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# Congress of the United States

## House of Representatives

### Select Committee on Benghazi

1036 Longworth House Office Building  
Washington, D.C. 20515-6090

(202) 226-7100

<http://benghazi.house.gov>

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114<sup>TH</sup> CONGRESS

SUSANNE SACHSMAN GROOMS, MINORITY  
STAFF DIRECTOR

September 2, 2015

**To: Democratic Members of the Select Committee on Benghazi**

**Fr: Democratic Committee Staff**

**Re: Bryan Pagliano's Assertion of Fifth Amendment Privilege**

On August 31, 2015, attorneys for former State Department employee Bryan Pagliano sent a letter to Chairman Gowdy indicating that he would assert his Fifth Amendment right not to appear before the Select Committee for a deposition on September 10, 2015.<sup>1</sup> Mr. Pagliano is a former IT staffer who worked for former Secretary Clinton and reportedly assisted with her email and server.

Multiple legal experts have concluded that there is little, if any, criminal liability relating to the former Secretary's use of private emails. For example, Anne M. Thompkins, the former United States Attorney for the Western District of North Carolina who oversaw the prosecution of General David Petraeus, wrote an op-ed this week rejecting comparisons with General Petraeus, who admitted to knowingly sharing highly classified "code-word" information with his biographer. She concluded that "there has been no evidence of criminal conduct" in Secretary Clinton's case.<sup>2</sup> Many other legal experts have come to the same conclusion.<sup>3</sup>

The letter from Mr. Pagliano's attorneys expresses concern about "the current political environment." In fact, Chairman Gowdy ordered Mr. Pagliano's deposition through a subpoena that he issued unilaterally on August 11, 2015, with no debate or vote by the Select Committee. In addition, when asked during a nationally televised interview five days after issuing this

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<sup>1</sup> Letter from Mark J. MacDougall, Counsel for Bryan Pagliano, to Chairman Trey Gowdy, House Select Committee on Benghazi (Aug. 31, 2015).

<sup>2</sup> *Petraeus Prosecutor: Clinton Has Committed No Crime*, USA Today (Aug. 30, 2015) (online at [www.usatoday.com/story/opinion/2015/08/30/clinton-controversy-no-comparison-petraeus-column/71421242/](http://www.usatoday.com/story/opinion/2015/08/30/clinton-controversy-no-comparison-petraeus-column/71421242/)).

<sup>3</sup> *Legal Experts See No Criminal Trouble for Clinton Thus Far*, Associated Press (Aug. 31, 2015) (online at [www.bigstory.ap.org/article/042f508d2f5a4c9e806b9900e0fc7c77/so-far-legal-experts-see-no-criminal-trouble-clinton](http://www.bigstory.ap.org/article/042f508d2f5a4c9e806b9900e0fc7c77/so-far-legal-experts-see-no-criminal-trouble-clinton)).

subpoena what the email matter has to do “with investigating what happened around Benghazi,” Chairman Gowdy responded, “Well, probably not much of anything.”<sup>4</sup>

Despite the lack of any evidence of criminal activity, it is understandable that attorneys for Mr. Pagliano have advised him to assert his constitutional right not to testify given the onslaught of reckless accusations of criminal conduct that continue to be made by many Republicans—including several running for President—without evidence to support their claims. For example:

- **Donald Trump:** “The fact is, what she’s done is criminal.”<sup>5</sup> “She committed a crime.”<sup>6</sup> “Donald Trump on Saturday afternoon called Hillary Clinton’s use of a private email server at the State Department ‘a criminal problem,’ pouncing again on the controversy that was stirred up this weekend with a joke she made about ‘disappearing’ messages.”<sup>7</sup>
- **Mike Huckabee:** “This has gone from political issue to legal one. . . . If David Petraeus was convicted of giving access just to some classified files, and she has had top secret files that have been accessed through her private server, this is a serious legal issue and she can scream all she wants about how it is just a matter of the right-wing attacking her. No, this is about her violation of the law. . . . I would say that if I were the prosecuting attorney, I’d have a hard time not at least pressing charges and taking it to a jury.”<sup>8</sup>
- **Scott Walker:** “Given Clinton’s reputation for thinking she’s above the rules—and her previous denial that she emailed classified material—a complete and thorough criminal investigation is the only way to get to the bottom of this serious matter.”<sup>9</sup>

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<sup>4</sup> *Carson Rides Post-Debate Bump Into Iowa; Gowdy Talks Clinton’s Widening Email Scandal*, Fox News Sunday (Aug. 16, 2015) (online at [www.foxnews.com/transcript/2015/08/16/carson-rides-post-debate-bump-into-iowa-gowdy-talks-clinton-widening-email/](http://www.foxnews.com/transcript/2015/08/16/carson-rides-post-debate-bump-into-iowa-gowdy-talks-clinton-widening-email/)).

<sup>5</sup> *Donald Trump Accuses Hillary Clinton of ‘Criminal’ Activity in Email Scandal*, Washington Times (July 26, 2015) (online at [www.washingtontimes.com/news/2015/jul/26/donald-trump-accuses-hillary-clinton-of-criminal-a/?page=all](http://www.washingtontimes.com/news/2015/jul/26/donald-trump-accuses-hillary-clinton-of-criminal-a/?page=all)).

<sup>6</sup> *Trump: Clinton ‘Committed a Crime’ With Email Server*, The Hill (Aug. 11, 2015) (online at <http://thehill.com/blogs/ballot-box/presidential-races/250903-trump-clinton-committed-a-crime-with-email-server>).

<sup>7</sup> *Trump on Clinton Emails: ‘It’s a Criminal Problem,’* CNN (Aug. 15, 2015) (online at [www.cnn.com/2015/08/15/politics/hillary-clinton-snapchat-email-server-donald-trump/](http://www.cnn.com/2015/08/15/politics/hillary-clinton-snapchat-email-server-donald-trump/)).

<sup>8</sup> *America’s Newsroom*, Fox News (Aug. 13, 2015) (online at [www.video.foxnews.com/v/4419034219001/huckabee-hopes-lightning-strikes-twice-in-iowa/?#sp=show-clips](http://www.video.foxnews.com/v/4419034219001/huckabee-hopes-lightning-strikes-twice-in-iowa/?#sp=show-clips)).

<sup>9</sup> *Scott Walker Presidential Campaign, Gov. Scott Walker Statement on Possible Criminal Investigation of Hillary Clinton’s Email* (July 24, 2015) (online at [www.scottwalker.com/news/gov-scott-walker-statement-possible-criminal-investigation-hillary-clinton%E2%80%99s-email](http://www.scottwalker.com/news/gov-scott-walker-statement-possible-criminal-investigation-hillary-clinton%E2%80%99s-email)).

- **Lindsay Graham**: “The trust problem looms. I guess this could potentially be a criminal problem for her, because classified information’s involved.”<sup>10</sup>

In addition, Republican Members of Congress, commentators, and conservative news outlets have also repeated these accusations for many weeks. For example:

- **Rep. Darrell Issa**: “The only reasonable path forward is a criminal investigation.”<sup>11</sup>
- **Rep. Blake Farenthold**: “There is no question that Hillary Clinton cannot be trusted,” the Corpus Christi based Congressman concluded. “Now more than ever, the Reagan mantra of ‘trust but verify’ must be applied by an exhaustive, independent and transparent investigation into Secretary Clinton and her staff.”<sup>12</sup>
- **Rudy Giuliani**: “I’d have her under investigation for about five different crimes.”<sup>13</sup>
- **Judge Andrew Napolitano**: “She is in trouble legally if there is a prosecutor with the courage or the authority to prosecute her because in addition to admitting that she diverted government records from the government, in addition to admitting that she put classified information in a non-classified venue, that’s the crime for which General Petraeus has agreed to plead guilty.”<sup>14</sup>
- **Patrick Buchanan**: “How many more of the documents that she had on her private server contain that kind of information? She’s going to first have to lawyer up,” Buchanan said to Steve Malzberg. “And secondly if it’s proven that she really has

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<sup>10</sup> *The Situation Room*, CNN (Aug. 17, 2015) (online at [www.cnn.com/TRANSCRIPTS/1508/17/sitroom.01.html](http://www.cnn.com/TRANSCRIPTS/1508/17/sitroom.01.html)).

<sup>11</sup> *Issa Calls for Criminal Probe of Hillary’s Server*, Washington Examiner (Aug. 12, 2015) (online at [www.washingtonexaminer.com/issa-calls-for-criminal-probe-of-hillarys-server/article/2570090](http://www.washingtonexaminer.com/issa-calls-for-criminal-probe-of-hillarys-server/article/2570090)).

<sup>12</sup> *Texas Rep Says Hillary Clinton Lied to the American People Over ‘Top Secret’ Emails*, Breitbart (Aug. 12, 2015) (online at [www.breitbart.com/texas/2015/08/12/texas-rep-says-hillary-clinton-lied-to-the-american-people-over-top-secret-emails/](http://www.breitbart.com/texas/2015/08/12/texas-rep-says-hillary-clinton-lied-to-the-american-people-over-top-secret-emails/)).

<sup>13</sup> *Giuliani: I’d have Hillary Clinton Facing Criminal Charges for Five Different Crimes*, Right Wing News (July 30, 2015) (online at [www.rightwingnews.com/democrats/giuliani-id-have-hillary-clinton-facing-criminal-charges-for-five-different-crimes-video/](http://www.rightwingnews.com/democrats/giuliani-id-have-hillary-clinton-facing-criminal-charges-for-five-different-crimes-video/)).

<sup>14</sup> *America’s Newsroom*, Fox News (Mar. 30, 2015) (online at <http://insider.foxnews.com/2015/03/30/judge-napolitano-hillary-clinton-has-admitted-obstruction-justice>).

misspoken very possibly deliberately misspoke, you're talking about her potential problem with the Department of Justice and a possible indictment down the road.”<sup>15</sup>

On July 23, 2015, the *New York Times* erroneously reported that Secretary Clinton was the target of a criminal probe into her email use, relying heavily on anonymous sources. However, after the facts emerged, the *New York Times* issued corrections to clarify that the Inspector General's referral was not criminal in nature.<sup>16</sup> The *New York Times*' external editor published a note explaining that the process creating story was “a mistake waiting to happen,” and the *Washington Post*'s Erik Wemple described the process as “a gargantuan mistake.”<sup>17</sup>

The Inspectors General of the Intelligence Community and State Department issued a statement clarifying its referral:

IC IG made a referral detailing the potential compromise of classified information to security officials within the Executive Branch. The main purpose of the referral was to notify security officials that classified information may exist on at least one private server and thumb drive that are not in the government's possession. An important distinction is that the IC IG did not make a criminal referral—it was a security referral made for counterintelligence purposes.<sup>18</sup>

Although some commentators may use the invocation of the Fifth Amendment privilege to assert that a criminal investigation may now be underway, the assertion of the Fifth Amendment privilege does not imply the existence of a criminal investigation. Under well-established jurisprudence, the Fifth Amendment privilege “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.”<sup>19</sup>

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<sup>15</sup> *Buchanan to Hillary: Better Lawyer Up*, Newsmax (Aug. 12, 2015) (online at [www.newsmax.com/Newsmax-Tv/Pat-Buchanan-Hillary-clinton-email-server/2015/08/12/id/669839/](http://www.newsmax.com/Newsmax-Tv/Pat-Buchanan-Hillary-clinton-email-server/2015/08/12/id/669839/)).

<sup>16</sup> *Corrections: July 25, 2015*, *New York Times* (July 25, 2015) (online at [www.nytimes.com/2015/07/25/pageoneplus/corrections-july-25-2015.html?ref=corrections](http://www.nytimes.com/2015/07/25/pageoneplus/corrections-july-25-2015.html?ref=corrections)); *Corrections: July 26, 2015*, *New York Times* (July 26, 2015) (online at [www.nytimes.com/2015/07/26/pageoneplus/corrections-july-26-2015.html?ref=corrections&\\_r=0](http://www.nytimes.com/2015/07/26/pageoneplus/corrections-july-26-2015.html?ref=corrections&_r=0)).

<sup>17</sup> *A Clinton Story Fraught with Inaccuracies: How it Happened and What Next?*, *New York Times* (July 27, 2015) (online at [http://publiceditor.blogs.nytimes.com/2015/07/27/a-clinton-story-fraught-with-inaccuracies-how-it-happened-and-what-next/?\\_r=0](http://publiceditor.blogs.nytimes.com/2015/07/27/a-clinton-story-fraught-with-inaccuracies-how-it-happened-and-what-next/?_r=0)). *NYT's Dean Baquet Exonerates Staffers on Clinton E-mail Story*, *Washington Post* (July 27, 2015) (online at [www.washingtonpost.com/blogs/erik-wemple/wp/2015/07/27/nyts-dean-baquet-exonerates-staffers-on-clinton-e-mail-story/](http://www.washingtonpost.com/blogs/erik-wemple/wp/2015/07/27/nyts-dean-baquet-exonerates-staffers-on-clinton-e-mail-story/)).

<sup>18</sup> Department of State, Office of Inspector General, *Statement from the Inspectors General of the Intelligence Community and the Department of State Regarding the Review of Former Secretary Clinton's Emails* (July 24, 2015) (online at <https://oig.state.gov/whats-new/9811>).

<sup>19</sup> *Kastigar v. United States*, 406 U.S. 441, 444 (1972).