



U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
CHAIRMAN FRED UPTON

The Policy Paper Series

Transforming Ideas Into Solutions

Promises Made, Promises Broken: The Obama Administration's Disappointing Transparency Track Record

of sound.

trans·pa·cif·ic (trāns'pā-sif'ik) *adj.* 1. Crossing the Pacific Ocean. 2. Located across or beyond the Pacific Ocean.

trans·par·en·cy (trāns-pār'an-sē, -pār'-) *n., pl. -cies* 1. also **trans·par·ence** (-pār'əns, -pār'-) The quality or state of being transparent. 2. A transparent object, esp. a photographic slide.

trans·par·ent (trāns-pār'ənt, -pār'-) *adj.* [ME < OFr. < Med. Lat. *transparens*, pr.part. of *transparere*, to be seen through : Lat. *trans*, through + Lat. *parere*, to show.] 1. Capable of transmitting light so that objects or images beyond can be clearly perceived. 2. Permeable to electromagnetic radiation of specified frequencies, as to visible light or radio waves. 3. So fine or delicate in texture that objects may be easily seen on the other side : DIAPHANOUS. 4a. Easily detected : OBVIOUS <*transparent lies*> b. Readily understandable : CLEAR <a *transparent explanation*> 5. Without guile : CANDID. 6. Obs. Luminous. —**trans·par·ent·ly** *adv.* —**trans·par·ent·ness** *n.*

trans·per·son·al (trāns-pār'sə-nəl) *adj.* Transcending the personal.

Prepared by the Energy and Commerce Committee, Majority Staff

Openness and transparency are hallmarks of good government. By enabling the American public to keep a watchful eye on the actions and decisions of their elected representatives, transparency furthers a system of accountability and instills a greater confidence that those representatives are in fact working on behalf of the American *people*. When the people's business is shrouded from public view, public trust and confidence are weakened, making it more difficult for the country to work together to solve our nation's problems.

By exercising its constitutional oversight function, Congress plays a fundamental role in ensuring that the Executive Branch operates in an open and transparent manner. Despite the unprecedented spending of trillions of taxpayer dollars during the first two years of the Obama Administration, virtually no oversight of the Executive Branch was conducted in the Democrat-controlled 111th Congress. In the 112th Congress, the House Energy and Commerce Committee has continually pursued its constitutionally mandated oversight responsibilities. Committee investigations and hearings, such as the May 2011 examination of whether the Obama Administration has fulfilled its pledges of transparency, have shown that the Executive Branch has a flawed record on transparency.

This report identifies a number of Obama Administration shortfalls that threaten the public trust and justify continued close monitoring by Congress as policy and practice diverge at the White House.

Key Examples of White House Transparency Policy Gone Awry

- The Obama Administration denied Freedom of Information Act (FOIA) requests for White House visitors' logs during the first six months of the Administration and continued to defend non-disclosure of the logs despite a January 2009 District Court ruling that the logs were subject to FOIA.
- The Obama Administration instituted its "voluntary" visitors' logs policy in September 2009 only after reaching a settlement agreement with the advocacy organization Citizens for Responsibility and Ethics in Washington (CREW). The settlement agreement does not cover the time period when major policy initiatives such as health care reform were being negotiated.
- White House officials used their personal email accounts to communicate with outside stakeholders. If these records were not properly preserved, something the White House has refused to verify, these actions could be in violation of the Presidential Records Act.
- A White House official specifically organized meetings related to the LightSquared/GPS interference dispute off White House grounds in order to avoid public disclosure on the visitors' logs.
- Documents submitted to the Committee by several health industry organizations and labor unions show that a multitude of meetings and phone calls took place between 2009 and early 2010 related to the formulation of the PPACA. A public record does not exist for a majority of these meetings since they took place prior to the arbitrary September 15, 2009 start date for visitors' log disclosure established in the White House's settlement with CREW.

I. Introduction

In September 2009, the Obama Administration announced a “historic” new policy to “voluntarily” disclose White House visitors’ logs to the public. According to President Obama, the release of the records would “achieve our goal of making this administration the most open and transparent administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it.”¹ While President Obama attempts to claim the mantle of “most open and transparent administration in history,” the record surrounding the creation and subsequent enforcement of his Administration’s policy tells a different story. This report chronicles the legal and procedural history leading to the creation of the Administration’s “voluntary” disclosure policy, discusses the shortcomings of that policy, and, through an examination of two distinct policy areas, details an emerging pattern of White House personnel deliberately violating the Administration’s policies on transparency. The findings contradict President Obama’s lofty rhetoric on transparency, revealing an Administration that has failed to live up to its proclamations.

II. Legal and Procedural History of the White House Voluntary Disclosure Policy

The United States Secret Service creates records, commonly referred to as “visitors’ logs,” as part of its statutory responsibility to protect the president, vice president, their residences, and the White House. These records include compilations from the Worker and Visitor Entrance System (WAVES), which logs planned White House meetings, and the Access Control Records System (ACR), which logs electronic key pass entries.

When President Obama took office in January 2009, his Administration did not immediately release information on White House visitors. For example, in the first six months of the Administration, the advocacy organization Citizens for Responsibility and Ethics in Washington (CREW) and msnbc.com both filed Freedom of Information Act (FOIA) requests for White House visitor records and were denied.² Specifically, CREW sought records of visits to the White House by health care³ and coal company⁴ executives and lobbyists in order to determine their degree of influence on health care and energy legislative proposals. According to CREW, “the Obama administration claimed the records [were] presidential, not agency records, and otherwise exempt in their entirety because of

¹ Norman L. Eisen, *Opening Up the People’s House*, WHITE HOUSE BLOG (Sept. 4, 2009), <http://www.whitehouse.gov/blog/Opening-up-the-peoples-house> (quoting President Barack Obama).

² Angie Drobnic Holan, *White House Visitor Logs Voluntarily Released, With Potential For Exceptions*, POLITIFACT.COM (Jan. 27, 2010), <http://www.politifact.com/truth-o-meter/statements/2010/jan/27/barack-obama/white-house-visitor-logs-voluntarily-released-pote>.

³ See Complaint, Citizens For Responsibility and Ethics in D.C. v. U.S. Dep’t of Homeland Sec. (D.C.C. 2009)(No. 09-1356), available at http://www.citizensforethics.org/page/-/PDFs/Legal/CREW_Lawsuit_Secret_Service_20090722.pdf?nocdn=1.

⁴ See Complaint, Citizens For Responsibility and Ethics in D.C. v. U.S. Dep’t of Homeland Sec. (D.C.C. 2009)(No. 09-1101). See also Citizens For Responsibility and Ethics in Washington, *CREW Sues Secret Service Over Refusal to Release White House Coal Exec Visitor Logs* (June 16, 2009), <http://www.citizensforethics.org/legal-filings/entry/secret-service-lawsuit-re-refusal-to-release-coal-executive-visitor-logs>.

the possibility in some instances they could reveal information protected by the presidential communications privilege.”⁵ After the Obama Administration refused to turn over these records, CREW filed lawsuits to seek their release.

During this same time period, the Obama Administration was challenging two District Court opinions that required the release of certain visitor records from the Bush Administration. The District Court judge had ruled in January 2009 that the records requested by CREW were agency records subject to FOIA.⁶ The Obama Administration defended the Bush Administration policy with respect to these records and challenged the disclosure order in the District of Columbia Circuit Court.⁷ As CREW Chief Counsel Anne L. Weismann said at the time in a statement to the *Washington Post*, “The Obama administration has now taken exactly the same position as the Bush administration.”⁸

Against this backdrop, in September 2009, the Obama Administration entered into settlement discussions with CREW. In a September 3, 2009 letter from then-White House Counsel Gregory B. Craig to Ms. Weismann, the White House agreed to produce the WAVES and ACR records for the health care executives identified in CREW’s June 22, 2009 FOIA request and the coal industry executives identified in CREW’s May 15, 2009 FOIA request.⁹

In another September 3, 2009 letter to Ms. Weismann, Department of Justice attorney Brad P. Rosenberg summarized the settlement of the various FOIA lawsuits brought by CREW against the Administration.¹⁰ Under the terms of the settlement, the White House agreed to produce all requested records. In turn, CREW agreed to dismiss all pending litigation.¹¹ The terms of that settlement are much more favorable to the White House than what is required under FOIA.

On September 4, 2009, the White House formally announced its intent to release some of the visitors’ logs as part of its settlement with CREW.¹² In a statement posted on the White House Blog, Special Counsel to the President for Ethics and Government Reform Norman L. Eisen announced “a historic new policy to voluntarily disclose White House

⁵ *Id.*

⁶ See *Citizens for Responsibility and Ethics in D.C. v. U.S. Dep’t of Homeland Sec.*, 592 F. Supp. 2d 111 (D.D.C. 2009) [“*CREW I*”] and *Citizens for Responsibility and Ethics in D.C. v. U.S. Dep’t of Homeland Sec.*, 592 F. Supp. 2d 127 (D.D.C. 2009) [“*CREW II*”].

⁷ See Response of Appellants, *Citizens for Responsibility and Ethics in D.C. v. U.S. Dep’t of Homeland Sec.*, No. 09-5014 (D.C. Cir. May 14, 2009), available at

http://msnbcmedia.msn.com/i/msnbc/Sections/NEWS/PDFs/white_house_obama_response_may_2009.pdf.

⁸ Michael D. Shear, *Obama, Like Bush, Criticized for Withholding Visitor Logs; Policy Under Review*, WASH. POST (June 17, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/16/AR2009061603517.html> (internal quotations omitted).

⁹ Letter from Gregory B. Craig, Counsel to the President, The White House, to Anne L. Weismann, Chief Counsel, *Citizens for Responsibility and Ethics in Washington* (Sept. 3, 2009), http://www.citizensforethics.org/page/-/PDFs/General%20CREW/Ltr_to_Weismann_20090903.pdf?nocdn=1.

¹⁰ Letter from Brad P. Rosenberg, Trial Attorney, U.S. Dep’t of Justice Civil Division, to Anne L. Weismann, Chief Counsel, *Citizens for Responsibility and Ethics in Washington* (Sept. 3, 2009), http://www.citizensforethics.org/page/-/PDFs/General%20CREW/DOJ_Settlement_Letter_20090903.pdf?nocdn=1.

¹¹ *Id.*

¹² See Holan, *supra* note 2.

visitor access records.”¹³ Under this policy, “[e]ach month, records of visitors from the previous 90-120 days [are] made available online.”¹⁴ In announcing the official White House Voluntary Disclosure Policy for Visitor Access Records,¹⁵ Eisen outlined a series of exceptions for records that would not be released.¹⁶ The White House process for determining what records are exempt, however, remains unclear. Presumably, an unnamed individual in the White House determines which records to disclose, with no neutral arbiter to decide whether these records were properly withheld. In contrast, under FOIA, the courts are vested with the power to make such determinations.

The settlement agreement does not cover visitor records generated between January 20, 2009 and September 15, 2009.¹⁷ According to the White House, the recordkeeping system was revamped when the settlement was reached, and going back into the old system to search for records from this time period would be overly burdensome and time consuming. The Administration stated it would respond to “reasonable, narrow, and specific” requests for visitor information from President Obama’s early months in office, but there would be no wholesale release of material.¹⁸

III. Shortcomings of the White House Voluntary Disclosure Policy

The White House website currently states that “[a]s part of President Obama’s commitment to government transparency” over 2.4 million records have been released to date.¹⁹ The Administration has repeatedly relied on this fact as proof of its unprecedented transparency. Even the logs which have been released, however, are problematic.²⁰ According to an April 13, 2011 report by the Center for Public Integrity (CPI), the logs “routinely omit or cloud key details about the identity of visitors, whom they met with and the nature of their visits.”²¹ According to CPI, “[t]hese are critical gaps that raise doubts

¹³ See Eisen, *supra* note 1.

¹⁴ *Id.* Under FOIA, an agency is required to respond to a request for information within 20 business days.

¹⁵ THE WHITE HOUSE, WHITE HOUSE VOLUNTARY DISCLOSURE POLICY VISITOR ACCESS RECORDS, <http://www.whitehouse.gov/VoluntaryDisclosure>.

¹⁶ See Holan, *supra* note 2. Such exceptions include: (1) personal information such as dates of birth, Social Security numbers or phone numbers; (2) information that would be of concern to law enforcement or a threat to national security interests; (3) personal guests of the President and Vice President and their families (“i.e., visits that do not involve any official or political business”); (4) records related to a “small group of particularly sensitive meetings (e.g., visits of potential Supreme Court nominees).” *Id.* The White House further stipulated that it “will disclose each month the numbers of records withheld on this basis, and it will release such records once they are no longer sensitive.” *Id.*

¹⁷ Viveca Novak & Fred Schulte, *White House Visitors Logs Leave Out Many*, POLITICO (Apr. 15, 2011), <http://www.politico.com/news/stories/0411/53072.html>. See also THE WHITE HOUSE VISITOR ACCESS RECORDS, <http://www.whitehouse.gov/briefing-room/disclosures/visitor-records> (last visited July 30, 2012) (stating that “[i]n December 2009, [the White House] will begin posting all White House records for the period from September 15th onwards under the terms of [its] new voluntary disclosure policy . . .”).

¹⁸ See *id.* (stating that “for records between January 20 and September 15, 2009, White House Counsel will voluntarily respond to individual requests that are reasonable, narrow, and specific (e.g. requests that list possible visitors).”).

¹⁹ THE WHITE HOUSE VISITOR ACCESS RECORDS, *supra* note 17.

²⁰ See Novak & Schulte, *supra* note 17.

²¹ *Id.*

about the records' historical accuracy and utility in helping the public understand White House operations...."²²

In addition, less than one percent of the approximately 500,000 meetings from President Obama's first eight months in office, when major policy initiatives such as health care reform were being discussed, have been released, and there are significant gaps in the data. For example, visitors are often listed as meeting with personal assistants or lower level staffers who provided them with access to the building or scheduled their appointments, rather than the more senior level presidential aides with whom they were meeting. No company or group affiliations are listed. A substantial majority of the names released are individuals on guided group tours. Finally, thousands of known visitors to the White House, including lobbyists, are missing.²³

IV. Failure to Abide by the White House Voluntary Disclosure Policy

In October 2008, then-Senator Obama and his surrogates repeatedly stated that meetings between lobbyists and the staff of regulatory agencies should be made public, "broadcast online ... or disclosed in some way."²⁴ As president, however, he has failed to follow through on these promises. For example, multiple news outlets have reported that meetings between the White House and lobbyists were specifically organized by the Administration to take place off campus to avoid public disclosure in the White House visitors' logs. The *New York Times* reported that White House officials have "met hundreds of times over the last 18 months with prominent K Street lobbyists" at nearby coffee shops, such as Caribou Coffee.²⁵ According to several lobbyists and political operatives who have taken part in these sessions, topics of conversation have included Wall Street regulation, health care reform, federal stimulus money, energy policy, and climate change.²⁶ Because these meetings deliberately did not take place at 1600 Pennsylvania Avenue, they are not subject to disclosure on the White House visitors' logs.

The *New York Times* story also reported that, while some White House officials will agree to an initial meeting at the White House, follow-up sessions to those meetings will often take place at a site not subject to the visitors' log requirement. White House officials identified as participants in these off-site meetings include then-Chief of Staff Rahm Emanuel, then-Deputy Chief of Staff Jim Messina, then-Special Counsel to the President for Ethics and Government Reform Norman L. Eisen, and senior aides in the Office of Management and Budget (OMB).²⁷

²² *Id.*

²³ *Id.*

²⁴ Carrie Budoff Brown, *Clinton WH Vets Doubt Obama Openness Vow*, POLITICO (Oct. 28, 2008), <http://www.politico.com/news/stories/1008/14944.html> (quoting Obama campaign spokeswoman Jen Psaki).

²⁵ Eric Lichtbau, *Across From White House, Coffee With Lobbyists*, N.Y. TIMES (June 24, 2010), http://www.nytimes.com/2010/06/25/us/politics/25caribou.html?pagewanted=1&_r=2.

²⁶ *Id.*

²⁷ *Id.*

Politico has also reported on the practice of White House officials meeting with lobbyists at the Jackson Place complex, also located off the White House grounds. According to the story, “at least four lobbyists who’ve been to the conference rooms just off Lafayette Square tell *Politico* they had the distinct impression they were being shunted off to Jackson Place – and off the books – so their visits wouldn’t later be made public.”²⁸ No records of these meetings are preserved. Furthermore, according to *Politico*, Administration officials “asked some lobbyists and others who met with them to sign confidentiality agreements barring them from disclosing what was discussed at meetings with administration officials”²⁹

Investigations conducted by the Committee have unearthed specific instances in which White House officials advocated and encouraged holding meetings off White House grounds -- a finding which validates the *New York Times* and *Politico* reports and contradicts White House claims of openness and transparency.

V. Potential Failure to Abide by the Presidential Records Act

The Presidential Records Act of 1978 (PRA) specifically addresses presidential record-keeping management and states that the president is responsible for documenting his official acts and maintaining those documents as “presidential records.”³⁰ The Act directs the president to “take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as [p]residential records”³¹ Documentary materials that are produced by the president, his staff, or units or individuals in the Executive Office of the President (EOP) which are used to advise and assist the president are subject to PRA record-keeping requirements.³²

In testimony before the House Oversight and Government Reform Committee on May 3, 2011, Brook M. Colangelo, Chief Information Officer of the Office of Administration in the EOP, acknowledged that the PRA “applies to work-related electronic communications over both official and personal accounts”³³ Mr. Colangelo also stated, “EOP employees are instructed to conduct all work-related communications on their EOP email account, except in emergency circumstances when they cannot access the EOP system and must accomplish time sensitive work.”³⁴ If EOP employees do perform work on personal email

²⁸ Chris Frates, *White House Meets Lobbyists Off Campus*, POLITICO (Feb. 24, 2011), <http://www.politico.com/news/stories/0211/50081.html>.

²⁹ *Id.*

³⁰ 44 U.S.C. § 2201-2207.

³¹ *Id.* at § 2203(a).

³² *Id.* at § 2203(b).

³³ *Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes to Improve Electronic Records Preservation: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. (2011) (statement of Brook M. Colangelo, CIO, Office of Admin., EOP), available at http://oversight.house.gov/wp-content/uploads/2012/01/5-3-11_Colangelo_Testimony.pdf.

³⁴ *Id.*

accounts, they are instructed to “forward[] those communications to their EOP account or copy[] their EOP account on outgoing email.”³⁵

In a June 2, 2011 press briefing, White House Press Secretary Jay Carney discussed the White House’s policy related to the use of personal email by White House personnel. He stated that “the administration policy that is effective here is that . . . all of our work is conducted on work email accounts; that’s part of the Presidential Records Act.”³⁶ Committee investigations have discovered that White House officials did, in fact, use their personal email accounts to communicate with outside stakeholders – a finding that contradicts the Administration’s assertions.

A. Investigation into the LightSquared/GPS Interference Dispute

Documents provided to the Committee by Trimble Navigation, as part of its investigation into the LightSquared/GPS interference dispute, include email exchanges between Jeff Smith, Senior Advisor to the Director of the White House Office of Science and Technology Policy (OSTP), and Jim Kirkland, Vice President and General Counsel of Trimble Navigation. At the time of these conversations, Kirkland, through his position at Trimble and participation in the Coalition to Save Our GPS, was lobbying Federal Communication Commission (FCC) officials to suspend the ability of LightSquared to deploy its network due to potential interference concerns with GPS receivers. The email exchanges portray a disregard for the White House transparency policy and demonstrate the lackadaisical manner in which that policy is enforced.

For example, on April 21, 2011, Kirkland sent an email to Smith to find out whether he was available to meet to discuss developments in the LightSquared matter. He wrote:

*Jeff, if you are around tomorrow I thought it might be good to check in and see what you are hearing. During my DC trip I met with the FCC commissioners’ staff and came away with heightened concern that the Chairman’s office is too far out on this limb. The expectation is that he will continue to keep this at the bureau level and thus avoid the level of scrutiny this deserves....To give you a little more advance warning I will be back in DC the week of m[a]y 9th and it would be great to grab dinner with youMaybe the evening of the 10th? Let me know.*³⁷

On April 22, 2011, Smith replied, “Let’s tentatively aim for the week of the 9th .”³⁸ When Kirkland arrived in Washington, D.C., on May 9, he contacted Smith again to solidify a

³⁵ *Id.*

³⁶ Jay Carney, Press Secretary, The White House, Press Briefing by Press Secretary Jay Carney (June 2, 2011), transcript available at <http://www.whitehouse.gov/the-press-office/2011/06/02/press-briefing-press-secretary-jay-carney-622011>.

³⁷ E-mail from Jim Kirkland, Vice President & Gen. Counsel, Trimble Navigation, to Jeffrey M. Smith, Senior Advisor, White House Office of Science & Technology Policy (Apr. 21, 2011, 08:05 PM) [Trimble Production at 000150].

³⁸ E-mail from Jeffrey M. Smith to Jim Kirkland (Apr. 22, 2011, 06:53 AM) [Trimble Production at 000150].

date and time for the meeting. After several email exchanges to finalize the details, Smith wrote to Kirkland:

Jim – coffee at Caribou Coffee – across the corner from the WH – would work at 11:30 a.m. on Friday...plus getting you through the new WH security rules these days almost takes an act of Congress almost (and you know how well that’s going these days) plus you’d appear on an official WH Visitor List which is maybe not want [sic] you want at this stage³⁹

After Kirkland informed Smith that the proposed time would not work with his schedule, the two agreed to meet the following week. In a May 17, 2011 email to Smith, Kirkland wrote:

Hi Jeff. I am in DC and am available after 530 today for a drink or dinner if you like and could also grab coffee tomorrow until around 1030. A fair number of developments to talk about, including a big meeting of the affected agencies last week⁴⁰

Smith responded:

Jim – got a cell phone #? I think tomorrow a.m. would be better . . . I have to be in meetings all day away from the WH starting at 9 a.m. at the Marriott Metro Center, 775 12th St., NW . . . maybe we could be there at 8:15 a.m. or so, but we’d need to confirm today.⁴¹

Subsequent emails confirm that the meeting between Kirkland and Smith took place the following morning. No public record of this meeting, however, was recorded.

Smith’s disregard for openness and transparency is not limited to holding meetings with an interested stakeholder off of the White House grounds. On a majority of the emails, he communicated with Kirkland using his personal email address, which avoided having an electronic record of his conversations preserved.

In one email exchange, Smith responded to a question from Kirkland as to whether he had contacted former Chief of Staff of the White House Office of Science and Technology Policy Jim Kohlenberger about setting up a meeting. In his June 1, 2011 response copying Kohlenberger, Smith wrote:

I reached Jim Kohlenberger on the phone yesterday. and am sending hIm [sic] a copy of this note . . . yes, he remembers you and said he’d be glad to speak with you . . . He is familiar with the situation . . . although as he was careful to point out, he may be constrained on some points . . . nonetheless, you can, as always, take his advice and

³⁹ E-mail from Jeffrey M. Smith to Jim Kirkland (May 11, 2011 05:48 AM) [Trimble Production at 000145].

⁴⁰ E-mail from Jim Kirkland to Jeffrey M. Smith (May 17, 2011, 12:08 PM) [Trimble Production at 000144].

⁴¹ E-mail from Jeffrey M. Smith to Jim Kirkland (May 17, 2011, 12:21 PM) [Trimble Production at 000144].

*suggestions to the bank . . . I told him that you may be in DC in the next few days and that he should expect a call from you . . . For both of you – on this or any other related subject or policy matter, please continue to communicate with me only on my personal email which is [REDACTED] . . . cell is [REDACTED].*⁴²

While the Committee recognizes the need for White House officials to meet with interested stakeholders in order to get a better understanding of issues of public importance, the American public expects those officials to abide by the rules.

B. Investigation into Agreements Made Prior to Passage of the PPACA

The Committee's investigation into agreements made prior to passage of the Patient Protection and Affordable Care Act (PPACA) has established that White House officials engaged in a series of closed-door negotiations with representatives of the health care industry throughout 2009 and early 2010 in order to garner industry support for the president's health care law.⁴³ These deals occurred despite the president's earlier promises to have the negotiations televised on C-SPAN.⁴⁴ Records for a majority of these meetings are not included in the publicly available White House visitors' logs, since most of the meetings took place prior to the arbitrary September 15, 2009 start date for public disclosure established in the Administration's settlement agreement with CREW. In addition, some of the conversations between White House officials and industry stakeholders were conducted over non-official, personal email accounts. Ironically, the self-proclaimed "most open and transparent administration in history" refused to fully provide documents related to the closed-door health care negotiations, with White House lawyers claiming compiling such information would be too "vast and expensive."⁴⁵ The Committee obtained the relevant documents directly from some of the non-governmental organizations that were engaged in these closed-door meetings and negotiations with the White House.

i. Use of Non-Official, Personal Email Accounts

Previous memoranda and internal emails acquired and released by the Committee have shown the key role played by White House personnel in negotiating and approving the specifics of a deal between the Pharmaceutical Research and Manufacturers of America

⁴² E-mail from Jeffrey M. Smith to Jim Kirkland (June 1, 2011, 08:37 PM) [Trimble Production at 000137].

⁴³ See Memorandum from Majority Staff of the Subcomm. on Oversight & Investigations, Energy & Commerce Comm. to Republican Members of the Energy & Commerce Comm., *Investigation of Negotiations and Agreements Between White House and Health Care Industry Stakeholders* (Apr. 17, 2012), available at <http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=9461>.

⁴⁴ Senator Barack Obama, Town Hall Meeting in Chester, VA (Aug. 21, 2008), available at <http://www.politifact.com/truth-o-meter/promises/obameter/promise/517/health-care-reform-public-sessions-C-SPAN/>.

⁴⁵ Letter from Robert F. Bauer, Counsel to the President, The White House, to Fred Upton, Chairman, Comm. on Energy & Commerce et al. (Mar. 4, 2011), available at http://republicans.energycommerce.house.gov/Media/file/Letters/112th/030411_Bauer.PDF.

(PhRMA) and the U.S. Senate Finance Committee.⁴⁶ Additional emails reveal that White House Deputy Chief of Staff Jim Messina used his personal email account on several occasions to conduct official business related to the deal.

For example, five days prior to passage of the PPACA, Messina used his personal email to discuss the White House's ongoing strategy to obtain the necessary appropriations to fund the deal. He wrote to PhRMA lobbyist Jeffrey Forbes:

*I will roll pelosi to get the 4 billion . . . As you may have heard I am literally rolling over the house. But there just isn't 8-10 billion for something they said 2-3 for last night[.]*⁴⁷

Messina also used his personal email account to discuss White House support for the deal. For example, on June 24, 2009, Forbes wrote to Messina's personal account to ask that the White House publicly confirm its backing of the deal. Referencing an upcoming meeting of White House Office of Health Reform (OHR) Director Nancy-Ann DeParle, Forbes wrote, "we need to make sure she owns this deal tomorrow, any hesitancy would be bad . . . she is speaking to a totally friendly audience so it wont be a sell job, they just need to see ownership – make any sense?"⁴⁸ Messina responded on his personal email account, "Yep."⁴⁹

On July 8, 2009, after being informed of a reporter's inquiry into whether the White House would be bound by its deal with PhRMA, Forbes contacted Messina on his personal account and asked, "any way you can shut this down?"⁵⁰ Messina replied from his personal account, "Yes, send the reporter to me[.]"⁵¹ Later, Messina promised from his personal email: "[W]e are issuing 'its our deal.' [s]tatement."⁵²

Several months later, after *The Hill* reported⁵³ that David Axelrod had promised to push for drug re-importation after the passage of the PPACA, PhRMA lobbyist Bryant Hall

⁴⁶ See Memorandum from Majority Staff of the Subcomm. on Oversight & Investigations, Energy & Commerce Comm. to Republican Members of the Energy & Commerce Comm., *Investigation Update: Closed-Door Obamacare Negotiations* (May 16, 2012), available at <http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=9526>; Memorandum from Majority Staff of the Energy & Commerce Comm. to Republican Members of the Energy & Commerce Comm., *Investigation Update: Closed-Door Obamacare Negotiations* (May 31, 2012), available at <http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=9560&IID=14>; and Memorandum from Majority Staff of the Energy & Commerce Comm. to Republican Members of the Energy & Commerce Comm., *Investigation Update: Closed-Door Obamacare Negotiations* (June 8, 2012), available at <http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=9588>.

⁴⁷ E-mail from Jim Messina, Deputy Chief of Staff, The White House, to Jeffrey Forbes, Founding Partner, Cauthen Forbes & Williams (Mar. 18, 2010, 10:17 PM) [PhRMA Production at 0000397].

⁴⁸ E-mail from Jeffrey Forbes to Jim Messina (June 24, 2009, 1:55 PM) [PhRMA Production at 0002160].

⁴⁹ E-mail from Jim Messina to Jeffrey Forbes (June 24, 2009, 1:59 PM) [PhRMA Production at 0002160].

⁵⁰ E-mail from Jeffrey Forbes to Jim Messina (July 8, 2009, 1:51 PM) [PhRMA Production at 000578].

⁵¹ E-mail from Jim Messina to Jeffrey Forbes (July 8, 2009, 2:16 PM) [PhRMA Production at 000578].

⁵² E-mail from Jim Messina to Jeffrey Forbes (July 8, 2009, 3:24 PM) [PhRMA Production at 000578].

⁵³ See Kevin Bogardus, *Axelrod Promises to Push for Drug Re-Importation After Healthcare Reform*, THE HILL (Dec. 20, 2009), available at <http://thehill.com/homenews/administration/73107-axelrod-promises-to-push-for-drug-reimportation-after-healthcare-reform>.

emailed Messina's personal account asking him to "translate this off line when you have a chance" because he "will get a lot of questions."⁵⁴ Messina replied that Axelrod specifically used language that discussed the issue of importation as one of safety and "talked about it perfectly."⁵⁵

Messina summed up the effectiveness of PhRMA's lobbying efforts when he wrote to PhRMA lobbyist Bryant Hall, five days prior to passage of the PPACA, using his personal email: "I hope you appreciate when the wh stepped in and said 'this is fair. let's get this done.' Let's all joins hands and pray on cbo!"⁵⁶

ii. Undisclosed Meetings With Interested Stakeholders

PhRMA was not the only stakeholder participating in closed-door negotiations with the White House during the formation of the PPACA. Documents submitted to the Committee by several health industry organizations and labor unions show that a multitude of meetings and phone calls between top White House officials and industry representatives took place between 2009 and early 2010. For the majority of the meetings, which took place prior to September 15, 2009, the White House has continued to refuse the wholesale release of records. For certain pre-September 15, 2009 records selectively chosen for release as part of the White House visitors' logs, the listings are incomplete and the White House appears to have gone to great lengths to ensure that certain meetings were not part of the public record.

For example, a list provided to the Committee by the American Medical Association (AMA)⁵⁷ identifies 41 telephone calls and 36 meetings that took place between AMA and Administration officials between March 5, 2009 and the date of passage of the PPACA on March 23, 2010. Of the 36 total meetings, 12 are listed as having taken place on White House grounds prior to September 15, 2009. Others are listed as having occurred at such places as the "Hotel Monaco, Washington DC" or an unnamed "Washington DC hotel."⁵⁸

Despite Administration claims that the release of pre-September 15 records would be overly burdensome, the White House managed to list select information for four of the 12 pre-September 15 White House meetings involving AMA officials. The information listed for those meetings, however, is incomplete and fails to provide the public with a full picture of the negotiations that occurred. For instance, AMA's list shows that three AMA officials participated in a May 11, 2009 meeting at the White House with President Obama, OHR Director Nancy-Ann DeParle, HHS Secretary Kathleen Sebelius, OMB Director Peter Orzag, National Economic Council Director Larry Summers and Chief of Staff Rahm

⁵⁴ E-mail from Bryant Hall to Jim Messina (Dec. 20, 2009, 10:45 AM) [PhRMA Production at 0000409].

⁵⁵ E-mail from Jim Messina to Bryant Hall (Dec. 20, 2009, 10:45 AM) [PhRMA Production at 0000409].

⁵⁶ E-mail from Jim Messina to Bryant Hall (Mar. 18, 2010, 10:34 AM) [PhRMA Production at 0000396].

⁵⁷ AMA, Response to Apr. 18, 2011 Letter from Energy & Commerce Comm. (May 20, 2011) [AMA Production at 000006-000009] [hereinafter, "AMA Response"].

⁵⁸ *Id.* at 000006.

Emanuel.⁵⁹ According to AMA, the topic of this meeting was “Reducing the Rate of Growth in Healthcare Costs[.]”⁶⁰

While the official visitors’ records posted to the White House website indicate that 22 people participated in this meeting, only nine names are listed,⁶¹ and only one of those is an AMA official. In addition, the official records fail to state which White House officials participated, listing only “POTUS” as the name of the “visitee.”⁶² Shortly after this meeting, the President announced a commitment from the industry to cut \$2 trillion from the growth rate of national health care spending.

A similar pattern of non-disclosure is evident when one compares the visitors’ logs with lists of meetings submitted by the AARP,⁶³ the American Hospital Association (AHA),⁶⁴ America’s Health Insurance Plans (AHIP),⁶⁵ and the Federation of American Hospitals (FAH).⁶⁶

Lists of meetings submitted to the Committee by the AFL-CIO;⁶⁷ the American Federation of State, County and Municipal Employees (AFSCME);⁶⁸ and the Service Employees International Union (SEIU)⁶⁹ show that these unions were in constant communication with top White House officials throughout the formulation of the PPACA, yet records released by the White House fail to fully document the number of meetings, their participants, or the topics.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ The nine individuals listed represented the organizations AdvaMed, AHIP, the AMA, the Greater New York Hospital Association, PhRMA, the SEIU, and SEIU Healthcare and the companies Kaiser Permanente and Pfizer. THE WHITE HOUSE VISITOR ACCESS RECORDS, *supra* note 17.

⁶² *Id.* The inaccuracy and incompleteness of the official visitors’ logs are highlighted by the fact that the White House managed to disclose a more complete list of meeting participants via press release. See Press Release, The White House, *List of Health Care Reform Stakeholders Who Will Meet with the President and Administration Officials Today* (May 11, 2009), available at http://www.whitehouse.gov/the_press_office/Todays-Health-Care-Costs-Meeting-Participants-Fact-Sheet-and-Letter/. Despite having the names of the additional meeting participants readily available, the White House failed to disclose them on the official visitors’ logs.

⁶³ See AARP, Response to Apr. 18, 2011 Letter from Energy & Commerce Comm. (May 20, 2011) [AARP Production at 000009-000018] and AARP, Supplemental Response to Apr. 18, 2011 Letter from Energy & Commerce Comm. (June 22, 2011) [AARP Production at 00190] [hereinafter, “AARP Responses”].

⁶⁴ See AHA, Response to Apr. 18, 2011 Letter from Energy & Commerce Comm. (May 27, 2011) [AHA Production at 2-00000002-00000007].

⁶⁵ See AHIP, Response to Apr. 18, 2011 Letter from Energy & Commerce Comm. (May 31, 2011) [AHIP Production at 02006-02009].

⁶⁶ FAH, Supplemental Response to Apr. 18, 2011 Letter from Energy and Commerce Comm. (Aug. 16, 2011) [FAH Production at 001143-001146].

⁶⁷ Letter from Jeffrey R. Freund & Robert Weinberg, Counselors to AFL-CIO, to Energy & Commerce Comm. (May 19, 2011) [hereinafter, “AFL-CIO Letter”].

⁶⁸ Letter from Jeffrey R. Freund & Robert Weinberg, Counselors to AFSCME, to Energy & Commerce Comm. (May 16, 2011) [hereinafter, “AFSCME Letter”].

⁶⁹ Letter from Jeffrey R. Freund & Robert Weinberg, Counselors to SEIU, to Energy & Commerce Comm. (May 16, 2011) [hereinafter, “SEIU Letter”].

According to the AFL-CIO list, between March 5, 2009, the date of the initial White House Summit on Healthcare,⁷⁰ and March 23, 2010, the date of the PPACA's passage, officials from the AFL-CIO participated in at least 27 White House meetings with various White House officials.⁷¹ The White House visitors' logs, however, only list 17 of those meetings and even then, fail to list all of the individuals in the White House with whom the AFL-CIO met. For example, the AFL-CIO list references a July 7, 2009 meeting of John Sweeney, William Samuel, Gerald McEntee, and Charles Loveless with Rahm Emanuel, Jim Messina, Nate Tamarin, and David Axelrod to discuss the "[e]xcise tax" and how "taxing benefits will endanger health care reform."⁷² The relevant entry in the White House visitors' logs, however, lists only Rahm Emanuel as a White House participant.⁷³ For several meetings between White House and AFL-CIO officials, only Messina's assistant is listed as the "visitee."⁷⁴ Notably, the AFL-CIO list also shows that Ron Bloom, a former Senior Counselor to both President Obama and Treasury Secretary Timothy Geithner, met with Damon Silvers, Associate General Counsel of the AFL-CIO, at the "Starbucks [on] 15th & I St[reet]" on at least eight occasions to discuss health care.⁷⁵

During this same period of time, representatives of AFSCME participated in at least 17 White House meetings with White House officials, including an April 7, 2009 meeting between AFSCME President Gerald McEntee and Vice President Joe Biden, which is not listed on the logs.⁷⁶ Several additional health care discussions between White House and AFSCME officials, for which no public records exist, were held at such locations as the United Food and Commercial Workers International Union (UFCW) headquarters, AFSCME headquarters, and the "VP Office/Sen. Recept. Room[.]"⁷⁷

Meanwhile, representatives of the SEIU participated in at least 25 White House meetings during this period.⁷⁸ The White House visitors' logs for these meetings suffer from the same deficiencies as those for the AFL-CIO and AFSCME. Most pre-September 15, 2009 meetings are not listed and most post-September 15, 2009 listings are incomplete. According to the SEIU, meetings with White House officials were also held at offsite locations such as the Democracy Alliance Conference in Florida and the Democratic Senatorial Campaign Committee (DSCC) headquarters in Washington, D.C.⁷⁹ It was at the April 15, 2009 meeting at the DSCC that Jim Messina sought the "[c]ommitment of [p]ublic

⁷⁰ Raw data posted on the White House website only lists 16 of the apparent 120 participants in the Healthcare Summit. THE WHITE HOUSE VISITOR ACCESS RECORDS, *supra* note 17.

⁷¹ See AFL-CIO Letter, *supra* note 67, at Attachment A.

⁷² *Id.*

⁷³ THE WHITE HOUSE VISITOR ACCESS RECORDS, *supra* note 17.

⁷⁴ These include a meeting between Bill Samuel, Gerry Shea, and Messina on September 24, 2009, a meeting between Rich Trumka, Kelly Ross, Samuel, Jason Furman and Messina on January 13, 2010, a meeting between Trumka, Furman and Messina on January 14, 2010, and a meeting between Samuel, Trumka, and Messina on February 25, 2010. See AFL-CIO Letter, *supra* note 67, at Attachment A and THE WHITE HOUSE VISITOR ACCESS RECORDS, *supra* note 17.

⁷⁵ See AFL-CIO Letter, *supra* note 67, at Attachment A.

⁷⁶ See AFSCME Letter, *supra* note 68, at Attachment A.

⁷⁷ *Id.*

⁷⁸ See SEIU Letter, *supra* note 69, at Attachment A.

⁷⁹ *Id.*

[s]upport for [l]egislation”⁸⁰ from all meeting participants, as outlined in the Committee’s June 8, 2012 memorandum.⁸¹

VI. Failure to Comply with Committee Requests

The Energy and Commerce Committee has experienced firsthand the Administration’s lack of transparency through its stonewalling of Committee information requests and refusal to provide witnesses for several hearings, one of which addressed the very issues presented in this report.

On May 3, 2011, the Subcommittee on Oversight and Investigations held the aforementioned hearing entitled “White House Transparency, Visitor Logs, and Lobbyists” which examined the Administration’s policies on transparency and lobbyist access to the Executive Branch.⁸² The Subcommittee invited Brad Kiley, Director of the Office of Management and Administration at the White House, or his designee, to testify. The White House, however, declined the Subcommittee’s request to send a witness.

On October 5, 2011, the Subcommittee held a hearing entitled “Administration Efforts on Line-by-Line Budget Review,” which examined the Obama Administration’s efforts to implement the president’s repeated commitment to conduct a “page by page, line by line” review of the Federal budget.⁸³ The Subcommittee extended a timely invitation to OMB Director Jacob Lew, but was told that Mr. Lew does not testify before subcommittees and, given that the OMB Deputy Director nominee had not yet been confirmed, OMB had no other official who could testify on this subject.

The White House and OMB have also refused to comply on multiple occasions with the Committee’s requests for documents and information related to the failed \$535 million Department of Energy loan guarantee to Solyndra. In March 2011, the Committee sent a letter to OMB⁸⁴ requesting documents and communications related to Solyndra, but OMB refused to produce the requested documents for four months.⁸⁵ Only after the

⁸⁰ *Id.*

⁸¹ See June 8, 2012 Memorandum from Majority Staff, *supra* note 46.

⁸² *White House Transparency, Visitor Logs, and Lobbyists: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 112th Cong. (2011). For information on this hearing, see *White House Transparency, Visitor Logs, and Lobbyists*, HOUSE ENERGY & COMMERCE COMM., <http://test.republicans.energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8531> (last visited July 30, 2012).

⁸³ *Administration Efforts on Line-by-Line Budget Review: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 112th Cong. (2011). For information on this hearing, see *Administration Efforts on Line-by-Line Budget Review*, HOUSE ENERGY & COMMERCE COMM., <http://test.republicans.energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8960> (last visited July 30, 2012).

⁸⁴ See Letter from Fred Upton, Chairman, Comm. on Energy & Commerce, to Jacob Lew, Director, OMB (Mar. 14, 2011), available at <http://republicans.energycommerce.house.gov/Media/file/Letters/112th/031411Lew.pdf>.

⁸⁵ For a discussion of OMB’s refusal to respond to the Committee’s March 14, 2011 document requests, see Memorandum from Subcomm. on Oversight & Investigations Staff, to Members, Subcomm. on Oversight & Investigations, *Business Meeting to Authorize the Issuance of a Subpoena to the Office of Management and Budget*

Subcommittee on Oversight and Investigations authorized a subpoena to then-Director Jacob Lew on July 14, 2011, did OMB begin to comply with the Committee's request. The Committee was also forced to issue subpoenas on November 3, 2011 to the White House and EOP for their failure to provide internal communications related to Solyndra. It was not until January 2012 that the White House even agreed to comply with the Committee's requests. It took the White House seven months to produce or make available the responsive documents relating to Solyndra.

VII. Conclusion

The White House staff's closed-door negotiations on PPACA and offline discussions related to LightSquared demonstrate that the Obama Administration's stated goals of openness and transparency are being intentionally subverted by some of the very same officials who created and are now tasked with implementing the White House transparency policies. By refusing the wholesale release of records prior to September 15, 2009, encouraging off-site meetings immune from the visitors' log requirement, conducting major policy negotiations over personal email accounts, and declining to respond to questions from Congress, the White House has failed to deliver on its promise of transparency to the American public.

Although the President proclaimed his Administration would usher in a new, historic era of transparency, the Executive Branch's actions are more illustrative of an Administration putting secrecy over transparency in an effort to avoid accountability. The Energy and Commerce Committee will continue to exercise its constitutionally mandated oversight responsibilities.

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