ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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March 14, 2014

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Ranking Member Cummings:

On March 12, 2014, you 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."[1] Your position was based on an allegedly "independent legal analysis" provided by your lawyer, Stanley M. Brand, and your "Legislative Consultant," Morton Rosenberg.[2]

Mr. Brand and Mr. Rosenberg claim that the prospect of judicial contempt proceedings against 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."[3] You and your lawyers and consultants are wrong on the facts and the law.

The Facts: 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, I specifically directed Lerner and her counsel to certain developments that had occurred since the Committee first convened the hearing (on May

[1] 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].
[2] 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)
[3] *Id.*, Rosenberg Memo at 3.

22, 2013): "These [developments] are important for the record and for Ms. Lerner to know and understand."[4]

Indeed, I 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."[5] This, of course, was not news to Lerner or her counsel. The Committee had expressly notified Lerner's counsel of the Committee's rejection of her Fifth Amendment claim, both orally and in writing. For example, in a letter to Lerner's counsel on February 25, 2014, on which you were copied, I 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."[6] Moreover, the press widely reported the fact that the Committee had formally rejected Lerner's Fifth Amendment claim.[7]

Accordingly, it is facially unreasonable for you and your lawyers and consultants to now claim that "at no stage in this proceeding did the witness receive the requisite clear rejections of her constitutional objections."[8]

There is more: The Committee's rejection of Lerner's privilege objection was not the only point that I emphasized before and during the March 5, 2014, proceeding. At the hearing, after several additional references to the Committee's determination that Lerner had waived her privilege objection, I *expressly* warned her that she remained under subpoena,[9] 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."[10]

You and your lawyers and consultants say, repeatedly, that our Committee did not provide "certainty for the witness and her counsel that a contempt prosecution was inevitable."[11]

But, as a longtime Member of the House of Representatives, you know as well as I do that that is a certainty that neither I, nor anyone else, can provide. I cannot guarantee that the Department of Justice will prosecute Lerner for her contumacious conduct, nor can I guarantee that the full House of Representatives will vote her into contempt; indeed, I cannot even

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[4] *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.
[5] *Id.* at 4 (emphasis added).
[6] Letter from 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).
[7] *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).
[8] Boehner Letter, Rosenberg Memo at 3.
[9] As you know, our Committee's subpoena to Lerner "commanded" her "to be and appear" before the Committee and "**to testify**." Subpoena, Issued by Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Lois Lerner, May 17, 2013. (emphasis in original).
[10] *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.
[11] *Id.*, Rosenberg Memo at 4; *id.* at 3, Rosenberg Memo at 3 (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)).

guarantee that this Committee will make such a recommendation. A Committee recommendation, and a full House vote on a contempt resolution, are both determined by the collective votes of our colleagues, each voting his or her conscience. And the Department of Justice, of course, is an agency of the *Executive Branch* of the federal government. All I can do is what I did: Make abundantly clear to Lerner and her counsel that to 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.

The Law: Magic words are not required.

You and your lawyers and consultants also misunderstand the law. Contrary to your 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.[12]

You and your lawyers and consultants refer specifically to *Quinn v. United States*. 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."[13] Here, of course, the Committee expressly rejected Lerner's objection, and specifically notified Lerner and her counsel of the same: She was left to guess at nothing.

You and your 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." (Emphasis added).[14] In other words, the Supreme Court expressly rejected your view that I should do the impossible by pronouncing on whether prosecution is "inevitable."[15] The Supreme Court required that our Committee do no more than what we did: advise Lerner that her objection had been overruled and thus that she risked contempt.

Second, *Quinn* expressly rejects your insistence on the talismanic incantation by the Committee of certain magic words: "**[T]he 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.**"[16]

The other cases that you and your lawyers and consultants cite state the same law, and thus serve to confirm the propriety of the Committee's actions. In *Empsak v. United States*, the Supreme Court—just as in *Quinn*, and unlike here—noted that the congressional committee had

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[12] *Quinn v. United States*, 349 U.S. 155, 170 (1955).
[13] *Id.* at 166.
[14] *Id.* (emphasis added).
[15] Boehner Letter, Attachment at 4.
[16] 349 U.S. at 170 (emphasis added).

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."[17] And in *Bart v. United States*, the Supreme Court pointedly distinguished the circumstances there from those here: "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."[18]

Your tactics undermine the Committee's investigative prerogatives and harm the institutional interests of the House of Representatives.

Congressional oversight of executive branch agencies, programs and officers is fundamental—indeed essential—to our tripartite system of checks and balances. And all Americans—but especially the Ranking Member of the principal investigative committee of the U.S. House of Representatives—should find it unsettling that the IRS scrutinized certain applicants for tax-exempt status based on their political beliefs. However, rather than pursuing the facts where they lead—which is the function of effective congressional oversight—you have made yourself an obstacle to effective congressional oversight, in effect, a defense counsel for Lerner and others who acted to deprive Americans of their constitutionally-guaranteed rights.

Even though the White House helped orchestrate your ascension to Ranking Member,[19] I have encouraged, and continue to encourage, you to subordinate your political loyalties to the institutional interests of the Committee and the House, especially in cases like this where obstructing the Committee's work risks permanently disadvantaging Congress in its interactions with the Executive Branch. The Committee's investigation of the IRS is a serious matter, and it behooves all of us to take seriously our responsibility to protect the Constitutional rights of all Americans. I hope you will join me, as we move forward, in finding constructive and effective ways to complete the Committee's investigation.

Sincerely,

Darrell Issa
Chairman

cc: The Honorable John Boehner
Speaker of the House of Representatives

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[17] 349 U.S. 190, 202 (1955).

[18] 349 U.S. 219, 223 (1955); *id.* at 222 (stating issue presented as: "whether petitioner was apprised of the committee's disposition of his objections").

[19] *See, e.g. id.*; *Ed Towns Steps Down, Sources Blame White House*, N.Y. DAILY NEWS, Dec. 16, 2010; Brian Beutler, *Pelosi Power Play Doomed Towns on Oversight Committee,* TALKING POINTS MEMO, Dec. 16, 2010, *available at* http://talkingpointsmemo.com/dc/pelosi-power-play-doomed-towns-on-oversight-committee (reporting that "[Democratic] congressional leadership and the White House, both . . . want the ranking member to be a bulldog, who can stand toe to toe with incoming chairman, Rep. Darrell Issa.").