ZUCKERMAN SPAEDER LLP

1800 M STREET, NW SUITE 1000
WASHINGTON, DC 20036-5802
202.778.1800 202.822.8106 fax www.zuckerman.com

WILLIAM W. TAYLOR, III
Partner
202.778.1810
wtaylor@zuckerman.com

May 30, 2013

VIA FACSIMILE AND OVERNIGHT DELIVERY

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Re: Lois Lerner

Dear Mr. Chairman:

There have been reports that the Committee is considering recalling our client Lois Lerner and that it is seeking advice from counsel on whether she waived her Fifth Amendment privilege at the hearing on May 22, 2013. If the Committee is in fact seeking legal authority on the question, we request that it consider the authorities we discuss below. As these authorities make clear, Ms. Lerner did not waive her Fifth Amendment privilege.

There are several well-established principles in this area. First, a witness who proclaims her innocence may invoke the Fifth Amendment. In *Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam), the U.S. Supreme Court summarily reversed the Supreme Court of Ohio's decision that a witness who denied involvement in the child abuse under investigation and claimed her innocence in the child's death was not entitled to assert her Fifth Amendment privilege (and therefore had been wrongly granted immunity from prosecution). *Id.* at 18-19, 22. The U.S. Supreme Court "emphasized that one of the Fifth Amendment's 'basic functions . . . is to protect *innocent* men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" *Id.* at 21 (quoting *Grunewald v. United States*, 353 U.S. 391, 421 (1957); *Slochower v. Board of Higher Ed. of New York City*, 350 U.S. 551, 557-58 (1956)) (emphasis in original). The Supreme Court made clear that the privilege may be properly invoked by those why deny wrongdoing.

Second, consistent with *Reiner*, a witness compelled to appear and answer questions does not waive her Fifth Amendment privilege by giving testimony proclaiming her innocence. For example, in *Isaacs v. United States*, 256 F.2d 654 (8th Cir. 1958), a witness subpoenaed to appear before a grand jury testified that he was not guilty of any crime while at the same time invoking his Fifth Amendment privilege. *Id.* at 655-56. The U.S. Court of Appeals for the Eighth Circuit rejected the government's waiver argument and held that the witness's "claim of

innocence . . . did not preclude him from relying upon his Constitutional privilege." *Id.* at 661. In *Ballantyne v. United States*, 237 F.2d 657 (5th Cir. 1956), a witness subpoenaed to appear before a grand jury testified that he had reported all income from his company but invoked the Fifth Amendment not to answer questions about his specific cash withdrawals from the company. *Id.* at 658-59. The U.S. Court of Appeals for the Fifth Circuit held that the witness's "general claim of innocence" did not "preclude him from thereafter relying upon his constitutional privilege when confronted with specific withdrawals." *Id.* at 665.

The law is no different for witnesses who proclaim their innocence before a Congressional committee. In *United States v. Hoag*, 142 F. Supp. 667 (D.D.C. 1956), a witness subpoenaed to appear before a Senate committee investigating links to the Communist Party testified that she had "never engaged in espionage" but invoked her Fifth Amendment privilege not to answer questions related to her alleged involvement in the Communist Party. *Id.* at 668-69. The U.S. District Court for the District of Columbia held that the witness did not waive her Fifth Amendment privilege. *Id.* at 671-72. In *United States v. Costello*, 198 F.2d 200 (2d Cir. 1952), a witness subpoenaed to appear before a Senate committee investigating his involvement in a major crime syndicate testified that he had "always upheld the Constitution and the laws" and provided testimony on his assets but invoked his Fifth Amendment privilege not to answer questions related to his net worth and indebtedness. *Id.* at 202. The U.S. Court of Appeals for the Second Circuit held that the witness did not waive his constitutional privilege. *Id.* at 202-03.

Third, the "status" of a person who has an absolute right not to testify (such as a defendant in a criminal case) but voluntarily takes the stand and testifies to the facts is "different from that of an ordinary witness" compelled to appear and answer questions. *Hoag*, 142 F. Supp. at 672. If a person voluntarily takes the stand to explain his actions, "his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination." *Brown v. United States*, 356 U.S. 148, 154-55 (1958); *see also Hoag*, 142 F. Supp. at 672 ("[W]hen a defendant takes the witness stand and testifies [in his own defense], '[h]is waiver is not partial,' and 'having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.'") (citations omitted).

On the other hand, if a witness "compelled to testify" is "to have the benefit of the privilege at all," then "he must be able to raise [it] at the point in his testimony when his immunity becomes operative." *Brown*, 356 U.S. at 155. The Supreme Court has emphasized that this "curtailment of the normal right of cross-examination" is necessary to protect "the constitutional protection against compulsory self-incrimination." *Id.* Thus, an "ordinary witness" compelled to appear and answer questions does not waive her Fifth Amendment privilege unless she testifies to "incriminating facts." *McCarthy v. Arndstein*, 262 U.S. 355, 359 (1923); *see also In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 58, 67 (D.D.C. 2000) ("It is clear

that a witness does not lose his Fifth Amendment privilege unless he testifies to an incriminating fact."); *United States v. MacCloskey*, 682 F.2d 468, 478 n.18 (4th Cir. 1982) ("The privilege is waived only if the prior testimony revealed incriminating facts."). In *Arndstein*, for instance, the Supreme Court held that a bankrupt individual compelled to appear before a bankruptcy commission did not waive his Fifth Amendment privilege by answering questions about his assets because "none of the answers which had been voluntarily given . . . , either by way of denials or partial disclosures, amounted to an admission or showing of guilt." *Id.* at 359-60. In this matter, Ms. Lerner proclaimed her innocence and denied any wrongdoing, but did not testify to any facts, let alone any incriminating facts.

Finally, we informed you that Ms. Lerner would invoke her Fifth Amendment privilege not to testify at the hearing on May 22, 2013, and requested that she be excused from appearing. By letter dated May 21, 2013, you informed us that the "subpoena compel[ling] Ms. Lerner to appear before the Committee" remained "in effect," and that the Committee was requiring her to appear at the hearing. If the hearing were to be "run like a courtroom" (as at least one member of the Committee has suggested), then the Committee should not have required Ms. Lerner to appear at the hearing. *See, e.g.*, *United States v. Crawford*, 707 F.2d 447, 449 (10th Cir. 1983) ("[N]either the prosecution nor the defense may call a witness knowing that the witness will assert his Fifth Amendment privilege against self-incrimination."); *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970) ("[A] witness should not be put on the stand for the purpose of having him exercise his [Fifth Amendment] privilege before the jury."). To recall Ms. Lerner to assert her Fifth Amendment privilege once again would serve no legitimate legislative purpose.

For the foregoing reasons, Ms. Lerner did not waive her Fifth Amendment privilege and should not be recalled to appear before the Committee. To the extent that you, your staff, or your counsel would like to discuss this matter further, we will make ourselves available at your convenience.

Sincerely,

William W. Taylor /PH

William W. Taylor, III

cc: The Honorable Elijah E. Cummings, Ranking Member (via facsimile)
Stephen Castor, Majority Chief Counsel for Investigations (via e-mail)
Susanne Grooms, Minority Counsel (via e-mail)
Kerry W. Kircher, General Counsel, U.S. House of Representatives (via e-mail)