JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FIFTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
MAJORITY (202) 225–5074
MINORITY (202) 225–5051
http://oversight.house.gov

February 16, 2017

The Honorable Jefferson B. Sessions III
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Attorney General:

I write to refer Bryan Pagliano for prosecution pursuant to 2 U.S.C. § 192 for failing to appear pursuant to a subpoena *ad testificandum* for a hearing before the Committee on Oversight and Government Reform ("Committee") on September 22, 2016.

Pagliano, formerly a Senior Advisor from May 2009 to February 2013 in the U.S. Department of State's Bureau of Information Resource Management, was required to appear before the Committee and testify regarding federal recordkeeping and technology practices at the State Department and his job responsibilities while employed there.

The Committee is a standing committee of the House of Representatives, duly established pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the U.S. Constitution.[1] House Rule X grants the Committee broad jurisdiction over federal "[g]overnment management" and reform, including the "[o]verall economy, efficiency, and management of government operations and activities," the "[f]ederal civil service," and "[r]eorganizations in the executive branch of the Government."[2] House Rule X further endows the Committee with broad oversight jurisdiction, including authority to "conduct investigations of any matter without regard to clause 1, 2, 3, or this clause [of House Rule X] conferring jurisdiction over the matter to another standing committee."[3] Finally, the House Rules direct the Committee to make available "the findings and recommendations of the committee . . . to any other standing committee having jurisdiction over the matter involved."[4]

House Rule XI specifically authorizes the Committee to "require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records,

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[1] U.S. CONST., art I. § 5, clause 2.
[2] H. Rule X, clause 1(n).
[3] H. Rule X, clause 4(c)(2).
[4] *Id.*

correspondence, memoranda, papers, and documents as it considers necessary."[5] The rule further provides that the "power to authorize and issue subpoenas" may be delegated to the Committee chairman.[6] Pursuant to Committee Rule 12(d), the Chairman may "Authorize and issue subpoenas as provided in House Rule XI, clause 2(m), in the conduct of any investigation or activity or series of investigations or activities within the jurisdiction of the Committee."[7]

In the 114th Congress, pursuant to the authority delegated to it under the House Rules, the Committee undertook an investigation into the circumstances that resulted in a failure to preserve federal records at the State Department. Because Pagliano's job functions included supporting mobile computing issues across the Department, he was uniquely positioned to answer questions regarding State Department policies and practices for preserving records, as well as the technological procedures utilized to do so. Pagliano refused to provide testimony to the Inspector General of the Department of State when it conducted a review of similar issues;[8] however, information provided by the Federal Bureau of Investigation indicated Pagliano clearly had knowledge on this issue.[9] Therefore, as part of the investigation, on September 6, 2016, Committee staff contacted Pagliano's attorney to inform him of the need for his client's testimony at an upcoming Committee hearing.[10]

On September 7, 2016, Pagliano's attorney advised Committee staff that Pagliano would not appear voluntarily to provide testimony at a Committee hearing, and that if he did appear, he would assert his rights under the Fifth Amendment and decline to answer questions related to the matters that were the subject of the hearing. Committee staff informed Pagliano's attorney of the Committee's established practice of requiring witnesses to appear in person to assert their right pursuant to the Fifth Amendment to decline to answer questions.[11] Committee staff further advised Pagliano's attorney that the Committee had a variety of questions that would not appear to implicate the Fifth Amendment.[12]

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[5] H. Rule XI, clause 2(m)(1)(B).
[6] H. Rule XI, clause 2(m)(3)(A)(1).
[7] Rules of the H. Comm. on Oversight & Gov't Reform, H.R. Doc. No. 93-559, at Rule 12(d).
[8] INSPECTOR GEN., DEP'T OF STATE, ESP-16-03, OFFICE OF THE SECRETARY: EVALUATION OF EMAIL RECORDS MANAGEMENT AND CYBERSECURITY REQUIREMENTS 2 fn.7 (2016); *see also id.* at 39. The Inspector General review addressed "efforts undertaken by the Department of State to preserve and secure electronic records and communications involving the Office of the Secretary." *Id.* at 1.
[9] The FBI investigation was based on a referral from the Intelligence Community Inspector General regarding the potential unauthorized transmission and storage of classified information, and was different in scope and nature from the Committee's investigation. FED. BUREAU OF INVESTIGATION, CLINTON EMAIL INVESTIGATION: MISHANDLING OF CLASSIFIED – UNKNOWN SUBJECT OR COUNTRY (SIM) 1 (July 2016).
[10] Telephone Call from Majority Staff, H. Comm. on Oversight & Gov't Reform, to Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP (Sept. 6, 2016).
[11] Telephone Call between Majority Staff, H. Comm. on Oversight & Gov't Reform, and Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP (Sept. 7, 2016).
[12] *Id.*

Later on September 7, 2016, I sent Pagliano's attorney a formal witness invitation letter indicating the Committee expected Pagliano's attendance.[13] On September 8, 2016, I issued a subpoena compelling Pagliano's testimony before the Committee on September 13, 2016, at 10:00 a.m.[14] The subpoena was served electronically on Pagliano's counsel.[15]

The Committee received no response from Pagliano or his attorneys until late on September 12, 2016, when Pagliano's attorneys transmitted a letter to the Committee (1) advising that Pagliano would continue to assert his right under the Fifth Amendment;[16] and (2) requesting that "the Committee formally excuse Pagliano from personally appearing on September 13, 2016."[17]

That same evening, I sent Pagliano's attorney a letter stating that Pagliano's prior experience makes clear: (1) Pagliano is uniquely qualified to answer questions that will assist the Committee's investigation, which is why at least two other investigative entities sought his testimony; and (2) Pagliano has in fact provided testimony under certain conditions, specifically, to the FBI pursuant to an immunity agreement.[18] The letter advised that the Committee required Pagliano's appearance because, among other reasons: (1) the possibility that he would waive or choose not to assert the privilege as to some or all questions; (2) the possibility that the Committee would agree to hear his testimony in executive session; and (3) the possibility that the Committee would seek, pursuant to 18 U.S.C. § 6005, to obtain a court order immunizing his testimony.[19] Therefore, the subpoena remained in effect, compelling Pagliano to appear on September 13, 2016, at 10:00 a.m.[20]

On September 13, 2016, at 8:51 a.m., Pagliano's attorneys transmitted a letter to the Committee stating that in the event the Committee voted to proceed in executive session, Pagliano's attorneys believed Pagliano would agree to appear on short notice to formally decline to answer all questions in reliance on the Fifth Amendment.[21] I advised Pagliano's attorneys that the subpoena remained in effect and that Pagliano was responsible for appearing. At 10:00 a.m. on September 13, 2016, Pagliano did not appear before the Committee as compelled by the valid

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[13] Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP (Sept. 7, 2016).
[14] Subpoena from H. Comm. on Oversight & Gov't Reform to Mr. Bryan Pagliano (Sept. 8, 2016).
[15] Email from Majority Staff, H. Comm. on Oversight & Gov't Reform, to Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP (Sept. 8, 2016, 8:48 p.m.) (on file with the Committee).
[16] Letter from Mark J. MacDougall, Esq., *et al.*, Akin Gump Strauss Hauer & Feld LLP, to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform at 2 (Sept. 12, 2016).
[17] *Id.*
[18] Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP at 1–2 (Sept. 12, 2016).
[19] *Id.* at 2.
[20] *Id.*
[21] Letter from Mark J. MacDougall, Esq., *et al.*, Akin Gump Strauss Hauer & Feld LLP, to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform at 2 (Sept. 12, 2016).

subpoena I issued on September 8, 2016. Accordingly, I recessed the hearing. On September 15, 2016, the Committee noticed its intent to resume the hearing on September 22, 2016.

On September 15, 2016, I advised Pagliano's attorneys that the failure to appear exposed Pagliano to the possibility of potential criminal liability pursuant to 2 U.S.C. § 192, and that the Committee would proceed to enforce the subpoena if Pagliano refused to appear when the hearing resumed on September 22, 2016.[22] In a letter, I stated:

> The Committee will permit him [Pagliano] the opportunity to cure his failure to comply by agreeing to appear and produce his immunity agreement when the Committee's hearing resumes on September 22, 2016. The Committee remains interested in his testimony, but also has a substantial interest in holding Mr. Pagliano accountable for his knowing and intentional failure to appear. Neither this Committee, nor the House, can countenance witnesses blatantly ignoring validly issued subpoenas for testimony and documents.[23]

On September 16, 2016, I issued and the U.S. Marshals served a subpoena to compel Pagliano to appear on September 22, 2016. When the hearing resumed at 10:00 a.m. on that date, Pagliano again failed to appear before the Committee. Accordingly, on September 22, 2016, the Committee reported favorably a resolution recommending that the House of Representatives find Pagliano in contempt of Congress for refusal to comply with a subpoena.

There is no legal basis for Pagliano's refusal to appear before the Committee. If left unaddressed, Pagliano's conduct in ignoring a lawful congressional subpoena could gravely impair Congress's ability to exercise its core constitutional authorities of oversight and legislation.

According to 2 U.S.C. § 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

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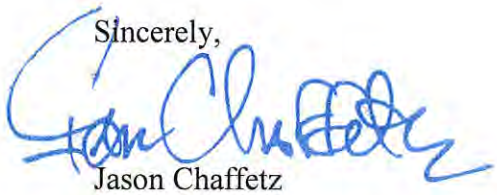
[22] Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP (Sept. 15, 2016).
[23] *Id.* at 3.

In light of Pagliano's contumacious conduct in refusing to testify, the Department should bring the matter before a grand jury for its action or file an information charging Pagliano with violating 2 U.S.C. § 192. Attached please find the Committee's correspondence with Pagliano's attorneys.

Thank you for your attention to this important matter.

Sincerely,



Jason Chaffetz
Chairman

Enclosures

cc: The Honorable Paul D. Ryan, Speaker of the House of Representatives

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

The Honorable James B. Comey, Director
Federal Bureau of Investigation

JASON CHAFFETZ, UTAH
CHAIRMAN

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ELIJAH E. CUMMINGS, MARYLAND
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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
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http://oversight.house.gov

September 7, 2016

Mark J. MacDougall, Esq.
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Dear Mr. MacDougall:

As my staff indicated to you on the phone last night and this morning, the Committee on Oversight and Government Reform requests the testimony of your client Bryan Pagliano at a hearing. The hearing will be Tuesday, September 13, 2016, at 10:00 a.m. in room 2154 of the Rayburn House Office Building. The Committee will send a subpoena shortly and expects Mr. Pagliano's attendance.

The hearing will examine federal recordkeeping, including the circumstances that resulted in a failure to preserve federal records belonging to the State Department. As a Senior Advisor in the Department's Bureau of Information Resources Management from May 2009 to February 2013, your client reported directly to the Deputy Chief Information Officer for Operations, and is uniquely positioned to shed light on these issues. The enclosed Witness Instruction Sheet provides information for witnesses appearing before the Committee.

In addition, as soon as possible, but no later than noon on Friday, September 9, 2016, please provide the Committee with any agreement between your client and the Department of Justice in order to assist the Committee with assessing the scope of any privileges your client may wish to assert. If you are unwilling to voluntarily produce this document, please advise the Committee, and I will authorize a subpoena. When producing documents to the Committee, please deliver production sets to 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.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request. Should you have any questions, please contact Tristan Leavitt of the Committee staff at (202) 225-5074.

Sincerely,

Jason Chaffetz
Chairman

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

Witness Instruction Sheet
Non-governmental Witnesses

1. Witnesses should provide their testimony, biography, and "Truth in Testimony" disclosure and certification form via e-mail to Sharon Casey, Deputy Chief Clerk, Sharon.Casey@mail.house.gov, no later than noon two business days prior to the hearing.

   a. Witnesses must complete the attached "Truth in Testimony" disclosure and certification. Additional pages may be attached to the form if needed. Witnesses must also include a biography, resume or curriculum vitae. This disclosure and biographical information is required by House Rules. (House Rule XI, clause 2(g)(5)).

2. Witnesses should also provide 60 copies of their written testimony, bio and "Truth in Testimony" delivered to 2157 Rayburn House Office Building, no later than 10:00 a.m. two business days prior to the hearing.

   Please do not send copies by U.S. Mail, UPS, Federal Express, or other shippers. Such packages are processed through an offsite security facility and will arrive 7-10 days late.

3. Written testimony, biography and "Truth in Testimony" disclosure and certification form will be made publicly available and will be posted on the Committee's website and U.S. House of Representatives Document Repository. It is therefore recommended that personally identifiable information such as addresses and phone numbers not be included in the biographical information.

4. At the hearing, each witness will be asked to summarize his or her written testimony in five minutes or less in order to maximize the time available for discussion and questions. Written testimony will be entered into the hearing record and may extend to any reasonable length.

5. The Committee does not provide financial reimbursement for witness travel or accommodations. Witnesses with extenuating circumstances; however, may submit a written request for such reimbursements to Robin Butler, Financial Administrator, 2157 Rayburn House Office Building, at least one week prior to the hearing. Reimbursements will not be made without prior approval.

6. Witnesses with disabilities should contact Committee staff to arrange any necessary accommodations.

7. Committee Rules governing this hearing are online at www.oversight.house.gov.

For inquiries regarding these rules and procedures, please contact the Committee on Oversight and Government Reform at (202) 225-5074.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name:

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1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

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2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

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3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

I certify that the above information is true and correct.
Signature: Date:

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

   (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

   BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT,CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to 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.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" 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, inter-office 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 document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document 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 in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

Akin Gump
STRAUSS HAUER & FELD LLP

MARK J. MACDOUGALL
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mmacdougall@akingump.com

September 12, 2016

VIA ELECTRONIC DELIVERY

Hon. Jason Chaffetz
Chairman
The Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Re: Subpoena issued on September 8, 2016 to Bryan Pagliano

Dear Chairman Chaffetz:

We write in response to the subpoena issued by the Committee on Oversight and Government Reform (the "Committee") to our client, Bryan Pagliano, on the evening of September 8, 2016. This subpoena calls for Mr. Pagliano to appear at a hearing before the Committee on Tuesday, September 13, 2016. The subpoena states that Mr. Pagliano will be questioned regarding federal recordkeeping and specifically the circumstances that "resulted in a failure to preserve federal records belonging to the State Department."

As an initial matter, we must object to the attempted service of a subpoena at 9:00 PM that seeks to compel a private citizen to appear before your Committee two business days later. In that regard, I was required to be in an evidentiary hearing in federal court all day on Friday, September 9, and so did not have the opportunity to consider your subpoena and consult with our client until the weekend.

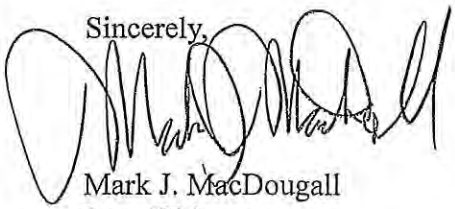
As you are well aware, Mr. Pagliano appeared before the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi (the "Benghazi Committee") on September 10, 2015. At that deposition, Mr. Pagliano declined to answer all questions that were put to him in reliance on his rights under the Fifth Amendment to the Constitution. Chairman Gowdy (who along with three other Members is also a Member of this Committee) arranged for that testimony to be taken privately. Chairman Gowdy then excused Mr. Pagliano after he asserted his rights and declined to answer any questions. On June 22, 2016, Mr. Pagliano likewise asserted his Fifth Amendment rights and declined to answer all questions that were put to him in a civil deposition ordered by U.S. District Judge Emmett Sullivan in the case styled Judicial Watch, Inc. v. Department of State (1:13-cv-01363-EGS) pending in the U.S. District Court for the District of Columbia.

We are authorized to inform you that Mr. Pagliano will continue to assert his rights under the Fifth Amendment and will decline to appear before your Committee on Tuesday, September 13, 2016. Mr. Pagliano is a private citizen who left his government job more than three years ago. As the Committee is well aware, Mr. Pagliano fully cooperated with the Department of Justice, subject to a limited grant of use immunity. Any effort to require Mr. Pagliano to publicly appear this week and again assert his Fifth Amendment rights before a committee of the same Congress, inquiring about the same matter as the Benghazi Committee, furthers no legislative purpose and is a transparent effort to publicly harass and humiliate our client for unvarnished political purposes.

The unreasonableness of the time constraint in the subpoena underscores the purely political motivations of this Committee.[1] We should also note that any lawyer associated with the Committee who seeks to force such an appearance is in violation of the Rules of Professional Responsibility. *See* D.C. Bar Ethics Opinion 31 (1977) (concluding that it is a violation of the D.C. Rules of Professional Conduct to summon a witness when "it is known in advance that no information will be obtained and the sole effect of the summons will be to pillory the witness.").

For these reasons, we respectfully request that the Committee formally excuse Mr. Pagliano from personally appearing on September 13, 2016.

Sincerely,



Mark J. MacDougall
Sean D'Arcy
Constance D. O'Connor
Connor Mullin
Abigail Kohlman
Counsel for Bryan Pagliano

cc: Hon. Elijah Cummings
Ranking Member

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[1] The Ranking Minority Member on the Committee on Oversight and Government Reform, Elijah Cummings, criticized Chairman Chaffetz in a letter stating that "this is the first time during my twenty years in Congress that I have witnessed the oversight power of this Committee used in such a transparently political manner to directly influence a presidential election…I can understand why some witnesses may want no part of this political circus." Letter from United States Representative Elijah E. Cummings (D-MD) to United States Representative Jason E. Chaffetz (R-UT) (Sept. 9, 2016).

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mmacdougall@akingump.com

September 12, 2016

VIA ELECTRONIC DELIVERY

Hon. Jason Chaffetz
Chairman
The Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Re: Subpoena issued on September 9, 2016 to Bryan Pagliano

Dear Chairman Chaffetz:

We write in response to the subpoena that we received at 7:30 PM on Friday, September 9, 2016. That subpoena calls for the production of documents and communications "relating to any immunity or proffer agreement between you and the U.S. Department of Justice, including...any agreement referring or relating to testimony given to the Federal Bureau of Investigation." The documents that the Committee is seeking pursuant to this subpoena are to be produced at 10:00 AM on Tuesday, September 13, 2016.

To the extent that Mr. Pagliano has any materials responsive to this subpoena, they are subject to substantial legal restrictions that we believe preclude their production to the Committee. These restrictions are in addition to protections afforded to Mr. Pagliano under the attorney-client privilege and the attorney work product doctrine. Accordingly, we have no documents or other materials for production to your Committee in response to this subpoena.

Sincerely,

Mark J. MacDougall
Sean D'Arcy
Constance D. O'Connor
Connor Mullin
Abigail Kohlman
Counsel for Bryan Pagliano

cc: Hon. Elijah Cummings
Ranking Member

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
MAJORITY (202) 225–5074
MINORITY (202) 225–5051
http://oversight.house.gov

September 12, 2016

Mr. Mark J. MacDougall
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue NW
Washington, D.C. 20036

Dear Mr. MacDougall:

On September 7, 2016, the Committee invited your client, Brian Pagliano, to testify at a hearing on September 13, 2016, titled "Examining Preservation of State Department Federal Records." As the invitation stated, the hearing will examine federal recordkeeping, including the circumstances that resulted in a failure to preserve federal records belonging to the State Department. Mr. Pagliano is one of five witnesses invited to appear at the hearing.[1]

You, however, were aware that Mr. Pagliano would be asked to testify even before the invitation was transmitted, and you advised the Committee that Mr. Pagliano would not appear voluntarily. You further advised that if he did appear, he would assert his rights under the Fifth Amendment and decline to answer questions related to the matters that are the subject of the hearing. In light of Mr. Pagliano's unwillingness to appear voluntarily, a subpoena was issued to compel him to appear. You received the subpoena on September 8, 2016—five days before the hearing.

Today, on the eve of the hearing, you advised the Committee in a letter that Mr. Pagliano intends to assert his rights under the Fifth Amendment and will decline to appear.[2] The letter further stated that Mr. Pagliano was previously called to answer questions by the Select Committee on Benghazi (he declined and asserted his Fifth Amendment privilege) and the Federal Bureau of Investigation (he fully cooperated subject to an immunity agreement).[3]

Mr. Pagliano's prior experience makes two things clear with respect to the topic of tomorrow's hearing: (1) Mr. Pagliano is uniquely qualified to answer questions that will assist the Committee's investigation, which is why at least two other investigative entities sought his

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[1] Letter from Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, to Mark J. MacDougall (Sept. 7, 2016).
[2] Letter from Mark J. MacDougall to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, re: Subpoena issued on September 8, 2016 to Bryan Pagliano (Sept. 12, 2016).
[3] *Id.* at 1.

testimony, and (2) Mr. Pagliano has in fact provided testimony under certain conditions, specifically, to the FBI pursuant to an immunity agreement.

It is therefore improper to assert, as you did, that Mr. Pagliano's appearance before the Committee "furthers no legislative purpose and is a transparent effort to publicly harass and humiliate our client for unvarnished political purposes."[4] The Committee invited Mr. Pagliano to appear with the expectation that his testimony will advance the Committee's investigation, which seeks information about former Secretary Hillary Clinton's use of a private, non-secure email server during her time at the Department of State. The Committee requires Mr. Pagliano's appearance because of, among other reasons, the possibility that he will waive or choose not to assert the privilege as to some or all questions, the possibility that the Committee will agree to hear his testimony in executive session, and the possibility that the Committee will immunize his testimony pursuant to 18 U.S.C. § 6005.[5]

For those reasons, the subpoena for Mr. Pagliano remains in effect. The subpoena compels Mr. Pagliano to appear before the Committee on September 13, 2016, at 10:00 a.m.

In a separate letter, regarding the Committee's subpoena for Mr. Pagliano's immunity agreement(s) with the Department of Justice, you stated "we have no documents or other materials for production to your Committee in response to this subpoena."[6] The U.S. House of Representatives does not recognize the privileges your letter refers to as the basis for that position, as the subpoena itself states.[7] The subpoena remains in effect. The subpoena requires Mr. Pagliano to produce the covered materials at or before 10:00 a.m. on September 13, 2016.

Please contact the Committee staff at (202) 225-5074 with any additional questions.

Sincerely,

Jason Chaffetz
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

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[4] *Id.* at 2.

[5] D.C. Bar Legal Ethics Opinion 358 (2011), while inapposite for a number of reasons, recognizes that there are legitimate reasons for a congressional committee to summon a witness who expresses an intention to assert his or her privilege against self-incrimination.

[6] Letter from Mark J. MacDougall to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, re: Subpoena issued on September 9, 2016 to Bryan Pagliano (Sept. 12, 2016).

[7] Subpoena Instruction 14 states, in pertinent part: "In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee do not recognize: any purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections . . . .

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September 13, 2016

VIA ELECTRONIC DELIVERY

Hon. Jason Chaffetz
Chairman
The Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Re: Subpoena issued on September 8, 2016 to Bryan Pagliano

Dear Chairman Chaffetz:

I am writing in reply to your letter that was received after 8:00 PM last evening. In the interest of time, I will not seek to address the inaccurate assertions of fact or characterizations of law conveyed in that letter.

You did, however, suggest three reasons that Bryan Pagliano should yet again be required to personally appear and assert his rights under the Fifth Amendment to the Constitution. As recited in your letter, these are (a) the possibility that he will waive or choose not to assert the privilege [sic] as to some or all questions, (b) the possibility that the Committee will agree to hear his testimony in executive session, and (c) the possibility that the Committee will immunize his testimony pursuant to 18 U.S.C. §6005. While Mr. Pagliano will continue to assert his constitutional right not to testify, let me address the reasons you contend that he must again appear in a public hearing.

With regard to the first reason, for more than a year and on multiple occasions Mr. Pagliano has uniformly and without exception asserted his rights under the Fifth Amendment. He has never made any statement or taken any action that could constitute a waiver of his constitutional rights and there is no reason for anyone to believe that he might suddenly depart from that position.

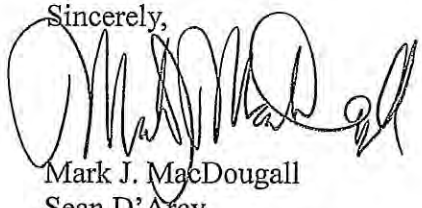
Your second stated reason is that the Committee might vote to hear Mr. Pagliano's testimony in executive session. As you know well, a similar approach was taken by Chairman Gowdy in September of 2015 when Mr. Pagliano appeared before the Benghazi Committee and asserted his Fifth Amendment rights under oath and on the record. We are confident that requiring a witness to assert his constitutional rights in hearings before multiple committees of the same Congress, investigating the same subject matter, is not a proper legislative purpose. In the event the Committee votes to proceed in executive session on September 13, 2016, however,

we believe that Mr. Pagliano would agree to appear on short notice in order to formally decline to answer all questions in reliance on the Fifth Amendment. If the Committee actually wants Mr. Pagliano to personally appear and invoke his constitutional rights, then this offers a simple and direct path toward that objective. If you decline to pursue this avenue, then there can be no doubt that the Committee is seeking only to promote the public spectacle of a private citizen repeatedly asserting his Fifth Amendment rights for no legitimate legislative purpose.

Finally, with regard to the prospect that the "Committee will immunize [Mr. Pagliano's] testimony pursuant to 18 U.S.C. §6005," I am sure that you understand that only a U.S. District Court may confer statutory immunity on a witness. That process may begin with a committee vote but then must proceed through a series of procedural steps – none of which requires the presence of the witness. If you believe that a formal assertion of the Fifth Amendment is a necessary prerequisite to proceeding under Section 6005 of Title 18 of the U.S. Code, however, then that step may also be taken in executive session.

Please let us know if the Committee would like to take advantage of any of these readily available mechanisms to resolve this matter. We should be clear, however, that nothing in this letter is intended to waive or release any right, remedy or privilege that may be available to our client.

Sincerely,



Mark J. MacDougall
Sean D'Arcy
Constance D. O'Connor
Connor Mullin
Abigail Kohlman
Counsel for Bryan Pagliano

cc: Hon. Elijah Cummings
Ranking Member

JASON CHAFFETZ, UTAH
CHAIRMAN

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September 15, 2016

Mr. Mark J. MacDougall
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue NW
Washington, D.C. 20036

Dear Mr. MacDougall:

Your client, Bryan Pagliano, failed to appear before the Committee's September 13, 2016, hearing, "Examining Preservation of State Department Federal Records," as required by a testimonial subpoena that the Committee issued to him after Mr. Pagliano refused to appear voluntarily. Mr. Pagliano also failed to produce documents related to his immunity agreement with the Department of Justice, which were compelled to be produced at the hearing pursuant to a separate Committee subpoena issued on September 9, 2016.

Mr. Pagliano's refusal to comply with two duly issued congressional subpoenas exposes him to the possibility of being held in contempt and potential criminal liability pursuant to 2 U.S.C. §§ 192 and 194, as well as possible civil litigation to enforce the Committee's subpoenas.

The Subpoena for Mr. Pagliano's Testimony

With respect to your client's failure to appear, your position seems to be based on the notion that compelling his presence does not serve a "legitimate legislative purpose."[1] Nothing could be further from the truth. Mr. Pagliano is a – perhaps the – crucial witness to the Committee's ongoing investigation of Secretary Hillary Clinton's use of a private email server to conduct official State Department business. The Committee has legislative jurisdiction over federal recordkeeping, transparency, and ethics laws, and the Committee's investigatory activities—such as taking testimony from witnesses in an open hearing—are inherent to the Committee's legislative function.

The "legitimate legislative purpose" for requiring witnesses to appear before the Committee has been answered by the Supreme Court, which held that Congress's power "to conduct investigations is inherent in the legislative process. That power is broad. It

[1] Letter from Mark J. MacDougall to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, Re: Subpoena issued on September 8, 2016 to Bryan Pagliano (Sept. 13, 2016).

encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[2]

The Committee's long-standing practice is to require witnesses to appear and assert their Fifth Amendment rights in person during open session. The stated rationale for your client's non-appearance—that there is no reason to believe Mr. Pagliano "might suddenly depart" from asserting his Fifth Amendment rights in response to the Committee's questions—incorrectly assumes that the Fifth Amendment privilege against self-incrimination would apply to all the Committee's questions. As you know, the Fifth Amendment may be asserted only when there is reasonable apprehension on the part of the witness that his answer would furnish some evidence upon which he could be convicted of a criminal offense.[3] In light of FBI Director Comey's assertions with respect to the FBI's investigation, as well as Mr. Pagliano's immunity agreement with the Department of Justice, the Committee has many questions that Mr. Pagliano will be able to answer without reasonable apprehension of criminal liability.

Your proposed alternative to compliance with the subpoena—whereby Mr. Pagliano would appear on the condition that the Committee moved to executive session[4]—failed to account for House and Committee rules, procedures, and practice.

From a procedural perspective, Mr. Pagliano foreclosed the possibility that the Committee would move into executive session (which requires a vote of the majority of the full Committee) when he willfully failed to appear as legally obligated. In light of his absence from the hearing room, there was no reason to vote on moving to executive session. Moreover, Mr. Pagliano's contumacious conduct was an affront to the Committee and severely damaged the prospect for a successful vote to move to executive session when the hearing resumes.

From a legal and practical perspective, witnesses subpoenaed by congressional committees may not demand conditions to guarantee their appearance.[5] If Mr. Pagliano wishes to maintain the possibility that the Committee will agree to immunize his testimony, he must appear before the Committee, take questions, and invoke a valid privilege.[6]

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[2] *Watkins v. United States*, 354 U.S. 178, 187 (1957).

[3] *United States v. Jaffee*, 98 F. Supp. 191, 193-94 (D.D.C. 1951); *see also Simpson v. United States*, 241 F.2d 222 (9th Cir. 1957) (privilege inapplicable to questions seeking basic identifying information, such as the witness's name and address).

[4] Letter from Mark J. MacDougall to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, re: Subpoena issued on September 8, 2016 to Bryan Pagliano (Sept. 13, 2016). ("In the event the Committee votes to proceed in executive session on September 13, 2016, however, we believe that Mr. Pagliano would agree to appear on short notice in order to formally decline to answer all questions in reliance on the Fifth Amendment.").

[5] *See United States v. Orman*, 207 F.2d 148 (3rd Cir. 1953) ("[A] court will not enforce a condition imposed upon committee procedure by a witness, at least where no circumstances appear which might affect the ability of the witness to give clear and truthful testimony.")

[6] *See In re McElreath*, 248 F.2d 612 (D.C. Cir. 1957) (en banc).

The Subpoena for Mr. Pagliano's Immunity Agreement

In light of Mr. Pagliano's experiences in other proceedings related to Secretary Clinton's private server,[7] it should come as no surprise that the Committee compelled him to produce his immunity agreement with the Department of Justice after you advised that he would assert his Fifth Amendment privilege. The Committee issued a subpoena for Mr. Pagliano's immunity agreement, and related documents that would help the Committee understand the scope of the agreement, to determine how and whether the agreement affects his ability to testify before the Committee, and assess the legitimacy of any reliance on the Fifth Amendment to avoid answering questions.

Your letter cited several common law privileges as a basis for refusing to produce the immunity agreement.[8] None, however, is applicable here, a fact made clear by the subpoena's instructions.[9] Your letter also states that any responsive materials "are subject to substantial legal restrictions that we believe preclude their production to the Committee."[10] Absent greater detail, and you offered none, about those restrictions—specifically, who imposed them, what they prohibit and permit, and whether they are part of the agreement itself—the Committee is not in a position to assess whether Mr. Pagliano's reasons for withholding the documents are compelling.

The Hearing Will Resume on September 22, 2016

In light of the foregoing, I urge your client to reconsider his decision. The Committee will permit him the opportunity to cure his failure to comply by agreeing to appear and produce his immunity agreement when the Committee's hearing resumes on September 22, 2016. The Committee remains interested in his testimony, but also has a substantial interest in holding Mr. Pagliano accountable for his knowing and intentional failure to appear. Neither this Committee, nor the House, can countenance witnesses blatantly ignoring validly issued subpoenas for testimony and documents.

If your client again fails to appear and produce documents, the Committee will take all necessary steps to protect its institutional interests regarding subpoena compliance, as failure to do so will result in Committee investigations "grind[ing] to a halt" whenever witnesses refuse to

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[7] *Judicial Watch v. U.S. Department of State* (D.D.C.) (No. 1:13-cv-01363). Judge Sullivan ordered Mr. Pagliano to produce his agreement with the Department of Justice so the court could "assess the legitimacy of his intent to assert his Fifth Amendment rights in this civil proceeding."

[8] Letter from Mark J. MacDougall to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, re: Subpoena issued on September 9, 2016 to Bryan Pagliano (Sept. 13, 2016). ("These restrictions are in addition to protections afforded to Mr. Pagliano under the attorney-client privilege and the attorney work product doctrine.")

[9] Subpoena Instruction 14 states, in pertinent part: "In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee do not recognize: any purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections . . . ."

[10] Letter from Mark J. MacDougall to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, re: Subpoena issued on September 9, 2016 to Bryan Pagliano (Sept. 13, 2016).

provide subpoenaed testimony or documents.[11] Accordingly, Mr. Pagliano's choice is clear: appear or face criminal contempt proceedings as well as possible civil litigation to enforce the subpoenas.

Please contact the Committee staff at (202) 225-5074 with any additional questions.

Sincerely,

Jason Chaffetz
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

[11] *Hutchison v. United States*, 369 U.S. 599, 617 (1962); *see also United States v. Bryan*, 339 U.S. 323 (1950).

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September 21, 2016

VIA ELECTRONIC DELIVERY

Hon. Jason Chaffetz
Chairman
The Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Re: *Subpoena ad testificandum* issued on September 16, 2016 to Bryan Pagliano

Dear Chairman Chaffetz:

We are writing in response to the subpoena that you caused to be served on our client Bryan Pagliano at his place of employment on September 16, 2016, seeking his appearance and testimony before the Committee on Thursday, September 22, 2016 at 10:00 AM. We are likewise responding to your letter of September 15, 2016 (the "September 15 Letter") as it relates to that subpoena.

We have corresponded extensively with you and the Committee's attorneys over the past two weeks on this subject. The facts have not changed. Mr. Pagliano previously appeared before the Benghazi Committee – in this same Congress – in response to a subpoena seeking the same testimony. Mr. Pagliano declined to answer all questions asked of him by the Benghazi Committee in reliance on his rights under the Fifth Amendment and was excused by Chairman Gowdy (who is also a Member of this Committee). You and the Committee have been told from the beginning that Mr. Pagliano will continue to assert his Fifth Amendment rights and will decline to answer any questions put to him by your Committee. In an effort to resolve this matter, Mr. Pagliano has offered to assert his rights on the record before this Committee in Executive Session. You have flatly refused that offer and continue to insist that Mr. Pagliano appear in a public session where his further and repeated assertion of his constitutional right not to testify can be videotaped and broadcast.

In the September 15 Letter you insist that the limited use immunity agreement between Mr. Pagliano and the Department of Justice – whatever its terms – will somehow permit the Committee to interrogate our client and demand that he answer despite the assertion of his Fifth Amendment rights. Your stated position betrays a fundamental misunderstanding of the law.[1]

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[1] "Use" immunity does not provide blanket immunity from prosecution: "The only benefit as far as the witness is concerned is that . . . any information directly or indirectly derived from such testimony may not be used

Mr. Pagliano has not waived his constitutional rights and he is free to continue to assert those rights before your Committee and all the other congressional bodies that demand his appearance.

A subpoena issued by a congressional committee is required by law to serve a valid legislative purpose – and there is none here. Your demand under the present circumstances, that Mr. Pagliano again assert his constitutional rights in front of video cameras six weeks before the presidential election, betrays a naked political agenda and furthers no valid legislative aim. The Committee lawyers who may be participating in this effort should give serious consideration to the consequences of their conduct.[2] In the event the Committee carries out your threat of a contempt citation and a referral to the U.S. Attorney for the District of Columbia, Mr. Pagliano will rely on his constitutional rights to vigorously defend himself in any such action. He will exercise the right to obtain discovery from the Committee and all those involved in this episode and to summon and confront witnesses to appear in federal court for examination.

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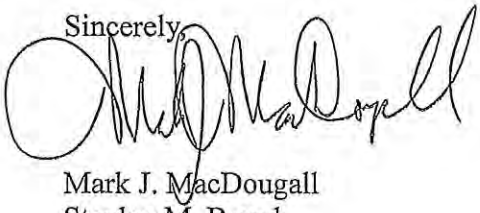
against him in a subsequent criminal prosecution." *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 887 (D.C. Cir. 1981). In other words, a grant of "use" immunity does not prevent the government from prosecuting; it merely limits the government's sources of evidence. The Supreme Court has squarely held that a nonparty deponent retains the right, despite a grant of "use" immunity by the DOJ under 18 U.S.C. § 6002, to rely on the Fifth Amendment in declining to testify. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 263-64 (1983). In *Conboy*, a district court held a nonparty deponent in contempt for asserting the Fifth Amendment privilege in response to a series of deposition questions that were identical to those asked during his grand jury testimony, which testimony was subject to a separate grant of "use" immunity under Section 6002. *Id.* at 250. The Supreme Court agreed that the contempt order was improper because the deponent was entitled to the protection of the Fifth Amendment. *Id.* The Court held that a nonparty "deponent's civil deposition testimony," even where it "closely track[s] his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of § 6002." *Id.* at 263-64. For example, the witness's answers that merely repeated prior immunized testimony verbatim might reflect his "current, independent memory of events" and might be used in a future prosecution. *Id.* at 255 (describing petitioner's argument). The Court thus held that "District Courts are without power to compel a civil deponent to testify over a valid assertion of his Fifth Amendment right, absent a separate grant of immunity pursuant to § 6002." *Id.* at 257 n.13.

[2] The Committee lawyers enjoy no immunity for ethical misconduct and proceed in this matter at their professional peril. *See* D.C. Bar Ethics Opinion 31 (1977) (concluding that it is a violation of the D.C. Rules of Professional Conduct to summon a witness when "it is known in advance that no information will be obtained and the sole effect of the summons will be to pillory the witness.").

Mr. Pagliano is defending a critical principal of individual liberty and the constitutional right of a private citizen to resist partisan political forces masquerading as proper government functions. We earnestly hope that the Committee will further reflect on this matter, and recognize the needless expense and institutional harm that will follow from continued pursuit of the course of action that you have threatened.

Sincerely,



Mark J. MacDougall
Stanley M. Brand
Sean D'Arcy
Constance D. O'Connor
Connor Mullin
Abigail Kohlman
Counsel for Bryan Pagliano

cc: Hon. Elijah Cummings
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September 21, 2016

VIA ELECTRONIC DELIVERY

Hon. Jason Chaffetz
Chairman
The Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Re: *Subpoena duces tecum* issued September 9, 2016 to Bryan Pagliano

Dear Chairman Chaffetz:

We are writing in response to the subpoena that you caused to be served on our client Bryan Pagliano at his place of employment on September 16, 2016, calling for production of "any immunity or proffer agreement between [Mr. Pagliano] and the U.S. Department of Justice." We are likewise responding to your letter of September 15, 2016 (the "September 15 Letter") as it relates to that subpoena.

As you know, this is the second time that that you have served a subpoena on Mr. Pagliano seeking production of the same "immunity or proffer agreement" with the Department of Justice ("DOJ"). In our letter to you dated September 9, 2016 – written in response to the previous service of that subpoena seeking the same documentation – we made clear to you that substantial legal restrictions preclude production of any immunity or proffer agreements to the Committee. That remains true and Mr. Pagliano will respectfully decline to produce any documentation in response to the Committee's subpoena.

In the September 15 Letter you express bewilderment at the nature of those legal restrictions and demand production by Mr. Pagliano of his immunity documentation under direct threat of criminal contempt proceedings. While we understand that you are not a lawyer, the Committee employs numerous lawyers who we must presume are advising you in this matter. Those lawyers are well aware of the civil case pending in the U.S. District Court for the District of Columbia styled *Judicial Watch v. U.S. Department of State* (D.D.C.) (No. 1:13 cv-01363). We know that, because that case is specifically cited in the September 15 Letter.

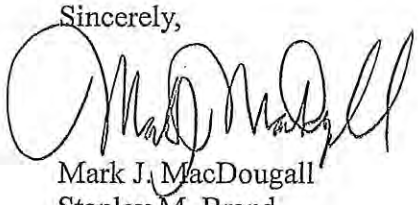
What is not clear to us is why those lawyers have not apprised you of the Order entered by U.S. District Judge Emmet Sullivan, on June 14, 2016, placing Mr. Pagliano's immunity agreement under seal. A copy of that Order can be found in the docket of the U.S. District Court

and, so long as it remains in effect, the documents remain under seal and we are precluded from producing them to the Committee in response to your subpoena.

To the extent Mr. Pagliano may have other "documents and communications referring or relating to any immunity or proffer agreement," such materials constitute privileged communications between attorney and client prepared in anticipation of litigation. In your September 15 Letter, you suggest that the Committee may unilaterally strip Mr. Pagliano of the attorney-client privilege and demand that he turn over to you his communications with his lawyers. We certainly hope that you do not believe that you exercise that kind of extraordinary power over private citizens. We also earnestly hope that, upon further reflection, you and the Committee's counsel will understand that such efforts to invade the attorney-client privilege are ill-conceived and without any basis in law.

We hope that this letter answers all of your questions regarding the subpoena seeking production of documents that was served on Mr. Pagliano on September 16, 2016 and the associated questions that you asked in the September 15 Letter.

Sincerely,



Mark J. MacDougall
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Abigail Kohlman
Counsel for Bryan Pagliano

cc: Hon. Elijah Cummings
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JASON CHAFFETZ, UTAH
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September 22, 2016

Mr. Mark J. MacDougall
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue NW
Washington, D.C. 20036

Dear Messrs. MacDougall, Brand, D'Arcy, Mullin, and Mses. O'Connor and Kohlman:

Late yesterday, you transmitted a pair of letters regarding the refusal of your client, Bryan Pagliano, to comply with subpoenas compelling him to appear before the Committee and to produce any immunity or proffer agreement between himself and the Department of Justice. Aside from arriving just hours before your client is scheduled to testify, and being delivered to the media first, the letters share numerous commonalities with your prior correspondence in this matter.

As was the case with your first two letters on this topic (which were similarly delivered on the eve of a hearing, but with fewer signatures), and your third letter (which arrived less than one hour before the hearing started), yesterday's letters continue to (i) improperly conflate the several investigations to which Mr. Pagliano's testimony is relevant; (ii) wrongly presume that Mr. Pagliano can validly invoke the Fifth Amendment on a blanket basis as to all of the proceedings in which his testimony may be compelled, regardless of the content of the potential questions; and (iii) misrepresent House and Committee rules, practice, and procedure.

Put simply, the Committee intends to ask questions that other committees and litigants have not asked, on topics unrelated to other committees' investigations. The Committee may also question the circumstances surrounding Mr. Pagliano's grant of immunity. Accordingly, Mr. Pagliano must appear and take those questions, or face contempt proceedings.[1]

***Subpoena ad testificandum* issued on September 16, 2016 to Bryan Pagliano.**

Regarding the need for your client to appear and respond to the Committee's questions, you have repeatedly cited the fact that Mr. Pagliano invoked his Fifth Amendment privilege when he was called before the Select Committee on Benghazi. Setting aside the fact that Mr. Pagliano's behavior before one committee has absolutely no bearing on whether he must comply

[1] *See United States v. Bryan*, 339 U.S. 323 (1950); *Committee on the Judiciary, U.S. House of Representatives v. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008).

with a subpoena from another, Mr. Pagliano's testimony to the Select Committee is not a compelling reason to excuse him from appearing, for several reasons.

First, the Select Committee's jurisdiction, and the scope of its investigation, is markedly different from this Committee's. The Select Committee was established for the limited purpose of investigating the events surrounding the 2012 terrorist attack in Benghazi, Libya.[2] This Committee, on the other hand, has broad jurisdiction, including over federal recordkeeping, data security, transparency, and ethics laws, among other things. The Committee's ongoing investigation of the implications of former Secretary Hillary Clinton's use of a private email server, a server built by Mr. Pagliano, for official State Department business is squarely within the Committee's jurisdiction as established by the Rules of the House of Representatives.[3] Although your letters belie this point, I suspect you know Mr. Pagliano's testimony will assist our investigation.

Second, your contention that "Mr. Pagliano will continue to assert his Fifth Amendment rights and will decline to answer any questions put to him by your Committee"[4] mistakenly presupposes that you can predict with certainty all of the Committee's questions for your client. As we have previously informed you, many of the Committee's questions will not raise a reasonable apprehension that his answer would furnish some evidence upon which he could be convicted of a criminal offense.[5]

For instance, Members of the Committee may ask about the dates of his employment at the State Department, whether he is currently being paid with federal funds, and who is paying his legal fees, among other questions that could not possibly form the basis of a criminal prosecution (especially considering that Attorney General Loretta Lynch announced the government's investigation of the matter is closed "and that no charges be brought against any individuals within the scope of the investigation").[6] Against that backdrop, it is unclear whether Mr. Pagliano can validly invoke the Fifth Amendment as to some questions, and certainly he cannot do so to all questions, as you have apparently counseled him to do. Moreover, the Committee has obtained documents and testimony that raise questions only Mr. Pagliano can answer – including the information contained in the FBI files provided to the Committee. Those materials were not previously available to other congressional committees who sought to interview Mr. Pagliano.

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[2] On May 8, 2014, the House of Representatives adopted H. Res. 567, "Providing for the Establishment of the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, Libya." The Select Committee is authorized and directed to conduct a full and complete investigation and study and issue a final report of its findings to the House regarding nine specific areas of inquiry, none of which are covered by the Committee's ongoing investigation to which Mr. Pagliano is a witness.

[3] House Rule X.

[4] Letter from Mark J. MacDougall *et al.* to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, Re: *Subpoena ad testificandum* issued on September 16, 2016 to Bryan Pagliano (Sept. 21, 2016) at 1.

[5] *United States v. Jaffee*, 98 F. Supp. 191, 193-94 (D.D.C. 1951); *see also Simpson v. United States*, 241 F.2d 222 (9th Cir. 1957) (the Fifth Amendment privilege is inapplicable to questions seeking basic identifying information, such as the witness's name and address).

[6] Eric Bradner, *AG Loretta Lynch declines to press charges against Clinton*, CNN, July 6, 2016.

Mr. Pagliano is being treated no differently than any other witness who advises the Committee that he intends to invoke the Fifth Amendment. He has been extended every courtesy to make the process routine, as it was for two other witnesses who were invited to testify alongside Mr. Pagliano in this case. In fact, the only difference between this case and the others is your argumentative posture with respect to the Committee's investigation. Your hostility is unnecessary. In fact, you required the U.S. Marshals Service to serve a subpoena on your client simply because you were not willing to confirm that you accepted service by email. Despite your hostility, we have aimed to keep the lines of communication open. We have also extended professional courtesies where we are able to.

Furthermore, you have lodged a series of threats against the Committee staff in an apparent effort to alter the Committee's course of action through intimidation. Aside from being baseless and futile, those tactics themselves may run afoul of the Rules of Professional Conduct for the District of Columbia, wherein threatening to file a bar complaint to gain an advantage in a disputed matter is itself a violation of Rule 8.4(g).[7]

***Subpoena duces tecum* issued on September 9, 2016 to Bryan Pagliano.**

With respect to the subpoena that covers Mr. Pagliano's immunity or proffer agreements with the Department of Justice, you stated that your client will decline to produce those documents because of what you mischaracterized as "substantial legal restrictions."[8] However, the specific restriction you cited – from U.S. District Court Judge Emmet Sullivan's Order in *Judicial Watch v. U.S. Department of State* – does not apply to Mr. Pagliano's legal obligations under the subpoena issued on September 9, 2016. Judge Sullivan's Order does not purport to preclude Mr. Pagliano from giving the documents in question to Congress pursuant to a subpoena; rather, it simply means the copy of the document your client chose to file with the district court is not to be included on the publicly available court docket.

Even assuming Judge Sullivan's Order prevented you from disclosing copies of the agreement to the public (which it plainly does not), disclosure of such information to Congress is not considered to be a public disclosure. The D.C. Circuit has repeatedly held that disclosure of information to a congressional committee is not a "public disclosure."[9] Indeed, courts have presumed just the opposite is true – that "[o]nce documents are in congressional hands, . . . 'the committees of Congress will exercise their powers responsibly and with due regard for the rights

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[7] Threats to file disciplinary charges, either against an attorney with Bar Counsel or against a non-attorney with a relevant professional board, for the sole purpose of gaining advantage in a civil matter are a violation of the Rules of Professional Conduct. *See* D.C. Bar Ethics Opinion 220 (1991).

[8] Letter from Mark J. MacDougall *et al.* to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, Re: *Subpoena duces tecum* issued on September 9, 2016 to Bryan Pagliano (Sept. 21, 2016) at 1.

[9] *See, e.g.*, *F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) (holding that executive agency "may not deny Congress access to confidential documents, including those that contain trade secrets," because "[r]elease to a congressional requestor is not a public disclosure forbidden by section 6(f) of the [Federal Trade Commission] Act"); *Exxon Corp. v. F.T.C.*, 589 F.2d 582, 585-86 (D.C. Cir. 1978) (similar); *Ashland Oil, Inc. v. F.T.C.*, 548 F.2d 977, 979 (D.C. Cir. 1976) (per curiam) (similar).

of affected parties.'"[10] This presumption reflects the general deference due to a coordinate branch of government, as well as the specific concern that "the judiciary must refrain from slowing or otherwise interfering with the legitimate investigatory functions of Congress."[11]

Moreover, judicial sealing of orders does not override the Committee's subpoena power and authority. The congressional power to investigate and issue subpoenas flows directly from the Constitution. As a result, a judicial order of the sort at issue here should not be construed to bar disclosure to Congress. The Supreme Court addressed this in its decision in *Eastland v. United States Servicemen's Fund.*[12]

The Supreme Court held that the Speech or Debate Clause of the Constitution, art. I, § 6, cl. 1, serves as "an absolute bar to interference" with a congressional subpoena.[13] The Court ruled that, once it was determined the issuance of the subpoena fell within the "sphere of legitimate legislative activity," judicial inquiry is at an end because the Speech or Debate Clause "forbid[s] invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority."[14] USSF's allegation the subpoena directed to the bank would result in a violation of its First Amendment rights without an opportunity for judicial review was therefore irrelevant because "[c]ollateral harm which may occur in the course of a legitimate legislative inquiry does not allow [courts] to force the inquiry to 'grind to a halt.'"[15]

Both Judge Sullivan and the Supreme Court have made clear the "substantial legal restrictions" to which you referred in your letter are not restrictions at all in this case. Furthermore, it seems contradictory to cite the limited nature of Mr. Pagliano's agreement with the Justice Department as one of the reasons that he cannot answer the Committee's questions without fear of prosecution while simultaneously refusing to show it to the Committee.

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[10] *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970 (quoting *Exxon Corp.*, 589 F.2d at 589); *see also, e.g.*, *Jaymar-Ruby, Inc. v. F.T.C.*, 496 F. Supp. 838, 845 (N.D. Ind. 1980) ("[W]hile Courts have held that as a matter of law, it cannot be presumed that private persons will honor commitments not to disclose information, Courts do presume that government officials will honor similar commitments." (internal citation omitted)).

[11] *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *see also Exxon Corp.*, 589 F.2d at 588-89.

[12] 421 U.S. at 494. *Eastland* involved a congressional subpoena issued to a bank for records of USSF, a servicemen's organization. That organization brought suit for declaratory and injunctive relief to prevent the enforcement of the subpoena, alleging that the subpoena sought information protected by the First Amendment and had been "issued to the bank rather than to USSF and its members . . . in order to deprive (them) of their rights to protect their private records, such as the source of their contributions, as they would be entitled to do if the subpoenas had been issued against them directly."

[13] *Id.* at 503, 505.

[14] *Id.* at 511.

[15] *Id.* at 509 n.16.

The Committee will consider whether to hold Mr. Pagliano in contempt if he fails to appear.

The Committee intends to immediately initiate contempt proceedings against Mr. Pagliano if he fails to appear at 10:00 a.m. As I stated before, there are several reason why he must appear, including the possibility that the Committee will immunize his testimony. Mr. Pagliano, however, must appear and make a valid Fifth Amendment assertion for the Committee to consider whether to immunize his testimony, or to proceed some other way.

Sincerely,

Jason Chaffetz
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member