

MINORITY VIEWS

Democratic Members of the Committee on Oversight and Government Reform



OPPOSITION TO RESOLUTION BY CHAIRMAN DARRELL ISSA PROPOSING THAT THE HOUSE OF REPRESENTATIVES HOLD LOIS LERNER IN CONTEMPT OF CONGRESS

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
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EXECUTIVE SUMMARY

These Minority Views are the opinions of Democratic Members of the Committee on Oversight and Government Reform in opposition to Chairman Darrell Issa's resolution proposing that the House of Representatives hold former Internal Revenue Service (IRS) employee Lois Lerner in contempt of Congress despite the fact that she exercised her rights under the Fifth Amendment of the Constitution.

We oppose the resolution because Chairman Issa fundamentally mishandled this investigation and this contempt proceeding. During this investigation, Chairman Issa has made reckless accusations with no evidence to back them up, routinely leaked partial excerpts of interview transcripts to promote misleading allegations, repeatedly ignored opposing viewpoints that are inconsistent with his political narrative, inconceivably rejected an offer by Ms. Lerner's attorney for her to testify with a simple one-week extension, and—in his rush to silence a fellow Committee Member—botched the contempt proceedings by disregarding key due process protections that are required by the Constitution, according to the Supreme Court.

McCarthy Era Precedent for Chairman Issa's Actions

Chairman Issa has identified virtually no historical precedent for successfully convicting an American citizen of contempt after that person has asserted his or her Fifth Amendment right not to testify before Congress. The only era in recent memory when Congress attempted to do this was a disgraceful stain on our nation's history.

We asked the nonpartisan Congressional Research Service (CRS) to identify the last time Congress disregarded an individual's Fifth Amendment rights, held that person in contempt, and pursued a criminal prosecution. CRS went back more than four decades to identify a series of cases spanning from 1951 to 1968. In these cases, the Senate Committee on Government Operations led by Senator Joseph McCarthy, the House Un-American Activities Committee, and other committees attempted to hold individuals in contempt even after they asserted their Fifth Amendment rights. In almost every case, juries refused to convict these individuals or Federal courts overturned their convictions.

We oppose Chairman Issa's efforts to re-create the Oversight Committee in Joe McCarthy's image, and we reject his attempts to drag us back to that shameful era in which Congress tried to strip away the Constitutional rights of American citizens under the bright lights of hearings that had nothing to do with responsible oversight and everything to do with the most dishonorable kind of partisan politics.

Chairman Issa Could Have Obtained Lerner's Testimony

The unfortunate irony of Chairman Issa's contempt resolution is that the Committee could have obtained Ms. Lerner's testimony if the Chairman had accepted a reasonable request by her attorney for a simple one-week extension.

When Chairman Issa demanded—with only a week’s notice—that Ms. Lerner appear before the Committee on March 5, her attorney had obligations out of town, so he requested an additional seven days to prepare his client to testify. If Chairman Issa had sought our input on this request, every one of us would have accepted it without a moment’s hesitation. Anyone actually interested in obtaining Ms. Lerner’s testimony would have done the same.

We wanted to question Ms. Lerner about the Inspector General’s finding that she failed to conduct sufficient oversight of IRS employees in Cincinnati who developed inappropriate terms to screen tax-exempt applicants. We wanted to know why she did not discover the use of these terms for more than a year, as the Inspector General reported, and how new inappropriate terms were put in place after she had directed employees to stop using them. We also wanted to know why she did not inform Congress sooner about the use of these inappropriate terms.

Instead, Chairman Issa rejected this request without consulting any of us. Even worse, he went on national television and stated—inaccurately—that Ms. Lerner had agreed to testify without the extension, scuttling the offer from Ms. Lerner’s attorney. This counterproductive action deprived the Committee of Ms. Lerner’s testimony, deprived us of the opportunity to question her, and deprived the American people of information important to our inquiry.

Independent Experts Conclude That Chairman Issa Botched Contempt Proceedings

Based on an overwhelming number of legal assessments from Constitutional law experts across the country—and across the political spectrum—we believe that pressing forward with contempt based on the fatally flawed record compiled by Chairman Issa would undermine the credibility of the Committee and the integrity of the House of Representatives.

We do not believe that Ms. Lerner “waived” her Fifth Amendment rights during the Committee’s hearing on May 22, 2013, when she gave a brief statement professing her innocence. Ms. Lerner’s attorney wrote to the Committee before the hearing making clear her plan to exercise her Fifth Amendment right not to testify, yet Chairman Issa compelled her to appear in person anyway. Ms. Lerner relied on her attorney’s advice at every stage of the proceeding, and there is no doubt about her intent. 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, 31 independent legal experts have now come forward to conclude that Chairman Issa botched the contempt proceeding when he abruptly adjourned the Committee’s hearing on March 5, 2014. In an effort to prevent Ranking Member Cummings from speaking, Chairman Issa rushed to end the hearing, ignored the Ranking Member’s repeated requests for recognition, silenced the Ranking Member’s microphone, and drew his hand across his neck while ordering Republican staff to “close it down.”

According to more than two dozen Constitutional law experts who have reviewed the record before the Committee, the legal byproduct of Chairman Issa’s actions on March 5 was that—in his rush to silence the Ranking Member—he failed to take key steps required by the Constitution, according to the Supreme Court. Specifically, these experts found that the

Chairman did not give Ms. Lerner a clear, unambiguous choice between answering his questions or being held in contempt because he failed to overrule Ms. Lerner's assertion of her Fifth Amendment rights and direct her to answer notwithstanding the invocation of those protections.

Chairman Issa has tried to minimize the significance of these independent experts, but their qualifications speak for themselves. They include two former House Counsels, three former clerks to Supreme Court justices, six former federal prosecutors, several attorneys in private practice, and law professors from Yale, Stanford, Harvard, Duke, and Georgetown, as well as the law schools of several Republican Committee Members, 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:

- Morton Rosenberg, who served for 35 years as an expert in Constitutional law and contempt at CRS, concluded that “the requisite due process protections have not been met.”
- Stanley M. 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.”
- Thomas J. Spulak, who served as House Counsel from 1994 to 1995, concluded that “I do not believe that the proper basis for a contempt of Congress charge has been established.”
- 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.”

After independent experts raised concerns about these Constitutional deficiencies, Chairman Issa asked the House Counsel's office to draft a memo justifying his actions. We have great respect for the dedicated attorneys in this office, and we recognize their obligation to represent their client, Chairman Issa. However, their memo must be understood for what it is—a legal brief written in preparation for defending Chairman Issa's actions in court.

Because of the gravity of these Constitutional issues and their implications for all American citizens, on June 26, 2013, Ranking Member Cummings asked Chairman Issa to hold a hearing with legal experts from all sides. He wrote: “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.” He added: “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.”

More than nine months later, Chairman Issa has still refused to hold a hearing with any legal experts, demonstrating again that he simply does not want to hear from anyone who disagrees with his position.

Democrats Call for Full Release of All Committee Interview Transcripts

Rather than jeopardizing Constitutional protections and continuing to waste taxpayer funds in pursuit of deficient contempt litigation, we call on the Committee to release copies of the full transcripts of all 38 interviews conducted during this investigation that have not been released to date.

For the past year, Chairman Issa's central accusation in this investigation has been that the IRS engaged in political collusion directed by—or on behalf of—the White House. Before the Committee received a single document or interviewed one witness, Chairman Issa went on national television and stated: “This was the targeting of the President's political enemies effectively and lies about it during the election year.”

The full transcripts show definitively that the Chairman's accusations are baseless. They demonstrate that the White House played no role in directing IRS employees to use inappropriate terms to screen tax-exempt applicants, they show that there was no political bias behind those actions, and they explain in detail how the inappropriate terms were first developed and used.

Until now, Chairman Issa has chosen to leak selected excerpts from interview transcripts and withhold portions that directly contradict his public accusations. For example, Chairman Issa leaked cherry-picked transcript excerpts prior to an appearance on national television on June 2, 2013. When pressed on why he provided only portions instead of the full transcripts, he responded: “these transcripts will all be made public.”

On June 9, 2013, Ranking Member Cummings asked Chairman Issa to “release publicly the transcripts of all interviews conducted by Committee staff.”

This request included, for example, the full transcript of an interview conducted with a Screening Group Manager in Cincinnati who identified himself as a “conservative Republican.” This official explained how one of his own employees first developed the inappropriate terms, and he explained that he knew of no White House involvement or political motivation. As he told us: “I do not believe that the screening of these cases had anything to do other than consistency and identifying issues that needed to have further development.”

Although Chairman Issa had promised to release the transcripts, he responded to this request by calling the Ranking Member “reckless” and claiming that releasing the full transcripts would “undermine the integrity of the Committee's investigation.” The Ranking Member asked Chairman Issa to “identify the specific text of the transcripts you believe should be withheld from the American public,” but he refused. As a result, the Ranking Member released the full transcript of the Screening Group Manager, while deferring to the Chairman on the others.

It has been more than nine months since Chairman Issa promised on national television to release the full transcripts, and we believe it is now time for the Chairman to make good on his promise.

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I. BACKGROUND

On May 14, 2013, the Treasury Inspector General for Tax Administration issued a report concluding that IRS employees used “inappropriate criteria” to screen applications for tax-exempt status.¹ The first line of the “results” section of the report found that this activity began in 2010 with employees in the Determinations Unit of the IRS office in Cincinnati.² The report stated that these employees “developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names.”³ The report also stated that these employees “developed and implemented inappropriate criteria in part due to insufficient oversight provided by management.”⁴

The Inspector General’s report found that Lois Lerner, the former Director of Exempt Organizations at the IRS, did not discover the use of these inappropriate criteria until a year later—in June 2011—after which she “immediately” ordered the practice to stop.⁵ Despite this direction, the Inspector General’s report found that employees subsequently began using different inappropriate criteria “without management knowledge.”⁶ The Inspector General reported that “the criteria were not influenced by any individual or organization outside the IRS.”⁷

After announcing that the Committee would be investigating this matter—but before the Committee received a single document or interviewed one witness—Chairman Issa went on national television and stated: “This was the targeting of the President’s political enemies effectively and lies about it during the election year.”⁸

To date, the IRS has produced more than 450,000 pages of documents, Committee staff have conducted 39 transcribed interviews of IRS and Department of the Treasury personnel, and the Committee has held five hearings. The IRS estimates that it has spent between \$14 million and \$16 million responding to Congressional investigations on this topic.⁹

¹ Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013) (2013-10-053).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Issa on IRS Scandal: “Deliberate” Ideological Attacks*, CBS News (May 14, 2013) (online at www.cbsnews.com/videos/issa-on-irs-scandal-deliberate-ideological-attacks/).

⁹ Letter from Commissioner John Koskinen, Internal Revenue Service, to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Feb. 25, 2014).

On May 14, 2013, Chairman Issa invited Ms. Lerner to testify before the Committee on May 22, 2013.¹⁰ On the same day, Chairman Issa and Chairman Jordan sent a second letter to Ms. Lerner accusing her of providing “false or misleading information” to the Committee, noting that her actions carry “potential criminal liability,” and citing Section 1001 of Title 18 of the United States Code providing criminal penalties of up to five years in prison.¹¹

The same week, House Speaker John Boehner also raised the specter of criminal prosecution, stating at a press conference: “Now, my question isn’t about who’s going to resign. My question is who’s going to jail over this scandal?” He added: “Clearly someone violated the law.”¹²

Based on these accusations of criminal conduct, Ms. Lerner’s attorney wrote a letter on May 20, 2013, informing Chairman Issa that he had advised his client to exercise her Fifth Amendment right not to testify and requesting that she not be compelled to appear in person:

Because Ms. Lerner is invoking her constitutional privilege, we respectfully request that you excuse her from appearing at the hearing. Congress has a longstanding practice of permitting a witness to assert the Fifth Amendment by affidavit or through counsel in lieu of appearing at a public hearing to do so. In addition, the District of Columbia Bar’s Legal Ethics Committee has opined that it is a violation of the Bar’s ethics rule to require a witness to testify before a congressional committee when it is known in advance that the witness will invoke the Fifth Amendment, and the witness’s appearance will serve “no substantial purpose ‘other than to embarrass, delay, or burden’ the witness.” D.C. Legal Ethics Opinion No. 358 (2011); see also D.C. Legal Ethics Opinion No. 31 (1977). Because Ms. Lerner will exercise her right not to answer questions related to the matters discussed in the TIGTA report or to her prior exchanges with the Committee, requiring her to appear at the hearing merely to assert her Fifth Amendment privilege would have no purpose other than to embarrass or burden her.¹³

¹⁰ Letter from Chairman Darrell Issa, House Committee on Oversight and Government Reform, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service (May 14, 2013).

¹¹ Letter from Chairman Darrell Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, House Committee on Oversight and Government Reform, to Lois Lerner, Director, Exempt Organizations Division, Internal Revenue Service (May 14, 2013).

¹² *Boehner on IRS Scandal: “Who Is Going to Jail?”*, CNN.com (May 15, 2013) (online at <http://politicalticker.blogs.cnn.com/2013/05/15/boehner-on-irs-scandal-who-is-going-to-jail/>).

¹³ Letter from William W. Taylor, III, Counsel to Lois Lerner, to Chairman Darrell Issa, House Committee on Oversight and Government Reform (May 20, 2013).

Rather than accepting the letter from Ms. Lerner's counsel as proof of her intention to invoke her Fifth Amendment right not to testify, Chairman Issa demanded that Ms. Lerner appear before the Committee on May 22, 2013, pursuant to his unilateral subpoena.¹⁴

On the advice of counsel, Ms. Lerner complied with the subpoena by attending the hearing and invoking her Fifth Amendment rights in a brief statement professing her innocence:

[M]embers of this committee have accused me of providing false information when I responded to questions about the IRS processing of applications for tax exemption.

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. And while I would very much like to answer the committee's questions today, I've been advised by my counsel to assert my constitutional right not to testify or answer questions related to the subject matter of this hearing. After very careful consideration, I have decided to follow my counsel's advice and not testify or answer any of the questions today.

Because I'm asserting my right not to testify, I know that some people will assume that I've done something wrong. I have not. One of the basic functions of the Fifth Amendment is to protect innocent individuals, and that is the protection I'm invoking today. Thank you.¹⁵

After she delivered her statement, Committee Member Trey Gowdy stated:

She just testified. She just waived her Fifth Amendment right to privilege. You don't get to tell your side of the story and then not be subjected to cross examination. That's not the way it works. She waived her right of Fifth Amendment privilege by issuing an opening statement. She ought to stay in here and answer our questions.¹⁶

Later in the hearing, Chairman Issa agreed, telling Ms. Lerner:

You have made an opening statement in which you made assertions of your innocence, assertions you did nothing wrong, assertions you broke no laws or rules. Additionally, you authenticated earlier answers to the IG. At this point I believe you have not asserted your rights, but, in fact, have effectively waived your rights.¹⁷

¹⁴ House Committee on Oversight and Government Reform, Subpoena to Lois Lerner (May 17, 2013); Letter from William Taylor, III, Counsel to Lois Lerner, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 20, 2013).

¹⁵ House Committee on Oversight and Government Reform, *Hearing on The IRS: Targeting Americans for their Political Beliefs* (May 22, 2013).

¹⁶ *Id.*

¹⁷ *Id.*

Chairman Issa then stated:

For this reason, 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.¹⁸

Chairman Issa recessed the hearing instead of adjourning it, explaining:

[I]t was brought up by Mr. Gowdy that, in fact, in his opinion as a longtime district attorney, Ms. Lerner may have waived her Fifth Amendment rights by addressing core issues in her opening statement and the authentication afterwards. I must consider this. So, although I excused Ms. Lerner, subject to a recall, I am looking into the possibility of recalling her and insisting that she answer questions in light of a waiver. For that reason and with your understanding and indulgence, this hearing stands in recess, not adjourned.¹⁹

On June 25, 2013, Chairman Issa announced that the Committee would hold a business meeting three days later 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.”²⁰

On June 26, 2013, Ranking Member Cummings sent a letter to Chairman Issa requesting that the Committee first hold a hearing with Constitutional law experts who could testify about the legal issues involved with Fifth Amendment waivers. He wrote:

[E]very 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.²¹

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ House Committee on Oversight and Government Reform, *Oversight Committee to Vote on Lois Lerner’s Potential Waiver of Fifth Amendment Right* (June 25, 2013) (online at <http://oversight.house.gov/release/oversight-committee-to-vote-on-lois-lerners-potential-waiver-of-fifth-amendment-right/>).

²¹ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 26, 2013) (online at: <http://democrats.oversight.house.gov/press-releases/cummings-asks-issa-for-testimony-from-legal-experts-before-committee-vote-on-lerners-5th-amendment-rights/>).

Chairman Issa disregarded this request, and the Committee voted on June 28, 2013, on a partisan basis to adopt a resolution concluding that Ms. Lerner waived her Fifth Amendment rights.²²

On February 25, 2014, Chairman Issa wrote a letter to Ms. Lerner's attorney recalling her to appear before the Committee on March 5, 2014, pursuant to the subpoena that remained in effect.²³

On February 26, 2014, Ms. Lerner's attorney wrote to the Committee stating that Ms. Lerner did not waive her Fifth Amendment rights when she appeared before the Committee in 2013, reaffirming that she would continue to decline to answer questions, and requesting that the Committee not require her to appear solely for the purpose of again invoking her Fifth Amendment rights.²⁴

Again, Chairman Issa insisted that Ms. Lerner appear in person, and, on March 5, 2014, he asked Ms. Lerner a series of questions. She again asserted her right under the Fifth Amendment not to answer his questions.²⁵ When the Chairman finished asking questions, he adjourned the hearing without overruling Ms. Lerner's invocation of her Fifth Amendment rights or ordering her to answer his questions notwithstanding her assertion. As Chairman Issa rushed to end the hearing, he disregarded repeated requests for recognition by Ranking Member Cummings, silenced the Ranking Member's microphone, and drew his hand across his neck while ordering Republican staff to "close it down."²⁶

II. LACK OF HISTORICAL PRECEDENT FOR CHAIRMAN ISSA'S ACTIONS

Chairman Issa has cited virtually no historical precedent for successfully convicting an American citizen of contempt after that person asserts his or her Fifth Amendment right not to testify before Congress.

On March 20, 2014, the nonpartisan Congressional Research Service (CRS) issued a memorandum reviewing "previous instances in which a witness before a congressional committee was voted in contempt of Congress and then prosecuted for refusing to answer the committee's questions or produce documents pursuant to a subpoena after invoking the Fifth

²² House Committee on Oversight and Government Reform, Business Meeting, Resolution of the Committee on Oversight and Government Reform (June 28, 2013) (22 yeas, 17 nays).

²³ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to William Taylor, III, Counsel to Lois Lerner (Feb. 25, 2014).

²⁴ Letter from William W. Taylor, III, Counsel to Lois Lerner, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Feb. 26, 2014).

²⁵ House Committee on Oversight and Government Reform, *Resumption of Hearing on The IRS: Targeting Americans for their Political Beliefs* (Mar. 5, 2014).

²⁶ *Id.*

Amendment privilege against self-incrimination.”²⁷ The memo also analyzed whether any subsequent convictions for contempt of Congress under 2 U.S.C. §§ 192, 194 were upheld or overturned.²⁸ The CRS memorandum is included as Attachment A to these Minority Views.

The CRS memo identified 11 cases spanning from 1951 to 1968 in which congressional committees held individuals in contempt even after they asserted their Fifth Amendment rights. These include seven individuals held in contempt by the House Committee on Un-American Activities, two by the Special Committee on Organized Crime in Interstate Commerce, one by the Senate Committee on Foreign Relations, and one by the Senate Committee on Government Operations.²⁹ The vast majority of those congressional investigations involved alleged communist activities.

In almost every case, the witnesses were either acquitted or their convictions were overturned on appeal. According to the CRS memo, three of these individuals were not convicted of criminal contempt, and Federal courts overturned the convictions of six more individuals. In three cases, the Supreme Court itself overturned the convictions despite the findings of the congressional committees. In each case, the Court found that the committee had failed to establish a record sufficient to prove the elements of contempt of Congress.³⁰

For example, in the case of *Quinn v. United States*, the defendant was held in contempt by the House Committee on Un-American Activities and convicted criminally. The Supreme Court overturned this conviction, finding that “the court below erred in failing to direct a judgment of acquittal.”³¹ The Court held that a committee must enable a witness to determine “with a reasonable certainty that the committee demanded his answer despite his objection.”³² The Court wrote: “Since the enactment of § 192, the practice of specifically directing a recalcitrant witness to answer has continued to prevail.”³³

In another example highlighted by CRS, *United States v. Hoag*, there are striking similarities between the actions of Senator Joseph McCarthy in 1954 and those of Chairman Issa in the present case. Senator McCarthy chaired the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. During a hearing on August 6, 1954, Senator

²⁷ Congressional Research Service, *Prosecutions for Contempt of Congress and the Fifth Amendment* (Mar. 20, 2014) (online at <http://democrats.oversight.house.gov/uploads/CRS%20Contempt%20Report%20--%20Redacted.pdf>) (noting the possibility that unpublished cases might not be included in its review).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Quinn v. United States*, 349 U.S. 155, 167 (1955).

³² *Id.*

³³ *Id.* at 169.

McCarthy repeatedly questioned a woman named Diantha Hoag despite the fact that she had asserted her Fifth Amendment rights. The witness was a coil winder at the Westinghouse Company in Cheektowaga who made \$1.71 an hour.³⁴

Like Ms. Lerner, Ms. Hoag professed her innocence and then declined to answer subsequent questions. In response to questioning from Senator McCarthy, for example, Ms. Hoag stated: “I have never engaged in espionage nor sabotage. I am not so engaged. I will not so engage in the future. I am not a spy nor a saboteur.”³⁵

Like Chairman Issa, Senator McCarthy concluded that his witness had waived her Fifth Amendment rights without citing any independent legal opinions or experts. He explained to her at the time:

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. Giving out information about Government work would be in that field.³⁶

The Senate pursued criminal charges, Ms. Hoag was indicted, and she opted for a federal judge to preside over her case instead of a jury. The judge explained the issue before the court:

The issue, therefore, is whether, by giving that answer, she waived her rights, under the Fifth Amendment, to the questions subsequently propounded. These, generally speaking, had to do with whether she had given information about her work to members of the Communist Party, whether she had discussed at a Communist Party meeting classified Government work, whether she received any clearance before 1947 to work on classified work, whether she did some espionage for the Communist Party seven and one-half years before, the character of work she was doing before 1947, and the city where she worked before her present job.³⁷

The judge rejected Senator McCarthy’s claims, found no Fifth Amendment waiver, and acquitted the witness of all charges, writing in an opinion in 1956:

Having in mind the admonition in the recent case of *Emspak v. United States*, 1955, 349 U.S. 190, 196, 75 S.Ct. 687, 691, 99 L.Ed. 997, quoting from *Smith v. United States*, 337

³⁴ Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, *Hearing on Subversion and Espionage in Defense Establishments and Industry* (Aug. 6. 1954) (online at <http://democrats.oversight.house.gov/uploads/McCarthy%20Hearing%2008-06-1954.pdf>).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *U.S. v. Hoag*, 142 F. Supp. 667, 668 (D.D.C. 1956) (online at www.courtlistener.com/dcd/cAQM/united-states-v-hoag/).

U.S. 137, 150, 69 S.Ct. 1000, 93 L.Ed. 1264, that “Waiver of constitutional rights * * * is not lightly to be inferred”, and in the light of the controlling decisions of the Supreme Court and the Court of Appeals for this circuit, above referred to, I reach the conclusion that the defendant did not waive her privilege under the Fifth Amendment and therefore did not violate the statute in question in refusing to answer the questions propounded to her. Therefore, I find that she is entitled to a judgment of acquittal on all counts, and judgment will be entered accordingly.³⁸

In addition to the cases cited by CRS, Committee staff identified additional cases from the same time period. In four of those cases, federal appellate courts overturned the convictions.³⁹ In one case, the federal appellate court affirmed the conviction. Unlike in the present case, however, the Chairman in that case gave the witness a direct, unequivocal order to answer the question: “You are ordered—with the permission of the committee the Chair orders and directs you to answer that question.”⁴⁰

III. CHAIRMAN ISSA COULD HAVE OBTAINED LERNER’S TESTIMONY

The Committee could have obtained Ms. Lerner’s testimony if Chairman Issa had accepted a request by her attorney for a simple one-week extension.

On February 25, 2014, Chairman Issa wrote a letter to Ms. Lerner’s attorney recalling her to appear before the Committee on March 5, 2014, pursuant to the subpoena that remained in effect.⁴¹ The next day, Ms. Lerner’s attorney wrote to the Committee stating that Ms. Lerner did not waive her Fifth Amendment rights when she appeared before the Committee in 2013, that she would continue to decline to answer questions, and that the Committee should not require her to appear solely for the purpose of again invoking her Fifth Amendment rights.⁴²

In the days that followed, Chairman Issa’s 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. That extension would have allowed him to adequately prepare his client for the hearing since he had obligations out of town.

³⁸ *Id.*

³⁹ See, e.g., *Singer v. United States*, 247 F.2d 535 (1957); *U.S. v. Doto*, 205 F.2d 416 (2d Cir. 1953); *Poretto v. U.S.*, 196 F.2d 392 (5th Cir. 1952); *Starkovich v. U.S.*, 231 F.2d 411 (9th Cir. 1956); *Aiuppa v. U.S.*, 201 F. 2d 287 (6th Cir. 1952).

⁴⁰ *Presser v. U.S.*, 284 F.2d 233 (D.C. Cir. 1960).

⁴¹ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to William W. Taylor, III, Counsel to Lois Lerner (Feb. 25, 2014).

⁴² Letter from William W. Taylor, III, Counsel to Lois Lerner, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Feb. 26, 2014).

On Saturday, March 1, 2014, a staff member working for Chairman Issa 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."⁴³ In response, Ms. Lerner's counsel wrote: "Yes."⁴⁴

In a subsequent email, Chairman Issa's 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."⁴⁵ It is unclear whether Chairman Issa ever discussed this offer with his Republican colleagues or Speaker Boehner, but he certainly did not discuss it with any Democratic Committee Members, who would have accepted it immediately.

Instead of consulting with Committee Members on the following Monday, Chairman Issa 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. He stated: "Quite frankly, we believe the evidence we've gathered causes her, in her best interest, to be someone who should testify."⁴⁶

As a result of Chairman Issa's actions, the Committee lost the opportunity to obtain Ms. Lerner's testimony. Following Chairman Issa's interview and his inaccurate statements, Ms. Lerner's attorney, William W. Taylor III, explained why he advised Ms. Lerner 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.⁴⁷

Chairman Issa's staff subsequently claimed that they "didn't realize at the time that Taylor's offer was contingent on the delay."⁴⁸

⁴³ 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).

⁴⁴ Email from William W. Taylor, III, Counsel to Lois Lerner, to Majority Staff, House Committee on Oversight and Government Reform (Mar. 1, 2014)

⁴⁵ Email from Majority Staff, House Committee on Oversight and Government Reform, to William W. Taylor, III, Counsel to Lois Lerner (Mar. 3, 2014).

⁴⁶ *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).

⁴⁷ *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/).

IV. INDEPENDENT EXPERTS CONCLUDE THAT CHAIRMAN ISSA BOTCHED CONTEMPT PROCEEDINGS

Independent experts conclude that Ms. Lerner did not waive her Fifth Amendment rights by professing her innocence and that Chairman Issa botched the contempt proceeding when he abruptly adjourned the Committee's hearing on March 5 without taking key steps required by the Constitution. Chairman Issa has steadfastly refused to hold a hearing with any legal experts on these issues.

A. No Waiver of Fifth Amendment Rights

Contrary to Chairman Issa's theory that Ms. Lerner waived her Fifth Amendment rights when she gave a brief statement professing her innocence, numerous legal experts have concluded that no Fifth Amendment waiver occurred.

On June 26, 2013, Ranking Member Cummings requested that the Chairman hold a hearing so Committee Members could hear directly from independent experts in Constitutional law before voting on a resolution offered by Chairman Issa concluding that Ms. Lerner waived her Fifth Amendment rights. Ranking Member Cummings wrote:

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.⁴⁹

His letter cited three noted experts who concluded, after reviewing the record before the Committee, that Ms. Lerner did not waive her Fifth Amendment rights:

- 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.”
- 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.”

⁴⁸ *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).

⁴⁹ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 26, 2013) (online at http://democrats.oversight.house.gov/images/user_images/gt/stories/EEC%20to%20Issa.Busines%20Mtg.LLerner.pdf).

- 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.”⁵⁰

The Ranking Member concluded his request by writing:

[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.⁵¹

The Chairman disregarded this request and proceeded with the Committee’s business meeting to consider his resolution. During debate on the resolution, Ranking Member Cummings introduced into the official record numerous opinions from legal experts addressing the issue.⁵² In addition to the experts described above, Ranking Member Cummings entered into the record a statement from Daniel Richman, a law professor who served as the Chief Appellate Attorney in the U.S. Attorney’s Office for the Southern District of New York, stating: “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.”⁵³

In contrast, Chairman Issa did not enter into the Committee’s official record any legal opinions supporting his position. Although he referred to a confidential memorandum from House Counsel, he shared it with Committee Members only on condition that it not be disclosed to the public or entered into the record. Without disclosing the details of that opinion, it did not conclude that Ms. Lerner waived her Fifth Amendment rights beyond a reasonable doubt—the standard that is required for criminal contempt.

B. Chairman’s Offensive Conduct in Silencing Ranking Member

To date, 31 independent experts in Constitutional and criminal law have now come forward to conclude that Chairman Issa botched the contempt proceeding when he abruptly adjourned the Committee’s hearing on March 5. In an effort to prevent Ranking Member Cummings from speaking, Chairman Issa rushed to end the hearing, ignored the Ranking

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Opening Statement of Ranking Member Elijah E. Cummings, Business Meeting, Resolution of the Committee on Oversight and Government Reform (June 28, 2013) (online at <http://democrats.oversight.house.gov/press-releases/opening-statement-of-ranking-member-elijah-e-cummings-full-committee-business-meeting/>).

⁵³ Statement of Professor Daniel Richman, *Regarding Validity of Fifth Amendment Privilege Assertion by Lois Lerner* (June 27, 2013).

Member's repeated requests for recognition, silenced the Ranking Member's microphone, and drew his hand across his neck while ordering Republican staff to "close it down."⁵⁴

Ranking Member Cummings intended to pose a procedural question concerning a potential proffer Ms. Lerner's counsel agreed to provide in response to a request from Chairman Issa's staff. Although Ranking Member Cummings was attempting to help the Committee obtain this information, Republican Committee Members left the room while the Ranking Member was attempting to speak.⁵⁵

Chairman Issa's actions were so egregious that within hours of the hearing, the Democratic Members of the Committee sent a letter criticizing the Chairman's actions and insisting that he "apologize immediately to Ranking Member Cummings as a first step to begin the process of restoring the credibility and integrity of our Committee."⁵⁶

Republicans also criticized Chairman Issa's actions. One senior Republican lawmaker stated: "You can be firm without being nasty; you can be effective without being snide—this is Darrell's personality. He is not the guy that you'd move next door to."⁵⁷ Similarly, Republican commentator Joe Scarborough stated: "It seemed like a bush league move to me."⁵⁸

In addition, David Firestone, the Projects Director for the *New York Times* Editorial Board, wrote:

For Mr. Issa, the fear of again being exposed as a fraud was greater than his fear of being accused of trampling on minority rights. When politicians reach for the microphone switch, you know they've lost the argument.⁵⁹

Dana Milbank of the *Washington Post* wrote:

⁵⁴ House Committee on Oversight and Government Reform, *Resumption of the Hearing on The IRS: Targeting Americans for Their Political Beliefs* (Mar. 5, 2014).

⁵⁵ Statement of Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, *Resumption of the Hearing on The IRS: Targeting Americans for Their Political Beliefs* (Mar. 5, 2014) (online at <http://democrats.oversight.house.gov/press-releases/issa-turns-off-mic-tries-to-silence-cummings-and-democrats-at-irs-hearing/>).

⁵⁶ Letter from Democratic Members to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Mar. 5, 2014) (online at <http://democrats.oversight.house.gov/press-releases/oversight-committee-democrats-unanimously-condemn-chairman-issas-actions-at-todays-irs-hearing/>).

⁵⁷ *Issa Hands Dems the Mic*, The Hill (Mar. 6, 2014) (online at <http://thehill.com/homenews/house/200162-issa-hands-dems-the-mic#ixzz2vJSTVh2e>).

⁵⁸ *Morning Joe*, MSNBC (Mar. 6, 2014) (online at www.msnbc.com/morning-joe/watch/rep-cummings-please-do-not-shut-my-mic-down-184217155964).

⁵⁹ David Firestone, *Why Darrell Issa Turned Off the Mic*, New York Times (Mar. 6, 2014).

Even by today's low standard of civility in Congress, calling a hearing and then not allowing minority lawmakers to utter a single word is rather unusual. But Issa, now in the fourth and final year of his chairmanship, is an unusual man.⁶⁰

The day after Chairman Issa's actions, Rep. Marcia Fudge offered a Privileged Resolution on the House floor, which stated:

That the House of Representatives strongly condemns the offensive and disrespectful manner in which Chairman Darrell E. Issa conducted the hearing of the House Committee on Oversight and Government Reform on March 5, 2014, during which he turned off the microphones of the Ranking Member while he was speaking and adjourned the hearing without a vote or a unanimous consent agreement.⁶¹

On March 6, 2014, the House tabled the resolution by a vote of 211 to 186.⁶² That evening, Chairman Issa telephoned Ranking Member Cummings and apologized for his conduct.⁶³

On March 14, 2014, Congressman Dan Kildee offered another Privileged Resolution on the House floor condemning the Chairman's "offensive and disrespectful behavior" and calling on Chairman Issa to issue a public apology from the well of the House.⁶⁴ That resolution was also tabled.⁶⁵

C. **"Fatal" Constitutional Defect in Rushed Adjournment**

According to more than two dozen Constitutional law experts who have now reviewed the record before the Committee, the legal byproduct of Chairman Issa's actions on March 5 was

⁶⁰ Dana Milbank, *Darrell Issa Silences Democrats and Hits a New Low*, Washington Post (Mar. 5, 2014).

⁶¹ Privileged Resolution Against the Offensive Actions of Chairman Darrell E. Issa (Mar. 6, 2014).

⁶² Vote to Table Privileged Resolution Against the Offensive Actions of Chairman Darrell E. Issa (Mar. 6, 2014).

⁶³ House Committee on Oversight and Government Reform Democrats, *Cummings Responds to Issa's Apology* (Mar. 6, 2014) (online at <http://democrats.oversight.house.gov/press-releases/cummings-responds-to-issas-apology1/>).

⁶⁴ Office of Rep. Dan Kildee, *Congressman Dan Kildee Introduces Privileged Resolution in House to Condemn Repeated Offensive Behavior by Chairman Darrell Issa* (Mar. 14, 2014) (online at <http://dankildee.house.gov/media-center/press-releases/congressman-dan-kildee-introduces-privileged-resolution-in-house-to>).

⁶⁵ *Dems Hold Up Pictures on House Floor to Protest Issa*, The Hill (Mar. 13, 2014) (online at <http://thehill.com/blogs/floor-action/votes/200779-house-rejects-dem-resolution-to-force-issa-apology#ixzz2y9SObYL6>).

that—in his rush to silence the Ranking Member—he failed to take key steps required by the Constitution, according to the Supreme Court.

Specifically, these experts found that the Chairman did not give Ms. Lerner a clear, unambiguous choice between answering the Committee’s questions or being held in contempt because he failed to overrule Ms. Lerner’s assertion of her Fifth Amendment rights and failed to direct her to answer notwithstanding the invocation of those protections.

In an independent analysis provided to the Committee, Morton Rosenberg, who spent 35 years as a Specialist in American Public Law with CRS, stated:

I conclude that the requisite legal foundation for a criminal contempt of Congress prosecution mandated by the Supreme Court rulings in *Quinn*, *Emspak* and *Bart* have not been met and that such a proceeding against Ms. Lerner under 2 U.S.C. 194, if attempted, will be dismissed.⁶⁶

Mr. Rosenberg stated that because Chairman Issa did not reject Ms. Lerner’s invocation of her Fifth Amendment rights and did not direct her to answer notwithstanding her assertion, the foundation for holding her in contempt of Congress has not been met. He explained:

More significantly, the Chairman’s opening remarks were equivocal about the consequence of a failure by Ms. Lerner to respond to his questions. As indicated above, he simply stated that “the Committee *may proceed to consider* whether she will be held in contempt.” Combined with his closing remarks in the May 2013 hearing, where he indicated he would be discussing the possibility of granting the witness statutory immunity with the Justice Department to compel her testimony, there could be no certainty for the witness and her counsel that a contempt prosecution was inevitable.⁶⁷

Stan Brand, who served as House Counsel from 1976 to 1983, joined in Mr. Rosenberg’s analysis, stating:

[A] review of the record from last week’s hearing reveals that at no time did the Chair expressly overrule the objection and order Ms. Lerner to answer on pain of contempt. Making it clear to the witness that she has a clear cut choice between compliance and assertion of the privilege is an essential element of the offense and the absence of such a demand is fatal to any subsequent prosecution.⁶⁸

After independent legal experts raised concerns regarding Chairman Issa’s procedural errors in the March 5 hearing, the Chairman asked the House Counsel’s office to draft a memo justifying his actions. On March 26, 2014, Chairman Issa released an opinion issued by House

⁶⁶ Statement of Morton Rosenberg, *Constitutional Due Process Prerequisites for Contempt of Congress Citations and prosecutions* (Mar. 9, 2014).

⁶⁷ *Id.*

⁶⁸ *Id.*

Counsel a day earlier stating that “it is this Office’s considered opinion that Mr. Rosenberg is wrong that ‘the requisite legal foundation for a criminal contempt of Congress prosecution [of Ms. Lerner] ... ha[s] not been met and that such a proceeding against [her] under 2 U.S.C. [§] 19[2], if attempted, will be dismissed.’”⁶⁹

In addition, Chairman Issa and other Committee members attempted to minimize the significance of these expert opinions. For example, in a letter to Ranking Member Cummings on March 14, 2014, Chairman Issa suggested that Mr. Rosenberg and Mr. Brand were not independent. He wrote: “Your position was based on an allegedly ‘independent legal analysis’ provided by your lawyer, Stanley M. Brand, and your ‘Legislative Consultant,’ Morton Rosenberg.”⁷⁰ Similarly, Committee Member Trey Gowdy stated: “I am not persuaded by the legal musings of two attorneys.”⁷¹

Despite these claims, the number of independent legal experts who have now come forward with opinions concluding that Chairman Issa’s contempt case is deficient has increased dramatically to 31. They include two former House Counsels, three former clerks to Supreme Court justices, six former federal prosecutors, several attorneys in private practice, and law professors from Yale, Stanford, Harvard, Duke, and Georgetown, as well as the law schools of several Republican Committee Members, 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, Thomas J. Spulak, who served as House Counsel from 1994 to 1995, concluded that “I do not believe that the proper basis for a contempt of Congress charge has been established.” He explained: “I have deep respect for Chairman Darrell Issa and his leadership of the Committee. But the matter before the Committee is a relatively rare occurrence and must be dispatched in a constitutionally required manner for the good of this and future Congresses.” He provided his opinion “out of my deep concerns for the constitutional integrity of the U.S. House of Representatives, its procedures and its future precedents.”⁷²

J. Richard Broughton, a former federal prosecutor and now a Professor at the University of Detroit Mercy Law School and member of the Republican National Lawyers Association, concluded:

⁶⁹ Memorandum from Office of General Counsel, United States House of Representatives, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Mar. 25, 2014) (bracketed text and ellipse in original).

⁷⁰ Letter from Chairman Darrell E. Issa to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Mar. 14, 2014).

⁷¹ *Democrats: Darrell Issa Botches Rules in Run-up to IRS Contempt Vote*, Politico (Mar. 12, 2014) (online at www.politico.com/story/2014/03/darrell-issa-irs-contempt-vote-lois-lerner-democrats-104611.html).

⁷² Letter from Thomas Spulak, former General Counsel to the House of Representatives, to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Mar. 14, 2014).

Like any other criminal sanction, however, the contempt power must be used prudently, not for petty revenge or partisan gain. It should also be used with appropriate respect for countervailing constitutional rights and with proof that the accused contemnor possessed the requisite level of culpability in failing to answer questions. ... Absent such a formal rejection and subsequent directive, the witness—here, Ms. Lerner—would likely have a defense to any ensuing criminal prosecution for contempt, pursuant to the existing Supreme Court precedent. Those who are concerned about the reach of federal power should desire legally sufficient proof of a person’s culpable mental state before permitting the United States to seek and impose criminal punishment.⁷³

Robert Muse, a partner at Stein, Mitchell, Muse & Cipollone, LLP, Adjunct Professor of Congressional Investigations at Georgetown University Law Center, and formerly the General Counsel to the Special Senate Committee to Investigate Hurricane Katrina, concluded: “Procedures and rules exist to provide justice and fairness. In his rush to judgment, Issa forgot to play by the rules.”⁷⁴

Louis Fisher, a former Senior Specialist in Separation of Powers at CRS, Adjunct Scholar at the CATO Institute, and Scholar in Residence at the Constitution Project, concluded:

Why would a delay of one week interfere with the committee’s investigation that has thus far taken nine and a half months? Why not, in pursuit of facts and evidence, probe this opportunity to obtain information from her, particularly when Chairman Issa and the committee have explained that she has important information that is probably not available from any other witness? With his last question, Chairman Issa raised the “expectation” that she would cooperate with the committee if given an additional week. Under these conditions, I think the committee has not made the case that she acted in contempt. If litigation resulted, courts are likely to reach the same conclusion.⁷⁵

Julie Rose O’Sullivan, a former federal prosecutor and law clerk to Supreme Court Justice Sandra Day O’Connor and current Professor at the Georgetown University Law Center, concluded:

The Supreme Court has spoken—repeatedly—on point. Before a witness may be held in contempt under 18 U.S.C. sec. 192, the government bears the burden of showing “criminal intent—in this instance, a deliberate, intentional refusal to answer.” *Quinn v. United States*, 349 U.S. 155, 165 (1955). This intent is lacking where the witness is not faced with an order to comply or face the consequences. Thus, the government must show that the Committee “clearly apprised [the witness] that the committee demands his

⁷³ Statement of Professor J. Richard Broughton, *Regarding Legal Issues Related to Possible Contempt of Congress Prosecution* (Mar. 17, 2014).

⁷⁴ Statement of Robert Muse (Mar. 13, 2014).

⁷⁵ Statement of Louis Fisher, *Regarding Possible Contempt of Lois Lerner* (Mar. 14, 2014).

answer notwithstanding his objections” or “there can be no conviction under [sec.] 192 for refusal to answer that question.” *Id.* at 166. Here, the Committee at no point directed the witness to answer; accordingly, no prosecution will lie. This is a result demanded by common sense as well as the case law. “Contempt” citations are generally reserved for violations of court or congressional orders. One cannot commit contempt without a qualifying “order.”⁷⁶

Joshua Levy, a partner at Cunningham & Levy who teaches Congressional Investigations at Georgetown University Law Center, concluded: “Contempt cannot be born from a game of gotcha. Supreme Court precedents that helped put an end to the McCarthy era ruled that Congress cannot initiate contempt proceedings without first giving the witness due process.”⁷⁷

Samuel W. Buell, a former federal prosecutor who teaches at Duke University Law School, concluded: “Seeking contempt now on this record thus could accomplish nothing but making the Committee look petty and uninterested in getting to the merits of the matter under investigation.”⁷⁸

A full set of the independent legal opinions from all of these Constitutional law experts is included as Attachment B to these Minority Views.

D. House Counsel’s Retroactive Defense of Chairman’s Actions

After Ranking Member Cummings warned that independent legal experts had identified Constitutional deficiencies with Chairman Issa’s actions at the May 5 hearing, House Speaker John Boehner stated: “I and the House Counsel reject the premise of Mr. Cummings’s letter.”⁷⁹ When asked if he would provide a copy of the House Counsel opinion he referenced, Speaker Boehner first directed reporters to ask “the appropriate people.” When they explained that he was the appropriate person, he answered: “I am sure that we will see an opinion at some point.”⁸⁰

It appears that, at the time Speaker Boehner made these statements, the House Counsel had not issued any written opinion. To date, no House Counsel opinion prepared before the March 5 hearing has been made available to the members of the Committee, particularly one stating that Ms. Lerner could be successfully prosecuted for contempt if Chairman Issa did not overrule her assertion of Fifth Amendment rights and order her to answer his questions

⁷⁶ Statement of Julie Rose O’Sullivan (Mar. 12, 2014).

⁷⁷ Statement of Joshua Levy (Mar. 12, 2014).

⁷⁸ Statement of Samuel Buell (Mar. 12, 2014).

⁷⁹ Letter from Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Speaker of the House John Boehner (Mar. 14, 2014) (online at <http://democrats.oversight.house.gov/press-releases/cummings-asks-speaker-boehner-for-copy-of-counsel-opinion-on-lerner-contempt-proceedings/#sthash.jpaw602R.dpuf>).

⁸⁰ *Id.*

notwithstanding her assertion. Instead, it appears that Chairman Issa sought an opinion justifying his actions only after the March 5 hearing when independent legal experts raised concerns about these Constitutional deficiencies.⁸¹

Independent legal experts have rejected the arguments raised by House Counsel in defense of Chairman Issa's actions. The House Counsel memo stated that contempt charges could be brought against Ms. Lerner because the Chairman had ensured that Ms. Lerner was "'clearly apprised that the [C]ommittee demand[ed] [her] answer[s] [to its questions] notwithstanding h[er Fifth Amendment] objections.'" *Quinn*, 349 U.S. at 166." The House Counsel's memo cited two reasons for this opinion:

First, the Committee formally rejected her Fifth Amendment claims and expressly advised her of its determination (a fact that she, through her attorney, acknowledged prior to her appearance at the reconvened hearing on March 5, 2014).

Second, the Committee Chairman thereafter advised Ms. Lerner in writing that the Committee expected her to answer its questions, and advised her orally, at the reconvened hearing on March 5, 2014, that she faced the possibility of being held in contempt of Congress if she continued to decline to provide answers.⁸²

According to Mr. Rosenberg, "both assertions are meritless." Regarding the Committee's June 28, 2013, partisan vote that Ms. Lerner waived her Fifth Amendment right, Mr. Rosenberg explained:

Nothing in the language of the Committee's June 28, 2013 resolution can be even be remotely construed as an *explicit* rejection of Ms. Lerner's Fifth Amendment privilege at the May 22 hearing. It is solely and exclusively concerned with the question whether Ms. Lerner voluntarily waived her privilege at that hearing. A rejection of a future claim in a resumed hearing may be implicit in the resolution's language, but that rejection, under *Quinn*, *Emspak*, and *Bart*, would have had to have been expressly directed at the particular claim when raised by the witness.⁸³

Mr. Rosenberg also addressed the second argument in the House Counsel memorandum:

⁸¹ Memo from the Office of General Counsel, United States House of Representatives, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Mar. 25, 2014) (explaining that Chairman Issa requested that the office "analyze a March 12, 2014 memorandum, prepared by former Congressional Research Service ('CRS') attorney Morton Rosenberg.").

⁸² Memo from the Office of General Counsel, United States House of Representatives, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Mar. 25, 2014).

⁸³ Statement of Morton Rosenberg, *Comments on House General Counsel Opinion* (Apr. 6, 2014).

[T]he Chairman’s verbal observation at the end of his opening remarks at the March 5 hearing that if she continued to refuse to answer questions, “the [C]ommittee may proceed to consider whether she should be held in contempt.” Thus the “indirect” support relies predominantly on the incorrect factual and legal premise that the Committee had communicated a rejection of her privilege claims in its waiver resolution and ambiguous statements by members and the Chairman about the risk of contempt. But, again, when the March 5 questioning took place, the Chairman never expressly overruled her objections or demanded a response.⁸⁴

Former House Counsel Tom Spulak also “fully” agreed with Mr. Rosenberg’s opinion that Chairman Issa failed to establish a record to support contempt charges. He explained:

The fact of the matter, however, is that based on relevant Supreme Court rulings, the pronouncement must occur with the witness present so that he or she can understand the finality of the decision, appreciate the consequences of his or her continued silence, and have an opportunity to decide otherwise at that time.⁸⁵

Mr. Spulak also explained that, although he agreed that there is no “fixed verbal formula” to convey to a witness the Committee’s decision regarding questioning, Chairman Issa’s equivocal statements to Ms. Lerner on March 5 did not meet the standard of “specifically directing a recalcitrant witness to answer” outlined by the Supreme Court.⁸⁶ He wrote:

I believe that the Court does require that whatever words are used be delivered to the witness in a direct, unequivocal manner in a setting that allows the witness to understand the seriousness of the decision and the opportunity to continue to insist on invoking the privilege or revoke it and respond to the Committee’s questioning. That, as I understand the facts, did not occur.⁸⁷

V. DEMOCRATS CALL FOR FULL RELEASE OF ALL COMMITTEE INTERVIEW TRANSCRIPTS

Instead of pursuing deficient contempt litigation that will continue to waste taxpayer funds, Democratic Members of the Oversight Committee now call on the Committee to officially release copies of the full transcripts of all 38 interviews conducted by Committee staff during this investigation that have not been released to date.

⁸⁴ *Id.*

⁸⁵ Letter from Thomas Spulak, former General Counsel to the House of Representatives, to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Mar. 14, 2014).

⁸⁶ *Quinn v. United States*, 349 U.S. 155, 169 (1955).

⁸⁷ Letter from Thomas Spulak, former General Counsel to the House of Representatives, to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Mar. 14, 2014).

For the past year, Chairman Issa's central accusation in this investigation has been that the IRS engaged in political collusion directed by—or on behalf of—the White House. Before the Committee received a single document or interviewed one witness, Chairman Issa went on national television and stated: “This was the targeting of the President’s political enemies effectively and lies about it during the election year.”⁸⁸

Until now, Chairman Issa has chosen to leak selected excerpts from the Committee’s interviews and withhold portions that directly contradict his public accusations. The interview transcripts show definitively that the Chairman’s accusations are baseless and that the White House played absolutely no role in directing IRS employees to use inappropriate terms to screen applicants for tax exempt status.

For example, on June 6, 2013, Committee staff interviewed the Screening Group Manager in the Cincinnati Determinations Unit who worked at the IRS for 21 years as a civil servant and supervised a team of several Screening Agents in that office. He answered questions from Committee staff directly and candidly for more than five hours. When asked by Republican Committee staff about his political affiliation, he answered that he is a “conservative Republican.”⁸⁹

The Screening Group Manager stated that there was no political motivation in the decision to screen and centralize the review of the Tea Party cases:

Q: In your opinion, was the decision to screen and centralize the review of Tea Party cases the targeting of the President’s political enemies?

A: I do not believe that the screening of these cases had anything to do other than consistency and identifying issues that needed to have further development.⁹⁰

The Screening Group Manager also explained that he had no reason to believe that any officials from the White House were involved in any way:

Q: Do you have any reason to believe that anyone in the White House was involved in the decision to screen Tea Party cases?

A: I have no reason to believe that.

Q: Do you have any reason to believe that anyone in the White House was involved in the decision to centralize the review of Tea Party cases?

⁸⁸ Issa on IRS Scandal: “Deliberate” Ideological Attacks, CBS News (May 14, 2013) (online at www.cbsnews.com/videos/issa-on-irs-scandal-deliberate-ideological-attacks/).

⁸⁹ House Committee on Oversight and Government Reform, Interview of Screening Group Manager, at 28-29 (June 6, 2013).

⁹⁰ *Id.* at 139-140.

A: I have no reason to believe that.⁹¹

Instead, the Screening Group Manager explained how one of his own employees flagged the first “Tea Party” case for additional review because it needed further development, and that he elevated the case to his management because it was “high-profile” and to ensure consistent review:

We would need to know how frequently or—of the total activities, 100 percent of the activities, what portion of those total activities would you be dedicating to political activities. And in this particular case, it wasn’t addressed, it was just mentioned, and, to me, that says it needs to have further development, and it could be good, you know. Once the information is all received, it could be fine.⁹²

After elevating the original case to his management, the Screening Group Manager explained that he made the decision on his own to instruct his Screening Agents to identify additional similar cases. He said: “There was no—there was no—one said to make a search.”⁹³ He explained that he did this to ensure “consistency” in the treatment of applications with similar fact patterns.⁹⁴

The Screening Group Manager informed Committee staff that he did not discover that his employee had used inappropriate search terms until June 2, 2011, and he did not provide that information to his superiors before June of 2011. The Inspector General’s report confirmed that Ms. Lerner did not learn of the use of the inappropriate criteria until June of 2011, a fact that also was corroborated by Committee interviews.⁹⁵

On June 2, 2013, Chairman Issa leaked selected excerpts of transcribed interviews with IRS employees prior to an appearance on CNN’s “State of the Union” with Candy Crowley. When pressed to release the full the transcripts, Chairman Issa promised to do so:

ISSA: These transcripts will all be made public. The killer about this thing is—

CROWLEY: Why don’t you put the whole thing out? Because you know our problem really here is—and you know that your critics say that Republicans and you in particular sort of cherry pick information that go to your foregone conclusion, and so it worries us to kind of to put this kind of stuff out. Can you not put the whole transcript out?

⁹¹ *Id.* at 141.

⁹² *Id.* at 146.

⁹³ *Id.* at 63.

⁹⁴ *Id.*

⁹⁵ Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013); House Committee on Oversight and Government Reform, Interview of Acting Director of Rulings and Agreements (May 21, 2013).

ISSA: The whole transcript will be put out. We understand—these are in real time. And the administration is still—they’re paid liar, their spokesperson, picture behind, he’s still making up things about what happens in calling this local rogue. There’s no indication—the reason that Lois Lerner tried to take the fifth is not because there is a rogue in Cincinnati, it’s because this is a problem that was coordinated in all likelihood right out of Washington headquarters and we’re getting to proving it.⁹⁶

On June 9, 2013, Ranking Member Cummings wrote to Chairman Issa requesting that the Committee “release publicly the transcripts of all interviews conducted by Committee staff.”⁹⁷ This request included the transcripts of the “conservative Republican” Screening Group Manager as well as all other officials interviewed by the Committee.

On June 11, 2013, Chairman Issa wrote to Ranking Member Cummings reversing his previous position and arguing instead that releasing the transcripts publicly would be “reckless” and “undermine the integrity of the Committee’s investigation.”⁹⁸

On June 13, 2013, Ranking Member Cummings wrote to Chairman Issa seeking clarification about his reversal and asking him to “identify the specific text of the transcripts you believe should be withheld from the American public.”⁹⁹

Over the following week, Chairman Issa reversed his position again and allowed select reporters to come into the Committee’s offices to review full, unredacted transcripts from several interviews with employees other than the Screening Group Manager. For example:

- *USA Today* reported that Chairman Issa allowed its reporters to review the full transcript of IRS official Holly Paz: “USA TODAY reviewed all 222 pages of the transcript of her interview.”

⁹⁶ *State of the Union*, CNN (June 2, 2013) (online at <http://www.youtube.com/watch?v=9zuQU-Mqll4&feature=youtu.be>).

⁹⁷ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 9, 2013) (online at <http://democrats.oversight.house.gov/press-releases/conservative-republican-manager-in-charge-of-irs-screeners-in-cincinnati-denies-any-white-house-involvement-or-political-influence-in-screening-tea-party-cases/>).

⁹⁸ Letter from Chairman Darrell E. Issa to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (June 11, 2013).

⁹⁹ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 13, 2013) (online at <http://democrats.oversight.house.gov/press-releases/new-cummings-letter-to-issa-identify-specific-transcript-text-you-want-withheld-from-public/>).

- The *Wall Street Journal* reported that he allowed its reporters to review the full Paz transcript: “The Wall Street Journal reviewed the transcript of her interview in recent days.”
- *Reuters* reported that he allowed its reporters to review the full Paz transcript as well: “Reuters has reviewed the interview transcript.”
- The *Associated Press* reported that he allowed its reporters to review not only the full Paz transcript, but also transcripts of interviews with two other IRS officials: “The Associated Press has reviewed transcripts from three interviews—with Paz and with two agents, Gary Muthert and Elizabeth Hofacre.”
- *Politico* also reported that its reporters were given access to full transcripts of interviews “conducted by the House Oversight and Government Reform Committee and reviewed by POLITICO.”¹⁰⁰

In light of the Chairman’s actions, Ranking Member Cummings publicly released the full transcript of the Screening Group Manager on June 18, 2013, explaining:

This interview transcript provides a detailed first-hand account of how these practices first originated, and it debunks conspiracy theories about how the IRS first started reviewing these cases. Answering questions from Committee staff for more than five hours, this official—who identified himself as a “conservative Republican”—denied that he or anyone on his team was directed by the White House to take these actions or that they were politically motivated.¹⁰¹

Democratic Committee Members have been asking for more than nine months for the public release of all of the Committee’s interview transcripts and believe it is now time for the Chairman to make good on his promise to do so.

¹⁰⁰ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 18, 2013) (online at http://democrats.oversight.house.gov/images/user_images/gt/stories/2013-06-18.EEC%20to%20Issa.pdf).

¹⁰¹ *Id.*

ATTACHMENT A

MEMORANDUM FROM THE NONPARTISAN CONGRESSIONAL RESEARCH SERVICE ON McCARTHY ERA PRECEDENT



**Congressional
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MEMORANDUM

March 20, 2014

To: House Committee on Oversight and Government Reform
Attention: [REDACTED]
From: [REDACTED] Legislative Attorney, [REDACTED]
Subject: Prosecutions for Contempt of Congress and the Fifth Amendment

This memorandum responds to your request for information about invocation of the Fifth Amendment privilege against self-incrimination in congressional hearings and contempt of Congress. Specifically, you asked for previous instances in which a witness before a congressional committee was voted in contempt of Congress and then prosecuted for refusing to answer the committee's questions or produce documents pursuant to a subpoena after invoking the Fifth Amendment privilege against self-incrimination. Additionally, you asked for information on whether any subsequent convictions for contempt of Congress under 2 U.S.C. §§ 192, 194 were upheld or overturned.

The table below provides the requested information based on searches of federal court cases in the LexisNexis database.¹ Although a number of search terms were used, it is possible that some relevant cases were missed. Additionally, other relevant cases may be unpublished, and therefore, not searchable in an available database. Cases involving witnesses who asserted other constitutional privileges, not including the Fifth Amendment privilege against self-incrimination, and were subsequently held in contempt of Congress are not included in the table. The cases are organized first by court authority (Supreme Court, followed by circuit courts and district courts) and then in chronological order.

¹ Several searches using different combinations of the following search terms were conducted: "2 U.S.C. 192," 192, committee, contempt, "contempt of Congress," "Fifth Amendment," subpoena, and subpena. Additionally, relevant cases appearing on the Shepard's report for 2 U.S.C § 192 were searched.

Table I. Published Cases of Prosecutions for Contempt of Congress Following a Fifth Amendment Privilege Assertion

Case	Court and Date	Congressional Committee	Was the Witness Convicted?	Disposition of Convictions	Case Excerpt
Quinn v. United States, 349 U.S. 155 (1955).	Supreme Court, May 23, 1955	Comm. on Un-American Activities	Yes	Overturned	"...we must hold that petitioner's references to the Fifth Amendment were sufficient to invoke the privilege and that the court below erred in failing to direct a judgment of acquittal." <i>Quinn</i> , 349 U.S. at 165.
Emspak v. United States, 349 U.S. 190 (1955).	Supreme Court, May 23, 1955	Comm. on Un-American Activities	Yes	Overturned	"...in the instant case, we do not think that petitioner's 'No' answer can be treated as a waiver of his previous express claim under the Fifth Amendment." <i>Emspak</i> , 349 U.S. at 197.
Bart v. United States, 349 U.S. 219 (1955).	Supreme Court, May 23, 1955	Comm. on Un-American Activities	Yes	Overturned	"Because of the consistent failure to advise the witness of the committee's position as to his objections, petitioner was left to speculate about the risk of possible prosecution for contempt; he was not given a clear choice between standing on his objection and compliance with a committee ruling. Because of this defect in laying the necessary foundation for a prosecution under § 192, petitioner's conviction cannot stand under the criteria set forth more fully in <i>Quinn v. United States</i> ..." <i>Bart</i> , 319 U.S. at 223.
McPhaul v. United States, 364 U.S. 372 (1960).	Supreme Court, Nov. 14, 1960	Comm. on Un-American Activities	Yes	Upheld	"The Fifth Amendment did not excuse petitioner from producing the records of the Civil Rights Congress, for it is well settled that 'books and records kept in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally.'" <i>McPhaul</i> , 364 U.S. at 380.

Case	Court and Date	Congressional Committee	Was the Witness Convicted?	Disposition of Convictions	Case Excerpt
Marcello v. United States, 196 F.2d 437 (1952).	Fifth Circuit April 22, 1952	Special Committee on Organized Crime in Interstate Commerce (The Kefauver Committee)	Yes	Overturned	"We are clear that there was no waiver by the appellant of the privilege against self-incrimination in this case. The judgment appealed from is reversed, and a judgment of acquittal here rendered." <i>Marcello</i> , 196 F.2d at 445.
Jackins v. United States, 231 F.2d 405 (1956).	Ninth Circuit March 8, 1956	Comm. on Un-American Activities	Yes	Overturned	"Jackins' claim of privilege must be sustained since in the setting here described it was not 'perfectly clear' from a careful consideration of all the circumstances in the case, that the witness (was) mistaken, and that the answer(s) cannot possibly have such tendency to incriminate.... The judgment is reversed with directions to enter a judgment of acquittal upon all counts." <i>Jackins</i> , 231 F.2d at 410.
Fagherhaugh v. United States, 232 F.2d 803 (1956).	Ninth Circuit April 24, 1956	Comm. on Un-American Activities	Yes	Overturned	"We believe that Quinn v. United States requires a reversal of this conviction as it appears that the Committee did not indicate its refusal to accept the claim of privilege against self-incrimination, and did not 'demand' that the witness answer the question.... The judgment is reversed with directions to enter a judgment of acquittal." <i>Fagherhaugh</i> , 232 F.2d at 805.
Shelton v. United States, 404 F.2d 1292 (1968).	D.C. Circuit August 14, 1968	Comm. on Un-American Activities	Yes	Upheld	"...the subpoena did not call upon Mr. Shelton to produce any personal papers, but only those of Klan organizations.... The privilege accordingly was not available to him as a basis for refusing to produce." <i>Shelton</i> , 404 F.2d at 1301.

Case	Court and Date	Congressional Committee	Was the Witness Convicted?	Disposition of Convictions	Case Excerpt
United States v. Jaffe, 98 F. Supp. 191 (1951).	District Court for the D.C. Circuit May 28, 1951	Senate Comm. on Foreign Relations	No	n/a	"...having claimed the privilege granted to him by the Fifth Amendment to the Constitution, he should not have been required to give such testimony, and, therefore, it is the judgment of the Court that, in refusing to do so, he is not guilty of contempt." <i>Jaffe</i> , 98 F. Supp. at 198.
United States v. Fischetti, 103 F. Supp. 796 (1952).	District Court for the D.C. Circuit March 11, 1952	Senate Special Comm. to Investigate Organized Crime in Interstate Commerce (The Kefauver Committee)	No	n/a	"...the Court is of the opinion that it is required to grant the defendant's motion for judgment of acquittal." <i>Fischetti</i> , 103 F. Supp. at 799.
United States v. Hoag, 142 F. Supp. 667 (1956).	District Court for the D.C. Circuit July 6, 1956	Senate Committee on Government Operations	No	n/a	"...I reach the conclusion that the defendant did not waive her privilege under the Fifth Amendment and therefore did not violate the statute in question in refusing to answer the questions propounded to her. Therefore, I find that she is entitled to a judgment of acquittal on all counts." <i>Hoag</i> , 142 F. Supp. at 673.

Sources: Searches of LexisNexis database

ATTACHMENT B

OPINIONS FROM 31 INDEPENDENT LEGAL EXPERTS IDENTIFYING CONSTITUTIONAL DEFICIENCIES IN CONTEMPT PROCEEDINGS

Experts Opinions on Lois Lerner Contempt Proceedings

1	Statement of Morton Rosenberg, Esq.	<u>Page 3</u>
2	Statement of Stanley Brand, former House Counsel	<u>Page 3</u>
3	Statement of Joshua Levy, Esq.	<u>Page 9</u>
4	Statement of Professor Julie Rose O’Sullivan	<u>Page 10</u>
5	Statement of Professor Samuel Buell	<u>Page 11</u>
6	Statement of Robert Muse, Esq.	<u>Page 12</u>
7	Statement of Professor Lance Cole	<u>Page 13</u>
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12	Statement of Professor J. Richard Broughton	<u>Page 24</u>
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31	Statement of Professor Alex Whiting	<u>Page 58</u>
	Additional Statement of Morton Rosenberg, Esq. Addressing Chairman Issa’s House Counsel Memo	<u>Page 59</u>

- 1. Morton Rosenberg spent 35 years as a former Specialist in American Public Law at the non-partisan Congressional Research Service and is a former Fellow at the Constitution Project.**
- 2. Stanley M. Brand, who served as General Counsel for the House of Representatives from 1976 to 1983, wrote that he agreed with Mr. Rosenberg's analysis.**

March 12, 2014

**To: Honorable Elijah E. Cummings
 Ranking Minority Member,
 House Committee on Oversight
 And Government Reform**

**From: Morton Rosenberg
 Legislative Consultant**

**Re: Constitutional Due Process Prerequisites for Contempt of Congress
 Citations and Prosecutions**

You have asked that I discuss whether, at this point in the questioning of Ms. Lois Lerner, a witness in the Committee's ongoing investigation of alleged irregularities by the Internal Revenue Service (IRS) in the processing of applications by certain organizations for tax-exempt status, the appropriate constitutional foundation has been established for the Committee to initiate the process that would lead to her prosecution for contempt of Congress. My understanding of the requirements of the law in this area leads me to conclude that the requisite due process protections have not been met.

My views in this matter have been informed by my 35 years of work as a Specialist in American Public Law with the American Law Division of the Congressional Research Service, during which time I concentrated particularly on constitutional and practice issues arising from interbranch conflicts over information disclosures in the course of congressional oversight and investigations of executive agency implementation of their statutory missions. My understandings have been further refined by my preparation for testimony on investigative matters before many committees, including your Committee, and by the research involved in the writing and publication by the Constitution Project in 2009 of a monograph entitled "When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry."

Briefly, the pertinent background of the situation is as follows. Ms. Lerner, who was formerly the Director of Exempt Organizations of the Tax-Exempt and Government Entities Division of IRS, was subpoenaed to testify

before the Committee on May 22, 2013. She appeared and after taking the oath presented an opening statement but thereafter refused to answer questions by Members, invoking her Fifth Amendment right against self-incrimination. The question was raised whether Ms. Lerner had effectively waived the privilege by her voluntary statements. On advice of counsel she continued to assert the privilege. Afterward, on dismissing Ms. Lerner and her counsel, Chairman Issa remarked "For this reason I have no choice but to excuse this witness subject to recall after we seek specific counsel on the question 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 of unity [sic: immunity] could be negotiated, the witness and counsel are dismissed." Thus at the end of her initial testimony, there had been no express Committee determination rejecting her privilege claim nor an advisement that she could be subject to a criminal contempt proceeding. There was, however, some hint of granting statutory use immunity that would compel her testimony. On June 28, 2013, the Committee approved a resolution rejecting Ms. Lerner's privilege claim on the ground that she had waived it by her voluntary statements.

Still subject to the original subpoena, Ms. Lerner was recalled by the Committee on March 5, 2014. Chairman Issa's opening statement recounted the events of the May 22, 2013 hearing and the fact of the Committee's finding that she had waived her privilege. He then stated that "if she continues to refuse to answer questions from Members while under subpoena, the Committee may proceed to consider whether she will be held in contempt." In answer to the first question posed by Chairman Issa, Ms. Lerner expressly stated in response that she had been advised by counsel that she had not waived her privilege and would continue to invoke her privilege, which she did in response to all the Chair's further questions. After his final question Chairman Issa adjourned the hearing without allowing further questions or remarks by Committee members, and granted her "leave of said Committee," stating, "Ms. Lerner, you're released." At no time during his questioning did the Chair explicitly demand an answer to his questions, expressly overrule her claim of privilege, or make it clear that her refusal to respond would result in a criminal contempt prosecution.

In 1955 the Supreme Court announced in a trilogy of rulings that in order to establish a proper legal foundation for a contempt prosecution, a jurisdictional committee must disallow the constitutional privilege objection and clearly apprise the witness that an answer is demanded. A witness will not be forced to guess whether or not a committee has accepted his or her objection. If the witness is not able to determine “with a reasonable degree of certainty that the committee demanded his answer despite his objection,” and thus is not presented with a “clear-cut choice between compliance and non-compliance, between answering the question and risking the prosecution for contempt,” no prosecution for contempt may lie. *Quinn v. United States*, 349 U.S. 155, 166, 167 (1955); *Empsak v. United States*, 349 U.S. 190, 202 (1955). In *Bart v. United States*, 349 U.S. 219 (1955), the Court found that at no time did the committee overrule petitioner’s claim of self-incrimination or lack of pertinency, nor was he indirectly informed of the committee’s position through a specific direction to answer. A committee member’s suggestion that the chairman advise the witness of the possibility of contempt was rejected. The Court concluded that the consistent failure to advise the witness of the committee’s position as to his objections left him to speculate about this risk of possible prosecution for contempt and did not give him a clear choice between standing with his objection and compliance with a committee ruling. Citing *Quinn*, the Court held that this defect in laying the necessary constitutional foundation for a contempt prosecution required reversal of the petitioner’s conviction. 349 U.S. at 221-23. Subsequent appellate court rulings have adhered to the High Court’s guidance. See, e.g., *Jackins v. United States*, 231 F. 2d 405 (9th Cir. 1959); *Fagerhaugh v. United States*, 232 F. 2d 803 (9th Cir. 1959).

In sum, at no stage in this proceeding did the witness receive the requisite clear rejections of her constitutional objections and direct demands for answers nor was it made unequivocally certain that her failure to respond would result in criminal contempt prosecution. The problematic Committee determination that Ms. Lerner had waived her privilege, see, e.g., *McCarthy v. Arndstein*, 262 U.S. 355, 359 (1926) and *In re Hitchings*, 850 F. 2d 180 (4th Cir. 1980), occurred after the May 2013 hearing. Chairman Issa’s opening statement at the March 5, 2014 hearing, while referencing the waiver decision did not make it a substantive element of the Committee’s current concern and was never mentioned again during his interrogation of the witness. More significantly, the Chairman’s opening remarks were equivocal about the consequence of a failure

by Ms. Lerner to respond to his questions. As indicated above, he simply stated that “the Committee *may proceed to consider* whether she will be held in contempt.” Combined with his closing remarks in the May 2013 hearing, where he indicated he would be discussing the possibility of granting the witness statutory immunity with the Justice Department to compel her testimony, there could be no certainty for the witness and her counsel that a contempt prosecution was inevitable. Finally, it may be reiterated that the Chairman during the course of his most recent questioning never expressly rejected Ms. Lerner’s objections nor demanded that she respond.

I conclude that the requisite legal foundation for a criminal contempt of Congress prosecution mandated by the Supreme Court rulings in *Quinn, Emspak and Bart* have not been met and that such a proceeding against Ms. Lerner under 2 U.S.C. 194, if attempted, will be dismissed. Such a dismissal will likely also occur if the House seeks civil contempt enforcement.

You also inquire whether the waiver claim raised in the May 2013 hearing can be raised in a subsequent hearing to which Ms. Lerner might be again subpoenaed and thereby prevent her from invoking her Fifth Amendment rights. The courts have long recognized that a witness may waive the Fifth Amendment right to self-incrimination in one proceeding, and then invoke it later at a different proceeding on the same subject. See, e.g., *United States v. Burch*, 490 F.2d 1300, 1303 (8th Cir. 1974); *United States v. Licavoli*, 604 F. 2d 613, 623 (9th Cir. 1979); *United States v. Cain*, 544 F. 2d 1113,1117 (1st Cir. 1976); *In re Neff*, 206 F. 2d 149, 152 (3d Cir. 1953). See also, *United States v. Allman*, 594 F. 3d 981 (8th Cir. 2010) (acknowledging the continued vitality of the “same proceeding” doctrine: “We recognize that there is ample precedent for the rule that the waiver of the Fifth Amendment privilege in one proceeding does not waive that privilege in a subsequent proceeding.”). Since Ms. Lerner was released from her subpoena obligations by the final adjournment of the Committee’s hearing, a compelled testimonial appearance at a subsequent hearing on the same subject would be a different proceeding.

In addition, Stanley M. Brand has reviewed this memorandum and fully subscribes to its contents and analysis.

Mr. Brand served as General Counsel for the House of Representatives from 1976 to 1983 and was the House's chief legal officer responsible for representing the House, its members, officers, and employees in connection with legal procedures and challenges to the conduct of their official activities. Mr. Brand represented the House and its committees before both federal district and appellate courts, including the U.S. Supreme Court, in actions arising from the subpoena of records by the House and in contempt proceedings in connection with congressional demands.

In addition to the analysis set forth above, Mr. Brand explained that a review of the record from last week's hearing reveals that at no time did the Chair expressly overrule the objection and order Ms. Lerner to answer on pain of contempt. Making it clear to the witness that she has a clear cut choice between compliance and assertion of the privilege is an essential element of the offense and the absence of such a demand is fatal to any subsequent prosecution.

3. **Joshua Levy, a partner in the firm of Cunningham and Levy and an Adjunct Professor of Law at the Georgetown University Law Center who teaches Congressional Investigations, said:**

“Contempt cannot be born from a game of gotcha. Supreme Court precedents that helped put an end to the McCarthy era ruled that Congress cannot initiate contempt proceedings without first giving the witness due process. For example, Congress cannot hold a witness in contempt without directing her to answer the questions being asked, overruling her objections and informing her, in clear terms, that her refusal to answer the questions will result in contempt. None of that occurred here.”

4. Julie Rose O’Sullivan, a former federal prosecutor and law clerk to Supreme Court Justice Sandra Day O’Connor and current a Professor at the Georgetown University Law Center, said:

“The Supreme Court has spoken—repeatedly—on point. Before a witness may be held in contempt under 18 U.S.C. sec. 192, the government bears the burden of showing ‘criminal intent—in this instance, a deliberate, intentional refusal to answer.’ *Quinn v. United States*, 349 U.S. 155, 165 (1955). This intent is lacking where the witness is not faced with an order to comply or face the consequences. Thus, the government must show that the Committee ‘clearly apprised [the witness] that the committee demands his answer notwithstanding his objections’ or ‘there can be no conviction under [sec.] 192 for refusal to answer that question.’ *Id.* at 166. Here, the Committee at no point directed the witness to answer; accordingly, no prosecution will lie. This is a result demanded by common sense as well as the case law. ‘Contempt’ citations are generally reserved for violations of court or congressional orders. One cannot commit contempt without a qualifying ‘order.’”

5. Samuel W. Buell, a former federal prosecutor and current Professor of Law at Duke University Law School, said:

“[T]he real issue for me is the pointlessness and narrow-mindedness of proceeding in this way. Contempt sanctions exist for the purpose of overcoming recalcitrance to testify. One would rarely if ever see this kind of procedural Javert-ism from a federal prosecutor and, if one did, one would expect it to be condemned by any federal judge before whom such a motion were made.

In federal court practice, contempt is not sought against grand jury witnesses as a kind of gotcha penalty for invocations of the Fifth Amendment privilege that might turn out to contain some arguable formal flaw. Contempt is used to compel witnesses who have asserted the privilege and then continued to refuse to testify after having been granted immunity. Skirmishing over the form of a privilege invocation is a wasteful sideshow. The only question that matters, and that would genuinely interest a judge, is whether the witness is in fact intending to assert the privilege and in fact has a legitimate basis to do so. The only questions of the witness that therefore need asking are the kind of questions (and a sufficient number of them) that will make the record clear that the witness is not going to testify. Usually even that process is not necessary and a representation from the witness’s counsel will do.

Again, contempt sanctions are on the books to serve a simple and necessary function in the operation of legal engines for finding the truth, and not for any other purpose. Any fair and level-headed judge is going to approach the problem from that perspective. Seeking contempt now on this record thus could accomplish nothing but making the Committee look petty and uninterested in getting to the merits of the matter under investigation.”

- 6. Robert Muse, a partner at Stein, Mitchell, Muse & Cipollone, LLP, Adjunct Professor of Congressional Investigations at Georgetown Law, and formerly the General Counsel to the Special Senate Committee to Investigate Hurricane Katrina, said:**

“Procedures and rules exist to provide justice and fairness. In his rush to judgment, Issa forgot to play by the rules.”

7. Professor Lance Cole of Penn State University's Dickinson School of Law, said:

"I agree with the analysis and conclusions of Mr. Rosenberg, and the additional comments by Mr. Brand. I also have a broader concern about seeking criminal contempt sanctions against Ms. Lerner. I do not believe criminal contempt proceedings should be utilized in a situation in which a witness is asserting a fundamental constitutional privilege and there is a legitimate, unresolved legal issue concerning whether or not the constitutional privilege has been waived. In that situation initiating a civil subpoena enforcement proceeding to obtain a definitive judicial resolution of the disputed waiver issue, prior to initiating criminal contempt proceedings, would be preferable to seeking criminal contempt sanctions when there is a legitimate issue as to whether the privilege has been waived and that legal issue inevitably will require resolution by the judiciary. Pursuing a criminal contempt prosecution in this situation, when the Committee has available to it the alternatives of either initiating a civil judicial proceeding to resolve the legal dispute on waiver or granting the witness statutory immunity, is unnecessary and could have a chilling effect on the constitutional rights of witnesses in congressional proceedings."

8. **Renée Hutchins is a former federal prosecutor, current appellate defense attorney, and Associate Professor of Law at the University of Maryland Carey School of Law. She said:**

"America is a great nation in no small part because it is governed by the rule of law. In a system such as ours, process is not a luxury to be afforded the favored or the fortunate. Process is essential to our notion of equal justice. In a contempt proceeding like the one being threatened the process envisions, at minimum, a witness who has refused to comply with a valid order. But a witness cannot refuse to comply if she has not yet been told what she must do. Our system demands more. Before the awesome powers of government are brought to bear against individual Americans we must be vigilant, now and always, to ensure that the process our fellow citizens confront is a fair one."

9. Colin Miller is an Associate Professor of Law at the University of South Carolina School of Law whose areas of expertise include Evidence, as well as Criminal Law and Procedure. He wrote:

In this case, the witness invoked the Fifth Amendment privilege, the Committee Chairman recessed the hearing, and the Chairman now wants to hold the witness in contempt based upon the conclusion that she could not validly invoke the privilege. Under these circumstances, the witness cannot be held in contempt. Instead, the only way that the witness could be held in contempt is if the Committee Chairman officially ruled that the Fifth Amendment privilege was not available, instructed the witness to answer the question(s), and the witness refused.

As the United States District Court for the Northern District of Illinois noted in *United States ex rel. Berry v. Monahan*, 681 F.Supp. 490, 499 (N.D.Ill. 19988),

If the law were otherwise, a person with a meritorious fifth amendment objection might not assert the privilege at all simply because of fear that the judge would find the invocation erroneous and hold the person in contempt. In that scenario, the law would throw the person back on the horns of the “cruel trilemma” for in order to insure against the contempt sanction the person would have to either lie or incriminate himself.

The Northern District of Illinois is not alone in this conclusion. Instead, it cited as support:

Traub v. United States, 232 F.2d 43, 49 (D.C.Cir.1955) (“no contempt can lie unless the refusal to answer follows an adverse ruling by the court on the claim of the privilege or clear direction thereafter to answer” (citation omitted)); *Carlson v. United States*, 209 F.2d 209, 214 (1st Cir.1954) (“the claim of privilege calls upon the judge to make a ruling whether the privilege was available in the circumstances presented; and if the judge thinks not, then he instructs the witness to answer”). See also *Wolfe v. Coleman*, 681 F.2d 1302, 1308 (11th Cir.1982) (the petition for the writ in a contempt case failed because the court had found the petitioner's first amendment objection invalid before ordering him to answer); *In re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600, 608 (D.C.Cir.1976) (a witness is subject to contempt if the witness refuses to answer a grand jury question previously found not to implicate the privilege). Compare *Maness v. Meyers*, 419 U.S. 449, 459, 95 S.Ct. 584, 591, 42 L.Ed.2d 574 (1975) (“once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders” (emphasis added)); *United States v. Ryan*, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971) (after the court rejects a witness' objections, the witness is confronted with the decision to comply or be held in contempt if his objections to testifying are rejected again on appeal).

Most importantly, it cited the Supreme Court's opinion in *Quinn v. United States*, 349 U.S. 155 (1955), in support

The Supreme Court in *Quinn v. United States*, 349 U.S. 155, 75 S.Ct. 688, 99 L.Ed. 964 (1955) held that in congressional-committee hearings the committee must clearly dispose of the witness' fifth amendment claim and order that witness to answer before the committee invokes its contempt power. *Quinn v. United States*, 349 U.S. 155, 167–68, 75 S.Ct. 668, 675–76, 99 L.Ed.

964 (1955). According to *Quinn*, “unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections,” the witness' refusal to answer is not contumacious because the requisite intent element of the congressional-contempt statute is lacking. *Id.* at 165–66, 75 S.Ct. at 674–75 (discussing 2 U.S.C. § 192). The court further stated that “a clear disposition of the witness' objection is a prerequisite to prosecution for contempt.”

Therefore, *Quinn* clearly stands for the proposition that the witness in this case cannot be held in contempt of COurt.

Sincerely,

Colin Miller
University of South Carolina School of Law

- 10. Thomas Crocker is a Distinguished Professor of Law at the University of South Carolina School of Law who teaches courses in teaches Constitutional Law, Criminal Procedure, as well as seminars in Jurisprudence.**

21 March 2014

Honorable Elijah E. Cummings
Ranking Minority Member
House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Honorable Cummings:

After reviewing materials relevant to the recent appearance of Ms. Lois Lerner as a witness before the Committee, I conclude that that no legal basis exists for holding her in contempt. Specifically, I agree with the legal analysis and conclusions Morton Rosenberg reached in the memo provided to you. Let me add a few thoughts as to why I agree.

The Fifth Amendment privilege against self-incrimination has deep constitutional roots. As the Supreme Court explained, the privilege is “of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions.” *Quinn v. United States*, 349 U.S. 155, 161-62 (1955). Because of its importance, procedural safeguards exist to ensure that government officials respect “our fundamental values,” which “mark[] an important advance in the development of our liberty.” *Kastigar v. United States*, 406 U.S. 441, 444 (1972). As the Supreme Court made clear in a trio of cases brought in response to congressional contempt proceedings, before a witness can be held in contempt under 18 U.S.C. sec. 192, a committee must “directly overrule [a witness’s] claims of self incrimination.” *Bart v. United States*, 349 U.S. 219, 222 (1955). “[U]nless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under sec. 192 for refusal to answer that question.” *Quinn*, 349 U.S. at 166. Without this clear appraisal, and without a subsequent refusal, the statutory basis for violation of section 192 does not exist. This reading of the statutory requirements under section 192, required by the Supreme Court, serves the constitutional purpose of protecting the values reflected in the Fifth Amendment.

Reviewing the proceedings before the House Oversight Committee, it is clear that Chairman Darrell Issa did not overrule the witness’s assertion of her Fifth Amendment privilege. As a result, the witness was “never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt.” *Empsak v. United States*, 349 U.S. 190, 202 (1955). Without that choice, then under section 192, the witness lacks the relevant intent, and therefore does not meet an essential element necessary for a claim of contempt. This is not a close or appropriately debatable case.

In addition, I understand that arguments have been made that Ms. Lerner waived her Fifth Amendment privilege in making an opening statement to the Committee and in authenticating earlier answers to the Inspector General. Although I would conclude that Ms. Lerner did not waive her right to invoke a Fifth Amendment privilege against testifying, resolution of this legal question is not relevant to the question of whether the proper foundation exists for a contempt of Congress claim under section 192. Even if the witness had waived her privilege, Chairman Issa failed to follow the minimal procedural safeguards required by the Supreme Court as a prerequisite for a contempt charge.

Sincerely,

Thomas P. Crocker, J.D., Ph.D.
Distinguished Professor of Law

- 11. Thomas Spulak served as General Counsel of the House of Representatives from 1994-1995. He wrote in a statement to Ranking Member Cummings:**

THOMAS J. SPULAK, ESQ.
1700 PENNSYLVANIA AVENUE, N. W.
202-661-7948

March 20, 2014

Honorable Elijah Cummings
Ranking Member
WASHINGTON, DC 20006
Committee on Oversight and Government Reform
U. S. House of Representatives
2471 Rayburn Office Building
Washington, DC 20515

Dear Representative Cummings:

I write to you in response to your request for my views on the matter involving Ms. Lois Lerner currently pending before the Committee on Oversight and Government Reform (the "Committee"). I do so out of my deep concerns for the constitutional integrity of the U.S. House of Representatives, its procedures and its future precedents. I have no association with the matter whatsoever.

I have read reports in the Washington Post regarding the current proceedings involving Ms. Lois Lerner and especially the question of whether an appropriate and adequate constitutional predicate has been laid to serve as the basis for a charge of contempt of Congress. In my opinion, it has not.

I have deep respect for Chairman Darrell Issa and his leadership of the Committee. But the matter before the Committee is a relatively rare occurrence and must be dispatched in a constitutionally required manner for the good of this and future

Congresses.

I have reviewed the memorandum that Mr. Morton Rosenberg presented to you on March 12th of this year. As you may know, Mr. Rosenberg is one of the leading scholars on the U.S. Congress, its procedures and the constitutional foundation. He has been relied upon by members and staff of both parties for over 30 years. I first met Mr. Rosenberg in the early 1980s when I was Staff Director and General Counsel of the House Rules Committee. He was an important advisor to the members of the Rules Committee then and has been for years after. While perhaps there have been times when some may have disagreed with his position, I know of no instance where his objectivity or commitment to the U.S. Congress has ever been questioned.

Based on my experience, knowledge and understanding of the facts, I fully agree with Mr. Rosenberg's March 12th memorandum.

I have also reviewed Chairman Issa's letter to you dated March 14th of this year. His letter is very compelling and clearly states the reasons that he believes a proper foundation for a charge of contempt of Congress has been laid. For example, he indicates that on occasions, Ms. Lerner knew or should have known that the Committee had rejected her Fifth Amendment privilege claim, either through the Chairman's letter to her attorney or to reports of the same that appeared in the media. The fact of the matter, however, is that based on relevant Supreme Court rulings, the pronouncement must occur with the witness present so that he or she can understand the finality of the decision, appreciate the consequences of his or her continued silence, and have an opportunity to decide otherwise at that time.

I agree with the Chairman's reading of *Quinn v. United States* in that there is no requirement to use any "fixed verbal formula" to convey to the witness the Committee's decision. But, I believe that the Court does require that whatever words are used be delivered to the witness in a direct, unequivocal manner in a setting that allows the

witness to understand the seriousness of the decision and the opportunity to continue to insist on invoking the privilege or revoke it and respond to the Committee's questioning. That, as I understand the facts, did not occur.

In conclusion, I quote from Mr. Rosenberg's memorandum and agree with him when he said-

... [A]t no stage in [the] proceeding did the witness receive the requisite clear rejections of her constitutional objections and direct demands for answers nor was it made unequivocally certain that her failure to respond would result in criminal contempt prosecution.

Accordingly, I do not believe that the proper basis for a contempt of Congress charge has been established. Ultimately, however, this will be determined by members of the Judicial Branch.

Sincerely,

Thomas J. Spulak

- 12. J. Richard Broughton is a Professor of Law at the University of Detroit Mercy School of Law and a member of the Republican National Lawyers Association.**

MEMORANDUM

TO: Donald K. Sherman, Counsel
House Oversight & Government Reform Committee
FROM: J. Richard Broughton, Associate Professor of Law
University of Detroit Mercy School of Law
RE: Legal Issues Related to Possible Contempt of Congress Prosecution
DATE: March 17, 2014

You have asked for my thoughts regarding the possibility of a criminal contempt prosecution pursuant to 2 U.S.C. §§ 192 & 194 against Lois Lerner, in light of the assertion that the Committee violated the procedures necessary for permitting such a prosecution. My response here is intended to be objective and non-partisan, and is based on my own research and expertise. I am a full-time law professor, and my areas of expertise include Constitutional Law, Criminal Law, and Criminal Procedure, with a special focus on Federal Criminal Law. I previously served as an attorney in the Criminal Division of the United States Department of Justice during the Bush Administration. These views are my own and do not necessarily reflect the views of the University of Detroit Mercy or anyone associated with the University.

The power of Congress to hold a witness in contempt is an important tool for carrying out the constitutional functions of the legislative branch. Lawmaking and oversight of the other branches require effective fact-finding and the cooperation of those who are in a position to assist the Congress in gathering information that will help it to do its job. Like any other criminal sanction, however, the contempt power must be used prudently, not for petty revenge or partisan gain. It should also be used with appropriate respect for countervailing constitutional rights and with proof that the accused contemnor possessed the requisite level of culpability in failing to answer questions. The Supreme Court has held that a recalcitrant witness's culpable mental state can only be established after the Committee has unequivocally rejected a witness's objection to a question and then demanded an answer to that question, even where the witness asserts the Fifth Amendment privilege. Absent such a formal rejection and subsequent directive, the witness – here, Ms. Lerner – would likely have a defense to any ensuing criminal prosecution for contempt, pursuant to the existing Supreme Court precedent. Those who are concerned about the reach of federal power should desire legally sufficient proof of a person's culpable mental state before permitting the United States to seek and impose criminal punishment.

Whether the precedents are sound, or whether they require such formality, however, is another matter. As set forth in the Rosenberg memorandum of March 12, 2014, the relevant cases are *Quinn v. United States*, 349 U.S. 155 (1955), *Emspak v. United States*, 349 U.S. 190 (1955), and *Bart v. United States*, 349 U.S. 219 (1955). *Quinn* contains the most detailed explanation of the procedural requirements for using section 192. Mr. Rosenberg's thoughtful memo correctly describes the holding in these cases. Still, those cases are not a model of clarity and their application to the Lerner matter is subject to some greater exploration.

One could argue that the Committee satisfied the rejection-then-demand requirement here, when we view the May 22, 2013 and March 5, 2014 hearings in their totality. At the May 22, 2013 hearing, Chairman Issa indicated to Ms. Lerner that he believed she had waived the

privilege (a contention bolstered by Rep. Gowdy at that hearing). The Committee then voted 22 to 17 on June 28, 2013 in favor of a resolution stating that she had waived the privilege. The Chairman then referred to this resolution in his opening statement on March 5, 2014, in the presence of Ms. Lerner and her counsel. And at each hearing, Chairman Issa continued to ask questions of her even after she re-asserted the privilege, thus arguably further demonstrating to her that the chair did not accept her invocation. Consequently, it could be argued that these actions placed her on adequate notice that her assertion of the privilege was unacceptable and that she was required to answer the questions propounded to her, which is why the Chairman continued with his questioning on March 5. Her refusal to answer was therefore intentional.

This argument is problematic, however, particularly if we read the cases as imposing a strict requirement that the specific question initially propounded be repeated and a demand to answer *it* made after formally rejecting the witness's invocation of privilege *as to that question*. And that is a fair reading of the cases. Although the Court said that no fixed verbal formula is necessary when rejecting a witness's objection, the witness must nevertheless be "fairly apprised" that the Committee is disallowing it. *See Quinn*, 349 U.S. at 170. Even Justice Reed's *Quinn* dissent, which criticized the demand requirement, conceded that the requisite mens rea for contempt cannot be satisfied where the witness is led to believe that – or at least confused about whether – her invocation of the privilege is acceptable. *See id.* at 187 (Reed, J., dissenting). Here, the Committee appeared equivocal at the first hearing. Although Chairman Issa's original rejection on May 22, 2013 was likely satisfactory (and bolstered by Rep. Gowdy's argument), it was not followed by a demand to answer the specific question propounded. He then moved onto other questions. On March 5, 2014, the Committee's conduct was also equivocal, because even though the Committee had approved a resolution stating that she had waived the privilege, and the Chairman referred to that resolution in his opening statement, the Committee never formally overruled her assertion of the privilege upon her repeated invocations of it (though it could easily have done so, by telling her that the resolution of June 28, 2013 still applied to each question she would be asked on March 5, 2014). Nor did the Committee demand answers to those same questions. Ms. Lerner was then excused each time and was never compelled to answer.

The problem, then, is not that the Committee failed to notify Ms. Lerner generally that it rejected her earlier assertion of privilege. Rather, the problem is that the Committee did not specifically overrule *each* invocation on either May 22, 2013 or March 5, 2014 and then demand an answer to *each* question previously asked. This is a problem because the refusal to answer each question constitutes a distinct criminal offense for which the mens rea must be established. Therefore, Ms. Lerner could have been confused about whether her invocation of the privilege as to each question was now acceptable – the waiver resolution and the Chair's reference to it notwithstanding – especially after her attorney had assured her that she did *not* waive the privilege. A fresh ruling disputing her counsel's advice would have clarified the Committee's position, but did not occur. But even if she could not have been so confused, she would likely have a persuasive argument that this process was still not sufficient under *Quinn*, absent a ruling on *each* question propounded *and* a demand that she answer the question initially asked of her prior to her invocation of the privilege.

Of course, none of this is to say that the cases are not problematic. *Quinn* is not clear about whether a general rejection of a witness's previous assertion of the privilege – like the one we have here via resolution and reference in an opening statement – would suffice as a method

for overruling an invocation of privilege on each and every question asked (as opposed to informing the witness after each invocation that the invocation is unacceptable). The best reading of *Quinn* is that although it does not require a talisman, it does require that the witness be clearly apprised as to each question that her objection to it is unacceptable. And that would seem to require a separate rejection and demand upon each invocation. *Quinn* also specifically states that once the Committee reasonably concludes that the witness has invoked the Fifth Amendment privilege, the privilege “must be respected.” *Quinn*, 349 U.S. at 163. Yet *Quinn* later states that when a witness asserts the privilege, a contempt prosecution may lie only where the witness refuses the answer once the committee has disallowed the objection and demanded an answer. *Id.* at 166. This would often put the committee in an untenable position. If the committee must respect an assertion of the privilege, then it cannot overrule the invocation of the privilege and demand an answer. For if the committee must decide to overrule the objection and demand an answer, then the committee is not respecting the assertion of the privilege. Perhaps the Court meant something different by “respect;” but its choice of language is confusing.

Also, the cases base the demand requirement on the problem of proving mens rea. Although the statute does not explicitly set forth the “deliberate and intentional” mens rea, the Court has held that the statute requires this. *See Sinclair v. United States*, 279 U.S. 263, 299 (1929). Contrary to *Quinn*, it is possible to read the statute as saying that the offense is complete once the witness refuses to answer a question, especially once it is made clear that the Committee rejects the underlying objection to answering. That reading is made even more plausible if the witness already knows that she may face contempt if she asserts the privilege and refuses to answer. Justice Reed raised this problem, *see Quinn*, 349 U.S. at 187 (Reed, J., dissenting), as did Justice Harlan, who went even farther in his *Emspak* dissent by saying that the rejection-then-demand requirement has no bearing on the witness’s state of mind as of the time she initially refuses to answer. *See Emspak*, 349 U.S. at 214 (Harlan, J., dissenting). Here, Chairman Issa asked Ms. Lerner a series of questions that she did not answer, asserting the privilege instead. There remains a plausible argument that this, combined with the Chairman’s initial statement that she had waived the privilege and the subsequent resolution of June 28, 2013, is enough to prove that she acted intentionally in refusing, even without a subsequent demand. That argument, however, would require reconsideration of the holding in *Quinn*.

Third, the Rosenberg memo adds that the witness must be informed that failure to respond *will* result in a criminal contempt prosecution. That, however, also places the committee in an untenable position. A committee cannot assure such a prosecution. Pursuant to section 194 and congressional rules, the facts must first be certified by the Speaker of the House and the President of the Senate, the case must be referred to the United States Attorney, and the United States Attorney must bring the case before a grand jury (which could choose not to indict). Even if the committee believes the witness should be prosecuted, that result is not inevitable. Therefore, because the committee alone is not empowered to initiate a contempt prosecution, requiring the committee to inform the witness of the inevitability of a contempt prosecution would be inconsistent with federal law (section 194). Perhaps what Mr. Rosenberg meant was simply that the witness must be told that the committee would refer the case to the full Congress.

Even assuming the soundness of the rejection-and-demand requirement (which we should, as it is the prevailing law), and assuming it was not satisfied here, this does not necessarily preclude some future contempt prosecution against Ms. Lerner under section 192. If

the Committee were to recall Ms. Lerner, question her, overrule her assertion of privilege and demand an answer to the same question(s) at that time, then her failure to answer would apparently satisfy section 192. In the alternative, the Committee could argue that *Quinn, et al.* were wrong to require the formality of an explicit rejection and a subsequent demand for an answer in order to prove mens rea. That question would then have to be subject to litigation.

Finally, although beyond the scope of your precise inquiry, I continue to believe that any discussion of using the contempt of Congress statutes must consider that the procedure set forth in section 194 potentially raises serious constitutional concerns, in light of the separation of powers. See J. Richard Broughton, *Politics, Prosecutors, and the Presidency in the Shadows of Watergate*, 16 CHAPMAN L. REV. 161 (2012).

I hope you find these thoughts helpful. I am happy to continue assisting the Committee on this, or any other, matter.

13. Louis Fisher, Adjunct Scholar at the CATO Institute and Scholar in Residence at the Constitution Project.

I am responding to your request for thoughts on holding former IRS official Lois Lerner in contempt. They reflect views developed working for the Library of Congress for four decades as Senior Specialist in Separation of Powers at Congressional Research Service and Specialist in Constitutional Law at the Law Library. I am author of a number of books and treatises on constitutional law. For access to my articles, congressional testimony, and books see <http://loufisher.org>. Email: lfisher11@verizon.net. After retiring from government in August 2014, I joined the Constitution Project as Scholar in Residence and continue to teach courses at the William and Mary Law School.

I will focus primarily on your March 5, 2014 hearing to examine whether (1) Lerner waived her constitutional privilege under the Fifth Amendment self-incrimination clause, (2) there is no expectation that she will cooperate with the committee, and (3) the committee should therefore proceed to hold her in contempt. For reasons set forth below, I conclude that if the House decided to hold her in contempt and the issue litigated, courts would decide that the record indicated a willingness on her part to cooperate with the committee to provide the type of information it was seeking. Granted that she had complicated her Fifth Amendment privilege by making a voluntary statement on May 22, 2013 (that she had done nothing wrong, not broken any laws, not violated any IRS rules or regulations, and had not provided false information to House Oversight or any other committee), the March 5 hearing revealed an opportunity to have her provide facts and evidence to House Oversight to further its investigation.

The March 5 hearing began with Chairman Issa stating that the purpose of meeting that morning was “to gather facts about how and why the IRS improperly scrutinized certain organizations that applied for tax-exempt status.” He reviewed the committee’s inquiry after May 22, 2013, including 33 transcribed interviews of witnesses from the IRS. He then stated: “If 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.” He asked her, under oath, whether her testimony would be the truth, the whole truth, and nothing but the truth. She replied in the affirmative. He proceeded to ask her nine questions. Each time she answered: “On the advice of my counsel I respectfully exercise my Fifth Amendment right and decline to answer that question.” With the initial warning from Chairman Issa, followed by nine responses taking the Fifth, the committee might have been in a position to consider holding her in contempt. However, the final question substantially weakens the committee’s ability to do that in a manner that courts will uphold.

Chairman Issa, after asking the eighth question, said the committee’s general counsel had sent an e-mail to Lerner’s attorney, saying “I understand that Ms. Lerner is willing to testify and she is requesting a week’s delay.” The committee checked to see if that information was correct and received a one-word response to that question from her attorney: “Yes.” Chairman Issa asked Ms. Lerner: “Are you still seeking a one-week delay in order to testify?” She took the Fifth, but might have been inclined to answer in the affirmative but decided to rely on the privilege out of concern that a positive answer could be interpreted as waiving her constitutional right. When she chose to make an opening statement on May 22, 2013, and later took the Fifth, she was openly challenged as having waived the privilege. The hearing on March 5 is unclear on her willingness to testify. For purposes of holding someone in contempt, the record should be clear without any ambiguity or uncertainty.

These are the final words from Chairman Issa: “Ladies and Gentlemen, seeking the truth is the obligation of this Committee. I can see no point in going further. I have no expectation that Ms. Lerner will cooperate with this committee. And therefore we stand adjourned.”

If it is the committee’s intent to seek the truth, why not fully explore the possibility that she would, supported by her attorney, be willing to testify after a short delay of one week? According to a news story, her attorney, William Taylor, agreed to a deposition that would satisfy “any obligation she has or would have to provide information in connection with this investigation.”

<http://www.usatoday.com/story/news/politics/2014/03/03/lois-lerner-testimony-lawyer-e-mails/5981967>.

Why would a delay of one week interfere with the committee’s investigation that has thus far taken nine and a half months? Why not, in pursuit of facts and evidence, probe this opportunity to obtain information from her, particularly when Chairman Issa and the committee have explained that she has important information that is probably not available from any other witness? With his last question, Chairman Issa raised the “expectation” that she would cooperate with the committee if given an additional week. Under these conditions, I think the committee has not made the case that she acted in contempt. If litigation resulted, courts are likely to reach the same conclusion.

- 14. Steven Duke, a former law clerk to Supreme Court Justice William O. Douglas and a current criminal procedure professor at Yale University Law School.**

March 20, 2014

To: Honorable Elijah E. Cummings, Ranking Minority Member, House Committee on Oversight and Government Reform

From: Steven B. Duke, Professor of Law, Yale Law School

Re: Prerequisites for Contempt of Congress Citations and Prosecutions

At the request of your Deputy Chief Counsel, Donald Sherman, I have reviewed video recordings of proceedings before the Committee regarding the testimony of Ms. Lois Lerner, including her claims of privilege and the remarks of Chairman Issa regarding those claims. I have also reviewed the March 12, 2014 report to you by Morton Rosenberg, legislative consultant, and the case law cited therein. I have also done some independent research on the matter. Based on those materials and my own experience as a teacher and scholar of evidence and criminal procedure for five decades, I concur entirely with the conclusions reached in Mr. Rosenberg's report that a proper basis has not been laid for a criminal contempt of Congress prosecution of Ms. Lerner.

I also agree with Mr. Rosenberg's conclusion that whether or not Ms. Lerner waived her Fifth Amendment privilege during the May, 2013 proceedings, any new efforts to subpoena and obtain testimony from Ms. Lerner will be accompanied by a restoration of her Fifth Amendment privilege, since that privilege may be waived or reasserted in separate proceedings without regard to what has previously occurred, that is, the privilege may be waived in one proceedings and lawfully reasserted in subsequent proceedings.

15. Barbara Babcock, Emerita Professor of Law at Stanford University Law School has taught and written in the fields of civil and criminal procedure. She said:

“I agree completely with the memo from Morton Rosenberg about the requirements for laying a foundation before a contempt citation can be issued: a minimal and long-standing requirement for due process. In addition, it is preposterous to think she waived her Fifth Amendment right with the short opening statement on her previous appearance.”

16. Michael Davidson is a Visiting Lecturer at Georgetown University on National Security and the Constitution. He wrote:

"I watched the tape of the March 5, 2014 hearing, by way of the link that you sent me. I also read Mort Rosenberg's memorandum to Ranking Member Cummings.

It seems to me the Committee is still midstream in its interaction with Ms. Lerner. Whatever may have occurred on May 22, 2013 (I have not watched that tape), the Chairman asked a series of questions on March 5, 2014, Ms. Lerner asserted privilege under the Fifth Amendment, but the Chairman did not rule with respect to his March 5 questions and Ms. Lerner's assertion of privilege with respect to them.

As Mr. Rosenberg's memorandum indicates, several Supreme Court decisions should be considered. It would be worthwhile, I believe, to focus on the discussion of 2 U.S.C. 192 in *Quinn v. United States*, 349 U.S. 155, 165-70 (1955). For a witness's refusal to testify to be punishable as a crime under Section 192, there must be a requisite criminal intent. Under the Supreme Court's decision in *Quinn*, "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under [section] 192 for refusal to answer that question." 349 U.S. at 166.

From the March 5 tape, it appears that the Chairman did not demand that Ms. Lerner answer, notwithstanding her assertion of privilege, any of the questions asked on March 5, and therefore in the words of *Quinn* there could be no conviction for refusal to answer "that question," meaning any of the questions asked on March 5.

The Committee could, of course, seek to complete the process begun on March 5. If I were counseling the Committee, which I realize I am not, I'd suggest the value of inviting Ms. Lerner's attorney to submit a memorandum of law on her assertion of privilege. That could include whether on May 22, 2013 she had waived her Fifth Amendment privilege for questions asked then and whether any waiver back then carried over to the questions asked on March 5, 2014. Knowing her attorney's argument, the Committee could then consider the analysis of its own counsel or any independent analysis it might wish to receive. If it then decided to overrule Ms. Lerner's assertion of privilege, she could be recalled, her assertion of privilege on March 5 overruled, and if so she could then be directed to respond."

- 17. Robert Weisberg is the Edwin E. Huddleson, Jr. Professor of Law and Director of the Stanford Criminal Justice Center at Stanford University Law School.**

To: Rep. Elijah Cummings, Ranking Member
Committee on Oversight & Government Reform
United States House of Representatives

March 21, 2014

From: Robert Weisberg, Stanford Law School

Contempt Issue In Regard To Witness Lois Lerner

Dear Rep. Cummings:

You have asked my legal opinion as to whether Chairman Issa has laid the proper foundation for a contempt charge against Ms. Lerner. My opinion is that he has not.

I base this opinion on a review of what I believe to be the relevant case law. Let me note, however, that I have undertaken this review on a very tight time schedule and therefore (a) I cannot claim to have exhausted all possible avenues of research, and (b) the following remarks are more conclusory and informal than scholarly would call for.

The core of my opinion is that the sequence of colloquies at the May 22, 2013 hearing and the March 5, 2014 hearing do not establish the criteria required under 2 U.S.C. sec. 192, as interpreted by the Supreme Court in *Quinn v. United States*, 349 U.S. 155 (1956); *Empsak v. United States*, 349 U.S. 190 (1956), and *Bart v. United States*, 349 U.S. 219 (1956). The clear holding of these cases is that a contempt charge may not lie unless the witness has been presented “with a clear-cut-choice between compliance and non-compliance, between answering the question and risking the prosecution for contempt.” *Quinn*, at 167. Put in traditional language of criminal law, the actus reus element of under section 192 is an express refusal to answer in the face of a categorical declaration that the refusal is legally unjustified..

I know that your focus is on the March 5, 2014 hearing, but I find it useful to first look at the earlier hearing. In my view, the Chairman essentially conceded that contempt had not occurred on May 22, 2013, because rather than frame the confrontation unequivocally as required by section 192, he excused the witness subject to recall, wanting to confirm with counsel whether the witness had waived the privilege by her remarks on that day. Moreover, as I understand it, the Chair at least considered the possibility offering the witness immunity after May 22. Under *Kastigar v. United States*, [406 US 441 \(1972\)](#), use immunity is a means by which the government can simultaneously respect the witness’s privilege and force her to testify. It makes little sense for the government to even consider immunity unless it believes it at least possible that the witness still holds the privilege. Thus, in my view, the government may effectively be estopped from alleging that the witness was in contempt at that point.

Nor, in my view, was the required confrontation framed at the March 5, 2014 hearing. Instead of directly confronting Ms. Lerner on her refusal to answer, the Chairman proceeded to ask a series of substantive questions, to each of which she responded with an invocation of her privilege. Ms. Lerner could have inferred that the Chair was starting the question/answer/invocation clock all over again, such that as long as she said nothing at this March 5 hearing that could be construed as a waiver, her privilege claim was intact. In my opinion, the Chairman's approach at this point could be viewed, in effect, as a waiver of the waiver issue, or as above, it would allow her to claim estoppel against the government.

Moreover, while the Chairman did lay out the position that Ms. Lerner had earlier waived the privilege, he did not do so in a way that set the necessary predicate for a contempt charge. In opening remarks, the Chairman alluded to Rep. Gowdy's belief that Ms. Lerner had earlier waived and said that the Committee had voted that she had waived. The former of these points is irrelevant. The latter is relevant, but not sufficient, if she was not directly confronted with a formal legal pronouncement upon demand for an answer. Apparently, the Chairman, the reference to the committee vote occurred after Ms. Lerner's first invocation on March 5, but before he continued on to a series of substantive questions and further invocations. Thus, even if reference to the committee view on waiver might have satisfied part of the *Quinn* requirement, Chairman Issa, yet again, arguably waived the waiver issue.

I recognize that by this view the elements of contempt are formalistic and that it puts a heavy burden of meeting those formalistic requirements on the questioner. But such a burden of formalism is exactly what the Supreme Court has demanded in *Quinn*, *Emspak*, and *Bart*. Indeed, it is precisely the formalism of the test that is decried by Justice Reed's dissent in those cases. See *Quinn*, at 171 ff.

Another, supplementary approach to the contempt issue is to consider what mens rea is required for a section 192 violation. This question requires me to turn to the waiver issue. I have not been asked for, nor am I am not offering, any ultimate opinion on whether Ms. Lerner's voluntary statements at the start of the May 22 hearing constituted a waiver. However, the possible dispute about waiver may be relevant to the contempt issue because it may bear whether Ms. Lerner had the required mental state for contempt, given that she may reasonably or at least honestly believed she had not waived.

The key question is whether the refusal to answer must be "willful." There is some syntactical ambiguity here. Section 192 says that a "default--by which I assume Congress means a failure to appear, must be willful to constitute contempt, and arguably the term "willfully" does not apply to the clause about refusal. But an equally good reading is that because contempt can hardly be a strict liability crime and so there must be some mens rea, Congress meant "willfully: to apply to the refusal as well. In any event, the word "refusal" surely suggests some level of defiance, not mere failure or declination.

So if the statute requires willfulness or its equivalent, federal case law would suggest that a misunderstanding or mistake of law can negate the required mens rea. The doctrine of mistake is very complex because of the varieties of misapprehension of law that call under this rubric. But this much is clear: While mistake about the existence or substantive meaning of a criminal law with which one is charged normally is irrelevant to one's guilt, things are different under a federal statute requiring willfulness. See *Cheek v. United States*, [498 US 192 \(1991\)](#) (allowing honest, even if unreasonable, misunderstanding of law to negate guilt).¹⁰²

Showing that the predicate for willfulness has not been established involves repeating much of what I have said before, from slightly different angle. That is, one can define the actus reus term "refuse" so as to implicitly incorporate the mens rea concept of willfulness.

One possible factor bearing on willfulness involves the timing of Ms. Lerner's statements at the May 22 hearing. If Ms. Lerner's voluntary exculpatory statements at that hearing preceded any direct questioning by the committee, there is an argument that those statements did not waive the privilege because she was not yet facing any compulsion to answer, and thus the privilege was not in play yet. To retain her privilege a witness need not necessarily invoke it at the very start of a hearing. Thus in cases like *Jackins v. United States*, 231 F.405 (9th Cir. 1959), the witness was able to answer questions and then later invoke the privilege because it was only after a first set of questions that new questions probed into areas that raised a legitimate concern about criminal exposure. Under those cases, the witness has not waived the privilege because the concern about compelled self-incrimination has not arisen yet. This is, of course, a different situation, because the risk of criminal exposure was already apparent to Ms. Lerner when she made her exculpatory statements. But the situations are somewhat analogous under a general principle that waiver has not occurred until by virtue of both a compulsion to answer and a risk of criminal exposure the witness is facing the proverbial "cruel trilemma" that it is the purpose of the privilege to spare the witness.

Here is one other analogy. When a criminal defendant testifies in his own behalf, the prosecutor may seek to impeach him by reference to the defendant's earlier silence, so long as the

¹⁰² According to Prof. Sharon Davies:

"Knowledge of illegality" has ... been construed to be an element in a wide variety of [federal] statutory and regulatory criminal provisions. . . . These constructions establish that . . . ignorance or mistake of law has already become an acceptable [defense] in a number of regulatory and nonregulatory settings, particularly in prosecutions brought under statutes requiring proof of "willful" conduct on the part of the accused. Under the reasoning employed in these cases, at least 160 additional federal statutes . . . are at risk of similar treatment." *The Jurisprudence of Ignorance: An Evolving Theory of Excusable Ignorance*, 48 *Duke L. J.* 341, 344-47 (1998).

prosecutor is not by penalizing the defendant for exercising his privilege against self-incrimination. The prosecutor may do so where the silence occurred before arrest or before the *Miranda* warning, because until the warning is given, the court will not infer that he was exercising a constitutional right. *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Fletcher v. Weir*, [455 US 603 \(1982\)](#) By inference here, the Fifth Amendment was not yet in legal play in at the May 22 hearing until Ms. Lerner was asked a direct question, en though she was under subpoena.

Second, I can imagine Ms. Lerner being under the impression that because her voluntary statement could not constitute a waiver because they chiefly amounted to a denial of guilt, not any details about the subject matter.¹⁰³ Again, I am not crediting such a view as a matter of law. Rather, I am allowing for the possibility t hat Ms. Lerner, perhaps on advice of counsel, had honestly believed this to be to be a correct legal inference. But it would probably require the questioner to confront the witness very specifically and expressly about the waiver and to make unmistakably clear to her that it was the official ruling of the committee that her grounds for belief that she had not waived were wrong. If she then still refused to answer, she might be in contempt. (Of course she could then argue to a trial or appellate court that she had not waived but if she lost on that point she would not then be able to undo her earlier refusal.

Most emphatically, I am *not* opining here that these arguments are valid and can defeat a waiver claim by the government. Rather, they are relevant to the extent that Ms. Lerner may have believed them to be valid arguments, and therefore may not have acted “willfully.” If so, at the very least her refusal at the March 5 hearing would not be willful unless the Chairman had categorically clarified for her that she had indeed waived, that she no longer had the privilege, and that if she immediately reasserted her purported privilege, she would be held in contempt. As discussed above, this the Chairman did not do.

One final analogy might be useful here, and that is perjury law. In *Bronston v. United States*,⁴⁰⁹ U.S. 352 (1973), the Supreme Court held that even when a witness clearly intended to mislead the questioner, there was no perjury unless the witness’s statement was a literally a false factual statement.¹⁰⁴ While its reading of the law imposed a heavy burden on the prosecutor to arrange the phrasing of its questions so as to prevent the witness from finessing perjury as Bronston had done there, the Court made clear that just such a formalistic burden is what the law required to

¹⁰³ The federal false statement statute 18 U.S.C. 1001, had allowed the defense that the false statement was merely an “exculpatory no.” That defense was overruled in *Brogan v. United States* 522 U.S. 398 (1998), but perhaps a witness or her lawyer might believe would advise a client that a parallel notion might apply in regard to waiver of her fifth amendment privilege.

¹⁰⁴ The perjury statute like the contempt statute, makes “willfulness” the required mens rea.

make a criminal of a witness.¹⁰⁵ “Ambiguities with respect to whether an answer is perjurious “are to be remedied through the questioner's acuity.” *Bronston*, at 362.

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¹⁰⁵ “[I]f the questioner is aware of the unresponsiveness of the answer, with equal force it can be argued that the very unresponsiveness of the answer should alert counsel to press on for the information he desires. It does not matter that the unresponsive answer is stated in the affirmative, thereby implying the negative of the question actually posed; for again, by hypothesis, the examiner's awareness of unresponsiveness should lead him to press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury.” *Bronston*, at 361-62.

18. Gregory Gilchrist is an attorney with experience representing individuals in congressional investigations and currently an Associate Professor at the University of Toledo College of Law.

Statement of Gregory M. Gilchrist, an attorney with experience representing individuals in congressional investigations and current Associate Professor at the University of Toledo College of Law:

The rule is clear, as is the reason for the rule, and neither supports a prosecution for contempt. The Supreme Court has consistently held that unless a witness is “confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt,” the assertion of the Fifth Amendment privilege is devoid of the criminal intent required for a contempt prosecution. See *Quinn v. United States*, 349 U.S. 155, 166 (1955).

Criminal contempt is not a tool for punishing those whose legal analysis about asserting the privilege is eventually overruled by a governing body. Privilege law is hard, and reasonable minds can and will differ.

Contempt proceedings are reserved for those instances where a witness – fully and clearly apprised that her claim of privilege has been rejected by the governing body and ordered to answer under threat of contempt – nonetheless refuses to answer. In this case, the committee was clear only that it had not yet determined how to treat the continued assertion of the privilege. Prosecution for contempt under these circumstances would be inconsistent with rule and reason.

19. Lisa Kern Griffin, Professor of Law at Duke University School of Law whose scholarship and teaching focuses on constitutional criminal procedure stated:

"The Committee has an interest in pursuing its investigation into a matter of public concern and in getting at the truth. But the witness has rights, and there are well-established mechanisms for obtaining her testimony. If a claim of privilege is valid, then a grant of immunity can compel testimony. If a witness has waived the privilege, or continues to demur despite a grant of immunity, then contempt sanctions can result from the failure to respond. But the Supreme Court has made clear that those sanctions are reserved for defiant witnesses. Liability for contempt of Congress under section 192 requires a refusal to answer that is a 'deliberate' and 'intentional' violation of a congressional order. The record of this Committee hearing does not demonstrate the requisite intent because the witness was not presented with a clear choice between compliance and contempt."

20. David Gray is a Professor of Law at the University of Maryland Francis King Carey School of Law with expertise in criminal law, criminal procedure, international criminal law, and jurisprudence. He said:

“After reviewing the relevant portions of the May 22, 2013, and March 5, 2014, hearings, I concur in the views of Messrs. Rosenberg and Brand that a contempt charge filed against Ms. Lerner based on her invocation of her Fifth Amendment privilege and subsequent refusal to answer questions at the March 5, 2014, hearing would in all likelihood be dismissed. Two deficits stand out.

First, at no point during the hearing was Ms. Lerner advised by the Chairman that her invocation of her Fifth Amendment privilege at the March 5, 2014, hearing was improper. The Chairman instead read a lengthy narrative history “for the record,” the content of which he believed were “important . . . for Ms. Lerner to know and understand.” During that narrative, the Chairman reported a vote taken by his committee on June 28, 2013, expressing the committee’s view that Ms. Lerner waived her Fifth Amendment rights at the May 22, 2013, hearing and that her invocation of her Fifth Amendment rights at the May 22, 2012, hearing was therefore improper. During subsequent questioning at the March 5, 2014, hearing, Ms. Lerner declared that her counsel had advised her that she had not waived her Fifth Amendment rights and that she would therefore refuse to answer questions posed at the March 5, 2014, hearing. This exchange produced a wholly ambiguous record. Chairman Issa’s narrative history could quite reasonably have been interpreted by Ms. Lerner as precisely that: history. The committee’s view that her invocation of Fifth Amendment privilege at the May 22, 2013, hearing was improper may well have been “important . . . for Ms. Lerner to know and understand” as a matter of history, but did not inform her as to the committee’s views on her potential invocation of Fifth Amendment privilege at the March 5, 2014, hearing. Ms. Lerner’s statement regarding her counsel’s opinion that she had not waived her Fifth Amendment rights might have been in direct response to the committee’s June 28, 2013, resolution. Alternatively, it may have been a statement regarding the extension of any waiver made in May 2013 to a hearing conducted in March 2014. In either event, in order to lay a proper foundation for a potential contempt charge, Chairman Issa needed to respond directly to Ms. Lerner’s March 5, 2013, invocation at the March 5, 2013, hearing.

Second, Ms. Lerner was never directly informed by the Chairman at the March 5, 2014, hearing that her failure to answer direct questions posed at the March 5, 2014, would leave her subject to a contempt charge. During his narrative history, the Chairman did state that “if [Ms. Lerner] continues to refuse to answer questions from Members while under subpoena, the Committee may proceed to consider whether she will be held in contempt.” Messrs. Rosenberg and Brand are quite right to point out that, by using the word “may,” this statement fails to put Ms. Lerner on notice that her failure to answer questions posed at the March 5, 2014, hearing would leave her subject to a contempt charge. There is another problem, however. In context, the statement seems to be reported as part of the content of the June 28, 2013, resolution and then-contemporaneous discussions of the committee rather than a directed warning to Ms. Lerner as to the risks of her conduct in the March 5, 2014, hearing. In order to lay a proper foundation for a potential contempt charge, Chairman Issa therefore needed to inform Ms. Lerner in unambiguous terms that, pursuant to its June 28, 2013, resolution, the committee would pursue contempt charges against her should she refuse to answer questions posed by the committee on March 5, 2014.

Although it appears that Chairman Issa failed to lay a proper foundation for any contempt charges against Ms. Lerner based on her refusal to answer questions at the March 5, 2014, hearing, I cannot discern any malevolent intent on his part. To the contrary, it appears to me that, based on his exchanges with Ms. Lerner at the May 22, 2013, hearing and his manner and comportment at the March 5, 2014, hearing, that he is genuinely, and laudibly, concerned that he and his committee pay all due deference to Ms. Lerner's constitutional rights. It appears likely to me that his omissions here are the results of an abundance of caution and his choice to largely limit his engagement with Ms. Lerner to reading prepared statements and questions rather than initiating the more extemporaneous dialogue that is the hallmark of examinations conducted in court."

21. JoAnne Epps, a former federal prosecutor and Dean of Temple University Beasley School of Law, said:

“A key element of due process in this country is fairness. The ‘uninitiated’ are not expected to divine the thinking of the ‘initiated.’ In other words, witnesses can be expected to make decisions based on what they are told, but they are not expected to know – or guess – what might be in the minds of governmental questioners. In the context of criminal contempt for refusal to answer, fairness requires that a witness be made clearly aware that an answer is demanded, that the refusal to answer is not accepted, and further that the refusal to answer can have criminal consequences. It appears that the witness in this case received neither a demand to answer, a rejection of her refusal to do so, nor an explanation of the consequences of her refusal. These omissions render defective any future prosecution.”

22. Stephen Saltzburg, is a former law clerk to Supreme Court Justice Thurgood Marshall, and currently the Wallace and Beverley Woodbury University at the George Washington University School of Law with expertise in criminal law and procedure; trial advocacy; evidence; and congressional matters. He said:

The Supreme Court has made clear that a witness may not be validly convicted of contempt of Congress unless the witness is directed by a committee to answer a question and the witness refuses. The three major cases are *Quinn v. United States*, 349 U.S. 155, *Emspak v. United States*, 349 U.S. 190, and *Bart v. United States*, 349 U.S. 219, all decided in 1955. They make clear that where a witness before a committee objects to answering a certain question, asserting his privilege against self-incrimination, the committee must overrule his or her objection based upon the Fifth Amendment *and* expressly direct him to answer before a foundation may be laid for a finding of criminal intent.

This is a common sense rule. When a witness invokes his or her privilege against self-incrimination, the witness is entitled to know whether or not the committee is willing to respect the invocation. Unless and until the committee rejects the claim and orders the witness to answer, the witness is entitled to operate on the assumption that the privilege claim entitles the witness not to answer.

There is another question that arises, which is whether the Chairman of a committee is delegated the power to unilaterally overrule a claim of privilege or whether the committee must vote on whether to overrule it. This is a matter as to which I have no knowledge. I note that the memorandum by Morton Rosenberg appears to assume that the Chairman may unilaterally overrule a privilege claim, but I did not see any authority cited for that proposition.

23. Kami Chavis Simmons, a former federal prosecutor and Professor of Law at Wake Forest University School of Law with expertise in criminal procedure stated:

I agree with the legal analysis provided by Mr. Rosenberg, as well the comments of other legal experts. The Supreme Court's holding in *Quinn v. U.S.*, is instructive here. In *Quinn*, the Supreme Court held that a conviction for criminal contempt cannot stand where a witness before a Congressional committee refuses to answer questions based on the assertion of his fifth-amendment privilege against self-incrimination "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections." *Quinn v. U.S.*, 349, U.S. 155, 165 (1955). Case law relying on *Quinn* similarly indicates that there can be no conviction where the witness was "never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt." *Emspak v. U.S.*, 349 U.S. 190, 202 (1955). Based on the record in this case, the witness was not confronted with a choice between compliance and non-compliance. Thus, the initiation of a contempt proceeding seems inappropriate here.

There are additional concerns related to the initiation of criminal contempt proceedings in the instant case. Here, the witness, who was *compelled* to appear before Congress, made statements declaring only her innocence and otherwise made no incriminating statements. Pursuing a contempt proceeding based on these facts, may set an interesting precedent for witnesses appearing before congressional committees, and could result in the unintended consequence of inhibiting future Congressional investigations.

24. Patrice Fulcher is an Associate Professor at Atlanta's John Marshall Law School where she teaches Criminal Law and Criminal Procedure. She said:

"American citizens expect, and the Constitution demands, that U.S. Congressional Committees adhere to procedural constraints when conducting hearings. Yet the proper required measures designed to provide due process of law were not followed during the May 22nd House Oversight Committee Hearing concerning Ms. Lerner. In *Quinn v. United States*, the Supreme Court clearly outlined practical safeguards to be followed to lay the foundation for contempt of Congress proceedings once a witness invokes the Fifth Amendment. 349 U.S. 155 (1955). To establish criminal intent, the committee has to demand the witness answer and upon refusal, expressly overrule her claim of privilege. This procedure assures that an accused is not forced to 'guess whether or not the committee has accepted [her] objection', but is provided with a choice between compliance and prosecution. *Id.* It is undeniable that the record shows that the committee did not expressly overrule Ms. Lerner's claim of privilege, but rather once Ms. Lerner invoked her 5th Amendment right, the Chairman subsequently excused her. The Chairman did not order her to answer or present her with the clear option to respond or suffer contempt charges. Therefore, launching a contempt prosecution against Ms. Lerner appears futile and superfluous due to the Committee's disregard for long standing traditions of procedure."

- 25. Andrea Dennis is a tenured Associate Professor of Law at the University of Georgia Law School who teaches Criminal Law, Criminal Procedure, and Evidence, among other courses.**



School of Law

MEMORANDUM

TO: The Honorable Elijah E. Cummings
Ranking Member
House Committee on Oversight & Government Reform

FROM: Andrea L. Dennis
Associate Professor of Law
University of Georgia School of Law

DATE: March 25, 2014

You asked my opinion whether the public video record of the appearance of Ms. Lois Lerner, former Director of Exempt Organizations of the Tax-Exempt and Government Entities Division of the Internal Revenue Service (IRS), before the House Committee on Oversight & Government Reform, which was investigating alleged improprieties by the IRS concerning the tax exempt status of some organizations, sufficiently demonstrates that Ms. Lerner acted “willfully” to support a criminal contempt of Congress charge, pursuant to 2 U.S.C. Sec. 192.

Based on my understanding of the facts, legal research, and professional experience, I must answer in the negative. Accordingly, I join the conclusions that Messrs. Morton Rosenberg and Stanley M. Brand presented on March 12, 2014, to Congressman Cummings, and which since have been echoed by others.

I will not herein detail the facts giving rise to this matter or offer a fully fleshed out research report. Mr. Rosenberg’s statement of relevant facts in his memorandum is accurate, and he has cited the most pertinent caselaw. I am happy, however, to provide you with additional supporting citations if necessary.

In short, my research of criminal Congressional contempt charges and analogous legal issues leads me to interpret the term “willfully” in 2 U.S.C. Sec. 192 to require that Ms. Lerner have voluntarily and intentionally violated a specific and unequivocal order to answer the Committee’s questions. Moreover, I believe that Ms. Lerner must have been advised that she faced contempt charges and punishment if she continued to refuse to answer the Committee’s questions despite its clear order to do so. Collectively, these elemental requirements ensure that witnesses in Ms. Lerner’s position are fairly notified that they must choose between making self-incriminating statements, lying under oath, and facing punishment for failing to comply with an order. Witnesses who refuse to comply with such clear statements of expectations have little room to question the nature of the circumstances with which they are confronted. In this case, the record indicates that Ms. Lerner was not forced to make such a choice and therefore a contempt prosecution would be legally and factually unsupportable.

Review of the public video recordings of Ms. Lerner's appearances at the Committee's hearings on May 22, 2013, and March 5, 2014, reveals that at no time during the Committee's publicized proceedings did the Committee Chair explicitly order Ms. Lerner to respond to questions under penalty of contempt. At most, the Committee Chair equivocally stated that if Ms. Lerner refused to answer the Committee's questions, then the Committee may possibly investigate her for contempt. This statement by itself is filled with such uncertainty that it would be erroneous to conclude that Ms. Lerner was directly ordered to answer questions and advised that she would be subject to penalty if she did not. And when considered in connection with the Chair's earlier mentions of possibly offering her immunity or granting her an extension of time to respond, the statement regarding possible contempt charges becomes even more indefinite. For these reasons, I am hard-pressed to conclude that the legal pre-requisites for acting "willfully" in a Congressional criminal contempt prosecution were factually established in these circumstances.

And although you did not particularly inquire of my opinion as to whether Ms. Lerner waived her Fifth Amendment privilege against compelled testimonial self-incrimination at the Committee's hearings on May 22, 2013, I find it an issue worthy of comment. Notably, I am unconvinced that Ms. Lerner waived her privilege at the proceedings by either reading an opening statement briefly describing her professional background and claiming innocence, or authenticating her earlier answers to questions posed to her by the Inspector General. From the record it does not appear that Ms. Lerner voluntarily revealed incriminating information or offered testimony on the merits of the issue being investigated. To conclude otherwise on the waiver issue would suggest oddly that in order to validly assert the privilege individuals must claim the privilege for even non-incriminating information, as well as upend the accepted notion that the innocent may benefit from the privilege.

Before closing, let me explain a little of my background. I am a tenured Associate Professor of Law. I teach Criminal Law, Criminal Procedure, and Evidence, among other courses. I research in a number of areas including criminal adjudication. Prior to entering academia, I clerked for a federal district court judge, practiced as an associate with the law firm of Covington & Burling in Washington, D.C., and served as an Assistant Federal Public Defender in the District of Maryland. A fuller bio may be found at: <http://www.law.uga.edu/profile/andrea-l-dennis>.

Thank you for the opportunity to reflect on this very important matter. Please let me know if you would like me to elaborate further on my thoughts or answer additional questions. If need be, I may be reached via email at aldennis@uga.edu or in my office at 706-542-3130.

26. Katherine Hunt Federle is a Professor of Law at the Ohio State University Michael E. Moritz College of Law where she teaches Criminal Law and serves as Director, for the Center for Interdisciplinary Law & Policy Studies. She said:

Constitutional rights do not end at the doors of Congress. Any witness who receives a subpoena to testify before Congress may nevertheless expect that constitutional protections extend to those proceedings. When that witness raises objections to the questions posed on the grounds of self-incrimination, due process entitles the witness to a clear ruling from the committee on those objections. *Bart v. United States*, 269 F.2d 357, 361 (1955). Only after the committee informs the witness that her objections are overruled, and she continues to assert her Fifth Amendment right, would it be possible to charge the witness with criminal contempt of Congress. *Quinn v. United States*, 349 U.S. 155, 165-166 (1955). However, without a clear statement from the committee overruling her objections, there can be no conviction for contempt of Congress based on her refusal to answer questions. *Id.*

Due process cannot stand for the proposition that a witness must guess whether her assertion of the privilege of self-incrimination has been accepted. In this case, there does not appear to be any statement by the members of the House Committee on Oversight and Government Reform during the hearings informing Ms. Lerner that her objections have been overruled. It would strain credulity to suggest that a witness must rely on news accounts or second-hand statements to divine the Committee's intentions on this matter. Moreover, insisting that a witness who has asserted her Fifth Amendment right appear before the Committee again would seem to serve only political ends in the absence of some intention either to accept the invocation of the privilege against self-incrimination or to offer the witness immunity in exchange for her testimony. Rather, in light of the suggestion that the Committee intends to seek contempt charges, recalling the witness suggests an opportunity for political theater.

The essence of due process is fairness. At the very least, due process requires a direct communication from the Committee to the witness stating in some way that the witness must answer the questions. Some idea that the Committee has disagreed with her objections is not enough, given the nature of the potential charge. Of course that also means that some questions must be posed. I remain unpersuaded that happened here since the Committee met and voted to overrule her objections after Ms. Lerner first appeared, and I cannot see that any questions were asked of Ms. Lerner that would have indicated to her that her objections were overruled. When Ms. Lerner appeared a second time and invoked the privilege against self-incrimination, the Committee then should have told her it was overruling her objections. Again, that did not happen.

27. Glenn F. Ivey is a former federal prosecutor and currently a Partner in the law firm of Leftwich & Ludaway, whose practice focuses on white collar criminal defense, as well as Congressional and grand jury investigations. He said:

"I agree with Morton Rosenberg's statement that Chairman Issa has not laid the requisite legal foundation to bring contempt of Congress charges. Mr. Rosenberg raises important points that the Committee ought to consider, especially given the negative historic impact this decision could have on the institution. Protecting these procedures and precedents from the pressures of the moment is important. Rushing to judgment or trying to score political points is not in the best interest of the Committee, the Congress or the country."

28. Jonathan Rapping is an Associate Professor of Law at the John Marshall School of Law where he teaches Criminal Law and Criminal Procedure. He said:

Ours is a nation founded on the understanding that whenever government representatives are given power over the people, there is the potential for an abuse of that power. Our Bill of Rights enshrined protections meant to shield the individual from a government that fails to exercise restraint. At no time is the exercise of prudence and temperament more important than when a citizen's liberty is at stake. The United States Supreme Court begins its analysis in *Quinn v. United States*, 349 U.S. 155 (1955), with a discussion of the historical importance the Fifth Amendment privilege against self-incrimination holds in our democracy. The Court reminds us that this right serves as "a safeguard against heedless, unfounded or tyrannical prosecutions[,] and that to treat it "as an historical relic, at most merely to be tolerated - is to ignore its development and purpose." *Id.* at 162.

In the instant case, zeal to charge into a criminal contempt prosecution appears to trump respect for process necessary to ensure this critical right is respected. The March 5th hearing opens with Representative Issa indicating that the Committee believes Ms. Lerner waived her Fifth Amendment privilege, and *suggesting* that if Ms. Lerner does not answer questions "the Committee may proceed to consider whether she should be held in contempt." Ms. Lerner subsequently makes clear that her lawyer disagrees with that assessment, and that she believes she retains her right to refuse to answer questions. Ms. Lerner proceeds to refuse to answer questions and Representative Issa appears to accept her refusal without ever again raising the specter of contempt. By the end of the hearing, the threat that contempt charges may be forthcoming is at best ambiguous.

But in our democracy, ambiguous is not good enough. The government has the burden, indeed the obligation, to make clear that refusal to answer questions will result in contempt, giving the individual a chance to comply with an unequivocal demand. There must be no ambiguity about whether the citizen is jeopardizing her liberty. The onus is on the government to dot all i's and cross all t's. Unwavering respect for this core constitutional principle demands no less.

29. Eve Brensike Primus is a Professor of Law at the University of Michigan Law School with expertise in criminal law, criminal procedure, as well as constitutional law. She said:

In order to be guilty of a criminal offense for refusing to testify or produce papers during a Congressional inquiry under 2 U.S.C. § 192, a subpoenaed witness must *willfully* refuse to answer any question pertinent to the question under inquiry. In a trilogy of cases in 1955, the Supreme Court made it clear that, “unless the witness is clearly apprised that the committee demands [her] answer notwithstanding [her] objections, there can be no conviction under § 192 for refusal to answer that question.” *Quinn v. United States*, 349 U.S. 155, 166 (1955); *see also Emspak v. United States*, 349 U.S. 190, 202 (1955); *Bart v. United States*, 349 U.S. 219, 222 (1955). Without such appraisal, “there is lacking the element of deliberateness necessary” to establish the willful mental state required by the statute. *Emspak v. United States*, 349 U.S. 190, 202 (1955).

The Supreme Court further emphasized that “[t]he burden is upon the presiding member to make clear the directions of the committee....” *Quinn v. United States*, 349 U.S. 155, 166 n.34 (1955) (quoting *United States v. Kamp*, 102 F. Supp. 757, 759 (D.D.C.)). The witness must be “confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt.” *Quinn v. United States*, 349 U.S. 155, 166 (1955); *see also Bart v. United States*, 349 U.S. 219, 222 (1955) (requiring that the committee give the witness a specific direction to answer before a conviction for contempt can lie).

In neither of the hearings at which Ms. Lerner testified did Chairman Issa expressly overrule her objections and explicitly direct her to answer the committee’s questions or face contempt proceedings. Having never been given an order to answer questions, Ms. Lerner could not *willfully* refuse to answer under § 192.

30. David Jaros is an Assistant Professor of Law at the University of Baltimore School of Law who teaches courses in criminal law and procedure. He said:

“A critical component of due process is that a defendant must have fair notice that their actions will expose them to criminal liability. To hold Ms. Lerner in contempt, the congressional committee must have done more than just inform Ms. Lerner that it had found that her voluntary statements waived her Fifth Amendment Rights. The Committee must have also clearly demanded that she respond to the questions notwithstanding her objections. Failing to do that is fatal to the charge.”

31. Alex Whiting is a former criminal prosecutor at the International Criminal Court (ICC) in The Hague and a Professor at Harvard Law School with expertise in criminal law, criminal trials and appeals as well as prosecutorial ethics. He said:

Proceeding with contempt against Lois Lerner on the basis of this record would be both unwise and unfair. Because of the risk of politicization in the congressional investigation and oversight process, it is particularly important that due process be scrupulously followed at all times and that the Committee take the maximum steps to ensure that witnesses are afforded all of their legal rights and protections. The record here falls short of meeting this standard. As others have noted, federal prosecutors would rarely if ever seek to deny a witness his or her Fifth Amendment privilege based on the arguments advanced here. Further, with regard to contempt, Congress should provide, as is the practice in courts, clear warnings to the witness that refusal to answer the questions will result in contempt proceedings and then give the witness every opportunity to answer the questions. That practice was not followed in this case. Fairness and a concern for the rights of witnesses who testify before Congress dictate that the Committee take great care in following the proper procedures before considering the drastic step of seeking a finding of contempt. Proceeding with contempt under these circumstances, and on this record, seriously risks eroding the Committee's legitimacy.

- 32. On April 6, 2014, Morton Rosenberg sent a memo to the Oversight Committee Democratic staff based on his review of Chairman Issa's March 25, 2014 memo from House Counsel. This memo directly rebuts the arguments raised by House Counsel in defense of Chairman Issa's actions on March 5, 2014.**

April 6, 2014

To: [REDACTED]
Deputy Chief Counsel, Minority
House Committee on Oversight
& Government Reform

From: Morton Rosenberg
Legislative Consultant

Re: Comments on House General Counsel Opinion

This is in response to your request for my comments on the House General Counsel's (HGC) March 25 opinion critiquing my March 12 memo for Ranking Member Cummings. In that opinion the HGC readily concedes that the Supreme Court in *Quinn*, *Emspak*, and *Bart* requires that in order for a congressional committee to successfully prosecute a subpoenaed witness's refusal answer pertinent questions after he has invoked his Fifth Amendment rights, it must be shown that the "witness is clearly apprised that the committee demands his answer notwithstanding his objections", *Quinn*, 349 U.S. at 196; a committee must "directly overrule [a witness's] claims of self-incrimination," *Bart*, 349 at 222; and the witness must be "confronted with a clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt." *Emspak*, 349 U.S. at 202. HGC Op. at 10-12. The HGC asserts that the Committee followed the High Court's requirements by "directly" overruling Ms. Lerner's privilege claim by its passage of a resolution specifically determining that she had voluntarily waived her constitutional rights in her opening exculpatory statement at the May 22, 2013 hearing and subsequent authentication of a document, and by communicating that committee action to her; and, "indirectly", by "demonstrating" that it had "specifically directed the witness to answer." *Id.*, 10-11, 12-15.

Both assertions are meritless. The June 28, 2013 resolution stands alone as a committee opinion (which was resisted and challenged by the witness's counsel) and is without any immediate legal consequence until the question of its legal substantiality is considered and resolved as a threshold issue by a court in criminal contempt prosecution under 2 U.S.C. 192 or civil enforcement proceeding to require the withheld testimony. By itself, the resolution, and the communication of its existence, is not a demand for an answer to a propounded question recognized by the Supreme Court trilogy. In fact, a perusal of the record of events relied on by the HGC indicates that there never has been at any time during 10 month pendency of the subject hearing a specific committee overruling of any of Ms. Lerner's numerous invocations of constitutional privilege at the time they were made or thereafter, nor any effective direction to her to respond. As a consequence, she "was left to speculate about the risk of possible prosecution for contempt; [s]he was not given a clear choice between standing on [her] objection and compliance with a committee ruling." *Bart*, 349 U.S. at 223.

More, particularly, after making her controverted opening statement and authentication of a previous document submission to an IG, Chairman Issa advised Ms. Lerner that she had effectively waived her constitutional rights and asked her to obtain her counsel's advice. She then announced her refusal to respond to any further questions, thereby invoking her privilege, to which the Chairman responded that "we will take your refusal as a refusal to testify." It may be noted that Lerner's counsel had advised the committee before the hearing that she was likely to claim privilege. The hearing proceeded without further testimony from the witness. Before adjournment, Chairman Issa announced that the question had arisen whether Ms. Lerner had waived her rights and that he would consider that issue and "look into the possibility of recalling her and insisting that she answer questions in light of a waiver." The committee thereafter sought and received input on the waiver issue, including the written views of Lerner's counsel. On June 28, 2013, after debate amongst the members, a resolution, presumably prepared and vetted by House Counsel and/or committee counsel, was passed by a 22-17 vote. The text of the committee resolution reads as follows:

Resolved, That the Committee on Oversight and Government Reform determines that voluntary statement offered by Ms. Lerner constituted a waiver of her Fifth Amendment privilege against self-incrimination as to all questions within the subject matter of the Committee hearing that began on May 22, 2013, including questions relating to (i) Ms. Lerner's knowledge of any targeting by the Internal Revenue Service of particular groups seeking tax exempt status, and (ii) questions relating to any facts or information that would support or refute her assertions that, in that regard, "she has not done anything wrong," "not broken any laws," "not violated IRS rules or regulations," and/or "not provided false information to this or any other congressional committee."

Nothing in the language of the Committee's June 28, 2013 resolution can be even be remotely construed as an *explicit* rejection of Ms. Lerner's Fifth Amendment privilege at the May 22 hearing. It is solely and exclusively concerned with the question whether Ms. Lerner voluntarily waived her privilege at that hearing. A rejection of a future claim in a resumed hearing may be implicit in the resolution's language, but that rejection, under *Quinn*, *Emspak*, and *Bart*, would have had to have been expressly directed at the particular claim when raised by the witness.

After a lapse of eight months, the Chairman decided to resume his questioning of Ms. Lerner and reminded her attorney, by letter dated February 25, 2014, that he had recessed the earlier hearing "to allow the committee to determine whether she had waived her asserted Fifth Amendment right [and that] [t]he Committee subsequently determined that Ms. Lerner in fact had waived that right." The Chairman then, for the first time, asserted "[B]ecause the Committee explicitly rejected {Ms. Lerner's} Fifth amendment privilege claim, I expect her to provide answers when the hearing reconvenes on March 5." Lerner's counsel simply responded the next day that the "[w]e understand that the Committee voted that she had waived her rights," but with no acknowledgement that any express rejection of a

privilege claim had taken place. HGC Op. at 7-8. When the hearing resumed on March 5, the Chairman opened by detailing past events. He again erroneously described what had occurred at the June 28, 2012 committee business meeting: "...[T]he committee approved a resolution rejecting Ms. Lerner's claim of Fifth Amendment privilege based on her waiver...." He then inconsistently followed up by stating "After that vote, having made the determination that Ms. Lerner waived her Fifth Amendment rights, the Committee recalled her to appear today to answer questions pursuant to rules. The committee voted and found that Ms. Lerner waived her Fifth Amendment rights by making" a voluntary exculpatory statement and a document authentication. The Chairman concluded that if the witness continued to refuse to answer questions, "the committee may proceed to consider whether she should be held in contempt." HGC Op. at 9. After being recalled and sworn in, Ms. Lerner was asked a question to which she responded that she had not waived her Fifth Amendment right and then asserted her privilege in refusing to answer that question. She continued to invoke privilege with respect to every subsequent question until the Chairman abruptly adjourned the hearing. As was detailed in my March 12 statement, the Chairman never expressly rejected her privilege claims at that hearing, individually or collectively, and thus she was never confronted with the risk of not replying.

Whether a witness has waived her Fifth Amendment protections is a preliminary, threshold issue that must be resolved by a reviewing court prior to grappling with the efficacy of a charge of criminal contempt for refusal to answer. The Supreme Court has long recognized that "Although the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution....Waiver of constitutional rights... is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege...upon vague and uncertain evidence." *Smith v. United States*, 337 U.S. 137, 150 (1949). Here, again, the Court's 1955 trilogy is instructive. In *Emspak* the Court was confronted with a Government claim that the petitioner had waived his rights with respect to one count of his indictment. The Court rejected the claim, emphasizing the context of the situation and its sense of the need to protect the integrity of the constitutional protection at stake. The witness was being questioned about his associations and expressed apprehension that the committee was "trying to perhaps frame people for possible criminal prosecution" and that "I think I have the right to reserve whatever rights I have." He was then asked, "Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?" *Emspak* relied, "No. I don't think this committee has a right to pry into my associations. That is my own position."

Analogizing the situation to the one encountered in the *Smith* case, the Court held that "[I]n the instant case, we do not think that petitioner's 'No' answer can be treated as a waiver of his previous express claim under the Fifth Amendment. At most, as in the *Smith* case, petitioner's 'No' is equivocal. It may have merely represented a justifiable refusal to discuss the reasons underlying petitioner's assertion of the privilege; the privilege would be of little avail if a witness invoking it were required to disclose the precise hazard which he fears. And even if petitioner's answer were taken as responsive to the question, the answer would still be consistent with a claim of privilege. The protection of the Self-Incrimination

Clause is not limited admissions that ‘would subject [a witness] to criminal prosecution’; for this Court has repeatedly held that ‘Whether such admissions by themselves would support a conviction under a criminal statute is immaterial’ and that the privilege extends to to admissions that may only tend to incriminate. In any event, we cannot say that the colloquy between the committee and the petitioner was sufficiently unambiguous to warrant waiver here. To conclude otherwise would be to violate this Court’s own oft-repeated admonition that the courts must ‘indulge every reasonable presumption against waiver of fundamental rights.’” *Emspak*, 349 U.S. at 196. Then the Court turned to the question whether the committee appropriately rejected petitioner’s privilege claims.

These passages from *Emspak* are presented not to argue about the validity of the Committee’s waiver resolution but to demonstrate that its conclusion is preliminary, not yet legally binding, and subject to judicial review and does not constitute the express rejection of the privilege required by the Supreme Court. However, as was indicated in my March 12 memo, extant case law, in addition to *Emspak*, makes a finding of waiver problematic; and past congressional practice accepting similar voluntary exculpatory statements further undermines the efficacy of the Committee’s June 28, 2013 resolution. See, Michael Stern, www.pointoforder.com/2013/05/23/lois-lerner-and-waiver-of-fifth-amendment-privilege.

The consequence of the HGC’s failure to “directly” establish “that the entity—here, the Oversight Committee—specifically overruled the witness’ objection,” HGC Op. at 10, is that it totally undermines the second prong of its argument: that “indirectly” it has “demonstrate[ed] that the congressional entity specifically directed the witness to answer.” *Id.* at 11. The HGC references three such purported directions. First, the Chairman’s statement in his February 25, 2014 letter to Ms. Lerner’s counsel that “because the Committee explicitly rejected [Ms. Lerner’s] Fifth Amendment privilege claim, I expect her to provide answers when the hearing reconvenes on March 5.” As has been demonstrated above, the Committee resolution in fact did not expressly reject an invocation of privilege; Lerner’s counsel’s immediate reply to that statement was to convey his understanding that the resolution dealt only with the question of waiver; and Ms. Lerner’s immediate response to the Chairman’s initial question to her at the March 5 hearing was to assert her belief that she had not waived her privilege rights and then to invoke her privilege. Second, the HGC quotes remarks by three members at the June 28, 2013 Committee meeting that issued the waiver determination that speculate that Ms. Lerner might be held in contempt. And, third, the Chairman’s verbal observation at the end of his opening remarks at the March 5 hearing that if she continued to refuse to answer questions, “the [C]ommittee *may* proceed to consider whether she should be held in contempt.” Thus the “indirect” support relies predominantly on the incorrect factual and legal premise that the Committee had communicated a rejection of her privilege claims in its waiver resolution and ambiguous statements by members and the Chairman about the risk of contempt. But, again, when the March 5 questioning took place, the Chairman never expressly overruled her objections or demanded a response.

The HGC's unsuccessful effort to demonstrate that the Committee has both "directly" overruled Ms. Lerner's claims of constitutional privilege and "indirectly...specifically directed the witness to answer," also belies, contradicts and undermines his argument that the Supreme Court's trilogy did not require the Committee to both reject Ms. Lerner's assertions of privilege and to direct her to answer. The rationale of the Court's establishment these foundational requirements for a contempt prosecution was to assure that a "witness is confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt." That would seem to clearly encompass both a rejection of a claim and a demand for an answer, with the latter containing some notion or sense of a prosecutorial risk. In most instances that I can think of, one without the other is simply insufficient to meet the bottom line of the Court's rationale. The great pains the HGC has unsuccessfully taken here to show that the Committee complied with both requirements raises serious doubts as to his reading of the Court's requirements.

The HGC opinion unfairly diminishes the historical and legal significance of the 1955 trilogy as well as the lessons of contempt practice since those rulings. The Court in those cases (and others subsequent to them) was attempting to send a strong message to Congress generally, and the House Un-American Activities Committee and its chairman in particular, that it would no longer countenance the McCarthyistic tactics evidenced in those proceedings. The Court in *Quinn* wrote a paean in support of the continued vitality of the privilege demanding a liberal application: "Such liberal construction is particularly warranted in a prosecution of a witness for refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly to treat it as an historical relic, at most merely to be tolerated--is to ignore its development and purpose." The *Quinn* Court did observe that no specific verbal formula was required to protect its investigative prerogatives, but it did underline that the firm rules iterated and reiterated in all three cases—clear rejections of a witness's constitutional objections, demands for answers, and notice that refusals would risk criminal prosecution—belied any intent to allow palpable ambiguity. Together with later Court rulings condemning the absence or public unavailability of committee procedural rules, or the failure to abide by standing rules, and the uncertainty of the subject matter jurisdiction and authority of investigating committees, we today have an oversight and investigatory process that is broad and powerful but restrained by clear due process requirements.

My own Zelig-like experience with contempt proceedings was that committees that have faithfully adhered to the script propounded by the Court's trilogy have found it extraordinarily useful in achieving sought after information disclosures. Normally, the criminal contempt process is principally designed to punish noncompliance, not to force disclosure of withheld documents or testimony. That has been the role of inherent contempt or civil enforcement proceedings. But in the dozens of criminal contempt citations voted against cabinet-level officials and private parties by subcommittees, full committees or by a House since 1975 there has been an almost universal success in obtaining full or significant cooperation before actual criminal proceedings were commenced. See generally, [REDACTED]

[REDACTED], *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, CRS Report RL34097 (August 12, 2012. Two such inquiries involving private parties are useful examples for present purposes. In 1998 the Oversight subcommittee of the House Commerce Committee began investigating allegations of undue political influence by an office developer, Franklin Haney, in having the General Services Administration locate the Federal Communications Commission in one of his new buildings. Subpoenas were issued to the developer and his attorneys. Attorney-client privilege was asserted by the developer and the law firm. A contempt hearing was called at which the developer and the representative of the firm were again asked to comply and refused, claiming privilege. The chair rejected the claims and advised the witnesses that continued noncompliance would result in a committee vote of contempt. The witnesses continued their refusals and the committee voted them in contempt. At the conclusion of the vote, the representative of the law firm rose and offered immediate committee access to the documents if the contempt vote against the firm was rescinded. The committee agreed to rescind the citation. Six months later the District of Columbia Bar Association Ethics Committee ruled that the firm had not violated its obligation of client confidentiality in the face of a subcommittee contempt vote that put them legal jeopardy. See, *Contempt of Congress Against Franklin I. Haney*, H. Rept. 105-792, 105th Cong., 2d Sess. (1998).

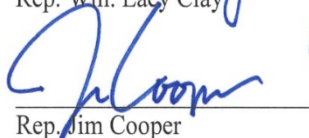
A second illustrative inquiry involved the Asian and Pacific Affairs subcommittee of House Foreign Affairs' investigation looking into real estate investment work by two brothers, Ralph and Joseph Bernstein, a real property investor and lawyer respectively, on behalf of President Ferdinand Marcos of the Philippines and his wife Imelda. The subcommittee was pursuing allegations of vast holdings in the United States by the Marcoses (some \$10 billion) that emanated in large part from U.S. government development funding. The Bernsteins refused to answer any questions about their investment work or even whether they knew the Marcoses, claiming attorney-client privilege. The subcommittee following appropriate demands and rejections of the asserted privilege, voted to report a contempt resolution to the full committee, which in turn presented a report and resolution to the House that was adopted in February 1986. Shortly thereafter, and before an indictment was presented to a grand jury, the Bernsteins agreed to supply the subcommittee with information it required. See, H. Rept. 99-462 (1986) and 132 Cong. Rec. 3028—62 (1986).

I continue to believe a criminal contempt proceeding under the present circumstances would be found faulty by a reviewing court.

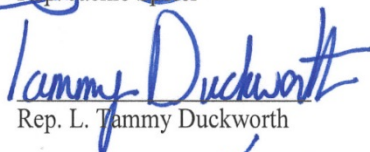

Rep. Elijah E. Cummings

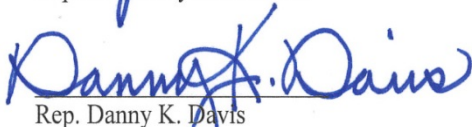

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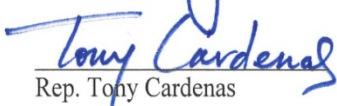

Rep. Wm. Lacy Clay


Rep. Jim Cooper


Rep. Jackie Speier

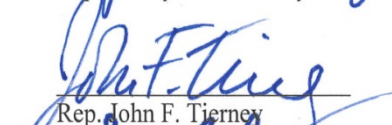

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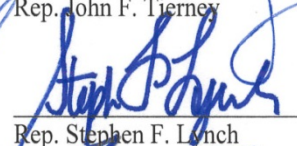

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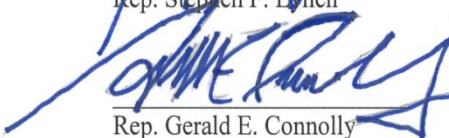

Rep. Tony Cardenas


Rep. Michelle Lujan Grisham


Rep. Carolyn B. Maloney

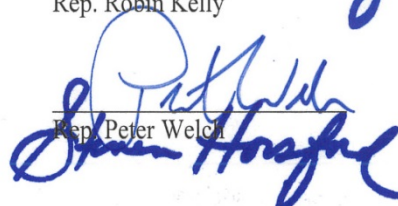

Rep. John F. Tierney

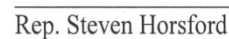

Rep. Stephen F. Lynch


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Rep. Matthew Cartwright


Rep. Robin Kelly


Rep. Peter Welch


Rep. Steven Horsford