

Experts Opinions on Lois Lerner Contempt Proceedings

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- 1. Morton Rosenberg spent 35 years as a former Specialist in American Public Law at the non-partisan Congressional Research Service and is a former Fellow at the Constitution Project.**
- 2. Stanley M. Brand, who served as General Counsel for the House of Representatives from 1976 to 1983, wrote that he agreed with Mr. Rosenberg's analysis.**

March 12, 2014

**To: Honorable Elijah E. Cummings
Ranking Minority Member,
House Committee on Oversight
And Government Reform**

**From: Morton Rosenberg
Legislative Consultant**

**Re: Constitutional Due Process Prerequisites for Contempt of Congress
Citations and Prosecutions**

You have asked that I discuss whether, at this point in the questioning of Ms. Lois Lerner, a witness in the Committee's ongoing investigation of alleged irregularities by the Internal Revenue Service (IRS) in the processing of applications by certain organizations for tax-exempt status, the appropriate constitutional foundation has been established for the Committee to initiate the process that would lead to her prosecution for contempt of Congress. My understanding of the requirements of the law in this area leads me to conclude that the requisite due process protections have not been met.

My views in this matter have been informed by my 35 years of work as a Specialist in American Public Law with the American Law Division of the Congressional Research Service, during which time I concentrated particularly on constitutional and practice issues arising from interbranch conflicts over information disclosures in the course of congressional oversight and investigations of executive agency implementation of their statutory missions. My understandings have been further refined by my preparation for testimony on investigative matters before many committees, including your Committee, and by the research involved in the writing and publication by the Constitution Project in 2009 of a monograph entitled "When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry."

Briefly, the pertinent background of the situation is as follows. Ms. Lerner, who was formerly the Director of Exempt Organizations of the Tax-Exempt and Government Entities Division of IRS, was subpoenaed to testify

before the Committee on May 22, 2013. She appeared and after taking the oath presented an opening statement but thereafter refused to answer questions by Members, invoking her Fifth Amendment right against self-incrimination. The question was raised whether Ms. Lerner had effectively waived the privilege by her voluntary statements. On advice of counsel she continued to assert the privilege. Afterward, on dismissing Ms. Lerner and her counsel, Chairman Issa remarked "For this reason I have no choice but to excuse this witness subject to recall after we seek specific counsel on the question whether or not the constitutional right of the Fifth Amendment has been properly waived. Notwithstanding that, in consultation with the Department of Justice as to whether or not limited or use of unity [sic: immunity] could be negotiated, the witness and counsel are dismissed." Thus at the end of her initial testimony, there had been no express Committee determination rejecting her privilege claim nor an advisement that she could be subject to a criminal contempt proceeding. There was, however, some hint of granting statutory use immunity that would compel her testimony. On June 28, 2013, the Committee approved a resolution rejecting Ms. Lerner's privilege claim on the ground that she had waived it by her voluntary statements.

Still subject to the original subpoena, Ms. Lerner was recalled by the Committee on March 5, 2014. Chairman Issa's opening statement recounted the events of the May 22, 2013 hearing and the fact of the Committee's finding that she had waived her privilege. He then stated that "if she continues to refuse to answer questions from Members while under subpoena, the Committee may proceed to consider whether she will be held in contempt." In answer to the first question posed by Chairman Issa, Ms. Lerner expressly stated in response that she had been advised by counsel that she had not waived her privilege and would continue to invoke her privilege, which she did in response to all the Chair's further questions. After his final question Chairman Issa adjourned the hearing without allowing further questions or remarks by Committee members, and granted her "leave of said Committee," stating, "Ms. Lerner, you're released." At no time during his questioning did the Chair explicitly demand an answer to his questions, expressly overrule her claim of privilege, or make it clear that her refusal to respond would result in a criminal contempt prosecution.

In 1955 the Supreme Court announced in a trilogy of rulings that in order to establish a proper legal foundation for a contempt prosecution, a jurisdictional committee must disallow the constitutional privilege objection and clearly apprise the witness that an answer is demanded. A witness will not be forced to guess whether or not a committee has accepted his or her objection. If the witness is not able to determine “with a reasonable degree of certainty that the committee demanded his answer despite his objection,” and thus is not presented with a “clear-cut choice between compliance and non-compliance, between answering the question and risking the prosecution for contempt,” no prosecution for contempt may lie. *Quinn v. United States*, 349 U.S. 155, 166, 167 (1955); *Empsak v. United States*, 349 U.S. 190, 202 (1955). In *Bart v. United States*, 349 U.S. 219 (1955), the Court found that at no time did the committee overrule petitioner’s claim of self-incrimination or lack of pertinency, nor was he indirectly informed of the committee’s position through a specific direction to answer. A committee member’s suggestion that the chairman advise the witness of the possibility of contempt was rejected. The Court concluded that the consistent failure to advise the witness of the committee’s position as to his objections left him to speculate about this risk of possible prosecution for contempt and did not give him a clear choice between standing with his objection and compliance with a committee ruling. Citing *Quinn*, the Court held that this defect in laying the necessary constitutional foundation for a contempt prosecution required reversal of the petitioner’s conviction. 349 U.S. at 221-23. Subsequent appellate court rulings have adhered to the High Court’s guidance. See, e.g., *Jackins v. United States*, 231 F. 2d 405 (9th Cir. 1959); *Fagerhaugh v. United States*, 232 F. 2d 803 (9th Cir. 1959).

In sum, at no stage in this proceeding did the witness receive the requisite clear rejections of her constitutional objections and direct demands for answers nor was it made unequivocally certain that her failure to respond would result in criminal contempt prosecution. The problematic Committee determination that Ms. Lerner had waived her privilege, see, e.g., *McCarthy v. Arndstein*, 262 U.S. 355, 359 (1926) and *In re Hitchings*, 850 F. 2d 180 (4th Cir. 1980), occurred after the May 2013 hearing. Chairman Issa’s opening statement at the March 5, 2014 hearing, while referencing the waiver decision did not make it a substantive element of the Committee’s current concern and was never mentioned again during his interrogation of the witness. More significantly, the Chairman’s opening remarks were equivocal about the consequence of a failure

by Ms. Lerner to respond to his questions. As indicated above, he simply stated that “the Committee *may proceed to consider* whether she will be held in contempt.” Combined with his closing remarks in the May 2013 hearing, where he indicated he would be discussing the possibility of granting the witness statutory immunity with the Justice Department to compel her testimony, there could be no certainty for the witness and her counsel that a contempt prosecution was inevitable. Finally, it may be reiterated that the Chairman during the course of his most recent questioning never expressly rejected Ms. Lerner’s objections nor demanded that she respond.

I conclude that the requisite legal foundation for a criminal contempt of Congress prosecution mandated by the Supreme Court rulings in *Quinn, Emspak and Bart* have not been met and that such a proceeding against Ms. Lerner under 2 U.S.C. 194, if attempted, will be dismissed. Such a dismissal will likely also occur if the House seeks civil contempt enforcement.

You also inquire whether the waiver claim raised in the May 2013 hearing can be raised in a subsequent hearing to which Ms. Lerner might be again subpoenaed and thereby prevent her from invoking her Fifth Amendment rights. The courts have long recognized that a witness may waive the Fifth Amendment right to self-incrimination in one proceeding, and then invoke it later at a different proceeding on the same subject. See, e.g., *United States v. Burch*, 490 F.2d 1300, 1303 (8th Cir. 1974); *United States v. Licavoli*, 604 F. 2d 613, 623 (9th Cir. 1979); *United States v. Cain*, 544 F. 2d 1113,1117 (1st Cir. 1976); *In re Neff*, 206 F. 2d 149, 152 (3d Cir. 1953). See also, *United States v. Allman*, 594 F. 3d 981 (8th Cir. 2010) (acknowledging the continued vitality of the “same proceeding” doctrine: “We recognize that there is ample precedent for the rule that the waiver of the Fifth Amendment privilege in one proceeding does not waive that privilege in a subsequent proceeding.”). Since Ms. Lerner was released from her subpoena obligations by the final adjournment of the Committee’s hearing, a compelled testimonial appearance at a subsequent hearing on the same subject would be a different proceeding.

In addition, Stanley M. Brand has reviewed this memorandum and fully subscribes to its contents and analysis.

Mr. Brand served as General Counsel for the House of Representatives from 1976 to 1983 and was the House's chief legal officer responsible for representing the House, its members, officers, and employees in connection with legal procedures and challenges to the conduct of their official activities. Mr. Brand represented the House and its committees before both federal district and appellate courts, including the U.S. Supreme Court, in actions arising from the subpoena of records by the House and in contempt proceedings in connection with congressional demands.

In addition to the analysis set forth above, Mr. Brand explained that a review of the record from last week's hearing reveals that at no time did the Chair expressly overrule the objection and order Ms. Lerner to answer on pain of contempt. Making it clear to the witness that she has a clear cut choice between compliance and assertion of the privilege is an essential element of the offense and the absence of such a demand is fatal to any subsequent prosecution.

3. Joshua Levy, a partner in the firm of Cunningham and Levy and an Adjunct Professor of Law at the Georgetown University Law Center who teaches Congressional Investigations, said:

“Contempt cannot be born from a game of gotcha. Supreme Court precedents that helped put an end to the McCarthy era ruled that Congress cannot initiate contempt proceedings without first giving the witness due process. For example, Congress cannot hold a witness in contempt without directing her to answer the questions being asked, overruling her objections and informing her, in clear terms, that her refusal to answer the questions will result in contempt. None of that occurred here.”

4. Julie Rose O’Sullivan, a former federal prosecutor and law clerk to Supreme Court Justice Sandra Day O’Connor and current a Professor at the Georgetown University Law Center, said:

“The Supreme Court has spoken—repeatedly—on point. Before a witness may be held in contempt under 18 U.S.C. sec. 192, the government bears the burden of showing ‘criminal intent—in this instance, a deliberate, intentional refusal to answer.’ *Quinn v. United States*, 349 U.S. 155, 165 (1955). This intent is lacking where the witness is not faced with an order to comply or face the consequences. Thus, the government must show that the Committee ‘clearly apprised [the witness] that the committee demands his answer notwithstanding his objections’ or ‘there can be no conviction under [sec.] 192 for refusal to answer that question.’ *Id.* at 166. Here, the Committee at no point directed the witness to answer; accordingly, no prosecution will lie. This is a result demanded by common sense as well as the case law. ‘Contempt’ citations are generally reserved for violations of court or congressional orders. One cannot commit contempt without a qualifying ‘order.’”

5. Samuel W. Buell, a former federal prosecutor and current Professor of Law at Duke University Law School, said:

“[T]he real issue for me is the pointlessness and narrow-mindedness of proceeding in this way. Contempt sanctions exist for the purpose of overcoming recalcitrance to testify. One would rarely if ever see this kind of procedural Javert-ism from a federal prosecutor and, if one did, one would expect it to be condemned by any federal judge before whom such a motion were made.

In federal court practice, contempt is not sought against grand jury witnesses as a kind of gotcha penalty for invocations of the Fifth Amendment privilege that might turn out to contain some arguable formal flaw. Contempt is used to compel witnesses who have asserted the privilege and then continued to refuse to testify after having been granted immunity. Skirmishing over the form of a privilege invocation is a wasteful sideshow. The only question that matters, and that would genuinely interest a judge, is whether the witness is in fact intending to assert the privilege and in fact has a legitimate basis to do so. The only questions of the witness that therefore need asking are the kind of questions (and a sufficient number of them) that will make the record clear that the witness is not going to testify. Usually even that process is not necessary and a representation from the witness’s counsel will do.

Again, contempt sanctions are on the books to serve a simple and necessary function in the operation of legal engines for finding the truth, and not for any other purpose. Any fair and level-headed judge is going to approach the problem from that perspective. Seeking contempt now on this record thus could accomplish nothing but making the Committee look petty and uninterested in getting to the merits of the matter under investigation.”

6. Robert Muse, a partner at Stein, Mitchell, Muse & Cipollone, LLP, Adjunct Professor of Congressional Investigations at Georgetown Law, and formerly the General Counsel to the Special Senate Committee to Investigate Hurricane Katrina, said:

“Procedures and rules exist to provide justice and fairness. In his rush to judgment, Issa forgot to play by the rules.”

7. Professor Lance Cole of Penn State University's Dickinson School of Law, said:

"I agree with the analysis and conclusions of Mr. Rosenberg, and the additional comments by Mr. Brand. I also have a broader concern about seeking criminal contempt sanctions against Ms. Lerner. I do not believe criminal contempt proceedings should be utilized in a situation in which a witness is asserting a fundamental constitutional privilege and there is a legitimate, unresolved legal issue concerning whether or not the constitutional privilege has been waived. In that situation initiating a civil subpoena enforcement proceeding to obtain a definitive judicial resolution of the disputed waiver issue, prior to initiating criminal contempt proceedings, would be preferable to seeking criminal contempt sanctions when there is a legitimate issue as to whether the privilege has been waived and that legal issue inevitably will require resolution by the judiciary. Pursuing a criminal contempt prosecution in this situation, when the Committee has available to it the alternatives of either initiating a civil judicial proceeding to resolve the legal dispute on waiver or granting the witness statutory immunity, is unnecessary and could have a chilling effect on the constitutional rights of witnesses in congressional proceedings."

8. **Renée Hutchins is a former federal prosecutor, current appellate defense attorney, and Associate Professor of Law at the University of Maryland Carey School of Law. She said:**

"America is a great nation in no small part because it is governed by the rule of law. In a system such as ours, process is not a luxury to be afforded the favored or the fortunate. Process is essential to our notion of equal justice. In a contempt proceeding like the one being threatened the process envisions, at minimum, a witness who has refused to comply with a valid order. But a witness cannot refuse to comply if she has not yet been told what she must do. Our system demands more. Before the awesome powers of government are brought to bear against individual Americans we must be vigilant, now and always, to ensure that the process our fellow citizens confront is a fair one."

9. Colin Miller is an Associate Professor of Law at the University of South Carolina School of Law whose areas of expertise include Evidence, as well as Criminal Law and Procedure. He wrote:

In this case, the witness invoked the Fifth Amendment privilege, the Committee Chairman recessed the hearing, and the Chairman now wants to hold the witness in contempt based upon the conclusion that she could not validly invoke the privilege. Under these circumstances, the witness cannot be held in contempt. Instead, the only way that the witness could be held in contempt is if the Committee Chairman officially ruled that the Fifth Amendment privilege was not available, instructed the witness to answer the question(s), and the witness refused.

As the United States District Court for the Northern District of Illinois noted in *United States ex rel. Berry v. Monahan*, 681 F.Supp. 490, 499 (N.D.Ill. 1998),

If the law were otherwise, a person with a meritorious fifth amendment objection might not assert the privilege at all simply because of fear that the judge would find the invocation erroneous and hold the person in contempt. In that scenario, the law would throw the person back on the horns of the “cruel trilemma” for in order to insure against the contempt sanction the person would have to either lie or incriminate himself.

The Northern District of Illinois is not alone in this conclusion. Instead, it cited as support:

Traub v. United States, 232 F.2d 43, 49 (D.C.Cir.1955) (“no contempt can lie unless the refusal to answer follows an adverse ruling by the court on the claim of the privilege or clear direction thereafter to answer” (citation omitted)); *Carlson v. United States*, 209 F.2d 209, 214 (1st Cir.1954) (“the claim of privilege calls upon the judge to make a ruling whether the privilege was available in the circumstances presented; and if the judge thinks not, then he instructs the witness to answer”). See also *Wolfe v. Coleman*, 681 F.2d 1302, 1308 (11th Cir.1982) (the petition for the writ in a contempt case failed because the court had found the petitioner's first amendment objection invalid before ordering him to answer); *In re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600, 608 (D.C.Cir.1976) (a witness is subject to contempt if the witness refuses to answer a grand jury question previously found not to implicate the privilege). Compare *Maness v. Meyers*, 419 U.S. 449, 459, 95 S.Ct. 584, 591, 42 L.Ed.2d 574 (1975) (“once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders” (emphasis added)); *United States v. Ryan*, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971) (after the court rejects a witness' objections, the witness is confronted with the decision to comply or be held in contempt if his objections to testifying are rejected again on appeal).

Most importantly, it cited the Supreme Court's opinion in *Quinn v. United States*, 349 U.S. 155 (1955), in support

The Supreme Court in *Quinn v. United States*, 349 U.S. 155, 75 S.Ct. 688, 99 L.Ed. 964 (1955) held that in congressional-committee hearings the committee must clearly dispose of the witness' fifth amendment claim and order that witness to answer before the committee invokes its contempt power. *Quinn v. United States*, 349 U.S. 155, 167–68, 75 S.Ct. 668, 675–76, 99 L.Ed. 964 (1955). According to *Quinn*, “unless the witness is clearly apprised that the committee

demands his answer notwithstanding his objections,” the witness' refusal to answer is not contumacious because the requisite intent element of the congressional-contempt statute is lacking. *Id.* at 165–66, 75 S.Ct. at 674–75 (discussing 2 U.S.C. § 192). The court further stated that “a clear disposition of the witness' objection is a prerequisite to prosecution for contempt.”

Therefore, *Quinn* clearly stands for the proposition that the witness in this case cannot be held in contempt of COurt.

Sincerely,

Colin Miller
University of South Carolina School of Law

10. Thomas Crocker is a Distinguished Professor of Law at the University of South Carolina School of Law who teaches courses in teaches Constitutional Law, Criminal Procedure, as well as seminars in Jurisprudence.

21 March 2014

Honorable Elijah E. Cummings
Ranking Minority Member
House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Honorable Cummings:

After reviewing materials relevant to the recent appearance of Ms. Lois Lerner as a witness before the Committee, I conclude that that no legal basis exists for holding her in contempt. Specifically, I agree with the legal analysis and conclusions Morton Rosenberg reached in the memo provided to you. Let me add a few thoughts as to why I agree.

The Fifth Amendment privilege against self-incrimination has deep constitutional roots. As the Supreme Court explained, the privilege is “of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions.” *Quinn v. United States*, 349 U.S. 155, 161-62 (1955). Because of its importance, procedural safeguards exist to ensure that government officials respect “our fundamental values,” which “mark[] an important advance in the development of our liberty.” *Kastigar v. United States*, 406 U.S. 441, 444 (1972). As the Supreme Court made clear in a trio of cases brought in response to congressional contempt proceedings, before a witness can be held in contempt under 18 U.S.C. sec. 192, a committee must “directly overrule [a witness’s] claims of self incrimination.” *Bart v. United States*, 349 U.S. 219, 222 (1955). “[U]nless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under sec. 192 for refusal to answer that question.” *Quinn*, 349 U.S. at 166. Without this clear appraisal, and without a subsequent refusal, the statutory basis for violation of section 192 does not exist. This reading of the statutory requirements under section 192, required by the Supreme Court, serves the constitutional purpose of protecting the values reflected in the Fifth Amendment.

Reviewing the proceedings before the House Oversight Committee, it is clear that Chairman Darrell Issa did not overrule the witness’s assertion of her Fifth Amendment privilege. As a result, the witness was “never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt.” *Empsak v. United States*, 349 U.S. 190, 202 (1955). Without that choice, then under section 192, the witness lacks the relevant intent, and therefore does not meet an essential element necessary for a claim of contempt. This is not a close or appropriately debatable case.

In addition, I understand that arguments have been made that Ms. Lerner waived her Fifth Amendment privilege in making an opening statement to the Committee and in authenticating earlier answers to the Inspector General. Although I would conclude that Ms. Lerner did not waive her right to invoke a Fifth Amendment privilege against testifying, resolution of this legal question is not relevant to the question of whether the proper foundation exists for a contempt of Congress claim under section 192. Even if the witness had waived her privilege, Chairman Issa failed to follow the minimal procedural safeguards required by the Supreme Court as a prerequisite for a contempt charge.

Sincerely,

Thomas P. Crocker, J.D., Ph.D.
Distinguished Professor of Law

11. Thomas Spulak served as General Counsel of the House of Representatives from 1994-1995. He wrote in a statement to Ranking Member Cummings:

THOMAS J. SPULAK, ESQ.
1700 PENNSYLVANIA AVENUE, N. W.
202-661-7948

March 20, 2014

Honorable Elijah Cummings
Ranking Member
WASHINGTON, DC 20006
Committee on Oversight and Government Reform
U. S. House of Representatives
24 71 Rayburn Office Building
Washington, DC 20515

Dear Representative Cummings:

I write to you in response to your request for my views on the matter involving Ms. Lois Lerner currently pending before the Committee on Oversight and Government Reform (the "Committee"). I do so out of my deep concerns for the constitutional integrity of the U.S. House of Representatives, its procedures and its future precedents. I have no association with the matter whatsoever.

I have read reports in the Washington Post regarding the current proceedings involving Ms. Lois Lerner and especially the question of whether an appropriate and adequate constitutional predicate has been laid to serve as the basis for a charge of contempt of Congress. In my opinion, it has not.

I have deep respect for Chairman Darrell Issa and his leadership of the Committee. But the matter before the Committee is a relatively rare occurrence and must be dispatched in a constitutionally required manner for the good of this and future

Congresses.

I have reviewed the memorandum that Mr. Morton Rosenberg presented to you on March 12^h of this year. As you may know, Mr. Rosenberg is one of the leading scholars on the U.S. Congress, its procedures and the constitutional foundation. He has been relied upon by members and staff of both parties for over 30 years. I first met Mr. Rosenberg in the early 1980s when I was Staff Director and General Counsel of the House Rules Committee. He was an important advisor to the members of the Rules Committee then and has been for years after. While perhaps there have been times when some may have disagreed with his position, I know of no instance where his objectivity or commitment-to the U.S. Congress has ever been questioned.

Based on my experience, knowledge and understanding of the facts, I fully agree with Mr. Rosenberg's March 12th memorandum.

I have also reviewed Chairman Issa's letter to you dated March 14th of this year. His letter is very compelling and clearly states the reasons that he believes a proper foundation for a charge of contempt of Congress has been laid. For example, he indicates that on occasions, Ms. Lerner knew or should have known that the Committee had rejected her Fifth Amendment privilege claim, either through the Chairman's letter to her attorney or to reports of the same that appeared in the media. The fact of the matter, however, is that based on relevant Supreme Court rulings, the pronouncement must occur with the witness present so that he or she can understand the finality of the decision, appreciate the consequences of his or her continued silence, and have an opportunity to decide otherwise at that time.

I agree with the Chairman's reading of *Quinn v. United States* in that there is no requirement to use any "fixed verbal formula" to convey to the witness the Committee's decision. But, I believe that the Court does require that whatever words are used be delivered to the witness in a direct, unequivocal manner in a setting that allows the

witness to understand the seriousness of the decision and the opportunity to continue to insist on invoking the privilege or revoke it and respond to the Committee's questioning. That, as I understand the facts, did not occur.

In conclusion, I quote from Mr. Rosenberg's memorandum and agree with him when he said-

... [A]t no stage in [the] proceeding did the witness receive the requisite clear rejections of her constitutional objections and direct demands for answers nor was it made unequivocally certain that her failure to respond would result in criminal contempt prosecution.

Accordingly, I do not believe that the proper basis for a contempt of Congress charge has been established. Ultimately, however, this will be determined by members of the Judicial Branch.

Sincerely,

Thomas J. Spulak

12. J. Richard Broughton is a Professor of Law at the University of Detroit Mercy School of Law and a member of the Republican National Lawyers Association.

MEMORANDUM

TO: Donald K. Sherman, Counsel
House Oversight & Government Reform Committee

FROM: J. Richard Broughton, Associate Professor of Law
University of Detroit Mercy School of Law

RE: Legal Issues Related to Possible Contempt of Congress Prosecution

DATE: March 17, 2014

You have asked for my thoughts regarding the possibility of a criminal contempt prosecution pursuant to 2 U.S.C. §§ 192 & 194 against Lois Lerner, in light of the assertion that the Committee violated the procedures necessary for permitting such a prosecution. My response here is intended to be objective and non-partisan, and is based on my own research and expertise. I am a full-time law professor, and my areas of expertise include Constitutional Law, Criminal Law, and Criminal Procedure, with a special focus on Federal Criminal Law. I previously served as an attorney in the Criminal Division of the United States Department of Justice during the Bush Administration. These views are my own and do not necessarily reflect the views of the University of Detroit Mercy or anyone associated with the University.

The power of Congress to hold a witness in contempt is an important tool for carrying out the constitutional functions of the legislative branch. Lawmaking and oversight of the other branches require effective fact-finding and the cooperation of those who are in a position to assist the Congress in gathering information that will help it to do its job. Like any other criminal sanction, however, the contempt power must be used prudently, not for petty revenge or partisan gain. It should also be used with appropriate respect for countervailing constitutional rights and with proof that the accused contemnor possessed the requisite level of culpability in failing to answer questions. The Supreme Court has held that a recalcitrant witness's culpable mental state can only be established after the Committee has unequivocally rejected a witness's objection to a question and then demanded an answer to that question, even where the witness asserts the Fifth Amendment privilege. Absent such a formal rejection and subsequent directive, the witness – here, Ms. Lerner – would likely have a defense to any ensuing criminal prosecution for contempt, pursuant to the existing Supreme Court precedent. Those who are concerned about the reach of federal power should desire legally sufficient proof of a person's culpable mental state before permitting the United States to seek and impose criminal punishment.

Whether the precedents are sound, or whether they require such formality, however, is another matter. As set forth in the Rosenberg memorandum of March 12, 2014, the relevant cases are *Quinn v. United States*, 349 U.S. 155 (1955), *Emspak v. United States*, 349 U.S. 190 (1955), and *Bart v. United States*, 349 U.S. 219 (1955). *Quinn* contains the most detailed explanation of the procedural requirements for using section 192. Mr. Rosenberg's thoughtful memo correctly describes the holding in these cases. Still, those cases are not a model of clarity and their application to the Lerner matter is subject to some greater exploration.

One could argue that the Committee satisfied the rejection-then-demand requirement here, when we view the May 22, 2013 and March 5, 2014 hearings in their totality. At the May 22, 2013 hearing, Chairman Issa indicated to Ms. Lerner that he believed she had waived the

privilege (a contention bolstered by Rep. Gowdy at that hearing). The Committee then voted 22 to 17 on June 28, 2013 in favor of a resolution stating that she had waived the privilege. The Chairman then referred to this resolution in his opening statement on March 5, 2014, in the presence of Ms. Lerner and her counsel. And at each hearing, Chairman Issa continued to ask questions of her even after she re-asserted the privilege, thus arguably further demonstrating to her that the chair did not accept her invocation. Consequently, it could be argued that these actions placed her on adequate notice that her assertion of the privilege was unacceptable and that she was required to answer the questions propounded to her, which is why the Chairman continued with his questioning on March 5. Her refusal to answer was therefore intentional.

This argument is problematic, however, particularly if we read the cases as imposing a strict requirement that the specific question initially propounded be repeated and a demand to answer *it* made after formally rejecting the witness's invocation of privilege *as to that question*. And that is a fair reading of the cases. Although the Court said that no fixed verbal formula is necessary when rejecting a witness's objection, the witness must nevertheless be "fairly apprised" that the Committee is disallowing it. *See Quinn*, 349 U.S. at 170. Even Justice Reed's *Quinn* dissent, which criticized the demand requirement, conceded that the requisite mens rea for contempt cannot be satisfied where the witness is led to believe that – or at least confused about whether – her invocation of the privilege is acceptable. *See id.* at 187 (Reed, J., dissenting). Here, the Committee appeared equivocal at the first hearing. Although Chairman Issa's original rejection on May 22, 2013 was likely satisfactory (and bolstered by Rep. Gowdy's argument), it was not followed by a demand to answer the specific question propounded. He then moved onto other questions. On March 5, 2014, the Committee's conduct was also equivocal, because even though the Committee had approved a resolution stating that she had waived the privilege, and the Chairman referred to that resolution in his opening statement, the Committee never formally overruled her assertion of the privilege upon her repeated invocations of it (though it could easily have done so, by telling her that the resolution of June 28, 2013 still applied to each question she would be asked on March 5, 2014). Nor did the Committee demand answers to those same questions. Ms. Lerner was then excused each time and was never compelled to answer.

The problem, then, is not that the Committee failed to notify Ms. Lerner generally that it rejected her earlier assertion of privilege. Rather, the problem is that the Committee did not specifically overrule *each* invocation on either May 22, 2013 or March 5, 2014 and then demand an answer to *each* question previously asked. This is a problem because the refusal to answer each question constitutes a distinct criminal offense for which the mens rea must be established. Therefore, Ms. Lerner could have been confused about whether her invocation of the privilege as to each question was now acceptable – the waiver resolution and the Chair's reference to it notwithstanding – especially after her attorney had assured her that she did *not* waive the privilege. A fresh ruling disputing her counsel's advice would have clarified the Committee's position, but did not occur. But even if she could not have been so confused, she would likely have a persuasive argument that this process was still not sufficient under *Quinn*, absent a ruling on *each* question propounded *and* a demand that she answer the question initially asked of her prior to her invocation of the privilege.

Of course, none of this is to say that the cases are not problematic. *Quinn* is not clear about whether a general rejection of a witness's previous assertion of the privilege – like the one we have here via resolution and reference in an opening statement – would suffice as a method

for overruling an invocation of privilege on each and every question asked (as opposed to informing the witness after each invocation that the invocation is unacceptable). The best reading of *Quinn* is that although it does not require a talisman, it does require that the witness be clearly apprised as to each question that her objection to it is unacceptable. And that would seem to require a separate rejection and demand upon each invocation. *Quinn* also specifically states that once the Committee reasonably concludes that the witness has invoked the Fifth Amendment privilege, the privilege “must be respected.” *Quinn*, 349 U.S. at 163. Yet *Quinn* later states that when a witness asserts the privilege, a contempt prosecution may lie only where the witness refuses the answer once the committee has disallowed the objection and demanded an answer. *Id.* at 166. This would often put the committee in an untenable position. If the committee must respect an assertion of the privilege, then it cannot overrule the invocation of the privilege and demand an answer. For if the committee must decide to overrule the objection and demand an answer, then the committee is not respecting the assertion of the privilege. Perhaps the Court meant something different by “respect;” but its choice of language is confusing.

Also, the cases base the demand requirement on the problem of proving mens rea. Although the statute does not explicitly set forth the “deliberate and intentional” mens rea, the Court has held that the statute requires this. *See Sinclair v. United States*, 279 U.S. 263, 299 (1929). Contrary to *Quinn*, it is possible to read the statute as saying that the offense is complete once the witness refuses to answer a question, especially once it is made clear that the Committee rejects the underlying objection to answering. That reading is made even more plausible if the witness already knows that she may face contempt if she asserts the privilege and refuses to answer. Justice Reed raised this problem, *see Quinn*, 349 U.S. at 187 (Reed, J., dissenting), as did Justice Harlan, who went even farther in his *Emspak* dissent by saying that the rejection-then-demand requirement has no bearing on the witness’s state of mind as of the time she initially refuses to answer. *See Emspak*, 349 U.S. at 214 (Harlan, J., dissenting). Here, Chairman Issa asked Ms. Lerner a series of questions that she did not answer, asserting the privilege instead. There remains a plausible argument that this, combined with the Chairman’s initial statement that she had waived the privilege and the subsequent resolution of June 28, 2013, is enough to prove that she acted intentionally in refusing, even without a subsequent demand. That argument, however, would require reconsideration of the holding in *Quinn*.

Third, the Rosenberg memo adds that the witness must be informed that failure to respond *will* result in a criminal contempt prosecution. That, however, also places the committee in an untenable position. A committee cannot assure such a prosecution. Pursuant to section 194 and congressional rules, the facts must first be certified by the Speaker of the House and the President of the Senate, the case must be referred to the United States Attorney, and the United States Attorney must bring the case before a grand jury (which could choose not to indict). Even if the committee believes the witness should be prosecuted, that result is not inevitable. Therefore, because the committee alone is not empowered to initiate a contempt prosecution, requiring the committee to inform the witness of the inevitability of a contempt prosecution would be inconsistent with federal law (section 194). Perhaps what Mr. Rosenberg meant was simply that the witness must be told that the committee would refer the case to the full Congress.

Even assuming the soundness of the rejection-and-demand requirement (which we should, as it is the prevailing law), and assuming it was not satisfied here, this does not necessarily preclude some future contempt prosecution against Ms. Lerner under section 192. If

the Committee were to recall Ms. Lerner, question her, overrule her assertion of privilege and demand an answer to the same question(s) at that time, then her failure to answer would apparently satisfy section 192. In the alternative, the Committee could argue that *Quinn, et al.* were wrong to require the formality of an explicit rejection and a subsequent demand for an answer in order to prove mens rea. That question would then have to be subject to litigation.

Finally, although beyond the scope of your precise inquiry, I continue to believe that any discussion of using the contempt of Congress statutes must consider that the procedure set forth in section 194 potentially raises serious constitutional concerns, in light of the separation of powers. See J. Richard Broughton, *Politics, Prosecutors, and the Presidency in the Shadows of Watergate*, 16 CHAPMAN L. REV. 161 (2012).

I hope you find these thoughts helpful. I am happy to continue assisting the Committee on this, or any other, matter.

13. Louis Fisher, Adjunct Scholar at the CATO Institute and Scholar in Residence at the Constitution Project.

I am responding to your request for thoughts on holding former IRS official Lois Lerner in contempt. They reflect views developed working for the Library of Congress for four decades as Senior Specialist in Separation of Powers at Congressional Research Service and Specialist in Constitutional Law at the Law Library. I am author of a number of books and treatises on constitutional law. For access to my articles, congressional testimony, and books see <http://loufisher.org>. Email: lfisher11@verizon.net. After retiring from government in August 2014, I joined the Constitution Project as Scholar in Residence and continue to teach courses at the William and Mary Law School.

I will focus primarily on your March 5, 2014 hearing to examine whether (1) Lerner waived her constitutional privilege under the Fifth Amendment self-incrimination clause, (2) there is no expectation that she will cooperate with the committee, and (3) the committee should therefore proceed to hold her in contempt. For reasons set forth below, I conclude that if the House decided to hold her in contempt and the issue litigated, courts would decide that the record indicated a willingness on her part to cooperate with the committee to provide the type of information it was seeking. Granted that she had complicated her Fifth Amendment privilege by making a voluntary statement on May 22, 2013 (that she had done nothing wrong, not broken any laws, not violated any IRS rules or regulations, and had not provided false information to House Oversight or any other committee), the March 5 hearing revealed an opportunity to have her provide facts and evidence to House Oversight to further its investigation.

The March 5 hearing began with Chairman Issa stating that the purpose of meeting that morning was “to gather facts about how and why the IRS improperly scrutinized certain organizations that applied for tax-exempt status.” He reviewed the committee’s inquiry after May 22, 2013, including 33 transcribed interviews of witnesses from the IRS. He then stated: “If Ms. Lerner continues to refuse to answer questions from our members while she is under a subpoena the committee may proceed to consider whether she should be held in contempt.” He asked her, under oath, whether her testimony would be the truth, the whole truth, and nothing but the truth. She replied in the affirmative. He proceeded to ask her nine questions. Each time she answered: “On the advice of my counsel I respectfully exercise my Fifth Amendment right and decline to answer that question.” With the initial warning from Chairman Issa, followed by nine responses taking the Fifth, the committee might have been in a position to consider holding her in contempt. However, the final question substantially weakens the committee’s ability to do that in a manner that courts will uphold.

Chairman Issa, after asking the eighth question, said the committee’s general counsel had sent an e-mail to Lerner’s attorney, saying “I understand that Ms. Lerner is willing to testify and she is requesting a week’s delay.” The committee checked to see if that information was correct and received a one-word response to that question from her attorney: “Yes.” Chairman Issa asked Ms. Lerner: “Are you still seeking a one-week delay in order to testify?” She took the Fifth, but might have been inclined to answer in the affirmative but decided to rely on the privilege out of concern that a positive answer could be interpreted as waiving her constitutional right. When she chose to make an opening statement on May 22, 2013, and later took the Fifth, she was openly challenged as having waived the privilege. The hearing on March 5 is unclear on her willingness to testify. For purposes of holding someone in contempt, the record should be clear without any ambiguity or uncertainty.

These are the final words from Chairman Issa: “Ladies and Gentlemen, seeking the truth is the obligation of this Committee. I can see no point in going further. I have no expectation that Ms. Lerner will cooperate with this committee. And therefore we stand adjourned.”

If it is the committee’s intent to seek the truth, why not fully explore the possibility that she would, supported by her attorney, be willing to testify after a short delay of one week? According to a news story, her attorney, William Taylor, agreed to a deposition that would satisfy “any obligation she has or would have to provide information in connection with this investigation.”

<http://www.usatoday.com/story/news/politics/2014/03/03/lois-lerner-testimony-lawyer-emails/5981967>.

Why would a delay of one week interfere with the committee’s investigation that has thus far taken nine and a half months? Why not, in pursuit of facts and evidence, probe this opportunity to obtain information from her, particularly when Chairman Issa and the committee have explained that she has important information that is probably not available from any other witness? With his last question, Chairman Issa raised the “expectation” that she would cooperate with the committee if given an additional week. Under these conditions, I think the committee has not made the case that she acted in contempt. If litigation resulted, courts are likely to reach the same conclusion.

- 14. Steven Duke, a former law clerk to Supreme Court Justice William O. Douglas and a current criminal procedure professor at Yale University Law School.**

March 20, 2014

To: Honorable Elijah E. Cummings, Ranking Minority Member, House Committee on Oversight and Government Reform

From: Steven B. Duke, Professor of Law, Yale Law School

Re: Prerequisites for Contempt of Congress Citations and Prosecutions

At the request of your Deputy Chief Counsel, Donald Sherman, I have reviewed video recordings of proceedings before the Committee regarding the testimony of Ms. Lois Lerner, including her claims of privilege and the remarks of Chairman Issa regarding those claims. I have also reviewed the March 12, 2014 report to you by Morton Rosenberg, legislative consultant, and the case law cited therein. I have also done some independent research on the matter. Based on those materials and my own experience as a teacher and scholar of evidence and criminal procedure for five decades, I concur entirely with the conclusions reached in Mr. Rosenberg's report that a proper basis has not been laid for a criminal contempt of Congress prosecution of Ms. Lerner.

I also agree with Mr. Rosenberg's conclusion that whether or not Ms. Lerner waived her Fifth Amendment privilege during the May, 2013 proceedings, any new efforts to subpoena and obtain testimony from Ms. Lerner will be accompanied by a restoration of her Fifth Amendment privilege, since that privilege may be waived or reasserted in separate proceedings without regard to what has previously occurred, that is, the privilege may be waived in one proceedings and lawfully reasserted in subsequent proceedings.

15. Barbara Babcock, Emerita Professor of Law at Stanford University Law School has taught and written in the fields of civil and criminal procedure. She said:

“I agree completely with the memo from Morton Rosenberg about the requirements for laying a foundation before a contempt citation can be issued: a minimal and long-standing requirement for due process. In addition, it is preposterous to think she waived her Fifth Amendment right with the short opening statement on her previous appearance.”

16. Michael Davidson is a Visiting Lecturer at Georgetown University on National Security and the Constitution. He wrote:

"I watched the tape of the March 5, 2014 hearing, by way of the link that you sent me. I also read Mort Rosenberg's memorandum to Ranking Member Cummings.

It seems to me the Committee is still midstream in its interaction with Ms. Lerner. Whatever may have occurred on May 22, 2013 (I have not watched that tape), the Chairman asked a series of questions on March 5, 2014, Ms. Lerner asserted privilege under the Fifth Amendment, but the Chairman did not rule with respect to his March 5 questions and Ms. Lerner's assertion of privilege with respect to them.

As Mr. Rosenberg's memorandum indicates, several Supreme Court decisions should be considered. It would be worthwhile, I believe, to focus on the discussion of 2 U.S.C. 192 in *Quinn v. United States*, 349 U.S. 155, 165-70 (1955). For a witness's refusal to testify to be punishable as a crime under Section 192, there must be a requisite criminal intent. Under the Supreme Court's decision in *Quinn*, "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under [section] 192 for refusal to answer that question." 349 U.S. at 166.

From the March 5 tape, it appears that the Chairman did not demand that Ms. Lerner answer, notwithstanding her assertion of privilege, any of the questions asked on March 5, and therefore in the words of *Quinn* there could be no conviction for refusal to answer "that question," meaning any of the questions asked on March 5.

The Committee could, of course, seek to complete the process begun on March 5. If I were counseling the Committee, which I realize I am not, I'd suggest the value of inviting Ms. Lerner's attorney to submit a memorandum of law on her assertion of privilege. That could include whether on May 22, 2013 she had waived her Fifth Amendment privilege for questions asked then and whether any waiver back then carried over to the questions asked on March 5, 2014. Knowing her attorney's argument, the Committee could then consider the analysis of its own counsel or any independent analysis it might wish to receive. If it then decided to overrule Ms. Lerner's assertion of privilege, she could be recalled, her assertion of privilege on March 5 overruled, and if so she could then be directed to respond."

17. Robert Weisberg is the Edwin E. Huddleson, Jr. Professor of Law and Director of the Stanford Criminal Justice Center at Stanford University Law School.

To: Rep. Elijah Cummings, Ranking Member
Committee on Oversight & Government Reform
United States House of Representatives

March 21, 2014

From: Robert Weisberg, Stanford Law School

Contempt Issue In Regard To Witness Lois Lerner

Dear Rep. Cummings:

You have asked my legal opinion as to whether Chairman Issa has laid the proper foundation for a contempt charge against Ms. Lerner. My opinion is that he has not.

I base this opinion on a review of what I believe to be the relevant case law. Let me note, however, that I have undertaken this review on a very tight time schedule and therefore (a) I cannot claim to have exhausted all possible avenues of research, and (b) the following remarks are more conclusory and informal than scholarly would call for.

The core of my opinion is that the sequence of colloquies at the May 22, 2013 hearing and the March 5, 2014 hearing do not establish the criteria required under 2 U.S.C. sec. 192, as interpreted by the Supreme Court in *Quinn v. United States*, 349 U.S. 155 (1956); *Empsak v. United States*, 349 U.S. 190 (1956), and *Bart v. United States*, 349 U.S. 219 (1956). The clear holding of these cases is that a contempt charge may not lie unless the witness has been presented “with a clear-cut-choice between compliance and non-compliance, between answering the question and risking the prosecution for contempt.” *Quinn*, at 167. Put in traditional language of criminal law, the actus reus element of under section 192 is an express refusal to answer in the face of a categorical declaration that the refusal is legally unjustified..

I know that your focus is on the March 5, 2014 hearing, but I find it useful to first look at the earlier hearing. In my view, the Chairman essentially conceded that contempt had not occurred on May 22, 2013, because rather than frame the confrontation unequivocally as required by section 192, he excused the witness subject to recall, wanting to confirm with counsel whether the witness had waived the privilege by her remarks on that day. Moreover, as I understand it, the Chair at least considered the possibility offering the witness immunity after May 22. Under *Kastigar v. United States*, [406 US 441 \(1972\)](#), use immunity is a means by which the government can simultaneously respect the witness’s privilege and force her to testify. It makes little sense for the government to even consider immunity unless it believes it at least possible that the witness still holds the privilege. Thus, in my view, the government may effectively be estopped from alleging that the witness was in contempt at that point.

Nor, in my view, was the required confrontation framed at the March 5, 2014 hearing. Instead of directly confronting Ms. Lerner on her refusal to answer, the Chairman proceeded to ask a series of substantive questions, to each of which she responded with an invocation of her privilege. Ms. Lerner could have inferred that the Chair was starting the question/answer/invocation clock all over again, such that as long as she said nothing at this March 5 hearing that could be construed as a waiver, her privilege claim was intact. In my opinion, the Chairman's approach at this point could be viewed, in effect, as a waiver of the waiver issue, or as above, it would allow her to claim estoppel against the government.

Moreover, while the Chairman did lay out the position that Ms. Lerner had earlier waived the privilege, he did not do so in a way that set the necessary predicate for a contempt charge. In opening remarks, the Chairman alluded to Rep. Gowdy's belief that Ms. Lerner had earlier waived and said that the Committee had voted that she had waived. The former of these points is irrelevant. The latter is relevant, but not sufficient, if she was not directly confronted with a formal legal pronouncement upon demand for an answer. Apparently, the Chairman, the reference to the committee vote occurred after Ms. Lerner's first invocation on March 5, but before he continued on to a series of substantive questions and further invocations. Thus, even if reference to the committee view on waiver might have satisfied part of the *Quinn* requirement, Chairman Issa, yet again, arguably waived the waiver issue.

I recognize that by this view the elements of contempt are formalistic and that it puts a heavy burden of meeting those formalistic requirements on the questioner. But such a burden of formalism is exactly what the Supreme Court has demanded in *Quinn*, *Emspak*, and *Bart*. Indeed, it is precisely the formalism of the test that is decried by Justice Reed's dissent in those cases. See *Quinn*, at 171 ff.

Another, supplementary approach to the contempt issue is to consider what mens rea is required for a section 192 violation. This question requires me to turn to the waiver issue. I have not been asked for, nor am I offering, any ultimate opinion on whether Ms. Lerner's voluntary statements at the start of the May 22 hearing constituted a waiver. However, the possible dispute about waiver may be relevant to the contempt issue because it may bear whether Ms. Lerner had the required mental state for contempt, given that she may reasonably or at least honestly believed she had not waived.

The key question is whether the refusal to answer must be "willful." There is some syntactical ambiguity here. Section 192 says that a "default--by which I assume Congress means a failure to appear, must be willful to constitute contempt, and arguably the term "willfully" does not apply to the clause about refusal. But an equally good reading is that because contempt can hardly be a strict liability crime and so there must be some mens rea, Congress meant "willfully: to apply to the refusal as well. In any event, the word "refusal" surely suggests some level of defiance, not mere failure or declination.

So if the statute requires willfulness or its equivalent, federal case law would suggest that a misunderstanding or mistake of law can negate the required mens rea. The doctrine of mistake is very complex because of the varieties of misapprehension of law that call under this rubric. But this much is clear: While mistake about the existence or substantive meaning of a criminal law with which one is charged normally is irrelevant to one's guilt, things are different under a federal statute requiring willfulness. See *Cheek v. United States*, [498 US 192 \(1991\)](#) (allowing honest, even if unreasonable, misunderstanding of law to negate guilt).¹

Showing that the predicate for willfulness has not been established involves repeating much of what I have said before, from a slightly different angle. That is, one can define the actus reus term "refuse" so as to implicitly incorporate the mens rea concept of willfulness.

One possible factor bearing on willfulness involves the timing of Ms. Lerner's statements at the May 22 hearing. If Ms. Lerner's voluntary exculpatory statements at that hearing preceded any direct questioning by the committee, there is an argument that those statements did not waive the privilege because she was not yet facing any compulsion to answer, and thus the privilege was not in play yet. To retain her privilege a witness need not necessarily invoke it at the very start of a hearing. Thus in cases like *Jackins v. United States*, 231 F.405 (9th Cir. 1959), the witness was able to answer questions and then later invoke the privilege because it was only after a first set of questions that new questions probed into areas that raised a legitimate concern about criminal exposure. Under those cases, the witness has not waived the privilege because the concern about compelled self-incrimination has not arisen yet. This is, of course, a different situation, because the risk of criminal exposure was already apparent to Ms. Lerner when she made her exculpatory statements. But the situations are somewhat analogous under a general principle that waiver has not occurred until by virtue of both a compulsion to answer and a risk of criminal exposure the witness is facing the proverbial "cruel trilemma" that it is the purpose of the privilege to spare the witness.

Here is one other analogy. When a criminal defendant testifies in his own behalf, the prosecutor may seek to impeach him by reference to the defendant's earlier silence, so long as the prosecutor is not penalizing the defendant for exercising his privilege against self-

¹ According to Prof. Sharon Davies:

"Knowledge of illegality" has ... been construed to be an element in a wide variety of [federal] statutory and regulatory criminal provisions. . . . These constructions establish that . . . ignorance or mistake of law has already become an acceptable [defense] in a number of regulatory and nonregulatory settings, particularly in prosecutions brought under statutes requiring proof of "willful" conduct on the part of the accused. Under the reasoning employed in these cases, at least 160 additional federal statutes . . . are at risk of similar treatment." *The Jurisprudence of Ignorance: An Evolving Theory of Excusable Ignorance*, 48 *Duke L. J.* 341, 344-47 (1998).

incrimination. The prosecutor may do so where the silence occurred before arrest or before the *Miranda* warning, because until the warning is given, the court will not infer that he was exercising a constitutional right. *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Fletcher v. Weir*, [455 US 603 \(1982\)](#) By inference here, the Fifth Amendment was not yet in legal play in at the May 22 hearing until Ms. Lerner was asked a direct question, en though she was under subpoena.

Second, I can imagine Ms. Lerner being under the impression that because her voluntary statement could not constitute a waiver because they chiefly amounted to a denial of guilt, not any details about the subject matter.² Again, I am not crediting such a view as a matter of law. Rather, I am allowing for the possibility t hat Ms. Lerner, perhaps on advice of counsel, had honestly believed this to be to be a correct legal inference. But it would probably require the questioner to confront the witness very specifically and expressly about the waiver and to make unmistakably clear to her that it was the official ruling of the committee that her grounds for belief that she had not waived were wrong. If she then still refused to answer, she might be in contempt. (Of course she could then argue to a trial or appellate court that she had not waived but if she lost on that point she would not then be able to undo her earlier refusal.

Most emphatically, I am *not* opining here that these arguments are valid and can defeat a waiver claim by the government. Rather, they are relevant to the extent that Ms. Lerner may have believed them to be valid arguments, and therefore may not have acted “willfully.” If so, at the very least her refusal at the March 5 hearing would not be willful unless the Chairman had categorically clarified for her that she had indeed waived, that she no longer had the privilege, and that if she immediately reasserted her purported privilege, she would be held in contempt. As discussed above, this the Chairman did not do.

One final analogy might be useful here, and that is perjury law. In *Bronston v. United States*,⁴⁰⁹ U.S. 352 (1973), the Supreme Court held that even when a witness clearly intended to mislead the questioner, there was no perjury unless the witness’s statement was a literally a false factual statement.³ While its reading of the law imposed a heavy burden on the prosecutor to arrange the phrasing of its questions so as to prevent the witness from finessing perjury as *Bronston* had done there, the Court made clear that just such a formalistic burden is what the law required to make a criminal of a witness.⁴ “Ambiguities with respect to whether an answer is perjurious “are to be remedied through the questioner's acuity.” *Bronston*, at 362.

² The federal false statement statute 18 U.S.C. 1001, had allowed the defense that the false statement was merely an “exculpatory no.” That defense was overruled in *Brogan v. United States* 522 U.S. 398 (1998), but perhaps a witness or her lawyer might believe would advise a client that a parallel notion might apply in regard to waiver of her fifth amendment privilege.

³The perjury statute like the contempt statute, makes “willfulness” the required mens rea.

⁴ “[I]f the questioner is aware of the unresponsiveness of the answer, with equal force it can be argued that the very unresponsiveness of the answer should alert counsel to press on for the information he desires. It does not matter that the unresponsive answer is stated in the affirmative, thereby implying the negative of the question actually posed; for again, by hypothesis, the examiner's awareness of unresponsiveness should lead him to press another

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question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury.” *Bronston*, at 361-62.

18. Gregory Gilchrist is an attorney with experience representing individuals in congressional investigations and currently an Associate Professor at the University of Toledo College of Law.

Statement of Gregory M. Gilchrist, an attorney with experience representing individuals in congressional investigations and current Associate Professor at the University of Toledo College of Law:

The rule is clear, as is the reason for the rule, and neither supports a prosecution for contempt. The Supreme Court has consistently held that unless a witness is “confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt,” the assertion of the Fifth Amendment privilege is devoid of the criminal intent required for a contempt prosecution. See *Quinn v. United States*, 349 U.S. 155, 166 (1955).

Criminal contempt is not a tool for punishing those whose legal analysis about asserting the privilege is eventually overruled by a governing body. Privilege law is hard, and reasonable minds can and will differ.

Contempt proceedings are reserved for those instances where a witness – fully and clearly apprised that her claim of privilege has been rejected by the governing body and ordered to answer under threat of contempt – nonetheless refuses to answer. In this case, the committee was clear only that it had not yet determined how to treat the continued assertion of the privilege. Prosecution for contempt under these circumstances would be inconsistent with rule and reason.

19. Lisa Kern Griffin, Professor of Law at Duke University School of Law whose scholarship and teaching focuses on constitutional criminal procedure stated:

"The Committee has an interest in pursuing its investigation into a matter of public concern and in getting at the truth. But the witness has rights, and there are well-established mechanisms for obtaining her testimony. If a claim of privilege is valid, then a grant of immunity can compel testimony. If a witness has waived the privilege, or continues to demur despite a grant of immunity, then contempt sanctions can result from the failure to respond. But the Supreme Court has made clear that those sanctions are reserved for defiant witnesses. Liability for contempt of Congress under section 192 requires a refusal to answer that is a 'deliberate' and 'intentional' violation of a congressional order. The record of this Committee hearing does not demonstrate the requisite intent because the witness was not presented with a clear choice between compliance and contempt."

20. David Gray is a Professor of Law at the University of Maryland Francis King Carey School of Law with expertise in criminal law, criminal procedure, international criminal law, and jurisprudence. He said:

“After reviewing the relevant portions of the May 22, 2013, and March 5, 2014, hearings, I concur in the views of Messrs. Rosenberg and Brand that a contempt charge filed against Ms. Lerner based on her invocation of her Fifth Amendment privilege and subsequent refusal to answer questions at the March 5, 2014, hearing would in all likelihood be dismissed. Two deficits stand out.

First, at no point during the hearing was Ms. Lerner advised by the Chairman that her invocation of her Fifth Amendment privilege at the March 5, 2014, hearing was improper. The Chairman instead read a lengthy narrative history “for the record,” the content of which he believed were “important . . . for Ms. Lerner to know and understand.” During that narrative, the Chairman reported a vote taken by his committee on June 28, 2013, expressing the committee’s view that Ms. Lerner waived her Fifth Amendment rights at the May 22, 2013, hearing and that her invocation of her Fifth Amendment rights at the May 22, 2012, hearing was therefore improper. During subsequent questioning at the March 5, 2014, hearing, Ms. Lerner declared that her counsel had advised her that she had not waived her Fifth Amendment rights and that she would therefore refuse to answer questions posed at the March 5, 2014, hearing. This exchange produced a wholly ambiguous record. Chairman Issa’s narrative history could quite reasonably have been interpreted by Ms. Lerner as precisely that: history. The committee’s view that her invocation of Fifth Amendment privilege at the May 22, 2013, hearing was improper may well have been “important . . . for Ms. Lerner to know and understand” as a matter of history, but did not inform her as to the committee’s views on her potential invocation of Fifth Amendment privilege at the March 5, 2014, hearing. Ms. Lerner’s statement regarding her counsel’s opinion that she had not waived her Fifth Amendment rights might have been in direct response to the committee’s June 28, 2013, resolution. Alternatively, it may have been a statement regarding the extension of any waiver made in May 2013 to a hearing conducted in March 2014. In either event, in order to lay a proper foundation for a potential contempt charge, Chairman Issa needed to respond directly to Ms. Lerner’s March 5, 2013, invocation at the March 5, 2013, hearing.

Second, Ms. Lerner was never directly informed by the Chairman at the March 5, 2014, hearing that her failure to answer direct questions posed at the March 5, 2014, would leave her subject to a contempt charge. During his narrative history, the Chairman did state that “if [Ms. Lerner] continues to refuse to answer questions from Members while under subpoena, the Committee may proceed to consider whether she will be held in contempt.” Messrs. Rosenberg and Brand are quite right to point out that, by using the word “may,” this statement fails to put Ms. Lerner on notice that her failure to answer questions posed at the March 5, 2014, hearing would leave her subject to a contempt charge. There is another problem, however. In context, the statement seems to be reported as part of the content of the June 28, 2013, resolution and then-contemporaneous discussions of the committee rather than a directed warning to Ms. Lerner as to the risks of her conduct in the March 5, 2014, hearing. In order to lay a proper foundation for a potential contempt charge, Chairman Issa therefore needed to inform Ms. Lerner in unambiguous terms that, pursuant to its June 28, 2013, resolution, the committee would pursue contempt charges against her should she refuse to answer questions posed by the committee on March 5, 2014.

Although it appears that Chairman Issa failed to lay a proper foundation for any contempt charges against Ms. Lerner based on her refusal to answer questions at the March 5, 2014, hearing, I cannot discern any malevolent intent on his part. To the contrary, it appears to me that, based on his exchanges with Ms. Lerner

at the May 22, 2013, hearing and his manner and comportment at the March 5, 2014, hearing, that he is genuinely, and laudibly, concerned that he and his committee pay all due deference to Ms. Lerner's constitutional rights. It appears likely to me that his omissions here are the results of an abundance of caution and his choice to largely limit his engagement with Ms. Lerner to reading prepared statements and questions rather than initiating the more extemporaneous dialogue that is the hallmark of examinations conducted in court."

21. JoAnne Epps, a former federal prosecutor and Dean of Temple University Beasley School of Law, said:

“A key element of due process in this country is fairness. The ‘uninitiated’ are not expected to divine the thinking of the ‘initiated.’ In other words, witnesses can be expected to make decisions based on what they are told, but they are not expected to know – or guess – what might be in the minds of governmental questioners. In the context of criminal contempt for refusal to answer, fairness requires that a witness be made clearly aware that an answer is demanded, that the refusal to answer is not accepted, and further that the refusal to answer can have criminal consequences. It appears that the witness in this case received neither a demand to answer, a rejection of her refusal to do so, nor an explanation of the consequences of her refusal. These omissions render defective any future prosecution.”

22. Stephen Saltzburg, is a former law clerk to Supreme Court Justice Thurgood Marshall, and currently the Wallace and Beverley Woodbury University at the George Washington University School of Law with expertise in criminal law and procedure; trial advocacy; evidence; and congressional matters. He said:

“The Supreme Court has made clear that a witness may not be validly convicted of contempt of Congress unless the witness is directed by a committee to answer a question and the witness refuses. The three major cases are *Quinn v. United States*, 349 U.S. 155, *Emspak v. United States*, 349 U.S. 190, and *Bart v. United States*, 349 U.S. 219, all decided in 1955. They make clear that where a witness before a committee objects to answering a certain question, asserting his privilege against self-incrimination, the committee must overrule his or her objection based upon the Fifth Amendment *and* expressly direct him to answer before a foundation may be laid for a finding of criminal intent.

This is a common sense rule. When a witness invokes his or her privilege against self-incrimination, the witness is entitled to know whether or not the committee is willing to respect the invocation. Unless and until the committee rejects the claim and orders the witness to answer, the witness is entitled to operate on the assumption that the privilege claim entitles the witness not to answer.

There is another question that arises, which is whether the Chairman of a committee is delegated the power to unilaterally overrule a claim of privilege or whether the committee must vote on whether to overrule it. This is a matter as to which I have no knowledge. I note that the memorandum by Morton Rosenberg appears to assume that the Chairman may unilaterally overrule a privilege claim, but I did not see any authority cited for that proposition.”

23. Kami Chavis Simmons, a former federal prosecutor and Professor of Law at Wake Forest University School of Law with expertise in criminal procedure stated:

“I agree with the legal analysis provided by Mr. Rosenberg, as well the comments of other legal experts. The Supreme Court’s holding in *Quinn v. U.S.*, is instructive here. In *Quinn*, the Supreme Court held that a conviction for criminal contempt cannot stand where a witness before a Congressional committee refuses to answer questions based on the assertion of his fifth-amendment privilege against self-incrimination “unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections.” *Quinn v. U.S.*, 349, U.S. 155, 165 (1955). Case law relying on *Quinn* similarly indicates that there can be no conviction where the witness was “never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt.” *Emspak v. U.S.*, 349 U.S. 190, 202 (1955). Based on the record in this case, the witness was not confronted with a choice between compliance and non-compliance. Thus, the initiation of a contempt proceeding seems inappropriate here.

There are additional concerns related to the initiation of criminal contempt proceedings in the instant case. Here, the witness, who was *compelled* to appear before Congress, made statements declaring only her innocence and otherwise made no incriminating statements. Pursuing a contempt proceeding based on these facts, may set an interesting precedent for witnesses appearing before congressional committees, and could result in the unintended consequence of inhibiting future Congressional investigations.”

24. Patrice Fulcher is an Associate Professor at Atlanta’s John Marshall Law School where she teaches Criminal Law and Criminal Procedure. She said:

“American citizens expect, and the Constitution demands, that U.S. Congressional Committees adhere to procedural constraints when conducting hearings. Yet the proper required measures designed to provide due process of law were not followed during the May 22nd House Oversight Committee Hearing concerning Ms. Lerner. In *Quinn v. United States*, the Supreme Court clearly outlined practical safeguards to be followed to lay the foundation for contempt of Congress proceedings once a witness invokes the Fifth Amendment. 349 U.S. 155 (1955). To establish criminal intent, the committee has to demand the witness answer and upon refusal, expressly overrule her claim of privilege. This procedure assures that an accused is not forced to ‘guess whether or not the committee has accepted [her] objection’, but is provided with a choice between compliance and prosecution. *Id.* It is undeniable that the record shows that the committee did not expressly overrule Ms. Lerner's claim of privilege, but rather once Ms. Lerner invoked her 5th Amendment right, the Chairman subsequently excused her. The Chairman did not order her to answer or present her with the clear option to respond or suffer contempt charges. Therefore, launching a contempt prosecution against Ms. Lerner appears futile and superfluous due to the Committee’s disregard for long standing traditions of procedure.”

25. Andrea Dennis is a tenured Associate Professor of Law at the University of Georgia Law School who teaches Criminal Law, Criminal Procedure, and Evidence, among other courses.



School of Law

MEMORANDUM

TO: The Honorable Elijah E. Cummings
Ranking Member
House Committee on Oversight & Government Reform

FROM: Andrea L. Dennis
Associate Professor of Law
University of Georgia School of Law

DATE: March 25, 2014

You asked my opinion whether the public video record of the appearance of Ms. Lois Lerner, former Director of Exempt Organizations of the Tax-Exempt and Government Entities Division of the Internal Revenue Service (IRS), before the House Committee on Oversight & Government Reform, which was investigating alleged improprieties by the IRS concerning the tax exempt status of some organizations, sufficiently demonstrates that Ms. Lerner acted “willfully” to support a criminal contempt of Congress charge, pursuant to 2 U.S.C. Sec. 192.

Based on my understanding of the facts, legal research, and professional experience, I must answer in the negative. Accordingly, I join the conclusions that Messrs. Morton Rosenberg and Stanley M. Brand presented on March 12, 2014, to Congressman Cummings, and which since have been echoed by others.

I will not herein detail the facts giving rise to this matter or offer a fully fleshed out research report. Mr. Rosenberg’s statement of relevant facts in his memorandum is accurate, and he has cited the most pertinent caselaw. I am happy, however, to provide you with additional supporting citations if necessary.

In short, my research of criminal Congressional contempt charges and analogous legal issues leads me to interpret the term “willfully” in 2 U.S.C. Sec. 192 to require that Ms. Lerner have voluntarily and intentionally violated a specific and unequivocal order to answer the Committee’s questions. Moreover, I believe that Ms. Lerner must have been advised that she faced contempt charges and punishment if she continued to refuse to answer the Committee’s questions despite its clear order to do so. Collectively, these elemental requirements ensure that witnesses in Ms. Lerner’s position are fairly notified that they must choose between making self-incriminating statements, lying under oath, and facing punishment for failing to comply with an order. Witnesses who refuse to comply with such clear statements of expectations have little room to question the nature of the circumstances with which they are confronted. In this case, the record indicates that Ms. Lerner was not forced to make such a choice and therefore a contempt prosecution would be legally and factually unsupportable.

Review of the public video recordings of Ms. Lerner's appearances at the Committee's hearings on May 22, 2013, and March 5, 2014, reveals that at no time during the Committee's publicized proceedings did the Committee Chair explicitly order Ms. Lerner to respond to questions under penalty of contempt. At most, the Committee Chair equivocally stated that if Ms. Lerner refused to answer the Committee's questions, then the Committee may possibly investigate her for contempt. This statement by itself is filled with such uncertainty that it would be erroneous to conclude that Ms. Lerner was directly ordered to answer questions and advised that she would be subject to penalty if she did not. And when considered in connection with the Chair's earlier mentions of possibly offering her immunity or granting her an extension of time to respond, the statement regarding possible contempt charges becomes even more indefinite. For these reasons, I am hard-pressed to conclude that the legal pre-requisites for acting "willfully" in a Congressional criminal contempt prosecution were factually established in these circumstances.

And although you did not particularly inquire of my opinion as to whether Ms. Lerner waived her Fifth Amendment privilege against compelled testimonial self-incrimination at the Committee's hearings on May 22, 2013, I find it an issue worthy of comment. Notably, I am unconvinced that Ms. Lerner waived her privilege at the proceedings by either reading an opening statement briefly describing her professional background and claiming innocence, or authenticating her earlier answers to questions posed to her by the Inspector General. From the record it does not appear that Ms. Lerner voluntarily revealed incriminating information or offered testimony on the merits of the issue being investigated. To conclude otherwise on the waiver issue would suggest oddly that in order to validly assert the privilege individuals must claim the privilege for even non-incriminating information, as well as upend the accepted notion that the innocent may benefit from the privilege.

Before closing, let me explain a little of my background. I am a tenured Associate Professor of Law. I teach Criminal Law, Criminal Procedure, and Evidence, among other courses. I research in a number of areas including criminal adjudication. Prior to entering academia, I clerked for a federal district court judge, practiced as an associate with the law firm of Covington & Burling in Washington, D.C., and served as an Assistant Federal Public Defender in the District of Maryland. A fuller bio may be found at: <http://www.law.uga.edu/profile/andrea-l-dennis>.

Thank you for the opportunity to reflect on this very important matter. Please let me know if you would like me to elaborate further on my thoughts or answer additional questions. If need be, I may be reached via email at aldennis@uga.edu or in my office at 706-542-3130.