

R E S O L U T I O N  
RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND  
BRYAN PAGLIANO  
IN CONTEMPT OF CONGRESS FOR REFUSAL TO  
COMPLY WITH A SUBPOENA DULY ISSUED BY THE  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

R E P O R T  
OF THE  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
HOUSE OF REPRESENTATIVES

The form of the resolution that the Committee on Oversight and Government Reform would recommend to the House of Representatives for citing Bryan Pagliano for contempt of Congress pursuant to this report is as follows:

*Resolved*, That because Mr. Bryan Pagliano, having been compelled to testify touching matters of inquiry committed to the House Committee on Oversight and Government Reform, refused to testify before the Committee, Mr. Pagliano shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

*Resolved*, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on Oversight and Government Reform, detailing the refusal of Mr. Pagliano to testify before the Committee on Oversight and Government Reform as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Mr. Pagliano be proceeded against in the manner and form provided by law.

*Resolved*, That the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena.

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## ***I. Executive Summary***

Mr. Bryan Pagliano, formerly a Senior Advisor in the Bureau of Information Resource Management at the U.S. Department of State, refused to comply with a congressional subpoena for testimony before the Committee on Oversight and Government Reform. Mr. Pagliano was expected to testify regarding the circumstances that resulted in a failure to preserve federal records belonging to the State Department. His testimony is vital to the Committee's investigation into this matter.

Mr. Pagliano did not appear, much less provide testimony, before the Committee, despite a duly issued subpoena that compelled him to do so on September 13, 2016. No legal basis exists for his failure to appear.

Accordingly, the Chairman of the Committee on Oversight and Government Reform recommends that the House find Mr. Pagliano in contempt for his failure to comply with the subpoena issued to him on September 8, 2016.

## ***II. Authority and Purpose***

An important corollary to the powers expressly granted to Congress by the Constitution is the responsibility to perform rigorous oversight of the Executive Branch. The U.S. Supreme Court has recognized this Congressional power and responsibility on numerous occasions. For example, in *McGrain v. Daugherty*, the Court held:

[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information—which not infrequently is true – recourse must be had to others who do possess it.”<sup>1</sup>

In addition, as Chief Justice Earl Warren wrote in *Watkins v. United States*: “The power of Congress to conduct investigations is inherent in the legislative process. That power is broad.”<sup>2</sup>

Further, both the Legislative Reorganization Act of 1946 (P.L. 79-601), which directed House and Senate Committees to “exercise continuous watchfulness” over Executive Branch programs under their jurisdiction, and the Legislative Reorganization Act of 1970 (P.L. 91-510), which authorized committees to “review and study, on a continuing basis, the application, administration, and execution” of laws, codify the powers of Congress.

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<sup>1</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

<sup>2</sup> *Watkins v. United States*, 354 U.S. 178, 1887 (1957).

The Committee on Oversight and Government Reform is a standing committee of the House of Representatives, duly established pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the U.S. Constitution.<sup>3</sup> House Rule X grants the Committee broad jurisdiction over federal “[g]overnment management” and reform, including the “[o]verall economy, efficiency, and management of government operations and activities,” the “[f]ederal civil service,” and “[r]eorganizations in the executive branch of the Government.”<sup>4</sup> House Rule X further endows the Committee with broad oversight jurisdiction, including authority to “conduct investigations of any matter without regard to clause 1, 2, 3, or this clause [of House Rule X] conferring jurisdiction over the matter to another standing committee.”<sup>5</sup> Finally, the House Rules direct the Committee to make available “the findings and recommendations of the committee . . . to any other standing committee having jurisdiction over the matter involved.”<sup>6</sup>

House Rule XI specifically authorizes the Committee to “require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary.”<sup>7</sup> The rule further provides that the “power to authorize and issue subpoenas” may be delegated to the Committee chairman.<sup>8</sup> Pursuant to Committee Rule 12(d), the Chairman may “Authorize and issue subpoenas as provided in House Rule XI, clause 2(m), in the conduct of any investigation or activity or series of investigations or activities within the jurisdiction of the Committee.”<sup>9</sup> The September 8 subpoena discussed in this report was issued pursuant to this authority.

The Committee has undertaken its investigation into the circumstances that resulted in a failure to preserve federal records belonging to the State Department pursuant to the authority delegated to it under the House Rules, including as described above.

The oversight and legislative purposes of the investigation at issue here, described more fully immediately below, include, but are not limited to: (1) seeking information about former Secretary Hillary Clinton’s use of a private, non-secure email server during her time at the Department of State, as well as the transmittal of classified national security information on that server; (2) examining the circumstances that resulted in the failure to preserve federal records arising during Secretary Clinton’s tenure, as required by the Federal Records Act, and to produce such records pursuant to Congressional requests or requests made pursuant to the Freedom of Information Act and; (3) determining what, if any, changes to the Federal Records Act of 1950, Freedom of Information Act of 1966, Ethics in Government Act of 1978, or any other federal law(s) may be necessary to prevent these or similar circumstances from recurring.

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<sup>3</sup> U.S. CONST., art I, § 5, clause 2.

<sup>4</sup> House Rule X, clause (1)(n).

<sup>5</sup> House Rule X, clause (4)(c)(2).

<sup>6</sup> *Id.*

<sup>7</sup> House Rule XI, clause (2)(m)(1)(B).

<sup>8</sup> House Rule XI, clause 2(m)(3)(A)(1).

<sup>9</sup> Rules of the Comm. on Oversight & Gov’t Reform, U.S. House of Representatives, 114th Cong., Rule 12(d).

### **III. Background on the Committee's Investigation**

The Committee has conducted longstanding oversight over the use of non-official email accounts for official business.<sup>10</sup> In the context of that oversight, on December 12, 2012, Chairman Darrell Issa wrote to Secretary Clinton regarding whether she or other senior State Department officials had ever used a personal email account to conduct official business.<sup>11</sup> In the course of its investigation on a separate matter, the House Select Committee on Benghazi discovered that Secretary Clinton had in fact used a personal email account for official business.<sup>12</sup> On March 10, 2015, former Secretary Clinton publicly acknowledged that she exclusively used a personal email account, set up on a private server in her home, to conduct government business as Secretary of State.<sup>13</sup>

The Committee has monitored what implications these events have for federal laws within its jurisdiction.<sup>14</sup> On December 16, 2015, the Committee held a hearing with the Office of Government Ethics, which enforces the Ethics in Government Act, to consider possible legislative changes.<sup>15</sup> On January 11, 2016, on the same day the House passed bipartisan Freedom of Information Act legislation, the Committee released a report entitled *FOIA Is Broken: A Report*.<sup>16</sup> On July 12, 2016, the Committee favorably reported by voice vote H.R. 5709, the Federal Records Modernization Act of 2016, which creates direct penalties for violations of the Federal Records Act.<sup>17</sup>

On July 7, 2016, James Comey, Director of the Federal Bureau of Investigation (FBI), testified before the Committee regarding the FBI's investigation into whether classified information was transmitted or stored on unclassified systems in violation of federal criminal statutes and whether classified information was compromised by unauthorized individuals.<sup>18</sup> The FBI did not make findings regarding the Federal Records Act, the Freedom of Information Act, the Ethics in Government Act, or potential false statements to Congress. On July 11, 2016, the Committee requested the FBI case file and all attachments.<sup>19</sup> On August 16, 2016, the FBI produced a heavily redacted portion of the file to the Sergeant at Arms of the U.S. House of

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<sup>10</sup> See, e.g., Letter from Hon. Henry Waxman, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Michael Astrue, Comm'r, U.S. Soc. Sec. Admin, *et al.*, Apr. 12, 2007.

<sup>11</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Hillary Rodham Clinton, Sec'y, U.S. Dep't of State, Dec. 13, 2012.

<sup>12</sup> See Letter from Hon. Trey Gowdy, Chairman, H. Select Comm. on Benghazi, to David E. Kendall, Williams & Connolly LLP, Dec. 2, 2014.

<sup>13</sup> Statement of Hillary Rodham Clinton, Mar. 10, 2015.

<sup>14</sup> See, e.g., Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. John F. Kerry, Sec'y, U.S. Dep't of State, Jan. 19, 2016.

<sup>15</sup> *Merit Sys. Prot. Bd., Office of Gov't Ethics, and Office of Special Counsel Reauthorization: Hearing Before the H. Subcomm. on Gov't Operations*, 114th Cong. (Dec. 16, 2015).

<sup>16</sup> H. Comm. on Oversight & Gov't Reform Staff Report, *FOIA Is Broken: A Report*, 114th Congress (Jan. 11, 2016).

<sup>17</sup> Fed. Records Modernization Act, H.R. 5709, 114th Cong. (as reported by the H. Subcomm. on Gov't Operations, July 12, 2016).

<sup>18</sup> *Oversight of the State Dep't: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (July 7, 2016) (testimony of Hon. James Comey, Dir., Fed. Bureau of Investigation).

<sup>19</sup> Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. James Comey, Dir., Fed. Bureau of Investigation, July 19, 2016.

Representatives.<sup>20</sup> When Congress resumed its session in September, the Committee scheduled multiple hearings regarding various issues related to its investigation, including the individuals from the State Department who set up and/or maintained Secretary Clinton's private server.<sup>21</sup>

#### ***IV. Mr. Pagliano's Refusal to Comply with the Committee's Subpoena for Testimony at the September 13, 2016 Hearing***

On September 6, 2016, Committee staff contacted Mr. Pagliano's attorney to inform him of the need for his client's testimony at an upcoming Committee hearing.<sup>22</sup> The next day, Mr. Pagliano's attorney advised Committee staff that Mr. Pagliano would not appear voluntarily, and that if he did appear, he would assert his rights under the Fifth Amendment and decline to answer questions related to the matters that were the subject of the hearing. Committee staff informed Mr. Pagliano's attorney of the Committee's established practice of requiring witnesses to appear in person to assert their right pursuant to the Fifth Amendment to decline to answer questions.<sup>23</sup>

Later on September 7, 2016, Chairman Chaffetz sent Mr. Pagliano's attorney a formal witness invitation letter indicating the Committee expected Mr. Pagliano's attendance.<sup>24</sup> On September 8, 2016, the Chairman issued to Mr. Pagliano's attorney a subpoena compelling Mr. Pagliano's appearance before the Committee on September 13, 2016, at 10:00 a.m.<sup>25</sup>

The Committee received no response from Mr. Pagliano or his attorneys until late on September 12, 2016, when Mr. Pagliano's attorneys transmitted a letter to the Committee (1) advising that Mr. Pagliano would continue to assert his right under the Fifth Amendment,<sup>26</sup> and (2) requesting that "the Committee formally excuse Mr. Pagliano from personally appearing on September 13, 2016."<sup>27</sup>

That same evening, Chairman Chaffetz sent Mr. Pagliano's attorney a letter stating that Mr. Pagliano's prior experience makes clear (1) Mr. Pagliano is uniquely qualified to answer questions that will assist the Committee's investigation, which is why at least two other investigative entities sought his testimony; and (2) Mr. Pagliano has in fact provided testimony

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<sup>20</sup> Letter from Hon. James Comey, Dir., Fed. Bureau of Investigation, to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Aug. 16, 2016.

<sup>21</sup> See, e.g., *Examining FOIA Compliance at the Dep't of State: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Sept. 8, 2016), *Examining Preservation of State Dep't Records: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Sept. 13, 2016); see also *Classifications and Redactions in FBI's Investigative File: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Sept. 12, 2016).

<sup>22</sup> Telephone Call from Majority Staff, H. Comm. on Oversight & Gov't Reform, to Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP, Sept. 7, 2016.

<sup>23</sup> Telephone Call between Majority Staff, H. Comm. on Oversight & Gov't Reform, and Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP, Sept. 7, 2016.

<sup>24</sup> Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP, Sept. 7, 2016.

<sup>25</sup> Subpoena from H. Comm. on Oversight & Gov't Reform to Mr. Bryan Pagliano (Sept. 8, 2016).

<sup>26</sup> Letter from Mark J. MacDougall, Esq., *et al.*, Akin Gump Strauss Hauer & Feld LLP, to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, Sept. 12, 2016, at 2.

<sup>27</sup> *Id.*

under certain conditions, specifically, to the FBI pursuant to an immunity agreement.<sup>28</sup> The letter advised that the Committee required Mr. Pagliano's appearance because of, among other reasons, (1) the possibility that he would waive or choose not to assert the privilege as to some or all questions; (2) the possibility that the Committee would agree to hear his testimony in executive session; and (3) the possibility that the Committee would seek, pursuant to 18 U.S.C. § 6005, to obtain a court order immunizing his testimony.<sup>29</sup> Therefore, the subpoena for Mr. Pagliano remained in effect, compelling him to appear on September 13, 2016 at 10:00 a.m.<sup>30</sup>

On September 13, 2016 at 8:51 a.m., Mr. Pagliano's attorneys transmitted a letter to the Committee stating that in the event the Committee voted to proceed in executive session, Mr. Pagliano's attorneys believed Mr. Pagliano would agree to appear on short notice to formally decline to answer all questions in reliance on the Fifth Amendment.<sup>31</sup> Chairman Chaffetz advised Mr. Pagliano's attorneys that the subpoena remained in effect and that Mr. Pagliano was expected to appear. At 10:00 a.m. on September 13, 2016, Mr. Pagliano did not appear before the Committee as compelled by the valid subpoena issued by Chairman Chaffetz on September 8, 2016.

## **V. Conclusion**

The refusal of Mr. Bryan Pagliano to appear before the Committee pursuant to a subpoena has no legal basis. Such complete refusal to comply with a lawful subpoena, or even to negotiate in good faith to determine a mutually agreeable date to testify, threatens the ability of this Committee, and every House Committee, to carry out its legislative and oversight functions. The House cannot accept a process whereby a subpoena can simply be ignored.

Mr. Pagliano willfully failed to comply with a duly issued subpoena from a standing Committee of the U.S. House of Representatives. It is imperative to protect the institutional interests of the House by enforcing the subpoena through the contempt process. This serious matter requires the Committee to seek action by the full House in this manner.

There is no constitutional impediment to (i) the Committee approving a resolution recommending that the full House hold Mr. Pagliano in contempt of Congress; (ii) the full House approving a resolution holding Mr. Pagliano in contempt of Congress; (iii) if such resolutions are approved, the Speaker certifying the matter to the United States Attorney for the District of Columbia, pursuant to 2 U.S.C. § 194 and; (iv) a grand jury indicting, and the United States Attorney prosecuting, Mr. Pagliano under 2 U.S.C. § 192.

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<sup>28</sup> Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Mark J. MacDougall, Esq., Akin Gump Strauss Hauer & Feld LLP, Sept. 12, 2016, at 1-2.

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.*

<sup>31</sup> Letter from Mark J. MacDougall, Esq., *et al.*, Akin Gump Strauss Hauer & Feld LLP, to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, Sept. 12, 2016, at 2.