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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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April 10, 2014

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

Dear Mr. Chairman:

I am writing in response to the letter you sent last Friday falsely accusing me of insisting on immunity for former IRS official Lois Lerner and requesting that I disclose my communications with her attorney. Although your accusation is completely baseless, I am happy to assist the Committee by describing the interactions both our staffs have had with Ms. Lerner's attorney.

### Your Consultations with the Justice Department About Immunity

In your letter on Friday, you wrote: "Your insistence on the prospect of immunity is surprising."<sup>1</sup> I was also surprised to hear I was insisting on immunity—since nothing could be further from the truth. In fact, you first raised the prospect of immunity on May 21, 2013, in a letter to Ms. Lerner's attorney demanding that she appear before the Committee despite the assertion of her Fifth Amendment rights. You wrote:

The Committee requires Ms. Lerner's appearance because of, among other reasons, the possibility that she will waive or choose not to assert the privilege as to at least certain questions of interest to the Committee; **the possibility that the Committee will immunize her testimony pursuant to 18 U.S.C. § 6005**; and the possibility that the Committee will agree to hear her testimony in executive session.<sup>2</sup>

In addition, during the Committee's hearing the next day, on May 22, 2013, you said you planned to consult with the Department of Justice about immunity. You stated:

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<sup>1</sup> Letter from Chairman Darrell E. Issa to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Apr. 4, 2014).

<sup>2</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to William W. Taylor, III, Counsel to Lois Lerner (May 21, 2013) (emphasis added).

I have no choice but to excuse the witness subject to recall after we seek specific counsel on the questions of whether or not the constitutional right of the Fifth Amendment has been properly waived. Notwithstanding that, **in consultation with the Department of Justice as to whether or not limited or use immunity could be negotiated**, the witness and counsel are dismissed.<sup>3</sup>

To date, you have not disclosed whether you took the actions you planned and, if you did, what the results of your consultations with the Department of Justice were.

### **The Difference Between Immunity and a Proffer**

In falsely accusing me of insisting on immunity, you appear to be conflating the concepts of immunity and a proffer. Immunity is a legal protection from prosecution granted by the Committee. Since immunity protects an individual from prosecution based on the specific testimony given, there is no corresponding Fifth Amendment right not to testify.

A proffer is a statement from an individual's attorney explaining what his or her client would say if granted immunity. A proffer is a routine investigative tool that does not grant immunity. It does not bind the Committee in any way, but instead allows the Committee to obtain information without requiring witnesses to waive their Fifth Amendment rights.

I have never insisted on immunity, as your letter claims. Instead, I have stated repeatedly that I believe a proffer would help the Committee obtain information in a way that does not grant immunity or bind the Committee to any course of action.

At one point, you apparently shared this view. On February 26, 2014, Ms. Lerner's attorney sent a letter to the Committee stating that he met privately with your staff in January. According to Ms. Lerner's attorney, "The staff asked if I would provide a proffer of the testimony she would give if immunized, and I agreed to do that."

Strangely, you went on national television just one week later and claimed that Ms. Lerner's attorney never made this written offer. You stated:

We want to get to the truth. If the attorney had a proffer, which as you know, which would be tell us—don't tell us your client is innocent—tell us what we need to know. And he's never offered to do that.<sup>4</sup>

In any event, you never obtained the proffer, and the Committee now does not have the benefit of its contents. When I attempted to ask about the status of the proffer at our hearing on

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<sup>3</sup> House Committee on Oversight and Government Reform, *Hearing on the IRS: Targeting Americans for their Political Beliefs* (May 22, 2013) (emphasis added).

<sup>4</sup> *On the Record with Greta Van Susteren*, Fox News (Mar. 5, 2014) (online at <http://video.foxnews.com/v/3299057287001/issa-cummings-explain-heated-words-at-irs-hearing/#sp=show-clips>).

March 5, 2014, you disregarded my requests for recognition, silenced my microphone, and drew your hand across your neck while ordering Republican staff to “close it down.”<sup>5</sup>

### **Your Inexplicable Rejection of Ms. Lerner’s Offer to Testify**

In your letter last Friday, you asked me to disclose to the Committee my interactions with Ms. Lerner’s attorney to assist the Committee. You wrote:

So that all Members of the Committee can have a better understanding of Mr. Taylor’s current position, please disclose any communications that you or your staff have had with Mr. Taylor. By identifying these communications, you will avoid concern that any last minute proposal is merely intended to delay and obstruct the ongoing investigation into IRS targeting.<sup>6</sup>

Your request is particularly hypocritical given that you excluded Democrats from your negotiations with Ms. Lerner’s attorney and rejected a proposal to have Ms. Lerner testify with a simple one-week extension.

When you demanded—with only a week’s notice—that Ms. Lerner appear before the Committee on March 5, 2014, her attorney requested an additional seven days to prepare her to testify because he had preexisting obligations out of town. In the days that followed, your staff communicated frequently with Ms. Lerner’s attorney via email and telephone about various options, including potential hearing testimony. Ultimately, Ms. Lerner’s attorney explained that Ms. Lerner was willing to testify if she could obtain a one-week extension to March 12.

On Saturday, March 1, 2014, a member of your staff wrote an email to Ms. Lerner’s counsel stating: “I understand from [another Republican staffer] that Ms. Lerner is willing [sic] testify, and she is requesting a one week delay. In talking to the Chairman, wanted to make sure we had this right.”<sup>7</sup> In response, Ms. Lerner’s counsel wrote: “Yes.”<sup>8</sup>

In a subsequent email, your staffer memorialized a telephone conversation he had with Ms. Lerner’s counsel, writing: “On Sat I indicated the Chairman would be in a position to confer with his members on that request on Monday.”<sup>9</sup> It is unclear whether you ever discussed this

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<sup>5</sup> House Committee on Oversight and Government Reform, *Resumption of Hearing on The IRS: Targeting Americans for their Political Beliefs* (Mar. 5, 2014).

<sup>6</sup> Letter from Chairman Darrell E. Issa to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Apr. 4, 2014).

<sup>7</sup> Email from Majority Staff, House Committee on Oversight and Government Reform, to William W. Taylor, III, Counsel to Lois Lerner (Mar. 1, 2014). *See also Lawyer for IRS Official Denies Issa Claim Client Will Testify*, Washington Times (Mar. 3, 2014).

<sup>8</sup> Email from William W. Taylor, III, Counsel to Lois Lerner, to Majority Staff, House Committee on Oversight and Government Reform (Mar. 1, 2014).

<sup>9</sup> Email from Majority Staff, House Committee on Oversight and Government Reform, to William W. Taylor, III, Counsel to Lois Lerner (Mar. 3, 2014).

offer with your Republican colleagues or Speaker Boehner, but you certainly did not discuss it with me or any Democratic Members. If you had sought our input on this request, every single Democratic Committee Member would have accepted it without a moment's hesitation.

Instead of consulting with Committee Members on the following Monday, you went on national television a day earlier, on Sunday, March 2, 2014, to announce—inaccurately—the “late breaking news” that Ms. Lerner would testify on March 5, 2014.<sup>10</sup> As a result of your actions, the Committee lost the opportunity to obtain Ms. Lerner's testimony. Following your interview and your inaccurate statements, Mr. Taylor explained why he advised his client against testifying:

We lost confidence in the fairness and the impartiality of the forum. It is completely partisan. There was no possibility in my view that Ms. Lerner would be given a fair opportunity to speak or to answer questions or to tell the truth.<sup>11</sup>

Your staff subsequently claimed that they “didn't realize at the time that Taylor's offer was contingent on the delay.”<sup>12</sup>

#### **Subsequent Discussions with Ms. Lerner's Attorney**

Although I was extremely disappointed after I learned how you scuttled the offer for Ms. Lerner to testify, I continued to hope that there was at least a remote possibility that the Committee could still obtain information important to our inquiry through a proffer, so I discussed this matter with you personally.

During our discussion, you proposed that I contact Ms. Lerner's attorney to see if he was still willing to provide a proffer. I explained that I would not proceed unless you and I both obtained the proffer together, in a joint, bipartisan action. I must admit that I was also concerned that you might use an attempt by me to obtain the proffer alone to falsely accuse me of secretly seeking immunity for Ms. Lerner—which is exactly what you did in your letter on Friday.

Because of your previous inaccurate claims, Ms. Lerner's attorney asked that we not discuss future proffer negotiations publicly. He made clear, however, that he had no objection to the Committee making the contents of the proffer available to the public. Although you agreed to these terms, your staff refused to agree to them when my staff followed up with them. As a result, today the Committee still has no proffer from Ms. Lerner's attorney.

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<sup>10</sup> *Fox News Sunday*, Fox News (Mar. 2, 2014) (online at [www.foxnews.com/on-air/fox-news-sunday-chris-wallace/2014/03/02/rep-mike-rogers-deepening-crisis-ukraine-rep-darrell-issa-talks-irs-investigation-sen-rob#p/v/3281439472001](http://www.foxnews.com/on-air/fox-news-sunday-chris-wallace/2014/03/02/rep-mike-rogers-deepening-crisis-ukraine-rep-darrell-issa-talks-irs-investigation-sen-rob#p/v/3281439472001)) (“Quite frankly, we believe the evidence we've gathered causes her, in her best interest, to be someone who should testify.”).

<sup>11</sup> *Lerner Again Takes the Fifth in Tea Party Scandal*, USA Today (Mar. 5, 2014) (online at [www.usatoday.com/story/news/politics/2014/03/05/lois-lerner-oversight-issa-irs/6070401/](http://www.usatoday.com/story/news/politics/2014/03/05/lois-lerner-oversight-issa-irs/6070401/)).

<sup>12</sup> *Darrell Issa Rankles Some Republicans in Handling IRS Tea Party Probe*, Politico (Mar. 27, 2014) (online at [www.politico.com/story/2014/03/darrell-issa-irs-tea-party-investigation-105119.html](http://www.politico.com/story/2014/03/darrell-issa-irs-tea-party-investigation-105119.html)).



In addition, you may find this difficult to believe, but I asked my staff to contact Ms. Lerner's attorney one last time to determine whether there was any chance that she would agree to testify before the Committee, notwithstanding her valid legal defenses and despite the negative interactions her attorney has had with you and your staff.

Ms. Lerner's attorney explained that he was stunned that you refused to take yes for an answer when he offered to have Ms. Lerner testify with a one-week extension. He also expressed great concern about your inaccurate statements on national television. He expressed confidence, however, that he would be successful in any future litigation due to the Constitutional defects of the proceedings. Ultimately, he stated that he will continue to advise his client to assert her Fifth Amendment right not to testify before the Committee.

### **Conclusion**

To summarize, you could have had Ms. Lerner's testimony, but you inexplicably refused a request for a simple one-week extension. You refused to consult with other Committee Members about this offer—which all Democratic Members would have accepted instantly. Instead, you went on national television and made inaccurate statements that ended up scuttling the offer and causing Ms. Lerner's attorney to lose faith in the credibility of our Committee.

You also could have had a proffer from Ms. Lerner's attorney, but you cut off my microphone at the Committee's March 5 hearing when I attempted to ask about it, your staff refused to honor the agreements you made to obtain it, and you falsely accused me of insisting on immunity for Ms. Lerner when I was attempting to work with you to obtain the proffer.

As a result, the Committee is now left with nothing but your constitutionally deficient contempt proceeding. Although you routinely accuse me of obstructing the Committee's work, you were the one who rejected Lois Lerner's testimony, you were the one who failed to obtain a proffer from her attorney, and your actions have prevented the Committee from obtaining that information for our inquiry.

With respect to the specific question posed in your letter on Friday, you can rest assured that neither I nor my staff have been in discussions with Ms. Lerner's attorney about immunity, and I have no intention of seeking immunity on her behalf.

Sincerely,

  
Elijah E. Cummings  
Ranking Member