



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 20, 2008

GENERAL COUNSEL

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and
Government Reform
U.S. House of Representatives
Washington, D.C. 20515-6143

Dear Mr. Chairman:

This letter responds to your letter of May 16, 2008 to Susan Dudley, the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget within the Executive Office of the President. I am writing to ensure that the Committee has a more complete picture of our extensive and ongoing efforts to achieve a mutual accommodation of the interests of our two separate branches of government.

As you are aware, OIRA has provided the Committee with access to 7,558 pages of documents. Among other things, these include communications between OIRA and EPA at all levels, including directly between Administrators Dudley and Johnson. That represents an extraordinary level of disclosure, and is the information that directly addresses EPA's promulgation of the ozone NAAQS regulation. Moreover, the communications between Administrators Dudley and Johnson were made public at the outset by OIRA and by EPA.

Contrary to the suggestion in your letter, the vast majority of the 7,558 documents we provided to the Committee were provided on March 26, April 11, and April 15, *before* you sent a subpoena to Ms. Dudley. Specifically, you were provided with 1,552 pages on March 26, with 3,559 pages on April 11, and 1,361 pages on April 15. My letter of April 18, 2008 expressed our disappointment that on April 16 you elected to send a subpoena, notwithstanding the very substantial cooperation that had occurred and was even then continuing.

The subpoena that you issued purported to call for additional documents to be provided by April 18, 2008. Although certain internal deliberative documents have been appropriately maintained as confidential, it would be wrong and unfair to characterize OIRA's posture in this regard as one of "defiance." To the contrary, counsel for OIRA and counsel for the Committee have had continuing discussions about ways to accommodate our mutual concerns and interests. As a result, OIRA provided the Committee with 260 additional pages of documents on April 18, and 144 additional pages of documents on April 21. Then, on May 2, 2008, we agreed upon an extraordinary accommodation to enable the Committee's staff to review 680 additional pages of documents that related to OIRA consultations with other agencies during the inter-agency review process.

The Executive Branch is continuing its substantial accommodation of the Committee's information needs by making Administrators Dudley and Johnson available for testimony at today's Committee hearing. As we have previously indicated, we remain open to further discussion and ideas as to ways to meet any legitimate Committee needs while preserving the important Executive Branch interests that are involved. We suggest that you evaluate whether the Committee needs any further information from OIRA after you receive the testimony today from Administrators Dudley and Johnson. Given the substantial Executive Office of the President confidentiality interests implicated by the requests to OIRA, and the availability of very extensive information from EPA itself, should you after the hearing determine you need more documents from OIRA, it will be reasonable for us to ask the Committee to specify in detail why the additional documents are legitimately needed, and for what legitimate legislative purpose. Under the accommodation process, "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977). Only after that occurs could it become necessary to work out arrangements for identifying a genuine impasse. As the Supreme Court has said: "These 'occasion[s] for constitutional confrontation between [two coequal branches]' should be avoided whenever possible." *Cheney v. U.S. District Court*, 542 U.S. 367, 389-90 (2004).

We appreciate the professional manner in which our discussions with the Committee's staff have occurred to date, and we likewise have sought to cooperate with the Committee in a professional and productive manner. It remains our desire to have a mutually acceptable resolution, so please feel free to have your staff contact OMB through Shannon O'Keefe at (202) 395-4790, or OMB's Deputy General Counsel John G. Knepper or me at (202) 395-5044, or to communicate directly with the office of the Counsel to the President, through Emmet T. Flood, at (202) 456-1019.

Sincerely,



Jeffrey A. Rosen
General Counsel

cc: The Honorable Tom Davis
Ranking Minority Member