



© ingimage

Waiving the Fifth Amendment Before Congress — Not as Easy As Congress Might Hope

On June 28, 2013, the House Oversight and Government Reform Committee (the committee) passed a resolution declaring that IRS official Lois Lerner waived her Fifth Amendment rights when she appeared at a hearing before the committee on May 22, 2013.¹

Lerner serves as the IRS's director of the Tax-Exempt and Government Entities Division; she is currently on paid administrative leave from the IRS as a result of allegations that her division improperly scrutinized purported conservative organizations seeking tax-exempt status. At the Oversight Committee hearing, Lerner made an opening statement attesting that she had done nothing wrong and had broken no laws in connection with the scandal.

House Republicans now contend that Lerner's opening statement operated as a waiver of her Fifth Amendment right against self-incrimination and that she may now be recalled before the committee and subjected to cross-examination, or held in contempt of Congress. Oversight Committee Chair Darrell E. Issa (R-CA) (a non-lawyer) rejected calls from Oversight Committee ranking minority member Elijah E. Cummings (D-MD) (a lawyer) to convene a hearing and call legal experts to testify about whether Lerner waived her Fifth Amendment rights.

The Fifth Amendment Privilege

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."² At first glance, it would appear that the privilege may only be invoked in "criminal" cases and is thus unavailable in civil matters, regulatory hearings or, as at issue in Lerner's case, congressional testimony. In *Kastigar v. United States*,³ however, the Supreme Court emphasized that the Court has historically been "zealous to safeguard the values which underlie the [Fifth Amendment] privilege" and explained that the privilege "can be asserted in *any proceeding*, civil or criminal, administrative or judicial, investigatory or adjudicatory[.]"⁴ A witness may properly invoke the privilege 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."⁵ Examples in which a witness in a congressional hearing was subsequently found to have inadvertently waived the Fifth Amendment are rare. Both Republican and Democrat members of the committee, however, have publically stated that they believe that the rules applicable to court witnesses should apply in Lerner's case.⁶

BY BRIAN P. KETCHAM

Waiving the Fifth Amendment Privilege

The Supreme Court has emphasized that waiver of the Fifth Amendment privilege “is not to be lightly inferred,”⁷ and that “courts must indulge every reasonable presumption against waiver.”⁸

Nevertheless, the protections afforded by the Fifth Amendment can of course be waived. For example, most lawyers are certainly familiar with so-called “*Miranda* waivers,” whereby an individual suspected of criminal wrongdoing is advised by the police of, among other things, the right to remain silent and that anything said after being advised of the right against self-incrimination may be used against the person in court, provided that the person’s Fifth Amendment waiver was knowing and intelligent.⁹

Fifth Amendment rights can be waived in other ways. Most relevant to Lerner’s case, a waiver of the privilege may be inferred from a witness’s prior testimony that is related to the same subject matter — sometimes referred to as a “testimonial waiver.” As one court has explained, however, a testimonial waiver is also not to be lightly inferred.¹⁰

In *Klein v. Harris*,¹¹ the U.S. Court of Appeals for the Second Circuit outlined the test for determining whether there has been a testimonial waiver of the privilege against self-incrimination. First, it must be shown that “the witness’s prior statements 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.”¹² Second, the witness must have also had “reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment’s privilege against self-incrimination.”¹³

Did Lerner Waive Her Fifth Amendment Right Against Self-incrimination?

A threshold inquiry — whether when Lerner appeared before the committee she had a reasonable belief that her testimony might be used against her — appears easily satisfied. Indeed, Speaker of the House John Boehner (R-OH) has publically asked, “Who is going to jail over this scandal?”¹⁴ Moreover, Lerner has not, to date, been offered immunity for her testimony. Accordingly, it appears beyond dispute that the Fifth Amendment is implicated.

Turning to the test outlined in *Klein*, the next question is whether

Lerner’s opening statement left the committee with a “distorted view of the truth.” Some Republican members of the committee certainly believe that she did.¹⁵ A parsing of Lerner’s actual statements to the committee, however, indicates that she said nothing to “distort” any of the underlying facts being investigated by the committee. Rather, as set forth below, Lerner simply made a brief blanket statement attesting to her innocence, and then invoked the privilege:

Good morning Mr. Chairman and members of the committee. My name is Lois Lerner and I am 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 moved to the IRS to work in the exempt organizations office and 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 am responsible for about 900 employees nationwide and administer a budget of almost \$100 million dollars. My professional career has been devoted to fulfilling responsibilities of the agencies for which I have worked and I am very proud of the work that I have done in government.

On May 14th, the Treasury inspector general released a report finding that the Exempt Organizations field office in Cincinnati, Ohio, used inappropriate criteria to identify for further review applications 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 investigation into the matters described in the inspector general’s report. In addition, members of this committee have accused me of providing false information when I responded to questions about the IRS processing of applications for tax exemption. I have

not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee. 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 am asserting my right not to testify, I know that some people will assume that I have 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 am invoking today. Thank you.¹⁶

It is indeed hard to see how Lerner’s statement distorted the truth. The first paragraph of the statement simply provided the committee with her background and did not touch on the substance or subject matter of the underlying inquiry. Next, the first portion of the second paragraph summarized what is best described as the procedural history leading up to Lerner’s appearance before the committee. Finally, the remainder of the statement is nothing more than a boilerplate denial of any personal misconduct — Lerner did not even offer a general challenge to the inspector general’s findings; rather, she seems to be stating that, even if the allegations set forth in the inspector general’s report are all true, she did not do anything improper or illegal. As such, it appears that Lerner’s statement cannot satisfy the first prong of the inquiry set forth in *Klein*.

Assuming for the sake of argument, however, that the first *Klein* prong has in fact been satisfied, it appears unlikely that the second prong of the *Klein* analysis has also been satisfied. Indeed, the very fact that Lerner expressly stated that she had chosen to invoke her Fifth Amendment protections on the advice of her attorneys undermines any argument that she “had reason to know”¹⁷ that her statements would be interpreted as a Fifth Amendment waiver. Indeed, her state-

ment indicates only a belief that anything she might say *beyond her statement* might operate as a waiver of her Fifth Amendment rights. As the *Klein* court explained, “[i]t would be unfair to the witness for a court to infer [testimonial] waiver unless the witness had reason to know, when he made the prior statements, that he might thereby be found to have waived his Fifth Amendment privilege.”¹⁸

Lerner Did Not Waive Her Fifth Amendment Rights

As the foregoing discussion illustrates, testimonial Fifth Amendment waivers are rare and are generally found “only in the most compelling of circumstances.”¹⁹ Although some House members certainly smell political blood in the water, such considerations fall well short of compelling legal circumstances. That said, it is surely in the public’s interest to develop a complete understanding of what happened in the Cincinnati field office and whether any organization was, in fact, singled out or improperly scrutinized due to the organization’s political leanings. However, the committee’s recent resolution — voted along party lines — simply finding that Lerner waived her Fifth Amendment rights was, in the first place, an improper exercise of

congressional authority²⁰ and, moreover, a misapplication of the doctrine of Fifth Amendment testimonial waivers.

Notes

1. In relevant part, the resolution states that “Ms. Lerner’s self-selected, and entirely voluntary, opening statement constituted a waiver of her Fifth Amendment privilege against self-incrimination because a witness may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. Resolution of the Committee on Oversight and Government Reform (*available at* <http://oversight.house.gov/release/oversight-committee-lerner-waived-her-5th-amendment-right/>) (last accessed July 2, 2013).
2. U.S. CONST. AMEND. V.
3. *Kastigar v. United States*, 406 U.S. 441 (1972) (footnotes omitted).
4. *Id.* at 445-46 (emphasis added).
5. *Id.* at 445.
6. See <http://nymag.com/daily/intelligencer/2013/05/lerner-gowdy-waive-right-5th-amendment-irs.html> (last accessed July 2, 2013).
7. *Smith v. United States*, 337 U.S. 137, 150 (1949).
8. *Emspak v. United States*, 349 U.S. 190, 198 (1955).
9. *Miranda v. Arizona*, 384 U.S. 436

(1966).

10. *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981) (citing *Smith v. United States*, 337 U.S. 137 (1949)).

11. *Klein*, *supra* note 10, at 274.

12. *Id.* at 287.

13. *Id.*

14. See <http://news.yahoo.com/john-boehner-irs-going-jail-over-scandal->

Continued on page 62

About the Author

Brian P. Ketcham is an Associate at Koste-



lanetz & Fink, LLP in New York City. He handles both civil and criminal tax matters, white collar criminal cases, and complex civil litigation.

Brian P. Ketcham

Kostelanetz & Fink, LLP
Seven World Trade Center
250 Greenwich Street, 34th Floor
New York, NY 10007
212-808-8100
Fax 212-808-8108

E-MAIL bketcham@kflaw.com

NACDL STAFF DIRECTORY

MEMBERSHIP HOTLINE 202-872-4001

Membership Marketing Manager	Public Affairs & Communications Assistant
Linda Gill Anderson / landerson@nacdl.org 202-465-7647	Isaac Kramer / ikramer@nacdl.org 202-465-7656
Resource Counsel	Associate Executive Director for Programs
Vanessa Antoun / vantoun@nacdl.org 202-465-7663	Gerald Lippert / glippert@nacdl.org 202-465-7636
Education Manager	Information Services Manager
Akville Athanason / aathanason@nacdl.org 202-465-7630	Steven Logan / slogan@nacdl.org 202-465-7648
Sales & Marketing Director	Graphic Designer
James Bergmann / jbergmann@nacdl.org 202-465-7629	Ericka Mills / emills@nacdl.org 202-465-7635
Deputy Executive Director	Associate Executive Director for Policy
Tom Chambers / tchambers@nacdl.org 202-465-7625	Kyle O'Dowd / kodowd@nacdl.org 202-465-7626
Editor, The Champion	National Affairs Assistant
Quintin Chatman / qchatman@nacdl.org 202-465-7633	Elsa Ohman / eohman@nacdl.org 202-465-7638
National Security and Privacy Counsel	Manager for Strategic Marketing & Sales
Mason C. Clutter / mclutter@nacdl.org 202-465-7658	Douglass Reale / dreale@nacdl.org 202-465-7643
Membership Director	Director — White Collar Crime Policy
Michael Connor / mconnor@nacdl.org 202-465-7654	Shana-Tara Regon / sregon@nacdl.org 202-465-7627
Director of Public Affairs & Communications	Executive Director
Ivan Dominguez / idinguez@nacdl.org 202-465-7662	Norman L. Reimer / nreimer@nacdl.org 202-465-7623
State Legislative Affairs Director	Member Services Assistant
Angelyn Frazer / afrazer@nacdl.org 202-465-7642	Nelle Sandridge / nsandridge@nacdl.org 202-465-7639
Manager for Grassroots Advocacy	Senior Membership and Administrative Assistant
Christopher D. Glen / cglen@nacdl.org 202-465-7644	Viviana Sejas / vsejas@nacdl.org 202-465-7632
Indigent Defense Counsel	Post-Conviction Project Counsel
John Gross / jgross@nacdl.org 202-465-7631	Katherine E. Stern / kstern@nacdl.org 202-465-7646
Counsel — White Collar Crime Policy	Foundation Manager and Executive Assistant
Tiffany M. Joslyn / tjoslyn@nacdl.org 202-465-7660	Daniel Aaron Weir / dweir@nacdl.org 202-465-7640
Director of Events	Art Director
Tamara Kalacevic / tkalacevic@nacdl.org 202-465-7641	Catherine Zlomek / czlomek@nacdl.org 202-465-7634