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ONE HUNDRED THIRTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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June 26, 2013

The Honorable Darrell E. Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

Yesterday, I received notification that you plan to hold a vote this Friday on a motion or resolution for the Oversight Committee to make a determination that IRS official Lois Lerner waived her Fifth Amendment privilege against self-incrimination when she appeared before the Committee on May 22, 2013. I am writing to request that you first take the preliminary, common-sense step of holding a hearing with legal experts before requiring Members of the Committee to vote on this very significant Constitutional question.

Yesterday, without any consultation with me or other Committee Members, you noticed a Business Meeting for June 28, 2013, to "consider a motion or resolution concerning whether Lois Lerner, the Director of Exempt Organizations at the Internal Revenue Service, waived her Fifth Amendment privilege against self-incrimination when she made a statement at the Committee hearing on May 22, 2013."<sup>1</sup> You did not provide a copy of your motion or resolution, and you did not provide any materials to shed light on how you intend to proceed.

I believe bringing a motion or resolution for Committee consideration at this time is premature. Some Members of our Committee are not attorneys, and I believe every Committee Member should have the benefit of testimony from legal experts—on both sides of this issue—to present and discuss the applicable legal standards and historical precedents regarding Fifth Amendment protections for witnesses appearing before Congress.

On May 30, 2013, Ms. Lerner's counsel, William Taylor, sent a detailed letter to the Committee citing extensive legal precedent supporting the position that Ms. Lerner did not waive her Fifth Amendment privilege. Citing a dozen opinions issued by the Supreme Court, Circuit Courts, and District Courts, Ms. Lerner's counsel explained that "a witness compelled to appear

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<sup>1</sup> Memorandum from Majority Staff, House Committee on Oversight and Government Reform, *Full Committee Business Meeting* (June 25, 2013).

and answer questions does not waive her Fifth Amendment privilege by giving testimony proclaiming her innocence.”<sup>2</sup> He added:

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.<sup>3</sup>

The Committee did not respond to this request or to the legal precedents Ms. Lerner’s counsel provided.

Many other legal experts have made public statements agreeing with Ms. Lerner’s counsel that she did not waive her Fifth Amendment privilege. For example:

- Stan Brand, the Counsel of the House of Representatives from 1976 to 1983, stated that Ms. Lerner was “not giving an account of what happened. She’s saying, ‘I’m innocent.’”<sup>4</sup>
- Yale Kamisar, a former University of Michigan law professor and expert on criminal procedure, stated: “A denial is different than disclosing incriminating facts. ... You ought to be able to make a general denial, and then say I don’t want to discuss it further.”<sup>5</sup>
- James Duane, a professor at Regent University School of Law, stated: “it is well settled that they have a right to make a ‘selective invocation,’ as it’s called, with respect to questions that they think might raise a meaningful risk of incriminating themselves.”<sup>6</sup>

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<sup>2</sup> Letter from William W. Taylor III, Counsel to Lois Lerner, to Rep. Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform (May 30, 2013).

<sup>3</sup> *Id.*

<sup>4</sup> *IRS’s Lerner May Have Waived Rights at Hearing, Issa Says*, Bloomberg Business Week (May 22, 2013) (online at [www.businessweek.com/news/2013-05-22/issa-says-inspector-general-failed-to-inform-congress-on-irs-1](http://www.businessweek.com/news/2013-05-22/issa-says-inspector-general-failed-to-inform-congress-on-irs-1)).

<sup>5</sup> *Did Lois Lerner Forfeit Her Fifth Amendment Privileges?*, Wall Street Journal Law Blog (May 22, 2013) (online at <http://blogs.wsj.com/law/2013/05/22/did-lois-lerner-forfeit-her-fifth-amendment-privileges/>).

<sup>6</sup> *Expert: Lois Lerner Didn’t Waive Her Right to Plead the Fifth*, New York Magazine (May 22, 2013) (online at <http://nymag.com/daily/intelligencer/2013/05/lerner-gowdy-waive-right-5th-amendment-irs.html>).

On the other hand, some prominent legal experts have opined that Ms. Lerner did waive her Fifth Amendment rights. For example, Professor Alan Dershowitz stated: "You can't simply make statements about a subject and then plead the Fifth in response to questions about the very same subject. ... Once you open the door to an area of inquiry, you have waived your Fifth Amendment right...you've waived your self-incrimination right on that subject matter."<sup>7</sup>

It is precisely because there is such a wide range of legal opinion on this issue that a hearing to obtain testimony from legal experts would help Committee Members consider this issue in a reasoned, informed, and responsible manner. In contrast, rushing to vote on a motion or resolution without the benefit of even a single hearing with expert testimony would risk undercutting the legitimacy of the motion or resolution itself.

I understand that you have been consulting with the House Counsel about this issue, and that he may be willing to support the legal argument that Ms. Lerner waived her Fifth Amendment privilege. It would be helpful for Committee Members to hear directly from the House Counsel and pose any questions they have about the legal standards and historical precedents he believes are controlling. I also believe Ms. Lerner's counsel should be given the opportunity to provide the Committee with a response to the legal arguments made by the House Counsel so each Committee Member can make his or her own decision based on a full and thoughtful debate among all parties involved.

My staff have contacted Ms. Lerner's counsel, and he indicated that he is willing and able to appear before the Committee to present the legal case on behalf of his client, to answer any questions posed by Committee Members about the law and precedents he provided, and to respond to arguments on the other side of this matter.

To date, this investigation has been characterized by a series of unsubstantiated accusations by Members of Congress who have jumped to conclusions without evidence to support their claims. I urge a more cautious and responsible approach on this very significant Constitutional question. Thank you for your consideration of this request.

Sincerely,



Elijah E. Cummings  
Ranking Member

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<sup>7</sup> Dershowitz: *IRS Official Lerner "Can Be Held in Contempt" of Congress*, The Hill (May 23, 2013) (online at <http://thehill.com/blogs/blog-briefing-room/news/301557-dershowitz-irs-chief-lerner-can-be-held-in-contempt-of-congress#ixzz2U9U3Vf3W>).