ensuring that such an operation will never happen again.

Nevertheless, Operation Fast and Furious’ outrageous tactics, the Justice Department’s refusal to fully cooperate with the investigation, and efforts to smear and retaliate against whistleblowers have tainted the institutional integrity of the Justice Department. Only 567 of the nearly 2,000 weapons from the operation have been recovered and, as the Attorney General admits, the effects from Fast and Furious are far from over.

The Justice Department’s initial denials that anything inappropriate occurred, and its insinuation that whistleblowers were not telling the truth, indicated an early mindset of a Department more concerned about appearances than actual truth. Making matters worse, a pattern of questionable behavior ensued that heightened concerns. Attorney General Holder initially expressed puzzlement when asked when he first heard of Operation Fast and Furious at a congressional hearing, but neither he nor his staff ever acknowledged that memos on the flawed operation had been addressed to him until they were publicly uncovered several months later. Even later in the investigation, senior political appointees in the Department’s Criminal Division were forced to acknowledge evidence that they had known about reckless gunwalking – and did nothing about it – even though the Attorney General had insisted that such tactics had always been against Department policy. Several other senior officials who attended briefings on Operation Fast and Furious repeatedly insisted they could not recall key details about what they knew. In an

interview, Attorney General Holder's former Deputy Chief of Staff stated that he could not recall specific incidents or even his own actions 82 times over the course of a three hour interview.

Perhaps the most damning assessments of the Department's handling of the fallout from Operation Fast and Furious have come from two Justice Department officials. Kenneth Melson, the former Acting AFT Director during the pendency of Fast and Furious, told Congress that, "it appears thoroughly to us that the department is really trying to figure out a way to push the information away from their political appointees at the department." Patrick Cunningham, who had been tasked by the Justice Department with investigating ATF whistleblower allegations of gunwalking, would later invoke his Fifth Amendment privilege against self-incrimination in refusing to answer questions about his work.

The suggestion of veteran Justice Department officials that a cover-up potentially involving criminal conduct may have occurred, even after Fast and Furious' field operations ended, underscores the Justice Department's inability to investigate itself or decide what information should be withheld from the Congressional investigation.

In dealing with a prostitution scandal in Cartagena, Columbia, the Secret Service has demonstrated that agencies can conduct investigations swiftly, determine responsibility, and act decisively to hold wrongdoers accountable. The Justice Department's response, however, has been the polar opposite. More than a year after field operations of Fast and Furious ended, the Attorney General still insists he needs more facts before holding individuals responsible for facilitating the transfer of weapons to Mexican drug cartels to account. To many Americans, this inaction creates the impression that the Department is trying to run out the clock on the relatively short lifespan of political appointments.

The Justice Department's failure to respond appropriately to the allegations of whistleblowers and to cooperate with Congressional oversight has crossed the line of appropriate conduct for a government agency. Congress now faces a moment of decision between exerting its full authority to compel an agency refusing to cooperate with congressional oversight or accepting a dangerous expansion of Executive Branch authority and unilateral action allowing agencies to set their own terms for cooperating with congressional oversight.

RESOLUTION RECOMMENDING THAT THE HOUSE OF
REPRESENTATIVES FIND ERIC H. HOLDER, JR., ATTORNEY GENERAL,
U.S. DEPARTMENT OF JUSTICE,
IN CONTEMPT OF CONGRESS FOR REFUSAL TO
COMPLY WITH A SUBPOENA DULY ISSUED BY THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

R E P O R T
OF THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

The form of the resolution that the Committee on Oversight and Government Reform would recommend to the House of Representatives for citing Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, for contempt of Congress pursuant to this report is as follows:

Resolved, That Eric H. Holder, Jr., Attorney General of the United States, shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on Oversight and Government Reform, detailing the refusal of Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, to produce documents to the Committee on Oversight and Government Reform as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Mr. Holder be proceeded against in the manner and form provided by law.

Resolved, That the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena.

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I. Executive Summary

The Department of Justice has refused to comply with Congressional subpoenas related to Operation Fast and Furious, an Administration initiative that allowed around two thousand firearms to fall into the hands of drug cartels and may have led to the death of a U.S. Border Agent. The consequences of the lack of judgment that permitted such an operation to occur are tragic.

The Department's refusal to work with Congress to ensure that it has fully complied with the Committee's efforts to compel the production of documents and information related to this controversy is inexcusable and cannot stand. Those responsible for allowing Fast and Furious to proceed and those who are preventing the truth about the operation from coming out must be held accountable for their actions.

Having exhausted all available options in obtaining compliance, the Chairman of the Oversight and Government Reform Committee recommends that Congress find the Attorney General in contempt for his failure to comply with the subpoena issued to him.

II. Authority and Purpose

An important corollary to the powers expressly granted to Congress by the Constitution is the implicit responsibility to perform rigorous oversight of the Executive Branch. The U.S. Supreme Court has recognized this Congressional power on numerous occasions. For example, in *McGrain v. Daugherty*, the Court held that “the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it.”¹ Further, in *Watkins v. United States*, Chief Justice Warren wrote for the majority: “The power of Congress to conduct investigations is inherent in the legislative process. That power is broad.”²

Both the Legislative Reorganization Act of 1946 (P.L. 79-601), which directed House and Senate Committees to “exercise continuous watchfulness” over Executive Branch programs under their jurisdiction, and the Legislative Reorganization Act of 1970 (P.L. 91-510), which authorized committees to “review and study, on a continuing basis, the application, administration and execution” of laws, codify the oversight powers of Congress.

The Committee on Oversight and Government Reform is a standing committee of the House of Representatives, duly established pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the Constitution.³ House Rule X grants to the Committee broad oversight jurisdiction, including authority to “conduct investigations of any matter without regard to clause 1, 2, 3, or this clause [of House Rule X] conferring jurisdiction over the matter to another standing committee.”⁴ The rules direct the Committee to make available “the findings and recommendations of the committee . . . to any other standing committee having jurisdiction over the matter involved.”⁵

House Rule XI specifically authorizes the Committee to “require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.”⁶ The rule further provides that the “power to authorize and issue subpoenas” may be delegated to the Committee chairman.⁷ The subpoenas discussed in this report were issued pursuant to this authority.

The Committee’s investigation into actions by senior officials in the U.S. Department of Justice and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) in designing, implementing, and supervising the execution of Operation Fast and Furious, and subsequently

¹ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

² *Watkins v. United States*, 354 U.S. 178, 187 (1957).

³ U.S. CONST., art. I, § 5, clause 2.

⁴ House Rule X, clause (4)(c)(2).

⁵ *Id.*

⁶ House Rule XI, clause (2)(m)(1)(B).

⁷ House Rule XI, clause (2)(m)(3)(A)(i).

providing false denials to Congress, is being undertaken pursuant to the authority delegated to the Committee under House Rule X as described above.

The oversight and legislative purposes of the investigations are (1) to examine and expose any possible malfeasance, abuse of authority, or violation of existing law on the part of the executive branch with regard to the conception and implementation of Operation Fast and Furious, and (2) based on the results of the investigation, to assess whether the conduct uncovered may warrant additions or modifications to federal law and to make appropriate legislative recommendations.

In particular, the 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. The major breakdown in the process that occurred with respect to the Fast and Furious wiretap applications necessitates careful examination of the facts before proposing a legislative remedy. Procedural improvements may need to be codified in statute to mandate immediate action in the face of highly objectionable information relating to operational tactics and details contained in future applications.

The Committee's investigation has called into question the ability of ATF to carry out its statutory mission and the ability of the Department of Justice to adequately supervise it. The information sought is needed to consider legislative remedies to restructure ATF as needed.

III. Background on the Committee's Investigation

In February 2011, the Oversight and Government Reform Committee joined Senator Charles E. Grassley, Ranking Member of the Senate Committee on the Judiciary, in investigating Operation Fast and Furious, a program conducted by ATF. On March 16, 2011, Chairman Darrell Issa wrote to then-Acting ATF Director Kenneth E. Melson requesting documents and information regarding Fast and Furious. Responding for Melson and ATF, the Department of Justice did not provide any documents or information to the Committee by the March 30, 2011 deadline. The Committee issued a subpoena to Melson the next day. The Department produced zero pages of non-public documents pursuant to that subpoena until June 10, 2011, on the eve of the Committee's first Fast and Furious hearing.

On June 13, 2011, the Committee held a hearing entitled "Obstruction of Justice: Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?" The Committee held a second hearing on June 15, 2011, entitled "Operation Fast and Furious: Reckless Decisions, Tragic Outcomes." The Committee held a third hearing on July 26, 2011, entitled "Operation Fast and Furious: The Other Side of the Border."

On October 11, 2011, the Justice Department informed the Committee its document production pursuant to the March 31, 2011 subpoena was complete. The next day, the Committee issued a detailed subpoena to Attorney General Eric Holder for additional documents related to Fast and Furious.

On February 2, 2012, the Committee held a hearing entitled “Fast and Furious: Management Failures at the Department of Justice.” The Attorney General testified at that hearing.

The Committee has issued two staff reports documenting its initial investigative findings. The first, *The Department of Justice’s Operation Fast and Furious: Accounts of ATF Agents*, was released on June 14, 2011. The second, *The Department of Justice’s Operation Fast and Furious: Fueling Cartel Violence*, was released on July 26, 2011.

Throughout the investigation, the Committee has made numerous attempts to accommodate the interests of the Department of Justice. Committee staff has conducted numerous meetings and phone conversations with Department lawyers to provide clarification of and highlight priorities with respect to the subpoenas. Committee staff has been flexible in scheduling dates for transcribed interviews, agreed to review certain documents *in camera*, allowed extensions of production deadlines, and agreed to postpone interviewing the Department’s key Fast and Furious trial witness.

Despite the Committee’s flexibility, the Department has refused to produce certain documents to the Committee. The Department has represented on numerous occasions that it will not produce broad categories of documents. The Attorney General has continued to withhold documents without any assertion of executive privilege by the President, and the Department has not provided a privilege log delineating with particularity why certain documents are being withheld.

The Department’s efforts at accommodation and ability to work with the Committee regarding its investigation into Fast and Furious have been wholly inadequate. The Committee requires the subpoenaed documents to meet its constitutionally mandated oversight and legislative duties.

IV. Operation Fast and Furious: Breakdowns at All Levels of the Department of Justice

The story of Operation Fast and Furious is one of widespread dysfunction across numerous components of the Department of Justice. This dysfunction allowed Fast and Furious to originate and grow at a local level before senior officials at Department of Justice headquarters ultimately approved and authorized it. The dysfunction within and among Department components continues to this day.

A. The ATF Phoenix Field Division

In October 2009, the Office of the Deputy Attorney General (ODAG) in Washington, D.C. promulgated a new strategy to combat gun trafficking along the Southwest Border. This new strategy directed federal law enforcement to shift its focus away from seizing firearms from criminals as soon as possible, and to focus instead on identifying members of trafficking

networks. The Office of the Deputy Attorney General shared this strategy with the heads of many Department components, including ATF.⁸

Members of the ATF Phoenix Field Division, led by Special Agent in Charge Bill Newell, became familiar with this new strategy and used it in creating Fast and Furious. In mid-November 2009, just weeks after the strategy was issued, Fast and Furious began. Its objective was to establish a nexus between straw purchasers of firearms in the United States and Mexican drug-trafficking organizations (DTOs) operating on both sides of the United States-Mexico border. Straw purchasers are individuals who are legally entitled to purchase firearms for themselves, but who unlawfully purchase weapons with the intent to transfer them to someone else, in this case DTOs or other criminals.

During Fast and Furious, ATF agents used an investigative technique known as “gunwalking” – that is, allowing illegally-purchased weapons to be transferred to third parties without attempting to disrupt or deter the illegal activity. ATF agents abandoned surveillance on known straw purchasers after they illegally purchased weapons that ATF agents knew were destined for Mexican drug cartels. Many of these transactions established probable cause for agents to interdict the weapons or arrest the possessors, something every agent was trained to do. Yet, Fast and Furious aimed instead to allow the transfer of these guns to third parties. In this manner, the guns fell into the hands of DTOs, and many would turn up at crime scenes. ATF then traced these guns to their original straw purchaser, in an attempt to establish a connection between that individual and the DTO.

Federal Firearms Licensees (FFLs), who cooperated with ATF, were an integral component of Fast and Furious. Although some FFLs were reluctant to continue selling weapons to suspicious straw purchasers, ATF encouraged them to do so, reassuring the FFLs that ATF was monitoring the buyers and that the weapons would not fall into the wrong hands.⁹ ATF worked with FFLs on or about the date of sale to obtain the unique serial number of each firearm sold. Agents entered these serial numbers into ATF’s Suspect Gun Database within days after the purchase. Once these firearms were recovered at crime scenes, the Suspect Gun Database allowed for expedited tracing of the firearms to their original purchasers.

By December 18, 2009, ATF agents assigned to Fast and Furious had already identified fifteen interconnected straw purchasers in the targeted gun trafficking ring. These straw purchasers had already purchased 500 firearms.¹⁰ In a biweekly update to Bill Newell, ATF Group Supervisor David Voth explained that 50 of the 500 firearms purchased by straw buyers had already been recovered in Mexico or near the Mexican border.¹¹ These guns had time-to-crimes of as little as one day, strongly indicating straw purchasing.¹²

⁸ E-mail from [Dep’t of Justice] on behalf of Deputy Att’y Gen. David Ogden to Kathryn Ruemmler, et al. (Oct. 26, 2009).

⁹ Transcribed Interview of Special Agent Peter Forcelli, at 53-54 (Apr. 28, 2011).

¹⁰ E-mail from Kevin Simpson, Intelligence Officer, Phoenix FIG, ATF, to David Voth (Dec. 18, 2009).

¹¹ *Id.*

¹² *Id.*

Starting in late 2009, many line agents objected vociferously to some of the techniques used during Fast and Furious, including gunwalking. The investigation continued for another year, however, until shortly after December 15, 2010, when two weapons from Fast and Furious were recovered at the murder scene of U.S. Border Patrol Agent Brian Terry.

Pursuant to the Deputy Attorney General's strategy, in late January 2010 the ATF Phoenix Field Division applied for Fast and Furious to become an Organized Crime Drug Enforcement Task Force (OCDETF) case. In preparation for the OCDETF application process, the ATF Phoenix Field Division prepared a briefing paper detailing the investigative strategy employed in Fast and Furious. This document was not initially produced by the Department pursuant to its subpoena, but rather was obtained by a confidential source. The briefing paper stated:

Currently our strategy is to allow the transfer of firearms to continue to take place, albeit at a much slower pace, in order to further the investigation and allow for the identification of additional co-conspirators who would continue to operate and illegally traffic firearms to Mexican DTOs which are perpetrating armed violence along the Southwest Border.¹³

Fast and Furious was approved as an OCDETF case, and this designation resulted in new operational funding. Additionally, Fast and Furious became a prosecutor-led OCDETF Strike Force case, meaning that ATF would join with the Federal Bureau of Investigation, Drug Enforcement Administration, Internal Revenue Service, and Immigrations and Customs Enforcement under the leadership of the U.S. Attorney's Office for the District of Arizona.

B. The United States Attorney's Office for the District of Arizona

The U.S. Attorney's Office for the District of Arizona led the Fast and Furious OCDETF Strike Force. Although ATF was the lead law enforcement agency for Fast and Furious, its agents took direction from prosecutors in the U.S. Attorney's Office. The lead federal prosecutor for Fast and Furious was Assistant U.S. Attorney Emory Hurley, who played an integral role in the day-to-day, tactical management of the case.¹⁴

Many ATF agents working on Operation Fast and Furious came to believe that some of the most basic law enforcement techniques used to interdict weapons required the explicit approval of the U.S. Attorney's Office, and specifically from Hurley. On numerous occasions, Hurley and other federal prosecutors withheld this approval, to the mounting frustration of ATF agents.¹⁵ The U.S. Attorney's Office chose not to use other available investigative tools common in gun trafficking cases, such as civil forfeitures and seizure warrants, during the seminal periods of Fast and Furious.

¹³ Phoenix Group VII, Phoenix Field Division, ATF, *Briefing Paper* (Jan. 8, 2010).

¹⁴ Transcribed Interview of Special Agent in Charge William Newell, at 32-33 (June 8, 2011).

¹⁵ Transcribed Interview of Special Agent Larry Alt, at 94 (Apr. 27, 2011).

The U.S. Attorney's Office advised ATF that agents needed to meet unnecessarily strict evidentiary standards in order to speak with suspects, temporarily detain them, or interdict weapons. ATF's reliance on this advice from the U.S. Attorney's Office during Fast and Furious resulted in many lost opportunities to interdict weapons.

In addition to leading the Fast and Furious OCDETF task force, the U.S. Attorney's Office was instrumental in preparing the wiretap applications that were submitted to the Justice Department's Criminal Division. Federal prosecutors in Arizona filed at least six of these applications, each containing immense detail about operational tactics and specific information about straw purchasers, in federal court after Department headquarters authorized them.

C. ATF Headquarters

Fast and Furious first came to the attention of ATF Headquarters on December 8, 2009, just weeks after the case was officially opened in Phoenix. ATF's Office of Strategic Information and Intelligence (OSII) briefed senior ATF personnel about the case on December 8, 2009, discussing in detail a large recovery of Fast and Furious weapons in Naco, Sonora, Mexico.¹⁶

The next day, December 9, 2009, the Acting ATF Director first learned about Fast and Furious and the large recovery of weapons that had already occurred.¹⁷ The following week, OSII briefed senior ATF officials about another large cache of Fast and Furious weapons that had been recovered in Mexico.¹⁸

On January 5, 2010, OSII presented senior ATF officials with a summary of all of the weapons that could be linked to known straw purchasers in Fast and Furious. In just two months, these straw purchasers bought a total number of 685 guns. This number raised the ire of several individuals in the room, who expressed concerns about the growing operation.¹⁹

On March 5, 2010, ATF headquarters hosted a larger, more detailed briefing on Operation Fast and Furious. David Voth, the Group Supervisor overseeing Fast and Furious, traveled from Phoenix to give the presentation. He gave an extremely detailed synopsis of the status of the investigation, including the number of guns purchased, weapons seizures to date, money spent by straw purchasers, and organizational charts of the relationships among straw purchasers and to members of the Sinaloa drug cartel. At that point, the straw purchases had bought 1,026 weapons, costing nearly \$650,000.²⁰

ATF's Phoenix Field Division informed ATF headquarters of large weapons recoveries tracing back to Fast and Furious. The Phoenix Field Division had frequently forwarded these

¹⁶ Interview with Lorren Leadmon, Intelligence Operations Analyst, Washington, D.C., July 5, 2011 [hereinafter Leadmon Interview].

¹⁷ *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (May 4, 2011) (Questions for the Record of Hon. Eric H. Holder, Jr., Att'y Gen. of the U.S.).

¹⁸ Leadmon Interview, *supra* note 16.

¹⁹ Transcribed Interview of Deputy Ass't Dir. Steve Martin, ATF, at 36 (July 6, 2011) [hereinafter Martin Tr.].

²⁰ See generally "Operation the Fast and the Furious" Presentation, Mar. 5, 2010.

updates directly to Deputy ATF Director Billy Hoover and Acting ATF Director Ken Melson.²¹ When Hoover learned about how large Fast and Furious had grown in March 2010, he finally ordered the creation of an exit strategy.²² This exit strategy, something Hoover had never before requested in any other case, was a timeline for ATF to wind down the case.²³

Though Hoover ordered the exit strategy in March, he did not receive it until early May. The three-page document outlined a 30-, 60-, and 90-day strategy for winding down Fast and Furious and handing it over to the U.S. Attorney's Office for prosecution.²⁴

In July 2010, Acting Director Melson expressed concern about the number of weapons flowing to Mexico,²⁵ and in October 2010 the Assistant Director for Field Operations, the number three official in ATF, expressed concern that ATF had not yet halted the straw purchasing activity in Fast and Furious.²⁶ Despite these concerns, however, the U.S. Attorney's Office continued to delay the indictments, and no one at ATF headquarters ordered the Phoenix Field Division to simply arrest the straw purchasers in order to take them off the street. The members of the firearms trafficking ring were not arrested until two weapons from Fast and Furious were found at the murder scene of Border Patrol Agent Brian Terry.

D. The Criminal Division

1. Coordination with ATF

In early September 2009, according to Department e-mails, ATF and the Department of Justice's Criminal Division began discussions "to talk about ways CRM [Criminal Division] and ATF can coordinate on gun trafficking and gang-related initiatives."²⁷ Early on in these discussions, Lanny Breuer, Assistant Attorney General in charge of the Criminal Division, sent a prosecutor to help the U.S. Attorney's Office in Arizona prosecute ATF cases. The first case chosen for prosecution was Operation Wide Receiver, a year-long ATF Phoenix Field Division investigation initiated in 2006, which involved several hundred guns being walked. The U.S. Attorney's Office in Arizona, objecting to the tactics used in Wide Receiver, had previously refused to prosecute the case.

According to James Trusty, a senior official in the Criminal Division's Gang Unit, in September 2009 Breuer was "VERY interested in the Arizona gun trafficking case [Wide Receiver], and he is traveling out [to Arizona] around 9/21. Consequently, he asked us for a 'briefing' on that case before the 21st rolls around."²⁸ The next day, according to Trusty, Breuer's chief of staff "mentioned the case again, so there is clearly great attention/interest from the front office."²⁹

²¹ E-mail from Mark Chait to Kenneth Melson and William Hoover (Feb. 24, 2010) [HOCR 001426].

²² Transcribed Interview of William Hoover, ATF Deputy Director, at 9 (July 21, 2011).

²³ *Id.* at 72.

²⁴ E-mail from Douglas Palmer, Supervisor Group V, ATF, to William Newell, ATF (Apr. 27, 2010).

²⁵ E-mail from Kenneth Melson to Mark Chait, et. al., (July 14, 2010) [HOCR 002084].

²⁶ E-mail from Mark Chait to William Newell (Oct. 29, 2010) [HOCR 001890].

²⁷ E-mail from Jason Weinstein to Lanny Breuer (Sept. 10, 2009) [HOCR 003378].

²⁸ E-mail from James Trusty to Laura Gwinn (Sept. 2, 2009) [HOCR 003375].

²⁹ E-mail from James Trusty to Laura Gwinn (Sept. 3, 2009) [HOCR 003376].

When the Criminal Division prosecutor first arrived in Arizona, she gave Trusty her impressions of the case. Her e-mail stated:

Case involves 300 to 500 guns . . . It is my understanding that a lot of these guns “walked”. Whether some or all of that was intentional is not known.³⁰

Discussions between ATF and the Criminal Division regarding inter-departmental coordination continued over the next few months. On December 3, 2009, the Acting ATF Director e-mailed Breuer about this cooperation. He stated:

Lanny: We have decided to take a little different approach with regard to seizures of multiple weapons in Mexico. Assuming the guns are traced, instead of working each trace almost independently of the other traces from the seizure, I want to coordinate and monitor the work on all of them collectively as if the seizure was one case.³¹

Breuer responded:

We think this is a terrific idea and a great way to approach the investigations of these seizures. Our Gang Unit will be assigning an attorney to help you coordinate this effort.³²

Kevin Carwile, Chief of the Gang Unit, assigned an attorney, Joe Cooley, to assist ATF, and Operation Fast and Furious was selected as a recipient of this assistance. Shortly after his assignment, Cooley had to rearrange his holiday plans to attend a significant briefing on Fast and Furious.³³

Cooley was assigned to Fast and Furious for the next three months. He advised the lead federal prosecutor, Emory Hurley, and received detailed briefings on operational details. Cooley, though, was not the only Criminal Division attorney involved with Fast and Furious during this time period. The head of the division, Lanny Breuer, met with ATF officials about the case, including Deputy Director Billy Hoover and Assistant Director for Field Operations Mark Chait.³⁴

Given the initial involvement of the Criminal Division with Fast and Furious in the early stages of the investigation, senior officials in Criminal Division should have been greatly alarmed about what they learned about the case. These officials should have halted the program,

³⁰ E-mail from Laura Gwinn to James Trusty (Sept. 3, 2009) [HOCR 003377].

³¹ E-mail from Kenneth Melson to Lanny Breuer (Dec. 3, 2009) [HOCR 003403].

³² E-mail from Lanny Breuer to Kenneth Melson (Dec. 4, 2009) [HOCR 003403].

³³ E-mail from Kevin Carwile to Jason Weinstein (Mar. 16, 2010) [HOCR 002832].

³⁴ Meeting on “Weapons Seizures in Mexico w/ Lanny Breuer” at Robert F. Kennedy Building, Room 2107, Jan. 5, 2010, 10:00 AM [HOCR 001987].

especially given their prior knowledge of gunwalking in Wide Receiver, run by the same leadership in the same ATF field division.

On March 5, 2010, Cooley attended a briefing about Fast and Furious. The detailed briefing highlighted the large number of weapons the gun trafficking ring had purchased and discussed recoveries of those weapons in Mexico. According to Steve Martin, Deputy Assistant Director in ATF's Office of Strategic Intelligence and Information, everyone in the room knew the weapons from Fast and Furious were being linked to a Mexican cartel.³⁵ Two weeks later, in mid-March 2010, Carwile pulled Cooley off Fast and Furious, when the U.S. Attorney's Office informed him that it had the case under control.³⁶

2. Wiretaps

At about the same time, lawyers in the Criminal Division authorized wiretap applications for Fast and Furious to be submitted to a federal judge. Fast and Furious involved the use of seven wiretaps between March and July of 2010.

In a letter to Chairman Issa, the Deputy Attorney General acknowledged that the Office of Enforcement Operations (OEO), part of the Justice Department's Criminal Division, is "primarily responsible for the Department's statutory wiretap authorizations."³⁷ According to the letter, lawyers in OEO review these wiretap packages to ensure that they "meet statutory requirements and DOJ policies."³⁸ When OEO completes its review of a wiretap package, federal law provides that the Attorney General or his designee – in practice, a Deputy Assistant Attorney General in the Criminal Division – reviews and authorizes it.³⁹ Each wiretap package includes an affidavit which details the factual basis upon which the authorization is sought. Each application for Fast and Furious included a memorandum from Assistant Attorney General Breuer to Paul O'Brien, Director of OEO, authorizing the interception application.⁴⁰

The Criminal Division's approval of the wiretap applications in Fast and Furious violated Department of Justice policy. The core mission of the Bureau of Alcohol, Tobacco, Firearms, and Explosives is to "protect[] our communities from . . . the illegal use and trafficking of firearms."⁴¹

The wiretap applications document the extensive involvement of the Criminal Division in Fast and Furious, yet the Department of Justice failed to produce them in response to the Committee's subpoena. The Criminal Division authorized Fast and Furious wiretap applications

³⁵ Martin Tr. at 100.

³⁶ E-mail from Kevin Carwile to Jason Weinstein (Mar. 16, 2010, 9:00 a.m.) [HOCR DOJ 2382].

³⁷ Letter from Dep Att'y Gen. James M. Cole Chairman Darrell Issa et al., at 6 (Jan. 27, 2012) [hereinafter Cole Letter].

³⁸ *Id.*

³⁹ See 18 U.S.C. § 2516(1).

⁴⁰ See, e.g., Memorandum from Lanny A. Breuer, Ass't Att'y Gen., Criminal Division to Paul M. O'Brien, Director, Office of Enforcement Operations, Criminal Division, Authorization for Interception Order Application, Mar. 10, 2010.

⁴¹ Bureau of Alcohol, Tobacco, Firearms, and Explosives, "ATF's Mission," <http://www.atf.gov/about/mission> (last visited May 1, 2012).

on March 10, 2010; April 15, 2010; May 6, 2010; May 14, 2010; June 1, 2010; and July 1, 2010. Deputy Assistant Attorney General Jason Weinstein, Deputy Assistant Attorney General Kenneth Blanco, and Deputy Assistant Attorney General John Keeney signed these applications on behalf of Assistant Attorney General Lanny Breuer.

E. The Office of the Deputy Attorney General

The Office of the Deputy Attorney General (ODAG) maintained close involvement in Operation Fast and Furious. In the Justice Department, ATF reports to the Deputy Attorney General (DAG).⁴² In practice, an official in the Office of the Deputy Attorney General is responsible for managing the ATF portfolio. This official monitors the operations of ATF, and raises potential ATF issues to the attention of the DAG.⁴³ During the pendency of Fast and Furious, this official was Associate Deputy Attorney General Edward Siskel.

Officials in ODAG became familiar with Fast and Furious as early as March 2010. On March 12, 2010, Siskel and then-Acting DAG Gary Grindler received an extensive briefing on Fast and Furious during a monthly meeting with the ATF's Acting Director and Deputy Director. This briefing presented Grindler with overwhelming evidence of illegal straw purchasing during Fast and Furious. The presentation included a chart of the names of the straw purchasers, 31 in all, and the number of weapons they had acquired to date, 1,026.⁴⁴ Three of these straw purchasers had already purchased over 100 weapons each, with one straw purchaser having already acquired over 300 weapons. During this briefing, Grindler learned that buyers had paid cash for every single gun.⁴⁵

A map of Mexico detailed locations of recoveries of weapons purchased through Fast and Furious, including some at crime scenes.⁴⁶ The briefing also covered the use of stash houses where weapons bought during Fast and Furious were stored before being transported to Mexico. Grindler learned of some of the unique investigative techniques ATF was using during Fast and Furious.⁴⁷ Despite receiving all of this information, then-Deputy Attorney General Gary Grindler did not order Fast and Furious to be shut down, nor did he follow-up with ATF or his staff about the investigation.

Throughout the summer of 2010, ATF officials remained in close contact with their ODAG supervisors regarding Fast and Furious. Fast and Furious was a topic in each of the monthly meetings between ATF and the DAG. ATF apprised Ed Siskel of significant recoveries of Fast and Furious weapons, as well as of notable progress in the investigation, and Siskel indicated to ATF that he was monitoring it.⁴⁸ In mid-December 2010, after Fast and Furious had been ongoing for over a year, Grindler received more details about the program. On December 15, 2010, Border Patrol Agent Brian Terry was killed. Two Fast and Furious weapons were

⁴² USDOJ: About Department of Justice Agencies, *available at* <http://www.justice.gov/agencies/index-org.html> (last visited May. 1, 2012).

⁴³ Transcribed Interview of Acting Dir. Kenneth Melson, at 25 (July 4, 2011).

⁴⁴ "Operation the Fast and the Furious," March 12, 2010 [HOCR 002820 – HOCR 002823].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ E-mail from Edward N. Siskel to Mark R. Chait (July 14, 2010) [HOCR 002847].

recovered at the scene of his murder. Two days later, Associate Deputy Attorney General Brad Smith sent Grindler and four ODAG officials an e-mail detailing the circumstances of Terry's murder and its connection to Fast and Furious.⁴⁹ Smith attached a four-page summary of the Fast and Furious investigation.

V. The Committee's October 12, 2011 Subpoena to Attorney General Holder

On October 12, 2011, the Committee issued a subpoena to Attorney General Eric Holder, demanding documents related to the Department of Justice's involvement with Operation Fast and Furious. The subpoena was issued following six months of constant refusals by the Justice Department to cooperate with the Committee's investigation into Operation Fast and Furious.

A. Events Leading Up to the Subpoena

On March 16, 2011, Chairman Issa sent a letter to then-ATF Acting Director Ken Melson asking for information and documents pertaining to Operation Fast and Furious.⁵⁰ Late in the afternoon of March 30, 2011, the Department, on behalf of ATF and Melson, informed the Committee that it would not provide any documents pursuant to the letter. The Committee informed the Department it planned to issue a subpoena. On March 31, 2011, the Committee issued a subpoena to Ken Melson for the documents.

On May 2, 2011, Committee staff reviewed documents the Department made available for *in camera* review at Department headquarters. Many of these documents contained partial or full redactions. Following this review, Chairman Issa wrote to the Department on May 5, 2011, asking the Department to produce all documents responsive to the Committee's subpoena forthwith.⁵¹

In spite of this letter, for the two months following the issuance of the subpoena, the Department produced zero pages of non-public documents. On June 8, 2011, the Committee again wrote to the Department requesting complete production of all documents by June 10, 2011.⁵² The Department responded on June 10, 2011, stating "complete production of all documents by June 10, 2011 . . . is not possible."⁵³ At 7:49 p.m. that evening, just three days before a scheduled Committee hearing on the obligation of the Department of Justice to cooperate with congressional oversight, the Department finally produced its first non-public documents to the Committee, totaling 69 pages.⁵⁴

Over the next six weeks, through July 21, 2011, the Department produced an additional 1,286 pages of documents. The Department produced no additional documents until September

⁴⁹ E-mail from Assoc. Deputy Att'y Gen. Brad Smith to Deputy Att'y Gen. Gary Grindler, et al. (Dec. 17, 2010) [HOCR 002875-002881].

⁵⁰ Letter from Chairman Darrell Issa to ATF Acting Dir. Kenneth Melson (Mar. 16, 2011) [hereinafter Mar. 16 Letter].

⁵¹ Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (May 5, 2011).

⁵² Letter from Chairman Darrell Issa to ATF Acting Dir. Kenneth Melson (June 8, 2011).

⁵³ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 10, 2011).

⁵⁴ *Id.*

1, 2011, when it produced 193 pages of documents.⁵⁵ On September 30, 2011, the Department produced 97 pages of documents.⁵⁶ On October 11, 2011, the Department produced 56 pages of documents.⁵⁷

Early in the investigation, the Committee received hundreds of pertinent documents from whistleblowers. Many of the documents the whistleblowers provided were not among the 2,050 pages that the Department had produced by October 11, 2011, demonstrating that the Department was withholding materials responsive to the subpoena.

The Committee requested additional documents from the Department as the investigation proceeded during the summer of 2011. On July 11, 2011, Chairman Issa and Senator Grassley wrote to the Attorney General requesting documents from twelve people in Justice Department headquarters pertaining to Fast and Furious.⁵⁸ The Justice Department first responded to this letter on October 31, 2011, nearly four months later.⁵⁹

On July 11, 2011, Chairman Issa and Senator Grassley sent a letter to the FBI requesting documents relating to the FBI's role in the Fast and Furious OCDETF investigation.⁶⁰ The letter requested information and documents pertaining to paid FBI informants who were the target of the Fast and Furious investigation. The FBI never produced any of the documents requested in this letter.

On July 15, 2011, Chairman Issa and Senator Grassley sent a letter to the DEA requesting documents pertaining to another target of the Fast and Furious investigation.⁶¹ The DEA was aware of this target before Fast and Furious became an OCDETF case, a fact that raises serious questions about the lack of information-sharing among Department components. Though DEA responded to the letter on July 22, 2011, it, too, did not provide any of the requested documents.⁶²

On September 1, 2011, Chairman Issa and Senator Grassley wrote to the Acting U.S. Attorney in Arizona requesting documents and communications pertaining to Fast and Furious.⁶³ As the office responsible for leading Fast and Furious, the Arizona U.S. Attorney's Office possesses a large volume of documents relevant to the Committee's investigation. The Department of Justice, on behalf of the U.S. Attorney's Office for the District of Arizona, did not

⁵⁵ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Sep. 1, 2011).

⁵⁶ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Sep. 30, 2011).

⁵⁷ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Oct. 11, 2011) [hereinafter Oct. 11 Letter].

⁵⁸ Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (July 11, 2011).

⁵⁹ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Oct. 31, 2011) [hereinafter Oct. 31 Letter].

⁶⁰ Letter from Chairman Darrell Issa and Senator Charles Grassley to FBI Dir. Robert Mueller (July 11, 2011) [hereinafter Mueller Letter].

⁶¹ Letter from Chairman Darrell Issa and Senator Charles Grassley to DEA Adm'r Michele Leonhart (July 15, 2011).

⁶² Letter from DEA Adm'r Michele Leonhart to Chairman Darrell Issa and Senator Charles Grassley (July 22, 2011).

⁶³ Letter from Chairman Darrell Issa and Senator Charles Grassley to Acting U.S. Att'y Ann Scheel (Sep. 1, 2011).

respond to this letter until December 6, 2011, the eve of the Attorney General's testimony before the House Judiciary Committee.⁶⁴

On September 27, 2011, Chairman Issa and Senator Grassley sent a letter to the Attorney General raising questions about information-sharing among Department components, the Department's cooperation with Congress, and FBI documents requested in the July 11, 2011 letter to FBI Director Mueller.⁶⁵ To date, the Department has not responded to this letter.

The Department wrote to Chairman Issa on October 11, 2011, stating it had "substantially concluded [its] efforts to respond to the Committee requests set forth in the subpoena and the letter of June 8th."⁶⁶ The letter further stated:

[O]ther documents have not been produced or made available for these same reasons because neither redacting them nor making them available for review (as opposed to production) was sufficient to address our concerns. Our disclosure of the vast majority of the withheld material is prohibited by statute. These records pertain to matters occurring before a grand jury, as well as investigative activities under seal or the disclosure of which is prohibited by law . . . we also have not disclosed certain confidential investigative and prosecutorial documents, the disclosure of which would, in our judgment, compromise the pending criminal investigations and prosecution. These include core investigative and prosecutorial material, such as Reports of Investigation and drafts of court filings.

Finally . . . we have also withheld internal communications that were generated in the course of the Department's effort to respond to congressional and media inquiries about Operation Fast and Furious. These records were created in 2011, well after the completion of the investigative portion of Operation Fast and Furious that the Committee has been reviewing and after the charging decisions reflected in the January 25, 2011 indictments. Thus, they were not part of the communications regarding the development and implementation of the strategy decisions that have not been the focus of the Committee's inquiry. . . Disclosure would have a chilling effect on agency officials' deliberations about how to respond to inquiries from Congress or the media. Such a chill on internal communications would interfere with our ability to respond as effectively and efficiently as possible to congressional oversight requests.⁶⁷

⁶⁴ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Dec. 6, 2011) [hereinafter Dec. 6 Letter].

⁶⁵ Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (Sep. 27, 2011).

⁶⁶ Oct. 11 Letter, *supra* note 57.

⁶⁷ *Id.*

The following day, on October 12, 2011, after the Department announced its intention to cease producing documents responsive to the Committee's March 31, 2011 subpoena to Melson, the Committee issued a subpoena to Attorney General Eric Holder demanding documents relating to Fast and Furious.

B. Subpoena Schedule Requests

In the weeks following the issuance of the subpoena, Committee staff worked closely with Department lawyers to provide clarifications about subpoena categories, and to assist the Department in prioritizing documents for production. Committee and Department staff engaged in discussions spanning several weeks to enable the Department to better understand what the Committee was specifically seeking. During these conversations, the Committee clearly articulated its investigative priorities as reflected in the subpoena schedule. The Department memorialized these priorities with specificity in an October 31, 2011 e-mail from the Office of Legislative Affairs.⁶⁸

Despite the Department's acknowledgement that it understands what the Committee was seeking, it has yet to provide a single document for 12 out of the 22 categories contained in the subpoena schedule. The Department has not adequately complied with the Committee's subpoena, and it has unequivocally stated its refusal to comply with entire categories of the subpoena altogether.

A review of each of the 22 schedule categories in the subpoena reflects the Department's clear understanding of the documents sought by the Committee for each category. Below is a listing of each category of the subpoena schedule, followed by what the Department has explained is its understanding of what the Committee is seeking for each category.

1. All communications referring or relating to Operation Fast and Furious, the Jacob Chambers case, or any Organized Crime Drug Enforcement Task Force (OCDETF) firearms trafficking case based in Phoenix, Arizona, to or from the following individuals:
 - a. Eric Holder Jr., Attorney General;
 - b. David Ogden, Former Deputy Attorney General;
 - c. Gary Grindler, Office of the Attorney General and former Acting Deputy Attorney General;
 - d. James Cole, Deputy Attorney General;
 - e. Lanny Breuer, Assistant Attorney General;
 - f. Ronald Weich, Assistant Attorney General;
 - g. Kenneth Blanco, Deputy Assistant Attorney General;
 - h. Jason Weinstein, Deputy Assistant Attorney General;
 - i. John Keeney, Deputy Assistant Attorney General;
 - j. Bruce Swartz, Deputy Assistant Attorney General;
 - k. Matt Axelrod, Associate Deputy Attorney General;
 - l. Ed Siskel, former Associate Deputy Attorney General;

⁶⁸ E-mail from Office of Leg. Affairs Staff, U.S. Dep't of Justice, to Investigations Staff, H. Comm. on Oversight and Gov't Reform (Oct. 31, 2011) [hereinafter OLA e-mail].

- m. Brad Smith, Office of the Deputy Attorney General;
- n. Kevin Carwile, Section Chief, Capital Case Unit, Criminal Division;
- o. Joseph Cooley, Criminal Fraud Section, Criminal Division; and,
- p. James Trusty, Acting Chief, Organized Crime and Gang Section.

Department Response: In late October 2011, the Department acknowledged that it had “already begun searches of some of the custodians listed here relating to Fast and Furious, such as in response to the Chairman’s letter of 7/11/11.”⁶⁹ Still, it has produced no documents since the issuance of the subpoena pursuant to subpoena categories 1(a), 1(b), 1(g), 1(i), and 1(k), only two documents pursuant to subpoena category 1(d), and very few documents pursuant to subpoena category 1(j) and 1(l).

2. All communications between and among Department of Justice (DOJ) employees and Executive Office of the President employees, including but not limited to Associate Communications Director Eric Schultz, referring or relating to Operation Fast and Furious or any other firearms trafficking cases.

Department Response: According to the Department, the Committee identified for the Department several people likely to be custodians of these documents.⁷⁰ Still, the Department has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

3. All communications between DOJ employees and Executive Office of the President employees referring or relating to the President’s March 22, 2011 interview with Jorge Ramos of Univision.

Department Response: The Department represented that it would “check on communications with WH Press Office in the time period preceding the President’s 3/22/11 interview,” and that it had identified the most likely custodians of those documents.⁷¹ Nonetheless, it has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

4. All documents and communications referring or relating to any instances prior to February 4, 2011 where the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) failed to interdict weapons that had been illegally purchased or transferred.

Department Response: The Department has produced some documents responsive to this subpoena category.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

5. All documents and communications referring or relating to any instances prior to February 4, 2011 where ATF broke off surveillance of weapons and subsequently became aware that those weapons entered Mexico.

Department Response: The Department has produced documents responsive to this subpoena category.

Most of the responsive documents the Department has produced pursuant to the subpoena pertain to categories 4 and 5 and relate to earlier cases the Department has described as involving gunwalking. The Department produced these documents strategically, advancing its own narrative about why Fast and Furious was neither an isolated nor a unique program. It has attempted to accomplish this objective by simultaneously producing documents to the media and the Committee.

6. All documents and communications referring or relating to the murder of Immigrations and Customs Enforcement Agent Jaime Zapata, including, but not limited to, documents and communications regarding Zapata's mission when he was murdered, Form for Reporting Information That May Become Testimony (FD-302), photographs of the crime scene, and investigative reports prepared by the FBI.

Department Response: The Department "understand[s] that the Zapata family has complained that they've been 'kept in the dark' about this matter" which necessitated this subpoena category.⁷² The Department "conferred with the U.S. Attorney's Office . . . which we hope will be helpful to them and perhaps address the concerns that are the basis of this item."⁷³ The Department, however, has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

In late February 2012, press accounts revealed that prosecutors had recently sentenced a second individual in relation to the murder of Immigration and Customs Enforcement (ICE) Agent Jaime Zapata. One news article stated that "[n]obody was more astonished to learn of the case than Zapata's parents, who didn't know that [the defendant] had been arrested or linked to their son's murder."⁷⁴ Press accounts alleged that the defendant had been "under ATF surveillance for at least six months before a rifle he trafficked was used in Zapata's murder" – a situation similar to what took place during Fast and Furious.⁷⁵ Despite this revelation, the Department has still failed to produce any documents responsive to this subpoena category.

7. All communications to or from William Newell, former Special Agent-in-Charge for ATF's Phoenix Field Division, between:

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Sharyl Attkisson, *Second gun used in ICE agent murder linked to ATF undercover operation*, (Feb. 22, 2012, 5:29 P.M.), http://www.cbsnews.com/8301-31727_162-57383089-10391695/second-gun-used-in-ice-agent-murder-linked-to-atf-undercover-operation/.

⁷⁵ *Id.*

- a. December 14, 2010 to January 25, 2011; and,
- b. March 16, 2009 to March 19, 2009.

Department Response: The Department has not produced any documents responsive to subpoena category 7(b), despite its understanding that the Committee sought documents pertaining “to communications with [Executive Office of the President] staff regarding gun control policy” within a specific and narrow timeframe.⁷⁶ The Department has not informed the Committee that no documents exist responsive to this schedule number.

8. All Reports of Investigation (ROIs) related to Operation Fast and Furious or ATF Case Number 785115-10-0004.

Department Response: Department representatives contended that this subpoena category “presents some significant issues for” the Department due to current and potential future indictments.⁷⁷ The Department has not produced any documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

9. All communications between and among Matt Axelrod, Kenneth Melson, and William Hoover referring or relating to ROIs identified pursuant to Paragraph 8.

Department Response: The Department acknowledged its understanding that this request specifically pertained to “emails Ken sent to Matt and Billy, expressing concerns, perhaps in March 2011, [that] are core to [the Committee’s] work, and we’ll look at those.”⁷⁸ Still, it has produced no documents pursuant to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

10. All documents and communications between and among former U.S. Attorney Dennis Burke, Attorney General Eric Holder Jr., former Acting Deputy Attorney General Gary Grindler, Deputy Attorney General James Cole, Assistant Attorney General Lanny Breuer, and Deputy Assistant Attorney General Jason Weinstein referring or relating to Operation Fast and Furious or any OCDETF case originating in Arizona.

Department Response: The Department has produced some documents pursuant to this subpoena category.

11. All communications sent or received between:

- a. December 16, 2009 and December 18, 2009, and;
- b. March 9, 2011 and March 14, 2011, to or from the following individuals:

⁷⁶ OLA e-mail, *supra* note 68.

⁷⁷ *Id.*

⁷⁸ *Id.*

- i. Emory Hurley, Assistant U.S. Attorney, Office of the U.S. Attorney for the District of Arizona;
- ii. Michael Morrissey, Assistant U.S. Attorney, Office of the U.S. Attorney for the District of Arizona;
- iii. Patrick Cunningham, Chief, Criminal Division, Office of the U.S. Attorney for the District of Arizona;
- iv. David Voth, Group Supervisor, ATF; and,
- v. Hope MacAllister, Special Agent, ATF.

Department Response: The Department acknowledged that it “will first search these custodians for records re a) the Howard meeting in 12/09; and b) the ROI or memo that was written during this time period relating to the Howard mtng in 12/09.”⁷⁹ Although the Department has produced documents that are purportedly responsive to this category, these documents do not pertain to the subject matter that the Department understands that the Committee is seeking.

12. All communications sent or received between December 15, 2010 and December 17, 2010 to or from the following individuals in the U.S. Attorney’s Office for the District of Arizona:

- a. Dennis Burke, former United States Attorney;
- b. Emory Hurley, Assistant United States Attorney;
- c. Michael Morrissey, Assistant United States Attorney; and,
- d. Patrick Cunningham, Chief of the Criminal Division.

Department Response: The Department understood that the Committee’s “primary interest here is in the communications during this time period that relate to the Terry death and, per our conversation, we will start with those.”⁸⁰ Although the Department has produced some documents responsive to this subpoena category, it has not represented that it has produced all responsive documents in this category.

13. All communications sent or received between August 7, 2009 and March 19, 2011 between and among former Ambassador to Mexico Carlos Pascual; Assistant Attorney General Lanny Breuer; and Deputy Assistant Attorney General Bruce Swartz.

Department Response : The Department acknowledged that it “understand[s] the Committee’s focus here is Firearms Trafficking issues along the SW Border, not limited to Fast & Furious.”⁸¹ Despite the Department’s understanding, it has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

14. All communications sent or received between August 7, 2009 and March 19, 2011 between and among former Ambassador to Mexico Carlos Pascual and any Department of

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

Justice employee based in Mexico City referring or relating to firearms trafficking initiatives, Operation Fast and Furious or any firearms trafficking case based in Arizona, or any visits by Assistant Attorney General Lanny Breuer to Mexico.

Department Response: The Department has produced approximately ten pages pursuant to this subpoena category, even though it “understand[s] that [the Committee] wants [the Department] to approach this effort with efficiency.”⁸² Despite the Committee’s request for an efficient effort, the Department produced a key document regarding Attorney General Lanny Breuer three and a half months after the subpoena was issued, after several previous document productions, and long after Breuer testified before Congress and could be questioned about the document. Given the importance of the contents of the document and the request for an efficient effort on the part of the Department in this subpoena category, it is inconceivable that the Department did not discover this document months prior to its production. The Department’s actions suggest that it kept this document hidden for strategic and public relations reasons.

15. Any FD-302 relating to targets, suspects, defendants, or their associates, bosses, or financiers in the Fast and Furious investigation, including but not limited to any FD-302s ATF Special Agent Hope MacAllister provided to ATF leadership during the calendar year 2011.

Department Response: The Department “understand[s] that [the Committee’s] primary focus here is the 5 FBI 302s that were provided to SA MacAllister, which she later gave to Messrs. Hoover and Melson.”⁸³ Despite the specificity of this document request, the Department has not produced any documents responsive to this schedule number. The Department has not informed the Committee that no documents exist responsive to this schedule number.

16. Any investigative reports prepared by the FBI or Drug Enforcement Administration (DEA) referring or relating to targets, suspects, or defendants in the Fast and Furious case.

Department Response: The Department was “uncertain about the volume here,” regarding the amount of documents, and pledged to “work[] on this [with] DEA and FBI.”⁸⁴ Despite this pledge, it has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

17. Any investigative reports prepared by the FBI or DEA relating to the individuals described to Committee staff at the October 5, 2011 briefing at Justice Department headquarters as Target Number 1 and Target Number 2.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Department Response: The Department acknowledged that it “think[s] we understand this item.”⁸⁵ Despite this understanding, it has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

18. All documents and communications in the possession, custody or control of the DEA referring or relating to Manuel Fabian Celis-Acosta.

Department Response: The Department agreed to “start with records regarding information that DEA shared with ATF about Acosta, which we understand to be the focus of your interest in this item.”⁸⁶ Despite this understanding, the Department has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

19. All documents and communications between and among FBI employees in Arizona and the FBI Laboratory, including but not limited to employees in the Firearms/Toolmark Unit, referring or relating to the firearms recovered during the course of the investigation of Brian Terry’s death.

Department Response: The Department’s understanding was that “[the Committee’s] focus here is how evidence was tagged at the scene of Agent Terry’s murder, how evidence was processed, how the FBI ballistics report was prepared and what it means.”⁸⁷ Despite this clear understanding, the Department has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

20. All agendas, meeting notes, meeting minutes, and follow-up reports for the Attorney General’s Advisory Committee of U.S. Attorneys between March 1, 2009 and July 31, 2011, referring or relating to Operation Fast and Furious.

Department Response: This category asks for documents from the Attorney General’s Advisory Committee within a clearly specified date range. Despite the fact that the Department has acknowledged this category “is clear,” the Department has produced no documents responsive to this subpoena category.⁸⁸ The Department has not informed the Committee that no documents exist responsive to this schedule number.

21. All weekly reports and memoranda for the Attorney General, either directly or through the Deputy Attorney General, from any employee in the Criminal Division, ATF, DEA, FBI, or the National Drug Intelligence Center created between November 1, 2009 and September 30, 2011.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

Department Response: This category asks for weekly reports and memoranda to the Attorney General from five different Department components “regarding ATF cases re firearms trafficking.”⁸⁹ The Department has produced some documents responsive to this subpoena category.

22. All surveillance tapes recorded by pole cameras inside the Lone Wolf Trading Co. store between 12:00 a.m. on October 3, 2010 and 12:00 a.m. on October 7, 2010.

Department Response: This category asks for all ATF surveillance tapes from Lone Wolf Trading Company between two specified dates in October 2010. Both the Committee and the Department “understand a break-in occurred” at that time.⁹⁰ The Department has produced no documents responsive to this subpoena category. The Department has not informed the Committee that no documents exist responsive to this schedule number.

C. Attempts of Accommodation by the Committee, Lack of Compliance by the Justice Department

In public statements, the Department has maintained that it remains committed to “work[ing] to accommodate the Committee’s legitimate oversight needs.”⁹¹ The Department, however, believes it is the sole arbiter of what is “legitimate.” In turn, the Committee has gone to great lengths to accommodate the Department’s interests as an Executive Branch agency. Unfortunately, the Department’s actions have not matched its rhetoric. Instead, it has chosen to prolong the investigation and impugn the motives of the Committee. A statement the Attorney General made at the February 2, 2012, hearing was emblematic of the Department’s posture with respect to the investigation:

But I also think that if we are going to really get ahead here, if we are really going to make some progress, we need to put aside the political gotcha games in an election year and focus on matters that are extremely serious.⁹²

This attitude with respect to a legitimate congressional inquiry has permeated the Department’s ranks. Had the Department demonstrated a willingness to cooperate with this investigation from the outset – instead of attempting to cover up its own internal mismanagement – this investigation likely would have concluded well before the election year even began. The Department has intentionally withheld documents for months, only to release a selected few on the eve of the testimony of Department officials.⁹³ The Department has impeded the ability of a

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Fast and Furious: Management Failures at the Department of Justice: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. (Feb. 2, 2012) (Statement of Hon. Eric H. Holder, Jr., Att’y Gen. of the U.S.).

⁹² *Id.*

⁹³ On Friday January 27, 2012, just days before the Attorney General testified before Congress, documents were delivered to the Senate Judiciary Committee so late in the evening that a disc of files had to be slipped under the

co-equal branch of government to perform its constitutional duty to conduct Executive Branch oversight. By any measure, it has obstructed and slowed the Committee's work.

The Committee has been unfailingly patient in working with Department representatives to obtain information the Committee requires to complete its investigation. The Department's progress has been unacceptably slow in responding to the October 12, 2011 subpoena issued to the Attorney General. Complying with the Committee's subpoena is not optional. Indeed, the failure to produce documents pursuant to a congressional subpoena is a violation of federal law.⁹⁴ Because the Department has not cited any legal authority as the basis for withholding documents pursuant to the subpoena its efforts to accommodate the Committee's constitutional obligation to conduct oversight of the Executive Branch are incomplete.

1. *In Camera* Reviews

In an attempt to accommodate the Justice Department's interests, Committee staff has viewed documents responsive to the subpoena that the Department has identified as sensitive *in camera* at Department headquarters. Committee staff has visited the Department on April 12, May 4, June 17, October 12, and November 3, 2011, as well as on January 30 and February 27, 2012 to view these documents. Many of the documents made available for *in camera* review, however, have been repetitive in nature. Many other documents seemingly do not contain any sensitive parts that require them to be viewed *in camera*. Other documents are altogether non-responsive to the subpoena.

Committee staff has spent dozens of hours at Department headquarters reviewing these documents. In addition, the Department has identified hundreds of other sensitive documents responsive to the subpoena, which it refuses to make available even for *in camera* review, instead withholding them from the Committee altogether. The Committee has made these accommodations to the Department at the expense of not being able to make these documents available for review by Committee Members.

2. Redacted Documents

The Department has redacted varying portions of many of the documents it has produced. These redactions purportedly protect ongoing criminal investigations and prosecutions, as well as other sensitive data. The Department has so heavily redacted some documents produced to Congress that they are unintelligible. There appears to be no objective, consistent criteria delineating why some documents were redacted, only provided *in camera*, or withheld entirely.

door. This is not only an extreme inconvenience for congressional staff but also deprives staff of the ability to review the materials in a timely manner.

⁹⁴ 2 U.S.C. § 192 states, in pertinent part:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before . . . any committee of either House of Congress, willfully makes default . . . shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

On the evening of May 2, 2011, Department of Justice representatives notified the Committee that the Department was planning to make approximately 400 pages of documents available for an *in camera* review at its headquarters.⁹⁵ Committee staff went to review those documents on May 4, 2011, only to discover they were partially, or in some cases almost completely, redacted. Since these documents were only made available pursuant to Committee's first subpoena and only on an *in camera* basis, redactions were inappropriate and unnecessary.

On June 14, 2011 the Department produced 65 pages of documents to the Committee in a production labeled "Batch 4."⁹⁶ Of these 65 pages, every single one was at least partially redacted, 44 were completely redacted, and 61 had redactions covering more than half of the page.

On July 18, 2011, after more than a month of discussions between Committee and Department staff, the Department finally included a redaction code that identifies the reason for each redaction within a document.⁹⁷ While the Department has used this redaction code in subsequent document productions to the Committee, documents produced and redacted prior to July 18, 2011 do not have the benefit of associated redaction codes for each redaction.

The Department has over-redacted certain documents. The Committee has obtained many of these documents through whistleblowers and has compared some of them with those produced by the Department. In some instances, the Department redacted more text than necessary, making it unnecessarily difficult and sometimes impossible for the Committee, absent the documents provided by whistleblowers, to investigate decisions made by Department officials.

Further, any documents made available pursuant to the Committee's subpoenas must not have any redactions. To fully and properly investigate the decisions made by Department officials during *Fast and Furious*, the Committee requires access to documents in their entirety. The Department has not complied with this requirement.

The Committee does recognize the importance of privacy interests and other legitimate reasons the Department has for redacting portions of documents produced to the Committee. The Committee has attempted to accommodate the Department's stated concerns related to documents it believes are sensitive. The Committee intended to release 230 pages of documents in support of its July 26, 2011 report entitled *The Department of Justice's Operation Fast and Furious: Fueling Cartel Violence*, and gave the Department an opportunity to suggest its own redactions before the documents became public.⁹⁸ These actions are consistent with the Committee's willingness to accommodate the Department's interests.

⁹⁵ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (May 2, 2011).

⁹⁶ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 14, 2011).

⁹⁷ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (July 18, 2011).

⁹⁸ E-mail from Office of Leg. Affairs Staff, U.S. Dep't of Justice, to Staff, H. Comm. on Oversight and Gov't Reform (July 28, 2011).

3. Privilege Log

Mindful of the Justice Department's prerogatives as an Executive Branch agency, the Committee has offered the opportunity for the Department to prepare a privilege log of documents responsive to the subpoena but withheld from production. A privilege log would outline the documents withheld and the specific grounds for withholding. Such a log would serve as the basis for negotiation between the Committee and the Department about prioritizing the documents for potential production.

On January 31, 2012, Chairman Issa wrote to the Attorney General. He said:

Should you choose to continue to withhold documents pursuant to the subpoena, you must create a detailed privilege log explaining why the Department is refusing to produce each document. If the Department continues to obstruct the congressional inquiry by not providing documents and information, this Committee will have no alternative but to move forward with proceedings to hold you in contempt of Congress.⁹⁹

On February 14, 2012, Chairman Issa again wrote to the Attorney General. He said:

We cannot wait any longer for the Department's cooperation. As such please specify a date by which you expected the Department to produce **all** documents responsive to the subpoena. In addition, please specify a Department representative who will interface with the Committee for production purposes . . . This person's primary responsibility should be to identify for the Committee all documents the Department has determined to be responsive to the subpoena but is refusing to produce, and should provide a privilege log of the documents delineating why each one is being withheld from Congress. Please direct this individual to produce this log to the Committee without further delay.¹⁰⁰

On several occasions, Committee staff has asked the Department to provide such a privilege log, including a listing, category-by-category, of documents the Department has located pursuant to the subpoena and the reason the Department will not produce those documents. Despite these requests, however, the Department has neither produced a privilege log nor responded to this aspect of Chairman Issa's letters of January 31, 2012 and February 14, 2012.

The Department has not informed the Committee that it has been unable to locate certain documents. This suggests that the Department is not producing responsive documents in its possession. Since the Department will not produce a privilege log, it has failed to make a good faith effort to accommodate the Committee's legitimate oversight interests.

⁹⁹ Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Jan. 31, 2012) [hereinafter Jan. 31 Letter].

¹⁰⁰ Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Feb. 14, 2012) (emphasis in original) [hereinafter Feb. 14 Letter].

4. Assertions of Non-Compliance

The Committee's investigation into Operation Fast and Furious is replete with instances in which the Justice Department has openly acknowledged it would not comply with the Committee's requests. These pronouncements began with the March 31, 2011 subpoena to the former Acting ATF Director, continued through the Committee's October 12, 2011 subpoena to the Attorney General, and persist to this day.

a) March 31, 2011 Subpoena

On March 16, 2011, Chairman Issa sent a letter to the then-Acting ATF Director requesting documents about Fast and Furious.¹⁰¹ As part of this request, Chairman Issa asked for a "list of individuals responsible for authorizing the decision to 'walk' guns to Mexico in order to follow them and capture a 'bigger fish.'"¹⁰² On the afternoon of March 30, 2011, the deadline given in Chairman Issa's letter, Department staff participated in a conference call with Committee staff. During that call, Department staff expressed a lack of understanding over the meaning of the word "list."¹⁰³ Department officials further informed Committee staff that the Department would not produce documents by the deadline and were uncertain when they would produce documents in the future. Committee staff understood this response to mean the Department did not intend to cooperate with the Committee's investigation.

The next day Chairman Issa authorized a subpoena for the Acting ATF Director. The following day, the Department wrote to Chairman Issa. Assistant Attorney General Ronald Weich wrote:

As you know, the Department has been working with the Committee to provide documents responsive to its March 16 request to the Bureau of Alcohol, Tobacco, Firearms and Explosives. Yesterday, we informed Committee staff that we intended to produce a number of responsive documents within the next week. As we explained, there are some documents that we would be unable to provide without compromising the Department's ongoing criminal investigation into the death of Agent Brian Terry as well as other investigations and prosecutions, but we would seek to work productively with the Committee to find other ways to be responsive to its needs.¹⁰⁴

Despite the Department's stated intention to produce documents within the next week, it produced no documents for over two months, until June 10, 2011. In the interim, the Department made little effort to work with the Committee to define the scope of the documents required by the subpoena.

¹⁰¹ Mar. 16 Letter, *supra* note 50.

¹⁰² *Id.*

¹⁰³ Teleconference between Committee Staff and U.S. Dep't of Justice Office of Leg. Affairs Staff (Mar. 30, 2011).

¹⁰⁴ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 1, 2011).

On April 8, 2011, the Department wrote to Chairman Issa to inform the Committee that it had located documents responsive to the subpoena. Assistant Attorney General Weich wrote that the Department did not plan to share many of these materials with the Committee. His letter stated:

To date, our search has located several law enforcement sensitive documents responsive to the requests in your letter and the subpoena. We have substantial confidentiality interests in these documents because they contain information about ATF strategies and procedures that could be used by individuals seeking to evade our law enforcement efforts. We are prepared to make these documents, with some redactions, available for review by Committee staff at the Department. They will bear redactions to protect information about ongoing criminal investigations, investigative targets, internal deliberations about law enforcement options, and communications with foreign government representatives. In addition, we notified Committee staff that we have identified certain publicly available documents that are responsive. While our efforts to identify responsive documents are continuing, many of your requests seek records relating to ongoing criminal investigations. Based upon the Department's longstanding policy regarding the confidentiality of ongoing criminal investigations, we are not in a position to disclose such documents, nor can we confirm or deny the existence of records in our ongoing investigative files. This policy is based on our strong need to protect the independence and effectiveness of our law enforcement efforts.¹⁰⁵

The letter cited prior Department policy in support its position of non-compliance:

We are dedicated to holding Agent Terry's killer or killers responsible through the criminal justice process that is currently underway, but we are not in a position to provide additional information at this time regarding this active criminal investigation for the reasons set forth above. . . .¹⁰⁶

On June 14, 2011, after the Department had produced 194 pages of non-public documents pursuant to the subpoena, the Department informed the Committee that it was deliberately withholding certain documents:

As with previous oversight matters, we have not provided access to documents that contain detailed information about our investigative activities where their disclosure would harm our pending investigations and prosecutions. This includes information that would identify investigative subjects, sensitive techniques, anticipated actions, and other details that would assist individuals in evading our law enforcement efforts. Our judgments begin with the premise that we will disclose as much as possible that is responsive to the Committee's interests, consistent

¹⁰⁵ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 8, 2011).

¹⁰⁶ *Id.*

with our responsibilities to bring to justice those who are responsible for the death of Agent Terry and those who violate federal firearms laws.¹⁰⁷

The June 14, 2011 letter arrived one day after the Committee held a hearing featuring constitutional experts discussing the legal obligations of the Department to comply with a congressional subpoena. The Department's letter did not address the views expressed at the hearing, instead reiterating its internal policy. The letter noted that the Department would not provide access to documents discussing its use of "sensitive techniques" – even though these techniques were central to the Committee's investigation.

On July 5, 2011, Chairman Issa and Senator Grassley wrote to the Department about serious issues involving the lack of information sharing among Department components, in particular, between the FBI and DEA.¹⁰⁸ These issues raised the possibility that the Department had been deliberately concealing information about Fast and Furious from the Committee, including the roles of its component agencies. The next day, the Department responded. It wrote:

Your letter raises concerns about the alleged role of other agencies in matters that you say touch on Operation Fast and Furious. Chairman Issa's staff previously raised this issue with representatives of the Department and it is my understanding that discussions about whether and how to provide any such sensitive law enforcement information have been ongoing. . . .¹⁰⁹

On July 11, 2011, Chairman Issa and Senator Grassley wrote to the FBI requesting information on the issue of information sharing within the Department. The letter included a request for information relating to the murder of Immigrations and Customs Enforcement Agent Jaime Zapata.¹¹⁰ On August 12, 2011, the FBI responded. It wrote:

Your letter also asks for specific information related to the crime scene and events leading to the murder of ICE Agent Jaime Zapata in Mexico on February 15, 2011. As you know, crime scene evidence and the circumstances of a crime are generally not made public in an ongoing investigation. Furthermore, the investigative reports of an ongoing investigation are kept confidential during the investigation to preserve the integrity of the investigation and to ensure its successful conclusion. We regret that we cannot provide more details about the investigation at this time, but we need to ensure all appropriate steps are taken to protect the integrity of the investigation.¹¹¹

¹⁰⁷ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 14, 2011).

¹⁰⁸ Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (July 5, 2011).

¹⁰⁹ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (July 6, 2011).

¹¹⁰ Mueller Letter, *supra* note 60.

¹¹¹ Letter from Stephen Kelley, Ass't Dir., FBI Office of Congressional Affairs, to Chairman Darrell Issa and Senator Charles Grassley (Aug. 12, 2011).

The FBI did not provide any documents to the Committee regarding the information sharing issues raised, though it did offer to provide a briefing to staff. It delivered that briefing nearly two months later, on October 5, 2011.

On October 11, 2011, the Department wrote to Chairman Issa. The Department stated:

We believe that we have now substantially concluded our efforts to respond to the Committee requests set forth in the subpoena and the letter of June 8th.¹¹²

The Department was well aware that the Committee was struggling to understand how the Department created its February 4, 2011 letter to Senator Grassley, which the Committee believed to contain false information. To that end, the Department stated:

As we have previously explained to Committee staff, we have also withheld internal communications that were generated in the course of the Department's effort to respond to congressional and media inquiries about Operation Fast and Furious. These records were created in 2011, well after the completion of the investigative portion of Operation Fast and Furious that the Committee has been reviewing and after the charging decisions reflected in the January 25, 2011 indictments. Thus, they were not part of the communications regarding the development and implementation of the strategy decisions that have been the focus of the Committee's inquiry. It is longstanding Executive Branch practice not to disclose documents falling into this category because disclosure would implicate substantial Executive Branch confidentiality interests and separation of powers principles. Disclosure would have a chilling effect on agency officials' deliberations about how to respond to inquiries from Congress or the media. Such a chill on internal communications would interfere with our ability to respond as effectively and efficiently as possible to congressional oversight requests.¹¹³

The next day, the Committee issued a subpoena to Attorney General Holder.

b) October 12, 2011 Subpoena

On October 31, 2011, the Department produced its first batch of documents pursuant to the Committee's October 12, 2011 subpoena.¹¹⁴ This production consisted of 652 pages. Of these 652 pages, 116 were about the Kingery case, a case that the Department wanted to highlight in an attempt to discredit some of the original Fast and Furious whistleblowers. Twenty-eight additional pages were about an operation from the prior administration, the Hernandez case, and 245 pages were about another operation from the prior administration, Operation Wide Receiver.

¹¹² Oct. 11 Letter, *supra* note 57.

¹¹³ *Id.*

¹¹⁴ Oct. 31 Letter, *supra* note 59.

Although the subpoena covered documents from the Hernandez and Wide Receiver cases, their inclusion into the first production batch under the subpoena was indicative of the Department's strategy in responding to the subpoena. The Department briefed the press on these documents at the same time as it produced them to the Committee. The Department seemed more interested in spin control than in complying with the congressional subpoena. Sixty percent of the documents in this first production were related to either Kingery, Hernandez, or Wide Receiver, and therefore, unrelated to the gravamen of the Committee's investigation into Fast and Furious.

On December 2, 2011, shortly before the Attorney General's testimony before the House Judiciary Committee, the Department produced 1,364 pages of documents pertaining to the creation of its February 4, 2011 letter.¹¹⁵ Despite its statements in the October 11, 2011 letter, the Department, through a letter from Deputy Attorney General James Cole, publicly admitted under pressure its obvious misstatements, formally acknowledging that the February 4, 2011 letter "contains inaccuracies."¹¹⁶

On December 13, 2011, on the eve of the Committee's interview with Gary Grindler, Chief of Staff to the Attorney General, the Department produced 19 pages of responsive documents.¹¹⁷

On January 5, 2012, the Department produced 482 pages of documents responsive to the subpoena.¹¹⁸ Of these 482 pages, 304 of them, or 63 percent, were related to the Wide Receiver case. This production brought the total number of pages produced pursuant to Wide Receiver to 549, nearly 100 more than the Department had produced at that time regarding Fast and Furious in three document productions.

On January 27, 2012 the Department produced 486 pages of documents pursuant to the October 12, 2011 subpoena.¹¹⁹ In its cover letter, the Department stated, "[t]he majority of materials produced today are responsive to items 7, 11 and 12 of your October 11 subpoena." There are no documents in the production, however, responsive to items 7(b) or 11(b)(i-v). The Department wrote in its January 27 cover letter:

We are producing or making available for review materials that are responsive to these items, most of which pertain to the specific investigations that we have already identified to the Committee. We are not, however, providing materials pertaining to other matters, such as documents regarding ATF cases that do not appear to involve the inappropriate tactics under review by the Committee; non-ATF cases, except for certain information relating to the death of Customs and Border

¹¹⁵ Letter from Deputy Att'y Gen. James Cole to Chairman Darrell Issa and Senator Charles Grassley (Dec. 2, 2011).

¹¹⁶ *Id.*

¹¹⁷ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Dec. 13, 2011).

¹¹⁸ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Jan. 5, 2012).

¹¹⁹ Cole Letter, *supra* note 37.

Protection Agent Brian Terry; administrative matters; and personal records.¹²⁰

The Department refused to produce documents pursuant to the subpoena regarding investigations that it had not previously specified to the Committee, or investigations that “do not appear” to involve inappropriate tactics. In doing so, the Department made itself the sole arbiter of the Committee’s investigative interests, as well as of the use of “inappropriate” tactics. The Department has prevented Congress from executing its constitutionally mandated oversight function, preferring instead to self-regulate.

The October 12, 2011 subpoena, however, covers all investigations in which ATF failed to interdict weapons that had been illegally purchased or transferred – not just those cases previously identified by the Department. The subpoena does not give the Department the authority to define which tactics are inappropriate. Rather, the language in sections 4 and 5 of the subpoena schedule is clear. The Department’s refusal to cooperate on this front and only produce documents about investigations that it had previously identified – documents that support the Department’s press strategy – is in violation of its obligation to cooperate with congressional oversight.

On January 31, 2012, Chairman Issa again wrote to the Attorney General, this time asking that the Department produce all documents pursuant to the subpoena by February 9, 2012.¹²¹ The following day, the Department responded. It stated:

Your most recent letter asks that we complete the production process under the October 11, 2011 subpoena by February 9, 2012. The broad scope of the Committee’s requests and the volume of material to be collected, processed and reviewed in response make it impossible to meet that deadline, despite our good faith efforts. We will continue in good faith to produce materials, but it simply will not be possible to finish the collection, processing and review of materials by the date sought in your most recent letter.¹²²

Yet, as discussed in Section V.B above, the Department was acutely aware in October 2011, approximately three months earlier, exactly what categories of documents the Committee was seeking. In response to the subpoena, the Department had, up to February 1, 2012, produced more documents relating to a single operation years before *Fast and Furious* even began than it had relating to Operation *Fast and Furious* itself.

On February 16, 2012, the Department produced 304 pages of documents pursuant to the subpoena.¹²³ The production included nearly 60 pages of publicly available and previously produced information, as well as other documents previously produced to the Committee.

¹²⁰ *Id.*

¹²¹ Jan. 31 Letter, *supra* note 99.

¹²² Letter from Deputy Att’y Gen. James Cole to Chairman Darrell Issa (Feb. 1, 2012) [hereinafter Feb. 1 Letter].

¹²³ Letter from Ass’t Att’y Gen. Ronald Weich to Chairman Darrell Issa (Feb. 16, 2012) [hereinafter Feb. 16 Letter].

On February 27, 2012, the Department produced eight pages pursuant to the subpoena.¹²⁴ These eight pages, given to the Committee by a whistleblower ten months earlier, were produced only because a transcribed interview with a former Associate Deputy Attorney General was to take place the next day.

On March 2, 2012, the Department produced 26 pages of documents pursuant to the October 12, 2011 subpoena.¹²⁵ Five of these documents were about the Kingery. Fourteen documents – over half of the production – related to Wide Receiver. Seven pages were duplicate copies of a press release already produced to the Committee.

On March 16, 2012, the Department produced 357 pages of documents pursuant to the subpoena. Three hundred seven of these pages, or 86%, related to the Hernandez and Medrano cases from the prior Administration. Twenty other pages had been previously produced by the Department, and seven pages were publicly available on the Justice Department's website.

On April 3, 2012, the Department produced 116 pages of documents pursuant to the subpoena. Forty four of these pages, or 38%, related to cases other than Fast and Furious. On April 19, 2012, the Department produced 188 pages of documents pursuant to the subpoena.

The Department has produced a total of 6,959 pages to the Committee to date.¹²⁶

c) **Post-February 4, 2011 Documents**

Many of the documents the October 12, 2011 subpoena requires were created or produced after February 4, 2011. The Department first responded to Congress about Fast and Furious on this date. The Department has steadfastly refused to make any documents created after February 4, 2011 available to the Committee.

The Department's actions following the February 4, 2011 letter to Senator Grassley are crucial in determining how it responded to the serious allegations raised by the whistleblowers. The October 12, 2011 subpoena covers documents that would help Congress understand what the Department knew about Fast and Furious, including when and how it discovered its February 4 letter was false, and the Department's efforts to conceal that information from Congress and the public. Such documents would include those relating to actions the Department took to silence or retaliate against Fast and Furious whistleblowers and to find out what had happened, and how the Department assessed the culpability of those involved in the program.

The Attorney General first expressed the Department's position regarding documents created after February 4, 2011 in his testimony before the House Judiciary Committee on December 8, 2011. In no uncertain terms, he stated:

[W]ith regard to the Justice Department as a whole – and I'm certainly a member of the Justice Department – we will not provide memos after

¹²⁴ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Feb. 27, 2012).

¹²⁵ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Mar. 2, 2012).

¹²⁶ The most recent production by the Department, on April 19, 2012, ended with Bates number HOGH 006959.

February the 4th . . . e-mails, memos – consistent with the way in which the Department of Justice has always conducted itself in its interactions.¹²⁷

He again impressed this point upon Committee Members later in the hearing:

Well, with the regard to provision of e-mails, I thought I've made it clear that after February the 4th it is not our intention to provide e-mail information consistent with the way in which the Justice Department has always conducted itself.¹²⁸

The Department reiterated this position less than a week later in a December 14, 2011, transcribed interview of Gary Grindler, the Attorney General's Chief of Staff. Department counsel broadened the Department's position with respect to sharing documents created after February 4, 2011 in refusing to allow Grindler to answer any questions relating to conversations that he had with anyone in the Department regarding *Fast and Furious* after February 4, 2011. Grindler stated:

What I am saying is that the Attorney General made it clear at his testimony last week that we are not providing information to the committee subsequent to the February 4th letter.¹²⁹

Department counsel expanded the position the Attorney General articulated regarding documentary evidence at the House Judiciary Committee hearing to include testimonial evidence as well.¹³⁰ Given the initial response by the Department to the congressional inquiry into *Fast and Furious*, the comments by Department counsel created a barrier preventing Congress from obtaining vital information about *Fast and Furious*.

The Department has maintained this position during additional transcribed interviews. In an interview with Deputy Assistant Attorney General Jason Weinstein on January 10, 2012, Department counsel prohibited him from responding to an entire line of questioning about his interactions with the Arizona U.S. Attorney's Office because it "implicates the post-February 4th period."¹³¹

The post-February 4 period is replete with details germane to the Committee's investigation. Documents encompassing this period are responsive to the October 12, 2011 subpoena. For example, following the February 4, 2011, letter, Weinstein, at the behest of Assistant Attorney General Breuer, prepared an analytical review of *Fast and Furious*.¹³² Weinstein interviewed Emory Hurley and Patrick Cunningham of the Arizona U.S. Attorney's

¹²⁷ *Oversight Hearing on the United States Department of Justice: Hearing Before the H. Comm. on the Judiciary, 112th Cong. (Dec. 8, 2011) (Test. of Hon. Eric H. Holder, Jr., Att'y Gen. of the U.S.).*

¹²⁸ *Id.*

¹²⁹ Transcribed Interview of Gary Grindler, Chief of Staff to the Att'y Gen., at 22 (Dec. 14, 2011) [hereinafter Grindler Tr.].

¹³⁰ *Id.*

¹³¹ Transcribed Interview of Jason Weinstein, Deputy Ass't Att'y Gen. at 177 (Jan. 10, 2012).

¹³² Transcribed Interview of Dennis K. Burke at 158-60 (Dec. 13, 2011).

office in conducting this review.¹³³ The document that resulted from Weinstein’s analysis specifically discussed issues relevant to the Committee’s inquiry. To date, the Department has not produced this document to the Committee.

Chairman Issa has sent several letters urging the Department urging to produce documents pertaining to the Fast and Furious from the post-indictment period, and raising the possibility of contempt if the Attorney General chose not to comply. Initially, the Department refused to produce any documents created after January 25, 2011, the date that the case was unsealed. On November 9, 2011, Chairman Issa wrote to the Department:

Over the past six months, Senator Grassley and I have asked for this information on many occasions, and each time we have been told it would not be produced. This information is covered by the subpoena served on the Attorney General on October 12, 2011, and I expect it to be produced no later than Wednesday, November 16, at 5:00 p.m. Failure to comply with this request will leave me with no other alternative than the use of compulsory process to obtain your testimony under oath.

Understanding the Department’s actions after Congress started asking questions about Fast and Furious is crucial. As you know, substantial effort was expended to hide the actions of the Department from Congress . . . I expect nothing less than full compliance with all aspects of the subpoena, including complete production of documents created after the indictments were unsealed on January 25, 2011.¹³⁴

On December 2, 2011, the Department produced documents pertaining to its February 4, 2011 response to Senator Grassley. When the Attorney General testified before Congress on December 8, 2011, he created a new cutoff date of February 4, 2011, after which no documents would be produced to Congress, despite the fact that such documents were covered by the October 12, 2011 subpoena. In support of this position regarding post-February 4, 2011 documents, in transcribed interviews, Department representatives have asserted a “separation of powers” privilege without further explanation or citation to legal authority.¹³⁵ The Department has not cited any legal authority to support this new, extremely broad assertion of privilege.

On January 31, 2012, Chairman Issa wrote to the Attorney General about this new, arbitrary date created by the Department, and raised the possibility of contempt:

In short, the Committee requires full compliance with all aspects of the subpoena, including complete production of documents created after the Department’s February 4, 2011 letter If the Department continues to obstruct the congressional inquiry by not providing documents and

¹³³ *Id.* at 158-59.

¹³⁴ Letter from Chairman Darrell Issa to Ass’t Att’y Gen. Ronald Weich (Nov. 9, 2011).

¹³⁵ *See, e.g.*, Grindler Tr. at 22.

information, this Committee will have no alternative but to move forward with proceedings to hold you in contempt of Congress.¹³⁶

The Department responded the following day. It said:

To the extent responsive materials exist that post-date congressional review of this matter and were not generated in that context or to respond to media inquiries, and likewise do not implicate other recognized Department interests in confidentiality (for example, matters occurring before a grand jury, investigative activities under seal or the disclosure of which is prohibited by law, core investigative information, or matters reflecting internal Department deliberations), we intend to provide them.¹³⁷

The Department quoted from its October 11, 2011 letter, stating:

[A]s we have previously explained to Committee staff, we have also withheld internal communications that were generated in the course of the Department's effort to respond to congressional and media inquiries about Operation Fast and Furious. These records were created in 2011, well after the completion of the investigative portion of Operation Fast and Furious that the Committee has been reviewing and after the charging decisions reflected in the January 25, 2011 indictments. Thus, they were not part of the communications regarding the development and implementation of the strategy decisions that have been the focus of the Committee's inquiry. It is longstanding Executive Branch practice not to disclose documents falling into this category because disclosure would implicate substantial Executive Branch confidentiality interests and separation of powers principles. Disclosure would have a chilling effect on agency officials' deliberations about how to respond to inquiries from Congress or the media. Such a chill on internal communications would interfere with our ability to respond as effectively and efficiently as possible to congressional oversight requests.¹³⁸

On February 14, 2012, Chairman Issa again wrote to the Department regarding post-February 4, 2011 documents, and again raised the possibility of contempt:

Complying with the Committee's subpoena is not optional. Indeed, the failure to produce documents pursuant to a congressional subpoena is a violation of federal law. The Department's letter suggests that its failure to produce, among other things, "deliberative documents and other internal communications generated in response to congressional oversight requests" is based on the premise that "disclosure would compromise

¹³⁶ Jan. 31 Letter, *supra* note 99.

¹³⁷ Feb. 1 Letter, *supra* note 122.

¹³⁸ *Id.*

substantial separation of powers principles and Executive Branch confidentiality interests.” Your February 4, 2011 cut-off date of providing documents to the Committee is entirely arbitrary, and comes from a “separation of powers” privilege that does not actually exist.

You cite no legal authority to support your new, extremely broad assertion. To the contrary, as you know, Congress possesses the “power of inquiry.” Furthermore, “the issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking.” Because the Department has not cited any legal authority as the basis for withholding documents, or provided the Committee with a privilege log with respect to documents withheld, its efforts to accommodate the Committee’s constitutional obligation to conduct oversight of the Executive Branch are incomplete.¹³⁹

* * *

Please specify a date by which you expect the Department to produce **all** documents responsive to the subpoena. In addition, please specify a Department representative who will interface with the Committee for production purposes. This individual should also serve as the conduit for dealing with possible contempt proceedings, should the Department continue to ignore the Committee’s subpoena.¹⁴⁰

On February 16, 2012, the Department responded. The response did not address the post-February 4, 2011 documents, nor did it address the possibility of contempt. The Department’s letter stated:

We have produced documents to the Committee on a rolling basis; since late last year these productions have occurred approximately twice a month. It is our intent to adhere to this rolling production schedule until we have completed the process of producing all responsive documents to which the Committee is entitled, consistent with the longstanding policies of the Executive Branch across administrations of both parties. Moreover, we intend to send a letter soon memorializing our discussions with your staff about the status of our production of documents within the various categories of the subpoena.

Our efforts to cooperate with the Committee have been a significant undertaking, involving a great deal of hard work by a large number of Department employees. The Department has been committed to providing the documents and information necessary to allow the Committee to satisfy its core oversight interests regarding the use of inappropriate tactics in Fast and Furious.

¹³⁹ Feb. 14 Letter, *supra* note 100.

¹⁴⁰ *Id* (emphasis in original).

The Department, however, has yet to produce any documents pursuant to the subpoena created after February 4, 2011. Despite warnings by Chairman Issa that the Committee would initiate contempt if the Department failed to comply with the subpoena, the Department has refused to produce documents.

d) Interview Requests

In addition to the October 12, 2011 subpoena, the Committee has requested to interview key individuals in Operation Fast and Furious and related programs. The Committee accommodated the Department's request to delay an interview with Hope MacAllister, the lead case agent for Operation Fast and Furious, despite her vast knowledge of the program. The Committee agreed to this accommodation due to the Department's expressed concern about interviewing a key witness prior to trial.

Throughout the investigation, the Department has had an evolving policy with regard to witnesses that excluded ever-broader categories of witnesses from participating in volunteer interviews. The Department first refused to allow line attorneys to testify in transcribed interviews, and then it prevented first-line supervisors from testifying. Next, the Department refused to make Senate-confirmed Department officials available for transcribed interviews. One such Senate-confirmed official, Assistant Attorney General Lanny Breuer, is a central focus in the Committee's investigation. On February 16, 2012, the Department retreated somewhat from its position, noting in a letter to the Committee that it was "prepared to work with [the Committee] to find a mutually agreeable date for [Breuer] to appear and answer the Committee's questions, whether or not that appearance is public."¹⁴¹ The Department has urged the Committee to reconsider this interview request.

While the Department has facilitated a dozen interviews to avoid compulsory depositions, there have been several instances in which the Department has refused to cooperate with the Committee in scheduling interviews. The Department has stated that it would not make available certain individuals that the Committee has requested to interview. On December 6, 2011, the Department wrote:

We would like to defer any final decisions about the Committee's request for Mr. Swartz's interview until we have identified any responsive documents, some of which may implicate equities of another agency. The remaining employees you have asked to interview are all career employees who are either line prosecutors or first- or second-level supervisors. James Trusty and Michael Morrissey were first-level supervisors during the time period covered by the Fast and Furious investigation, and Kevin Carwile was a second-level supervisor. The remaining three employees you have asked to interview - Emory Hurley, Serra Tsethlikai, and Joseph Cooley - are line prosecutors. We are not prepared to make any of these attorneys available for interviews.¹⁴²

¹⁴¹ Feb. 16 Letter, *supra* note 123.

¹⁴² Dec. 6 Letter, *supra* note 64.

The Department did, however, make Patrick Cunningham, Chief of the Criminal Division for the U.S. Attorney's Office in Arizona, available for an interview. The Committee had been requesting to interview Cunningham since summer 2011. The Department finally allowed access to Cunningham for an interview in December 2011. Cunningham chose to retain private counsel instead of Department counsel. On January 17, 2012, Cunningham canceled his interview scheduled for the Committee on January 19, 2012.

Chairman Issa issued a subpoena to Cunningham to appear for a deposition on January 24, 2012. In a letter dated January 19, 2012, Cunningham's counsel informed the Committee that Cunningham would "assert his constitutional privilege not to be compelled to be a witness against himself."¹⁴³ On January 24, 2012, Chairman Issa wrote to the Attorney General to express that the absence of Cunningham's testimony would make it "difficult to gauge the veracity of some of the Department's claims" regarding Fast and Furious.¹⁴⁴

On January 27, 2012, Cunningham left the Department of Justice. After months of Committee requests, the Department finally made him available for an interview just before he left the Department. The actions of the Department in delaying the interview and Cunningham's own assertion of the Fifth Amendment privilege delayed and denied the Committee the benefit of his testimony.

5. Failure to Turn Over Documents

The Department has failed to turn over any documents pertaining to three main categories contained in the October 12, 2011 subpoena.

a) Who at Justice Department Headquarters Should Have Known of the Reckless Tactics

The Committee is seeking documents relating to who had access to information about the objectionable tactics used in Operation Fast and Furious, who approved the use of these tactics, and what information was available to those individuals when they approved the tactics. Documents that whistleblowers have provided to the Committee indicate that those officials were the senior officials in the Criminal Division, including Lanny Breuer and one of his top deputies, Jason Weinstein.

Documents in this category include those relating to the preparation of the wiretap applications, as well as certain ATF, DEA, and FBI Reports of Investigation. Key decision makers at Justice Department headquarters relied on these and other documents to approve the investigation.

¹⁴³ Letter from Tobin Romero, Williams & Connolly LLP, to Chairman Darrell Issa (Jan. 19, 2012).

¹⁴⁴ Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Jan. 24, 2012).

b) How the Department Concluded that Fast and Furious was “Fundamentally Flawed”

The Committee requires documents from the Department relating to how officials learned about whistleblower allegations and what actions they took as a result. The Committee is investigating not just management of Operation Fast and Furious, but also the Department’s efforts to slow and otherwise interfere with the Committee’s investigation.

For months after the congressional inquiry began, the Department refused to acknowledge that anything improper occurred during Fast and Furious. At a May 5, 2011 meeting with Committee staff, a Department representative first acknowledged that “there’s a there, there.” The Attorney General acknowledged publicly that Fast and Furious was “fundamentally flawed” on October 7, 2011. On December 2, 2011 the Department finally admitted that its February 4, 2011 letter to Senator Grassley contained false information – something Congress had been telling the Department for over seven months.

Documents in this category include those that explain how the Department responded to the crisis in the wake of the death of U.S. Border Patrol Agent Brian Terry. These documents will reveal when the Department realized it had a problem, and what actions it took to resolve that problem.

c) How the Inter-Agency Task Force Failed

The Organized Crime Drug Enforcement Task Force (OCDETF) program was created to coordinate inter-agency information sharing. As early as December 2009, the DEA shared information with ATF that should have led to arrests and the identification of the gun trafficking network that Fast and Furious sought to uncover. The Committee has received information suggesting that, after arrests were made one year later, ATF discovered that two Mexican drug cartel associates at the top of the Fast and Furious network had been designated as national security assets by the FBI, and at times have been paid FBI informants. Because of this cooperation, these associates are considered by some to be unindictable.

Documents in this category will reveal the extent of the lack of information-sharing among DEA, FBI, and ATF. Although the Deputy Attorney General is aware of this problem, he has expressed little interest in resolving it.

VI. Historical Perspectives on Contempt

Contempt proceedings in Congress date back over 215 years. These proceedings provide Congress a valuable mechanism for adjudicating its interests. Congressional history is replete with examples of the pursuit of contempt proceedings by House committees when faced with strident resistance to their constitutional authority to exercise investigative power.

A. Past Instances of Contempt

Congress first exercised its contempt authority in 1795 when three Members of the House charged two businessmen, Robert Randall and Charles Whitney, with offering bribes in exchange for the passage of legislation granting Randall and his business partners several million acres bordering Lake Erie.¹⁴⁵ This first contempt proceeding began with a resolution by the House deeming the allegations were adequate “evidence of an attempt to corrupt,” and the House reported a corresponding resolution that was referred to a special committee.¹⁴⁶ The special committee reported a resolution recommending formal proceedings against Randall and Whitney “at the bar of the House.”¹⁴⁷

The House adopted the committee resolution which laid out the procedure for the contempt proceeding. Interrogatories were exchanged, testimony was received, Randall and Whitney were provided counsel, and at the conclusion, on January 4, 1796, the House voted 78-17 to adopt a resolution finding Randall guilty of contempt.¹⁴⁸ As punishment Randall was “ordered [] to be brought to the bar, reprimanded by the Speaker, and held in custody until further resolution of the House.”¹⁴⁹ Randall was detained until January 13, 1796, when the House passed a resolution discharging him.¹⁵⁰ In contrast, Whitney “was absolved of any wrongdoing,” since his actions were against a “member-elect” and occurred “away from the seat of government.”¹⁵¹

Congressional records do not demonstrate any question or hesitation regarding whether Congress possesses the power to hold individuals in contempt.¹⁵² Moreover, there was no question that Congress could punish a non-Member for contempt.¹⁵³ Since the first contempt proceeding, numerous congressional committees have pursued contempt against obstinate administration officials as well as private citizens who failed to cooperate with congressional investigations.¹⁵⁴ Since the first proceeding against Randall and Whitney, House committees, whether standing or select, have served as the vehicle used to lay the foundation for contempt proceedings in the House.¹⁵⁵

On August 3, 1983, the House passed a privileged resolution citing Environmental Protection Agency Administrator Anne Gorsuch Burford with contempt of Congress for failing to produce documents to a House subcommittee pursuant to a subpoena.¹⁵⁶ This was the first occasion the House cited a cabinet-level executive branch member for contempt of Congress.¹⁵⁷

¹⁴⁵ Todd Garvey & Alissa M. Dolan, Congressional Research Service, *Congress’s Contempt Power: Law, History, Practice, & Procedure*, no. RL34097, Apr. 15, 2008 [hereinafter CRS Contempt Report].

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; quoting Asher C. Hinds, Precedents of the House of Representatives, Sec. 1603 (1907).

¹⁵² *Id.*

¹⁵³ *Id.* at 5.

¹⁵⁴ *Id.* at 6.

¹⁵⁵ *Id.* at 14.

¹⁵⁶ *Id.*

¹⁵⁷ Wm. Holmes Brown et al., House Practice: A Guide to the Rules, Precedents, and Procedures of the House, 450 (2011).

A subsequent agreement between the House and the Administrator, as well as prosecutorial discretion, was the base for not enforcing the contempt citation against Burford.¹⁵⁸

Within the past fifteen years the Committee on Oversight and Government Reform has undertaken or prepared for contempt proceedings on multiple occasions. In 1998, Chairman Dan Burton held a vote recommending contempt for Attorney General Janet Reno based on her failure to comply with a subpoena issued in connection with the Committee's investigation into campaign finance law violations.¹⁵⁹ On August 7, 1998, the Committee held Attorney General Reno in contempt by a vote of 24 to 18.¹⁶⁰

During the 110th Congress, Chairman Henry Waxman threatened and scheduled contempt proceedings against several Administration officials.¹⁶¹ Contempt reports were drafted against Attorney General Michael B. Mukasey, Stephen L. Johnson, Administrator of the U.S. Environmental Protection Agency, and Susan E. Dudley, Administrator of the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget. Business meetings to consider these drafts were scheduled.¹⁶² Former Attorney General Mukasey's draft contempt report charged him with failing to produce documents in connection to the Committee's investigation of the release of classified information. According to their draft contempt reports, Administrators Johnson and Dudley failed to cooperate with the Committee's lengthy investigation into California's petition for a waiver to regulate greenhouse gas emissions from motor vehicles and the revision of the national ambient air quality standards for ozone.

Most recently, the House Judiciary Committee pursued contempt against former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten.¹⁶³ On June 13, 2007, the Committee served subpoenas on Miers and Bolten.¹⁶⁴ After attempts at accommodations from both sides, the Committee determined that Miers and Bolten did not satisfactorily comply with the subpoenas. On July 25, 2007, the Committee voted, 22-17, to hold Miers and Bolten in contempt of Congress.

On February 14, 2008, the full House, with most Republicans abstaining, voted to hold Miers and Bolten in criminal contempt of Congress by a margin of 223-42.¹⁶⁵ One hundred seventy-three Members of Congress did not cast a vote either in favor or against the resolution.¹⁶⁶ All but nine Members who abstained were Republican.¹⁶⁷ Only three Republicans

¹⁵⁸ *Id.* at 20, 22.

¹⁵⁹ David E. Rosenbaum, *Panel Votes to Charge Reno With Contempt of Congress*, N.Y. TIMES (Aug. 7, 1998).

¹⁶⁰ *Id.*

¹⁶¹ Laurie Kellman, *Waxman Threatens Mukasey With Contempt Over Leak*, U.S.A. TODAY (July 8, 2008); Richard Simon, *White House Says No to Congress' EPA Subpoena*, L.A. TIMES (June 21, 2008).

¹⁶² Press Release, Rep. Henry Waxman, *Chairman Waxman Warns Attorney General of Scheduled Contempt Vote* (July 8, 2008) <http://oversight-archive.waxman.house.gov/story.asp?ID=2067> (last visited Feb. 22, 2012); Press Release, Rep. Henry Waxman, *Chairman Waxman Schedules Contempt Vote* (June 13, 2008) <http://oversight-archive.waxman.house.gov/story.asp?ID=2012> (last visited Feb. 22, 2012).

¹⁶³ CRS Contempt Report at 54-55.

¹⁶⁴ *Id.*

¹⁶⁵ See H. Res. 982.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

supported the contempt resolution for Miers and Bolten.¹⁶⁸ This marked the first contempt vote by Congress with respect to the Executive Branch since the Reagan Administration.¹⁶⁹ The resolutions passed by the House allowed Congress to exercise all available remedies in the pursuit of contempt.¹⁷⁰ The House Judiciary Committee’s action against Miers marked the first time that a former administration official had ever been held in contempt.¹⁷¹

B. Document Productions

The Department has refused to produce thousands of documents pursuant to the October 12, 2011 subpoena because it claims certain documents are Law Enforcement Sensitive, others pertain to ongoing criminal investigations, and others relate to internal deliberative process. The President has not claimed Executive Privilege over any documents pertaining to Fast and Furious.

During the past ten years the Committee on Oversight and Government Reform has undertaken a number of investigations that resulted in strong opposition from the Executive Branch regarding document productions. These investigations include regulatory decisions of the Environmental Protection Agency (EPA), the leak of CIA operative Valerie Plame’s identity, and the fratricide of Army Corporal Patrick Tillman. In all cases during the 110th Congress, the Administration produced an overwhelming amount of documents, sheltering a narrow few by asserting executive privilege.

In 2008, the Committee received or reviewed *in camera* all agency-level documents related to the EPA’s decision regarding California’s request for a rule waiver, numbering approximately 27,000 pages in total.¹⁷² According to a Committee Report, the EPA withheld only 32 documents related to the California waiver decision based on executive privilege. These included notes of telephone calls or meetings in the White House “involving at least one high-ranking EPA official and at least one high-ranking White House official.”¹⁷³ The White House Counsel informed the Committee that these documents represented “deliberations at the very highest level of government.”¹⁷⁴

During the Committee’s 2008 investigation into the Administration’s promulgation of ozone standards, the EPA produced or allowed *in camera* review of over 35,000 pages of documents. The President asserted executive privilege over a narrow set of documents, encompassing approximately 35 pages. One such document included “talking points for the EPA Administrator to use in a meeting with [the President].”¹⁷⁵

¹⁶⁸ *Id.*

¹⁶⁹ Philip Shenon, *House Votes to Issue Contempt Citations*, N.Y. TIMES (Feb. 15, 2008).

¹⁷⁰ CRS Contempt Report at 54-55.

¹⁷¹ *Id.*

¹⁷² H. Comm. on Oversight and Gov’t Ref. Minority Additional Views, *EPA, OIRA Investigations & Exec. Privilege Claims; Missed Opportunities by Majority to Complete Investigations*, Oct. 22, 2008.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

In furtherance of the Committee’s ozone regulation investigation, OIRA produced or allowed *in camera* review of 7,500 documents.¹⁷⁶ Documents produced by EPA and OIRA represented pre-decisional opinions of career scientists and agency counsel.¹⁷⁷ These documents were sensitive because some, if not all, related to ongoing litigation.¹⁷⁸ The OIRA Administrator withheld a certain number of documents that were communications between OIRA and certain White House officials, and the President ultimately “claimed executive privilege over these documents.”¹⁷⁹

Also during the 110th Congress, the Committee investigated the revelation of CIA operative Valerie Plame’s identity in the news media. The Committee’s investigation was contemporaneous with the Department of Justice’s criminal investigation into the leak of this classified information – a situation nearly identical to the Committee’s current investigation into Operation Fast and Furious.

Pursuant to the Committee’s investigation, the Justice Department produced FBI reports of witness interviews, commonly referred to as “302s.” Specifically, documents reviewed by the Committee staff during the Valerie Plame investigation included the following:

FBI interviews of federal officials who did not work in the White House, as well as interviews of relevant private individuals . . . total of 224 pages of records of FBI interview reports with 31 individuals, including materials related to a former Secretary, Deputy Secretary, Undersecretary [sic], and two Assistant Secretaries of State, and other former or current CIA and State Department officials, including the Vice President’s CIA briefer.¹⁸⁰

To accommodate the Committee, the Department permitted *in camera* review of the following:

[D]ocuments include[ing] redacted reports of the FBI interview with Mr. Libby, Andrew Card, Karl Rove, Condoleezza Rice, Stephen Hadley, Dan Bartlett, and Scott McClellan and another 104 pages of additional interview reports of the Director of Central Intelligence, and eight other White House or Office of the Vice President officials.¹⁸¹

The only documents the Justice Department declined to produce were the FBI 302s with respect to the interviews of the President and the Vice President.¹⁸² Ultimately, the Committee relented in its pursuit of the President’s 302.¹⁸³ The Committee, however, persisted in its request for the

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ H. Comm. on Oversight and Gov’t Ref. Draft Report, *U.S. House of Reps. Regarding President Bush’s Assertion of Exec. Privilege in Response to the Comm. Subpoena to Att’y Gen. Michael B. Mukasey*, <http://oversight-archive.waxman.house.gov/documents/20081205114333.pdf> (last visited Mar. 5, 2012).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

Vice President's 302. As a result, the President asserted executive privilege over that particular document.¹⁸⁴

The Committee specifically included "302s" in its October 12, 2011 subpoena to the Attorney General regarding Fast and Furious. These subpoenaed "302s" do not include FBI interviews with White House personnel, or even any other Executive Branch employee. Still, in spite of past precedent, the Department has refused to produce those documents to the Committee or to allow staff an *in camera* review.

In the 110th Congress, the Committee investigated the fratricide of Army Corporal Patrick Tillman and the veracity of the account of the capture and rescue of Army Private Jessica Lynch.¹⁸⁵ The Committee employed a multitude of investigative tools, including hearings, transcribed interviews, and non-transcribed interviews. The Administration produced thousands of documents.¹⁸⁶ The Committee requested the following:

[T]he White House produce all documents received or generated by any official in the Executive Office of the President from April 22 until July 1, 2004, that related to Corporal Tillman. The Committee reviewed approximately 1,500 pages produced in response to this request. The documents produced to the Committee included e-mail communications between senior White House officials holding the title of "Assistant to the President." According to the White House, the White House withheld from the Committee only preliminary drafts of the speech President Bush delivered at the White House Correspondents' Dinner on May 1, 2004.¹⁸⁷

The Department of Defense produced over 31,000 responsive documents, and the Committee received an unprecedented level of access to documents and personnel.¹⁸⁸

The Oversight and Government Reform Committee's investigations over the past five years demonstrate ample precedent for the production of a wide array of documents from the Executive Branch. In these investigations, the Committee received pre-decisional deliberative regulatory documents, documents pertaining to ongoing investigations, and communications between and among senior advisors to the President. The Committee's October 12, 2011 subpoena calls for many of these same materials, including 302s and deliberative documents. Still, the Justice Department refuses to comply.

Further, the number of documents the Department has produced during the Committee's Fast and Furious investigation pales in comparison to those produced in conjunction with the Committee's prior investigations. In separate EPA investigations, the Committee received 27,000 documents and 35,000 documents respectively. In the Patrick Tillman investigation, the

¹⁸⁴ *Id.*

¹⁸⁵ H. Comm. on Oversight and Gov't Ref. Comm. Report, *Misleading Information From the Battlefield: the Tillman & Lynch Episodes*, H. Rep. 110-858, Sept. 16, 2008.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; The minority views by Hon. Tom Davis states that the Comm. received 50,000 pages of documents and reviewed additional documents *in camera*.

Committee received 31,000 documents. Moreover, in the Valerie Plame investigation, the Committee received access to highly sensitive materials despite the fact that the Justice Department was conducting a parallel criminal investigation.

As of May 1, 2012, in the Fast and Furious investigation, in the light most favorable to the Department of Justice, it has “produc[ed] or [made] available over 7,300 pages of documents to the Committee” – a small fraction of what has been produced to the Committee in prior investigations and of what the Department has produced to the Inspector General in this matter.¹⁸⁹ This small number reflects the Department’s lack of cooperation since the Committee sent its first letter to the Department about Fast and Furious on March 16, 2011.

¹⁸⁹ Letter from Ass’t Att’y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 19, 2012).