

More Than 30 Independent Legal Experts Conclude That Chairman Issa's Contempt Resolution is Constitutionally Deficient

Dear Colleague:

More than 30 independent legal experts have now come forward to conclude that the contempt resolution being brought to the House Floor this week by Oversight Committee Chairman Darrell Issa is fatally flawed and will likely be thrown out of court. **I urge you to vote no on the resolution.**

These independent experts include two former House Counsels, three former clerks to Supreme Court justices, six former federal prosecutors, and law professors from Yale, Stanford, Harvard, Duke, and Georgetown, as well as the law schools of several Republican members of the Oversight Committee, including Temple, University of Michigan, University of South Carolina, George Washington, University of Georgia, and John Marshall. They also include both Democrats and Republicans. For example:

- **Stan Brand**, who served as House Counsel from 1976 to 1983, concluded that Chairman Issa's failure to comply with Constitutional due process requirements "is fatal to any subsequent prosecution."
- **J. Richard Broughton**, a Professor at the University of Detroit Mercy School of Law and a member of the Republican National Lawyers Association, concluded that Ms. Lerner "would likely have a defense to any ensuing criminal prosecution for contempt, pursuant to the existing Supreme Court precedent."
- **Thomas J. Spulak**, who served as House Counsel from 1994 to 1995, concluded: "I do not believe that the proper basis for a contempt of Congress charge has been established."
- **Morton Rosenberg**, who served for 35 years as an expert in Constitutional law and contempt at the nonpartisan Congressional Research Service, concluded that "the requisite due process protections have not been met."

A witness does not waive the Fifth Amendment simply by professing her innocence.

As the Supreme Court held in 1949, "testimonial waiver is not to be lightly inferred and the courts accordingly indulge every reasonable presumption against finding a testimonial waiver."

In addition, more than 30 experts in Constitutional and criminal law who have reviewed the record before the Committee now conclude that Chairman Issa botched the contempt proceedings in his rush to adjourn the Committee's hearing on March 5, 2014, when he cut off my microphone, drew his hand across his neck, and ordered Republican staff to "close it down." These experts conclude that the Chairman failed to comply with the Constitution's requirements to overrule the witness' Fifth Amendment assertion and order her to answer his questions.

Although Chairman Issa asked the House Counsel's office to draft a memo retroactively justifying his actions, that memo must be recognized for what it is—a legal brief written in

preparation for defending their client's actions in court.

Because of the gravity of these Constitutional issues, I asked Chairman Issa to hold a hearing with legal experts, writing: "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."

More than nine months later, Chairman Issa has still refused to hold a hearing with any legal experts on this issue. Voting on this resolution without the benefit of even a single hearing with expert testimony not only undercuts the legitimacy of the resolution itself, but jeopardizes the Constitutional protections of all Americans in the future.

The full opinions of the 32 independent legal experts on the botched contempt proceedings can be found [here](#), and the full opinions of independent legal experts who have concluded that Ms. Lerner's statements did not constitute a waiver can be found [here](#).

Please contact my office at (202) 225-5051 with any questions.

Sincerely,

Elijah E. Cummings
Ranking Member