House Committee on Oversight and Government Reform 6/27/13
Re: Validity of Fifth Amendment Privilege Assertion by Lois Lerner

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Chairman Issa, Ranking Member Cummings, Members of the Committee, and staff: I am currently the Paul J. Kellner Professor of Law at Columbia Law School. For the past twenty years, my scholarship has focused on criminal procedure and federal criminal enforcement issues. I teach courses in Criminal Procedure, Evidence, Federal Criminal Law, and a Sentencing seminar. Before entering academia, I served as an assistant U.S. Attorney in the Southern District of New York, and ultimately was the Chief Appellate Attorney in that Office. Since leaving government service in 1992, I have served as a consultant for various federal agencies, including the Justice Department's Office of the Inspector General, and I have been retained as defense counsel or a consultant in a number of criminal and civil matters.

I have been asked by the minority staff to provide a written statement as to whether the conduct and words of Lois Lerner, the former Director of the Internal Revenue Service's Exempt Organizations Division, in the course of her May 22, 2013, appearance before this Committee constituted a waiver of her Fifth Amendment privilege against self-incrimination. To this end, I have reviewed a video of Ms. Lerner's appearance before this committee; the May 30, 2013, letter submitted by Ms. Lerner's counsel, as well as the relevant legal authorities. And I am quite confident that, as a matter of law, Ms. Lerner did not waive her privilege and would not be found to have done so by a competent federal court.

That Ms. Lerner did not lose her Fifth Amendment privilege before this Committee simply because she previously provided information to the Treasury Inspector General for Tax Administration (TIGTA) should be clear. As the Tenth Circuit recently noted, "there is ample precedent for the rule that waiver of the Fifth Amendment privilege in one proceeding does not waive that privilege in a subsequent proceeding, often because circumstances have changed between the two proceedings." *United States v. Allmon*, 596 F.3d 981, 985 (10th Cir. 2000) (citing cases); see also *In re Vitamins Antitrust Litig.*, 120 F. Supp.2d 58, 66 (D.D.C. 2000) ("most courts that have considered this issue have held that the waiver of the privilege against self-incrimination in one proceeding does not affect the right of a witness or accused to invoke the privilege as to the same subject matter in another independent proceeding, but is limited to the proceeding in which it occurs."). The question thus becomes whether testimonial waiver could found based on her brief statement on May 22 in which, having identified herself, she denied having broken any law or violated any rules.

Framing the inquiry is the general rule, as explained by the Second Circuit, that

> "testimonial waiver" is not to be lightly inferred, see *Smith v. United States*, 337 U.S. 137, 150 (1949), and the courts accordingly indulge every reasonable

> presumption against finding a testimonial waiver, see *Emspak v. United States*, 349 U.S. 190, 198 (1955); *United States v. O'Henry's Filmworks*, Inc., 598 F.2d 313, 318-19 (2d Cir. 1979). Indeed, we read the prior decisions of the Supreme Court and the courts of this Circuit to hold that a court should only infer a waiver of the fifth amendment's privilege against self-incrimination from a witness' prior statements if (1) the witness' prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth, and (2) the witness had reason to know that his prior statements would be interpreted as a waiver of the fifth amendment's privilege against self-incrimination.

Klein v. Harris, 667 F.2d 274 (2d Cir. 1981); see also *Coushatta Tribe of La. v. Abramoff*, 2009 U.S. Dist. LEXIS 71540 (W.D. La. 2009); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 58, 66 (D.D.C. 2000).

Neither of the oft-cited *Klein* factors is present here. With respect to the first, this not a situation in which the privilege has been selected invoked so as to "garble" the truth. See *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (Hand, J.); see also *Rogers v. United States*, 340 U.S. 367, 371 (1951) (warning against recognition of the privilege when it "would open the way to distortion of facts by permitting a witness to select any stopping place in testimony"). Indeed, any claim that Ms. Lerner was seeking to use the Fifth Amendment as a sword is particularly weak on the facts here, where Ms. Lerner unsuccessfully attempted to avoid appearing before the Committee at all, and tried to assert her privilege by letter. Forced to appear (in contrast to, say, a party choosing to testify at trial), she limited herself to a general denial of malfeasance, of precisely the nature a fact finder would appropriately discount as the defensive non-account of someone in her position. If the cases cited by Ms. Lerner's counsel for the proposition that a general claim of innocence does not amount to waiver seem dated, it is probably because the general proposition is clear enough not to need reiteration. See also *SEC v. Cayman Islands Reinsurance Corp.*, 551 F. Supp. 1056, 1058 (S.D.N.Y. 1982) (no prejudice to SEC from defendant's Fifth Amendment invocation because his prior statements "amount to little more than a general denial of the SEC's allegations against him").

Neither is the second *Klein* factor present here, since Ms. Lerner had no reason to know that her brief protestation of innocence, made because the Committee demanded her attendance, would be construed as a waiver of her Fifth Amendment privilege. See *Cartier v. Micha, Inc.*, 2008 U.S. Dist. LEXIS 39143 (S.D.N.Y. 2008) (finding that witness did not "volunteer" information on his own initiative, but did so "within the context of an adversarial deposition at which he had no choice but to face questions chosen by adversary counsel for plaintiffs' benefit").

Nor did Ms. Lerner's willingness, in response to the Chairman's request that she "authenticate" her prior statements to TIGTA deprive her of her Fifth Amendment privilege. In *Colombo v. Bd. of Educ. for the Clifton Sch. Dist.*, 2011 U.S. Dist. LEXIS 127771 (D.N.J. 2011), the court noted "If a witness makes an admission in an affidavit

submitted in a proceeding, she may lose her ability to invoke the privilege when asked about the substance of that admission later in the proceeding." But willingness to authenticate – to simply admit that the prior statements were made, without any concession of their veracity – is not testimony on "the substance" of the prior statements. See also *Nursing Home Pension Fund v. Oracle Corp*., 2007 U.S. Dist. LEXIS 49851 (N.D. Cal. 2007)

My bottom line is that Ms. Lerner's responses to this Committee on May 22 did not come close to waiving her Fifth Amendment privilege against self-incrimination.