

January 2012

# January 2012

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**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 5, 2012

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

Dear Mr. Chairman:

This responds to your subpoena dated October 11, 2011, which requested documents regarding the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) investigation known as Operation Fast and Furious and related matters. It also responds to your subpoena of March 31, 2011 to then-Acting ATF Director Kenneth Melson requesting documents about Operation Fast and Furious, your letter dated July 11, 2011, requesting communications of twelve named Department employees, and your letter dated September 1, 2011, requesting documents and communications of six current or former employees in the United States Attorney's Office for the District of Arizona.

We are delivering today to your office 482 pages of material responsive to these requests.<sup>1</sup> Further, we have identified an additional 80 pages of law-enforcement sensitive material that we are prepared to make available at the Department for review by staff of your Committee, as well as staff of the Senate and House Committees on the Judiciary.<sup>2</sup>

<sup>1</sup> These documents bear limited redactions to protect specific details about pending investigations, including text that would identify targets and sensitive techniques or disclose prosecutorial deliberations, plus limited information relating to line employees, such as their cellular phone numbers, and we have withheld entire pages for these same reasons in some instances. We also have withheld text that implicates individual privacy interests, including information about individuals who have been investigated but not prosecuted. In addition, we have redacted text from multi-subject documents that is not responsive to your requests. In some substantial multi-subject documents, such as regular ATF reports, we have not included entire pages that contained text that was either not responsive or contained details of investigations outside of the scope of your inquiry. In response to requests from Chairman Smith and Chairman Leahy, we will deliver to the House and Senate Committees on the Judiciary the same documents that we deliver to you.

<sup>2</sup> There are limited redactions of text in these pages that would identify law-enforcement sensitive details and techniques as well as information implicating individual privacy interests.

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To assist the Committee in its oversight duties, we appreciate the opportunity to provide relevant and necessary context for some of the documents in today's production. The single largest group of materials produced today relates to the Wide Receiver investigation.<sup>3</sup> Previously, on October 31, 2011, we provided the Committee with documents regarding the involvement in Wide Receiver of the Gang Unit of the Justice Department's Criminal Division. Those documents focused largely on the 2009-10 time period and reflected the Gang Unit's entry into the matter after the prosecution had languished in the United States Attorney's Office for the District of Arizona following the completion of the investigation near the end of 2007. After the Gang Unit became involved, individuals who would not otherwise have been prosecuted were charged in indictments returned in May and October 2010 and, to date, six of these defendants have been convicted.

By way of background, our prior production included a memorandum dated July 13, 2006 from Arizona AUSAs Maldonado and Petermann to then-U.S. Attorney Paul Charlton. That memorandum noted a question "as to the U.S. Attorney's Office's position on the possibility of allowing an indeterminate number of illegal weapons, both components of which (the upper and the lower) were provided to the criminals with ATF's knowledge and/or participation, to be released into the community, and possibly into Mexico, without any further ability by the U.S. Government to control their movement or future use." HOCR WR 003364. Our prior production also included a response from U.S. Attorney Charlton on July 14, 2006 that "I'm meeting with the ATF SAC on Tuesday and I'll discuss it with him then." HOCR WR 003366. Today's production includes a June 20, 2006 U.S. Attorney's Office memorandum reviewing legal authorities on issues related to the Wide Receiver investigation and bearing a handwritten note on the first page reading "Check w/ Agent - Is this still an issue? Any response from PKC following my memo of 7-13-06?" HOCR WR 005231.

Today's production of Wide Receiver materials generally focuses on the investigative phase of the matter during the time period 2006-07. Today's documents reflect that in March 2006, ATF's Tucson field office received information that an individual was purchasing large quantities of AR-15 lower receivers from a federal firearms licensee. HOCR WR 005200. By June, according to the documents, three suspects had purchased a total of 126 lower receivers in four separate firearms transactions. HOCR WR 005200. One of the suspects told a confidential source that the firearms were being converted into machine guns and that upper receivers were being purchased on the Internet. HOCR WR 005201. ATF believed that the gun-purchasing ring had ties to a "very powerful, aggressive and violent" Mexican drug cartel. HOCR WR 005201. Despite this, it appears from the documents that a decision was made during early 2006 not to charge the case at that time. As one ATF official explained in March 2006, "[w]e have two AUSA[s] assigned to this matter, and the USAO @ Tucson is prepared to issue Search and Arrest Warrants. We already have enough for the 371 [conspiracy] and 922 a6 [false statement in purchase of a firearm] charges, but we want the Title II [sic] manufacturing and distribution

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<sup>3</sup> Other investigations reflected in today's production include the Hernandez, Medrano and Fast and Furious matters. Our collection and review of documents related to all of these matters is ongoing.

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pieces also – we want it all.” HOGWR 005176. A June 15, 2006 email from an ATF supervisor in Arizona to other ATF personnel observed that “we believe at this point there is more value in the surveillance, identification of locations, persons, vehicles and asset [sic] rather than making sight arrests.” HOGWR 005189. A June 2006 ATF memorandum noted that a “strategy meeting” had recently been held with the United States Attorney’s Office and that the “AUSAs concurred with the current investigative strategy and its progression.” HOGWR 005205.

In August 2006, ATF’s Phoenix Field Division prepared a briefing paper on Wide Receiver for “Law Enforcement Command Staff.” HOGWR 005243-005246. The briefing paper explained that the “state of affairs in Mexico” is “basically one of daily violence, including the routine murder of police officers and other government officials.” HOGWR 005243. According to the briefing paper, the “primary and [sic] source of firearms used by [these Mexican cartels] is the United States, specifically Arizona and Texas.” HOGWR 005244. The briefing paper went on to say that “[i]t is highly unlikely in view of the very limited recovery within the United States of firearms transfers identified in this case [sic], that the remaining firearms have not entered into the conduit of illegally trafficked firearms to Mexico.” HOGWR 005244. Like the March 2006 memorandum discussed above, the August 2006 briefing paper made clear that “[t]here is currently sufficient documentation to conclude a historical criminal case on individuals involved in the illegal purchase and transfer of firearms identified as of this date.” HOGWR 005244.

Despite this, the August 2006 briefing paper does not reflect that arrests were contemplated any time soon. Rather, the briefing paper explained that one of the “[e]xpected [o]utcomes” of the investigation was the “[i]dentification and development of sufficient evidence to dismantle, disrupt and prosecute levels of this trafficking organization up to and including the primary conspirators responsible for providing the funds, direction and ultimate delivery and criminal implementation of the firearms in question.” HOGWR 005245. An October 2006 ATF Operational Plan explicitly stated that “[w]e are not prepared to make any arrests at this time because we are still attempting to coordinate our efforts with AFI in Mexico.” HOGWR 005272. Consistent with the desire to coordinate with Mexican law enforcement (“MLE”) officials, the August 2006 briefing paper contemplated “[t]ravel to Mexico by ATF Case Agents to brief the MCO as to this investigation in preparation for initiation of joint investigative activity with vetted MLE.” HOGWR 005245. The ATF MCO was to “coordinate law enforcement activity within Mexico through the appropriate vetted MLE.” HOGWR 005245.

By December 2006, the documents reflect that targets of the investigation had purchased 136 lower rifle receivers from a federal firearms licensee, as well as 45 firearms purchased from other sources. HOGWR 005296. ATF reported in December that “[t]he Tucson II Field Office has maintained contact with the ATF Mexico City Country Office in an effort to secure the cooperation and joint investigation with” Mexican officials. HOGWR 005299. ATF further noted that “[t]hree Tucson II Field Office SA have obtained official U.S. Government passports in anticipation of a coordination meeting” with Mexican officials “during calendar year 2007.” HOGWR 005299.

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The documents reflect ATF efforts in the spring of 2007 to enlist Mexican law enforcement assistance. In an April 10, 2007 email, a Special Agent in ATF's Phoenix Field Division reported on a call with an ATF Assistant Attaché in Mexico, saying that the ATF Mexico City Office "would coordinate the involvement of Mexican Federal law enforcement and security agencies in investigating in Mexico the recipients of the firearms purchased in Tucson." HOGW WR 005315. The email observed that ATF in Tucson "wished that once the trafficker moved into Mexico that LE on that side follow the lead to it's [sic] ultimate destination and that all phones and other means be utilized to identify the organization involved." HOGW WR 005315. The email also made clear that "it was not in Tucson II's interest to engage in a long term surveillance if the end result would be a Border entry stop or traffic stop in Mexico" and that a particular purchase and trafficking of firearms by the suspects in the case "was only one piece of a potentially much larger future movement of firearms into Mexico." HOGW WR 005315. The documents reflect ATF "viewed a successful operation in Mexico as a potential CCE [Continuing Criminal Enterprise] of a DTO." HOGW WR 005315. In another email that same day, the ATF supervisor in Arizona observed that "[w]e are looking at this as a test of the Mexican interest and capability. If the Mexican authorities decline to participate we anticipate arresting those subjects prior to their leaving the U.S. If the Mexican authorities decline to surveil or further this investigation, merely arresting the individuals once they get to the Mexico side we will proceed accordingly in the future." HOGW WR 005316. The ATF supervisor observed "[o]bviously, a lot has to go right for this op to work - I won't give odds. Certainly, if successful, ATF can point to this matter as part of the SWB initiative. The plan certainly won't work if we don't give it a try." HOGW WR 005316.

An ATF Operational Plan dated April 11, 2007 asserted that Wide Receiver was by that point in time being conducted by "[t]he Tucson II field Ofc in conjunction w/ the Tucson Police Department, Special Investigation Division (TPD SID), the ATF Mexico City Office, and Mexican Federal law enforcement authorities," who "intend to work jointly to determine violations of U.S. and Mexican law." HOGW WR 005322. A late-April 2007 ATF memorandum noted that "Government passports have been obtained by four (4) Tucson II Field Office special agents. A meeting between Tucson II Field Office agents, ATF Mexico City Agents, and the Mexican Federal law enforcement officials is anticipated during May 2007." HOGW WR 005344. A May 12, 2007 ATF email, however, reflects that a meeting between ATF and Mexican officials was delayed: "[w]e will not be traveling to Hermosillo this coming Tuesday per our conversation with Edgar today [sic] we hope that we can reschedule this in the next couple of weeks and that the PGR will by that time have information on some of these players." HOGW WR 005370.

The documents produced today paint a mixed picture of events in May and June 2007. An ATF Operational Plan dated May 7, 2007 indicates that ATF officials planned to monitor a purchase of weapons by the suspects and that "[d]etectives and officers will subsequently follow these individuals to their border crossing at the U.S./Mexico border, where Mexican enforcement authorities will follow the firearms to their final destination in Mexico. If the Mexican authorities decline or fail to participate, the firearms traffickers will be arrested prior to leaving

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the United States.” HOCR WR 005357. A May 29, 2007 email from a prosecutor in the U.S. Attorney’s Office in Arizona to the ATF supervisor in Arizona said that “[m]y understanding his [sic] you guys will probably take them down on the next purchase. Keep me posted.” HOCR WR 005403. By June, an ATF official observed that “[w]e already have numerous charges up here and actually taking it into Mexico doesn’t add to our case specifically at that point. We want the money people in Mexico that are orchestrating this operation for indictment but obviously we may never actually get our hands on them for trial, so the real beneficiary is to PGR [sic].” HOCR WR 005404. And, a late-June 2007 email exchange between the ATF supervisor in Arizona and the OCDEF coordinator for the Southwest Region reflects that:

the southbound firearms trafficking investigation has gathered even more steam. We anticipate surveillance this evening where the subject(s) of interest are scheduled to purchase approx. \$20K of assorted firearms for further shipment to Caborca, Mx, and we are coordinating with the Mexican authorities in the event that the surveillance is successful. We have reached that stage where I am no longer comfortable allowing additional firearms to ‘walk,’ without a more defined purpose.

HOCR WR 005412.

Today’s production reflects that by late 2008, concerns about the tactics used in the investigation were expressed by the Arizona AUSA then-assigned to the case. In December 2008, the prosecutor -- who took over the matter after the original prosecution team had departed -- wrote that she had reviewed the prosecution memo prepared by her predecessor and “I don’t like the case. I think it is wrong for us to allow 100s of guns to go into Mexico to drug people knowing that is where they are going.” HOCR WR 005430. In August 2009, just a month before the Gang Unit of the Criminal Division took over the matter, an ATF email summarized the case as follows:

AUSA was also pushing back w/ moral dilemma w/ the G allowing the targets to traffic 300+ firearms to Mexico. I advised AUSA that the case was investigated within ATF Trafficking guidelines and in furtherance of attempting to identify and secure evidence on targets inside Mexico receiving the firearms for the drug cartels. The case stands on its own merit and a prosecution decision should be made.

HOCR WR 005432.

In September 2009, as the case was about to be transferred to the Gang Unit, ATF’s Phoenix SAC prepared to send a summary of the investigation to the head of the Gang Unit. Before doing so, he told the Phoenix ASAC “I want Dennis Burke to be aware of what we’ve done to try to get this case prosecuted. Can you e-mail me some bullets on the meetings we’ve had (quantity and date – approx), with whom at the USAO, and what was said.” HOCR WR 005438. As noted earlier and in our October letter to you, the Gang Unit agreed to assume responsibility for prosecuting the Wide Receiver defendants notwithstanding the problematic

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history of the case and, to date, six defendants have been convicted of offenses connected to the trafficking of these firearms in 2006 and 2007.

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

January 5, 2012

The Honorable Patrick Leahy  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 Washington, DC 20510

Dear Mr. Chairman:

This responds further to your letter to the Attorney General, dated June 23, 2011, requesting that the Senate Judiciary Committee receive the same access to documents that the Department provides to the House Committee on Oversight and Government Reform related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Project Gunrunner.

Enclosed on CD please find 482 pages of material that we produced to the House Oversight and Government Reform Committee on January 5, 2012.<sup>1</sup> Further, we have identified an additional 80 pages of law-enforcement sensitive material that we are prepared to make available at the Department for review by staff of your Committee, as well as staff of the House Committee on the Judiciary.<sup>2</sup>

To assist the Committee in its oversight duties, we appreciate the opportunity to provide relevant and necessary context for some of the documents in today's production. The single

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In August 2006, ATF's Phoenix Field Division prepared a briefing paper on Wide Receiver for "Law Enforcement Command Staff." HOCR WR 005243-005246. The briefing paper explained that the "state of affairs in Mexico" is "basically one of daily violence, including the routine murder of police officers and other government officials." HOCR WR 005243. According to the briefing paper, the "primary and [sic] source of firearms used by [these Mexican cartels] is the United States, specifically Arizona and Texas." HOCR WR 005244. The briefing paper went on to say that "[i]t is highly unlikely in view of the very limited recovery within the United States of firearms transfers identified in this case [sic], that the remaining firearms have not entered into the conduit of illegally trafficked firearms to Mexico." HOCR WR 005244. Like the March 2006 memorandum discussed above, the August 2006 briefing paper made clear that "[t]here is currently sufficient documentation to conclude a historical criminal case on individuals involved in the illegal purchase and transfer of firearms identified as of this date." HOCR WR 005244.

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that a particular purchase and trafficking of firearms by the suspects in the case “was only one piece of a potentially much larger future movement of firearms into Mexico.” HOCR WR 005315. The documents reflect ATF “viewed a successful operation in Mexico as a potential CCE [Continuing Criminal Enterprise] of a DTO.” HOCR WR 005315. In another email that same day, the ATF supervisor in Arizona observed that “[w]e are looking at this as a test of the Mexican interest and capability. If the Mexican authorities decline to participate we anticipate arresting those subjects prior to their leaving the U.S. If the Mexican authorities decline to surveil or further this investigation, merely arresting the individuals once they get to the Mexico side we will proceed accordingly in the future.” HOCR WR 005316. The ATF supervisor observed “[o]bviously, a lot has to go right for this op to work – I won’t give odds. Certainly, if successful, ATF can point to this matter as part of the SWB initiative. The plan certainly won’t work if we don’t give it a try.” HOCR WR 005316.

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The documents produced today paint a mixed picture of events in May and June 2007. An ATF Operational Plan dated May 7, 2007 indicates that ATF officials planned to monitor a purchase of weapons by the suspects and that “[d]etectives and officers will subsequently follow these individuals to their border crossing at the U.S./Mexico border, where Mexican enforcement authorities will follow the firearms to their final destination in Mexico. If the Mexican authorities decline or fail to participate, the firearms traffickers will be arrested prior to leaving the United States.” HOCR WR 005357. A May 29, 2007 email from a prosecutor in the U.S. Attorney’s Office in Arizona to the ATF supervisor in Arizona said that “[m]y understanding his [sic] you guys will probably take them down on the next purchase. Keep me posted.” HOCR WR 005403. By June, an ATF official observed that “[w]e already have numerous charges up here and actually taking it into Mexico doesn’t add to our case specifically at that point. We want the money people in Mexico that are orchestrating this operation for indictment but obviously we may never actually get our hands on them for trial, so the real beneficiary is to PGR [sic].” HOCR WR 005404. And, a late-June 2007 email exchange between the ATF supervisor in Arizona and the OCDETF coordinator for the Southwest Region reflects that:

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that stage where I am no longer comfortable allowing additional firearms to 'walk,' without a more defined purpose.

HOGW WR 005412.

Today's production reflects that by late 2008, concerns about the tactics used in the investigation were expressed by the Arizona AUSA then-assigned to the case. In December 2008, the prosecutor -- who took over the matter after the original prosecution team had departed -- wrote that she had reviewed the prosecution memo prepared by her predecessor and "I don't like the case. I think it is wrong for us to allow 100s of guns to go into Mexico to drug people knowing that is where they are going." HOGW WR 005430. In August 2009, just a month before the Gang Unit of the Criminal Division took over the matter, an ATF email summarized the case as follows:

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We hope that this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Charles Grassley  
Ranking Minority Member

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January 18, 2012

Patrick J. Cunningham, Esq.  
Chief, Criminal Division  
United States Attorney's Office for the District of Arizona  
Two Renaissance Square  
40 North Central Avenue, Suite 1200  
Phoenix, Arizona 85004

Dear Mr. Cunningham:

Yesterday, you canceled your interview scheduled with the Committee for Thursday, January 19, 2012. As recently as last Friday, both your attorney and the Department of Justice had assured the Committee that you would submit to a voluntary interview and that you intended to cooperate with our investigation. The Committee has made every effort to accommodate you. The Justice Department has identified you as the most appropriate person to interview from the U.S. Attorney's Office regarding Operation Fast and Furious, and we have been working with your counsel and the Department since August to interview you. Your sudden withdrawal, without any explanation, is unfortunate. It has also delayed the Committee's ability to uncover the truth about this reckless program.

During the course of our investigation, the Committee has learned of the outsized role played by the Arizona U.S. Attorney's Office – and you specifically – in approving the unacceptable tactics used in Fast and Furious. Senior Justice Department officials have recently told the Committee that you relayed inaccurate and misleading information to the Department in preparation for its initial response to Congress. These officials told us that even after Congress began investigating Fast and Furious, you continued to insist that no unacceptable tactics were used. In fact, documents obtained confidentially just last week appear to confirm that you remained steadfast in your belief that no unacceptable tactics were used, even after the Department's initial response to the congressional inquiry. Given that the Attorney General has labeled these tactics as unacceptable and Fast and Furious as “fundamentally flawed,” this position is startling.<sup>1</sup>

It is of paramount importance that you appear before the Committee. Given your intimate knowledge of Fast and Furious, your counsel's offer of an attorney proffer, akin to what a defense lawyer would offer for an indicted defendant, is wholly inadequate. As a result of your

<sup>1</sup> Letter from Att'y Gen Eric Holder to Chairman Darrell Issa, et al. (Oct. 7, 2011).

Patrick J. Cunningham, Esq.  
January 18, 2012  
Page 2

recalcitrance and inflexible position, the Committee is now forced to engage in compulsory process to obtain your testimony.

Such compulsory process will require you to submit to a deposition with 72 hours advance notice. The deposition will take place at a time and place convenient to the Committee's schedule. Your lawyer has expressed a willingness to accept service of process on your behalf. The Committee will serve your subpoena in the near future.

Sincerely,



Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

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The Honorable Darrell E. Issa  
 Chairman  
 Committee on Oversight and Government Reform  
 U.S. House of Representatives  
 2157 Rayburn House Office Building  
 Washington, DC 20515

Dear Mr. Chairman:

I am writing in response to your letter of yesterday.

My client, Patrick Cunningham, has spent his entire 32-year career in government service, including as a JAG officer in the United States Army, as a state court prosecutor, and as a federal prosecutor. He also served on the State Bar of Arizona's Committee on Rules of Professional Conduct (Ethics Committee) from 1995 to 2002. When he returned to the United States Attorney's Office in 2010, he did so to advance the law enforcement interests of the United States. Regrettably, he now finds himself caught in the middle of a dispute between the Legislative Branch and the Executive Branch, with both, according to the allegations in your letter, finding it convenient to make accusations that are inconsistent with the documentary evidence and the public record.

My client and I offered your staff alternative ways to provide the Committee with the information it wants. Those options have been rejected. I am writing to explain why an interview was not an acceptable option from my perspective. According to your letter, Department of Justice officials have reported to the Committee that my client relayed inaccurate information to the Department upon which it relied in preparing its initial response to Congress. If, as you claim, Department officials have blamed my client, they have blamed him unfairly.

The objective evidence collected by this Committee demonstrates that Mr. Cunningham did nothing wrong and that he acted in good faith. Indeed, your staff has provided me with documentary evidence demonstrating the following. First, Mr. Cunningham proposed draft

WILLIAMS & CONNOLLY LLP  
The Honorable Darrell E. Issa  
January 19, 2012  
Page 2

language internally to his supervisor in the United States Attorney's Office. Second, Mr. Cunningham vetted the accuracy of the draft language with others in the United States Attorney's Office. Third, Mr. Cunningham's supervisor reported that he provided the draft language to the Department of Justice. Fourth, the Department of Justice did not include in its response to Congress the draft language Mr. Cunningham's supervisor reportedly provided.

Further, although your staff purported to provide me with all documents sent or received by my client, it has provided no documents supporting the allegation in your letter that my client had anything to do with approving the "unacceptable tactics used in Fast and Furious." Indeed, it is a matter of public record that the Fast and Furious investigation began in 2009, months before my client even started at the United States Attorney's Office in 2010.

Finally, as a professional courtesy, and to avoid needless preparation by the Committee and its staff for a deposition next week, I am writing to advise you that my client is going to assert his constitutional privilege not to be compelled to be a witness against himself. The Supreme Court has held that "one of the basic functions of the privilege is to protect innocent men." *Grunewald v. United States*, 353 U.S. 391, 421 (1957); *see also Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam). The evidence described above shows that my client is, in fact, innocent, but he has been ensnared by the unfortunate circumstances in which he now stands between two branches of government. I will therefore be instructing him to assert his constitutional privilege.

If the Committee still wishes to proceed with the deposition, please let me know.

Respectfully submitted,



Tobin J. Romero

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

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## Congress of the United States

### House of Representatives

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January 24, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Mr. Attorney General:

I was disappointed to learn last week that Patrick J. Cunningham, Chief of the Criminal Division in the U.S. Attorney's Office for the District of Arizona, plans not to answer any questions regarding Fast and Furious at his deposition scheduled for today, Tuesday, January 24, 2012. Specifically, Mr. Cunningham pledged to "assert his constitutional privilege not to be compelled to be a witness against himself."<sup>1</sup> Because he refused to appear voluntarily, I authorized a subpoena for his testimony.

My staff was advised Mr. Cunningham's decision to invoke his Fifth Amendment rights was not simply limited to the facts associated with the Department's interactions with Congress during the pendency of our investigation, but was far broader. Mr. Cunningham, we have been told, will refuse to answer any questions beyond his name and position. This is extraordinary in that the only valid reason to assert Fifth Amendment rights is fear of criminal prosecution.

Mr. Cunningham's broad assertion of the privilege is a startling development in the Committee's Fast and Furious investigation. The implication that Mr. Cunningham may have engaged in criminal conduct with respect to Fast and Furious is a major escalation of the Department's culpability. The significance of these developments cannot be overstated, and this assertion raises many questions about ongoing criminal cases currently pending in federal court in Arizona – including prosecutions relating to Fast and Furious.

For the past year, the Department has denied any wrongdoing in Fast and Furious and its response to the congressional investigation. Yet, a senior Department official recently indicated that Mr. Cunningham misrepresented the facts of Fast and Furious as the Department prepared its initial response to the congressional inquiry. Senior Justice Department officials point to Cunningham as having significant responsibility for providing this false information, in addition

<sup>1</sup> Letter from Tobin J. Romero, Esq., Williams & Connolly LLP, to Rep. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Jan. 19, 2012).

The Honorable Eric H. Holder, Jr.  
January 24, 2012  
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to approving the reckless tactics used in Fast and Furious. Mr. Cunningham's lawyer disputes these allegations.

Without Mr. Cunningham's testimony, it will be difficult to gauge the veracity of some of the Department's claims. Main Justice has chosen to blame the U.S. Attorney's Office in Arizona, and senior officials in the U.S. Attorney's Office have rejected this accusation. This tension renews doubts about the Department's management of the Fast and Furious scandal. Additionally, Mr. Cunningham's broad assertion of his Fifth Amendment privilege raises the specter that the Department has allowed him to continue in his position as Chief of the Criminal Division knowing that he might have criminal culpability himself.

The former Acting ATF Director has testified that the Department is managing its response to the congressional inquiry to protect its political appointees. Deflecting blame deprives the American public of confidence that the Department of Justice is being fully truthful. The possibility that senior Justice Department officials were either engaging in a cover-up or were so negligently unaware that a key employee feared criminal prosecution underscores deep concerns about your management of the Department of Justice both during the implementation of Fast and Furious and the subsequent congressional investigation.

Although I was willing to excuse Mr. Cunningham from today's deposition, I have reserved the right to authorize another subpoena for his testimony at a future date. Due to Mr. Cunningham's recent actions, the Committee will be making further document requests of the Department. I expect nothing less than the Department's full and complete compliance with these requests.

The Committee is also reiterating its demand for subpoenaed documents created after February 4, 2011 – an arbitrary deadline you created to minimize the public fallout over the Department's cover-up. Further, it is now necessary to interview several of Mr. Cunningham's associates in the U.S. Attorney's Office regarding the details of Fast and Furious. As the Members of the Committee look forward to your February 2, 2012, testimony, it is now incumbent on you to finally take responsibility for this Justice Department scandal and the clear management failures that occurred on your watch.

Sincerely,



Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

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January 25, 2012

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The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Dear Mr. Attorney General:

Last week's revelation that Patrick Cunningham, Criminal Division Chief of the U.S. Attorney's Office for the District of Arizona, was going to assert his Fifth Amendment rights during this week's scheduled deposition was stunning. Mr. Cunningham's position raises new questions about the Department's handling of the congressional inquiry into Operation Fast and Furious. Mr. Cunningham's assertion of the privilege suggests that the Department has jeopardized public safety and the public trust by allowing individuals with potential criminal culpability to remain in positions of authority. Further, Mr. Cunningham's refusal to testify has deprived Congress of important details about not only Operation Fast and Furious but also the Department's botched management of the congressional response.

Since August, the Department has identified Patrick Cunningham as the best person in the U.S. Attorney's Office to provide information about Fast and Furious to the Committee. The Department has refused to make Michael Morrissey and Emory Hurley, both Assistant United States Attorneys supervised by Mr. Cunningham, available to speak with the Committee, citing a policy of not making "line attorneys" available for congressional scrutiny. Mr. Morrissey, however, was Mr. Hurley's direct supervisor, and an integral part of Fast and Furious. Importantly, both Morrissey and Hurley are unique in their possession of key factual knowledge about Fast and Furious not readily available from any other source.

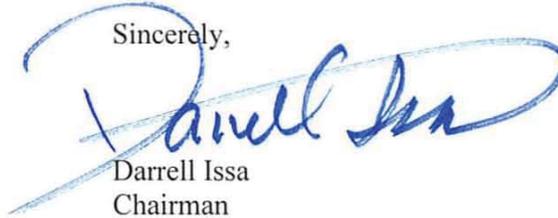
Now that Mr. Cunningham has formally refused to speak with the Committee, the Department must make Mr. Morrissey available as soon as possible. Please notify the Committee no later than Thursday, January 26, 2012, at 5:00 p.m. whether you plan to make Mr. Morrissey available for a transcribed interview. If you choose not to make Mr. Morrissey available, the Committee will be forced to use compulsory process to ensure his presence.

I am also attaching a September 1, 2011 letter that Senator Grassley and I sent to Ann Scheel, Acting U.S. Attorney for the District of Arizona. In that letter, we requested all documents and communications created from October 1, 2009 and the present by Mr. Cunningham, Mr. Morrissey, and Mr. Hurley. The subpoena I authorized and issued to you on

The Honorable Eric H. Holder, Jr.  
January 25, 2012  
Page 2

October 12, 2011 also required the production of those documents. To date, you have not complied fully with the subpoena with respect to documents, including, but not limited to, e-mails sent and received by Messrs. Cunningham, Morrissey, and Hurley.

Sincerely,

A handwritten signature in blue ink, appearing to read "Darrell Issa", is written over the word "Sincerely,". The signature is fluid and cursive, with a large initial "D".

Darrell Issa  
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

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

The Honorable Elijah Cummings  
Ranking Minority Member  
Committee on Oversight  
and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Lamar S. Smith  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

The Honorable John Conyers, Jr.  
Ranking Minority Member  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Messrs. Chairmen and Senator Grassley, Congressman Conyers, and  
Congressman Cummings:

In his appearance before the House Judiciary Committee on December 8, 2011, the Attorney General made clear that “[d]isrupting the dangerous flow of firearms along the Southwest border and putting an end to the violence that has claimed far too many lives is and will continue to be a top priority for this Department of Justice.” At the same time, the Attorney General has recognized that “in pursuit of that laudable goal, unacceptable tactics were adopted as part of Operation Fast and Furious,” as well as during the prior administration’s Operation Wide Receiver and in other investigations occurring in both administrations. This letter describes reforms we have instituted to ensure that such tactics are not utilized in the future, and to address other concerns raised in regard to this matter.

Shortly after learning about the allegations raised by agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Attorney General requested a review of the Fast and Furious matter by the Department’s Acting Inspector General. But, even while awaiting the Inspector General’s report, we are undertaking key enhancements to existing Department

policies and procedures to ensure that mistakes like those that occurred in Wide Receiver and Fast and Furious are not repeated. These changes are outlined below and are in addition to the numerous changes that have occurred in the leadership of both ATF and the U.S. Attorney's Office for the District of Arizona, as well as the reassignment of other personnel and cases. And, as the Attorney General has made clear, following receipt and review of the Acting Inspector General's report, additional decisions and enhancements may be implemented.

#### I. Enhancements Undertaken Even Prior to the Acting Inspector General's Report

ATF has put in place a series of new policies and programs designed to respond to the lessons of these operations and has provided employees with additional opportunities to raise work-related concerns above the level of their immediate supervisors. The Department's Office of Enforcement Operations (OEO) has implemented changes to its wiretap authorization process and I have issued a direction to Department components regarding the handling of congressional requests for information. I discuss each of these reforms in more detail below.

##### A. Enhancements Implemented By ATF

On August 30, 2011, the Attorney General announced the appointment of U.S. Attorney B. Todd Jones to serve as Acting Director of ATF. Acting Director Jones is a former military prosecutor, has twice served as the U.S. Attorney for the District of Minnesota, and was -- until his appointment as Acting Director of ATF -- the Chair of the Attorney General's Advisory Committee. Both the Attorney General and I have directed Acting Director Jones to evaluate ATF's operations and, where appropriate, overhaul them. Within several weeks of assuming the position, Acting Director Jones announced key management changes and instituted reviews of some of the agency's policies and procedures. Other of the agency's policies and procedures had been amended shortly before his arrival or were already under review. Acting Director Jones is committed to implementing reforms to prevent tactics like those used in Operation Fast and Furious from happening again. His work in that regard is well underway.

##### 1. ATF Has Clarified Its Firearms Transfer Policy

On November 3, 2011, Acting Director Jones issued a memorandum clarifying ATF policy regarding firearms transfers. The policy reminds agents that interdiction or other forms of early intervention may be necessary to prevent the criminal acquisition, trafficking, or misuse of firearms, and that during the course of an investigation, protecting public and officer safety should be the primary considerations. Under the policy, an agent must take all reasonable steps to prevent a firearm's criminal misuse.

The policy establishes a list of specific law enforcement options from which an agent must choose once the agent has a legal basis to make an arrest or seize a firearm. In addition, the policy makes clear that when a Federal Firearms Licensee (FFL) contacts an agent with concerns regarding a suspicious person or transaction prior to consummating a firearm transfer, the agent should: (1) direct the FFL to follow applicable law; and (2) advise the FFL that he or she is under no obligation to transfer firearms under circumstances he or she feels are suspicious and should use his or her best judgment in determining whether or not to transfer a firearm. Moreover, the policy makes clear that an agent should never respond to general inquiries by an FFL by affirmatively advising the FFL to sell or transfer a firearm. To help implement the policy, ATF has added a code in its case management system to track interdiction efforts. The addition of this code reinforces the message to agents that interdiction is an important law enforcement tool and one that will be considered in evaluating their performance.

## 2. ATF Has Implemented a New Monitored Case Program

On July 19, 2011, ATF announced the implementation of a new Monitored Case Program designed to ensure close investigative, operational and strategic coordination between the field and relevant headquarters personnel for ATF's most sensitive investigations. Under the Program, certain identified categories of investigations—among them investigations in which more than 50 firearms have been straw-purchased or trafficked—will receive enhanced oversight from ATF headquarters. Once an investigation qualifies as a monitored case, the Special Agent in Charge (SAC) of the relevant ATF Field Division becomes responsible for briefing his or her supervisor at ATF headquarters each month on the progress of the investigation. The SAC is also required to notify the supervisor each time an unanticipated significant event occurs in the investigation. ATF's Deputy Assistant Directors have begun briefing on a monthly basis the Acting Director, Deputy Director and Assistant Director for Field Operations on the monitored investigations within their region. Through the Monitored Case Program, significant cases will receive additional oversight and guidance from ATF headquarters personnel.

## 3. ATF Has Revised Its Policies Regarding The Use Of Confidential Informants And Undercover Operations

ATF also recently revised its policies governing the use of confidential informants and undercover operations. The revised Confidential Informants Usage Policy was issued on November 8, 2011 and the revised Undercover Operations Policy was issued on November 17, 2011.

The revised Undercover Operations Policy establishes an undercover review committee to review all cases that are deemed to involve sensitive circumstances, or to have or potentially have a significant regional or national impact, or otherwise to merit committee review. The committee is comprised of a Deputy Assistant Director for Field Operations, the Chief of the Special Operations Division, the SAC of the Undercover Branch, the Chief of the Operations Security Branch, and the Associate Chief Counsel for Field Operations and Information. The revised confidential informant usage guidelines similarly establish a confidential informant review committee to consider issues including the use of high-level confidential informants, long-term confidential informants, and informants under the obligation of a legal privilege or affiliated with the media. Under the guidelines, this committee is chaired by a Deputy Assistant Director for Field Operations and includes a Criminal Division Deputy Assistant Attorney General, an Assistant United States Attorney, the Chief of the Special Operations Division, and the Associate Chief Counsel for Field Operations and Information.

ATF's revised confidential informant policy also contains a provision stating that, "[u]nless extraordinary circumstances exist and are substantiated," ATF shall not approve the use of "[p]ersons who are licensees in an industry in which ATF has jurisdiction (including Federal firearms and explosives licensees)" as confidential informants. This provision means that, absent such extraordinary circumstances, ATF may not use FFLs as paid informants. Another provision specifically illustrates the types of situations in which "extraordinary circumstances" are deemed to exist. The first is when the licensee is arrested, charged or facing charges and agrees to cooperate as a confidential informant in consideration of a reduction of sentence or in lieu of prosecution. The second is when employees of licensees who are not actual license holders or officers of the corporation listed under the license provide information against the licensee suspected of illegal activity. Combined with the refinements to ATF's firearms transfer policy discussed above, these measures directly address the concerns presented by ATF's interactions with FFLs in Wide Receiver and Fast and Furious.

#### 4. ATF Has Reinforced The Importance of Deconfliction and Information Sharing

In July 2011, ATF issued a memorandum to all Special Agents in Charge (SACs) reinforcing the importance of deconfliction and information sharing in every investigation and requiring the use of available deconfliction databases in every investigation. The memorandum requires deconfliction with other law enforcement components of all suspects or persons prior to opening an investigation to determine whether the suspect or his or her address is already the subject of investigation. If there is an open investigation, the memorandum requires ATF agents to contact the appropriate case agent and coordinate efforts. Any new persons or subjects identified during the course of the investigation must also be queried through the databases to

ensure constant and continual deconfliction. The memorandum recognizes the need for such deconfliction given the multi-jurisdictional nature of the individuals and criminal organizations subject to investigation by ATF and other law enforcement agencies.

5. ATF Has Established Advisory Committees To Advise Agency Leadership

This year, Acting Director Jones established a SAC Advisory Committee and the Deputy Director established a Special Agent (SA) Advisory Committee. These Committees will meet quarterly with the Acting Director and Deputy Director, respectively, to share their issues, concerns, and recommendations. They may also be tasked to propose solutions for problems or concerns that they identify. The Advisory Committees offer the field an opportunity to be heard directly by the leaders of the agency. The SAC Advisory Committee, which is modeled after the Attorney General's Advisory Committee and the SAC Advisory Committees of the FBI and DEA, is composed of a diverse group of SACs representing the three regions of the country. The SAC Advisory Committee will present ideas directly to the Acting Director and examine particular issues on which he seeks input. The SA Advisory Committee originated as a result of the Deputy Director's desire to open a dialogue with ATF agents who work at the street level and whom he does not see every day. The Deputy Director intends to solicit ideas and recommendations that Special Agents have for making the Bureau better. This committee is composed of a mix of street agents who volunteered to participate. The Committee gives agents a direct line of communication to the Deputy Director.

6. ATF Has Provided Supplemental Training Based On The Lessons Of Fast and Furious

Recently, ATF provided targeted training for special agents and law enforcement personnel in the Phoenix Field Division designed to address the legal and investigative issues raised by Operation Fast and Furious. The training covered techniques, strategies and the law applicable to firearms trafficking investigations. The training specifically targeted U.S.-Mexico cross-border firearms trafficking issues with many of the instructors having been posted in, or temporarily assigned to, Mexico. The training focused on legal and practical issues involved in developing cases beyond traditional false statement charges. It also included instruction on ATF's revised firearms transfer policy. Other topics addressed included: making traffic stops based on reasonable suspicion (with a renewed emphasis on interdiction); interviewing suspects and identification techniques; intelligence issues and ATF Mexico operations capabilities with specific reference to cross-border firearms trafficking; trafficking trends involving Mexico; and the role of the Phoenix Field Division in ATF's efforts to interrupt firearms destined for the Mexican drug trafficking organizations. The legal instruction also emphasized moving cases

beyond straw purchaser investigations and helping obtain increased sentences for straw purchasers.

ATF intends to evaluate the training delivered to Phoenix employees and determine how to provide similar training nationally.

B. ATF Has Expanded Opportunities For Employees To Raise Work-Related Concerns

ATF has expanded the opportunities for employees to raise work-related concerns and stressed the need for supervisory level officials to be receptive to those concerns when they are raised. Acting Director Jones is in the process of visiting each field office and conducting town hall meetings with employees. Employees are encouraged to raise concerns or issues directly with him and the Senior Executive Staff at these meetings without fear of retaliation or reprisal. ATF has also restructured its Office of the Ombudsman, which assists employees in seeking fair solutions to work-related problems through an informal, neutral and confidential process. In January 2011, ATF added a full-time special agent position to that office to address issues raised by other special agents. In December 2011, the Acting Director also appointed a senior special agent as the Chief ATF Ombudsman and has initiated measures to better publicize the existence of the office and ultimately improve efforts to address concerns raised by ATF employees.

C. Enhancements Implemented By The Department's Office of Enforcement Operations

Beyond the enhancements implemented by ATF, Assistant Attorney General for the Criminal Division Lanny Breuer has refined the Criminal Division's wiretap authorization process. As you know, OEO is primarily responsible for the Department's statutory wiretap authorizations. Assistant U.S. Attorneys in U.S. Attorneys' Offices around the country, and trial attorneys in the Criminal Division's litigating sections, submit wiretap packages (which consist of an application from a prosecuting attorney, an affidavit from a case agent, and a proposed judicial order) to OEO's Electronic Surveillance Unit (ESU), and ESU lawyers help AUSAs and trial attorneys ensure that their wiretap packages meet statutory requirements and DOJ policies. Once a wiretap package is deemed sufficient by OEO, OEO then submits the package, with a cover memorandum making a recommendation, to a Deputy Assistant Attorney General (DAAG) in the Criminal Division, who reviews it to decide whether or not to authorize the submission of the wiretap application to a federal court. Thousands of wiretap packages are submitted to OEO each year.

In the Fall of 2011, the OEO supervisors and Criminal Division DAAGs involved in the wiretap review process were directed to increase their efforts to ensure that relevant supervisory AUSAs are notified when the Criminal Division's review of wiretap applications raises concerns about operational tactics being used in a matter, rather than rely on the fact that supervisory

AUSAs should already be aware of the tactics used in their own office's cases. In particular, the Director of OEO has been instructed to communicate any such concerns—whether they originate with a DAAG or within OEO—to the relevant supervisory AUSAs if and when they arise. In addition, OEO now requires two levels of OEO supervisory review (as opposed to one) in cases involving multiple extensions of Title III wiretaps. Thus, after 90 days of interception in a particular case, if an AUSA requests a further extension of the wiretap, two OEO supervisors must now review the application before it is submitted to a Criminal Division DAAG for authorization.

D. The Department Has Issued a Directive To Components Regarding The Handling Of Congressional Requests For Information

On January 26, 2012, I issued a memorandum for Heads of Department Offices, Boards, Divisions and Components and all United States Attorneys regarding the handling of congressional requests for information. This directive makes clear that ensuring the accuracy and completeness of information that the Department provides to Congress is a matter of utmost importance. Accordingly, the directive instructs that each component must undertake rigorous efforts to obtain accurate and complete information from employees with the best knowledge of the matters relevant to the congressional inquiry. In particular, the directive instructs Department components to:

- Assign ultimate responsibility for submitting or reviewing a draft response to a congressional inquiry to an appropriate senior manager who can ensure that all appropriate units and sections within the component provide the necessary information and have the opportunity to raise any relevant questions or concerns. This senior manager has responsibility for ensuring that the component's response is properly fact-checked and vetted.
- Solicit information directly from employees with detailed personal knowledge of the subject matter at issue and consult records relevant to the inquiry if such records are available.
- Recognize that, in some instances, the employees with the most relevant information may already have made protected disclosures on the subject to Congress or others. The directive emphasizes the Department's commitment to protecting the rights of whistleblowers and to complying both with the letter and spirit of the Whistleblower Protection Act. It also makes clear that the Whistleblower Protection Act does not prohibit seeking relevant information directly from employees who have made protected disclosures when necessary to ensure the accuracy and completeness of

responses to Congress. The directive instructs components that, in seeking to obtain information from such employees, they must do so in a manner that does not create a fear of reprisal for any protected disclosure.

- Recognize that while the Department strives to answer congressional inquiries promptly and undertakes to meet deadlines set by requestors when practical, the top priority is to ensure the accuracy and completeness of the information ultimately provided to Congress.

## II. The Need For Congressional Action

While the reforms described above are an appropriate response to Wide Receiver, Fast and Furious and the other investigations where inappropriate investigative tactics were used, they will not halt the epidemic of gun trafficking on the Southwest border. Respectfully, we ask Congress to join us in addressing the dangers revealed by these flawed operations. The very ATF agents who brought Fast and Furious to light testified before the House Oversight and Government Reform Committee that ATF needs more effective enforcement tools if it is to make more progress in the fight against Mexican drug cartels.

As the Attorney General has testified, there are several concrete steps we ask Congress to take to assist ATF in addressing this major public safety challenge:

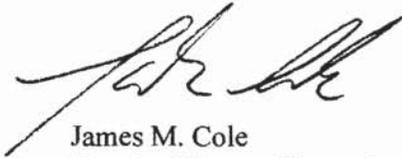
- *Enact a Federal Firearms Trafficking Statute.* Currently, there is no federal statute that specifically prohibits straw purchasing or firearms trafficking itself. Instead, prosecutors rely primarily on “paperwork” provisions in Title 18 that prohibit making false statements in connection with the purchase of a firearm. We ask Congress to enact a comprehensive firearms trafficking statute to directly target criminal enterprises that utilize straw purchasers to assemble arsenals and supply weapons to criminal organizations.
- *Strengthen Penalties for Straw Purchasing of Firearms.* Often the penalties imposed for the paperwork violations described above are too low to serve as a meaningful deterrent or to account for the violence associated with gun trafficking. Due in large part to the low penalties they are likely to face, defendants arrested for straw purchasing or related conduct have little or no incentive to cooperate with law enforcement, which frustrates prosecutors’ efforts to build cases against the leaders of gun trafficking schemes. Although the Sentencing Commission recently adopted changes to the Sentencing Guidelines

applicable to straw purchasing, we ask Congress to amend Title 18 to provide stiffer penalties in gun trafficking cases.

- *Do Not Block ATF from Receiving Useful Intelligence About Gun Trafficking.* Last year, ATF established a common sense requirement that gun dealers in the border states report multiple sales of certain long guns to law enforcement, just as they have long been required to report multiple sales of handguns. The House of Representatives voted to withhold funding for this requirement, notwithstanding the fact that a court subsequently concluded that the requirement is “properly limited in scope.” *The National Shooting Sports Foundation, Inc. v. B. Todd Jones, Acting Director, Bureau of Alcohol, Tobacco, Firearms & Explosives*, Civil Action No. 11-1401 (RMC), slip op. at 2 (D.D.C. Jan. 13, 2012).

In conclusion, the Department has worked to develop and implement measures to address the concerns raised in connection with these flawed law enforcement operations. We look forward to continuing to work with you to improve public safety on the Southwest border.

Sincerely,



James M. Cole  
Deputy Attorney General



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

January 27, 2012

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

Dear Mr. Chairman:

This responds to your subpoena dated October 11, 2011, which requested documents regarding the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) investigation known as Operation Fast and Furious and related matters. It also supplements our previous responses to your subpoena of March 31, 2011 to then ATF Acting Director Kenneth Melson requesting documents about Fast and Furious, your letter dated July 11, 2011, requesting communications of twelve named Department employees, and your letter dated September 1, 2011, requesting documents and communications of six current or former employees in the United States Attorney's Office for the District of Arizona.

We are delivering today to your office 486 pages of material.<sup>1</sup> We have identified an additional 94 pages that we are prepared to make available at the Department for review by staff of your Committee, as well as staff of the Senate and House Committees on the Judiciary. The majority of the materials produced today are responsive to items 7, 11 and 12 of your October 11 subpoena. 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

<sup>1</sup> These documents bear limited redactions to protect specific details about pending investigations, including text that would identify targets and sensitive techniques or disclose prosecutorial deliberations, plus limited information implicating individual privacy interests, such as employee cellular phone numbers or information about individuals who have been investigated but not prosecuted. In addition, we have redacted text from multi-subject documents that is not responsive to your requests. In some substantial multi-subject documents, such as regular ATF reports, we have not included pages that contained text that was either not responsive or contained details of investigations outside of the scope of your inquiry. In response to requests from Chairman Smith and Chairman Leahy, we will deliver to the House and Senate Committees on the Judiciary the same documents that we deliver to you.

The Honorable Darrell E. Issa  
Page 2

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. Consistent with established third-agency practice, we have consulted with the Departments of State and Homeland Security about materials that are responsive to your interests and implicate their equities. We have completed those consultations with the Department of Homeland Security, and with the Department of State as to a portion of the documents implicating its equities, and those documents are enclosed today with limited redactions. We will supplement this response when the consultation with the Department of State as to the remaining documents is completed.

In addition, following the public release of the indictment in *Fast and Furious*, ATF's William Newell emailed copies of that indictment and several others multiple times. We have included in this production one full set of these materials, following the email at HOCR DOJ 005645. These indictments were also attached to emails at HOCR DOJ 005734 and HOCR DOJ 005738 but, for your convenience, we have not reproduced them. Similarly, because some of the materials requested in subpoena items 7, 11 or 12 overlap with other requests you have made, we have not re-produced duplicates of materials previously produced to you.

To assist the Committee in its oversight duties, we also appreciate the opportunity to provide relevant and necessary context for some of the documents in today's production.

We have previously produced communications from the mid-December 2010 time period between former Arizona U.S. Attorney Dennis Burke and Monty Wilkinson, former Deputy Chief of Staff to the Attorney General. Today's production includes additional communications between the two from that same time period that were located in response to your most recent requests. Burke received an email during the early morning hours of December 15 reporting that Customs and Border Protection Agent Brian Terry had tragically lost his life. HOCR DOJ 005869. Burke forwarded that information to Wilkinson later that morning. HOCR DOJ 005872. Wilkinson responded by saying, "[t]ragic. I've alerted the AG, the Acting DAG, Lisa, etc." HOCR DOJ 005872. Later that morning, Wilkinson again emailed Burke, saying "[p]lease provide any additional details as they become available to you." HOCR DOJ 005876. Burke followed up with an email later that afternoon, and Wilkinson responded, "[t]hanks, Dennis. Terrible situation." HOCR DOJ 005888. That same evening, Burke emailed Wilkinson that "[t]he guns found in the desert near the murder [sic] BP officer connect back to the investigation we were going to talk about – they were AK-47s purchased at a Phoenix gun store." HOCR DOJ 005917. Wilkinson responded "I'll call tomorrow." HOCR DOJ 005917. Wilkinson does not recall a follow-up call with Burke or discussing this aspect of the matter with the Attorney General. Similarly, we have been advised that Burke has no recollection of discussing this aspect of the matter with Wilkinson.

The Committee has received testimony and evidence in this matter regarding the priority that the Department has placed on fostering a cooperative relationship with Mexican law

The Honorable Darrell E. Issa  
Page 3

enforcement officials in order to advance the two nations' efforts to combat Mexican drug cartels. Today's production includes several documents that reflect this commitment. We are producing these documents because, although they fall outside the terms of the subpoenas and letter requests referenced earlier, they may pertain to your investigative interests.<sup>2</sup> These include a redacted summary, written by the then-Criminal Division attaché to Mexico, of several meetings that Assistant Attorney General Lanny Breuer participated in, along with the U.S. Deputy Chief of Mission in Mexico, the attaché, and others, during an official visit to Mexico on February 1-3, 2011. HOCR DOJ 005752 - HOCR DOJ 005754. As this document reflects, on February 2, 2011, Assistant Attorney General Breuer met with numerous senior officials in the Mexican government, including the Attorney General of Mexico, who heads the Procuraduría General de la República (PGR); the Secretary of Public Security, who heads the Secretaría de Seguridad Pública (SSP); and the Undersecretary for North American Affairs, in the Secretaría de Relaciones Exteriores (SRE). The document reflects that Assistant Attorney General Breuer discussed with the Attorney General of Mexico and the Secretary of Public Security a number of mutual law enforcement priorities, including prosecutions on both sides of the border in connection with the March 2010 murders of a U.S. Consular official and others that occurred in Ciudad Juarez; extraditions between Mexico and the United States; and the sharing of evidence between the two countries.

In addition, the summary indicates that Assistant Attorney General Breuer met with the Mexican Undersecretary for North American Affairs to discuss multiple issues of mutual Mexico/U.S. interest, including U.S. extradition requests to Mexico; the Mérida initiative; and ways to stem the flow of arms from the United States to Mexico. The summary states that, during the arms trafficking discussion, the Undersecretary said that "greater coordination and flow of information would be helpful to combat arms trafficking into Mexico." HOCR DOJ 005754. According to the document, Assistant Attorney General Breuer followed up with two ideas: that the SRE or PGR write a letter in support of increased sentencing guidelines for straw purchasers, and that the United States and Mexico consider working together to allow straw purchasers to "cross into Mexico so SSP can arrest and PGR can prosecute and convict" them. HOCR DOJ 005754. In short, Assistant Attorney General Breuer and the Undersecretary discussed how their two nations could work more closely with one another to fight arms trafficking, including whether U.S. and Mexican law enforcement should consider coordinating their law enforcement operations to enable the Mexican government to interdict at the border and prosecute in Mexico straw purchasers, given the more expansive prohibitions in Mexico on the possession and purchase of firearms.

Today's production also includes a summary, written by the same Criminal Division attaché to Mexico mentioned above, of a meeting that then-Acting Director Melson had with the former U.S. Ambassador to Mexico while Acting Director Melson was in Mexico during the week of February 7, 2011. At that meeting, the summary states, "Melson and the Ambassador discussed the possibility of allowing weapons to pass from the US to Mexico and US law enforcement coordinating with SSP and PGR to arrest and prosecute the arms trafficker."

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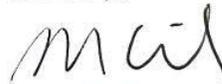
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The Honorable Darrell E. Issa  
Page 4

HOCR DOJ 005761. The summary further states that the then-attaché “raised the issue that there is an inherent risk in allowing weapons to pass from the US to Mexico; the possibility of the [Government of Mexico] not seizing the weapons; and the weapons being used to commit a crime in Mexico.” HOCR DOJ 005761.

We hope that this information is helpful. Our efforts to identify documents responsive to your subpoena are continuing and we will supplement this response when additional documents become available. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

January 27, 2012

The Honorable Patrick Leahy  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 Washington, DC 20510

Dear Mr. Chairman:

This responds further to your letter to the Attorney General, dated June 23, 2011, requesting that the Senate Judiciary Committee receive the same access to documents that the Department provides to the House Committee on Oversight and Government Reform related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Project Gunrunner.

Enclosed on CD please find 486 pages of material that we produced to the House Oversight and Government Reform Committee (HOCR) today.<sup>1</sup> We have identified an additional 94 pages that we are prepared to make available at the Department for review by staff of your Committee, as well as staff of the House Committee on the Judiciary. The majority of the materials produced today are responsive to items 7, 11 and 12 of Chairman Issa's October 11 subpoena. 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. Consistent with established third-agency practice, we have consulted with the Departments of

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The Honorable Patrick Leahy  
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The Committee has received testimony and evidence in this matter regarding the priority that the Department has placed on fostering a cooperative relationship with Mexican law enforcement officials in order to advance the two nations' efforts to combat Mexican drug cartels. Today's production includes several documents that reflect this commitment. We are producing these documents because, although they fall outside the terms of the subpoenas and letter requests referenced earlier, they may pertain to your investigative interests.<sup>2</sup> These include

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The Honorable Patrick Leahy  
Page 3

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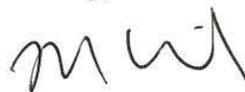
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We hope that this information is helpful. Our efforts to identify documents responsive to Chairman Issa’s subpoena are continuing and we will supplement this response when additional

The Honorable Patrick Leahy  
Page 4

documents become available. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'm w', written in a cursive style.

Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Charles Grassley  
Ranking Minority Member

DARRELL E. ISSA, CALIFORNIA  
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LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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JOHN A. YARMUTH, KENTUCKY  
CHRISTOPHER S. MURPHY, CONNECTICUT  
JACKIE SPEIER, CALIFORNIA

January 31, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Dear Attorney General Holder:

On October 12, 2011, this Committee issued a subpoena to you for documents regarding Operation Fast and Furious. The subpoenaed documents are vital to help Congress fully understand the genesis, implementation, and oversight of Operation Fast and Furious within the Department of Justice. They are also critical in understanding how the Department mishandled its response to Congress and obstructed our investigative responsibilities.

Late on Friday, January 27, 2012 – a year into our investigation – the Department produced documents that provide startling new details about the involvement of senior Department officials in what appears to be the Fast and Furious cover-up. We now know that Assistant Attorney General Lanny Breuer, head of the Criminal Division, promoted the moving of guns to Mexico as a strategy worth pursuing. This dangerous strategy relied on Mexican law enforcement officials to capture the guns and the smugglers who trafficked them. One e-mail reads, **“Breuer suggested allowing straw purchasers cross into Mexico so SSP [Secretariat of Public Security] can arrest and PGR [Office of the General Prosecutor] can prosecute and convict. Such coordinated operations between the US and Mexico may send a strong message to arms traffickers.”**<sup>1</sup> These new documents show that Breuer made this statement on February 4, 2011, the same day Assistant Attorney General Ronald Weich wrote to Congress denying that the Department allowed guns to walk.

The fact that the Department just produced this document on Friday shows the lengths to which you are willing to go to obstruct our investigation and deceive the public. Just months ago, the prior administration faced severe criticism regarding the ATF Phoenix Field Division’s alleged use of similar tactics. Mr. Breuer advocated these same tactics. It is inconceivable that the Department just became aware of this highly damaging document. On October 31, 2011, Mr. Breuer apologized for failing to stop questionable tactics used in Fast and Furious in 2010. Yet, as late as February 2011, he was actively advocating gunwalking. This e-mail casts renewed doubt on the sincerity of Mr. Breuer’s apology and his ability to continue to serve in a leadership role at the Department.

<sup>1</sup> E-mail from Anthony P. Garcia to Adam Lurie, Bruce Swartz, Kenneth Blanco, Jason Weinstein, et al. (Feb. 4, 2011, 3:49 PM) [HOCR DOJ 005752-54].

The Honorable Eric H. Holder, Jr.  
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During your testimony before the House Judiciary Committee on December 8, 2011, you stated that the Department of Justice will not produce any responsive documents created after February 4, 2011 regarding Operation Fast and Furious. Your testimony was the first assertion of this position to Congress. In no uncertain terms, you stated that:

[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.<sup>2</sup>

You 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.<sup>3</sup>

Your testimony indicates that the Department has no intention of fully complying with the Committee’s subpoena. This position is entirely unacceptable. For three months after Senator Grassley’s initial letters, the Department was in denial that the congressional investigation had any merit. Not until a May 5, 2011, meeting with Committee staff did the Department finally admit that “there’s a there, there.” The actions of the Department following February 4 are crucial in determining whether it has concealed information from Congress – including subpoenaed information – and to what extent it has obstructed our work.

During a transcribed interview on December 14, 2011, your chief of staff, Gary Grindler, broadened the Department’s position with respect to sharing documents created after February 4, 2011. The Associate Deputy Attorney General serving as Department counsel refused to allow Mr. Grindler to answer any questions relating to conversations that he had with you or anyone else in the Department regarding Fast and Furious after February 4, 2011:

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.<sup>4</sup>

Department counsel expanded the position you articulated regarding documentary evidence at the Judiciary Committee hearing to include testimonial evidence as well.<sup>5</sup> Given the initial response by the Department to the congressional inquiry earlier this year, the comments by the Associate Deputy Attorney General create a barrier preventing Congress from obtaining vital information about Fast and Furious.

The Department has also maintained this position during additional transcribed interviews. In an interview with Deputy Assistant Attorney General Jason Weinstein on January 10, 2012, in response to a question about Mr. Weinstein’s interactions with the Arizona U.S. Attorney’s Office, Department counsel

<sup>2</sup> *Oversight Hearing on the United States Department of Justice of the H. Comm. on the Judiciary*, 112th Cong. (Dec. 8, 2011) (testimony of Att’y Gen. Eric H. Holder, Jr.) [hereinafter Holder Testimony].

<sup>3</sup> *Id.*

<sup>4</sup> Transcribed Interview of Gary Grindler, Chief of Staff to the Att’y Gen. (Dec. 14, 2011) at 22.

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

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prohibited an entire line of questioning by claiming it “implicates the post-February 4th period.”<sup>6</sup> Department counsel cited a “constitutional privilege” in support of this position, without elaborating further.<sup>7</sup> To date, the Department has not provided any further detail as to the scope of this position, which was at odds with Mr. Weinstein’s willingness to answer the Committee’s questions:

[A]s I said, I personally would be more than happy to answer questions about post-February 4th, but I am not authorized to do so.<sup>8</sup>

In fact, following the February 4, 2011, letter, Mr. Weinstein, at the behest of Mr. Breuer, prepared an analytical review of *Fast and Furious*.<sup>9</sup> Mr. Weinstein interviewed Emory Hurley and Patrick Cunningham of the Arizona U.S. Attorney’s office in conducting this review.<sup>10</sup> The document that resulted from Mr. Weinstein’s analysis specifically discussed issues relevant to the case. To date, the Department has not produced this document to the Committee, despite the fact that it is responsive to the subpoena.

At the December 8 hearing, you also stressed, on multiple occasions, that the Department’s decision to produce documents related to the February 4, 2011 letter to Senator Grassley was unprecedented, and reflected an effort to be transparent.<sup>11</sup> Such comments, however, completely belie the facts and are misleading. First and foremost, I cannot underemphasize that the Department’s February 4, 2011, letter to Congress contained false information. You decided to release materials related to the letter only after Committee staff informed Department lawyers that the Committee was considering a criminal referral. It is disingenuous to claim that this was a voluntary effort to be transparent. Unfortunately, the Department’s delays in document production reflect a recurring pattern throughout this investigation. To put it bluntly, the Department has been irresponsible in failing to take congressional oversight of *Fast and Furious* seriously.

The Committee issued its first subpoena for documents on March 31, 2011. In response, the Department produced zero pages of non-public documents until June 10, 2011, over two months later, and on the eve of the Committee’s first hearing into *Fast and Furious*. That hearing featured constitutional scholars who explained the Department’s clear obligations to comply with the subpoena and highlighted congressional mechanisms to compel production. Faced with the possibility of contempt proceedings, the Department began to produce documents.

Over the next five months, Senator Grassley and I repeatedly asked for information surrounding the creation of the Department’s February 4, 2011 letter. The Department flatly refused these requests. It was not until my November 9, 2011 letter to Assistant Attorney General Ronald Weich – which raised the possibility of criminal charges for the false statements made in the February 4 letter – that the Department finally saw fit to give Congress the materials we had been requesting for months. Contrary to statements you made during the December 8 hearing, you did not release these materials voluntarily. Instead, the Department provided them because it had no alternative.

As I stated in my November 9, 2011 letter to Assistant Attorney General Weich, understanding the Department’s actions after Congress began its investigation is crucial. Even after the Department

<sup>6</sup> Transcribed Interview of Jason Weinstein, Deputy Assistant Att’y Gen. (Jan. 10, 2012) at 177.

<sup>7</sup> *Id.* at 178.

<sup>8</sup> *Id.* at 227.

<sup>9</sup> Transcribed Interview of Dennis K. Burke at 158-60 (Dec. 13, 2011).

<sup>10</sup> *Id.* at 158-59.

<sup>11</sup> Holder Testimony, *supra* note 2.

The Honorable Eric H. Holder, Jr.  
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began to recognize the full effect of the problems resulting from Fast and Furious, it still failed to come forward and share with Congress what it had learned.

Since the Department initially misrepresented the facts and misled Congress, it is necessary to investigate the Department's response to our investigation. Your actions lead us to conclude that the Department is actively engaged in a cover-up. It is essential for the Department's Office of Legislative Affairs to facilitate the production of documents we have requested so we can complete our investigation. The Department's persistent delay tactics make this task increasingly and unreasonably difficult.

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. As such, provide all documents pursuant to the October 12, 2011 subpoena as soon as possible, but by no later than 5:00 p.m. on February 9, 2012. 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.

Sincerely,



Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

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

February 2012

# February 2012



Office of the Deputy Attorney General  
Washington, D.C. 20530

February 1, 2012

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

Dear Mr. Chairman:

This responds to your letter to the Attorney General dated January 31, 2012 regarding your Committee's inquiry into Operation Fast and Furious. Your criticisms of the Department, in general, and Assistant Attorney General for the Criminal Division Lanny Breuer, in particular, seem predicated on significant misunderstandings both of the documents we recently produced and of the Department's positions on the issues you raise.

You criticize Mr. Breuer for conversations he had with his Mexican law enforcement counterparts in February 2011 on the subject of a proposed cross-border operation. But it is not correct for you to contend, as you do in your letter, that Mr. Breuer was "actively advocating gunwalking" or that he suggested the use of the same failed tactics that had been used in the prior administration's Operation Wide Receiver, in Operation Fast and Furious, or in similar operations. Likewise, your criticism of our response to the Committee's extremely broad October 11, 2011 subpoena fails to account for the substantial efforts we have made in that regard and for the numerous ways in which we have cooperated with the Committee's inquiry, including by taking the nearly unprecedented step of providing the Committee with materials showing the internal process by which our now-withdrawn February 4, 2011 letter was drafted.

And, finally, your letter claims that we have refused to provide the Committee with any materials created after February 4, 2011. That is not the case. Last October, we wrote to you and explained our position on this issue after having discussed it with your staff. Our position is consistent with the position the Department has taken across Administrations of both political parties. 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.

I address each of these issues below.

I turn first to your contentions relating to Assistant Attorney General Breuer. The documents we produced to the Committee on January 5, 2012 suggest that Wide Receiver was an operation in which ATF rejected the idea of having Mexican law enforcement make arrests of

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straw purchasers at the U.S./Mexico border. Instead, the documents indicate that ATF believed that arrests at the border were inconsistent with the goals of that investigation. An ATF email about Wide Receiver from April 2007 said that it was not in the agency's interest "to engage in a long term surveillance if the end result would be a Border entry stop or traffic stop in Mexico." HOCR WR 005315. Rather, ATF's plan, as reflected in the documents, was that "once the trafficker moved into Mexico that LE on that side follow the lead to it's [sic] ultimate destination and that all phones and other means be utilized to identify the organization involved." *Id.*

This understanding of the goals of Wide Receiver is reaffirmed by a July 13, 2006 memorandum from two Assistant United States Attorneys in Arizona to then-Arizona U.S. Attorney Paul Charlton that we produced to the Committee last October. In that memorandum, Mr. Charlton was advised by his subordinates that Operation Wide Receiver involved "allowing an indeterminate number of illegal weapons, both components of which (the upper and the lower) were provided to the criminals with ATF's knowledge and/or participation, to be released into the community, and possibly into Mexico, without any further ability by the U.S. Government to control their movement or future use." HOCR WR 003364.

The documents relating to Assistant Attorney General Breuer's meeting with Mexican law enforcement officials relate to a potential joint operation with Mexico that would have been dramatically different from Wide Receiver, Fast and Furious and similar operations. The documents reflect that on February 2, 2011, Assistant Attorney General Breuer met with a variety of high-level Mexican officials, including the Attorney General of Mexico, and over the course of that day discussed multiple issues of mutual Mexico/U.S. interest, including U.S. extradition requests to Mexico, the Mérida initiative, and ways to stem the flow of arms from the United States to Mexico. A summary of a meeting that Assistant Attorney General Breuer had with the Mexican Undersecretary for North American Affairs states that, during an arms trafficking discussion, the Undersecretary said that "greater coordination and flow of information would be helpful to combat arms trafficking into Mexico." HOCR DOJ 003104.

According to the document, Assistant Attorney General Breuer followed up with two ideas: that Mexican officials write a letter in support of increased sentencing guidelines for straw purchasers in the United States, and that the United States and Mexico consider working together to allow straw purchasers to "cross into Mexico so SSP can arrest and PGR can prosecute and convict" them.<sup>1</sup> HOCR DOJ 003104. In short, Assistant Attorney General Breuer and the Undersecretary discussed how their two nations could work more closely with one another to fight arms trafficking, including whether U.S. and Mexican law enforcement should consider coordinating their law enforcement operations to enable the Mexican government to interdict straw purchasers at the border and prosecute them in Mexico, given the more expansive prohibitions in Mexico for the possession and purchase of firearms.

As this discussion makes clear, Assistant Attorney General Breuer proposed to his Mexican counterparts a scenario in which those carrying illegal weapons across the border would be arrested at the border by Mexican officials and charged in Mexico. While these officials

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<sup>1</sup> The SSP is Mexico's Secretaría de Seguridad Pública. The PGR is Mexico's Procuraduría General de la República.

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ultimately did not pursue that strategy, it is neither fair nor accurate to say that this was advocacy of “gunwalking.” It was not. In light of Assistant Attorney General Breuer’s commitment to stemming the flow of guns from the United States into Mexico and his strong ties and collaborative relationships with his counterparts in Mexico, it is inconceivable that his intention was to have guns released into Mexico.

You also criticize the Department’s response to the Committee’s October 11, 2011 subpoena. This criticism does not recognize our substantial efforts to comply with the extensive requests in the subpoena, or the many other requests for information we have received from the Committee by letter, email or orally, without requiring formal process. We have devoted significant resources to meeting the Committee’s many requests for information. Our cooperation includes:

- Producing or making available for review by the Committee in excess of 6,400 pages of material.
- Making numerous witnesses available either for transcribed interviews or public hearings, including senior-level Department officials.
- Making the Attorney General available six times (including tomorrow’s scheduled appearance) to discuss with members of Congress matters relating to Fast and Furious.
- Making Assistant Attorneys General Weich and Breuer available to testify about this matter before congressional committees.
- Responding to more than three dozen letters on this subject from members of Congress.
- Devoting a team of lawyers and technical personnel to collecting, processing and reviewing documents requested by the Committee and making sure that responsive materials are provided in a timely manner.

Our good faith in this process is further reflected in our decision to provide the Committee with documents relating to the drafting of our now-withdrawn February 4 letter. While your most recent letter suggests that our decision to produce February 4 materials was not voluntary, that is not the case. Our December 2, 2011 letter transmitting those materials set forth our rationale for providing them. We explained that because we had concluded that our February 4 response contained inaccuracies, we had also determined that an exception to the Department’s recognized protocols was appropriate. Thus, we made a rare exception to the longstanding practice of Administrations of both political parties not to disclose deliberative documents and other internal communications generated in response to congressional oversight requests because disclosure would compromise substantial separation of powers principles and Executive Branch confidentiality interests.

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

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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.

Finally, you assert that the Department is unwilling to produce any information generated after congressional review of these matters commenced. As I noted earlier, that is not the case and it appears that you have misconstrued our position with respect to this issue. 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. Indeed, in last week's production, we included a number of documents that post-date congressional review of this matter. Likewise, Department witnesses have provided information in their transcribed interviews about management and policy changes that the Department has undertaken during the course of congressional review.

Your letter suggests that the first time you learned of the Department's position on this issue was during the Attorney General's testimony before the House Judiciary Committee on December 8. However, in a letter to you dated October 11, 2011, which accompanied the production of certain documents, we confirmed prior discussions with your staff on this very subject. We wrote that:

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.

*Letter from Assistant Attorney General Ronald Weich to Chairman Issa at 2 (Oct. 11, 2011).*

The separation of powers concerns we have previously expressed are particularly acute here because Congress has sought information about open criminal investigations and prosecutions. That has required Department officials to confer candidly about how to

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accommodate Congress' oversight interests while at the same time ensuring that ongoing law enforcement decision-making is free from even the appearance of political influence.

We remain committed to working to accommodate the Committee's legitimate oversight needs and we trust that the Committee will equally understand our position and will work with us to avoid further conflict on this matter, as the Constitution requires.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. M. Cole', is positioned above the printed name and title.

James M. Cole  
Deputy Attorney General

cc: The Honorable Patrick Leahy, Chairman  
U.S. Senate Committee on the Judiciary

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

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

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

February 1, 2012

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

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman and Senator Grassley:

This responds to your letter of October 25, 2011, requesting information related to the Department's investigation of the purchase of a firearm used during the fatal attack on Immigration and Customs Enforcement Agent Jaime Zapata.

As noted in our letter dated October 11, 2011, the Department takes seriously your concerns about the death of Agent Zapata and about gun trafficking more generally. We can confirm now that on November 10, 2011, Otilio Osorio, who purchased a firearm that was ultimately used during the attack on Agent Zapata, pleaded guilty to several firearms trafficking offenses, including conspiracy to make a false statement or representation required to be kept in records of a licensed firearms dealer (18 U.S.C. § 371), making a false statement or representation with respect to information required to be kept in records of a licensed firearms dealer (18 U.S.C. § 924(a)(1)(A)), and possession of a firearm bearing a removed or obliterated serial number (18 U.S.C. § 922(k)). On the same date or subsequently, seven other individuals associated with Osorio, including Kelvin Morrison and Ranferi Osorio, also pleaded guilty to firearms trafficking offenses. Sentencing of the defendants in this matter is scheduled to occur in February and March of 2012. These matters are being prosecuted by the U.S. Attorney's Office for the Northern District of Texas.

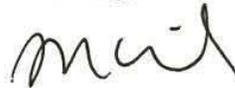
The Honorable Darrell E. Issa  
The Honorable Charles E. Grassley  
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In addition, related to this matter, you may also already be aware that Julian Zapata Espinoza has been extradited from Mexico to the United States, where he faces charges for his alleged participation in the murder of Agent Zapata and the attempted murder of Immigration and Customs Enforcement Agent Victor Avila. This case is being prosecuted by the Justice Department's Criminal Division with the United States Attorney's Office for the District of Columbia.

These very important events notwithstanding, the investigations related to Agent Zapata's death and the activities of the individuals charged with firearms trafficking offenses are ongoing. Our disclosure at this time of the additional information you requested could compromise the ongoing criminal investigations, including our efforts to hold accountable those responsible for Agent Zapata's death.

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance regarding this or any on other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member  
House Committee on Oversight and Government Reform

The Honorable Patrick Leahy  
Chairman  
Senate Committee on the Judiciary

**Congress of the United States**  
**Washington, DC 20515**

February 8, 2012

The Honorable Eric H. Holder, Jr.  
 Attorney General  
 U.S. Department of Justice  
 950 Pennsylvania Avenue, N.W.  
 Washington, D.C. 20530

Dear Mr. Attorney General:

During your testimony before the Committee last week, you pledged to work with Congress to find a way to make the wiretap applications from the Fast and Furious investigation available for congressional review. We appreciate your willingness to work with us on this issue, and we believe these applications will advance the investigation in a meaningful way. The contents of the wiretap applications are central in determining the level of involvement of senior Department officials during the pendency of Operation Fast and Furious. It is indisputable that gunwalking occurred during Fast and Furious, and it is therefore important to know whether any facts in the wiretap applications should have raised concerns that gunwalking, or other ill-advised tactics, were occurring. The contents of the wiretap applications are likely to resolve factual disputes about the level of detail available to senior Department officials during Fast and Furious.

Legal Sufficiency

The Office of Enforcement Operations (OEO), part of the Justice Department's Criminal Division, is "primarily responsible for the Department's statutory wiretap authorizations."<sup>1</sup> Generally, federal prosecutors across the country submit wiretap packages to OEO, whose lawyers ensure that these wiretap packages "meet statutory requirements and DOJ policies."<sup>2</sup> When OEO deems a wiretap package sufficient, "[t]he Attorney General or his designee" – in practice, a Deputy Assistant Attorney General in the Criminal Division – reviews and authorizes it.<sup>3</sup> Each package includes an affidavit which details the factual basis upon which the authorization is sought.

In previous testimony before the Senate Judiciary Committee on November 1, 2011, Assistant Attorney General Lanny Breuer commented that the "one role" Main Justice plays in authorizing wiretap applications is to "ensure there is legal sufficiency to make an application."<sup>4</sup> The federal wiretap statute describes what this legal sufficiency entails, requiring that the

<sup>1</sup> Letter from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to Rep. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, et al., at 6 (Jan. 27, 2012) [hereinafter Cole Letter].

<sup>2</sup> *Id.*

<sup>3</sup> 18 U.S.C. § 2516(1).

<sup>4</sup> *Combating International Organized Crime: Evaluating Current Authorities, Tools and Resources: Hearing Before the Subcomm. on Crime and Terrorism, S. Comm. on the Judiciary*, 112th Cong. (Nov. 1, 2011) (Test. of Assistant Att'y Gen. Lanny Breuer).

The Honorable Eric H. Holder, Jr.  
 February 8, 2012  
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application include **“a full and complete statement of facts and circumstances justifying the application.”**<sup>5</sup> In addition, for a judge to order the requested wire interception, the application must show that **“[n]ormal investigative procedures have been tried and have failed or will likely fail, or are too dangerous.”**<sup>6</sup> The Department, therefore, must include specific facts in the application that demonstrate other investigative procedures have been exhausted.

During our investigation into Operation Fast and Furious, several ATF agents have testified about the use of many long-standing and highly effective investigative techniques used in firearms trafficking investigations. These procedures include “knock and talks,” traffic stops conducted by local law enforcement, consensual encounters, sustained surveillance of suspects and investigative targets, search warrants for suspected stash houses, use of undercover informants, and advising federal firearms licensees of their prerogative to refuse to sell weapons to individuals they deem suspicious.

Last week, you testified that wiretap applications “don’t always go into all of the techniques that are used in a particular investigation.”<sup>7</sup> Yet, a wiretap application *must* include precisely this type of information in order to meet the legal sufficiency standard required by the Criminal Division in its review. Therefore, law enforcement officials would have to include these procedures, and possibly others, in the wiretap applications to meet the statutory requirement and obtain the Criminal Division’s approval.

As such, if the Fast and Furious wiretap applications were accurate and complete, they should contain significant indications of gunwalking. If they were not accurate and complete, then serious questions arise as to why the Criminal Division approved them despite being legally deficient for failing to describe the specific techniques that had been used and failed. Therefore, the content of the applications is crucial in order to gain a complete understanding of the issues surrounding this controversy.

#### Violations of ATF and Department of Justice Policy

The highly questionable investigative techniques used in Fast and Furious violated both ATF and Department policy. If the Fast and Furious wiretap applications mention ATF breaking off surveillance or allowing illegally purchased guns to be transferred in an uncontrolled manner, then the Criminal Division approved the applications in direct conflict with ATF policy. If the Fast and Furious wiretap applications mention guns crossing the border with ATF’s foreknowledge, then the Criminal Division approved the applications in direct conflict with Department of Justice policy. Congress needs to understand the exact facts and circumstances in detail to conduct adequate oversight and fully inform our legislative functions under the Constitution.

<sup>5</sup> 18 U.S.C. § 2518(1)(b) (emphasis added).

<sup>6</sup> 18 U.S.C. § 2518(3)(c) (emphasis added).

<sup>7</sup> *Fast and Furious: Management Failures at the Department of Justice: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (Feb. 2, 2012) (Test. of Hon. Eric H. Holder, Jr., Att’y Gen. of the U.S.).

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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.”<sup>8</sup> Multiple agents testified last year that in *Fast and Furious*, ATF prematurely broke off surveillance after witnessing illegal weapons purchases and allowed guns to walk. These tactics went against everything ATF stands for.

On March 9, 2011, Deputy Attorney General James M. Cole sent an e-mail to southwest border U.S. Attorneys stating: “I want to reiterate the Department’s policy: We should not design or conduct undercover operations which include guns crossing the border.”<sup>9</sup> Since this e-mail was a reiteration of Department policy, any operations allowing guns to cross the border would violate Department policy. On January 27, 2012, Deputy Attorney General Cole sent a letter to Congress stating that the Department’s “lawyers help AUSAs and trial attorneys ensure that their wiretap packages meet statutory requirements and DOJ policies.” Thus, Mr. Cole acknowledged that Criminal Division lawyers are responsible for ensuring that wiretap packages comply with both federal law and Department policies, including the policy against designing operations that allow guns to cross the border.

#### Wiretap Information

We seek to determine whether wiretap applications were approved in contravention of either ATF or Department policy. It is highly likely that information contained in the wiretap applications will provide answers to the following questions:

1. Do the wiretap applications include the number of guns purchased by individual members of the straw purchasing ring? If so, do the applications demonstrate that other investigative techniques, such as “knock and talks,” traffic stops, or search warrants, were attempted and failed, or avoided, so as to not “tip off” the subjects and cause them to cease further illegal activity?
2. Do the wiretap applications include the amount of money spent on weapons by individual members of the straw purchasing ring?
3. Do the wiretap applications include information about the taxable incomes of individual members of the straw purchasing ring?
4. Do the wiretap applications contain any evidence that suspects were acquiring the weapons with the intent to transfer them to another person? If so, why wasn’t such evidence immediately used to arrest and prosecute those suspects for the crime of straw purchasing?
5. Do the wiretap applications include information about whether any of the targets or suspects were attempting to acquire firearms for the purpose of trafficking them to

<sup>8</sup> Bureau of Alcohol, Tobacco, Firearms, and Explosives, “ATF’s Mission,” <http://www.atf.gov/about/mission> (last visited Feb. 8, 2012).

<sup>9</sup> E-mail from James M. Cole to Angel Moreno, et al. (Mar. 9, 2011) [HOCR 005811].

The Honorable Eric H. Holder, Jr.  
 February 8, 2012  
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Mexico? If so, was blanket surveillance initiated to insure that the targets or suspects in question would not be able to effectuate their intent?

6. Do the wiretap applications contain any evidence that ATF allowed straw purchasers to acquire firearms? If so, what safeguards were put in place to protect public safety?
7. Do the wiretap applications contain any evidence of associations among individuals in the straw purchasing ring?
8. Do the wiretap applications include the number of border crossings, including dates, made by individual members of the straw purchasing ring?
9. Do the wiretap applications include the number of weapons recovered, both in the United States and in Mexico, that were bought by individual members of the straw purchasing ring?
10. Do the wiretap applications include the locations of residences where the transfer of firearms took place during the course of the investigation?
11. Do the wiretap applications include specific instances of law enforcement surveillance of illegal weapons purchases and subsequent transfers of those weapons without interdiction by law enforcement?
12. Do the wiretap applications contain any evidence that ATF deemed other investigative techniques, such as the execution of search warrants, not feasible because such techniques would alert the subjects to the investigation? If so, does the failure to execute these search warrants demonstrate a violation of ATF's core mission?

#### Leave of Court

By their very nature, requests for wiretap applications are intrusions into the privacy of individuals. It is for this reason that the law requires the Justice Department to exercise meaningful supervision over these applications, and one of the reasons why OEO scrutinizes each application before submitting it to federal court. Although we are mindful of the sensitive nature of the information associated with the individuals mentioned in the applications, the grave public concern over Fast and Furious weighs in favor of providing this information in furtherance of our oversight interests under the Constitution.

Recently, the *Arizona Republic* "convinced a [federal] judge to [unseal] some documents [relating to the Brian Terry murder], saying the public had a right to inspect them."<sup>10</sup> This marked the first time in a case relating to Fast and Furious that documents have been unsealed.

<sup>10</sup> Dennis Wagner, *Brian Terry border case: 2nd suspect revealed*, ARIZ. REPUBLIC, Jan. 30, 2012, available at <http://tucsoncitizen.com/arizona-news/2012/01/30/brian-terry-border-case-2nd-suspect-revealed/>.

The Honorable Eric H. Holder, Jr.  
 February 8, 2012  
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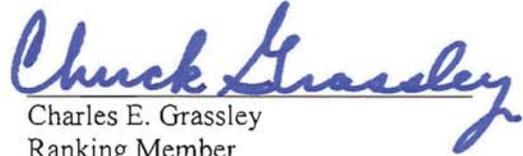
Likewise, in the event that the wiretap applications are sealed, we request that the Department of Justice seek leave of court to unseal them for the purpose of facilitating congressional review. If the Department requires a subpoena in order to take this step, the Committee is willing to provide one.

We look forward to your response as soon as possible, but by no later than noon on February 15, 2012.

Sincerely,



Darrell Issa  
 Chairman  
 Committee on Oversight  
 and Government Reform  
 United States House of Representatives



Charles E. Grassley  
 Ranking Member  
 Committee on the Judiciary  
 United States Senate



Patrick Meehan  
 Member of Congress  
 United States House of Representatives

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

The Honorable Patrick Leahy, Chairman  
 Committee on the Judiciary  
 United States Senate

DARRELL E. ISSA, CALIFORNIA  
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DENNIS A. BOSS, FLORIDA  
FRANK C. GUINTA, NEW HAMPSHIRE  
BLAKE FARENTHOLD, TEXAS  
MIKE KELLY, PENNSYLVANIA

LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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JACKIE SPEGIER, CALIFORNIA

February 14, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Attorney General:

I received Deputy Attorney General Cole's letter dated February 1, 2012, in which the Department requested an extension past February 9, 2012, to produce documents responsive to the October 12, 2011, subpoena issued to you. This requested extension, nearly four months after you received the subpoena, ignores the reality that the Department has unreasonably delayed producing these documents to the Committee. My staff has been working with Department lawyers assiduously to provide requested clarifications about documents requested in the subpoena and to assist the Department in prioritizing categories of documents for production. On its face, the requested extension demonstrates a lack of good faith. With one exception, the Department has only produced documents responsive to the subpoena on the eve of congressional hearings in which senior Department officials testified. The Department appears to be more concerned with protecting its image through spin control than actually cooperating with Congress.

It is ironic that while the Department's delay tactics have extended this investigation into a presidential election year, you have had the audacity to characterize it as an attempt at "headline-grabbing Washington 'gotcha' games and cynical political point scoring."<sup>1</sup> Congress must complete its work. We cannot wait any longer for the Department's cooperation. As such, 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 the contempt proceedings, should the Department continue to ignore the Committee's subpoena. Additionally, this individual should be prepared to testify before the Committee about production status. 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

<sup>1</sup> Statement of Att'y Gen. Eric Holder Before S. Jud. Comm. (Nov. 8, 2011), *available at* <http://www.justice.gov/iso/opa/ag/testimony/2011/ag-testimony-111108.html>.

The Honorable Eric H. Holder, Jr.  
 February 14, 2012  
 Page 2 of 7

delineating why each one is being withheld from Congress. Please direct this individual to produce this log to the Committee without further delay.

### Unanswered Questions

In February 2011, the Department of Justice assured Congress that nothing improper occurred during Operation Fast and Furious. It took nearly nine months for the Department to take the unprecedented step of withdrawing its February 4, 2011, letter to Congress and publicly acknowledging the assurances it contained were false. Prior to this withdrawal, the Department stood by its February 4, 2011, letter despite overwhelming evidence presented by Congress that the Department had made false statements. We are investigating not just management of the reckless Operation Fast and Furious, but also the Department's efforts to slow and otherwise interfere with our investigation. Many questions remain unanswered with respect to Operation Fast and Furious and the Department's response to the congressional investigation.

In your testimony before the Committee on February 2, 2012, you stated, "[w]ell, I have heard the magic word here, 'cover-up,' and I want to make clear that there is no attempt at any sort of cover-up."<sup>2</sup> In spite of your assurances, however, the Department has produced only sparse information on the confidential informants that were the primary targets of the Fast and Furious investigation. Fast and Furious was designed to identify a link between the Phoenix-based firearms trafficking ring and the Sinaloa Cartel. Yet, when ATF finally learned of this link, the two individuals turned out to be paid FBI informants – deemed national security assets and said to be unindictable. In June 2011, when the Acting ATF Director brought this serious lack of information-sharing among ATF, DEA, and FBI – all Department components – to the attention of Deputy Attorney General James Cole, Mr. Cole was non-committal: "[w]e will look into it. . . All he said was we will have to look into it. There was very little expression."<sup>3</sup> The Committee is very interested to know:

- What steps did the Deputy Attorney General take to "look into it?" What steps did he take to ensure a similar lapse of information-sharing would not occur in the future?

We have grown increasingly frustrated in dealing with the Department's Office of Legislative Affairs (OLA) in attempting to obtain the information we seek. OLA represents the face of the Department to Congress and plays an important role in communicating with Congress. Yet, virtually all congressional requests regarding Fast and Furious have gone unanswered and even unacknowledged. For example, we requested subpoenaed items 11(b) and 22 in a letter dated October 11, 2011. The Department has thus far ignored both the letter request and the subpoenaed items. More recently, we requested a briefing by DEA regarding a front page *New York Times* article about international money laundering schemes. That request is now two months old, and the Department has yet to schedule this briefing. These two

<sup>2</sup> *Fast and Furious: Management Failures at the Department of Justice: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (Feb. 2, 2012) (Test. of Hon. Eric H. Holder, Jr., Att'y Gen. of the U.S.) [hereinafter *Holder Testimony*].

<sup>3</sup> Transcribed Interview of Kenneth Melson, at 184-185 (July 4, 2011) [hereinafter *Melson Transcript*].

The Honorable Eric H. Holder, Jr.  
 February 14, 2012  
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examples illustrate that OLA is unable or unwilling to work cooperatively with Congress. It is our understanding that the involvement of the Office of the Deputy Attorney General (ODAG) has slowed OLA's response to Committee requests considerably. Again, more questions arise:

- Is ODAG deliberately interfering with OLA's efforts to prevent Congress from getting the information it seeks?
- Why is ODAG exercising so much control over OLA's response to Congress when it completely failed to exercise any proper supervision over ATF and the failed Fast and Furious program?

Another unanswered question revolves around Patrick Cunningham, former Criminal Chief in the U.S. Attorney's Office in Arizona, who recently asserted his Fifth Amendment privilege against self-incrimination with respect to everything except his name and position. It is our understanding that an Associate Deputy Attorney General in ODAG tasked Cunningham with conducting a comprehensive review of Fast and Furious in April 2011:

- What information did Cunningham uncover? To whom did he report this information? What was done with this information?

Deputy Assistant Attorney General Jason Weinstein testified that Cunningham provided him with false information:<sup>4</sup>

- Did Cunningham provide this false information to Weinstein himself, or was Cunningham merely a conduit for false information that he obtained from other witnesses? If it was Cunningham himself, is the Department aware of this, and has it launched a criminal review of Cunningham for possible obstruction of a congressional investigation?<sup>5</sup>
- Were Department lawyers responsible for inaccurately conveying information provided to them by Cunningham?

<sup>4</sup> Transcribed Interview of Jason Weinstein, at 227-28 (Jan. 10, 2012).

<sup>5</sup> 18 U.S.C. § 1505 states, in pertinent part:

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

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

The Honorable Eric H. Holder, Jr.  
 February 14, 2012  
 Page 4 of 7

- Does the investigation undertaken by Cunningham – at the direction of ODAG – have *Brady* implications? If so, has the Department turned over these materials to the defense attorneys in the case?

Many other questions still remain unanswered in our investigation:

- How did the Department move from its initial dismissal of whistleblower complaints to the recognition they were true?
- Exactly how and when did senior Department officials learn the truth of what happened?
- Did Department officials retaliate against whistleblowers?
- Why did Department officials decide to move forward with prosecuting old cases involving highly objectionable tactics when line prosecutors had refused to do so?
- Why did senior Department officials fail to see the clear connection between Fast and Furious and prior flawed operations they have admitted they knew about?
- When did the Department first learn about Assistant Attorney General Lanny Breuer's February 2011 suggestion of gunwalking, and why did the Department wait so long before telling Congress about it?
- A year later, will the responsible senior Department officials be held accountable?

Last summer, the former Acting ATF Director said that “it appears thoroughly to us that the Department is really trying to figure out a way to push the information away from their political appointees at the Department.”<sup>6</sup>

- Is the Department “pushing information away” from its political appointees?

This list of questions is far from exhaustive. You maintain that the Department remains committed to “work[ing] to accommodate the Committee’s legitimate oversight needs.”<sup>7</sup> Unfortunately, the Department’s actions do not live up to this rhetoric. Instead, it has chosen to prolong the investigation unnecessarily and then impugn the motives of Congressional investigators. Your comment at the February 2 hearing is 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

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<sup>6</sup> Melson Transcript at 124.

<sup>7</sup> Holder Testimony, *supra* note 2.

The Honorable Eric H. Holder, Jr.  
 February 14, 2012  
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gotcha games in an election year and focus on matters that are extremely serious.<sup>8</sup>

This attitude with respect to a legitimate congressional inquiry, which seems to have permeated the Department's ranks, is deeply disappointing. Had the Department demonstrated 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 end of 2011. In reality, **it is the Department that is playing political gotcha games**, instead of allowing a co-equal branch of government to perform its constitutional duty to conduct oversight of the Executive Branch.

### Subpoena Compliance

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.<sup>9</sup> 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.<sup>10</sup>

The Department has not cited any legal authority to support this new, extremely broad assertion. To the contrary, as you know, Congress possesses the "power of inquiry."<sup>11</sup> Furthermore, "the issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking."<sup>12</sup> 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.

By any measure, the Department has obstructed and slowed our work. It has now been a year since the Department sent Senator Grassley the February 4, 2011, letter containing false information. That letter, however, is but one example of interference with our progress. Since then, some documents produced to Congress have been so heavily redacted as to render them

<sup>8</sup> *Id.*

<sup>9</sup> 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.

<sup>10</sup> Transcribed Interview of Gary Grindler at 22 (Dec. 14, 2011).

<sup>11</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

<sup>12</sup> *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 75 (D.D.C. 2008) (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 505 (1975)).

The Honorable Eric H. Holder, Jr.  
 February 14, 2012  
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unintelligible. Other documents have been intentionally withheld for months, only to be released on the eve of testimony by Department officials.<sup>13</sup> Yet others, made available for *in camera* review, have been repetitive, publically available on the Internet, or non-responsive, thus wasting the limited time of Committee staff. There appears to be no rhyme or reason why some documents are redacted, only provided *in camera*, or withheld entirely. Further, it is difficult to understand why the Department took nearly a year to produce documents the Committee had already received from whistleblowers in early 2011.

In May 2011, the Department took the position that the Committee should postpone taking the transcribed interview of a federal firearms licensee (FFL) until the conclusion of an ongoing criminal prosecution - likely to last for years until all appeals are exhausted. In the original briefing to Senate Judiciary Committee staff on February 10, 2011 - just days after the now-withdrawn February 4, 2011, letter - Department representatives suggested that whistleblowers who first brought to light the questionable techniques used in Fast and Furious lacked the requisite experience to make such allegations. They further indicated that FFLs had not expressed concerns about suspicious transactions and that ATF would never compel these gun dealers to make transactions against their better judgment. Both of these statements were completely false.

#### Transcribed Interviews

With respect to transcribed interviews, the Department's ever-evolving policy seems designed to thwart the progress of the congressional investigation. First, the Department refused to allow line attorneys to testify in transcribed interviews. Next, it prevented first-line supervisors from testifying in such interviews. Most recently, the Department has indicated that the Committee may not take the transcribed interviews of Senate-confirmed Department officials.

Since July, the Committee has been attempting to interview lawyers who were not only involved in Fast and Furious during the pendency of the operation but also those who led the Department-created task force to examine the program *ex post facto*. We requested that the Department make Emory Hurley, Michael Morrissey, and Patrick Cunningham of the U.S. Attorney's Office in Arizona available for transcribed interviews. It was not until January 2012, some seven months after the request was first made, that we were able to arrange an interview date for Cunningham. Shortly thereafter and without warning, Cunningham asserted his Fifth Amendment privilege, refused to testify, and vanished from the Department. The Department will not make Mr. Morrissey available until at least March 2012, and it still refuses to make Mr. Hurley available.

The Department has also refused to schedule dates with several other witnesses. For example, last week we were told that Assistant Attorney General Lanny Breuer was not available

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<sup>13</sup> 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.

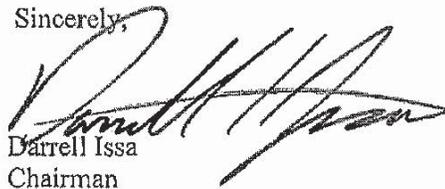
The Honorable Eric H. Holder, Jr.  
 February 14, 2012  
 Page 7 of 7

for a transcribed interview, but rather only for full Committee hearing testimony. These repeated refusals leave us with the strong impression that the Department has no interest in allowing Congress to conduct a complete investigation. Key Department employees possess factual information integral to our investigation. The only way to get this information is through transcribed interviews. Still, the Department continues to deny Congress access to these fact witnesses, and so questions about Fast and Furious continue to linger.

The Committee has been more than patient in dealing with Department representatives to obtain the information it requires. Nearly four months have passed since I authorized your subpoena. During that time, the Department's progress has been unacceptably slow. So far, we have not received a single document in 14 out of 22 categories in the subpoena schedule. Thus, nearly two thirds of these categories remain completely unanswered. Sub-parts of the other 8 categories also remain unanswered.

It is impossible to end our investigation with the current level of cooperation we are receiving from the Department. Rather, the Committee requires the full cooperation of the Department of Justice. This is not an "election year political 'gotcha' game," but rather a bipartisan sentiment. As Ranking Member Cummings promised the family of slain Border Patrol Agent Brian Terry, **"we will not rest until every single person responsible for all of this, no matter where they are, are brought to justice."**<sup>14</sup> I applaud his resolve, and I want to make it clear that Congress will not give up until this accountability has been achieved.

Sincerely,



Darrell Issa  
 Chairman

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

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<sup>14</sup> *Fast and Furious: Reckless Decisions, Tragic Outcomes: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (Jun. 15, 2011).

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

February 15, 2012

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Senator Grassley:

This responds to your letter dated February 8, 2012, which requested information about the content of wiretap applications that may have been generated in the course of the investigation by the Department's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) known as Operation Fast and Furious. You also asked the Department to move to unseal any such application that may be subject to seal in this pending criminal case.

While we are reviewing your request, we are not in a position to provide a substantive response today as you requested. We will send an identical response to the other Members who joined in your letter to us. We appreciate your patience as we consider the significant issues raised by your letter.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Weich".

Ronald Weich  
Assistant Attorney General

cc: The Honorable Patrick Leahy  
Chairman

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 15, 2012

The Honorable Patrick Meehan  
U.S. House of Representatives  
Washington, DC 20515

Dear Congressman Meehan:

This responds to your letter dated February 8, 2012, which requested information about the content of wiretap applications that may have been generated in the course of the investigation by the Department's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) known as Operation Fast and Furious. You also asked the Department to move to unseal any such application that may be subject to seal in this pending criminal case.

While we are reviewing your request, we are not in a position to provide a substantive response today as you requested. We will send an identical response to the other Members who joined in your letter to us. We appreciate your patience as we consider the significant issues raised by your letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Weich".

Ronald Weich  
Assistant Attorney General



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

February 16, 2012

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

Dear Mr. Chairman:

This supplements our previous responses to your subpoena dated October 11, 2011, which requested documents regarding the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) investigation known as Operation Fast and Furious and related matters, and your letter dated September 1, 2011, requesting documents and communications of six current or former employees in the United States Attorney's Office for the District of Arizona.

We are delivering today to your office 304 pages of material.<sup>1</sup> We have identified an additional 82 pages that we are prepared to make available at the Department for review by staff of your Committee, as well as staff of the Senate and House Committees on the Judiciary. In addition to your letter of September 1, 2011, these documents are responsive to subpoena items 1 and 2. Consistent with established third-agency practice, we have consulted with the Department of Homeland Security about responsive materials in this collection that implicate its equities and they are enclosed here. We are in the process of consulting with the Department of State about documents that implicate its equities and we will supplement this response when that consultation completed.

To assist the Committee in its oversight duties, we also appreciate the opportunity to provide relevant and necessary context for some of the documents in today's production. Last October, we produced documents reflecting an interest on the part of the Arizona U.S. Attorney's Office in December 2010 and January 2011 in having either the Attorney General or the Deputy Attorney General participate in the late-January 2011 press conference announcing the Fast and Furious indictments. Today's production includes similar documents. As we noted back in October, neither the Attorney General nor the Deputy Attorney General attended that press conference and we have been advised that Dennis Burke, the former U.S. Attorney in

<sup>1</sup> These documents bear limited redactions to protect specific details about pending investigations, including text that would identify targets and sensitive techniques or disclose prosecutorial deliberations, plus limited information implicating individual privacy interests, such as employee cellular phone numbers or information about individuals who have been investigated but not prosecuted. In addition, we have redacted text from multi-subject documents that is not responsive to your requests. In response to requests from Chairman Smith and Chairman Leahy, we will deliver to the House and Senate Committees on the Judiciary the same documents that we deliver to you.

The Honorable Darrell E. Issa  
Page Two

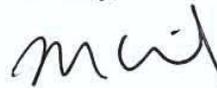
Arizona, has no recollection of raising the issue either with the Attorney General or Deputy Attorney General.

The Committee has already been made aware that, on the same day the Fast and Furious indictment was unsealed, the Department announced indictments in the Arizona case known as Flores. We previously have produced a press release dated January 25, 2011 announcing indictments in those two cases and related emails. Because the Flores case was charged by the Department's Criminal Division, a quote from the Criminal Division was included in the joint press release. Today's production includes additional emails relating to that press release.

Finally, we produce today a January 15, 2011 email among attorneys within the Arizona U.S. Attorney's Office reflecting that Mr. Burke was preparing for a telephone call with the Deputy Attorney General. The email is dated exactly one week after the tragic shooting of Representative Gabrielle Giffords and others in Tucson. In advance of the call, Mr. Burke solicited from attorneys in his office possible subjects to cover with the Deputy Attorney General. The majority of topics related to the Tucson shooting. One suggested topic was the status of the investigation relating to the murder of Customs and Border Protection Agent Brian Terry. As the Committee is aware, Mr. Burke has testified that, during this period, he was unaware of the inappropriate tactics used in Operation Fast and Furious.

We hope that this information is helpful. Our efforts to identify documents responsive to your subpoena are continuing and we will supplement this response when additional documents become available. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

February 16, 2012

The Honorable Patrick J. Leahy  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 Washington, DC 20510

Dear Mr. Chairman:

This responds further to your letter to the Attorney General, dated June 23, 2011, requesting that the Senate Judiciary Committee receive the same access to documents that the Department provides to the House Committee on Oversight and Government Reform related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Project Gunrunner.

Enclosed on CD please find 304 pages of material that we produced to the House Oversight and Government Reform Committee (HOCR) today.<sup>1</sup> We have identified an additional 82 pages that we are prepared to make available at the Department for review by staff of your Committee, as well as staff of the House Committee on the Judiciary. In addition to the September 1, 2011 letter from Chairman Issa and Senator Grassley, these documents are responsive to Chairman Issa's subpoena items 1 and 2. Consistent with established third-agency practice, we have consulted with the Department of Homeland Security about responsive materials in this collection that implicate its equities and they are enclosed here. We are in the process of consulting with the Department of State about documents that implicate its equities and we will supplement this response when that consultation completed.

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The Honorable Patrick Leahy  
Page Two

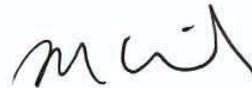
the Deputy Attorney General participate in the late-January 2011 press conference announcing the Fast and Furious indictments. Today's production includes similar documents. As we noted back in October, neither the Attorney General nor the Deputy Attorney General attended that press conference and we have been advised that Dennis Burke, the former U.S. Attorney in Arizona, has no recollection of raising the issue either with the Attorney General or Deputy Attorney General.

The Committee has already been made aware that, on the same day the Fast and Furious indictment was unsealed, the Department announced indictments in the Arizona case known as Flores. We previously have produced a press release dated January 25, 2011 announcing indictments in those two cases and related emails. Because the Flores case was charged by the Department's Criminal Division, a quote from the Criminal Division was included in the joint press release. Today's production includes additional emails relating to that press release.

Finally, we produce today a January 15, 2011 email among attorneys within the Arizona U.S. Attorney's Office reflecting that Mr. Burke was preparing for a telephone call with the Deputy Attorney General. The email is dated exactly one week after the tragic shooting of Representative Gabrielle Giffords and others in Tucson. In advance of the call, Mr. Burke solicited from attorneys in his office possible subjects to cover with the Deputy Attorney General. The majority of topics related to the Tucson shooting. One suggested topic was the status of the investigation relating to the murder of Customs and Border Protection Agent Brian Terry. As the Committee is aware, Mr. Burke has testified that, during this period, he was unaware of the inappropriate tactics used in Operation Fast and Furious.

We hope that this information is helpful. Our efforts to identify documents responsive to Chairman Issa's subpoena are continuing and we will supplement this response when additional documents become available. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Charles E. Grassley  
Ranking Minority Member

**Congress of the United States**  
**Washington, DC 20515**

February 24, 2012

**VIA ELECTRONIC TRANSMISSION**

The Honorable Eric H. Holder, Jr.  
 Attorney General  
 U.S. Department of Justice  
 950 Pennsylvania Avenue, NW  
 Washington, DC 20530

Dear Mr. Attorney General:

For almost an entire year, we have been requesting that the Department provide information about the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF's) knowledge regarding Otilio Osorio's straw purchasing activities. We are interested in him because he was the straw purchaser of the weapon used in the murder of Immigration and Customs Enforcement (ICE) Agent Jaime Zapata on February 15, 2011.

Letters from Senator Grassley on March 4, 2011, and March 28, 2011, provided documentation that, on September 17, 2010, ATF traced trafficked weapons to Otilio's brother and co-habitant, Ranferi Osorio, as well as the Osorio brothers' next-door neighbor, Kelvin Morrison. Senator Grassley further inquired why these facts did not prompt ATF to conduct a "knock and talk" with these individuals or begin conducting surveillance on them.

On November 9, 2010, as part of a Drug Enforcement Administration (DEA) investigation, ATF witnessed Otilio and Ranferi Osorio providing 40 weapons with obliterated serial numbers to an undercover ATF informant for the purpose of trafficking the weapons to Mexico. Surprisingly, they were not arrested for another three and a half months. Senator Grassley further inquired why they were not arrested at the time they were observed to be in possession of weapons with obliterated serial numbers, which is a crime. He asked whether ATF or DEA continued to surveil the Osorio brothers between early November and their arrest, following the discovery that Otilio Osorio's weapon was used in the murder of Agent Zapata. Inexplicably, the Department has failed to provide substantive responses to any of these letters, including a subsequent follow-up letter on this matter, sent jointly on October 25, 2011.

ATF has tried to distinguish this case from Operation Fast and Furious and to justify its failure to intervene. In one news article on the Osorio brothers, ATF North Texas spokesperson Tom Crowley is quoted as saying: "[T]aking them down and arresting them at that time would have possibly jeopardized that investigation. . . . None of the tactics used in this investigation were anything similar to what was used in Arizona's Fast and Furious, including intentionally walking firearms across the border."<sup>1</sup> Yet failure to conduct surveillance of individuals known to be trafficking weapons to Mexico was a core problem with the tactics used in Fast and

<sup>1</sup> Jack Douglas Jr., "Fort Worth Gun Falls Into Wrong Hands, Kills U.S. Agent," CBS 11 News (Feb. 15, 2011), available at <http://dfw.cbslocal.com/2012/02/15/fort-worth-gun-falls-into-wrong-hands-kills-u-s-agent>.

The Honorable Eric H. Holder, Jr.  
 February 24, 2012  
 Page 2 of 3

Furious. Lack of surveillance is what allowed such firearms to reach the border. The same irresponsible tactic appears to have been used in this matter.

Now, news reports indicate that this may have been an issue with a purchaser of another one of the weapons found at Agent Zapata's murder scene.<sup>2</sup> Records indicate that ATF opened a case against Manuel Barba in June 2010,<sup>3</sup> approximately two months before he took possession on August 20, 2010, of the rifle which was later trafficked to Mexico and also used in the murder of Agent Zapata.<sup>4</sup> Additionally, the documents show that ATF had indications in October 2010 that Barba was obliterating serial numbers on weapons, the possession of which would have been a prosecutable offense.<sup>5</sup> At least as of December 13, 2010, ATF also was aware that Barba was still under indictment for a 2006 state case, and thus had been unlawfully receiving firearms while under indictment.<sup>6</sup> However, a warrant was not issued for Barba's arrest in this case until February 14, 2011.<sup>7</sup>

To assist us in better understanding of the circumstances leading up to the murder of Agent Zapata, please answer the following questions:

1. Did ATF have any contact with Barba, such as a "knock and talk," between June 7, 2010, when Barba's case was opened, and August 20, 2010, when he received the weapon that would later be used in the murder of Agent Zapata?
2. When did ATF agents first contact Barba in connection with this case?
3. Records indicate Federal Firearms Licensee (FFL) interviews were conducted in this case by early October 2010. When were FFLs first contacted by ATF in this case?
4. What information about Barba or the individuals known to be working with him as straw purchasers was communicated to the FFLs?
5. What cooperation did any FFLs agree to provide ATF in this investigation?
6. Did any FFLs ever provide ATF with advance or contemporaneous (within three days) notice of purchases by the individuals suspected to be working with Barba as straw purchasers?
7. Why was Barba not arrested in October 2010 when ATF obtained audio evidence that Barba was obliterating serial numbers before trafficking weapons to Mexico?

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The Honorable Eric H. Holder, Jr.  
 February 24, 2012  
 Page 3 of 3

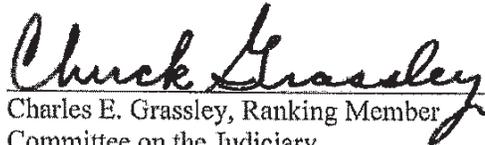
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Thank you in advance for ensuring your response arrives no later than March 9, 2012. Should you have any questions regarding this letter, please contact Tristan Leavitt of Ranking Member Grassley's staff at (202) 224-5225 or Henry Kerner of Chairman Issa's staff at (202) 225-5074.

Sincerely,



Darrell Issa, Chairman  
 Committee on Oversight and  
 Government Reform  
 U.S. House of Representatives



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

cc: The Hon. B. Todd Jones, Acting Director  
 Bureau of Alcohol, Tobacco, Firearms and Explosives

The Hon. Michele M. Leonhart, Administrator  
 U.S. Drug Enforcement Administration

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

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

**Congress of the United States**  
Washington, DC 20510

February 27, 2012

**VIA ELECTRONIC TRANSMISSION**

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Attorney General Holder:

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The Honorable Eric H. Holder, Jr.  
 February 27, 2012  
 Page 2 of 3

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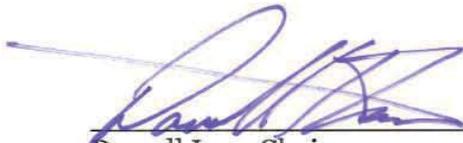
<sup>7</sup> *Id.*

The Honorable Eric H. Holder, Jr.  
 February 27, 2012  
 Page 3 of 3

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Thank you in advance for ensuring your response arrives no later than March 9, 2012. Should you have any questions regarding this letter, please contact Tristan Leavitt of Ranking Member Grassley's staff at (202) 224-5225 or Henry Kerner of Chairman Issa's staff at (202) 225-5074.

Sincerely,



Darrell Issa, Chairman  
 Committee on Oversight and  
 Government Reform  
 U.S. House of Representatives



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

cc: The Hon. B. Todd Jones, Acting Director  
 Bureau of Alcohol, Tobacco, Firearms and Explosives

The Hon. Michele M. Leonhart, Administrator  
 U.S. Drug Enforcement Administration

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

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



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

February 27, 2012

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

Dear Mr. Chairman:

In advance of the Committee's interview scheduled with former Associate Deputy Attorney General Ed Siskel, we are enclosing with this letter two emails related to the Southwest Border Strategy Group. These documents fall outside the terms of the Committee's subpoenas and letter requests, but may pertain to your investigative interests.

Sincerely,

A handwritten signature in cursive script that reads "M. Keith Burton for".

Ronald Weich  
 Assistant Attorney General

Enclosures

cc: The Honorable Elijah E. Cummings  
 Ranking Minority Member

The Honorable Patrick J. Leahy  
 Chairman  
 Committee on the Judiciary  
 United States Senate

The Honorable Charles E. Grassley  
 Ranking Minority Member  
 Committee on the Judiciary  
 United States Senate

The Honorable Darrell E. Issa  
Page Two

The Honorable Lamar Smith  
Chairman  
Committee on the Judiciary  
U. S. House of Representatives

The Honorable John Conyers, Jr.  
Ranking Minority Member  
Committee on the Judiciary  
U. S. House of Representatives

March 2012

# March 2012



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

March 2, 2012

The Honorable Patrick J. Leahy  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 Washington, DC 20510

Dear Mr. Chairman:

This responds further to your letter to the Attorney General, dated June 23, 2011, requesting that the Senate Judiciary Committee receive the same access to documents that the Department provides to the House Committee on Oversight and Government Reform related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Project Gunrunner.

In addition to the documents we provided to you on February 27<sup>th</sup> and February 28<sup>th</sup>, we are delivering today to your office 26 pages of material that we produced to the House Oversight and Government Reform Committee (HOCR) today.<sup>1</sup> We have identified an additional 17 pages that we are prepared to make available at the Department for review by staff of your Committee, as well as staff of the House Committee on the Judiciary. In addition to the September 1, 2011 letter from Chairman Issa and Senator Grassley, these documents are responsive to Chairman Issa's subpoena items 4 and 5. Consistent with established third-agency practice, we are in the process of consulting with the Department of Homeland Security and the Department of State regarding documents that implicate their equities. We will supplement this response when those consultations are completed.

To assist the Committee in its oversight duties, we appreciate the opportunity to provide relevant and necessary context for some of the documents in today's production. We have previously produced to you documents relating to the Wide Receiver and Medrano investigations. Today's production includes additional documents relating to those matters. For example, an email dated September 22, 2011 from an FFL to the gang unit prosecutor handling the Wide Receiver matter is enclosed. HOCR DOJ 006278.<sup>2</sup> The email appeared as an exhibit to a motion to dismiss charges that was filed in court by a defendant in one of the Wide Receiver prosecutions. The motion to dismiss was denied by the judge in the case shortly after it was filed. Also included in today's production is an ATF Operational Plan from the Wide Receiver

<sup>1</sup> These documents bear limited redactions to protect law-enforcement sensitive details, including text that would identify targets and sensitive techniques, plus limited information implicating individual privacy interests. In response to requests from Chairman Smith, we will deliver to the House Committee on the Judiciary the same documents that we deliver to you.

<sup>2</sup> The highlighting in the document appears in the version that the defendant filed with the court.

The Honorable Patrick J. Leahy  
Page 2

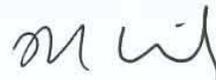
investigation dated May 31, 2007. HOCR DOJ 006279-80. The Operational Plan reflects ATF's intention to conduct surveillance at an FFL where firearms were to be purchased by suspects in the Wide Receiver case and to "subsequently follow these individuals to their border crossing at the U.S./Mexico border, where Mexican enforcement authorities will follow the firearms to their final destination in Mexico." HOCR DOJ 006279.

Also being produced today is a criminal complaint filed in the Medrano matter on December 10, 2008.<sup>3</sup> HOCR DOJ 006281-86. Paragraphs 11 and 12 of the Complaint reflect that, on or about June 17, 2008, Medrano and another individual went to an FFL and purchased 6 rifles. HOCR DOJ 006283. The complaint indicates that the two men "placed the six (6) rifles in the back seat of their vehicle" and drove "to the Douglas Port of Entry where they both entered into Mexico with at least" those six rifles "in the vehicle." HOCR DOJ 006283. An ATF Operational Plan dated December 11, 2008 is also included with our production. HOCR DOJ 006288-89. It appears to provide more information about these events. It says that, in June 2008, agents "observed" Medrano and the other individual "place the firearms in the backseat and trunk. Agents and officers surveilled the vehicle to Douglas, AZ where it crossed into Mexico at the Douglas Port of Entry (POE) before a stop at the border could be coordinated with CBP." HOCR DOJ 006289. Finally, we produce today an excerpt from the ATF case management log for the Medrano matter. The log reflects that, in October 2008, an ATF agent discussed the Medrano case with an Assistant United States Attorney, who advised the agent that she was "uneasy with straw cases. Advised [sic] that purchases followed by immediate border crossings and two traces define pc." HOCR DOJ 006287.

The Wide Receiver and Medrano documents discussed above appear to reflect instances where firearms were allowed to cross the border in an uncontrolled fashion with no immediate interdiction by Mexican law enforcement authorities on the other side of the border. Such uncontrolled deliveries to Mexico were and are unacceptable.

We hope this information is helpful. Our efforts to identify documents responsive to Chairman Issa's subpoena are continuing and we will supplement this response when additional documents become available. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Charles E. Grassley  
Ranking Minority Member

<sup>3</sup> As noted on the document, the complaint was unsealed by the court on January 8, 2009.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 2, 2012

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

Dear Mr. Chairman:

This supplements our previous responses to your subpoena dated October 11, 2011, which requested documents regarding the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) investigation known as Operation Fast and Furious and related matters, and your letter dated September 1, 2011, requesting documents and communications of six current or former employees in the United States Attorney's Office of the District of Arizona.

In addition to the documents we provided to you on February 27<sup>th</sup> and February 28<sup>th</sup>, we are delivering today to your office 26 pages of material.<sup>1</sup> We have identified an additional 17 pages that we are prepared to make available at the Department for review by staff of your Committee, as well as staff of the Senate and House Committees on the Judiciary. In addition to your letter of September 1, 2011, the documents are responsive to subpoena items 4 and 5. Consistent with established third-agency practice, we are in the process of consulting with the Department of Homeland Security and the Department of State regarding documents that implicate their equities. We will supplement this response when those consultations are completed.

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The Honorable Darrell E. Issa  
Page 2

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Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Elijah Cummings  
Ranking Minority Member

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The Honorable Darrell E. Issa  
Page 3

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate

**Congress of the United States**  
Washington, DC 20510

March 5, 2012

**VIA ELECTRONIC TRANSMISSION**

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

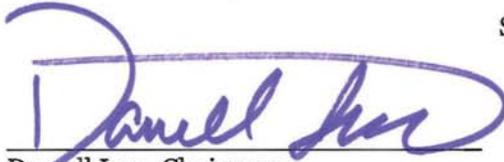
Dear Attorney General Holder:

This letter follows up on information you provided on September 9, 2011, regarding the circumstances in which firearms associated with Operation Fast and Furious were recovered in relation to crimes of violence.<sup>1</sup> As of August 16, 2011, it was our understanding that besides the two weapons found at the Terry murder scene, there had been only one weapon recovered in the U.S. in connection with a violent crime. We also understood that the Department was aware of twenty-eight total weapons recovered in Mexico in connection with violent crimes.

We are interested in learning whether any additional Fast and Furious guns have been seized in the intervening six months since that update. Again, please describe the date and circumstances of each recovery in detail, including the date of each recovery or request, what type of violent crime was indicated on the trace request, the jurisdiction where the firearm was recovered, and its make, model, and serial number.

Thank you in advance for ensuring your response arrives no later than March 12, 2012. Should you have any questions regarding this letter, please contact Tristan Leavitt of Ranking Member Grassley's staff at (202) 224-5225 or Henry Kerner of Chairman Issa's staff at (202) 225-5074.

Sincerely,



Darrell Issa, Chairman  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives



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

cc: Mr. B. Todd Jones, Acting Director  
U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives

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

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

<sup>1</sup> Letter from M. Faith Burton for Ronald Weich, Assistant Attorney General for Legislative Affairs Department of Justice, to Darrell Issa, Chairman, House Committee on Oversight and Government Reform, and Charles Grassley, Ranking Member, Senate Committee on the Judiciary (Sep. 9, 2011).

LAW OFFICES

**STEIN, MITCHELL & MUSE L.L.P.**1100 CONNECTICUT AVE., N.W., STE. 1100  
WASHINGTON, D. C. 20036GLENN A. MITCHELL  
JACOB A. STEIN  
GERARD E. MITCHELL  
ROBERT F. MUSE  
DAVID U. FIERST  
RICHARD A. BUSSEY  
ROBERT L. BREDHOFF  
CHRISTOPHER H. MITCHELL  
ANDREW M. BEATO  
LAURIE A. AMELL  
DENIS C. MITCHELL  
ARI S. CASPER  
JOSHUA A. LEVY  
JULIE L. MITCHELL  
KERRIE C. DENTOF COUNSEL  
RONALD KOVNERTELEPHONE: (202) 737-7777  
TELECOPIER: (202) 296-8312  
www.SteinMitchell.comMarch 14, 2012  
via E-mailJason Foster, Minority Counsel  
Senate Judiciary Committee  
327 Hart Senate Office Building  
Washington, DC 20510

Dear Jason,

Today I hand delivered a letter to you the letter is addressed to Chairman Issa and Senator Grassley. The letter inadvertently included the production of the last two pages at tab 4. As discussed, I would like to claw them back. To that end, please contact my assistant Charlie Amuzie at (202) 661-0936 to make arrangements to retrieve those two pages from your office.

Sincerely,



Joshua Levy

**Congress of the United States**  
**Washington, DC 20515**

March 15, 2012

The Honorable Cynthia A. Schnedar  
Acting Inspector General  
U.S. Department of Justice  
Office of the Inspector General  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Ms. Schnedar:

We are writing to obtain clarification as to the parameters of your investigation of the significant management failures that occurred in Operation Fast and Furious. Specifically, we want to find out whether you have decided not to interview any political appointees from the Justice Department's Criminal Division, Office of the Deputy Attorney General, or Office of the Attorney General as part of your investigation. Your investigation has been ongoing for almost a year. The Attorney General has repeatedly cited it as a prime example of steps he has taken to get to the bottom of Operation Fast and Furious.

On February 29, 2012, our staffs conducted a transcribed interview of former Associate Deputy Attorney General Edward Siskel. During this interview, we learned that your office has not yet interviewed him regarding his role in Operation Fast and Furious.<sup>1</sup> Given that Siskel was responsible for managing the ATF portfolio in the Office of the Deputy Attorney General, and that he had frequent contact with ATF leadership in conjunction with his duties, this information came as a surprise.

In the Siskel interview, Department counsel, an Associate Deputy Attorney General, was shocked that we asked this question. On the record, this Department representative stated, "**it demonstrates a total lack of [understanding of] what the IG's jurisdiction is**, but go ahead."<sup>2</sup> Frankly, his response was puzzling, and we now wonder if there is some reason your office cannot or should not interview Siskel.

The Siskel interview was not the first time we have encountered this issue. Apparently, despite the advanced stage of its review, your office has not interviewed several key figures in Fast and Furious. During the Committee's transcribed interview of former Acting Deputy Attorney General Gary Grindler last December, we learned that your office had yet to interview him.<sup>3</sup> Grindler acknowledged that he would be a likely witness in your investigation.<sup>4</sup> He received detailed briefings about the tactics used in Operation Fast and Furious in March 2010,

<sup>1</sup> Transcribed Interview of Edward Siskel, Transcript at 128 (Feb. 29, 2012).

<sup>2</sup> *Id.* (emphasis added).

<sup>3</sup> Transcribed Interview of Gary Grindler, Transcript at 125 (Dec. 14, 2011).

<sup>4</sup> *See id.* at 116-18.

The Honorable Cynthia A. Schnedar  
 March 15, 2012  
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and his handwritten notes appear with a presentation about Fast and Furious.<sup>5</sup> Additionally, Jason Weinstein, a Deputy Assistant Attorney General in the Criminal Division who authorized Fast and Furious wiretap applications, reported that your office had not interviewed him as of January 10, 2012.<sup>6</sup>

Finally, during a briefing delivered to congressional staff on January 20, 2012, we informed representatives of your office that Patrick Cunningham, Criminal Chief of the Arizona U.S. Attorney's Office, had asserted his Fifth Amendment privilege to Congress a day earlier. The Committee had asked Mr. Cunningham to appear at a deposition on January 24, 2012. Prior to that, the Department had represented to Congress that Mr. Cunningham was the most appropriate person from the U.S. Attorney's Office to interview regarding Fast and Furious. Your staff agreed that Mr. Cunningham's refusal to testify before the Committee and stated intention to take the Fifth was a serious development. Further, your staff told congressional staff present that they would make arrangements immediately to speak with Mr. Cunningham before he left the Department.

We have had previous concerns with the independence of your office with respect to this investigation. On March 8, 2011, Ranking Member Grassley wrote to the Integrity Committee of the Council of Inspectors General on Integrity and Efficiency expressing these concerns about your office's independence. On June 22, 2011, Chairman Issa wrote to you regarding the influence of potentially improper political and other concerns on the investigation. On September 20, 2011, we both wrote to you regarding your decision to turn over audio recordings obtained through the investigation to the Arizona U.S. Attorney's Office.

These recent revelations raise serious questions about your investigation. As such, please provide answers to the following questions as soon as possible, but by no later than noon on March 21, 2012:

- 1) Has your office requested to interview Mr. Siskel? If so, what was his response? If not, why not?
- 2) Has your office requested to interview Mr. Grindler? If not, why not?
- 3) Has your office requested to interview Mr. Weinstein? If not, why not?
- 4) Has your office interviewed any other current or former political appointees in the Justice Department's Office of the Attorney General, Office of the Deputy Attorney General, or Criminal Division in connection with Fast and Furious? If not, please explain why not.

<sup>5</sup> See "Operation the Fast and the Furious," Mar. 12, 2010 [HOCR 002819 – 002823].

<sup>6</sup> See Transcribed Interview of Jason Weinstein, Transcript at 197 (Jan. 10, 2012).

The Honorable Cynthia A. Schnedar  
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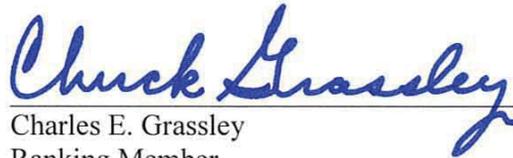
- 5) Did your office request to interview Mr. Cunningham after you were told of his assertion of the Fifth Amendment privilege and before he left the Department? If so, did it complete the interview prior to his departure? If not, why not?
- 6) Are there any restrictions on your ability to interview political appointees?
- 7) Have any other current or former Administration officials declined your request for an interview? If so, why were you denied access to these witnesses and what steps did you take to obtain their testimony?

If you have any questions regarding this letter, please contact Tristan Leavitt in Ranking Member Grassley's office at (202) 224-5225 or Henry Kerner of Chairman Issa's Committee staff at (202) 225-5074. Thank you for your attention to this important matter.

Sincerely,



Darrell E. Issa  
 Chairman  
 Committee on Oversight and  
 Government Reform  
 U.S. House of Representatives



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

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

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

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

March 16, 2012

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

Dear Mr. Chairman:

This letter supplements our previous responses to your subpoena dated October 11, 2011, which requested documents regarding the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) investigation known as Operation Fast and Furious and related matters, and your letter dated September 1, 2011, requesting documents and communications of six current or former employees in the United States Attorney's Office of the District of Arizona. This letter also describes the Department's response to the Committee's subpoenas and numerous other requests regarding Operation Fast and Furious.

As you know, soon after learning in early 2011 of the inappropriate tactics allegedly employed in Fast and Furious, the Attorney General asked the Department's Inspector General to conduct a review. He also directed the Deputy Attorney General to make clear to Department personnel that such inappropriate tactics should not be utilized. Since these events, there is new leadership in place at both ATF and the Arizona United States Attorney's Office (USAO). And, as enumerated in our January 27, 2012 letter, both ATF and the Department as a whole have adopted important reforms, including more rigorous oversight of significant gun trafficking investigations and clarification of ATF's firearms transfer policy. These reforms are designed to ensure that the inappropriate tactics used in Fast and Furious and in operations in the prior administration, including the Wide Receiver, Medrano, and Hernandez matters, will not be utilized in the future. Moreover, the Department remains firmly committed to eliminating illicit gun trafficking networks and bringing the killers of Customs and Border Protection Agent Brian Terry to justice.

The Honorable Darrell E. Issa  
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## **I. Today's Production**

We are delivering today to your office 357 pages of material.<sup>1</sup> In addition to your letter of September 1, 2011, the documents are responsive to subpoena items 1, 4, 5, and 21. Consistent with established third-agency practice, we are in the process of consulting with the Department of Homeland Security and the Department of State regarding documents that implicate their equities. We will supplement this response when those consultations are completed.

To assist the Committee in its oversight duties, we appreciate the opportunity to provide relevant and necessary context for some of the documents in today's production. The majority of today's documents relate to the Fidel Hernandez investigation that occurred in 2007, and about which we previously have provided documents. Today's production reflects that, in July 2007, ATF anticipated that Hernandez and his confederates would be prosecuted in Mexico by Mexican authorities. (HOCR DOJ 006300) Consistent with this, a September 26, 2007 ATF Operational Plan anticipated a purchase of weapons by Hernandez from an FFL in Arizona and that ATF would surveil Hernandez "to the border, and Mexico police will continue with the operation." (HOCR DOJ 006305) In an email that same day, ATF's William Newell remarked, "This has the potential to be a very good 'leap of faith' for us and something the Mexicans have been wanting us to do for a long time. I'm all for it and have cleared it with the U.S. Attorney's Office." (HOCR DOJ 006307) Another email that same day prepared by a different ATF official reflected that Hernandez and a confederate "have collectively purchased over 200 firearms" and that four of those weapons were associated with a kidnapping investigation in Mexico. (HOCR DOJ 006336) Today's production reflects, however, that on the day of the operation, ATF agents observed Hernandez's vehicle cross the border but "the ATF MCO did not get a response from the Mexican side until 20 minutes later, who then informed us that they did not see the vehicle cross." (HOCR DOJ 006348)

Today's documents indicate that, by early October 2007, ATF was considering another coordinated effort with Mexico on the case. Newell wrote to an ATF official on October 2, 2007, "We are potentially going to give it another shot this weekend if everything goes as planned." (HOCR DOJ 006364) The initial Operational Plan for this event reflected that ATF would "coordinate with Mexican authorities to conduct a vehicle stop of the target vehicle after it transports the firearms into Mexico" (HOCR DOJ 006396), but a later version of the plan indicated that "agents will direct a uniformed Border Patrol stop. Agents will take subjects into custody and conduct post-arrest interview." (HOCR DOJ 006404) An ATF After Action Report dated October 20, 2007 said that "Surveillance was conducted without incident – no enforcement action taken." (HOCR DOJ 006409) A later Operational Plan dated November 1, 2007

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<sup>1</sup> These documents bear limited redactions to protect law-enforcement sensitive details, including text that would identify targets and sensitive techniques, plus limited information implicating individual privacy interests. In addition, we have redacted text that implicates equities of the Departments of State and Homeland Security. In response to requests from Chairman Smith and Chairman Leahy, we will deliver to the House and Senate Committees on the Judiciary the same documents that we deliver to you.

The Honorable Darrell E. Issa  
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indicates that ATF again intended to surveil a purchase of weapons by Hernandez and his confederates in Arizona and “Once the subjects cross into Mexico, ATF attache’s [sic] will liaison with Mexican authorities to coordinate the arrest of the subjects.” (HOCR DOJ 006443) The email covering this Operational Plan says, in part, “keep your fingers crossed maybe we’ll be successful this time.” (HOCR DOJ 006442)

A November 2007 briefing paper prepared by ATF discusses the Hernandez case, saying that “ATF Phoenix has been attempting to complete one of the first Federal cross-border firearms trafficking investigations with ultimate prosecution by the Republic of Mexico Attorney Generals [sic] Office. Unfortunately this case has been a trial and error process.” (HOCR DOJ 006458) The briefing paper goes on to say, “Nonetheless we believe we have made breakthroughs in coordinating such operations through PFP-CENAPI and we want to thank Mexico City Office for the diligence. I think we’re going to ‘knock one out of the park’ soon.” (HOCR DOJ 006458) A November 14, 2007 email among ATF officials reflects that a briefing paper on the case was prepared “For meeting with Mex. Attorney General and U.S. Attorney General.” (HOCR DOJ 006390) The email reflects that ATF “briefed DOJ on this case and told them it is ongoing. They asked for a BP. Attached.” (HOCR DOJ 006390) The attached briefing paper discusses the unsuccessful efforts that ATF had made to that date to enlist the support of Mexican law enforcement authorities in making a stop of Hernandez in Mexico. (HOCR DOJ 006392) The briefing paper nevertheless reflected that ATF’s investigative plan continued to be for Hernandez and a confederate to be “arrested on the Mexican side of the border with a large load of ‘weapons of choice.’” (HOCR DOJ 006393)

The latest Operational Plan for the case in today’s production is dated November 26, 2007, and says that ATF intended to surveil a purchase of weapons in Arizona by Hernandez and confederates and “units will then follow the vehicle and its occupants from the FFL in Phoenix, AZ to the Mexican port of entry in Nogales, Arizona. Once the subjects cross into Mexico, ATF attache’s [sic] will liaison with Mexican authorities to coordinate the arrest of the subjects.” (HOCR DOJ 006489) However, an After Action Report dated that same day indicates that “Contact made w/ F/A trafficking suspects at border, 2 arrested for conspiracy to violate Arms Control Export Act. Nine firearms seized.” (HOCR DOJ 006494)

Also in today’s production is an affidavit and statement of probable cause filed in the Medrano case.<sup>2</sup> (HOCR DOJ 006603-006606) We previously have produced documents relating to the Medrano matter. The affidavit reflects that, on June 17, 2008, ATF agents and local police officers observed Medrano and an associate “purchase six (6) ‘weapons of choice’ firearms from an FFL in Tucson, Arizona and place them in the back seat of the associate’s vehicle.” (HOCR DOJ 006605) While the agents briefly lost contact with Medrano’s vehicle following the purchase, they ultimately found it in a parking lot in Douglas, Arizona. “The vehicle then exited the parking lot with Alejandro MEDRANO driving and immediately crossed the International Border through the Douglas POE. Your affiant believes that the firearms were still in the vehicle.” (HOCR DOJ 006605) An ATF record documenting the events of that day

<sup>2</sup> The redactions in the document appear in the version that was unsealed by the court in the Medrano case.

The Honorable Darrell E. Issa  
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says, under the heading “Type of Operation,” “Buy Walk/Surveillance.” (HOCR DOJ 006598) An ATF Operational Plan dated August 2008 reflects an ATF operation in the case in which ATF agents would surveil a purchase of weapons by Medrano and his cohorts in Arizona and “Following any purchases, agents and officers will conduct surveillance on the vehicle and the individuals in an attempt to determine the firearms [sic] final destination.” (HOCR DOJ 006602) The Operational Plan indicates that “If determined that the target vehicle intends to cross into Mexico, SA Garcia will coordinate with Mexican law enforcement to continue the surveillance into Mexico.” (HOCR DOJ 006602) However, “if Mexican authorities are unable to respond, SA Garcia will coordinate a stop on the identified vehicle at the Port of Entry into Mexico[.]” (HOCR DOJ 006602)

We previously have produced to you communications between former Arizona U.S. Attorney Dennis Burke and former Deputy Chief of Staff to the Attorney General Monty Wilkinson from the December 2010 time period that relate to whether the Attorney General might attend the January 2011 press conference announcing the Fast and Furious indictments. Today’s production contains an additional email on this subject dated December 21, 2010 in which Mr. Burke tells Mr. Wilkinson “I would not recommend the AG announce this case. I can explain in detail at your convenience. Thx.” (HOCR DOJ 006614) Mr. Wilkinson replies, “Ok. Family obligation tonight. I’ll call tomorrow. Thanks.” (HOCR DOJ 006614) We have previously advised you that neither Mr. Burke nor Mr. Wilkinson recalls the specifics of these exchanges.

Also in today’s production is a draft of a speech delivered by then-Deputy Attorney General David Ogden in Albuquerque, New Mexico on June 30, 2009 at an ATF Firearms Trafficking Summit.<sup>3</sup> (HOCR DOJ 006607-006613) The draft in today’s production, and the version prepared for delivery, include the following language:

As you know, firearms trafficking cases take time to develop and are not always glamorous. Prosecuting individual straw purchasers may not seem in isolation to have a lot of jury appeal or to be making a dent in the trafficking problem. But that straw purchase was not a victimless “paperwork” violation – it was the action that provided the guns to the drug trafficker, who used them in horrific acts of violence. [By] purs[u]ing that seemingly unglamorous case each of you – as prosecutors and agents – help reduce violence outside your jurisdictions.

(HOCR 006612)

Finally, we previously have produced weekly reports to the Attorney General from NDIC for a period in 2010 that referenced the Fast and Furious investigation. Today, we produce additional NDIC weekly reports from the period after the Fast and Furious indictments were

<sup>3</sup> The version of this speech as prepared for delivery is available on the Department’s website at <http://www.justice.gov/dag/speeches/2009/dag-speech-090630.html>.

The Honorable Darrell E. Issa  
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announced in 2011 that refer to that matter. These post-indictment references do not include substantive discussion of the case but simply reflect continued activity by NDIC during the post-indictment phase of the matter.

## **II. The Department Is Working in Good Faith to Respond to the Committee's Subpoenas and Related Requests for Information**

The Department has and will continue to work in good faith to respond to your subpoenas and cooperate with your requests for information about this matter. Indeed, consistent with our recent practice, we intend to continue making documents available on a rolling basis approximately twice a month until our production is complete.

To date, we have provided over 7,200 pages of documents to the Committee as part of more than 40 separate productions. Since our first production in response to the Committee's March 31, 2011 subpoena to ATF, and continuing with the Department's productions in response to the October 11, 2011 subpoena, we have endeavored to produce and make documents available to the Committee on a regular basis; more recently, we have done so on a rolling basis approximately twice each month. In addition, we have provided information informally to Committee staff and provided briefings as requested by the Committee. We intend to continue our rolling production schedule until we have produced all responsive documents to which the Committee is entitled, consistent with longstanding policies of the Executive Branch across administrations of both parties.

The Department has devoted significant information technology resources and personnel to responding to the Committee's numerous requests. We have collected a large volume of emails, documents and data from approximately 240 custodians in various Department divisions and components. In an effort to ensure that we had access to potentially responsive information, we typically collected electronic records of relevant custodians regardless of the date and subject matter of those materials. In addition, we collected and processed electronically stored information that derived from overlapping universes of data (*e.g.*, from active data systems, archival systems or backup tapes), which resulted in significant duplication in our data set. After de-duplication, broad search terms were then used in an effort to identify information to which the Committee is entitled. Because we collected and processed records so broadly, our data set was comprised of an overwhelming number of non-responsive materials.

As part of our effort to be thorough, we have learned, and want to advise you, that there are some gaps in electronic databases of the Arizona USAO and of ATF that date back to 2006 and may relate to some electronic records covered by your requests. Specifically, we understand that email from the Arizona USAO for the periods February 2006 to August 2006 and May 2007 to October 2008 is generally not available because the backup tapes for these periods were maintained pursuant to the then-applicable records retention policy established by the Executive Office of United States Attorneys (EOUSA), which required the preservation of backup tapes for no more than six months. We understand that, pursuant to litigation hold instructions from EOUSA in an unrelated matter, some backup tapes of the Arizona USAO from the period August

The Honorable Darrell E. Issa  
Page 6

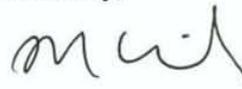
2006 to May 2007 were preserved. After October 2008, the Arizona USAO began using a different Department email system, which automatically archived users' email traffic in real-time and preserved those emails for a period of several years.

We also understand that there are gaps in the data available from ATF's email exchange servers prior to September 2008. Certain backup tapes during that time period are unavailable either because of irrevocable damage to the backup tapes, or, during the period between November 2007 and September 2008, due to procedural errors in the preservation of the tapes. We understand that the damage on certain of these tapes is due to repetitive use of these recycled tapes for backup purposes and physical hardware failures.

### **III. Conclusion**

Our efforts to identify documents responsive to your subpoena are continuing and we will supplement this response when additional documents become available. We will continue to work in good faith to satisfy the Committee's legitimate requests for information. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

March 16, 2012

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

This responds further to your letter to the Attorney General, dated June 23, 2011, requesting that the Senate Judiciary Committee receive the same access to documents that the Department provides to the House Committee on Oversight and Government Reform related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Project Gunrunner. This letter also describes the Department's response to the Committee's subpoenas and numerous other requests regarding Operation Fast and Furious.

As you know, soon after learning in early 2011 of the inappropriate tactics allegedly employed in Fast and Furious, the Attorney General asked the Department's Inspector General to conduct a review. He also directed the Deputy Attorney General to make clear to Department personnel that such inappropriate tactics should not be utilized. Since these events, there is new leadership in place at both ATF and the Arizona United States Attorney's Office (USAO). And, as enumerated in our January 27, 2012 letter, both ATF and the Department as a whole have adopted important reforms, including more rigorous oversight of significant gun trafficking investigations and clarification of ATF's firearms transfer policy. These reforms are designed to ensure that the inappropriate tactics used in Fast and Furious and in operations in the prior administration, including the Wide Receiver, Medrano, and Hernandez matters, will not be utilized in the future. Moreover, the Department remains firmly committed to eliminating illicit gun trafficking networks and bringing the killers of Customs and Border Protection Agent Brian Terry to justice.

The Honorable Patrick J. Leahy  
Page 2

## **I. Today's Production**

We are delivering today to your office 357 pages of material that we produced to the House Oversight and Government Reform Committee (HOCR) today.<sup>1</sup> In addition to the September 1, 2011 letter from Chairman Issa and Senator Grassley, the documents are responsive to Chairman Issa's subpoena items 1, 4, 5, and 21. Consistent with established third-agency practice, we are in the process of consulting with the Department of Homeland Security and the Department of State regarding documents that implicate their equities. We will supplement this response when those consultations are completed.

To assist the Committee in its oversight duties, we appreciate the opportunity to provide relevant and necessary context for some of the documents in today's production. The majority of today's documents relate to the Fidel Hernandez investigation that occurred in 2007, and about which we previously have provided documents. Today's production reflects that, in July 2007, ATF anticipated that Hernandez and his confederates would be prosecuted in Mexico by Mexican authorities. (HOCR DOJ 006300) Consistent with this, a September 26, 2007 ATF Operational Plan anticipated a purchase of weapons by Hernandez from an FFL in Arizona and that ATF would surveil Hernandez "to the border, and Mexico police will continue with the operation." (HOCR DOJ 006305) In an email that same day, ATF's William Newell remarked, "This has the potential to be a very good 'leap of faith' for us and something the Mexicans have been wanting us to do for a long time. I'm all for it and have cleared it with the U.S. Attorney's Office." (HOCR DOJ 006307) Another email that same day prepared by a different ATF official reflected that Hernandez and a confederate "have collectively purchased over 200 firearms" and that four of those weapons were associated with a kidnapping investigation in Mexico. (HOCR DOJ 006336) Today's production reflects, however, that on the day of the operation, ATF agents observed Hernandez's vehicle cross the border but "the ATF MCO did not get a response from the Mexican side until 20 minutes later, who then informed us that they did not see the vehicle cross." (HOCR DOJ 006348)

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The Honorable Patrick J. Leahy  
Page 3

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The Honorable Patrick J. Leahy  
Page 4

An ATF Operational Plan dated August 2008 reflects an ATF operation in the case in which ATF agents would surveil a purchase of weapons by Medrano and his cohorts in Arizona and “Following any purchases, agents and officers will conduct surveillance on the vehicle and the individuals in an attempt to determine the firearms [sic] final destination.” (HOCR DOJ 006602) The Operational Plan indicates that “If determined that the target vehicle intends to cross into Mexico, SA Garcia will coordinate with Mexican law enforcement to continue the surveillance into Mexico.” (HOCR DOJ 006602) However, “if Mexican authorities are unable to respond, SA Garcia will coordinate a stop on the identified vehicle at the Port of Entry into Mexico[.]” (HOCR DOJ 006602)

We previously have produced to you communications between former Arizona U.S. Attorney Dennis Burke and former Deputy Chief of Staff to the Attorney General Monty Wilkinson from the December 2010 time period that relate to whether the Attorney General might attend the January 2011 press conference announcing the Fast and Furious indictments. Today’s production contains an additional email on this subject dated December 21, 2010 in which Mr. Burke tells Mr. Wilkinson “I would not recommend the AG announce this case. I can explain in detail at your convenience. Thx.” (HOCR DOJ 006614) Mr. Wilkinson replies, “Ok. Family obligation tonight. I’ll call tomorrow. Thanks.” (HOCR DOJ 006614) We have previously advised you that neither Mr. Burke nor Mr. Wilkinson recalls the specifics of these exchanges.

Also in today’s production is a draft of a speech delivered by then-Deputy Attorney General David Ogden in Albuquerque, New Mexico on June 30, 2009 at an ATF Firearms Trafficking Summit.<sup>3</sup> (HOCR DOJ 006607-006613) The draft in today’s production, and the version prepared for delivery, include the following language:

As you know, firearms trafficking cases take time to develop and are not always glamorous. Prosecuting individual straw purchasers may not seem in isolation to have a lot of jury appeal or to be making a dent in the trafficking problem. But that straw purchase was not a victimless “paperwork” violation – it was the action that provided the guns to the drug trafficker, who used them in horrific acts of violence. [By] purs[u]ing that seemingly unglamorous case each of you – as prosecutors and agents – help reduce violence outside your jurisdictions.

(HOCR 006612)

Finally, we previously have produced weekly reports to the Attorney General from NDIC for a period in 2010 that referenced the Fast and Furious investigation. Today, we produce additional NDIC weekly reports from the period after the Fast and Furious indictments were announced in 2011 that refer to that matter. These post-indictment references do not include

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<sup>3</sup> The version of this speech as prepared for delivery is available on the Department’s website at <http://www.justice.gov/dag/speeches/2009/dag-speech-090630.html>.

The Honorable Patrick J. Leahy  
Page 5

substantive discussion of the case but simply reflect continued activity by NDIC during the post-indictment phase of the matter.

## **II. The Department Is Working in Good Faith to Respond to the Committee's Subpoenas and Related Requests for Information**

The Department has and will continue to work in good faith to respond to Chairman Issa's subpoenas and cooperate with your requests for information about this matter. Indeed, consistent with our recent practice, we intend to continue making documents available on a rolling basis approximately twice a month until our production is complete.

To date, we have provided over 7,200 pages of documents to the Committee as part of more than 40 separate productions. Since our first production in response to the Committee's March 31, 2011 subpoena to ATF, and continuing with the Department's productions in response to the October 11, 2011 subpoena, we have endeavored to produce and make documents available to the Committee on a regular basis; more recently, we have done so on a rolling basis approximately twice each month. In addition, we have provided information informally to Committee staff and provided briefings as requested by the Committee. We intend to continue our rolling production schedule until we have produced all responsive documents to which the Committee is entitled, consistent with longstanding policies of the Executive Branch across administrations of both parties.

The Department has devoted significant information technology resources and personnel to responding to the Committee's numerous requests. We have collected a large volume of emails, documents and data from approximately 240 custodians in various Department divisions and components. In an effort to ensure that we had access to potentially responsive information, we typically collected electronic records of relevant custodians regardless of the date and subject matter of those materials. In addition, we collected and processed electronically stored information that derived from overlapping universes of data (*e.g.*, from active data systems, archival systems or backup tapes), which resulted in significant duplication in our data set. After de-duplication, broad search terms were then used in an effort to identify information to which the Committee is entitled. Because we collected and processed records so broadly, our data set was comprised of an overwhelming number of non-responsive materials.

As part of our effort to be thorough, we have learned, and want to advise you, that there are some gaps in electronic databases of the Arizona USAO and of ATF that date back to 2006 and may relate to some electronic records covered by your requests. Specifically, we understand that email from the Arizona USAO for the periods February 2006 to August 2006 and May 2007 to October 2008 is generally not available because the backup tapes for these periods were maintained pursuant to the then-applicable records retention policy established by the Executive Office of United States Attorneys (EOUSA), which required the preservation of backup tapes for no more than six months. We understand that, pursuant to litigation hold instructions from EOUSA in an unrelated matter, some backup tapes of the Arizona USAO from the period August 2006 to May 2007 were preserved. After October 2008, the Arizona USAO began using a

The Honorable Patrick J. Leahy  
Page 6

different Department email system, which automatically archived users' email traffic in real-time and preserved those emails for a period of several years.

We also understand that there are gaps in the data available from ATF's email exchange servers prior to September 2008. Certain backup tapes during that time period are unavailable either because of irrevocable damage to the backup tapes, or, during the period between November 2007 and September 2008, due to procedural errors in the preservation of the tapes. We understand that the damage on certain of these tapes is due to repetitive use of these recycled tapes for backup purposes and physical hardware failures.

### **III. Conclusion**

Our efforts to identify documents responsive to Chairman Issa's subpoena are continuing and we will supplement this response when additional documents become available. We will continue to work in good faith to satisfy the Committee's legitimate requests for information. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Charles E. Grassley  
Ranking Minority Member

# Congress of the United States

Washington, DC 20510

March 19, 2012

**VIA ELECTRONIC TRANSMISSION**

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Attorney General Holder:

We have recently obtained the attached document, which indicates that Manuel Fabian Celis-Acosta, the central target of the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Operation Fast and Furious, was stopped in May 2010 attempting to cross the border into Mexico with ammunition and an illegal alien in his car. The Fast and Furious case agent from Phoenix responded to the border and interviewed Celis-Acosta. However, Celis-Acosta was allowed to go free into Mexico and was not arrested until February 2, 2011—eight months later. In the three months following this May 2010 stop, the top five straw purchasers ATF knew to be working with Celis-Acosta illegally acquired more than 284 more weapons.

Please provide the appropriate senior Justice Department officials to brief the Committees no later than March 26, 2012 as to why Celis-Acosta was not arrested at the time of the above-described border crossing. Additionally, please provide a detailed written explanation of why the Department has (1) failed to produce these documents pursuant to category eight of your October 12, 2011 subpoena, and (2) failed to provide notice that the Department is withholding these documents pursuant to a valid legal privilege. To schedule this briefing, please contact Tristan Leavitt of Ranking Member Grassley's staff at (202) 224-5225 and Henry Kerner of Chairman Issa's staff at (202) 225-5074.

Sincerely,



Darrell Issa, Chairman  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives



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

**ATTACHMENT**

cc: The Hon. B. Todd Jones, Acting Director  
Bureau of Alcohol, Tobacco, Firearms and Explosives

The Honorable Eric H. Holder, Jr.  
March 19, 2012  
Page 2 of 2

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

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

# Congress of the United States

Washington, DC 20510

March 22, 2012

## VIA ELECTRONIC TRANSMISSION

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Attorney General Holder:

In our letter to you three days ago, we requested a briefing on why Manuel Celis-Acosta, the central target of the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Operation Fast and Furious, was not arrested after being stopped during a May 29, 2010, border crossing. We have now learned that two months earlier, on April 2, 2010, law enforcement officials recovered a firearm in the possession of Celis-Acosta. ATF documented this firearm recovery in Report of Investigation (ROI) #242.<sup>1</sup> The firearm, a Colt .38 caliber pistol, was one of seven firearms purchased by Uriel Patino on March 26, 2010, and was entered into ATF's Suspect Gun Database on March 30, 2010.<sup>2</sup> By that date, Patino had purchased at least 434 weapons from cooperating gun dealers, many with contemporaneous notice to ATF. He eventually purchased a total of 720 weapons—more than any other straw buyer in Fast and Furious.<sup>3</sup>

Please provide the appropriate senior Justice Department officials to brief the Committees as to the circumstances of the April 2, 2010, firearm recovery and why Celis-Acosta was not arrested on that date. This briefing should be conducted at the same time as the briefing we requested in our March 19, 2012, letter. Additionally, please provide a detailed written explanation of why the Department has (1) failed to produce ROI #242 pursuant to category eight of the October 12, 2011, subpoena issued to you, and (2) failed to provide notice that the Department is withholding this document pursuant to a valid legal privilege. To schedule this briefing, please contact Tristan Leavitt of Ranking Member Grassley's staff at (202) 224-5225 and Henry Kerner of Chairman Issa's staff at (202) 225-5074.

Sincerely,



Darrell Issa, Chairman  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives



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

<sup>1</sup> Overt Acts Document, Operation Fast and Furious (Jun. 8, 2010), at 32 [Attachment 1].

<sup>2</sup> Suspect Gun Summary, Uriel Patino, March 26, 2010 [Attachment 2].

<sup>3</sup> ATF intelligence chart, purchases by indicted targets in Operation Fast and Furious (Jun. 14, 2011) [HOCR ATF 001479] [Attachment 3].

The Honorable Eric H. Holder, Jr.  
March 22, 2012  
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ATTACHMENT

cc: The Hon. B. Todd Jones, Acting Director  
Bureau of Alcohol, Tobacco, Firearms and Explosives

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

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

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

March 23, 2012

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

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman and Senator Grassley:

This responds to your letters dated March 19, 2012 and March 22, 2012, which summarize the contents of sensitive law enforcement documents known as Reports of Investigation (ROIs) that were prepared by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The ROIs summarized in your letters relate to an active criminal investigation of a firearms trafficking ring, as well as to the prosecution of Manuel Celis-Acosta, who is under indictment in federal court in Arizona and awaiting trial on serious felony charges.

We began to receive calls from reporters about your letters soon after we received them from you, and they have since been the subject of public reports. While we do not know who provided these letters to reporters, we are deeply disturbed that the sensitive law enforcement information contained in them has now entered the public realm. This public disclosure is impeding the Department's efforts to hold individuals accountable for their illegal acts, including by discouraging cooperation with our efforts in these very cases. Since we know that you share our desire to bring dangerous arms traffickers to justice, we ask that you preserve the confidentiality of sensitive law enforcement information that may come into your possession.

We consider the airing of this information to have been quite unnecessary because we have already acknowledged on numerous occasions that Operation Fast and Furious and operations conducted during the prior Administration employed inappropriate investigative tactics. Indeed, after learning about the allegations relating to Operation Fast and Furious, the Attorney General referred the matter to the Department's Inspector General for review and instructed the Deputy Attorney General to issue a directive making clear that such tactics must not be used again.

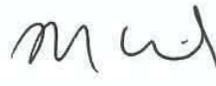
The Honorable Darrell E. Issa  
The Honorable Charles E. Grassley  
Page Two

Your letters seek briefings by the Department relating to the timing of Mr. Celis-Acosta's arrest. Consistent with longstanding Department policy, we have concluded that it would be inappropriate for us to brief Congress about the details of our investigation of this individual while the criminal proceeding against him remains pending. Among other considerations, information from his case may be relevant to other ongoing federal criminal investigations. The Department must avoid disclosures that could compromise pending investigations or prosecutions, and we must also ensure that prosecutorial decisions are free of political influence and the appearance of political influence. That is why, from the beginning of your review, we have provided documents and information about the inappropriate strategy and tactics employed in Operation Fast and Furious while, at the same time, declining to provide details about specific investigative or prosecutorial judgments made with respect to particular individuals.

Finally, your letters ask why the Department has not produced ROIs in response to the Committee's subpoena. ROIs often contain sensitive details about law enforcement matters, especially when they pertain to pending investigations or prosecutions. We have produced and will continue to produce information that relates to the Committee's legitimate oversight interest in the strategies and tactics of these operations, but only consistent with our law enforcement responsibilities. Our efforts to respond to the subpoena are continuing, and we will advise you if we have withheld ROIs and other documents responsive to your subpoena for law enforcement reasons.

We hope that this information is helpful. Please do not hesitate to contact this office if we can provide additional assistance regarding this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

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

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate



## U.S. Department of Justice

Office of the Inspector General

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March 23, 2012

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

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20515

Dear Chairman Issa and Senator Grassley:

This letter responds to your correspondence dated March 15, 2012, regarding whether we have interviewed political appointees at the Department of Justice (DOJ) in our review of Operation Fast & Furious and other investigations with similar objectives, methods, and strategies.

While a review is ongoing, we generally do not disclose the identities of the DOJ officials that we have interviewed or intend to interview. We follow this policy to preserve the integrity of the ongoing review. However, we can assure you that we will follow the facts and evidence wherever they lead us in this review. We have not refrained from and will not refrain from interviewing any DOJ witness with relevant information, regardless of the witness's status as a political or career employee. In several previous reviews, we have interviewed DOJ personnel at the very highest levels of the Department and we will continue to do so as appropriate.

Thank you for your interest in this matter. If you have further questions, please feel free to contact me or Senior Counsel Jay Lerner at (202) 514-3435.

Sincerely,

A handwritten signature in blue ink that reads "Cynthia A. Schnedar".

Cynthia A. Schnedar  
Acting Inspector General

**Congress of the United States**  
**Washington, DC 20515**

March 27, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Mr. Attorney General:

We are writing in response to the Department's March 23, 2012, letter refusing to provide a briefing on documents regarding Manuel Celis-Acosta (Acosta) that were recently disclosed by the private attorney for a Department employee. Acosta was the ring leader of the Fast and Furious gun trafficking network, which amassed approximately 2,000 firearms. The new documents indicate that law enforcement agents stopped Acosta twice – in April and May of 2010. On both occasions, agents let him go. The failure to arrest Acosta and put him out of the business of gun trafficking is highly embarrassing for the Department.

Your letter expressing serious concern about the “airing” of newly disclosed information relating to the prosecution of Acosta failed to note that it was the attorney for a Department employee who made the disclosures. It also failed to note that congressional staff consulted with the Department about its employee's disclosures. Yet, the letter states the Department is “deeply disturbed” that information relating to Acosta has “entered the public realm” without explaining that the source of the disclosures was its own employee's counsel.

As Committee staff communicated to Department representatives the day *before* the Department sent the letter, the information in question became public on March 14, 2012. On that date, Joshua Levy, counsel to David Voth, the ATF Group Supervisor who oversaw Fast and Furious, delivered a 27-page letter to us. We received press inquiries about his letter on that date. It is available in its entirety on the website *Townhall.com*. Levy also provided the Committee with hundreds of pages of documents, most of which were called for by the subpoena served on you on October 12, 2011. The Department still has not produced most of these documents, has provided no notice that it is withholding them, and has cited no valid legal privilege to authorize doing so. Failure to produce documents pursuant to the subpoena merely because they would prove embarrassing for the Department runs contrary to principles of transparency and the Department's obligation to cooperate with the congressional investigation in good faith.

The Department's concern rings particularly hollow in light of its attempts to generate publicity for its March 23, 2012, letter. Just hours after we received the letter, CNN ran a story

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The Honorable Eric H. Holder, Jr.  
 March 27, 2012  
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about it online. Fox News Channel discussed it in a live broadcast shortly thereafter. If the Department were genuinely interested in avoiding attention for its failures to arrest Acosta as documented in ATF Reports of Investigation (ROI), then it would not have sought additional coverage of its letter from national news outlets. Any threat to the ongoing criminal prosecution of Acosta is a direct result of the actions of Department personnel. The suggestion that any actions by Congress are the cause is unfounded.

Congress treats disclosures of information to Congress, such as those provided by Joshua Levy, very seriously. Individuals with information on specific cases often wish to share the information with Congress or news organizations on a confidential basis to sound the alarm about a particular issue. The Department initially ignored the allegations of Fast and Furious whistleblowers, calling their allegations “false.” Not until media outlets such as *CBS News*, *Fox News*, *CNN*, *Los Angeles Times*, *Wall Street Journal*, *Washington Post*, *National Public Radio*, *Daily Beast* and *Daily Caller*, among others, started reporting on these allegations were you forced to retreat from your initial stance. These media outlets have informed the public about the Fast and Furious investigation.

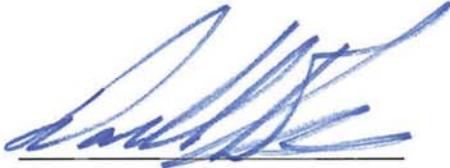
These recent disclosures of information raise serious questions regarding the Department’s mishandling of the Acosta case and the Fast and Furious investigation. Instead of publicly chastising Congress for asking to be briefed on it, you should address these questions directly. We did not write to you until *after* the *Los Angeles Times* published a story on March 19, 2012, referencing a ROI describing law enforcement’s failure to arrest Acosta. This ROI was among the documents disclosed by Voth’s attorney. The Department’s March 23, 2012, complaint about this information reaching the “public realm” is an issue that should be addressed internally.

The Department’s professed outrage at the airing of this information is confusing. The ROIs in question regarding the failure to arrest Acosta were dated April and May 2010 – five months *after* DEA gave ATF enough information on Acosta to provide probable cause to arrest Acosta or at least disrupt his firearms trafficking network. In fact, former ATF Deputy Director Billy Hoover told our staff on October 5, 2011, that ATF had dropped the ball in December 2009 regarding the information DEA provided to ATF about Acosta. Hoover said that David Voth and the ATF Phoenix Field Division failed to use the information about Acosta’s activities, which DEA provided on several occasions. ATF’s failure to arrest or disrupt Acosta in December 2009 and again in April and May 2010 should be of far greater concern to the Department than the public airing of the two embarrassing ROIs.

According to the letter, the Department “ha[s] produced and will continue to produce information that relates to the Committees’ legitimate oversight interest in the strategies and tactics of these operations, but only consistent with our law enforcement responsibilities.” This position hamstring our ability to conduct a proper investigation and is untenable. Since the Teapot Dome scandal in the early 1920s, the Supreme Court has consistently ruled that the Department must cooperate with congressional oversight – irrespective of the Department’s views about its law enforcement responsibilities. It is not for you to determine our oversight

The Honorable Eric H. Holder, Jr.  
March 27, 2012  
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interests – that is for Congress to decide. We are investigating mismanagement and potential wrongdoing at the highest levels of the Department during Fast and Furious, pursuant to our constitutionally mandated duty to do so.



Darrell Issa  
Chairman  
Committee on Oversight and  
Government Reform  
United States House of Representatives

Sincerely,



Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate

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

The Honorable Patrick Leahy, Chairman  
Committee on the Judiciary  
United States Senate

**Congress of the United States**  
**Washington, DC 20515**

March 28, 2012

The Honorable Kathryn Ruemmler  
Counsel to the President  
The White House  
Washington, D.C. 20500

Dear Ms. Ruemmler:

The congressional investigation into Operation Fast and Furious has revealed communications between Kevin O'Reilly, a former member of the National Security Staff, and William Newell, the ATF Special Agent in Charge of the Phoenix Field Division. It is our understanding that it is unusual for an agent in charge of a field division of a subcomponent of the Justice Department to have direct communication with the White House. Newell's communications seem to recognize the unusual nature of the contact. For instance, in a September 3, 2010, e-mail to O'Reilly referring to Fast and Furious, Newell stated, "You didn't get these from me. . ." <sup>1</sup> Another e-mail shows Newell's intent to circumvent his leadership structure in talking with O'Reilly: "Just don't want ATF HQ to find out, especially since this is what they should be doing (briefing you)!" <sup>2</sup> During the Committee's July 26, 2011, hearing on Fast and Furious, Newell was unable to explain why these e-mails were inappropriate, or why he had direct contact with O'Reilly about an ongoing criminal investigation. <sup>3</sup>

To this day, Newell has failed to disown Fast and Furious or admit the flawed nature of the program. This failure has raised new questions. Was Newell looking for authorization outside of his chain-of-command in order to continue this deadly program? What did O'Reilly know about the objectives and tactics used in Fast and Furious and with whom did he share his knowledge? These questions are germane to the Committee's investigation. O'Reilly is the only person capable of supplying accurate answers to them.

To date, the White House has not complied with multiple congressional requests to interview O'Reilly. Our staffs have had extensive discussions with lawyers in your office, who have represented that the White House does not perceive any need for us to interview O'Reilly and consequently will not make arrangements for him to speak to us. Although O'Reilly is currently stationed in Iraq, our staffs have made it clear that a telephonic interview would be acceptable. O'Reilly's personal lawyer has represented to the Committee that he would permit his client to speak with the Committee in the absence of any objections from the White House.

O'Reilly's testimony is necessary to allow us to begin to determine the extent of the involvement – if any – of White House staff in Operation Fast and Furious. As such, we strongly

<sup>1</sup> E-mail from William Newell to Kevin O'Reilly (Sept. 3, 2010) [HOCR DOJ 002559].

<sup>2</sup> E-mail from William Newell to Kevin O'Reilly (July 28, 2010) [HOCR 002664].

<sup>3</sup> *Operation Fast and Furious: The Other Side of the Border: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (July 26, 2011) (Test. of William Newell).

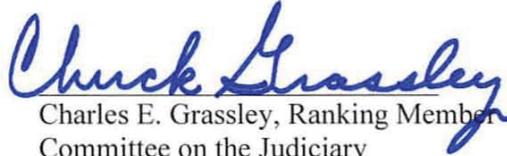
The Honorable Kathryn Ruemmler  
March 28, 2012  
Page 2

urge you to reverse your position and facilitate an interview with O'Reilly without further delay. Please inform us as soon as possible, but by no later than April 4, 2012, of the date on which you plan to make him available for an interview. Should you have any questions, please call Ashok Pinto or Henry Kerner of Chairman Issa's staff at (202) 225-5074 or Tristan Leavitt of Ranking Member Grassley's staff at (202) 224-5225.

Sincerely,



Darrell Issa, Chairman  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives



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

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

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



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF NATIONAL DRUG CONTROL POLICY  
Washington, D.C. 20503

March 28, 2012

The Honorable Charles E. Grassley  
Co-Chairman  
Senate Caucus on International Narcotics Control  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senator Grassley:

Enclosed, please find my responses to your Questions for the Record pertaining to the December 7, 2011 hearing before the Senate Caucus on International Narcotics Control, entitled, "Exploring the Problem of Domestic Marijuana Cultivation." Please note that, while your questions were dated December 14, 2011, our office did not receive the e-mail containing the questions until January 25, 2012.

I appreciated the opportunity to testify before the Caucus. Should you have any further questions, please do not hesitate to contact me directly at (202) 395-6700, or have your staff contact Rob Reed, Director of ONDCP's Office of Legislative Affairs, at (202) 395-6912.

Respectfully,

A handwritten signature in cursive script that reads "R. Gil Kerlikowske".

R. Gil Kerlikowske  
Director

cc: Senator Dianne Feinstein, Chairman, Senate Caucus on International Narcotics Control

April 2012

# April 2012



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

April 3, 2012

The Honorable Patrick J. Leahy  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 Washington, DC 20510

Dear Mr. Chairman:

This responds further to your letter to the Attorney General, dated June 23, 2011, requesting that the Senate Judiciary Committee receive the same access to documents that the Department provides to the House Committee on Oversight and Government Reform related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Project Gunrunner. This letter also describes the Department's response to the Committee's subpoenas and numerous other requests regarding Operation Fast and Furious.

Enclosed are 116 pages of documents responsive to subpoena categories 7, 13, and 14 that we produced to the House Oversight and Government Reform Committee (HOCR) today. We have an additional 46 pages responsive to these same categories available for review by Committee staff at the Department.<sup>1</sup> Some of these pages reflect the completion of our consultations with the Departments of State and Homeland Security that have been described in prior letters.

To assist the Committee in its oversight duties, we appreciate the opportunity to provide relevant and necessary context for one of the documents in today's production. We produce today a memorandum dated August 19, 2009, setting forth recommendations of an interagency firearms trafficking working group that was formed in response to a high-level U.S.-Mexico meeting in Cuernavaca, Mexico, in April 2009. The working group, which put forward joint Department of Justice (DOJ) and Department of Homeland Security (DHS) recommendations, was led by DOJ's Criminal Division and included representatives from DOJ's Bureau of Alcohol, Tobacco, Firearms and Explosives, the Federal Bureau of Investigation, the National Security Division, the Drug Enforcement Administration, the Executive Office of U.S. Attorneys, and the Office of Legal Policy; from DHS, the group included representatives from

<sup>1</sup> These documents bear limited redactions to protect law-enforcement sensitive details, including text that would identify targets and sensitive techniques, plus limited information implicating individual privacy interests. In addition, there are limited redactions resulted from our consultations with the Departments of State and Homeland Security. In response to requests from Chairman Smith, we will deliver to the House Committee on the Judiciary the same documents that we deliver to you.

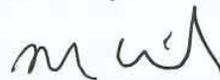
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U.S. Immigration and Customs Enforcement, Customs and Border Protection, and the DHS  
General Counsel. (HOCR DOJ 006706-6717)

In part, the interagency memorandum, which was addressed to the Attorney General through the Deputy Attorney General, recommended the formation of a multi-agency umbrella strategy group to be co-chaired by officials of components of DOJ and DHS. (HOCR DOJ 006708) The memorandum indicates that the purpose of the group would have been to monitor and respond to emerging threats and challenges related to illegal firearms trafficking. (HOCR DOJ 6706) It does not appear that this memorandum was actually forwarded to the Attorney General by the Deputy Attorney General. Rather, the Deputy Attorney General responded to the specific proposals in this memorandum by forming the Southwest Border Strategy Group, which he chaired. We previously have produced documents to the Committee relating to the Southwest Border Strategy Group.

Our efforts to identify documents responsive to Chairman Issa's subpoena are continuing and we will supplement this response when additional documents become available. We will continue to work in good faith to satisfy the Committee's legitimate requests for information. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

cc: The Honorable Charles E. Grassley  
Ranking Minority Member

THE WHITE HOUSE  
WASHINGTON

April 5, 2012

The Honorable Darrell E. Issa  
Chairman  
Committee on Oversight and Government Reform  
United States House of Representatives  
2157 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Chairman Issa and Ranking Member Grassley:

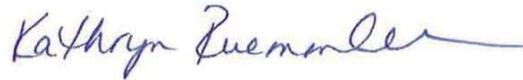
I am writing in response to your letter dated March 28, 2012 seeking further information from a former member of the National Security Staff (NSS), Kevin O'Reilly, as it relates to "Operation Fast and Furious," a criminal investigation led by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

Over six months ago, the White House produced documents responsive to your prior request for communications between Mr. O'Reilly and ATF agent William Newell that relate to "Operation Fast and Furious" or any ATF gun trafficking cases in Phoenix, AZ. At the time we produced these documents, you had already received many of those same documents from the Department of Justice. And what was true then remains true today: none of these limited communications between Mr. O'Reilly and Mr. Newell revealed the existence of any of the inappropriate investigative tactics at issue in your inquiry, let alone any decision to allow guns to "walk."

In light of the important Executive Branch confidentiality interests and institutional prerogatives implicated by your request, including those of NSS, and in the absence of any evidence that suggests that Mr. O'Reilly had any involvement in "Operation Fast

and Furious” or was aware of the existence of any inappropriate investigative tactics, there is an insufficient basis to support the request to interview Mr. O’Reilly.

Sincerely,



Kathryn Ruemmler  
Counsel to the President

Cc: The Honorable Elijah E. Cummings  
Ranking Member  
House Committee on Oversight and Government Reform

The Honorable Patrick Leahy  
Chairman  
Senate Committee on the Judiciary



OFFICE OF THE VICE PRESIDENT  
WASHINGTON

April 6, 2012

The Honorable Darrell E. Issa  
Chairman  
Committee on Oversight and Government Reform  
United States House of Representatives  
2157 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman and Senator Grassley:

I write in response to your letter dated March 16, 2012, regarding the Vice President's interview with Univision's "Al Punto." Specifically, you reference the Vice President's comment during the interview that the tactics underlying Operation Fast and Furious have "ceased to exist" and inquire as to the basis of this statement.

As your Committees are aware and as the Vice President's statement reflects, for over a year the Attorney General has stated clearly and publicly that certain investigative tactics used in Operation Fast and Furious were inconsistent with Department of Justice policy and that he instructed the Deputy Attorney General to issue a directive making clear that such tactics must not be used again. The Attorney General has also made clear in testimony before Congress that he takes the allegations that have been raised about strategies used in Operation Fast and Furious very seriously and that he has referred the matter to the Department's Inspector General for review.

The Attorney General has also indicated that the Department of Justice will continue to investigate any criminal activity by straw purchasers identified during Operation Fast and Furious and will continue to work with Congress to stem the dangerous flow of firearms and violence along the Southwest border.

Sincerely,



Cynthia C. Hogan  
Counsel to the Vice President

cc: The Honorable Elijah E. Cummings  
Ranking Member  
House Committee on Oversight and Government Reform

The Honorable Patrick Leahy  
Chairman  
Senate Committee on the Judiciary

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

April 17, 2012

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

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman and Senator Grassley:

This responds to your letter, dated November 3, 2011, to the Attorney General seeking additional information pertaining to a shared network drive developed to house documents responsive to inquiries being undertaken related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) investigation known as Operation Fast and Furious. The focus of your inquiry pertains to an allegation that a particular document relating to ATF Special Agent John Dodson was provided to news media.

Our letter dated September 19, 2011, provided significant details to the Committee regarding the staffing and operation of the shared network drive. We included substantial descriptive information about the use of the shared network drive to house or produce records made available to the Committee, and the access given to certain Department employees and contractors assigned tasks related to the Committee's March 31, 2011 subpoena and related document requests. The shared network drive continues to be utilized by ATF as a repository of records that may be responsive to pending inquiries. As of April 13, 2012, ten Department employees have access to the contents of the shared network drive. These individuals are professional and information technology systems staff assigned tasks relating to preserving, searching, organizing, and reviewing documents that may be responsive to the Committee's inquiry and other matters, including ongoing investigations by the Department's Office of Inspector General and the Office of Special Counsel, as well as a lawsuit filed by the Judicial Watch organization. Additional individuals employed by ATF contractors who provide systems security and database administrator services also have access to the shared network drive in order to carry out their technical duties.

We are not in a position to provide you with any information about leak investigations that may be ongoing in the Department's Office of Inspector General and Office of Professional Responsibility. We do know that former U.S. Attorney Dennis Burke, in a letter from his

The Honorable Darrell E. Issa  
The Honorable Charles E. Grassley  
Page Two

counsel to the Department's Acting Inspector General that was released publicly on or about November 8, 2011, acknowledged that he disclosed to a reporter "a memorandum written by Agent Dodson." Based on review of the letter from Mr. Burke's counsel, we believe that the "memorandum" may be the same document made available for review by your staff pursuant to our letter dated May 2, 2011, and which Committee staff thereafter reviewed at the Department. The document pertains to ATF strategy and operations that we understand to be central to your inquiry. Accordingly, it was made available for review in redacted form notwithstanding our substantial confidentiality interests in an investigation that did not result in public charges.

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance regarding this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

cc: The Honorable Elijah E. Cummings  
Ranking Member  
Committee on Oversight and Government Reform

The Honorable Patrick Leahy  
Chairman  
Committee on the Judiciary



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

April 19, 2012

The Honorable Patrick J. Leahy  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 Washington, DC 20510

Dear Mr. Chairman:

This responds further to your letter to the Attorney General, dated June 23, 2011, requesting that the Senate Judiciary Committee receive the same access to documents that the Department provides to the House Committee on Oversight and Government Reform related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Project Gunrunner. This letter also describes the Department's response to the Committee's subpoenas and numerous other requests regarding Operation Fast and Furious.

Enclosed are 188 pages of documents responsive to subpoena categories 1, 4, 5, 12, 13, and 14 that we produced to the House Oversight and Government Reform Committee (HOCR) today. We have an additional 2 pages responsive to these same categories available for review by Committee staff at the Department.<sup>1</sup> Some of these pages reflect the completion of our consultations with the Departments of State and Homeland Security that have been described in prior letters. The records we are providing today include some documents with reduced redactions, when compared to the versions that were previously produced to you.

The material we are providing today constitutes another installment in the Justice Department's rolling production of information to the Committee. We have provided documents to the Committee at least twice every month since late last year as part of the Department's ongoing efforts to comply with the Committee's subpoenas and other requests for information. In addition to producing or making available over 7,300 pages of documents to the Committee, we have provided briefings for the Committee staff as requested, and have facilitated staff interviews of numerous Department officials. We intend to continue our rolling production

<sup>1</sup> These documents bear limited redactions to protect law-enforcement sensitive details, including text that would identify targets and sensitive techniques, plus limited information implicating individual privacy interests. In addition, there are limited redactions resulted from our consultations with the Departments of State and Homeland Security. In response to requests from Chairman Smith, we will deliver to the House Committee on the Judiciary the same documents that we deliver to you.

The Honorable Patrick J. Leahy  
Page Two

schedule until we have accommodated the Committee's information needs to the fullest extent possible, consistent with longstanding policies of the Executive Branch.

During the House Oversight Committee's February 2 hearing on this subject, Members asked why the Department has produced more documents to its Inspector General than it has produced to the Committee. This comparison is inapposite. As a component of the Justice Department, the Office of the Inspector General is entitled to review material that is not appropriate for further disclosure, such as transcripts of grand jury proceedings and other law enforcement sensitive materials. In the course of its investigation of Operation Fast and Furious and operations that occurred during the prior Administration, the Office of the Inspector General has reviewed a large volume of such material.

Our efforts to identify documents responsive to Chairman Issa's subpoena are continuing and we will supplement this response when additional documents become available. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'm w', is positioned above the typed name of the signatory.

Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Charles E. Grassley  
Ranking Minority Member

# Congress of the United States

Washington, DC 20510

April 23, 2012

## VIA ELECTRONIC TRANSMISSION

The Honorable Janet Napolitano  
Secretary  
U.S. Department of Homeland Security  
301 7th Street, NW  
Washington, D.C. 20528

Dear Secretary Napolitano:

On December 6, 2011, we wrote to you to request a copy of the U.S. Immigration and Customs Enforcement (ICE) case file on Operation Fast and Furious. In a December 15, 2011, briefing, ICE officials informed our staffs that ICE was in the process of preparing that case file for production, after which the Department of Homeland Security (DHS) and then the Department of Justice (DOJ) would review it for consideration of their respective equities.

It is our understanding that as of today – nearly five months after our initial letter – the case file has yet to go to DHS or DOJ and is still in ICE's possession. We now request you expedite this process and provide this case file to our Committees as soon as possible, but by no later than May 9, 2012. We sincerely hope that further requests for this information will not be necessary.

In addition, we ask that you provide the following documents and information:

1. All e-mails between you and Attorney General Eric Holder regarding the death of Border Patrol Agent Brian Terry.
2. All e-mails between you and any other DOJ employee regarding the death of Agent Terry.
3. All communications and documents relating to the connection of the firearms at the scene of Agent Terry's death to any case or investigation within the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) or any DOJ component.
4. All documents, including e-mails, relating to Operation Fast and Furious.
5. All documents and communications involving the May 29, 2010, encounter between law enforcement agents and Manuel Celis-Acosta.

Please also provide these documents as soon as possible, but by no later than May 9, 2012. Should you have any questions regarding our request, please contact Tristan

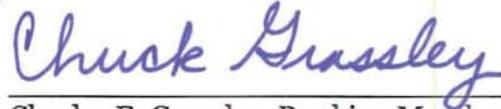
The Honorable Janet Napolitano  
April 23, 2012  
Page 2 of 2

Leavitt of Ranking Member Grassley's staff at (202) 224-5225 or Henry Kerner of  
Chairman Issa's staff at (202) 225-5074.



Darrell Issa, Chairman  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives

Sincerely,



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

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

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

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BLAKE FARENTHOLD, TEXAS  
MIKE KELLY, PENNSYLVANIA

LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074  
FACSIMILE (202) 225-3974  
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<http://oversight.house.gov>

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RANKING MINORITY MEMBER

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JACKIE SPEIER, CALIFORNIA

April 27, 2012

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

Dear Mr. Chairman:

According to a Los Angeles Times story published yesterday, you have drafted a 48-page contempt citation for the Attorney General relating to the Committee's investigation into Operation Fast and Furious, and a copy of this document has already been provided to the press and to House Speaker John Boehner's office even before being distributed to Members of our own Committee.<sup>1</sup>

Holding someone in contempt of Congress is one of the most serious and formal actions our Committee can take, and it should not be used as a political tool to generate press as part of an election-year witch hunt against the Obama Administration. Leaking a draft contempt citation that Members of our Committee have never seen suggests that you are more interested in perpetuating your partisan political feud in the press than in obtaining any specific substantive information relating to the Committee's investigation. These actions undermine the credibility of the Committee, as well as the integrity and validity of any contempt actions the Committee ultimately may choose to adopt in the future.

Unfortunately, your latest actions appear to be part of a larger and more troubling pattern. Last July, you boasted with respect to a different investigation that your aggressive actions against the President and the White House would be "good theater."<sup>2</sup> Similarly, one of your

<sup>1</sup> *Republicans Seek to Hold Attorney General in Contempt Over Fast and Furious*, Los Angeles Times (Apr. 26, 2012) (online at [www.latimes.com/news/nationworld/nation/la-na-holder-contempt-20120427,0,3641424.story](http://www.latimes.com/news/nationworld/nation/la-na-holder-contempt-20120427,0,3641424.story)).

<sup>2</sup> *House Panel to Probe DNC's Obama Ad*, Washington Times (July 25, 2011) (online at [www.washingtontimes.com/news/2011/jul/25/issa-panel-will-probe-dnc-obama-campaign-video/](http://www.washingtontimes.com/news/2011/jul/25/issa-panel-will-probe-dnc-obama-campaign-video/)).

The Honorable Darrell E. Issa  
Page 2

subcommittee chairmen asserted that investigating Solyndra was designed to influence the upcoming Presidential election, stating, “Ultimately, we’ll stop it on Election Day.”<sup>3</sup>

I strongly believe in fair and even-handed oversight if there are credible allegations of wrongdoing—regardless of whether those implicated are Democrats or Republicans—but the official resources provided to this Committee by U.S. taxpayers must not be used for partisan political purposes.

As you know, in January, I issued a 90-page staff report documenting in detail how Operation Fast and Furious was the latest in a series of misguided gunwalking operations that originated in 2006 in the Phoenix Field Division of the Bureau of Alcohol, Tobacco, Firearms, and Explosives. As the report explained, these operations continued for five years until our Committee exposed and ended them, an accomplishment for which I have commended you.<sup>4</sup>

Contrary to your repeated claims, the report explained that the Committee has obtained no evidence that the Attorney General authorized, approved of, or was aware of gunwalking. None of the two dozen witnesses interviewed by the Committee contradict that finding.

For all of these reasons, I request that you immediately provide to me and all other Members of the Committee a copy of the same draft contempt citation that was provided to Speaker Boehner’s office and the Los Angeles Times, and that you strive to ensure the fairness and legitimacy of our proceedings and actions.

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

Sincerely,



Elijah E. Cummings  
Ranking Member

---

<sup>3</sup> *Jim Jordan Suggests Elections Drive Solyndra Investigation*, Huffington Post (Apr. 27, 2012) (online at [www.huffingtonpost.com/2012/03/22/jim-jordan-solyndra-investigation-elections\\_n\\_1372205.html](http://www.huffingtonpost.com/2012/03/22/jim-jordan-solyndra-investigation-elections_n_1372205.html)).

<sup>4</sup> Report of the Minority Staff, House Committee on Oversight and Government Reform, *Fatally Flawed: Five Years of Gunwalking in Arizona* (January 2012) (online at [http://democrats.oversight.house.gov/index.php?option=com\\_content&task=view&id=5575&Itemid=104](http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5575&Itemid=104)).



Office of the Deputy Attorney General  
Washington, D.C. 20530

May 3, 2012

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

Dear Mr. Chairman:

The Department strongly disputes the contention that we have failed to cooperate with the Committee's review of Operation Fast and Furious as asserted in the staff briefing paper and draft contempt of Congress resolution that the Committee released today.

We have provided or made available to the Committee more than 7,600 pages of material as part of 46 separate productions of documents and we have continued to produce materials twice a month since last year. We have made available numerous officials for testimony, interviews and briefings, including testimony by senior Department officials such as the Attorney General, the Assistant Attorney General for the Criminal Division and the Assistant Attorney General for Legislative Affairs. Indeed, the Attorney General has testified no fewer than seven times in the last year and a half on the subject of Fast and Furious. We have also responded to dozens of letters from members of Congress seeking information on a wide range of issues relating to the Committee's review and we remain committed to cooperating with the Committee's legitimate oversight interests. This record reflects the Department's consistent efforts to cooperate with the Committee's investigation.

Viewed fairly, the disagreements between the Committee and the Department over the scope of the documents to be produced stem not from a lack of cooperation, but from our sincere and unwavering belief that disclosure of materials related to ongoing criminal investigations and prosecutions could well jeopardize our core law enforcement mission, which must remain free from political pressure or even the appearance of political pressure. This is not a novel concept. As Attorneys General and heads of the Office of Legal Counsel during Administrations of both political parties have articulated, "the policy of the Executive Branch throughout our Nation's history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances." Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, Charles J. Cooper, Assistant Attorney General, 10 Op. O.L.C. 68, 76 (1986). Thus, "[s]ince the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature." Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, Theodore B. Olson, 8 Op. O.L.C. 101 (May 30, 1984).

The Honorable Darrell E. Issa  
May 3, 2012  
Page 2

Some have questioned why the Department's Inspector General has received a greater number of documents than have been provided to the Committee. The answer lies in the fact that the Office of the Inspector General, as a component of the Department, is entitled in these circumstances to review material that is not appropriate for disclosure outside the Department – materials such as transcripts of grand jury proceedings, reports of investigations and prosecutions, wiretap materials and FBI interview transcripts. As noted above, these are precisely the kinds of materials that the Department, across Administrations, has not provided to Congress.

The Committee's request for documents created after the inappropriate tactics in Operation Fast and Furious became public likewise is inconsistent with precedent across Administrations. During the prior Administration, the Acting Assistant Attorney General for the Office of Legislative Affairs explained to Congress that "[t]he appropriate functioning of the separation of powers requires that Executive Branch officials preserve the ability to communicate confidentially as they discuss how to respond to inquiries from a coordinate branch of government. Such robust internal communications would be effectively chilled, if not halted, if they were disclosed, which could substantially impede any agency's ability to respond to congressional oversight requests." Letter to the Honorable John Conyers and the Honorable Linda T. Sanchez, from Richard A. Hertling, Acting Assistant Attorney General, Office of Legislative Affairs, at 3 (Mar. 19, 2007). Indeed, the prior Administration advised Congress that the production of such materials "would introduce a significantly unfair imbalance to the oversight process if committees were able to obtain internal Executive Branch documents that are generated in order to assist Executive Branch officials in determining how to respond to an inquiry by the very committee seeking the documents or other information." *Id.*

The suggestion in your draft resolution of contempt that the Department has failed to accommodate the Committee's interests in this matter is contradicted by the fact that the Department accommodated the Committee's interest in understanding how inaccurate information came to be transmitted to Congress as part of our now-withdrawn February 4, 2011 letter. Late last year, the Department provided the Committee with over 1,300 pages of documents and other information relating to the preparation of that letter. This extraordinary accommodation was based solely on our acknowledgement that the letter contained inaccurate information and on our acknowledgement that Congress had a legitimate interest in understanding the source of that inaccurate information.

Despite the differing views currently held by the Committee and the Department, we continue to believe that efforts to arrive at a mutually acceptable resolution have not been fully exhausted. The Committee, in our view, has not taken sufficient steps to define the categories of documents it deems essential to its review of Fast and Furious and its decision to issue a draft contempt citation appears to express a preference for confrontation over resolution. The Constitution establishes co-equal branches of government with interlocking responsibilities and imposes on the officials of those branches the obligation to resolve conflicts in good faith. We remain willing to work with the Committee in good faith in an effort to avoid this impasse.

The Honorable Darrell E. Issa  
May 3, 2012  
Page 3

We look forward to hearing from you.

Sincerely,



James M. Cole  
Deputy Attorney General

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

May 2012

May 2012

Assistant Secretary of Legislative Affairs  
 U.S. Department of Homeland Security  
 Washington, DC 20528



**Homeland  
 Security**

May 4, 2012

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

The Honorable Charles E. Grassley  
 Ranking Member  
 Committee on the Judiciary  
 United States Senate  
 Washington, DC 20510

Dear Chairman Issa and Senator Grassley:

I am writing in response to your April 23, 2012 letter to Secretary Napolitano regarding the Operation Fast and Furious investigation.

Since your first inquiry into this matter, the U.S. Department of Homeland Security (DHS) has endeavored to respond expeditiously to your requests. On seven different occasions, U.S. Immigration and Customs Enforcement (ICE) employees have briefed Congressional offices and, on three separate occasions, have briefed members of your staff about the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)-led investigation. ICE has also responded to written questions posed by your staff. DHS has been gathering the information you requested and will continue to keep your staff apprised of our progress.

With regard to the case file you reference, ICE and your staff continue to be in regular contact. As you know, producing a law enforcement case file of this type can be particularly challenging for the following reasons:

- The investigation was run by an interagency task force, rather than by one agency;
- The task force was led by an agency other than ICE;
- As this investigation is currently under an ongoing prosecution in Federal Court, divulging any information prior to a thorough and substantive vetting could jeopardize the success of the prosecution;
- The file contains a substantial amount of law enforcement and investigation sensitive information that must be protected; and
- The file contains information received from confidential sources whose security would be compromised if their involvement is revealed.

ICE is working expeditiously to make the case file available for review, and ICE and U.S. Customs and Border Protection (CBP) are gathering the other information requested in your letter. While they gather this information, ICE and CBP employees remain prepared to brief your staff on the contents of the documents, where possible, to assist you in your investigation. As to requests 3-5 in your letter, we will continue to work diligently and expeditiously to get this material to you.

With regard to your requests for emails between the Secretary and the Attorney General or other DOJ employees about the death of Border Patrol Agent Brian Terry, we have determined that no such emails exist. In the meantime, if I can be of assistance in any other way, please do not hesitate to contact me at 202-447-5890.

Respectfully,

A handwritten signature in black ink, appearing to read "Nelson Peacock". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Nelson Peacock  
Assistant Secretary for Legislative Affairs

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

The Honorable Patrick Leahy, Chairman  
Committee on the Judiciary  
United States Senate



**U.S. Department of Justice**  
**Federal Bureau of Investigation**

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*Washington, D.C. 20535*

May 4, 2012

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

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman and Senator Grassley:

Thank you for your letter to Director Mueller dated October 20, 2011 concerning the FBI's investigation of the murder of Border Patrol Agent Brian Terry and allegations that a third weapon was recovered from perpetrators at the crime scene. We apologize for the delay in providing you a written response to your letter. As you know, there are criminal charges pending in connection with Agent Terry's murder and the trafficking of weapons, which limit our ability to respond specifically to many of your questions.

In September 2011, the FBI issued a public statement making it clear that allegations concerning a third weapon were "inaccurate." Senior FBI officials met personally with your staff in early October to clarify and reinforce these facts. While we appreciate the Committee's interests, we are not in the position to disclose the detailed information you seek about crime scene evidence or the government's view of what happened at the crime scene. Disclosure of these types of investigative details at this time would pose unacceptable risk to our law enforcement efforts.

Similarly, consistent with our need to protect the integrity of the prosecution of this matter, we cannot comment on the forensic examinations of the ballistic evidence from the crime scene. A number of the questions that you pose would require forensic examiners to offer new opinions or prematurely disclose the results of their forensic tests. Although we are not in the position to provide this information, the FBI has posted general information about firearms and toolmark testing at FBI Laboratory, which may answer a number of your questions. See <http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/april2000/schehl1.htm>

The Honorable Darrell Issa and Honorable Charles E. Grassley

Your letter further asks how many suspects were encountered at the crime scene and how many of the suspects were carrying weapons. As you know, the public court documents indicate that there were five suspected illegal aliens encountered by the U.S. Border Patrol agents on December 14, 2010 at approximately 11:15 p.m. According to the court records, at least two of the suspected aliens were observed carrying weapons by one of the U.S. Border Patrol agents using thermal binoculars. One of the suspected illegal aliens was later detained at the scene and he provided a statement after waiving his Miranda warnings indicating that he was traveling with four individuals, and he stated that all of five of them were armed. However, as noted previously, only two weapons were recovered from the perpetrators at the crime scene and only one of the individuals was detained at the scene.

Your letter also asks a number of additional, detailed questions about how the investigation is being conducted and about the progress of the investigation to date. As set forth above, there are criminal charges pending related to this matter and the investigation is continuing. As a result, the FBI cannot provide the detailed information about the evidence in the case requested in your letter. Once the case is concluded it may be possible for the FBI to provide you with additional information.

Thank you for your interest in this important matter.

Sincerely,



Stephen D. Kelly  
Assistant Director  
Office of Congressional Affairs

Larry A. Dever  
Sheriff

# Office of the Sheriff Cochise County



Rodney W. Rothrock  
Chief Deputy

May 10, 2012

Charles E. Grassley, Ranking Member  
Committee on the Judiciary  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Attn: Investigator Brian M. Downey  
Fax: 202-224-3799

Dear Mr. Grassley/Investigator Downey,

Pursuant to your public records request dated June 2, 2011, the following information is being provided to your office for review. Please note that although the original request was reportedly dated in June of 2011, the actual request was not received into this office until May 2, 2012 hence the delay.

In response to specific records information outlined in item number 1 of your request, the Cochise County Sheriff's Office does not have any reports in which we have reason to believe may be connected to Operation Fast and Furious.

In response to specific records information outlined in item number 2 of your request, the Cochise County Sheriff's Office does not have any reports that list Assistant U.S. Attorney Emory Hurley as a point of contact.

In response to specific records information outlined in item number 3 of your request, the Cochise County Sheriff's Office has several reports from September 2009 to present where firearms were recovered attendant to investigations into homicide, aggravated assault, kidnapping, or home invasions. These reports have been included in this correspondence for your review.

If you have any questions regarding this information please contact me at 520-432-9504.

Sincerely,

Carol A. Capas  
Communications Program Coordinator  
Cochise County Sheriff's Office

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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

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May 10, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, D.C. 20530

Dear Mr. Attorney General:

I am in receipt of the Department's letter dated May 3, 2012. It was disappointing. The letter regurgitated misleading numbers and irrelevant internal memoranda disguised as legal opinions to make the case that the Department has cooperated with the Committee's investigation. The Department should have instead pledged to work with the Committee to provide documents shedding light on the most significant outstanding issues – including retaliation against whistleblowers and how the Department officials learned the true nature of a reckless operation that contributed to the death of a Border Patrol Agent.

The Committee has been able to advance the Fast and Furious investigation even this far despite the Department dragging its feet every step of the way. To make the case that the Department has been cooperative, the May 3, 2012 letter bragged that it provided or made available “more than 7,600 pages of material as part of 46 separate productions of documents.”<sup>1</sup> In fact, the best metric for measuring the Department's commitment to cooperating is not how many documents have been made available to the Committee. Rather, it is how many have been withheld. The 7,600 pages shared with the Committee are a small fraction of the documents related to Fast and Furious made available to the Office of the Inspector General and a fraction of those brought to the Committee's attention by other sources.

Beyond this, the Justice Department should expect its compliance to be measured by not merely the quantity of documents, but their quality. The documents you shared with the Committee were heavily redacted, to the point that the redactions were laughable. Literally. On *The Daily Show*, comedian Jon Stewart described a stack of pages that consisted almost entirely of large black boxes as “prized Mondrians from his famed black period.”<sup>2</sup>

<sup>1</sup> Letter from Deputy Att'y Gen. James M. Cole to Chairman Darrell Issa, May 3, 2012, at 1 [hereinafter May 3, 2012 letter].

<sup>2</sup> Jon Stewart, *The Daily Show*, Comedy Central, June 21, 2011.

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 May 10, 2012  
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## WAITING FOR GODOT

In the May 3, 2012, letter, the Department noted that the Executive Branch provides committees of Congress with access to open law enforcement files “in extraordinary circumstances.”<sup>3</sup> This is in fact an extraordinary circumstance. Congress is investigating the Justice Department for helping arm the Sinaloa Cartel – the most powerful and dangerous drug cartel in the world. The full extent of the casualties of Fast and Furious may never be known.

Had Department leadership not authorized the sale of arms to people working for the Sinaloa Cartel, then Congress would not need the documents specified in the subpoena to understand what went wrong. Had the Department not lied to gun store owners about the scope of the firearms trafficking investigation, then Congress would not need the documents specified in the subpoena to understand what went wrong. The documents we seek correlate precisely with the enormity of the Department’s failure with respect to all aspects of Fast and Furious.

For those of us on the Committee, waiting for the Department to move off its misguided position and produce the documents we seek has been like waiting for Godot. Like Vladimir and Estragon, we held out hope despite mounting evidence that nothing is going to show up. We cannot wait any longer.

Fortunately for us, the Department of Justice is not the arbiter of what the Committee’s legitimate oversight interests are. There is a mechanism for resolving cases that challenge the limits of the congressional prerogative. The contempt process is part of that mechanism. The Department’s unwillingness to recognize that an investigation into Fast and Furious is in fact a legitimate oversight interest signals we have reached an impasse and that contempt proceedings are necessary.

***“The Committee . . . has not taken sufficient steps to define the categories of documents it deems essential to its review of Fast and Furious”***

The Department’s assertion that “[t]he Committee . . . has not taken sufficient steps to define the categories of documents it deems essential to its review of Fast and Furious” has no basis in reality.

For over a year, Committee staff have identified for the Department specifically what documents the Committee is seeking. The draft contempt report released last week delineates the Department’s understanding of exactly what the Committee is seeking for each of the 22 categories in the subpoena. The draft report also describes three specific categories of documents covered by the subpoena for which no documents have been produced. The Committee has repeated this information to senior Department lawyers on numerous occasions.

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<sup>3</sup> *Id.*, citing 10 Op. O.L.C. 68, 76, “Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,” Ass’t Att’y Gen. Charles J. Cooper (1986).

The Honorable Eric H. Holder, Jr.  
 May 10, 2012  
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The Department has failed to produce any documents related to these three categories. The documents produced by the Department to date do not address the substance of the Committee's major concerns. Only full compliance with the Committee's subpoena will restore the faith of the American public that you intend to cooperate fully with Congress. Considering you are the Nation's highest ranking law enforcement official, it is important that such faith exists.

*"The Committee's request . . . is inconsistent with precedent across Administrations"*

For over a year, the Department has failed to cite a single piece of legal authority or case law that supports its refusal to produce documents to Congress. Instead, the Department has the audacity to cite internal memoranda – drafted by the Department's own lawyers – to support the position that DOJ does not have to produce documents to a co-equal branch of government when they are related to ongoing criminal investigations. Most recently, in the May 3, 2012, letter, the Department cited a letter from a former Assistant Attorney General for Legislative Affairs to justify withholding documents.<sup>4</sup>

The May 3, 2012, letter apparently signaled for the first time that the President may assert the Executive Privilege to withhold agency documents from Congress. In the letter, the Department cited an internal opinion from 1984 that said "Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature."<sup>5</sup> That opinion referred to an Executive Branch official who asserted a claim of executive privilege. Is the President in fact asserting executive privilege over these documents?

The Department's position that ongoing criminal investigations preclude the production of documents appears at this point to be a red herring meant to stall the Committee's investigation. The Department has not sought to find alternative means to provide the Committee with the information necessary to complete its investigation.

**GOING FORWARD**

Recently, in the earliest stages of a highly public scandal, the leadership of the U.S. Secret Service took immediate action. The Secret Service readily acknowledged a problem, began a thorough and extensive internal investigation, and immediately placed a dozen employees on administrative leave. All this occurred within four days, and with Congress being briefed constantly.

In contrast, when faced with the Fast and Furious scandal, the Department of Justice batted down the hatches and began developing a public relations strategy. The Fast and Furious scandal will be your legacy as Attorney General. If the Justice Department, however, decides to change course and make a serious effort to cooperate in order to halt contempt

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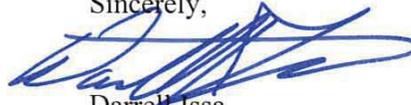
<sup>4</sup> May 3, 2012 letter at 2.

<sup>5</sup> *Id.* at 1.

The Honorable Eric H. Holder, Jr.  
May 10, 2012  
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proceedings, the Committee stands ready to work with you to ensure that the congressional investigation does not harm legitimate Department interests.

Sincerely,



Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

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

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

Dear Mr. Chairman:

This responds to your letter to the Attorney General dated May 10, 2012. We believe that a contempt proceeding would be unwarranted given the information the Department has disclosed to the Committee to date; unprecedented given the law enforcement sensitivities at issue; and ill-advised given the damage it would cause to relations between the Executive and Legislative Branches. The Committee's concerns about the Department's response to the October 11 subpoena appear predicated on a misunderstanding both of the extraordinary lengths to which the Department has gone to respond to the Committee's requests, and of the threat that disclosures of sensitive law enforcement information would pose to open criminal investigations and prosecutions. Furthermore, we believe that the core questions posed by the Committee about Operation Fast and Furious have been answered.

The Department continues to believe, however, that efforts to arrive at a mutually acceptable resolution of this matter have not been fully exhausted and that both the Committee and the Department must continue to work constructively to avoid conflict. We note that the Committee does not appear to have completed other aspects of its investigation and that the results of the Department's Inspector General review have not yet been reported. Such alternative means for obtaining information would provide the Committee with clearer insight into the need for additional documents and whether harmful conflict between co-equal Branches of government is avoidable. In any event, we remain willing to work with the Committee in good faith to avoid this impasse.

At the outset, I want to reiterate what we have said previously: Operation Fast and Furious was a fundamentally flawed response to the problem of gun trafficking on the Southwest Border. While the goal of stopping gun trafficking is important, the tactics employed in Fast and Furious, as well as in investigations in the prior Administration, like Wide Receiver and Hernandez, were inappropriate and should not have been used. Shortly after the Attorney General learned of the inappropriate tactics used in Operation Fast and Furious, he asked that the Department's Acting Inspector General conduct a review. Moreover, the Attorney General instructed me to issue a directive to the field making clear that those tactics should not be used again. In addition, the Department has implemented a number of reforms in the wake of Fast and Furious, and the investigations conducted in the prior Administration, including the

requirement of closer supervision by ATF management of significant gun trafficking cases. There have also been broad changes in leadership and staffing at ATF and the Arizona U.S. Attorney's Office.

Because the Committee's review of this matter is focused on open criminal investigations and prosecutions, the Department is required to balance the Committee's oversight interests against the Department's need to maintain the absolute independence and integrity of its ongoing and sensitive law enforcement activities. Accordingly, the Department has provided the Committee with documents and information showing how the inappropriate tactics in Fast and Furious, Wide Receiver and the other operations under review came to be employed while, at the same time, preserving the confidentiality of core law enforcement documents relating to ongoing matters. Although the Committee has expressed concern about the length of time it has taken the Department to respond to the Committee's October 11, 2011 subpoena, its oversight of open criminal investigations and prosecutions has required the Department to undertake painstaking reviews of documents so we could be confident that we were addressing the Committee's legitimate concerns while, at the same time, not compromising our ability to hold accountable those who violate our laws.

The Committee has also raised questions about the lack of documents produced by the Department reflecting the participation of senior Department officials in devising the inappropriate tactics used in Fast and Furious. Far from reflecting a "cover-up," as some have claimed, the lack of documents makes clear that these tactics had their origin in the field in Arizona and not among Department leaders in Washington. This reality was expressly recognized in the Memorandum ("Memorandum") recently issued by the Committee as a companion to the Committee's Draft Resolution of Contempt ("Draft Resolution"). *Memorandum at 4*. It therefore is not surprising that the documents sought by the Committee do not exist.

We continue to be concerned about statements that conflate knowledge by Department officials that there was a regional investigation in Arizona called Fast and Furious with knowledge of the inappropriate tactics used in the matter. In this regard, the Draft Resolution for the first time expresses a Committee view that a Washington-based stamp of approval exists in this matter because the Operation was OCDETF-funded. *Memorandum at 8*. However, as the Committee knows, the OCDETF approval process is regional and not centralized in Washington. Moreover, none of the documents submitted in support of the request for OCDETF funding of Fast and Furious described the inappropriate tactics used. Indeed, the OCDETF Investigation Initiation Form submitted in connection with the Operation – which the Department allowed the Committee to review – makes repeated references to *seizures of weapons* that law enforcement made in connection with the investigation. *OCDETF Investigation Initiation Form at 3-4*. Thus, to the extent Department personnel in Washington may have reviewed the forms, they would have been left with the clear understanding that law enforcement was actively *seizing* weapons in this matter.

Below, we explain the extraordinary efforts we have undertaken in this matter; the critical confidentiality interests implicated by the Committee's requests; the information that has come to light as a result of the ongoing inquiry into inappropriate tactics used in several law enforcement operations; and the steps the Department has taken to eliminate the unnecessary risk to public safety by prohibiting such tactics.

**I. The Department Has Made Extraordinary Efforts to Respond to the Committee's Requests**

The Department has undertaken extraordinary efforts over the last year to cooperate in this matter. To respond to the Committee's March 31, 2011, subpoena, a team of attorneys from ATF and other Department components was deployed to search for and review potentially responsive records. We searched the records of 20 separate custodians and reviewed over 140,000 documents to find responsive materials. After receiving the Committee's October 11, 2011, subpoena, a separate team of attorneys was specially assigned from various Department divisions to review potentially responsive documents and to perform tasks necessary to respond to the Committee's oversight requests.

In all, the Department has collected data from approximately 240 custodians in relevant divisions and components. To ensure the completeness of the data, multiple files for each custodian were collected and processed. In total, the Department has processed millions of electronic records, including a substantial volume of duplicate records that derived from processing overlapping universes of data (*e.g.*, from active data systems, archival systems or backup tapes), even though only a small fraction of these documents has proven to be responsive. The Department has made significant investments in information technology and staffing resources in order to meet the Committee's requests, and the experienced information technology personnel assisting us in this project, and the subcontractors hired by them, have indicated that the volume of data processed during this review has been extraordinary.

Even beyond our document production efforts, the Department has made available numerous senior officials and employees for testimony, interviews, and briefings. The Attorney General, the Assistant Attorney General for the Criminal Division, and the Assistant Attorney General for Legislative Affairs have all testified before Congress on this matter. In fact, the Attorney General has answered questions about Operation Fast and Furious at seven congressional hearings, including for four hours before this Committee on February 2, 2012. In addition, a former Acting Deputy Attorney General and the Attorney General's current Chief of Staff, the Attorney General's former Deputy Chief of Staff, a Deputy Assistant Attorney General for the Criminal Division, and other officials, have been made available for transcribed interviews by Committee investigators.

In addition, the former United States Attorney for the District of Arizona was interviewed twice in order to accommodate the Committee's information needs. The Department also made available six ATF employees, including the Special Agent in Charge of the Phoenix Field

Division, to answer the Committee's questions, in addition to ATF Agents who have been interviewed independently by the Committee. Furthermore, the Department has provided eight briefings on matters of interest to the Committee, including virtually unprecedented briefings by the FBI, ATF, and DEA, on highly sensitive topics. These comprehensive efforts were undertaken to respond to your questions and concerns.

**II. The Department Has Provided the Committee with a Large Volume of Documents, Including Materials That the Department Does Not Normally Disclose To Congress**

Your May 10, 2012, letter acknowledges that the Department has produced a large volume of documents relating to open investigations and prosecutions, but takes issue with the "quality" of the documents on grounds that some were redacted. We do not believe this to be a fair criticism because both the documents and witness testimony provided to the Committee have gone to the central issue in this matter – how inappropriate tactics came to be used in Operation Fast and Furious and other investigations in the prior Administration. To the extent the Department has redacted documents provided to the Committee, it has done so to preserve Department interests that do not go to what we understand to be the core of the Committee's review.

The Department has received 58 letters from you and Senator Grassley regarding this matter, 35 of which requested documents or other information, in addition to the Committee's two subpoenas. To date, we have provided the Committee over 7,600 pages of documents from both ATF and the Department as part of 47 separate productions. We have provided documents to the Committee at least twice every month since late last year as part of the Department's ongoing efforts to comply with the Committee's subpoenas and other requests for information.

The assertion in the Draft Resolution (p. 14) that the Department has provided documents only for 10 of the 22 subpoena items is incorrect. In fact, the Department has produced or made available for review documents responsive to 16 of the 22 subpoena items. As to 13 of these items, we delivered the documents to the Committee or made them available for staff review (subpoena items 1, 2, 4, 5, 6, 7, 10, 11, 12, 13, 14, 20, and 21). We provided access to documents responsive to three additional items (subpoena items 15, 17, and 18) in the course of briefings on sensitive law enforcement matters on October 5, 2011, and on subsequent occasions, as referenced in Section IV(C) below. We have not located any documents responsive to a 17th item (subpoena item 3). The documents responsive to the five remaining items (subpoena items 8, 9, 16, 19, and 22), as well as additional documents responsive to the other 16 items of the October 11 subpoena, pertain to sensitive law enforcement activities, including ongoing criminal investigations and prosecutions that raise significant concerns for the Department, as discussed in Section III(A) below, or are materials generated by Department officials in the course of responding to congressional investigations or media inquiries about this matter that are generally not appropriate for disclosure, as discussed in Section III(B) below.

Members of the Committee continue to express concern that the Department's Office of the Inspector General (OIG) has received more documents in connection with its review of this matter than the Committee has received. But, as I explained in my May 3, 2012, letter to you, that comparison is inapposite. First, the OIG, while independent, is a component of the Department and, in pursuit of its mission, is authorized: (a) to review transcripts of grand jury proceedings and wiretap applications whose disclosure to third parties is prohibited by law; and (b) to review Reports of Investigation and other sensitive law enforcement information relating to ongoing investigations and prosecutions that generally are not appropriate for disclosure outside the Department. Second, in responding to your requests, the Department took steps to manually de-duplicate documents, including lengthy email chains, as a courtesy and in order to facilitate the Committee's efforts to review information efficiently. We did not take those same time-consuming steps in processing documents for the OIG. While we could have increased the number of pages provided to the Committee and increased our speed by eliminating this step, we thought this manual de-duplication effort would be more helpful to the Committee. Finally, we understand that the OIG has obtained documents from sources other than the Department. Thus, it is not accurate to suggest that the Department has not complied with Committee requests for information because the OIG reportedly has obtained a larger number of documents as part of its investigation.

Indeed, as evidence of our good faith in this process, the Department on December 2, 2011, took the highly unusual step of delivering to the Committee 1364 pages of material that were generated in the course of preparing our now-withdrawn February 4, 2011, letter to Senator Grassley. While Executive Branch agencies have not historically provided such deliberative material to Congress (*see* Section III(B) below), we determined in this instance that it was important for the Department to respond to the Committee's requests for these documents in order to demonstrate that the February 4 letter was developed in good faith, based on information provided by those believed to know the true facts. The production of these materials was a significant effort by the Department to work cooperatively with the Committee and was directed by the Attorney General himself.

### **III. The Department's Concerns About Highly Sensitive Documents That Go To The Core Of the Department's Mission and Independence**

#### **A. Documents That Implicate Ongoing Law Enforcement Matters**

Multiple items in the Committee's October 11 subpoena seek core investigative materials from significant ongoing criminal investigations and prosecutions. They include the murder of Customs and Border Protection Agent Brian Terry, the murder of Immigration and Customs Enforcement Special Agent Jaime Zapata, the ongoing Fast and Furious investigations and prosecutions, as well as other investigative matters that the Department has not publicly disclosed. Our disclosure to this oversight Committee of some material sought by the October 11 subpoena, such as records covered by grand jury secrecy rules and federal wiretap applications and related information, is prohibited by law or court orders. Moreover, disclosure outside the judicial process

of other non-public information, such as core investigative material, poses significant risks to those efforts and to the individuals involved in them. For these reasons, the Department's long-standing policy across Administrations is to decline congressional requests for non-public information relating to pending law enforcement matters in order to protect the independence and integrity of those efforts.

The Department's non-partisan commitment to protecting ongoing criminal investigations and prosecutions runs deep. As Attorneys General and heads of the Office of Legal Counsel during Administrations of both political parties have articulated, "the policy of the Executive Branch throughout our Nation's history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances." *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, Charles J. Cooper, Assistant Attorney General, 10 Op. O.L.C. 68, 76 (1986) ("*Cooper Opinion*"). This policy is grounded in the constitutional separation of powers and the Department's need to protect the independence, effectiveness, and integrity of our law enforcement actions. Thus, "[s]ince the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, Theodore B. Olson, Assistant Attorney General, 8 Op. O.L.C. 101 (May 30, 1984).

There are two fundamental bases for this longstanding policy. First, disclosure to Congress of information from open criminal files creates the "danger that congressional pressure will influence, or will be perceived to influence, the course of the investigation." *Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations*, Douglas W. Kmiec, Assistant Attorney General, 13 Op. O.L.C. 93 (Mar. 24, 1989). Second, such disclosure could also "seriously prejudice law enforcement." *Position of the Executive Department Regarding Investigative Reports*, Robert Jackson, Attorney General, 40 Op. Att'y Gen. 45, 46 (1941). Specifically, it could reveal "sensitive techniques, methods, or strategy," providing a road map of our efforts to current and future targets of criminal investigations and prosecutions; it could raise "concern over the safety of confidential informants and [thus have a] chilling effect on other sources of information"; and it could impinge "the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law." *Cooper Opinion*, 10 Op. O.L.C. at 23-25.

In your letter to the Attorney General dated May 10, 2012, you discount the significance of the authorities discussed above. As you know, however, these opinions set forth the official legal positions of Administrations that span both political parties in their dealings with Congress. It is very significant, in our view, that there is no instance in which Congress has held an Attorney General in contempt based on a failure to provide materials relating to ongoing criminal investigations and prosecutions. Nor, in our view, are there extraordinary circumstances present in this matter that would justify giving the Committee documents relating to our open criminal

investigations and prosecutions. As we explain in Section IV below, the Committee already has answers to the questions that it asserts necessitate the production of these materials.

**B. Documents Generated in the Course of Efforts to Respond to Congressional and Media Inquiries Relating to This Matter**

The Committee demands the production of internal Department communications dated after congressional review of this matter commenced. These communications took place after the flawed tactics used in Operation Fast and Furious were terminated and made public. Thus, they were not generated as part of the Fast and Furious operation but instead were made later in the course of responding to congressional or media inquiries about the operation. Administrations of both parties consistently have recognized that materials generated by Executive Branch officials in the course of responding to congressional investigations are generally not appropriate for disclosure to the congressional committee conducting the oversight. Congressional demands for such information implicate heightened Executive Branch confidentiality interests and “significant separation of powers concerns” by threatening to compromise the Executive Branch’s ability to respond independently and effectively to congressional investigations. *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, Janet Reno, Attorney General, 20 Op. O.L.C. 2, 3 (1996).

It has been the Department’s longstanding view across Administrations of both parties that candid Executive Branch deliberations regarding how to respond to a congressional inquiry would be substantially chilled if such deliberations were disclosed to Congress. *See, e.g., id.* (advising that compliance with a congressional subpoena seeking White House Counsel’s Office documents generated in response to oversight requests “would compromise the ability of [the] Office to advise and assist the President in connection with the pending Committee and Independent Counsel investigations”); Letter to the President from Paul D. Clement, Solicitor General and Acting Attorney General, at 5-7 (June 27, 2007) (“Clement Letter”) (stating the same concern); Letter to Chairman Conyers and Chairwoman Sanchez, from Richard Hertling at 3 (Mar. 19, 2007) (“The appropriate functioning of the separation of powers requires that Executive Branch officials preserve the ability to communicate confidentially as they discuss how to respond to inquiries from a coordinate branch of government. Such robust internal communications would be effectively chilled, if not halted, if they were disclosed, which could substantially impede any agency’s ability to respond to congressional oversight requests.”).

Just as the confidentiality of internal communications between and among the Chairman, Members of the Committee and their staffs is essential to the Committee’s ability to conduct oversight, the confidentiality of internal communications among Department officials is essential to our ability to respond to matters under congressional review. This is a substantial government-wide concern. As the Department stated during the prior Administration, “it would introduce a significantly unfair imbalance to the oversight process if committees were able to obtain internal Executive Branch documents that are generated in order to assist Executive Branch officials in determining how to respond to an inquiry by the very committee seeking the

documents or other information.” Letter to the Honorable John Conyers and the Honorable Linda T. Sanchez, from Richard A. Hertling, Assistant Attorney General, Office of Legislative Affairs, at 3 (Mar. 26, 2007); *see also* Clement Letter at 6 (“the ability of the Office of the Counsel to the President to assist the President in responding to [congressional and media] investigations ‘would be significantly impaired’ if a congressional committee could review ‘confidential documents prepared in order to assist the President and his staff in responding to an investigation by the committee seeking the documents’”) (quoting 20 Op. O.L.C. at 3). By threatening to compromise the ability of the Executive Branch to respond effectively to congressional inquiries, oversight targeted at this category of deliberative documents raises grave constitutional concerns regarding the separation of powers.

Moreover, an additional, particularized separation of powers concern is presented here because the Committee has sought information about open criminal investigations and prosecutions. In responding to oversight in such a sensitive area, officials within the Department necessarily have conferred about how to respond to Congress while ensuring that critical ongoing law enforcement actions are not compromised and law enforcement decision-making is not infected by even the appearance of political influence. The confidentiality of such candid internal deliberations must be protected in order to preserve the independence, integrity, and effectiveness of the Department’s law enforcement activities.

For these reasons, and for those set forth in Section IV(B) below, the Department has not provided these materials to the Committee. The one exception is that the Department provided the Committee with materials relating to the preparation of the now-withdrawn February 4 letter. This limited exception was based solely on the Department’s acknowledgment that that letter contained inaccurate information. This was consistent with the position the Department took in the last Administration during the oversight regarding the resignation of United States Attorneys. *See* Letter to Chairman Conyers and Chairwoman Sanchez from Richard Hertling, at 3 (Mar. 19, 2007) (informing House Judiciary Committee that Department would “provid[e] deliberative documents concerning the preparation of the [inaccurate] congressional testimony by Department officials in order to clarify the integrity of our process for preparing the testimony” but stating that the Department would “not provid[e] other documents generated within the Executive Branch for the purpose of responding to the congressional (and media) inquiries about the resignations”).

**IV. The Information Already Provided By the Department Answers Each of the Remaining Questions Identified in the Draft Resolution**

In its Draft Resolution, the Committee identifies “three main categories” of documents that it says have not been provided in response to the October 11 subpoena, and that it argues are necessary to answer remaining questions about Fast and Furious. *Draft Resolution at 37*. First, the Committee asserts that it lacks documents showing who at the Department “should have known of the reckless tactics” used in the Operation. *Id.* With respect to this issue, the Committee seeks the production of federal wiretap applications and sensitive criminal

investigative reports that were prepared by law enforcement agencies. Second, the Committee contends that it lacks documents showing “how the Department concluded that Fast and Furious was ‘fundamentally flawed.’” *Id.* at 38. More specifically, the Committee seeks documents created after the inappropriate tactics used in Fast and Furious were made public and had terminated. Finally, the Committee argues that it has not received documents about a supposed “lack of information-sharing among DEA, FBI, and ATF.” *Id.* The Committee’s spokesperson recently explained that documents in this category contain “information about informants and their roles.” As such, these documents directly implicate the Department’s most sensitive law enforcement operations.

In both the Draft Resolution and your letter to the Attorney General dated May 10, 2012, the claim is made that the Committee has not received any information on these topics. In fact, the Committee has received documents and information on each of these topics and those materials provide the answers that the Committee says it still needs.

**A. Wiretap and Core Law Enforcement Materials**

The Memorandum argues that Department officials in Washington obtained unspecified “documents from the field” that should have alerted those officials of the inappropriate tactics being used in Fast and Furious, and the Committee therefore seeks the production of those materials. *Memorandum* at 8. The Draft Resolution clarifies that the unspecified documents referenced in the Memorandum are federal wiretap applications that have been filed under seal in federal district court. *Draft Resolution* at 37. The argument that the Department should produce these applications ignores the fact that the Department is *prohibited by law* from providing them. As the Committee knows well, the sealing and disclosure of materials relating to electronic intercepts authorized under federal law are governed by a federal statute and a court sealing order, both of which prohibit the Department from disclosing the materials that the Committee seeks. Indeed, disclosure of these materials in violation of these provisions, including by Department personnel to the Committee, is punishable as a criminal offense, as the Attorney General made clear when he testified before the Committee on February 2, 2012. The failure to produce something whose production is prohibited by law cannot serve as the basis for a finding of contempt. Even beyond these concerns, disclosing such core law enforcement materials while criminal investigations and prosecutions arising out of them remain pending would be damaging to the Department’s efforts to hold accountable those who violate the law, as discussed above. *See* Section III(A).

The Committee also seeks core law enforcement documents relating to open criminal investigations and prosecutions in an effort to determine who “should have known of the reckless tactics.” However, senior management officials at ATF and the Arizona U.S. Attorney’s Office have already provided recorded statements to the Committee that they did not alert Department leadership of the tactics used in Fast and Furious because those senior management officials themselves were unaware of them. Thus, the documents sought by the Committee will not answer the question it poses. Moreover, we have already explained the settled practice of

Administrations of both political parties to protect such materials from congressional review and the compelling reasons underlying that policy. *See* Section III(A) above. In any event, the material that the Department has already provided, and the witnesses it has made available to the Committee, amply respond to the question. The record reflects that the inappropriate tactics used in Fast and Furious were initiated and carried out by personnel in the field over several years and were not initiated or authorized by Department leadership in Washington.

**B. Documents Reflecting How The Department Concluded that Operation Fast and Furious Was Fundamentally Flawed**

The Committee argues that it does not understand how the Department concluded that Operation Fast and Furious was fundamentally flawed and that communications generated after congressional review of this matter commenced are required to answer that question. The reality is that the Committee knows the answer to the question it poses. The record makes clear that Department leadership was unaware of the inappropriate tactics used in Fast and Furious until allegations about those tactics were made public in early 2011. The record further reflects that after those public allegations were raised, the heads of Department components believed to know the true facts assured Department leadership that the allegations were “categorically false.” However, over a period of months, as documents to be provided to the Committee were collected and reviewed, and as witness testimony before the Committee was evaluated, Department leadership was able to assess facts independently.

Throughout last year, Department officials made numerous public statements or took actions reflecting these realities and their increasing concern about what actually had happened in Fast and Furious. Those statements and actions include:

- On February 28, 2011, the Attorney General asked the Department’s Acting Inspector General to review these issues.
- On March 9, 2011, the Attorney General issued a public statement explaining his rationale for requesting the Inspector General investigation: “[Q]uestions [that] have been raised by ATF agents about the way in which some of these operations have been conducted . . . have to be taken seriously, and on that basis, I’ve asked the inspector general to look into that.”
- On March 10, 2011, in testimony before the Senate Appropriations Committee, the Attorney General stated that “there have been concerns expressed about the way in which this operation was conducted – and I took those allegations . . . very seriously, and asked the inspector general to try to get to the bottom of it.”
- On May 2, 2011, the Department wrote to Senator Grassley stating that “[i]t remains our understanding that [Fast and Furious] did not knowingly permit straw buyers to take guns into Mexico,” but informing the Senator that that we had referred his letters to the Acting Inspector General “so that she may conduct a thorough review and resolve your allegations.”

- On May 3, 2011, in response to a question from Chairman Issa at a House Judiciary Committee hearing, the Attorney General advised that the Acting Inspector General was reviewing “whether or not Fast and Furious was conducted in a way that’s consistent with” Department policy, stating “that’s one of the questions that we’ll have to see.”
- On May 4, 2011, in response to a question from Senator Grassley at a Senate Judiciary Committee hearing about allegations that ATF had not interdicted weapons, the Attorney General said: “I frankly don’t know. That’s what the [Inspector General’s] investigation . . . will tell us.”
- On May 5, 2011, in a briefing to Committee and other congressional staff, Department officials made clear that we had questions about the initial assurances from relevant components regarding allegations of non-interdiction, and that was why the Attorney General had referred the matter to the Acting Inspector General.
- On June 15, 2011, Assistant Attorney General Weich testified as follows before the Committee: “[O]bviously allegations from the ATF agents . . . have given rise to serious questions about how ATF conducted this operation.” He also noted that “we’re not clinging to the statements” in the February 4 letter.
- On October 7, the Attorney General made clear in his letter to the Committee that the tactics used in Fast and Furious were “fundamentally flawed” and “completely unacceptable.”
- In November 2011, both the Attorney General and Assistant Attorney General Breuer testified before the Senate Judiciary Committee in separate hearings that the February 4 letter inadvertently included inaccurate information.

In short, the Department’s understanding of the facts underlying Fast and Furious became more developed as evidence came to light that was inconsistent with the initial denials provided to Department personnel. Over time, Department leadership came to recognize that Fast and Furious was fundamentally flawed. In part, considerations of public safety do not appear to have been taken into account in formulating and carrying out the investigative plan for the Operation. Likewise, in light of the significant risks to public safety, Fast and Furious remained operational far too long. We trust that the Committee’s understanding of what happened in Fast and Furious has also evolved based on its review of the evidence and testimony that has been accumulated. On this well-developed record, there is no basis for the Committee to demand additional documents relating to this issue, particularly since, as we have already discussed in Section III(B) above, the kinds of documents sought by the Committee have not historically been provided to Congress regardless of which party controls the Executive Branch.

### **C. Documents About Informants And Their Roles**

Finally, the Committee seeks documents regarding “informants and their roles.” More specifically, the Committee posits the existence of an intelligence-sharing failure among ATF, DEA and FBI that is predicated on the relationship that the Committee asserts those agencies had with certain cooperating witnesses. However, the Committee has been provided with information during confidential law enforcement briefings that answers the questions it claims remain outstanding.

As the Committee knows, the Department neither confirms nor denies its relationships with cooperating witnesses. Assuming solely for purposes of this discussion that the relationships alleged by the Committee exist, the production of the materials sought by the Committee would raise very significant concerns going to the heart of our law enforcement mission. It is often true that the only way to build cases against violent and dangerous criminal kingpins who have insulated themselves from their unlawful activities is by obtaining information from those in their inner circles.

Those in control of the Mexican drug cartels are among the most dangerous and violent criminals operating anywhere in the world. Disclosure of information about cooperating witnesses not only eliminates the ability of law enforcement to continue using such sources, it imperils the lives of the cooperators and their families and friends. Even where the fact of an individual’s cooperation with the Department somehow becomes known, exposing details about the nature or extent of that cooperation would provide valuable information to the targets of the Department’s investigative efforts and make more difficult our sworn goal of bringing them to justice.

Moreover, our ability to maintain the confidentiality of information about cooperating witnesses strongly influences the likelihood that we will be able to recruit cooperating witnesses in future investigations. If future cooperating witnesses understand that the Department does not protect relationships with those assisting our law enforcement efforts, and further see that the result of cooperating with the Department is unspeakable violence against the families and friends of those who assist us, our law enforcement mission will be severely impacted. We take as a given that the Committee does not intend such a result here.

Despite these very real concerns, and in an effort to answer Committee questions, the Department organized a briefing on this subject on October 5, 2011, that was conducted by officials of ATF, DEA and FBI. During this briefing, the Committee was allowed to review sensitive law enforcement documents in redacted form. The Committee also received follow-up briefings from some of these agencies that responded to the Committee interests. While the documents sought by the Committee go to the heart of the Department’s law enforcement mission, we have pursued alternative means to provide the Committee with information on this issue. The Department’s reasonable efforts to balance these competing interests should not give rise to a finding of contempt.

V. **The Department Has Instituted Reforms To Ensure That The Flawed Tactics of Operation Fast and Furious Are Not Repeated in The Future**

As I described in my letter to you of January 27, 2012, the Department has instituted a number of reforms to ensure that mistakes like those made in Operation Fast and Furious, and in operations in the prior Administration, do not happen again. These improvements were made even while we await the Inspector General's report, and additional reforms may be appropriate depending on the Inspector General's conclusions.

ATF has in place new leadership. Since last August, the agency has been operating under the direction of Acting Director B. Todd Jones, who has put in place his own management team. Last summer, ATF implemented a program to enhance ATF headquarters oversight regarding certain categories of investigations, including investigations in which more than 50 firearms have been straw-purchased or trafficked. It also issued a memorandum to all Special Agents in Charge requiring, and reinforcing the importance of, de-confliction and information sharing in every investigation.

Additional reforms have included clarification last fall of ATF's firearms transfer policy to remind agents that, during the course of an investigation, public safety is the primary consideration and that interdiction or other early intervention may be necessary to prevent a firearm's criminal misuse. ATF also issued revised policies last fall regarding undercover operations and the use of confidential informants that establish review committees for such sensitive issues and restrict the use of Federal Firearms Licensees as confidential informants. In addition, ATF has established SAC Advisory and Special Agent Advisory Committees to share agency issues, concerns, and recommendations; provided targeted training for Phoenix Field Division personnel regarding techniques, strategies, and the law applicable to firearms trafficking investigations; and expanded the opportunities for employees to raise work-related concerns with supervisory level officials without fear of retaliation or reprisal.

In addition to these ATF measures, the Criminal Division has refined the process for reviewing wiretap authorization requests by its Office of Enforcement Operations (OEO). Among other things, the Criminal Division has enhanced its efforts to ensure that relevant supervisory AUSAs are notified when the Criminal Division's review of wiretap applications raises concerns about operational tactics being used in a matter, rather than rely on the fact that supervisory AUSAs should already be aware of the tactics used in their own office's cases. The goal of these revised procedures is to ensure that supervisory level personnel in the relevant litigating components are familiar with, and approve of, the operational tactics being used in the investigations being conducted by their offices in which authorizations for electronic intercepts are requested. In addition, OEO now requires two levels of supervisory review (as opposed to one) in cases involving multiple extensions of Title III wiretaps. Thus, after 90 days of interception in a particular case, if an AUSA requests a further extension of the wiretap, two

OEO supervisors must now review the application before it is submitted to a Criminal Division DAAG for authorization.

Further, in light of the inaccurate information provided to Congress in the Department's February 4, 2011, letter to Senator Grassley, on January 26, 2012, I issued direction to component heads emphasizing the need for the Department to provide accurate information in response to congressional requests and setting forth both the Attorney General's and my expectations in that regard. In particular, the directive makes clear that in responding to congressional requests for information, affected components must solicit information directly from employees with detailed personal knowledge of the subject matter at issue. In some instances, those employees will be those who have made protected disclosures on the subject to Congress. The directive makes clear that our commitment to protecting the rights of whistleblowers is not inconsistent with seeking information in an appropriate manner from employees who have made protected disclosures and that it is our responsibility to do so when necessary to ensure the accuracy and completeness of our responses to Congress.

**VI. Contempt is an Extraordinary Step that is Unwarranted and Inappropriate Here**

Congress has *never* held an Attorney General in contempt based on a failure to provide documents relating to open criminal investigations and prosecutions. Here, the Department has gone to great lengths to accommodate the Committee's oversight interests in the context of pending criminal investigations and prosecutions. Our responses to Congress have exceeded the boundaries that usually define our responses to oversight as we have disclosed information from open law enforcement files in an effort to meet the Committee's needs. We have briefed the Committee on extremely confidential matters and provided access to documents relating to those sensitive subjects. We note that the Committee does not appear to have completed other aspects of its investigation and that the results of the Department's Inspector General review have not yet been reported. Such alternative means for obtaining information would provide the Committee with insight into the need for additional documents and therefore whether harmful conflict between the Branches of government is avoidable.

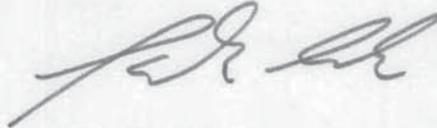
We readily acknowledge that, like our predecessors in Administrations of both parties, we have protected documents where we have believed that their disclosure would jeopardize the independence, integrity, and effectiveness of our continuing law enforcement efforts. We are absolutely committed to bringing the killers of Brian Terry and Jaime Zapata to justice. And, we are committed to seeing the continuing investigations and prosecutions arising out of Operation Fast and Furious to a successful conclusion. We know that the Committee shares these goals and we ask that the Committee work with us to ensure that we are able to hold accountable those who violate the law.

Moreover, while we have acknowledged an error in our February 4 letter to Senator Grassley (and disclosed the internal deliberations surrounding the preparation of that letter), consistent with long-standing Executive Branch practice across Administrations we have not

produced all of the other internal communications we generated following the commencement of congressional review of this matter. We recognize the Committee's broad oversight authority, as well as the contribution that the Committee's investigation has made to ensuring that the tactics used in Fast and Furious, Wide Receiver and other similar matters, are not used again. That said, we also believe that the Committee already has answers to the questions posed in the Draft Resolution. Production of the additional materials sought would undermine the Department's independence and effectiveness.

To the extent the Committee continues to have concerns, we are willing to meet with you to address those concerns and look forward to doing so.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Cole', written in a cursive style.

James M. Cole  
Deputy Attorney General

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

May 15, 2012

The Honorable Patrick J. Leahy  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 Washington, DC 20510

Dear Mr. Chairman:

This responds further to your letter to the Attorney General, dated June 23, 2011, requesting that the Senate Judiciary Committee receive the same access to documents that the Department provides to the House Committee on Oversight and Government Reform related to the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Project Gunrunner.

Enclosed are 29 pages of documents responsive to subpoena categories 1, 6, and 13 that we produced to the House Oversight and Government Reform Committee (HOCR) today.<sup>1</sup> To date, we have provided the Committee over 7,600 pages of documents from both ATF and the Department as part of 47 separate productions. We have provided documents to the Committee at least twice every month since late last year as part of the Department's ongoing efforts to comply with the Committee's subpoenas and other requests for information.

Included in this production are emails relating to a previously produced policy directive sent to the field by Deputy Attorney General Cole on March 9, 2011. Today's emails reflect a telephone conversation between Deputy Attorney General Cole and Southwest Border U.S. Attorneys, and a follow-up communication in which the Deputy Attorney General set forth the Department's policy to interdict weapons before they cross the border into Mexico. The Deputy Attorney General's email was forwarded without comment to staffers in the Office of the Attorney General, who then forwarded it to the Attorney General. HOCR DOJ 006982. As the Committee knows, the Deputy Attorney General's directive was also shared with all U.S. Attorney's offices.

Other documents produced today show that the message was forwarded by the U.S. Attorney for the Southern District of Texas to other law enforcement components in that region, including to ATF officials in the Southern District of Texas. The response from the ATF Special Agent in Charge in the District was that "As far as I know, we have never let any firearms walk

<sup>1</sup> These documents bear limited redactions of text outside of the scope of your inquiry or to protect information implicating individual privacy interests. Some of these pages reflect the completion of our consultations with the Departments of State and bear limited redactions resulting from those consultations. In response to requests from Chairman Smith, we will deliver to the House Committee on the Judiciary the same documents that we deliver to you.

The Honorable Patrick J. Leahy  
Page 2

to Mexico in this division. And while we have discussed controled [*sic*] deliveries to Mexico in our joint cases with ICE, we have never made controled [*sic*] deliveries of firearms to Mexico." HOCR DOJ 006984. That response was forwarded to officials in ATF headquarters in Washington, D.C., and ultimately to the Deputy Attorney General and the Attorney General. HOCR DOJ 006983-6984.

Also included in today's production is a background briefing paper prepared for then-Attorney General Mukasey in advance of his trip to Mexico in 2008. These documents reference discussions with Mexican officials regarding arms trafficking across the Southwest Border and specifically note that "ATF has developed a Southwest Border strategy, with domestic and international strategic components designed to simultaneously attack the firearms trafficking problem on both sides of the border." HOCR DOJ 006961. As in documents previously produced regarding Attorney General Mukasey's trip, the background briefing paper notes that ATF had recently attempted an unsuccessful controlled delivery of weapons into Mexico and that "ATF would like to expand the possibility of such joint investigations and controlled deliveries[.]" HOCR DOJ 006962. A briefing paper prepared in April 2008 prior to a scheduled meeting in Washington between the prior Administration's Deputy Attorney General and Assistant Attorney General for the Criminal Division and visiting senior Mexican officials likewise discusses recent failed efforts at a controlled delivery and ATF's desire to expand those efforts. HOCR DOJ 006967-006969.

Finally, today's production includes communications between Department of Justice and Department of State officials in the U.S. Embassy in Mexico regarding the appearance of Mexican Foreign Secretary Espinosa in September 2011 before the Senate of Mexico, as well as a subsequent meeting between Secretary Espinosa and Secretary of State Hillary Clinton that included a reference to the Department's investigation of Operation Fast and Furious. Those communications were forwarded to staffers in the Office of the Attorney General who then forwarded them to the Attorney General. HOCR DOJ 006986-6988.

We hope this information is helpful. We will supplement this production if we identify additional records responsive to Chairman Issa's subpoena. Please do not hesitate to contact us if we can provide additional assistance regarding this or any other matter.

Sincerely,



Ronald Weich  
Assistant Attorney General

Enclosures

cc: The Honorable Charles E. Grassley  
Ranking Minority Member

**Congress of the United States**  
**Washington, DC 20515**

May 18, 2012

The Honorable Eric H. Holder, Jr.  
Office of the Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, Northwest  
Washington, DC 20530

Dear Attorney General Holder:

We write to express our concerns with the lack of full cooperation from the Department of Justice (“the Department”) with the ongoing Congressional investigation into the operation known as “Fast & Furious” and the related death of Border Agent Brian Terry. While we recognize that the Department has provided some documents in response to some aspects of the October 11, 2011, subpoena from the Chairman of the Oversight & Government Reform Committee (“the Committee”), two key questions remain unanswered: first, who on your leadership team was informed of the reckless tactics used in Fast & Furious prior to Agent Terry’s murder; and, second, did your leadership team mislead or misinform Congress in response to a Congressional subpoena?

We are troubled by the Department’s assertions that the Executive Branch possesses the ability to determine whether inquiries from the Legislative Branch have been fully complied with. As the Supreme Court has noted, each co-equal branch of our Government is supreme in their assigned area of Constitutional duties.<sup>1</sup> Thus, the question of whether the Executive Branch has sufficiently complied with a Congressional subpoena requesting specific information pursuant to Congress’ Article I responsibilities is one only the Legislative Branch can answer.

One fact appears to be undisputed by all concerned: Fast & Furious was a fundamentally flawed operation. It was taken to an extreme that resulted in at least one death of a U.S. Border Patrol agent and unknown other consequences, because U.S. law enforcement agencies allowed thousands of firearms to be illegally “walked” into Mexico and into the hands of drug cartels. Beyond the horrific impact on the Terry family, there is no doubt that this operation has done serious harm to one of the United States’ most important bilateral relationships. It is our hope that, in finding the truth, we can both provide closure to the Terry family, begin to repair our relationship with Mexico, and take steps to make necessary changes at the Department.

Clearly, the Department must take steps to ensure that tragic mismanagement like Fast & Furious does not occur in the future. Unfortunately, without the disclosure of the information requested in the October 11, 2011, subpoena regarding which members of your leadership team were informed of the reckless tactics that were used in the operation, the American people cannot be confident that any remedial steps you implement will accomplish this goal. For example,

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<sup>1</sup> United States v. Nixon, 418 U.S. 683 (1974).

your leadership team recently asserted that “Department leadership was unaware of the inappropriate tactics used in Fast and Furious until allegations about those tactics were made public in early 2011.”<sup>2</sup> Yet, Federal law requires that you, or a member of your leadership team, approve the application to a Federal judge for use of a wiretap.<sup>3</sup>

In approving such an application, you or your designee would – or should – have reviewed the accompanying materials and affidavits that provided the basis for the wiretap application prior to affixing the Department’s approval to the application. We understand that the Fast & Furious operation may have included seven such wiretaps between March and July 2010. Whether the information used to justify the wiretap application or the information gained from the wiretaps is being used in any ongoing criminal prosecution is immaterial to the question of who on your leadership team reviewed and approved the wiretaps and was therefore privy to the details of the Fast & Furious operation. The assertion that your leadership team could approve wiretaps in 2010 and yet not have any knowledge of the tactics used in Fast & Furious until 2011 simply cannot be accurate and furthers the perception that the Department is not being forthright with Congress.

We would note that correspondence between your Deputy and Chairman Issa raises concerns that further Congressional actions might cause damage between the Legislative and the Executive branch.<sup>4</sup> We would submit that the damage to that relationship began with a February 4, 2011, letter from the Department to the Congress that was subsequently withdrawn because it provided Congress with false information. The means to repair the damage caused by your Department lies within your powers to work with the Committee to find a mutually satisfactory level of compliance with the subpoena and avoid further confrontation.

While we are disappointed that a Senior Department official would provide false information to Congress, we are also concerned that it took your Department ten months to acknowledge the inaccuracy and ultimately withdraw the letter. In light of the letter and its subsequent withdrawal, it is critical for Congress to understand whether the letter was part of a broader effort by your Department to obstruct a Congressional investigation. We are unaware of any assertions of executive privilege that would prevent compliance with the Congressional subpoena. We are also unaware of any national security concerns or diplomatic sensitivities that would preclude compliance with the subpoena. Finally, as these post-February 4, 2011, communications concern the Department’s response to Congress, their disclosure to Congress would not impact any ongoing criminal investigations or prosecutions.

If the Office of Legal Counsel has provided a legal opinion that takes into account the specific circumstances of this investigation and you are relying on that opinion to maintain your current position, we would request that the opinion be provided to Congress at the earliest possible opportunity. Similar to arrangements previously made between your Department and Congressional investigators, we are confident that you possess adequate means to provide

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<sup>2</sup> Letter from Deputy Att’y Gen. James M. Cole to House Oversight & Government Reform Chairman Darrell Issa, May 15, 2012, at 10 [hereinafter DAG Cole Letter].

<sup>3</sup> See 18 U.S.C. § 2516(1).

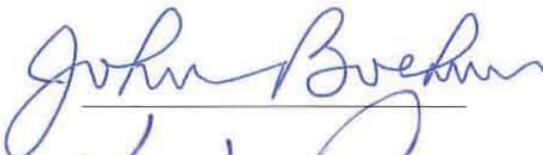
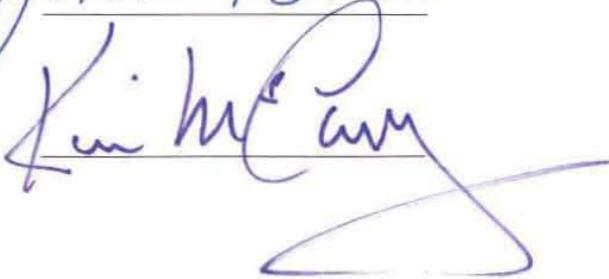
<sup>4</sup> DAG Cole Letter at 1.

substantive compliance with a Congressional subpoena while protecting the integrity and confidentiality of specific documents.

We firmly believe and hope that you agree that a mutually acceptable resolution to this matter may yet be achieved. The Terry family deserves to know the truth about the circumstances that led to Agent Terry's murder. The whistle-blowers who brought these issues to light deserve to be protected, not intimidated, by their government. And, the American people deserve to know how such a fundamentally flawed operation could have continued for so long and have a full accounting of who knew of and approved an operation that placed weapons in the hands of drug cartels.

As co-equal branches of the U.S. Government, the relationship between the Legislative and Executive branches must be predicated on honest communications and cannot be clouded by allegations of obstruction. If necessary, the House will act to fulfill our Constitutional obligations in the coming weeks. It is our hope that, with your cooperation, this sad chapter in the history of American law enforcement can be put behind us.

Sincerely,




12 JUN -4 AM 11:50

Washington DC Office – 1615 L Street NW, Suite 1100 (202)861-24280

May 23, 2012

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

The Honorable Elijah E. Cummings  
Ranking Member  
Committee on Oversight  
and Government Reform  
2235 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Patrick J. Leahy  
Chairman  
Senate Judiciary Committee  
437 Russell Senate Building  
Washington, D.C. 20510

The Honorable Chuck Grassley  
Ranking Member  
Senate Judiciary Committee  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Chairman Issa, Chairman Leahy, Congressman Cummings, and Senator Grassley,

The Association of Prosecuting Attorneys (APA) is a private non-profit whose mission is to support and enhance the effectiveness of prosecutors in their efforts to create safer communities. We are the only national organization to include and support all prosecutors, including both appointed and elected prosecutors, as well as their deputies and assistants, whether they work as city attorneys, city prosecutors, district attorneys, state's attorneys, attorneys general or US attorneys. On behalf of APA, we believe that the Committee's ongoing investigation into an operation which the Deputy Attorney General has identified as the ATF's flawed response to the problem of gun trafficking impacts prosecutors and other law enforcement agencies. Because of this issue and out of concern for the integrity of the process and our profession we present the prosecutor's perspective.

As professional prosecutors, we believe it is important to hold dangerous offenders fully accountable, especially when the allegations include the murder of at least two law enforcement officers. Those responsible for the murder of Brian Terry, for example, must face consequences that ensure justice and deter other criminal enterprises and offenders from similar conduct. Prosecutors throughout this country are handling cases every day which include information from confidential informants, wiretaps and witnesses, who are reluctant to come forward out of fear for their safety as well as their family and friends.

***Our mission is to support and enhance the effectiveness of prosecutors in their efforts to create safer communities.***

Further, it is common practice for prosecutors to refuse to disclose the identity of their informants as well as the identity and whereabouts of key witnesses who are likely to be executed by the accused or his criminal enterprise. Every effort is made by prosecutors to comply with criminal discovery yet ensure the legal protections our justice system affords.

Therefore, in cases where witnesses may be intimidated by Mexican drug cartels, where informants may be compromised (thereby jeopardizing ongoing criminal investigations and prosecutions, as well as future leads), and where releasing photographs and other sensitive information may hinder prosecutors' ability to proceed in a current criminal trial or be unable to file future cases, it is logical to delay release of information until all of the related investigations are closed and related cases have been finally adjudicated.<sup>1</sup> Not only is it necessary, we have been provided the legal basis that it is indeed against the law to disclose core investigative materials, such as transcripts of grand jury proceedings and wiretap applications, from ongoing criminal investigations and prosecutions.<sup>2</sup> As a former California prosecutor, I am fully aware that ethical prosecutors are prevented from publically releasing evidence pre-trial. This preclusion includes information concerning confidential informants, photographs, and wiretaps. Prosecutors are only allowed to release the name of the accused, the charges and the maximum penalty.<sup>3</sup> They are forbidden to discuss the evidence or provide information which is not contained in the charging document or included in a public record. The discussion about the case, the investigation, and other criminal acts by the accused is only proper after verdict and sentencing.

As prosecutors, we are accustomed to doing the public's business in the public. Prosecutors' offices throughout the country respond to requests for information, hold press conferences, testify before grand juries and appear before committees and commissions. It is important that those with oversight responsibility are fully informed as to the basis for the actions of the public prosecutor's office. However, since "providing open investigative files in response to a congressional subpoena could give rise to a claim, by defense counsel or others, of improper congressional influence over the criminal justice process . . ."<sup>4</sup>, we at the APA encourage congress to delay those aspects of its investigation that necessitate disclosure of trial-related documents until all related investigations and prosecutions have been finally adjudicated.

<sup>1</sup> See Letter from James M. Cole, Deputy Attorney General, to Darrell E. Issa, Chairman, Committee on Oversight and Government Reform (May 15, 2012), at 1.

<sup>2</sup> *Id.* at 5.

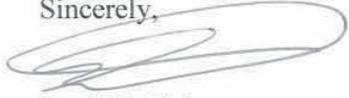
<sup>3</sup> As the Terry trial is set to commence in California, federal prosecutors are bound to California's rules of ethics. 28 CFR 77.3. ("In all criminal investigations and prosecutions . . . attorneys for the government shall conform their conduct and activities to the state rules and laws . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.")

<sup>4</sup> Letter from Janet Reno, Attorney General, to Orrin Hatch, Chairman, Committee on the Judiciary (May 17, 2000).

***Our mission is to support and enhance the effectiveness of prosecutors in their efforts to create safer communities.***

Thank you for your consideration of this important matter and please feel free to contact me or my staff if we may be of any assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "David LaBahn", written over a horizontal line.

David LaBahn  
President and CEO

*Our mission is to support and enhance the effectiveness of prosecutors in their efforts to create safer communities.*

June 2012

# June 2012

DARRELL E. ISSA, CALIFORNIA  
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LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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JACKIE SPEIER, CALIFORNIA

June 1, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Attorney General:

On October 12, 2011, I wrote to you to express serious concerns about retaliation by the Department against whistleblowers who provided information in the Fast and Furious investigation.<sup>1</sup> I now write regarding reports that another whistleblower, Special Agent Jay Dobyns, has also been retaliated against for speaking out about mismanagement and abuse at ATF. Agent Dobyns has been helpful to Congress throughout the Fast and Furious investigation in providing information related to your fatal gun trafficking program. He was also instrumental in encouraging several whistleblowers with firsthand knowledge of Fast and Furious to come forward and speak with Congress. I urge supreme caution when disciplining a Department employee for alerting the public about internal misconduct.

ATF has earned a reputation for vindictiveness when it comes to retaliating against its employees. Unfortunately, despite prior assurances from senior ATF officials, it appears that Acting Director B. Todd Jones has yet to change this reputation, as he recently upbraided Special Agent John Dodson in a private meeting at ATF headquarters. These apparent attempts to silence critics of the Bureau are potentially illegal and certainly counter-productive.<sup>2</sup> As I have previously stressed, direct communications with Congress are both vitally important and protected by law.<sup>3</sup>

<sup>1</sup> Letter from Senator Charles Grassley and Chairman Darrell Issa to Attorney General Eric Holder (Oct. 12, 2011).

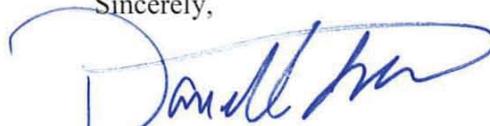
<sup>2</sup> See 5 U.S.C. § 7211 ("The rights of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House or Congress, or to a committee or a Member thereof, may not be interfered with or denied.").

<sup>3</sup> See Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3034, § 714 (2010) (setting prohibitions on restricting communications of federal government employees with Congress); see generally, Government Accountability Office, "Department of Health and Human Services-Chief Actuary's Communications with Congress," B-302911 (Sep. 7, 2004) (discussing the history and background in support of the government-wide prohibition on attempts to prevent direct communications with Congress); see also 18 U.S.C. § 1505 (providing that obstructing or impeding a Congressional inquiry is also a criminal violation).

The Honorable Eric H. Holder, Jr.  
June 1, 2012  
Page 2

It appears that ATF has not received instructions from Department leadership that retaliation is not to be tolerated in any Department component. Please ensure that ATF receives the necessary instructions reiterating this policy.

Sincerely,

A handwritten signature in blue ink, appearing to read "Darrell Issa". The signature is fluid and cursive, with a large initial "D" and a long horizontal stroke.

Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



Office of the Deputy Attorney General  
Washington, D.C. 20530

June 5, 2012

The Honorable John Boehner  
Speaker  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Kevin McCarthy  
Majority Whip  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Eric Cantor  
Majority Leader  
U.S. House of Representatives  
Washington, DC 20515

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

Dear Mr. Speaker, Mr. Leader, Congressman McCarthy, and Mr. Chairman:

This letter updates you on the matters raised in your May 18, 2012 letter to the Attorney General. Following the receipt of your letter, the Department has had a number of constructive conversations with staff aimed at satisfying the legitimate goals of congressional oversight while, at the same time, ensuring the integrity and independence of the Department's law enforcement efforts.

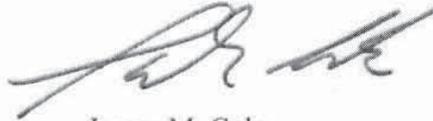
Your May 18 letter, which identified the two key questions that you believe remain unanswered in this matter, was a helpful step toward reaching a resolution of the issues in dispute. We are hopeful that these ongoing conversations will lead to a mutually acceptable resolution of these issues and continue to provide the kinds of information that would answer your questions. While our staffs continue to discuss these issues, I want to reiterate that I remain available to meet with you personally.

These conversations stand in contrast with the tone and content of the letter that Chairman Issa made public today. Chairman Issa's letter makes clear that sealed court documents relating to pending federal prosecutions being handled by the U.S. Attorney's Office for the Southern District of California have been disclosed to the Committee on Oversight and Government Reform in violation of law. This is of great concern to us. While we are legally prohibited from commenting on the content of sealed court documents, we disagree with the Chairman's assertions.

The Honorable John Boehner, The Honorable Eric Cantor,  
The Honorable Kevin McCarthy, The Honorable Darrell Issa  
Page 2

As I have stated on a number of occasions, the Department of Justice remains committed to addressing your two key questions and to continuing to work cooperatively with you and your staffs.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Cole', written in a cursive style.

James M. Cole  
Deputy Attorney General

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STAFF DIRECTOR

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**House of Representatives**

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June 5, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Dear Attorney General Holder:

On February 8, 2012, Senator Grassley, Congressman Meehan and I wrote to you requesting the Department's assistance in obtaining the wiretap applications from Operation Fast and Furious. We did so because we believed their contents would shed additional light on senior Department officials' level of knowledge of the unacceptable tactics used in Fast and Furious. Other than having acknowledged receipt of the letter, the Department has not responded to the February 8 request. In a May 15, 2012 letter, the Deputy Attorney General reiterated the Department's position that the "inappropriate tactics used in Fast and Furious . . . were not initiated or authorized by Department leadership in Washington."<sup>1</sup> We now know that statement is false.

The Committee has obtained copies of six wiretap applications in support of seven wire intercepts utilized during Fast and Furious. I recently provided these materials to Ranking Member Cummings in a series of three letters that outlined their extraordinary contents. The wiretap applications show that immense detail about questionable investigative tactics was available to the senior officials who reviewed and authorized them. The close involvement of these officials – much greater than previously known – is shocking.

These six applications were approved by senior Justice Department officials in March, April, May, June and July 2010. Each application included a memorandum from Assistant Attorney General Lanny A. Breuer to Paul M. O'Brien, Director, Office of Enforcement

<sup>1</sup> Letter from Deputy Att'y Gen. James Cole to Chairman Darrell Issa, H. Comm. on Oversight and Gov't Reform (May 15, 2012) [hereinafter DAG Cole letter].

The Honorable Eric H. Holder, Jr.  
 June 5, 2012  
 Page 2

Operations, authorizing the wiretap applications on behalf of the Attorney General.<sup>2</sup> The memoranda from Breuer are marked specifically for the attention of Emory Hurley, the lead prosecutor for Operation Fast and Furious.

### Repeated Department Denials

Throughout the course of the congressional investigation into Operation Fast and Furious, the Department has consistently denied that any senior officials were provided information about the tactics used in Operation Fast and Furious. The wiretap applications obtained by the Committee show such statements made by senior Department officials regarding the wiretaps to be false and misleading.

You have repeatedly either denied involvement by senior officials in Fast and Furious, or asserted that the wiretap applications do not contain rich detail about irresponsible investigative tactics. In a press conference on September 7, 2011, you stated:

The notion that somehow or other this thing reaches into the upper levels of the Justice Department is something that . . . I don't think is supported by the facts. It's kind of something I think certain members of Congress would like to see, the notion that somehow or other high-level people in the department were involved. As I said, I don't think that is going to be shown to be the case – which doesn't mean that the mistakes were not serious.<sup>3</sup>

One month later, in a letter to three Committee Chairmen, you wrote:

I now understand some senior officials within the Department were aware at the time that there was an operation called Fast and Furious although they were not advised of the unacceptable operational tactics being used in it.<sup>4</sup>

In congressional testimony, you have repeatedly stated that you did not believe that the wiretap applications included any discussion of operational tactics. Specifically, on November 8, 2011, you testified:

I don't think the wiretap applications -- I've not seen -- I've not seen them. But I don't know -- I don't have any information that indicates that those

<sup>2</sup> See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, Criminal Division to Paul M. O'Brien, Director, Office of Enforcement Operations, Criminal Division, Authorization for Interception Order Application, (Mar. 10, 2010).

<sup>3</sup> Mike Levine, *Holder Denies Prior Knowledge of 'Fast and Furious,'* FOXNEWS, Sept. 7, 2011, available at: <http://www.foxnews.com/politics/2011/09/07/holder-denies-prior-knowledge-fast-and-furious/>.

<sup>4</sup> Letter from Att'y Gen. Eric H. Holder, Jr. to Chairman Darrell Issa, H. Comm. on Oversight and Gov't Reform, et al. (Oct. 7, 2011).

The Honorable Eric H. Holder, Jr.  
 June 5, 2012  
 Page 3

wiretap applications had anything in them that talked about the tactics that have made this such a bone of contention and have legitimately raised the concern of members of Congress, as well as those of us in the Justice Department. I -- I'd be surprised if the tactics themselves about gun walking were actually contained in those -- in those applications. I have not seen them, but I would be surprise[d] [if] that were the case.<sup>5</sup>

In sworn testimony before this Committee on February 2, 2012, you also denied that any information relating to tactics appeared in the wiretap applications. You said:

I think, first off, there is no indication that Mr. Breuer or my former deputy were aware of the tactics that were employed in this matter until everybody I think became aware of them, which is like January February of last year. The information -- I am not at this point aware that any of those tactics were contained in any of the wiretap applications.<sup>6</sup>

We now know that all of these statements are not accurate.

The remarkable level of detail about these objectionable tactics contained in the applications renews concerns that senior Department officials failed to perform their jobs. It also raises concerns about the veracity of your testimony before Congress, and the accuracy of recent letters sent to Congress by senior Department officials. Not insignificantly, this is not the first time that the Department presented inaccurate information to Congress during this investigation. Having seen the wiretap applications, we now know that the information coming from the Department has been misleading. That must stop.

#### Senior Officials Authorized Unacceptable Tactics at the Expense of Public Safety

While I am mindful of the legal restrictions that limit the Department's ability to comment on documents potentially under seal, it is disingenuous for Department officials to publicly claim that senior officials were unaware of the unacceptable tactics used in Fast and Furious. Even a perfunctory review of the wiretap applications amply demonstrates the immense detail documenting gun walking tactics that should have prompted senior officials in the Criminal Division to shut down the program immediately.

Senior officials in the Justice Department, including Assistant Attorney General Lanny Breuer, Deputy Assistant Attorney General Jason Weinstein, and Deputy Assistant Attorney General Kenneth Blanco, were responsible for authorizing these wiretap applications. The applications discussed -- in no uncertain terms -- the reckless tactics used in Operations Fast and

<sup>5</sup> *Oversight of the Dept. of Justice, Hearing before Sen. Comm. on the Judiciary*, 112th Cong. (Nov. 8, 2011) (testimony of Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice).

<sup>6</sup> *Operation Fast and Furious: Management Failures at the Department of Justice: Hearing Before the Comm. on Oversight and Gov't Reform*, 112th Cong. (Feb. 2, 2012) (testimony of Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice).

The Honorable Eric H. Holder, Jr.  
June 5, 2012  
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Furious. In light of the information contained in these wiretap applications, senior Department officials can no longer disclaim responsibility for failing to shut down Fast and Furious because they were unaware of the tactics used.

As early as March 2010, senior officials in the Criminal Division were aware of important facts about Fast and Furious. For example, these officials received information showing that ATF had identified a specific gun trafficking ring led by an individual who had demonstrated the specific intent to transport weapons from the United States to Mexico. This straw purchasing ring was uncomplicated, with just one man at the center and only a few key individuals purchasing 1,300 of the more than 2,000 weapons trafficked.

Throughout the winter, spring, and summer of 2010, these same senior officials received information that ATF decided to break off surveillance of key suspects because a variety of acceptable investigative tactics ATF agents tried had failed. These officials were told that although ATF had contemporaneous knowledge of illegal weapons purchases and knew the leader of the straw purchasing ring had the present intent to take the weapons to Mexico, ATF still broke off surveillance of the suspects right after they purchased firearms illegally.

These officials were given partial transcripts from a previous DEA wire intercept. On that wiretap, participants in the firearms trafficking ring discussed purchasing, stashing, and transporting weapons to Mexico. The senior Department officials received reports that people who had no steady source of income were purchasing large volumes of expensive weapons and paying exclusively in cash. This information provided further evidence that they were acting illegally on behalf of an organized crime ring. Provided with this information, senior Department officials could have asked questions about the questionable tactics exposed in the applications and halted this fundamentally flawed operation. Instead, they simply authorized the wiretap applications. Tragically, this failure to halt Fast and Furious had deadly consequences.

On May 15, 2012, the Deputy Attorney General wrote that “considerations of public safety do not appear to have been taking into account in formulating and carrying out the investigative plan for the Operation.”<sup>7</sup> He was right. Senior Department officials, including Lanny Breuer, Jason Weinstein, and Kenneth Blanco, did not take public safety into account when they approved the wiretap applications.

It was top ATF officials, and not leaders in Department headquarters, who were concerned about the number of weapons purchased during Fast and Furious and the impact those weapons would have on the surrounding community. ATF Deputy Director William Hoover became so concerned about the volume that he demanded an exit strategy so that Fast and Furious would be shut down sooner. Yet, when presented with this same information – the large volume of high powered weapons, short time-to-crime, repeated straw purchasing, and the termination of surveillance – Department leadership simply rubber-stamped the operation and authorized its unacceptable tactics.

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<sup>7</sup> DAG Cole letter, at 11.

The Honorable Eric H. Holder, Jr.  
 June 5, 2012  
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Accountability

The wiretap applications are a crucial component of the Fast and Furious investigation, and establish a direct link between what was happening on the ground in Phoenix and senior Justice Department officials in Washington, D.C. The approval of wiretap applications, replete with details of the investigative techniques used, reveals a major failure of leadership within the Department and requires scrutiny.

During your December 8, 2011 testimony before the House Judiciary Committee, you stated:

There is an impatience here, and in some ways, I understand it. The reality is that we have to do these things on the basis of evidence, on the basis of findings that are factually grounded. . . . I want to assure you and the American people, people will be accountable for the mistakes that were made in Fast and Furious.<sup>8</sup>

The new information contained in the wiretap applications places us in a position to begin the process of assigning accountability among senior Department officials, some of whom were responsible for approving the wiretap applications. After having reviewed these applications, we now understand why the Department has been resisting our efforts to secure full cooperation and compliance with the subpoena. It is because, as former ATF Acting Director Kenneth Melson testified, "it appears thoroughly to us that the department is really trying to figure out a way to push the information away from their political appointees at the department."<sup>9</sup>

With the wiretap applications in possession of the Committee, the Department can no longer push such information away from its political appointees. These appointees were responsible for approving the reckless tactics used during Fast and Furious. Because of the wiretap applications, we now know which senior Department officials made these serious mistakes. It is time for you to honor your commitment to Congress and the American people by holding these individuals accountable.

Sincerely,



Darrell Issa  
 Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

<sup>8</sup> *Oversight Hearing on the United States Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. (Dec. 8, 2011) (testimony of Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice).

<sup>9</sup> Transcribed interview of Acting Director Kenneth E. Melson, at 130 (July 4, 2011).

The Honorable Eric H. Holder, Jr.  
June 5, 2012  
Page 6

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

The Honorable John Boehner, Speaker of the House

The Honorable Eric Cantor, House Majority Leader

The Honorable Kevin McCarthy, House Republican Whip



Office of the Assistant Attorney General

Washington, D.C. 20530

**JUN 05 2012**

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

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
U.S. Senate  
Washington, D.C. 20510

Dear Chairman Issa and Senator Grassley:

This responds to your letter of October 11, 2011, requesting documents and information related to the threat assessment undertaken by the United States Marshals Service on behalf of Mr. Andre Howard. We apologize for our delay in responding. We had hoped to communicate the results of the assessment first to Mr. Howard, but his attorney has not responded to repeated messages regarding the assessment left for him by representatives of the United States Attorney's Office for the Southern District of California.

With regard to the questions raised by your letter, at the request of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and the United States Attorney's Office for the District of Arizona (USAO), the United States Marshals Service undertook an assessment of potential danger to Mr. Howard in the spring of 2011. This assessment resulted in a Protective Intelligence Brief dated July 20, 2011. The Department has certain confidentiality interests in that document and the informal notes from meetings that occurred in the course of the assessment process because they contain law enforcement sensitive information. We recognize the Committee's interest in understanding the assessment, however, and we are prepared to make those documents available for review at the Department by Committee staff, with redactions of particularly sensitive information and of limited text implicating Mr. Howard's privacy interests. We hope that this significant accommodation addresses the Committee's questions regarding this matter.

The Honorable Darrell E. Issa  
The Honorable Charles E. Grassley  
Page Two

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional information about this or any other matters.

Sincerely,



Judith C. Appelbaum  
Acting Assistant Attorney General

cc:

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

The Honorable Patrick Leahy  
Chairman  
Committee on the Judiciary  
United States Senate

*Steve Caster*

**City of Phoenix**  
OFFICE OF THE POLICE CHIEF

June 7, 2011

Congressman Darrell Issa  
U.S. House of Representatives  
Washington, D.C 20515-6143

Dear Congressman Issa,

I am in receipt of your letter requesting information pertaining to aspects of investigations and reports regarding matters relating to the Bureau of Alcohol, Tobacco, Firearms and Explosives program known as Operation Fast and Furious dated June 2, 2011.

Your letter constitutes a public information request. As such, it has been forwarded to Patti Rea, the Unit Manager of our Code Enforcement Unit, Public Records Section. She will review your request for appropriate response actions and protocol.

If you have any further need for assistance, please contact our Public Records Section at 602-534-6613.

Sincerely,

JOSEPH G YAHNER  
Acting Police Chief

A handwritten signature in black ink, appearing to read "J. M. Yahner".

MICHAEL KURTENBACH, Lieutenant  
Office of Administration

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**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 07 2012

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

The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Chairman Issa and Senator Grassley:

This responds to your letter dated March 5, 2012, which requested updated information about any firearms recovered in relation to crimes of violence that are associated with an investigation by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) known as Operation Fast and Furious. Based on information collected and reviewed by ATF, there do not appear to have been any such recoveries since we last provided you information on this subject on September 9, 2011.

ATF advises that between September 2011 and May 2012, 49 firearms associated with Fast and Furious have been recovered and successfully traced, 10 in the United States and 39 in Mexico. In all of these recoveries, the trace requests for these firearms provided a crime code indicating that the firearm had not been recovered in connection with violent crime.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Judith C. Appelbaum".

Judith C. Appelbaum  
Acting Assistant Attorney General

The Honorable Darrell E. Issa  
The Honorable Charles E. Grassley  
Page Two

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

The Honorable Patrick Leahy  
Chairman  
Committee on the Judiciary  
United States Senate



Office of the Deputy Attorney General  
Washington, D.C. 20530

June 11, 2012

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

Dear Mr. Chairman:

We were surprised to learn earlier today that the Committee has scheduled a hearing to consider its draft contempt resolution arising out of the Fast and Furious investigation. As you know, over the past few weeks our staffs have met twice and had other communications in an effort to address the questions set forth in the May 18, 2012 letter from House Leadership and you to the Attorney General, and at the same time preserve the Department's legitimate interests. The conversations between our staffs have been productive and we believe that an amicable resolution of these matters is achievable. Because of this, the Committee's decision to set a hearing on its draft contempt resolution is premature.

In prior letters that the Department has sent you, I have offered to meet with you to discuss how we can reach a resolution of this matter. However, you have not responded to those offers. I continue to believe that such a meeting could be productive. I once more suggest that you and I meet to discuss these remaining issues. I am confident that the two of us, working in good faith, can bring this matter to a close.

Sincerely,

A handwritten signature in black ink, appearing to read "James M. Cole".

James M. Cole  
Deputy Attorney General

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

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STAFF DIRECTOR

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## Congress of the United States

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June 13, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001

Dear Mr. Attorney General:

I write to respond to the Deputy Attorney General letter from Monday, and to comments you made yesterday, expressing a desire to meet. As our staffs have discussed, the House Oversight and Government Reform Committee and the Department of Justice are at an impasse over documents the Department has refused to produce. Let me be clear – if the Department of Justice submits a serious proposal for how it intends to alter its refusal to produce critical documents subpoenaed by the Committee, I am ready and willing to meet to discuss your proposal.

As you may recall, a May 3, 2012, Committee memo identified three categories of documents necessary for Congress to complete its investigation into Operation Fast and Furious. On May 18, House leaders and I narrowed this request to two categories: (1) information showing the involvement of senior officials during Operation Fast and Furious, and (2) documents from after February 4, 2011, related to the Department's response to Congress and whistleblower allegations. In a June 5, 2012 letter, Deputy Attorney General James Cole described this narrowing as, "a helpful step toward reaching a resolution of the issues in dispute." The Department did not, however, indicate a willingness to comply or offer the committee *any* proposal for altering its objections to providing subpoenaed documents.

As a result of discoveries made by the Committee independent of the Justice Department's document production, on Monday, June 11, the Committee further narrowed the focus of what the Justice Department needed to produce to avoid contempt. This further accommodation, made in an effort to resolve this matter short of contempt, focused on the aforementioned relevant materials created after February 4, 2011 –after Operation Fast and Furious ended. This accommodation by the Committee effectively eliminated the dispute over information gathered during the criminal investigation of Operation Fast and Furious, prior to the announcement of indictments. Despite this proposed compromise by the Committee, the Department has not indicated a willingness to accept these terms nor has it responded with *any* offer to alter its objections to providing subpoenaed documents.

The remaining aspects of our dispute concern documents the Department refuses to produce on the grounds that they reflect internal Department deliberations. I remind you that

The Honorable Eric H. Holder, Jr.  
 June 13, 2012  
 Page 2

while courts have found that the President of the United States can exert executive privilege over materials and conversations that play a role in advising the President, Department officials – including the Attorney General – enjoy no such privilege. Putting this aside for the moment, the Department has already acknowledged that exceptions to protecting internal deliberations can be justified. The Department made such an exception when it chose to make materials available to Congress, related to the issuance of a false denial of reckless conduct in Operation Fast and Furious. During the previous Administration, the Department made similar materials available to Congress. These materials also reflected internal deliberations made available in response to a congressional investigation of the firing of several U.S. Attorneys. If the Department wishes to settle this dispute short of contempt, the Committee has offered it a clear path to do so without the need to disclose sensitive documents created during Operations Fast and Furious.

Many factors in this matter invoke not only a right, but an obligation, for Congress to do all that it can to examine the Department's mismanagement of its response to Operation Fast and Furious: the Department's false February 4 denial of improper conduct; the fact that an attorney assigned by the Justice Department to investigate whistleblower allegations has since asserted his Fifth Amendment privilege in refusing to speak with congressional investigators; the admission by former Arizona U.S. Attorney Dennis Burke that he leaked sensitive information portraying a whistleblower in a distorted and negative light; continued complaints by whistleblowers that they have faced retaliation since blowing the whistle on reckless conduct; allegations by the former Acting Director of the ATF that the Department is managing its response in a way intended to protect its political appointees; and the nine month delay before the Department formally withdrew its false February 4 denial to Congress.

In making repeated accommodations, the Committee has made a good faith effort to allow the Department to meet its obligations to comply with the Committee's subpoena. For the Department to argue otherwise without making a serious offer to alter its opposition to producing subpoenaed documents is highly disingenuous. If the Department is prepared to engage in discussions based upon a stated willingness to drop its opposition to providing material from after February 4, 2011, that may reflect internal deliberations, I ask that you indicate such intention. If the Department has another proposal for altering its objections to providing subpoenaed materials, I ask that you promptly submit that proposal for consideration as a basis for productive discussions.

Again, I appreciate your effort to resolve this dispute. I believe the interests of the Department, Congress, and those directly affected by reckless conduct in Operation Fast and Furious are best served by an agreement that renders the process of contempt unnecessary.

Sincerely



Darrell Issa  
 Chairman

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

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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BRUCE A. COHEN, *Chief Counsel and Staff Director*  
 KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

**United States Senate**  
 COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

June 14, 2012

**VIA ELECTRONIC TRANSMISSION**

The Honorable Eric H. Holder, Jr.  
 Attorney General  
 U.S. Department of Justice  
 950 Pennsylvania Avenue, NW  
 Washington, D.C. 20530

Dear Attorney General Holder:

Tuesday, in response to Senator Cornyn's call for your resignation, you responded, in part, with the following statement:

If you want to talk about Fast and Furious, I'm the Attorney General that put an end to the misguided tactics that were used in Fast and Furious. An Attorney General who I suppose you would hold in higher regard was briefed on these kinds of tactics in an operation called Wide Receiver and did nothing to stop them – nothing. Three hundred guns, at least, walked in that instance.

This is a serious charge. However, as far as I'm aware, the Justice Department has produced nothing to date that indicates any former Attorney General was briefed on Operation Wide Receiver.

I am aware that the Justice Department produced a memorandum to Attorney General Mukasey in preparation for a November 16, 2007, meeting with Mexican Attorney General Medina Mora.<sup>1</sup> At no point does this memo mention Operation Wide Receiver, in which over 300 guns were allowed to walk to Mexico. Instead, the memo appears to refer to a case called Hernandez, which involved a planned controlled delivery – not intentional gunwalking.

<sup>1</sup> Memo to the Attorney General, "Meeting of the Attorney General with Mexican Attorney General Medina Mora" (Nov. 16, 2007) [HOCR HRNDZ 003240].

The Honorable Eric H. Holder, Jr.  
June 14, 2012  
Page 2 of 2

Documents the Justice Department has produced *have* indicated that the gunwalking in Operation Wide Receiver was brought to the attention of Assistant Attorney General Lanny Breuer in April 2010 by his deputy, Jason Weinstein. Breuer's response, according to a contemporaneous e-mail from Criminal Division Gang Unit Chief James Trusty, was simply that he "want[ed] us to meet with [ATF] at some point so they know *the bad stuff that could come out.*"<sup>2</sup> Weinstein subsequently indicated to ATF Deputy Director William Hoover: "The reason we wanted to meet with you before charging is that the case has [two] aspects that could create media challenges and we wanted to talk through them first."<sup>3</sup> I have called for Breuer's resignation in part because, the evidence so far shows that he is the highest-ranking government official who was personally informed about gunwalking in any case, and he did nothing to put a stop to it.

If the Justice Department has documentation about Operation Wide Receiver which it has not yet produced and which indicate a higher level of awareness of gunwalking than has previously been indicated, such evidence should be produced immediately. Given the gravity of these allegations, I would appreciate a response by Monday, June 18, 2012. If you have any questions concerning this matter, please contact Tristan Leavitt of my staff at (202) 224-5225.

Sincerely,



Charles E. Grassley  
Ranking Member

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<sup>2</sup> E-mail from James Trusty, Acting Chief, Gang Unit, Criminal Division, DOJ, to Kevin Carwile, Chief, Capital Case Unit, Criminal Division, DOJ (Apr. 19, 2010) [HOCR 003451] (emphasis added).

<sup>3</sup> E-mail from Jason Weinstein, Deputy Assistant Attorney General, Criminal Division, DOJ, to William Hoover, Deputy Director, ATF (Apr. 20, 2010) [HOCR 003452].



Office of the Attorney General  
Washington, D. C. 20530

June 14, 2012

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

Dear Mr. Chairman:

Thank you for your letter dated June 13, 2012. I appreciate that the Committee has narrowed its request for information related to its review of Operation Fast and Furious and now no longer seeks sensitive law enforcement information arising out of that investigation. We have repeatedly expressed concern that the production of such materials would undermine the integrity and independence of the Department's core law enforcement operations. The Committee's decision not to insist on the production of those materials is an important step forward in this accommodation process.

In the last week, I have testified before both the House and Senate Judiciary Committees that the Department is prepared to compromise with the Committee in order to answer the questions set forth in the May 18, 2012, letter to me from you and House Leaders. I reiterate that offer today with a specific focus on the collection of documents to which you referred in your letter to me of June 13. More specifically, the Department is prepared to provide documents that, while outside the scope of the Committee's interest in the inappropriate tactics used in Fast and Furious, are responsive to how the Department's understanding of the facts regarding that matter evolved throughout 2011 and how the Department came to withdraw its February 4, 2011, letter to Senator Grassley. The Department is willing to accommodate the Committee's interest in those materials.

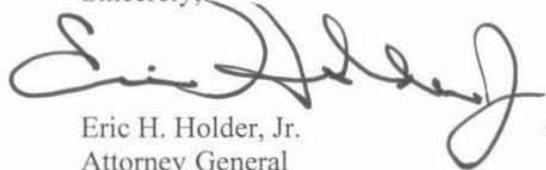
The record in this matter reflects that until allegations about the inappropriate tactics used in Fast and Furious were made public, Department leadership was unaware of those tactics. Indeed, as the documents we provided to the Committee relating to the drafting of the February 4 letter reflect, Department leaders were assured by the heads of Department components in the best position to know the true facts that the allegations being made were "categorically false." However, over a period of months in 2011, as documents to be provided to the Committee were collected and reviewed, and as witness testimony before the Committee was evaluated, Department leadership learned more and began to assess the facts of this matter independently. The Department's understanding of the facts underlying Fast and Furious became more developed, particularly as evidence came to light that was inconsistent with the initial denials

provided to Department personnel. Over time, Department leadership came to recognize that Fast and Furious was fundamentally flawed, as I noted in my October 7, 2011, letter to you and other members of Congress. And, notwithstanding numerous public statements and communications to the Committee throughout 2011 reflecting our increasing concern about what actually had happened in the operation and the accuracy of the February 4 letter, the Department took the extraordinary step of formally withdrawing that letter in early December of last year and providing unprecedented access to deliberative materials reflecting how the letter came to be drafted.

Over the past few weeks, our staffs have had productive conversations aimed at identifying relevant documentation that would respond to remaining congressional concerns about the post-February 4 period. The Department is prepared to offer an extraordinary accommodation of the Committee's interest in those issues by providing a briefing, based on documents that the Committee could retain, explaining how the Department's understanding of the facts of Fast and Furious evolved during the post-February 4 period, and the process that led to the withdrawal of the February 4 letter. We believe that this briefing, and the documents we are prepared to provide – which will include information you have requested regarding whistleblowers – will fully address the remaining concerns identified in the recent letters to me from you and House Leadership.

The Department's willingness to provide these materials is a serious, good faith effort to bring this matter to an amicable resolution. However, because as the Chairman only you have the authority to bind the committee, I continue to believe that a meeting is required both to assure that there are no misunderstandings about this matter and to confirm that the elements of the proposal we are making will be deemed sufficient to render the process of contempt unnecessary. I seek your direct engagement for precisely that reason, and I propose that the meeting occur by Monday, June 18, 2012.

Sincerely,



Eric H. Holder, Jr.  
Attorney General

cc: Speaker John Boehner  
Majority Leader Eric Cantor  
Majority Whip Kevin McCarthy  
The Honorable Elijah E. Cummings  
Ranking Minority Member  
Minority Leader Nancy Pelosi  
Minority Whip Steny Hoyer  
The Honorable James E. Clyburn  
Deputy Attorney General James M. Cole

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LAWRENCE J. BRADY  
STAFF DIRECTOR

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**Congress of the United States**  
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JACKIE SPEIER, CALIFORNIA

June 15, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Mr. Attorney General:

Thank you for your June 14, 2012, letter recognizing the substantial efforts made by the House Oversight and Government Reform Committee to narrow the scope of differences between our positions over documents created after February 4, 2011, related to Operation Fast and Furious and the Department's response to whistleblower accusations. In your letter, you repeated your readiness to produce a new subset of documents detailing how the Department's understanding of the facts of Fast and Furious evolved during the post-February 4 period and information sought by the Committee related to the treatment of whistleblower accusations, the whistleblowers themselves, and other concerns expressed by the Committee.

In a meeting yesterday, the Department offered some additional details about the subset of post-February 4 documents you are willing to produce pursuant to the Committee's October 12, 2011, subpoena. While I do have substantial concerns that these documents may not be sufficient to allow the Committee to complete its investigation, delivery of these documents to the Committee before the scheduled consideration of contempt at 10:00 a.m. on Wednesday, June 20, 2012, would be sufficient to justify the postponement of the proceeding to allow for the review of materials. Senator Grassley and I are also willing to meet with you as soon as Tuesday, June 19, 2012. It would best facilitate a constructive dialogue if the Department would produce the documents you have outlined prior to this discussion.

While I do appreciate your willingness to drop objections to providing some materials reflecting internal deliberations, I do have some remaining concerns. The Department indicated that the subset of pages it is prepared to produce numbers less than the 1,300 pages that were previously delivered to the Committee concerning the preparation of the February 4, 2011, letter that falsely denied reckless tactics. The Department has also so far declined to note how many pages from this period the Department intends to withhold from the full category of documents between February 4 and December 2, 2011. The Department has also not provided a log that includes descriptions of documents, the dates they were created, who created them, and

The Honorable Eric H. Holder, Jr.  
June 15, 2012  
Page 2

individualized explanations for why the Department believes these documents should not be produced pursuant to the subpoena. Only the Department knows what it possesses. A full understanding of the post February 4, 2011, documents under subpoena that the Department is not prepared to produce is essential for the Committee to determine whether or not the Department has substantially met its obligations.

Again, production of the documents noted in your letter and outlined yesterday in a meeting with Committee staff would be sufficient for me to justify a postponement of the Committee's scheduled vote on contempt to facilitate their review and discussions with the Department. I am prepared to announce this delay once the Department produces these documents. Please contact my staff to arrange a mutually agreeable time for us to meet.

Sincerely,



Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

The Honorable Charles E. Grassley, Ranking Member  
Committee on the Judiciary  
United States Senate

DARRELL E. ISSA, CALIFORNIA  
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June 18, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Dear Mr. Attorney General:

Thank you for today's letter and your willingness to meet tomorrow. The Committee will make its facilities in 2157 Rayburn available at 5 p.m. for this discussion.

So that expectations for this meeting are clear, and as I previously indicated in my June 15, 2012, letter, only the delivery of documents outlined and offered by the Department of Justice last Thursday to staff will be sufficient to justify a postponement of Wednesday's scheduled vote. As the Department has not yet produced these documents – and unless it does so tomorrow morning – I will not be able to offer you the Committee's assessment of them at tomorrow's meeting.

The Department earlier indicated that the subset of pages it is prepared to produce numbers less than the 1,300 pages that were previously delivered to the Committee concerning the preparation of the February 4, 2011, letter that falsely denied reckless tactics. Thus far, the Department has also declined to specify how many pages from this period it intends to withhold from the full category of documents between February 4 and December 2, 2011.

The Department has also failed to provide a log that includes descriptions of documents, the dates they were created, who created them, and individualized explanations for why the Department believes these documents should not be produced pursuant to the subpoena. Only the Department knows what it possesses. A full understanding of the post-February 4, 2011, documents under subpoena that the Department is not prepared to produce is essential for the Committee to determine whether the Department has substantially met its obligations.

The Honorable Eric H. Holder, Jr.  
June 18, 2012  
Page 2

As the Committee lacks this information, I will not be in a position tomorrow to negotiate over whether certain actions – short of full compliance – are sufficient to warrant more than a delay of contempt proceedings. There is nothing extraordinary about an offer from a Federal agency to fully or partially respond to a subpoena. I do, however, hope the Department will decide to produce the documents that would justify a postponement and will use tomorrow's discussion to better understand what steps it can take if it sincerely seeks an outcome other than the continuation of contempt proceedings.

Sincerely,

A handwritten signature in blue ink, appearing to read "Darrell Issa", is written over a printed name and title. The signature is stylized and cursive.

Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

The Honorable Charles E. Grassley, Ranking Member  
Committee on the Judiciary, United States Senate



## Office of the Attorney General

Washington, D.C. 20530

June 18, 2012

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

Dear Chairman Issa:

Thank you for your letter of June 15, 2012 and your agreement to meet on Tuesday, June 19, 2012. The Department has offered a serious, good faith proposal to bring this matter to an amicable resolution in the form of a briefing based on documents that the Committee could retain. These documents explain how the Department's understanding of the facts of Operations Fast and Furious, Wide Receiver and similar Arizona-based investigations evolved during the post-February 4 period, and the process that led to the withdrawal of the February 4 letter. We expect that this extraordinary accommodation will fully address the remaining concerns that you and House Leadership have identified in your written and oral communications to the Department over the last few weeks.

We propose to meet at 11 am on Tuesday, June 19, 2012. In light of your inclusion of Senator Grassley, and in keeping with the protocols of this investigation, we expect that Chairman Leahy and Ranking Member Cummings would also participate in order to finalize our accommodation agreement with the Committee and avoid an unnecessary Constitutional confrontation.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Holder, Jr.", with a large, stylized flourish at the end.

Eric H. Holder, Jr.  
 Attorney General

cc: Speaker John Boehner  
 Majority Leader Eric Cantor  
 Majority Whip Kevin McCarthy  
 The Honorable Elijah E. Cummins  
 Ranking Minority Member

Minority Leader Nancy Pelosi  
 Minority Whip Steny Hoyer  
 The Honorable James E. Clyburn  
 Chairman Patrick J. Leahy  
 Senator Charles E. Grassley



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 18, 2012

The Honorable Charles E. Grassley  
 Ranking Minority Member  
 Committee on the Judiciary  
 United States Senate  
 Washington, DC 20510

Dear Senator Grassley:

This responds to your letter dated June 14, 2012, in which you asked about Attorney General Holder's recent testimony that a previous Attorney General had been briefed on misguided operational tactics and taken no action in response. Attorney General Holder's testimony referred to a briefing paper prepared for Attorney General Mukasey in advance of a November 16, 2007, meeting with the Mexican Attorney General. That briefing paper notes that "ATF has recently worked jointly with Mexico on the first-ever attempt to have a controlled delivery of weapons being smuggled into Mexico by a major arms trafficker" and that "the first attempts at this controlled delivery have not been successful." It further states that "ATF would like to expand the possibility of such joint investigations and controlled deliveries – since only then will it be possible to investigate an entire smuggling network, rather than arresting simply a single smuggler." (HOCR HRNDZ 003240).

As we explained in a letter to Chairman Issa on March 16, 2012, and as you note, this briefing paper concerned the case of Fidel Hernandez, not Wide Receiver as the Attorney General inadvertently stated at the hearing. Other documents produced by the Department indicated that in the Hernandez case, ATF agents observed Hernandez's vehicle cross the border on September 27, 2007 but "the ATF MCO did not get a response from the Mexican side until 20 minutes later, who then informed us that they did not see the vehicle cross." (HOCR DOJ 006348). ATF reported that it could "still pursue U.S. prosecution if necessary (the targets returned [sic] to the U.S. within 90 minutes of the crossing)." (HOCR DOJ 006347). These documents also reflect that on October 4, 2007 "ATF agents attempted to coordinate with Mexican authorities through ATF attache's [sic] to apprehend the suspects [including Hernandez] in Mexico. The attempts were unsuccessful. Case agents believe the subjects are continuing to traffick [sic] firearms to Mexico." (HOCR DOJ 006397, HOCR DOJ 006444, HOCR DOJ 6405, and HOCR DOJ 006411).

As Attorney General Holder also noted in his testimony, and as we have set forth in prior correspondence and testimony, he took measures and instituted a series of important reforms designed to ensure that the inappropriate tactics used in Fast and Furious, Wide Receiver, Hernandez, and other matters about which the Department has informed Congress are not repeated. These measures include asking the Department's Acting Inspector General to open an investigation in response to the allegations regarding inappropriate tactics in Fast and Furious,

The Honorable Charles E. Grassley  
Page 2

directing the Deputy Attorney General to make clear to Department personnel that such inappropriate tactics should not be utilized, and replacing the leadership at both ATF and the Arizona U.S. Attorney's Office.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Judith C. Appelbaum", followed by a horizontal line extending to the right.

Judith C. Appelbaum  
Acting Assistant Attorney General

cc: The Honorable Patrick J. Leahy  
Chairman

June 19, 2012

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

Dear Mr. Chairman:

During our meeting today, the Attorney General and I reiterated our concerns about the inappropriate tactics used in Operation Fast and Furious and expressed our appreciation for the whistleblowers who brought these issues to public attention. The Department also made the good faith offer of an extraordinary accommodation to the Committee that will respond to the single outstanding question posed by House Leadership and you in your May 18, 2012 letter to the Attorney General, namely, whether the Department's February 4, 2011 letter to Senator Grassley "was part of a broader effort by your Department to obstruct a Congressional investigation." The answer to that question is an emphatic "no" and we have offered the Committee the opportunity to satisfy itself that that is so.

Today, we offered the Committee documents to answer the question it posed, as well as a briefing, information that would provide greater insight into the documents not being provided, and the ability to ask follow-up questions about these issues. We regret that the Committee rejected our proposal. Our offer would have provided the Committee with unprecedented access to these documents, many of which are not covered by the Committee's subpoenas in this matter.

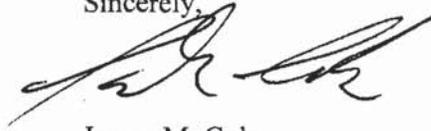
At the end of last year, the Department produced documents showing that leaders of both ATF and the Arizona U.S. Attorney's Office told Department personnel that allegations being made about Operation Fast and Furious were false and that Department personnel relied on those assertions in drafting the Department's February 4, 2011 letter to Senator Grassley. Eventually, Department leaders concluded that those assertions could not be reconciled with the information being provided by Congress and the media, and the Department therefore undertook significant efforts to understand the true facts about Operation Fast and Furious. What our review showed was that Operation Fast and Furious was just one in a series of Arizona-based investigations dating back to 2006 in the prior Administration that had used such tactics. The Department acted reasonably in waiting to formally withdraw the February 4 letter to review a large volume of electronic materials relating to these matters and to understand the full range of the issues presented.

Even before the formal withdrawal of the February 4 letter, however, Department leaders publicly indicated that the facts surrounding Operation Fast and Furious were uncertain and that

the Department did not continue to rely on the assertions in its letter to Senator Grassley. In late February, the Attorney General referred the matter to the Department's Acting Inspector General for review. And, the Department's concerns about these issues were conveyed in a variety of other ways, including in multiple appearances before congressional committees by the Attorney General and by Assistant Attorneys General. And, as you are aware, in October 2011 the Attorney General told the Committee and other congressional leaders that he believed Fast and Furious was "fundamentally flawed." Finally, the Attorney General and I implemented a series of reforms designed to ensure that the tactics used in Operation Fast and Furious and the other investigations dating back to the prior Administration are not used again.

We had hoped that you shared our interest in bringing this matter to an amicable resolution and we regret that you rejected our extraordinary proposal to do so.

Sincerely,

A handwritten signature in black ink, appearing to read "James M. Cole", written in a cursive style.

James M. Cole

cc: The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
The Honorable Elijah E. Cummings

PATRICK J. LEAHY, VERMONT, CHAIRMAN

HERB KOHL, WISCONSIN	CHARLES E. GRASSLEY, IOWA
DIANNE FEINSTEIN, CALIFORNIA	ORRIN G. HATCH, UTAH
CHARLES E. SCHUMER, NEW YORK	JON KYL, ARIZONA
RICHARD J. DURBIN, ILLINOIS	JEFF SESSIONS, ALABAMA
SHELDON WHITEHOUSE, RHODE ISLAND	LINDSEY O. GRAHAM, SOUTH CAROLINA
AMY KLOBUCHAR, MINNESOTA	JOHN CORNYN, TEXAS
AL FRANKEN, MINNESOTA	MICHAEL S. LEE, UTAH
CHRISTOPHER A. COONS, DELAWARE	TOM COBURN, OKLAHOMA
RICHARD BLUMENTHAL, CONNECTICUT	

**United States Senate**  
 COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

*BRUCE A. COHEN, Chief Counsel and Staff Director*  
*KOLAN L. DAVIS, Republican Chief Counsel and Staff Director*

June 20, 2012

**VIA ELECTRONIC TRANSMISSION**

President Barack Obama  
 The White House  
 1600 Pennsylvania Avenue, NW  
 Washington, DC 20500

Dear Mr. President:

This morning, the House Committee on Oversight and Government Reform began considering a contempt citation against Attorney General Holder for his refusal to deliver documents related to Operation Fast and Furious. As you know, two guns that federal law enforcement allowed to be illegally purchased and trafficked to Mexico as part of that operation were found at the murder scene of Border Patrol Agent Brian Terry on December 14, 2010. I have been seeking documents related to this matter from the Justice Department since January 2011.

At the last minute before the House Committee proceedings began this morning, I received notice that you were claiming executive privilege. After 18 months of investigation and interaction with Justice Department officials on this matter, this was the first indication that anyone at the Department or the White House believed the documents being sought were subject to executive privilege claims. Last week, I questioned the Attorney General about a specific example of a document that I and the House Committee have been seeking and whether there could be a legitimate claim of executive privilege over that document and others like it. The document I referenced is an internal email from the then-Acting Director of ATF to people at ATF and DOJ headquarters.

The Attorney General was not clear in response to my question whether he believed that executive privilege could be asserted with regard to that document or others like it. Rather than executive privilege, the Attorney General talked about "deliberative process." He indicated a willingness to provide that document and others like it, if the possibility of contempt were to be taken off the table. Yet this morning, it appears that you may be claiming executive privilege over the very same type of document—internal Justice Department communications not involving the White House—that the Attorney General said he was willing to provide.

Can you please provide a more precise description of the scope of your executive privilege claim? Are you asserting it only with regard to documents called for by the

President Barack Obama  
June 20, 2012  
Page 2 of 2

subpoena that may have involved communications with you? Or are you extending your claim to records of purely internal Justice Department communications, not involving the White House? Please provide a more detailed description of the documents that you are or are not asserting executive privilege to protect.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive style and is set against a light yellow rectangular background.

Charles E. Grassley  
Ranking Member

cc: Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives

June 20, 2012

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

Dear Mr. Chairman:

After you rejected the Department's recent offers of additional accommodations, you stated that the Committee intends to proceed with its scheduled meeting to consider a resolution citing the Attorney General for contempt for failing to comply with the Committee's subpoena of October 11, 2011. I write now to inform you that the President has asserted executive privilege over the relevant post-February 4, 2011, documents.

We regret that we have arrived at this point, after the many steps we have taken to address the Committee's concerns and to accommodate the Committee's legitimate oversight interests regarding Operation Fast and Furious. Although we are deeply disappointed that the Committee appears intent on proceeding with a contempt vote, the Department remains willing to work with the Committee to reach a mutually satisfactory resolution of the outstanding issues.

Over the last fourteen months, the Department has provided a significant amount of information to the Committee in an extraordinary effort to accommodate the Committee's legitimate oversight interests. The Department has provided the Committee with over 7,600 pages of documents and has made numerous high-level officials available for public congressional testimony, transcribed interviews, and briefings. Attorney General Holder has answered congressional questions about Fast and Furious during nine public hearings, including two before the Committee. The Department has devoted substantial resources to responding to these congressional inquiries.

In addition, upon learning of questions about the tactics used in Fast and Furious, the Attorney General promptly asked the Department's Acting Inspector General to open an investigation into the operation. This investigation continues today. We expect that the Inspector General's report will further help the Department to understand how these mistakes occurred and to ensure that they do not occur again.

Finally, the Department has instituted a number of significant reforms to ensure that the mistakes made in Fast and Furious are not repeated. For example, a directive was issued to the field prohibiting the flawed tactics used in that operation from being used in future law

enforcement operations. Leadership and staffing at ATF and the Arizona U.S. Attorney's Office were reorganized, and ATF instituted new policies to ensure closer supervision by ATF management of significant gun trafficking cases. The Criminal Division refined its process for reviewing wiretap authorization requests by its Office of Enforcement Operations. And component heads were directed to take additional care to provide accurate information in response to congressional requests, including by soliciting information directly from employees with detailed personal knowledge of the subject matter at issue.

The Committee's original report accompanying its contempt resolution identified three "main categories" of interest: (1) "Who at Justice Department Headquarters Should Have Known of the Reckless Tactics"; (2) "How the Department Concluded that Fast and Furious was 'Fundamentally Flawed'"; and (3) "How the Inter-Agency Task Force Failed." Committee on Oversight and Government Reform, U.S. House of Representatives, *Report* at 39-40 (June 15, 2012). With respect to the first category, the thousands of pages of documents and other information we have provided establish that the inappropriate tactics used in Fast and Furious were initiated and carried out by personnel in the field over several years and were not initiated or authorized by Department leadership. We have also provided the Committee with significant information with respect to the third category. In a revised report issued late last week, the Committee has made clear that these categories will not be the subject of the contempt vote. *See Report* at 41.

Rather, the Committee has said that the contempt vote will address only the second category, "How the Department Concluded that Fast and Furious was 'Fundamentally Flawed.'" *See Report* at 42; Letter for Eric H. Holder, Jr., Attorney General, from Darrell E. Issa, Chairman at 1-2 (June 13, 2012) ("Chairman's Letter"). In this regard, your letter of June 13 stated that the Committee is now "focused on" "documents from after February 4, 2011, related to the Department's response to Congress and whistleblower allegations" concerning Operation Fast and Furious, in order to "examine the Department's mismanagement of its response to Operation Fast and Furious." *Id.* The Committee has explained that it needs these post-February 4 documents, including "those relating to actions the Department took to silence or retaliate against Fast and Furious whistleblowers," so that it can determine "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." *Report* at 33.

The Department has gone to great lengths to accommodate the Committee's legitimate interest in the Department's management of its response to congressional inquiries into Fast and Furious. The information provided to the Committee shows clearly that the Department leadership did not intend to mislead Congress in the February 4 letter or in any other statements concerning Fast and Furious. The Department has already shared with the Committee all internal documents concerning the drafting of the February 4 letter, and numerous Department officials and employees, including the Attorney General, have provided testimony, transcribed interviews, briefings, and other statements concerning the drafting and subsequent withdrawal of that letter.

This substantial record shows that Department officials involved in drafting the February 4 letter turned to senior officials of components with supervisory responsibility for Operation Fast and Furious – the leadership of ATF and the U.S. Attorney’s Office in Arizona – and were told in clear and definitive terms that the allegations in Ranking Member Grassley’s letters were false. After the February 4 letter was sent, such assurances continued but were at odds with information being provided by Congress and the media, and the Attorney General therefore referred the matter to the Acting Inspector General for review.

As the Department’s review proceeded over the next several months, Department leaders publicly indicated that the facts surrounding Fast and Furious were uncertain and that the Department had significant doubts about the assertions in the February 4 letter. For example, at a House Judiciary Committee hearing on May 3, 2011, the Attorney General testified that the Department’s Acting Inspector General was reviewing “whether or not Fast and Furious was conducted in a way that’s consistent with” Department policy, stating “that’s one of the questions that we’ll have to see.” The next day, May 4, 2011, in response to a question from Senator Grassley at a Senate Judiciary Committee hearing about allegations that ATF had not interdicted weapons, the Attorney General said, “I frankly don’t know. That’s what the [Inspector General’s] investigation . . . will tell us.” As you have acknowledged, Department staff reiterated these doubts during a briefing for Committee staff on May 5, 2011. Testifying before the Committee in June 2011, Ronald Weich, Assistant Attorney General for Legislative Affairs, acknowledged that “obviously allegations from the ATF agents . . . have given rise to serious questions about how ATF conducted this operation.” He added that “we’re not clinging to the statements” in the February 4 letter.

In October 2011, the Attorney General told the Committee that Fast and Furious was “fundamentally flawed.” This statement reflected the conclusion that Department leaders had reached based on the significant effort over the prior months to understand the facts of Fast and Furious and the other Arizona-based law enforcement operations. The Attorney General reiterated this conclusion while testifying before Congress in November 2011. The Department’s many public statements culminated in the formal withdrawal of the February 4 letter on December 2, 2011.

The Department has substantially complied with the outstanding subpoena. The documents responsive to the remaining subpoena items pertain to sensitive law enforcement activities, including ongoing criminal investigations and prosecutions, or were generated by Department officials in the course of responding to congressional investigations or media inquiries about this matter that are generally not appropriate for disclosure.

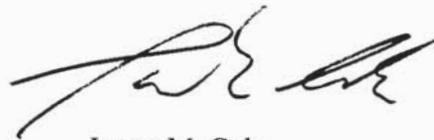
In addition to these productions, we made extraordinary accommodations with respect to the drafting and subsequent withdrawal of the February 4 letter, producing to the Committee 1,364 pages of deliberative documents. And we accepted your June 13 letter’s invitation to “mak[e] a serious offer” of further accommodation in hopes of reaching “an agreement that renders the process of contempt unnecessary.” Chairman’s Letter at 2. Specifically, we offered to provide the Committee with a briefing, based on documents that the Committee could retain,

explaining further how the Department's understanding of the facts of Fast and Furious evolved during the post-February 4 period, as well as the process that led to the withdrawal of the February 4 letter. *See* Letter for Darrell E. Issa, Chairman, from Eric H. Holder, Jr., Attorney General at 1 (June 14, 2012). We also offered to provide you with an understanding of the documents that we could not produce and to address any remaining questions that you had after you received the briefing and the documents on which it was based. We believe that this additional accommodation would have fully satisfied the Committee's requests for information. We are therefore disappointed that the Committee has not accepted our offer and has chosen instead to proceed with the scheduled contempt vote.

As I noted at the outset, the President, in light of the Committee's decision to hold the contempt vote, has asserted executive privilege over the relevant post-February 4 documents. The legal basis for the President's assertion of executive privilege is set forth in the enclosed letter to the President from the Attorney General. In brief, the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department's response to congressional oversight and related media inquiries would have significant, damaging consequences. As I explained at our meeting yesterday, it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight. Such compelled disclosure would be inconsistent with the separation of powers established in the Constitution and would potentially create an imbalance in the relationship between these two co-equal branches of the Government.

In closing, while we are deeply disappointed that the Committee intends to move forward with consideration of a contempt citation, I stress that the Department remains willing to work toward a mutually satisfactory resolution of this matter. Please do not hesitate to contact this office if we can be assistance.

Sincerely,



James M. Cole  
Deputy Attorney General

Enclosure

cc: The Honorable Elijah E. Cummings  
Ranking Minority Member



**Office of the Attorney General**  
**Washington, D. C. 20530**

June 19, 2012

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

Dear Mr. President,

I am writing to request that you assert executive privilege with respect to confidential Department of Justice (“Department”) documents that are responsive to the subpoena issued by the Committee on Oversight and Government Reform of the United States House of Representatives (“Committee”) on October 25, 2011. The subpoena relates to the Committee’s investigation into Operation Fast and Furious, a law enforcement operation conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) and the United States Attorney’s Office for the District of Arizona to stem the illegal flow of firearms from the United States to drug cartels in Mexico (“Fast and Furious”). The Committee has scheduled a meeting for June 20, 2012, to vote on a resolution holding me in contempt of Congress for failing to comply with the subpoena.

**I.**

The Committee’s subpoena broadly sweeps in various groups of documents relating to both the conduct of Operation Fast and Furious and the Department’s response to congressional inquiries about that operation. In recognition of the seriousness of the Committee’s concerns about both the inappropriate tactics used in Fast and Furious and the inaccuracies concerning the use of those tactics in the letter that the Department sent to Senator Grassley on February 4, 2011 (“February 4 Letter”), the Department has taken a number of significant steps in response to the Committee’s oversight. First, the Department has instituted various reforms to ensure that it does not repeat these law enforcement and oversight mistakes. Second, at my request the Inspector General is investigating the conduct of Fast and Furious. And third, to the extent consistent with important Executive Branch confidentiality and separation of powers interests affected by the Committee’s investigation into ongoing criminal investigations and prosecutions, as well as applicable disclosure laws, the Department has provided a significant amount of information in an extraordinary effort to accommodate the Committee’s legitimate oversight interests, including testimony, transcribed interviews, briefings and other statements by Department officials, and all of the Department’s internal documents concerning the preparation of the February 4 Letter.

The Committee has made clear that its contempt resolution will be limited to internal Department “documents from after February 4, 2011, related to the Department’s response to Congress.” Letter for Eric H. Holder, Jr., Attorney General, from Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives at 1-2 (June 13, 2012) (“Chairman’s Letter”). I am asking you to assert executive privilege over these documents. They were not generated in the course of the conduct of Fast and Furious. Instead,

they were created after the investigative tactics at issue in that operation had terminated and in the course of the Department's deliberative process concerning how to respond to congressional and related media inquiries into that operation.

In view of the significant confidentiality and separation of powers concerns raised by the Committee's demand for internal documents generated in response to the Committee's investigation, we consider the Department's accommodations regarding the preparation of the February 4 Letter to have been extraordinary. Despite these accommodations, however, the Committee scheduled a vote on its contempt resolution. At that point, the Department offered an additional accommodation that would fully address the Committee's remaining questions. The Department offered to provide the Committee with a briefing, based on documents that the Committee could retain, explaining how the Department's understanding of the facts of *Fast and Furious* evolved during the post-February 4 period, as well as the process that led to the withdrawal of the February 4 Letter. The Committee, however, has not accepted the Department's offer and has instead elected to proceed with its contempt vote.

As set forth more fully below, I am very concerned that the compelled production to Congress of internal Executive Branch documents generated in the course of the deliberative process concerning its response to congressional oversight and related media inquiries would have significant, damaging consequences: It would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight. This would raise substantial separation of powers concerns and potentially create an imbalance in the relationship between these two co-equal branches of the Government. Consequently, as the head of the Department of Justice, I respectfully request that you assert executive privilege over the identified documents. This letter sets forth the basis for my legal judgment that you may properly do so.

## II.

Executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). It is "a necessary corollary of the executive function vested in the President by Article II of the Constitution." *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (1989) ("*Congressional Requests Opinion*") (opinion of Assistant Attorney General William P. Barr); see U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. Const. art. II, § 3 (The President shall "take Care that the Laws be faithfully executed . . ."). Indeed, executive privilege "has been asserted by numerous Presidents from the earliest days of our Nation, and it was explicitly recognized by the Supreme Court in *United States v. Nixon*." *Congressional Requests Opinion*, 13 Op. O.L.C. at 154.

The documents at issue fit squarely within the scope of executive privilege. In connection with prior assertions of executive privilege, two Attorneys General have advised the President that documents of this kind are within the scope of executive privilege. See Letter for the President from Paul D. Clement, Solicitor General and Acting Attorney General, *Re: Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys at 6* (June 27, 2007) ("*U.S. Attorneys Assertion*") ("[C]ommunications between the Department of

Justice and the White House concerning . . . possible responses to congressional and media inquiries about the U.S. Attorney resignations . . . clearly fall within the scope of executive privilege.”); *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (“*WHCO Documents Assertion*”) (opinion of Attorney General Janet Reno) (concluding that “[e]xecutive privilege applies” to “analytical material or other attorney work-product prepared by the White House Counsel’s Office in response to the ongoing investigation by the Committee”).

It is well established that “[t]he doctrine of executive privilege . . . encompasses Executive Branch deliberative communications.” Letter for the President from Michael B. Mukasey, Attorney General, *Re: Assertion of Executive Privilege over Communications Regarding EPA’s Ozone Air Quality Standards and California’s Greenhouse Gas Waiver Request* at 2 (June 19, 2008) (“*EPA Assertion*”); see also, e.g., *U.S. Attorneys Assertion* at 2; *Assertion of Executive Privilege with Respect To Clemency Decision*, 23 Op. O.L.C. 1, 1-2 (1999) (“*Clemency Assertion*”) (opinion of Attorney General Janet Reno). The threat of compelled disclosure of confidential Executive Branch deliberative material can discourage robust and candid deliberations, for “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” *Nixon*, 418 U.S. at 705. Thus, Presidents have repeatedly asserted executive privilege to protect confidential Executive Branch deliberative materials from congressional subpoena. See, e.g., *EPA Assertion* at 2-3; Letter for the President from Michael B. Mukasey, Attorney General, *Re: Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff* at 2 (July 15, 2008) (“*Special Counsel Assertion*”); Letter for the President from John Ashcroft, Attorney General, *Re: Assertion of Executive Privilege with Respect to Prosecutorial Documents* at 2 (Dec. 10, 2001) (“*Prosecutorial Documents Assertion*”); *Clemency Assertion*, 23 Op. O.L.C. at 1-4; *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 29-31 (1981) (“*1981 Assertion*”) (opinion of Attorney General William French Smith).

Because the documents at issue were generated in the course of the deliberative process concerning the Department’s responses to congressional and related media inquiries into *Fast and Furious*, the need to maintain their confidentiality is heightened. Compelled disclosure of such material, regardless of whether a given document contains deliberative content, would raise “significant separation of powers concerns,” *WHCO Documents Assertion*, 20 Op. O.L.C. at 3, by “‘significantly impair[ing]’” the Executive Branch’s ability to respond independently and effectively to matters under congressional review. *U.S. Attorneys Assertion* at 6 (“the ability of the Office of the Counsel to the President to assist the President in responding to [congressional and related media] investigations ‘would be significantly impaired’ if a congressional committee could review ‘confidential documents prepared in order to assist the President and his staff in responding to an investigation by the committee seeking the documents’”) (quoting *WHCO Documents Assertion*, 20 Op. O.L.C. at 3) (alterations omitted). See generally *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 126-28, 133-35 (1996) (explaining that, under Supreme Court case law, congressional action that interferes with the functioning of the Executive Branch, including “attempts to dictate the processes of executive deliberation,” can violate general separation of powers principles); *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (congressional enactment that

“disrupts the proper balance between the coordinate branches” may violate the separation of powers).

Congressional oversight of the process by which the Executive Branch responds to congressional oversight inquiries would create a detrimental dynamic that is quite similar to what would occur in litigation if lawyers had to disclose to adversaries their deliberations about the case, and specifically about how to respond to their adversaries’ discovery requests. As the Supreme Court recognized in establishing the attorney work product doctrine, “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Were attorney work product “open to opposing counsel on mere demand,” the Court explained, “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial . . . , [a]nd the interests of the clients and the cause of justice would be poorly served.” *Id.* at 511.

Similarly, in the oversight context, as the Department recognized in the prior administration, a congressional power to request information from the Executive Branch and then review the ensuing Executive Branch discussions regarding how to respond to that request would chill the candor of those Executive Branch discussions and “introduce a significantly unfair imbalance to the oversight process.” Letter for John Conyers, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, and Linda T. Sanchez, Chairwoman, Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, from Richard A. Hertling, Acting Assistant Attorney General, Office of Legislative Affairs at 3 (Mar. 26, 2007). Such congressional power would disserve both Branches and the oversight process itself, which involves two co-equal branches of government and, like litigation, often is, and needs to be, adversarial. We recognize that it is essential to Congress’s ability to interact independently and effectively with the Executive Branch that the confidentiality of internal deliberations among Members of Congress and their staffs be protected against incursions by the Executive Branch. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) (“The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.”). It is likewise essential to the Executive Branch’s ability to respond independently and effectively to matters under congressional review that the confidentiality of internal Executive Branch deliberations be protected against incursions by Congress.

Moreover, there is an additional, particularized separation of powers concern here because the Committee’s inquiry into Fast and Furious has sought information about ongoing criminal investigations and prosecutions. Such information would itself be protected by executive privilege, *see, e.g., Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32 (1982) (opinion of Attorney General William French Smith) (“[I]t has been the policy of the Executive Branch throughout this Nation’s history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances.”). Consequently, the Department’s deliberations about how to respond to these congressional inquiries involved discussion of how to ensure that critical ongoing law enforcement actions are not compromised and that law enforcement decisionmaking is not tainted by even the appearance of political

influence. *See, e.g., id.* at 33 (noting “substantial danger that congressional pressures will influence the course of the investigation . . . [and] potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods, or strategy”) (quotation marks omitted). Maintaining the confidentiality of such candid internal discussions helps preserve the independence, integrity, and effectiveness of the Department’s law enforcement efforts.

### III.

A congressional committee “may overcome an assertion of executive privilege only if it establishes that the subpoenaed documents are ‘*demonstrably critical*’ to the responsible fulfillment of the Committee’s functions.” *Special Counsel Assertion* at 5-6 (quoting *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (emphasis added)); *see also, e.g., U.S. Attorneys Assertion* at 2 (same); *Clemency Assertion*, 23 Op. O.L.C. at 2 (same); *Nixon*, 418 U.S. at 707 (“[I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.”). “Those functions must be in furtherance of Congress’s legitimate *legislative* responsibilities,” *Special Counsel Assertion* at 5 (emphasis added), for “[c]ongressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws.” *1981 Assertion*, 5 Op. O.L.C. at 30-31. *See also, e.g., Special Counsel Assertion* at 5; *U.S. Attorneys Assertion* at 2-3; *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) (congressional oversight power may be used only to “obtain information in aid of the legislative function”); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 n.15 (1975) (“The subject of any [congressional] inquiry always must be one on which legislation could be had.”) (quotation marks omitted).

#### A.

The Committee has not satisfied the “demonstrably critical” standard with respect to the documents at issue. The Committee has said that it needs the post-February 4 documents “related to the Department’s response to Congress” concerning Fast and Furious in order to “examine the Department’s mismanagement of its response to Operation Fast and Furious.” Chairman’s Letter at 1-2. More specifically, the Committee has explained in the report that it is scheduled to consider at its June 20 contempt meeting that it needs these documents so that it can “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.” Comm. on Oversight and Gov’t Reform, U.S. House of Representatives, *Report* at 33 (June 15, 2012). House leaders have similarly communicated that the driving concern behind the Committee’s scheduled contempt vote is to determine whether Department leaders attempted to “mislead or misinform Congress” in response to congressional inquiries into Fast and Furious. *See* Letter for Eric H. Holder, Jr., Attorney General, from John A. Boehner, Speaker, U.S. House of Representatives, *et al.* at 1 (May 18, 2012) (“Speaker’s Letter”).

At the threshold, it is not evident that the Committee’s asserted need to review the management of the Department’s response to congressional inquiries furthers a *legislative* function of Congress. *See WHCO Documents Assertion*, 20 Op. O.L.C. at 4 (noting the question

of “the extent of Congress’s authority to conduct oversight of the executive branch’s response to oversight . . . must be viewed as unresolved as a matter of law in light of the requirement that there be a nexus to Congress’s legislative authority”). In any event, the purported connection between the congressional interest cited and the documents at issue is now highly attenuated as a result of the Department’s extraordinary efforts to accommodate the Committee’s interest in this regard. Through these efforts, the Department has amply fulfilled its constitutional “obligation . . . to make a principled effort to acknowledge, and if possible to meet, the [Committee’s] legitimate needs.” *1981 Assertion*, 5 Op. O.L.C. at 31; *see also, e.g., United States v. AT&T*, 567 F.2d 121, 127, 130 (D.C. Cir. 1977) (“[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. . . . Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.”).

Specifically, the Department has already shared with the Committee over 1300 pages of documents concerning the drafting of the February 4 Letter, in acknowledgment that the February 4 Letter contained inaccurate information. In addition, numerous Department officials and employees, including the Attorney General, have provided testimony and other statements concerning both the conduct of Fast and Furious and the Department’s preparation and withdrawal of the February 4 Letter. This substantial record shows that the inaccuracies in the February 4 Letter were the inadvertent product of the fact that, at the time they were preparing that letter, neither Department leaders nor the heads of relevant Department components on whom Department leaders reasonably relied for information knew the correct facts about the tactics used in Fast and Furious. Department leaders first learned that flawed tactics may have been used in Fast and Furious when public allegations about such tactics surfaced in early 2011, after such tactics had been discontinued. But Department leaders were mistakenly assured by the heads of relevant Department components that those allegations were false. As the Department collected and reviewed documents to provide to the Committee during the months after submitting the February 4 Letter, however, Department leaders came to understand that Fast and Furious was in fact fundamentally flawed and that the February 4 Letter may have been inaccurate. While the Department was developing that understanding, Department officials made public statements and took other actions alerting the Committee to their increasing concern about the tactics actually used in Fast and Furious and the accuracy of the February 4 Letter. When the Department was confident that it had a sufficient understanding of the factual record, it formally withdrew the February 4 Letter. All of this demonstrates that the Department did not in any way intend to mislead the Committee.

The Department continued its extraordinary efforts at accommodating the Committee by recently offering to provide the Committee with a briefing, based on documents that the Committee could retain, explaining further how the Department’s understanding of the facts of Fast and Furious evolved during the post-February 4 period, as well as the process that led to the withdrawal of the February 4 Letter. The Department believes that this briefing, and the accompanying documents, would have fully addressed what the Committee described as its remaining concerns related to the February 4 Letter and the good faith of the Department in responding to the Committee’s investigation. The Committee, however, has not accepted this offer of accommodation.

Finally, the Committee's asserted need for post-February 4 documents is further diminished by the Inspector General's ongoing investigation of Fast and Furious, which was undertaken at my request. As an Executive Branch official, the Inspector General may obtain access to documents that are privileged from disclosure to Congress. The existence of this investigation belies any suspicion that the Department is attempting to conceal important facts concerning Fast and Furious from the Committee. Moreover, in light of the Inspector General's investigation, congressional oversight is not the only means by which the management of the Department's response to Fast and Furious may be scrutinized.

In brief, the Committee received all documents that involved the Department's preparation of the February 4 Letter. The Committee's legitimate interest in obtaining documents created after the February 4 Letter is highly attenuated and has been fully accommodated by the Department. The Committee lacks any "demonstrably critical" need for further access to the Department's deliberations to address concerns arising out of the February 4 Letter.

## B.

The Department's accommodations have concerned only a subset of the topics addressed in the withheld post-February 4 documents. The documents and information provided or offered to the Committee address primarily the evolution of the Department's understanding of the facts of Fast and Furious and the process that led to the withdrawal of the February 4 Letter. Most of the withheld post-February 4 documents, however, relate to other aspects of the Department's response to congressional and related media inquiries, such as procedures or strategies for responding to the Committee's requests for documents and other information. The Committee has not articulated *any* particularized interest in or need for documents relating to such topics, let alone a need that would further a legislative function.

"Broad, generalized assertions that the requested materials are of public import are simply insufficient under the 'demonstrably critical' standard." *U.S. Attorneys Assertion* at 3; *see also, e.g., Congressional Requests Opinion*, 13 Op. O.L.C. at 160 ("A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information.") (quoting *1981 Assertion*, 5 Op. O.L.C. at 30)). Moreover, "Congress's legislative function does not imply a freestanding authority to gather information for the sole purpose of informing 'the American people.'" *Special Counsel Assertion* at 6. The "only informing function" constitutionally vested in Congress "is that of informing itself about subjects susceptible to legislation, not that of informing the public." *Id.* (quoting *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 531 (9th Cir. 1983)). In the absence of any particularized legitimate need, the Committee's interest in obtaining additional post-February 4 documents cannot overcome the substantial and important separation of powers and Executive Branch confidentiality concerns raised by its demand.

\* \* \* \*

In sum, when I balance the Committee's asserted need for the documents at issue against the Executive Branch's strong interest in protecting the confidentiality of internal documents generated in the course of responding to congressional and related media inquiries and the separation of powers concerns raised by a congressional demand for such material, I conclude

that the Committee has not established that the privileged documents are demonstrably critical to the responsible fulfillment of the Committee's legitimate legislative functions.

**IV.**

For the reasons set forth above, I have concluded that you may properly assert executive privilege over the documents at issue, and I respectfully request that you do so.

Sincerely,

A handwritten signature in blue ink, reading "Eric H. Holder, Jr.", with a stylized flourish at the end.

Eric H. Holder, Jr.  
Attorney General

NATIONAL RIFLE ASSOCIATION OF AMERICA  
**INSTITUTE FOR LEGISLATIVE ACTION**  
 11250 WAPLES MILL ROAD  
 FAIRFAX, VIRGINIA 22030



**NRA**

Office of the Executive Director  
**CHRIS W. COX**

June 20, 2012

The Hon. Darrell E. Issa, Chairman  
 The Hon. Elijah Cummings, Ranking Member  
 Committee on Oversight and Government Reform  
 United States House of Representatives  
 Washington, DC 20515

Dear Chairman Issa and Ranking Member Cummings:

On behalf of the National Rifle Association of America, I am writing in support of the Committee's resolution recommending that the House find Attorney General Eric H. Holder, Jr. in contempt of Congress.

Neither the Committee's vote, nor the NRA's support of the resolution, are undertaken lightly. The Committee's report thoroughly details the immediate reasons for the resolution: the Justice Department's open defiance of legitimate demands for documents that are needed for oversight and investigation of one of the most disastrous episodes in the history of federal law enforcement.

That episode, too, is now well documented. In the "Fast and Furious" program, agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives pressured reluctant firearms dealers to make sales to known straw purchasers, with the intention of allowing those firearms to be trafficked to Mexican drug cartels. The guns would only be traced after they were recovered by unwitting Mexican authorities, often after being used in violent crimes. And of course, one of those crimes—the murder of Border Patrol agent Brian Terry—took place not in Mexico, but in the United States. BATFE agents foresaw exactly this type of tragedy, but their warnings were disregarded by senior management.

Heightening the NRA's concerns—and requiring our involvement—is the White House's use of this program to advance its gun control agenda. The White House actively sought information from the operation to support its plan to demand reporting of multiple rifle sales by the nearly 9,000 federally licensed firearm dealers in border states.

It is no secret that the NRA does not admire Attorney General Holder. For years, we have pointed out his history of anti-Second Amendment advocacy and enforcement actions. Since

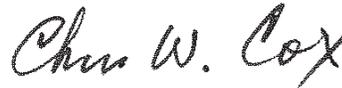
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taking office, Attorney General Holder has seized on the violence in Mexico to promote the lie that “90 percent” of firearms used in Mexican crime come from the U.S.; to call for bringing back the 1994 Clinton gun ban; and to justify the illegal multiple sales reporting scheme, which amounts to gun registration for honest Americans who buy long guns in southwest border states.

But our support of this contempt resolution is not about those issues—nor is it a partisan decision, for we have also expressed our strong policy disagreements with Attorney General Holder’s predecessors of both parties. The reason we support the contempt resolution is the same reason we first called for Attorney General Holder’s resignation more than a year ago: the Department’s obstruction of congressional oversight of a program that cost lives in support of an anti-gun agenda.

The American people—including millions of NRA members and tens of millions of NRA supporters—deserve the truth about these issues, and we will support any effort that leads us to that truth. This is an issue of the utmost seriousness and the NRA will consider this vote in our future candidate evaluations. If you have any questions about our position on this issue, please do not hesitate to contact me.

Sincerely,



Chris W. Cox  
Executive Director

cc: Speaker John Boehner  
Majority Leader Eric Cantor  
Majority Whip Kevin McCarthy  
Minority Leader Nancy Pelosi  
Minority Whip Steny Hoyer  
Members of the House of Representatives



U.S. Department of Justice

Office of the Inspector General

June 21, 2012

The Honorable Carl Levin  
Chairman  
Committee on Armed Services  
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing this letter in response to your correspondence dated May 31, 2012, regarding the nomination of Kevin A. Ohlson to be a Judge of the United States Court of Appeals for the Armed Forces.

We have reviewed our files relating to the firearms trafficking investigation known as Operation Fast and Furious for information. Based upon this review, we have not found information to indicate that Mr. Ohlson was aware of the flawed law enforcement tactics employed in Operation Fast and Furious at the time they were being used. In addition, we have not found information to indicate that, as Chief of Staff, Mr. Ohlson was given any responsibilities or duties to learn of the flawed tactics. Please note that our investigation into Operation Fast & Furious is ongoing, and if we discover information relevant to your inquiry, we will be sure to advise you.

We hope that this information is helpful for your Committee's purposes. If you have any questions, please do not hesitate to contact me or Senior Counsel Jay Lerner at (202) 514-3435.

Sincerely,

A handwritten signature in black ink that reads "Michael E. Horowitz".

Michael E. Horowitz  
Inspector General

cc: The Honorable John McCain  
United States Senate

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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RICHARD BLUMENTHAL, CONNECTICUT	

**United States Senate**  
 COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

Bruce A. Cohen, *Chief Counsel and Staff Director*  
 KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

June 25, 2012

**VIA ELECTRONIC TRANSMISSION**

The Honorable Eric H. Holder, Jr.  
 Attorney General  
 U.S. Department of Justice  
 950 Pennsylvania Avenue, NW  
 Washington, DC 20530

Dear Attorney General Holder:

I have received information that the Department of Justice headquarters may be providing boxes of Operation Fast and Furious documents to individuals at the headquarters of the Department of Homeland Security (DHS). Given the fact that the Justice Department has refused to produce large categories of documents to Congress, this is disturbing information. Since the DHS Inspector General (IG) is conducting its own investigation into Operation Fast and Furious, it also raises questions as to whether such records may have also been made available to the DHS IG.

Accordingly, please respond to the following questions:

1. Have documents regarding Operation Fast and Furious been provided to anyone in Secretary Napolitano's office? If so, which documents and for what purpose? Have such documents also been provided to the DHS IG?
2. Have documents regarding Operation Fast and Furious been provided to anyone at DHS? If so, which documents and for what purpose? Have such documents also been provided to the DHS IG?
3. Are any of the documents among those that are responsive to the October 12, 2011 subpoena, but have not been produced to the Committees? If so, which documents?

Thank you in advance for ensuring your response arrives no later than July 2, 2012. If you have any questions concerning this matter, please contact Tristan Leavitt of my staff at (202) 224-5225.

Sincerely,



Charles E. Grassley  
 Ranking Member

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

DAN BURTON, INDIANA  
JOHN L. MICA, FLORIDA  
TODD RUSSELL PLATTS, PENNSYLVANIA  
MICHAEL R. TURNER, OHIO  
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BLAKE FARENTHOLD, TEXAS  
MIKE KELLY, PENNSYLVANIA

LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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CHRISTOPHER S. MURPHY, CONNECTICUT  
JACKIE SPEIER, CALIFORNIA

June 25, 2012

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

Dear Mr. President:

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

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

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

The President  
 June 25, 2012  
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As you know, the Committee voted to recommend that the full House hold Attorney General Holder in contempt of Congress for his continued refusal to produce relevant documents in the investigation of Operation Fast and Furious. Last week's proceeding would not have occurred had the Attorney General actually produced the subpoenaed documents he said he could provide. The House of Representatives is scheduled to vote on the contempt resolution this week. I remain hopeful that the Attorney General will produce the specified documents so that we can work towards resolving this matter short of a contempt citation. Furthermore, I am hopeful that, consistent with assertions of executive privilege by previous Administrations, you will define the universe of documents over which you asserted executive privilege and provide the Committee with the legal justification from the Justice Department's Office of Legal Counsel (OLC).

### ***Background***

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

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

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

The President  
 June 25, 2012  
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During the June 19th meeting, the Attorney General stated he wanted to “buy peace.” He indicated a willingness to produce the “fair compilation” of post-February 4th documents. He told me that he would provide the “fair compilation” of documents on three conditions: (1) that I permanently cancel the contempt vote; (2) that I agree the Department was in full compliance with the Committee’s subpoenas, and; (3) that I accept the “fair compilation,” sight unseen.

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

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

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

### *The Scope of Executive Privilege*

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

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

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

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

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

The President  
 June 25, 2012  
 Page 4

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

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

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

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

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

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

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

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

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

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

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

The President  
June 25, 2012  
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***Remarks about White House Involvement in Fast and Furious***

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

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

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

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

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

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

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

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

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

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

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

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

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

The President  
 June 25, 2012  
 Page 6

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

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

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

### *Moving Forward*

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

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

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

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

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

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

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

The President  
June 25, 2012  
Page 7

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

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

I appreciate your prompt attention to this important matter.

Sincerely,



Darrell Issa  
Chairman

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

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

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

The Honorable Kathryn Ruemmler, Counsel to the President



Office of the Deputy Attorney General  
Washington, D.C. 20530

June 28, 2012

The Honorable John A. Boehner  
Speaker  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Speaker:

As you know, the President has asserted executive privilege and directed the Attorney General not to release certain documents that are responsive to the subpoena issued to the Attorney General by the Committee on Oversight and Government Reform ("Committee") in connection with its investigation into Operation Fast and Furious. That directive was based on a legal opinion from the Department of Justice advising that the assertion of privilege would be legally proper. *See* Letter for the President from Eric H. Holder, Jr., Attorney General (June 19, 2012).

Notwithstanding the President's directive, on June 20, 2012, the Committee adopted a resolution recommending that the House of Representatives cite the Attorney General for contempt. On June 22, 2012, the Committee referred its report on the resolution to the full House. And on June 28, 2012, the House adopted a contempt resolution, which calls upon you to refer the report to the United States Attorney for the District of Columbia for prosecution under the contempt of Congress statute, 2 U.S.C. §§ 192, 194.

Across administrations of both political parties, the longstanding position of the Department of Justice has been and remains that we will not prosecute an Executive Branch official under the contempt of Congress statute for withholding subpoenaed documents pursuant to a presidential assertion of executive privilege. The fullest explanation of the legal basis for the Department's position was provided during the Reagan Administration by Assistant Attorney General for the Office of Legal Counsel Theodore Olson. Mr. Olson's opinion explained that "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984) ("*Prosecution for Contempt of Congress*"). The Department has consistently adhered to this position ever since. *See, e.g., Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995) ("application of the contempt statute against an assertion of executive privilege would seriously disrupt the balance between the President and Congress") (citing *Prosecution for Contempt of Congress*).

The Honorable John A. Boehner  
Page 2

The Department relied on this longstanding position in 2008, during the George W. Bush administration, when it declined to prosecute two White House officials who were the subject of a contempt of Congress referral from the House of Representatives. Attorney General Michael Mukasey informed Speaker Nancy Pelosi that, in accord with “the Department of Justice’s longstanding position taken during Administrations of both parties, ... the Department has determined that the non-compliance by [the White House officials] with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute [them].” Letter for Nancy Pelosi, Speaker, from Michael B. Mukasey, Attorney General at 1-2 (Feb. 29, 2008). To support his decision, Attorney General Mukasey relied explicitly on Mr. Olson’s *Prosecution for Contempt of Congress* opinion, *see id.* at 1, and enclosed a letter the Department had sent the Committee the prior year more fully setting forth the Department’s position, *see* Letter for John Conyers, Jr., Chairman, Committee on the Judiciary, from Brian A. Benzckowski, Principal Deputy Assistant Attorney General, Office of Legislative Affairs (July 24, 2007). Both of these letters are enclosed.

Consistent with this uniform position and practice, the Department has determined that the Attorney General’s response to the subpoena issued by the Committee on Oversight and Government Reform does not constitute a crime, and therefore the Department will not bring the congressional contempt citation before a grand jury or take any other action to prosecute the Attorney General.

Please do not hesitate to contact me if you would like to discuss this matter further.

Sincerely,



James M. Cole  
Deputy Attorney General

Enclosures

cc: The Honorable Nancy Pelosi  
The Honorable Darrell E. Issa  
The Honorable Elijah E. Cummings

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*  
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

June 29, 2012

**VIA ELECTRONIC TRANSMISSION**

The Honorable Ronald C. Machen, Jr.  
United States Attorney  
District of Columbia  
United States Department of Justice  
555 Fourth Street, NW  
Washington, DC 20530

Dear U.S. Attorney Machen:

Last night, the Deputy Attorney General sent a letter to the Speaker of the House of Representatives saying:

The Department has determined that the Attorney General's response to the subpoena issued by the Committee on Oversight and Government Reform does not constitute a crime, and therefore the Department will not bring the congressional contempt citation before a grand jury or take any other action to prosecute the Attorney General.<sup>1</sup>

It is odd that this letter arrived before the House of Representatives had even transmitted the contempt resolution adopted yesterday to you as the "appropriate United States Attorney" under 2 U.S.C. § 194. Under that statute, the appropriate U.S. Attorney's "duty . . . **shall** be to bring the matter before the grand jury for its action."<sup>2</sup>

This language is quite clear and simple to comprehend. It is not optional.<sup>3</sup> Moreover, the law clearly assigns that duty to you and to no one else. It could have assigned the duty to the Attorney General or to the Deputy Attorney General or some other official. But, it does not. As for the ultimate decision to proceed with a prosecution after you have exercised your duty to present the matter to a grand jury,

<sup>1</sup> Letter from Deputy Attorney General James Cole to John Boehner, Speaker of the U.S. House of Representatives (June 28, 2012), at 2.

<sup>2</sup> 2 U.S.C. § 194 (2006) (emphasis added).

<sup>3</sup> See *F.T.C. v. Tarriff*, 584 F.3d 1088, 1090-1091 (D.C. Cir. 2009) (defining *shall*: "It is fixed law that words of statutes or regulations must be given their 'ordinary, contemporary, common meaning.' *Williams v. Taylor*, 529 U.S. 420, 431 (2000). It is also fixed usage that 'shall' means something on the order of 'must' or 'will'. See, e.g., Black's Law Dictionary 1407 (8th ed. 2004) (defining 'shall' as 'has a duty to; more broadly, is required to').").

The Honorable Ronald C. Machen, Jr.  
 June 29, 2012  
 Page 2 of 4

that decision is for the citizens empaneled in the grand jury, not for you or for the Deputy Attorney General or for "the Department" generally to make.

The Deputy Attorney General's letter cites the President's assertion of executive privilege as relieving you of your duty to present the contempt citation to a grand jury.<sup>4</sup> Arguably, that may be true. But, it can only be true to the extent that the assertion of executive privilege is valid as to every single document sought by the House subpoena that has been withheld. The Deputy Attorney General relies on a 1984 Office of Legal Counsel (OLC) opinion, which argues that the duty of a U.S. Attorney to present a contempt citation to a grand jury could not be constitutionally applied where there is a valid assertion of privilege.<sup>5</sup> However, the OLC opinion clearly sets forth "the caveat that our conclusions are limited to the unique circumstances that gave rise to these questions in late 1982 and early 1983."<sup>6</sup> According to the OLC opinion, "a United States Attorney is *not required* to refer a contempt citation *in these circumstances* to a grand jury or otherwise to prosecute an Executive Branch official who is carrying out the President's instruction *in a factual context such as that presented by the December 16, 1982, contempt citation.*"<sup>7</sup> Whether or not you are ultimately required by law to refer the contempt citation, nothing in the OLC opinion prohibits you from determining whether the facts here are like those in 1984. Since it is your clear duty under the statute, it is you who must undertake an independent assessment of the facts and circumstances of this case to determine whether there may be important differences between that case and this one, and therefore, the extent to which you may or may not be relieved of your duty by the assertion of executive privilege.

It does not appear possible that you could have undertaken any such independent assessment. The Deputy Attorney General's letter has put the cart before the horse. As you may or may not know, the Justice Department and the White House have refused to provide a particularized description of the documents being withheld or a description of the documents over which executive privilege has been asserted. No one can reasonably make an intelligent judgment as to the validity of a privilege claim without a specific description of the documents in question, at the very least. As the District Court for the District of Columbia recognized when it considered the contempt citations of White House officials Josh Bolton and Harriet Miers:

[B]oth the Court and the parties will need some way to evaluate privilege assertions going forward in the context of this litigation. More specifically, if the Court is called upon to decide the merits of any specific claim of privilege, it will need a better description of the documents withheld than the one found in Mr. Clement's letter of June 27, 2007.<sup>8</sup>

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<sup>4</sup> *Id.* at 1.

<sup>5</sup> 8 Op. O.L.C. 101 (1984) ("*Prosecution for Contempt of Congress*").

<sup>6</sup> *Id.* at 102.

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> Committee on Judiciary, U.S. House of Representatives v. Miers, 558 F.Supp.2d 53, 107 (D.D.C., 2008).

The Honorable Ronald C. Machen, Jr.  
June 29, 2012  
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The same principle applies to you in order to evaluate the privilege assertion and thus assess your duty under the statute. Ideally, you would undertake an actual examination of the documents in order to make an independent assessment of the validity of any privilege claim.

The Attorney General has assigned to you the duty of investigating a series of national security leaks. The Attorney General and several members of the Senate Judiciary Committee expressed supreme confidence in your ability to act independently and take the facts wherever they lead, regardless of the political consequences or any pressure to pull punches that might come from the political leadership of the Department or from the White House. Your independence and integrity were cited as the reason that there was supposedly no necessity to appoint a special prosecutor. This matter gives you an opportunity to live up to that high praise and prove your independence.

However, the way this has been handled so far suggests no such independence at all. Before you have even received the citation, before you have even had a chance to understand the scope of the documents and the privilege claim at issue, the Deputy Attorney General has already announced the decision of "the Department" not to proceed as required by the contempt statute. Therefore, so that Congress can have a better understanding of the procedural standing of this matter, please provide answers to the following questions:

- 1) Have you had any communications with the Deputy Attorney General, the Attorney General, or other senior Department political appointees about the contempt citation or about Operation Fast and Furious? If so, provide a detailed description of those communications and when they occurred.
- 2) Have you been instructed not to present the contempt citation to a grand jury? If so, when, by whom, and on what grounds?
- 3) Have you independently decided not to present the contempt citation to a grand jury? If so, when and on what basis?
- 4) Have you conducted an independent review of the documents being withheld from Congress by the Attorney General in order to assess the validity of any privilege claims? If so, when did that review occur? If not, please explain why not.
- 5) Have you been provided with copies of the documents the Attorney General is withholding from Congress or a specific list of the documents being withheld? If so, have you conducted an independent analysis of the executive privilege claim? If not, how can you conduct an independent assessment of the validity of any executive privilege claim or make any independent judgment about your duty under the contempt statute to present the contempt citation to a grand jury?

The Honorable Ronald C. Machen, Jr.  
June 29, 2012  
Page 4 of 4

Please provide written responses to each of these questions as soon as possible, but no later than July 3, 2012. Thank you for your prompt attention to this important matter. If you have any questions concerning this matter, please contact Jason Foster of my staff at (202) 224-5225.

Sincerely,



Charles E. Grassley  
Ranking Member

cc: The Honorable John A. Boehner  
The Honorable Patrick J. Leahy  
The Honorable Darrell E. Issa  
The Honorable Elijah E. Cummings

**Congress of the United States**  
Washington, DC 20510

June 29, 2012

**VIA ELECTRONIC TRANSMISSION**

Michael E. Horowitz  
Inspector General  
U.S. Department of Justice  
Office of the Inspector General  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Inspector General Horowitz:

Following yesterday's vote to hold the Attorney General in contempt of Congress, we are now concerned that the Justice Department and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) may be even more motivated to engage in acts of retaliation against the whistleblowers who brought this matter to light. We just learned that ATF senior management placed two of the main whistleblowers who have testified before Congress about Fast and Furious under the supervision of someone who vowed to retaliate against them.

Senator Grassley disclosed whistleblower allegations to the ATF about Operation Fast and Furious on January 27, 2011. At that time, Scot Thomasson was serving as Chief of ATF's Public Affairs Division. According to a direct eyewitness account, shortly after the allegations became public, he stated: "We need to get whatever dirt we can on these guys [the whistleblowers] and take them down." This information was made public on May 3, 2012 in the House Oversight and Government Reform Committee's memorandum accompanying its draft contempt report.<sup>1</sup> Not included in the report is more explicit language. Thomasson was also allegedly heard to have said: "All these whistleblowers have axes to grind. ATF needs to f—k these guys." When asked if the whistleblower allegations were true, Thomasson purportedly said he didn't know and didn't care. It is difficult to understand why ATF leadership would put two of these

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<sup>1</sup> Memorandum from Chairman Darrell Issa to Members of the Committee on Oversight and Government Reform (May 3, 2012), at 12.

courageous whistleblowers at the mercy of an individual who made such reckless, irresponsible, and inaccurate comments about them 18 months ago.

As we have learned, Thomasson had been aware of concerns about Operation Fast and Furious two weeks before Senator Grassley's first letter. On January 11, 2011, Special Agent in Charge (SAC) of the Phoenix Field Division William Newell e-mailed Thomasson: "Just heard Melson's coming for the Fast/Furious press conf on the 25th. I hope he realizes how politically charged Arizona is right now especially regarding gun issues, was that way even before the Tucson shooting."<sup>2</sup> By the next day, the Public Affairs Division at ATF Headquarters had prepared internal talking points that specifically anticipated the issue of gunwalking.<sup>3</sup> The January 12, 2011 talking points were drafted to respond to such sample questions as:

Some media reports, referencing an anonymous ATF official, claim that ATF knowingly "walked" about 1,900 firearms across the U.S.-Mexico border as part of this operation. What can you tell me about that?

...

We understand that a firearm bought in connection with this ATF investigation was used to murder Border Patrol Agent Brian A. Terry. Can you please comment on this information?<sup>4</sup>

Thomasson was also involved in the process at ATF and the Justice Department of responding to Senator Grassley's January 27, 2011, letter.<sup>5</sup>

Since allegations about Thomasson's desire to retaliate against whistleblowers have been public since May 3, 2012, and since your office should be a firm, independent voice within the Department to protect whistleblowers from retaliation, please undertake a review to determine: (1) what steps the Department has taken, if any, to admonish Thomasson about such retaliatory remarks, (2) how someone who expressed Thomasson's contempt for whistleblowers was chosen to become the Division Chief of the Firearms Operations Unit and given supervisory responsibility over those very same whistleblowers, and (3) what steps, if any, are being taken to ensure that Thomasson

<sup>2</sup> E-mail from William Newell to Scot Thomasson (Jan. 11, 2011) [HOCR 005479] (Attachment 1).

<sup>3</sup> ATF Official Statements, "Operation: Fast and Furious and Corresponding Investigations" (Jan. 12, 2011) [HOCR 005543-005546] (Attachment 2).

<sup>4</sup> *Id.* at 2.

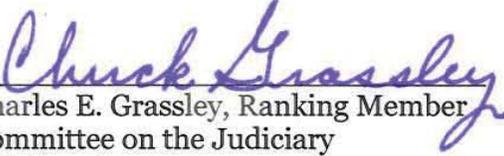
<sup>5</sup> *See, e.g.*, e-mail from Gregory Rasnake to Ron Weich, et al. (Jan. 27, 2011) [HOCR 003637] (Attachment 3).

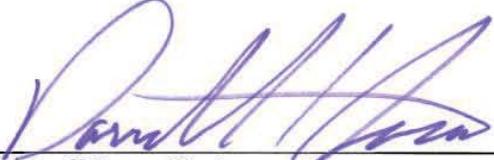
Inspector General Horowitz  
 June 29, 2012  
 Page 3 of 3

does not use his new position to engage in a campaign of retaliation along the lines he expressed a desire to conduct last year.

We would appreciate a response as soon as possible, but by no later than July 6, 2012. If you have any questions concerning this matter, please contact Tristan Leavitt of Senator Grassley's staff at (202) 224-5225, or Henry Kerner of Chairman Issa's staff at (202) 225-5074. We look forward to receiving your response.

Sincerely,

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

  
 Darrell Issa, Chairman  
 Committee on Oversight and  
 Government Reform  
 U.S. House of Representatives

cc: The Honorable Patrick J. Leahy, Chairman  
 Committee on the Judiciary, U.S. Senate

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

The Honorable James M. Cole  
 Deputy Attorney General, U.S. Department of Justice

B. Todd Jones  
 Acting Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives

July 2012

# July 2012

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**United States Senate**

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*  
 KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

July 3, 2012

**Via Electronic Transmission**

The Honorable Eric H. Holder, Jr.  
 Attorney General  
 U.S. Department of Justice  
 950 Pennsylvania Avenue, NW  
 Washington, DC 20530

Dear Attorney General Holder:

The investigation into Operation Fast and Furious has focused on two specific areas: (1) When did individuals within the Department of Justice (DOJ/Department) become aware of the tactics and (2) How did DOJ provide false information to Congress regarding the allegations of gunwalking.

I believe the Department should have been abundantly aware of allegations of gunwalking as there was more than one ATF agent providing information to Department components before the February 4, 2011, letter was sent to Congress.

Specifically, on February 2, 2011, my investigators contacted an ATF Special Agent who worked out of the Phoenix Field Division, Group VII office, and was familiar with Operation Fast and Furious. The conversation centered on the ATF Agent's recollection of how Fast and Furious was executed and his recollection confirmed the allegations my office had heard from other ATF whistleblowers. What was unknown until late 2011 was that this ATF Agent produced a memorandum on February 3, 2011, which documented his discussion about Fast and Furious. The subject of the memorandum is, "Contact with Congressional Investigators," and I have enclosed it within this letter.

This Fast and Furious memorandum traveled rapidly through ATF's chain of command. The memorandum was emailed on February 3, 2011, from the Dallas Field Division to Phoenix SAC William Newell and Deputy Assistant Director for Field Operations William McMahon. Records that the Justice Department has withheld from Congress, which were only made available for review *in camera*, show an email chain attaching this memorandum was sent to Assistant Director of Field Operations Mark Chait at ATF headquarters by the afternoon of February 3, 2011.

According to ATF personnel, the memorandum was discussed by high level ATF personnel and possibly forwarded to DOJ headquarters on February 3, 2011. Specifically, it has been alleged that individuals within the Deputy Attorney General's (DAG's) office and the Office of Legislative Affairs (OLA) at the Department were aware of or actually read the memorandum before the Department's February 4, 2011, letter was sent. Some individuals

The Honorable Eric H. Holder, Jr.  
July 3, 2012  
Page 2 of 3

who spoke with my office claim they were "alarmed" by the substance of the memorandum and it caused such a stir that ATF planned to put a panel together to address the allegations but someone within DOJ suppressed the idea.

The possibility that DOJ was aware of this memorandum on February 3, 2011, and still sent the erroneous letter to Congress on February 4, 2011, raises more questions about DOJ's claim that faulty information from Department components inadvertently led to the false letter. This was direct, documented information from street level agents in a far better position to know the facts than the senior supervisory personnel whom DOJ claims to have relied upon for information about the allegations.

Discovering how high up the chain of command inside the Justice Department the memorandum was reviewed has not been easy. The Department has not made available certain individuals who could corroborate what my office has been told. Moreover, it is unclear whether the set of "deliberative" materials about the drafting of the February 4, 2011, letter that the Department produced to Congress constitutes a complete set of all relevant documents or whether other relevant documents from the pre-February 4th timeframe may have been withheld. Consequently, please answer the following questions:

- 1) Have all records relating to the February 3, 2011, memorandum been gathered and preserved by the Justice Department? If not, why not? If so, please describe the nature and volume of those records.
- 2) Will you produce those records to Congress? If not, please explain why not.
- 3) Which DOJ personnel received a copy of the February 3, 2011, memorandum prior to February 4, 2011?
- 4) Which DOJ personnel were aware of the memorandum before the February 4, 2011 reply was sent to me? Please provide all records related to these questions, or certify that all relevant documents have already been provided.

I would appreciate a written response by no later than July 17, 2012. If you have any questions concerning this matter, please contact Brian Downey of my staff at (202) 224-5225.

Sincerely,



Charles E. Grassley  
Ranking Member

The Honorable Eric H. Holder, Jr.  
July 3, 2012  
Page 3 of 3

Enclosure

cc: The Honorable Patrick J. Leahy, Chairman  
Committee on the Judiciary, U.S. Senate

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

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

The Honorable Michael E. Horowitz, Inspector General  
U.S. Department of Justice

B. Todd Jones, Acting Director  
Bureau of Alcohol, Tobacco, Firearms, and Explosives



**U.S. Department of Justice**

Bureau of Alcohol, Tobacco,  
Firearms and Explosives

www.atf.gov

February 3, 2011

MEMORANDUM TO: Special Agent in Charge  
Dallas Field Division

THRU: Resident Agent in Charge <sup>TL</sup>  
Lubbock Field Office 2-3-2011

FROM: Gary M. Styers  
Special Agent  
Lubbock Field Office

SUBJECT: Contact with Congressional Investigators

On February 2, 2011, at approximately 1500 hours, ATF Special Agent Gary Styers was contacted telephonically by Robert Donovan and Brian Downey, representing United States Senator Chuck Grassley and the Senate Judiciary Committee. Downey and Donovan after identifying themselves asked Special Agent Styers if he would be willing to answer some questions regarding the time Special Agent Styers spent on a detail to the Phoenix Field Division, Phoenix Group VII Office. Special Agent Styers said he would be willing to answer questions to the best of his knowledge.

Special Agent Styers was asked if he was familiar with the large firearms trafficking case in Phoenix Group VII and Special Agent Styers said he was. Downey and Donovan asked if Special Agent Styers knew the name of the case and he responded that it was "Fast and Furious". Downey and Donovan then asked if Special Agent Styers knew who the case agent was and Special Agent Styers said it was Special Agent Hope McAllister. Special Agent Styers was also asked who the supervisor of the group was and Special Agent Styers said it was Group Supervisor David Voth. Downey and Donovan also asked who helped Special Agent McAllister, Special Agent Styers said that Special Agent McAllister had a Co-Case Agent from Immigration and Customs Enforcement (ICE) as well as an agent from Group VII. Downey and Donovan asked who was the Agent from ICE and Special Agent Styers told them it was Lane France.

Downey and Donovan asked Special Agent Styers if he knew what the agents were assigned to do on the investigation. Special Agent Styers explained that a group of agents were assigned to the case and that since the case was in the stage of an active wiretap, some agents were working within the group and

others were working at various functions related to the wire. Special Agent Styers further said that he did not specifically know the role of each individual agent.

Downey and Donovan inquired as to the role that Special Agent Styers had in this case and Special Agent Styers advised that he had assisted with some surveillance operations with the case. Special Agent Styers was asked to describe the operations and relayed that one of the operations was a suspected transaction that was to occur at a gas station and detailed agents were asked to cover the transaction. While positioning to observe the suspects, Special Agent Styers and other detailed agents were told by Special Agent McAllister that agents were too close and would burn the operation. Special Agent McAllister told all the agents to leave the immediate area. While the agents were repositioning, the transaction between the suspects took place and the vehicle that took possession of the firearms eventually left the area without agents following it.

Downey and Donovan asked Special Agent Styers if he ever saw guns actually go into Mexico. Special Agent Styers said he did not see any firearms cross the border to Mexico. They also asked if Special Agent Styers had worked with any agencies in Mexico, Special Agent Styers relayed that he had not, but had knowledge that other agents within Group VII spoke of communication with other ATF Special Agents assigned in Mexico.

Downey and Donovan then asked if Special Agent Styers had any knowledge that Federal Firearms Licensees (FFLs) were reporting suspected straw purchasers. Special Agent Styers explained that FFLs were indeed reporting such situations and that Special Agent Styers had numerous contacts with FFLs in the Phoenix area and had also worked inside of an FFL in an undercover capacity, while an individual attempted a large scale straw purchase. Special Agent Styers told Downey and Donovan that in speaking with the FFL holder and owner of the gun shop, he told Special Agent Styers that he had asked ATF to install cameras inside his shop and to have an undercover agent inside on a more regular basis.

Downey and Donovan inquired as to what the procedures were and who handled the calls from the FFLs when they reported such suspected transactions. Special Agent Styers told them that he had no knowledge of any special procedures. If the FFLs called during normal business hours, Special Agent Styers assumed that, if they called the office number, their call was handled by the Group Supervisor. Special Agent Styers also told Downey and Donovan that if the FFLs were calling individual agents within the group, he had no direct knowledge of those calls and what the ATF response was to those reports. However, Special Agent Styers did tell Downey and Donovan that he had heard from within the group that FFLs were calling case agents.

With regards to statistics and reporting, Downey and Donovan, questioned Special Agent Styers as to whether he had any knowledge of "padding of statistics or inconsistent reporting". Special Agent Styers advised them that he had no knowledge of a wide scale effort to skew statistics. However, Special Agent Styers relayed that he did question the Group Supervisor as to why he wanted Special Agent Styers to trace firearms that had not been recovered. Special Agent Styers was assigned to the investigation and provided the ATF Form 4473s, the Firearms Transaction Record, and told to trace said firearms. Special Agent Styers asked as to why, when ATF has the Suspect Gun Database, which is designed for such firearms that have yet to be recovered by law enforcement. Group Supervisor Voth said he wanted them traced so that if someone else traced the firearms, they would know the firearms were connected to the case Special Agent Styers was assigned. Special Agent Styers relayed that even though he disagreed with the requested procedures, he follow the request of Group Supervisor Voth. Special Agent Styers also informed Donovan and Downey that he asked several agents also assigned to Group VII if they had to submit similar firearms traces and they replied that they in fact also were told to trace all firearms in a similar fashion.

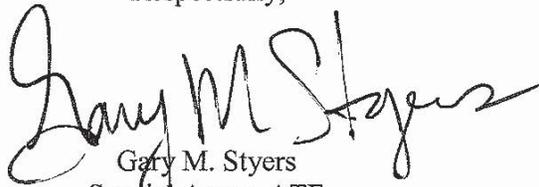
Special Agent Styers was then asked about his general impression of the Fast and Furious case. Special Agent Styers stated that the case had systematically divided and isolated agents from the group. The case agent had solicited the advice of numerous experienced agents, including Special Agent Styers, regarding how to conduct and end the wiretap operations and case overall. Special Agent Styers gave the case agent his honest opinion and advice since Special Agent Styers had worked two wiretap investigations in his career. Special Agent Styers felt that his advice and opinions, as well as other agents' advice and opinions were widely disregarded. Along with other agents within the group, Special Agent Styers explained that he was no longer asked to assist with Fast and Furious and concentrated on his assigned cases and provided necessary assistance to fellow agents within the detail and group.

Downey and Donovan asked Special Agent Styers what he felt was incorrect about the way the Fast and Furious case was conducted. Special Agent Styers explained that first and foremost, it is unheard of to have an active wiretap investigation without full time dedicated surveillance units on the ground. Special Agent Styers relayed that no agents in the group were assigned to surveillance on the Fast and Furious case. Special Agent Styers said that other agencies or task force officers may have been used to conduct surveillance and respond to calls of FFLs, but it seemed that either the case agent or Group Supervisor would poll the office for agents who were available to respond at short notice.

Secondly, Special Agent Styers said that it appeared odd to have a majority of ATF Agents working on a wiretap investigation, who had never worked such a case. Especially, when numerous, permanent Group VII agents and detailers had previous wiretap experience.

Special Agent Styers was provided with contact information for Downey and Donovan and the conversation was ended. Special Agent Styers contacted the Lubbock Resident Agent in Charge, Jim Luera at 1545 hours after the conversation with Downey and Donovan ended, to inform him of the contact. Special Agent Styers was later asked to document the conversation herein and attempted to do so to the fullest extent possible.

Respectfully,



Gary M. Styers  
Special Agent, ATF



U.S. Department of Justice

Office of the Inspector General

July 5, 2012

Honorable Darrell E. Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
2347 Rayburn House Office Building  
Washington, DC 20515

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman and Senator Grassley:

This letter responds to your correspondence dated June 29, 2012, regarding the apparent decision by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to place two whistleblowers who testified before Congress about the Fast and Furious matter under the supervision of an individual who allegedly threatened to retaliate against them.

This Office takes seriously any situation where a whistleblower may face possible retaliation, and it is important that the Department ensure that whistleblowers do not suffer retaliation. We have carefully reviewed the materials you provided, and we have initiated an investigation into this matter. Once we complete the investigation, we will be in a better position to respond to your specific inquiries.

Thank you for bringing this important matter to our attention. If you have any questions, please do not hesitate to call me or Senior Counsel Jay Lerner at (202) 514-3435.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael E. Horowitz", is written over the typed name.

Michael E. Horowitz  
Inspector General

cc: **The Honorable Patrick J. Leahy**  
**Chairman**  
**Committee on the Judiciary**  
**United States Senate**

**Honorable Elijah E. Cummings**  
**Ranking Member**  
**Committee on Oversight and Government Reform**  
**U.S. House of Representatives**

**James E. Cole**  
**Deputy Attorney General**  
**U.S. Department of Justice**

**B. Todd Jones**  
**Acting Director**  
**Bureau of Alcohol, Tobacco, Firearms and Explosives**

**Congress of the United States**  
Washington, DC 20510

July 13, 2011

**VIA ELECTRONIC TRANSMISSION**

The Honorable Harold D. Rogers  
Chairman  
Committee on Appropriations  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

We write today in response to a July 6, 2011, letter you may have received from Mayors Against Illegal Guns (MAIG) addressed to Speaker of the House John Boehner and Senate Majority Leader Harry Reid. That letter refers to the investigation that we have been conducting into the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) "Operation Fast and Furious." The letter falsely claims our investigation has been impeded by the Tiahrt Amendment, an appropriations restriction that prevents the release of firearms trace information unless the disclosure is pursuant to one of several exceptions. No exception is necessary for disclosure to Congress, however. As with all non-disclosure provisions in law, Congress does not limit its own access to information or ability to conduct oversight of the Executive Branch unless it does so explicitly.

Despite the claims by MAIG, the Tiahrt provision has not impeded our investigation. The provision has not been cited by anyone from whom we have sought information as a reason to deny our requests, and the Department of Justice (DOJ) did provide documents containing trace data pursuant to the House subpoena. However, DOJ has been slow to respond and uncooperative in other ways, leading us to ask both the Government of Mexico (GOM) and the State of Arizona for information independent of the DOJ. As is clear from our letter dated June 21, 2011, quoted by MAIG, the requests we sent to the Mexican government and to Arizona law enforcement officials were not limited to firearms on which ATF would already have records through its National Tracing Center. Rather, the request also sought information on firearms that may not yet have been traced, but that officials "believe may be connected with Operation Fast and Furious." In any event, the Tiahrt Amendment would not bind either the GOM or the State of Arizona and neither has cited it as a reason to withhold information.

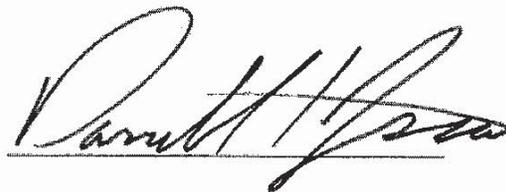
Chairman Harold Rogers  
 July 13, 2011  
 Page 2 of 2

Furthermore, anyone who has closely followed our investigation of Fast and Furious should not be surprised by the need to seek information from additional sources even if it might be held by ATF. One of our major concerns in this investigation has been the failure of ATF and DOJ to provide complete, accurate and timely responses to our questions and document requests. As long as those agencies continue to withhold key information, we will continue to look for that information wherever else it may be found.

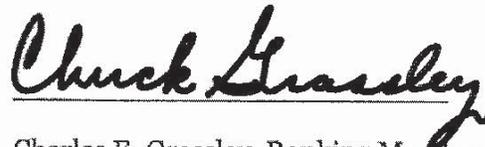
MAIG also quotes Senator Grassley's June 16, 2011, letter to ATF's Acting Director, Kenneth Melson, in a misleading manner. In that letter, Senator Grassley pointed out that "Federal law prohibits the ATF from releasing firearm trace data or multiple handgun sales reports," but only in the context of criticizing the accuracy and completeness of ATF statistical information that is *not* restricted by the Tiahrt Amendment—as Senator Grassley expressly stated in the letter.

We hope this background is helpful to you in understanding the truth about the relationship between these appropriations provisions and the investigation of Operation Fast and Furious. We would urge you and your committee to disregard MAIG's deceptive efforts to exploit that investigation as an argument for the repeal of the Tiahrt Amendment—a provision that we strongly support as necessary to protect the integrity of legitimate criminal investigations.

Sincerely,



Darrell Issa, Chairman  
 Committee on Oversight &  
 Government Reform  
 U.S. House of Representatives



Charles E. Grassley, Ranking Member  
 Committee on the Judiciary  
 United States Senate

Cc: The Honorable Frank Wolf  
 Chairman  
 House Committee on Appropriations Subcommittee on  
 Commerce, Justice, Science and Related Agencies

The Honorable Lamar Smith  
 Chairman  
 House Committee on the Judiciary



## Office of the Deputy Attorney General

Washington, D.C. 20530

July 16, 2012

The Honorable Charles E. Grassley  
 Ranking Minority Member  
 Committee on the Judiciary  
 United States Senate  
 Washington, D.C. 20515

Dear Senator Grassley:

This responds to your letter of June 29, 2012, to Ronald C. Machen, Jr., the United States Attorney for the District of Columbia, regarding the Department's decision, consistent with established legal principles adopted by administrations of both political parties, not to pursue criminal prosecution against the Attorney General for acting in accordance with the President's invocation of executive privilege.

I am responding to your letter because it raises Department-wide legal questions best addressed by the Deputy Attorney General and not by an individual U.S. Attorney, although U.S. Attorney Machen has asked that I convey to you his concurrence with the position articulated below and in my enclosed letter to Speaker John A. Boehner dated June 28, 2012. I note that, in 2008, when the Department declined to prosecute two officials in the Bush White House who were the subject of a contempt of Congress citation by the House of Representatives, that decision was conveyed to the Speaker of the House of Representatives by the Attorney General and not by the U.S. Attorney for the District of Columbia.

My letter to Speaker Boehner set forth well-settled precedent for the Department's decision not to pursue the recent contempt citation, including an opinion drafted during the Reagan administration by Assistant Attorney General for the Office of Legal Counsel Theodore Olson and the Department's reliance on that opinion in the 2008 matter noted above. These precedents are authoritative expressions of Justice Department legal interpretation regarding such matters.

Simply put, the Attorney General's response to the subpoena issued by the House Committee on Oversight and Government Reform does not constitute a crime in light of the President's assertion of executive privilege. That assertion is conclusive within the Executive Branch and thus binding on the Department, including individual U.S. Attorneys. As Assistant Attorney General Olson explained, "the fundamental balance required by the Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the Constitution." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 140 (1984) ("*Prosecution for Contempt of Congress*"). Thus, "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege." *Id.* at 102.

The Honorable Charles E. Grassley  
Page 2

The Olson opinion restates and confirms “the Department’s long-standing position that the contempt of Congress statute does not apply to executive officials who assert Presidential claims of executive privilege.” *Id.* at 129. That has been the Department position at least since 1956, when Deputy Attorney General (subsequently Attorney General) William P. Rogers explained that “in the context of Presidential assertions of the privilege, the contempt of Congress statute was ‘inapplicable to the executive departments.’” *Id.* (quoting *Hearings Before a Subcommittee of the House Committee on Government Operations*, 84<sup>th</sup> Cong., 2d Sess. 2933 (1956)).

The Department has consistently adhered to the position articulated in the Olson opinion. Most recently, as noted, Attorney General Mukasey relied on the Olson opinion when he declined to prosecute White House officials for contempt of Congress in 2008 in light of President George W. Bush’s assertion of executive privilege. *See* Letter for Nancy Pelosi, Speaker, from Michael Mukasey, Attorney General, at 1-2 (Feb. 29, 2008) (enclosed); *see also, e.g.*, Letter for John Conyers, Jr., Chairman, Committee on the Judiciary, from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, Office of Legislative Affairs (July 24, 2007) (“Benczkowski Letter”) (enclosed) (informing congressional committee that Department’s position as articulated in *Prosecution for Contempt of Congress* would apply to the White House officials if held in contempt of Congress); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995) (opinion of Assistant Attorney General Walter Dellinger) (“[T]he criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege.”).

This settled legal position compelled the Department’s decision to refrain from pursuing any criminal prosecution on the recent contempt citation. As Assistant Attorney General Olson concluded, “[t]he President, through a United States Attorney, need not, indeed *may* not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege.” *Prosecution for Contempt of Congress*, 8 Op. O.L.C. at 141 (emphasis added).

Sincerely,



James M. Cole  
Deputy Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy  
Chairman

**Congress of the United States**  
Washington, DC 20510

July 18, 2012

**Via Electronic Transmission**

Mr. B. Todd Jones  
Acting Director  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
U.S. Department of Justice  
99 New York Avenue, NE  
Washington, DC 20226

Dear Acting Director Jones:

If courageous whistleblowers within the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF/Agency) had not come forward to Congress, the tactics used in Operation Fast and Furious might never have come to light. By providing Congress key information about the shortcomings of Fast and Furious, these whistleblowers put their careers on the line to prevent reckless operational tactics from ever being employed again and to make sure the family of murdered Border Patrol Agent Brian Terry got the whole truth about their son's death. On numerous occasions, we have stressed to ATF and the Department of Justice the importance of protecting whistleblower disclosures and preventing retaliation against whistleblowers.

We recently reviewed a video message you sent to ATF employees on July 9, 2012. In this message, entitled "ChangeCast #8: Choices and Consequences," you stress to ATF employees that "if you make poor choices, that if you don't abide by the rules, that if you don't *respect the chain of command*, if you don't find the appropriate way to raise your concerns *to your leadership*, there will be consequences. . . ." The essence of whistleblowing is reporting problems outside of an employee's chain of command when the chain of command has failed to address them. In fact, for a disclosure to be legally protected, it is often necessary for the employee to report the wrongdoing to someone other than his or her supervisor.

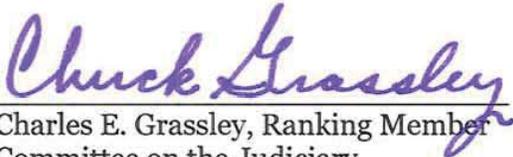
Your ominous message – which could be interpreted as a threat – is likely to have a major chilling effect on ATF employees exercising their rights to contact Congress. Therefore, it needs to be clarified.

Mr. B. Todd Jones  
 July 18, 2012  
 Page 2

You must remind ATF employees about their right to talk to Congress and provide Congress with information free and clear of agency interference or retaliation.<sup>1</sup> By clarifying your message, you will ensure that ATF employees are aware of their rights and whistleblower protections. Sometimes it is necessary to address concerns outside the chain of command, and those kinds of disclosures are protected by law and should not be threatened with unspecified "consequences." ATF managers should be required to respect protected whistleblower disclosures and held accountable when they do not. That would send a clear message that ATF will not tolerate intimidation of whistleblowers who provide information to Congress.

We would appreciate a written response by no later than July 25, 2012, indicating whether or not you intend to clarify your remarks so that they are not misunderstood and that you agree whistleblowers rights must be protected under law. If you have any questions concerning this matter, please contact Henry Kerner of the House Oversight Committee staff at (202) 225-5074 or Brian Downey of the Senate Judiciary Committee staff at (202) 224-5225.

Sincerely,



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



Darrell Issa, Chairman  
 Committee on Oversight and  
 Government Reform  
 U.S. House of Representatives

cc: The Honorable Patrick J. Leahy, Chairman  
 Committee on the Judiciary, U.S. Senate

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

The Honorable James M. Cole  
 Deputy Attorney General, U.S. Department of Justice

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<sup>1</sup> 5 U.S.C. § 7211 states:

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

**U.S. Department of Justice**

Bureau of Alcohol, Tobacco,  
Firearms and Explosives

*Office of the Director*

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Washington, DC 20226

**JUL 25 2012**

Via Hand Delivery

The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate

The Honorable Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
United States House of Representatives

Dear Ranking Member Grassley and Chairman Issa:

This is in response to your letter dated July 18, 2012, wherein you raised concerns about an internal video message entitled "ChangeCast #8: Choices and Consequences" that I recorded for the employees of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

Since becoming the Acting Director of ATF in August of 2011, I have used these brief internal video messages, or ChangeCasts, as a means to communicate efficiently with our nearly 5,000 employees throughout the country and in our international posts of duty. In developing these ChangeCasts, I have covered a number of topics of interest to our workforce, to include Trust, Morale, Mission, Change, ATF's Role in the Department of Justice, Leadership and Organizational Discipline. This latest video message, "ChangeCast #8," was designed to reinforce and highlight the importance of accountability at all levels of ATF to safe and efficient Federal law enforcement, one of the main concerns raised to me by employees in the field. At no time was I attempting to discourage, dissuade or prevent employees from making protected disclosures under Title 5 of the United States Code.

I have issued a "Special Message" to all ATF employees that clarifies the message of ChangeCast #8, and outlines the nature of the protected disclosures under the Whistleblower Protection Act.

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The Honorable Charles E. Grassley  
The Honorable Darrell Issa

Thank you for your time and consideration in this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "B. Todd Jones". The signature is written in a cursive style with a large, looping "B" and "J".

B. Todd Jones  
Acting Director

c: The Honorable Patrick J. Leahy, Chairman  
Committee on the Judiciary, U.S. Senate

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