

Exhibit 5

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

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February 14, 2012

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

Dear Mr. Attorney General:

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

It is ironic that while the Department's delay tactics have extended this investigation into a presidential election year, you have had the audacity to characterize it as an attempt at "headline-grabbing Washington 'gotcha' games and cynical political point scoring."¹ Congress must complete its work. We cannot wait any longer for the Department's cooperation. As such, please specify a date by which you expect the Department to produce all documents responsive to the subpoena. In addition, please specify a Department representative who will interface with the Committee for production purposes. This individual should also serve as the conduit for dealing with the contempt proceedings, should the Department continue to ignore the Committee's subpoena. Additionally, this individual should be prepared to testify before the Committee about production status. This person's primary responsibility should be to identify for the Committee all documents the Department has determined to be responsive to the subpoena but is refusing to produce, and should provide a privilege log of the documents

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

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

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

Unanswered Questions

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

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

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

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

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

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

The Honorable Eric H. Holder, Jr.
February 14, 2012
Page 3 of 7

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

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

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

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

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

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

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

⁵ 18 U.S.C. § 1505 states, in pertinent part:

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

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

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

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

Many other questions still remain unanswered in our investigation:

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

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

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

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

But I also think that if we are going to really get ahead here, if we are really going to make some progress, we need to put aside the political

⁶ Melson Transcript at 124.

⁷ Holder Testimony, *supra* note 2.

The Honorable Eric H. Holder, Jr.
February 14, 2012
Page 5 of 7

gotcha games in an election year and focus on matters that are extremely serious.⁸

This attitude with respect to a legitimate congressional inquiry, which seems to have permeated the Department's ranks, is deeply disappointing. Had the Department demonstrated willingness to cooperate with this investigation from the outset – instead of attempting to cover up its own internal mismanagement – this investigation likely would have concluded well before the end of 2011. In reality, **it is the Department that is playing political gotcha games**, instead of allowing a co-equal branch of government to perform its constitutional duty to conduct oversight of the Executive Branch.

Subpoena Compliance

Complying with the Committee's subpoena is not optional. Indeed, the failure to produce documents pursuant to a congressional subpoena is a violation of federal law.⁹ The Department's letter suggests that its failure to produce, among other things, "deliberative documents and other internal communications generated in response to congressional oversight requests" is based on the premise that "disclosure would compromise substantial separation of powers principles and Executive Branch confidentiality interests." Your February 4, 2011, cut-off date of providing documents to the Committee is entirely arbitrary, and comes from a "separation of powers" privilege that does not actually exist.¹⁰

The Department has not cited any legal authority to support this new, extremely broad assertion. To the contrary, as you know, Congress possesses the "power of inquiry."¹¹ Furthermore, "the issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking."¹² Because the Department has not cited any legal authority as the basis for withholding documents, or provided the Committee with a privilege log with respect to documents withheld, its efforts to accommodate the Committee's constitutional obligation to conduct oversight of the Executive Branch are incomplete.

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

⁸ *Id.*

⁹ 2 U.S.C. § 192 states, in pertinent part:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before . . . any committee of either House of Congress, willfully makes default . . . shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

¹⁰ Transcribed Interview of Gary Grindler at 22 (Dec. 14, 2011).

¹¹ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

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

The Honorable Eric H. Holder, Jr.
February 14, 2012
Page 6 of 7

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

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

Transcribed Interviews

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

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

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

¹³ On Friday January 27, 2012, just days before the Attorney General testified before Congress, documents were delivered to the Senate Judiciary Committee so late in the evening that a disc of files had to be slipped under the door. This is not only an extreme inconvenience for congressional staff but also deprives staff of the ability to review the materials in a timely manner.

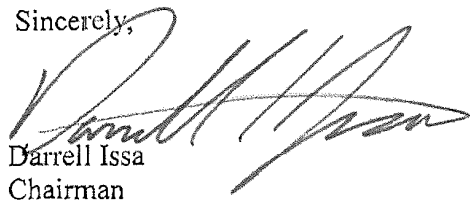
The Honorable Eric H. Holder, Jr.
February 14, 2012
Page 7 of 7

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

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

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

Sincerely,



Darrell Issa
Chairman

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

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