

R E S O L U T I O N  
RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND  
LOIS G. LERNER, FORMER DIRECTOR, EXEMPT ORGANIZATIONS, INTERNAL  
REVENUE SERVICE,  
IN CONTEMPT OF CONGRESS FOR REFUSAL TO  
COMPLY WITH A SUBPOENA DULY ISSUED BY THE  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

R E P O R T  
OF THE  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
UNITED STATES HOUSE OF REPRESENTATIVES

The form of the resolution that the Committee on Oversight and Government Reform would recommend to the House of Representatives for citing Lois G. Lerner, former Director, Exempt Organizations, Internal Revenue Service, for contempt of Congress pursuant to this report is as follows:

*Resolved*, That because Lois G. Lerner, former Director, Exempt Organizations, Internal Revenue Service, offered a voluntary statement in testimony before the Committee, was found by the Committee to have waived her Fifth Amendment Privilege, was informed of the Committee's decision of waiver, and continued to refuse to testify before the Committee, Ms. Lerner shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

*Resolved*, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on Oversight and Government Reform, detailing the refusal of Ms. Lerner to testify before the Committee on Oversight and Government Reform as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Ms. Lerner be proceeded against in the manner and form provided by law.

*Resolved*, That the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena.

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## I. Executive Summary

Lois G. Lerner has refused to comply with a congressional subpoena for testimony before the Committee on Oversight and Government Reform relating to her role in the Internal Revenue Service's treatment of certain applicants for tax-exempt status. Her testimony is vital to the Committee's investigation into this matter.

Ms. Lerner offered a voluntary statement in her appearance before the Committee. The Committee subsequently determined that she waived her Fifth Amendment privilege in making this statement, and it informed Ms. Lerner of its decision. Still, Ms. Lerner continued to refuse to testify before the Committee.

Accordingly, the Chairman of the Oversight and Government Reform Committee recommends that the House find Ms. Lerner in contempt for her failure to comply with the subpoena issued to her.

## II. Authority and Purpose

An important corollary to the powers expressly granted to Congress by the Constitution is the responsibility to perform rigorous oversight of the Executive Branch. The U.S. Supreme Court has recognized this Congressional power and responsibility on numerous occasions. For example, in *McGrain v. Daugherty*, the Court held:

[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information—which not infrequently is true – recourse must be had to others who do possess it.”<sup>1</sup>

Further, in *Watkins v. United States*, Chief Justice Earl Warren wrote for the majority: “The power of Congress to conduct investigations is inherent in the legislative process. That power is broad.”<sup>2</sup>

Further, both the Legislative Reorganization Act of 1946 (P.L. 79-601), which directed House and Senate Committees to “exercise continuous watchfulness” over Executive Branch programs under their jurisdiction, and the Legislative Reorganization Act of 1970 (P.L. 91-510), which authorized committees to “review and study, on a continuing basis, the application, administration, and execution” of laws, codify the powers of Congress.

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<sup>1</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

<sup>2</sup> *Watkins v. United States*, 354 U.S. 178, 1887 (1957).

The Committee on Oversight and Government Reform is a standing committee of the House of Representatives, duly established pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the U.S. Constitution.<sup>3</sup> House Rule X grants to the Committee broad jurisdiction over federal “[g]overnment management” and reform, including the “[o]verall economy, efficiency, and management of government operations and activities,” the “[f]ederal civil service,” and “[r]eorganizations in the executive branch of the Government.”<sup>4</sup> House Rule X further grants the Committee particularly broad oversight jurisdiction, including authority to “conduct investigations of any matter without regard to clause 1, 2, 3, or this clause [of House Rule X] conferring jurisdiction over the matter to another standing committee.”<sup>5</sup> The rules direct the Committee to make available “the findings and recommendations of the committee . . . to any other standing committee having jurisdiction over the matter involved.”<sup>6</sup>

House Rule XI specifically authorizes the Committee to “require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary.”<sup>7</sup> The rule further provides that the “power to authorize and issue subpoenas” may be delegated to the Committee chairman.<sup>8</sup> The subpoena discussed in this report was issued pursuant to this authority.

The Committee has undertaken its investigation into the IRS’s inappropriate treatment of conservative tax-exempt organizations pursuant to the authority delegated to it under the House Rules, including as described above.

The oversight and legislative purposes of the investigation at issue here, described more fully immediately below, include (1) to evaluate decisions made by the Internal Revenue Service regarding the inappropriate treatment of conservative applicants for tax-exempt status; and (2) to assess, based on the findings of the investigation, whether the conduct uncovered may warrant additions or modifications to federal law, including, but not limited to, a possible restructuring of the Internal Revenue Service and the IRS Oversight Board.

### **III. Background on the Committee’s Investigation**

In February 2012, the Committee received reports that the Internal Revenue Service inappropriately scrutinized certain applicants for 501(c)(4) tax-exempt status. Since that time, the Committee has reviewed nearly 500,000 pages of documents obtained from (i) the Department of the Treasury, including particular component entities, the IRS, the Treasury Inspector General for Tax Administration (TIGTA), and the IRS Oversight Board, (ii) former and current IRS employees, and (iii) other sources. In addition, the Committee has conducted 33

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<sup>3</sup> U.S. CONST., art I, § 5, clause 2.

<sup>4</sup> House Rule X, clause (1)(n).

<sup>5</sup> House Rule X, clause (4)(c)(2).

<sup>6</sup> *Id.*

<sup>7</sup> House Rule XI, clause (2)(m)(1)(B).

<sup>8</sup> House Rule XI, clause 2(m)(3)(A)(1).

transcribed interviews of current and former IRS officials, ranging from front-line employees in the IRS's Cincinnati office to the former Commissioner of the IRS.

Documents and testimony reveal that the IRS targeted conservative-aligned applicants for tax-exempt status by scrutinizing them in a manner distinct—and more intrusive—than other applicants. Critical questions remain regarding the extent of this targeting, and how and why the IRS acted—and persisted in acting—in this manner.

### **A. IRS Targeting of Tea Party Tax-Exempt Applications**

In late February 2010, a screener in the IRS's Cincinnati office identified a 501(c)(4) application connected with the Tea Party. Due to “media attention” surrounding the Tea Party, the application was elevated to the Exempt Organizations Technical Unit in Washington, D.C.<sup>9</sup> When officials in the Cincinnati office discovered several similar applications in March 2010, the Washington, D.C. office asked for two “test” applications, and ordered the Cincinnati employees to “hold” the remainder of the applications.<sup>10</sup> A manager in the Cincinnati office asked his screeners to develop criteria for identifying other Tea Party applications so that the applications would not “go into the general inventory.”<sup>11</sup> By early April 2010, Cincinnati screeners began to identify and hold any applications meeting certain criteria. Applications that met the criteria were removed from the general inventory and assigned to a special group.

In late spring 2010, an individual recognized as an expert in 501(c)(4) applications in the Washington office was assigned to work on the test applications. The expert issued letters to the test applicants asking for additional information or clarification about information provided in their applications.<sup>12</sup> Meanwhile, through the summer and into fall 2010, applications from other conservative-aligned groups idled. As the Cincinnati office awaited guidance from Washington regarding those applications, a backlog developed. By fall 2010, the backlog of applications that had stalled in the Cincinnati office had grown to 60.

On February 1, 2011, Lois G. Lerner, who served as Director of Exempt Organizations (EO) at IRS from 2006 to 2013,<sup>13</sup> wrote an e-mail to Michael Seto, the manager of the Technical Office within the Exempt Organizations business division. The EO Technical Office was staffed by approximately 40 IRS lawyers who offered advice to IRS agents across the country. Ms. Lerner wrote, “Tea Party Matter very dangerous” and ordered the Office of Chief Counsel to get involved.<sup>14</sup> Ms. Lerner advocated for pulling the cases out of the Cincinnati office entirely. She

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<sup>9</sup> E-mail from Cindy Thomas, Manager, Exempt Organizations Determinations, IRS, to Holly Paz, Manager, Exempt Organizations Technical Unit, IRS (Feb. 25, 2010) [IRSR 428451].

<sup>10</sup> Transcribed Interview of Elizabeth Hofacre, Revenue Agent, Exempt Orgs. Determinations Unit, IRS (May 31, 2013).

<sup>11</sup> Transcribed Interview of John Shafer, Group Manager, Exempt Orgs. Determinations Unit, IRS (June 6, 2013).

<sup>12</sup> IRS, Timeline for the 3 exemption applications that were referred to EOT from EOD. [IRSR 58346-49]

<sup>13</sup> See *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 22 (May 22, 2013) (H. Rpt. 113-33) (statement of Lois Lerner, Director, Exempt Orgs., IRS) (emphasis added).

<sup>14</sup> E-mail from Lois Lerner, Director, Exempt Orgs., IRS to Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS (Feb. 1, 2011) [IRSR 161810].

advised Seto that “Cincy should probably NOT have these cases.”<sup>15</sup> Seto testified to the Committee that Ms. Lerner ordered a “multi-tier” review for the test applications, a process that involved her senior technical advisor and the Office of Chief Counsel.<sup>16</sup>

On July 5, 2011, Ms. Lerner became aware that the backlog of Tea Party applications pending in Cincinnati had swelled to “over 100.”<sup>17</sup> Ms. Lerner also learned of the specific criteria that were used to screen the cases that were caught in the backlog.<sup>18</sup> She believed that the term “Tea Party”—which was a term that triggered additional scrutiny under the criteria developed by IRS personnel—was “pejorative.”<sup>19</sup> Ms. Lerner ordered her staff to adjust the criteria.<sup>20</sup> She also directed the Technical Unit to conduct a “triage” of the backlogged applications and to develop a guide sheet to assist agents in Cincinnati with processing the cases.<sup>21</sup>

In November 2011, the draft guide sheet for processing the backlogged applications was complete.<sup>22</sup> By this point, there were 160-170 pending applications in the backlog.<sup>23</sup> After the Cincinnati office received the guide sheet from Washington, officials there began to process the applications in January 2012. IRS employees drafted questions for the applicant organizations designed to solicit information mandated by the guide sheet. The questions asked for information about the applicant organizations’ donors, among other things.<sup>24</sup>

By early 2012, questions about the IRS’s treatment of these backlogged applications had attracted public attention. Staff from the Committee on Oversight and Government Reform met with Ms. Lerner in February 2012 regarding the IRS’s process for evaluating tax-exempt applications.<sup>25</sup> Committee staff then met with TIGTA representatives on March 8, 2012.<sup>26</sup> Shortly thereafter, TIGTA began an audit of the IRS’s process for evaluating tax-exempt applications.

In late February 2012, after Ms. Lerner briefed Committee staff, Steven Miller, then the IRS Deputy Commissioner, requested a meeting with her to discuss these applications. She informed him of the backlog of applications and that the IRS had asked applicant organizations

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<sup>15</sup> *Id.*

<sup>16</sup> Transcribed Interview of Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS (July 11, 2013) [hereinafter Seto Interview].

<sup>17</sup> Transcribed Interview of Justin Lowe, Technical Advisor to the Commissioner, Tax Exempt and Gov’t Entities Division, IRS (July 23, 2013).

<sup>18</sup> *Id.*

<sup>19</sup> Transcribed Interview of Holly Paz, Director, Exempt Orgs., Rulings and Agreements, IRS (May 21, 2013).

<sup>20</sup> *Id.*

<sup>21</sup> Seto Interview, *supra* note 6.

<sup>22</sup> E-mail from Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS, to Cindy Thomas, Manager, Exempt Orgs. Determinations Unit, IRS (Nov. 6, 2011) [IRS 69902].

<sup>23</sup> Transcribed Interview of Stephen Daejin Seok, Group Manager, Exempt Orgs. Determinations Unit, IRS (June 19, 2013).

<sup>24</sup> *Id.*

<sup>25</sup> Briefing by Lois Lerner, Director, Exempt Orgs., IRS, to H. Comm. on Oversight & Gov’t Reform Staff (Feb. 24, 2012).

<sup>26</sup> Treasury Inspector Gen. for Tax Admin., What is the timeline for TIGTA’s involvement with this tax-exempt issue? (provided to the Committee May 2013).

about donor information.<sup>27</sup> Miller relayed this information to IRS Commissioner Douglas Schulman.<sup>28</sup> On March 23, 2012, Miller convened a meeting of his senior staff to discuss these applications. Miller launched an internal review of potential inappropriate treatment of Tea Party 501(c)(4) applications “to find out why the cases were there and what was going on.”<sup>29</sup>

The internal IRS review took place in April 2012. Miller realized there was a problem and that the application backlog needed to be addressed.<sup>30</sup> IRS officials designed a new system to process the backlog, and Miller received weekly updates on the progress of the backlog throughout the summer 2012.<sup>31</sup>

In May 2013, in advance of the release of TIGTA’s audit report on the IRS’s process for evaluating applications for tax-exempt status, the IRS sought to acknowledge publicly that certain tax-exempt applications had been inappropriately targeted.<sup>32</sup> On May 10, 2013, at an event sponsored by the American Bar Association, Ms. Lerner responded to a question she had planted with a member of the audience prior to the event. A veteran tax lawyer asked, “Lois, a few months ago there were some concerns about the IRS’s review of 501(c)(4) organizations, of applications from tea party organizations. I was just wondering if you could provide an update.”<sup>33</sup> In response, Ms. Lerner stated:

So our line people in Cincinnati who handled the applications did what we call centralization of these cases. They centralized work on these in one particular group. . . . However, in these cases, the way they did the centralization was not so fine. Instead of referring to the cases as advocacy cases, they actually used case names on this list. They used names like Tea Party or Patriots and they selected cases simply because the applications had those names in the title. That was wrong, that was absolutely incorrect, insensitive, and inappropriate – that’s not how we go about selecting cases for further review. We don’t select for review because they have a particular name.<sup>34</sup>

Ms. Lerner’s statement during the ABA panel, entitled “News from the IRS and Treasury,” was the first public acknowledgement that the IRS had inappropriately scrutinized the applications of conservative-aligned groups. Within days, the President and the Attorney

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<sup>27</sup> Transcribed Interview of Steven Miller, Deputy Commissioner, IRS (Nov. 13, 2013) [hereinafter Miller Interview].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> E-mail from Nicole Flax, Chief of Staff to the Deputy Commissioner, IRS, to Lois Lerner, Director, Exempt Orgs., IRS (Apr. 23, 2013) [IRSR 189013]; Miller Interview, *supra* note 16; Transcribed Interview of Sharon Light, Senior Technical Advisor to the Director, Exempt Orgs., IRS (Sept. 5, 2013); E-mail from Nicole Flax, Chief of Staff to the Deputy Commissioner, IRS, to Adewale Adeyemo, Dept. of the Treasury (Apr. 22, 2013) [IRSR 466707].

<sup>33</sup> Eric Lach, *IRS Official’s Admission Baffled Audience at Tax Panel*, TALKING POINTS MEMO, May 14, 2013.

<sup>34</sup> Rick Hasen, *Transcript of Lois Lerner’s Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 a.m.), <http://electionlawblog.org/?p=50160>.

General expressed serious concerns about the IRS's actions. The Attorney General announced a Justice Department investigation.<sup>35</sup>

## **B. Lois Lerner's Testimony Is Critical to the Committee's Investigation**

Lois Lerner's testimony is critical to the Committee's investigation. Without her testimony, the full extent of the IRS's targeting of Tea Party applications cannot be known, and the Committee will be unable to fully complete its work.

Ms. Lerner was, during the relevant time period, the Director of the Exempt Organizations business division of the IRS, where the targeting of these applications occurred. The Exempt Organizations business division contains the two IRS units that were responsible for executing the targeting program: the Exempt Organizations Determinations Unit in Cincinnati, and the Exempt Organizations Technical Unit in Washington, D.C.

Ms. Lerner has not provided the Committee with any testimony since the release of the TIGTA audit in May 2013. Although the Committee staff has conducted transcribed interviews of dozens of IRS officials in Cincinnati and Washington, D.C., the Committee will never be able to understand the IRS's actions fully without her testimony. She has unique, first-hand knowledge of how, and why, the IRS scrutinized applications for tax-exempt status from certain conservative-aligned groups.

The IRS sent letters to 501(c)(4) application organizations, signed by Ms. Lerner, that included questions about the organizations' donors. These letters went to applicant organizations that had met certain criteria. As noted, Ms. Lerner later described the selection of these applicant organizations as "wrong, [] absolutely incorrect, insensitive, and inappropriate."<sup>36</sup>

Documents and testimony from other witnesses show Ms. Lerner's testimony is critical to the Committee's investigation. She was at the epicenter of the targeting program. As the Director of the Exempt Organizations business division, she interacted with a wide array of IRS personnel, from low-level managers all the way up to the Deputy Commissioner. Only Ms. Lerner can resolve conflicting testimony about why the IRS delayed 501(c)(4) applications, and why the agency asked the applicant organizations inappropriate and invasive questions. Only she can answer important outstanding questions that are key to the Committee's investigation.

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<sup>35</sup> *Holder launches probe into IRS targeting of Tea Party groups*, FOXNEWS.COM, May 14, 2013.

<sup>36</sup> Rick Hasen, *Transcript of Lois Lerner's Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 AM), <http://electionlawblog.org/?p=50160>.

#### **IV. Lois Lerner's Refusal to Comply with the Committee's Subpoena for Testimony at the May 22, 2013 Hearing**

On May 14, 2013, Chairman Issa sent a letter to Ms. Lerner inviting her to testify at a hearing on May 22, 2013, about the IRS's handling of certain applications for tax-exempt status.<sup>37</sup> The letter requested that she "please contact the Committee by May 17, 2013," to confirm her attendance.<sup>38</sup> Ms. Lerner, through her attorney, confirmed that she would appear at the hearing.<sup>39</sup> Her attorney subsequently indicated that she would not answer questions during the hearing, and that she would invoke her Fifth Amendment rights.<sup>40</sup>

Because Ms. Lerner would not testify voluntarily at the May 22, 2013 hearing and because her testimony was critical to the Committee's investigation, Chairman Issa authorized a subpoena to compel the testimony. The subpoena was issued on May 20, 2013, and served on her the same day. Ms. Lerner's attorney accepted service on her behalf.<sup>41</sup>

##### **A. Correspondence Leading Up to the Hearing**

On May 20, 2013, Ms. Lerner's attorney sent a letter to Chairman Issa stating that she would be invoking her Fifth Amendment right not to answer any questions at the hearing. The letter stated, in relevant part:

You have requested that our client, Lois Lerner, appear at a public hearing on May 22, 2013, to testify regarding the Treasury Inspector General for Tax Administration's ("TIGTA") report on the Internal Revenue Service's ("IRS") processing of applications for tax-exempt status. As you know, the Department of Justice has launched a criminal investigation into the matters addressed in the TIGTA report, and your letter to Ms. Lerner dated May 14, 2013, alleges that she 'provided false or misleading information on four separate occasions last year in response to' the Committee's questions about the IRS's processing of applications for tax-exempt status. Accordingly, we are writing to inform you that, upon our advice, Ms. Lerner will exercise her constitutional right not to answer any questions related to the matters addressed in the TIGTA report or to the written and oral exchanges that she had with the Committee in 2012 regarding the IRS's processing of applications for tax-exempt status.

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<sup>37</sup> Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Lois Lerner, Director, Exempt Orgs., IRS (May 14, 2013) (letter inviting Lerner to testify at May 22, 2013 hearing).

<sup>38</sup> *Id.*

<sup>39</sup> E-mail from William W. Taylor, III, Zuckerman Spaeder LLP, to H. Comm. on Oversight & Gov't Reform Majority Staff (May 17, 2013).

<sup>40</sup> Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 20, 2013).

<sup>41</sup> E-mail from William W. Taylor, III, Zuckerman Spaeder LLP, to H. Comm. on Oversight & Gov't Reform Majority Staff (May 20, 2013).

She has not committed any crimes or made any misrepresentation but under the circumstances she has no choice but to take this course. As the Supreme Court has “emphasized,” one of the Fifth Amendment’s “basic functions . . . is to protect *innocent* [individuals].” *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (quoting *Grunewald v. United States*, 353 U.S. 391, 421 (1957)).

Because Ms. Lerner is invoking her constitutional privilege, we respectfully request that you excuse her from appearing at the hearing. . . . 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.<sup>42</sup>

The following day, after issuing the subpoena to compel Ms. Lerner to appear before the Committee, Chairman Issa responded to her attorney. Chairman Issa stated, in relevant part:

I write to advise you that the subpoena you accepted on Ms. Lerner’s behalf remains in effect. The subpoena compels Ms. Lerner to appear before the Committee on May 22, 2013, at 9:30 a.m.

According to your May 20, 2013, letter, ‘requiring [Ms. Lerner] to appear at the hearing merely to assert her Fifth Amendment privilege would have no purpose other than to embarrass or burden her.’ That is not correct. As Director, Exempt Organizations, Tax Exempt and Government Entities Division, of the Internal Revenue Service, Ms. Lerner is uniquely qualified to answer questions about the issues raised in the aforementioned TIGTA report. The Committee invited her to appear with the expectation that her testimony will advance the Committee’s investigation, which seeks information about the IRS’s questionable practices in processing and approving applications for 501(c)(4) tax exempt status. **The Committee requires Ms. Lerner’s appearance because of, among other reasons, the possibility that she will waive or choose not to assert the privilege as to at least certain questions of interest to the Committee;** the possibility that the Committee will immunize her testimony pursuant to 18 U.S.C. § 6005; and the possibility that the Committee will agree to hear her testimony in executive session.<sup>43</sup>

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<sup>42</sup> Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (May 20, 2013).

<sup>43</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform to William W. Taylor, III, Zuckerman Spaeder LLP (May 21, 2013) (emphasis added).

## B. Lois Lerner's Opening Statement

Chairman Issa's letter to Ms. Lerner's attorney on May 22, 2013 raised the possibility that she would waive or choose not to assert her privilege as to at least certain questions of interest to the Committee.<sup>44</sup> In fact, that is exactly what happened. At the hearing, Ms. Lerner made a voluntary opening statement, of which she had provided the Committee no advance notice, notwithstanding Committee rules requiring that she do so.<sup>45</sup> She stated, after swearing an oath to tell "the truth, the whole truth, and nothing but the truth":

Good morning, Mr. Chairman and members of the Committee. My name is Lois Lerner, and I'm the Director of Exempt Organizations at the Internal Revenue Service.

I have been a government employee for over 34 years. I initially practiced law at the Department of Justice and later at the Federal Election Commission. In 2001, I became — I moved to the IRS to work in the Exempt Organizations office, and in 2006, I was promoted to be the Director of that office.

Exempt Organizations oversees about 1.6 million tax-exempt organizations and processes over 60,000 applications for tax exemption every year. As Director I'm responsible for about 900 employees nationwide, and administer a budget of almost \$100 million. My professional career has been devoted to fulfilling responsibilities of the agencies for which I have worked, and I am very proud of the work that I have done in government.

On May 14th, the Treasury inspector general released a report finding that the Exempt Organizations field office in Cincinnati, Ohio, used inappropriate criteria to identify for further review applications for organizations that planned to engage in political activity which may mean that they did not qualify for tax exemption. On that same day, the Department of Justice launched an investigation into the matters described in the inspector general's report. In addition, members 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.**

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<sup>44</sup> *Id.*

<sup>45</sup> Rule 9(f), Rules of the H. Comm. on Oversight & Gov't Reform, 113th Cong., *available at* <http://oversight.house.gov/wp-content/uploads/2013/12/OGR-Committee-Rules-113th-Congress.pdf> (last visited April 7, 2014).

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.<sup>46</sup>

After Ms. Lerner made this voluntary, self-selected opening statement—which included a proclamation that she had done nothing wrong and broken no laws, Chairman Issa explained that he believed she had waived her right to assert a Fifth Amendment privilege and asked her to reconsider her position on testifying.<sup>47</sup> In response, she stated:

I will not answer any questions or testify about the subject matter of this Committee's meeting.<sup>48</sup>

Upon Ms. Lerner's refusal to answer any questions, Congressman Trey Gowdy made a statement from the dais. He said:

Mr. Issa, Mr. Cummings just said we should run this like a courtroom, and I agree with him. 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.**<sup>49</sup>

Shortly after Congressman Gowdy's statement, Chairman Issa excused Ms. Lerner from the panel and reserved the option to recall her as a witness at a later date. Specifically, Chairman Issa stated that she was excused "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."<sup>50</sup>

Rather than adjourning the hearing on May 22, 2013, the Chairman recessed it, in order to reconvene at a later date after a thorough analysis of Ms. Lerner's actions. He did so to avoid "mak[ing] a quick or uninformed decision" regarding what had transpired.<sup>51</sup>

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<sup>46</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 22 (May 22, 2013) (H. Rpt. 113-33) (statement of Lois Lerner, Director, Exempt Orgs., IRS) (emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> *Id.* at 24.

<sup>51</sup> *Business Meeting of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 4 (June 28, 2013).

### C. The Committee Resolved That Lois Lerner Waived Her Fifth Amendment Privilege

On June 28, 2013, Chairman Issa convened a Committee business meeting to allow the Committee to determine whether Ms. Lerner had in fact waived her Fifth Amendment privilege. After reviewing during the intervening five weeks legal analysis provided by the Office of General Counsel, arguments presented by Ms. Lerner's counsel, and other relevant legal precedent, Chairman Issa concluded that Ms. Lerner waived her constitutional privilege when she made a voluntary opening statement that involved several specific denials of various allegations.<sup>52</sup> Chairman Issa stated:

Having now considered the facts and arguments, I believe Lois Lerner waived her Fifth Amendment privileges. She did so when she chose to make a voluntary opening statement. Ms. Lerner's opening statement referenced the Treasury IG report, and the Department of Justice investigation . . . and the assertions that she had previously provided false information to the committee. She made four specific denials. Those denials are at the core of the committee's investigation in this matter. She stated that she had not done anything wrong, not broken any laws, not violated any IRS rules or regulations, and not provided false information to this or any other congressional committee regarding areas about which committee members would have liked to ask her questions. Indeed, committee members are still interested in hearing from her. Her statement covers almost the entire range of questions we wanted to ask when the hearing began on May 22.<sup>53</sup>

After a lengthy debate, the Committee approved a resolution, by a 22-17 vote, which stated as follows:

[T]he Committee on Oversight and Government Reform determines that the 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 any IRS rules or regulations," and/or "not provided false information to this or any other congressional committee."<sup>54</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Resolution of the H. Comm. on Oversight & Gov't Reform (June 28, 2013), *available at* <http://oversight.house.gov/wp-content/uploads/2013/06/Resolution-of-the-Committee-on-Oversight-and-Government-Reform-6-28-131.pdf>.

#### **D. Lois Lerner Continued to Defy the Committee's Subpoena**

Following the Committee's resolution that Ms. Lerner waived her Fifth Amendment privilege, Chairman Issa recalled her to testify before the Committee. On February 25, 2014, Chairman Issa sent a letter to Ms. Lerner's attorney advising him that the May 22, 2013 hearing would reconvene on March 5, 2014.<sup>55</sup> The letter also advised that the subpoena that compelled her to appear on May 22, 2013 remained in effect.<sup>56</sup> The letter stated, in relevant part:

Ms. Lerner's testimony remains critical to the Committee's investigation . . . . Because Ms. Lerner's testimony will advance the Committee's investigation, the Committee is recalling her to a continuation of the May 22, 2013, hearing, on March 5, 2014, at 9:30 a.m. in room 2154 of the Rayburn House Office Building in Washington, D.C.

The subpoena you accepted on Ms. Lerner's behalf remains in effect. In light of this fact, and because the Committee explicitly rejected her Fifth Amendment privilege claim, I expect her to provide answers when the hearing reconvenes on March 5.<sup>57</sup>

The next day, Ms. Lerner's attorney responded to Chairman Issa. In a letter, he wrote:

I write in response to your letter of yesterday. I was surprised to receive it. I met with the majority staff of the Committee on January 24, 2014, at their request. At the meeting, I advised them that Ms. Lerner would continue to assert her Constitutional rights not to testify if she were recalled. . . . We understand that the Committee voted that she had waived her rights. . . . We therefore request that the Committee not require Ms. Lerner to attend a hearing solely for the purpose of once again invoking her rights.<sup>58</sup>

Because of the possibility that she would choose to answer some or all of the Committee's questions, Chairman Issa required Ms. Lerner to appear in person on March 5, 2014. When the May 22, 2013, hearing, entitled "The IRS: Targeting Americans for Their Political Beliefs," was reconvened, Chairman Issa noted that the Committee might recommend that the House hold Ms. Lerner in contempt if she continued to refuse to answer questions, based on the fact that the Committee had resolved that she had waived her Fifth Amendment privilege. He stated:

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<sup>55</sup> Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform to William W. Taylor, III, Zuckerman Spaeder LLP (Feb. 25, 2014).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Feb. 26, 2014).

At a business meeting on June 28, 2013, the Committee approved a resolution rejecting Ms. Lerner's claim of Fifth Amendment privilege based on her waiver at the May 22, 2013, hearing.

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 statement on May 22, 2013, and additionally, by affirming documents after making a statement of Fifth Amendment rights.

If Ms. Lerner continues to refuse to answer questions from our Members while she's under subpoena, the Committee may proceed to consider whether she should be held in contempt.<sup>59</sup>

Despite the fact that Lerner was compelled by a duly issued subpoena and Chairman Issa had warned her of the possibility of contempt proceedings, and despite the Committee's resolution that she waived her Fifth Amendment privilege, Ms. Lerner continued to assert her Fifth Amendment privilege, and refused to answer any questions posed by Members of the Committee.

Specifically, Ms. Lerner asserted her Fifth Amendment privilege on eight separate occasions at the hearing. In response to questions from Chairman Issa, she stated:

Q. On October 10 -- on October -- in October 2010, you told a Duke University group, and I quote, 'The Supreme Court dealt a huge blow overturning a 100-year-old precedent that basically corporations couldn't give directly to political campaigns. And everyone is up in arms because they don't like it. The Federal Election Commission can't do anything about it. They want the IRS to fix the problem.' Ms. Lerner, what exactly 'wanted to fix the problem caused by Citizens United,' what exactly does that mean?

A. My counsel has advised me that I have not --

Q. Would you please turn the mic on?

A. Sorry. I don't know how. My counsel has advised me that I have not waived my constitutional rights under the Fifth Amendment, and on his advice, I will decline to answer any question on the subject matter of this hearing.

Q. So, you are not going to tell us who wanted to fix the problem

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<sup>59</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov't Reform, 113th Cong. (Mar. 5, 2014).*

caused by Citizens United?

- A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.
- Q. Ms. Lerner, in February 2011, you emailed your colleagues in the IRS the following: ‘Tea Party matter, very dangerous. This could be the vehicle to go to court on the issue of whether Citizens United overturning the ban on corporate spending applies to tax-exempt rules. Counsel and Judy Kindell need to be on this one, please. Cincy should probably NOT,’ all in caps, ‘have these cases.’ What did you mean by ‘Cincy should not have these cases’?
- A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer the question.
- Q. Ms. Lerner, why would you say Tea Party cases were very dangerous?
- A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.
- Q. Ms. Lerner, in September 2010, you emailed your subordinates about initiating a, parenthesis, (c)(4) project and wrote, ‘We need to be cautious so that it isn’t a per se political project.’ Why were you worried about this being perceived as a political project?
- A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.
- Q. Ms. Lerner, Mike Seto, manager of EO Technical in Washington, testified that you ordered Tea Party cases to undergo a multi-tier review. He testified, and I quote, ‘She sent me email saying that when these cases need to go through’ -- I say again – ‘she sent me email saying that when these cases need to go through multi-tier review and they will eventually have to go to Ms. Kindell and the Chief Counsel’s Office.’ Why did you order Tea Party cases to undergo a multi-tier review?
- A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.
- Q. Ms. Lerner, in June 2011, you requested that Holly Paz obtain a copy of the tax-exempt application filed by Crossroads GPS so that your senior technical advisor, Judy Kindell, could review it and

summarize the issues for you. Ms. Lerner, why did you want to personally order that they pull Crossroads GPS, Karl Rove's organization's application?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, in June 2012, you were part of an email exchange that appeared to be about writing new regulations on political speech for 501(c)(4) groups, and in parenthesis, your quote, 'off plan' in 2013. Ms. Lerner, what does 'off plan' mean?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, in February of 2014, President Obama stated that there was not a smidgeon of corruption in the IRS targeting. Ms. Lerner, do you believe that there is not a smidgeon of corruption in the IRS targeting of conservatives?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, on Saturday, our committee's general counsel sent an email to your attorney saying, 'I understand that Ms. Lerner is willing to testify and she is requesting a 1 week delay. In talking' -- 'in talking to the chairman' -- excuse me -- 'in talking to the chairman, wanted to make sure that was right.' Your lawyer, in response to that question, gave a one word email response, 'yes.' Are you still seeking a 1 week delay in order to testify?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.<sup>60</sup>

The hearing was subsequently adjourned and Ms. Lerner was excused from the hearing room.

**E. Legal Precedent Strongly Supports the Committee's Position to Proceed with Holding Lois Lerner in Contempt**

After Ms. Lerner's appearance before the Committee on March 5, 2014, her lawyer convened a press conference at which he apparently revealed that she had sat for an interview

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<sup>60</sup> *Id.*

with Department of Justice prosecutors and TIGTA staff within the past six months.<sup>61</sup> According to reports, Ms. Lerner's lawyer described that interview as not under oath<sup>62</sup> and unconditional, i.e., provided under no grant of immunity.<sup>63</sup> Revelation of this interview calls into question the basis of Ms. Lerner's assertion of the Fifth Amendment privilege in the first place, her waiver of any such privilege notwithstanding.

Despite that fact, and the balance of the record, Ranking Member Elijah E. Cummings questioned the Committee's ability to proceed with a contempt citation for Ms. Lerner. On March 12, 2014, he sent a letter to Speaker Boehner arguing that the House of Representatives is barred "from successfully pursuing contempt proceedings against former IRS official Lois Lerner."<sup>64</sup> The Ranking Member's position was based on an allegedly "independent legal analysis" provided by his lawyer, Stanley M. Brand, and his "Legislative Consultant," Morton Rosenberg.<sup>65</sup>

Brand and Rosenberg claimed that the prospect of judicial contempt proceedings against Ms. Lerner has been compromised because, according to them, "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."<sup>66</sup> The Ranking Member subsequently issued a press release that described "opinions from 25 legal experts across the country and the political spectrum"<sup>67</sup> regarding the Committee's interactions with Ms. Lerner. The opinions released by Ranking Member Cummings largely relied on the same case law and analysis that Rosenberg and Brand provided, and are contrary to the opinion of the House Office of General Counsel.<sup>68</sup> The Ranking Member and his lawyers and consultants are wrong on the facts and the law.

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<sup>61</sup> John D. McKinnon, *Former IRS Official Lerner Gave Interview to DOJ*, WALL ST. J., Mar. 6, 2014, <http://blogs.wsj.com/washwire/2014/03/06/former-irs-official-lerner-gave-interview-to-doj/>.

<sup>62</sup> Patrick Howley, *Oversight lawmaker: Holding Lois Lerner in Contempt Is 'Where We're Moving,'* DAILY CALLER, Mar. 6, 2014, <http://dailycaller.com/2014/03/06/oversight-lawmaker-holding-lois-lerner-in-contempt-the-right-thing-to-do/>.

<sup>63</sup> McKinnon, *supra* note 61.

<sup>64</sup> Letter from Hon. Elijah E. Cummings, Ranking Member, H. Comm. on Oversight & Gov't Reform, to Hon. John Boehner, Speaker, U.S. House of Representatives (Mar. 12, 2014), at 1 [hereinafter *Boehner Letter*], attaching Memorandum from Morton Rosenberg, Legislative Consultant, to Hon. Elijah E. Cummings, Ranking Member, H. Comm. on Oversight & Gov't Reform (Mar. 12, 2014) [hereinafter *Rosenberg Memo*].

<sup>65</sup> *Boehner Letter* at 1, Attachment at 1; Statement of Stanley M. Brand, *The Last Word with Lawrence O'Donnell*, MSNBC, Mar. 12, 2014, *available at* <http://www.msnbc.com/the-last-word/watch/the-fatal-error-of-issas-irs-blowup-193652803735> (last visited Mar. 14, 2014).

<sup>66</sup> *Rosenberg Memo* at 3.

<sup>67</sup> Press Release, Hon. Elijah E. Cummings, Ranking Member, H. Comm. on Oversight and Gov't Reform (Mar. 26, 2014), *available at* <http://democrats.oversight.house.gov/press-releases/twenty-five-independent-legal-experts-now-agree-that-issa-botched-contempt/> (last visited Mar. 27, 2014).

<sup>68</sup> Memorandum, *Lois Lerner and the Rosenberg Memorandum*, Office of General Counsel, United States House of Representatives (Mar. 25, 2014), *available at* <http://oversight.house.gov/release/house-counsel-oversight-committee-can-hold-lerner-contempt/> (last visited Apr. 4, 2014).

**1. Ms. Lerner knew that the Committee had rejected her privilege objection and that, consequently, she risked contempt should she persist in refusing to answer the Committee's questions.**

At the March 5, 2014 proceeding, Chairman Issa specifically made Ms. Lerner and her counsel aware of developments that had occurred since the Committee first convened the hearing (on May 22, 2013): “These [developments] are important for the record and for Ms. Lerner to know and understand.”<sup>69</sup>

Chairman Issa emphasized one particular development: “At a business meeting on June 28, 2013, the committee approved a resolution **rejecting Ms. Lerner’s claim of Fifth Amendment privilege** based on her waiver.”<sup>70</sup> This, of course, was not news to Ms. Lerner or her counsel. The Committee had expressly notified her counsel of the Committee’s rejection of her Fifth Amendment claim, both orally and in writing. For example, in a letter to Ms. Lerner’s counsel on February 25, 2014, the Chairman wrote: “[B]ecause the Committee explicitly **rejected [Lerner’s] Fifth Amendment privilege claim**, I expect her to provide answers when the hearing reconvenes on March 5.”<sup>71</sup> Moreover, the press widely reported the fact that the Committee had formally rejected Ms. Lerner’s Fifth Amendment claim.<sup>72</sup>

Accordingly, it is facially unreasonable for Ranking Member Cummings and his lawyers and consultants to subsequently claim that “at no stage in this proceeding did the witness receive the requisite clear rejections of her constitutional objections.”<sup>73</sup>

The Committee’s rejection of Ms. Lerner’s privilege objection was not the only point that Chairman Issa emphasized before and during the March 5, 2014 proceeding. At the hearing, after several additional references to the Committee’s determination that she had waived her privilege objection, the Chairman *expressly* warned her that she remained under subpoena,<sup>74</sup> and thus that, if she should persist in refusing to answer the Committee’s questions, she risked contempt: “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.”<sup>75</sup>

Ranking Member Cummings and his lawyers and consultants state, repeatedly, that the Committee did not provide “certainty for the witness and her counsel that a contempt prosecution

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<sup>69</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. (Mar. 5, 2014), Tr. at 3.

<sup>70</sup> *Id.* at 4 (emphasis added).

<sup>71</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to William W. Taylor, III, Esq., Zuckerman Spaeder LLP (Feb. 25, 2014), at 2 (emphasis added).

<sup>72</sup> See, e.g., *House panel finds IRS official waived Fifth Amendment right, can be forced to testify in targeting probe*, FOXNEWS.COM, June 28, 2013, available at <http://www.foxnews.com/politics/2013/06/28/republican-led-house-panel-challenges-irs-worker-who-took-fifth-amendment/> (last visited Mar. 14, 2014).

<sup>73</sup> Boehner Letter, at 1; Rosenberg Memo at 3.

<sup>74</sup> The subpoena to Lerner “commanded” her “to be and appear” before the Committee and “**to testify**.” Subpoena, Issued by Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Lois G. Lerner (May 17, 2013) (emphasis in original).

<sup>75</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. (Mar. 5, 2014), Tr. at 5.

was inevitable.”<sup>76</sup> But, that is a certainty that no Member of the Committee can provide. From the Committee’s perspective (and Ms. Lerner’s), there is no guarantee that the Department of Justice will prosecute Ms. Lerner for her contumacious conduct, and there is no guarantee that the full House of Representatives will vote to hold her in contempt. In fact, there is no guarantee that the Committee will make such a recommendation. The collective votes of Members voting their consciences determine both a Committee recommendation and a full House vote on a contempt resolution. And, the Department of Justice, of course, is an agency of the *Executive Branch* of the federal government. All the Chairman can do is what he did: make abundantly clear to Ms. Lerner and her counsel that of which she already was aware, i.e., that if she chose not to answer the Committee’s questions after the Committee’s ruling that she had waived her privilege objection (exactly the choice that she ultimately made), she would risk contempt.

## 2. The Law Does Not Require Magic Words.

The Ranking Member and his lawyers and consultants also misunderstand the law. Contrary to their insistence, the courts do not require the invocation by the Committee of certain magic words. Rather, and sensibly, the courts have required only that congressional committees provide witnesses with a “fair appraisal of the committee’s ruling on an objection,” thereby leaving the witness with a choice: comply with the relevant committee’s demand for testimony, or risk contempt.<sup>77</sup>

The Ranking Member and his lawyers and consultants refer specifically to *Quinn v. United States* in support of their arguments. In that case, however, the Supreme Court held only that, because “[a]t no time did the committee [at issue there] specifically overrule [the witness’s] objection based on the Fifth Amendment,” the witness “was left to guess whether or not the committee had accepted his objection.”<sup>78</sup> Here, of course, the Committee expressly rejected Ms. Lerner’s objection, and specifically notified Ms. Lerner and her counsel of the same. She was left to guess at nothing.

The Ranking Member and his lawyers’ and consultants’ reliance on *Quinn* is odd for at least two additional reasons. First, in that case, the Supreme Court expressly noted that the congressional committee’s failure to rule on the witness’s objection mattered because it left the witness without “a clear-cut choice . . . between answering the question and **risking** prosecution for contempt.”<sup>79</sup> In other words, the Supreme Court expressly rejected the Ranking Member’s view that the Chairman should do the impossible by pronouncing on whether prosecution is “inevitable.”<sup>80</sup> The Supreme Court required that the Committee do no more than what it did: advise Ms. Lerner that her objection had been overruled and thus that she risked contempt.

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<sup>76</sup> *Id.*; Rosenberg Memo at 3-4 (Committee did not make “unequivocally certain” that Lerner’s “failure to respond would result in [a] criminal contempt prosecution”); *id.* at 2 (Chairman did not pronounce that “refusal to respond would result” in a criminal contempt prosecution”) (emphasis added).

<sup>77</sup> *Quinn v. United States*, 349 U.S. 155, 170 (1955).

<sup>78</sup> *Id.* at 166.

<sup>79</sup> *Id.* (emphasis added).

<sup>80</sup> Boehner Letter, Attachment at 4.

Second, *Quinn* expressly rejects the Ranking Member’s insistence on the talismanic incantation by the Committee of certain magic words. The Supreme Court wrote that “**the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee’s ruling, he has no cause to complain.**”<sup>81</sup>

The other cases that the Ranking Member and his lawyers and consultants cite state the same law, and thus serve to confirm the propriety of the Committee’s actions. In *Emspak v. United States*, the Supreme Court—just as in *Quinn*, and unlike here—noted that the congressional committee had failed to “overrule petitioner’s objection based on the Fifth Amendment” and thus failed to provide the witness a fair opportunity to choose between answering the relevant question and “risking prosecution for contempt.”<sup>82</sup> And in *Bart v. United States*, the Supreme Court pointedly distinguished the circumstances there from those here. The Court wrote: “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.”<sup>83</sup>

## V. Conclusion

For all these reasons, and others, Rosenberg’s opinion that “the requisite legal foundation for a criminal contempt of Congress prosecution [against 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” is wrong.<sup>84</sup> There is no constitutional impediment to (i) the Committee approving a resolution recommending that the full House hold Ms. Lerner in contempt of Congress; (ii) the full House approving a resolution holding Ms. Lerner in contempt of Congress; (iii) if such resolutions are approved, the Speaker certifying the matter to the United States Attorney for the District of Columbia, pursuant to 2 U.S.C. § 194; and (iv) a grand jury indicting, and the United States Attorney prosecuting, Ms. Lerner under 2 U.S.C. § 192.

At this point, it is clear Ms. Lerner will not comply with the Committee’s subpoena for testimony. On May 20, 2013, Chairman Issa issued the subpoena to compel Ms. Lerner’s testimony. On May 22, 2013, Ms. Lerner gave an opening statement and then refused to answer any of the Committee’s questions and asserted her Fifth Amendment privilege. On June 28, 2013, the Committee voted that Ms. Lerner waived her Fifth Amendment privilege. Chairman Issa subsequently recalled her to answer the Committee’s questions. When the May 22, 2013 hearing reconvened nine months later, on March 5, 2014, she again refused to answer any of the Committee’s questions and invoked the Fifth Amendment.

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<sup>81</sup> 349 U.S. at 170 (emphasis added).

<sup>82</sup> 349 U.S. at 190, 202 (1955).

<sup>83</sup> 349 U.S. at 219, 223 (1955); *id.* at 222 (stating issue presented as: “whether petitioner was apprised of the committee’s disposition of his objections”).

<sup>84</sup> Rosenberg Memo at 4.

In short, Ms. Lerner has refused to provide testimony in response to the Committee's duly issued subpoena.