

## **100 FLAWS IN THE ISSA CONTEMPT CITATION**

On June 20, 2012, the House Committee on Oversight and Government Reform adopted on a strictly party-line basis a report and resolution to hold the Attorney General in contempt of Congress (hereinafter “Contempt Citation”). All Democratic attempts to amend the Contempt Citation to correct deficiencies were defeated along party lines. The same day, House Republican leaders announced that a Floor vote would be held this week. This document describes 100 errors, omissions, and misstatements in the Contempt Citation that was voted out of Committee and is now being rushed to the Floor. Although some of these flaws are simply misleading, others are significant legal deficiencies and factual errors that may call into the question the validity of the contempt resolution itself.

### **Resolution Recommendation**

1. On page 1, the Contempt Citation states, “That Eric H. Holder, Jr., Attorney General of the United States, shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.” However, the Contempt Resolution would hold the Attorney General in contempt for failing to produce documents that were never demanded by the Committee’s subpoena.

Specifically, the report accompanying the contempt resolution covers documents from the date the Department sent a letter to Senator Charles Grassley on February 4, 2011, to the date it formally withdrew this letter on December 2, 2011. The report states that the Attorney General is being held in contempt for failing to produce documents, explaining “why it took so long for the Department to withdraw the letter.”

The subpoena issued by the Committee never demanded documents created between October 11, 2011, and December 2, 2011. The subpoena was issued on October 11, 2011, and it demanded documents only up to the date it was issued. Documents created between October 11, 2011 and December 2, 2011, clearly fall outside of the scope of the subpoena. This obvious deficiency could undermine the legal validity of the contempt resolution itself.

### **I. Executive Summary**

2. On page 2, the Contempt Citation states, “The Department of Justice has refused to comply with congressional subpoenas related to Operation Fast and Furious.” The Contempt Citation disregards the fact that for more than a year, the Committee has been holding the Attorney General to an impossible standard by demanding documents that the Department is prohibited by law from producing, including “records covered by grand jury secrecy rules and federal wiretap applications and related information” that the Department is “prohibited by law or court orders” from disclosing.
3. On page 2, the Contempt Citation states, “The Department’s refusal to work with Congress to ensure that it has fully complied with the Committee’s efforts to compel the production of documents and information related to this controversy is inexcusable and cannot stand.” The Contempt Citation disregards the fact that the Department of

Justice has produced has produced thousands of pages of responsive documents, made two dozen witnesses available for interviews and testimony, and the Attorney General has testified nine times before Congress on these issues. It also fails to mention that the Attorney General and Deputy Attorney General offered to meet with Chairman Issa to negotiate an accommodation on at least six occasions prior to last week's meeting

4. On page 2, the Contempt Citation states, "Those responsible for allowing Fast and Furious to proceed and those who are preventing the truth about the operation from coming out must be held accountable for their actions." The Contempt Citation fails to acknowledge that the Justice Department has removed, reassigned, or accepted the resignation of each of the officials in the chain of command involved with Operation Fast and Furious—including the U.S. Attorney in Arizona and the head of ATF—and that the Attorney General has explained that he will take appropriate disciplinary action after receiving the final report from the Inspector General.
5. On page 2, the Contempt Citation states, "Having exhausted all available options in obtaining compliance, the Chairman of the Oversight and Government Reform Committee recommends that Congress find the Attorney General in contempt for his failure to comply with the subpoena issued to him." The Contempt Citation fails to state that on Tuesday, June 19, 2012, Chairman Issa flatly rejected a proposal from the Attorney General to: (1) provide the Committee with documents relating to the Department's letter to Senator Grassley on February 4, 2011, that were created after that date; (2) provide a substantive briefing on the Department's actions relating to how they determined the letter contained inaccuracies; (3) provide a description of the categories of documents that would be produced and withheld; and (4) answer additional substantive requests for information from the Committee.

## **II. Authority and Purpose**

6. On page 3, the Contempt Citation states that the House rule governing subpoenas "provides that the 'power to authorize and issue subpoenas' may be delegated to the Committee chairman. The subpoenas discussed in this report were issued pursuant to this authority." The Contempt Citation fails to mention that the subpoenas referenced in the citation were issued unilaterally, deviating from the historical practice of previous Republican and Democratic Chairman, including Chairmen Towns, Waxman, and Davis, to seek the concurrence of the Ranking Member or a Committee vote prior to issuing subpoenas.
7. On page 3, the Contempt Citation states, "The Committee's investigation into actions by senior officials in the U.S. Department of Justice and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) in designing, implementing, and supervising the execution of Operation Fast and Furious, and subsequently providing false denials to Congress, is being undertaken pursuant to the authority delegated to the Committee under House Rule X as described above." The Contempt Citation fails to mention that documents obtained by the Committee show that Operation Fast and Furious was the fourth in a series of gunwalking operations run by ATF's Phoenix field division over a span of five years beginning in 2006. Three prior operations—Operation Wide

Receiver (2006-2007), the Hernandez case (2007), and the Medrano case (2008)—occurred during the Bush Administration, and were supervised by the same Special Agent In Charge that oversaw Fast and Furious.

8. On page 3, the Contempt Citation states, “The oversight and legislative purposes of the investigations are (1) to examine and expose any possible malfeasance, abuse of authority, or violation of existing law on the part of the executive branch with regard to the conception and implementation of Operation Fast and Furious.” The Contempt Citation fails to mention that the Committee has refused requests to invite former Attorney General Michael Mukasey to testify before the Committee about operations involving gunwalking during the Bush Administration, including Operation Wide Receiver.
9. On page 3, the Contempt Citation states, “The major breakdown in the process that occurred with respect to the Fast and Furious wiretap applications necessitates careful examination of the facts before proposing a legislative remedy.” The Contempt Citation fails to mention that Chairman Issa has failed to respond to a proposal by Ranking Member Cummings to hold meetings with current and former Department officials including Michael Chertoff and James B. Comey “with the purpose of weighing possible consensus reforms to the wiretap review process.”
10. On page 3, the Contempt Citation states that the information being withheld by the Department of Justice “is needed to consider legislative remedies to restructure ATF as needed.” The Contempt Citation fails to note that in January 2012, the Deputy Attorney General explained that the Department was “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,” including restructuring ATF’s Office of the Ombudsman by appointing a senior special agent as Chief ATF Ombudsman and adding a full-time special agent to handle agent complaints.

### **III. Background in the Committee’s Investigation**

11. On page 4, the Contempt Citation states, “The Department has represented on numerous occasions that it will not produce broad categories of documents.” The Contempt Citation disregards the fact that for more than a year, the Committee has been holding the Attorney General to an impossible standard by demanding documents that the Department is prohibited by law from producing, including “records covered by grand jury secrecy rules and federal wiretap applications and related information” that the Department is “prohibited by law or court orders” from disclosing.
12. On page 4, the Contempt Citation states, “The Committee has issued two staff reports documenting its initial investigative findings.” The Contempt Citation fails to mention that in January 2012, Ranking Member Cummings issued a comprehensive 95-page staff report showing that Operation Fast and Furious in fact was the fourth in a series of gunwalking operations run by ATF’s Phoenix field division over a span of five years beginning in 2006 with Operation Wide Receiver.

13. On page 4, the Contempt Citation states, “the Department has not provided a privilege log delineating with particularity why certain documents are being withheld.” The Contempt Citation disregards the fact that during a meeting on June 19, 2012, with the Chairman, the Attorney General agreed to a request by Senator Grassley to provide a description of the “categories” of documents that would be produced or withheld, but that Chairman Issa flatly refused this offer.
14. On page 4, the Contempt Citation states, “The Department’s efforts at accommodation and ability to work with the Committee regarding its investigation into Fast and Furious have been wholly inadequate.” The Contempt Citation fails to mention that in January 2012, Ranking Member Cummings issued a comprehensive 95-page staff report answering key questions posed in this investigation. The Contempt Citation mischaracterizes the Department’s response to the Committee’s subpoena, disregarding the fact that for more than a year, the Committee has been holding the Attorney General to an impossible standard by demanding documents that the Department is prohibited by law from providing.

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

15. On page 4-5, the Contempt Citation states, “The story of Operation Fast and Furious is one of widespread dysfunction across numerous components of the Department of Justice. This dysfunction allowed Fast and Furious to originate and grow at a local level before senior officials at Department of Justice headquarters ultimately approved and authorized it.” The Contempt Citation fails to mention that the Committee has obtained no evidence that senior officials at the Department of Justice, including the Attorney General, ever approved or authorized gunwalking in Operation Fast and Furious.

##### **A. The ATF Phoenix Field Division**

16. On page 5, the Contempt Citation states that the Department’s Cartel Focused Strategy “directed federal law enforcement to shift its focus away from seizing firearms from criminals as soon as possible, and to focus instead on identifying members of trafficking networks.” The Contempt Citation fails to mention that the Cartel Focused Strategy states that “[g]iven the national scope of this issue, merely seizing firearms through interdiction will not stop firearms trafficking to Mexico. We must identify, investigate, and eliminate the sources of illegally trafficked firearms and the networks that transport them.” ATF officials interviewed by the Committee, including William Hoover, the former Acting Deputy Director of ATF, told investigators that the Cartel Focused Strategy did not authorize gunwalking in Operation Fast and Furious.
17. On page 5, the Contempt Citation states that “Members of the ATF Phoenix Field Division, led by Special Agent in Charge Bill Newell, became familiar with this new strategy and used it in creating Fast and Furious.” The Contempt Citation fails to mention that Newell had overseen investigations involving gunwalking in three previous operations since 2006.

18. On page 6, the Contempt Citation states, “Starting in late 2009, many line agents objected vociferously to some of the techniques used during Fast and Furious, including gunwalking.” The Contempt Citation fails to mention that in a transcribed interview, Acting ATF Director Melson stated, “I do wish they had come to me because I have—I had and still have an open-door policy with respect to any employee in ATF with respect to any issue whatsoever.”
19. On page 6, the Contempt Citation states that “Pursuant to the Deputy Attorney General’s [Cartel Focused] strategy, in late January 2010 the ATF Phoenix Field Division applied for Fast and Furious to become an Organized Crime Drug Enforcement Task Force (OCDETF) case.” The Contempt Citation omits the fact that ATF officials interviewed by the Committee, including William Hoover, the former Deputy Director of ATF, told investigators that the Cartel Focused Strategy did not authorize gunwalking in Operation Fast and Furious.

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

20. On page 7, the Contempt Citation states, “Many ATF agents working on Operation Fast and Furious came to believe that some of the most basic law enforcement techniques used to interdict weapons required the explicit approval of the U.S. Attorney’s Office, and specifically from Hurley.” The Contempt Citation fails to mention that the ATF agents who worked on Operation Fast and Furious told Committee staff in transcribed interviews that prosecutors in the case claimed that probable cause did not exist to arrest straw buyers, and that numerous ATF agents in Phoenix informed the Committee that the U.S. Attorney’s Office in Arizona historically has been reluctant to prosecute firearms traffickers.
21. On page 7, the Contempt Citation states, “Federal prosecutors in Arizona filed at least six of these [wiretap] applications, each containing immense detail about operational tactics and specific information about straw purchasers, in federal court after Department headquarters authorized them.” The Contempt Citation fails to mention that on June 5, 2012, Ranking Member Cummings wrote to Chairman Issa expressing concerns that the Chairman had “mischaracterized the contents and significance of these documents,” and that the omission of a “critical fact ... completely undermines your conclusions and distorts your representations.” The Contempt Citation also fails to note that 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.

**C. ATF Headquarters**

22. On page 8, the Contempt Citation states, “ATF’s Phoenix Field Division informed ATF headquarters of large weapons recoveries tracing back to Fast and Furious. The Phoenix Field Division had frequently forwarded these updates directly to Deputy ATF Director Billy Hoover and Acting ATF Director Ken Melson. When Hoover learned about how large Fast and Furious had grown in March 2010, he finally ordered the development of an exit strategy.” The Contempt Citation fails to mention that Melson

and Hoover both informed Committee staff privately that, despite these briefings, they were unaware of gunwalking in Fast and Furious, and that Chairman Issa has declined to invite Melson or Hoover to testify before the Committee.

23. On page 8, the Contempt Citation states, “The U.S. Attorney’s Office in Arizona, objecting to the tactics used in Wide Receiver, had previously refused to prosecute the case.” The Contempt Citation fails to mention that in 2006, then-U.S. Attorney Paul Charlton received a memo regarding Operation Wide Receiver requesting his “position on the possibility of allowing an indeterminate number of illegal weapons ... provided to 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.” The memo also noted that “ATF’s legal counsel is opposed to this proposed method of furthering the investigation, citing moral objections.” Charlton responded that he would meet with the ATF Special Agent in Charge, and although it is unknown what occurred during that meeting, gunwalking continued during Charlton’s tenure.
24. On page 9, the Contempt Citation states that senior officials in the Criminal Division “should have halted the program, especially given their prior knowledge of gunwalking in Wide Receiver, which was run by the same leadership in the same ATF field division.” The Contempt Citation fails to mention that Lanny Breuer, the Assistant Attorney General for the Criminal Division, testified before the Senate Judiciary Committee that he did not learn about gunwalking in Operation Fast and Furious until the allegations became public in 2011, stating “I found out first when the public disclosure was made by the ATF agents early this year.” The Contempt Citation also fails to mention that Jason Weinstein, a Deputy Assistant Attorney General in the Criminal Division, told the Committee in a transcribed interview that he did not learn about gunwalking in Operation Fast and Furious until the allegations became public in 2011, and that if he had known sooner, he would have “sounded the alarm about it.”
25. On page 10, the Contempt Citation states, “The Criminal Division’s approval of the wiretap applications in Fast and Furious violated Department of Justice policy.” The Contempt Citation fails to mention that Lanny Breuer, the Assistant Attorney General for the Criminal Division, testified before the Senate Judiciary Committee that “the role of the reviewers and the role of the deputy in reviewing Title III applications is only one. It is to ensure that there is legal sufficiency to make an application to go up on a wire and legal sufficiency to petition a Federal judge somewhere in the United States that we believe it is a credible request.”
26. On page 10, the Contempt Citation states, “The wiretap applications document the extensive involvement of the Criminal Division in Fast and Furious.” The Contempt Citation fails to mention that during a June 2012 House Judiciary Committee hearing, Attorney General Holder testified that after the allegations of gunwalking became public, he reviewed the wiretap applications in Operation Fast and Furious, and he fundamentally disagrees with how the Chairman has characterized them.

27. On page 10, the Contempt Citation states, “These [wiretap] applications were constructed from raw data contained in hundreds of Reports of Investigation (ROI); the Department of Justice failed to produce any of these ROI in response to the Committee’s subpoena.” The Contempt Citation disregards the fact that this request covers documents the Department has said it will not produce because they are sensitive law enforcement documents that could affect ongoing criminal investigations and prosecutions. Chairman Issa subsequently claimed that he is not demanding these documents at this time.
28. On page 10-11, the Contempt Citation states, “Deputy Assistant Attorney General Jason Weinstein, Deputy Assistant Attorney General Kenneth Blanco, and Deputy Assistant Attorney General John Keeney signed these [wiretap] applications on behalf of Assistant Attorney General Lanny Breuer.” The Contempt Citation fails to mention that Chairman Issa has failed to respond to a request from Ranking Member Cummings 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.
29. On pages 11, the Contempt Citation states, “On March 12, 2010, [Assistant Deputy Attorney General Edward] Siskel and then-Acting DAG Gary Grindler received an extensive briefing on Fast and Furious during a monthly meeting with the ATF’s Acting Director and Deputy Director. This briefing presented Grindler with overwhelming evidence of illegal straw purchasing during Fast and Furious.” The Contempt Citation fails to mention that both officials who gave this briefing, ATF Acting Director Melson and Acting Deputy Director Hoover, told Committee staff in transcribed interviews that they were unaware that gunwalking occurred in Operation Fast and Furious at that time.
30. On page 11, the Contempt Citation states, “Despite receiving all of this information, then-Deputy Attorney General Gary Grindler did not order Fast and Furious to be shut down, nor did he follow-up with ATF or his staff about the investigation.” As mentioned above, the Contempt Citation fails to note that ATF Acting Director Melson and Acting Deputy Director Hoover told Committee staff that they were unaware that gunwalking occurred in Operation Fast and Furious at that time.

**V. The Committee’s October 12, 2012, Subpoena to Attorney General Holder**

31. On page 12, the Contempt Citation states, “The subpoena was issued following six months of constant refusals by the Justice Department to cooperate with the Committee’s investigation into Operation Fast and Furious.” The Contempt Citation disregards the fact that by the date the subpoena was issued on October 11, 2011, the Department had produced 2,050 pages of documents to the Committee, made an additional 1,195 pages of documents available for *in camera* review, briefed the Committee four times, and made 17 witnesses available for transcribed interviews.

**A. Events Leading Up to the Subpoena**

32. On page 13, the Contempt citation states, “Many of the documents the whistleblowers provided were not among the 2,050 pages that the Department had produced by October 11, 2011, demonstrating that the Department was withholding materials responsive to the subpoena.” We now know that whistleblowers provided wiretap applications, which the Department of Justice is prohibited by law from producing.
33. On page 13, the Contempt Citation states that the Committee “requested information and documents pertaining to paid FBI informants who were the target of the Fast and Furious investigation.” The Contempt Citation disregards the fact that on October 5, 2011, Committee staff received a private briefing from the FBI regarding targets in the Fast and Furious investigation. During this briefing, the FBI explained that the release of information about confidential informants could jeopardize the lives of the informants and their families.
34. On page 13, the Contempt Citation states, “The FBI never produced any of the documents” relating to informants who were involved with Operation Fast and Furious. The Contempt Citation disregards the fact that the Department explained on numerous occasions that producing such documents could jeopardize “the safety of confidential informants” and deter other sources of information. The Chairman subsequently claimed that he is no longer seeking those documents from the Department.
35. On page 13, the Contempt Citation states, “The Department of Justice, on behalf of the U.S. Attorney’s Office for the District of Arizona, did not respond to” the Committee’s request for documents until December 6, 2011. In fact, by December 6, 2011, the Department had already provided hundreds of pages of documents from the Arizona U.S. Attorney’s Office.
36. On pages 13 and 14, the Contempt Citation states that the FBI never responded to the Chairman’s request for answers to “questions about information-sharing among Department components.” The Contempt Citation disregards the fact that on October 5, 2011, senior officials from ATF, DEA, and the FBI briefed Committee staff on information-sharing among Department components.

**B. Subpoena Schedule Request**

37. On page 15, the Contempt Citation states the Department “has yet to provide a single document for 11 out of the 22 categories contained in the subpoena schedule.” The Contempt Citation is incorrect because the Department had provided documents responsive to 16 categories and explained that documents for one additional category do not exist.
38. On page 15, the Contempt Citation states that the Department “has unequivocally stated its refusal to comply with entire categories of the subpoena altogether.” The Contempt Citation disregards that the Department has stated that it is legally prohibited from responding to certain categories of the subpoena that require the production of



wiretap applications and grand jury material, and the Chairman has since claimed that he is no longer seeking those documents from the Department.

39. On pages 16, the Contempt Citation states that the Department “has produced no documents since the issuance of the subpoena pursuant to subpoena categories 1(a), 1(b), 1(g), 1(i), and 1(k), only two documents pursuant to subpoena category 1(d), and very few documents pursuant to subpoena category 1(j) and 1(l).” In fact, the Department has produced documents responsive to subpoena categories 1(a) and 1(b), has provided all responsive documents for categories 1(d), 1(j), and 1(l), has stated that no documents exist for 1(k), and has stated repeatedly that it cannot produce any documents responsive to categories 1(g) and 1(i) because the Department is prohibited by law from disclosing such documents.
40. On page 16, the Contempt Citation states that the Department has produced no documents showing “communications between and among Department of Justice (DOJ) employees and Executive Office of the President employees.” The Contempt Citation fails to mention that the Committee has received multiple documents responsive to this category and has provided copies of these documents to the press including HOCR ATF 002559.
41. On page 16, the Contempt Citation states, “The Department has not informed the Committee that no documents exist responsive to this schedule number [3].” In fact, the Department wrote to the Committee stating, “We have not located any documents responsive to a 17th item (subpoena item 3).”
42. On pages 16, the Contempt Citation states, “Most of the responsive documents the Department has produced pursuant to the subpoena pertain to categories 4 and 5 and relate to earlier cases the Department has described as involving gunwalking,” and that “[t]he Department produced these documents strategically.” The Contempt Citation fails to mention that documents showing examples of gunwalking going back to 2006 during the Bush Administration were clearly demanded by the subpoena and could be produced because they do not involve ongoing criminal investigations and prosecutions.
43. On page 17, the Contempt Citation states that the Department has not produced any documents responsive to item 6 regarding the murder of Jamie Zapata. In fact, the Department produced documents relating to the murder of Jamie Zapata, including document HOCR DOJ 006956. The Citation also fails to mention that on multiple occasions, both the Department of Homeland Security and the Department of Justice warned the Committee that it could not disclose other documents in this category given the potential impact on the ongoing murder prosecution.
44. On page 17, the Contempt Citation states, “The Department has not produced any documents responsive to subpoena category 7(b).” In fact, the Department has made numerous documents in this category available to the Committee for review.

45. On page 17, the Contempt Citation states that the Department has failed to produce Reports of Investigation (ROIs) because this subpoena category “‘presents some significant issues for’ the Department.” The Contempt Citation disregards the fact that the Department has explained multiple times that “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.” Chairman Issa subsequently stated that he is no longer demanding that the Department produce those documents at this time.
46. On page 18, the Contempt Citation states, “The Department has produced some documents responsive to this subpoena category [10].” In fact, the Department has produced hundreds of pages of documents responsive to this category as part of just one production set on December 2, 2011.
47. On page 19, the Contempt Citation states that the Department has failed to produce sufficient documents regarding the death of Border Patrol Agent Brian Terry and that, “[a]lthough the Department has produced some documents responsive to this subpoena category, it has not represented that it has produced all responsive documents in this category.” In fact, the Department has provided numerous documents responsive to this category including HOCR DOJ 005869, and warned the Committee that it could not produce many of the documents in this category given the potential impact on the ongoing murder prosecution.
48. On page 19, the Contempt Citation states, “The Department’s actions suggest that it kept this document hidden for strategic and public relations reasons.” The Contempt Citation disregards that the Department has made 47 document productions on a rolling basis nearly twice per month for since the end of 2011.
49. On page 19, the Contempt Citation states, “Despite the specificity of this document request, the Department has not produced any documents responsive to this schedule number [15].” The Contempt Citation fails to fully acknowledge that this request covers FBI interviews that the Department has said it will not produce because these are sensitive law enforcement documents that could affect ongoing criminal investigations and prosecutions. Chairman Issa subsequently stated that he is not demanding these documents at this time.
50. On page 20, the Contempt Citation states that Department has failed to produce “investigative reports prepared by the FBI or Drug Enforcement Administration (DEA) referring or relating to targets, suspects, or defendants in the Fast and Furious case. The Contempt Citation disregards the fact that this request covers documents the Department has said it will not produce because they are sensitive law enforcement documents that could affect ongoing criminal investigations and prosecutions. Chairman Issa subsequently claimed that he is not demanding these documents at this time.
51. On page 20, the Contempt Citation states that the Department has failed to produce “investigative reports prepared by the FBI or DEA relating to the individuals described

to Committee staff at the October 5, 2011, briefing at Justice Department headquarters as Target Number 1 and Target Number 2” of Operation Fast and Furious. The Contempt Citation disregards the fact that this request covers documents the Department has said it will not produce because they are sensitive law enforcement documents that could affect ongoing criminal investigations and prosecutions. Chairman Issa subsequently claimed that he is not demanding these documents at this time.

52. On page 20, the Contempt Citation states that the Department has failed to produce “documents and communications in the possession, custody or control of the DEA referring or relating to Manuel Fabian Celis-Acosta.” The Contempt Citation disregards the fact that this request covers documents the Department has said it will not produce because they are sensitive law enforcement documents that could affect ongoing criminal investigations and prosecutions. Chairman Issa subsequently claimed that he is not demanding these documents at this time.
53. On page 20, the Contempt Citation states that the Department has failed to produce FBI documents and communications relating to evidence collected at the scene of Brian Terry’s murder. The Contempt Citation disregards the fact that this request covers documents the Department has said it will not produce because they are sensitive law enforcement documents that could affect ongoing criminal investigations and prosecutions. Chairman Issa subsequently claimed that he is not demanding these documents at this time.
54. On page 21, the Contempt Citation states that the Department has failed to produce ATF recordings of a break-in at a Federal Firearms Licensee in Phoenix, Arizona. The Contempt Citation disregards the fact that this request covers documents the Department has said it will not produce because they are sensitive law enforcement documents that could affect ongoing criminal investigations and prosecutions. Chairman Issa subsequently claimed that he is not demanding these documents at this time.

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

55. On page 21, the Contempt Citation states, “the Committee has gone to great lengths to accommodate the Department’s interests as an Executive Branch agency.” The Contempt Citation fails to mention that the Committee refused, until the week before the Committee vote, to acknowledge any legitimate executive branch concerns regarding documents the Department was prohibited by law from providing or that would jeopardize ongoing criminal investigations.
56. On page 22, footnote 96, the Contempt Citation states that documents provided to the Committee on January 27, 2012 were “delivered to the Senate Judiciary Committee so late in the evening that a disc of files had to be slipped under the door” and further states that “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 Contempt

Citation fails to mention that since an upcoming House Committee hearing was on February 2, these documents were provided with five full days before the hearing for staff to review them.

57. On page 22, the Contempt Citation states that the “Committee has been unfailingly patient in working with Department representatives to obtain information the Committee requires to complete its investigation.” The Contempt Citation ignores the fact that the Committee spent more than a year accusing Department officials of obstruction and a cover up for failing to provide documents they were prohibited by law from providing as well as documents that would jeopardize ongoing criminal investigations and prosecutions if disclosed.
58. On page 22, the Contempt Citation states, “Because the Department has not cited any legal authority as the basis for withholding documents pursuant to the subpoena its efforts to accommodate the Committee’s constitutional obligation to conduct oversight of the Executive Branch are incomplete.” The Contempt Citation disregards the fact that the Department repeatedly cited its executive branch concerns and its legal authorities in numerous letters to the Chairman.
59. On page 22, the Contempt Citation states, “In an attempt to accommodate the Justice Department’s interests, Committee staff has viewed documents responsive to the subpoena that the Department has identified as sensitive *in camera* at Department headquarters.” The Contempt Citation also omits the fact that early in the investigation, the Committee mistakenly released to the press a document that was under seal by a federal court in Arizona.
60. On pages 22 and 23, the Contempt Citation states, “There appears to be no objective, consistent criteria delineating why some documents were redacted, only provided *in camera*, or withheld entirely.” On page 23, however, the Contempt Citation concedes that the Department provided a redaction code that identified the reason for each redaction type included in the documents.
61. On page 23, the Contempt Citation states, “Since the documents were only made available pursuant to the Committee’s first subpoena and only on an *in camera* basis, redactions were inappropriate and unnecessary.” The Contempt Citation disregards the fact that the Department redacted information that was not responsive to the subpoena, as well as “non-public information relating to pending law enforcement matters.” Chairman Issa subsequently claimed that he is not demanding these documents at this time.
62. On page 23, the Contempt Citation states that the Committee provided 230 pages of documents that it intended to release in support of its July 26, 2011, report to the Department for “an opportunity to suggest its own redactions before the documents became public.” The Contempt Citation omits the fact that the Committee provided the Department with less than 24 hours to conduct that review. The Contempt Citation also fails to mention that on a prior occasion the Committee did not consult with the

Department and inadvertently disclosed to the press a document under seal by a federal court in Arizona.

63. On page 24, the Contempt Citation states that the Department “has neither produced a privilege log nor responded to this aspect of Chairman Issa’s letters of January 31, 2012 and February 14, 2012.” The Contempt Citation ignores the fact that Attorney General Holder agreed to Senator Grassley’s proposal to provide a description of the categories of documents that would be withheld on June 19, 2012.
64. On page 24, the Contempt Citation states that the “Department has not informed the Committee that it has been unable to locate certain documents. This suggests that the Department is not producing responsive documents in its possession.” The Contempt Citation fails to mention that the Committee is now requesting documents that were never demanded by the Committee’s subpoena.
65. On page 25, the Contempt Citation states that the “Committee’s investigation into Fast and Furious is replete with instances in which the Justice Department has openly acknowledged that it would not comply with the Committee’s requests.” The Contempt Citation disregards the fact that for the past year the Committee has held the Department to an impossible standard by demanding that they produce documents that are prohibited by law from providing including wiretap applications and grand jury material. Chairman Issa subsequently claimed that he is not demanding these documents at this time.
66. On page 26, the Contempt Citation states that part of the Department’s “non-compliance” was its refusal to provide information relating to the investigation of “Agent Terry’s killer or killers.” The Contempt Citation disregards the fact that this request covers documents the Department has said it will not produce because they are sensitive law enforcement documents that could affect ongoing criminal investigations and prosecutions, including the prosecutions for the murder of Agent Terry. Chairman Issa subsequently claimed that he is not demanding these documents at this time.
67. On page 26, the Contempt Citation states that the Department was “deliberately withholding certain documents.” The Contempt Citation disregards the fact that the Department explained on numerous occasions that “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.” Chairman Issa subsequently claimed that he is no longer demanding that the Department produce those documents at this time.
68. On pages 26 and 27, the Contempt Citation states that the “sensitive techniques” withheld by the Department “were central to the Committee’s investigation.” The Contempt Citation omits the fact that the Department never indicated that it considered gunwalking to be “sensitive technique.” Instead, the Department explained that it was attempting to protect documents that “could reveal ‘sensitive techniques, methods, or strategy,’ providing a road map of our efforts to current and future targets of criminal investigations and prosecutions.”

69. On page 27, the Contempt Citation complains that the Department withheld documents that “related to the crime scene and events leading to the murder of ICE Agent Jaime Zapata” as well as “investigative reports” related to the ongoing investigation of his murder. The Contempt Citation disregards the fact that this demand covers documents the Department has said it will not produce because they are sensitive law enforcement documents that could affect ongoing criminal investigations and prosecutions, including the prosecutions for the murder of Agent Zapata. Chairman Issa subsequently claimed that he is not demanding these documents at this time.
70. On page 28, the Contempt Citation states that the Department provided 116 pages of documents about the Kingery case, “a case that the Department wanted to highlight in an attempt to discredit some of the original Fast and Furious whistleblowers.” This statement is unfounded given that the Department provided these documents because they were directly responsive to the subpoena, which demanded all documents in which ATF has “broken off surveillance of weapons and subsequently became aware that those weapons entered Mexico.”
71. On pages 28 and 29, the Contempt Citation states that 60% of the documents in the first production to the October 12, 2011, subpoena were “related to Kingery, Hernandez, or Wide Receiver, and therefore, unrelated to the gravamen of the Committee’s investigation into Fast and Furious.” The Contempt Citation omits the fact that the Hernandez and Wide Receiver were gunwalking operations that predated Fast and Furious, were overseen by the same Special Agent in Charge that supervised Operation Fast and Furious, and do not involve ongoing investigations or prosecutions. These documents were directly responsive to the subpoena, which requested all documents in which ATF has “broken off surveillance of weapons and subsequently became aware that those weapons entered Mexico.”
72. On page 29, the Contempt Citation states that the Committee did not receive responsive documents to items 7(b) or 11(b)(i-v). In fact, the Department made available for review documents responsive to both subpoena demands.
73. On page 29, the Contempt Citation states that the Department “made itself the sole arbiter of the Committee’s investigative interests, as well as the use of ‘inappropriate’ tactics” when it “refused to produce documents pursuant to the subpoena regarding investigations that it had not previously specified to the Committee or investigations that ‘do not appear’ to involve inappropriate tactics.” The Contempt Citation mischaracterizes the Department’s response, which simply indicated that the Department did not plan to turn over documents related to investigations that did not involve gunwalking.
74. On page 30, the Contempt Citation states that the Department is “in violation of its obligation to cooperate with congressional oversight” because it “only produce[d] documents about investigations that it had previously identified—documents that support the Department’s press strategy.” The Contempt Citation mischaracterizes the Department’s response, which simply indicated that the Department did not plan to turn over documents related to investigations that did not involve gunwalking.

75. On page 33, the Contempt Citation states that the Department has “asserted a ‘separation of powers’ privilege without further explanation or citation to legal authority. The Department has not cited any legal authority to support this new, extremely broad assertion of privilege.” In fact, the Department repeatedly cited its executive branch concerns and legal authority in numerous letters to the Chairman.
76. On page 35, the Contempt Citation states, “Despite warnings by Chairman Issa that the Committee would initiate contempt if the Department failed to comply with the subpoena, the Department has refused to produce documents.” The Contempt Citation fails to mention that the Department of Justice has offered to work with the Committee repeatedly to reach an accommodation regarding the Chairman’s subpoena, and continues to do so. On June 19, 2012, Chairman Issa flatly rejected a proposal from the Attorney General (1) to provide the Committee with documents relating to the Department’s letter to Senator Grassley on February 4, 2011, that were created after that date; (2) offering a substantive briefing on the Department’s actions relating to how they determined the letter contained inaccuracies; (3) to provide a description of the categories of documents that would be produced and withheld; and (4) to answer additional substantive requests for information from the Committee.
77. On page 35, the Contempt Citation describes the Committee’s accommodation of the Department’s “request to delay an interview” with the lead case agent for Fast and Furious because of the “Department’s expressed concern about interviewing a key witness prior to trial.” However, the Contempt Citation omits the fact that the Committee disregarded the concerns of the Department when it interviewed another witness before the trial.
78. On pages 35 and 36, the Contempt Citation states that the Department prevented “first-line supervisors from testifying” before the Committee. The Contempt Citation fails to mention that the Committee has held interviews with first-line supervisors at ATF, including Group Supervisor David Voth, and that the Department agreed to make available another first-line supervisor, Assistant United States Attorney Michael Morrissey.
79. On page 36, the Contempt Citation states that the Department initially refused to permit the Committee to interview Assistant Attorney General Lanny Breuer, before it changed its position to permit the interview. The Contempt Citation omits the key fact that Assistant Attorney General Lanny Breuer has already testified before Congress about Fast and Furious and offered to testify at a public hearing in front of the entire Committee. After the Committee rejected Mr. Breuer’s offer to testify in public, Mr. Breuer agreed to a staff interview.
80. On page 37, the Contempt Citation states that the wiretap applications indicate that “senior officials in the Criminal Division, including Lanny Breuer and one of his top deputies, Jason Weinstein,” “had access to information about the objectionable tactics used in Operation Fast and Furious.” The Contempt Citation fails to mention that the undisputed testimony before the Committee is that these senior officials did not read the wiretap applications, but instead reviewed summaries prepared by Department line

attorneys, consistent with the historical practice under both Democratic and Republican administrations.

81. On page 37, the Contempt Citation states that “key decision makers at Justice Department headquarters relied on these [wiretap applications as well as ATF, DEA, and FBI Reports of Investigation] and other documents to approve the investigation.” The Contempt Citation fails to mention that on June 5, 2012, Ranking Member Cummings wrote to Chairman Issa expressing concerns that the Chairman had “mischaracterized the contents and significance of these documents,” and that the omission of a “critical fact ... completely undermines your conclusions and distorts your representations.”
82. On page 37, the Contempt Citation states, “The Committee requires documents from the Department relating to how officials learned about whistleblower allegations and what actions they took as a result.” The Contempt Citation fails to mention that on February 2, 2012, Attorney General Holder testified before this Committee stating, “I didn’t know about Operation Fast and Furious until the beginning parts of 2011 after I received that letter from Senator Grassley I guess at the end of January, and then that was about Operation Gunrunner. I actually learned about the Fast and Furious operation in February of that year.”
83. On page 37, the Contempt Citation states, “For months after the congressional inquiry began, the Department refused to acknowledge that anything improper occurred during Fast and Furious.” The Contempt Citation omits the fact that the Attorney General took significant and immediate steps to address the allegations. On February 2, 2012, the Attorney General testified before this Committee stating, “when I learned early last year about the allegations raised by ATF agents involved with Fast and Furious, I took action. In addition to requesting an Inspector General investigation last February, I ordered that a directive be sent prohibiting the use of such tactics.”
84. On page 37, the Contempt Citation states, “Documents in this category include those that explain how the Department responded to the crisis in the wake of the death of U.S. Border Patrol Agent Brian Terry.” The Contempt Citation omits the fact that the Department has already produced more than 100 pages of documents that specifically relate to the aftermath of Agent Terry’s shooting. In addition, the Department also produced 1,364 pages of documents “pertaining to the creation of its February 4, 2011, letter,” many of which also related to how the Department responded to the news of Brian Terry’s death.
85. On page 38, the Contempt Citation states, “Although the Deputy Attorney General is aware of this [information sharing] problem, he has expressed little interest in resolving it.” The Contempt Citation omits the fact that in January 2012, the Deputy Attorney General wrote to Congress explaining reforms the Department has made in light of Operation Fast and Furious, including revising ATF’s confidential informants usage policy” and issuing a memorandum reinforcing the importance of “deconfliction” and “information sharing” in every investigation.



## **VI. Additional Accommodations by the Committee**

86. On page 38, the Contempt Citation states that the Department “failed to turn over any documents responsive to three main categories covered by the October 12, 2011, subpoena: a) Who at Justice Department Headquarters Should Have Known of the Reckless Tactics; b) How the Department Concluded that Fast and Furious was “Fundamentally Flawed”; and, c) How the Inter-Agency Task Force Failed.” The Contempt Citation omits the fact that the Department has produced documents relating directly to these questions and has made witnesses available for interviews.
87. On page 39, the Contempt Citation states that the “deliberative process privilege is not recognized by Congress as a matter of law and precedent.” The Contempt Citation omits the fact that the deliberative process privilege, which courts have called “the most frequent form of executive privilege raised,” protects “the deliberations and decisionmaking process of executive officials generally.” This privilege has been asserted by Democratic and Republican Presidents and Attorneys General alike, including Attorney General Michael Mukasey, who wrote in 2008: “The doctrine of executive privilege also encompasses Executive Branch deliberative communications that do not implicate presidential decisionmaking.”
88. On page 39, the Contempt Citation states, “To this moment, the President himself has not indicated that he is asserting executive privilege.” The Contempt Citation fails to mention that the President’s assertion in this case follows precisely the manner in which previous Presidents have asserted the privilege, which is to convey that information in a letter from the Department of Justice to the Committee.
89. On page 39, the Contempt Citation states, “The assertion [of executive privilege] is transparently invalid in that it is not credible that every document withheld involves a ‘communication[] authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate,’” The Contempt Citation fails to acknowledge that courts have called the deliberative process privilege “the most frequent form of executive privilege raised,” and that it protects “the deliberations and decisionmaking process of executive officials generally.” This privilege has been raised by Democratic and Republican Presidents and Attorneys General, including Attorney General Mukasey, who wrote in 2008, “The doctrine of executive privilege also encompasses Executive Branch deliberative communications that do not implicate presidential decisionmaking.”
90. On page 39, the Contempt Citation states that the assertion of executive privilege “was obstructive given that it could have and should have been asserted months ago, but was not until literally the day of the contempt mark-up,” and that the assertion “should have been made by October 25, 2011, the subpoena return date.” The Contempt Citation fails to mention that negotiations were continuing up until the day before the Committee vote, and that the Committee failed to define the precise category of

documents it was seeking until it circulated a draft Contempt Citation less than a week before the Committee's business meeting.

91. On page 40, the Contempt Citation states, "Even if the privilege were valid as an initial matter, which it is not, it certainly has been overcome here, as: (i) the committee has demonstrated a sufficient need for the documents as they are likely to contain evidence important to the Committee's inquiry." The Contempt Citation omits the fact that the Committee has not established that the documents in dispute are necessary to the Committee's investigation of how gunwalking originated or was utilized in Operation Fast and Furious. The assertion of privilege covers only a narrow category of documents regarding the Department's response to Congress in 2011—after Operation Fast and Furious had concluded.

## **VII. Historical Perspectives on Contempt**

92. On page 40, the Contempt Citation states, "Congressional history is replete with examples of the pursuit of contempt proceedings by House committees when faced with strident resistance to their constitutional authority to exercise investigative power." The Contempt Citation disregards the fact that the House has never in its history held a sitting Attorney General in contempt of Congress. It also fails to mention that the use of the contempt power against executive branch officials is exceedingly rare, and that only four executive branch officials have ever been held in contempt of Congress by the full House of Representatives.
93. On page 40, the Contempt Citation states that the contempt proceedings against Robert Randall and Charles Whitney are relevant precedent. Randall and Whitney were private individuals and not executive branch officials, and their contempt proceedings did not implicate separation of powers concerns. In contrast, in executive-congressional information disputes, the Constitution requires both branches to seek reasonable accommodations of the other branch's legitimate institutional interests.
94. On page 41, the Contempt Citation states that the Committee's contempt proceeding against Attorney General Janet Reno is relevant precedent. The contempt citation disregards the fact that this action was so partisan and so widely discredited that even then-Speaker Newt Gingrich did not bring it to the House Floor for a vote.
95. On page 41, the Contempt Citation cites as relevant precedent the Committee's scheduled contempt proceedings against Attorney General Michael B. Mukasey, EPA Administrator Stephen L. Johnson, and Administrator of the Office of Information and Regulatory Affairs. The Contempt Citation disregards the fact that in all of these cases the Committee declined to go forward with the contempt proceedings after the assertion of executive privilege.
96. On page 42, the Contempt Citation states that the full House of Representatives held former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten in contempt of Congress. The Contempt Citation omits the fact that in that case, President Bush made an extremely broad assertion of executive privilege in an

attempt to convey “absolute immunity,” an assertion that was described as “unprecedented” by the federal court that later held it invalid. In contrast, the current assertion covers only a very narrow category of deliberative Department documents. In addition, the Department of Justice has already produced over 7,600 documents, made two dozen witnesses available for interviews, and the Attorney General has testified nine times before Congress on these issues.

97. On page 43, the Contempt Citation states that the Committee’s investigation of the leak of CIA operative Valerie Plame’s identity was “contemporaneous” with the Department of Justice’s criminal investigation into the leak of this classified information. The Contempt Citation omits the key fact that the Committee, under then-Chairman Henry A. Waxman, did not obtain access to relevant documents until after I. Lewis “Scooter” Libby, Vice President Cheney’s chief of staff, was convicted and sentenced for obstructing justice, perjury, and making false statements.
98. On page 44, the Contempt Citation states that Committee’s investigation into the fratricide of Army Corporal Patrick Tillman and the capture and rescue of Army Private Jessica Lynch is relevant precedent. The Contempt Citation fails to mention that then-Chairman Waxman negotiated in good faith with the Bush Administration and did not pursue contempt charges, accepting the White House’s offer of accommodation to make senior officials available for off-the-record interviews, and dropped his request for certain documents upon the administration’s assertion of Executive Branch confidentiality interests.
99. On page 45, the Contempt Citation states that “in the Valerie Plame investigation, the Committee received access to highly sensitive materials despite the fact that the Justice Department was conducting a parallel criminal investigation.” The Contempt Citation omits the key fact that the Committee, under then-Chairman Henry A. Waxman, did not obtain access to relevant documents until after I. Lewis “Scooter” Libby, Vice President Cheney’s chief of staff, was convicted and sentenced for obstructing justice, perjury, and making false statements.
100. On page 45, the Contempt Citation states that the Department provided only a “small fraction” of what the Department has produced to the Inspector General. The Contempt Citation fails to mention that the Inspector General can receive documents that the Department is prohibited by law from turning over to Congress. It also fails to note that the Inspector General can receive documents relating to ongoing investigations, which the Chairman subsequently claimed he was no longer requesting.

