

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMMITTEE ON OVERSIGHT AND  
GOVERNMENT REFORM,  
UNITED STATES HOUSE OF  
REPRESENTATIVES,

Plaintiff,

v.

ERIC H. HOLDER, in his official  
capacity as Attorney General of the  
United States,

Defendant.

No. 1:12-cv-1332 (ABJ)

**MEMORANDUM AMICI CURIAE OF REPRESENTATIVES ELIJAH E. CUMMINGS,  
JOHN CONYERS, JR., HENRY A. WAXMAN, EDOLPHUS TOWNS, AND  
LOUISE M. SLAUGHTER IN SUPPORT OF DISMISSAL**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. INTEREST OF THE AMICI.....	1
II. THE CONSTITUTION OBLIGES THE PARTY SEEKING JUDICIAL INTERVENTION TO FIRST SEEK RESOLUTION THROUGH GOOD-FAITH NEGOTIATION AND ACCOMMODATION.....	2
III. THE COMMITTEE FAILED TO SATISFY ITS CONSTITUTIONAL OBLIGATIONS.....	8
A. The Committee’s Conduct Has Been Inconsistent With its Claims of Investigative Necessity and With its Accommodation and Negotiation Obligations.....	9
1. The Committee Affirmatively Refused to Pursue Centrally Relevant Information from Readily Available Sources.....	9
2. The Committee Rushed the Contempt Vote.....	13
3. The Committee Rushed to the Courthouse.....	16
B. The Complaint Disregards the Record of Repeated, Significant, and Ongoing Accommodations By the Department.....	18
1. The Department Turned Over Very Substantial Information Responsive to the Committee’s Current Areas of Interest and Made Significant Efforts at Accommodation.....	18
2. The Committee’s Shifting Positions and Requests Frustrated the Department’s Accommodation Efforts.....	21
C. The Release of the Inspector General’s Report Highlights the Need and Prospects for a Renewed Effort at Accommodation Between the Parties.....	25
CONCLUSION.....	30

**TABLE OF AUTHORITIES**

(sources available online at: [http://democrats.oversight.house.gov/Amicus\\_Brief](http://democrats.oversight.house.gov/Amicus_Brief))

**Cases**

*Allen v. Wright*, 468 U.S. 737 (1984) ..... 3

*Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) ..... 3

*\*Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) ..... passim

*Hanes Corp. v. Millard*, 531 F.2d 585, 591-92 (D.C. Cir. 1976) ..... 3, 4

*Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983) ..... 3

*\*United States v. AT&T Co.*, 551 F.2d 384 (D.C. Cir. 1976)..... 3, 5

*\*United States v. AT&T Co.*, 567 F.2d 121 (D.C. Cir. 1977) ..... 5, 6

*United States v. Avila*, No. 11-00126 (C.D. Cal. Oct. 19, 2012) ..... 28

*\*United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983)..... 3, 4, 5, 8

*Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983)..... 3

*Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995)..... 3

**Statutes**

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et. seq.*..... 25, 28

**Other Authorities**

Congressional Research Service, *Congress' Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice and Procedure* (2012)..... 7

Dana Milbank, Op-Ed., *Republicans' Attempt to Hold Holder in Contempt is Uphill Battle*, Wash. Post (June 20, 2012)..... 9

Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 Minn. L. Rev. 1127 (1999)..... 6

DOJ Inspector General, *A Review of ATF's Operation Fast and Furious and Related Matters* (Nov. 2012) ..... 28

DOJ Inspector General, *A Review of ATF's Operation Fast and Furious and Related Matters* (Sept. 2012)..... 21, 25, 26, 27

Editorial, *A Pointless Partisan Fight*, N.Y. Times (June 20, 2012) ..... 9

Editorial, <i>Holder Contempt Vote is Dysfunctional Washington as Usual</i> , Baltimore Sun (June 21, 2012) .....	9
Eugene Robinson, Editorial, <i>GOP Witch Hunt for Eric Holder Reflects Bigger Problem</i> , Wash. Post (June 21, 2012).....	9
Juan Williams, Op-Ed., <i>Darrell Issa’s Fast and Furious Campaign Against Team Obama</i> , Fox News (May 15, 2012) .....	9
Michael Hirsh, Editorial, <i>Darrell Issa and House Republicans’ Permanent Witch Hunt</i> , The Atlantic (June 22, 2012).....	9
Neal Devins, <i>Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing</i> , 48 Admin. L. Rev. 109 (1996) .....	5
Ned Resnikoff, <i>Michael Steele on Issa’s contempt vote for Holder: ‘The optics are not good for the GOP,’</i> MSNBC (June 20, 2012).....	9
Robert VerBruggen, <i>Too Fast, Too Furious</i> , National Review Online (June 27, 2012).....	9
Todd David Peterson, <i>Contempt of Congress v. Executive Privilege</i> , 14 U. Pa. J. Const. L. 77 (2011). .....	3
<i>Top Bush Aides to Testify in Attorneys’ Firings</i> , N.Y. Times (Mar. 4, 2009) .....	7

**Congressional Materials**

156 Cong. Rec. H4405 (daily ed. June 28, 2012) (statement of Rep. Steny Hoyer) .....	13
156 Cong. Rec. H4413 (daily ed. June 28, 2012) (statement of Rep. Darrell Issa).....	12
156 Cong. Rec. H4413 (daily ed. June 28, 2012) (statement of Rep. John Dingell).....	12
158 Cong. Rec. H4165 (daily ed. June 28, 2012) (statement of Rep. James McGovern) .....	10
158 Cong. Rec. H4406 (daily ed. June 28, 2012) (statement of Rep. Carolyn Maloney) .....	10
<i>Business Meeting to Consider a Report Holding Attorney General Eric Holder in Contempt of Congress for his Failure to Produce Documents Specified in the Committee’s Oct. 12, 2011 Subpoena: Hearing Before the H. Comm. on Oversight &amp; Gov’t Reform</i> , 112th Cong. (2012) .....	15
<i>Continuing Investigation Into the U.S. Attorneys Controversy and Related Matters (Part III): Hearing Before the Subcomm. on Commercial &amp; Admin. Law of the H. Comm. on the Judiciary</i> , 110th Cong. (2007).....	16
H. Select Comm. on Congressional Operations and the S. Comm. on Rules and Administration, Report Identifying Court Proceedings and Actions of Vital Interest to the Congress, 95th Cong. 46-50 (1978).....	6

H.R. Rep. No. 112-546 (2012) (Minority Views on contempt resolution) (June 22, 2012).....	20
House Comm. on Rules, Rules of the Comm. on Rules for the 112th Congress .....	14
<i>IG Report: The Department of Justice’s Office of the Inspector General Examines the Failures of Operation Fast and Furious: Hearing before the H. Comm. on Oversight &amp; Gov’t Reform, 112th Cong. (2012)</i> .....	25, 27
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Eric Holder, Att’y General, DOJ (Jan. 25, 2012) .....	12
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Ann Birmingham Scheel, U.S. Att’y for the Dist. of Ariz. (Sept. 1, 2011).....	22
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Eric Holder, Att’y Gen., DOJ (Feb. 8, 2012) .....	22
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Eric Holder, Att’y Gen., DOJ (Nov. 1, 2011) .....	22
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Kenneth Melson, Acting Dir., ATF (Mar. 16, 2011) .....	22
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Michele Leonhart, Adm’r, U.S. DEA (July 15, 2011) .....	22
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Robert Mueller, Dir., FBI (July 11, 2011) .....	22
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Robert Mueller, Dir., FBI (Oct. 20, 2011) .....	22
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Eric Holder, Att’y Gen., DOJ (Feb. 14, 2012) .....	12
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Eric Holder, Att’y Gen., DOJ (June 13, 2012) .....	23
Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Eric Holder, Att’y Gen., DOJ (May 10, 2012) .....	17

Letter from Elijah Cummings, Ranking Member, H. Comm. on Oversight & Gov't Reform, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Oct. 28, 2011).....	10
Letter from James Cole, Deputy Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Dec. 2, 2011).....	18, 19
Letter from James Cole, Deputy Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Feb. 1, 2012) .....	17
Letter from James Cole, Deputy Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (June 20, 2012) .....	14
Letter from James Cole, Deputy Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 15, 2012) .....	17
Letter from James Cole, Deputy Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 3, 2012).....	17
Letter from John Boehner, Speaker, House of Representatives, et al., to Eric Holder, Att'y Gen., DOJ (May 18, 2012) .....	23
Letter from Judith Applebaum, Acting Assistant Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform <i>et al.</i> (Sept. 19, 2012) .....	28
Letter from Michael Horowitz, Inspector Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Oct. 16, 2012).....	26
Letter from Ronald Weich, Assistant Att'y Gen. for Legislative Affairs, DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (June 14, 2011).....	17
Letter from Ronald Weich, Assistant Att'y Gen. for Legislative Affairs, DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Apr. 1, 2011).....	16
Letter from Ronald Weich, Assistant Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Feb. 16, 2012) .....	12
Letter from Ronald Weich, Assistant Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Apr. 19, 2012) .....	17
Report of the House Committee on Oversight & Government Reform Regarding President Bush's Assertion of Executive Privilege in Response to the Committee's Subpoena to Attorney General Michael B. Mukasey, 110th Cong. (2008).....	15
Staff Notes from Meeting with Ron Weich, Assistant Att'y Gen. for Legislative Affairs, DOJ, Steve Reich, Assoc. Deputy Att'y Gen., DOJ, and Committee Staff in Washington, DC (May 24, 2012) .....	23

Staff of H. Comm. on Oversight & Gov't Reform, 112th Cong., Resolution Recommending that the House of Representatives Find Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, in Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Committee on Oversight & Gov't Reform (Comm. draft May 3, 2012)..... 17

Subpocna from H. Comm. on Oversight & Gov. Reform, to Eric Holder, Att'y Gen., DOJ (Oct. 11, 2011) ..... 22, 24

*The Johnson and Dudley Contempt of Congress Resolutions: Hearing Before the H. Comm. on Oversight and Gov't Reform, 110th Cong. (2008) ..... 15*

U.S. House of Representatives, Roll Call Vote on Agreeing to Dingell Motion to Refer Resolution H.Res. 711 to the Committee on Oversight and Government Reform With Instructions (June 28, 2012)..... 12

\* Authorities chiefly relied upon are marked with an asterisk.

## I. INTEREST OF THE AMICI

This brief is submitted by Representative Elijah E. Cummings, in his capacity as Ranking Member of the House Committee on Oversight and Government Reform and the leader of the Democratic Members of the Committee, all of whom participated directly and extensively in every facet of the Committee's investigation of the use of the misguided tactic of "gunwalking" by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) in Operation Fast and Furious and previous operations. Other amici are Representative John Conyers, Jr., Ranking Member of the House Committee on the Judiciary and former Chairman of the House Committee on Government Operations (the predecessor to the Committee on Oversight and Government Reform), Representative Henry A. Waxman, Ranking Member of the House Committee on Energy and Commerce and former Chairman of the House Committee on Oversight and Government Reform, Representative Edolphus Towns, former Chairman of the House Committee on Oversight and Government Reform, and Representative Louise M. Slaughter, Ranking Member and former Chairwoman of the Committee on Rules.

Amici offer a distinctive perspective on this litigation. As we have in previous situations, amici strongly support Congress's authority to obtain information necessary to its legislative functions, and to conduct robust investigations of the Executive Branch. We also believe that Congress may pursue litigation to enforce that authority, and that Article III courts may and, in appropriate circumstances, should decide interbranch constitutional disputes.

In this case, however, amici urge the Court to dismiss the Complaint without prejudice. Based on our considerable experience with congressional investigations and familiarity with this one in particular, amici believe the lawsuit by the Committee on Oversight and Government Reform (the "Committee") fails at the threshold. This is because the Committee has defaulted on

its constitutional obligation to pursue, through negotiation, a resolution that accommodates the legitimate institutional interests of both branches of government before asking the Court to take the momentous step of adjudicating this dispute. Instead, the Committee has chosen to rush toward unnecessary conflict, in the process denying its Members the opportunity to obtain relevant information available through alternative means. In view of the Committee's failure to take steps that would be performed by any investigatory body focused on pursuing the facts, and its failure to seize promising opportunities for accommodation and compromise, court intervention would be inappropriate, would encourage (and reward) unnecessary and premature litigation, and would threaten the delicate balance of powers implicated in disputes of this kind. Amici believe that dismissal in this instance would not only preserve, but would strengthen the Committee's ability to conduct effective oversight in the future.

## **II. THE CONSTITUTION OBLIGES THE PARTY SEEKING JUDICIAL INTERVENTION TO FIRST SEEK RESOLUTION THROUGH GOOD-FAITH NEGOTIATION AND ACCOMMODATION**

Amici agree with the Committee that federal courts are, and should be, open to deciding suits of this character. Congress's ability to exercise its powers and discharge its responsibilities under the Constitution requires that it have access to information within the control of the Executive Branch; it is contrary to our tradition and the Constitution's design for the Executive Branch to unilaterally determine its legal obligations in a dispute with a coequal branch, and for such a determination to be unreviewable.

Although we agree there is no absolute constitutional or statutory bar to entertaining civil actions such as this one, history and governing case law make clear that instances of litigation have been—and should continue to be—rare. In particular, decisions of the D.C. Circuit and this Court have emphasized that “judicial intervention” should be reserved for circumstances where it

is truly “necessary,” *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983), *i.e.*, instances in which the branch enlisting the judiciary’s assistance has engaged in serious and good faith negotiation and accommodations without a satisfactory resolution, and “all possibilities for settlement have been exhausted.” *Id.* Although the opinions stating these principles are of relatively recent vintage, the clear teaching of our history and our collective experience is that contentious and politicized disputes over access to information usually can be resolved through means other than litigation. Indeed, “the legislative and executive branches have a long history of settlement of disputes that seemed irreconcilable.” *United States v. AT&T Co.*, 551 F.2d 384, 394 (D.C. Cir. 1976); *see generally* Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. Pa. J. Const. L. 77, 130-37 (2011).

In large part, this doctrine making judicial intervention a last resort flows from principles of prudence and self-restraint that apply to federal courts generally. Such rules ensure that parties who have means of obtaining relief through ordinary processes do not rush to the courthouse, *see, e.g., Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1338 (D.C. Cir. 1983) (common-law exhaustion of remedies); that constitutional decisions, in particular, are to be avoided whenever possible, *see Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring); that the issues properly decided by an “unelected, unrepresentative judiciary” are limited to those framed concretely and with the benefit of relevant facts and circumstances, *see Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)); and that gamesmanship or the importunings of eager litigants do not control the exercise of equitable powers, *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (noting the “unique breadth” of judges’ “discretion to decline to enter a declaratory judgment”); *Hanes Corp. v. Millard*, 531

F.2d 585, 591-92 (D.C. Cir. 1976) (the discretion to grant declaratory relief “is to be ‘exercised in the public interest’”) (citation omitted).

Courts considering interbranch subpoena disputes have imposed even more demanding standards. In these controversies, both branches, without resorting to the courts, have formidable tools to wield in their negotiations—as well as advantages and constraints flowing from the fact that they must answer to the electorate. The costs to the courts from entertaining such disputes unnecessarily or prematurely can be large, casting them into highly partisan disputes bristling with difficult and poorly-charted constitutional questions, some of which have been left (perhaps beneficially) unanswered for centuries, and risking the judiciary’s own prestige on matters the political branches could have resolved.

The decisions arising from interbranch information disputes reveal not merely a marked judicial preference for negotiation and accommodation, but also a recognition that pursuing those avenues first and in good faith is the political branches’ *constitutional obligation*. In *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983), the Executive Branch brought a declaratory judgment action asking the court to determine that an administration official whom Congress had voted in contempt for defying a subcommittee subpoena had lawfully withheld the documents under a claim of executive privilege. The district court declined to reach the merits of the dispute, concluding that “to entertain [it] ... would be an improper exercise of discretion granted by the Declaratory Judgment Act.” *Id.* at 153. The court reasoned that:

Courts have a duty to avoid unnecessarily deciding constitutional issues. When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. Judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution. Since the controversy which has led to *United States v. House of*

*Representatives* clearly raises difficult constitutional questions in the context of an intragovernmental dispute, the Court should not address these issues until circumstances indicate that judicial intervention is necessary.

*Id.* at 152 (citations omitted). Ultimately, the political branches reached a settlement, and the court avoided involvement in their thorny constitutional dispute. *See* Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 *Admin. L. Rev.* 109, 119 (1996) (noting that “[t]he court’s ruling seemed to promote a resolution”).

Similarly, in *United States v. AT&T*, which arose from congressional oversight of warrantless wiretapping, the Court of Appeals declined to decide the political branches’ conflicting claims, twice sending the parties back to the negotiating table. 551 F.2d 384 (D.C. Cir. 1976) (“*AT&T I*”); 567 F.2d 121 (D.C. Cir. 1977) (“*AT&T II*”). In that case, President Ford had instructed AT&T not to comply with a congressional subpoena for documents relating to warrantless wiretapping, and the Justice Department obtained an injunction from the district court to enforce that directive. *AT&T I*, 551 F.2d at 387-88. Refusing to reach the merits of the “portentous” dispute, *id.* at 385, the Court of Appeals emphasized that a “compromise worked out between the branches is most likely to meet their essential needs and the country’s constitutional balance.” *Id.* at 394. “Before moving on to a decision of such nerve-center constitutional questions,” the court “pause[d]” and remanded, “to allow for further efforts at a settlement.” *Id.*

After those negotiations narrowed but failed to resolve the dispute, the Court of Appeals once more withheld judgment on the merits and instead mandated a process for negotiation and accommodation, “so long as this procedure gives promise of satisfying the substantial needs of both parties.” *AT&T II*, 567 F.2d at 123. The court explained this procedural course:

The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an *implicit constitutional mandate* to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

*Id.* at 127 (emphasis added). *See also id.* at 130 (“The Constitution contemplates such accommodation.”); *id.* at 133 (“It is the long-term staying power of government that is enhanced by the mutual accommodation required by the Separation of Powers.”). In that case, too, the negotiations to which the court steered the parties ultimately yielded a compromise. *See* H. Select Comm. on Congressional Operations and the S. Comm. on Rules and Administration, Report Identifying Court Proceedings and Actions of Vital Interest to the Congress, 95th Cong. 46-50 (1978) (noting that subcommittee staff were allowed to review *in camera* a subset of the disputed documents). In most cases, “the messy give and take of negotiations” between Congress and the Executive allows for case-specific “flexibility, a balancing of competing interests, and compromise,” Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 Minn. L. Rev. 1127, 1139 (1999), while avoiding broad and definitive rulings that might harden positions in future conflicts.

This Court’s recent decision in *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008), relied on heavily by the Committee here, is consistent with these other decisions. In the *Miers* case, President George W. Bush insisted on a maximalist position—that the former White House counsel was “absolutely immune” and not obliged even to appear before the Committee or provide any documents. Although the *Miers* court saw it necessary to reject that claim of “absolute immunity,” and therefore to affirm (correctly) judicial *jurisdiction* to resolve

such disputes, it strongly affirmed that negotiation and accommodation are the constitutionally primary means of resolving interbranch conflict. Indeed, the court emphasized that it acted only after assuring itself that the Committee had made serious efforts to accommodate the Executive Branch's institutional interests and that "nothing in the Committee's course of conduct [was] ... cause for concern," *id.* at 97 n.33, and observing "that it was the Executive and not the Committee that refused to budge from its initial bargaining position." *Id.* at 97. The court "re-emphasize[d]" the "limited" and "strikingly minimal" character of its involvement, and its

sincere desire that it stays that way. The Court strongly encourages the parties to reach a negotiated solution to this dispute. Quite frankly, this decision does not foreclose the accommodations process; if anything, it should provide the impetus to revisit negotiations.

*Id.* at 98-99. Again, the parties reached a negotiated resolution. *See* Congressional Research Service, *Congress' Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice and Procedure* 45 (2012); David Johnston, *Top Bush Aides to Testify in Attorneys' Firings*, N.Y. Times (Mar. 4, 2009).

The precedents confirm that, before resorting to a judicial enforcement remedy, each political branch has a *constitutional* responsibility to fully engage with the other, to consider the other's constitutional interests and try to accommodate these interests, and to exhaust responsible possibilities for non-judicial settlement. The courts have not provided and should not provide relief to parties who have not faithfully discharged that constitutional duty.

This principle still requires courts to make potentially sensitive judgments whether a petitioning branch has in fact discharged its threshold constitutional responsibilities (and to ensure that the negotiation duty does not itself become an occasion for gamesmanship or manipulation). But that judgment, we submit, is not difficult in this case. As detailed more fully below, the Committee's conduct to date—in affirmatively refusing, *inter alia*, to hear testimony

from available witnesses who were most centrally involved in and knowledgeable about the subjects under investigation, and in rushing to contempt proceedings and then to court—establishes that the Committee has yet to fulfill its constitutional responsibilities and that this conflict has not reached the point where judicial intervention is appropriate, let alone “necessary.” *United States v. House of Representatives*, 556 F. Supp. at 153.

### **III. THE COMMITTEE FAILED TO SATISFY ITS CONSTITUTIONAL OBLIGATIONS**

The Committee has failed to discharge the responsibilities the Constitution requires of a party seeking to invoke the court’s authority in an interbranch subpoena dispute. It has not exhausted reasonable avenues of negotiation or accommodation; indeed, it has affirmatively refused to pursue avenues that promised to yield information centrally relevant to its asserted interests. The Committee also failed to proceed with the deliberation and care appropriate in these circumstances. The speed with which it proceeded to a contempt vote was extraordinary—as was the Committee’s cursory dismissal of the executive privilege assertion and its indifference to the Inspector General’s comprehensive investigation and report. Moreover, the Committee continues to mischaracterize and denigrate the information it did receive and the extent of the Executive’s efforts at accommodation. Indeed, what the Committee’s brief strains to depict as a patient investigatory process was, on closer inspection, an erratic zig-zag of shifting demands and moving goalposts. Although the Committee declares its conduct in the investigation “exemplary,” Pl.’s Opp’n to Def.’s Mot. to Dismiss at 44, its actions led many observers to a starkly different conclusion—that it was and is more focused on the partisan goal of holding the Attorney General in contempt than on the legislative goal of obtaining information pertinent to

its investigation.<sup>1</sup> Indeed, this case implicates considerations of self-protection that are among the most important reasons for the rules of judicial restraint discussed above—to enable courts to resist being enlisted as one branch’s pawn in political fights.

**A. The Committee’s Conduct Has Been Inconsistent With its Claims of Investigative Necessity and With its Accommodation and Negotiation Obligations**

**1. The Committee Affirmatively Refused to Pursue Centrally Relevant Information from Readily Available Sources**

At no time during its protracted investigation did the Committee obtain sworn hearing testimony from Acting ATF Director Kenneth Melson. This omission is startling in its own right: it is self-evident that Director Melson, as the head of the agency whose actions were

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<sup>1</sup> See, e.g., Juan Williams, Op-Ed., *Darrell Issa’s Fast and Furious Campaign Against Team Obama*, Fox News (May 15, 2012) (“Issa—like Captain Ahab in his sinking ship—continues to go farther out, beyond the limits of rigorous oversight.”); Editorial, *A Pointless Partisan Fight*, N.Y. Times (June 20, 2012) (“The Republicans shamelessly turned what should be a routine matter into a pointless constitutional confrontation.”); Dana Milbank, Op-Ed., *Republicans’ Attempt to Hold Holder in Contempt is Uphill Battle*, Wash. Post (June 20, 2012) (describing the “contemptible antics” of the Committee’s contempt proceedings); Ned Resnikoff, *Michael Steele on Issa’s contempt vote for Holder: ‘The optics are not good for the GOP,’* MSNBC (June 20, 2012) (“To have this sort of devolve into the political realm and become this sort of hyper-extended conversation that leads to—what? It just seems to me off track.” (quoting former Republican National Committee Chair Michael Steele)); Editorial, *Holder Contempt Vote is Dysfunctional Washington as Usual*, Baltimore Sun (June 21, 2012) (“Our view: war over documentation of botched gun trafficking investigation escalates beyond all reasonable proportion—in other words, it’s partisan ‘gotcha-as-usual’ in Washington.”); Eugene Robinson, Editorial, *GOP Witch Hunt for Eric Holder Reflects Bigger Problem*, Wash. Post (June 21, 2012) (“The problem is that Issa isn’t interested in the truth. He just wants to score political points.”); Michael Hirsh, Editorial, *Darrell Issa and House Republicans’ Permanent Witch Hunt*, The Atlantic (June 22, 2012) (“Rep. Issa himself has made no pretense of his intentions: Nail Barack Obama first, raise Issa’s profile second (or maybe that’s first), and get to the truth last.”); Robert VerBruggen, *Too Fast, Too Furious*, National Review Online (June 27, 2012) (“But the theory that Fast and Furious was devised to promote gun control goes far beyond the evidence, as Issa basically admitted to ABC this weekend, and it does not withstand scrutiny. The chairman should be ashamed to have dabbled in it, and should fully retract his initial comment, unless he has a considerable amount of evidence he has not shared with the public.”). The documents cited in this memorandum may be found at [http://democrats.oversight.house.gov/Amicus\\_Brief](http://democrats.oversight.house.gov/Amicus_Brief).

investigated, would possess relevant and important information about both the “Operations” and what the Committee calls the “Obstruction” of the investigation. Indeed, the Inspector General’s investigation has since determined that Director Melson was an important source of the information that led the Department to make the inaccurate statements in the February 4 letter to Congress. *See infra*, pp. 25-26.

This failure to obtain sworn hearing testimony from Director Melson is all the more remarkable because it was the result of a deliberate choice by the Chairman of the Committee, who refused multiple specific requests—more than ten—from Members of the Committee to hold a public hearing with Director Melson. Ranking Member Cummings, for example, told the Chairman: “With respect to our own Committee’s investigation, I do not believe it will be viewed as legitimate or credible—and I do not believe the public record will be complete—without public testimony from Kenneth Melson.”<sup>2</sup>

As a result, no Member of the Committee had the opportunity to pose even a single question to Director Melson about his inaccurate assurances to Department officials who prepared the February 4 letter, the manner in which he learned that his assurances were mistaken, or his concerns about the Department’s responses to Congress. Numerous Members commented upon this basic flaw in the investigation, and noted that it raised questions about the purposes and seriousness of the investigation.<sup>3</sup>

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<sup>2</sup> Letter from Elijah Cummings, Ranking Member, H. Comm. on Oversight & Gov’t Reform, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Oct. 28, 2011).

<sup>3</sup> *See, e.g.*, 158 Cong. Rec. H4165 (daily ed. June 28, 2012) (statement of Rep. James McGovern) (“You know, if you’re actually interested in learning about an ATF operation, don’t you think you would want to talk to the leadership of the ATF?”); 158 Cong. Rec. H4406 (daily ed. June 28, 2012) (statement of Rep. Carolyn Maloney) (“If they were really interested in discovering the truth, the committee would have called Kenneth Melson, head of the ATF, as a witness.”).

Acting ATF Director Melson submitted to a closed staff interview on July 4, 2011, during which, the Complaint alleges, he made a “suggestion that the Department deliberately was seeking to obstruct the Committee.” Compl. ¶ 7. This private staff interview occurred with no Committee Members present, with less than 24 hours’ notice, and months before the Committee obtained documents demonstrating Melson’s role in providing inaccurate assurances to Department officials. It also occurred months before the Committee obtained verbatim quotes from notes taken by Department officials of their discussions with senior ATF officials as the February 4 letter was being drafted. *See infra*, pp. 18-19.

When asked to explain his refusal to call a hearing with Melson, the Committee’s Chairman answered that he preferred to wait until all the documents were produced, stating: “we are not easily going to have somebody back again when there are documents that are being withheld...”<sup>4</sup> The Chairman did not apply this rationale to any other Department officials who testified before the Committee, including the Attorney General, who testified nine times before Congress on these matters; Ronald Weich, former Assistant Attorney General at the Department; William McMahon, former Deputy Assistant Director for Field Operations at ATF; or the numerous other ATF officials who testified.

As a result of the Committee’s refusal to take the basic investigative step of holding a hearing with the head of the agency responsible for the program under investigation, Rep. John Dingell—the “Dean” of the House of Representatives, a respected congressional investigator

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<sup>4</sup> *Emergency Meeting on H. Res. \_\_\_\_, Resolution Recommending that the House of Representatives Find Eric. H. Holder Jr., Attorney General, U.S. Department of Justice, in Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Committee on Oversight and Government Reform: Hearing Before the H. Comm. on Rules, 112th Cong. (2012)* (video available online at [http://house.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=355](http://house.granicus.com/MediaPlayer.php?view_id=2&clip_id=355)) (hereinafter “Rules Committee Hearing”).

with decades of experience, and a frequent and vocal critic of ATF—offered a motion on the floor of the House to return the Contempt Citation to the Committee with instructions to obtain testimony from Director Melson and other Department officials. As he stated during the debate on his motion:

Instead of going after the real answers and getting the facts about what happened at ATF, the majority of the committee has engaged in what appears to be a partisan political witch hunt, with the Attorney General as its target. Over the 16-month investigation, Democrats were not permitted to call a single witness to testify. So much for bipartisanship. The American people deserve better than this, Mr. Speaker. They deserve a legitimate inquiry based on facts which all Members of this body can support.<sup>5</sup>

Without explaining his opposition to pursuing these additional sources of information that would further the Committee's investigation, the Committee Chairman opposed Rep. Dingell's motion, and it was defeated.<sup>6</sup>

The intentional decision by the Chairman *not* to gather pertinent information from perhaps the single most important official in the investigation is relevant here. Amici are not merely second-guessing minor steps of an investigation; Director Melson's hearing testimony was fundamental to this investigation, and was requested more than 10 separate times by

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<sup>5</sup> 156 Cong. Rec. H4413 (daily ed. June 28, 2012) (statement of Rep. John Dingell).

<sup>6</sup> 156 Cong. Rec. H4413 (daily ed. June 28, 2012) (statement of Rep. Darrell Issa); U.S. House of Representatives, Roll Call Vote on Agreeing to Dingell Motion to Refer Resolution H.Res. 711 to the Comm. on Oversight and Gov't Reform With Instructions (June 28, 2012) (172 Yeas, 251 nays). The Committee also failed to obtain testimony from other key officials, including Assistant Attorney General for the Criminal Division Lanny Breuer, who expressed his willingness to "answer the Committee's questions, whether or not that appearance is public," and Michael Morrissey, a supervisor in the U.S. Attorney's Office in Arizona who the Department offered to make available, contrary to the assertion in the Committee's Complaint. *See* Letter from Ronald Weich, Assistant Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Feb. 16, 2012); Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Eric Holder, Att'y General, DOJ (Jan. 25, 2012); Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Eric Holder, Att'y Gen., DOJ (Feb. 14, 2012) (acknowledging that the Department agreed to make Mr. Morrissey available).

Members of the Committee. The Committee's decision not to call Director Melson denied Committee Members the opportunity to pursue one of the most critical avenues of information-gathering that remains available to this day, and caused many to question whether the Committee was truly in search of the facts. Although it is certainly the Committee's prerogative to forego these basic investigative steps, the Committee may not then claim in this litigation that it pursued all available sources of information prior to holding the Attorney General in contempt.

## **2. The Committee Rushed the Contempt Vote**

The House voted on contempt just one week after the Committee's vote, the Committee voted on contempt only one week after the Chairman purported to narrow the Committee's demands for documents, and the Committee failed to devote even a single day to debating the validity of the President's assertion of executive privilege. This expedited timeframe left little time for true negotiation and accommodation and was, by any objective measure, unprecedented.

The eight days between the Committee vote and the House vote in this case stand in stark contrast to the six months that elapsed between the Committee and House votes in the *Miers* case. *Miers*, 558 F.Supp.2d at 63. During that time, the House Committee on the Judiciary had continued to try to resolve the issue on a cooperative basis with the Administration. *Id.*

During debate on the House floor in the present case, Rep. Steny Hoyer, the House Democratic Whip, recounted the average time between Committee and House votes in all contempt cases dating back several decades:

The average time between committee action and consideration on the floor of this House is 87 days; time to reflect on an extraordinarily important action with consequences beyond the knowledge of anybody sitting here today.<sup>7</sup>

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<sup>7</sup> 156 Cong. Rec. H4405 (daily ed. June 28, 2012) (statement of Rep. Steny Hoyer).

In this case, the time period between Committee and House votes was so brief that the House Committee on Rules (“Rules Committee”) was forced to hold what it deemed an “emergency meeting” to consider the rule for the voting on the resolutions.<sup>8</sup> The “emergency” designation meant that the resolution avoided the Rules Committee’s regular requirements to provide Members 48-hours prior notice of the meeting and to provide them with the resolution and other documents at least 24 hours in advance of the meeting.<sup>9</sup> In addition, the resolution to authorize the current civil litigation was written the night before the Rules Committee hearing and was never considered by the Committee on Oversight and Government Reform.<sup>10</sup> Rules Committee member Rep. James McGovern expressed his concern at the hearing:

[W]e are rushing this. And I don’t know what the emergency is. Let’s see whether we can work this out, avoid this kind of terrible confrontation. Because, quite frankly, the process is flawed. And that’s why people like myself question what the real motivations are here.<sup>11</sup>

A week earlier, the Committee refused to delay its contempt vote by even one day in order to carefully consider the President’s assertion of executive privilege. The Committee was informed about the assertion on June 20, 2012, the day the Committee had scheduled its contempt vote.<sup>12</sup> In light of this significant development, several Committee Members, specifically referencing the “constitutional obligation ... to try to reach some accommodation

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<sup>8</sup> Rules Committee Hearing.

<sup>9</sup> House Comm. on Rules, Rules of the Comm. on Rules for the 112th Congress, Section 2(c)(1) (2011).

<sup>10</sup> Rules Committee Hearing. The Committee on Oversight and Government Reform held a business meeting and voted only on the criminal contempt resolution.

<sup>11</sup> *Id.*

<sup>12</sup> Letter from James Cole, Deputy Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (June 20, 2012).

between the two branches,”<sup>13</sup> requested that the Committee postpone its business meeting to allow Committee Members time to review, reflect on, and debate the matter.

Rather than postpone the contempt vote, the Committee simply adopted an amendment to the contempt resolution stating that the President’s assertion of executive privilege was “transparently invalid.”<sup>14</sup>

The Chairman’s decision to forego any serious consideration of the assertion of executive privilege stands in contrast to the precedents set by other committee chairmen. For example, when President George W. Bush asserted executive privilege over Environmental Protection Agency documents pertaining to a proposed ozone regulation, then-Chairman Henry Waxman halted a contempt vote scheduled for that day, stating: “I want to look at the matter further and talk to members of this committee to see what further actions we will take.”<sup>15</sup> Similarly, when the Bush Administration asserted executive privilege in the investigation into the leak of the identity of covert CIA operative Valerie Plame, Chairman Waxman suspended the contempt vote scheduled for that day.<sup>16</sup> In the case of former White House Counsel Harriet Miers, the House Committee on the Judiciary waited for 15 days after the White House asserted absolute immunity

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<sup>13</sup> *Business Meeting to Consider a Report Holding Attorney General Eric Holder in Contempt of Congress for his Failure to Produce Documents Specified in the Committee’s Oct. 12, 2011 Subpoena: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. 118 (2012) (statement of Rep. John Tierney).

<sup>14</sup> *Id.* at 180-81 (Gowdy Amendment).

<sup>15</sup> *The Johnson and Dudley Contempt of Congress Resolutions: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. (2008) (statement of Chairman Henry Waxman).

<sup>16</sup> Report of the House Committee on Oversight & Government Reform Regarding President Bush’s Assertion of Executive Privilege in Response to the Committee’s Subpoena to Attorney General Michael B. Mukasey, 110th Cong. 6 (2008).

for Ms. Miers before holding its full committee contempt vote—in order to fully research, consider and debate the issue.<sup>17</sup>

### 3. The Committee Rushed to the Courthouse

To support the Committee’s assertion that “there was no rush to the courthouse,” Pl.’s Opp’n to Def.’s Mot. to Dismiss at 44, the Committee represents that between October 2011 and June 2012, it “repeatedly tried to reach an accommodation with the Attorney General regarding the documents at issue here.” *Id.* However, the Committee fails to mention that during that eight-month period, negotiations were stalled primarily because the Committee was demanding documents that are not at issue in this litigation. During that time, the Committee focused on obtaining documents related to the “Operations Component” of the investigation, which included sensitive documents from ongoing criminal investigations and prosecutions. Compl. ¶ 4. Only in May did the Committee shift (or seem to shift, see *infra*) its focus to the documents at issue in the Complaint relating to the “Obstruction Component” of the investigation, *i.e.*, those relating to how and why the Department provided Congress with inaccurate information. Compl. ¶ 7.

For the vast majority of the time referenced in the Committee’s Opposition, the Committee placed its highest priority on obtaining documents relating to the “Operations Component” of the investigation. The Department explained repeatedly that it could not produce certain law enforcement sensitive documents because their disclosure: could compromise ongoing criminal investigations and prosecutions;<sup>18</sup> could identify cooperating witnesses or

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<sup>17</sup> *Continuing Investigation Into the U.S. Attorneys Controversy and Related Matters (Part III): Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007); *Miers*, 558 F.Supp.2d at 62-63.

<sup>18</sup> Letter from Ronald Weich, Assistant Att’y Gen. for Legislative Affairs, DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Apr. 1, 2011); Letter from Ronald Weich, Assistant Att’y Gen. for Legislative Affairs, DOJ, to Darrell Issa, Chairman, H.

confidential informants;<sup>19</sup> or was prohibited by law or court sealing orders, such as documents covered by grand jury secrecy rules<sup>20</sup> and Title III wiretap applications.<sup>21</sup> Despite these legitimate concerns, which the Committee had a constitutional obligation to make a good faith effort to accommodate, the Committee continued to demand “full compliance” with its entire subpoena—and indeed included all these documents in its Draft Contempt Resolution.<sup>22</sup>

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Comm. on Oversight & Gov’t Reform (June 14, 2011); Letter from James Cole, Deputy Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Feb. 1, 2012).

<sup>19</sup> See Letter from James Cole, Deputy Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (May 15, 2012).

<sup>20</sup> Letter from James Cole, Deputy Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Feb. 1, 2012); Letter from Ronald Weich, Assistant Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Apr. 19, 2012); Letter from James Cole, Deputy Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (May 3, 2012); Letter from James Cole, Deputy Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (May 15, 2012).

<sup>21</sup> Letter from James Cole, Deputy Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Feb. 1, 2012); Letter from James Cole, Deputy Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (May 15, 2012) (“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.”).

<sup>22</sup> Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Eric Holder, Att’y Gen., DOJ (May 10, 2012) (“Only full compliance with the Committee’s subpoena will restore the faith of the American public that you intend to cooperate fully with Congress.”); Staff of H. Comm. on Oversight & Gov’t Reform, 112th Cong., Resolution Recommending that the House of Representatives Find Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, in Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Committee on Oversight & Gov’t Reform i (Comm. draft May 3, 2012) (“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.”) (hereinafter “Draft Resolution”). See also Draft Resolution at 37 (“Documents in this category include those relating to the preparation of the wiretap applications, as well as certain ATF, DEA and FBI Reports of Investigation.”); Draft Resolution at 9 (“The wiretap applications document the extensive involvement of the Criminal division in *Fast and Furious*, yet the Department of Justice failed to produce them in response to the Committee’s subpoena.”).

## **B. The Complaint Disregards the Record of Repeated, Significant, and Ongoing Accommodations By the Department**

The Complaint alleges that the Department “refus[ed] to produce documents that would enable the Committee (and the American people) to understand how and why the Department provided false information to Congress and otherwise obstructed the Committee’s concededly-legitimate investigation into Operation Fast and Furious.” Compl. at 2. The Complaint also states:

In effect, the Attorney General has refused to produce any documents that might aid the Committee in understanding, among other things, what the Department learned about which DOJ officials were responsible for Assistant Attorney General Weich providing Congress with false information.

*Id.* at ¶10. These assertions are not accurate. The Department made several accommodations to provide the Committee with information about the drafting of its letter, including documents created both before and after February 4, 2011.

### **1. The Department Turned Over Very Substantial Information Responsive to the Committee’s Current Areas of Interest and Made Significant Efforts at Accommodation**

For example, the Complaint makes no reference to the fact that on December 2, 2011, the Department provided 1,364 pages of internal deliberative documents leading up to the drafting of the February 4 letter, including e-mails among senior Department officials, previous drafts of the letter, and meeting notes. In producing these documents, the Department explained that it would make “a rare exception to the Department’s recognized protocols and provide you with information related to how the inaccurate information came to be included in the letter.”<sup>23</sup> While these documents contain no evidence that senior Department officials deliberately misled

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<sup>23</sup> Letter from James Cole, Deputy Att’y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Dec. 2, 2011)

Congress, they demonstrate that Director Melson was one of the key officials who provided the inaccurate information that was relayed to Congress.

The Department also provided the Committee with direct quotes from notes taken by Department officials during discussions with senior ATF officials during the preparation of the February 4 letter. They include:

- “we didn’t let [] guns walk[;]”
- “we ... didn’t know they were straw purchasers at the time[;]”
- “ATF had no probable cause to arrest the purchaser or prevent action[;]”
- “ATF doesn’t let guns walk[;]”
- “we always try to interdict weapons purchased illegally[;] and
- “we try to interdict all that we being [sic] transported to Mexico[.]”<sup>24</sup>

These documents strongly support the Department’s explanation to the Committee and the Inspector General’s later conclusion, *see infra*, pp. 25-26, that the February 4 letter’s inaccuracies were not due to a deliberate effort by Department officials to mislead, but because those officials “relied on information provided by supervisors from the components in the best position to know the relevant facts: ATF and the U.S. Attorney’s Office in Arizona, both of which had responsibility for Operation Fast and Furious.”<sup>25</sup>

In yet another effort to accommodate the Committee’s interest, on June 26, 2012, the Department made available for *in camera* review by Committee staff additional documents created after February 4 relating to the inaccurate statements in the February 4 letter, including e-mails among senior officials, meeting notes, internal memoranda, and draft letters to Congress. These documents also included e-mails to and from Attorney General Holder seeking clarifying information about the facts of Operation Fast and Furious. Again, nothing in these documents

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

indicated any deliberate effort to mislead Congress, but they confirmed that Director Melson was one of the key officials providing inaccurate information.

The Complaint also mischaracterizes the offer made by the Attorney General on the evening of June 19, 2012, the day before the Committee contempt vote was scheduled. The Complaint asserts that, in return for producing selected documents, the Department demanded that the Chairman consider the Department in “full compliance with the Holder subpoena,” which would require the Committee “wholly to abdicate its constitutional oversight responsibilities.” Compl. ¶46.

In fact, the Attorney General made the following offer, which was memorialized at the time by the Ranking Member of the Committee: (1) to provide additional internal deliberative Department documents created after February 4, 2011; (2) to provide a substantive briefing on the Department’s actions relating to how it determined the letter contained inaccuracies; (3) to agree to Senator Grassley’s request to provide a description of the categories of documents that would be withheld; and (4) to answer additional substantive requests for information from the Committee.<sup>26</sup> The only request the Attorney General made in return was for a good faith commitment to work towards a final resolution of the contempt issue.<sup>27</sup> The Chairman flatly refused this offer.<sup>28</sup>

In addition, on September 19, 2012, after the contempt vote in the House, the Department provided an additional 309 pages of documents created after the February 4 letter was sent, including e-mails among senior-level officials, meeting notes, internal memoranda, and draft

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<sup>26</sup> H.R. Rep. No. 112-546 at 165 (2012) (Minority Views on contempt resolution) (June 22, 2012).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

letters to Congress. As discussed in section C. below, these documents were identified by the Department's Inspector General in his report on Operation Fast and Furious as particularly relevant to questions surrounding the Department's inaccurate assertion in the February 4 letter. After reviewing these documents, the Inspector General concluded that senior Department officials did not deliberately mislead Congress, but that Acting ATF Director Melson had conveyed inaccurate assurances to Department officials.<sup>29</sup>

All of these actions by the Department stand in stark contrast to the immovable position of the Bush Administration in the *Miers* case, in which the Administration declared that the former White House Counsel had "absolute immunity" before Congress, refused to permit Ms. Miers to appear before the Committee, refused to provide any White House documents, and "refused to budge from its initial bargaining position." 558 F. Supp. 2d at 97. Indeed, the actions and accommodations already taken by the Department in this instance much more closely resemble the final negotiated resolution reached by the parties in the *Miers* case, after this Court rejected the "absolute immunity" claim. *Id.* at 98-99.

## **2. The Committee's Shifting Positions and Requests Frustrated the Department's Accommodation Efforts**

One of the most challenging obstacles to negotiating a resolution of this dispute has been the failure of the Committee to articulate its interests clearly. The Committee provided conflicting information about the scope of the documents at issue, which created confusion that was not conducive to negotiating a solution. As noted above, the Committee sought extremely

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<sup>29</sup> DOJ Inspector General, *A Review of ATF's Operation Fast and Furious and Related Matters* 395-396 (Sept. 2012) (hereinafter "IG Report") ("[T]he primary sources of information to Department officials about Operation Fast and Furious were Burke, Melson, and Hoover.").

sensitive and controversial information in voluminous amounts, material that it appears no longer to seek in this Court.<sup>30</sup>

To start, the Committee made numerous extremely broad demands for documents in its subpoenas and letter requests during the course of the investigation. The subpoena served on the Department on October 11, 2011, included 22 separate requests for documents.<sup>31</sup> The Committee also sent seven letters to the Department seeking 13 additional categories of documents.<sup>32</sup> As was explained above, until May 2012, the focus of the Committee's investigation was on documents related to the "Operations" component of the investigation, with

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<sup>30</sup> Even today, questions remain about whether the Complaint demands documents that relate to ongoing criminal cases, wiretaps, confidential informants, court-sealed documents, and grand jury secrecy laws. Based on a plain reading of the Complaint, such documents have not been excluded from the broad categories of documents enumerated.

<sup>31</sup> Subpoena from H. Comm. on Oversight & Gov. Reform, to Eric Holder, Att'y Gen., DOJ (Oct. 11, 2011).

<sup>32</sup> Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Eric Holder, Att'y Gen., DOJ (Feb. 8, 2012) (requesting wiretap applications); Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Eric Holder, Att'y Gen., DOJ (Nov. 1, 2011) (requesting a log of all surveillance operations); Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Robert Mueller, Dir., FBI (Oct. 20, 2011) (requesting all documents and communications between nine officials relating to the Terry murder); Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Ann Birmingham Scheel, U.S. Att'y for the Dist. of Ariz. (Sept. 1, 2011) (requesting all documents and communications between six individuals); Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Michele Leonhart, Adm'r, U.S. DEA (July 15, 2011) (requesting two categories of documents and communications between six individuals); Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Robert Mueller, Dir., FBI (July 11, 2011) (requesting all communications between eight FBI personnel) Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, and Charles Grassley, Ranking Member, S. Comm. on the Judiciary, to Kenneth Melson, Acting Dir., ATF (Mar. 16, 2011) (requesting five categories of documents).

various sensitive law enforcement documents as the primary topic of negotiations between the parties.

On May 18, 2012, the Committee, in conjunction with House Republican Leadership, sent a letter to the Department appearing to narrow its demand to documents relating to two main questions: “first, who on your leadership team was informed of the reckless tactics used in Fast & Furious prior to Agent Terry’s murder; and second, did your leadership team mislead or misinform Congress in response to a Congressional subpoena?”<sup>33</sup> In a subsequent meeting with the Department, however, Committee staff insisted that the May 18, 2012, letter did not limit the Committee’s request, and they continued to negotiate for documents pertaining to ongoing law enforcement investigations and confidential informants.<sup>34</sup>

Reversing its position again, on June 13, 2012, just one week prior to the scheduled contempt vote, the Committee sent another letter confirming that the May 18, 2012, letter indeed “narrowed this request to two categories” and explaining that the Committee “effectively eliminated the dispute over information gathered during the criminal investigation of Operation Fast and Furious, prior to the announcement of indictments.”<sup>35</sup>

Confusion about the scope of the subpoena and the Committee’s demands continued to be expressed less than 24 hours before the contempt vote in the House of Representatives.

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<sup>33</sup> Letter from John Boehner, Speaker, House of Representatives, et al., to Eric Holder, Att’y Gen., DOJ (May 18, 2012).

<sup>34</sup> Staff Notes from Meeting with Ron Weich, Assistant Att’y Gen. for Legislative Affairs, DOJ, Steve Reich, Assoc. Deputy Att’y Gen., DOJ, and Committee Staff in Washington, DC (May 24, 2012) (on file with Minority Staff of the H. Comm. on Oversight & Gov’t Reform) (describing the May 18, 2012, letter as “an invitation to discuss” and stating that the letter could not be read as a narrowing of the Committee’s demands).

<sup>35</sup> Letter from Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Eric Holder, Att’y Gen., DOJ (June 13, 2012).

During a hearing before the House Rules Committee on June 27, 2012, Ranking Member Cummings raised a concern that the contempt resolution and accompanying report proposed holding the Attorney General in contempt for refusing to produce documents that were never subpoenaed by the Committee. The Committee's subpoena demanded documents created until "the present," or the date of the subpoena, October 11, 2011.<sup>36</sup> Yet, the report accompanying the contempt resolution proposed holding the Attorney General in contempt for failing to produce documents up to December 2, 2011, the date the Department's letter was formally withdrawn, which was almost two months *after* the date of the subpoena. Initially, the Chairman testified to the Rules Committee that "[t]he ranking member is correct," that documents from October 11 to December 2, 2011, were outside the scope of the subpoena, but that he believed the Department should produce them.<sup>37</sup> Later during the hearing, the Chairman reversed himself, stating that these documents were intended to be covered by the subpoena.<sup>38</sup>

Confusion over the scope of documents in dispute persisted well past the contempt vote. As late as September 2012, the Chairman stated that if the Department provided the Committee with "most if not all of those 100,000 pages that were made available to" the Inspector General,

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<sup>36</sup> Subpoena from H. Comm. on Oversight & Gov't Reform, to Eric Holder, Att'y Gen, DOJ (Oct. 11, 2011).

<sup>37</sup> Rules Committee Hearing.

<sup>38</sup> *Id.* ("I would like to correct the record on one thing. Our subpoena covers the period of Aug. 1, 2009, until the present. It runs every day until January 3 next year. So I was mistaken when I said that we would have some uncovered period. The subpoena is not defective. It does continue to run."). The Chairman's latter statement suggested a misunderstanding of basic subpoena mechanics: Although the *validity* of a subpoena continues until the end of the Congress during which it was issued (here, January 3, 2013), the *scope* of a subpoena does not change with the passage of time.

that production could “perhaps eliminate the need for a protracted fight in the courts.”<sup>39</sup> The 100,000 pages of documents reviewed by the Inspector General encompass a scope well beyond that described in the Complaint.<sup>40</sup>

**C. The Release of the Inspector General’s Report Highlights the Need and Prospects for a Renewed Effort at Accommodation Between the Parties**

On September 19, 2012, the Department’s Inspector General issued a 471-page report describing in great detail what occurred in Operation Fast and Furious, its predecessor, Operation Wide Receiver, and the Department’s response to the Congressional inquiry into gunwalking.<sup>41</sup> The report was the result of a year-and-a-half long investigation that involved a review of more than 100,000 pages of documents and interviews of more than 130 witnesses.<sup>42</sup> As a component of the Department of Justice and the Executive Branch, the Inspector General was provided all Department records that are in dispute in this litigation, including the Department’s internal deliberative documents created after February 4, 2011.<sup>43</sup>

The Inspector General report found that Attorney General Holder did not authorize, approve, or know about the gunwalking, contrary to the primary allegation of the

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<sup>39</sup> *IG Report: The Department of Justice’s Office of the Inspector General Examines the Failures of Operation Fast and Furious: Hearing before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. 137 (2012) (statement of Chairman Darrell Issa).

<sup>40</sup> Compare IG Report at 4-5 with Compl. at 39.

<sup>41</sup> IG Report.

<sup>42</sup> *Id.* at 3-4.

<sup>43</sup> See, e.g., *id.* at 4-5 (“We received over 100,000 pages of documents . . . from the Department, ATF, the DEA, FBI, and DHS that we relied upon in drafting this report. These included . . . documents obtained with grand jury subpoenas, as well as all 14 wiretap applications and other court documents filed in the investigations.”); and Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2517 & 2510(7) (2011) (explaining that information included in a wiretap application may be used by “any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations”).

Committee.<sup>44</sup> The report also devoted an entire chapter to describing in detail “how the Department formulated its February 4 response to Sen. Grassley and how it subsequently reassessed the representations made in that letter and reached the conclusion that those representations were inaccurate and that letter should be withdrawn.”<sup>45</sup> The report found that senior Department officials in Washington did not intentionally mislead Congress, but instead “relied on information provided by senior component officials that was not accurate.”<sup>46</sup> Those senior component officials primarily responsible for providing the inaccurate information were ATF Acting Director Melson, his Deputy, William Hoover, and the U.S. Attorney for the District of Arizona, Dennis Burke.<sup>47</sup> The Inspector General’s report concluded that “the Department officials who had a role in drafting the February 4 letter should have done more to inform themselves about the allegations in Sen. Grassley’s letter and should not have relied solely on the assurances of senior officials at ATF and the U.S. Attorney’s Office that the allegations were false.”<sup>48</sup>

The Inspector General also examined statements to Congress by senior Department officials after February 2011. Although he did not find that any testimony was “untruthful”<sup>49</sup> or intentionally misleading,<sup>50</sup> he concluded that the Assistant Attorney General for Legislative

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<sup>44</sup> IG Report at 297, 299, 301-02, 314-15.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.* at 395.

<sup>47</sup> *Id.* at 395-6.

<sup>48</sup> *Id.* at 329.

<sup>49</sup> Letter from Michael Horowitz, Inspector Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Oct. 16, 2012).

<sup>50</sup> *IG Report: The Department of Justice’s Office of the Inspector General Examines the Failures of Operation Fast and Furious: Hearing before the H. Comm. on Oversight & Gov’t*

Affairs “should not have provided testimony on June 15 before the House Committee on Oversight and Government Reform in a manner that created ambiguity and uncertainty regarding whether the Department was still defending its February 4 letter.”<sup>51</sup>

The Inspector General’s report was widely recognized by both Republican and Democratic Committee Members as fair, impartial, and comprehensive. During a hearing with the Inspector General on September 20, 2012, Chairman Issa praised the report as a “thorough and complete work” and noted that the report “concludes a major chapter in Fast and Furious and the false statements made to Congress.”<sup>52</sup> Ranking Member Cummings stated: “I want to make it very, very clear I join the Chairman in expressing our appreciation. It is a thorough report. Your staff has done an outstanding job.”<sup>53</sup> Representative Trey Gowdy, one of the Department’s harshest critics, stated:

Mr. Inspector General, when I met with you several weeks ago, I left that meeting cautiously optimistic that we would receive a thorough balanced report, and my optimism was rewarded because of you and your staff.<sup>54</sup>

In addition to the conclusions in the Inspector General’s report, on September 19, 2012, the Department produced to the Committee copies of every document that was referenced in the Inspector General’s report that had been withheld previously.<sup>55</sup> These documents included

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*Reform*, 112th Cong. 135-36 (2012) (testimony of DOJ Inspector Gen. Michael Horowitz); IG Report at 414-17.

<sup>51</sup> IG Report at 330.

<sup>52</sup> *IG Report: The Department of Justice’s Office of the Inspector General Examines the Failures of Operation Fast and Furious: Hearing before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. 136, 139 (2012) (statement of Chairman Darrell Issa).

<sup>53</sup> *Id.* at 9 (statement of Ranking Member Elijah Cummings).

<sup>54</sup> *Id.* at 40 (statement of Rep. Trey Gowdy).

<sup>55</sup> These documents were created after February 4, 2011, and referenced in Chapter 6 of the Inspector General’s report, which was titled “The Department’s Statements to Congress

additional information about how the Department came to withdraw its letter to Congress on February 4, 2011, and none contained evidence that senior Department officials attempted to deliberately mislead Congress.

The Department also worked with the Inspector General to release information previously under seal by a federal court. On October 19, 2012, the Department filed a motion in *United States v. Avila* requesting permission for the Inspector General to release information from the Fast and Furious wiretap applications. U.S.'s Mot. for Disclosure of Limited Information about Wiretap Applications, *United States v. Avila*, No. 11-00126 (C.D. Cal. Oct. 19, 2012). This information was previously subject to a court sealing order as required by federal law.<sup>56</sup> That motion was granted, *see* Order Granting Mot. for Disclosure of Limited Information about Wiretap Applications, *United States v. Avila*, No.11-00126 (C.D. Cal. Nov. 25, 2012), and on November 15, 2012, the Department reissued the Inspector General's report with additional information from the wiretap applications.<sup>57</sup>

Despite these subsequent intervening events, including the Department's ongoing efforts to provide additional information to the Committee and engage in constructive efforts to resolve the dispute, the Committee failed to reinitiate negotiations until prompted by this Court in November.

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Concerning ATF Firearms Trafficking Investigations." Letter from Judith Applebaum, Acting Assistant Att'y Gen., DOJ, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform *et al.* (Sept. 19, 2012).

<sup>56</sup> Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518(8)(b) (2011) ("Applications made and orders granted under this chapter shall be sealed by the judge.").

<sup>57</sup> DOJ Inspector General, *A Review of ATF's Operation Fast and Furious and Related Matters* at note (Nov. 2012) ("[T]he Department agreed to seek court orders authorizing the unsealing of portions of the redacted wiretap information . . . and the motions were granted by the United States District Court for the District of Arizona that same month. The OIG is re-issuing its report . . . with wiretap information that can now be made public.").

The release of the Inspector General's report and the Committee's response is significant to this Court's decision in at least four respects. First, it calls into question why the Committee rushed toward contempt despite knowing that this comprehensive report was imminent; second, the completion of the Inspector General's investigation led to release of further documents after the Committee filed its Complaint in this action; third, the substance of these newly produced documents and the conclusions reached by the Inspector General reinforce the impression that the Committee is seeking confrontation for its own sake—that it meant to ignore Director Melson and focus instead on Attorney General Holder, irrespective of the facts; finally, the Committee's response to the report—its failure to recognize the significance of these new documents and the Inspector General's conclusions—illustrates its lack of interest in negotiation or accommodation.

## CONCLUSION

Congress's ability to obtain information necessary to its legislative task, particularly oversight of the Executive Branch, is vital to the effective functioning of our constitutional system. But the constitutional principles that support Congress's ability to obtain judicial enforcement in cases of Executive recalcitrance also demand that pleas for judicial intervention be made only in cases of genuine necessity and only after reasonable efforts at accommodation with the Executive have been pursued. Because those prerequisites manifestly have not been satisfied here, the Complaint should be dismissed.

Respectfully submitted,

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