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March 24, 2010

The Honorable Robert Bauer
Counsel to the President
The White House
1600 Pennsylvania Ave, N.W.
Washington, D.C.

Dear Mr. Bauer:

I am writing to reiterate my request for information relating to possible violations of the Presidential Records Act (PRA) by members of the White House staff. In particular, I have been concerned about the reported actions of Carol Browner in negotiating a secret deal with the automobile industry and the State of California, behind closed doors and under a "vow of silence."¹ Given these reports, it appears that the President has either failed to develop and implement adequate policies to ensure the creation and preservation of Presidential Records, or staff members at the White House have acted deliberately to thwart such policies. For your convenience, I am attaching the original inquiry, sent on November 13, 2009.

As the Ranking Member of the Oversight and Government Reform Committee, which has legislative jurisdiction over the PRA, I continue to be concerned that a member of the Administration may have deliberately violated the law. My concern has only grown as the matter in question is now at the very center of the Congressional debate over the Resolution of Disapproval for the Endangerment Finding. As you are aware, the Endangerment Finding is the legal predicate to regulate greenhouse gas (GHG) emissions under the Clean Air Act (CAA). Environmental Protection Agency (EPA) Administrator Lisa Jackson is seeking to regulate GHG emissions from light duty vehicles under authority of the CAA.²

In my November letter, I articulated my concerns for the actions of the Assistant to the President for Energy and Climate Change, also known as the Energy and Environment Czar, Carol Browner.³ According to a New York Times article, there was a

¹ Colin Sullivan, *Vow of Silence Key to White House – California Fuel Economy Talks*, N.Y. TIMES, May 20, 2009.

² Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454 (Sept. 28, 2009).

³ Colin Sullivan, *Vow of Silence Key to White House – California Fuel Economy Talks*, N.Y. TIMES, May 20, 2009.

deliberate “vow of silence” surrounding the negotiations between the White House and California on vehicle fuel economy [standards].⁴ Great care was taken to “put nothing in writing ever.” These meetings culminated in the Rose Garden Ceremony on May 19, 2009, where President Obama announced an “historic agreement” between the Automobile industry, the State of California, and the Obama Administration to set fuel economy standards through 2016.

In a letter sent on February 22, 2010 to Senator Rockefeller, Administrator Jackson specifically stated that if enacted into law, the Resolution of Disapproval would “undo an historic agreement among states, automakers, the federal government, and other stakeholders. California and at least thirteen other states that have adopted California’s emission standards likely would enforce those standards within their jurisdiction.”⁵ As stated in a letter drafted by California Attorney General Edmund G. Brown on May 18, 2009, as part of this agreement, California had agreed to revise its state standards “such that compliance with the GHG emission standards adopted by EPA shall be deemed compliance with the California GHG emission standards.”⁶ Recently, the Alliance of Automobile Manufacturers weighed in, echoing EPA’s concerns that “if the [Resolutions of Disapproval] were enacted into law, the historic agreement creating the One National Program for regulating vehicle fuel economy and greenhouse gas emissions would collapse.”⁷ This “historic agreement” crafted under a vow of silence, which may well be a violation of the law, is at the very center of debate now before Congress.

Importantly, the Alliance letter also reminds us that at the time the agreement was reached, the industry faced a significant amount of duress. According to the letter, “the auto industry faced the alarming possibility of having to comply with multiple sets of inconsistent fuel economy standards.”⁸ That same spring, General Motors and Chrysler, two key members of the Alliance, were engaged in separate negotiations with the Obama Administration to develop restructuring plans and loan commitments in an attempt to avoid bankruptcy.⁹ As you are aware, these negotiations resulted in the Obama Administration controlling 61% of GM and 8% of Chrysler shares.

Given the clear conflict-of-interest issues at play when this “historic agreement” was reached, it was imperative that the Administration act with the utmost transparency. Unfortunately, it was at precisely this moment when Energy and Environment Czar Carol Browner imposed a “vow of silence” on the participants of these negotiations. Accordingly, the “historic agreement” to set CAFE standards, which are at the very heart

⁴ *Id.*

⁵ letter from The Honorable Lisa Jackson, Administrator, U.S. EPA to The Honorable Jay D. Rockefeller IV, U.S. Senator, Feb. 22, 2010.

⁶ Letter from Edmund G. Brown, Jr., Attorney General, State of California to the Honorable Lisa Jackson, Administrator of the U.S. EPA and the Honorable Ray LaHood, Secretary, U.S. Department of Transportation (May 18, 2009).

⁷ Letter from Dave McCurdy, President Alliance of Automobile Manufacturers to the Honorable Nancy Pelosi, Speaker, U.S. House of Representative, et.al. (March 17, 2010).

⁸ *Id.*

⁹ BILL CANIS, ET.AL, U.S. MOTOR VEHICLE INDUSTRY: FEDERAL FINANCIAL ASSISTANCE AND RESTRUCTURING, 20 (Congressional Research Service) (2009).

of the Congressional debate over the Resolution of Disapproval, is shrouded in secrecy and reeks of back room deals and pay-for-play strong arm tactics on the part of this Administration.

It is imperative that Congress and the American people gain an understanding of exactly what transpired behind the closed doors of this White House. Accordingly, I urge you once again to respond to original questions I posed in My November 13 letter. In addition, I respectfully request that you:

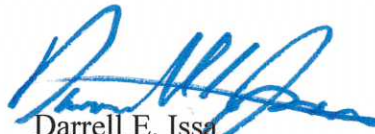
1. Turn over all records or communications relating to the negotiations with the automobile industry with respect to the "historic agreement" on CAFE standards from January 20 through May 19, 2010;
2. Provide the Committee with a list of participants in meetings in leading to the "historic agreement," as well as the dates on which these meetings occurred;
3. Turn over any records or communications relating to negotiations for financial assistance for GM and Chrysler from January 20, 2009 through June 30 2009.

Please note that, for purposes of responding to this request, the terms "records," "communications," and "referring or relating" should be interpreted consistently with the attached Definitions of Terms.

As the White House was first notified of my concerns in November 2009, I respectfully request that you respond to this and the prior letter and produce all relevant documents **no later than April 8, 2010**.

If you have any questions regarding this request, please do not hesitate to contact me directly or Kristina Moore or Tom Alexander of my staff at 202-225-5074.

Sincerely,



Darrell E. Issa
Ranking Member

cc: The Honorable Edolphus Towns, Chairman

Enclosure

Definitions of Terms

1. The term "record" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A record bearing any notation not a part of the original text is to be considered a separate record. A draft or non-identical copy is a separate record within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.
3. The terms "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any manner whatsoever pertinent to that subject.

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ANH "JOSEPH" CAO, LOUISIANA

November 13, 2009

The Honorable Gregory B. Craig
Counsel to the President
The White House
1600 Pennsylvania Ave. N.W.
Washington, DC

Dear Mr. Craig:

As you are aware, the President of the United States has an affirmative obligation to adequately document decisions made while carrying out his official duties.¹ As the Ranking Member of the Oversight and Government Reform Committee, which has legislative and oversight jurisdiction for the Presidential Records Act ("PRA"), I am concerned that the President has either failed to develop and implement adequate policies to ensure the creation and preservation of Presidential records, or members of the White House staff have deliberately thwarted such policies. Accordingly, I am requesting your assistance to resolve my concerns, particularly regarding questionable actions taken by Assistant to the President for Energy and Climate Change Carol Browner.

Carol Browner is commonly referred to as the Energy and Environment Czar for the Obama Administration. According to your recent letter to Senator Feingold, Ms. Browner is a "senior White House Advisor, who assists the President in the formulation of Executive Branch Policy and exercises no independent legal authority."² This position gives her wide-ranging authority to coordinate top officials at the Council on Environmental Quality, Environmental Protection Agency, and the Departments of Energy and Transportation. Given her senior role and proximity to the President, Ms. Browner wields significant influence over environmental and energy policy.

In her capacity as Energy and Environment Czar, the New York Times reported on May 20, 2009, that Ms. Browner orchestrated a series of meetings with the State of

¹ Presidential Records Act, 44 U.S.C. Sect. 2201 (which creates an affirmative duty for the President to "implement records management practices to assure that the carrying out of the constitutional, statutory, and other official and ceremonial duties of the President are *adequately documented*.")

² Letter from Gregory Craig, Counsel to the President to the Honorable Russell Feingold, U.S. Senator, (Oct. 5, 2009).

California and the automobile industry from the White House.³ The purpose of these negotiations was to reach an agreement on Corporate Average Fuel Economy (“CAFE”) standards. In prior Administrations, the Department of Transportation was in charge of setting fuel economy standards for automobiles. However, in remarks before state transportation officials, Department of Transportation (“DOT”) Secretary Ray LaHood declared that he would “take a back seat in the climate debate,” and that “we’ve really taken all of our cues from Carol Browner.”⁴ These meetings eventually resulted in the joint EPA/DOT Proposed Rulemaking *To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*.⁵

According to Mary Nichols, the head of the California Air Resources Board, and a participant at these meetings, there was a deliberate “vow of silence” surrounding the negotiations between the White House and California on vehicle fuel economy [standards].⁶ Great care was taken to “put nothing in writing, ever.”⁷

Ms. Browner’s controversial decision to “put nothing in writing” may violate her legal obligations under PRA. The PRA creates an affirmative duty for the President to “implement records management practices to assure that the carrying out of constitutional, statutory, and other official and ceremonial duties of the President are *adequately documented*.”

The legislative history of the PRA explains that covered activities are those relating to the President’s official duties, i.e., those done to effectuate Constitutional, statutory, or other official and ceremonial obligations.⁸ The obligation to adequately document and to maintain such records extends to decisions made by the President, his immediate personal staff, as well as units, or individuals, within the Executive Office, whose purpose it is to advise and assist the President.⁹

You explained in your letter to Senator Feingold that Carol Browner works within the Executive Office and was hired to advise and assist the President on energy and environmental policy.¹⁰ The CAFE negotiations were held in order to effectuate statutory obligations of the President - to develop a consensus among stakeholders on how to move forward with one national standard, per the authorities granted under the Clean Air Act to EPA and under the Energy Policy Act to the DOT. The Secretary of Transportation is on

³ Colin Sullivan, *Vow of Silence Key to White House-California Fuel Economy Talks*, N.Y. TIMES, May 20, 2009.

⁴ Josh Voorhess, *DOT Will Take A Back Seat to Browner on Warming – LaHood*, E AND E NEWS PM, (Feb. 24, 2009).

⁵ Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454 (Sept. 28, 2009) available at <http://www.epa.gov/EPA-AIR/2009/September/Day-28/a22516a.htm>.

⁶ Sullivan, *supra* note 3.

⁷ *Id.*

⁸ H.R. No. 95-591 at 5741, 42 (1978).

⁹ *Id.* at 5743.

¹⁰ Craig, *supra* note 2.

record that he would defer to the judgment of Carol Browner with respect to the climate debate, apparently granting Browner the authority to enter into binding agreements. Therefore, it is clear that the decisions reached by Ms. Browner as a result of the off the record meetings and binding negotiations fall within the class of decisions encompassed by the PRA.

Despite the clear application of the PRA to the CAFE negotiations organized by Carol Browner, affirmative steps were taken to ensure that no records were maintained. Therefore, it appears that Browner's decision to "put nothing in writing, ever" violated the letter, as well as the spirit, of the President Records Act.

In order to determine whether the White House is complying with the Presidential Records Act, I respectfully request that you answer the following questions:

1. What steps has the White House taken to ensure that Presidential Records are appropriately and adequately retained and managed, pursuant to the mandates contained in the PRA?
2. As Special Assistant to the President for Energy and Environmental policy, does the White House consider the work of Carol Browner to fall within the scope of the Presidential Records Act?
3. Did Carol Browner seek and or obtain legal advice before deciding that no notes should be taken at the meetings? If so, what was that advice? Do you believe that advice to be consistent with her practice of maintaining no written record of the negotiations?
4. Has Carol Browner or any other Executive Branch employee, on any other occasion, issued instructions not to maintain records? Please detail when such instructions were issued, to whom, by whom, and the subject of the meeting.
5. Please explain all remedial steps taken by the White House to prevent future violations of the PRA and to ensure the adequate and appropriate documentation and retention of Presidential Records.

In addition, I request you submit to the Committee the following documents:

1. A copy of the White House policy that governs document retention procedures under the PRA;
2. Any legal opinions further interpreting the obligations of presidential advisors to adequately create and retain records;

3. Any request by or on behalf of Carol Browner seeking and/ or obtaining legal advice relating to her document retention obligations;
4. Any request by or on behalf of other White House employees seeking and/ or obtaining legal advice relating to document retention obligations.

The Committee on Oversight and Government Reform is the main investigative committee in the U.S. House of Representatives. Pursuant to House Rule X, it has authority to investigate the subjects within the Committee's legislative jurisdiction as well as "any matter" within the jurisdiction of the other standing House Committees. This broad jurisdiction includes the oversight of Executive Branch management, operations, and administrative functions.

I ask that you provide the requested information to the Committee **no later than November 19, 2009**. Thank you in advance for your prompt response to this inquiry. If you have any questions regarding this request, please contact Thomas Alexander or Kristina Moore Committee staff at (202)-225-5074.

Sincerely,



Darrell Issa
Ranking Member

cc: The Honorable Edolphus Towns, Chairman