

## Day 4: Obama donor gained nearly \$1 billion in tax credits in Solyndra bankruptcy

BY CONN CARROLL | SEPTEMBER 19, 2013 AT 5:06 AM

*Part four of the Washington Examiner's 10-part series "With the Stroke of a Pen: How Obama abuses executive power to make the law of the land."*

Most people who follow the news are aware that President Obama invested \$527 million in Solyndra, the now-bankrupt California-based solar panel manufacturing company.

What is much less well-known is that the federal government was legally required to cut its losses of tax dollars just months into the project, and that only an illegal loan modification made to benefit an Obama fundraiser led to taxpayers losing more than \$500 million.

"The true engine of economic growth will always be companies like Solyndra," Obama declared in May 2010, but even then, the company was burning through more than \$10 million a month and headed towards bankruptcy.

By December 2010, Solyndra was so cash-poor that it missed a \$5 million payment to an Equity Funding Account as required by the firm's deal with the Energy Department.

The DOE could have canceled the Solyndra loan then and cut the taxpayers' losses at the \$440 million previously disbursed to the company. Instead, DOE told Solyndra the government would "forbear" its right to cancel the contract as long as Solyndra complied with certain federal regulations on compensation for its employees.

At this point, the largest private backer of Solyndra, Argonaut Private Equity (owned by Obama donor George Kaiser of Tulsa, Okla.), demanded that DOE restructure the original loan agreement or they would take the company into bankruptcy.

Kaiser's demand got the attention of Frances Nwachuku, DOE's director of portfolio management for the loan programs office. Nwachuku offered to modify the original loan agreement to ensure Argonaut would be the first creditor in line – ahead of U.S. taxpayers – should Solyndra file for bankruptcy.

This type of agreement happens all the time in the private sector. But private-sector financing is not controlled by the Energy Policy Act of 2005. The DOE's loan guarantee program is.

Section 1702(d)(3) of that law clearly states, "The obligation shall be subject to the condition that the obligation is not subordinate to other financing."

In other words, the taxpayers must come before any other creditors, which made Nwachuku's offer illegal. The

## About this series

On Nov. 16, 2010, just days after voters gave Republicans control of the House of Representatives, the progressive think tank Center for American Progress published a report titled "The Power of the President."

Obama-Biden Transition Project Chairman John Podesta introduced the report, writing that "in the aftermath of this month's midterm congressional elections, pundits and politicians across the ideological spectrum are focusing on how difficult it will be for President Barack Obama to advance his policy priorities through Congress."

"Some debate whether the administration should tack to the center and compromise with the new House leadership," Podesta continued.

"As a former White House chief of staff, I believe those to be the wrong preoccupations. President Obama's ability to govern the country as chief executive presents an opportunity to demonstrate strength, resolve, and a capacity to get things done," Podesta said.

Not only did Obama almost immediately embrace the report's call for maximizing executive power to achieve progressive ends without Congress, it even branded the effort "We Can't Wait," thus advertising the fact that Obama had abandoned all pretense of following the U.S. Constitution's carefully drawn separation-of-powers doctrine.

In this *Washington Examiner* series, Senior Writer Conn Carroll documents the many times Obama has flagrantly abused executive authority to advance his liberal agenda without congressional approval.

The top 10 instances will be examined over the next two weeks, and more will come later.

## Stories in this series

1. Immigration amnesty by executive memo
2. The employer mandate delay
3. War in Libya
4. The illegal Solyndra contract modification
5. Rewriting federal education law by waiver

day after Nwachuku's offer, DOE Chief Counsel Susan Richardson told DOE General Counsel Scott Blake Harris they needed to talk "as soon as possible."

DOE also asked its outside counsel, Morrison & Foerster LLP, for its opinion, which described the offer as "prohibited."

The Office of Management and Budget also concluded that the DOE's Solyndra loan modification was illegal. On Dec. 14, 2010, OMB analyst Kelly Colyar, formerly the credit policy director at DOE, informed OMB Deputy Associate Director Richard Mertens of a problem "regarding the proposed structure's compliance with the statutory requirement that the DOE guaranteed debt not be subordinate to other financing." A Jan. 4, 2011, OMB staff memo said the same thing.

Colyar estimated that if Solyndra was immediately liquidated, taxpayers would only lose \$141 million. But if DOE went ahead with the new deal, taxpayers would lose \$385 million, due in no small part to the subordination of the taxpayer loan.

Obama's DOE restructured the Solyndra loan anyway.

In direct opposition to the plain meaning of the statute and OMB guidelines on government contracting, DOE lawyers invented a new legal theory that the ban on subordination applied only at loan origination and was not a "continuing obligation."

In other words, since the Solyndra restructuring was a loan modification, DOE could do whatever it wanted.

Upon hearing this novel interpretation, OMB Energy Branch Chief Kevin Carroll said the DOE's reasoning meant "that basically DOE could modify to allow subordination on any loan, at any time, for any reason."

Kaiser has done well despite Solyndra's woes. Taxpayers can expect no more than \$24 million returned from the original \$527 million investment. Kaiser's investment firm got \$975 million in tax breaks that could cut its future federal income tax bills by a third.

Having a friend in the Oval Office who ignores the law can be quite profitable in the Obama era.

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6. Unconstitutional NLRB appointees

7. The Yucca Mountain delay

8. Gutting welfare reform

9. The Gulf of Mexico drilling moratorium

10. Regulating the Internet