



**EPA, OIRA Investigations and
Executive Privilege Claims;
Missed Opportunities by Majority to
Complete Investigations**

**Additional Views
U.S. House of Representatives
110th Congress
Committee on Oversight and Government Reform**

**Tom Davis, Ranking Member
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EXECUTIVE SUMMARY

Regarding the Committee's investigations into (1) the denial of California's petition for a waiver to regulate greenhouse gas emissions from motor vehicles ("California Waiver"), and (2) the revision of the National Ambient Air Quality Standards for Ozone ("Ozone"), the Majority's Report concludes that President Bush's assertions of executive privilege over certain documents responsive to the Committee's subpoenas has "stymied the Committee's investigations of the waiver and ozone decisions"¹ and are "wrong and an abuse of the privilege."²

By merely releasing a report without any further action, the Majority has undermined the future authority of the Committee, insofar as this report has absolutely no legal impact on the situation that has given rise to consternation on both sides of the aisle. The Majority, in challenging the respective privilege claims should press the Executive Office of the President directly and even seek redress in the courts, but it has done neither.

Reasonable minds can differ on the appropriate scope of executive privilege. Indeed, over time, both the Majority and Minority have expressed frustration with broad privilege claims by a variety of occupants of the White House—some of which have had questionable bases in fact or law. We will acknowledge that this Administration has taken an expansive view of executive privilege. However, it is clear that some of the documents withheld in the instant investigations are communications directly with the President or in preparation for meeting with the President, and the courts have held that such communications are privileged.

Troubling to the Minority is the lack of any consultation with Committee Members over this chosen course of action despite promises to do so. After receiving the President's claim of executive privilege on June 20, 2008, Chairman Henry A. Waxman stated that the Committee would need to examine whether the claims of privilege were appropriate and further stated that he wanted to have discussions with Ranking Member Tom Davis and other Members of the Committee about their views of the privilege and possible next steps.

At the June 20, 2008 business meeting, Chairman Waxman stated:

We had scheduled a vote on a contempt resolution for this morning for Mr. Johnson and Ms. Dudley, and we in all of our correspondence said that we would insist that they comply, unless a valid assertion of executive

¹ *Draft Report Regarding the Bush Administration's Abuse of Power in Asserting Executive Privilege in Response to Committee Subpoenas to Stephen Johnson, Administrator Environmental Protection Agency, and Susan Dudley, Administrator, [Office of Information and Regulatory Affairs,] White House Office of Management and Budget*, Oct 14, 2008 [hereinafter "Majority Report"] at 1 (*available at <http://oversight.house.gov/documents/20081014104748.pdf>*) [last visited Oct. 15, 2008].

² *Id.*

privilege was submitted to us. We don't know whether this privilege that is being asserted is valid or not.

I want to talk with my colleagues on both sides of the aisle about this new development. I want to learn more about the assertion and the basis for this assertion of the executive privilege, and I think it is important that we consider all our options before deciding how we should proceed.³

We were disappointed there was not more to that pledge to examine what might be privileged, whether the Committee truly needed the documents to accomplish our oversight functions, or whether there might be other ways for the Committee to gather the information.

Even after the privilege was asserted, the Administration stated its willingness to continue to try to seek some accommodation with the Committee. However, the Committee made no such efforts. Accommodation can and should work to break logjams between the branches of government. For example, the Committee successfully reached an accommodation in our investigation into the death of Corporal Pat Tillman; namely, by agreeing to off-the-record interviews of senior White House officials, the Committee was able to obtain the necessary information without undermining core Constitutional principles, including the comity between co-equal branches.

Unfortunately with the subject investigations, the accommodations process was unnaturally tolled, with the Majority having to accept wagging its rhetorical finger at the Administration and scolding it rather than taking action that protects the interests of this Committee and our oversight function.

Again, the Majority alleges these claims of executive privilege are “wrong and an abuse of the privilege”⁴ because it has “stymied the Committee’s investigation of the waiver and ozone decisions.”⁵ Beyond making this statement, the Majority fails to explain how an assertion of the privilege has “stymied” the investigation. While failing to produce documents has undoubtedly made the Committee’s job harder, at this point, the Minority is not prepared to say that it has prevented us from gathering the information in other ways.

In the case of these investigations, the Committee held a hearing on May 20, 2008, where Administrator Johnson and Administrator Dudley both appeared to answer any and all questions regarding their roles in the process leading up to the issuance of the final NAAQS ozone regulation as well as the California waiver. However, the Committee did not avail itself of the opportunity to question these witnesses thoroughly.

³ *Meeting to consider resolution to find Stephen L. Johnson, EPA Administrator, and Susan Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget*, before the House Oversight and Government Reform Committee, Jun. 20, 2008 (statement by Henry A. Waxman, Chairman, House Oversight and Government Reform Committee) (**emphasis** added).

⁴ *Majority Report* at 1.

⁵ *Id.*

In the case of the Ozone investigation, this point is aptly put by Attorney General Michael Mukasey when he wrote to the Committee:

[T]he Committee had the opportunity to ask [Administrator Dudley] about OIRA's role, as well as that of [the President] and the White House staff, in the process leading up to the issuance of the final NAAQS ozone regulation. Yet, the Committee asked no such questions. Indeed Administrator Dudley was asked only four questions during the entire hearing. None of the questions put to the Administrator related to OIRA's internal deliberations or communications with the White House, and none demonstrated a need for additional documents or information from OIRA.⁶

Additionally, the Committee could have interviewed or deposed employees of OIRA, however, no such effort was ever made. In fact, the Committee never accepted offers from OIRA to provide Committee staff with a briefing.

Finally, for the reasons discussed below, the Minority is concerned that the Majority's present course of action will have long-term consequences for the Committee's ability to conduct meaningful oversight over future Administrations. For all intents and purposes, merely adopting a report signals that White House privilege claims will go unchallenged. Nothing in the Majority's Report forces a resolution of the substantive issue, and it does not bring any clarity to the appropriate boundaries of executive privilege. As such, it sets a dangerous precedent, in which the Majority cedes the factual high ground in exchange for a rhetorically satisfying yet ultimately meaningless gesture.

ANALYSIS OF MAJORITY CLAIMS

The Majority is misleading by not adequately highlighting the volume of documents provided and the nature of documents not provided to the Committee by EPA and OIRA.

Majority Claim

The Majority asserts that “[i]nsufficient information” has been provided to the Committee to determine the considerations that motivated White House involvement in the waiver and the ozone decisions.⁷

⁶ Letter from Michael B. Mukasey, U.S. Attorney General, to President George W. Bush (June 19, 2008) [hereinafter “Jun. 19, 2008 Bush Letter”].

⁷ *Majority Report* at 5, 9.

Fact

The Majority does not adequately reflect the number and nature of documents that have been provided to the Committee. Likewise, the Majority assumes that the documents being withheld necessarily detail White House involvement, however, the Majority cannot know the contents of documents they have yet to see. Both of these statements together belie the Majority's propensity to conduct investigations through the prism of their own assumptions.

Regarding the California Waiver investigation, EPA provided a substantial number of documents. EPA provided the Committee with copies of or *in camera* access to over 7,000 documents totaling over 27,000 pages. On April 22, 2008, White House counsel informed Committee staff that EPA possesses 32 documents that evidence telephone calls or meetings in the White House involving at least one high-ranking EPA official and at least one high-ranking White House official. The White House counsel described these documents as "indicative of deliberations at the very highest level of government."⁸ On June 20, 2008, the President claimed executive privilege over this limited group of responsive documents that has not been provided to the Committee.⁹

Regarding the Ozone investigation, the EPA Administrator provided the Committee with copies of or *in camera* access to over 4,000 documents totaling over 35,000 pages. On May 6, 2008, Committee staff met with EPA staff and White House counsel to discuss these documents, and on June 20, 2008, the President claimed executive privilege over approximately 35 documents because of their nature as being indicative of high level decision-making material.¹⁰ Specifically, these documents include:

[U]nredacted copies of notices for meeting between EPA officials and senior White House officials to discuss the ozone regulation and California waiver decisions ... [and] the only other EPA document concerning the ozone regulation is a set of talking points for the EPA Administrator to use in a meeting with [the President].¹¹

Regarding the Ozone investigation, the OIRA Administrator provided the Committee with copies of or *in camera* access to over 7,500 pages of documents. On April 25, 2008, OMB staff and White House counsel informed the Committee that the OIRA Administrator continued to withhold approximately 1,900 pages of responsive

⁸ Meeting between Staff from the House Oversight and Government Reform Committee, Staff from the U.S. Environmental Protection Agency, and Staff from the White House, in Washington, D.C. (Apr. 22, 2008) [hereinafter *Apr. 22, 2008 Meeting*].

⁹ Letter from Christopher Bliley, Associate Administrator, Environmental Protection Agency, to Henry A. Waxman, Chairman, House Oversight and Government Reform Committee (Jun. 20, 2008) [hereinafter "Jun. 20, 2008 EPA Letter"] (citing *Jun. 19, 2008 Bush Letter*).

¹⁰ *Id.*

¹¹ *Jun. 19, 2008 Bush Letter*.

documents.¹² Approximately 275 pages of responsive documents are communications between OIRA and other White House officials outside of OMB.¹³ The remaining 1,625 pages of documents relate to internal OIRA communications about EPA's revised ozone standards.¹⁴ On June 20, 2008, the President claimed executive privilege over these documents.¹⁵

The Majority Report does not adequately state the extensive consultations between EPA, OIRA, and the Committee, which the Chairman himself deemed beneficial to narrowing differences.

Majority Claim

The Majority gives the impression that EPA and OIRA were not cooperative with the Committee and somewhat obstinately withheld documents. This, by the Chairman's own admission in previous correspondence with the agencies, was simply not the case.

Fact

Since opening the California Waiver and Ozone investigations, Committee staff participated in nearly four dozen meetings (including in-person meetings and conference calls) with EPA and OIRA staff to discuss the process and the substance of the respective document productions. These consultations included discussions of when documents would be provided as well as "negotiations" over which documents should be made available.

Regarding EPA, EPA demonstrated its willingness and cooperation by providing to the Committee numerous sensitive documents, including some that raised concerns for EPA over matters of agency confidentiality especially given ongoing litigation. Nonetheless, EPA provided the Committee with access to or possession of all except approximately 67 documents in total in the California Waiver and Ozone investigations. Further, EPA and White House counsel provided to the Committee over the course of at least six in-person meetings the specific nature of these documents and why they fall within a "zone of protection."¹⁶

¹² Meeting between Oversight and Government Reform Committee staff, OMB staff and White House counsel (Apr. 25, 2008) [hereinafter "Apr. 25, 2008 Meeting"]

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Letter from Jim Nussle, Director, Office of Management and Budget, to Chairman Henry A. Waxman (June 20, 2008) (citing *Jun. 19, 2008 Bush Letter*).

¹⁶ Meeting between staff from the House Committee on Oversight and Government Reform, staff from the U.S. Environmental Protection Agency, and staff from the White House in Washington, D.C. (Apr. 15, 2008).

In addition, the Chairman himself, called the document production and review process “productive”¹⁷ and stated that he “appreciate[s]” EPA’s efforts to collect documents.¹⁸ In past investigations, the Chairman stated that ongoing discussions (similar to those between EPA, OIRA, and the Committee) “enabled us to narrow our differences and focus our request for documents.”¹⁹ In a previous investigation, after extensive consultation, the Committee decided that “[i]n deference to your concerns [over providing documents implicating Presidential privilege], [the Committee would not] insist at this time on production of drafts that were reviewed by the President.”²⁰ It is not clear why the Majority now balks at the very same process they called productive in the past.

The Majority’s premise for assessing the President’s claim of executive privilege is flawed.

Majority Claim

Regarding the California Waiver investigation, the Majority states:

The record before the Committee raises many questions about the Administrator’s actions. The documents and testimony that the Committee received show: (1) the career staff at EPA unanimously supported granting California’s petition; (2) Administrator Johnson also supported granting California’s petition at least in part; and (3) Administrator Johnson reversed his position after communications with officials in the White House. What the record does not show is what happened inside the White House and why.²¹

Fact

The Majority relies heavily upon the characterization that the EPA Administrator “reversed himself” in his decision to deny California’s request for a waiver to support their claim that the assertion of Executive Privilege has “stymied” the Committee’s investigations.”²² Therefore, the Majority’s analysis of the executive privilege claim is flawed.

¹⁷ Letter from Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency (Mar. 10, 2008).

¹⁸ Letter from Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency (Mar. 24, 2008).

¹⁹ Letter from Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, to Fred Field, Counsel to the President, White House (Jul. 24, 2007).

²⁰ *Id.*

²¹ *Majority Report* at 4.

²² *Id.* at 1.

However, this belief by the Majority is based upon the statements made during one deposition coupled with the Majority's clear predisposition to assume inappropriate White House involvement in the waiver and ozone decisions. The record simply does not support this categorical assessment of the nature of conversations and documents over which executive privilege has been claimed and, in fact, reflect the Majority's frustrations in not uncovering evidence to support their preconceived conclusion that the Administrator's decision was not on the merits.

When being deposed by Committee staff, Jason Burnett, Associate Deputy Administrator, stated: "Over the course of several months, when I had regular conversations with the administrator, I came away with the understanding that he had different opinions at different points in time."²³ Burnett also testified that "the Administrator was interested in initially a full grant, and became interested in a partial grant, asked for me and others to explore ways of making a partial grant work."²⁴ Finally, Burnett testified that "I had the impression that [Administrator Johnson] was quite interested in and was seriously exploring the objection of granting the waiver. Later in the process, as previous questioning has noted, there was a lot of interest in middle-ground options."²⁵

It is critical to note that Burnett's statements reflect not the actual opinion or decision of Administrator Johnson but Burnett's "understanding" and his "impression" – not any specific statements or communications from the Administrator. In fact, according to Burnett, he did not know the Administrator's final decision until the Administrator came into Burnett's office on Monday, December 17, 2007, and told him.²⁶

This series of statements by Burnett during his deposition is essentially the basis for the Majority's claim that the Administrator reversed himself and therefore there may have been inappropriate White House interference. The Majority therefore concludes that the "legislative and oversight need" for the documents "clearly overcomes any confidentiality interests the executive branch may have in the documents."²⁷ This heavy reliance is ironic given that, elsewhere, the Majority laments the lack of a record given that individuals providing evidence—much like Burnett himself—"had no firsthand knowledge of the communications [with the White House]."²⁸

Again, the record simply does not support this categorical assessment of the nature of conversations and documents over which executive privilege has been claimed, and, instead reflect the Majority's frustrations in not uncovering evidence to support their preconceived conclusion that the Administrator's decision was not on the merits.

²³ Deposition of Jason Burnett, Associate Deputy Administrator, U.S. Environmental Protection Agency, in Washington, D.C. (May 15, 2007) [hereinafter *Burnett Deposition*] at Draft Tr. 59.

²⁴ *Id.* at Draft Tr. 123

²⁵ *Id.* at Draft Tr. 60

²⁶ *Id.* at Draft Tr. 131

²⁷ *Id.*

²⁸ *Majority Report* at 19.

The Majority is misleading when it claims that information is not available from other sources.

Majority Claim

The Majority's report states:

Because of this broad invocation of executive privilege, the Committee has no responsive documents from EPA or the White House that could explain what happened in the White House on the waiver and ozone decisions.²⁹

* * *

Insufficient information has been provided to the Committee to determine the considerations that motivated White House involvement in [the waiver] matter and whether those considerations were proper under the Clean Air Act.³⁰

* * *

Insufficient information has been provided to determine the considerations that motivated White House involvement in [the ozone] matter and whether those considerations were proper under the Clean Air Act.³¹

* * *

[T]he information sought by the Committee subpoenas is not available from other sources. The Attorney General's suggestion that Committee has had access to such information through depositions of EPA officials is specious.³²

Fact

The Majority alleges that insufficient information was provided to make a determination on the genesis of the Ozone decision, yet they do not mention that they simply failed to avail themselves of opportunities to ask OIRA any substantive questions which would have shed light on the decision making process. They did not seek to interview a single career or political appointee, and they asked the OIRA Administrator only four questions—none of which related to the decision making processes—during the hearing. The Majority is silent on this topic because they know they did not exercise the full power of the Congress in this aspect of the investigation, making their current

²⁹ *Majority Report* at 19.

³⁰ *Id.* at 5.

³¹ *Id.* at 9.

³² *Id.* at 19.

arguments disputing the President's claims of executive privilege that much more extraordinary.

The Majority alleges the assertion of executive privilege "is wrong and an abuse of the privilege"³³ because it has "stymied the Committee's investigation of the waiver and ozone decisions."³⁴ In fact, in the context of the OIRA documents, the Majority fails to remind the reader that the Majority themselves stymied the Committee's investigation because the Majority had the opportunity to explore the nature of these documents further at the Committee's May 20, 2008 hearing but elected not to do so.

This point is aptly put by Attorney General Mukasey when he says:

[T]he Committee had the opportunity to ask [Administrator Dudley] about OIRA's role, as well as that of [the President] and the White House staff, in the process leading up to the issuance of the final NAAQS ozone regulation. Yet, the Committee asked no such questions. Indeed Administrator Dudley was asked only four questions during the entire hearing. None of the questions put to the Administrator related to OIRA's internal deliberations or communications with the White House, and none demonstrated a need for additional documents or information from OIRA.³⁵

In the Minority's opinion, the Majority did not avail themselves of every opportunity to educate themselves about the information they now seek.

The Committee record on these investigations remains robust.

Majority Claim

The Majority's report claims:

Because of this broad invocation of executive privilege, the Committee has not received responsive documents from EPA or the White House that could explain what happened inside the White House on the waiver and ozone decisions.³⁶

³³ *Majority Report* at 1.

³⁴ *Id.*

³⁵ *Jun. 19, 2008 Bush Letter*.

³⁶ *Majority Report* at 19.

* * *

Insufficient information has been provided to the Committee to determine the considerations that motivated White House involvement in [the waiver] matter and whether those considerations were proper under the Clean Air Act.³⁷

Fact

Subsequent to his announcement on December 19, 2007, the EPA Administrator, in interviews, written statements, and hearing testimony too numerous to count, took personal ownership of his decision to deny California's request for a waiver. As the EPA Administrator has stressed numerous times, in arriving at his decision to deny California's waiver request, he reviewed the "impacts of global climate change in California in comparison to the rest of the nation as a whole."³⁸ The EPA Administrator stated this "call[ed] for EPA to exercise its own judgment to determine whether the air pollution problem at issue - elevated concentrations of GHG emissions - is within the confines of state air pollution programs covered by section 209(b)(1)(B)."³⁹ It was on this basis that the EPA Administrator made his final determination that the subject regulations are "not needed to meet compelling and extraordinary conditions."⁴⁰

The EPA Administrator was provided with the option of denying California's request for a waiver during his consultations with EPA staff. During the course of this investigation, Committee staff was told the EPA staff would not have presented the Administrator with options that were not legally defensible. For example, in response to a question of, "Would [EPA] staff have presented and would the Administrator have ever accepted an option or a piece of information or advice that in some way wasn't legally defensible?" Burnett responded, "I think that we eliminated from consideration options that were not legally defensible."⁴¹

Likewise with regard to the Ozone investigation, the documents and testimony received by the Committee in the course of this investigation provide the Committee with a robust understanding of what steps the OIRA Administrator and the EPA Administrator took in regards to the EPA Administrator's decision to revise the national ambient air quality standards for ozone.

The extensive public record and the Committee's investigation have failed to reveal or even suggest that the President or any official in the Executive Office of the President acted inappropriately or contrary to the law. Article II of the Constitution provides: "The Executive power shall be vested in a President of the United States." Executive Order 12866, promulgated by President Clinton, openly declares the

³⁷ *Id.* at 5.

³⁸ U.S. EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12158 (Mar. 6, 2008).

³⁹ *Id.*

⁴⁰ *Id.* at 12,156, 12,162

⁴¹ *Burnett Deposition* at Draft Tr. 136-37.

President's role in major rulemakings -- namely that the President will resolve disagreements between an agency and the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA").

According to the record, the President himself accepted OIRA's conclusion that the uncertainties of the benefits of a standard lower than the one chosen justified not selecting the lower standard. The President appears to have carried out his constitutional responsibilities, consistent with E.O. 12866.