Congress, the Constitution, and the Fifth Amendment Communist: A Proposal for Pleading the Fifth in a Congressional Investigation

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INTRODUCTION

Since assuming office, President Trump and his administration have faced no fewer than sixteen congressional investigations spearheaded by seven House or Senate committees.[1] The investigations varied in scope. Some committees explored several lines of questioning, while others launched specific inquiries about the administration's response to Hurricane Maria or the potential addition of a citizenship question on the census.[2] Some investigations conducted as many as 200 interviews.[3] The subjects of these interviews often included people facing concurrent criminal charges, including Michael Cohen and Paul Manafort.[4]

The high number of congressional investigations into the Trump administration is not unique. In fact, the previous two presidential administrations faced serious congressional investigations and inquiries of their own. The Obama administration endured over thirteen major investigations on issues such as the

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1. Examples of these investigations include: (1) an investigation into possible abuse of power by using foreign aid for political ends by the House Foreign Affairs Committee, the House Permanent Select Committee on Intelligence, and the House Committee on Oversight and Reform; (2) an investigation into the possible role of the President and his associates in concealing hush money payments to Stormy Daniels by the House Committee on Oversight and Reform; (3) an investigation into possible misrepresentation of the President's personal wealth and tax returns by the House Ways and Means Committee; (4) an investigation into possible money laundering and subpoenas to Deutsche Bank by the House Financial Services Committee; (5) an investigation into possible abuses of the White House security clearance process regarding the clearances of Jared Kushner and Ivanka Trump by the House Committee on Oversight and Reform; and (6) an investigation into Russian interference in the 2016 election by the Senate Intelligence Committee. Larry Buchanan & Karen Yourish, *Tracking 30 Investigations Related to Trump*, N.Y. TIMES (Sept. 25, 2019), https://www.nytimes.com/interactive/2019/05/13/us/politics/trump-investigations.html?auth=login-smartlock [https://perma.cc/H4YV-HRGL]; Madeleine Carlisle & Olivia Paschal, *After Mueller: The Ongoing Investigations Surrounding Trump*, THE ATLANTIC (March 22, 2019), https://www.theatlantic.com/politics/archive/2019/03/after-mueller-ongoing-investigations-trump/585376/ [https://perma.cc/64QC-QTX9].

2. Amber Phillips, *All the Congressional Investigations of Trump that Aren't Related to the Mueller Report*, WASH. POST (May 23, 2019), https://www.washingtonpost.com/politics/2019/05/23/all-congressional-investigations-into-trump-that-arent-mueller-related/ [https://perma.cc/6UQ5-NP7E].

3. Carlisle, *supra* note 1.

4. *Id.*

Solyndra program and the Benghazi attacks.[5] During the Bush administration Congress launched more than thirty-five inquiries or full scale investigations.[6] Media outlets dubbed the 110th session of Congress "The Oversight Congress" for the number of investigations it made into the Bush administration.[7]

Across all three administrations—Trump, Obama, and Bush—congressional investigations peaked when opposing political parties controlled the executive and legislative branches.[8] This correlation suggests Congress is willing, and able, to use its broad investigative power as a tool of partisanship. Perhaps unsurprisingly, partisan hostility continues to deepen,[9] a signal that the trend of partisan investigations will remain a fixture of Congress.

The large number of investigations of the Trump administration, increased partisan hostility, and the possibility of congressional witnesses facing concurrent criminal charges all raise a fundamental question for congressional investigations: What happens when a witness invokes her Fifth Amendment right against self-incrimination before Congress? An uneasy, and at times uneven, balance exists between Congress's broad investigatory authority and a witness's Fifth Amendment protection.[10] Congress's mistreatment of witnesses who invoked their constitutional rights dates back to the height of McCarthyism, when witnesses who pled the Fifth earned the nickname "Fifth Amendment Communists."[11]

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5. Five separate House committees and two Senate committees launched investigations into the Benghazi attacks; Congress also formed a select committee of House members to investigate the attacks. Phillip Bump, *The Many Investigations into the Administration of Barack Obama*, WASH. POST (Feb. 7, 2019), https://www.washingtonpost.com/politics/2019/02/07/many-investigations-into-administration-barack-obama/ [https://perma.cc/UBT3-YWCE].

6. Josephine Hearn & Jim Vandehei, *The Oversight Congress: Trouble for Bush*, POLITICO (May 22, 2007), https://www.politico.com/story/2007/05/the-oversight-congress-trouble-for-bush-004137 [https://perma.cc/5L8X-VHY2].

7. *Id.*

8. *See id.* ("The new Democratic majority's zeal for congressional investigations goes well beyond Alberto Gonzales and the fired federal prosecutors."); Buchanan, *supra* note 1 ("In the months since Democrats took control of the House, several committees have opened inquiries that could turn up politically damaging or embarrassing material or lead to impeachment proceedings."); Bump, *supra* note 5 ("For the first two years of Obama's presidency, there were no significant investigations into his administration that focused on him. Once Republicans took control of the House in early January 2011, though, that changed.").

9. A survey of 9,895 adults found most Republicans and Democrats agreed about their inability to agree on "basic facts," and growing shares in each party labeled the other party as "closed-minded," "unpatriotic," "immoral," or "unintelligent." Carroll Doherty & Jocelyn Kiley, *Partisan Antipathy: More Intense, More Personal*, Pew Research Center (Oct. 10, 2019), https://www.people-press.org/2019/10/10/partisan-antipathy-more-intense-more-personal/ [https://perma.cc/NM4W-MG2E].

10. *See* Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 31 GEO. L.J. 2445, 2446 (2002); *see also* Stephanie Fagan, *From Benghazi to Russia: An Assessment of Congress's Treatment of the Fifth Amendment in Recent Congressional Investigations*, 31 GEO. J. LEGAL ETHICS 601, 601–03 (2018); Daniel Curbelo Zeidman, *To Call or Not to Call: Compelling Witnesses to Appear before Congress*, 42 FORDHAM URB. L.J. 569, 574–75 (2014) [hereinafter *To Call or Not to Call*]. *See generally* James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1121 (2007).

11. Hamilton, *supra* note 10, at 1164.

The Supreme Court has never directly answered the question of whether the Fifth Amendment applies to Congress;[12] moreover, pleading the Fifth before a congressional committee involves significant procedural questions, including whether Congress can compel a witness to publicly appear before a committee if the witness previously expressed that she will claim her Fifth Amendment rights.[13] In fact, two currently valid legal ethics opinions answer this question differently; one advises that Congress cannot compel a witness to appear while the other advises that Congress may compel a witness to appear.[14]

These unresolved issues are more pertinent than ever. The residual questions surrounding compelled appearances, and the ongoing tension between Congress's investigatory ability and a witness's constitutional protections, presents a prime opportunity for heightened conflict in congressional investigations—potentially at the expense of the Constitution.

This Note provides a detailed consideration of two central questions: (1) Is Congress currently balancing its investigative abilities with protection of the Fifth Amendment in a way that is ethical and responsible; and (2) Can Congress compel a witness to appear to invoke her Fifth Amendment right against self-incrimination in person? Part I provides background information and context on the Fifth Amendment as invoked in congressional investigations, including an analysis of relevant caselaw, the scope of the privilege, and issues with immunity. Part II considers three case studies of witnesses who pled the Fifth before an investigative committee. Part III offers competing legal ethics perspectives for whether a witness can be compelled to appear before Congress—one perspective suggests that a witness cannot be compelled to appear, the second suggests that a witness may be compelled to appear. Finally, Part IV argues that a witness should not be compelled to appear before Congress to invoke her Fifth Amendment rights.

I. A PRIMER ON THE FIFTH AMENDMENT AND CONGRESSIONAL INVESTIGATIONS

Before answering question one or two, it is important to consider the legal parameters and procedures involved in pleading the Fifth Amendment in a congressional investigation. The following section provides a brief overview of four key aspects of invoking the Fifth Amendment in an investigation: (1) the scope of the amendment's protection in a congressional setting, (2) the process for invoking the amendment before a congressional committee, (3) Congress's immunity power, and (4) the implications of invoking the amendment.

12. O'Neill, *supra* note 10, at 2519.
13. Hamilton, *supra* note 10, at 1163–64.
14. D.C. Bar, Op. 31 (1977); D.C. Bar, Op. 358 (2011).

A. THE SCOPE OF THE FIFTH AMENDMENT IN CONGRESSIONAL INVESTIGATIONS

Congress possesses broad investigatory power. Although not based on any specific constitutional provision, the Supreme Court has held that the power to investigate is inherent in the legislative process.[15] Elaborating further, Chief Justice Warren wrote that the power includes:

> [I]nquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.[16]

However, this power is not limitless. Congress must investigate with a valid legislative purpose, which includes gathering information: (1) on whether Congress should legislate in an area,[17] (2) for the purpose of conducting oversight of the executive branch,[18] and (3) to inform itself and the public about the workings of the government.[19] Notably, Congress may not investigate for the purpose of punishment,[20] nor may it investigate with the goal of harassing or exposing a witness.[21]

The Fifth Amendment reads, in part, "No person shall . . . be compelled in any criminal case to be a witness against himself."[22] Most scholars agree that the privilege against self-incrimination applies to congressional investigations, despite a literal textualist reading.[23] Legislative history affirms this belief: The first congressional immunity statute in 1857 reveals that Congress recognized the Fifth Amendment's applicability to its investigations.[24]

Four cases inform the scope of the privilege as applied to congressional investigations: *Watkins v. United States*,[25] *Quinn v. United States*,[26] *Emspak v. United States*,[27] and *Bart v. United States*.[28] Notably, in each of these cases the Court assumed the legitimacy of the privilege and focused on procedural elements of

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15. Watkins v. United States, 354 U.S. 178, 187 (1957).
16. *Id.*
17. McGrain v. Daugherty, 273 U.S. 135, 161, 177 (1927).
18. *Id.* at 180 (affirming the legitimacy of a Senate investigation of the Attorney General).
19. United States v. Rumely, 345 U.S. 41, 44 (1953).
20. *Watkins*, 345 U.S. at 187; *see also* Quinn v. United States, 349 U.S. 155, 161 (1955) (holding Congress's investigative power is not equivalent to law enforcement powers).
21. Wilkinson v. United States, 365 U.S. 399 (1961) (writing that harassment or exposure were not legitimate legislative purposes but finding that the Committee in question did have a legitimate legislative purpose beyond the harassment and thus the Committee's questioning was justified).
22. U.S. CONST. amend. V.
23. Hamilton, *supra* note 10, at 1138; *cf* O'Neill, *supra* note 10, at 2523.
24. Hamilton, *supra* note 10, at 1138.
25. Watkins v. United States, 354 U.S. 178 (1957).
26. Quinn v. United States, 349 U.S. 155 (1955).
27. Emspak v. United States, 349 U.S. 190 (1955).
28. Bart v. United States, 349 U.S. 219 (1955).

claiming the privilege, such as what a witness must say to plead the Fifth. Chief Justice Warren wrote:

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the fact needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves.[29]

Each of these cases involved investigations launched by the House Un-American Activities Committee,[30] a dark period for the legitimacy and reputation of congressional investigations. Announced the same day, *Bart*, *Emspak*, and *Quinn* all address how a witness invokes the privilege.[31] The Court held that congressional committees should make reasonable inferences about the application of the privilege, and that the privilege applies to questions that could be construed as incriminatory, even if they may not actually be incriminatory.[32] Two years later in *Watkins*, the Court further held that congressional committee members must give witnesses adequate explanation for the pertinency and relevancy of questions, so a witness can determine whether she is within her rights to refuse to answer.[33] Because cases from the 1950s and McCarthyism define the application of the Fifth Amendment to congressional investigations, some scholars debate whether the holdings retain legal significance.[34]

B. THE PROCESS FOR INVOKING THE FIFTH AMENDMENT IN CONGRESSIONAL INVESTIGATIONS

The Court has traditionally granted wide latitude to witnesses who invoked the Fifth Amendment in a congressional investigation.[35] A witness need not say any special combination of words, and investigating committees should consider any reasonable indication, such as using the words "the Fifth Amendment," as a witness's valid assertion of the privilege.[36] While a committee may review the

29. *Watkins*, 354 U.S. at 187–88.

30. *See Watkins*, 354 U.S. at 182; *Quinn*, 349 U.S. at 157; *Emspak*, 349 U.S. at 192; *Bart*, 349 U.S. at 219.

31. *See Quinn*, 349 U.S. at 164–65; *Emspak* 349 U.S. at 201; *Bart*, 349 U.S. at 223.

32. *See generally Quinn*, 349 U.S. at 164; *Emspak*, 349 U.S. at 194; *Bart*, 349 U.S. at 223.

33. 354 U.S. at 215.

34. O'Neill, *supra* note 10, at 2515.

35. *See generally* Watkins v. United States, 354 U.S. 178 (1957); Bart v. United States, 349 U.S. 219 (1955); Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955).

36. TODD GARVEY, CONG. RESEARCH SERV., CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE, at 69 (2017) (referencing the holding of *Emspak*).

assertion of the privilege to determine its validity, the witness does not have to specify why she is concerned about self-incrimination.[37] A committee may only reject the assertion if it is "perfectly clear, from a careful consideration of all the circumstances of the case, that the witness is mistaken, and that the answers cannot possibly have a tendency to incriminate."[38]

A witness may waive the privilege against self-incrimination in three ways. She may decline to assert it, specifically disclaim it, or testify on issues as to which the privilege is later asserted.[39] Notably, a committee may not interpret an ambiguous statement as a waiver of privilege.[40] Nor may it construe a waiver of privilege in one forum, for example a concurrent disciplinary hearing before an agency or a criminal trial, as waiver of privilege before Congress.[41] Put simply, Congress should find the privilege waived only "in the most compelling circumstances."[42] This creates a strong presumption of Fifth Amendment protection for a witness appearing before Congress.

C. CONGRESS'S IMMUNITY POWER

Congress may offer immunity to a witness planning to plead the Fifth; this allows a committee to obtain the information it needs while shielding the witness from criminal liability. The topic of immunity is complex and merits further scholarship, but this section is intended to provide a brief overview of the essential components of granting use immunity.[43]

Congress may grant use immunity to a witness, but it may not grant transactional immunity.[44] That is, the immunized testimony a witness gives or any derivative of that testimony may not be used against the witness in a criminal prosecution; however, the witness may still be convicted of the crime based on other evidence independently gathered by the prosecutor.[45] A federal statute authorizing Congress to provide use immunity does not protect witnesses against perjury prosecutions or prosecutions for failing to comply with the immunity order.[46]

Notably, Congress's ability to grant this immunity supersedes the discretion of a federal judge and the Attorney General.[47] Congress must follow procedural

37. *Id.*
38. Hoffman v. United States, 341 U.S. 479, 488 (1951) (emphasis omitted).
39. GARVEY, *supra* note 36, at 70.
40. *Emspak*, 349 U.S. at 198.
41. Hamilton, *supra* note 10, at 1162.
42. *Id.*
43. In *Kastigar v. United States* the Court upheld the constitutionality of granting exclusively use immunity, as opposed to transactional immunity. 406 U.S. 441, 462 (1972).
44. *See id.* at 471.
45. GARVEY, *supra* note 36, at 70; *see also* Hamilton, *supra* note 10, at 1130–31.
46. 18 U.S.C. § 6002 (1994).
47. So long as Congress follows proper procedural requirements a federal judge or the Attorney General cannot deny an immunity grant. Hamilton, *supra* note 10, at 1131.

requirements to immunize a witness. First, a majority of the House or Senate or two-thirds of the full committee must approve the application.[48] Congress must also notify the Attorney General at least ten days before the request for the order.[49] The court order must direct the witness to testify and grant the witness use immunity.[50] Finally, the order only becomes effective when a committee asks the witness a question, she claims her Fifth Amendment privilege, and she is presented with the court order.[51]

Although the process for granting immunity is procedurally straightforward, Congress uses it infrequently. Conferring immunity on a witness creates serious roadblocks to a later successful prosecution.[52] Although use immunity does not insulate a witness from future criminal charges, prosecutors face an uphill battle in bringing a successful case against a witness who received this type of immunity from Congress.[53] As such, Congress must balance the need for immediate disclosure against the societal value of future criminal punishment.[54] There is a demonstrated chilling effect on immunity use when prosecutions are halted by congressional investigations.[55] Immunity carries great potential for political fallout,[56] and scholars have referred to its use by Congress as "the all-important fixed price at which the government may buy a person's testimony outside his own criminal case."[57] Consequently, attorneys are wary of counseling a client to threaten to plead the Fifth in hopes of receiving immunity; it is a leveraging tactic that may draw the ire of the investigating committee.[58]

There are many more factors to consider regarding use immunity. For the purposes of this Note, the essential takeaway is that Congress carries vast authority

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48. GARVEY, *supra* note 36, at 70.

49. *Id.* (The Department of Justice can waive the notice requirement.)

50. *See* MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 21 (The Constitution Project 2017).

51. GARVEY, *supra* note 36, at 70.

52. *See* Hamilton, *supra* note 10, at 1131.

53. One high profile example of this conundrum involves the failed prosecution of Oliver North who was granted an "immunity bath" by Congress in the Iran-Contra investigation. *See* Hamilton, *supra* note 10, at 1131; WILLIAM COHEN & GEORGE J. MITCHELL, MEN OF ZEAL 147, 157 (1989). North's attorneys deftly negotiated his immunity mere hours before he was scheduled to appear before Congress. Hamilton, *supra* note 10, at 1131. North's testimony captured the attention, and sympathy, of tens of thousands of Americans. *Id.* In a later criminal trial, prosecutors went to great lengths to demonstrate their case was based on independent findings, and not any products of North's testimony, but the U.S. Court of Appeals for the D.C. Circuit ultimately reversed North's conviction because North's immunized statements may have influenced the testimony prosecutors presented. *Id.* The court reasoned that many of the prosecution's witnesses watched the high-profile North hearing before Congress, so their recollection of important facts was impermissibly impacted by this viewing. *Id.* As such, the court reasoned, the prosecution "used" North's immunized testimony. *Id.*

54. Hamilton, *supra* note 10, at 1165.

55. Ronald F. Wright, *Congressional Use of Immunity Grants After Iran*-Contra, 80 MINN. L. REV. 407, 429, 431–33 (1995).

56. Hamilton, *supra* note 10, at 1165 (using the decline in immunity grants as an example of political consequences of granting immunity in an investigation).

57. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 207 (1997).

58. Hamilton, *supra* note 10, at 1165.

and discretion to grant immunity, but it uses this power infrequently.[59] Despite its limited use in recent years, some theorize that immunity is the key to achieving the balance between Congress's investigative power and a witness's Fifth Amendment right against self-incrimination, as demonstrated in Part III.[60]

D. THE IMPLICATIONS OF INVOKING THE FIFTH AMENDMENT

Invocation of the right against self-incrimination carries significant consequences, which can be amplified by a high-profile congressional hearing. There are two important considerations for a witness who pleads the Fifth: legal and reputational damage.[61] First, invoking the Fifth Amendment has significant legal implications.[62] Those seeking to claim their privilege should consider inferences a prosecutor might draw from the decision, as well as later consequences in civil litigation.[63] Second, witnesses can face substantial reputational consequences for invoking the privilege. As mentioned above, subjects who invoked their Fifth Amendment rights before Congress during the height of McCarthyism were infamously nicknamed "Fifth Amendment Communists."[64] While the House Un-American Activities Committee is long gone, the implication of invoking the privilege in a highly publicized, often televised setting is not. Witnesses must consider the impact on their jobs, as well as the public criticisms they may face from Congressmembers, the media, and other influential voices.[65]

The preceding overview of the legal landscape of the Fifth Amendment and congressional investigations provides context for Parts II, III, and IV of this Note. Congress maintains expansive investigatory powers and broad power to grant immunity. However, the Supreme Court is also willing to protect a witness's Fifth Amendment right against self-incrimination vociferously. Finally, there are additional considerations beyond this tension, namely immunity and the legal and reputational consequences for a witness, that exacerbate the dichotomy.

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59. *Id.*

60. Zeidman, *supra* note 10, at 609.

61. Daniel H. Pollitt provides a more in-depth look at the reasons witnesses choose to invoke their Fifth Amendment rights despite the potential ramifications. Pollitt interviewed 120 people who took the Fifth in a congressional testimony to learn why they invoked this privilege. *See* Daniel H. Pollitt, *The Fifth Amendment Plea Before Congressional Committees Investigating Subversion: Motives and Justifiable Presumptions – A Survey of 120 Witnesses*, 106 U. PA. L. REV. 1117, 1132 (1958). His work was published in 1958, just after the peak of the infamous House of Un-American Activities investigations. *Id.* Pollitt found that the most common reasons for pleading the Fifth included a belief that the investigative committee infringed on the witness's freedom of speech, association, or conscience, a fear that answering any question posed by the committee would waive the right to refuse to answer questions concerning the identity of others, and fear of a perjury indictment. *Id.*

62. Hamilton, *supra* note 10, at 1162–63.

63. *Id.*; *see also* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

64. Hamilton, *supra* note 10, at 1164.

65. *Id.*

II. INVOKING THE FIFTH AMENDMENT IN PRACTICE: THREE CASE STUDIES

The following abbreviated case studies offer insight into how pleading the Fifth works in practice. The first considers Lois Lerner's appearance before the House Committee on Oversight and Government Reform (House Oversight Committee). The second considers Bryan Pagliano's appearance before the House Select Committee on Benghazi (House Benghazi Committee) and the House Oversight Committee. The third considers Glenn Simpson's appearance before the House Judiciary Committee.

A. LOIS LERNER

Lois Lerner, a former Internal Revenue Service (IRS) director, invoked her Fifth Amendment right against self-incrimination on two separate occasions before a congressional committee. Lerner was called as a witness before the House Oversight Committee for an investigation on the IRS targeting conservative groups applying for tax-exempt status.[66] Lerner's attorney advised the Committee before her first appearance that she would plead the Fifth,[67] but the Committee still made Lerner appear publicly to invoke the privilege.[68] An issue arose when Lerner offered a statement maintaining her innocence before invoking the privilege.[69] Chairman Darrell Issa understood this as a waiver of privilege, as did Representative Trey Gowdy, who attempted to prolong Lerner's appearance by stating: "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 ought to stay in here and answer our questions."[70] These comments sparked a debate with the Committee's Ranking Member Elijah Cummings, who demanded Issa and Gowdy respect Lerner's constitutional rights.[71]

The public sparring between the Congressmen only intensified at Lerner's second appearance before the Committee. Once again, her attorney wrote the Committee and explained that his client planned to plead the Fifth and could not provide any additional information to questions posed by Committee members or staff attorneys.[72] Lerner's attorney shared that Lerner faced half a dozen death

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66. Frank James, *Lois Lerner's Brief and Awful Day on Capitol Hill*, NPR (May 22, 2013), https://www.npr.org/sections/itsallpolitics/2013/05/22/186102554/lois-lerners-brief-and-awful-day-on-capitol-hill [https://perma.cc/T2UG-PEBG].

67. Letter from William Taylor, III, Zuckerman Spaeder LLP, to Darrell Issa, Chairman, House Committee on Oversight and Government Reform (May 20, 2013).

68. H.R. Res. 574, 113th Cong. (2014).

69. Lerner stated, in part, "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." James, *supra* note 66.

70. H.R. Rep. No. 113-415, at 10 (2014).

71. Lauren French & Kelsey Snell, *Lois Lerner Pleads the Fifth*, POLITICO (May 23, 2013), https://www.politico.com/story/2013/05/irs-hearing-091732 [https://perma.cc/K6KD-FA42].

72. H.R. Rep. No. 113-415, at 12 (2014).

threats against her family and herself.[73] He accused the Committee of attempting to vilify Lerner in the eyes of the public, which would only exacerbate the threats she faced.[74] Despite this, Lerner was forced to again appear before the Committee to plead the Fifth.[75] Issa claimed Lerner waived her rights at her first hearing, and he explained the Committee was acting pursuant to a legitimate legislative function of: (1) evaluating decisions made by the IRS regarding treatment of conservative applicants for tax-exempt status, and (2) assessing whether the conduct warranted additional modifications to federal law regarding IRS structure.[76]

At the hearing, Lerner was forced to state "[o]n the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question" on ten separate occasions.[77] Issa continued to proceed with questions, disregarding Lerner's invocation of the privilege.[78] Eventually Issa permitted Lerner to leave and adjourned the hearing; however, Cummings quickly responded, "You cannot run a committee like this."[79] Issa cut off Cummings' mic, and Cummings replied, "I want to ask a question. What's the big deal?"[80] Issa again turned the mic on, but he quickly shut it off again after Cummings began critiquing the investigation's process.[81] A C-SPAN mic picked up Cummings' next line: "I am a member of the Congress of the United States of America! I am tired of this . . . you cannot just have a one-sided investigation."[82]

Just two days later, Congress voted to find Lerner in contempt of Congress.[83] Contempt of Congress is a Class A misdemeanor, so this vote exposed Lerner to the possibility of jail time and a $100,000 fine.[84] Ultimately the Department of Justice chose not to pursue criminal contempt charges against Lerner; attorneys found Lerner did not waive her Fifth Amendment privilege in her initial statement to the Committee.[85]

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73. Peter Schroeder, *Fireworks at Hearing as Lerner Pleads Fifth*, THE HILL (March 5, 2014), https://thehill.com/policy/finance/199944-lerner-pleads-the-fifth-again [https://perma.cc/GVP6-3Z9A].

74. *Id.*

75. *Id.*

76. H.R. Rep. No. 113-415, at 3 (2014).

77. *See id.* at 13–15.

78. *Id.*

79. Mark Memmott, *Ex-IRS Official Invoked 5th Amendment Again, Then Things Get Hot*, NPR (March 5, 2014), https://www.npr.org/sections/thetwo-way/2014/03/05/286231779/ex-irs-official-invokes-5th-amendment-again-then-things-get-hot [https://perma.cc/Y4KG-B23D].

80. *Id.*

81. *Id.*

82. *Id.*

83. H.R. Res. 574, 113th Cong. (2014).

84. 2 U.S.C. §192 (1938). As a result of congressional classification of offenses, the penalty for contempt of Congress is a Class A misdemeanor; thus, the $1,000 maximum fine under §192 has been increased to $100,000. See 18 U.S.C. §§3559, 3571 (2012).

85. Rachael Bade & John Bresnahan, *DOJ: No Contempt Charges for Former IRS Official Lerner*, POLITICO (April 1, 2015) https://www.politico.com/story/2015/04/lois-lerner-no-contempt-charges-justice-department-116577 [https://perma.cc/UT9Q-2VYQ].

B. BRYAN PAGLIANO

Unfortunately, Lerner's treatment represents just one instance in a pattern of bad behavior by congressional committees conducting investigations. In 2015, the House Benghazi Committee forced Hillary Clinton's former IT staffer Bryan Pagliano to appear in a closed-door session despite his attorney's notice to the Committee that Pagliano would take the Fifth.[86] Although the Committee's stated legislative purpose was investigating the 2012 Benghazi attacks, many accused the Committee of attempting to damage the reputation of then presidential candidate, Hillary Clinton.[87] House Majority Leader Kevin McCarthy appeared to confirm this in September 2015, just weeks after Pagliano's compelled appearance, when he referenced the fact that the House Benghazi Committee damaged Hillary Clinton's poll numbers.[88] Almost a month later Representative Richard Hanna also conceded he "think[s] that there was a big part of this investigation that was designed to go after . . . Hillary Clinton."[89]

At the time, Pagliano's attorney accused Chairman Trey Gowdy of playing politics with his client, writing: "Forcing Mr. Pagliano to appear, restate the advice of his counsel, and decline to respond to questions can only be intended to intimidate our client, cause him personal embarrassment, and foster further political controversy."[90] Gowdy expressed that he would not consider immunity for Pagliano.[91] Like Lerner's testimony, this compelled appearance sparked major Committee infighting between Democrats and Republicans.[92]

Just over a year later, the investigation into Pagliano continued.[93] This time, the House Oversight Committee compelled Pagliano's appearance, despite his attorney's repeated warnings that Pagliano would not provide any information to the Committee.[94] Chairman Jason Chaffetz demanded Pagliano appear publicly,

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86. Rachael Bade, *Former Clinton IT Staffer Takes the Fifth*, POLITICO (Sept. 10, 2015) https://www.politico.com/story/2015/09/former-hillary-clinton-staffer-bryan-pagliano-pleads-fifth-213501 [https://perma.cc/7G3M-WPFE].

87. Rachael Bade, *Gowdy Slams Fellow Republican Over Benghazi Remark*, POLITICO (Oct. 15, 2015), https://www.politico.com/story/2015/10/trey-gowdy-benghazi-committee-richard-hanna-214857 [https://perma.cc/5Q4S-DMHV].

88. Ben Geman, *Now It's Two: Second GOP Lawmaker Suggests Benghazi Committee's Aim is Hillary Clinton*, NAT'L. JOURNAL (Oct. 15, 2015), https://www.theatlantic.com/politics/archive/2015/10/now-its-two-second-gop-lawmaker-suggests-benghazi-committees-aim-is-hillary-clinton/447750/ [https://perma.cc/3DRH-43NH].

89. *Id.*

90. Rachael Bade, *Former Clinton IT staffer takes the Fifth*, POLITICO (Sept. 10, 2015), https://www.politico.com/story/2015/09/former-hillary-clinton-staffer-bryan-pagliano-pleads-fifth-213501 [https://perma.cc/V8HY-HE9K].

91. *Id.*

92. *Id.*

93. Josh Gerstein, *House Panel Votes to Hold Clinton Tech Aide Bryan Pagliano in contempt*, POLITICO (Sept. 22, 2016), https://www.politico.com/story/2016/09/bryan-pagliano-contempt-house-panel-228520 [https://perma.cc/6FE6-LDJC].

94. *Id.*

stating, "I don't think it should be done behind closed doors. I think it's the way this committee should operate."[95] Eventually, the Committee voted to hold Pagliano in contempt.[96] Pagliano even drew the ire of then candidate Donald Trump, who stated in a debate: "When you have your staff taking the Fifth Amendment, taking the Fifth so they are not prosecuted, when you have the man that set up the illegal server taking the Fifth, I think it is disgraceful."[97] The congressional scrutiny of Pagliano was unrelenting.[98] Eventually Chaffetz attempted to pursue criminal charges against Pagliano two years after Pagliano's initial appearance before the House Benghazi Committee.[99]

C. GLENN SIMPSON

A more recent example of a witness invoking his Fifth Amendment right against self-incrimination demonstrates how little Congress has improved its behavior since the Lerner and Pagliano debacles. In October 2018, the House Judiciary Committee subpoenaed Glenn Simpson, the head of Fusion GPS, to appear before a joint House panel investigating Russia's interference in the 2016 election and the infamous Steele dossier.[100]

Simpson's attorneys alerted the Committee that their client intended to invoke his Fifth Amendment right against self-incrimination.[101] His attorneys further explained that, among other things, the Committee failed to articulate the scope of the deposition and Committee members already accused Simpson of lying.[102] This indicated that the purpose for Simpson's appearance was not pursuant to a legitimate legislative function but instead designed to embarrass and incriminate him.[103] Indeed, Simpson received press attention from a number of outlets, and some reporters followed him down the hallway of the Capitol basement asking, "Mr. Simpson why are you taking the Fifth? Are you facing legal or criminal

95. *Id.*

96. *Id.*

97. Chad Matlick, *WVPB Live Coverage of the First Presidential Debate*, WVPB (Sep. 23, 2016), https://www.wvpublic.org/post/wvpb-live-coverage-first-presidential-debate#stream/0 [https://perma.cc/UBA3-RW6Z].

98. *See generally* Matthew Daly, *Chaffetz Seeks Charge of Ex-Clinton Aide in Email Inquiry*, ASSOC. PRESS (Feb. 17, 2017), https://www.pbs.org/newshour/politics/chaffetz-seeks-charge-ex-clinton-aide-email-inquiry [https://perma.cc/3U2Q-2449].

99. *Id.*

100. Karoun Demirjian, *House Russia-probe Witness Invokes Fifth Amendment as Trump Urges Firing of DOJ Official Connected to Dossier*, WASH. POST (Oct. 16, 2018), https://www.washingtonpost.com/powerpost/house-russia-probe-witness-invokes-fifth-amendment-as-trump-urges-firing-of-doj-official-connected-to-steele-dossier/2018/10/16/09f9e044-d176-11e8-b2d2-f397227b43f0_story.html [https://perma.cc/8QCJ-HC7V].

101. Letter from Joshua A. Levy, Robert F. Muse, Rachel M. Clattenburg, Cuningham, Levy, Muse, to Bob Goodlatte, Chairman, U.S. House of Representatives Committee on the Judiciary (Oct. 11, 2018).

102. *Id.*

103. *Id.*

exposure? Mr. Simpson why is there a discrepancy between your earlier testimony and that of Justice Department Official Bruce Ohr?"[104]

Representatives sitting on the panel mirrored the press's critiques. In an interview with Lou Dobbs just hours after Simpson's closed-door hearing, Representative Jim Jordan, a member of the Committee, accused Simpson of "farming this fake news dossier out to as many press outlets as he could and then recycling it back to the Justice Department people."[105] Jordan even accused Simpson of obstructing Congress by pleading the Fifth.[106] Other Congressmembers belittled Simpson's attorneys after they expressed concern at the legitimacy of requiring Simpson to appear to invoke the Fifth.[107] Representative Mark Meadows accused one of the attorneys of grandstanding and looking for "a viral moment [to] attack[] the credibility of an investigation."[108] He even questioned whether Simpson had the legal right to invoke the Fifth,[109] despite the long-recognized legitimacy of invoking the Fifth in Congress.[110] Simpson's attorneys maintained the House panel not only levied false accusations against witnesses, it also exposed personal aspects of witnesses private lives without any consequences.[111]

By forcing Simpson to invoke his Fifth Amendment rights in person, the Committee exposed Simpson to public backlash by both the press and Congressmembers investigating him. Members conducting the investigation allegedly leaked information to the press,[112] compromising the potential benefits of holding a closed-door hearing in the first place. Both Jordan and Meadows demonstrated a willingness to malign both Simpson and his attorneys just hours after the confidential testimony.

The case studies of Lerner, Pagliano, and Simpson exhibit how little respect Congress shows for a witness's Fifth Amendment rights. Congressmembers demonstrated a willingness to badger witnesses with questions after the privilege was invoked, a move that blatantly disregards the letter and spirit of the Fifth

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104. *Fox Business: Fusion GPS Co-Founder Pleads Fifth on Anti-Trump dossier* (Fox Business television broadcast Oct. 16, 2018), https://www.youtube.com/watch?v=rx2XvIVAGZg [https://perma.cc/34L2-JTPC].

105. *Lou Dobbs Tonight: Rep. Jordan reacts to Fusion GPS's Glenn Simpson pleading the Fifth* (Fox Business television broadcast Oct. 16, 2018), https://www.youtube.com/watch?v=SiWrocB6yDQ [https://perma.cc/6EQF-BHJQ].

106. *Id.*

107. *Fusion GPS Co-Founder Pleads the Fifth in Congress, Attorney cries McCarthyism*, THE HILL (Oct. 16, 2018), https://thehill.com/hilltv/rising/411737-fusion-gps-co-founder-pleads-the-fifth-in-congress-attorney-cries-mccarthyism [https://perma.cc/T23G-K6VG] [hereinafter *Fusion GPS Pleads Fifth*].

108. *Id.*

109. Demirjian, *supra* note 100.

110. Hamilton, *supra* note 10, at 1138.

111. *Fusion GPS Pleads Fifth in Congress, supra* note 107.

112. Karoun Demirjian, *Senate Intelligence Leaders Suspect Republicans Leaked a Top Democrat's Text Messages*, WASH. POST (Mar. 1, 2018), https://www.washingtonpost.com/powerpost/senate-intelligence-leaders-suspect-republicans-leaked-a-top-democrats-text-messages/2018/03/01/eba80e2c-1d89-11e8-b2d9-08e748f892c0_story.html [https://perma.cc/D93G-YVF5].

Amendment. Further, by demanding witnesses appear in person to claim their constitutional rights, Congressmembers exposed the witnesses to harassment, degradation, and embarrassment. Despite the theoretical balance between a witness's Fifth Amendment rights and Congress's investigatory power,[113] in practice Congress's investigatory power curtails many elements of the protections offered by the Fifth Amendment.

III. TWO LEGAL ETHICS PERSPECTIVES ON WITNESSES PLANNING TO INVOKE THE FIFTH AMENDMENT

The following section considers two Legal Ethics Opinions for resolving the issues outlined above. Each proposal answers the question of whether Congress can compel a witness to appear to plead the Fifth in person. The first opinion states congressional committees and staff attorneys cannot compel a witness to appear if the witness plans to invoke the Fifth.[114] The second opinion states that congressional committees and staff attorneys may compel a witness to appear if the witness plans to invoke the Fifth, so long as there is a legitimate legislative function and the appearance does not pillory the witness.[115]

A. CONGRESS CANNOT COMPEL A WITNESS TO APPEAR

The D.C. Bar Legal Ethics Committee (the Committee) explains the first proposal, that Congress cannot compel a witness to appear, in Legal Ethics Opinion 31 (Opinion 31).[116] Opinion 31 offers guidance on whether it is ethical to summon a witness to appear before Congress when Congress knows in advance the

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113. *Supra* Part I(a).

114. *See* D.C. Bar, Op. 31 (1977).

115. A third alternative exists outside of the legal ethics opinions considered in Part III. Some scholars, including Michael O'Neill and Akhil Amar, advocate that congressional committees and staff attorneys must compel a witness to appear even if the witness plans to invoke the Fifth, because the Fifth Amendment does not apply to congressional proceedings. Amar, *supra* note 57 at 207. O'Neill and Amar would forbid the introduction of testimony compelled in a congressional investigation at a criminal trial, but they would not offer witnesses the benefit of the right against self-incrimination in the course of a congressional hearing. *Id.*; *see* O'Neill, *supra* note 10. They argue the text of the Fifth Amendment, ". . . any criminal case . . ." serves as a limiting principle for application of the amendment outside of a court room. *See* O'Neill, *supra* note 10; Amar, *supra* note 57 at 207. O'Neill's work draws on extensive legislative history, while Amar focuses more directly on the text and purpose of the Fifth Amendment. *See* O'Neill, *supra* note 10; Amar, *supra* note 57 at 70-71, 207.

116. D.C. Bar, Op. 31 (1977). The D.C. Bar Legal Ethics Committee (the Committee) issues Legal Ethics Opinions (LEO), which are advisory opinions to assist lawyers in the prospective interpretation and application of the D.C. Rules of Professional Conduct (the Rules), formerly the D.C. Code of Professional Responsibility. Telephone Interview with Nakia L. Matthews, Senior Legal Ethics Counsel, D.C. Bar (Jan. 27, 2020). Attorneys are encouraged to follow the guidance of an LEO, but they are disciplined for violating the underlying Rules. *Id.* LEOs do not answer questions of law—i.e. whether the Fifth Amendment applies before Congress—but rather offer guidance on the prospective applications of the Rules. *Id.* LEOs are persuasive authority; if the D.C. Court of Appeals chooses to adopt language or interpretation used in an LEO then it becomes binding as case law. *Id.* Attorneys practicing in D.C. are subject to the Rules. *Id.* Additionally, the D.C. Bar has a reciprocal discipline rule that largely depends on the facts of the disciplinary issue at hand. Disciplinary actions and sanctions for violating a Rule ranges from diversion to disbarment. *Id.*

witness will exercise her Fifth Amendment right against self-incrimination.[117] The Committee advised that an attorney acting as counsel for a congressional committee may only compel a witness to appear to plead the Fifth if that appearance was pursuant to a legitimate legislative function, specifically obtaining information.[118] As the Committee wrote: "There is no congressional power to expose for the sake of exposure."[119]

The Committee ultimately concluded that compelling a witness to appear when Congress knows in advance she will plead the Fifth conflicts with the ethical requirements of attorneys counseling congressional committees.[120] In arriving at this conclusion, the Committee considered the American Bar Association standards on prosecutorial misconduct.[121] The Committee analogized Congress and congressional attorneys' obligations to this standard and it wrote: "We see no reason in principle why this standard should not govern the conduct of an attorney acting for a congressional committee."[122] It further advised that Congress should not compel a witness to publicly claim the privilege because "[t]here is certainly no need to have the test of claim of privilege take place in a televised open hearing with the resultant inevitable prejudicial publicity for the witness."[123]

Finally, the Committee concluded that compelling a witness to appear violates the letter and spirit of the D.C. Code of Professional Responsibility. When an attorney knows a witness will invoke her privilege the attorney cannot reasonably believe the witness will offer relevant information, which is the only proper reason for compelling appearance.[124] Therefore, the Committee reasoned, compelling a witness to appear and permitting Congress to attempt to question the witness serves only to degrade the witness, a direct violation of D.C. Code DR 7-106(C)(2).[125]

Many seasoned congressional attorneys support Opinion 31 because, from a practical perspective, a witness who plans to plead the Fifth offers very little useful information to a congressional committee or its staff attorneys.[126] They note that if a witness reasonably believes anything she says may be used against her, then the witness will just refuse to answer any questions the investigating committee poses.[127] Indeed, this was the case for Lois Lerner, who, during her second

117. D.C. Bar, Op. 31 (1977).
118. *Id* (citing *McGrain v. Daugherty*, 273 U.S. 135 (1929)).
119. *Id*.
120. *Id*.
121. *Id*.
122. *Id*.
123. *Id*.
124. *Id*.
125. *Id*. The D.C. Rules of Professional Conduct replaced the D.C. Code of Professional Responsibility in 1991. The D.C. Rules contain a provision similar to DR 7-106(C)(2). *See generally* D.C. RULES OF PROF'L CONDUCT, R. 3.4, 3.5, 3.8, 4.4, 5.2, 8.4 (2015).
126. *See* Hamilton, *supra* note 10, at 1164.
127. *Id*.

appearance before Congress, answered every single question posed with a recitation of her Fifth Amendment rights.[128] Taken to its logical extension, if congressional committees' investigative power exists for the purpose of gathering information, and a committee and its attorneys know they will not gather information from a witness, then compelling the witness to appear serves no legitimate legislative function.[129]

Additionally, advocates of this proposal suggest that compelling a witness to appear generates bad policymaking.[130] The potential assumptions that may be drawn from an invocation of the Fifth, as demonstrated during the heyday of the "Fifth Amendment Communist" nickname, permits legislators to make decisions on purely inferential information.[131] The proponents of Opinion 31 argue legislating based on inferences is bad policymaking.[132] Additionally, there are avenues for congressional committees to get information from a witness without compelling the witness to appear, including offering immunity, as explained in Part I, or permitting a witness to appear in an Executive Session.[133]

In conclusion, Opinion 31 considers how invoking the Fifth works in practice at a congressional investigation and recommends that when a witness cannot provide any information to a committee or its attorneys, then calling the witness for the sole purpose of pleading the Fifth before a committee is per se improper. Attorneys representing clients who regularly appear before Congress support this opinion because of the practical effects it has on their clients, who may face the harassment and degradation outlined above.

B. CONGRESS MAY COMPEL A WITNESS TO APPEAR

The Committee presents a second possible proposal for balancing Congress's broad investigatory power with a witness's Fifth Amendment right against self-incrimination. In Legal Ethics Opinion 358 (Opinion 358), the Committee advises that staff attorneys may compel a witness to appear publicly before a congressional committee to invoke her Fifth Amendment rights.[134] The only exception to the expectation of public appearance is when a congressional committee calls a witness for the sole purpose of embarrassment or harassment.[135]

The Committee issued Opinion 358 after it received a request to vacate Opinion 31.[136] The request claimed that attorneys interpreted Opinion 31 as a way to avoid publicly appearing before a congressional committee; moreover, it

128. H.R. REP. NO. 113-415, at 13–15 (2014).
129. *See* Hamilton, *supra* note 10, at 1164; Zeidman, *supra* note 10, at 608.
130. *See* Hamilton, *supra* note 10, at 1164; Zeidman, *supra* note 10, at 608.
131. *See* Hamilton, *supra* note 10, at 1164; Zeidman, *supra* note 10, at 608.
132. Zeidman, *supra* note 10, at 608.
133. *Id*. at 609.
134. *See* D.C. Bar, Op. 358 (2011).
135. *Id*.
136. *Id*.

claimed Opinion 31 stood for the proposition that compelling a witness to appear when she already expressed she would claim her Fifth Amendment rights violated the D.C. Rules of Professional Conduct (the Rules).[137] Finally, the request alleged that several legitimate reasons existed for compelling the appearance of a witness who plans to plead the Fifth:

> the committee's right to evaluate the privilege assertion, the possibility that the witness will waive or not assert the privilege, the possibility that the committee will agree to hear the witness in executive session, and the possibility that the committee will immunize the witness's testimony under 18 U.S.C. § 6005.[138]

In a surprising move, the Committee chose not to vacate Opinion 31.[139] However, it also established a seemingly conflicting standard: Congress may compel witnesses to appear except in instances where embarrassment or harassment is the sole purpose of the witness's appearance.[140] The Committee first noted that although the Rules superseded the D.C. Code of Professional Responsibility, many of the current Rules still support Opinion 31.[141] Additionally, the Committee interpreted Opinion 31 as standing for the proposition that an ethical violation occurs only when Congress compels a witness to appear who will provide no information, and the appearance is intended to degrade the witness.[142] By adopting this interpretation of Opinion 31, the Committee was able to keep Opinion 31 intact and also reach its two primary conclusions in Opinion 358: (1) calling a witness for the sole purpose of embarrassment or harassment is not appropriate, but (2) there are legitimate purposes for calling a witness anyways, even when she plans to claim her Fifth Amendment privilege.[143] Essentially, the Committee adopted the request's rationale that valid information can still be given by a witness who intends to invoke her Fifth Amendment rights, and, therefore, that witness should be compelled to appear publicly before a congressional committee.[144]

The second proposal for balancing the tension between Congress's broad investigatory power with a witness's Fifth Amendment right against self-

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137. *Id*. Requests to the D.C. Legal Ethics Committee and any deliberations related to Legal Ethics Opinions are confidential. Email Interview with Saul Jay Singer, Senior Legal Ethics Counsel, D.C. Bar (Jan. 13, 2020).

138. D.C. Bar, Op. 358 (2011).

139. *Id*.

140. *Id*.

141. *Id*. The Committee found two provisions most analogous to the former DR 7-106(C)(2), which served as the underlying rule for Opinion 31. *Id*. First, the Committee cited Rule 4.4(a) which states "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." D.C. R. 4.4. Second, the Committee cited Rule 8.4(d) which prohibits an attorney from "engaging in conduct that seriously interferes with the administration of justice." D.C. RULES OF PROF'L CONDUCT, R. 8.4(d).

142. D.C. Bar, Op. 358 (2011).

143. *Id*.

144. *See id*.

incrimination instructs Congress to compel a witness who plans to plead the Fifth to appear so long as the summons is not solely for the purposes of embarrassment or harassment. Under this model, a congressional staff attorney would not violate ethics rules if a witness was harassed or embarrassed by an investigating committee, so long as the witness could provide any information to that committee.

IV. CONGRESS SHOULD FOLLOW OPINION 31

While the D.C. Legal Ethics Committee may attempt to shoehorn Opinion 358 into the precedent set by Opinion 31, they are incompatible. Congress should follow Opinion 31 rather than Opinion 358. Not only is Opinion 31 strong on its own merits and reasoning, it is also stronger than Opinion 358, which would further aggravate the uneven balance between Congress's investigative power and a witness's constitutional rights. Opinion 31 best reflects the Supreme Court's precedent regarding invocation of the Fifth Amendment in Congress, it is the most practical option for witnesses, and it provides better protection of a witness's Fifth Amendment rights than Opinion 358.

First, the rationale given for Opinion 31 fits well within the framework of Supreme Court precedent. The Court has exhibited a strong desire to protect a witness's Fifth Amendment rights in a congressional investigation.[145] The holdings of *Quinn*,[146] *Emspak*,[147] *Bart*,[148] and *Watkins*[149] demonstrate the Court's preference that witnesses receive full and fair constitutional protection in a congressional investigation. Opinion 31 is best suited to uphold this protection because it does not allow Congressmembers to disregard a witness's invocation of the Fifth, nor does it allow Congressmembers the opportunity to manipulate a witness's statements into waiver of the privilege. Indeed, Congressmembers are never tempted to engage in these bad practices because a witness is not forced to appear before a committee.

Further, Opinion 31 makes the most sense from a practical standpoint: first because a witness who pleads the Fifth cannot offer any relevant information to Congress,[150] and second because Congress has demonstrated a systemic disregard for the constitutional rights of witnesses who chose to plead the Fifth.[151] It is unreasonable for Congress to claim it can gather information from a witness who expressed she would plead the Fifth. Compelling the witness to appear anyways cannot fulfill a committee's legislative purpose, but it can serve to embarrass or

145. *Supra* Part I.

146. *See* Quinn v. United States, 349 U.S. 155, 164–65 (1955).

147. *See* Emspak v. United States, 349 U.S. 190, 201 (1955).

148. *See* Bart v. United States, 349 U.S. 219, 223 (1955).

149. *See* Watkins v. United States, 354 U.S. 178, 215 (1957).

150. *Supra* Part I ("Congress must investigate with a valid legislative purpose, which includes gathering information: (1) on whether Congress should legislate in an area, (2) for the purpose of conducting oversight of the executive branch, and (3) to inform itself and the public about the workings of the government.").

151. *Supra* Part II.

harass the witness at best—or impinge on a witness's constitutional rights at worst. Neither of the latter options should be endorsed by a branch of government. The three case studies demonstrate consistent outcomes of Congress compelling a witness who planned to plead the Fifth: committee infighting, mistreatment of the witness, inferences about the witness's criminal liability, and, most egregiously, votes to expose the witness to massive fines or jail time by voting to hold the witness in contempt solely for exercising his or her constitutional rights.[152]

Finally, Opinion 358 expands Congress's investigatory ability at the great expense of a witness's constitutional protections. Congressional attorneys should not follow this practice. First, the D.C. Legal Ethics Committee misreads Opinion 31 on a fundamental level. Opinion 31 clearly states, "There is no congressional power to expose for the sake of exposure."[153] It advised congressional attorneys to follow American Bar Association standards and not compel the appearance of a witness who plans to plead the Fifth because that witness would not be able to offer a committee any relevant information.[154] The opinion explicitly stated that there was "no need to test a claim of privilege [in] a televised open hearing with the resultant inevitable prejudicial publicity for the witness."[155]

Yet, Opinion 358 makes no mention of the American Bar Association standards or the preceding sentence; it merely adopts the reasoning offered by the request to the Committee without providing additional legal analysis on why this reasoning comports with its previous position on compelling appearance. Opinion 358 permits congressional attorneys to compel a witness's appearance even if the investigating committee plans to embarrass or harass that witness. So long as the embarrassment or harassment is accompanied by potential information the witness provides, there is no ethics violation.

In practice, Opinion 358 offers Congress a carte blanche to use the power of the congressional investigation for illegitimate, partisan purposes. Such a standard would not only permit but endorse the treatment of Bryan Pagliano—a witness called before a committee with a suspect legislative purpose who faced two years of requested appearances and two potential criminal charges that resulted from the investigations. Perhaps more dangerously, it would continue to expose witnesses like Lois Lerner to death threats, merely for exercising a constitutional right. The impact of Opinion 358 would have major collateral consequences by directing the disdain and scrutiny of Congress and the public not only at a witness but also at a witness's attorney, as demonstrated in the case of Glenn Simpson. By following Opinion 358, Congress and congressional staff attorneys give witnesses two options: (1) appear to plead and expose oneself to belittlement,

152. *Id.*
153. D.C. Bar, Op. 31 (1977).
154. *Id.*
155. *Id.*

harassment, and threats or (2) refuse to appear and expose oneself to a criminal contempt charge. By presenting this false choice to witnesses, Congress risks a chilling effect on its ability to receive information from witness, and therefore its ability to conduct a valid congressional investigation.

By advising that Congress may call a witness who plans to plead the Fifth, Opinion 358 essentially states that respect for the Fifth Amendment may, rather than must, occur in a congressional investigation. It is clear Congressmen have little respect for the letter and spirit of the Fifth Amendment, and the view that Opinion 358 provides an adequate safeguard for the constitutional rights of a witness ignores Congress's behavior and treatment of witnesses in the last several decades.

CONCLUSION

This Note posed two questions: (1) Is Congress currently balancing its investigative abilities with protection of the Fifth Amendment in a way that is ethical and responsible; and (2) Can Congress compel a witness to appear to invoke her Fifth Amendment rights in person? Part I and Part II answer the first question; there is a clear gap between the legal standards for the Fifth Amendment's use in Congress and the practical experience of witnesses who plead the Fifth. This suggests Congress is not balancing its investigative abilities in a way that is ethical or responsible. Part III and Part IV answer the second question; Congress should not be able to compel a witness who plans to plead the Fifth to appear before an investigating committee. Opinion 31 offers the most robust protection of a witness's Fifth Amendment right against self-incrimination and ensures Congress faithfully executes its investigatory power pursuant to a legitimate legislative function.