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House Committee Votes IRS Official Must Testify Despite Fifth Amendment

The Fifth Amendment to the U.S. Constitution guarantees one's right not to incriminate oneself. But this fundamental right came into controversy when IRS Official Lois Lerner—a key player in the [IRS Tea Party scandal](#)—invoked it at a Congressional Hearing about the IRS. See [IRS Takes The Fifth, But You Can't](#). Now, by a 22-17 vote, the House Oversight and Government Reform Committee approved a resolution determining that she waived her Fifth Amendment rights when she offered testimony. See [Resolution of the Committee on Oversight and Government Reform](#).



Lerner was the Director of Exempt Organizations at the IRS during the time that political groups applying for tax exempt status were being targeted for extra scrutiny. That controversy won't die. Ms. Lerner refusing to testify probably would have been controversial to begin with, given that the Tea Party targeting scandal was in full swing and there was a real whodunit atmosphere. See [IRS Brass: Did You Order The Code Red?](#)

But what annoyed some Republicans was the fact that Ms. Lerner read a statement saying she did nothing wrong. Only ***thereafter*** did she invoke her constitutional right under the Fifth Amendment. Did she waive her right?

There could be a difference of opinion along party lines. There's certainly a difference of opinion among legal experts. However, many seem to believe that reading a prepared statement and then invoking is OK. Still, this Supreme Court statement is being quoted a lot:

"It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. See *Rogers v. United States*, 340 U.S. 367, 373 (1951). The privilege is waived for the matters to which the witness testifies, and the scope of the 'waiver is determined by the scope of relevant cross-examination,' *Brown v. United States*, 356 U.S. 148, 154-155 (1958). "The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry,' *id.*, at 155. Nice questions will arise, of course, about the extent of the initial testimony and whether the ensuing questions are comprehended within its scope, but for now it suffices to note the general rule." *Mitchell v. United States*.

In any case, the Committee sure didn't like it. Several Committee members raised objections, contending she had effectively waived her Fifth Amendment right by reading a self-selected and entirely voluntary opening statement that was entered into the record. After conferring with counsel, Issa allowed Lerner to leave and later recessed the hearing. See [House Oversight Republicans: IRS official Lois Lerner waived Fifth Amendment right](#).

The [resolution notes](#) that Ms. Lerner voluntarily said:

"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."

The resolution says this was self-selected, entirely voluntary, and was a waiver of her Fifth Amendment privilege against self-incrimination. It is not clear who is right as a legal matter. Perhaps Ms. Lerner's lawyer could advise his client to wait for the ruling of a judge or to seek a promise of full immunity in exchange for her testimony. Either way, this debate isn't over.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.