

Thank Goodness that Professor Dershowitz is
Wrong About the Fifth Amendment

Written Statement of

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I am a tremendous admirer of Harvard Law Professor Alan Dershowitz. He is a brilliant man, and I had the great pleasure of buying him breakfast the last time he visited my law school. He is right about a great number of things. But with all due respect, he is not right about everything, and sometimes that is a very good thing.



FIG. 1: Professor James Duane chatting with Professor Alan Dershowitz during his most recent visit to Regent Law School.

In her recent appearance before this Committee, Lois Lerner invoked her right to remain silent, although she did not do so until after she first declared that: “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.”

In an online radio interview given shortly after that testimony, Professor Dershowitz opined that Lois Lerner thereby waived her Fifth Amendment privilege to refuse to answer further questions from this Committee, merely because she chose to give this brief “opening statement” in which she made a general denial of any guilt. In his view of the law, as he explained it:

You can’t simply make statements about a subject and then plead the Fifth in response to questions about the very same subject. Once you open the door to an area of inquiry, you have waived your Fifth Amendment right.¹

¹ *Alan Dershowitz: IRS Chief Lerner ‘Can Be Held in Contempt’* (May 22, 2013) (online at <http://www.newsmax.com/Headline/lerner-irs-held-contempt/2013/05/22/id/505922>).

With supreme confidence, Dershowitz concluded that “it’s an open and shut case,” that the “law is as clear as could be,” that Lerner is now in contempt, and that her lawyers were therefore guilty of “malpractice” by allowing her to say what she did.²

Only a few hours before this interview with Professor Dershowitz was broadcast online, I gave a brief explanation of my contrary view that Lerner had not waived her Fifth Amendment privilege.³ In the remarks that follow, I shall briefly amplify those remarks, respectfully explain why Dershowitz is mistaken about the Fifth Amendment, and point out why this Committee and all Americans should be glad that he is wrong.

I. PROFESSOR DERSHOWITZ IS MISTAKEN ABOUT THE FIFTH AMENDMENT

In his recent interview about this Committee’s investigation, Professor Dershowitz did not cite any Supreme Court opinion to support his assertions about Lerner’s supposed waiver, although he did assert that “The law is as clear as could be, that once you open up an area of inquiry, you can’t ‘shut off the spigot’ – I think that’s the metaphor that the Supreme Court has used – once you turn on the faucet, you can’t turn it off when you choose to.”⁴

I am not sure what unnamed Supreme Court case Professor Dershowitz has in mind, although he is not quoting the language of that case correctly if it does exist. A computer search reveals that no decision of the Supreme Court of the United States involving the Fifth Amendment has ever used the word *spigot* or *faucet*.

On the contrary, the law is actually rather clearly settled in favor of Lerner’s claim that she has not waived her Fifth Amendment privilege by the mere act of announcing in general terms that she had done nothing wrong.

There are two well-known situations in which a witness or criminal suspect may waive his or her right against self-incrimination by talking too much. But neither applies to an investigation like the one being conducted by this Committee.

A. The Witness Who Makes Incriminating Admissions.

The Supreme Court has held that a witness cannot claim the Fifth Amendment privilege in the extremely rare case in which the witness voluntarily answers so many questions, and so thoroughly incriminates himself, that the answer to any additional questions on the same topic would not present “a reasonable danger of

² *Id.*

³ *Expert: Lois Lerner Didn't Waive Her Right to Plead the Fifth*, NEW YORK MAGAZINE (May 22, 2013) (online at <http://nymag.com/daily/intelligencer/2013/05/lerner-gowdy-waive-right-5th-amendment-irs.html>)

⁴ Professor Dershowitz, *supra* note 1.

further crimination in light of all the circumstances, including [those] previous disclosures.” *Rogers v. United States*, 340 U.S. 367, 374 (1951) (emphasis added). The Court added that “[s]ince the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, [a witness] cannot invoke the privilege where response to the specific question in issue ... would not *further* incriminate her.” *Id.* at 372-73 (emphasis added). For example, a man who appears before a grand jury and admits that he shot and killed his neighbor, and that he did so knowingly and intentionally and without any legal justification, cannot then plead the Fifth Amendment if the jurors ask him whether he was holding the gun in his right hand or his left hand.

But that has nothing to do with Lois Lerner’s testimony. She did not admit anything incriminating, as Dershowitz concedes, but instead made a general denial of any wrongdoing at all. Professor Dershowitz acknowledges that fact but dismisses it as irrelevant, reasoning that:

Now what [Lerner will] say, or her lawyers will say is, ‘Well, she didn’t say anything incriminating in her opening statement; now they’re asking her to make incriminating statements, so she has the right to remain silent.’ That’s not the way it works. That’s not the way it works. Once you open up a subject matter of inquiry by your own testimony, then you’ve waived your self-incrimination right on that subject matter.⁵

With all due respect, Professor Dershowitz is entirely mistaken in his apparent recollection of the reasoning of the *Rogers* case.⁶ Indeed, the Supreme Court in that case took pains to emphasize that it had reached a different result in a pair of previous opinions, and had held that a different witness had *not* waived his Fifth Amendment privilege in voluntarily supplying some information about a certain matter, because in both cases “the Court stressed the absence of any previous admission of guilt *or incriminating facts* [by that witness].” *Rogers*, 340 U.S. at 373 (internal punctuation and citation omitted).

The Supreme Court thus distinguished its holding in an earlier case, in which it had specifically held that “where the previous disclosure by an ordinary witness is not an

⁵ Dershowitz, *supra* note 1.

⁶ It seems likely that Professor Dershowitz’s mistaken off-the-cuff assertions about waiver of the Fifth Amendment privilege were based on his hazy recollection of the holding in *Rogers*. His remarks in his online interview included a mention of an unnamed Cold-War era case involving Communist Party members, almost exactly like the facts of the *Rogers* case, and his recent book on the Fifth Amendment mentions no case involving the waiver of the Fifth Amendment – or that even arguably supports his claims about Lois Lerner – other than that same decision in *Rogers*. Alan Dershowitz, IS THERE A RIGHT TO REMAIN SILENT? COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11, at page 98 (2008).

actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him.” *McCarthy v. Arndstein*, 262 U.S. 355, 359 (1923). Indeed, the Court specifically cited with approval the holding of the highest court of New York that “a witness by answering questions exonerating himself in general terms from all connection with a criminal transaction” – precisely as Lois Lerner did before this Committee – “does not thereby waive his right to remain silent” as to additional questions that might tend to incriminate him with respect to that same matter. *Id.* at 359 (citing *People v. Forbes*, 143 N.Y. 219).

B. The Defendant Who Voluntarily Testifies at Her Own Trial.

There is a second situation in which a witness may waive his Fifth Amendment rights by saying too much. When a criminal or civil defendant chooses to *voluntarily* testify at his trial in his own defense, it has always been universally understood that he cannot – after testifying fully to his one-sided version of the facts in response to questions from his own lawyer on direct examination – then “take the Fifth” and refuse to answer any questions from the prosecutor on cross-examination. *Brown v. United States*, 356 U.S. 148, 154-55 (1957). This is a reflection of the special nature of the right of cross-examination at civil and criminal trials, and of the inherent unfairness in allowing a witness to potentially interfere with “the function of courts of justice to ascertain the truth.” *Id.* at 156. These concerns apply with special force in a criminal trial, because the Double Jeopardy clause of the Fifth Amendment gives the prosecution only one shot at trying to prove its case against the accused.

But this is not the same as the rule for witnesses like Lois Lerner, who attempted to invoke the Fifth Amendment in response to questions put to her at an investigative hearing where she was ordered to appear under subpoena. *See Brown*, 356 U.S. at 155 (distinguishing between “a witness who is compelled to testify” and the situation “when a witness voluntarily testifies,” and noting that the Fifth Amendment is more readily waived in the latter situation). She did not appear voluntarily, did not give a complete presentation of her side of the case on direct examination, and her generic denial of wrongdoing – even without the equivalent of cross-examination – did not pose the slightest threat to the investigative work of this Committee.

In *Brown*, the Supreme Court noted the special danger that would result at a trial if a witness who voluntarily testified at length were allowed to put her version of the facts before the judge or jury, thus potentially influencing the verdict and the outcome of the case, without allowing herself to be subject to meaningful cross-examination. The Court reasoned that the value of cross-examination in that context would be vastly superior to the unacceptable alternative of “striking the witness’ testimony” and asking the judge or jury to put it out of their minds. *Brown*, 356 U.S. at 156 n.5. But that danger is simply not present in a situation like the one before this Committee, when a witness claims the Fifth Amendment after giving a

generic wrongdoing not at a *trial* but during an *investigative* proceeding such as a police interview, a grand jury proceeding, or a Congressional committee. In such settings the ultimate objective is gathering information – as much as possible – not necessarily reaching any final determinations of fact or liability, and so there is no grave threat of injustice if a witness in such a setting invokes the Fifth Amendment to prevent the government agency or investigator from getting an answer to *every* question it would prefer to have answered. This is especially true in a case like this one, where a Congressional committee has heard nothing from a witness other than a generic denial of wrongdoing; surely no member of this distinguished Committee (unlike the jurors at an ordinary trial) would have the slightest difficulty disregarding those unexplained and conclusory denials in light of her refusal to answer specific questions pertaining to those denials.

II. IT IS A GOOD THING THAT PROFESSOR DERSHOWITZ IS WRONG ABOUT THE FIFTH AMENDMENT

All Americans are fortunate that Professor Dershowitz is wrong about the scope of the Fifth Amendment's protections. But slightly less obvious is the fact that his view of the law, if it were sound, would also be an unfortunate development in the long run from the perspective of this Committee or any other investigative body.

In the short run, it is understandable why some members of this Committee might prefer to find a way to persuade some court, if possible, that Lois Lerner had entirely waived her Fifth Amendment privilege – and could therefore be compelled to answer every conceivable question about every aspect of her work at the Internal Revenue Service – simply because she made a categorical denial of any wrongdoing. That position, if it were sustained by the courts, would probably enable this Committee to obtain much more information from this one witness in this one proceeding. But in the long run, such a broad conception of waiver would actually lead to far more frequent assertions of the privilege, and therefore to the disclosure of less information.

If this Committee could find some way to persuade a federal court to hold Ms. Lerner in contempt on the theory identified by Professor Dershowitz, the work of this and every other investigative body would be undermined in the long run, for competent attorneys would then be entitled – and ethically obligated – to frequently advise their clients to answer certain questions in the following fashion:

On the advice of counsel, I must respectfully decline to answer *any* questions related in any way to the subject matter of this investigation, no matter how tangentially or remotely connected those questions might be to any possible basis that I might incriminate myself, and even if there is no realistic chance that some of your questions in

isolation might pose any risk that I might incriminate myself, because I cannot take the risk under the *Lerner* doctrine that by answering even a few innocuous and generic inquiries I will at some point inadvertently cross over the nebulous line that might later persuade some court that I have said just a little too much, and let just a little bit too much of the proverbial cat out of the bag – even if it is just part of one paw – as Lois Lerner did when she spoke three dozen words back in 2013. I therefore must once again refuse to answer that last question, just like the rest of the questions you have put to me today, to ensure that my answer will not amount to a waiver of the right to answer *other* later questions on the same topic that might pose a genuine risk of self-incrimination.

Needless to say, this is not an accurate statement of the law, nor an accurate description of the way in which witnesses are expected to proceed when asserting their Fifth Amendment privileges. And that is a good thing for every investigative body, for it would ultimately enable investigative bodies like this one to obtain much less information from witnesses, not more.