

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 Patrol 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

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.

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 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 a revision 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.

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).

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 clarify 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; agreed to postpone interviewing the Department's key Fast and Furious trial witness; and narrowed the scope of documents the Department must produce to be in compliance with the subpoena and to avoid contempt proceedings.

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.

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).

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

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.

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.*

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

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.

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

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).

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.

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 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 purchasers 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 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 development 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 commissioned 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.

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.

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].

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 for the Criminal Division, sent an attorney 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 Assistant Attorney General 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

When the Criminal Division prosecutor 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

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].

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].

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, especially given their prior knowledge of gunwalking in Wide Receiver, which was 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, senior 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

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].

³⁵ Martin Tr. at 100.

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

“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. These applications were constructed from raw data contained in hundreds of Reports of Investigation (ROI); the Department of Justice failed to produce any of these ROI in response to the Committee’s subpoena. The Criminal Division authorized Fast and Furious wiretap applications 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.

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).

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).

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 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.

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].

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].

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 That same day, senior Department officials met with Committee staff and acknowledged "there's a there, there" regarding the legitimacy of the congressional inquiry into Fast and Furious.

In spite of Chairman Issa's May 5, 2011, letter, during 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 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.

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.*

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].

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 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.

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).

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).

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

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

⁶⁶ Oct. 11 Letter, *supra* note 57.

⁶⁷ *Id.*

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 11 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. In a letter to Chairman Issa on May 15, 2012, the Department stated that it had delivered or made available for review documents responsive to 13 of the 22 categories of the subpoena.⁶⁹

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;
 - 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.”⁷⁰ Still, it has produced

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].

⁶⁹ Letter from Deputy Att’y Gen. James Cole to Chairman Darrell Issa (May 15, 2012), at 4 [hereinafter May 15 Cole Letter].

⁷⁰ OLA e-mail.

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: The Department acknowledged that the Committee identified several people likely to be custodians of these documents.⁷¹ Though the Department has stated it has produced documents pursuant to this subpoena category, the Committee has not found any documents produced by the Department responsive to this subpoena category.⁷²

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.⁷³ 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.

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,

⁷¹ *Id.*

⁷² May 15 Cole Letter, at 4.

⁷³ *Id.*

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 Immigration 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.⁷⁴ 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."⁷⁵ Though the Department has stated it has produced documents pursuant to this subpoena category, the Committee has not found any documents produced by the Department responsive to this subpoena category.⁷⁶

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."⁷⁷ 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.⁷⁸ Despite this revelation, the Department 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:
 - 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.⁷⁹ The Department has not informed the Committee that no documents exist responsive to this schedule number.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ May 15 Cole Letter, at 4.

⁷⁷ 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/.

⁷⁸ *Id.*

⁷⁹ OLA e-mail, *supra* note 68.

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.⁸⁰ 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.”⁸¹ 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 responsive to this subpoena category.

A complete production of these documents is crucial to allow Congress to understand how senior Department officials came to know that the February 4, 2011, letter to Senator Grassley was false, why it took so long for the Department to withdraw the letter despite months of congressional pressure to do so, and why the Department obstructed the congressional investigation for nearly a year. These documents will show the reactions of top officials when confronted with evidence about gunwalking in Fast and Furious. The documents will also show whether these officials knew about, or were surprised to learn of, the gunwalking. Additionally, these documents will reveal the identities of Department officials who orchestrated various forms of retaliation against the whistleblowers.

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:

⁸⁰ *Id.*

⁸¹ *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.”⁸² 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.”⁸³ 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.”⁸⁴ The Department has produced some documents responsive to this subpoena category.

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 Justice employee based in Mexico City referring or relating to firearms trafficking

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

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 only a handful of pages responsive to this subpoena category, even though it “understand[s] that [the Committee] wants [the Department] to approach this effort with efficiency.”⁸⁵ 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.”⁸⁶ 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.”⁸⁷ 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.

Department Response: The Department acknowledged that it “think[s] we understand this item.”⁸⁸ Despite this understanding, it has produced no documents responsive to this

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

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.”⁸⁹ 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.”⁹⁰ 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.⁹¹ 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.

Department Response: This category asks for weekly reports and memoranda to the Attorney General from five different Department components “regarding ATF cases re

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

firearms trafficking.”⁹² 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.⁹³ 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.”⁹⁴ 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.⁹⁵

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.⁹⁶ The Department has impeded the ability of a

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *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.).

⁹⁵ *Id.*

⁹⁶ 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 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.

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.⁹⁷ 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.

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

⁹⁷ 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.

available for an *in camera* review at its headquarters.⁹⁸ 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."⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ These actions are consistent with the Committee's willingness to accommodate the Department's interests.

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

⁹⁸ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (May 2, 2011).

⁹⁹ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 14, 2011).

¹⁰⁰ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (July 18, 2011).

¹⁰¹ 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).

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.¹⁰²

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.¹⁰³

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.

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

¹⁰² Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Jan. 31, 2012) [hereinafter Jan. 31 Letter].

¹⁰³ Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Feb. 14, 2012) (emphasis in original) [hereinafter Feb. 14 Letter].

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*.¹⁰⁴ 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.'"¹⁰⁵ 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."¹⁰⁶ 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.¹⁰⁷

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.

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:

¹⁰⁴ Mar. 16 Letter, *supra* note 50.

¹⁰⁵ *Id.*

¹⁰⁶ Teleconference between Committee Staff and U.S. Dep't of Justice Office of Leg. Affairs Staff (Mar. 30, 2011).

¹⁰⁷ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 1, 2011).

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.¹⁰⁸

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. . . .¹⁰⁹

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 with our responsibilities to bring to justice those who are responsible for the death of Agent Terry and those who violate federal firearms laws.¹¹⁰

¹⁰⁸ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Apr. 8, 2011).

¹⁰⁹ *Id.*

¹¹⁰ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (June 14, 2011).

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.¹¹¹ 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. . . .¹¹²

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.¹¹³ 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.¹¹⁴

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.

¹¹¹ Letter from Chairman Darrell Issa and Senator Charles Grassley to Att'y Gen. Eric Holder (July 5, 2011).

¹¹² Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (July 6, 2011).

¹¹³ Mueller Letter, *supra* note 60.

¹¹⁴ Letter from Stephen Kelley, Ass't Dir., FBI Office of Congressional Affairs, to Chairman Darrell Issa and Senator Charles Grassley (Aug. 12, 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.¹¹⁵

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.¹¹⁶

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.¹¹⁷ 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.

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

¹¹⁵ Oct. 11 Letter, *supra* note 57.

¹¹⁶ *Id.*

¹¹⁷ Oct. 31 Letter, *supra* note 59.

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.¹¹⁸ 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."¹¹⁹

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.¹²⁰

On January 5, 2012, the Department produced 482 pages of documents responsive to the subpoena.¹²¹ 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.¹²² 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 Protection Agent Brian Terry; administrative matters; and personal records.¹²³

¹¹⁸ Letter from Deputy Att'y Gen. James Cole to Chairman Darrell Issa and Senator Charles Grassley (Dec. 2, 2011).

¹¹⁹ *Id.*

¹²⁰ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa and Senator Charles Grassley (Dec. 13, 2011).

¹²¹ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Jan. 5, 2012).

¹²² Cole Letter, *supra* note 37.

¹²³ *Id.*

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, 2012.¹²⁴ 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.¹²⁵

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.¹²⁶ The production included nearly 60 pages of publicly available and previously produced information, as well as other documents previously produced to the Committee.

On February 27, 2012, the Department produced eight pages pursuant to the subpoena.¹²⁷ These eight pages, given to the Committee by a whistleblower ten months earlier, were produced

¹²⁴ Jan. 31 Letter, *supra* note 102.

¹²⁵ Letter from Deputy Att’y Gen. James Cole to Chairman Darrell Issa (Feb. 1, 2012) [hereinafter Feb. 1 Letter].

¹²⁶ Letter from Ass’t Att’y Gen. Ronald Weich to Chairman Darrell Issa (Feb. 16, 2012) [hereinafter Feb. 16 Letter].

¹²⁷ Letter from Ass’t Att’y Gen. Ronald Weich to Chairman Darrell Issa (Feb. 27, 2012).

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.¹²⁸ 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 percent, 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 percent, related to cases other than Fast and Furious. On April 19, 2012, the Department produced 188 pages of documents pursuant to the subpoena.

On May 15, 2012, the Department produced 29 pages of documents pursuant to the subpoena. Ten of these pages, or 36 percent, related to cases other than Fast and Furious.

The Department has produced a total of 6,988 pages to the Committee to date.¹²⁹ Though the Department recently stated that it has “provided documents to the Committee at least twice every month since late last year,” the Department has not produced any documents to the Committee in over 30 days.¹³⁰

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.

¹²⁸ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (Mar. 2, 2012).

¹²⁹ The most recent production by the Department, on May 15, 2012, ended with Bates number HOGH 006988.

¹³⁰ May 15 Cole Letter, *supra* note 69.

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 February the 4th . . . e-mails, memos – consistent with the way in which the Department of Justice has always conducted itself in its interactions.¹³¹

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.¹³²

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.¹³³

Department counsel expanded the position the Attorney General articulated regarding documentary evidence at the House Judiciary Committee hearing to include testimonial evidence as well.¹³⁴ 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."¹³⁵

¹³¹ *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.).*

¹³² *Id.*

¹³³ Transcribed Interview of Gary Grindler, Chief of Staff to the Att'y Gen., at 22 (Dec. 14, 2011) [hereinafter Grindler Tr.].

¹³⁴ *Id.*

¹³⁵ Transcribed Interview of Jason Weinstein, Deputy Ass't Att'y Gen. at 177 (Jan. 10, 2012).

Understanding the post-February 4th period is critical to the Committee's investigation. Furthermore, documents from this period are responsive to the October 12, 2011, subpoena. For example, following the February 4, 2011, letter, Jason Weinstein, at the behest of Assistant Attorney General Breuer, prepared an analytical review of *Fast and Furious*.¹³⁶ Weinstein interviewed Emory Hurley and Patrick Cunningham of the Arizona U.S. Attorney's office as part of this review.¹³⁷ The document that resulted from Weinstein's analysis specifically discussed issues relevant to the Committee's inquiry. To date, the Department has not produced documents related to Weinstein's review to the Committee.

Chairman Issa has sent several letters urging the Department 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, 2011.¹³⁸

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.¹³⁹ The Department has not cited any legal authority to support this new, extremely broad assertion of privilege.

¹³⁶ Transcribed Interview of Dennis K. Burke at 158-60 (Dec. 13, 2011).

¹³⁷ *Id.* at 158-59.

¹³⁸ Letter from Chairman Darrell Issa to Ass't Att'y Gen. Ronald Weich (Nov. 9, 2011).

¹³⁹ *See, e.g.,* Grindler Tr. at 22.

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 information, this Committee will have no alternative but to move forward with proceedings to hold you in contempt of Congress.¹⁴⁰

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.¹⁴¹

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.¹⁴²

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

¹⁴⁰ Jan. 31 Letter, *supra* note 102.

¹⁴¹ Feb. 1 Letter, *supra* note 125.

¹⁴² *Id.*

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 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.¹⁴³

* * *

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.¹⁴⁴

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.

¹⁴³ Feb. 14 Letter, *supra* note 103.

¹⁴⁴ *Id* (emphasis in original).

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.

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."¹⁴⁵ 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

¹⁴⁵ Feb. 16 Letter, *supra* note 126.

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.¹⁴⁶

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."¹⁴⁷ 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.¹⁴⁸

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.

¹⁴⁶ Dec. 6 Letter, *supra* note 64.

¹⁴⁷ Letter from Tobin Romero, Williams & Connolly LLP, to Chairman Darrell Issa (Jan. 19, 2012).

¹⁴⁸ Letter from Chairman Darrell Issa to Att'y Gen. Eric Holder (Jan. 24, 2012).

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.

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. These documents will also show whether senior Department officials were surprised to learn that gunwalking occurred during Fast and Furious, or if they already knew that to be the case. These documents will also identify who at the Department was responsible for authorizing retaliation against the whistleblowers. The documents may also show the Department’s assignment of responsibility to officials who knew about the reckless conduct or were negligent during Fast and Furious.

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. Additional Accommodations by the Committee

As discussed above in Section V.C.5, the Department has failed to turn over any documents responsive to three main categories covered by the October 12, 2011, subpoena:

- a) Who at Justice Department Headquarters Should Have Known of the Reckless Tactics;**
- b) How the Department Concluded that Fast and Furious was “Fundamentally Flawed”; and,**
- c) How the Inter-Agency Task Force Failed.**

The Committee notified the Justice Department on multiple occasions that its failure to produce any documents responsive to these three categories would force the Committee to begin contempt proceedings against the Attorney General.

On May 18, 2012, Chairman Issa, along with Speaker John Boehner, Majority Leader Eric Cantor, and Majority Whip Kevin McCarthy, wrote a letter to the Attorney General. As an accommodation to the Department, the letter offered to narrow the scope of documents the Department needed to provide in order to avoid contempt proceedings.¹⁴⁹ Documents in category (c) are outside the scope of the narrowed request, and so the Department no longer needed to produce them to avoid contempt proceedings, even though such documents are covered by the October 12, 2011, subpoena.

The Committee also obtained copies of wiretap applications authorized by senior Department officials during Operation Fast and Furious. These documents, given to the Committee by whistleblowers, shined light on category (a). Still, many subpoenaed documents under this category have been deliberately withheld by the Department. These documents are critical to understanding who is responsible for failing to promptly stop Fast and Furious. The Department has cited such documents as “core investigative” materials that pertain to “pending law enforcement matters.”¹⁵⁰ To accommodate the Department’s interest in successfully prosecuting criminal defendants in this case, the Committee is willing to accept production of these documents after the current prosecutions of the 20 straw purchasers indicted in January 2011, have concluded at the trial level. This deferment should in no way be interpreted as the Committee ceding its legitimate right to receive these documents, but instead solely as an accommodation meant to alleviate the Department’s concerns about preserving the integrity of the ongoing prosecutions.

In addition to deferring production of category (a) documents, the Committee is also willing to view these documents *in camera* with limited redactions. These accommodations represent a significant commitment on the part of the Committee to negotiating in good faith to avoid contempt.

¹⁴⁹ Letter from Speaker John Boehner et al. to Att’y Gen. Eric Holder (May 18, 2012).

¹⁵⁰ May 15 Cole Letter, *supra* note 69.

Unlike documents in category (a), the Department has no legitimate interest in limiting the Committee’s access to documents in category (b). On February 4, 2011, the Department wrote a letter to Congress categorically denying that gunwalking had occurred. This letter was false. Still, it was not withdrawn until December 2011. The Committee has a right to know how the Department learned that gunwalking did in fact occur, and how it handled the fallout internally. The deliberative process privilege is not recognized by Congress as a matter of law and precedent. By sending a letter that contained false and misleading statements, the Department forfeited any reasonable expectation that the Committee would accommodate its interest in withholding deliberative process documents.

VII. 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.¹⁵¹ 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.¹⁵² The special committee reported a resolution recommending formal proceedings against Randall and Whitney “at the bar of the House.”¹⁵³

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.¹⁵⁴ 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.”¹⁵⁵ Randall was detained until January 13, 1796, when the House passed a resolution discharging him.¹⁵⁶ In contrast, Whitney “was absolved of any wrongdoing,” since his actions were against a “member-elect” and occurred “away from the seat of government.”¹⁵⁷

¹⁵¹ 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].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; quoting Asher C. Hinds, Precedents of the House of Representatives, Sec. 1603 (1907).

Congressional records do not demonstrate any question or hesitation regarding whether Congress possesses the power to hold individuals in contempt.¹⁵⁸ Moreover, there was no question that Congress could punish a non-Member for contempt.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹

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.¹⁶² This was the first occasion the House cited a cabinet-level executive branch member for contempt of Congress.¹⁶³ 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.¹⁶⁴

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.¹⁶⁵ On August 7, 1998, the Committee held Attorney General Reno in contempt by a vote of 24 to 18.¹⁶⁶

During the 110th Congress, Chairman Henry Waxman threatened and scheduled contempt proceedings against several Administration officials.¹⁶⁷ 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.¹⁶⁸ 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

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.* at 6.

¹⁶¹ *Id.* at 14.

¹⁶² *Id.*

¹⁶³ Wm. Holmes Brown et al., House Practice: A Guide to the Rules, Precedents, and Procedures of the House, 450 (2011).

¹⁶⁴ *Id.* at 20, 22.

¹⁶⁵ David E. Rosenbaum, *Panel Votes to Charge Reno With Contempt of Congress*, N.Y. TIMES (Aug. 7, 1998).

¹⁶⁶ *Id.*

¹⁶⁷ 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).

¹⁶⁸ 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).

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.¹⁶⁹ On June 13, 2007, the Committee served subpoenas on Miers and Bolten.¹⁷⁰ 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 223-42.¹⁷¹ One hundred seventy-three Members of Congress did not cast a vote either in favor or against the resolution.¹⁷² All but nine Members who abstained were Republican.¹⁷³ Only three Republicans supported the contempt resolution for Miers and Bolten.¹⁷⁴ This marked the first contempt vote by Congress with respect to the Executive Branch since the Reagan Administration.¹⁷⁵ The resolutions passed by the House allowed Congress to exercise all available remedies in the pursuit of contempt.¹⁷⁶ The House Judiciary Committee's action against Miers marked the first time that a former administration official had ever been held in contempt.¹⁷⁷

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

¹⁶⁹ CRS Contempt Report at 54-55.

¹⁷⁰ *Id.*

¹⁷¹ See H. Res. 982.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Philip Shenon, *House Votes to Issue Contempt Citations*, N.Y. TIMES (Feb. 15, 2008).

¹⁷⁶ CRS Contempt Report at 54-55.

¹⁷⁷ *Id.*

approximately 27,000 pages in total.¹⁷⁸ 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.”¹⁷⁹ The White House Counsel informed the Committee that these documents represented “deliberations at the very highest level of government.”¹⁸⁰

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].”¹⁸¹

In furtherance of the Committee’s ozone regulation investigation, OIRA produced or allowed *in camera* review of 7,500 documents.¹⁸² Documents produced by EPA and OIRA represented pre-decisional opinions of career scientists and agency counsel.¹⁸³ These documents were sensitive because some, if not all, related to ongoing litigation.¹⁸⁴ 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.”¹⁸⁵

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

¹⁷⁸ 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.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

CIA and State Department officials, including the Vice President's CIA briefer.¹⁸⁶

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.¹⁸⁷

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.¹⁸⁸ Ultimately, the Committee relented in its pursuit of the President's 302.¹⁸⁹ The Committee, however, persisted in its request for the Vice President's 302. As a result, the President asserted executive privilege over that particular document.¹⁹⁰

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.¹⁹¹ The Committee employed a multitude of investigative tools, including hearings, transcribed interviews, and non-transcribed interviews. The Administration produced thousands of documents.¹⁹² 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

¹⁸⁶ 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).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 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.

¹⁹² *Id.*

from the Committee only preliminary drafts of the speech President Bush delivered at the White House Correspondents' Dinner on May 1, 2004.¹⁹³

The Department of Defense produced over 31,000 responsive documents, and the Committee received an unprecedented level of access to documents and personnel.¹⁹⁴

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 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 15, 2012, in the Fast and Furious investigation, in the light most favorable to the Department of Justice, it has "provided the Committee over 7,600 pages of documents" – 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.¹⁹⁵ 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.

¹⁹³ *Id.*

¹⁹⁴ *Id.*; The minority views by Hon. Tom Davis states that the Comm. received 50,000 pages of documents and reviewed additional documents *in camera*.

¹⁹⁵ Letter from Ass't Att'y Gen. Ronald Weich to Chairman Darrell Issa (May 15, 2012).