



JASON KORNMEHL

**WAIVER OF THE PRIVILEGE AGAINST  
SELF-INCRIMINATION IN  
CONGRESSIONAL INVESTIGATIONS:  
WHAT CONGRESS, WITNESSES, AND  
LAWYERS CAN LEARN FROM  
THE IRS SCANDAL**

May 8, 2015

**Abstract:** “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.” These few sentences uttered by Lois Lerner, the former head of the *IRS* Tax Exempt Organizations Division, ignited a debate among criminal law scholars over whether Lerner waived her Fifth Amendment privilege against self-incrimination. This Article analyzes what constitutes a waiver of the privilege against self-incrimination in the context of congressional investigations and asserts that Lois Lerner likely waived her right to remain silent. An examination of Lerner’s testimony before the House Oversight Committee illustrates that the issue of Fifth Amendment waivers in congressional hearings is complicated and highly fact-specific. Thus, this Article proposes measures that Congress should adopt to ensure that complex questions regarding waiver do not arise in future congressional hearings. In addition, this Article offers guidance to lawyers who represent clients in congressional investigations by suggesting how witnesses should invoke their right to remain silent in congressional hearings.

**Author:** Jason Kornmehl is a 2014 graduate of The George Washington University Law School.

# WAIVER OF THE PRIVILEGE AGAINST SELF- INCRIMINATION IN CONGRESSIONAL INVESTIGATIONS: WHAT CONGRESS, WITNESSES, AND LAWYERS CAN LEARN FROM THE IRS SCANDAL

*Jason Kornmehl\**

*There is no other agency in this country that directly touches the lives of more Americans, nor is there any agency which strikes more fear into their hearts. The threat of an audit, the awesome power of the IRS looms like the Sword of Damocles over the heads of taxpayers.<sup>1</sup>*

*Senator William V. Roth, Jr.*

## INTRODUCTION



The Internal Revenue Service's ("IRS" or "the Agency") targeting of conservative groups seeking tax-exempt status has been declared a "moment of reckoning."<sup>2</sup> Indeed, politicians from both sides of the aisle weighed in on the scandal. Congressman Darrell Issa, then-Chairman of the House Oversight and Government Reform Committee, which held hearings on the scandal, stridently called for "accountability."<sup>3</sup> Senator Susan Collins, a mod-

---

\* Jason Kornmehl is a 2014 graduate of The George Washington University Law School.

<sup>1</sup> *Practices and Procedures of the Internal Revenue Service: Hearing Before the S. Comm. on Fin.*, 105th Cong. 1 (1997).

<sup>2</sup> David B. Rivkin, Jr. & Lee A. Casey, *The True Lesson of the IRS Scandal*, WALL ST. J. (Aug. 22, 2013), <http://www.wsj.com/articles/SB10001424127887323477604579001263134291446>.

<sup>3</sup> Juliet Eilperin, *IRS Targeted Groups Critical of Government, Documents from Agency Probe Show*, WASH. POST, May 12, 2013, [http://www.washingtonpost.com/politics/irs-targeted-groups-critical-of-government-documents-from-agency-probe-show/2013/05/12/bb38e5bc-bb24-11e2-97d4-a479289a31f9\\_story.html](http://www.washingtonpost.com/politics/irs-targeted-groups-critical-of-government-documents-from-agency-probe-show/2013/05/12/bb38e5bc-bb24-11e2-97d4-a479289a31f9_story.html).

erate Republican, labeled the scandal “absolutely chilling.”<sup>4</sup> Even President Barack Obama stated that the IRS’s actions, if true, are “outrageous” and would not be tolerated.<sup>5</sup> However, a significant controversy regarding what constitutes a waiver of the Fifth Amendment’s right against self-incrimination evolved from this larger scandal.

On May 14, 2013, the U.S. Treasury Inspector General for Tax Administration released a report finding that the IRS used “inappropriate criteria to identify organizations applying for tax-exempt status.”<sup>6</sup> The Inspector General’s (“IG”) Report revealed that the IRS targeted conservative groups applying for tax-exempt status as far back as 2010.<sup>7</sup> On May 10, 2013, four days before the public release of the IG Report, the Director of the IRS Exempt Organizations division, Lois Lerner, apologized for the Agency’s actions at an American Bar Association conference in an apparent attempt to get out ahead of the IG Report.<sup>8</sup> The apology came in response to a “planted question” by Celia Roady, a tax attorney in private practice and former colleague of Lerner’s, at the ABA’s Tax Section’s Exempt Organizations Committee Meeting.<sup>9</sup> In response to the question, Lerner contended that the IRS targeting had not been centrally planned and had been done by lower-level IRS employees in the Cincinnati office.<sup>10</sup>

Following the IG’s report, the House Oversight and Government Reform Committee began an investigation into the IRS and subpoenaed Lerner to testify at a congressional hearing.<sup>11</sup> Lerner’s attorney, William Taylor, III, wrote a letter to Congressman Issa, Chairman of the House Oversight Committee, asserting

---

<sup>4</sup> *Id.*

<sup>5</sup> Aaron Blake, *Obama: IRS Wrongdoing is ‘Outrageous,’* Post Politics, WASH. POST, May 13, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/05/13/obama-irs-wrongdoing-is-outrageous/>.

<sup>6</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013), available at <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> Abby D. Phillip, *IRS Planted Question About Tax Exempt Groups*, ABC NEWS, (May 17, 2013, 6:49 PM), <http://abcnews.go.com/blogs/politics/2013/05/irs-planted-question-about-tax-exempt-groups>.

<sup>9</sup> *See id.* (reporting Roady’s admission that Lerner had called her up the previous day to ask whether she would pose a question after Lerner’s remarks). Steven Miller, then-Acting IRS Commissioner, later testified to Congress that he knew about the planted question when he discussed with Lerner how she was to make the apology at the ABA meeting. *See* Gregory Korte, *Planted Question Gambit Backfires on IRS Officials*, USA TODAY, May 18, 2013, <http://www.usatoday.com/story/news/politics/2013/05/18/irs-scandal-planted-question/2216747/>.

<sup>10</sup> Frank James, *Lois Lerner’s Brief and Awful Day on Capitol Hill*, NPR (May 22, 2013), <http://www.npr.org/blogs/itsallpolitics/2013/05/22/186102554/lois-lerners-brief-and-awful-day-on-capitol-hill>.

<sup>11</sup> *See* Lauren French, *Lois Lerner Still Hill’s Favorite Piñata*, POLITICO (Sept. 24, 2013), <http://www.politico.com/story/2013/09/lois-lerner-retires-irs-97217.html> (characterizing Lerner as “a central figure” in the IRS scandal).

that Lerner would invoke the Fifth Amendment and would not answer any questions.<sup>12</sup> In light of the fact that Lerner planned to invoke her right against self-incrimination, Taylor maintained that Lerner should be excused from appearing because the hearing would “have no purpose other than to embarrass or burden her.”<sup>13</sup> Congressman Issa responded in a letter to Taylor, disputing this contention and asserting that the subpoena to compel Lerner’s testimony would remain in effect.<sup>14</sup> Lerner then appeared before the Committee on May 22, 2013. In her opening remarks, Lerner stated:

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, in 2006, I was promoted to be Director of that office.

Exempt Organizations oversees about 1.6 million tax-exempt organizations and processes over 60,000 applications for tax exemption a 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 IGs released a report finding that the Exempt Organizations field office in Cincinnati, Ohio, used inappropriate criteria to identify for further review applications from 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 investiga-

---

<sup>12</sup> Richard Simon & Joseph Tanfani, *Top IRS Official Will Invoke 5th Amendment*, L.A. TIMES, May 21, 2013, <http://articles.latimes.com/2013/may/21/news/la-pn-top-irs-official-fifth-amendment-20130521>.

<sup>13</sup> *Id.*

<sup>14</sup> H.R. REP. NO. 113-415, at 9 (2014), available at <https://www.congress.gov/113/crpt/hrpt415/CRPT-113hrpt415.pdf> (quoting Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to William W. Taylor, III, Zuckerman Spaeder LLP (May 21, 2013)) (“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. § 6002; and the possibility that the Committee will agree to hear her testimony in executive session.”).

tion 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.

And while I would very much like to answer the committee's questions today, I have 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>15</sup>

Lerner's brief statement on the record declaring her innocence prompted some members of the Committee to question whether Lerner had waived her right to invoke the Fifth. Congressman Issa retorted, "[a]t this point I believe you have not asserted your rights, but, in fact, have effectively waived your rights."<sup>16</sup> In addition, Congressman Trey Gowdy, a former state and federal prosecutor,<sup>17</sup> angrily declared that Lerner waived her rights. He averred:

Mr. [Elijah] Cummings [D., Md.] 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

---

<sup>15</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 22 (2013), available at <http://oversight.house.gov/wp-content/uploads/2014/02/2013-05-22-Ser.-No.-113-33-FC-The-IRS-Targeting-Americans-for-Their-Pol-Beliefs.pdf> [Hereinafter *Lerner Statement*] (statement of Lois Lerner).

<sup>16</sup> *Id.*

<sup>17</sup> Press Release, H. Comm. on Oversight & Gov't Reform, *Lerner Waived Her 5th Amendment Right* (June 28, 2013), <http://oversight.house.gov/release/oversight-committee-lerner-waived-her-5th-amendment-right/>.

right of Fifth Amendment privilege by issuing an opening statement. She ought to stand here and answer our questions.<sup>18</sup>

This impassioned proclamation was met with a smattering of applause from the audience.<sup>19</sup> However, Elijah Cummings, the ranking member of the House Oversight Committee and an attorney, replied that he said he “would like to see [the hearing] run like a Federal court,” but the hearing was “not a Federal [c]ourt, and [Lerner] does have the right [to remain silent].”<sup>20</sup> After Lerner asserted the Fifth for a second time, Congressman Issa dismissed Lerner subject to recall and stated he would “seek specific counsel on the question of whether or not the constitutional right of the Fifth Amendment has been properly waived.”<sup>21</sup> As a result, the issue of whether Lerner properly invoked her Fifth Amendment right against self-incrimination was embedded within the larger issue of whether high-ranking IRS officials knew of inappropriate targeting of conservative groups.

Subsequently, on a 22-17 vote, the Committee on Oversight and Government Reform passed a resolution declaring that Lerner had waived her right against self-incrimination.<sup>22</sup> Following this resolution, the Committee informed Lerner that the May 22, 2013 hearing would reconvene in March 2014 and that the subpoena that compelled her to testify remained in effect.<sup>23</sup> At the March 2014 hearing, Lerner again asserted her Fifth Amendment privilege.<sup>24</sup> The Committee then adopted a resolution recommending the full House of Representatives find Lerner in contempt of Congress for refusing to testify.<sup>25</sup> Eventually, the full House voted 231-187 to find Lerner in contempt and the matter was referred to the U.S. Attorney’s Office for the District of Columbia.<sup>26</sup> However, on March 31, 2015, the U.S. Attorney for the District of Columbia, Ronald Machen, wrote Speaker of the House of Representatives John Boehner notifying him that his office would not present Lois

---

<sup>18</sup> *Lerner Statement*, *supra* note 15, at 23.

<sup>19</sup> Oversightandreform, *IRS’ Lois Lerner Pleads the Fifth*, YOUTUBE (May 22, 2013), <http://www.youtube.com/watch?v=d65f4ySkWos>.

<sup>20</sup> *Lerner Statement*, *supra* note 15, at 23. Had Lerner’s statement been uttered by a defendant on the stand in a criminal trial, it would have absolutely constituted a waiver of the privilege against self-incrimination. *See infra* Part II.C.

<sup>21</sup> *Lerner Statement*, *supra* note 15, at 24.

<sup>22</sup> H.R. REP. NO. 113-415, at 6–7 (2014), *available at* <https://www.congress.gov/113/crpt/hrpt415/CRPT-113hrpt415.pdf> (describing the resolution).

<sup>23</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), *available at* <http://oversight.house.gov/wp-content/uploads/2014/02/2014-02-25-DEI-to-Taylor-re-Lois-Lerner-recall-03-05-14.pdf>.

<sup>24</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (Mar. 5, 2014), *available at* <http://oversight.house.gov/wp-content/uploads/2014/02/2013-05-22-Ser.-No.-113-33-FC-The-IRS-Targeting-Americans-for-Their-Pol-Beliefs.pdf>.

<sup>25</sup> H.R. REP. NO. 113-415.

<sup>26</sup> H.R. Res. 574, 113th Cong. (2014) (enacted).

Lerner's contempt citation to a federal grand jury, ending any potential criminal prosecution against Lerner for contempt of Congress.<sup>27</sup>

Similar to the reaction to the broader IRS scandal, the discrete legal issue of whether Lerner properly invoked the Fifth has generated a wide array of views. Some legal scholars have maintained that Lerner absolutely waived the privilege and that the "law is as clear as it could be" on Fifth Amendment waivers.<sup>28</sup> Conversely, other commentators assert that Lerner did not waive the privilege and such selective invocations of waiver "happen all the time" in congressional hearings.<sup>29</sup> On the other hand, many observers emphasize that it is not clear whether Lerner waived her Fifth Amendment right.<sup>30</sup>

This is not the first time the question of what constitutes waiver of Fifth Amendment rights has arisen in a congressional hearing. In 2002, Bernard Ebbers, the former chief executive of WorldCom, appeared before the House Financial Services Committee and made a brief opening statement. Similar to Lerner, Ebbers de-

---

<sup>27</sup> Letter from Ron Machen, U.S. Attorney for D.C., to Hon. John Boehner, Speaker, House of Representatives (Mar. 31, 2015), available at <http://apps.npr.org/documents/document.html?id=1699732-letter-to-honorable-john-boehner>. The U.S. Attorney's Office often declines to refer contempt citations of executive branch officials to a grand jury. See TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34114, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: A SKETCH 9 n.64 (1995), available at <http://fas.org/sgp/crs/misc/95-464.pdf> (refusing to present EPA administrator Anne Gorsuch's contempt of Congress citation to the grand jury); Letter from James M. Cole, Deputy Attorney Gen., to Hon. John Boehner, Speaker, House of Representatives (June 28, 2012), available at <http://oversight.house.gov/wp-content/uploads/2012/08/June-28-2012-Cole-to-Boehner.pdf>. (refusal to present Attorney General Eric Holder's congressional contempt citation resulting from investigation into "Operation Fast & Furious" to a grand jury); Letter from Michael B. Mukasey, Attorney Gen., to Hon. Nancy Pelosi, Speaker, House of Representatives (Feb. 29, 2008), available at <https://www.documentcloud.org/documents/373620-mukasey-letter-to-pelosi-feb-29-2008.html> (advising that the U.S. Attorney would not bring congressional contempt citations of Harriet Miers or Joshua Bolton to a grand jury after their refusal to comply with subpoenas related to investigation of dismissal of U.S. Attorneys). See also *Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 114-15 (1984) (concluding that a U.S. Attorney has discretion whether to refer a contempt of Congress citation to a grand jury or otherwise prosecute an executive branch official who is carrying out the President's direction to assert executive privilege).

<sup>28</sup> Justin Sink, *Dershowitz: IRS Official Lerner "Can be Held in Contempt" of Congress*, THE HILL (May 23, 2013, 3:13 PM), <http://thehill.com/blogs/blog-briefing-room/news/301557-dershowitz-irs-chief-lerner-can-be-held-in-contempt-of-congress>.

<sup>29</sup> See, e.g., Dan Amira, *Expert: Lois Lerner Didn't Waive Her Right to Plead the Fifth*, N.Y. MAG., (May 22, 2013, 1:26 PM), <http://nymag.com/daily/intelligencer/2013/05/lerner-gowdy-waive-right-5th-amendment-irs.html> (quoting James Duane, a Fifth Amendment expert at Regent University).

<sup>30</sup> See, e.g., Hans von Spakovsky, *Did the IRS's Lois Lerner Waive Her Fifth Amendment Rights?*, THE DAILY SIGNAL, (May 24, 2013), <http://dailysignal.com/2013/05/24/did-the-irss-lois-lerner-waive-her-fifth-amendment-rights/> (claiming that "there does not seem to be a clear-cut answer"); Orin Kerr, *Can A Congressional Witness Deny Guilt and Then Plead the Fifth?*, VOLOKH CONSPIRACY, (May 22, 2013, 6:15 PM), <http://www.volokh.com/2013/05/22/can-a-congressional-witness-deny-guilt-and-then-plead-the-fifth/> (characterizing the issue of Lerner's waiver "at least a somewhat open question").

clared his innocence in his opening remarks before invoking the Fifth. He stated: "I believe that no one will conclude that I engaged in any criminal or fraudulent conduct during my tenure at WorldCom."<sup>31</sup> Shortly after Ebbers invoked his right to remain silent, then-Congressman Max Sandlin similarly admonished "this new theory of selective Fifth Amendment."<sup>32</sup> Just as legal experts were divided on the waiver question after Lerner testified, they were also divided on the waiver question after Ebbers testified.<sup>33</sup> With two recent unresolved instances disputing "selective Fifth Amendment waiver," the question of what constitutes a waiver in congressional hearings should be addressed before it has a chance to reappear in future hearings.

This Article analyzes what constitutes waiver of the privilege against self-incrimination in the context of congressional hearings and examines the recent IRS scandal. Furthermore, this Article asserts that Lois Lerner likely waived her privilege against self-incrimination based on the specific exculpatory remarks in her opening statement. Part I of this Article provides a historical overview of the Fifth Amendment and presents background information on the role of the Fifth Amendment in congressional hearings. Part II explains the Article's finding that Lerner likely waived her Fifth Amendment right to remain silent. Part III addresses the course of action Lerner should have taken at the House Oversight hearing. Finally, Part IV proposes a rule and principle Congress should heed when it arranges for future witnesses to testify at congressional hearings.

#### I. HISTORICAL OVERVIEW OF THE FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION AND THE AMENDMENT'S CONTEMPORARY ROLE IN CONGRESSIONAL HEARINGS

The Fifth Amendment's privilege against self-incrimination is an extremely important constitutional provision.<sup>34</sup> The Fifth Amendment's Self-Incrimination Clause intersects with congressional hearings when witnesses in-

---

<sup>31</sup> *Wrong Numbers: The Accounting Problems at WorldCom: Hearing Before the H. Comm. on Fin. Servs.*, 107th Cong. 20–21 (2002), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107hhrg83079/pdf/CHRG-107hhrg83079.pdf>.

<sup>32</sup> *Id.*

<sup>33</sup> See Adam Liptak, *Legal Journal; Not Answering Can Raise Lots of Questions*, N.Y. TIMES, July 10, 2002, <http://www.nytimes.com/2002/07/10/business/legal-journal-not-answering-can-raise-lots-of-questions.html> (noting legal scholars' opinions on whether Ebbers's statements amounted to a waiver). In contrast to Lerner, the House Financial Services Committee did not initiate any formal action proclaiming that Ebbers waived his Fifth Amendment privilege or pass a resolution to hold him in contempt of Congress. See JERRY W. MARKHAM, *A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS FROM ENRON TO REFORM* 345 (2006).

<sup>34</sup> See *Kastigar v. United States*, 406 U.S. 441, 444 (1972) (noting that the self-incrimination privilege "marks an important advance in the development of our liberty"); *Twining v. New Jersey*, 211 U.S. 78, 91 (1908) (describing protection against self-incrimination as "a privilege of great value"); *Brown v. Walker*, 161 U.S. 591, 610 (1896) (stating that the "[self-incrimination] constitutional provision . . . is justly regarded as one of the most valuable prerogatives of the citizen").



voke their right to remain silent. Because congressional hearings play a critical role in congressional investigations, there is considerable tension when witnesses invoke the privilege against self-incrimination before legislative committees.

### A. *The Fifth Amendment*

The Fifth Amendment provides, in pertinent part, “No person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>35</sup> A witness may properly invoke the privilege against self-incrimination when the witness reasonably believes that a disclosure could be used in a criminal prosecution or could lead to other evidence that might be so used.<sup>36</sup> Although it is a “cornerstone of American criminal procedure,” it is not entirely clear how the Self-Incrimination Clause of the Fifth Amendment found its way into the U.S. Constitution.<sup>37</sup> The privilege against self-incrimination is not found in the Magna Carta, the Petition of Right, the Bill of Rights of 1689, or any other canonical English sources from which the United States draws many of its constitutional guarantees.<sup>38</sup> Two constitutional law scholars have characterized the Self-Incrimination Clause as “an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights.”<sup>39</sup> Additionally, as evidenced by the unsettled question of whether Lois Lerner waived her right against self-incrimination, the Fifth Amendment “continues to confound and confuse.”<sup>40</sup>

Despite the Self-Incrimination Clause’s “obscure beginnings,”<sup>41</sup> it is regarded as a “fundamental . . . part of our constitutional fabric”<sup>42</sup> and “a sacred principle of United States law.”<sup>43</sup> For example, the Supreme Court incorporated the Self-Incrimination Clause of the Fifth Amendment, extending its application to individual states. In *Malloy v. Hogan*, the Court held that a defendant’s Fifth Amendment right against self-incrimination was applicable within state courts as

---

<sup>35</sup> U.S. CONST. amend. V.

<sup>36</sup> See *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (stating the privilege against self-incrimination “not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime”); see also *Mason v. United States*, 244 U.S. 362, 365 (1917) (holding that Fifth Amendment “protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer”).

<sup>37</sup> Michael Edmund O’Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2445 (2002) (“The reality is that the privilege against self-incrimination enjoys somewhat ambiguous historical roots.”).

<sup>38</sup> See *De Luna v. United States*, 308 F.2d 140, 144 (5th Cir. 1962). Writing for the court, Judge John Minor Wisdom stated that the “first major constitutional document” in which the Self-Incrimination Clause appeared was the Virginia Bill of Rights in 1776. *Id.*

<sup>39</sup> Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857 (1995).

<sup>40</sup> *Id.* at 858.

<sup>41</sup> *De Luna*, 308 F.2d at 144.

<sup>42</sup> *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 56 n.5 (1964).

<sup>43</sup> Kalah Auchincloss, Note, *Congressional Investigations and the Role of Privilege*, 43 AM. CRIM. L. REV. 165, 195 (2006).

well as federal courts.<sup>44</sup> The Court furthered this point by stating that it had previously rejected the notion that the individual guarantees of the Bill of Rights should be applied to the States in a “watered-down, subjective” manner by way of the Fourteenth Amendment.<sup>45</sup>

In fact, the Fifth Amendment privilege against compulsory self-incrimination is so significant to the notion of justice that it can be asserted in a wide array of proceedings. The Supreme Court has found that the privilege can be invoked in civil, criminal, administrative, judicial, investigatory, and adjudicatory proceedings.<sup>46</sup> Accordingly, the Fifth Amendment right to remain silent can be invoked in congressional hearings.<sup>47</sup> In *Watkins v. United States*, the Supreme Court explicitly recognized that “[w]itnesses cannot be compelled to give evidence against themselves” even in a congressional hearing because “[t]he Bill of Rights is applicable to investigations as to all forms of governmental action.”<sup>48</sup> Because the privilege against self-incrimination can be invoked in a diverse array of proceedings,<sup>49</sup> and is incorporated against the states,<sup>50</sup> it plays a crucial role in shielding incriminating witness testimony.

### *B. Congressional Investigations*

Inherent and integral to Congress's authority to legislate pursuant to Article I is the power to investigate.<sup>51</sup> Moreover, not only may Congress as a whole

---

<sup>44</sup> 378 U.S. 1, 3 (1964).

<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Kastigar v. United States*, 406 U.S. 441, 445 (1972); see also *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966) (holding suspects in custody have the right to assert the privilege against self-incrimination as well as the right to be informed of that privilege through warnings).

<sup>47</sup> See Auchincloss, *supra* note 43, at 194 (asserting that “[r]espect for an individual’s private thoughts remains a significant interest both in a congressional setting and in a court, such that the two are effectively equivalent forums”). This sweeping reading of the Self-Incrimination Clause has been labeled “atextual” because the clause itself seems to limit exercise of the privilege to testimony adduced in criminal cases—“No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V (emphasis added); see also O’Neill, *supra* note 37, at 2470 (“[T]he clause appears to be limited to ‘criminal case[s],’ which would not appear to extend to legislative inquiries.”).

<sup>48</sup> 354 U.S. 178, 188 (1957) (overturning petitioner’s conviction for contempt of Congress because inquiry by House Un-American Activities Committee was not in furtherance of a legitimate task of Congress). Additionally, some state courts have found that the privilege against self-incrimination can be invoked in their own state legislatures. *E.g.*, *Brigs v. Mackellar*, 2 Abb. Pr. 30, 62 (N.Y. Ct. C.P. 1855) (maintaining that a witness appearing before a state legislative committee did not have to “answer any questions that would tend to criminate him”); see generally O’Neill, *supra* note 37, at 2519–23 (examining state court decisions that have considered the application of the privilege to state legislative inquiries). It is interesting to note that *Brigs v. Mackellar* “apparently ranks as the first decision dealing with legislative investigations [both state and federal] and compelled self-incrimination.” *Id.* at 2519.

<sup>49</sup> See *Kastigar*, 406 U.S. at 445; see also *Miranda*, 384 U.S. at 467–68; *Watkins*, 354 U.S. at 188.

<sup>50</sup> *Malloy v. Hogan*, 378 U.S. 1, 3 (1964).

<sup>51</sup> See *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 504 (1975); see also *Watkins*, 354 U.S. at 187 (1957) (asserting that Congress’s power “to conduct investigations is in-

employ investigations as a tool of legislating, congressional committees and subcommittees may also utilize the power to investigate.<sup>52</sup> Since 1792, congressional investigations have played a prominent role in this country's history. The first congressional inquiry took place in 1792 when the House investigated Major General Arthur St. Clair for the massacre of American troops under his command in the Northwest Territories.<sup>53</sup> Other notable congressional investigations over the years include the Teapot Dome Scandal,<sup>54</sup> the House Un-American Activities Committee's investigation into Communist activity and alleged disloyalty,<sup>55</sup> and Watergate.<sup>56</sup>

Even today, congressional investigations play a prominent role in the legislative process.<sup>57</sup> The Supreme Court has acknowledged that Congress has broad investigatory authority.<sup>58</sup> A particularly salient power that Congress uses

---

herent in the legislative process"); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”).

<sup>52</sup> The Court has asserted that “[t]o conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the ‘integrity of the legislative process.’” *Eastland*, 421 U.S. at 505 (citation omitted).

<sup>53</sup> JOHN C. GRABOW, *CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE* 19 (1988).

<sup>54</sup> William Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 792 n.75 (2004).

<sup>55</sup> H.R. REP. NO. 80-592 (1947)

<sup>56</sup> H.R. COMM. ON THE JUDICIARY, 93D CONG., *IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES*, H.R. REP. NO. 93-1305 (1974).

<sup>57</sup> In 2013 alone, Congress launched a multitude of major investigations. Five committees in the House of Representatives—Armed Services, Foreign Affairs, Intelligence, Judiciary, and Oversight and Government Reform—initiated their own inquiries into the attack on the American diplomatic mission in Benghazi, Libya. See HOWARD P. MCKEON, CHAIRMAN, H.R. COMMITTEE ON ARMED SERVICES, ET AL., *INTERIM PROGRESS REPORT FOR THE MEMBERS OF THE HOUSE REPUBLICAN CONFERENCE ON THE EVENTS SURROUNDING THE SEPTEMBER 11, 2012 TERRORIST ATTACKS IN BENGHAZI, LIBYA* (Apr. 23, 2012), available at <http://www.speaker.gov/sites/speaker.house.gov/files/documents/libya-progress-report.pdf>. Additionally, three committees from both chambers of Congress probed developing problems with the implementation of “Obamacare.” See generally *Federal Implementation of Obamacare: Concerns of State Governments: Joint Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013), available at <http://oversight.house.gov/wp-content/uploads/2014/02/2013-09-18-Ser.-No.-113-63-Jt.-SC-EG-and-EP-Fed-Implementation-of-Obamacare.pdf>; *PPACA Implementation Failures: What's Next? Hearing Before the H. Comm. on Energy & Commerce*, 113th Cong. (2013), available at <http://docs.house.gov/meetings/IF/IF14/20131211/101581/HHRG-113-IF14-20131211-SD001.pdf>; *Health Ins. Exchs. and Ongoing State Implementation of the Patient Protection and Affordable Care Act: Hearing Before the S. Comm. on Health, Educ., Labor & Pension*, 113th Cong. (2013), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg81489/html/CHRG-112shrg81489.htm>.

<sup>58</sup> See *Barenblatt v. United States*, 360 U.S. 109, 111 (1958) (contending that the “scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution”); see also *Watkins v. United States*, 354 U.S. 178, 187 (1957) (acknowledging that the “power [to investigate] is broad”).

when it conducts investigations is the power to depose witnesses.<sup>59</sup> The Supreme Court has also recognized that the power to subpoena is an “indispensable ingredient” of the legislative and investigatory powers granted to Congress.<sup>60</sup> Some commentators even contend that “[a]lthough both the judicial and the legislative use of subpoenas serves vital interests, the legislative need is the more essential of the two, since initially more interests are involved in a legislative determination than are involved in a court decision.”<sup>61</sup> Congress’s power to subpoena is backed up by the contempt power.<sup>62</sup> If a witness improperly refuses to produce evidence or testify, the witness may be held in contempt of Congress,<sup>63</sup> which can be a misdemeanor criminal offense.<sup>64</sup>

Congress also has the ability to grant immunity when it conducts an investigation.<sup>65</sup> Because Congress cannot hold a witness in contempt for merely invoking the right against self-incrimination,<sup>66</sup> Congress may grant a witness immunity to compel him to testify. Congress’s ability to grant immunity is a tremendous power in light of two decisions stemming from the Iran-Contra af-

---

<sup>59</sup> MORTON ROSENBERG, CONG. RESEARCH SERV., NO. 95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE, AND PROCEDURE OF CONGRESSIONAL INQUIRY 7 (1995), available at <http://fas.org/spp/crs/misc/95-464.pdf> (noting that “with more frequency in recent years, congressional committees have utilized staff conducted depositions as a tool in exercising the investigatory power”). As an example, in 1992 the House October Surprise Task Force’s bipartisan staff of lawyers and investigators “conducted over 230 formal interviews and depositions” while investigating accusations that the Reagan presidential campaign had sought to negotiate a solution to the Iran hostage crisis to prevent President Jimmy Carter from receiving an electoral boost from the possible release of the hostages before the 1980 election. Lee H. Hamilton, *Last Word on the October Surprise?; Case Closed*, N.Y. TIMES, Jan. 24, 1993, <http://www.nytimes.com/1993/01/24/opinion/dialogue-last-word-on-the-october-surprise-case-closed.html>.

<sup>60</sup> *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927); see also *Exxon Corp. v. Fed. Trade Comm’n*, 589 F.2d 582, 592 (D.C. Cir. 1978) (“There is no doubt that the subpoena power may be exercised on behalf of Congress by either House, and that the subpoenas issued by committees have the same authority as if they were issued by the entire House of Congress from which the committee is drawn.”).

<sup>61</sup> Thomas E. Evans III, Comment, *Executive Privilege and the Congress: Perspectives and Recommendations*, 23 DEPAUL L. REV. 692, 700 n.44 (1974).

<sup>62</sup> Roberto Iraola, *Self-Incrimination and Congressional Hearings*, 54 MERCER L. REV. 939, 950–54 (2003).

<sup>63</sup> The 1992-93 Staff of the Legislative Research Bureau, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 SYRACUSE J. LEGIS. & POL’Y 1, 5 (1995).

<sup>64</sup> See 2 U.S.C.A. § 192 (West 2014).

<sup>65</sup> Congressional power to confer immunity can be found in 18 U.S.C.A. §§ 6001–6005 (West 2014).

<sup>66</sup> See *Watkins v. United States*, 354 U.S. 178, 188 (1957); Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407, 413 (1995) (citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951) and *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)) (“The government cannot compel a witness in a non-criminal proceeding, such as a civil trial or congressional hearing, to provide evidence that would tend to expose the witness to later criminal charges.”).

fair—*United States v. North*<sup>67</sup> and *United States v. Poindexter*<sup>68</sup>—which make it extremely difficult for the government to prove that its prosecution did not rely on a defendant's immunized congressional testimony.<sup>69</sup> Finally, witnesses before a congressional committee may be prosecuted for perjury if they lie under oath. Federal law authorizes congressional committees to administer oaths to witnesses.<sup>70</sup> Accordingly, a witness who testifies falsely under oath to a congressional committee may be prosecuted for perjury under federal,<sup>71</sup> District of Columbia<sup>72</sup> or state law (if testimony is given outside Washington, D.C. at a field hearing).<sup>73</sup>

Congress's broad powers, including the power to depose witnesses, issue subpoenas, grant immunity, and hear truthful testimony under threat of perjury clearly demonstrate the legislature's robust role in our system of government. However, like the other branches of government, Congress's role is not an unlimited one. One strong barrier against congressional overreach is the Fifth Amendment's Self-Incrimination Clause.<sup>74</sup> The clash between Lois Lerner and the House Oversight Committee regarding waiver of the privilege against self-incrimination is, therefore, a classic conflict in which a branch of government seeks to exert its powers to the fullest extent to which the Constitution will allow.<sup>75</sup>

---

<sup>67</sup> 910 F.2d 843 (D.C. Cir. 1990) (per curiam) (reversing defendant's convictions because prosecution witnesses had reviewed his immunized testimony before the congressional Iran-Contra Committee).

<sup>68</sup> 951 F.2d 369, 371 (D.C. Cir. 1991) (vacating defendant's convictions and emphasizing that prosecution must show a source for evidence "wholly independent of immunized testimony").

<sup>69</sup> See, e.g., Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407, 409 (1995) (remarking that *North* and *Poindexter* "made it more difficult than ever for the government to prove that its prosecution did not rely on a defendant's compelled congressional testimony").

<sup>70</sup> 2 U.S.C.A. § 191 (West 2014).

<sup>71</sup> 18 U.S.C. § 1621 (2014).

<sup>72</sup> D.C. CODE § 22-2402 (2013).

<sup>73</sup> James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1127 n.50 (2007).

<sup>74</sup> In fact, the Fifth Amendment right against self-incrimination has come to be inextricably intertwined with the storied history of congressional investigations. For example, so many witnesses who appeared before the House Un-American Activities Committee chose to plead the Fifth that they became known as "Fifth Amendment Communists." WALTER GOODMAN, *THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES* 356 (1968).

<sup>75</sup> Many disputes regarding the scope of a branch's authority involve separation-of-powers issues. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (holding that Congress's one-house legislative veto of the Attorney General's decision to suspend deportation had violated constitutional requirements of bicameralism and presentment); *United States v. Nixon*, 418 U.S. 683 (1974) (finding executive privilege not absolute and affirming that President Nixon must comply with grand jury subpoena); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (invalidating executive order by President Truman authorizing seizure of steel mills in labor dispute).

## II. LOIS LERNER LIKELY WAIVED HER PRIVILEGE AGAINST SELF- INCRIMINATION BASED ON THE OPENING STATEMENT SHE MADE BEFORE THE HOUSE OVERSIGHT COMMITTEE

The question of whether Lois Lerner waived her right against self-incrimination is a thorny one.<sup>76</sup> One criminal procedure scholar has presented the question to a “listserv of criminal procedure professors that includes some serious Fifth Amendment experts” and found that “opinions were somewhat mixed.”<sup>77</sup> Another criminal procedure expert acknowledged that “it has never been clearly articulated exactly what constitutes a waiver of privileges in this [congressional hearing] situation.”<sup>78</sup> Although the Supreme Court has found that “[w]aiver of constitutional rights . . . is not lightly to be inferred,”<sup>79</sup> there is an argument that Lois Lerner waived her privilege against self-incrimination based on her short opening statement before the House Oversight and Government Reform Committee.

The Fifth Amendment may only be asserted if one's conduct is (1) compelled, (2) testimonial, and (3) incriminating.<sup>80</sup> The “paradigm for compulsion” is a subpoena *ad testificandum* (an order directing an individual to provide testimony under oath).<sup>81</sup> Turning to the testimonial requirement, an individual's conduct must “relate a factual assertion or disclose information.”<sup>82</sup> The Supreme Court has noted that “the vast majority of verbal statements . . . will be testimonial” because “[t]here are few instances in which a verbal statement, either oral or written, will not convey information or assert facts.”<sup>83</sup> Finally, compelled testimony

---

<sup>76</sup> See Juliet Eilperin, *Did Lois Lerner Waive Her Right to Invoke the Fifth Amendment?*, WASH. POST, May 22, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/05/22/did-lois-lerner-waive-her-right-to-invoke-the-fifth-amendment/> (noting that resolving the issue of whether Lerner improperly waived her Fifth Amendment privilege, like many legal questions, depends upon whom you ask).

<sup>77</sup> Orin Kerr, *Can A Congressional Witness Deny Guilt and Then Plead the Fifth?*, VOLOKH CONSPIRACY (May 22, 2013, 6:15 PM), <http://www.volokh.com/2013/05/22/can-a-congressional-witness-deny-guilt-and-then-plead-the-fifth/>.

<sup>78</sup> Jacob Gershman, *Did Lois Lerner Forfeit Her Fifth Amendment Privileges?*, WALL ST. J. L. BLOG (May 22, 2013, 4:10 PM), <http://blogs.wsj.com/law/2013/05/22/did-lois-lerner-forfeit-her-fifth-amendment-privileges/>.

<sup>79</sup> *Smith v. United States*, 337 U.S. 137, 150 (1949).

<sup>80</sup> See JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 853–55 (1999).

<sup>81</sup> WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* 831 (3d ed. 2007). A subpoena *ad testificandum* produces what the Supreme Court has described as the “core” unfairness which led to the adoption of the Self-Incrimination Clause—“subject[ing] those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.” *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990).

<sup>82</sup> *Doe v. United States*, 487 U.S. 201, 210 (1988) (declaring court order compelling defendant to sign authorization to disclose foreign bank records was not testimonial).

<sup>83</sup> *Id.* at 213. In contrast to verbal statements, the Court has generally sustained the forced production of physical evidence notwithstanding the fact that such evidence may be incriminating. See, e.g., *Gilbert v. California*, 388 U.S. 263 (1967) (requiring suspect to provide handwriting exemplar);

is incriminating if there exists reasonable cause to believe that the testimony could be used against the witness in a criminal prosecution.<sup>84</sup> Lois Lerner certainly met the threshold inquiries necessary to invoke the privilege. The House Oversight Committee issued a subpoena *ad testificandum* on May 17, 2013 to compel Lerner's testimony and any answers she would provide in response to the Committee's questions could be used against her in a subsequent criminal action.

*A. Lerner's Opening Statement Meets the Rogers Standard for Testimonial Waiver*

Waiver of the right against self-incrimination may occur in two ways. First, a witness may relinquish the privilege against self-incrimination through an express statement of waiver.<sup>85</sup> This avenue of waiver did not occur in the instant case because Lois Lerner did not explicitly state that she was waiving her right against self-incrimination. On the contrary, Lerner stated that she would "not testify or answer any of the questions" after she had "been advised by [her] counsel to assert [her] constitutional right not to testify or answer questions related to the subject matter of [the] hearing."<sup>86</sup> However, "an individual may lose the benefit of the privilege [against self-incrimination] without making a knowing and intelligent waiver."<sup>87</sup> The second way in which a waiver of the privilege against self-incrimination can be found is if a court infers a waiver from an individual's course of conduct, without any inquiry into the individual's actual knowledge of the right.<sup>88</sup> One form of waiver by course of conduct is testimonial waiver. The doctrine of testimonial waiver posits that a witness may, by making certain statements, waive the privilege against self-incrimination. Thus, the waiver at issue in Lerner's case concerns solely testimonial waiver.

The seminal testimonial waiver case is *Rogers v. United States*.<sup>89</sup> The Supreme Court held that "where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details."<sup>90</sup>

---

United States v. Wade, 388 U.S. 218 (1967) (forcing suspect to participate in a lineup); Schmerber v. California, 384 U.S. 757, 764 (1966) (compelling suspect to furnish blood test not testimonial); Holt v. United States, 218 U.S. 245 (1910) (ordering accused to try on blouse).

<sup>84</sup> Hoffman v. United States, 341 U.S. 479, 486 (1951) (explaining that the Fifth Amendment extends beyond testimony acknowledging an element of a crime, and that any testimony that "would furnish a link in the chain of evidence"—i.e., any statement that could provide a lead to other evidence—is incriminating).

<sup>85</sup> Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752, 1752 (1979) ("[A]n individual may consciously choose not to assert a right he knows exists, acknowledging the decision openly—the classic intelligent waiver.").

<sup>86</sup> *Lerner Statement*, *supra* note 15, at 22.

<sup>87</sup> *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976).

<sup>88</sup> DRESSLER & THOMAS, *supra* note 80, at 1752.

<sup>89</sup> 340 U.S. 367 (1951).

<sup>90</sup> *Id.* at 373. Although *Rogers* involved waiver in the grand jury context, a witness who discloses an incriminating fact waives the self-incrimination privilege as to the details of that fact irrespective of the type of proceeding in which the witness appears. See, e.g., *McCarthy v.*

Based on this reasoning, a determination of whether Lerner waived her privilege against self-incrimination would hinge upon whether Lerner revealed “criminating facts” in her opening statement. If Lerner merely opined on her innocence, then no criminating facts were revealed. But if Lerner “assert[ed] actual facts about a matter that could subject her to criminal prosecution by the U.S. Department of Justice,” then criminating—or, as they are often colloquially described, *incriminating*—facts could have been revealed.<sup>91</sup> A denial thus is markedly different than disclosing criminating facts.

Lerner’s statements before the House Oversight Committee can be broken into two distinct sections. The later statement, that she had “not done anything wrong,” “not broken any laws,” “not violated any IRS rules or regulations,” and “not provided false information” to the House Oversight Committee is likely a “general denial” or mere assertion of innocence. A witness “ought to be able to make a general denial, and then say I don’t want to discuss it further.”<sup>92</sup> The latter half of Lerner’s opening statement will, therefore, not constitute a waiver of the privilege of self-incrimination.<sup>93</sup>

However, the more problematic part of Lerner’s opening statement is the first portion,<sup>94</sup> in which she stated that she was “responsible for about 900 [Exempt Organizations] employees nationwide” and that “the Treasury IGs released a report finding that the Exempt Organizations field office in Cincinnati, Ohio, used inappropriate criteria to identify for further review applications from organizations that planned to engage in political activity.”<sup>95</sup> The Supreme Court has stated that “[i]t is well established that a witness, in a single proceeding, may not

---

Arndstein, 262 U.S. 355, 357 (1923) (reversing contempt finding against debtor in involuntary bankruptcy stemming from a disclosure statement he made to the bankruptcy commissioner, because the statement did not amount to an admission of guilt or reveal incriminating facts).

<sup>91</sup> Von Spakovsky, *supra* note 30.

<sup>92</sup> Jacob Gershman, *Did Lois Lerner Forfeit Her Fifth Amendment Privileges?*, WALL ST. J. L. BLOG (May 22, 2013, 4:10 PM), <http://blogs.wsj.com/law/2013/05/22/did-lois-lerner-forfeit-her-fifth-amendment-privileges/> (quoting Professor Yale Kamisar).

<sup>93</sup> See *United States v. Hoag*, 142 F. Supp. 667, 669 (D.D.C. 1956) (ruling that a witness who made a general denial of being a spy or saboteur before the Senate Permanent Subcommittee on Investigations did not waive her Fifth Amendment privilege); *Isaacs v. United States*, 256 F.2d 654 (8th Cir. 1958) (reversing defendant’s conviction for contempt of court and finding a claim of innocence to be “a far cry from an intentional waiver”).

<sup>94</sup> U.S. Attorney Ron Machen’s letter to Speaker John Boehner informing him that his office would not take any action to prosecute Lerner for contempt of Congress failed to consider any testimony from the first part of Lerner’s opening statement. Machen’s conclusion that Lerner did not waive her Fifth Amendment privilege relies on an analysis of the latter part of Lerner’s opening remarks, namely Lerner’s general denials that she had done nothing wrong, broken no law, violated no IRS rules, and provided no false information to Congress. See Letter from Ron Machen, U.S. Attorney for D.C., to Hon. John Boehner, Speaker, House of Representatives 2, 4–6 (Mar. 31, 2015), *available at* <http://apps.npr.org/documents/document.html?id=1699732-letter-to-honorable-john-boehner>.

<sup>95</sup> *Lerner Statement*, *supra* note 15, at 22.



testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.”<sup>96</sup> Lerner’s referencing the Treasury Inspector General’s report and repeating its finding that IRS Exempt Organizations employees used inappropriate criteria to determine whether organizations qualified for a tax exemption acknowledges potentially incriminating facts that speak to one of the primary purposes of the congressional hearings on the IRS scandal. The investigation was set up to determine if “front-line” IRS employees in the Cincinnati office were solely to blame or whether high-level officials at the IRS, such as Lerner, were aware of the extra scrutiny to conservative groups.<sup>97</sup> Indeed, the Inspector General’s report indicated that Lerner herself had been informed of the targeting at a meeting that she had attended on June 29, 2011. Lerner’s reference to the report—and the potentially incriminating facts contained therein—cannot possibly be considered a general denial or a claim of innocence, particularly in light of the critical fact that Lerner at no point denied any of the allegations or findings made in the report.<sup>98</sup>

While a witness “may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details,”<sup>99</sup> this is exactly what Lerner did before the House Oversight Committee. She testified about the subject of inappropriate scrutiny of conservative groups when she explicitly recognized the Inspector General’s finding “that the Exempt Organizations field office in Cincinnati, Ohio, used inappropriate criteria to identify for further review applications from organizations that planned to engage in political activity.”<sup>100</sup> However, she refused to testify about the details of the subject, namely whether or not she and other high-level IRS employees were aware of the inappropriate scrutiny. By voluntarily recognizing the factual statement made in the report that inappropriate conduct had occurred, Lerner waived her

---

<sup>96</sup> *Mitchell v. United States*, 526 U.S. 314, 321–22 (1999) (citing *Rogers v. United States*, 340 U.S. 367, 373 (1951)). The Court’s use of the word “voluntarily” would appear to limit this principle to situations in which a witness testifies without compulsion by a subpoena. However, the facts underlying *Rogers* belie this notion, as the petitioner in that case appeared before a grand jury to testify in response to a subpoena *ad testificandum*. *Rogers*, 340 U.S. at 368. Indeed, the two cases that the Court cited for this principle involved witnesses appearing in response to a subpoena. *United States v. St. Pierre*, 132 F.2d 837 (2d Cir. 1942); *Buckeye Powder Co. v. Hazard Powder Co.*, 205 F. 827, 829 (D. Conn. 1913).

<sup>97</sup> Darrell Issa & Dave Camp, *The IRS Scandal’s Inconsistencies*, WASH. POST, Aug. 6, 2013, [http://www.washingtonpost.com/opinions/darrell-issa-and-dave-camp-the-irs-scandals-inconsistencies/2013/08/06/d70d2b6a-fbc8-11e2-9bde-7ddaa186b751\\_story.html](http://www.washingtonpost.com/opinions/darrell-issa-and-dave-camp-the-irs-scandals-inconsistencies/2013/08/06/d70d2b6a-fbc8-11e2-9bde-7ddaa186b751_story.html).

<sup>98</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013), *available at* <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

<sup>99</sup> *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (citing *Rogers v. United States*, 340 U.S. 367, 373 (1951)).

<sup>100</sup> *Lerner Statement*, *supra* note 15, at 22.

privilege against self-incrimination, and thus should have answered questions concerning the details of the inappropriate conduct.

*B. Lois Lerner's Opening Statement Meets the Klein v. Harris Standard for Testimonial Waiver*

In *Klein v. Harris*,<sup>101</sup> the Second Circuit articulated a two-pronged analysis that “has come to be the most widely-accepted test for determining whether an individual has waived the Fifth Amendment privilege against self-incrimination.”<sup>102</sup> However, it bears emphasis that although *Klein* has been widely cited, its two-part test for determining whether a waiver has occurred has never expressly been adopted by the Supreme Court or any other circuit, and its use is merely instructive. Under the first part of the test, the witness's prior statements must “have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth.”<sup>103</sup> The second part of the test asks whether the witness had “reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination.”<sup>104</sup>

Lerner's testimony satisfies the first part of the *Klein* test because it “created a . . . distorted view of the truth.” Lerner's assertion that she was “responsible for about 900 [Exempt Organizations] employees nationwide,” in conjunction with her reference to the Inspector General's report, created a distorted view of the truth. The IG's report concludes that wrongdoing had occurred, but fails to directly explicate the extent of the wrongdoing (i.e., whether high-level officials knew of the wrongdoing). Lerner's maintaining innocence and stating that she was “responsible for about 900 [Exempt Organizations] employees nationwide” is testimony that fills in the details of the IG's report.<sup>105</sup> Accordingly, by filling in gaps inherent in the IG's report and then refusing to give details on the gaps she had filled, Lerner created a risk that the Committee would be left to rely on distorted facts. Had Lerner maintained her innocence and made a general denial without mentioning the IG's report and her responsibility for those in the Cincinnati field office, then there likely would not have been any statements to cause confusion.

Even if Lerner only referenced the Inspector General's report and did not declare that she oversaw Exempt Organization employees nationwide, she still created a risk that the Committee would have to rely on a distorted view of the

---

<sup>101</sup> 667 F.2d 274 (2d Cir. 1981).

<sup>102</sup> Craig Peyton Gaumer & Charles L. Nail, Jr., *Truth or Consequences: The Dilemma of Asserting the Fifth Amendment Privilege Against Self-Incrimination in Bankruptcy Proceedings*, 76 NEB. L. REV. 497, 536 (1997).

<sup>103</sup> *Klein*, 667 F.2d at 287.

<sup>104</sup> *Id.*

<sup>105</sup> *Lerner Statement*, *supra* note 15, at 22.

truth because the IG's report was not clear itself. For instance, the IG's report found that the IRS used inappropriate criteria that identified conservative organizations applying for tax-exempt status for review.<sup>106</sup> The report does not explicitly conclude that higher-level IRS officials were aware of the inappropriate targeting of conservative groups, but it does seem to indicate that Lerner was informed of the targeting at a 2011 meeting.<sup>107</sup> Representative Sander Levin called the IG's report "fundamentally flawed" because it allegedly failed to include details that progressive groups were also flagged for extra attention, but Representative Dave Camp contended that the IG's report did not ignore the possibility that liberal groups faced the same type of scrutiny from the IRS as conservative organizations.<sup>108</sup> Additionally, reports and audits of Inspectors General generally do not reach talismanic, non-contestable conclusions and often cannot provide a comprehensive conclusion as some facts may be indeterminate or unknown.<sup>109</sup> Like those in many reports, the findings in the IG's report on the IRS are not entirely clear. Thus, Lerner's acknowledgment of the IG's conclusion,<sup>110</sup> which itself is open to interpretation, created "a distorted view of the truth," thereby satisfying the first prong of the *Klein* test.<sup>111</sup>

The second part of the *Klein* test requires that the witness have had "reason to know that his prior statements would be interpreted as a waiver of the

---

<sup>106</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 2 (2013), available at <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

<sup>107</sup> *Id.*

<sup>108</sup> Lauren French, *Sander Levin: IRS Tea Party Probe "Flawed in a Fundamental Way,"* POLITICO PRO (June 24, 2013, 8:02 PM), <http://www.politico.com/story/2013/06/sander-levin-irs-tea-party-93303.html>.

<sup>109</sup> See generally William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 GEO. MASON INDEP. L. REV. 97 (1993).

<sup>110</sup> *Lerner Statement*, *supra* note 15, at 22 (recognizing "that the Exempt Organizations field office in Cincinnati, Ohio, used inappropriate criteria to identify for further review applications from organizations that planned to engage in political activity").

<sup>111</sup> There is a possibility that Lerner testified the way she did rather than simply invoking the Fifth to *intentionally* create a "distorted view of the truth." By mentioning the IG report's findings and maintaining her innocence in successive sentences, Lerner might have been insinuating that the IG's report did not directly prove that she had knowledge of the inappropriate conduct. Courts are not sympathetic to litigants who partake in what appears to be gamesmanship with the privilege against self-incrimination in the legal system. See Ellen Podgor, *Did Lois Lerner Waive the Fifth?*, WHITE COLLAR CRIME PROF BLOG (May 24, 2013), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2013/05/most-witnesses-with-potential-criminal-exposure-who-are-called-to-testify-before-congressional-hearings-take-the-stand-with.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2013/05/most-witnesses-with-potential-criminal-exposure-who-are-called-to-testify-before-congressional-hearings-take-the-stand-with.html); see also, e.g., *In re Biaggi*, 478 F.2d 489, 491, 493 (2d Cir. 1973). In *In re Biaggi*, a former U.S. congressman, in response to a leak disclosing he had invoked his privilege against self-incrimination in a grand jury, declared that he had cooperated fully and answered all the grand jury's questions. 478 F.2d at 491. Biaggi publicly announced that he had instructed his attorneys to seek release of his grand jury testimony to prove his case. *Id.* However, the appellate court affirmed the district court's finding that Biaggi had waived the privilege of grand jury secrecy and order releasing the grand jury transcript on the day Biaggi testified. *Id.* at 493. Based on this scenario, a court could have viewed Lerner's opening statement to be a strategic move constituting waiver of the privilege.

Fifth Amendment's privilege against self-incrimination."<sup>112</sup> It is less clear whether this part of the *Klein* test is satisfied. However, there is a strong argument that Lerner had reason to know that her prior statements would be interpreted as a waiver, because Congressman Issa wrote a letter to Lerner's attorney the day before the May 22 hearing raising the possibility that Lerner might choose to answer some questions by the Committee. After Lerner's attorney requested that she be excused from appearing at the hearing because she would be invoking her privilege against self-incrimination,<sup>113</sup> Congressman Issa responded that the House Oversight Committee still required her appearance because of "the possibility that she will waive or choose not to assert the privilege as to at least certain questions."<sup>114</sup> Thus, Lerner may have had reason to know that her statement that she was "responsible for about 900 [Exempt Organizations] employees nationwide"<sup>115</sup> and that "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 from organizations that planned to engage in political activity"<sup>116</sup> would be interpreted by the House Oversight Committee as a waiver of her privilege against self-incrimination for any questions concerning Lerner's oversight of lower-level employees. In light of Congressman Issa's letter, Lerner had reason to know that any remarks in her lengthy opening statement could be construed by the House Oversight Committee as a willingness to discuss certain aspects of the IRS scandal.

*C. The Standard for Waiver is Not Higher in a Congressional Hearing than it is in a Criminal Trial When a Witness Makes Incriminating Statements*

Had Lerner been "in an actual criminal trial, in an actual criminal courtroom," her opening statement would likely have constituted a waiver of the privilege.<sup>117</sup> Those claiming Lerner did not waive her privilege put forth two rationales for why the distinction between a congressional hearing and a criminal trial is legally significant: (1) unlike a criminal trial, where a defendant can choose to take the stand or not, an individual under subpoena has no choice but to appear before the committee; (2) a congressional hearing is unlike a criminal trial where there is a concern about compromising a judge or jury by providing them with a partial presentation of facts.<sup>118</sup> However, both of these reasons are unsound.

---

<sup>112</sup> *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).

<sup>113</sup> See H.R. REP. NO. 113-415, at 8 (2014), available at <https://www.congress.gov/113/crpt/hrpt415/CRPT-113hrpt415.pdf> (citing 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>114</sup> *Id.* at 9 (citing Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to William W. Taylor, III, Zuckerman Spaeder LLP (May 21, 2013)).

<sup>115</sup> *Lerner Statement*, *supra* note 15, at 22.

<sup>116</sup> *Id.*

<sup>117</sup> Amira, *supra* note 29.

<sup>118</sup> *Id.*

The first rationale supporting the distinction between a criminal trial and a congressional hearing is inapposite. There is indeed a difference between a witness who involuntarily testifies, such as when one is subpoenaed to appear, and a witness who voluntarily testifies, as a defendant does when she elects to take the stand in a criminal trial. In *Brown v. United States*,<sup>119</sup> the Supreme Court held that a defendant who chose to take the stand waived her privilege against self-incrimination and could not use the privilege to avoid being cross-examined about matters raised by her own direct testimony. The defendant in *Brown* argued that her situation was analogous to that of the petitioner in *Arndstein v. McCarthy*.<sup>120</sup> In *Arndstein*,<sup>121</sup> the Supreme Court reversed a contempt finding against a debtor in involuntary bankruptcy who had invoked the Fifth Amendment after answering questions stemming from a disclosure statement he made to a bankruptcy commissioner. The court in *Brown* distinguished *Arndstein*, and clarified that when a defendant in a criminal case "takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness."<sup>122</sup> In contrast, the court noted, that "[a] witness who is compelled to testify, as in the *Arndstein* type of case, has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate" and is thus "entitled to 'stop short' when further testimony 'might tend to incriminate him.'"<sup>123</sup>

While it is true that a witness who involuntarily testifies may selectively assert the privilege against self-incrimination, this principle is limited to witnesses who have not disclosed incriminating facts. The Court in *Arndstein* concluded that selective assertion of the privilege against self-incrimination was permitted only "where the previous disclosure by an ordinary witness [one who involuntarily testifies] is not an actual admission of guilt or incriminating facts."<sup>124</sup> The Court's determination that the debtor's disclosure statements to the bankruptcy commissioner were not incriminating was critical to *Arndstein*'s finding that the debtor did not waive his self-incrimination privilege.<sup>125</sup> Lerner's assertion that she was "responsible for about 900 employees nationwide" and recognition of

---

<sup>119</sup> 356 U.S. 148, 154–55 (1958) (stating that a defendant who chooses to take the stand is subject to cross-examination about matters "made relevant by her direct examination," and that the breadth of her waiver of the privilege against self-incrimination "is determined by the scope of relevant cross-examination").

<sup>120</sup> *Id.* at 154 (recognizing "decisions holding that witnesses in civil proceedings and before congressional committees do not waive the privilege by denials and partial disclosures, but only by testimony that itself incriminates").

<sup>121</sup> 262 U.S. 355 (1923).

<sup>122</sup> *Brown*, 356 U.S. at 154.

<sup>123</sup> *Id.* (quoting *Arndstein*, 262 U.S. at 358).

<sup>124</sup> *Arndstein*, 262 U.S. at 359 (emphasis added).

<sup>125</sup> *Id.* at 359–60; see also *Rogers v. United States*, 340 U.S. 367, 373 (1951) (recognizing that the Court in *Arndstein* "stressed the absence of any previous 'admission of guilt or incriminating facts'" (quoting *Arndstein*, 262 U.S. at 359)).

the Inspector General report's conclusion that the "Exempt Organizations field office in Cincinnati, Ohio, used inappropriate criteria to identify for further review applications from organizations that planned to engage in political activity" seems to be incriminating testimony.<sup>126</sup> Consequently, the fact that Lerner had no choice but to appear before the House Oversight Committee and involuntarily testified is immaterial.

Additionally, the second rationale is an inadequate justification for distinguishing between a congressional hearing and a criminal trial. A congressional hearing, like a criminal trial, is a search for the truth (albeit a partisan search for the truth).<sup>127</sup> Congressional hearings help inform Congress and the public about the workings of government, and a witness who asserts factual statements but refuses to elaborate as to the details of those statements diminishes the integrity of this truth-seeking inquiry. Hence, there should also be a concern about compromising the public and members of Congress when a witness provides a partial representation of the facts.

### III. THE MORE APPROPRIATE COURSE OF ACTION: LERNER SHOULD HAVE IMMEDIATELY PLEADED THE FIFTH AMENDMENT AND FOREGONE MAKING AN OPENING STATEMENT

Lois Lerner should not have made the first part of her opening statement when she appeared before the House Oversight Committee on May 22, 2013. Lerner should only have made a proclamation of innocence and asserted her privilege against self-incrimination. Although the issue of waiver in a congressional hearing is "at least a somewhat open question,"<sup>128</sup> lawyers should take a conservative approach when the law is unclear.<sup>129</sup> Lerner was "gambling" when she

---

<sup>126</sup> *Lerner Statement*, *supra* note 15, at 22; *see also supra* Part II.B.

<sup>127</sup> *See* William T. Hassler, *Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes*, 24 ENVTL. L. REP. 10074, 10086 (1994), available at <http://elr.info/sites/default/files/articles/24.10074.htm> ("Congressional investigators should be mindful of the inherent difficulties of staging a 'balanced' congressional hearing . . . [N]ormal partisan politics can hamper balanced proceedings where Congress itself attempts to act as a neutral fact finder."); David Parker, Note, *Policing Procedure Before Substance: Reforming Judicial Review of the Factual Predicates to Legislation*, 99 VA. L. REV. 1327, 1354 (2013) ("In order to earn [judicial] deference, a congressional hearing would have to be restructured to remove not just partisan bias, but majoritarian bias, and it is unclear how this is possible. . . . [Also] it would never be appropriate to defer completely to a factual decision made by members of Congress (as opposed to apolitical actors)."); Stephen F. Hayes, Op-Ed, *New Details Often Come Out of Congressional Hearings*, N.Y. TIMES (May 8, 2013), <http://www.nytimes.com/roomfordebate/2013/05/08/are-congressional-hearings-serious-investigations-or-just-party-politics/new-details-often-come-out-of-congressional-hearings> ("Congressional hearings are inescapably political exercises . . .").

<sup>128</sup> Kerr, *supra* note 30.

<sup>129</sup> Matthew Huisman, *IRS Official May Have Unwittingly Lost Right to Silence*, NAT'L L.J., May 23, 2013, <http://www.nationallawjournal.com/id=1202601440346> (quoting Robert Kelner).

made partial statements before the House Oversight Committee.<sup>130</sup> Lerner had, “at a minimum, taken the risk that the committee would hold her in contempt and that a court would later side with the committee.”<sup>131</sup> Lerner’s counsel likely attempted to strike a balance between preserving her Fifth Amendment rights and preventing further harm to her reputation.<sup>132</sup> However, this delicate balance could have been accomplished by the second half of Lerner’s opening statement—the general denials and proclamations of innocence coupled with her assertion of her privilege against self-incrimination.<sup>133</sup> The factual statements in the beginning of Lerner’s opening statement were unnecessary because the general denials and proclamation of innocence were an adequate means to preserve her reputation. By foregoing an opening statement and immediately pleading the Fifth, a witness might lose the opportunity to prevent further harm to his reputation. However, an opening statement should be carefully crafted to avoid raising Fifth Amendment waiver issues.<sup>134</sup> A general denial and declaration of innocence followed by an invocation of the privilege against self-incrimination achieve this equilibrium.

When the IRS scandal was first unfolding, Speaker John Boehner exclaimed, “[M]y question isn’t about who’s going to resign. My question is who’s going to jail over this scandal?”<sup>135</sup> When one of the most powerful members of Congress makes such a strong statement calling for accountability, the best course of action is not to take risks and further antagonize Congress. The fact that Eric Holder ordered the U.S. Department of Justice and FBI to launch a parallel investigation into the IRS scandal to see “if there were criminal violations”<sup>136</sup> counsels in favor of foregoing even a general denial. Although the Oversight

---

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> See James M. Keneally, *Lois Lerner vs. Darrell Issa and Trey Gowdy: Who Wins?*, N.Y. L.J., July 30, 2013, <http://www.newyorklawjournal.com/id=1202612878852/Lois-Lerner-vs-Darrell-Issa-and-Trey-Gowdy-Who-Wins?slreturn=20150319225711> (contending that foregoing an opening statement and simply pleading her Fifth Amendment privilege might have been “safer with respect to preserving Lerner’s Fifth Amendment rights, but it would also have brought at least the same amount of public opprobrium upon her”); cf. James Hamilton, Robert F. Muse & Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1163–64 (2007) (observing that “asserting a privilege has reputation implications,” and that “perceived public reaction” can complicate the decision whether to assert Fifth Amendment rights).

<sup>133</sup> Indeed, Lerner testified in her opening statement that no adverse inference of wrongdoing should be taken against her simply because she was asserting her Fifth Amendment privilege against self-incrimination. See *Lerner Statement*, *supra* note 15, at 22 (“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.”).

<sup>134</sup> See Hamilton, Muse, & Amer, *supra* note 132, at 1167–69 (discussing the importance of a well-prepared opening statement).

<sup>135</sup> Kevin Liptak & Deirdre Walsh, *Boehner on IRS Scandal: “Who is Going to Jail?”*, CNN POLITICAL TICKER (May 15, 2013, 10:30 AM), <http://politicalticker.blogs.cnn.com/2013/05/15/boehner-on-irs-scandal-who-is-going-to-jail/> (quoting Congressman John Boehner).

<sup>136</sup> Rachel Weiner, *Holder Has Ordered IRS Investigation*, WASH. POST, May 14, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/05/14/holder-has-ordered-irs-investigation/> (quoting Attorney General Eric Holder).

Committee's Resolution proclaiming that Lerner waived her privilege against self-incrimination has no legal force,<sup>137</sup> a court may have found that Lerner waived her privilege against self-incrimination if a grand jury had indicted Lerner for contempt of Congress. Witnesses who appear before future congressional committees would be well-advised to learn from Lerner and consider either immediately invoking the Fifth Amendment without any opening statement, or making a general denial without any factual assertions.

#### IV. CONGRESS SHOULD ADOPT MEASURES TO ENSURE THAT COMPLEX QUESTIONS OF WAIVER DO NOT ARISE IN FUTURE CONGRESSIONAL HEARINGS

Congressional committees should not subpoena people to testify when it is absolutely certain that they will plead the Fifth. Analogously, the U.S. Department of Justice has an internal policy of not calling witnesses to appear before a grand jury if the witness makes an advance assertion, in writing, of an intention to plead the Fifth.<sup>138</sup> Had such a rule been in place during the investigation into the IRS, Lerner never would have appeared before the House Oversight Committee as her attorney wrote a letter to Congressman Issa announcing Lerner's intent to take the Fifth.<sup>139</sup> Like grand juries, congressional hearings should at least partially resemble a truth-seeking forum and should not exist solely to entrap witnesses.<sup>140</sup>

---

<sup>137</sup> Josh Hicks, *House Committee Votes that Lois Lerner Waived Fifth Amendment Privilege*, WASH. POST, June 28, 2013, <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/06/28/house-committee-to-vote-on-lois-lerner-resolution/> (quoting a statement by Alan Dershowitz that the resolution is "political" and "has no legal impact at all").

<sup>138</sup> U.S. ATTORNEY'S MANUAL § 9-11.154, ADVANCE ASSERTIONS OF AN INTENTION TO CLAIM THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION (May 2012), available at <http://www.justice.gov/usam/usam-9-11000-grand-jury#9-11.154>.

<sup>139</sup> Richard Simon & Joseph Tanfani, *Top IRS Official Will Invoke 5<sup>th</sup> Amendment*, L.A. TIMES, May 21, 2013, <http://articles.latimes.com/2013/may/21/news/la-pn-top-irs-official-fifth-amendment-20130521>.

<sup>140</sup> Some have speculated that inviting Roger Clemens to testify before a House Committee on Oversight and Government Reform hearing addressing steroid use in professional baseball was simply a perjury trap. See Kevin Robillard, *Darrell Issa Fights Subpoena in Roger Clemens Trial*, POLITICO (May 21, 2012, 6:30 PM), <http://www.politico.com/blogs/under-the-radar/2012/05/darrell-issa-fights-subpoena-in-roger-clemens-trial-124144.html> (quoting a statement by Congressman Darrell Issa: "I don't believe that his [Clemens's] false testimony when he gave it was anything other than [then-Chairman of the House Committee on Oversight and Government Reform] Henry Waxman trapping him into perjury"); Teri Thompson, *Rogers Clemens and Attorney Rusty Hardin Push for Testimony of Rep. Darrell Issa*, N.Y. DAILY NEWS (June 5, 2012, 8:17 AM), <http://www.nydailynews.com/sports/i-team/roger-clemens-attorney-rusty-hardin-push-testimony-rep-darrell-issa-article-1.1089932> (stating that the hearing that led to Clemens' indictment was, in the words of Rep. Darrell Issa, "all about setting a trap for Roger Clemens"); see also Ellen Podgor, *Will a Perjury Trap Be Set for Roger Clemens on Capitol Hill?*, WHITE COLLAR CRIME PROF BLOG, (Dec. 20, 2007), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2007/12/will-a-perjury.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2007/12/will-a-perjury.html) (remarking that "[o]f course, Congress would learn nothing of any importance from having Clemens testify")



Additionally, congressional committees should adopt the practice of issuing notice letters to witnesses who are known to be under federal criminal investigation informing them that any opening statement might be deemed a waiver by the committee.<sup>141</sup> Federal prosecutorial practice is instructive.<sup>142</sup> Justice Department guidelines require that all witnesses who are the target or subject of a grand jury investigation be advised of their right to exercise the self-incrimination privilege.<sup>143</sup> If the internal policy of the Justice Department requires notification of the right against self-incrimination in grand jury proceedings, then it might be sound policy for a congressional committee to advise a witness that an opening statement might be construed by the committee as a waiver of the privilege.<sup>144</sup>

---

and “[t]he invitation is really asking Clemens to step into a perjury trap”). Courts have also suggested that it is impermissible for congressional committees to hold hearings for the sole purpose of deliberately trapping a witness into committing perjury. *See, e.g.*, *United States v. Cross*, 170 F. Supp. 303, 309 (D.D.C. 1959) (holding that a perjury indictment may not be found on false testimony when an investigative Senate committee questioned a witness solely for a purpose other than to elicit facts in aid of legislation); *United States v. Icardi*, 140 F. Supp. 383, 388 (D.D.C. 1956) (stating that “extracting testimony with a view to a perjury prosecution” is not a valid legislative purpose, and directing a verdict of acquittal for charge of perjury before congressional subcommittee).

<sup>141</sup> Michael Stern, *Lois Lerner and Waiver of Fifth Amendment Privilege*, POINT OF ORDER (May 23, 2013, 1:26 PM), <http://www.pointoforder.com/2013/05/23/lois-lerner-and-waiver-of-fifth-amendment-privilege/>. Congressional committees should only issue notice letters to those known to be under a parallel federal criminal investigation at the time of their testimony because issuing such notice letters to all individuals might frighten witnesses and deter them from testifying. WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 262 n.102 (3d ed. 2007).

<sup>142</sup> *See Silverthorne v. United States*, 400 F.2d 627, 633–34 (9th Cir. 1968) (observing that a congressional committee and the federal grand jury “are associates in exposing criminal activity and moving toward its curtailment”).

<sup>143</sup> U.S. ATTORNEYS’ MANUAL, *supra* note 138, § 9-11.150 (setting a policy to append an “Advice of Rights” form to grand jury subpoenas directed at targets or subject of a grand jury investigation, which includes the notification that a witness may “refuse to answer any question if a truthful answer to the question would tend to incriminate” him). As a matter of practice, the Advice of Rights form is typically attached to all grand jury subpoenas, not just those directed at targets and subjects of a grand jury investigation. LAFAVE, ET AL., *supra* note 141, at 257. It should be noted that the “Advice of Rights” form is not constitutionally required, as the Supreme Court has declined to mandate that witnesses who give testimony before a grand jury be given *Miranda* warnings. *See United States v. Mandujano*, 425 U.S. 564 (1976).

<sup>144</sup> It might be argued that Congress should adopt DOJ’s precise policy of advising witnesses of the right against self-incrimination rather than simply implementing a policy that only informs witnesses who are known to be under federal criminal investigation that an opening statement might be deemed a waiver of the privilege. However, subpoenaing a witness to appear before a congressional committee rests on considerations generally inapplicable to the grand jury. The procedural safeguards that attend a criminal investigation need not be present in a congressional investigation because Congress’s investigative power is “not to be confused with any powers of law enforcement.” *Quinn v. United States*, 349 U.S. 155, 161 (1955); *see also Sinclair v. United States*, 279 U.S. 263, 295 (1929) (asserting that Congress lacks the authority to “compel disclosures for the purpose of aiding the prosecution in pending suits; but . . . its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits”). Congress adopting a policy that is only akin to DOJ’s internal guidelines rather than an exact copy is in accord with the notion that congressional committees play a role in exposing criminal activity but are nonetheless not criminal tribunals or arms of law enforcement.

Such a rule engenders fairness to both Congress as an institution and the witness.<sup>145</sup> This proposed rule is fair to Congress because it compels witnesses to think twice about making self-serving opening statements and then hiding under the cloak of the Fifth Amendment. Furthermore, this rule is fair to witnesses because they will have notice that opening statements might be deemed to constitute a waiver of the privilege against self-incrimination. In the interest of fairness, this proposed rule should be adopted by Congress.

#### CONCLUSION

Lois Lerner's opening statement before the House Oversight and Government Reform Committee on May 22, 2013 ignited a legal and political debate over the waiver of the privilege against self-incrimination in congressional hearings. Lerner's "short statement is open to interpretation" on the issue of waiver.<sup>146</sup> There is a strong argument that Lerner likely waived her privilege against self-incrimination under the *Rogers* standard and *Klein* test because her opening statement contained not only a general denial of wrongdoing, but also incriminating factual assertions as well as a reference to the Inspector General's ambiguous findings in the audit report on the IRS.

However, Lerner is not solely to blame for generating the hazy issue of waiver during the House Oversight hearing. Congress should adopt an internal rule preventing committees from forcing witnesses to appear if a witness makes an advance assertion, in writing, of an intention to plead the Fifth. Congress should also send notice letters informing witnesses that opening statements will be deemed a waiver of the privilege against self-incrimination. Even if this Article's recommendations are not implemented by Congress, witnesses appearing before future congressional hearings and attorneys who represent clients in congressional investigations can all learn from Lois Lerner's opening remarks before the House Oversight Committee.



---

<sup>145</sup> See *supra* note 144.

<sup>146</sup> Von Spakovsky, *supra* note 30.