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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, White House Office of Management and Budget

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<u>DRAFT</u>

R E P O R T
OF THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
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, WHITE HOUSE OFFICE OF MANAGEMENT AND BUDGET

On June 20, 2008, President George W. Bush asserted executive privilege over approximately two thousand pages of documents that were withheld from the Committee on Oversight and Government Reform by Stephen Johnson, Environmental Protection Agency Administrator, and Susan Dudley, Administrator of the Office of Information and Regulatory Affairs in the White House Office of Management and Budget. The Committee had subpoenaed these documents on April 9, April 16, and May 7, 2008, as part of its investigation into whether the President and his staff complied with the Clean Air Act in overruling Administrator Johnson on two decisions: (1) preventing California and other states from reducing greenhouse gas emissions from motor vehicles and (2) adopting new ozone air quality standards inconsistent with those recommended by the agency's scientific experts.

Congress has a compelling legislative and oversight need for documents withheld from the Committee. The documents withheld pursuant to the President's assertion of executive privilege are critical to determining the role of the White House in Administrator Johnson's waiver and ozone decisions, whether White House actions with respect to these decisions were in compliance with Clean Air Act requirements, and whether any additional legislation is necessary to ensure the goals of the Act are effectuated properly in the future.

The President's assertion of executive privilege covers is expansive. It covers any communications that occurred within the White House, no matter how attenuated the connection between the staff authoring the communications and the presidential decisionmaking process. At the same time, the Administration has barred a key EPA official from responding to Committee questions about these communications and has refused to provide the Committee basic information about the authorship and distribution of the documents that would enable the Committee to assess the merits of the privilege claim and whether further accommodations could be achieved. The assertion of executive privilege under these circumstances has stymied the Committee's investigation of the waiver and ozone decisions.

For these reasons, the Committee finds that the President's assertion of executive privilege is wrong and an abuse of the privilege.

II. BACKGROUND

A. The California Waiver Request

The Clean Air Act authorizes two sets of standards to control tailpipe pollution from motor vehicles: (1) federal standards and (2) state standards established by California, which can also be adopted by other states. Section 209(b) of the Clean Air Act requires EPA to waive federal preemption for California motor vehicle standards if the agency determines that California's standards in the aggregate will be at least as protective of public health and welfare as federal standards. EPA may reject a waiver request only if the Administrator finds: (1) California's determination regarding protectiveness is "arbitrary and capricious"; (2) California does not need state standards "to meet compelling and extraordinary conditions"; or (3) California's standards are not consistent with statutory requirements for adequate lead-time and technological feasibility.[1]

The special authority for California to set its own motor vehicle standards was part of the Air Quality Act of 1967 and was retained when Congress adopted the original 1970 Clean Air Act.[2] This authority was expanded in the 1977 amendments, with Congress recognizing that "the underlying intent" of section 209 is "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare."[3]

In September 2004, California amended its existing motor vehicle regulations to include standards requiring cars and light-duty trucks to limit emissions of greenhouse gases.[4] The standards begin with the 2009 model year and phase-in gradually over eight years.[5] By the 2016 model year, they would cut global warming pollution from new vehicles by almost 30%.[6]

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[1] Clean Air Act § 209(b).

[2] See Motor & Equipment Mfrs. Ass'n v. EPA ("MEMA I"), 627 F.2d 1095, 1108-1111 (D.C. Cir. 1979); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State Dept. of Environmental Conservation, 17 F.3d 521, 525 (2nd Cir. 1994).

[3] H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977).

[4] California Environmental Protection Agency Air Resources Board, Final Regulation Order — Amendments to Sections 1900 and 1961 and Adoption of New Sections 1961.1, Title 13, California Code of Regulations as Approved by OAL, California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light Trucks and Medium-Duty Vehicles as Approved by OAL (Sept. 24, 2004 hearing date) (online at www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm).

[5] California Environmental Protection Agency Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver of Preemption for California's Adopted and Amended New Motor Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions: Support Document, at 6 (Dec. 21, 2005).

[6] California Environmental Protection Agency Air Resources Board, *ARB Approves Greenhouse Gas Rule* (Sept. 24, 2004) (press release) (online at www.arb.ca.gov/newsrel/nr092404.htm).

Thirteen other states — Arizona, Connecticut, Maine, Maryland, Massachusetts, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington — have already adopted the California standards. Together, these 14 states' consumers buy over 40% of the new vehicles sold nationwide each year.[7]

On December 21, 2005, California requested that EPA grant a waiver of preemption under section 209(b) for the California greenhouse gas emissions standards.[8] EPA took no public action on the waiver request until the Supreme Court ruled in *Massachusetts v. EPA* on April 2, 2007, that greenhouse gases are air pollutants under the Clean Air Act.[9] EPA then published a notice on April 30, 2007, announcing a public hearing and a comment period on the waiver request.[10] The public comment period closed on June 15, 2007.[11]

On December 19, 2007, Administrator Johnson announced that he had "found that California does not have a 'need to meet compelling and extraordinary conditions'" and that he had decided to deny California's waiver request.[12] In an unusual departure from agency practice, the Administrator announced this decision without releasing a decision document explaining the legal basis for the decision. The formal legal justification for the decision was not released until March 6, 2008, when Administrator Johnson wrote in the Federal Register:

> I do not believe section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems; nor, in the alternative, do I believe that the effects of climate change in

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[7] Union of Concerned Scientists, *Automakers v. the People* (online at www.ucsusa.org/clean_vehicles/avp/) (accessed May 8, 2008).

[8] Letter from Catherine Witherspoon, Executive Director, California Air Resources Board, to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, Re: Regulations to Control Greenhouse Gas Emissions From Motor Vehicles; Request for Waiver of Preemption Under Clean Air Act Section 209(b) (Dec. 21, 2005).

[9] *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

[10] Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21260 (Apr. 30, 2007).

[11] Environmental Protection Agency, 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, 12157 (Mar. 6, 2008).

[12] Letter to Arnold Schwarzenegger, Governor of California, from Stephen L. Johnson, Administrator, U.S. EPA (Dec. 19, 2007).

California are compelling and extraordinary compared to the effects in the rest of the country.[13]

The record before the Committee raises many questions about the Administrator's actions. The documents and testimony that the Committee has 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.

As described in a May 19, 2008, memorandum from Committee staff to the members, EPA staff had a series of meetings with the Administrator on the waiver decision over a period of months in the summer and fall of 2007.[14] At an early meeting in June 2007, the briefing slides included the "initial assessment" of the Office of Transportation and Air Quality career staff that "CA met the statutory criteria for a waiver."[15] A briefing prepared by the lead staff lawyer for EPA's General Counsel stated: "After review of the docket and precedent, we don't believe there are any good arguments against granting the waiver. All of the arguments … are likely to lose in court if we are sued." The EPA staff assessments of the merits of California's request and developing decision options for the Administrator led to briefings to the Administrator on September 12, 20, and 21, and October 30, 2007.

According to EPA staff interviewed by the Committee, at the September 12 meeting career EPA staff communicated to the Administrator that "we did not have reason to deny the waiver."[16] At the September 20 and 21 briefing with the Administrator, the Administrator polled the room to ascertain the opinions of the various EPA staff assembled. According to the five EPA employees who attended the meeting and were interviewed by the Committee, every EPA employee who expressed an opinion at that meeting supported granting the waiver in full or in part, and no one advised that the Administrator deny the waiver.[17] During the October 30 briefing, career EPA staff explicitly told the Administrator that granting the waiver was the most

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[13] Environmental Protection Agency, 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, 12157 (Mar. 6, 2008).

[14] *See* Committee on Oversight and Government Reform, Majority Staff, *Memorandum to Members of the Committee on Oversight and Government Reform* (May 19, 2008) (attached as Appendix A).

[15] Environmental Protection Agency, *President's GHG Rule: Status Briefing* (June 15, 2007).

[16] Committee on Oversight and Government Reform, Interview of Maureen Delaney, at 13 (Feb. 11, 2008).

[17] *See* Committee on Oversight and Government Reform, Majority Staff, *Memorandum to Members of the Committee on Oversight and Government Reform*, at 11-12 (May 19, 2008) (citing various Committee interviews with EPA employees).

legally defensible option, while a denial of the waiver would be unlikely to survive legal challenge.[18]

Evidence obtained by the Committee indicates that EPA employees also prepared written analyses and slides for these briefings that advised the Administrator to grant the waiver, but the Principal Deputy Administrator for the Office of Air and Radiation deleted these written recommendations so that the information was only communicated to the Administrator orally.[19]

According to the testimony of EPA Associate Deputy Administrator Jason Burnett, Administrator Johnson was "very interested in a full grant of the waiver" in August and September and then "at some point in the process" modified his view and believed that a partial grant of the waiver "was the best course of action."[20] According to Mr. Burnett, Administrator Johnson's preference for a full or partial grant of the waiver did not change until after he communicated with the White House about the matter.[21] Mr. Burnett also affirmed that there was "White House input into the rationale in the December 19th letter."[22]

Evidence obtained by the Committee indicates that at the time of the December 19 decision to deny the waiver, there were no EPA employees or agency documents arguing in favor of denying the waiver.[23] On December 20, the day after Administrator Johnson announced his decision, the most recent internal draft of the decision document was written as if the waiver was to be granted in full.[24]

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

B. The Ozone Air Quality Standards

Ozone is an air pollutant that contributes to what is typically referred to as smog. When ozone is inhaled, it reacts chemically with molecules in the respiratory tract, causing serious adverse health effects. Exposure to ozone can decrease lung function, cause inflammation of

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[18] *See id.* at 14-15 (citing various Committee interviews with EPA employees).

[19] *See id.* at 7-15.

[20] Committee on Oversight and Government Reform, Deposition of Jason Burnett, at 118, 123 (May 15, 2008).

[21] *See Memorandum to Members of the Committee on Oversight and Government Reform,* at 17-18 (citing the Burnett deposition).

[22] *See Memorandum to Members of the Committee on Oversight and Government Reform,* at 18 (citing the Burnett deposition).

[23] *See Memorandum to Members of the Committee on Oversight and Government Reform,* at 18.

[24] *Id.*

airways, and induce respiratory symptoms such as coughing, throat irritation, chest tightness, wheezing, pain, burning, discomfort, and shortness of breath. Exposure to ozone can result in school absences, doctor visits, emergency room visits, hospital admissions, and even premature death.

Ozone can also damage sensitive vegetation and ecosystems. According to EPA, ozone injures crop production and native vegetation and ecosystems "more than any other air pollutant."[25] Ozone exposure can damage leaves, interfere with photosynthesis, and reduce the ability of sensitive species to adapt to or withstand environmental stresses, such as freezing temperatures and pest infestation.[26] Exposure to ozone reduces crop yields for fruits and vegetables and can stunt the growth of trees.[27]

The Clean Air Act requires EPA to protect against the public health and environmental effects of ozone by establishing national ambient air quality standards (NAAQS).[28] Under the Act, EPA is required to establish two standards: (1) a primary standard for the protection of public health and (2) a secondary standard for the protection of "public welfare," including the environment.[29] In 2001, in the case of *Whitman v. American Trucking Association*, the Supreme Court ruled that "EPA may not consider implementation costs in setting the … NAAQS."[30]

In January 2007, EPA staff recommended that the primary NAAQS for ozone be reduced from 80 ppb to as low as 60 ppb.[31] In addition, the staff concluded that it was no longer appropriate "to use an 8-hr averaging time for the secondary O_3 standard" and recommended to Administrator Johnson that the "8-hr average form should be replaced with a cumulative, seasonal, concentration weighted form."[32] EPA staff recommended that the new secondary standard be a "cumulative, weighted total of 12-hour (8 a.m. – 8 p.m.) exposures over a 3-month period giving greater weight to exposures at higher levels of ozone."[33] The staff made this

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[25] Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information,* at 7-1 (Jan. 2007) (EPA-452/R-07-003).

[26] *Id.* at 7-6 – 7-9.

[27] *Id.* at 7-9, 7-10.

[28] Clean Air Act § 109 (2005).

[29] *Id.*

[30] *Whitman v. American Trucking Associations,* 531 U.S. 457 (2001).

[31] Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information* at 6-77 (Jan. 2007) (EPA-452/R-07-003).

[32] *Id.* at 8-24.

[33] Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone Final Staff Paper, Human Exposure and Risk Assessments and Environmental Report* (Jan. 2007) (online at www.epa.gov/ttn/naaqs/standards/ozone/data/2007_01_finalsp_ factsheet.pdf).

recommendation because the cumulative, seasonal form is more "biologically relevant" to vegetation and new research showed that the eight-hour standard would not cover the same "areas of concern for vegetation" as the cumulative, seasonal standard.[34]

The Clean Air Act establishes a Clean Air Scientific Advisory Committee (CASAC) to guide the EPA Administrator on setting the NAAQS. [35] CASAC reviewed the staff recommendations on the ozone standards and unanimously supported them. In the case of the secondary standard, its Ozone Review Panel members were "unanimous in supporting the recommendation in the Final Ozone Paper that protection of managed agricultural crops and natural terrestrial ecosystems requires a secondary Ozone NAAQS that is substantially different from the primary ozone standard in averaging time, level and form."[36]

Internal EPA documents show that the "option selection" meeting with the Administrator occurred on January 7, 2008.[37] At this meeting or shortly thereafter, the Administrator decided to proceed with a primary standard of 75 ppb and a cumulative, seasonal secondary standard.[38] A draft final rule reflecting these decisions was submitted by Administrator Johnson to the White House Office of Management and Budget on February 22, 2008.[39]

The draft final rule submitted by Administrator Johnson stated that adoption of a seasonal secondary standard was supported by "compelling" evidence and was "necessary" to protect the environment.[40] According to the draft approved by Administrator Johnson: "EPA has found no evidence that from the perspective of biological impact of O_3 exposure, the 8-hour standard form is an appropriate metric to protect vegetation."[41] The draft added: "the Administrator concludes that to provide adequate protection, the standard should be revised by establishing a distinct

[34] *Id.* at 8-20.

[35] Clean Air Act § 109(d)(2) (2005).

[36] Letter from Dr. Rogene Henderson, Chair of the Clean Air Scientific Advisory Committee, to EPA Administrator Stephen L. Johnson (Mar. 26, 2007).

[37] Environmental Protection Agency, *Ozone NAAQS Review; SAN 5008; Tier 1* (Revised on Mar. 4, 2008).

[38] *Id.* EPA has not responded to a Committee request to identify the exact date on which Administrator Johnson made the option selection.

[39] Memorandum from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 6, 2008).

[40] U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 243 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

[41] U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 252 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

secondary standard with a cumulative, seasonal form that is biologically relevant to O_3-related effects."[42]

During the evening of March 11, 2008, EPA staff was directed to reject the seasonal standard and make the secondary standard equal to the primary one, as OMB had previously urged. An e-mail from an EPA attorney working on the ozone standard explained:

> Well, we lost on the secondary. the decision came in about 7:00 to make it equal to the primary. About an hour later we heard there was also to be some sort of presidential announcement.[43]

The following day, Ms. Dudley sent a letter to EPA Administrator Johnson explaining that the President had reviewed the secondary standard. According to Ms. Dudley's letter:

> The President has concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard.[44]

The record before the Committee shows that the President's involvement triggered what EPA staff called an "emergency rewrite" of the final rule. Just before 1:00 a.m. on March 12, 2008, the Director of EPA's Health and Environmental Impacts Division informed EPA staff that "the primary and secondary standards are going to be identical" and asked that the "implementation section" be reworked "first thing in the morning."[45] The final rule was issued late in the day on March 12.

As described in a May 20, 2008, memorandum from Committee staff to the members, EPA staff questioned both the legality and motivation for the last-minute change in the secondary standard.[46] Documents produced to the Committee show:

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[42] U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 243 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

[43] E-mail from John Hannon to Richard Ossias and Kevin McLean (Mar. 12, 2008; 7:40 a.m.).

[44] Letter from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 12, 2008). The letter is misdated as March 13, but was actually transmitted on March 12 as evidenced by its availability on that date and the citation to the letter in the March 12 final regulation.

[45] E-mail from Lydia Wegman to Bill Harnett, et al. (Mar. 12, 2008; 12:55 a.m.).

[46] *See* Committee on Oversight and Government Reform, Majority Staff, *Memorandum to Members of the Committee on Oversight and Government Reform* (May 20, 2008) (attached as Appendix B).

- The Associate Director for Health for EPA's National Center for Environmental Assessment commented: "Looks like pure politics."[47]

- An EPA lawyer wrote: "we could be in a position of having to fend off contempt proceedings. … The obligation to promulgate a rule arguably means to promulgate one that is nominally defensible."[48]

- A career official stated: "I have been working on NAAQS for over 30 years and have yet to see anything like this."[49]

- A career official charged with revising communications materials for the final rule wrote: "I don't think that we need to repeat all this … um … stuff … about 'parks and forests' when we're not doing anything to protect them. … No need to distinguish which types of vegetation are in need of additional protection, since we're not really protecting any of them properly!"[50]

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

II. THE COMMITTEE'S INVESTIGATION

A. Investigation of the California Waiver Request

On December 19, 2007, Administrator Johnson denied California's petition to regulate greenhouse gas emissions from motor vehicles. The next day, Chairman Waxman requested documents relating to the decision, other than those that were available on the public record, including "all communications between the agency and persons outside the agency, including persons in the White House, related to the California waiver request."[51] The deadline for this request was January 23, 2008.

On January 18, EPA staff informed the Committee that the agency would complete production by February 15.[52] However, Administrator Johnson failed to complete production by that date. On March 10, 2008, Chairman Waxman wrote to Administrator Johnson again to request that EPA staff work with Committee staff to establish by the close of business on March

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[47] E-mail from John Vandenberg to Ila Cote and Peter Preuss (Mar. 10, 2008; 4:22 pm).

[48] E-mail from Lea Anderson to Mary Ann Poirier (Mar. 11, 2008; 11:24 am).

[49] E-mail from Dave McKee to Lewis Weinstock (Mar. 11, 2008; 9:39 pm).

[50] E-mail from Erika Sasser to Sara Terry (Mar. 11, 2008; 8:43 pm).

[51] Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (Dec. 20, 2007).

[52] Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (Jan. 18, 2008).

12, 2008, a mutually agreeable deadline for the production of documents involving the White House.[53] EPA staff responded on March 12 that the agency anticipated providing final responses regarding documents involving the White House no later than March 28.[54] On March 24, Chairman Waxman wrote to Administrator Johnson again and requested the documents involving the White House by noon on March 28.[55]

On March 28, 2008, EPA staff informed the Committee that the agency would respond by April 3, 2008.[56] On April 4, EPA staff informed Committee staff that approximately 90 responsive documents would not be made available to the Committee, but there was no assertion of executive privilege.[57]

On April 9, Chairman Waxman issued a subpoena to Administrator Johnson for the production of the remaining responsive documents. The subpoena required Administrator Johnson to produce the responsive documents by April 11.

On April 11, Administrator Johnson did not provide the documents. Instead, EPA staff requested a meeting with the Committee staff and White House counsel to discuss the production of EPA's documents reflecting communications with the White House.[58] In response to this request, Committee staff met repeatedly with EPA and White House counsel.

On April 22, 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."[59] The agency has provided some e-mails that coordinate press interactions and schedule meetings and telephone calls between EPA officials and others, including White House

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[53] Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (Mar. 10, 2008). Correspondence regarding the Committee's investigation of the waiver is attached as Appendix C.

[54] Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (Mar. 12, 2008).

[55] Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (Mar. 24, 2008).

[56] Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (Mar. 28, 2008).

[57] Phone conversation between Oversight and Government Reform Committee staff and EPA staff (Apr. 4, 2008).

[58] Phone conversation between Oversight and Government Reform Committee staff and EPA staff (Apr. 11, 2008).

[59] Meeting between Oversight and Government Reform Committee staff, EPA staff, and White House staff (Apr. 22, 2008).

officials.[60] However, these scheduling e-mails have been redacted to omit descriptions of the meetings or calls, subjects of the meetings or calls, agendas of the meetings or calls, complete lists of participants, and perhaps other information. According to EPA, the agency continues to withhold approximately 25 documents in their entirety.[61]

On May 15, the Committee took the deposition of EPA Associate Deputy Administrator Jason Burnett. Mr. Burnett told the Committee he knew Administrator Johnson had communications with the White House regarding the California waiver, and that Administrator Johnson had related to Mr. Burnett the substance of his communications with the White House on this matter.[62] However, when Committee staff asked Mr. Burnett to identify the White House officials with whom Administrator Johnson had communications and to describe the substance of those communications, Mr. Burnett's attorney interjected to prevent him from responding to the questions, citing instructions from the Administration to withhold this information from the Committee.[63]

At a May 20 hearing before the Committee, Administrator Johnson also refused to answer questions about his communications with the White House regarding the waiver:

> Q: … Did you have a meeting with the President about this issue of the EPA waiver?
>
> Mr. Johnson: When and where and if I have meetings with the President are – I said I have routine meetings with members of the Executive Branch. Those meetings I believe are in confidence.
>
> ***
>
> Q: Did you have a discussion with the President on any one of these three rules [including the waiver]?
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> Mr. Johnson: Mr. Chairman, as I said, I have routine conversations with the President and the Executive Branch on all, on many matters before the Agency of particular importance. I don't believe that it is appropriate for me to get into the details of what those conversations are or are not. I think that is an important privilege and opportunity that we have.
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> Q: Are you asserting executive privilege?

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[60] Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (June 20, 2008).

[61] *Id.*

[62] House Committee on Oversight and Government Reform, Deposition of Jason Burnett, at 58 (May 15, 2008).

[63] *Id.* at 61, 69, 77-78.

Mr. Johnson: Not at this time, sir.[64]

B. Investigation of the Ozone Air Quality Standards

On March 12, 2008, Administrator Johnson issued revised national ambient air quality standards for ozone. In investigating this decision, the Committee sought documents and testimony from both EPA and the Office of Management and Budget (OMB).

1. EPA Investigation

On March 14, Chairman Waxman wrote to Administrator Johnson requesting documents relating to the ozone standards decision, including complete and unredacted copies of documents reflecting "communications between EPA and persons in the White House relating to the updated NAAQS for ozone."[65] The deadline for the production of communications with the White House was March 21.

Administrator Johnson began to produce documents to the Committee on April 11, and EPA staff informed Committee staff that the agency hoped to complete the production by April 18.[66] On April 28, EPA staff informed Committee staff that Administrator Johnson was withholding approximately 200 EPA documents involving the White House and that the agency was consulting with the White House about its production. EPA staff was unable to provide any estimate of when these documents would be produced.[67]

On May 2, EPA staff informed Committee staff that consultations with the White House regarding the production of documents continued and that they could provide no information about when or whether the documents would be provided.[68] That day, Chairman Waxman wrote to Administrator Johnson to request that the outstanding EPA documents reflecting communications with the White House be provided by May 5.[69]

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[64] House Committee on Oversight and Government Reform, *Hearing EPA's New Ozone Standards*, 110th Cong. at 84 (May 20, 2008) (transcript of the proceeding).

[65] Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (Mar. 14, 2008). Correspondence regarding the Committee's investigation of the ozone decision is attached as Appendix D.

[66] Phone conversation between EPA staff and House Oversight and Government Reform Committee staff (Apr. 11, 2008).

[67] Phone conversation between EPA staff and House Oversight and Government Reform Committee staff (Apr. 28, 2008).

[68] Phone conversation between Oversight and Government Reform Committee staff and EPA staff (May 2, 2008).

[69] Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (May 2, 2008).

On May 5, Administrator Johnson did not provide the documents, and there was no assertion of executive privilege. Instead, EPA staff informed the Committee that it was prepared to provide only 15 of the approximately 200 responsive documents and requested a meeting with the Committee staff and White House counsel to discuss the production of EPA's communications with the White House.[70]

On May 5, Chairman Waxman issued a subpoena to Administrator Johnson requiring production of the responsive documents by 5 p.m. on May 6. On May 6, Committee staff met with EPA staff and White House counsel, and White House counsel said approximately 35 documents would not be produced to the Committee because they are "indicative of high level" decisionmaking material.[71]

On May 15, in his deposition with the Committee, EPA Associate Deputy Administrator Jason Burnett testified that there were meetings between Administrator Johnson and the White House on the ozone decision, that Administrator Johnson relayed the substance of these meetings to Mr. Burnett, but that based on instructions from the Administration he would decline to tell the Committee the substance of what Administrator Johnson told him about those meetings.[72]

On May 16, Chairman Waxman wrote to Administrator Johnson again, stating:

> [T]he Committee has not been provided sufficient access to the information to understand why the President rejected your recommendations regarding the ozone standard. The Clean Air Act specifies the factors that may be permissibly considered in setting air quality standards and those that may not. The record before the Committee does not provide enough insight into the deliberations inside the White House to assess whether the President and other White House officials acted in compliance with the requirements of the law.[73]

Chairman Waxman also noted that Administrator Johnson would be testifying before the Committee on May 20 and advised him:

> Unless the President asserts a valid claim of executive privilege with respect to the documents being withheld by EPA, you will be expected to personally bring the documents to the hearing. The Committee's subpoena was directed to you and you will be in defiance of the subpoena if you appear at the hearing without the documents.[74]

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[70] Phone conversation between Oversight and Government Reform Committee staff and EPA staff (May 5, 2008).

[71] Meeting between Oversight and Government Reform Committee staff, EPA staff, and White House staff (Apr. 22, 2008).

[72] Deposition of Jason Burnett at 68-69.

[73] Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (May 16, 2008).

[74] *Id.*

At the May 20 hearing, Administrator Johnson did not produce the remaining responsive documents and he testified that the President was not asserting executive privilege.[75] He also refused to answer questions about the substance of his communications with the White House regarding the ozone decision:

> Q: Mr. Johnson, during the consultations you had with the White House, did the White House officials express concerns to you or your agency about the costs of implementing the ozone standards?
>
> Mr. Johnson: Well, if I did recall, I am not sure that it would be appropriate for me to get into what – who said what at what point in time. In fact, I believe that it is important for me and others, future administrators, to be able to have candid discussions with members of the Executive Branch.[76]

On that same day, EPA staff confirmed that Administrator Johnson was continuing to withhold approximately 35 responsive documents from the Committee without an assertion of executive privilege.[77] The agency provided some additional documents on June 20, 2008.[78] However, these documents contained numerous redactions, including redactions of descriptions of meetings or calls, subjects of meetings or calls, complete lists of participants, agendas of meetings or calls, and other key information. According to EPA, the agency continues to withhold approximately 25 documents in their entirety.[79]

2. OMB Investigation

On March 14, 2008, Chairman Waxman wrote to request that Administrator Dudley provide the Committee with documents relating to EPA's revised national ambient air quality standards for ozone.[80] The Chairman requested that Administrator Dudley provide these documents by March 26.

On March 26, Administrator Dudley provided only a partial response. Jeff Rosen, General Counsel for OMB, responded by providing copies of a number of responsive documents

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[75] House Oversight and Government Reform Committee, *EPA's New Ozone Standards,* 110th Cong. (May 20, 2008).

[76] House Committee on Oversight and Government Reform, *Hearing on EPA's New Ozone Standards,* 110th Cong. at 74 (May 20, 2008).

[77] Conversation between Oversight and Government Reform Committee staff and EPA staff (May 20, 2008).

[78] Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (June 20, 2008).

[79] *Id.*

[80] Letter from Chairman Henry A. Waxman to Susan Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (Mar. 14, 2008).

that were either part of the publicly available docket or were expected to be placed in the docket.[81] In his letter, Mr. Rosen also stated that the White House would not be providing an unspecified number of documents responsive to the Committee's request, citing "the confidentiality of the Executive Branch deliberative and consultative process," but did not state that executive privilege had been asserted.[82] Although Committee staff and OMB staff communicated repeatedly in the remaining days of March, Administrator Dudley did not provide any additional documents.

On April 1, Chairman Waxman wrote to Administrator Dudley again and explained:

> There are two options available to OMB if you wish to cooperate voluntarily with the Committee's request. One is to provide the responsive documents to the Committee by the close of business on April 7, 2008. The other is to bring the responsive documents to the Committee offices for a staff review, the purpose of which would be to assess whether the documents are relevant to the Committee's investigation and need to be produced. If OMB would prefer this alternative approach, then I ask that you provide a mutually agreeable schedule for the staff review by close of business on April 7, 2008.[83]

On April 7, Administrator Dudley did not provide any additional documents. OMB staff informed Committee staff that she would provide some additional documents on April 11.[84]

At a meeting between Committee staff and OMB staff on April 11, some additional documents were produced to the Committee. However, despite a hearing being scheduled for April 24, OMB staff would not commit to a schedule for producing the remaining documents. Also, OMB staff stated that there would not be a commitment to producing internal OMB communications.[85]

On April 16, Chairman Waxman issued a subpoena to Administrator Dudley requiring production of the responsive documents by 5 p.m. on April 18. On April 18, she provided some additional documents and OMB counsel objected to the subpoena on unspecified grounds and requested further discussion on the matter.[86] In response to this request, Committee staff met repeatedly with OMB staff and White House counsel.

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[81] Letter from Jeffrey A. Rosen, General Counsel, Office of Management and Budget, to Chairman Henry A. Waxman (Mar. 26, 2008).

[82] *Id.*

[83] Letter from Chairman Henry A. Waxman to Susan Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (Apr. 1, 2008).

[84] Phone conversation between Oversight and Government Reform Committee staff and OMB staff (Apr. 7, 2008).

[85] Meeting between Oversight and Government Reform Committee staff and OMB staff (Apr. 11, 2008).

[86] Letter from Jeffrey A. Rosen, General Counsel, Office of Management and Budget, to Chairman Henry A. Waxman (Apr. 18, 2008).

On April 25, OMB staff and White House counsel informed the Committee that Administrator Dudley continued to withhold approximately 1,900 pages of responsive documents.[87] Approximately 275 pages of responsive documents are communications between the Office of Information and Regulatory Affairs (OIRA) and other White House officials outside of OMB.[88] The remaining 1,625 pages of documents relate to internal OIRA communications about EPA's revised ozone standards.[89] These documents have been completely withheld from the Committee with no assertion of executive privilege.

On May 16, Chairman Waxman wrote to Administrator Dudley again, stating:

> [T]he Committee has not been provided sufficient access to the information to understand why the President rejected the recommendations of EPA Administrator Stephen Johnson. The Clean Air Act specifies the factors that may be permissibly considered in setting air quality standards and those that may not. The record before the Committee does not provide enough insight into the deliberations inside the White House to assess whether the President and other White House officials acted in compliance with the requirements of the law.[90]

Chairman Waxman also noted that Administrator Dudley would be testifying before the Committee on May 20, and advised her:

> Unless the President asserts a valid claim of executive privilege with respect to the documents being withheld by OMB, you will be expected to personally bring the documents to the hearing. The Committee's subpoena was directed to you and you will be in defiance of the subpoena if you appear at the hearing without the documents.[91]

At the May 20 hearing, Administrator Dudley did not produce the remaining documents, nor did the President assert executive privilege.[92]

III. THE PRESIDENT'S ASSERTION OF EXECUTIVE PRIVILEGE

In a June 20 letter, the associate administrator of EPA informed the Committee that President Bush was asserting executive privilege over documents responsive to the April 9

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

[88] *Id.*

[89] *Id.*

[90] Letter from Chairman Henry A. Waxman to OIRA Administrator Susan E. Dudley (May 16, 2008).

[91] *Id.*

[92] House Oversight and Government Reform Committee, *EPA's New Ozone Standards,* 110th Cong. (May 20, 2008).

subpoena to Administrator Johnson concerning the California waiver decision.[93] This letter also informed the Committee that President Bush was asserting executive privilege over documents responsive to the May 5 subpoena to Administrator Johnson concerning to the ozone decision.[94]

In addition, on June 20, 2008, the director of the Office of Management and Budget informed the Committee that President Bush was asserting executive privilege over documents responsive to the April 16 subpoena to Administrator Dudley concerning the ozone decision.[95]

The June 20, 2008, letters from the associate administrator of EPA and the director of OMB informing the Committee of the President's assertion of executive privilege both included a June 19, 2008, letter from Attorney General Mukasey to the President regarding the basis for asserting executive privilege with respect to the April 9, April 16, and May 5 Committee subpoenas on the waiver and ozone decisions.[96]

In his June 19 letter, the Attorney General argued that the documents subpoenaed from EPA and OMB on the waiver and ozone decisions "implicate both the presidential communications and deliberative process components of executive privilege." The letter claims that all of the withheld OIRA documents on the ozone decision fall under the "presidential communications" component of the privilege, as "they are deliberative documents generated by your staff in reviewing a proposed agency regulation on your behalf and developing a position for presentation to you."

The Attorney General did not claim that any of the withheld EPA documents on the waiver decision fell under the "presidential communications" component of the privilege. He identified only one EPA document relating to the ozone decision, talking points prepared for the EPA Administrator to use in a meeting with the President, as falling under the "presidential communications" component.[97]

The Attorney General asserted that a congressional committee may overcome an assertion of executive privilege "only if it establishes that the subpoenaed documents are 'demonstrably critical to the fulfillment of the Committee's functions,'"[98] the standard articulated by the D.C. Circuit Court in *Senate Select Committee on Presidential Campaign*

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[93] Letter from Christopher Bliley, Associate Administrator, U.S. Environmental Protection Agency (June 20, 2008).

[94] Letter from Christopher Bliley, Associate Administrator, U.S. Environmental Protection Agency (June 20, 2008).

[95] Letter from Jim Nussle, Director, Office of Management and Budget, to Chairman Henry A. Waxman (June 20, 2008).

[96] Letter from Attorney General Michael B. Mukasey to President George W. Bush (June 19, 2008).

[97] Letter from Attorney General Michael B. Mukasey to President George W. Bush (June 19, 2008).

[98] *Id.*

Activities v. Nixon.[99] He then applied this standard to his analysis of all the withheld EPA and OIRA documents and concluded the Committee had not demonstrated sufficient need for the documents to overcome the executive branch interests in confidentiality.[100]

On August 5, 2008, Chairman Waxman wrote Administrator Johnson and Administrator Dudley requesting a specific description of the documents being withheld from production on the basis of executive privilege, including the type of document, the subject matter of the document, the date, author, and addressee, and the relationship of the author and addressee to each other.[101] In August 22, 2008, letters, the Administration refused to provide this information.[102]

IV. ANALYSIS OF THE PRESIDENT'S ASSERTION OF EXECUTIVE PRIVILEGE

Congress has a compelling legislative and oversight need for the information sought by the Committee subpoenas in the waiver and ozone investigations. The evidence obtained by the Committee raises serious questions about whether Administrator Johnson's December 2007 decision reflected inappropriate influence by the White House. Evidence also raises serious questions about whether the highly unusual eleventh hour reversal of the EPA Administrator's ozone decision, and the White House involvement in this reversal, was appropriate and legal. Without access to the communications that reveal the White House role in the decisionmaking process concerning the waiver and ozone decisions, the Committee cannot evaluate the conduct of the President and his aides, the appropriateness and legality of the decisions, and whether future changes to the Clean Air Act are necessary to ensure the goals of the Act are properly effectuated in the future.

In contrast to the Committee's compelling and focused investigative needs, the President's assertion of privilege is exceptionally broad. It appears to cover any communications on the waiver and ozone decisions that may reflect deliberations by White House staff, no matter how attenuated the connection between the staff authoring the communications and the presidential decisionmaking process. The vague description of the withheld documents in the Attorney General's June 19, 2008, letter to the President compounds this problem because they do not indicate the authors or addressees of individual documents or the position of these

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[99] *Senate Select Committee on Presidential Campaign Activities v. Nixon,* 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc).

[100] Letter from Attorney General Michael B. Mukasey to President George W. Bush (June 19, 2008).

[101] Letter from Chairman Henry A. Waxman to Stephen Johnson, Administrator, U.S. Environmental Protection Agency (Aug. 5, 2008); Letter from Chairman Henry A. Waxman to Susan Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (Aug. 5, 2008).

[102] Letter from Jeffrey Rosen, Office of Management and Budget, to Chairman Henry A. Waxman (Aug. 22, 2008); Letter from Christopher Bliley, Associate Administrator, U.S. Environmental Protection Agency, to Chairman Henry A. Waxman (Aug. 22, 2008).

individuals in the chain of command extending down from the President.[103] It is likely that many — if not the majority — of the withheld documents were authored by OIRA employees and never reached the President's top aides, much less the President.

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. Moreover, the 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. EPA officials who appeared before the Committee in the waiver and ozone investigations were either instructed by the Administration not to respond to questions about substantive communications with the White House regarding these decisions or had no firsthand knowledge of the communications. EPA Administrator Johnson also refused to answer questions about these matters when testifying before the Committee on May 20, 2008.

Further, the legal analysis provided by the Attorney General in support of the assertion of privilege is misleading and flawed in several respects. First, the standard cited by the Attorney General for weighing congressional oversight interest against executive branch interests is relevant only to information protected by the "presidential communications" component of executive privilege, not the "deliberative process" component of executive privilege.[104] The standard used in reviewing assertion of the latter involves a lower threshold of need, and it "disappears altogether when there is any reason to believe government misconduct has occurred."[105] By the Attorney General's own description, the withheld EPA waiver documents do not constitute "presidential communications." Thus, assuming that the Attorney General's characterization of the withheld documents is accurate, his analysis erroneously applied the presidential communications privilege standard to the EPA waiver documents.

Second, the "demonstrably critical" standard for presidential communications discussed in *Senate Select Committee* and cited by the Attorney General was refined by the Supreme Court in *United States v. Nixon,* in which the Court stated that executive privilege was a qualified privilege that could be overcome by showing a "demonstrated, specific need."[106] Following *Nixon,* the D.C. Circuit explained:

> Nixon's demonstrated, specific need standard has two components. A party seeking to overcome a claim of presidential privilege must demonstrate: first, that each discrete

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[103] *See* Letter from Attorney General Michael B. Mukasey to President Bush (June 19, 2008).

[104] *Senate Select Committee* concerned a Senate committee's attempt to civilly enforce a subpoena issued to President Nixon for tape recordings of conversations between the President and his former White House counsel. Thus, all of the materials at issue concerned direct conversations with the President himself.

[105] *In re Sealed Case,* 121 F.3d 729, 744-45 (D.C. Cir. 1997).

[106] 418 U.S. 683 at 713 (1974).

group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere.[107]

Under this precedent, the Committee must only show that it has such a "demonstrated, specific need" for the communications, a standard that is far exceeded in this case.

It is also important to note that the Administration's refusal to provide the Committee basic information about the authorship and distribution of the documents has impeded the Committee's ability to evaluate the merits of the privilege claim. The courts have made clear that the presidential communications component of executive privilege covers communications involving only "limited extension" down the chain of command from the President and "'should not extend to staff outside the White House in executive branch agencies.'"[108] Without this additional information, the record lacks substantiation of the Attorney General's claim that the withheld documents could be subject to the presidential communication component of executive privilege.

IV. CONCLUSION

The Committee on Oversight and Government Reform is a standing committee of the House of Representatives, duly established pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the Constitution.[109] House Rule X grants to the Committee broad oversight jurisdiction, including authority to "conduct investigations of any matter without regard to clause 1, 2, 3, or this clause [of House Rule X] conferring jurisdiction over the matter to another standing committee."[110] The rules direct the Committee to make available "the findings and recommendations of the committee … to any other standing committee having jurisdiction over the matter involved."[111] House Rule XI specifically authorizes the Committee to "require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary."[112]

The Committee's investigation into actions by the Administrator of the Environmental Protection Agency in denying California's petition to regulate greenhouse gas emissions and in issuing revised national ambient air quality standards for ozone is being undertaken pursuant to these authorities. The Committee sought to answer basic questions regarding any possible malfeasance, abuse of authority, or violation of existing law on the part of the executive branch with regard to the denial of the California petition and the issuance of the revised ozone standard,

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[107] *In re Sealed Case,* 121 F.3d. 729, at 754 (D.C. Cir. 1997).

[108] *Judicial Watch v. Department of Justice,* 365 F.3d 1108, 1115-1116 (D.C. Cir. 2004) (citing *In re Sealed Case,* at 749-50).

[109] U.S. Const., art. I, § 5, clause 2.

[110] House Rule X, clause (4)(c).

[111] *Id.*

[112] House Rule XI, clause (2)(m)(1)(B).

and based on the results of the investigation, to assess whether the conduct uncovered may warrant additions or modifications to federal law, and to make appropriate legislative recommendations.

The Committee has been unable to investigate these matters fully because of the President's assertion of executive privilege to withhold any document from the Committee that would explain the role the White House played in Administrator Johnson's waiver and ozone decisions. This invocation of privilege was wrong and an abuse of the executive privilege.