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VIA FACSIMILE AND MESSENGER

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
H-232 U.S. Capitol Building
Washington, D.C. 20515

The Honorable Eric I. Cantor
Majority Leader
U.S. House of Representatives
H-329 U.S. Capitol Building
Washington, D.C. 20515

Re: Lois Lerner

Dear Speaker Boehner and Leader Cantor:

This firm represents Lois G. Lerner. On April 10, 2014, the House Committee on Oversight and Government Reform passed, along party lines, a resolution recommending that the House hold Ms. Lerner in contempt. The reason for the recommendation is that Ms. Lerner, having been compelled to appear, asserted her innocence and refused to answer questions posed to her by the Committee on the basis of her Fifth Amendment privilege. The Committee voted that she waived the Fifth Amendment's protection when she proclaimed her innocence.

We write to request an opportunity to present to the House the reasons why it should not hold Ms. Lerner in contempt. The law is clear that she did not waive her Fifth Amendment privilege by proclaiming her innocence while invoking her constitutional privilege not to answer questions. In addition, the Committee did not satisfy the minimum procedural requirements for holding her in contempt, because it did not order her to answer any questions.

Ms. Lerner's privilege not to testify or answer the Committee's questions is deeply rooted in our fundamental liberties. As the Congressional Research Service recently reported, Congress has not brought contempt charges against a witness who asserted her Fifth Amendment privilege since the 1960s. Ms. Lerner asserted her constitutional privilege in a respectful way on the advice of her counsel. Numerous respected constitutional scholars and experts support her right and have given written opinions to that effect. She cooperated in obtaining for the Committee documents and communications on her business and personal computer.

Ms. Lerner cannot be prosecuted for respectfully asserting her privilege under these circumstances. No court will hold that she waived her privilege. Supreme Court precedent is clear that a witness compelled to appear before a Congressional committee does not waive her Fifth Amendment privilege by asserting her innocence. Holding Ms. Lerner in contempt would

not only be unfair and, indeed, un-American, it would be flatly inconsistent with the Fifth Amendment as interpreted by the Supreme Court. Congress has the same duty to defend and uphold the Constitution as every other branch of government.

I. MS. LERNER DID NOT WAIVE HER FIFTH AMENDMENT PRIVILEGE.

Ms. Lerner did not waive her Fifth Amendment privilege by giving a brief opening statement proclaiming her innocence at the House Oversight Committee hearing on May 22, 2013. In *Ohio v. Reiner*, the Supreme Court affirmed a longstanding rule that a witness who proclaims her innocence is entitled to assert her Fifth Amendment privilege. 532 U.S. 17, 18-19, 22 (2001). The 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.*, 350 U. S. 551, 557-558 (1956)) (emphasis in original).

Because Ms. Lerner was compelled by subpoena to appear at the hearing on May 22, 2013, she did not waive her Fifth Amendment privilege unless she testified to incriminating facts, which she clearly did not do. In *McCarthy v. Arndstein*, an individual compelled to appear before a bankruptcy commissioner testified that he did not have any stocks or bonds in his possession but refused to testify further about his assets. 262 U.S. 355, 356-57 (1923). Holding that the individual did not waive his Fifth Amendment privilege, the Supreme Court made clear that an "ordinary witness" compelled to appear does not waive his privilege unless he testifies to "incriminating facts." *Id.* at 359; *see also In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 58, 67-68 (D.D.C. 2000) (holding that a witness did not lose his Fifth Amendment privilege because he did not testify to incriminating facts).

Thus, there is no serious argument that a witness compelled to appear waives her Fifth Amendment privilege by proclaiming her innocence. For example, in *Isaacs v. United States*, 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. 256 F.2d 654, 655-56 (8th Cir. 1958). The United States 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 660-61. In *Ballantyne v. United States*, 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 cash withdrawals from the company. 237 F.2d 657, 659 (5th Cir. 1956). The United States 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 cash withdrawals." *Id.* at 665.

The law is no different for witnesses who proclaim their innocence before a Congressional committee. For example, in *United States v. Hoag*, a witness subpoenaed to appear before a Senate subcommittee chaired by Senator Joseph McCarthy 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. 142 F. Supp. 667, 668-69 (D.D.C. 1956). Congress held the witness in contempt after Senator McCarthy argued that she had waived her privilege by "volunteering" that she had never engaged in espionage:

> For your benefit, you have waived any right as far as espionage is concerned by your volunteering the information you have never engaged in espionage. . . . My position is, just for counsel's benefit, when the witness says she never engaged in espionage, then she waived the fifth amendment, not merely as to that question, but the entire field of espionage. . . . Therefore, the witness is ordered to answer.

Subversion and Espionage in Defense Establishments and Industry, Hearing before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, 83rd Cong. 284 (1954). The United States District Court for the District of Columbia rejected Senator McCarthy's argument, holding that the witness did not waive her Fifth Amendment privilege because she did not testify to any incriminating facts. *Hoag*, 142 F. Supp. at 671-672. In *United States v. Costello*, 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 about his net worth and indebtedness. 198 F.2d 200, 202 (2d Cir. 1952). The United States Court of Appeals for the Second Circuit held that the witness did not waive his constitutional privilege. *Id.* at 202-03.

The House Oversight Committee's argument that Ms. Lerner waived her Fifth Amendment privilege because her opening statement was in some sense "voluntary" is foreclosed by the Supreme Court's decision in *Arndstein*. The issue presented in that case was whether an individual compelled to appear before a bankruptcy commissioner waived his Fifth Amendment privilege by testifying "*of his own accord*, without invoking any privilege, to the very matters" at issue. 262 U.S. at 357 (emphasis added). The Supreme Court held that because "none of the answers which had been *voluntarily* given by [the individual], either by way of denials or partial disclosures, amounted to an admission or showing of guilt," he did not waive his privilege. *Id.* at 359-60 (emphasis added).

Ms. Lerner is certainly not the first Congressional witness to proclaim her innocence while invoking the Fifth Amendment privilege. In a hearing before the House Financial Services Committee in 2002, Bernie Ebbers, the former Chief Executive Officer of WorldCom, gave a

longer opening statement than Ms. Lerner in which he proclaimed his innocence ("no one will conclude that I engaged in any criminal or fraudulent conduct during my time at WorldCom") and invoked his Fifth Amendment privilege not to answer any questions. Wrong Numbers: The Accounting Problems at WorldCom, Hearing before the House Financial Services Committee, 107th Cong. 20-21 (2002). Neither the House Financial Services Committee (on which Leader Cantor served) nor the full House took any action to hold Mr. Ebbers in contempt. To do so against Ms. Lerner would not only be unlawful, it would be unfair.

II. THE HOUSE OVERSIGHT COMMITTEE DID NOT FOLLOW THE MINIMUM PROCEDURAL REQUIREMENTS FOR CONTEMPT.

As more than 30 academics and other authorities have already opined, the Committee did not satisfy the minimum procedural requirements for contempt. The Supreme Court held in three companion cases arising out of contempt prosecutions during the McCarthy Era that "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction . . . for refusal to answer that question." *Quinn v. United States*, 349 U.S. 155, 166 (1955). In each of the cases, the House Committee on Un-American Activities did not "specifically overrule" the witnesses' Fifth Amendment objections to the questions asked or "specifically direct[]" the witnesses to answer the questions. *Quinn*, 349 U.S. at 166; *Empsak v. United States*, 349 U.S. 190, 202 (1955); *see also Bart v. United States*, 349 U.S. 219, 222 (1955). The Supreme Court overturned the witnesses' convictions because they "were never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution." *Quinn*, 349 U.S. at 166; *Empsak*, 349 U.S. at 202; *see also Bart*, 349 U.S. at 223.

Based on this Supreme Court precedent, the nonpartisan Congressional Research Service ("CRS") wrote in a recent report to Congress that "when a witness objects to a question or otherwise refuses to answer, the chairman or presiding member should rule on any objection and, if the objection is overruled, the witness should be clearly directed to answer." CRS, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, at 55-56 (2012). CRS advised that the following procedure be followed if a witness objects to a question on privilege or other grounds:

> If a witness refuses to answer a question, the committee must ascertain the grounds relied upon by the witness. It must clearly rule on the witness's objection, and if it overrules the witness's objection and requires the witness to answer, it must instruct the witness that his continued refusal to answer will make him liable to prosecution for contempt of Congress. By failing adequately to apprise the witness that an answer is required notwithstanding his objection[,] the

> element of deliberateness necessary for conviction for contempt under 2 U.S.C. § 192 is lacking, and such a conviction cannot stand.

Id. at 56 (quoting *Leading Cases on Congressional Investigatory Power*, at 7 (Comm. Print. 1976)).

Nothing close to this procedure was followed by the House Oversight Committee in this case. Before both hearings, Ms. Lerner, through her counsel, notified the Committee that she would invoke her privilege and requested that she not be forced to do so in public. At the second of two hearings to which she was subpoenaed, on March 5, 2014, Chairman Issa asked Ms. Lerner eight different questions, and Ms. Lerner invoked her Fifth Amendment privilege in response to each question, explaining that her counsel had advised her that she had not waived her privilege. Chairman Issa did not overrule her privilege as to any question nor direct her to answer. Instead, he abruptly adjourned the hearing after the last question.

Even if she was aware that the Committee disagreed with her counsel's position on waiver, Ms. Lerner was not given a "clear-cut choice" between answering the Committee's questions and risking prosecution. The last statement Chairman Issa made before excusing Ms. Lerner from the May 22, 2013, hearing was that the Committee would be in "consultation with the Department of Justice as to whether or not limited or use immunity could be negotiated." Although the Committee voted on June 28, 2013, that Ms. Lerner had waived her Fifth Amendment privilege, immunity was discussed when Ms. Lerner's counsel met with Committee staff on January 24, 2014, at their request. Committee staff asked if counsel would provide a proffer of the testimony Ms. Lerner would give if immunized, and counsel readily agreed to do so. Committee staff gave assurances that the Committee would discuss immunity further and get back to counsel. Counsel next received a February 25, 2014, letter from Chairman Issa recalling Ms. Lerner to testify on March 5, 2014.

Over the course of the next few days, Ms. Lerner's counsel made several proposals for the Committee to obtain her testimony, but none were accepted. At the March 5, 2014, hearing, Chairman Issa said in his opening statement that "[i]f 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." (Emphasis added.) He did not say anything else about contempt, and his last question to Ms. Lerner ("Are you still seeking a one-week delay in order to testify?") indicated that the Committee was still seeking a resolution short of contempt.

The procedural requirements that any Congressional committee must follow before holding a witness in contempt for refusal to answer are simple and straightforward. A committee

must give a witness a "clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution." *Quinn*, 349 U.S. at 166. This requirement is not a mere technicality behind which recalcitrant witnesses may stand to avoid the consequences of defiance. It is fundamental to exercise of the contempt power.

Recognizing this defect in process here will not demean the power of Congress. It will articulate how precious the House recognizes the constitutional right asserted and how dramatic, dangerous, and misguided would be a decision of this body to attempt to prosecute Ms. Lerner for respectfully exercising it.

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We respectfully request an opportunity to address you and the House before any vote.

Sincerely,

William W. Taylor / DH

William W. Taylor, III

c: The Honorable Nancy Pelosi, Minority Leader, U.S. House of Representatives
The Honorable Kevin O. McCarthy, Majority Whip, U.S. House of Representatives
The Honorably Steny H. Hoyer, Minority Whip, U.S. House of Representatives
The Honorable Darrel E. Issa, Chairman, House Oversight Committee
The Honorable Elijah E. Cummings, Ranking Member, House Oversight Committee