

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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<http://oversight.house.gov>

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."<sup>1</sup> 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

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<sup>1</sup> 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.”<sup>2</sup>

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.<sup>3</sup> 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<sup>4</sup>—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.<sup>5</sup> 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.<sup>6</sup>

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<sup>2</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>3</sup> *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).

<sup>4</sup> 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.”).

<sup>5</sup> 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.”)

<sup>6</sup> 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,<sup>7</sup> 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.<sup>8</sup> None, however, is applicable here, a fact made clear by the subpoena's instructions.<sup>9</sup> Your letter also states that any responsive materials "are subject to substantial legal restrictions that we believe preclude their production to the Committee."<sup>10</sup> 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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<sup>7</sup> *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."

<sup>8</sup> 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.")

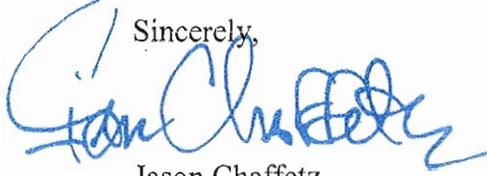
<sup>9</sup> Subpoena Instruction 14 states, in pertinent part: "In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee do not recognize: any purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative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

<sup>10</sup> 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).

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provide subpoenaed testimony or documents.<sup>11</sup> 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

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<sup>11</sup> *Hutchison v. United States*, 369 U.S. 599, 617 (1962); see also *United States v. Bryan*, 339 U.S. 323 (1950).