



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

June 18, 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 June 13, 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.

We were surprised and disappointed to receive your letter. I am writing because your letter fails to provide a complete picture of our extensive and ongoing efforts to achieve a mutual accommodation of the interests of our two separate branches of government. In reality, our communications *before* the Committee's May 20 hearing, *at* the May 20 hearing, *immediately following* the May 20 hearing, and in *the month after* the May 20 hearing all demonstrate that there is no legitimate reason to pursue a resolution of contempt, as I will detail below. We instead urge the Committee to recognize the benefit of the extraordinary cooperation that has occurred to date, and that with the hearing and the Committee's reports now completed there is no valid reason for moving from mutual cooperation to unilateral confrontation.

First, as to the events *before* the May 20, 2008 Committee hearing, OIRA went to great lengths to accommodate the Committee; we met regularly with your staff, and provided voluminous documents on an expedited basis. As you are aware, OIRA 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.

It bears note that the vast majority of the 7,558 pages of documents we made available 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. Nonetheless, 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.

Second, *at* the May 20 hearing itself, OIRA continued its substantial accommodation of the Committee's information needs by making Administrator Dudley available for testimony. At that hearing, the Committee had the opportunity to question Ms. Dudley about OIRA's role in the process leading to the ozone regulation, but elected not to do so. In a hearing that lasted almost three hours, Ms. Dudley was asked only four questions (two from Rep. Sarbanes, one from Rep. Issa, and one from you). Not one of these related to OIRA's internal deliberations; not one question raised any legitimate need for additional documents, or for information that Ms. Dudley could not herself provide at the hearing.

Third, *immediately after* the May 20 hearing, neither you nor any other Member of the Committee raised additional questions or identified a specific legislative need for additional documents from OIRA. You will recall that my letter of May 18, 2008 suggested 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." We received no response.

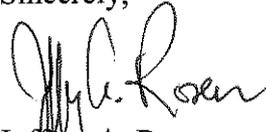
Fourth, in the *four weeks after* the May 20 hearing, we heard nothing further from the Committee or your staff, and certainly nothing detailing reasons that the information provided at the hearing or in the more than 7500 pages of documents provided was insufficient to address questions that you had. In light of the hearing itself, it is obvious why that was so: the facts involving the ozone rule are available, and the Committee has not demonstrated any legitimate need for going beyond the extensive information that was provided.

Accordingly, under the oversight 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). 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).

In view of the foregoing, we believe that the present state of affairs does not justify the sudden, significant escalation that your June 13 letter portends. You have received extensive information through document production and you have conducted a hearing at which Administrator Dudley was asked only four questions – none of them directly related to OIRA's internal deliberations. To escalate this issue to a contempt proceeding at this point would be

inconsistent with the respectful and cooperative manner in which OIRA, the Committee and its staff have worked together to provide information to the Committee. We, therefore, earnestly urge the Committee not to proceed with such a resolution of contempt.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey A. Rosen". The signature is fluid and cursive, with the first name "Jeffrey" written in a more compact, stylized manner.

Jeffrey A. Rosen
General Counsel

cc: The Honorable Tom Davis
Ranking Minority Member