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

May 15, 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 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.

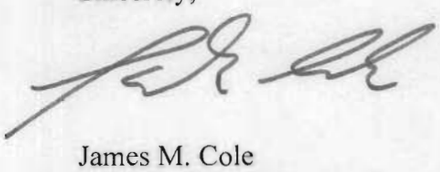
We readily acknowledge that, like our predecessors in Administrations of both parties, we have protected documents where we have believed that their disclosure would jeopardize the independence, integrity, and effectiveness of our continuing law enforcement efforts. We are absolutely committed to bringing 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,



James M. Cole
Deputy Attorney General

cc: The Honorable Elijah E. Cummings
Ranking Minority Member