

MINORITY VIEWS

The Democratic Members of the Committee on Oversight and Government Reform opposed the resolution of contempt for Bryan Pagliano. Every Democratic Member that was present voted in opposition to the resolution.

- Since Labor Day, the Oversight Committee has held five days of “emergency” hearings on Hillary Clinton’s emails. In those three weeks, the Chairman issued 12 subpoenas, which is more than one a day excluding weekends. It is also more than a third of the total number of subpoenas the Chairman issued in all of 2016. The Chairman issued all of the subpoenas unilaterally, without any debate or vote.
- The actions by the Committee raise serious legal, ethical, and Constitutional concerns, and Members should not be placed in a position of voting in favor of a resolution that could subject them or their staffs to potential disciplinary action.
- Mr. Pagliano has already asserted his Fifth Amendment rights before the Select Committee on Benghazi—a key fact that the current contempt resolution completely disregards.
- There is no legitimate legislative purpose in forcing Mr. Pagliano to appear before the Committee to assert his Fifth Amendment rights before Congress for a second time, and there is certainly no legitimate legislative purpose in forcing him to do so in public.
- Although Republicans argue that Mr. Pagliano received immunity from the Department of Justice, his attorneys have already explained that this immunity agreement was limited, and a federal court has already ruled that Mr. Pagliano continues to have the right to assert his Constitutional privileges in separate proceedings.
- The current contempt resolution inaccurately accuses Mr. Pagliano of a “complete refusal to comply with a lawful subpoena, or even to negotiate in good faith to determine a mutually agreeable date to testify.”
- In fact, despite the abusive and unilateral subpoena, Mr. Pagliano’s attorneys offered to have him appear in person to assert his Fifth Amendment rights in executive session on the date set by the Committee. The Chairman refused, but he has not offered a valid reason for doing so.
- On September 16, 2016, the Chairman secretly sent armed U.S. Marshals into Mr. Pagliano’s workplace to personally serve a second subpoena for his public appearance before the Committee. This action—using armed Marshals instead of Committee staffers in business attire—served no purpose but to further harass and intimidate Mr. Pagliano. There was no vote, debate, consultation, or even notification to Democratic Committee Members before the Chairman took this unilateral action.

- If the Chairman wants to obtain Mr. Pagliano's Fifth Amendment assertion for the record, he could easily hold a deposition, as Chairman Trey Gowdy did with Mr. Pagliano before the Select Committee on Benghazi. Alternatively, he could have moved the hearing into executive session, recessed, notified Mr. Pagliano's attorneys, and received his assertion on-the-record. Chairman Chaffetz has declined to follow either approach and instead, demanded a public hearing.
- The actions of the Committee demonstrate a fundamental disrespect for the principles of separation of powers in an effort to re-investigate the work of the FBI, which has already concluded that no criminal charges were warranted. FBI Director Jim Comey reported that "we found no evidence that any of the additional work-related emails were intentionally deleted in an effort to conceal them" and that "we didn't find any evidence of evil intent and intent to obstruct justice."
- The sole purpose of compelling Mr. Pagliano to appear in public to invoke his Fifth Amendment rights for a second time before Congress is to harass and embarrass him and those associated with him, and to create fodder for political attack ads against Secretary Clinton during her presidential campaign. This is a blatant abuse of taxpayer funds for partisan political purposes.

I. ETHICS RULES PROHIBITING HARASSMENT OF WITNESSES

Legal ethics rules set forth by the American Bar Association (ABA) and the District of Columbia Bar prohibit attorneys from taking actions to embarrass, harass, or burden an individual.

According to the ABA's professional ethical standards for attorneys, Rule 4.4 of the Model Rules of Professional Conduct states that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."¹

Rule 8.4(a) considers it to be "professional misconduct" for an attorney to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."²

Rule 8.4(d) states that it is professional misconduct for lawyers to "engage in conduct that is prejudicial to the administration of justice."³

¹ American Bar Association, *Model Rules of Professional Conduct, Rule 4.4: Respect for the Rights of Third Persons* (2016) (online at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_4_respect_for_rights_of_third_persons.html).

² American Bar Association, *Model Rules of Professional Conduct, Rule 8.4: Misconduct* (2016) (online at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html).

³ *Id.*

The District of Columbia Bar has interpreted these rules to prohibit attorneys—including congressional staff attorneys—from being involved in the process to compel witnesses who have indicated that they intend to assert their Fifth Amendment privilege at a public hearing when the sole purpose of that action is to “harass or embarrass” the witness.

In January 2011, the D.C. Legal Ethics Committee upheld an earlier opinion barring attorneys from subpoenaing 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.” The Legal Ethics Committee explained that ethical obligations are violated when an attorney compels a witness to appear knowing that the appearance “(1) will provide no information to the committee and (2) is intended merely to degrade a witness.”⁴

The Legal Ethics Committee explained that these rules apply to all attorneys involved in these unethical actions, which includes staff attorneys who participate in preparation for hearings or participate in the hearings themselves. The opinion states:

Opinion 31 correctly asserted that when an attorney causes a witness to be called for the sole purpose of harassing or degrading that witness, that attorney violates our rules. See Rules 4.4, 8.4(d). Similarly, a lawyer would violate Rule 8.4(d) by engaging in abuse or harassment of the witness. Further, such conduct by a staff lawyer might constitute assisting another in violating the rules. See D.C. Rule 8.4(a). In addition to participation in the hearing itself, such related activities as preparing subpoenas also could subject a lawyer to sanctions, though we note that Rule 5.2 protects a subordinate lawyer who acts at the direction of a supervising attorney so long as there is a reasonable argument that calling the witness is permitted by the Rules.⁵

In addition, House Rules and the Code of Official Conduct generally proscribe unethical behavior. House Rule XXIII provides: “A Member, Delegate, Resident Commissioner, officer, or employee of the House shall behave at all times in a manner that shall reflect creditably on the House.”⁶

II. SUBPOENAS AND PROPOSED CONTEMPT CONSTITUTE HARASSMENT

Mr. Pagliano has already asserted his Fifth Amendment right against self-incrimination before the Select Committee on Benghazi—a key fact that the Chairman’s contempt resolution completely disregards. There is no legitimate legislative purpose in forcing Mr. Pagliano to appear to assert his Fifth Amendment rights before Congress for a second time, and there is no legitimate legislative purpose in forcing him to do so in public.

⁴ D.C. Bar, *Ethics Opinion 358: Subpoenaing Witness When Lawyer for Congressional Committee Has Been Advised that Witness Will Decline to Answer Any Questions on Claim of Privilege; Legal Ethics Opinion 31 Revisited* (Jan. 2011) (online at www.dcb.org/bar-resources/legal-ethics/opinions/opinion358.cfm).

⁵ *Id.*

⁶ House Rule XXIII, clause 1.

Approximately one year ago, the Chairman of the Select Committee on Benghazi, Rep. Trey Gowdy, subpoenaed Mr. Pagliano to testify in a closed-door deposition about this same topic, during this same Congress. In a letter prior to his appearance, Mr. Pagliano's counsel informed the Select Committee that Mr. Pagliano would invoke his Fifth Amendment privilege as to any and all questions.⁷

Chairman Gowdy explained at that time that he had "appropriate potential reasons for the Committee to go forward with Mr. Pagliano's appearance," including "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."⁸

Instead of requiring Mr. Pagliano to appear in a public hearing, however, Chairman Gowdy permitted Mr. Pagliano to invoke his privilege in a closed deposition. Similar to an executive session hearing, a deposition is an official Committee activity with a transcribed official record. Mr. Pagliano attended the deposition and invoked his Fifth Amendment privilege to all substantive questions.

In June 2016, Mr. Pagliano again invoked his Fifth Amendment rights in a civil deposition brought by conservative group Judicial Watch. Mr. Pagliano invoked his Fifth Amendment rights for every substantive question asked, including more than 125 questions regarding "the creation and operation of clintonemail.com for State Department business."⁹

The Justice Department provided Mr. Pagliano with limited use immunity during its criminal investigation, and a federal district court judge examining that immunity agreement determined that it did not preclude Mr. Pagliano from continuing to invoke his Fifth Amendment rights in separate proceedings.¹⁰

Despite these facts, the Oversight Committee demanded that Mr. Pagliano come before Congress once again to invoke his Fifth Amendment privilege in public.

⁷ Letter from Mark J. MacDougall, Counsel for Bryan Pagliano, to Chairman Trey Gowdy, House Select Committee on Benghazi (Sept. 8, 2015).

⁸ Letter from Chairman Trey Gowdy, House Select Committee on Benghazi, to Mark J. MacDougall, Counsel for Bryan Pagliano (Sept. 9, 2015).

⁹ Deposition of Bryan Pagliano (June 22, 2016), *Judicial Watch, Inc., v. U.S. Department of State*, D.D.C. (No. 13-cv-1363) (online at www.judicialwatch.org/wp-content/uploads/2016/06/JW-v-State-Pagliano-Deposition-01363.pdf); see also *Judicial Watch: Clinton IT Staffer Pleads 5th 125 Consecutive Times*, CNN (June 22, 2016) (online at www.cnn.com/2016/06/22/politics/bryan-pagliano-judicial-watch-deposition/).

¹⁰ Minute Order Issued by Judge Emmet G. Sullivan (June 14, 2016), *Judicial Watch, Inc., v. U.S. Department of State*, D.D.C. (No. 13-cv-1363).

On September 7, 2016, the Chairman sent a letter inviting Mr. Pagliano to testify before the Committee in six days and threatening the imminent use of the compulsory process, stating: “The Committee will send a subpoena shortly and expects Mr. Pagliano’s attendance.”¹¹

The next day, on September 8, 2016, the Chairman issued a unilateral subpoena, with no debate or vote, compelling Mr. Pagliano’s appearance at the hearing scheduled for September 13, 2016.¹²

On September 12, 2016, Mr. Pagliano’s attorneys objected to these short-notice demands, writing: “we must object to the attempted service of a subpoena at 9:00 P.M. that seeks to compel a private citizen to appear before your Committee two business days later.”¹³ Mr. Pagliano’s attorneys explained that Mr. Pagliano “will continue to assert his rights under the Fifth Amendment and will decline to appear” before the Committee’s hearing.¹⁴ Noting that Mr. Pagliano had already asserted his Fifth Amendment rights before the Select Committee on Benghazi, his attorneys explained:

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.¹⁵

On Friday, September 16, 2016, without notifying other Members of the Committee, the Chairman sent armed U.S. Marshals into Mr. Pagliano’s workplace to serve yet another unilateral subpoena compelling him to appear before the Committee on September 22, 2016.

There was no reason to send armed Marshals to serve the subpoena. Even if the Chairman believed personal service was required, House rules allow Committee staff to serve subpoenas rather than armed law enforcement authorities.

III. NO LEGITIMATE LEGISLATIVE PURPOSE TO COMPEL MR. PAGLIANO TO APPEAR

On the evening of September 12, 2016, Chairman Chaffetz informed Mr. Pagliano’s attorneys that the Committee’s subpoena remained in effect. The Chairman set forth three possible reasons for Mr. Pagliano to appear:

¹¹ Letter from Chairman Jason Chaffetz, House Committee on Oversight and Government Reform, to Mark J. MacDougall, Counsel for Bryan Pagliano (Sept. 7, 2016).

¹² House Committee on Oversight and Government Reform, Subpoena to Bryan Pagliano (Sept. 8, 2016).

¹³ Letter from Mark J. MacDougall, et al., Counsel for Bryan Pagliano, to Chairman Jason Chaffetz, House Committee on Oversight and Government Reform (Sept. 12, 2016).

¹⁴ *Id.*

¹⁵ *Id.*

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. § 6005.¹⁶

However, there was no reasonable basis or legitimate expectation that any of these three possibilities would materialize.

No Possibility That Mr. Pagliano Would Reverse His Fifth Amendment Assertion

First, with respect to the Fifth Amendment assertion, on September 21, 2016, the day before the second day of hearings was scheduled to occur, Mr. Pagliano's attorneys sent yet another letter reiterating that the "facts have not changed," and that their client would continue to assert his Fifth Amendment rights as to all questions:

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.¹⁷

No Possibility of Going Into Executive Session

Despite claiming that Mr. Pagliano must appear before the Committee because of the possibility that the Committee would vote to go into executive session, the Chairman made clear that he had no intention of doing so.

As described above, the letter from Chairman Chaffetz on September 12, 2016, stated: "The Committee requires Mr. Pagliano's appearance because of, among other reasons ... the possibility that the Committee will agree to hear his testimony in executive session."¹⁸

During the hearing, however, the Chairman made clear that he never intended to permit Mr. Pagliano to make his appearance in executive session. This was expressed in the following exchange with Ranking Member Cummings:

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| Rep. Cummings: | Last night, the Chairman sent another letter to Mr. Pagliano saying that our Committee might go into executive session to accept his Fifth Amendment assertion. |
| Rep. Chaffetz: | No, I did not say that. |
| Rep. Cummings: | Well, what did you say? |

¹⁶ Letter from Chairman Jason Chaffetz, House Committee on Oversight and Government Reform, to Mark J. MacDougall, Counsel for Bryan Pagliano (Sept. 12, 2016).

¹⁷ Letter from Mark J. MacDougall, et al., Counsel for Bryan Pagliano, to Chairman Jason Chaffetz, House Committee on Oversight and Government Reform (Sept. 21, 2016).

¹⁸ Letter from Chairman Jason Chaffetz, House Committee on Oversight and Government Reform, to Mark J. MacDougall, Counsel for Bryan Pagliano (Sept. 12, 2016).

Rep. Chaffetz: I want this Committee to be open and transparent. We do things as everything we can possibly do out in the open. That is the American way. That's the way this Committee is going to be run.¹⁹

The Chairman's claim directly contradicted the statements he had made in his letter to Mr. Pagliano the night before, while at the same time making clear that executive session was not a real option under consideration by the Committee.

In those comments at the hearing, the Chairman also clearly rejected an offer from Mr. Pagliano's attorneys to appear before the Committee and assert his Fifth Amendment privilege against self-incrimination in executive session. Earlier that morning, Mr. Pagliano's counsel had offered:

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.²⁰

No Possibility of Granting Immunity

On September 22, 2016, the Department of Justice provided Committee Members and staff with access to Mr. Pagliano's immunity agreement with the Department, and the Committee was able to confirm that it is a limited grant of use immunity that permits Mr. Pagliano to continue to assert his Fifth Amendment rights in separate proceedings, including a congressional hearing.

Republican Committee Members have publicly criticized the Justice Department for its decision to grant immunity to Mr. Pagliano. As Rep. Gowdy stated in a television interview:

These are the two people the FBI decides to give immunity to, Bryan Pagliano and this guy at Platte River, if it happened, if it happened. Those are the two that you would want to prosecute, so you're giving immunity to the trigger people, and everybody goes free.²¹

Rep. Gowdy continued:

¹⁹ House Committee on Oversight and Government Reform, *Hearing on Examining Preservation of State Department Federal Records* (Sept. 13, 2016).

²⁰ Letter from Mark. J. MacDougall, et al., Counsel for Bryan Pagliano, to Chairman Jason Chaffetz, House Committee on Oversight and Government Reform (Sept. 13, 2016).

²¹ *America's Newsroom*, Fox News (Sept. 9, 2016).

That's why those of us who used to do it for a living didn't like to give immunity. That's why you never heard me calling for giving Bryan Pagliano immunity. You better be right on who the trigger person is.²²

Similarly, Chairman Chaffetz has criticized the Justice Department's decision to grant immunity to individuals in the case, stating to the Associated Press: "No wonder they couldn't prosecute a case. ... They were handing out immunity deals like candy."²³

IV. CONCLUSION

There was no credible expectation that Mr. Pagliano would choose to waive his Fifth Amendment rights, that the Chairman would permit Mr. Pagliano to invoke those rights in executive session, or that the Chairman would seek immunity for Mr. Pagliano. As a result, the Committee has failed to set forth any legitimate legislative purpose for demanding that Mr. Pagliano appear in public before the Committee to invoke his rights for a second time.

At the September 13, 2016, hearing, Ranking Member Cummings expressed his concerns about the Committee's actions:

There's no legitimate reason for Republicans to force Mr. Pagliano to appear yet again before Congress just to assert his Fifth Amendment rights one more time. How many times will Republicans do this? Will they force him to take the Fifth in front of the Science Committee next? How about the Homeland Security or Intelligence Committee? Should we have them go to those Committees too? This is an absolute abuse of authority.

Now, Chairman Gowdy and I disagree about many things, but I give him full credit for one thing that he did. At least when he subpoenaed Mr. Pagliano, he did it in a private session. He did not force Mr. Pagliano to assert the Fifth in public just to humiliate him, and I respect Mr. Gowdy for that.

Let me say this as plainly as I can. If this Committee's goal were just to get Mr. Pagliano or other witnesses on the record asserting their Fifth Amendment rights, we could do that easily in a private session just like Mr. Gowdy did with Mr. Pagliano a year ago. There's no legitimate reason to force Mr. Pagliano, or the other witnesses who were subpoenaed for this hearing, to assert the Fifth in open session. There's only an illegitimate reason—to get a photo op that Republicans think could harm Secretary Clinton's presidential campaign.²⁴

²² *Id.*

²³ *GOP Lawmaker: FBI Gave Immunity to Top Clinton Aide*, Associated Press (Sept. 23, 2016).

²⁴ House Committee on Oversight and Government Reform, *Hearing on Examining Preservation of State Department Federal Records* (Sept. 13, 2016).

When the sole purpose of the Committee's actions is to pillory, harass, and abuse an individual, those actions are illegitimate and unethical. The Committee's actions in the past three weeks raised serious legal, ethical, and Constitutional concerns, and therefore, Democratic Members of the Committee chose to vote against the resolution of contempt for Mr. Pagliano.

A handwritten signature in blue ink that reads "Elijah E. Cummings". The signature is stylized with a large, sweeping "R" at the end.

Elijah E. Cummings
Ranking Member