

August 28, 2012

**By Facsimile: (202-586-7851) and First-Class Mail**

Gregory H. Friedman  
Inspector General  
U.S. Department of Energy  
1000 Independence Avenue, S.W.  
Washington, D.C. 20585

Dear Inspector General Friedman:

Citizens for Responsibility and Ethics in Washington (CREW) respectfully requests that you investigate whether employees of the U.S. Department of Energy (DOE) are purposefully using private email accounts for official business to shield their contents from public view and avoid having their emails captured by the agency's record keeping system. CREW also requests that you determine the extent to which Energy Secretary Steven Chu and other top agency officials have knowingly allowed this practice.

On August 14, 2012, the *Washington Post* reported Jonathan Silver, the former head of DOE's clean-energy loan program, warned one of his staff, Morgan Wright, not to include personal email addresses in official correspondence to prevent them from being "subpoenable." Carol D. Leonnig and Joe Stephens, [Energy Dept. Loan Chief Warned Staff That Personal E-Mail Could Be Subpoenaed](#), *Washington Post*, August 14, 2012 (attached as Exhibit A) (quoting August 21, 2011 email from Jonathan Silver). This article was based, in part, on documents obtained by the House of Representatives Committee on Oversight and Government Reform as part of its oversight of DOE's 1705 Loan Guarantee Program. Those documents, a small number of which have been released by the Oversight Committee (attached as Exhibit B), reveal this is by no means the only instance in which a DOE official used a personal email account to communicate official agency business. For example, Mr. Silver sent another email on September 16, 2011, from a non-governmental email address to the non-governmental email address of DOE Chief of Staff Brandon Hurlbut, discussing the loan program. In that email Mr. Silver expressly asked whether Deputy Chief of Staff Jeff Navin had a private email address. The answer apparently was yes, as the documents released by the Oversight Committee include an email from Mr. Silver dated five days later from his private email address to the private email addresses of both Mr. Hurlbut and Mr. Navin discussing pending DOE business. According to

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the Oversight Committee, “at least fourteen DOE officials used non-government accounts to communicate about the loan guarantee program and other public business.”<sup>1</sup>

The Federal Records Act (FRA) requires each agency head to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency . . .” 44 U.S.C. § 3101. Further, the FRA places an affirmative duty on each agency head to implement the Act’s standards and guidelines for the retention of federal records. Specifically, each agency head must maintain an active records management program that provides for effective controls over the creation and use of federal records, and that ensures application of the Archivist’s standards and procedures for preserving federal records. *Id.* at § 3102. Agency heads also are required to establish safeguards against the removal or loss of records the agency determines are necessary. *Id.* at § 3105.

The National Archives and Records Administration (NARA) has issued implementing regulations that, among other things, delineate additional requirements for agencies in managing their electronic mail records. See 36 C.F.R. § 1236.22.<sup>2</sup> Those regulations specify:

Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved in the appropriate agency record-keeping system.

36 C.F.R. § 1236.22(b).

As the documents obtained by the Oversight Committee demonstrate, DOE employees are knowingly using electronic mail systems not operated by the agency. The context of the emails implies they are doing so to shield their communications from public view and congressional access, knowing that the use of private email accounts prevents their messages from being preserved in the agency’s record keeping system. The fact that high-level DOE officials have engaged in this conduct raises a serious question of the extent to which DOE management is not only complicit in this practice, but actively encourages it.

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<sup>1</sup> Letter from Darrell Issa, Chairman, Oversight Committee, Jim Jordan, Chairman, Subcommittee on Regulatory Affairs, and Trey Gowdy, Chairman, Subcommittee on Health Care, District of Columbia, Census and the National Archives to Secretary Steven Chu, August 14, 2012 (attached as Exhibit C).

<sup>2</sup> The FRA requires agencies to comply with NARA’s records management regulations. See 44 U.S.C. § 3102(3).

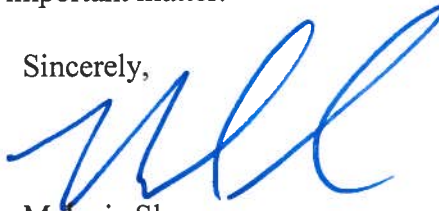
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Your office plays a critical role in ensuring DOE and its employees comply fully with all their legal obligations. Without access to all agency records, including emails generated by agency employees while performing agency functions, your office is stymied in its ability to investigate fully all charges brought to it. Similarly, Congress and outside watchdog groups like CREW are also impeded in their efforts to bring more accountability to DOE.

CREW therefore respectfully requests that you immediately open an investigation into these issues and also take steps to ensure that, on an ongoing basis, all emails sent or received by DOE employees in the course of their employment, whether or not through the use of agency email accounts, are preserved.

Thank you for your attention to this important matter.

Sincerely,



Melanie Sloan  
Executive Director

Enclosures

cc: Secretary Steven Chu  
Gary Stern, General Counsel, NARA

# **EXHIBIT A**

# The Washington Post

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## Energy Dept. loan chief warned staff that personal e-mail could be subpoenaed

By [Carol D. Leonnig](#) and [Joe Stephens](#), Published: August 14

The former head of the Obama administration's controversial clean-energy loan program warned a staff member last year not to include personal e-mail addresses in official correspondence, to prevent the personal accounts from being subpoenaed, documents show.

Jonathan Silver, a political appointee who oversaw the Energy Department's \$38 billion program, sent the warning days before a centerpiece of the program — solar-panel maker [Solyndra](#) — declared bankruptcy, pushing a congressional investigation into high gear.

"Don't ever send an email on doe email with a personal email addresses," Silver wrote Aug. 21, 2011, from his personal account to a program official's private Gmail account. "That makes them subpoenaable."

The House Committee on Oversight and Government Reform wrote a letter to Energy Secretary Steven Chu on Tuesday, charging that he and Silver appear to have given "inaccurate" or "misleading" testimony to Congress about their handling of the loan program. Silver had testified that no one in the department used personal e-mails to conceal internal discussions about the program.

Silver repeatedly communicated about internal and sensitive loan decisions via his personal e-mail, the newly released records show, and more than a dozen other Energy Department staff members used their personal e-mail to discuss decisions involving taxpayer-funded loans as well. The Washington Post

received the e-mails from Republican investigators on the committee.

“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,” committee Chairman Darrell Issa (R-Calif.) and subcommittee Chairmen Jim Jordan (R-Ohio) and Trey Gowdy (R-S.C.) wrote to Chu.

Silver said Tuesday that he did not mean to avoid congressional scrutiny. “I intended to advise my DOE colleagues to use their official email for official purposes and personal email for personal purposes,” he said in a statement. “It was never my intention to avoid the requirements of the Federal Records Act.”

Silver’s warning came as he and senior White House officials were desperately negotiating with Solyndra investors to try to keep the company alive. The government had backed Solyndra’s panel-manufacturing facility in Fremont, Calif., with a \$535 million government loan, and one of its leading investors was the family foundation and equity firm of George Kaiser, a top Obama donor.

The Energy Department voluntarily provided the e-mails to the House oversight panel last week, department spokesman Damien LaVera said. He said that the department treated personal e-mail threads as official records in the “rare cases” in which officials had used them to discuss government business and charged that the committee had cherry-picked individual e-mails to “misrepresent the facts.”

“Nothing in these e-mails or in any of the 950,000 pages of documents we have voluntarily provided to Congress demonstrates anything except what we have consistently said from day one,” LaVera said.

The loan program has become a major issue in this year’s presidential campaign, with Republicans accusing the administration of wasting taxpayer money and backing projects that benefited Obama donors. The White House and Chu have repeatedly asserted that the Energy Department staff made all loan decisions based on merit, without regard to politics or donors.

In the new e-mails, Silver cited political considerations in pressing for the administration to approve at least one loan applicant.

Silver wrote on June 12, 2011, to David Lane, counsel to White House Chief of Staff Bill Daley, arguing that approving a loan to a solar-generation facility called Project Amp would help Obama politically.

Project Amp then planned to buy from Solyndra, which investors hoped would help the struggling solar-panel maker.

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

Silver dismissed the possibility of political interference in testimony last year before a congressional oversight committee. He said that “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.”

But in August 2011, Silver left a voice-mail message asking to speak with Kaiser, records released earlier show. Silver also exchanged e-mails with staff members about Kaiser and other investors, and the status of talks to get the investors to provide more cash for the company to continue operating.

E-mails show that Kaiser declined to return Silver's call.

Silver said in a statement that in his testimony he meant loan officers did not know whether investors were donors.

Kimberly Kindy contributed to this report.

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# **EXHIBIT B**

**Jonathan Silver**

---

**From:** Morgan Wright [REDACTED]@gmail.com]  
**Sent:** Sunday, August 21, 2011 1:41 PM  
**To:** Jonathan@ [REDACTED].net  
**Subject:** Re;

Ok. She requested I do so since she left her blackberry at the office.

On Aug 21, 2011 1:31 PM, "Jonathan Silver" <Jonathan@[REDACTED].net> wrote:  
> Don't ever send an email on doe email with private email addresses. That makes them  
> subpoenaable.  
> Jonathan Silver  
>  
> cell: 202 309-[REDACTED]  
> Jonathan@[REDACTED].net

11/21/2011

JMS-002390



Brandon Hurlbut <[REDACTED]@gmail.com>

---

(no subject)

1 message

---

Jonathan Silver <Jonathan@[REDACTED].net>  
Reply-To: Jonathan@[REDACTED].net  
To: Brandon Hurlbut <[REDACTED]@gmail.com>

Sun, Sep 18, 2011 at 6:14 PM

Does Navin have a private email?

New Idea; how about: listen, this is a fight congress should be having with itself, not the loan program. We just execute congressional intent.

Jonathan Silver

cell: 202 908-[REDACTED]  
Jonathan@[REDACTED].net



Brandon Hurlbut <[REDACTED]@gmail.com>

---

**Fw: Fwd: Strong**

1 message

---

Jonathan Silver <Jonathan@[REDACTED].net>

Wed, Sep 21, 2011 at 11:04 PM

Reply-To: Jonathan@[REDACTED].net

To: Jeff Navin <[REDACTED]@hotmail.com>, Brandon Hurlbut <[REDACTED]@gmail.com>

Read this. Important.

Jonathan Silver

cell: 202 300 [REDACTED]

Jonathan@[REDACTED].net

---

From: "Peter O'Rourke" <[REDACTED]@gmail.com>

Date: Wed, 21 Sep 2011 22:45:26 -0400

To: Jonathan Silver <Jonathan@[REDACTED].net>

Subject: Fwd: Strong

fyi

----- Forwarded message -----

From: Tim Newell <[REDACTED]@usregroup.com>

Date: Wed, Sep 21, 2011 at 10:43 PM

Subject: Strong

To: Peter O'Rourke <[REDACTED]@gmail.com>

Given the message from DOE to us tonight, SolarCity is currently planning to release the story to the media tomorrow. Won't be pretty. My understanding is that they are preparing to make veterans available to media who have been hired to work on the project.

Tim Newell  
US Renewables Group  
(310) 586-[REDACTED] Office  
(415) 517-[REDACTED] Mobile  
[REDACTED]@usregroup.com

**Evans, Denise**

---

**From:** David Lane <[REDACTED]@gmail.com>  
**Sent:** Saturday, June 18, 2011 12:49 PM  
**To:** Jonathan Silver  
**Subject:** Re: RE: RE:

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Were you happy with the outcome on this? Bill surprised the economic team.

Sent from my iPhone

On Jun 12, 2011, at 5:06 PM, "Jonathan Silver" <Jonathan@[REDACTED].net> wrote:

- > David,
- >
- > As always, thank you for your time this afternoon.
- >
- > Attached is a short PowerPoint that I think touches on everything we
- > discussed.
- >
- > Key takeaways:
- >
- > A transformational project; makes rooftop solar competitive with big
- > projects in the desert with lots fewer problems
- >
- > Creates a brand new way to finance these projects by creating a
- > secondary market for the project's debt (and there is a ton more
- > liquidity in the secondary market than in the federal government)
- >
- > Complies with every single part of the Recovery Act. There is no
- > stipulation on the amount of time a project should take and we have
- > many that will take nearly as long.
- >
- > 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.
- >
- > Solution: If you think it 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 and after the call,
- > Daley's office can cancel the meeting.
- >
- > If we move this one forward, there is one in a month or so that does
- > the same for military housing and uses returning war vets for labor.
- > If this one dies, that one does, too. DoD is very high on the military solar deal.
- >
- > Let me know what you think. And, again, thank you. It seems odd that
- > things need to get done this way.
- >
- >
- >
- > Jonathan Silver
- > Phone: 202 309-[REDACTED]
- > Fax: 202 333-[REDACTED]

> Email: Jonathan@[REDACTED].net

>  
> The preceding E-mail message contains information that is confidential  
> and may be protected by the attorney/client or other applicable  
> privileges, and may constitute non-public information. It is intended  
> to be conveyed only to the designated recipient(s). If you are not the  
> intended recipient of this message, please notify the sender at  
> 202/309-8880. Unauthorized use, dissemination, distribution or  
> reproduction of this message is strictly prohibited and may be unlawful.

> -----Original Message-----

> From: David Lane (mailto:[REDACTED]@gmail.com)  
> Sent: Saturday, June 11, 2011 8:31 PM  
> To: Jonathan Silver  
> Subject: Re: RE:

> Jonathan, sorry I failed today. Can we do this between noon and 4 Sunday?

> Sent from my iPhone

> On Jun 11, 2011, at 9:52 AM, "Jonathan Silver"

> <Jonathan@[REDACTED].net>

> wrote:

>> To make sure you saw the cell number below: 202 909-[REDACTED]

>> Jonathan Silver

>> Phone: 202 309-[REDACTED]

>> Fax: 202 339-[REDACTED]

>> Email: Jonathan@[REDACTED].net

>> The preceding E-mail message contains information that is  
>> confidential and may be protected by the attorney/client or other  
>> applicable privileges,

>> and

>> may constitute non-public information. It is intended to be conveyed

>> only

>> to

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>> this message, please notify the sender at 202/309-8880. Unauthorized  
>> use, dissemination, distribution or reproduction of this message is  
>> strictly prohibited and may be unlawful.

>> -----Original Message-----

>> From: David Lane (mailto:[REDACTED]@gmail.com)

>> Sent: Saturday, June 11, 2011 9:31 AM

>> To: Jonathan@[REDACTED].net

>> Subject: Re:

>> I was at an offsite all day yesterday. What's your cellphone? I can

>> call

>> as

>> I drive this afternoon?

>> Sent from my iPhone

>> On Jun 10, 2011, at 6:57 AM, "Jonathan Silver"

>> <Jonathan@[REDACTED].net> wrote:

>>> David,  
>>> I'd really like to speak with you this morning. Do you have ten minutes?  
>> Concerns a monday meeting.  
>>> Thanks,  
>>> J  
>>>  
>>>  
>>> Jonathan Silver  
>>>  
>>> cell: 202 309-  
>>> jonathan@.net  
>> <Jonathan Silver (jonathan@.net)>  
> (jonathan@.net).vcf>  
> <Jonathan Silver (jonathan@.net)>  
> (jonathan@.net).vcf>  
> <Amp Briefing for 6-15-11 (12 June v).pptx>

**Jonathan Silver**

---

**From:** Peter O'Rourke ([REDACTED]@gmail.com]  
**Sent:** Thursday, June 16, 2011 9:40 PM  
**To:** Jonathan@ [REDACTED] net  
**Cc:** Matt Winters  
**Subject:** Re:

Yeah, even more so given that Geitner actually chimed in. Kind of nuts that Chu defeated Treas Sec, OMB head, and NEC head.

Thanks very much to both of you for all the time you put into getting this through the gauntlet. I know your plates are very full, so your time is appreciated by all of the deal team.

peter

On Thu, Jun 16, 2011 at 8:28 PM, Jonathan Silver <jonathan@[REDACTED]net> wrote:  
Chu is right not to gloat publicly, but, the full deal going forward minus a year, is a close to an annihilation of the economic team's position as you could actually possibly hope for. Its actually daley giving them a fig leaf. Think about it.  
Let's do some serious gloating when I get back.  
Total victory.

Jonathan Silver

cell: 202 309-[REDACTED]  
jonathan@[REDACTED]net

11/21/2011

JMS-002155

Evans, Denise

---

From: Shikany, Ann [redacted]@Hq.Doe.Gov] on behalf of Silver, Jonathan [redacted]@hq.doe.gov]  
Sent: Friday, June 24, 2011 1:17 PM  
To: 'Jonathan@[redacted].net'  
Subject: FW: Draft LPO slides for POTUS meeting

From: Hurlbut, Brandon  
Sent: Friday, June 24, 2011 12:14 PM  
To: SCHU  
Cc: Adams, Ian; Poneman, Daniel; Winters, Matthew; Carlson, Jaime; Silver, Jonathan; Navin, Jeff  
Subject: Re: Draft LPO slides for POTUS meeting

I am in a CRB for the next half hour - they need me for quorum - I will call you when this meeting ends.

---

From: SCHU  
To: Hurlbut, Brandon  
Cc: Adams, Ian; Poneman, Daniel; Winters, Matthew; Carlson, Jaime; Silver, Jonathan; Navin, Jeff  
Sent: Fri Jun 24 12:08:21 2011  
Subject: RE: Draft LPO slides for POTUS meeting

Brandon,

This is missing important information: what could have been improved, why did the loans take so long, and why was there so much interagency angst. Below is the "blunt, truthful" version.

**We need to tell the President the truth, as we see it. We need to also present the other side's point of view as fairly as possible.**

- 1) Treasury, and often OMB felt that the all the allowed subsidies, when added together, permitted to loan applicants too large a ROI, ("Unjust enrichment" ). We could not agree on even the underlying assumptions of how much a subsidy was worth. Give one example of a deal that we could not agree on and the particulars of that deal.
- 2) Many times, they felt that a "better deal" could have been brokered by DOE and asked us to re-negotiate.
- 3) I heard that OMB assigned very few people to review the loans. Would they acknowledge that?
- 4) Throughout the loan program, DOE was asked to respond to multiple inquiries on virtually all loans, amounting to thousands of pages of questions. Many times they specifically refused to have in-person briefings.
- 5) Other agencies would sometimes argue that a particular loan is "not in the spirit of the Recovery Act"
- 6) Principles in OMB and especially Treasury would often times rely on lower level staffers - e.g. acting deputy assistant secretary - and back them without understanding the details of the loan. The staffers would cite numerous initial objections, and as we explained the loan, their objections shifted to other reasons. Throughout the process, they believed that were taking "principled stands."

12/2/2011

JMS-002219

7)

Stoyon Chu  
Department of Energy

**From:** Hurlbut, Brandon

**Sent:** Friday, June 24, 2011 11:35 AM

**To:** SCHU

**Cc:** Adams, Ian; Poneman, Daniel; Winters, Matthew; Carlson, Jaime; Silver, Jonathan; Navin, Jeff

**Subject:** Draft LPO slides for POTUS meeting

Attached are the draft slides for the daily economic briefing with the President on Monday where you will discuss the status of LPO. The WH was very direct about what should be included in the slides so we don't have much flexibility. They want:

- 3 slides that describe the status of the program and explain why the President hears so much about it. The President actually hears about it because at official events and political events he interacts with business community and Congressional members - many of them have some affiliation or interest in the numerous applications we have received that involve substantial funds. As a result, the President has likely heard a wide range of feedback on the program and wants to know its status.
- 1 slide on status of Cape Wind (because he has heard from Gov. Patrick a few times - they are close friends)
- 1 slide on USEC (I think Gov. Kasich brought it up when he golfed with the President last weekend).

During the meeting, you will have an opportunity to verbally raise CEDA and any other thoughts on clean energy finance. You have a lengthy pre-brief scheduled on Monday morning to discuss that aspect of the meeting.

Please let us know what you think - the WH has asked that we send a draft early afternoon so they can review and make any necessary changes to get in the President's book for the weekend.

Brandon Hurlbut  
Department of Energy  
Office: 202.586 [REDACTED]  
Cell: 202.281 [REDACTED]

12/2/2011

JMS-002220

Jonathan Silver

---

From: Morgan Wright [redacted]@gmail.com]  
Sent: Tuesday, August 23, 2011 9:21 PM  
To: Jonathan@[redacted].net  
Subject: Re:

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. Both in the sense of mgmt's perspective and the investors appetite to continue. They're going to set up a call with us at 1pm tomorrow to walk through everything, and will send us the revised model, which should be closer to 35rw/quarter. Mitchell indicated he would recommend to the trustees to fund another week assuming the ProLogis order is tied down tomorrow (which it should be). All in all it sounded fairly positive.

On 23 August 2011 20:31, Morgan Wright <[redacted]@gmail.com> wrote:

Agreed. Trying to get ahold of Andrew for an update this evening.  
Did you get back in the building?

On 23 August 2011 19:34, Jonathan Silver <jonathan@[redacted].net> wrote:

If we seem to be making progress with steve, I want you to set him up with scott stephens, who is impressive as hell.

Scott needs to be briefed/prepped on what his mission is, but I bet steve walks away from that mtg thinking our guy is smarter than his are.

Jonathan Silver

cell: 202 309-[redacted]  
jonathan@[redacted].net

# **EXHIBIT C**

DARRELL E. ISSA, CALIFORNIA  
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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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WASHINGTON, DC 20515-6143

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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.”<sup>1</sup> Silver replied, “No, unequivocally not, Congressman.”<sup>2</sup>

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?”<sup>3</sup> Silver stated, “Well, it certainly was not my motive, sir.”<sup>4</sup>

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.<sup>5</sup>

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...”<sup>6</sup> Three days later, Silver used his Yahoo! account to send an e-mail to Navin’s Hotmail address.<sup>7</sup> 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.

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<sup>1</sup> 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).

<sup>2</sup> *Id.*

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

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

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

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

<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

In addition, the Presidential Records Act requires the preservation of all records that could inform presidential decision-making.<sup>10</sup> 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,

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

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

<sup>10</sup> 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.<sup>11</sup>

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."<sup>12</sup>

*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.<sup>13</sup>

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.<sup>14</sup> 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

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<sup>11</sup> 18 U.S.C. § 1001 (a)(1). (emphasis added)

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

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

<sup>14</sup> 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.”<sup>15</sup> 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.**<sup>16</sup>

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.<sup>17</sup>

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

<sup>16</sup> 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)

<sup>17</sup> 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.<sup>18</sup> Furthermore, on August 12, 2011, Silver left a voicemail message asking to speak with George Kaiser of Argonaut Private Equity.<sup>19</sup> 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.<sup>20</sup> 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,

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<sup>18</sup> 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/>.

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

<sup>20</sup> 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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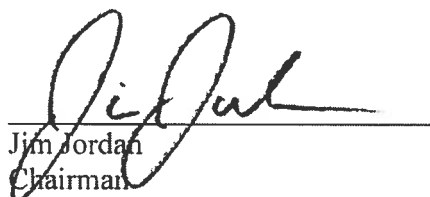
please deliver separate production sets to both the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

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

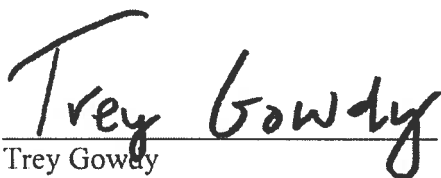
Sincerely,



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