

**Statement of Stanley M. Brand, Esq. Regarding Lois Lerner's
Assertion of Constitutional Privilege**

Dated: June 27, 2013

Counsel for the Committee on Oversight and Government Reform (Minority) has asked me to provide a brief statement concerning my view of whether Lois Lerner, an IRS official who appeared before the Committee on May 22, 2013 in connection with its inquiry into the Internal Revenue Service's consideration of applications for tax exempt status by certain groups, waived her rights under the Fifth Amendment by giving a brief prefatory statement during her appearance. As I stated at the time of her appearance, I do not believe her comments would be construed as a waiver under current judicial interpretations of the Fifth Amendment. It is well settled that the Fifth Amendment privilege against being compelled to testify against oneself is available in congressional proceedings. *Quinn v. United States*, 349 U.S. 155 (1955); *Emspack v. United States*, 349 U.S. 190 (1955). What is also well settled is that the Courts will afford witnesses wide latitude in assessing the sufficiency of the words used to assert the privilege. As the Court in *Quinn* stated "no ritualistic formula is necessary to invoke the privilege... *Quinn's* references to the Fifth Amendment were clearly sufficient to put the Committee on notice of an apparent claim of privilege." 349 U.S. at 164.

Ms. Lerner's brief introductory statement to the Committee, not given in response to any specific question, was simply a profession of her innocence, offered prior to the commencement of Member questioning regarding the substance of the Committee's inquiry. It contained no factual representations relating to the subject matter of the hearing and generally denied wrongdoing.

Indeed, in the *Quinn* case itself, a lengthy colloquy between the witness asserting the privilege and the Committee propounding the questions occurred during the witnesses' appearance. When sworn and questioned, Quinn stated "I would like to make a statement along the lines that [an earlier witness] made yesterday in regard to a question of that nature, I feel that the political beliefs, opinions and associations of the American people can be held secret if they so desire." *Id.*, at 158, n.8. The witness went on in response to further questions from the committee "... I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred, I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am." *Id.* Despite this extended expression by the witness, the Court upheld his claim of privilege.

As with all constitutional privileges that protect individuals against governmentally compelled testimony, the Courts have insisted on a knowing and unequivocal waiver before divesting a witness of such privileges. See, e.g. *United States v. Helstoski*, 442 U.S. 477, 493 (1979)(the constitutional privilege for congressional speech or debate requires "an explicit and unequivocal waiver").

Based on the foregoing, I do not believe that Ms. Lerner's brief introductory profession of innocence, in which she offered no substantive testimony or evidence constitutes a waiver of her Fifth Amendment rights.