

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

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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September 25, 2015

The Honorable Jason Chaffetz  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

On Monday, all 18 Democratic Members of the Committee sent you a letter regarding next week's hearing with Planned Parenthood.

We warned that the relentless campaign by the conservative House Freedom Caucus to attack Planned Parenthood was in fact "part of a broader power struggle to unseat House Speaker John Boehner, led by an extreme wing of the Republican Party that is using this issue to force a government shutdown unless the Speaker bows to their demands."<sup>1</sup>

Given the Speaker's announcement today that he will be resigning his post, our warnings proved prescient.

In our letter to you on Monday, we requested that, if you chose to proceed with this hearing, you also invite David Daleiden, who heads the organization that deceptively edited secretly-recorded videos in a failed attempt to entrap Planned Parenthood. As we wrote:

Mr. Daleiden and his organization, the Center for Medical Progress (CMP), engaged in a host of potentially illegal activities, including filing false documents with government agencies, falsely impersonating a legitimate business concern, soliciting charitable contributions under false pretenses, and secretly recording Planned Parenthood officials without their consent. Despite all of these machinations, the Committee has obtained no credible evidence that Planned Parenthood violated any law.<sup>2</sup>

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<sup>1</sup> Letter from Ranking Member Elijah E. Cummings et al. to Chairman Jason Chaffetz, House Committee on Oversight and Government Reform (Sept. 21, 2015) (online at <http://democrats.oversight.house.gov/news/press-releases/all-oversight-committee-democrats-object-to-plan-by-extreme-wing-of-republican>).

<sup>2</sup> *Id.*

We requested the courtesy of a reply by Wednesday, but we received no response from you. There have been few occasions this year in which we have felt the need to join together in this manner to express our concerns to you, so it was particularly disappointing that we received no reply whatsoever.

Questions have been raised about whether you are declining to invite Mr. Daleiden because he may invoke the Fifth Amendment and refuse to answer questions that might incriminate him based on his potentially illegal activities.

It is unclear why the Committee would take a different approach in this case than Republicans have taken in previous cases. The Republican position on this question has been that witnesses must be compelled by subpoena to appear—in person—in order to assert their Fifth Amendment rights on the record.

This was the position taken by Benghazi Select Committee Chairman Trey Gowdy when he subpoenaed an IT employee during his investigation of Secretary Clinton's email server, and it was the position of former Oversight Committee Chairman Darrell Issa during his investigation of former IRS employee Lois Lerner.

No explanation has been given for why Republicans would suddenly break from their practice in this case, especially when the Committee is relying so extensively on the results of the potentially criminal conduct of Mr. Daleiden and his group.

Moreover, in this case, the Committee has received no indication from Mr. Daleiden's attorneys that he plans to invoke the Fifth Amendment before our Committee. To the contrary, he personally indicated in a press interview just last week that he "is likely to comply with an expected invitation to testify before Congress."

Since you did not respond to our request from Monday, I now request, on behalf of the Democratic Members of the Committee, that you issue a subpoena for Mr. Daleiden's testimony at next Tuesday's hearing.

### **Republican Policy Requiring Invocation of Fifth Amendment in Person**

The policy and practice of House Republicans has been to issue subpoenas to compel witnesses to appear in person in order to invoke their Fifth Amendment rights, even in cases in which their attorneys have indicated previously that their clients would assert their Constitutional rights.

For example, on August 11, 2015, Benghazi Select Committee Chairman Trey Gowdy, who is also a Member of the Oversight Committee, issued a subpoena to compel the testimony of Bryan Pagliano, a former IT employee who worked on Secretary Clinton's email server.<sup>3</sup>

On August 31, 2015, Mr. Pagliano's attorneys informed Chairman Gowdy that, in the context of several ongoing investigations and on the advice of counsel, "Mr. Pagliano must

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<sup>3</sup> House Select Committee on Benghazi, Subpoena to Bryan Pagliano (Aug. 11, 2015).

respectfully assert his Fifth Amendment right under the United States Constitution.” For these reasons, Mr. Pagliano’s counsels requested “that the Select Committee excuse Mr. Pagliano from personally appearing on September 10, 2015.”<sup>4</sup>

Mr. Pagliano’s attorneys also wrote on September 8, 2015:

Forcing Mr. Pagliano to appear, restate the advice of his counsel, and decline to respond to questions can only be intended to intimidate our client, cause him personal embarrassment, and foster further political controversy.<sup>5</sup>

In response, Chairman Gowdy rejected these requests and forced Mr. Pagliano to appear in person to invoke the Fifth Amendment. On September 9, 2015, Chairman Gowdy sent a letter to Mr. Pagliano’s attorneys listing four reasons for requiring witnesses to invoke their Fifth Amendment rights in person before Congress:

- (1) “[T]he Fifth Amendment privilege against self incrimination is personal, and substantial authority suggests the privilege must be asserted personally.”
- (2) “[A]s a parliamentary and precedential matter, committee chairs of both parties have on several occasions required witnesses to personally assert the Fifth Amendment privilege against self incrimination during a committee proceeding, notwithstanding prior statements by counsel informing the Committee of the intention of the witness to assert Fifth Amendment rights.”
- (3) “Among the legitimate reasons for requiring an appearance implicitly recognized by the Committee ‘are the committee’s right to evaluate the privilege assertion, the possibility that the witness will waive or not assert the privilege, the possibility that the committee will agree to hear the witness in executive session, and the possibility that the committee will immunize the witness’s testimony under 18 U.S.C § 6005.”
- (4) “[W]ith respect to your unsubstantiated assertion that the Committee can only intend ‘to intimidate [your] client, cause him personal embarrassment, and foster political controversy,’ I want to assure you that nothing could be further from the truth.”<sup>6</sup>

On September 10, 2015, Mr. Pagliano appeared before the Benghazi Select Committee and formally invoked his Fifth Amendment rights.

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<sup>4</sup> Letter from Mark J. McDougall et al., Counsel to Bryan Pagliano, to Chairman Trey Gowdy, House Select Committee on Benghazi (Aug. 31, 2015).

<sup>5</sup> Letter from Mark J. McDougall et al., Counsel to Bryan Pagliano, to Chairman Trey Gowdy, House Select Committee on Benghazi (Sept. 8, 2015).

<sup>6</sup> Letter from Chairman Trey Gowdy, House Select Committee on Benghazi, to Mark MacDougall, Akin, Gump, Strauss, Hauer & Feld LLP (Sept. 9, 2015).

Former Chairman Darrell Issa took an even more aggressive approach last Congress when he issued a subpoena to compel former IRS employee Lois Lerner to publicly assert her Fifth Amendment rights in person—not once, but twice. Like Chairman Gowdy, Chairman Issa argued that this was necessary because of the possibilities “that she will waive or choose not to assert the privilege as to at least certain questions,” “that the Committee will immunize her testimony,” or “that the Committee will agree to hear her testimony in executive session.”<sup>7</sup>

### **Request for Subpoena for David Daleiden**

All of the arguments made by Chairman Gowdy and former Chairman Issa apply with equal force to Mr. Daleiden. Based on Republican policy and practice alone, the Committee should issue a subpoena to compel Mr. Daleiden to testify before the Committee in person and to invoke his Fifth Amendment right not to answer questions that may incriminate him. It is unclear why the Committee would break from this practice in Mr. Daleiden’s case, particularly since the Committee is relying so extensively on the results of his group’s potentially illegal activities.

In both previous cases, Democrats objected to forcing witnesses to appear in person after their attorneys had informed the Committees that their clients would invoke the Fifth Amendment. In this case, however, it is entirely unclear whether Mr. Daleiden will in fact invoke the Fifth Amendment when he appears before the Committee.

On August 21, 2015, Mr. Daleiden’s attorneys suggested in a civil case in California that Mr. Daleiden would invoke the Fifth Amendment in that venue. They advised the Court that “all individual defendants plan to invoke their Fifth Amendment privilege to refrain from self-incrimination.”<sup>8</sup>

However, just last week, on September 18, 2015, Mr. Daleiden indicated during a press interview that “he is likely to comply with an expected invitation to testify before Congress.”<sup>9</sup> In fact, Mr. Daleiden has been talking freely and extensively about his activities:

- On August 27, 2015, less than a week after Mr. Daleiden’s attorneys suggested that he would invoke the Fifth Amendment, the *Washington Post* reported that he tried to defend his selective video edited by claiming that “gaps in the longer video were bathroom breaks taken by the actors wearing hidden cameras, or long periods during which an actor sat silently in a waiting room.”<sup>10</sup>

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<sup>7</sup> Letter from Chairman Darrell Issa, House Committee on Oversight and Government Reform, to William W. Taylor, III, Zuckerman Spaeder, LLP (May 21, 2013).

<sup>8</sup> Civil Minutes, *National Abortion Federation v. Center for Medical Progress* (case no. 15-cv-03522-WHO) (Aug. 21, 2015) (online at <http://prochoice.org/wp-content/uploads/2015-08-21-78-Civil-Minutes.pdf>).

<sup>9</sup> *Meet the Californian Who Might Shut Down the Government*, Politico (Sept. 21, 2015) (online at [www.politico.com/tipsheets/politico-pulse/2015/09/pro-morning-pulse-210307](http://www.politico.com/tipsheets/politico-pulse/2015/09/pro-morning-pulse-210307)).

<sup>10</sup> *Videos Deceptively Edited, Planned Parenthood Tells Congress*, Washington Post (Aug. 27, 2015) (online at [www.washingtonpost.com/national/videos-deceptively-edited-](http://www.washingtonpost.com/national/videos-deceptively-edited-)



- Similarly, on September 4, 2015, *Fox News* aired a one-hour special in which Mr. Daleiden described in detail some of the potentially illegal tactics that he and his team used in their three-year effort to entrap Planned Parenthood. *Fox News* reported that these tactics “would probably get them fired in most newsrooms.”<sup>11</sup>
- On September 15, Mr. Daleiden hosted his own “webinar,” or online video conference, during which he discussed his group’s actions.<sup>12</sup>

Based on Mr. Daleiden’s own statements, we simply do not know at this time whether he will in fact invoke the Fifth Amendment before the Committee, and the only way to determine whether he will do so is to issue a subpoena compelling him to appear on Tuesday.

### Conclusion

The contrast between the policy used by House Republicans in these scenarios is striking. When attempting to target Secretary Clinton for the Benghazi attacks or President Obama for the IRS scandal, witnesses are hauled before Congress and forced to assert their Fifth Amendment rights in person, sometimes more than once. Here, there appears to be a different standard. Republicans have been letting Mr. Daleiden off the hook even though his group’s potentially illegal actions form the very foundation of the congressional investigation itself.

For these reasons, I respectfully request that you issue a subpoena to compel Mr. Daleiden’s testimony at next Tuesday’s hearing.

Sincerely,



Elijah E. Cummings  
Ranking Member

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[planned-parenthood-tells-congress/2015/08/27/5633612c-4cdd-11e5-902f-39e9219e574b\\_story.html](http://planned-parenthood-tells-congress/2015/08/27/5633612c-4cdd-11e5-902f-39e9219e574b_story.html)).

<sup>11</sup> *Planned Parenthood: The Hidden Harvest*, Fox News (Sept. 4, 2015) (online at <http://video.foxnews.com/v/4464998729001/fox-news-reporting-planned-parenthood-the-hidden-harvest/?#sp=show-clips>).

<sup>12</sup> *Stop Baby Parts Trafficking*, Online Webcast Event (Sept. 15, 2015) (online at [www.thomasmoresociety.org/pro-life-leaders-to-host-urgent-stop-baby-parts-trafficking-nationwide-webcast/](http://www.thomasmoresociety.org/pro-life-leaders-to-host-urgent-stop-baby-parts-trafficking-nationwide-webcast/)).