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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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LAWRENCE J. BRADY
STAFF DIRECTOR

MEMORANDUM

June 14, 2012

To: Democratic Members of the House Committee on Oversight and Government Reform

Fr: Democratic Staff

Re: Business Meeting to Consider Motion to Hold Attorney General in Contempt

On Wednesday, June 20, 2012, at 10:00 a.m., in room 2154 of the Rayburn House Office Building, the Committee is scheduled to hold a business meeting to consider a motion by Chairman Issa to adopt a Committee report resolving to hold Attorney General Eric Holder "in contempt of Congress for failure to comply with a congressional subpoena" relating to the Committee's investigation of Operation Fast and Furious. This memo provides an update on the status of negotiations between Committee staff and the Department of Justice. It also conveys draft Dissenting Views that detail significant deficiencies with the draft Contempt Citation that remains on the Committee's agenda for Wednesday.

I. STATUS OF NEGOTIATIONS

It is unclear as of the date of this memo whether the Committee and the Department will reach an agreement to avoid contempt. Recent events include the following:

- On Monday, Chairman Issa officially notified Committee Members that he had scheduled a business meeting on June 20, 2012, to vote on his Contempt Citation. At the same time, he issued a press release stating that "the Justice Department can still stop the process of contempt" by producing documents created after February 4, 2011, "related to Operation Fast and Furious and whistleblower accusations subpoenaed by the Committee." Chairman Issa also stated that he was "confident we can reach agreement on other materials and render the process of contempt unnecessary."
- Later on Monday, Deputy Attorney General James Cole wrote to Chairman Issa stating that, although the Department was surprised that the Committee had scheduled a vote on the Contempt Citation, he believes that "conversations between our staffs have been productive" and that "an amicable resolution of these matters is achievable." He also renewed his previous offers to meet personally in order to reach a resolution.

- On Tuesday, Ranking Member Cummings wrote to Chairman Issa requesting that they jointly accept the offer by Deputy Attorney General Cole to meet in person. He also wrote: “If we can recognize the valid interests of the Department in protecting the independence of its ongoing criminal investigations and prosecutions, I believe we can work together toward a timely resolution of this matter.”
- Later on Tuesday, the Attorney General testified before the Senate Judiciary Committee that he is “prepared to make compromises with respect to the documents that could be made available,” and he offered to meet with House Speaker John Boehner and Chairman Issa personally.
- On Wednesday, Chairman Issa sent a letter to the Attorney General stating that he was narrowing the categories of documents he was demanding to one: “documents from after February 4, 2011, related to the Department’s response to Congress and whistleblower allegations.” He also wrote: “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.”

It is expected that negotiations will continue through the end of the week, and perhaps into next week. Ranking Member Cummings issued the following statement on the status of the ongoing negotiations:

I am guardedly optimistic that a path forward exists that will serve the legitimate interests of the Committee in conducting rigorous oversight, protect the legitimate interests of the Department in its ongoing investigations and prosecutions, and avoid the needless politicization of this very serious issue.

II. DISSENTING VIEWS

Since the business meeting scheduled for next Wednesday has not been postponed or removed from the Committee’s calendar, it is important for Committee Members to be fully prepared in the event that negotiations are unsuccessful.

Committee Rule 4(b) provides that a proposed Committee report, such as the Contempt Citation, “shall not be considered in the committee unless the proposed report has been available to the members of the committee for at least three calendar days.” Chairman Issa circulated this Contempt Citation to Committee Members on May 3, 2012, fulfilling this requirement.

Attached for your review are draft Dissenting Views that are based on a thorough review of the Contempt Citation, which was provided to Committee Members on May 3, as well as the legal and historical precedents of the Committee and Congress. The draft Dissenting Views make the following conclusions:

- The Contempt Citation, as circulated by the Chairman, is irresponsible, unprecedented, and contrary to the rule of law.

- It would hold the Attorney General in contempt not only for complying with statutes passed by Congress that require him to protect documents from disclosure, but also for withholding documents relating to ongoing criminal investigations that have been protected consistently by Democratic and Republican administrations to safeguard the lives of informants and ensure the integrity of active criminal investigations.
- Holding the Attorney General in contempt of Congress for protecting these documents is an extreme and blatant abuse of the congressional contempt power that undermines the credibility of the Committee.
- The House of Representatives has never in its history voted to hold a sitting Attorney General in contempt of Congress for protecting such documents, and it should not do so in this case.
- The Contempt Citation inaccurately cites as precedent the Committee's investigation of the leak of the covert status of CIA operative Valerie Plame Wilson in 2007 and 2008. The Contempt Citation omits the key fact that then-Chairman Henry A. Waxman delayed the Committee's review of law enforcement documents at the request of Patrick Fitzgerald, the U.S. Attorney and Special Prosecutor investigating the leak, until after I. Lewis "Scooter" Libby, Vice President Dick Cheney's chief of staff, was convicted and sentenced for obstructing justice, perjury, and making false statements.
- The only other precedent referenced in the Contempt Citation for holding a sitting Attorney General in contempt for refusing to provide documents that impact an ongoing criminal investigation is this Committee's vote in 1998 to hold then-Attorney General Janet Reno in contempt during the campaign finance investigation conducted by then-Chairman Dan Burton. Chairman Burton's investigation was widely discredited, and the decision to hold the Attorney General in contempt was criticized by editorial boards across the country as "a gross abuse of his powers as chairman of the committee," a "fishing expedition," "laced with palpable political motives," and "showboating." Then-Speaker Newt Gingrich never held a vote on the House floor.
- The Contempt Citation fails to honor the Constitutional requirement to avoid unnecessary conflict with the Executive Branch because it disregards the Department's significant accommodation of producing to the Committee a host of internal documents relating to the Department's responses to this investigation.
- Rather than conducting this investigation in an even-handed manner, the Committee has politicized this inquiry by systematically refusing to investigate gunwalking operations during the Bush Administration and by disregarding clear evidence that contradicts the political narrative in the Contempt Citation.
- The Chairman has refused multiple requests for former Attorney General Michael Mukasey to testify before the Committee or to meet with Committee Members informally to discuss the origination and evolution of gunwalking operations since 2006. Documents obtained during the investigation indicate that Mr. Mukasey was briefed

personally on botched efforts to coordinate firearm interdictions with Mexican law enforcement officials in 2007 and was informed directly that such efforts would be expanded during his tenure.

- In one of the most significant flaws of the investigation, the Chairman refused requests to hold a public hearing with Kenneth Melson, the former head of ATF, the agency responsible for conducting these operations. The Chairman's refusal came after Mr. Melson told Committee investigators privately in July 2011 that he never informed senior officials at the Justice Department about gunwalking during Operation Fast and Furious because he was unaware of it himself.
- The investigation of Operation Fast and Furious has been characterized by a series of unsubstantiated allegations against the Obama Administration that later turned out to be inaccurate. For example, during an interview on national television on October 16, 2011, the Chairman accused the Federal Bureau of Investigation (FBI) of concealing evidence of the murder of Agent Brian Terry by hiding a "third gun" found at the murder scene. The FBI demonstrated quickly that this claim was completely unsubstantiated. Although the Chairman admitted during a subsequent hearing that "we do go down blind alleys regularly," he never apologized to the FBI agents he accused of a cover-up.

Please contact Democratic Committee staff at (202) 225-5051 with any questions.

DISSENTING VIEWS

Report of the Committee on Oversight and Government Reform

Resolution Recommending that the House of Representatives Find Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, in Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Committee on Oversight and Government Reform

On May 3, 2012, Committee Chairman Darrell Issa circulated to Committee Members a draft report and resolution (hereinafter “Contempt Citation”) concluding that Attorney General Eric H. Holder, Jr., the chief law enforcement officer of the United States, should be held in contempt of Congress for declining to produce certain documents pursuant to the Committee’s investigation of “gunwalking” during Operation Fast and Furious.¹ The Chairman subsequently scheduled a Committee business meeting on June 20, 2012, for Members to vote on this Contempt Citation.²

These dissenting views conclude that the Contempt Citation, as circulated by the Chairman, is irresponsible, unprecedented, and contrary to the rule of law. It would hold the Attorney General in contempt not only for complying with statutes passed by Congress that require him to protect documents from disclosure, but also for withholding documents relating to ongoing criminal investigations that have been protected consistently by Democratic and Republican administrations to safeguard the lives of informants and ensure the integrity of active criminal investigations.

Holding the Attorney General in contempt of Congress for protecting these documents is an extreme and blatant abuse of the congressional contempt power that undermines the credibility of the Committee. The House of Representatives has never in its history voted to hold a sitting Attorney General in contempt of Congress for protecting such documents, and it should not do so in this case.

Disregarding these facts and moving ahead with this Contempt Citation—while at the same time ignoring documented evidence of gunwalking operations during the previous administration—exposes the Committee’s action as a politically-motivated, election-year witch hunt rather than a legitimate exercise of congressional oversight designed to develop reform measures to combat the flow of illegal weapons.

Documents Protected by Federal Law

One of the key sets of documents demanded during this investigation has been federal wiretap applications submitted by law enforcement agents in order to obtain a federal court’s approval to secretly monitor the telephone calls of individuals suspected of gun trafficking. The Contempt Citation asserts that the Attorney General should be held in contempt because he “refused to comply with Congressional subpoenas related to Operation Fast and Furious.”³ In particular, the Contempt Citation describes in detail the Attorney General’s failure to produce wiretap applications subpoenaed by the Chairman in October 2011:

The wiretap applications document the extensive involvement of the Criminal Division in Fast and Furious, yet the Department of Justice failed to produce them in response to the Committee's subpoena.⁴

It contradicts the rule of law to hold the Attorney General in contempt for abiding by a federal criminal statute, which is precisely what the Contempt Citation does. The federal wiretapping statute, which was passed by Congress and signed by President Lyndon B. Johnson on June 19, 1968, provides for a penalty of up to five years in prison for the unauthorized disclosure of wiretap communications and prohibits the unauthorized disclosure of wiretap applications approved by federal judges, who must seal them to protect against their disclosure.⁵ The statute states:

Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction. ... Applications made and orders granted under this chapter shall be sealed by the judge.⁶

Although the Chairman stated at a hearing before the House Judiciary Committee on June 7, 2012, that he never subpoenaed these documents, his statements directly contradict the text of the Contempt Citation, which states explicitly that the Attorney General should be held in contempt for not producing them.⁷ This is not a valid foundation on which to base a contempt holding.

Documents Protected by Grand Jury Secrecy Rules

It is also inappropriate to hold the Attorney General in contempt for complying with other federal laws that require documents to be protected. For example, in 1940, Congress passed a statute giving the Supreme Court the power to prescribe rules of pleading, practice, and procedure in criminal cases.⁸ In 1946, the modern grand jury secrecy rule was codified as Rule 6(e) of the Federal Rules of Criminal Procedure, which provides for criminal penalties for disclosing grand jury information.⁹ The Department has explained this to the Committee repeatedly, including in a letter on May 15, 2012:

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.¹⁰

Although the Chairman's Contempt Citation acknowledges the Department's explanations, it nevertheless concludes:

The Department has impeded the ability of a co-equal branch of government to perform its constitutional duty to conduct Executive Branch oversight. By any measure, it has obstructed and slowed the Committee's work.¹¹

This faulty conclusion is not a valid basis for a contempt holding. The Committee should not hold the Attorney General in contempt for complying with the law.

Documents Relating to Ongoing Investigations and Prosecutions

It is also inappropriate to hold the Attorney General in contempt for protecting documents relating to ongoing criminal investigations and prosecutions, such as Reports of Investigation, which could endanger the lives of informants and their families and jeopardize active criminal investigations and prosecutions if disclosed. These documents have been protected consistently by Democratic and Republican administrations. As Theodore Olsen explained when he served as Assistant Attorney General in 1984:

Since 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.¹²

The Contempt Citation inaccurately cites as precedent the Committee's investigation of the leak of the covert status of CIA operative Valerie Plame Wilson in 2007 and 2008. The Contempt Citation asserts that the Committee's investigation was "contemporaneous" with the Department's criminal investigation and that the Committee reviewed Federal Bureau of Investigation (FBI) reports of witness interviews, referred to as "302s." According to the Contempt Citation, "in spite of" this precedent, the Department in the present case "has refused to produce those documents to the Committee or to allow staff an *in camera* review."¹³

The Contempt Citation omits the key fact that then-Chairman Henry A. Waxman delayed the Committee's review of law enforcement documents at the request of Patrick Fitzgerald, the U.S. Attorney and Special Prosecutor investigating the leak, until after I. Lewis "Scooter" Libby, Vice President Dick Cheney's chief of staff, was convicted and sentenced for obstructing justice, perjury, and making false statements.¹⁴ Only then did the Committee obtain access to these documents.¹⁵ Even then, Mr. Fitzgerald continued to redact and withhold any documents that he felt could impact Mr. Libby's appeal, as well as grand jury documents, and internal deliberative materials.¹⁶

The only other precedent referenced in the Contempt Citation for holding a sitting Attorney General in contempt for refusing to provide documents that impact an ongoing criminal investigation is this Committee's vote in 1998 to hold then-Attorney General Janet Reno in contempt during the campaign finance investigation conducted by then-Chairman Dan Burton.¹⁷ Chairman Burton's investigation was widely discredited, and the decision to hold the Attorney General in contempt was criticized by editorial boards across the country as "a gross abuse of his powers as chairman of the committee,"¹⁸ a "fishing expedition,"¹⁹ "laced with palpable political motives,"²⁰ and "showboating."²¹ Then-Speaker Newt Gingrich never held a vote on the House floor.²²

Documents Relating to Correspondence with Congress

The Contempt Citation fails to honor the Constitutional requirement to avoid unnecessary conflict with the Executive Branch because it disregards the Department's significant accommodation of producing to the Committee a host of internal documents relating to the Department's responses to this investigation.

Under the Constitution, both Congress and the Executive Branch are required to accommodate the interests of the other in order to avoid unnecessary conflict. As the D.C. Circuit Court has explained, the Framers expected that "where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in a manner most likely to result in efficient and effective functioning of our governmental system."²³ Similarly, Attorney General William French Smith, who served under President Ronald Reagan, stated:

The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.²⁴

On February 4, 2011, the Department wrote a letter in response to Senator Charles Grassley denying the allegation that ATF "knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico" and stating that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico."²⁵ On December 2, 2011, the Department formally withdrew this letter, stating that "facts have come to light during the course of this investigation that indicate that the February 4 letter contains inaccuracies."²⁶ The Committee's October 2011 subpoena demanded the production of internal Department communications relating to how the February 4 letter was drafted and sent to Congress with this inaccurate statement.

In a letter to the Committee on May 15, 2012, the Department explained that, under normal circumstances, Executive Branch agencies do not disclose internal deliberative communications about how to respond to congressional inquiries:

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.²⁷

Nevertheless, in this case, due to the inaccuracy in the February 4 letter, the Department made a significant accommodation and deviated from this historical practice by producing a wide range of internal communications leading up to the February 4 letter. These documents demonstrate that officials in the Office of Legislative Affairs who were responsible for drafting the letter did not intentionally mislead Congress, but instead relied on inaccurate assertions and strong denials from officials "in the best position to know the relevant facts: ATF and the U.S. Attorney's Office in Arizona, both of which had responsibility for Operation Fast and Furious."²⁸

Despite these facts, the Chairman's Contempt Citation would hold the Attorney General in contempt for failing to produce additional internal Department communications after the February 4 letter was sent. The Contempt Citation disregards the significant accommodation made by the Department, as well as the facts contained in the documents produced to the Committee pursuant to this accommodation.

The Attorney General and the Deputy Attorney General have offered on six separate occasions to meet with the Chairman personally to work towards a compromise that serves the legitimate interests of both the Committee and the Department.²⁹ Chairman Issa has yet to hold such a meeting.

Needless Politicization of Investigation

Rather than conducting this investigation in an even-handed manner, the Committee has politicized this inquiry by systematically refusing to investigate gunwalking operations during the Bush Administration and by disregarding clear evidence that contradicts the political narrative in the Contempt Citation.

For example, despite promising that he would be "investigating a president of my own party because many of the issues we're working on began on President Bush," the Chairman has refused multiple requests for former Attorney General Michael Mukasey to testify before the Committee or to meet with Committee Members informally to discuss the origination and evolution of gunwalking operations since 2006.³⁰ Documents obtained during the investigation indicate that Mr. Mukasey was briefed personally on botched efforts to coordinate firearm interdictions with Mexican law enforcement officials in 2007 and was informed directly that such efforts would be expanded during his tenure.³¹

In one of the most significant flaws of the investigation, the Chairman refused requests to hold a public hearing with Kenneth Melson, the former head of ATF, the agency responsible for conducting these operations.³² The Chairman's refusal came after Mr. Melson told Committee investigators privately in July 2011 that he never informed senior officials at the Justice Department about gunwalking during Operation Fast and Furious because he was unaware of it himself.³³ Mr. Melson's statements directly contradict the claim in the Contempt Citation that senior Justice Department officials were aware of gunwalking because Gary Grindler, then-Acting Deputy Attorney General, "received an extensive briefing on Fast and Furious" from Mr. Melson in March 2010.³⁴

The Committee also failed to conduct interviews of other key figures. For example, the Committee did not respond to a request to interview Alice Fisher, who served as Assistant Attorney General in charge of the Criminal Division from 2005 to 2008, about her role in authorizing wiretaps in Operation Wide Receiver, or to a request to interview Deputy Assistant Attorney General Kenneth Blanco, who also authorized wiretaps in Operation Fast and Furious and still works at the Department, but who was placed in his position under the Bush Administration in April 2008.³⁵ No explanation for these refusals has been given.

Unsubstantiated Claims

While refusing to investigate Bush Administration operations, the investigation of Operation Fast and Furious has been characterized by a series of unsubstantiated allegations against the Obama Administration that later turned out to be inaccurate.

For example, during an interview on national television on October 16, 2011, the Chairman accused the Federal Bureau of Investigation of concealing evidence of the murder of Agent Brian Terry by hiding a “third gun” found at the murder scene.³⁶ The FBI demonstrated quickly that this claim was completely unsubstantiated.³⁷ Although the Chairman admitted during a subsequent hearing that “we do go down blind alleys regularly,” he never apologized to the FBI agents he accused of a cover-up.³⁸

At the same time, the Chairman has defended the previous Administration’s operations as “coordinated.”³⁹ In response to a question about gunwalking during the Bush Administration, the Chairman stated: “We know that under the Bush Administration there were similar operations, but they were coordinated with Mexico. They made every effort to keep their eyes on the weapons the whole time.” To the contrary, a detailed 95-page staff report issued by Ranking Member Cummings on January 31, 2012, documents at least three operations during the previous Administration in which coordination efforts were either non-existent or severely deficient.⁴⁰

The Chairman has also stated repeatedly that senior Justice Department officials were “fully aware” of gunwalking in Operation Fast and Furious.⁴¹ After conducting two dozen transcribed interviews, none of the witnesses who spoke with Committee investigators said they informed the Attorney General or other senior Department officials about gunwalking in Operation Fast and Furious. Instead, the heads of the agencies responsible for the operation—ATF and the U.S. Attorney’s Office—told Committee investigators just the opposite, that they never informed senior Department officials about gunwalking in Operation Fast and Furious because they were unaware of it.⁴²

In addition, although the Chairman has stated that the contents of wiretap applications in Operation Fast and Furious should have alerted senior Department officials to gunwalking, the undisputed testimony before the Committee is that senior officials under Democratic and Republican administrations did not read wiretap applications, but instead reviewed summaries prepared by Department line attorneys.⁴³

Failure to Engage in Constructive Reform Efforts

The Committee has failed to entertain constructive and common-sense proposals to provide law enforcement agents with the legal tools they have requested to combat gun trafficking or to develop reforms to the federal wiretap approval process.

On June 15, 2011, the Committee held a hearing with three ATF field agents who brought to light gunwalking allegations in Operation Fast and Furious.⁴⁴ These agents and others warned about the increasingly dire problem of U.S. firearms flooding into Mexico, including tens

of thousands of military-grade assault weapons illegally trafficked each year. They discussed specific improvements to current law that would allow them to counter firearms trafficking by Mexican drug cartels more effectively, including stronger criminal penalties for illegal straw purchasers, the enactment of a dedicated illegal firearms trafficking statute, and requiring reports of multiple long gun purchases.⁴⁵

During the June 15 hearing, the Chairman attempted repeatedly to cut off questioning about these topics by Committee Member Carolyn Maloney and instructed the ATF witnesses not to answer her questions because they were outside the scope of the hearing and “would not be considered valid testimony.”⁴⁶ Ranking Member Cummings and Rep. Maloney subsequently held a forum with panelists to discuss the reform proposals, issued a staff report detailing the specific deficiencies in current law, and introduced legislation to remedy these defects.⁴⁷

In response to the efforts of Ranking Member Cummings and Rep. Maloney, the Mexican Ambassador to the United States sent a letter on June 30, 2011, that expressed his gratitude for their “dedication and perseverance,” and noted that “there are several actions that the United States Congress and the Administration can take to reduce the number of weapons that cross the border illegally.”⁴⁸

Separately, the Contempt Citation states that one reason the Committee has been investigating Operation Fast and Furious is to evaluate “whether reconsideration of the statutory provisions governing the approval of federal wiretap applications may be necessary.” According to the Contempt Citation:

Procedural improvements may need to be codified in statute to mandate immediate action in the face of highly objectionable information relating to operational tactics and details contained in future applications.⁴⁹

However, the Committee has taken no steps toward this goal. On June 5, 2012, Ranking Member Cummings wrote to the Chairman to propose “a series of meetings with Committee Members to hear directly from various current and former officials with the purpose of weighing possible consensus reforms to the wiretap review process.” Specifically, he suggested meetings with Michael Chertoff, who served in the Justice Department under both Democratic and Republican administrations before President George W. Bush appointed him to a seat on the United States Court of Appeals for the Third Circuit, and James B. Comey, who served as Deputy Attorney General during the Bush Administration and worked in several U.S. Attorneys Offices during the Clinton Administration.⁵⁰ The Chairman did not respond to this proposal.

Conclusion

It is fundamentally inaccurate to describe the actions of the Attorney General or the Department as obstructing the Committee’s work, as the Contempt Citation does.⁵¹ For the reasons described above, we respectfully dissent and will vote against the contempt resolution.

The evidence before the Committee is that the Attorney General acted quickly and decisively as soon as he learned that gunwalking occurred during Operation Fast and Furious. He called immediately for an investigation by the Department's Inspector General, and unlike his predecessor, who was briefed personally in 2007 on interdiction failures during Operation Wide Receiver, he put an end to this tactic.⁵²

The Attorney General has now testified nine times before Congress about Operation Fast and Furious. The Department has collected data from 240 custodians and made 46 document productions to the Committee totaling more than 7,600 pages. The Department has also made available two dozen officials for public hearings and transcribed interviews with Committee staff.⁵³

Since this controversy became public, the Department has removed, reassigned, or accepted the resignation of the following officials: the Acting Director of ATF; the Acting Deputy Director of ATF; the Assistant Director for Field Operations of ATF; the Deputy Assistant Director for Field Operations of ATF; the Special Agent in Charge in ATF's Arizona Field Office; the Assistant Special Agent in Charge in ATF's Arizona Field Office; the Group Supervisor in ATF's Arizona Field Office; the U.S. Attorney for the District of Arizona; the Chief of the Criminal Division in the U.S. Attorney's Office; and the Unit Chief and line prosecutor in the U.S. Attorney's Office.⁵⁴

The Attorney General has overseen significant administrative changes to processes and procedures within the Department and ATF. The Department has issued new guidance reiterating the prohibition against gunwalking; provided additional training to ATF agents regarding that guidance and other cross-border firearms trafficking issues; required supervisors in U.S. Attorneys Offices to review and approve wiretap applications; implemented a new program to increase coordination and oversight of ATF field operations; and restructured ATF's Office of the Ombudsman to devote additional resources to the handling of agent complaints.⁵⁵

The Attorney General has also overseen improvements to ensure the accuracy and completeness of information provided to Congress, including a directive from the Deputy Attorney General requiring Department components to solicit information from employees with detailed personal knowledge of the relevant subject matter and to have senior component managers take responsibility for reviewing draft responses to Congress.⁵⁶

There is widespread agreement among Democrats and Republicans in Congress, as well as the Attorney General, that gunwalking is a dangerous and misguided tactic that should never be used. The Chairman should be commended for helping to expose a series of gunwalking operations conducted by ATF field agents in Arizona over a span of five years dating back to the Bush Administration. We cannot support this Contempt Citation, however, which holds the Attorney General to an impossible standard by demanding documents the Committee knows he cannot produce, and by disregarding our Constitutional obligation to avoid conflict and seek accommodations when possible.

ENDNOTES

¹ Memo from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to Committee Members (May 3, 2012) (attaching Report of the Committee on Oversight and Government Reform on Resolution Recommending that the House of Representatives Find Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, in Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Committee on Oversight and Government Reform).

² House Committee on Oversight and Government Reform, *Advance Notice* (June 11, 2012).

³ Contempt Citation, at i.

⁴ *Id.* at 9.

⁵ Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968, June 19, 1968; 18 U.S.C. § 2511(4)(a) (providing that violators “shall be fined under this title or imprisoned not more than five years, or both”); 18 U.S.C. §2511(1)(e) (covering any person who “intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized” under this chapter).

⁶ 18 U.S.C. § 2518(1), 2518(8).

⁷ House Committee on the Judiciary, *Hearing on Oversight of the United States Department of Justice* (June 7, 2012) (stating that “we did not request any wiretaps under seal” and that “I’m the person who signed the subpoenas”).

⁸ Sumner Courts Act, Pub. L. No. 76-675, 54 Stat. 688 (1940).

⁹ Fed. R. Crim. Pro. 6(e)(7) (providing that a knowing violation of Rule 6 “may be punished as a contempt of court”). *See also* 18 U.S.C. §401(3) (providing that a “court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority”).

¹⁰ Letter from James Cole, Deputy Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 15, 2012).

¹¹ Contempt Citation, at 21-22.

¹² *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101 (1984).

¹³ Contempt Citation, at 42-43.

¹⁴ Letter from Patrick J. Fitzgerald, Special Counsel, Department of Justice, to Chairman Henry A. Waxman, House Committee on Oversight and Government Reform (Mar. 14, 2007); Letter from Chairman Henry A. Waxman, House Committee on Oversight and Government Reform, to Patrick J. Fitzgerald, Special Counsel, Department of Justice (July 16, 2007); *United States v. Libby*, Crim. No. 05-394 (RBW), Order (D.D.C. July 3, 2007).

¹⁵ Letter from Patrick J. Fitzgerald, Special Counsel, Department of Justice, to Chairman Henry A. Waxman, House Committee on Oversight and Government Reform (Aug. 16, 2007) (enclosing the “first production of documents responsive to your request”).

¹⁶ Letter from Patrick J. Fitzgerald, Special Counsel, Office of Special Counsel, Department of Justice, to Chairman Henry A. Waxman, House Committee on Oversight and Government Reform (Aug. 16, 2007).

¹⁷ House Committee on Government Reform and Oversight, *Contempt of Congress: Refusal of Attorney General Janet Reno to Produce Documents Subpoenaed By the Government Reform and Oversight Committee*, 105th Cong. (1998) (H. Rept. 105-728).

¹⁸ *The Contempt Citation*, Washington Post (Sep. 22, 1998).

¹⁹ *Buck Stops With Reno; Appointing an Independent Counsel in Campaign Contribution Case: That Decision is Reno’s Alone to Make on the Basis of Her Information and Her Interpretation of the Law*, Los Angeles Times (Aug. 6, 1998).

²⁰ *Tell Him No, Ms. Reno!*, Miami Herald (Aug. 6, 1998).

²¹ *Give Reno Some Room*, St. Petersburg Times (Aug. 6, 1998).

²² Congressional Research Service, *Congressional Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* (May 8, 2012).

²³ *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977).

²⁴ 5 Op. O.L.C. 27, 31 (1981).

²⁵ Letter from Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to Ranking Member Charles Grassley, Senate Committee on the Judiciary (Feb. 4, 2011).

²⁶ Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, et al. (Dec. 2, 2011).

²⁷ Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 15, 2012).

²⁸ Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, et al. (Dec. 2, 2011).

²⁹ Letter from Ronald Weich, Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Apr. 28, 2011); Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 15, 2012); Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Speaker John Boehner, U.S. House of Representatives (June 5, 2012); House Committee on the Judiciary, Testimony of Eric H. Holder Jr., Attorney General, Department of Justice, *Hearing on Oversight of the Justice Department* (June 7, 2012); Letter from James M. Cole, Deputy

Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 11, 2012); Senate Committee on the Judiciary, Testimony of Eric H. Holder Jr., Attorney General, Department of Justice, *Hearing on Oversight of the U.S. Department of Justice* (June 12, 2012).

³⁰ *The Daily Rundown*, MSNBC (Nov. 3, 2010) (online at <http://videocafe.crooksandliars.com/david/darrell-issa-obama-must-answer-several-hundr>); Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 5, 2012); Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Feb. 2, 2012); Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (November 4, 2011).

³¹ Department of Justice, *Meeting of the Attorney General with Mexican Attorney General Medina Mora* (Nov. 16, 2007).

³² Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Oct. 28, 2011).

³³ House Committee on Oversight and Government Reform, Transcribed Interview of Kenneth Melson (July 4, 2011).

³⁴ Contempt Citation, at 10.

³⁵ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 5, 2012).

³⁶ *Face the Nation*, CBS News (Oct. 16, 2011) (online at www.cbsnews.com/stories/2011/10/16/ftn/main20121072.shtml).

³⁷ *Justice Department Accuses Issa of "Mischaracterizing" Evidence in Probe of Operation Fast and Furious*, Fox News (Oct. 17, 2011) (online at www.foxnews.com/politics/2011/10/17/justice-department-accuses-issa-mischaracterizing-evidence-in-probe-operation/#ixzz1xiMQtvoh).

³⁸ House Committee on Oversight and Government Reform, *Hearing on Operation Fast and Furious: Management Failures at the Department of Justice* (Feb. 2, 2012).

³⁹ *Face the Nation*, CBS News (Oct. 16, 2011) (online at www.cbsnews.com/stories/2011/10/16/ftn/main20121072.shtml).

⁴⁰ Minority Staff, House Committee on Oversight and Government Reform, *Fatally Flawed: Five Years of Gunwalking in Arizona* (Jan. 2012) (online at http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5575&Itemid=104).

⁴¹ The Roger Hedgecock Show (Nov. 21, 2011) (online at www.youtube.com/watch?v=pGYUxuBNxk0).

⁴² House Committee on Oversight and Government Reform, Transcribed Interview of Kenneth Melson (July 4, 2011); House Committee on Oversight and Government Reform, Transcribed Interview of Dennis Burke (Aug. 18, 2011).

⁴³ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 5, 2012); House Committee on Oversight and Government Reform, Transcribed Interview of Jason Weinstein (Jan. 10, 2012).

⁴⁴ House Committee on Oversight and Government Reform, *Hearing on Operation Fast and Furious: Reckless Decisions, Tragic Outcomes* (June 15, 2011).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Minority Members, House Committee on Oversight and Government Reform, *Minority Forum on Law Enforcement Tools to Stop the Flood of Illegal Weapons* (June 30, 2011); Minority Staff, House Committee on Oversight and Government Reform, *Outgunned: Law Enforcement Agents Warn Congress They Lack Adequate Tools to Counter Illegal Firearms Trafficking* (June 2011); H.R. 2554, The Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011.

⁴⁸ Letter from Arturo Sarukhan, Ambassador to the United States, Government of Mexico, to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, et al. (June 30, 2011).

⁴⁹ Contempt Citation, at 2.

⁵⁰ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 5, 2011).

⁵¹ Contempt Citation, at 22, 38.

⁵² House Committee on the Judiciary, Testimony of Eric H. Holder Jr., Attorney General, Department of Justice, *Hearing on Oversight of the Justice Department* (June 7, 2012); Minority Staff, House Committee on Oversight and Government Reform, *Fatally Flawed: Five Years of Gunwalking in Arizona* (Jan. 31, 2012).

⁵³ House Committee on the Judiciary, Testimony of Eric H. Holder Jr., Attorney General, Department of Justice, *Hearing on Oversight of the Justice Department* (June 7, 2012).

⁵⁴ *ATF Chief Removed Over Border Guns Scandal*, Los Angeles Times (Aug. 30, 2011); *ATF Official Newell Says Whistleblowers Were Silent on Fast and Furious*, Main Justice (Sept. 22, 2011) (online at www.mainjustice.com/2011/09/22/atf-official-newell-says-whistleblowers-were-silent-on-fast-and-furious/); Bureau of Alcohol, Tobacco, Firearms and Explosives, *ATF Acting Director Jones Announces New Staff Assignments* (Oct. 5, 2011); *"Fast and Furious" Whistleblowers Struggle Six Months After Testifying Against ATF Program*, Fox News (Nov. 30, 2011); *Three ATF Officials Reassigned in Shakeup Over Fast and Furious*, Main Justice (Jan. 6, 2012) (online at www.mainjustice.com/2012/01/06/three-atf-officials-reassigned-in-shakeup-over-fast-and-furious/); *ATF Officials Suspended over Fast and Furious*, Washington Examiner (Jan. 10, 2012); *Arizona U.S. Attorney's Criminal Chief Resigns Amid Fast and Furious Probe*, Main Justice (Jan. 31, 2012) (online at www.mainjustice.com/2012/01/31/arizona-u-s-attorney-office-criminal-chief-resigns-amid-fast-and-furious-probe/).

⁵⁵ Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, et al. (Jan. 27, 2012).

⁵⁶ *Id.*