

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
113TH CONGRESS
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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.