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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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LAWRENCE J. BRADY
STAFF DIRECTOR

August 14, 2012

The Honorable Steven Chu
Secretary
U.S. Department of Energy
1000 Independence Avenue SW
Washington, D.C. 20585

Dear Mr. Secretary:

The Committee on Oversight and Government Reform continues to conduct oversight of the Department of Energy's (DOE) 1705 Loan Guarantee Program. The Committee has requested documents and information that would show why DOE officials disregarded a number of warnings from the President's senior economic advisors and Congress and continued to place taxpayer money at risk through the 1705 Loan Guarantee Program. Despite significant public interest in this matter, new discoveries indicate the Department of Energy and its employees have deceptively and unlawfully withheld documents related to White House involvement in decisions related to loans, correspondence with loan applicants, and internal agency deliberations about the risky use of taxpayer funds.

Recently-obtained documents show DOE officials frequently used Yahoo! and Gmail to communicate about the loan guarantee program. This use of non-government e-mail accounts for official business may have violated the Presidential Records Act (PRA) and the Federal Records Act (FRA). The documents also show that testimony given to the Committee by current and former DOE officials, including you, was inaccurate, and may have been intentionally false.

DOE officials routinely used non-government e-mail accounts to communicate about the 1705 Loan Guarantee Program.

The Committee has obtained thousands of documents related to official business from the non-official e-mail accounts of federal employees. While these e-mails show DOE officials routinely using non-official accounts to conduct official business, prior to the Committee's acquisition of these documents from individuals, the Department had not produced them. These e-mails contradict important assertions made by the Administration and DOE's failure to produce them is troubling. The frequent use of non-government e-mail accounts and the contents of e-mails leaves little doubt that DOE officials participated in an intentional effort to shield their communications from legal scrutiny and the public.

The documents show that former DOE Loan Program Office Director Jonathan Silver testified inaccurately to the Committee. When Silver appeared before the Committee on July 18, 2012, he was asked by Ranking Member Elijah Cummings whether he used a private e-mail account to “hide information or . . . hold back information.”¹ Silver replied, “No, unequivocally not, Congressman.”²

Rep. Trey Gowdy asked Silver whether “concealment might also be a motive for folks who want to use their personal account and not their official account?”³ Silver stated, “Well, it certainly was not my motive, sir.”⁴

Documents show that Silver did in fact consider the implications of using non-government e-mail accounts to conduct official business. On August 21, 2011, Silver used his Yahoo! account to send a message to Morgan Wright, Director of Strategic Initiatives for DOE’s Loan Programs Office. Silver stated:

Don’t ever send an email on doe email with private email addresses. That makes them subpoenaable.⁵

Silver solicited the private e-mail addresses of his colleagues to discuss official matters. On September 18, 2011, in an e-mail from his Yahoo! account to the Gmail address of DOE Chief of Staff Brandon Hurlbut, Silver wrote “Does [Deputy Chief of Staff Jeff] Navin have a private email...”⁶ Three days later, Silver used his Yahoo! account to send an e-mail to Navin’s Hotmail address.⁷ In addition to Hurlbut and Navin, documents show that Silver routinely used his Yahoo! account to communicate with other DOE officials about the loan guarantee program, including senior staff in the DOE Loan Program Office such as Peter O’Rourke (Gmail), Frances Nwachuku (Yahoo!), Jim McCrea (Optimum) and Matthew Winters (Gmail). In fact, at least fourteen DOE officials used non-government accounts to communicate about the loan guarantee program and other public business.

Silver also communicated with White House staff on their non-government e-mail accounts. On June 18, 2011, Silver used his Yahoo! account to e-mail David Lane, who was then-Assistant to the President and Counselor to Chief of Staff William Daley at the White House. In a message to Lane’s Gmail address, Silver wrote:

Why are the most senior people in the Administration worrying about a \$200 million deal? Don’t we have bigger problems? Obama will look like a hero if we do this to a constituency that is now worried about him.

¹ Transcript, H. Comm. on Oversight and Gov’t Reform hearing, “The Administration’s Bet on Abound Solar: Assessing the Costs to the American Taxpayers,” (Jul. 18, 2012).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ E-mail from Jonathan Silver to Morgan Wright (Aug. 21, 2011).

⁶ E-mail from Jonathan Silver to Brandon Hurlbut (Sep. 18, 2011).

⁷ E-mail from Jonathan Silver to Jeff Navin and Brandon Hurlbut (Sep. 21, 2011).

Solution: if you think this makes sense, ask Daley to simply call Chu to discuss the deal privately. Chu is a huge supporter. If Daley thinks the deal makes sense, we move forward after the call, Daley's office can cancel the meeting.⁸

All the communications described above are covered by federal recordkeeping statutes and as such, must be preserved. The Federal Records Act defines records as:

[A]ll books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the U.S. Government under Federal law or **in connection with the transaction of public business** and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.⁹

In addition, the Presidential Records Act requires the preservation of all records that could inform presidential decision-making.¹⁰ The communications in question could be considered records under the PRA.

The use of non-official e-mail accounts to conduct government business raises the prospect that records – as defined by the PRA and FRA – were not captured by official government e-mail archiving systems. In addition to running afoul of the PRA and FRA, the use of a non-official e-mail account to conduct government business creates difficulties in fulfilling Freedom of Information Act (FOIA) or litigation requests. Unless all e-mails were forwarded to Federal Government (.gov) addresses or preserved as paper copies, there is a risk that records subject to the PRA or FRA were not retained as required by law.

Furthermore, conducting official business using a non-official account may implicate criminal or civil penalties for the unlawful removal or destruction of federal records (18 U.S.C. 2071), and the improper handling of records containing other information exempt under FOIA (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), and other information to which access is restricted by law. The use of non-official e-mail to conceal communication from Congress also implicates section 1001 of Title 18 of the U.S. Code. Subsection (a) of the statute states:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully falsifies, **conceals**, or covers up by any trick,

⁸ E-mail from Jonathan Silver to David Lane (Jun. 18, 2011).

⁹ 44 U.S.C. § 3301, Definition of Records. (emphasis added)

¹⁰ 44 U.S.C. § 2201. The PRA defines records as “documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”

scheme, or device **a material fact** . . . shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.¹¹

Congress passed record-keeping laws because, among other things, they allow the American people to understand how and why officials make decisions to spend their tax dollars. Widespread efforts to circumvent these laws intended to create transparency create a clear appearance that officials sought to hide the truth from possible scrutiny.

In addition to being unlawful, the use of non-government e-mail to conduct official business is wholly inconsistent with the President's commitment to create "an unprecedented level of openness in Government" and to "work together to ensure the public trust and establish a system of transparency, public participation, and collaboration."¹²

The documents show that testimony given to the Committee by DOE officials, including you, was inaccurate, and may have been intentionally false.

On March 20, 2012, you testified to the Committee that you did not communicate with the White House about companies seeking loan guarantees. You had the following exchange with Chairman Jim Jordan:

Chairman Jordan: Did the White House ever call you, ever talk to you about any of these? Did you get someone from the White House, Chief of Staff, someone from the White House talk to you about these respective companies involving these individuals?

Secretary Chu: No, we did not.¹³

The documents obtained by the Committee show that you and your staff did in fact communicate with the White House about the 1705 Loan Guarantee Program. Documents show that the White House requested that you brief the President on the status of the loan program. The June 27, 2011, briefing occurred less than two weeks after then-White House Chief of Staff William Daley resolved a dispute about the loan guarantee program between you and the President's top economic advisors in your favor.¹⁴ As you know, the economic team argued that the loan guarantee program was unjustly enriching certain companies. Your apparent false or – at minimum - misleading testimony, combined with the widespread use of private e-mail accounts by Department employees, creates the appearance that you have been complicit in an organized

¹¹ 18 U.S.C. § 1001 (a)(1). (emphasis added)

¹² The President, Memorandum for the Heads of Executive Departments and Agencies re: Transparency and Open Government, Jan. 21, 2009.

¹³ Transcript, H. Comm. on Oversight and Gov't Reform hearing, "Oversight of the Department of Energy's Stimulus Spending," (Mar. 20, 2012).

¹⁴ E-mail from Jonathan Silver to Peter O'Rourke (Jun. 16, 2011).

effort to deceive Congress and hide the motives and process for decisions to use taxpayer funds to aid private interests.

As you well know, the President requested a briefing from DOE officials because, “at official events and political events [the President] interacts with [the] business community and Congressional members – many of them have some affiliation or interest in the numerous applications we have received that involve substantial funds.”¹⁵ In addition, former Executive Director of the Loan Programs Office Jonathan Silver inaccurately testified to the Committee that he did not know the investors in loan guarantee companies. At a July 18, 2012, Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending, Silver had the following exchange with Ranking Member Elijah Cummings:

Mr. Cummings: Now, we have identified nearly 500 letters sent by both Republican and Democratic members, including our Chairman, Chairman Issa, seeking funds for clean energy projects in their districts. I am not saying there is anything wrong with that, but more recently Chairman Issa has been calling the Department of Energy’s entire Loan Guarantee Program a “broad scandal” that has been driven by political favoritism and accusations of pay-to-play relationships.

Did you see any evidence of that during your tenure?

Mr. Silver: None whatsoever, sir. As I say, almost nobody, and **certainly nobody that I am aware of in the loan program, even knew who the individuals were who had invested, either directly or indirectly, into these companies.**¹⁶

Contrary to Silver’s testimony, documents indicate that key DOE officials in the Loan Program Office knew investors in Solyndra quite well. On August 23, 2011, Morgan Wright (Director of Strategic Initiatives for the Loan Programs Office) wrote to Jonathan Silver:

Talked to Andrew. They’re leaving on the red eye tonight. Argonaut, Rockport, and Madrone are leaving in the morning (they were all there today). He said they made good progress and the tone has changed.¹⁷

¹⁵ E-mail from Brandon Hurlbut to Steven Chu (Jun. 24, 2011).

¹⁶ Transcript, H. Comm. On Oversight and Gov’t Reform hearing, “The Administration’s Bet on Abound Solar: Assessing the Costs to the American Taxpayers,” (Jul. 18, 2012). (emphasis added)

¹⁷ E-mail from Morgan Wright to Jonathan Silver (Aug. 23, 2011).

Argonaut Private Equity, Rockport Capital Partners, and Madrone Capital Partners were all significant investors in Solyndra.¹⁸ Furthermore, on August 12, 2011, Silver left a voicemail message asking to speak with George Kaiser of Argonaut Private Equity.¹⁹ All of these e-mails indicate that, contrary to Jonathan Silver's testimony, senior officials working on loan guarantee deals knew and communicated with investors in companies that applied for and received taxpayer-backed loan guarantees.

The American people have a right to know whether political considerations played a role in the process by which loan guarantees were approved.

The documents obtained by the Committee show that DOE officials routinely used non-government e-mail accounts to conduct official business. Silver's e-mail clearly shows that the use of private e-mail accounts was neither incidental nor isolated. These e-mails indicate employees working under your supervision were intentionally hiding their conversations from potential disclosure requirements. So the Committee can better understand your testimony, and why records covered by the FRA and PRA were not properly preserved, please provide responses to the following requests:

1. Clarify or amend in writing your testimony to the Committee on March 20, 2012;
2. On May 23, 2012 and July 12, 2012, the Committee invited you to testify at a future hearing on the 1705 Loan Guarantee Program.²⁰ In light of the new information described herein, commit in writing to appear before the Committee at a hearing on this matter on September 20, 2012; and
3. Produce any document or communication referring or relating to the 1705 Loan Guarantee Program sent or received by DOE staff using a non-government account that was forwarded to an official government e-mail address or printed-and-saved for the purpose of complying with the Presidential Records Act or Federal Records Act. Include any indication of the date such communications came into the Department's possession.

Please provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on August 28, 2012. The Committee will consider the use of compulsory process to obtain documents and testimony if the Department continues to delay or otherwise obstruct our investigation of the loan guarantee program. When producing documents to the Committee,

¹⁸ Todd Woody, "Solyndra: Pay Some Investors Before Taxpayers in Solar Flame Out," *Forbes*, September 6, 2011. Available at: <http://www.forbes.com/sites/toddwoody/2011/09/06/solyndra-pay-some-investors-before-taxpayers-in-solar-flame-out/2/>.

¹⁹ Email to George Kaiser (Aug. 12, 2011). Available at: http://energycommerce.house.gov/Media/file/PDFs/Solyndra/669_756.pdf.

²⁰ Letter from H. Comm. on Oversight and Gov't Reform Chairman Darrell Issa and H. Regulatory Affairs, Gov't Spending and Stimulus Oversight Subcommittee Chairman Jim Jordan to Sec'y Steven Chu (May 23, 2012); Letter from H. Comm. on Oversight and Gov't Reform Chairman Darrell Issa and H. Regulatory Affairs, Gov't Spending and Stimulus Oversight Subcommittee Chairman Jim Jordan to Sec'y Steven Chu (Jul. 12, 2012)

The Honorable Steven Chu

August 14, 2012

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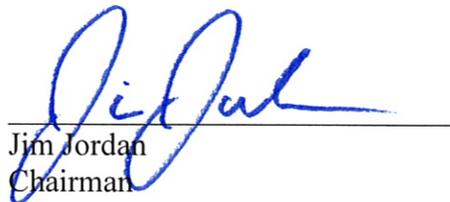
please deliver separate production sets to both the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

Please contact the Committee at (202) 225-5074 with any questions about this request. Thank you for your attention to this important matter.

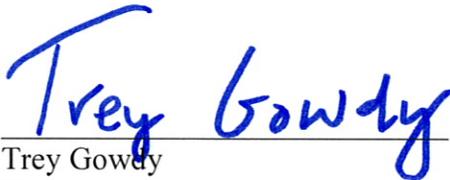
Sincerely,



Darrell Issa
Chairman



Jim Jordan
Chairman
Subcommittee on Regulatory Affairs,
Stimulus Oversight and Government
Spending



Trey Gowdy
Chairman
Subcommittee on Health Care,
District of Columbia, Census, and the National Archives

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

The Honorable Dennis Kucinich, Ranking Minority Member
Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

The Honorable Danny Davis
Subcommittee on Health Care, District of Columbia, Census, and the National Archives