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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

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

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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.

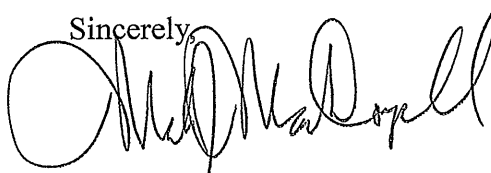
against him in a subsequent criminal prosecution.” *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 887 (D.C. Cir. 1981). In other words, a grant of “use” immunity does not prevent the government from prosecuting; it merely limits the government’s sources of evidence. The Supreme Court has 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.”).

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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,

A handwritten signature in black ink, appearing to read 'Mark J. MacDougall', written over the word '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
Ranking Member