

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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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.<sup>1</sup>

***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

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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"<sup>4</sup> 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.<sup>5</sup>

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").<sup>6</sup> 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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<sup>2</sup> 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.

<sup>3</sup> House Rule X.

<sup>4</sup> 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.

<sup>5</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) (the Fifth Amendment privilege is inapplicable to questions seeking basic identifying information, such as the witness's name and address).

<sup>6</sup> 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).<sup>7</sup>

***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."<sup>8</sup> 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."<sup>9</sup> 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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<sup>7</sup> 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).

<sup>8</sup> 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.

<sup>9</sup> 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.”<sup>10</sup> 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.”<sup>11</sup>

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*.<sup>12</sup>

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.<sup>13</sup> 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.”<sup>14</sup> 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.’”<sup>15</sup>

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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<sup>10</sup> *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)).

<sup>11</sup> *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; see also *Exxon Corp.*, 589 F.2d at 588-89.

<sup>12</sup> 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.”

<sup>13</sup> *Id.* at 503, 505.

<sup>14</sup> *Id.* at 511.

<sup>15</sup> *Id.* at 509 n.16.

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**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 reasons 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,

A handwritten signature in blue ink, appearing to read "Jason Chaffetz". The signature is stylized and cursive.

Jason Chaffetz  
Chairman

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