

# CORD

## **Report of the Committee on Oversight and Government Reform U.S. House of Representatives Regarding President Bush's Assertion of Executive Privilege in Response to the Committee Subpoena to Attorney General Michael B. Mukasey**

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A T T O R N E Y G E N E R A L M I C H A E L B . M U K A S E Y**

On July 16, 2008, President George W. Bush asserted executive privilege regarding documents relating to the FBI investigation of an alleged illegal leak of the identity of former CIA officer Valerie Plame Wilson that the Committee subpoenaed on June 16, 2008, from Attorney General Michael Mukasey. The principal document in contention is a report of an interview that Special Counsel Patrick J. Fitzgerald and FBI investigators conducted with Vice President Richard B. Cheney. This interview was conducted by Mr. Fitzgerald as part of his criminal investigation into the leak of Ms. Wilson's identity. According to Mr. Fitzgerald, "there were no agreements, conditions, and understandings between the Office of Special Counsel or the Federal Bureau of Investigation and either the President or Vice President regarding the conduct and use of the interview or interviews."<sup>1</sup>

The Committee finds that the President's assertion of executive privilege over the report of the Vice President's interview was legally unprecedented and an inappropriate use of executive privilege. The assertion of executive privilege prevents the Committee from having access to a complete set of records and thus results in the Committee's inability to assess fully the actions of the Vice President. This report is supported by both Chairman Henry A. Waxman and the former Rep. Tom Davis, who served as the Committee's Ranking Member during the Committee's investigation of the leak of Ms. Wilson's identity in the 110<sup>th</sup> Congress and who resigned from Congress on November 24, 2008.

**I. THE COMMITTEE'S INVESTIGATION**

The Committee initiated an investigation in March 2007 into the disclosure by officials in the White House of the identity of Valerie Plame Wilson, a covert CIA agent. At a hearing on March 16, 2007, Chairman Waxman explained the purpose of the Committee's investigation as follows:

In June and July 2003, one of the nation's most carefully guarded secrets — the identity of covert CIA agent Valerie Plame Wilson — was repeatedly revealed by White House officials to members of the media. ...

[W]e will be asking three questions: (1) How did such a serious violation of our national security occur? (2) Did the White House take the appropriate investigative and disciplinary steps after the breach occurred? And (3) what

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<sup>1</sup> Letter from Patrick J. Fitzgerald, Special Counsel, to Henry A. Waxman, Chairman (July 3, 2008).

changes in White House procedures are necessary to prevent future violations of our national security from occurring?<sup>2</sup>

At the March 16, 2007, hearing, the Committee heard the first public testimony of Valerie Plame Wilson. A statement cleared for public release by CIA Director Michael Hayden established definitively that Ms. Wilson had worked at the CIA “on the prevention of the development and use of weapons of mass destruction against the United States”; that she had taken “serious risks on behalf of her country”; that she was “covert” at the time Mr. Novak’s column was published; and that her “employment status with the CIA was classified information prohibited from disclosure under Executive Order 12958.”<sup>3</sup> The cleared statement also established that “maintaining her cover was critical to protecting the safety of both colleagues and others” and that the disclosure of her employment “placed her professional contacts at greater risk” and “undermined the trust and confidence with which future CIA employees and sources hold the United States.”<sup>4</sup>

In addition, the Committee learned that White House officials did not take the actions required under an Executive Order after Ms. Wilson’s identity was disclosed. Under Executive Order 12958 and applicable regulations, the White House must investigate security breaches which originate within it, implement prompt corrective action to deter such future violations, and punish violators.<sup>5</sup> Federal employees who commit security violations can be subject to a range of administrative sanctions, including reprimand, suspension without pay, denial of access to classified information, and termination.<sup>6</sup> At the hearing, James Knodell, the director of the White House Security Office, testified:

- The Office of Security for the White House never conducted any investigation of the disclosure of Ms. Wilson’s identity, because of the ongoing criminal investigation;
- Karl Rove, Scooter Libby, and other senior White House officials failed to report what they knew about the disclosure of Ms. Wilson’s identity, as required by the applicable executive order and regulations; and
- There was no suspension of security clearances or any other administrative sanction for Mr. Rove and other White House officials because of the disclosure.<sup>7</sup>

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<sup>2</sup> Opening Statement of Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, *Hearing on White House Procedures for Safeguarding Classified Information*, 110th Cong. (Mar. 16, 2007) (H. Rept. 110-28).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Exec. Order No. 12958, *Classified National Security Information*, as amended by Executive Order 13292, § 5.5 (Mar. 25, 2003).

<sup>6</sup> *Id.* § 5.5(c).

<sup>7</sup> Testimony of James Knodell, Hearing House Committee on Oversight and Government Reform, *Hearing on White House Procedures for Safeguarding Classified Information*, 110th Cong. (Mar. 16, 2007) (H. Rept. 110-28).

On July 16, 2007, Chairman Waxman wrote to Special Counsel Fitzgerald to request documents from the Special Counsel investigation that were relevant to the Committee's investigation into the leak of the identity of Valerie Plame Wilson.<sup>8</sup> The Committee's letter included a request for "transcripts, reports, notes, and other documents relating to any interviews outside the presence of the grand jury" of President George W. Bush, Vice President Richard B. Cheney, and members of the White House staff.<sup>9</sup>

On August 16, 2007, and September 6, 2007, Mr. Fitzgerald produced a number of documents responsive to the Committee. These documents consisted of FBI interviews of federal officials who did not work in the White House, as well as interviews of relevant private individuals.<sup>10</sup> Combined with a later production made on June 18, 2008, the Justice Department produced a total of 224 pages of records of Federal Bureau of Investigation interview reports with 31 individuals, including materials related to a former Secretary, Deputy Secretary, Undersecretary, and two Assistant Secretaries of State, and other former or current CIA and State Department officials, including the Vice President's CIA briefer.

Mr. Fitzgerald did not provide any records of interviews with White House officials because of objections raised by the White House. As he explained in a January 18, 2008, letter to the Committee:

[M]y responsibilities as Special Counsel encompass making decisions on matters normally incident to the execution of prosecutorial authority for the assigned matter, including making determinations of what information is protected by the rules of grand jury secrecy. However, I have concluded that neither the December 2003 delegation nor the February 2004 clarification delegated to me the authority of the Attorney General to provide counsel to the White House concerning the assertion of executive branch confidentiality interests in response to possible Congressional oversight, or to represent such executive branch interests in responding to an oversight request. ...

Accordingly, the Office of Special Counsel will complete our work providing responsive documents to the White House and other appropriate agencies after assuring ourselves that such materials are not protected by grand jury secrecy. We will also continue to transmit to you the materials to which the White House or other agencies do not assert executive branch confidentiality interests. To the extent there are materials we forward to the White House for which the executive branch asserts confidentiality interests, we will not be acting as attorneys for the executive branch in that regard. I am advised that the

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<sup>8</sup> Committee correspondence regarding its document requests in this investigation are attached in Appendix A.

<sup>9</sup> Letter from Henry A. Waxman, Chairman, to Patrick J. Fitzgerald, Special Counsel (July 16, 2007).

<sup>10</sup> Letter from Patrick J. Fitzgerald, Special Counsel, to Henry A. Waxman, Chairman (Aug. 16, 2007); Letter from Patrick J. Fitzgerald, Special Counsel, to Henry A. Waxman, Chairman (Sept. 6, 2007).

Department's Office of Legislative Affairs will correspond with you ... regarding those interests.<sup>11</sup>

On December 3, 2007, Chairman Waxman wrote to Attorney General Mukasey to request that he make an "independent judgment" as the Attorney General about producing the White House interview reports and the other requested materials.<sup>12</sup> On December 18, 2007, Chairman Waxman renewed this request in a second letter to the Attorney General.<sup>13</sup>

On January 18, 2008, the Justice Department agreed to allow Committee staff to review redacted versions of reports of FBI interviews of White House staff, but refused to permit any access to the interview reports of the President and Vice President, citing "serious separation of powers and heightened confidentiality concerns."<sup>14</sup>

Over the next few weeks, Committee staff and Department of Justice officials had numerous discussions regarding the terms under which the Committee staff review of requested documents would take place. Through an accommodation process, on March 31 and April 7, 2008, the Department of Justice made available for Committee staff review a subset of the withheld documents. These documents included redacted reports of the FBI interviews with Mr. Libby, Andrew Card, Karl Rove, Condoleezza Rice, Stephen Hadley, Dan Bartlett, and Scott McClellan and another 104 pages of additional interview reports of the Director of Central Intelligence, and eight other White House or Office of the Vice President officials.

The Committee staff's review of the reports of the FBI interviews with White House staff and other developments raised questions about the involvement of Vice President Cheney in the disclosure of Ms. Plame Wilson's name and place of employment and the White House response to this disclosure. For example, the review of Mr. Libby's FBI interview showed that Mr. Libby stated that it was "possible" that Vice President Cheney instructed him to disseminate information about Ambassador Wilson's wife to the press.<sup>15</sup> To assist the Committee in answering these questions, Chairman Waxman wrote the Attorney General on June 3, 2008, to renew the Committee's request for information the Attorney General had been withholding.

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<sup>11</sup> Letter from Patrick J. Fitzgerald, Special Counsel, to Henry A. Waxman, Chairman (Jan. 18, 2008).

<sup>12</sup> Letter from Henry A. Waxman, Chairman, to Michael B. Mukasey, Attorney General (Dec. 3, 2007).

<sup>13</sup> Letter from Henry A. Waxman, Chairman, to Michael B. Mukasey, Attorney General (Dec. 18, 2007).

<sup>14</sup> Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (Jan. 18, 2008).

<sup>15</sup> FBI 302 Report of Interview of Scooter Libby (Nov. 26, 2003).

On June 11, 2008, the Justice Department responded to the June 3, 2008, letter by again refusing to produce the interview reports of the President and Vice President, again citing “serious separation of powers and heightened confidentiality concerns.”<sup>16</sup>

On June 16, 2008, the Committee served a subpoena on Attorney General Mukasey requiring the production of the interview reports of the President and Vice President, unredacted versions of five interview reports previously shown to Committee staff, and all remaining responsive documents that had been determined not to be subject to grand jury secrecy rules, with a return date of June 23, 2008.<sup>17</sup>

On June 24, 2008, the Justice Department informed the Committee by letter that it would not “provide or make available any reports of interviews with the President or the Vice President from the leak investigation.”<sup>18</sup> The Department’s letter alluded to the “constitutional magnitude” of the “confidentiality interests” relating to these interview reports, and asserted that “communications of the President and the Vice President with their staffs relating to official Executive Branch activities lie at the absolute core of executive privilege.”<sup>19</sup> The Justice Department also argued that providing the interviews to the Committee would undermine future law enforcement investigations, as future Presidents or Vice Presidents “might limit the scope of any voluntary interview or insist that they will only testify pursuant to a grand jury subpoena and subject to the protection of the grand jury secrecy provision.”<sup>20</sup> The letter suggested that the Justice Department might be willing to further accommodate the Committee with additional access to the redacted portions of interviews with White House staff, but because the relevant redactions dealt with presidential or vice presidential communications, efforts by the Committee staff to arrange for a review of these passages were unsuccessful.

Chairman Waxman responded to the Attorney General’s June 24, 2008, letter on July 8, 2008. As an accommodation to issues the Department raised, Chairman Waxman stated that the Committee would refrain from seeking the report of the FBI interview with the President at that time. However, noting the serious questions that remained unanswered regarding the Vice President’s conduct in the leak of Valerie Plame’s status as a CIA officer, he reiterated the Committee’s demand for the report of the FBI interview with the Vice President.<sup>21</sup>

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<sup>16</sup> Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (June 11, 2008).

<sup>17</sup> Committee on Oversight and Government Reform, *Subpoena to Attorney General Michael B. Mukasey* (served June 16, 2008).

<sup>18</sup> Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (June 24, 2008).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Letter from Henry A. Waxman, Chairman, to Michael B. Mukasey, Attorney General (July 8, 2008).

In his July 8, 2008, letter, Chairman Waxman also responded to arguments made by Attorney General Mukasey to justify withholding the report of Vice President Cheney's FBI interview, and advised the Attorney General that the Committee would meet on July 16, 2008, to consider a resolution citing the Attorney General in contempt unless all responsive documents with the exception of the FBI interview report of President Bush had been provided to the Committee or a valid assertion of executive privilege had been made.<sup>22</sup> Attorney General Mukasey did not subsequently provide the Committee any additional responsive documents.

## II. THE PRESIDENT'S ASSERTION OF EXECUTIVE PRIVILEGE

On July 16, 2008, Keith Nelson, principal deputy assistant attorney general at the Department of Justice, responded to Chairman Waxman's July 8, 2008, letter. Mr. Nelson stated: "the Attorney General has requested that the President assert executive privilege with respect to these documents, and the President has done so."<sup>23</sup>

Mr. Nelson's letter attached a July 15, 2008, legal opinion prepared for the President on this subject from the Attorney General himself. The Attorney General's legal opinion argues that executive privilege applies in this case because "much of the content of the subpoenaed documents falls squarely within the presidential communications and deliberative process components of executive privilege," noting that several subpoenaed interview reports summarize conversations between the President and his advisors, and other portions "summarize deliberations" among the President's senior advisors in the course of preparing information or advice for presentation to the President.<sup>24</sup> The Attorney General further claimed that the subpoena implicates the "law enforcement component of executive privilege" because it seeks documents from law enforcement files.<sup>25</sup>

On August 5, 2008, Chairman Waxman wrote Attorney General Mukasey requesting a specific description of the documents being withheld from production on the basis of executive privilege, including the type of document, subject matter of the document, the date, author, and addressee, and the relationship of the author and addressee to each other.<sup>26</sup> The Administration to date has not provided this information to the Committee.

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<sup>22</sup> *Id.*

<sup>23</sup> Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Henry A. Waxman, Chairman (July 16, 2008).

<sup>24</sup> Letter from Michael B. Mukasey, Attorney General, to President George W. Bush (July 15, 2008).

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

<sup>26</sup> Letter from Henry A. Waxman, Chairman, to Michael B. Mukasey, Attorney General (Aug. 5, 2008).

### III. ASSESSMENT OF THE PRESIDENT'S ASSERTION OF EXECUTIVE PRIVILEGE

The central document in this dispute is the report of the FBI interview with the Vice President. Both the Chairman and former Rep. Tom Davis agree that the President's assertion of executive privilege over this document was legally unprecedented and an inappropriate use of executive privilege.

At its core, the doctrine of executive privilege is intended to preserve the ability of the President to receive confidential advice from the President's closest advisors. In the case of the FBI interview with the Vice President, there is no legal basis — or precedent — for asserting executive privilege in a situation like this. The Vice President had no reasonable expectation of confidentiality regarding the statements he made to Mr. Fitzgerald and the FBI agents.<sup>27</sup> As Mr. Fitzgerald wrote the Committee: “there were no agreements, conditions, and understandings between the Office of Special Counsel or the Federal Bureau of Investigation and either the President or Vice President regarding the conduct and use of the interview or interviews.”<sup>28</sup> For this and other reasons the statements should have been produced to the Committee.

There are other problems with the assertion of executive privilege over the report of the Vice President's interview. There is no precedent holding that summaries of presidential conversations given to third parties — as opposed to the original conversations themselves — are subject to claims of executive privilege. Courts have carved out a presidential communications privilege, but they have limited it quite narrowly to communications had directly with the President or his immediate advisors about presidential decisionmaking.<sup>29</sup>

There is also no precedent in which executive privilege has been asserted over communications between a vice president and his staff about vice presidential decisionmaking. The Administration's refusal to produce the Vice President's interview report is particularly puzzling in light of the position taken by the Office of the Vice President that the Vice President is not an “entity within the executive branch.”<sup>30</sup> The logical extension of the Vice President's

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<sup>27</sup> In *In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997), the Court held the White House had waived its claim of executive privilege with regard to a specific document it voluntarily sent to former Secretary of Agriculture Mike Espy's counsel, who was a third party outside the White House. It is unclear whether this precedent would govern in this situation.

<sup>28</sup> Letter from Patrick J. Fitzgerald, Special Counsel, to Henry A. Waxman, Chairman (July 3, 2008).

<sup>29</sup> See *In Re Sealed Case*, 121 F.3d 729, 749-53 (D.C. Cir. 1997); *Judicial Watch v. Department of Justice*, 365 F.3d 1108, 1115-1117 (D.C. Cir. 2004).

<sup>30</sup> See Letter from Henry A. Waxman, Chairman, to Richard B. Cheney, Vice President (June 21, 2007); Testimony of David Addington, Chief of Staff to the Vice President, House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Hearing on From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part III*, 110th Cong. (June 26, 2008) (asserting that “the Vice President belongs neither to the executive nor the legislative branch”).

position is that executive branch confidentiality interests would not be relevant to his communications.

The Attorney General argues that the Committee should not have access to the report of the interview because of the sensitive nature of the matters discussed. In this case, however, the Committee is not seeking to examine sensitive questions of foreign policy or national security. Rather, the Committee is seeking information on the role, if any, played by the Vice President and others in the White House in the leak of the identity of a covert CIA officer and what steps, if any, the Vice President and others took to investigate and respond to the leak after it occurred. There is no reason to believe that the Special Counsel's interview with the Vice President went beyond these questions and into areas relating to presidential decisionmaking about foreign policy or national security.

The Attorney General's argument that the subpoena implicates the "law enforcement component" of executive privilege is equally flawed. There is no basis to support the proposition that a law enforcement privilege, particularly one applied to closed investigations, can shield from congressional scrutiny information that is important for addressing congressional oversight concerns. The Attorney General did not cite a single judicial decision recognizing this alleged privilege. Even the Department's own opinions that he cited, which do not have the force of law, only apply the privilege to open law enforcement inquiries, not to closed matters like the Special Counsel investigation.<sup>31</sup>

Further, the Attorney General's "chilling effect" argument — that the Committee subpoena would discourage voluntary cooperation with future criminal investigations involving White House actions — contradicts both experience and logic. The previous Department of Justice production to this Committee of the reports of FBI interviews of President Clinton and Vice President Gore from the 1998 campaign finance investigation did not deter President Bush and Vice President Cheney from submitting to voluntary interviews with Special Counsel Fitzgerald in this investigation. Executive officials' decisions whether to cooperate with law enforcement investigations will be shaped primarily by political pressures to be forthcoming and the knowledge that grand jury subpoenas can issue to compel their testimony if they do not volunteer it.

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<sup>31</sup> Only one of the four memoranda and opinions cited by the Attorney General even mentions the issue of closed law enforcement files. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117, 118 (1984) (referring only to "open law enforcement files" and "open enforcement files"); *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 31, 33, 34 (1982) (referring only to "open investigative files" and the release of files in "the course of the investigation"); *Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45 (1941) (no mention of closed investigative files). Moreover, the 1941 opinion by Attorney General Robert Jackson, on which many subsequent Department opinions have been based, is fundamentally flawed because it was based on the erroneous and outdated assumption, *see United States v. Nixon*, 418 U.S. 683, 706-07 (1974), that "the question whether the production of papers would be against the public interest is one for the executive and not for the courts to determine." 40 Op. Att'y Gen. at 49.

In addition, the “law enforcement evidentiary privilege” recognized by courts in civil litigation “do[es] not have the constitutional dimension” of the presidential communications privilege recognized in *United States v. Nixon*<sup>32</sup> or the state secrets privilege noted in *United States v. Reynolds*.<sup>33</sup> Rather, the privilege is “rooted in common sense as well as common law.”<sup>34</sup> Thus, the claimed law-enforcement privilege is more akin to the deliberative process privilege than to the one encompassing presidential communications.<sup>35</sup>

Attorney General Mukasey also erred by refusing to produce privilege logs containing essential information about other withheld documents, such as the authors, addressees, and subject matters of the withheld documents. This action significantly impedes the Committee’s ability to evaluate the accuracy of the Attorney General’s characterization of certain withheld documents as falling within the scope of executive privilege. Short of viewing the purportedly privileged documents themselves, the only manner in which Congress can properly review the soundness of an executive privilege claim is through an itemized description of the documents withheld. Such procedures have been found not to be overly burdensome, intrusive, or unnecessary, and in fact, courts have held such procedures to be necessary to the fair disposition of disputes involving the executive branch.<sup>36</sup>

In addition to seeking the report of the Vice President’s interview and other responsive documents that were being withheld, the Committee’s subpoena sought unredacted copies of the reports of FBI interviews with senior White House officials. These unredacted FBI interview reports were also withheld from the Committee. This report does not address this aspect of the President’s assertion of executive privilege because Chairman Waxman and former Ranking Member Davis could not reach a consensus. Additional views submitted by Chairman Waxman and other members reject the validity of the assertion of executive privilege. On the other hand, the additional views submitted by minority members support the invocation of the privilege.

#### IV. CONCLUSION

The Committee on Oversight and Government Reform is the principal oversight committee in the U.S. House of Representatives. House Rule X grants to the Committee broad oversight jurisdiction, including authority to “conduct investigations of any matter” within the

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<sup>32</sup> 418 U.S. 683 (1974).

<sup>33</sup> 345 U.S. 1 (1953).

<sup>34</sup> *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 542 (D.C. Cir. 1977).

<sup>35</sup> *Id.*; see also *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

<sup>36</sup> See *Nixon v. Sirica*, 487 F.2d 700, 721 (D.C. Cir. 1973) (“Without compromising the confidentiality of the information, the analysis should contain descriptions specific enough to identify the basis of the particular claim or claims”); *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 543 (D.C. Cir. 1977) (asserting that an affiant must “specify the documents for which protection is sought, and ... explain why the specified documents properly fall within the scope of the privilege”).

jurisdiction of any standing committee of Congress.<sup>37</sup> The same rule directs the Committee to make available “the findings and recommendations of the committee ... to any other standing committee having jurisdiction over the matter involved.”<sup>38</sup> Under House Rule XI, the Committee is authorized 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.”<sup>39</sup>

The Committee’s investigation into the alleged White House involvement into the improper disclosure of the employment status of Central Intelligence Agency officer Valerie Plame Wilson was undertaken pursuant to these authorities. The investigation sought to answer basic questions about this incident, including (1) how the Valerie Plame Wilson leak occurred, including whether there was a concerted effort to knowingly disclose classified information; (2) whether senior White House officials complied with requirements governing the handling of classified information; (3) whether the White House took appropriate steps to address an improper leak and sanction any individuals involved; and (4) what legislative or other actions are needed to ensure appropriate identification and handling of classified information by White House officials so that such leaks do not occur in the future.

The Committee has been unable to completely investigate these matters, in part, because of the President’s assertion of executive privilege over the report of the FBI interview of Vice President Cheney. This invocation of executive privilege was legally unprecedented and an inappropriate use of executive privilege. It prevented the Committee from learning the extent of the Vice President’s role in the disclosure of Ms. Wilson’s identity.

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<sup>37</sup> House Rule X, clause (4)(c).

<sup>38</sup> *Id.*

<sup>39</sup> House Rule XI, clause (2)(m)(1)(B).