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EDITORIAL

Abuse of Executive Privilege

After six years of kowtowing to the White House, Congress is finally challenging President Bush's campaign to trample all legal and constitutional restraints on his power.

Congressional committees have issued subpoenas for documents and witnesses in two major cases and have asked for the first — and likely not the last — criminal investigation of an executive branch official who might have lied to Congress.

Predictably, the White House is claiming executive privilege and refusing to cooperate with the legitimate Congressional investigations, one springing from Mr. Bush's decision to spy on Americans without a warrant and the other from the purge of United States attorneys.

The courts have recognized a president's limited right to keep the White House's internal deliberations private. But it is far from an absolute right, and Mr. Bush's claim of executive privilege in the attorneys scandal is especially ludicrous. The White House has said repeatedly that Mr. Bush was not involved in the firings of nine United States attorneys. If that's true, he can hardly argue that he has the right to conceal conversations and e-mail exchanges that his aides had with one another and the Justice Department.

When the White House refused last week to even account for the documents it was withholding and why, as presidents generally have done in these cases, Senator Patrick Leahy, chairman of the Judiciary Committee, rightly denounced this arrogance as "Nixonian stonewalling." He pointed out that every president since World War II has at some point complied with Congressional requests or subpoenas for testimony by members of the White House staff or other presidential advisers.

Mr. Bush's claim of executive privilege may be somewhat stronger on the spying program, since he personally issued the order to start the wiretapping. But executive privilege cannot be used to cover up actions and policies that involve an outright violation of the law, as the spying program did.

Nor can it be used to shield an official who might have lied to Congress. The Senate Judiciary Committee has asked the Justice Department to investigate Brett Kavanaugh, a former White House official who told a Senate hearing on his appointment to a federal judgeship that he was not involved in forming rules on the treatment of detainees. Recent press accounts suggest that he was.

The White House has predictably accused the Democrats of being soft on terrorism for opposing illegal wiretapping and of partisan politicking in their attempt to get to the bottom of the attorneys scandal. This is the point when we used to wearily watch as Congress bowed and backed out of the room. But lawmakers finally seem determined to do their duty. Partly that's because tough-minded Democrats are now in charge, like Senator Leahy. But even some of Mr. Bush's Republican enablers on Capitol Hill seem to be losing patience.

Last week, three Republican senators, including the highly partisan Orrin Hatch, voted to issue subpoenas for records relating to Mr. Bush's decision to authorize the tapping of Americans' phone calls and e-mails abroad without legally and constitutionally mandated warrants. Only three Republicans actually voted against the subpoenas. (Three others did not register a vote.) Not long ago, those same nine Republicans would not even allow Senator Leahy to hold a roll-call vote on issuing subpoenas connected to the attorneys scandal.

If the White House continues to defy Congress, the Senate and the House could file criminal contempt charges. It's a strong measure, but lawmakers should not be afraid to take it, as they have done 10 times since 1975 under both parties.

Last week, in a bit of especially mendacious spin, Tony Fratto, the White House deputy press secretary, responded to the subpoenas on the illegal wiretapping by saying, "It's unfortunate that Congressional Democrats continue to choose the route of confrontation."

Actually, Mr. Bush chose that route long ago by defining consultation as a chance for lawmakers to hear about decisions he had already made, bipartisanship as a chance for Democrats to join Republicans in rubber-stamping those choices and Congressional oversight as self-serving and possibly seditious. At this point, confrontation is far preferable to the path the Republican majority in Congress chose for so many years — capitulation.

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