Independent Experts Found that Lois Lerner Did Not Waive Her Fifth Amendment Rights

Opinions on General Waiver

A. Statement of Professor James J. Duane

James Duane is a Professor of Law at Regent University Law School who teaches in the areas of Evidence, Civil Procedure, Trial Practice, and Appellate Advocacy.

Thank Goodness that Professor Dershowitz is Wrong About the Fifth Amendment

Written Statement of

Professor James J. Duane
Regent University School of Law

Submitted to the House Committee on Oversight and Government Reform

June 28, 2013

I am a tremendous admirer of Harvard Law Professor Alan Dershowitz. He is a brilliant man, and I had the great pleasure of buying him breakfast the last time he visited my law school. He is right about a great number of things. But with all due respect, he is not right about everything, and sometimes that is a very good thing.

FIG. 1: Professor James Duane chatting with Professor Alan Dershowitz during his most recent visit to Regent Law School.

In her recent appearance before this Committee, Lois Lerner invoked her right to remain silent, although she did not do so until after she first declared that: "I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee."

In an online radio interview given shortly after that testimony, Professor Dershowitz opined that Lois Lerner thereby waived her Fifth Amendment privilege to refuse to answer further questions from this Committee, merely because she chose to give this brief "opening statement" in which she made a general denial of any guilt. In his view of the law, as he explained it:

> 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.[1]

[1] *Alan Dershowitz: IRS Chief Lerner 'Can Be Held in Contempt'* (May 22, 2013) (online at http://www.newsmax.com/Headline/lerner-irs-held-contempt/2013/05/22/id/505922).

With supreme confidence, Dershowitz concluded that "it's an open and shut case," that the "law is as clear as could be," that Lerner is now in contempt, and that her lawyers were therefore guilty of "malpractice" by allowing her to say what she did.[2]

Only a few hours before this interview with Professor Dershowitz was broadcast online, I gave a brief explanation of my contrary view that Lerner had not waived her Fifth Amendment privilege.[3] In the remarks that follow, I shall briefly amplify those remarks, respectfully explain why Dershowitz is mistaken about the Fifth Amendment, and point out why this Committee and all Americans should be glad that he is wrong.

I. PROFESSOR DERSHOWITZ IS MISTAKEN ABOUT THE FIFTH AMENDMENT

In his recent interview about this Committee's investigation, Professor Dershowitz did not cite any Supreme Court opinion to support his assertions about Lerner's supposed waiver, although he did assert that "The law is as clear as could be, that once you open up an area of inquiry, you can't 'shut off the spigot' – I think that's the metaphor that the Supreme Court has used – once you turn on the faucet, you can't turn it off when you choose to."[4]

I am not sure what unnamed Supreme Court case Professor Dershowitz has in mind, although he is not quoting the language of that case correctly if it does exist. A computer search reveals that no decision of the Supreme Court of the United States involving the Fifth Amendment has ever used the word *spigot* or *faucet*.

On the contrary, the law is actually rather clearly settled in favor of Lerner's claim that she has not waived her Fifth Amendment privilege by the mere act of announcing in general terms that she had done nothing wrong.

There are two well-known situations in which a witness or criminal suspect may waive his or her right against self-incrimination by talking too much. But neither applies to an investigation like the one being conducted by this Committee.

A. The Witness Who Makes Incriminating Admissions.

The Supreme Court has held that a witness cannot claim the Fifth Amendment privilege in the extremely rare case in which the witness voluntarily answers so many questions, and so thoroughly incriminates himself, that the answer to any additional questions on the same topic would not present "a reasonable danger of

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[2] *Id.*

[3] *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)

[4] Professor Dershowitz, *supra* note 1.

further crimination in light of all the circumstances, including [those] previous disclosures." Rogers v. United States, 340 U.S. 367, 374 (1951) (emphasis added). The Court added that "[s]ince the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, [a witness] cannot invoke the privilege where response to the specific question in issue … would not *further* incriminate her." *Id.* at 372-73 (emphasis added). For example, a man who appears before a grand jury and admits that he shot and killed his neighbor, and that he did so knowingly and intentionally and without any legal justification, cannot then plead the Fifth Amendment if the jurors ask him whether he was holding the gun in his right hand or his left hand.

But that has nothing to do with Lois Lerner's testimony. She did not admit anything incriminating, as Dershowitz concedes, but instead made a general denial of any wrongdoing at all. Professor Dershowitz acknowledges that fact but dismisses it as irrelevant, reasoning that:

> Now what [Lerner will] say, or her lawyers will say is, 'Well, she didn't say anything incriminating in her opening statement; now they're asking her to make incriminating statements, so she has the right to remain silent.' That's not the way it works. That's not the way it works. Once you open up a subject matter of inquiry by your own testimony, then you've waived your self-incrimination right on that subject matter.[5]

With all due respect, Professor Dershowitz is entirely mistaken in his apparent recollection of the reasoning of the *Rogers* case.[6] Indeed, the Supreme Court in that case took pains to emphasize that it had reached a different result in a pair of previous opinions, and had held that a different witness had *not* waived his Fifth Amendment privilege in voluntarily supplying some information about a certain matter, because in both cases "the Court stressed the absence of any previous admission of guilt *or incriminating facts* [by that witness]." Rogers, 340 U.S. at 373 (internal punctuation and citation omitted).

The Supreme Court thus distinguished its holding in an earlier case, in which it had specifically held that "where the previous disclosure by an ordinary witness is not an

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[5] Dershowitz, *supra* note 1.

[6] It seems likely that Professor Dershowitz's mistaken off-the-cuff assertions about waiver of the Fifth Amendment privilege were based on his hazy recollection of the holding in *Rogers*. His remarks in his online interview included a mention of an unnamed Cold-War era case involving Communist Party members, almost exactly like the facts of the *Rogers* case, and his recent book on the Fifth Amendment mentions no case involving the waiver of the Fifth Amendment – or that even arguably supports his claims about Lois Lerner – other than that same decision in *Rogers*. Alan Dershowitz, IS THERE A RIGHT TO REMAIN SILENT? COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11, at page 98 (2008).

actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him." McCarthy v. Arndstein, 262 U.S. 355, 359 (1923). Indeed, the Court specifically cited with approval the holding of the highest court of New York that "a witness by answering questions exonerating himself in general terms from all connection with a criminal transaction" – precisely as Lois Lerner did before this Committee – "does not thereby waive his right to remain silent" as to additional questions that might tend to incriminate him with respect to that same matter. *Id*. at 359 (citing People v. Forbes, 143 N.Y. 219).

B. The Defendant Who Voluntarily Testifies at Her Own Trial.

There is a second situation in which a witness may waive his Fifth Amendment rights by saying too much. When a criminal or civil defendant chooses to *voluntarily* testify at his trial in his own defense, it has always been universally understood that he cannot – after testifying fully to his one-sided version of the facts in response to questions from his own lawyer on direct examination – then "take the Fifth" and refuse to answer any questions from the prosecutor on cross-examination. Brown v. United States, 356 U.S. 148, 154-55 (1957). This is a reflection of the special nature of the right of cross-examination at civil and criminal trials, and of the inherent unfairness in allowing a witness to potentially interfere with "the function of courts of justice to ascertain the truth." *Id*. at 156. These concerns apply with special force in a criminal trial, because the Double Jeopardy clause of the Fifth Amendment gives the prosecution only one shot at trying to prove its case against the accused.

But this is not the same as the rule for witnesses like Lois Lerner, who attempted to invoke the Fifth Amendment in response to questions put to her at an investigative hearing where she was ordered to appear under subpoena. *See Brown*, 356 U.S. at 155 (distinguishing between "a witness who is compelled to testify" and the situation "when a witness voluntarily testifies," and noting that the Fifth Amendment is more readily waived in the latter situation). She did not appear voluntarily, did not give a complete presentation of her side of the case on direct examination, and her generic denial of wrongdoing – even without the equivalent of cross-examination – did not pose the slightest threat to the investigative work of this Committee.

In *Brown*, the Supreme Court noted the special danger that would result at a trial if a witness who voluntarily testified at length were allowed to put her version of the facts before the judge or jury, thus potentially influencing the verdict and the outcome of the case, without allowing herself to be subject to meaningful cross-examination. The Court reasoned that the value of cross-examination in that context would be vastly superior to the unacceptable alternative of "striking the witness' testimony" and asking the judge or jury to put it out of their minds. *Brown*, 356 U.S. at 156 n.5. But that danger is simply not present in a situation like the one before this Committee, when a witness claims the Fifth Amendment after giving a

generic wrongdoing not at a *trial* but during an *investigative* proceeding such as a police interview, a grand jury proceeding, or a Congressional committee. In such settings the ultimate objective is gathering information – as much as possible – not necessarily reaching any final determinations of fact or liability, and so there is no grave threat of injustice if a witness in such a setting invokes the Fifth Amendment to prevent the government agency or investigator from getting an answer to *every* question it would prefer to have answered. This is especially true in a case like this one, where a Congressional committee has heard nothing from a witness other than a generic denial of wrongdoing; surely no member of this distinguished Committee (unlike the jurors at an ordinary trial) would have the slightest difficulty disregarding those unexplained and conclusory denials in light of her refusal to answer specific questions pertaining to those denials.

II. IT IS A GOOD THING THAT PROFESSOR DERSHOWITZ IS WRONG ABOUT THE FIFTH AMENDMENT

All Americans are fortunate that Professor Dershowitz is wrong about the scope of the Fifth Amendment's protections. But slightly less obvious is the fact that his view of the law, if it were sound, would also be an unfortunate development in the long run from the perspective of this Committee or any other investigative body.

In the short run, it is understandable why some members of this Committee might prefer to find a way to persuade some court, if possible, that Lois Lerner had entirely waived her Fifth Amendment privilege – and could therefore be compelled to answer every conceivable question about every aspect of her work at the Internal Revenue Service – simply because she made a categorical denial of any wrongdoing. That position, if it were sustained by the courts, would probably enable this Committee to obtain much more information from this one witness in this one proceeding. But in the long run, such a broad conception of waiver would actually lead to far more frequent assertions of the privilege, and therefore to the disclosure of less information.

If this Committee could find some way to persuade a federal court to hold Ms. Lerner in contempt on the theory identified by Professor Dershowitz, the work of this and every other investigative body would be undermined in the long run, for competent attorneys would then be entitled – and ethically obligated – to frequently advise their clients to answer certain questions in the following fashion:

> On the advice of counsel, I must respectfully decline to answer *any* questions related in any way to the subject matter of this investigation, no matter how tangentially or remotely connected those questions might be to any possible basis that I might incriminate myself, and even if there is no realistic chance that some of your questions in

> isolation might pose any risk that I might incriminate myself, because I cannot take the risk under the *Lerner* doctrine that by answering even a few innocuous and generic inquiries I will at some point inadvertently cross over the nebulous line that might later persuade some court that I have said just a little too much, and let just a little bit too much of the proverbial cat out of the bag – even if it is just part of one paw – as Lois Lerner did when she spoke three dozen words back in 2013. I therefore must once again refuse to answer that last question, just like the rest of the questions you have put to me today, to ensure that my answer will not amount to a waiver of the right to answer *other* later questions on the same topic that might pose a genuine risk of self-incrimination.

Needless to say, this is not an accurate statement of the law, nor an accurate description of the way in which witnesses are expected to proceed when asserting their Fifth Amendment privileges. And that is a good thing for every investigative body, for it would ultimately enable investigative bodies like this one to obtain much less information from witnesses, not more.

Opinions on General Waiver

B. Statement of Professor Daniel C. Richman

Daniel C. Richman is the Paul J. Kellner Professor of Law at Columbia University Law School. A former law clerk to United States Supreme Court Justice Thurgood Marshall, Professor Richman teaches courses in Criminal Procedure, Evidence, and Federal Criminal Law.

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

Professor Daniel Richman
Columbia Law School

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.

Opinions on General Waiver

C. Statement of Stanley M. Brand, Esq.

Stanley M. Brand served as General Counsel for the House of Representatives from 1976 to 1983.

Statement of Stanley M. Brand, Esq. Regarding Lois Lerner's Assertion of Constitutional Privilege

Dated: June 27, 2013

Counsel for the Committee on Oversight and Government Reform (Minority) has asked me to provide a brief statement concerning my view of whether Lois Lerner, an IRS official who appeared before the Committee on May 22, 2013 in connection with its inquiry into the Internal Revenue Service's consideration of applications for tax exempt status by certain groups, waived her rights under the Fifth Amendment by giving a brief prefatory statement during her appearance. As I stated at the time of her appearance, I do not believe her comments would be construed as a waiver under current judicial interpretations of the Fifth Amendment. It is well settled that the Fifth Amendment privilege against being compelled to testify against oneself is available in congressional proceedings. *Quinn v. United States,* 349 U.S. 155 (1955)*; Emspack v. United States,* 349 U.S. 190 (1955). What is also well settled is that the Courts will afford witnesses wide latitude in assessing the sufficiency of the words used to assert the privilege. As the Court in *Quinn* stated "no ritualistic formula is necessary to invoke the privilege... Quinn's references to the Fifth Amendment were clearly sufficient to put the Committee on notice of an apparent claim of privilege." 349 U.S. at 164.

Ms. Lerner's brief introductory statement to the Committee, not given in response to any specific question, was simply a profession of her innocence, offered prior to the commencement of Member questioning regarding the substance of the Committee's inquiry. It contained no factual representations relating to the subject matter of the hearing and generally denied wrongdoing.

Indeed, in the *Quinn* case itself, a lengthy colloquy between the witness asserting the privilege and the Committee propounding the questions occurred during the witnesses' appearance. When sworn and questioned, Quinn stated "I would like to make a statement along the lines that [an earlier witness] made yesterday in regard to a question of that nature, I feel that the political beliefs, opinions and associations of the American people can be held secret if they so desire." *Id.*, at 158, n.8. The witness went on in response to further questions from the committee"... I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred, I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am." Id. Despite this extended expression by the witness, the Court upheld his claim of privilege.

As with all constitutional privileges that protect individuals against governmentally compelled testimony, the Courts have insisted on a knowing and unequivocal waiver before divesting a witness of such privileges. *See, e.g. United States v. Helstoski,* 442 U.S. 477, 493 (1979)(the constitutional privilege for congressional speech or debate requires "an explicit and unequivocal waiver").

Based on the foregoing, I do not believe that Ms. Lerner's brief introductory profession of innocence, in which she offered no substantive testimony or evidence constitutes a waiver of her Fifth Amendment rights.

Opinions Regarding the Impact of Lerner's Unsworn Statements to the Department of Justice

A. Statement of Professor Bruce A. Green

Bruce Green is a former law clerk to United States Supreme Court Justice Thurgood Marshall, a former federal prosecutor and currently the Louis Stein Professor at Fordham University Law School with expertise in criminal procedure and prosecutorial ethics.

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April 29, 2014

Committee on Oversight
and Government Reform
c/o Donald K. Sherman, Counsel
U.S. House of Representatives
Washington, DC 10515

Re: Assertion of the Fifth Amendment Right Against Self-Incrimination

To the Chairman and Members of the Committee:

I understand that the question has arisen whether Lois Lerner, a witness in a Committee hearing, properly asserted the Fifth Amendment right against self-incrimination in response to questions about how she conducted her work at the IRS, or whether she effectively waived her right by submitting to questioning by representatives of the Department of Justice ("DOJ"). I offer this letter to discuss judicial decisions that make it clear that Ms. Lerner's did not waive her constitutional right by answering DOJ investigators' questions.

Earlier, I submitted a letter to your Committee, dated February 4, 2014, with regard to different issues that have arisen in the same investigation, and my background is described there. In brief, I have been a law professor for 27 years, during which time I have taught and written in the areas of legal ethics, criminal law and criminal procedure. I was previously a federal prosecutor and judicial law clerk.

My understanding of the relevant facts, in summary, is as follows. Members of Congress and others have raised questions about the IRS's conduct in examining the tax-exempt status of certain organizations. On May 22, 2013, Ms. Lerner, who had directed the IRS's Exempt Organizations division, was called to testify in a hearing of your Committee. After briefly asserting her innocence of any law breaking, she invoked her Fifth Amendment right against self-incrimination. DOJ has also been investigating the matter. After the hearing, Ms. Lerner reportedly answered DOJ representatives' questions in an informal interview in which she was not under oath. The Committee recalled Ms. Lerner to testify. On March 5, 2014, she appeared again before the Committee, asserted her Fifth Amendment right, and was excused.

Your Committee has now issued a Report recommending that the House of Representatives find Ms. Lerner in contempt. The Report (at page 17) asserts that Ms. Lerner's reported interview by DOJ "calls into question the basis of Ms. Lerner's assertion of the Fifth Amendment privilege." For the reasons discussed below, I believe this assertion reflects a misunderstanding of the relevant law: Ms. Lerner did not waive or otherwise forfeit her right against self-incrimination by answering DOJ representatives' questions informally and not under oath.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." The right is not limited to criminal defendants or criminal trials but applies in any proceeding, including in congressional hearings. *Emspak v. United States*, 349 U.S. 190 (1955). It entitles a witness to decline to answer questions if the answers would tend to incriminate the witness – *i.e.*, if her answers would furnish a "a link in the chain of evidence" needed to prosecute the individual. *Hoffman v. United States*, 341 U.S. 479 (1951). Even a witness who is "entirely innocent" of any charges may assert the right: "It is not every one, however honest who would . . . willingly be placed on the witness stand." *Wilson v. United States*, 149 U.S. 60 (1893).

A criminal defendant who testifies on direct examination at trial may not refuse to testify on cross-examination "on the matters he has himself put in dispute." *Brown v. United States*, 356 U.S. 148 (1958). That is because, once a defendant testifies, "[the] interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." The defendant who voluntarily testifies on his own behalf may be cross-examined on matters "reasonably related to the subject matter of his direct examination." *Jenkins v. Anderson*, 447 U.S. 231 (1980).

It does not follow, however, that a person who answers questions outside the criminal trial setting waives the privilege in that proceeding, much less in future proceedings. A person who begins answering questions in the grand jury may cease answering questions in reliance on the Fifth Amendment right. Likewise, a person questioned by police or other law enforcement authorities may begin to answer questions but then assert the right to remain silent.

The D.C. Circuit, among a minority of lower federal courts, has recognized a narrow exception. In *Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969), the court held that, in some situations, a witness who voluntarily reveals incriminating facts in the grand jury may be required to reiterate his testimony as a witness at trial. The court acknowledged that "the prevailing rule is that a waiver of Fifth Amendment privilege at one proceeding does not carry through to another proceeding." The court reasoned, however, that "[o]nce a witness has voluntarily spoken out, we do not see how his protected interest is jeopardized by testifying in a subsequent proceeding, provided he is not required to disclose matters of substance which are unknown to the Government." The court made clear, however, that "[t]he privilege of course remains as to matters that would subject the witness to a 'real danger' of further crimination." The court concluded that requiring a witness, who is not "himself accused or under indictment," merely to reiterate earlier testimony, "accommodates both the policies underlying the Fifth Amendment's privilege and the interest of obtaining full disclosure whenever possible in criminal trials."

At the same time, the court in *Ellis* stated that there was no such waiver when a person voluntarily answers investigators' questions. It explained:

> "There is, of course, an important distinction between prior sworn testimony at a formal proceeding, for example a grand jury hearing, and statements volunteered during an informal investigation or properly supervised custodial situation. We deal with a question of substantially increased credibility and reliability. Thus we do not hold that waiver takes place when a witness, who has made disclosures to investigating agents is called at trial, or before the grand jury. . . . [W]e feel that a statement made to investigators, as opposed to that at a formally constituted tribunal, has less impact even in legal significance if introduced at a subsequent trial of the witness. Thus, the witness may suffer real detriment if he is held to his informal waiver."

The District of Columbia appellate court's decision in *Carter v. United States*, 791 A.2d 23 (D.C. App. 2001), relied on this observation in concluding that a defendant did not waive the Fifth Amendment right by making a statement during a pre-sentence interview.

The judicial decisions are therefore flatly contrary to the suggestion that Ms. Lerner waived her Fifth Amendment right by answering DOJ representatives' questions outside a formal setting. As the court noted in *Ellis*, the prevailing view is that testifying voluntarily in one setting does not waive the right in later settings. The limited exception recognized in in *Ellis*, which is a minority view, also does not apply. If Ms. Lerner had testified in the grand jury, *Ellis* would support the view that she might be compelled to reiterate her testimony at a criminal trial. But that is not the situation here. Ms. Lerner did not give "sworn testimony at a formal proceeding" but gave unsworn answers in an informal interview. The courts in *Ellis* and *Carter* were explicit that a person does not waive the Fifth Amendment right by answering questions outside a formal setting or by making statements that were not under oath. Two further distinctions might also be noted. First, Ms. Lerner was not called to testify at a criminal trial (or any other trial) but in a congressional investigation, where hearsay is admissible, and so there is no evident need to have a witness reiterate earlier statements that are already known. Second, there is nothing to indicate that the Committee's intention was in fact simply to have Ms. Lerner merely reiterate statements that the Committee already knew.

Very truly yours,

Bruce A. Green

Opinions Regarding the Impact of Lerner's Unsworn Statements to the Department of Justice

B. Additional Statement of Professor Daniel C. Richman

House Committee on Oversight and Government Reform April 29, 2014

Re: Continued Validity of Fifth Amendment Privilege Assertion by Lois Lerner

Professor Daniel Richman, Columbia Law School

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 and 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 whether Lois Lerner, the former Director of the Internal Revenue Service's Exempt Organizations Division, can continue to maintain a valid Fifth Amendment privilege against self-incrimination before this Committee in the wake of her reported conversations with Justice Department prosecutors in connection with that department's IRS inquiry.

As I noted in a previous submission to this Committee, dated June 27, 2013, I am confident that Ms. Lerner did not waive her privilege when she testified before this Committee on May 22, 2013. I will therefore focus on the effect of her subsequent conversations with Justice Department officials, and in particular on whether her meeting with them -- one in which she presumably waived her Fifth Amendment right -- can properly be deemed to have waived her privilege before this Committee. As the following analysis will show, I do not believe any competent court would find such a waiver to have occurred.

1. Generally the decision of a witness to waive her Fifth Amendment right in one context will not prevent her from asserting a valid privilege against self-incrimination in another. Not long ago, the Connecticut Supreme Court summarized the current constitutional landscape in this regard:

> It is well settled that a waiver of the self-incrimination privilege in one proceeding does not affect the rights of a witness in another, separate proceeding. *State v. Grady*, 153 Conn. 26, 34, 211 A.2d 674 (1965) ("It is settled law that even if an accused waives his privilege against self-incrimination by voluntarily testifying [at his own trial], the waiver is limited to the particular proceeding in which he volunteers the testimony. 8 Wigmore, Evidence § 2276(4), p. 470 [McNaughton Rev.1961]."); 1 C. McCormick, Evidence (5th Ed.1999) § 134 ("[a] witness's loss of the privilege by testifying ... applies throughout but not beyond the 'proceeding' in which the witness has [testified]"). Indeed, virtually all the federal circuits recognize this principle. It similarly is established in numerous states that have addressed the issue that a person who has waived his privilege in one

> proceeding is not estopped from asserting the privilege in a subsequent proceeding.

Martin v. Flanagan, 259 Conn. 487, 789 A.2d 979 (2002); see also Slutzker v. Johnson, 393 F.3d 373, 389 (3d Cir. 2004) ("[i]t is settled by the overwhelming weight of authority that a person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it as to the same matter in a subsequent trial or proceeding.") (quoting In re Neff, 206 F.2d 149, 152 (3d Cir.1953)).

As the Sixth Circuit has explained of the no-waiver approach taken by the majority of federal courts (in the absence of explicit Supreme Court clarification of the issue):

> The policy behind the majority rule that the privilege is "proceeding specific" and not waived in a subsequent proceeding by waiver in an earlier one, rests on the thought that during the period between the successive proceedings conditions might have changed creating new grounds for apprehension, *e.g.*, the passage of new criminal law, or that the witness might be subject to different interrogation for different purposes at a subsequent proceeding, or that repetition of testimony in an independent proceeding might itself be incriminating, even if it merely repeated or acknowledged the witness' earlier testimony, because it could constitute an independent source of evidence against him or her.

In re Morganroth, 718 F.2d 161, 165 (6th Cir. 1983).

2. To some extent, the D.C. Circuit in Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969), adopted a different, "minority" analysis. See Tomlin v. United States, 680 A.2d 1020, 1022 (D.C. 1996); In re Morganroth, 718 F.2d at 65 (both using "minority" term when referring to *Ellis*).

In *Ellis*, a witness who had voluntarily testified before a grand jury without invoking the privilege against self-incrimination (of which he had been advised) sought to claim it when he was called to testify as a witness at the trial on the indictment returned by the grand jury. While acknowledging that "the prevailing rule is that a waiver of Fifth Amendment privilege at one proceeding does not carry through to another proceeding," the *Ellis* court declined to follow this rule on this particular set of facts.

In so holding, the *Ellis* court observed: "It would impede sound law enforcement if an implicated but cooperating witness can decide, after he has made disclosure to the grand jury, that he will refuse to testify at trial. The Government may have structured its case around this witness, and be unable at a late hour, often after jeopardy has attached, to recast an investigation." 416 F.2d at 801. It then went on to find that there is no "Fifth Amendment policy that would be furthered by restricting a witness's waiver before the grand jury so as to give him a mint-new privilege at trial." Id. at 802. But the court took care to note: It may be that in some situations the passage of time, and change in purpose of an investigation, may open up new real dangers. The question must be faced realistically, however, and not mechanically. In the case before us involving a grand jury

presentation and then a trial without unusual delay, this danger does not have substance." Id. at 803.

3. *Ellis* has been broadly criticized. Indeed, the Sixth Circuit has suggested that it is bad law. See In re Morganroth, 718 F.2d at 166, n. 1 (noting that Pillsbury Co. v. Conboy, 459 U.S. 248 (1983), "raises doubt as to the continued validity of the *Ellis* Court's view"). But even assuming it is still good law within the D.C. Circuit, it doesn't come close to supporting an argument that Ms. Lerner waived her rights before the House Committee (or in other fora) by speaking with Justice Department officials. The *Ellis* Court took pains to note that

> There is, of course, an important distinction between prior sworn testimony at a formal proceeding, for example a grand jury hearing, and statements volunteered during an informal investigation or properly supervised custodial situation. We deal with a question of substantially increased credibility and reliability. Thus we do not hold that waiver takes place when a witness, who has made disclosures to investigating agents is called at trial, or before the grand jury.

416 F.2d at 805 n.37. This distinction between formal hearings (like those held by this Committee) and informal interviews (like that apparently conducted by Justice Department officials in this matter) has been deemed critical by courts applying *Ellis*. See Carter v. United States, 791 A.2d 23, 25 (D.C. 2001) (holding that witness validly asserted his Fifth Amendment privilege at trial because his prior statements during a presentence interview had been "neither made under oath nor at a judicial proceeding"). One can thus safely say that, even in the D.C. Circuit, a witness's readiness to speak with prosecutors or agents informally – i.e. outside the context of formal proceedings – will not preclude him thereafter from asserting a valid Fifth Amendment privilege in a formal hearing.

4. Moreover, any expansion of Ellis beyond its facts would threaten the government's ability to productively investigate a broad range of crimes. Consider the following scenario: An individual called to be a witness in a civil deposition – perhaps in an private action, perhaps a public enforcement action -- invokes the Fifth Amendment. Thereafter prosecutors pursuing a related criminal investigation seek to meet with him with an eye to obtaining his cooperation against more culpable targets. They can – if he wants– offer him some protection in the form of a proffer agreement. (These are standard agreements that, to varying degrees, limit the government's ability to introduce his statements against him down the road.) They won't want, at least at this juncture, to offer him immunity. He, for his part, in order to give the government his side of the story – often as a prelude to cooperation – will want to take the protection afforded by the proffer agreement and waive his Fifth Amendment right to remain completely silent. If the consequence of waiver in the prosecutor's office is waiver at further formal proceedings – whether in the grand jury, at trial, or in the context of an enforcement action or civil suit – the individual would be well advised not engage in this proffer. A reading of *Ellis* to reach this scenario – which in all relevant respects is the one presented here – would thus deprive the government of this potential source of useful information. Such was not the intent of the *Ellis* court. And as best I can tell, it is not the law.