



Itinerary for the September 22, 2014 Meeting of the George Mason American Inn Of Court

Book 'Em Danno: A Roundtable Discussion Of Recurring Fifth Amendment Issues In Civil And Criminal Litigation

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(7:30 - 7:40)
 2. Skit Number 1: David Lee Roth Strikes Back.
Audience Questions and Comments.
(7:40-7:55)
 3. Skit Number 2: Paul Paramour Takes the Fifth.
Audience Questions and Comments.
(7:55-8:10)
 4. Nuts and Bolts of Seeking Immunity.
Audience Questions and Comments.
(8:10-8:25)
 5. Closing Remarks.
(8:25-8:30)



***BOOK 'EM DANNO: A ROUNDTABLE
DISCUSSION OF RECURRING FIFTH
AMENDMENT ISSUES IN CIVIL AND
CRIMINAL LITIGATION***

**George Mason American Inn Of Court
Presentation for Monday, September 22, 2014**



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1. *The Fifth Amendment Privilege Against Self-Incrimination in Civil Cases*, David L. Arnold and Afshin Farashahi (Virginia Lawyer Magazine 2009) (Reprinted with permission of Virginia Lawyer Magazine).

The Fifth Amendment Privilege Against Self-Incrimination in Civil Cases

by David L. Arnold and Afshin Farashahi

A witness need not give testimony that could lead to criminal prosecution.

The privilege against self-incrimination is primarily invoked in the context of criminal prosecutions. As criminal practitioners most frequently encounter Fifth Amendment issues, they tend to be more familiar with the scope and availability of the privilege. Moreover, the Fifth Amendment affords criminal suspects and defendants a blanket protection

against self-incrimination. Since there is rarely ever any question as to whether an individual is either a suspect or a target in an investigation, the Fifth Amendment in a criminal context is relatively easy to identify and invoke.

Fifth Amendment issues arise in civil cases often with little warning, however, and practitioners who may have never represented a criminal defendant are suddenly confronted with a constitutional right primarily associated with criminal law. Unlike criminal cases, in which a defendant is readily identifiable and may simply refuse to take the stand, civil litigants, witnesses, and their counsel are sometimes afforded less warning—and less time to prepare—for these issues. Accordingly, it is beneficial for all trial lawyers to have a basic knowledge of a Fifth Amendment application in the civil context.

Availability of the Fifth Amendment Privilege

Despite the U.S. Constitution's apparent limitation of Fifth Amendment rights to "any criminal case" (as well as an identical limitation in the Virginia Constitution¹), the Fifth Amendment privilege is available to an individual in any court

proceeding, whether criminal or civil.² The rule protects civil litigants and witnesses because incriminating testimony solicited in a civil proceeding could be used against the person in a future criminal case, which directly violates state and federal constitutional prohibitions on compelling a witness from giving "evidence against himself."³ The privilege, however, is available only to an individual and cannot be invoked on behalf of a company.⁴ Moreover, it is a "personal" privilege, and a witness cannot refuse to answer to protect another.⁵

In order to protect an unwitting client against self-incrimination, a practitioner must be able to identify the instance when invocation of the privilege is appropriate and analyze the applicability of the privilege. The privilege applies to testimony that may create a reasonable apprehension of prosecution by the witness. But the Fifth Amendment "does not provide a blanket right to refuse to answer questions."⁶ It is up to the judge to determine whether the privilege is properly invoked, and that means that "some investigative questioning must be allowed."⁷

A witness need not give testimony that could lead to criminal prosecution. In other words, there must be some identifiable criminal charge to which the questionable testimony would support or provide a link to evidence to support the charge.⁸ To sustain the privilege, "it need only be evident from the implication of the question, in the setting in which it is asked, the responsive answer to the question or an explanation of why it cannot be answered might be dangerous. . . ."⁹ To sustain the privilege, counsel or the witness must demonstrate to the trial court how a prosecutor, "building the most unseemingly harmless answer, might proceed step by step to link the witness to some crime" and that such linkage not seem incredible or remote in the circumstances of the particular case.¹⁰

Although the privilege is restricted to evidence that is testimonial in nature, it has been applied

in other circumstances. The Supreme Court of Virginia has held that it may be applied to discovery responses.¹¹ The Virginia Court of Appeals has extended the privilege to “private papers.”¹² Practitioners should carefully distinguish, however, testimony that could result in criminal prosecution from that which might result in civil, administrative, or other punitive penalties. No protection is afforded a client who may suffer a penalty as opposed to criminal liability. For example, attorney disciplinary proceedings are civil in nature, and the Fifth Amendment privilege is not available in a Virginia State Bar disciplinary proceeding simply because testimony could result in disciplinary action.¹³

Special analysis is required in situations in which the information sought is not verbal in nature, particularly when the evidence is the target of a subpoena. Private papers that contain incriminating information and are “testimonial or communicative” appear to be privileged.¹⁴ Business records, or other records that are required to be kept by statute, are not protected.¹⁵ Also, documents that might otherwise enjoy protection but which have been transferred to a third party are not protected.¹⁶ When analyzing incriminating documents, the most compelling factor to be considered is possession, rather than ownership of those documents.¹⁷

In order to uphold criminal statutes, courts have been careful to distinguish between communications and other evidence that could be used in a criminal prosecution. For example, nontestimonial evidence such as breath and blood samples, lineups, and mug shots are not protected. Photographs or electronic computer data are not “testimonial,” but they certainly could be incriminating. For instance, a compromising photograph suggesting adultery in the possession of a party to a divorce proceeding or the computer hard drive in a business conspiracy case where embezzlement has occurred is not likely to be protected by the Fifth Amendment. A carefully crafted subpoena could circumvent the privilege. In similar instances, practitioners should not assume that the privilege is available, or that it is definitely enforceable if an adversary invokes it.

Methods of Invoking the Privilege Against Self-Incrimination

Whereas a criminal defendant enjoys a blanket protection and may simply invoke Fifth Amendment privilege and refuse to take the stand, offer any testimony, or answer any questions, the Fifth Amendment privilege enjoyed

by civil litigants and witnesses is more narrowly applied. A criminal defendant may simply refuse to take the stand; a civil litigant or witness, however, may not refuse to take the stand and may not refuse to offer testimony. To the contrary, in the civil context, the Fifth Amendment privilege extends only to specific questions. The privilege will not be automatically sustained upon a declaration by the witness or the witness’s counsel that the response could be incriminating. For obvious reasons, the witness need not explain in minute detail why the response may be incriminating. To do so may jeopardize the very protection that the privilege seeks to establish. However, the privilege must be invoked for each question. At trial or in a deposition, the witness must take the stand and invoke the privilege for each and every applicable question posed. Only the witness, and not his or her attorney, can invoke the privilege.¹⁸ In the context of a civil discovery process, such as interrogatories and requests for admissions, the privilege must be invoked in the responses.

Most Common Pitfall: Waiver of the Privilege

The privilege is most commonly waived when a client simply answers the question posed. The response will be considered a waiver not just to that specific question, but also to the matter and events relating to the question.¹⁹ Moreover, the affirmative denial of an allegation in a pleading may result in waiver of the privilege with regard to specific questions posed in discovery further along in litigation.

It is much more burdensome to invoke the Fifth Amendment privilege as opposed to waive it. To invoke, a witness has to invoke for each question. But by answering one question, waiver attaches not just to the question, but also to related inquiries.

When analyzing incriminating documents, the most compelling factor to be considered is possession, rather than ownership of those documents.

Limitations On and Consequences In a Civil Proceeding

Counsel should be aware that, although the Fifth Amendment privilege is a right that always accompanies a person to any legal proceeding, there are some limitations to invoking it. The concern usually involves the person who uses the

privilege not to shield himself from criminal liability but as a sword to hinder the other party's attempts to obtain information. As explained below, the General Assembly has diminished the ability to abuse the privilege.

Another limitation of availability is that the privilege cannot be invoked when the risk of criminal prosecution has dissipated, such as when the statute of limitations has expired. And the privilege does not apply to embarrassing or degrading responses, nor to testimony that may lead to civil liability. Finally, as discussed above, it does not protect against producing nontestimonial, incriminating evidence.

Sword and Shield Doctrine and Virginia Code § 8.01-223.1

The Virginia Supreme Court in *Davis v. Davis*²⁰ set out the common law doctrine of “sword and shield,” explaining that the privilege against self-incrimination was intended solely as a shield. The rule thus provides that a moving party cannot use it as a sword to sabotage any attempt by the other party, either during pretrial discovery or at trial, to obtain information relevant to the cause of action alleged and to possible defenses of the claim.²¹

This doctrine's applicability in Virginia is questionable in light of Virginia Code § 8.01-223.1, which states, “In any civil action the exercise by a party of any constitutional protection shall not be used against him.” The court of appeals has interpreted this latter provision as superceding, at least in some instances, the sword and shield doctrine.²² In effect, the invocation of the Fifth Amendment privilege is a weapon available to both parties that can prevent disclosure of relevant information.

On the other hand, the impact of this protection may be minimized in the context of divorce cases where adultery is alleged. In divorce proceedings, allegations of adultery must be proven by clear and convincing evidence. In a case in which the alleged adulterer's conduct is suspicious, one factor the courts consider is whether an explanation has been provided for the conduct. If no explanation has been provided, then an adverse inference may be drawn. Even when the privilege against self-incrimination has been invoked, it appears that, despite the protection afforded by § 8.01-223.1, it is still possible for an adverse inference to be drawn.²³ In *Watts v. Watts*²⁴, this is precisely what the Court of Appeals did. The husband had invoked the privilege during deposition when asked about whether he had

engaged in extramarital intercourse. In a footnote, the court stated that it was “mak[ing] no negative inference based” on this exercise of the Fifth Amendment right.²⁵ But the court, having found sufficient evidence of adultery, then made the following statement: “In [invoking the Fifth Amendment], however, husband failed to provide a reasonable explanation for his conduct, a matter about which we do take cognizance.”²⁶

On this issue, counsel should also review *Romero v. Colbow*,²⁷ a divorce case in which the wife invoked the privilege in connection with questions about adultery. The Court of Appeals upheld the commissioner in chancery's finding that evidence was not sufficient to prove the wife had committed adultery despite very strong suspicious circumstances. The commissioner, relying on Code § 8.01-223.1, had said that the wife's invocation could not be used against her.²⁸ The Court of Appeals issued its ruling without commenting on this statement of the commissioner.²⁹

Virginia Code §§ 8.01-401(B) and 8.01-223.1

Under Virginia Code 8.01-401(B), when one party calls another party to testify and the latter party refuses to do so, the court may punish the refusing party for contempt of court. In addition, the court may punish the refusing party by dismissing the action (if the refusing party is the plaintiff) and strike or disregard the plea, answer, or other defense of the party.

Just as with the sword and shield doctrine, the effectiveness of this provision has been diminished by Virginia Code § 8.01-223.1. One circuit court has ruled that Code § 8.01-223.1 is a more specific statute because it addresses a refusal to testify based on a constitutionally protected right as opposed to a general refusal.³⁰ Therefore, under this reasoning, a party cannot be punished for refusing to testify based on the privilege against self-incrimination. But note that § 8.01-223.1 applies to “a party” in a civil action; this could suggest that if a party's witness invokes the privilege against self-incrimination, then the trial court is permitted to draw an adverse inference against that party.

Virginia Code § 19.2-270

Counsel who is attempting to counter an invocation of the privilege by the opponent should also become familiar with Virginia Code § 19.2-270, which provides

In a criminal prosecution, other than for perjury, or in an action on a penal statute,

evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, in a criminal or civil action, unless such statement was made when examined as a witness in his own behalf.

On a quick reading, the statute appears to provide immunity from future prosecution, thereby preventing the invocation of the privilege against self-incrimination. As discussed above, in order to validly invoke the privilege, there must be a danger that the statement will support some part of a criminal case against the witness. However, the statute does not provide the type of blanket immunity (such as derivative use or transactional immunity) that would prevent an invocation of the privilege. First, notice that the statute only prevents the statement being used in a subsequent prosecution. It does not prohibit using that statement to lead to other evidence; the statute only provides use immunity and not derivative use or transactional immunity. This is significant because a witness can base an invocation on the premise that the statement, even though not directly admissible, may lead to other evidence.

Also, the statute provides the immunity only if the person is testifying on his own behalf. If an attorney's client is a witness in a litigation in which the client has no interest, then the statute does not apply to that witness.

Finally, the statute does not encompass perjury prosecutions. A client cannot invoke the privilege because she wants to commit perjury at a later hearing. But if the client has already given testimony under oath in another matter and that testimony is arguably inconsistent with what the client intends to testify, then a valid basis likely remains to invoke the privilege.

Conclusion

In criminal cases, the privilege against self-incrimination frequently arises, and counsel is typically prepared to address the issue well in advance of the moment. In the civil arena, however, the privilege can come up unexpectedly. If the issue is missed—or misunderstood—then the consequences can be severe. An inadvertent waiver of the issue will mean that the client will be deprived of invoking a powerful constitutional protection. ▮

Endnotes:

- 1 Va. Const., art. I, § 8.
- 2 *Husske v. Commonwealth*, 252 Va. 203, 214, 476 S.E.2d 920, 927 (1996).
- 3 Va. Const., art. I, § 8.
- 4 *North American Mortgage Investors v. Pomponio*, 219 Va. 914, 918, 252 S.E.2d 345, 348 (1979).
- 5 *Id.* at 920, 252 S.E.2d at 349 (citing *Rogers v. United States*, 340 U.S. 367, 371 (1951)).
- 6 *Cunningham v. Commonwealth*, 2 Va. App. 358, 361, 344 S.E.2d 389, 391 (1986).
- 7 *Id.* at 361-62, 344 S.E.2d at 391.
- 8 *Pomponio*, 219 Va. at 919, 252 S.E.2d at 348 (citations omitted).
- 9 *Id.* at 919, 252 S.E.2d at 348 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951)).
- 10 *Id.* at 919, 252 S.E.2d at 348-349 (quoting *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952)).
- 11 *Dunlany v. Smith*, 97 Va. 130, 33 S.E. 533 (1899).
- 12 *Moyer v. Commonwealth*, 30 Va. App. 744, 751, 520 S.E.2d 371, 375 (1999).
- 13 *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987).
- 14 *Moyer*, 30 Va. App. at 751, 520 S.E.2d at 375.
- 15 *United States v. Doe*, 465 U.S. 605, 606 (1984); *Shapiro v. United States*, 335 U.S. 1, 16-18 (1948).
- 16 *United States v. Taylor*, 399 F.Supp. 681 (E.D. Va. 1975).
- 17 *Id.*
- 18 *Powell v. Commonwealth*, 167 Va. 558, 577, 189 S.E. 433, 441 (1937).
- 19 *Rogers v. United States*, 340 U.S. 367, 373-74 (1951); *Woody v. Commonwealth*, 214 Va. 296, 199 S.E.2d 529, 531 (1973).
- 20 233 Va. 452, 357 S.E.2d 495 (1987).
- 21 *Id.* at 456-457, 357 S.E.2d at 498.
- 22 Virginia Code § 8.01-223.1 went into effect before the *Davis* opinion was published. But *Davis* did not address this code section because the relevant facts in *Davis* arose before the statute went into effect.
- 23 In Virginia, adultery is Class 1 misdemeanor, which carries a maximum penalty of twelve months in jail and a fine of \$2,500. Virginia Code §§ 18.2-366, 18.2-11.
- 24 *Watts v. Watts*, 40 Va. App. 685, 581 S.E.2d 224 (2003).
- 25 *Id.* at 702 n.2, 581 S.E.2d at 233 n.2.
- 26 *Id.*
- 27 27 Va. 88, 497 S.E.2d 516 (1998).
- 28 *Id.* at 93, 497 S.E.2d at 518-519.
- 29 Despite the omission of any discussion of the Fifth Amendment in *Romero*, the Court of Appeals in the *Watts* case cited *Romero* in a footnote as holding specifically that the wife's invocation could not be used against her. *Watts*, 40 Va. App. At 702 n.2, 581 S.E.2d at 233 n.2.
- 30 *Murphy v. Murphy*, 19 Va. Cir. 96 (Fairfax County 1995).



2. *Davis v. Davis* (Norfolk Cir. Ct., June 6, 2014).

June 6, 2014

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Re: Susan K. Davis v. Millard M. Davis
Civil Nos.: CL13-7696, 13-7696-01

Dear Ladies and Mr. Murov:

We are fortunate there are no children of the marriage in this particularly spiteful divorce suit. The parties entered into separation agreements in April and July of 2011, but the husband is asking they be declared void because of certain alleged misbehavior of the wife during the time they were negotiating the agreements. In what is surely a bad sign for the trial judge, whoever that may prove to be, each party has issued subpoenae *duces tecum* for the pharmacy records of the other. The suit came before me on May 22 on several motions, but time permitted only two of them to be heard fully.

Motion to Quash

Mr. C (as this is a public record I shall so refer to Ms. Markiewicz's client), who is alleged to be (or to have been) the wife's paramour, seeks to quash a subpoena *duces tecum* the husband issued for his cellular telephone records. He states he is self-employed and he complains that this would be an invasion of the privacy of his clients. The evidence adduced at

the hearing supported that complaint as it proved the husband is likely to misuse the information if its production is compelled.

The husband has sent many text messages to Mr. C. It appears he obtained Mr. C's number from his wife's telephone records. Some of the text messages were vulgar; others were somewhat threatening. Mr. C, no doubt, found them all unwanted.

The husband has also called two women who are friends of his wife, whose telephone numbers he also seems to have obtained from his wife's telephone records. Ms. Alewine testified she did not know the husband, but he nonetheless called her to tell her that his wife had cheated on him eight times. Ms. Bangel testified she has met the husband, but she does not know him well. Their lack of familiarity did not dissuade the husband from telling her she could expect a subpoena because the wife had a tryst at her house.

I sustain the motion to quash except that Mr. Murov may: (i) obtain records showing communications to or from any telephone number the wife used, and (ii) give to Ms. Markiewicz a list of other telephone numbers he wishes to check against Mr. C's records, and a specific reason for each other number requested. If Ms. Markiewicz has no objection to the request she shall produce the records; if she has an objection another hearing may be necessary. Telephone numbers not covered by (i) or (ii) shall be redacted. The husband will pay Ms. Markiewicz a reasonable paralegal's fee for preparing these records.

Motion to Compel

The husband moves to compel Mr. C to answer questions at a deposition about sexual relations he may have had with the wife. Mr. C was deposed on April 8, and he invoked his right against self-incrimination to most of the questions asked. At the hearing he claimed he did so because he feared that if he answered he could be prosecuted for fornication, prostitution, or consensual sodomy.

The privilege against self-incrimination must be specifically claimed on a particular question. The court may require a witness to answer a question if it clearly appears the witness is mistaken in his belief of a hazard of incrimination. To sustain the privilege, the court must be shown how conceivably a prosecutor, building on a seemingly harmless answer, might proceed step by step to link the witness to some crime, but this suggested course and scheme of linkage must not seem incredible in the circumstances of the particular case. Furthermore, the privilege protects against real dangers, not remote and speculative possibilities. *North American Mortgage Investors v. Pomponio*, 219 Va. 914, 918-19, 252 S.E.2d 345, 348-49 (1979) (citing and quoting from *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951)); *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972); *United States v. Coffey*, 198 F.2d 438, 440 (3rd Cir. 1952); *Temple v. Commonwealth*, 75 Va. 892, 899 (1881).

Fornication

At the hearing it was stated without objection or contradiction that Mr. C is not married. If he has been having an affair with the wife, he has committed fornication. *Commonwealth v. Lafferty*, 6 Gratt. (47 Va.) 672 (1849). The General Assembly has not repealed the fornication statute, *Code* § 18.2-344, but the Supreme Court held it unconstitutional with respect to private, consensual conduct in *Martin v. Zihlerl*, 269 Va. 35, 607 S.E.2d 367 (2005), as explained in *McDonald v. Commonwealth*, 274 Va. 249, 645 S.E.2d 918 (2007). As fornication is a class 4 misdemeanor, there is a one year statute of limitations on prosecutions. *Code* § 19.2-8.

Prostitution

Mr. C claims he could be subject to prosecution for prostitution, *Code* § 18.2-346, based upon questions about the wife's payment of his traveling expenses or debts. (Deposition pp. 14-15). Prostitution is "common, indiscriminate, illicit intercourse for hire, or the practice by a female in offering her body to an indiscriminate intercourse with men for money or its equivalent." *Trent v. Commonwealth*, 181 Va. 338, 342, 25 S.E.2d 350, 352 (1943) (quoting *People v. Marron*, 140 Cal. App. 432, 35 P.2d 610 (1934)). Even applying a gender-neutral definition, if lovers bestow gifts or other things of value on one another, they are not engaged in prostitution. His prosecution for this offense is beyond a remote and speculative possibility.

Furthermore, as prostitution is a class 1 misdemeanor, there is a one year statute of limitations on prosecutions. *Code* § 19.2-8.

Sodomy

Mr. C also claims he could be subject to prosecution for sodomy, *Code* § 18.2-361. The Court of Appeals for the Fourth Circuit held the statute unconstitutional in *Macdonald v. Moose*, 710 F.3d 154 (4th Cir. 2013). The Supreme Court of Virginia has upheld the statute as applied to acts involving an adult and a minor. *McDonald v. Commonwealth*, *supra*. The Court of Appeals of Virginia has upheld the statute as applied to public acts. *Singson v. Commonwealth*, 46 Va. App. 724, 621 S.E.2d 682 (2005). As sodomy is a felony not mentioned in *Code* § 19.2-8, there is no statute of limitations on its prosecution.

Public Acts

An act occurring in a place not open to the public may nonetheless be considered to be "in public" under various criminal statutes. In *Crislip v. Commonwealth*, 37 Va. App. 66, 554 S.E.2d 96 (2001), the Court upheld a conviction for intoxication "in public," *Code* § 18.2-388, when the defendant was on a porch on private property in open view of a public highway sixty feet away. In *Singson*, *supra*, the act occurred in a department store bathroom. In *Barnes v. Commonwealth*, 61 Va. App. 495, 737 S.E.2d 919 (2013), the Court upheld convictions for indecent exposure, *Code* § 18.2-387, and obscene sexual display, *Code* § 18.2-387.1, when the defendant was masturbating in his cell block in jail – a place most members of the public hope never to be. The former statute requires that the act occur "in any public place, or in any place where others are present;" the latter requires the act occur "in any public place where others are

present.” The Court of Appeals held that “public place” as used in these statutes: “comprises places and circumstances where the offender does not have a reasonable expectation of privacy, because of the foreseeability of a non-consenting public witness.” 61 Va. App. at 500, 737 S.E.2d at 921. However, in *Everett v. Commonwealth*, 214 Va. 325, 200 S.E.2d 564 (1973), a conviction under former *Code* §18.1-193 for “open and gross lewdness and lasciviousness” was reversed because the defendant’s nakedness was revealed to a deputy sheriff staking out the motel room only when the “wind parted the curtains at the open window to the back bedroom.” 214 Va. at 326, 200 S.E.2d at 566. The Court held that: “Conduct not in a public place or a place open to public view and which can be seen only by looking past drawn curtains into a private residence is not ‘open’” 214 Va. at 327, 200 S.E.2d at 566.

What to make of all this? If Mr. C and the wife engaged in coitus or consensual sodomy, criminal liability could depend, among other factors, upon the nature of the place where the act occurred, and, if in a building, the location of windows, the presence of drawn or open curtains, lighting, the proximity to a public street or sidewalk, and the time of day. As a witness may not claim a blanket right to refuse to answer questions in a civil proceeding, but, rather, must claim the privilege with respect to a particular question, I should not decree a blanket denial of the privilege when exposure to prosecution may depend upon so many unknown circumstances. Although prosecutions for fornication and consensual sodomy are now uncommon, the discretion of an unknown assistant Commonwealth’s attorney is a poor guarantee of the liberty of the citizen, and, given the husband’s conduct to-date, it is quite possible he would attempt to secure a warrant from a magistrate based upon deposition testimony.

Mr. C must answer questions about coitus with the wife more than one year before the resumption of his deposition. I am not prepared to go beyond this on the state of the record before me. Ms. Markiewicz shall prepare an order reflecting this ruling.

Sincerely yours,

Everett A. Martin, Jr.
Judge

EAMjr./mls

Enclosure



3. *Waiving the Fifth Amendment Before Congress—Not As Easy As Congress Might Hope*, Brian P. Ketcham (Champion Magazine 2013) (Reprinted with permission of National Association of Criminal Defense Lawyers).



1 of 7 DOCUMENTS

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The Champion

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37 Champion 46

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FEATURE: WAIVING THE FIFTH AMENDMENT BEFORE CONGRESS -- NOT AS EASY AS CONGRESS MIGHT HOPE

By Brian P. Ketcham

Brian P. Ketcham is an Associate at Kostelanetz & Fink, LLP in New York City. He handles both civil and criminal tax matters, white collar criminal cases, and complex civil litigation.

TEXT:

[*46]

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. n1

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." n2 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*, n3 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[.]" n4 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." n5 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. n6

[*47] **Waiving the Fifth Amendment Privilege**

The Supreme Court has emphasized that waiver of the Fifth Amendment privilege "is not to be lightly inferred," n7 and that "courts must indulge every reasonable presumption against waiver." n8

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. n9 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. n10

In *Klein v. Harris*, n11 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." n12 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." n13

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 (ROH) has publically asked, "Who is going to jail over this scandal?" n14 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. n15 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. n16

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" n17 that her statements would be interpreted as a Fifth Amendment waiver. Indeed, her statement [*48] 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." n18

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." n19 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 authority n20 and, moreover, a misapplication of the doctrine of Fifth Amendment testimonial waivers.

GRAPHIC:

PHOTO, Brian P. Ketcham

FOOTNOTE-1:

n1 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).

n2 U.S. CONST. AMEND. V.

n3 *Kastigar v. United States*, 406 U.S. 441 (1972) (footnotes omitted).

n4 *Id.* at 445-46 (emphasis added).

n5 *Id.* at 445.

n6 See <http://nymag.com/daily/intelligencer/2013/05/lerner-gowdy-waive-right-5th-amendment-irs.html> (last accessed July 2, 2013).

n7 *Smith v. United States*, 337 U.S. 137, 150(1949).

n8 *Emspak v. United States*, 349 U.S. 190, 198(1955).

n9 *Miranda v. Arizona*, 384 U.S. 436 (1966).

n10 *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981) (citing *Smith v. United States*, 337 U.S. 137 (1949)).

n11 *Klein*, *supra* note 10, at 274.

n12 *Id.* at 287.

n13 *Id.*

n14 *See* <http://news.yahoo.com/john-boehner-irs-going-jail-over-scandal-182410567.html> (last accessed July 2, 2013).

n15 *See, e.g.,* http://www.realclearpolitics.com/video/2013/05/22/rep_gowdy_lerner_waived_her_fifth_amendment_rights_by_giving_statement.html (remarks of Rep. Trey Gowdy (R-SC): "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.") (last accessed July 2, 2013).

n16 Transcript prepared by author from video of Ms. Lerner's statement to House Oversight Committee on May 22, 2013. Video clip available at <http://www.politico.com/story/2013/05/darrell-issa-irs-lois-lerner-91755.html> (last accessed July 2, 2013).

n17 *Klein, supra* note 10, at 287.

n18 *Id.* at 288.

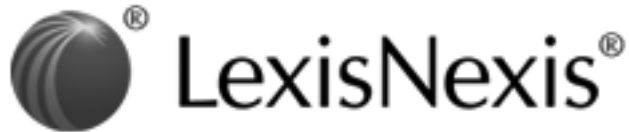
n19 *Id.*

n20 *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of *the judicial department* to say what the law is.") (emphasis added).



4. *Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects In Light Of Salinas v. Texas*, Neal Davis and Dick DeGuerin (Champion Magazine 2014) (Reprinted with permission of National Association of Criminal Defense Lawyers, Neal Davis, and Dick DeGuerin).

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COVER STORY: SILENCE IS NO LONGER GOLDEN: HOW LAWYERS MUST NOW ADVISE SUSPECTS IN
LIGHT OF SALINAS V. TEXAS

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TEXT:

[*16]

Almost 70 years ago, Justice Robert Jackson made the following observation in *Watts v. Indiana*: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." n1 But after the Supreme Court's recent decision in *Salinas v. Texas*, n2 Justice Jackson's once-stalwart advice could be tantamount to malpractice if police question a suspect in a noncustodial context. Silence is no longer golden.

Under the Supreme Court's *Alice in Wonderland* approach to the Self-Incrimination Clause, witnesses cannot exercise their right to remain silent in a noncustodial context unless they speak up. In a 5-4 decision, n3 *Salinas* held that a witness, whom police subject to noncustodial questioning without giving the *Miranda* warning, cannot rely on the Fifth Amendment unless he expressly invokes it. n4 That is, if a witness remains silent in the face of such questioning, the prosecution can, at trial, introduce his silence as substantive evidence of his guilt. And further, the police do not have to inform the witness in advance of his right *against* self-incrimination.

While it did not receive widespread media attention, *Salinas* has profoundly changed the law of self-incrimination. n5 Imagine the myriad common scenarios in which *Salinas* might apply. For example, *Salinas* might apply when (1) a suspect receives a target letter from a prosecutor; (2) police or prosecutors contact a suspect to discuss a case; or (3)

police question a suspect while conducting an investigation or serving a subpoena. Then think about the frightening prospect of a suspect who simply remains silent. At trial, the prosecution can argue that the defendant must be guilty because he remained silent instead of cooperating and speaking to police. Consider how this argument -- that pretrial silence shows the defendant's guilt -- muddles the jury charge that a nontestifying defendant's refusal to take the stand cannot be held against him.

Welcome to the Roberts Court and the shrinking Bill of Rights.

1. Background

In late 1992, someone shot and killed Juan and Hector Garza in their apartment. A witness heard shots fired early that morning and saw a man run from the Garzas' apartment building to "a dark-colored Camaro or Trans Am." Houston police officers found shotgun shell casings in the apartment but no other physical evidence. Their investigation revealed that the Garzas had hosted a party the night before, and officers began searching for suspects from that gathering.

[*17] Officers learned that Genovevo Salinas had attended the Garzas' party, and they began to consider him a suspect in the murders. Nearly three weeks later, two police officers went to the Salinas family home. The officers spoke with Salinas and his father, both of whom cooperated fully with the investigation. Salinas and his father signed a consent-to-search form. Salinas told the police that his father owned a shotgun, and his father produced the weapon upon request.

The officers asked Salinas to accompany them to the police station "to take photographs" and provide "elimination prints." He agreed.

Salinas and the officers arrived at the police station around 6:30 p.m. The two officers showed him into an "interview room" and began questioning him about his relationship with the people who had been at the party. Salinas was never handcuffed and was technically free to leave at any time during the interview. And so *Miranda* warnings were neither issued nor required. He had no counsel present.

After the officers asked whether any of the other attendees had "disagreements" with the Garzas, their inquiry abruptly pivoted to Salinas. The officers asked him whether his father's shotgun "would match the shells recovered at the scene of the murder." Salinas remained silent, refusing to respond to the question. According to Sergeant Elliott, one of the questioning officers, Salinas also "looked down at the floor, shuffled his feet" and tightened up.

Officers then asked Salinas about other topics, such as where he had been the morning of the shootings. Salinas answered that he had been at home that morning.

After the interview, which lasted almost an hour, the questioning officers decided to arrest Salinas on outstanding traffic fines. The next day, a ballistics report suggested that the shotgun owned by his father matched the casings found at the Garzas' apartment. Yet the district attorney found the evidence insufficient to charge Salinas with murder and ordered him released.

Several days later, police procured an additional statement from Damien Cuellar, someone else at the Garzas' party. Cuellar had already given two statements to the HPD, neither of which implicated Salinas. But Cuellar now said that he "felt compelled to come forward" after the ghosts of the Garza brothers visited him in a dream. In this third statement, Cuellar claimed that, over scrambled eggs, Salinas confessed to him that he (Salinas) had killed the Garzas.

Based on this alleged confession, the Harris County district attorney charged Salinas with murdering Juan Garza. Police did not locate Salinas until 2007, when they found him living in Harris County under a different name.

The state argued at trial that Salinas had attended the party at the Garzas' apartment, returned several hours later with his father's shotgun, and killed both men. "We don't have [a] motive," the prosecution conceded to the jury. But it

argued in closing that the jury should convict Salinas based on the ballistics report, Cuellar's revised statement to the police, and Salinas's effort to elude arrest.

At trial, the state placed little emphasis on Salinas's prearrest silence. During his direct examination, Sergeant Elliott did not mention Salinas's silence in response to his question about the shotgun shells; he mentioned it only during the redirect, and then briefly. And at closing, the prosecutor referred to Salinas's silence during prearrest questioning only in passing.

Salinas did not testify. His attorney argued that others had motives to commit the murders and attacked the state's three pieces of evidence. The jury was unable to reach a verdict, and the judge declared a mistrial.

The state elected to retry Salinas. Before trial, defense counsel asked the court to make clear that the Self-Incrimination Clause barred the state from referencing Salinas's silence during his prearrest interview. The state disagreed, contending that Salinas's silence was admissible. The court deferred a final ruling until trial.

Once again, Salinas did not testify at trial. Yet unlike the first trial, the prosecution relied heavily on Salinas's silence during police questioning, characterizing it as a "very important piece of evidence." Over the defense's renewed objection, the judge permitted Sergeant Elliott to testify at length during direct examination about Salinas's silence when asked whether the casings found at the Garzas' apartment would match his father's shotgun. The officer emphasized that Salinas "did not answer" that question.

During closing arguments, the prosecutor highlighted this evidence, arguing that Salinas's silence demonstrated his guilt:

The police officer testified that [Salinas] wouldn't answer that question. He didn't want to answer that. Probably the first time he realizes you can do that. What? You can compare those? You know, if you asked somebody -- there is a murder in New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [*sic*] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say, "What are you talking about? I didn't do that. I wasn't there." He didn't respond that way. He didn't say, "No, it's not going to match up. It's my shotgun. It's been in our house. What are you talking about?" He wouldn't answer that question.

The jury found Salinas guilty of murder. Under Texas law, the jury also had to determine a proper sentence. Even though murder is punishable by up to life in prison, and the prosecution maintained that Salinas had actually killed both Garza brothers, the jury sentenced him to only 20 years in jail.

2. Texas Appeals

In the court of appeals -- which is the intermediate appeals court in Texas -- Salinas argued that the prosecution's use of his silence as substantive evidence of his guilt violated the Fifth Amendment. The prosecution argued the Fifth Amendment did not apply because he was not in custody and so not under compulsion when police questioned him. The court of appeals agreed with the prosecution and affirmed the conviction:

Absent a showing of government compulsion, the Fifth Amendment simply has nothing to say on the admissibility of prearrest, *pre-Miranda* silence in the state's case-in-chief. We therefore hold the Fifth Amendment has no applicability to prearrest, *pre-Miranda* silence used as substantive evidence in cases in which the defendant does not testify.

* * *

Salinas does not argue he was in custody during the interview, and [police] testified Salinas was never handcuffed and was free to leave. Salinas's interview is therefore properly categorized as a voluntary encounter with police.

[*18] While it did not receive widespread media attention, *Salinas* has profoundly changed the law of self-incrimination.

Miranda warnings, therefore, were neither issued nor required. There was no government compulsion in the prearrest, *pre-Miranda* questioning in which Salinas voluntarily participated for almost an hour. Accordingly, the Fifth Amendment privilege against self-incrimination was not triggered and did not prevent the state from offering Salinas's failure to answer the question at issue. n6

The Texas Court of Criminal Appeals, which is the highest criminal court in Texas, granted review. The court, in a 7-1 opinion, affirmed:

The plain language of the Fifth Amendment protects a defendant from *compelled* self-incrimination. In prearrest, *pre-Miranda* circumstances, a suspect's interaction with police officers is not compelled. Thus, the Fifth Amendment right against compulsory self-incrimination is "simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." n7

3. Supreme Court

After the state appeal, Salinas filed a petition for certiorari, raising the following question: "Whether or under what circumstances the Fifth Amendment's Self-incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights." n8 The Supreme Court granted certiorari "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." n9

At oral argument, most questions focused on whether a witness must formally invoke the Fifth Amendment. Justice Kagan easily navigated the nuances of Fifth Amendment law. Her heated questions forced the state to concede that the Fifth Amendment would apply to prearrest silence if the witness expressly invoked his right to silence. This was a shift from the state's position in Texas courts that a defendant has absolutely no Fifth Amendment rights during noncustodial interrogation. (Justice Sotomayor, a former prosecutor, described this position as "radical" at oral argument.)

It was apparent at oral argument that the case would be closely decided. We needed Justice Kennedy. During oral argument, he implied that prior cases had provided clarity on when the Fifth Amendment applies and that we were asking the Court to push those decisions into "a gray area." Appearing in his 21st oral argument, Professor Jeffrey Fisher replied that Salinas was actually arguing for a bright-line rule -- that the right to remain silent be guaranteed for any individual "in a police investigation setting." Did Justice Kennedy's concern mean that he would vote against Salinas?

On June 17, 2013, the Supreme Court decided *Salinas*. Justice Kennedy joined the conservatives. Salinas lost 5-4.

Justice Alito wrote the Court's plurality opinion, which Chief Justice Roberts and Justice Kennedy joined. n10 This opinion controls the case.

The plurality held that "before [a witness can] rely on the privilege against self-incrimination, he [is] required to invoke it." n11 Since Salinas remained silent, instead of expressly invoking his right against self-incrimination, the prosecution could use his silence as substantive evidence of his guilt. The Court therefore affirmed the judgment of the Texas Court of Criminal Appeals, albeit on a totally different ground.

In explaining its holding, the plurality opinion stated that "[t]o prevent the privilege from shielding information not properly within its scope, we have long held that a witness who 'desires the protection of the privilege . . . must claim it' at the time he relies on it." n12

The plurality argued that its precedents had carved out two exceptions to this rule that a witness must invoke the privilege -- neither of which applied to Genovevo Salinas.

The first exception was established in *Griffin v. California*. n13 There, the Court held that a defendant does not have to take the stand to assert his right against self-incrimination. A criminal defendant has an absolute right to refuse to testify. And so neither a showing that his testimony would be self-incriminating nor a grant of immunity could force him to speak. Accordingly, forcing him to take the stand to invoke the Fifth would be pointless.

The second exception is that defendants do not have to invoke the privilege when governmental coercion forces them to abnegate the privilege. The exception applies, for example, when a defendant faces the "inherently compelling pressures" of an "*unwarned* custodial interrogation." n14

The plurality held that Salinas did not fall into the first exception -- the right to refuse to take the stand -- because witnesses in precustodial interrogation do not have an unqualified right to invoke the Fifth.

And it held that Salinas did not fall into the second exception because he had voluntarily accompanied the police and was free to leave the station. Thus, governmental coercion did not prevent him from invoking the privilege.

The problem, the plurality reasoned, was that "whatever the most probable explanation" for Salinas's silence, it was ultimately "insolubly ambiguous" why he was invoking it. There are different reasons a witness, like Salinas, might keep silent: perhaps he is trying to think of a good lie, he is embarrassed, or he is protecting someone else. Since Salinas alone knew why he did not answer the officer's question, he had the "burden . . . to make a timely assertion of the privilege." n15

The plurality observed that it might be true that a witness "unschooled in the particulars of legal doctrine" could think silence sufficiently invokes the right against self-incrimination. But despite "popular misconceptions," the Fifth Amendment protects a defendant against being "compelled in any criminal case to be a witness against himself." It does not establish an "unqualified 'right to remain silent.'" n16

The plurality stated, in dicta, that police "have done nothing wrong" and "accurately state the law" when they tell suspects their silence can be used against them. In *Minnesota v. Murphy*, n17 for example, nothing unconstitutional occurred when government officials told Marshall Murphy that he was required to speak truthfully to his parole officer. "So long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth [*19] Amendment violation," the Supreme Court said in *Salinas*.

4. The Impact of *Salinas*

Salinas profoundly affects how police investigate cases, prosecutors try cases, and defense attorneys advise suspects. n18

a. Police

Salinas does not require police officers to give any warning -- *Miranda* or otherwise -- to witnesses they subject to noncustodial interrogation. Witnesses are expected to know they have a right against self-incrimination. And unless they expressly invoke this right, anything they say -- or do not say -- can be used against them.

Perhaps most disturbing is the plurality's approval, in dicta, of police "accurately stating the law" to witnesses. Under this theory, there is nothing improper about police telling a suspect who is not in custody, "Joey, I want to ask

you some questions. And if you don't answer my questions, then at your trial the prosecutor will be able to stand in front of the jury and tell them an innocent man would answer my questions. So I recommend you answer my questions." All but an expert in Fifth Amendment law would believe he had to answer the officer's questions.

And this is just part of the reason the plurality opinion significantly undermines *Miranda*. Police are now encouraged to "question first, arrest later." They can conduct noncustodial questioning of a suspect -- even when probable cause exists to arrest him -- knowing that he will rarely assert the privilege and that anything else he does, whether he speaks or remains silent, can be used against him. Under *Salinas*, police can wield various investigative techniques against suspects.

They can send a letter to the suspect and ask him to come in for questioning. They can call the suspect to ask him questions. Or they can ask the suspect questions ancillary to an investigation or while serving a subpoena. In any of these circumstances, or an array of others, the suspect's silence or his failure to respond can be held against him.

b. Prosecutors

The plurality opinion allows prosecutors to argue to jurors that the defendant's noncustodial silence can be held against him. After all, prosecutors will argue, an innocent person would talk.

This argument can have a devastating collateral effect. Jurors may well experience cognitive dissonance trying to reconcile how a defendant's pretrial silence is evidence of his guilt but his refusal to testify at trial is not. Jurors will be inclined to interpret a defendant's noncustodial silence as evidence of guilt despite all the innocent reasons a suspect might remain silent. As a result, defendants will feel extra pressure to take the stand to offer an explanation for their silence.

c. Defense Attorneys

It is no longer sufficient for defense attorneys to tell suspects to keep their mouths shut or ignore messages and letters from the police. The defense must tell suspects to expressly invoke their right against self-incrimination if governmental agents try to question them. Counsel should explain to the suspect that, even when the police or a prosecutor tells the suspect his silence can be used against him, he can -- and should -- invoke his right against self-incrimination. Some role-playing, with the lawyer playing an officer, would help condition the suspect to feel comfortable expressly invoking the Fifth Amendment.

Since an ounce of prevention is worth a pound of cure, the lawyer should give the suspect a letter explaining that he has been advised of his constitutional rights, including his right against self-incrimination, and he wishes to assert them. The letter should be on the lawyer's letterhead, addressed to government agents, and ask them to allow the suspect to contact his lawyer. The suspect should sign the letter. See the example below.

5. Terry Stops -- The Gray Area

It is unclear whether a suspect's silence during a *Terry* stop sufficiently invokes the right against self-incrimination. The Court emphasized that *Salinas* applies to noncustodial interrogation. *Berghuis v. Thompson*, n19 on the other hand, applies to an arrested suspect and suggests a suspect's silence is sufficient to assert his *Miranda* rights. In *Berghuis*, the Court addressed whether Van Thompson's silence was sufficient to end police questioning and preclude the admissibility of his later statements. The Court held that a suspect who has received and understood the *Miranda* warnings and has **not invoked** his *Miranda* rights waives the right to remain silent if he makes an uncoerced statement to the police. The Court pointed out that "[i]f Thompson wanted to remain silent, *he could have said nothing in response to [police] questions*, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." n20

It is arguable that, unlike what happened in *Salinas*, a *Terry* stop involves a detention and that there is enough

inherent compulsion in this detention that silence can sufficiently invoke the [*20] right against self-incrimination. Further, *Salinas* is merely a three-justice plurality opinion, so lawyers can ask courts to read it narrowly in the *Terry* context.

6. Custody

Miranda warnings must be given when the police subject a suspect to custodial interrogation. n21 Silence in response to *post-Miranda* questioning is inadmissible under *Doyle v. Ohio*. n22 *Miranda* defined *custodial interrogation* as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." n23 *Miranda* did not further define *custody*.

In 1983, the Supreme Court defined *custody* as "a formal arrest or restraint of freedom of movement of the degree associated with a formal arrest." n24 This -- the equating of custody with *de facto* and *de jure* formal arrest -- narrowed *Miranda's* definition of a *custodial interrogation*.

In 2012, the Supreme Court set forth a two-prong test for custody. n25 This is the first question:

[W]hether, in light of "the objective circumstances of the interrogation," a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." And in order to determine how a suspect would have "gauge[d]" his "freedom of movement," courts must examine "all of the circumstances surrounding the interrogation." Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning. n26

If a reasonable person would not feel free to end questioning and leave, then this is the second question:

[W]hether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. Our cases make clear . . . that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. n27

And when we get to the bottom we go back to the top: Are these "same inherently coercive pressures" the same as "a formal arrest or restraint of freedom of movement of the degree associated with a formal arrest"? Or are they the same as being "taken into custody or otherwise deprived of . . . freedom of action in any significant way"?

Regardless, here is what is known: a suspect is not in custody when he voluntarily goes alone to a police station to answer questions. n28 And a suspect is not in custody when he voluntarily accompanies police to the station house for questioning, as *Salinas* did. n29

During a traffic stop, few would feel comfortable speeding away while the officer was writing a ticket. And yet a traffic stop is "temporary and relatively nonthreatening," without the same inherently coercive character as a station house interrogation. n30 The traffic stop, therefore, would not -- categorically speaking -- amount to custody under *Miranda*, even though it undoubtedly restrains the suspect's movement. n31

While the Supreme Court's definition of *custody* has been far from precise, or even uniform, it would be futile to argue that the definition should be extended to cover *all* traffic stops. But one should not assume that custody only exists when the police are questioning a handcuffed suspect at the station house. *Custody*, as courts have defined it, can arise during a traffic stop n32 or when a suspect is not hand-cuffed n33 or when a defendant is questioned by police but later released n34 -- as long as under the totality of the circumstances there are inherently coercive pressures.

7. Proper Invocation

The amicus brief submitted by the United States, which constitutes the official position of the Department of Justice

until it says otherwise, approvingly cites cases in which the suspect sufficiently invoked the right against self-incrimination. Adequate invocation includes the following: "talk to my lawyer," n35 a statement that the suspect would not confess and that police should talk to his lawyer, n36 a refusal "to make any statement" to the police, n37 and an express declination to be questioned in the first place.

But, to be safe, defense lawyers should advise suspects to expressly invoke the Fifth Amendment right against self-incrimination, particularly given the rationale of the *Salinas* plurality.

8. Excluding Silence on Evidentiary Grounds

A suspect's silence in response to noncustodial police questioning, while constitutionally admissible, can still be excluded under the Rules of Evidence. After all, the Supreme Court in *Salinas* described silence, as "insolubly ambiguous." How relevant can "insolubly ambiguous" testimony be?

Indeed, state courts have generally found noncustodial silence inadmissible on evidentiary grounds because silence is too ambiguous to prove guilt, and its probative value would be outweighed by the prejudice to the defendant. n38 In *Ex parte Marek*, for example, the Alabama Supreme Court abolished the evidentiary "tacit admission rule" in criminal cases because the "underlying premise, that an innocent person *always* objects when confronted with a baseless accusation, is inappropriately simple, because it does not account for the manifold motivations that an accused may have when, confronted with an accusation, he chooses to remain silent. n39 The *Marek* court explained: "Confronted with an accusation of a crime, the accused might well remain silent because he is angry, or frightened, or because he thinks he has [*22] the right to remain silent that the mass media have so well publicized." n40

9. Explaining Noncustodial Silence

If a defendant's noncustodial silence will be admitted at trial, defense attorneys should raise the issue at voir dire, just as they raise the silence of a defendant who will not testify. Defense attorneys should ask the venire: "Why would an innocent suspect, who is free to leave, remain silent when police question him?" Then counsel should explain why he might: anger, fear, intimidation, embarrassment, the suspect thinks he has the right to remain silent and should not talk, he wants to speak with an attorney first, he has language problems, he does not understand the question, he does not know the answer to the question, he might get someone else in trouble, and so on. Undoubtedly, some members of the venire will give the defense attorney the answer the defense wants. But the defense can then identify other members of the venire who agree or disagree, and why. This may lead to a valid challenge for cause depending on the jurisdiction.

In one Texas case, the lawyer -- before *Salinas* was decided -- had advised his client not to speak to the police. When police called the client and tried to interview him about an alleged assault, he refused to say anything -- but he never expressly invoked his right against self-incrimination.

The case went to trial after *Salinas*. The prosecutor sought to introduce the client's noncustodial silence as substantive evidence of his guilt. At the pretrial conference, the trial court was inclined to admit this silence.

The lawyer decided he needed to address the issue in jury selection. He asked the venire why someone under investigation would hire a lawyer, whether it is a good idea to follow a lawyer's advice, and why a lawyer would advise an innocent suspect not to say anything to the police. The silence was admitted and, after a week-long trial, the jury acquitted in less than an hour.

10. Post-Salinas Cases

In the wake of *Salinas*, how will the courts answer the question that was originally before the Court? n41 Time will tell, but it appears -- even after *Salinas* -- that the government cannot use an invocation to prove guilt. n42

The Second Circuit, in *United States v. Okatan*, n43 supports this reading of *Salinas*. There, Tayfun Okatan, the

defendant -- during prearrest questioning -- told the interrogating agent that he wanted a lawyer. n44 The prosecution then used Okatan's request to prove his guilt during its case in chief. n45

The Second Circuit held that when Okatan requested a lawyer he expressly invoked his Fifth Amendment rights, n46 and that it was a violation of the self-incrimination clause for the government to use his invocation to prove his guilt. n47

The Second Circuit distinguished *Salinas* on the basis that Salinas remained silent -- that is, he did not expressly invoke his Fifth Amendment rights. n48 Because Okatan did invoke them, the logic of *Griffin* -- that the government cannot punish a defendant for exercising a constitutional right -- applied. n49 "The Fifth Amendment guaranteed [the defendant] a right to react to the question without incriminating himself, and he successfully invoked that right . . . [A]llowing a jury to infer guilt from a prearrest invocation . . . [would] 'ignore[] the teaching that the protection of the Fifth Amendment is not limited to those in custody. . . .'" n50

11. Snatching (Some) Victory From the Jaws of Defeat

How could *Salinas* have been worse for the defense and civil liberties? It would have been worse if a majority of the Supreme Court had agreed with the reasoning of the Texas Court of Criminal Appeals, the Harris County prosecutors, and Justices Thomas and Scalia. They all contended that the Fifth Amendment does not apply to questioning in a noncustodial context -- regardless of whether a suspect expressly asserts his right against self-incrimination -- because a prosecutor's use of the suspect's silence at trial does not amount to compulsion. n51 This would mean that anything a suspect said could be admitted as evidence of his guilt, that his silence could be admitted as evidence of his guilt, and that his express invocation of the Fifth Amendment could be admitted as evidence of his guilt.

Salinas thinned, but did not destroy, the right against self-incrimination in noncustodial interrogations. While it affirmed the judgment of the Texas Court of Criminal Appeals, the Court did not affirm Texas's radical take on the Fifth Amendment. The ball is now in defense counsel's court. It is up to each defense lawyer to educate other defense lawyers and clients about *Salinas*. Go forth and spread the word!

The authors did not represent Genovevo Salinas at trial. They handled his direct state appeal.

GRAPHIC:

PHOTO 1, no caption; PHOTO 2, no caption; PHOTO 3, no caption

FOOTNOTE-1:

n1 *Watts v. Indiana*, 338 U.S. 49, 59 (1949).

n2 *Salinas v. Texas*, 570 U.S. , 133 S. Ct. 2174(2013).

n3 Justice Alito wrote the controlling opinion, joined by Chief Justice Roberts and Justice Kennedy. Justice Thomas concurred in the judgment and was joined by Justice Scalia. Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented.

n4 It has long been settled that if police officers give the *Miranda* warning to a witness after he is arrested, the Due Process Clause forbids the prosecution from using any silence against him at trial, even for impeachment. *See Doyle v. Ohio*, 426 U.S. 610 (1976). Moreover, even when the defendant has waived his *Miranda* rights and given several statements, but is then silent in response to police questions, a prosecutor under *Doyle* cannot use this silence: "If a suspect does speak, he has not forever waived his right to be silent. *Miranda* allows the suspect to reassert his right to remain silent at any time during the custodial interrogation. Thus, a suspect may speak to the agents, reassert his right to remain silent or refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his silence against him." *United States v. Scott*, 47 F.3d 904 (7th Cir. 1995). While police officers, of course, have no duty to give the *Miranda* warning to a suspect precustody, they sometimes do. Given the rationale of *Doyle* -- that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights" and "[t]hus, every postarrest silence is insolubly ambiguous" -- the Due Process Clause should equally apply to noncustodial silence in response to police questioning following *Miranda* warnings.

n5 Gabriel Grand described *Salinas* as "arguably the most consequential Supreme Court ruling of the term." <http://www.policymic.com/articles/52453/salinas-v-texas-the-biggest-change-to-miranda-rights-that-slipped-under-everyone-s-razor> Kerr at the Volokh Conspiracy described *Salinas* as a "sleeper" case and wrote: "This morning the Supreme Court decided a very important criminal procedure case, *Salinas v. Texas*, by a 5-4 vote. I'm guessing that you haven't heard of *Salinas*. And it probably won't get much attention in the press. But it should: *Salinas* is likely to have a significant impact on police practices." <http://www.volokh.com/2013/06/17/do-you-have-a-right-to-remain-silent-thoughts-on-the-sleeper-criminal-procedure-case-of-the-week/> University of Virginia Law Professor Brandon L. Garrett wrote for *Slate*: "On Monday, in a case called *Salinas v. Texas* that hasn't gotten the attention it deserves, the Supreme Court held that you remain silent at your peril." http://www.slate.com/arti-cles/news_and_politics/jurisprudence/2013/06/salinas_v_texas_right_to_remain_silent_supreme_court/

n6 *Salinas v. State*, 368 S.W.2d 550 (Tex. App.-- Houston [14th Dist.] 2011, pet. granted).

n7 *Salinas v. State*, 369 S.W.3d 176 (Tex. Crim.App.2012).

n8 Stanford Law Professor Jeffrey Fisher volunteered to assist in the appeal to the U.S. Supreme Court. Three of Professor Fisher's students in the Stanford Supreme Court Clinic -- Ryan McGinley-Stemple, Mark Middaugh, and Alisa Claire Philo -- worked full time for several months helping the team representing Genovevo Salinas. Stanford Law Professor Pamela Karlan and Lecturer Kevin Russell also worked on the case. Their help was invaluable. The defense could not have asked for a better team.

n9 *Salinas v. Texas*, 570 U.S. , 133 S. Ct. 2174(2013).

n10 Justices Thomas, joined by Justice Scalia, concurred in the judgment. They contended that the Fifth

Amendment does not apply to noncustodial questioning, regardless of whether the witness expressly invokes his right against self-incrimination. This was consistent with the reasoning of the court of criminal appeals and the argument of the state in Texas courts.

n11 *Salinas*, 133 S.Ct. at 2184.

n12 *Id.* at 2179 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984)).

n13 380 U.S. 609 (1965).

n14 *Salinas*, 133 S. Ct. at 2180 (emphasis added).

n15 *Id.* at 2182.

n16 *Id.* at 2177.

n17 465 U.S. 427 (1984).

n18 The United States amicus brief supporting Texas states: "The Court's resolution of that issue will have significant implications for the conduct of federal investigations and trials."

n19 560 U.S. ,130 S.Ct.2250 (2010).

n20 *Id.* at 2263 (emphasis added).

n21 *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

n22 426 U.S. 610 (1976).

n23 *Id.*

n24 *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

n25 *Howes v. Fields*, 565 U.S. , 132 S. Ct. 1181 (2012) (explaining that *custody*, in the *Miranda* context, "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion").

n26 *Id.* at 1189 (citations omitted).

n27 *Id.*

n28 *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

n29 *See Beheler*, 463 U.S. at 1125.

n30 *Maryland v. Shatzer*, 559 U.S. 98, 112-13 (2010).

n31 *See id.*

n32 *See, e.g., White v. United States*, 68 A.3d 271, 282 (D.C. Cir. 2013) (holding the defendant was in custody where police immediately pulled him out of the car, handcuffed him, and took him to the rear of the car; they never told him why they pulled him over, nor asked for his license and registration); *see also Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) ("If a motorist who[m] police have] detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.").

n33 *See, e.g., United States v. Slaight*, 620 F.3d 816, 820 (7th Cir. 2010) (A small cavalry of police charged into the defendant's house, guns drawn, and seized his computer. They requested that he accompany them to the police station for questioning, which the defendant did. The police never manacled him, but the court held that the defendant was in custody for *Miranda* purposes.); *United States v. Craighead*, 539 F.3d 1073, 1086 (9th Cir.

2008) ("Craighead was not handcuffed or physically restrained . . . [but] Craighead's freedom of action was restrained in a way that increased the likelihood that [he would] succumb to police pressure to incriminate himself.").

n34 *See, e.g., United States v. Colonna*, 511 F.3d 431,434-36 (4th Cir. 2007) (holding that defendant was in custody for *Miranda* purposes even though the FBI released him after questioning and waited 22 months to arrest him); *United States v. Mittel-Carey*, 493 F.3d 36, 39 (1st Cir. 2007) (finding that the defendant was in custody where the agents questioned him at his home and then left without placing him under arrest).

n35 *Combs v. Coyle*, 205 F.3d 269, 279 (6th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000).

n36 *Coppola v. Powell*, 878 F.2d 1562 (1st Cir. 1989), *cert. denied* 493 U.S. 969 (1989).

n37 *Savory v. Lane*, 832 F.2d 1011, 1015 (7th Cir. 1987).

n38 *See, e.g., People v. Welsh*, 80 P.3d 296 (Colo. 2003); *Landers v. State*, 508 S.E.2d 637 (Ga. 1998); *Ex parte Marek*, 556 So. 2d 375 (Ala. 1989); *People v. DeGeorge*, 541 N.E.2d 11 (N.Y.1989).

n39 *Marek*, 556 So.2d at 381.

n40 *Id.* *See also* Meaghan Elizabeth Ryan, *Do You Have the Right to Remain Silent?: The Substantive Use of Pre-Miranda Silence*, 58 ALA. L. REV. 903 (2007).

n41 The Supreme Court had indicated that the police do not have to stop questioning when a defendant invokes the Fifth.

n42 By refusing to join Justice Thomas's opinion, the *Salinas* plurality implicitly rejected the notion that the government can use a defendant's (noncustodial) express invocation of the privilege to prove his guilt.

n43 728 F.3d 111 (2d Cir. 2013).

n44 *Id.* at 114.

n45 *Id.* at 115.

n46 *Id.* at 118.

n47 *Id.* at 120.

n48 *Id.* at 119.

n49 *Id.*

n50 *Id.* (quoting *Coppola v. Powell*, 878 F.2d 1562, 1566 (1st Cir. 1989)).

n51 At oral argument, Harris County crawfished on its position under intense questioning from Justice Kagan.



5. *The Privilege of Silence: Fifth Amendment Protections Against Self-Incrimination (Second Edition)*, Chapters 3 and 4, Steven M. Salky and Paul B. Hynes, Jr. (American Bar Association 2014) (Reprinted with permission of American Bar Association).

**Steven M. Salky
and Paul B. Hynes, Jr.**

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SECOND EDITION

THE PRIVILEGE OF SILENCE

**Fifth Amendment
Protections
Against
Self-Incrimination**



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CHAPTER 3

Proceedings in Which the Fifth Amendment May Be Asserted

The Supreme Court has remarked on numerous occasions that the Fifth Amendment “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,” in which the witness reasonably believes the information sought, or discoverable as a result of his testimony, could be used in a subsequent criminal proceeding.

- *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (“The [Fifth Amendment] privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. It protects, likewise, the owner of goods which may be forfeited in a penal proceeding.”) (citation omitted).
- *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972) (“[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”) (citations omitted).
- *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (“The [Fifth] Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but

also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”) (citation omitted).

- *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (“The Fifth Amendment, in relevant part, provides that no person ‘shall be compelled in any criminal case to be a witness against himself.’ It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also ‘privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.’”) (quoting *Lefkowitz*, 414 U.S. at 77).
- *United States v. Balsys*, 524 U.S. 666, 672 (1998) (“[The Self-Incrimination Clause] ‘can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,’ in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding.”) (quoting *Kastigar*, 406 U.S. at 444–45).

Furthermore, numerous U.S. Supreme Court decisions have allowed parties to litigate disputes arising under the Self-Incrimination Clause not only after a criminal prosecution has been initiated, but also in advance of any such prosecution. These cases recognize that the Fifth Amendment protects not only a right not to have compelled self-incriminating statements used in a criminal case, but a distinct and independent right not to be compelled to make self-incriminatory statements that could be used in a future criminal case.

- *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256–57 (1983) (Grant of immunity at the earlier criminal trial did not require a witness to testify at his later civil deposition, even when the questions asked at the deposition closely tracked the testimony the witness had previously given in the criminal case under the grant of immunity. Instead,

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- the Court recognized that the witness retained a Fifth Amendment privilege to refuse to answer questions posed at his civil deposition.).
- *Garner v. United States*, 424 U.S. 648, 653 (1976) (“[T]he privilege protects against the use of compelled statements as well as guarantees the right to remain silent absent immunity.”).
- *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 57 n.6 (1964) (“The constitutional privilege against self-incrimination has two primary interrelated facets: [t]he Government may not use compulsion to elicit self-incriminating statements . . . and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion.”) (citations omitted).

The proposition that the Fifth Amendment protects not only against the *use* of compelled self-incriminating disclosures at a criminal trial but also against the compelled *making* of self-incriminating statements is, however, undergoing reexamination. As previously mentioned, in *Chavez v. Martinez*, 538 U.S. 760, 777 (2003), Martinez was subjected to coercive interrogation while undergoing medical treatment for gunshot wounds. He subsequently brought a claim for violation of his Fifth Amendment privilege against self-incrimination pursuant to 42 U.S.C. § 1983. Despite the fact the coercive interrogation elicited incriminating testimony, Martinez was never charged with a crime. A splintered Court held that a violation of the constitutional right against self-incrimination does not occur until self-incriminating testimony obtained by impermissible coercion has been used against the defendant in a criminal case. The plurality remarked:

Although our cases have permitted the Fifth Amendment’s self-incrimination privilege to be asserted in noncriminal cases . . . that does not alter our conclusion that a violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case.

Id. at 770 (internal citations omitted).

Thus, some subsequent decisions have refused to recognize a Fifth Amendment violation when the witness retained the ability to challenge the use of compelled self-incriminating testimony in court.

- *United States v. Johnson*, 446 F.3d 272, 279–80 (2d Cir. 2006) (because the parolee retained the right to challenge any subsequent use in court of incriminating statements produced by a compelled polygraph examination, he could be required to take the polygraph exam or have his parole revoked).
- *Pina v. Vail*, No. 08-CV-0511-MJP-JPD, 2009 WL 1320962, at *9 (W.D. Wash. May 11, 2009) (a parolee's Fifth Amendment right was not violated by the requirement that he submit to periodic polygraph testing as a condition of supervised release, in part because he had "not made any showing . . . that he could not challenge the admission of such statements in a future criminal proceeding").
- *United States v. Porter*, No. 03-CR-0129 (CPS), 2008 WL 117839, at *7 (E.D.N.Y. Jan. 3, 2008) (requirement that a parolee submit to polygraph examinations as a condition of supervised release did not violate his Fifth Amendment rights "because he can challenge the use of any incriminating statements made during the course of the polygraph examination in any court proceeding.") (citation omitted).
- *But cf. United States v. Antelope*, 395 F.3d 1128, 1130–35 (9th Cir. 2005) (disagreeing with the district court that a probationer's refusal to incriminate himself as part of his sexual offender treatment was not ripe for review until he was subject to a prosecution for additional crimes as a result of his compelled disclosures, and reversing the district court's decision to revoke his supervised release for refusing to submit to sexual offense treatment questioning).

These decisions conflict with prior Supreme Court decisions refusing to leave the validity of a Fifth Amendment assertion to a future judge in a future criminal prosecution. See discussion on pages 58–59.

Assertions of the Fifth Amendment Right Against Self-Incrimination in Criminal Proceedings During Custodial Police Interrogation

Several recent Supreme Court decisions have suggested that the core right against compelled self-incrimination protected by the Fifth Amendment does not apply until a person is charged in a court of law.

- *United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) (“Potential violations [of the Self-Incrimination Clause] occur, if at all, only upon the admission of [compelled incriminatory] statements into evidence at trial.”).
- *Chavez v. Martinez*, 538 U.S. 760, 766 (2003) (plurality rejected defendant’s argument that a “criminal case” encompasses the entire investigatory process, stating that “[i]n our view, a ‘criminal case’ at the very least requires the initiation of legal proceedings.”) (citation omitted).
- *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (stating *in dicta* that “[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.”) (citations omitted).

Nonetheless, to protect an individual’s Fifth Amendment right against compelled self-incrimination in a criminal case, the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), established a safeguard requiring law enforcement officials to give certain warnings to persons in police custody before questioning them. *Miranda* requires law enforcement officials to inform a suspect being held in custody that he has a right to remain silent, that his statements may be used against him at trial, and that he has the right to an attorney during questioning, including a court-appointed attorney if he cannot afford one. *Id.* at 478–79. Absent proof that police gave such warnings and a suspect validly waived the rights, incriminating statements obtained during custodial interrogation are inadmissible at trial. *Id.* at 479.

The *Miranda* Court was faced with four cases in which law enforcement officials questioned defendants "in a room in which [each] was cut off from the outside world." *Id.* at 445. Although the Court cited to numerous instances of police brutality toward witnesses undergoing interrogation while in custody at the police station, the Court was just as concerned with psychological police tactics designed to secure self-incriminating statements. The Court "perceive[d] an intimate connection between the privilege against self-incrimination and police custodial questioning," announcing itself "satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." *Id.* at 458, 461. Thus, the Court reasoned

that without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

Id. at 467.

The Supreme Court crafted an exclusionary rule to effectuate its recognition of an accused's right to remain silent during custodial interrogation. It stated the rule as follows:

After such warnings have been given, . . . the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 479.

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The *Miranda* majority appeared to hold that the Fifth Amendment privilege against self-incrimination was fully applicable during custodial interrogation. However, the decision, including its exclusionary rule for unwarned statements produced by custodial interrogation, has subsequently been described as merely setting forth prophylactic procedures, not a constitutional rule. Thus, it has been subject to numerous exceptions and not expanded beyond its limited holding.

- *Moran v. Burbine*, 475 U.S. 412 (1986) (refusing to expand *Miranda* to require police to inform a suspect of the fact that an attorney retained by his sister was seeking to contact him).
- *Michigan v. Tucker*, 417 U.S. 433, 435–37 (1974) (limiting the remedy for a *Miranda* violation to the exclusion of testimonial evidence obtained from the suspect and allowing testimony of third parties identified in the excluded testimony to be presented at trial).
- *New York v. Quarles*, 467 U.S. 649, 655–56 (1974) (*Miranda* was subject to a “public safety” exception, allowing testimonial evidence obtained directly from a suspect interrogated while in custody to be admitted at trial, reasoning that when a threat to public safety necessitated immediate questioning, failure to give *Miranda* warnings was excused).

The decision in *Moran v. Burbine* has not held sway with a large number of state courts, many of which have suppressed statements obtained by custodial interrogation after the police failed to inform the suspect that a lawyer was seeking to contact him. *See, e.g., State v. Stoddard*, 537 A.2d 446, 206 Conn. 157 (1988); *Bryan v. State*, 571 A.2d 170 (Del. 1990); *State v. Reed*, 627 A.2d 630, 133 N.J. 237 (1993); *West v. Commonwealth*, 887 S.W.2d 338 (Ky. 1994); *People v. McCauley*, 645 N.E.2d 923, 163 Ill. 2d 414 (1995); *People v. Bender*, 551 N.W.2d 71, 452 Mich. 594 (1996); and *State v. Roache*, 803 A.2d 572, 148 N.H. 45 (2002).

The Supreme Court seemed to breathe new life into *Miranda*’s Fifth Amendment justification when it ruled in *Dickerson v. United States*, 530 U.S. 428, 444 (2000), that “*Miranda* announced a constitutional rule”

that could not be overruled by Congress. In *Dickerson*, the petitioner was indicted on federal charges, and, before trial, moved to suppress a statement he had made at an FBI field office on the ground that he had not received *Miranda* warnings before being interrogated. The district court granted his motion to suppress, but the Fourth Circuit granted the government's interlocutory appeal and reversed. The Fourth Circuit agreed with the district court that *Dickerson* had not received *Miranda* warnings, but found that 18 U.S.C. § 3501, which allowed un-*Mirandized* statements to be admitted into evidence if made voluntarily, governed the case.

The Supreme Court reversed. While it recognized that Section 3501 was intended to legislatively overrule *Miranda*, the Court concluded that Congress had no authority to supersede *Miranda*. Although the Court admitted that language in some of its prior decisions indicated that *Miranda* was merely "prophylactic" (*Quarles*) and the warnings were "not themselves rights protected by the Constitution" (*Tucker*), it struck down 18 U.S.C. § 3501 as a violation of the Fifth Amendment. *Dickerson*, 530 U.S. at 444.

Enthusiasm for a constitutional basis for *Miranda* was short-lived. In *Chavez v. Martinez*, 538 U.S. 760 (2003), mentioned earlier, the Court considered a civil rights claim against a police officer whose interrogation of a suspect he had shot clearly violated *Miranda*. Four justices ruled directly that there had never been the necessary constitutional violation to support the claim, because statements taken in violation of the suspect's *Miranda* rights were never used against him at trial. Indeed, these justices, led by Justice Thomas, ruled that the Fifth Amendment did not apply to police questioning at all, as it occurs before the "criminal case" described in the Fifth Amendment commences. The two swing justices, Souter and Breyer, were concerned about "expand[ing] protection of the privilege against compelled self-incrimination to the point of [the] civil liability" and reasoned that "[r]ecognizing an action for damages [whenever the police fail to honor *Miranda*] would revolutionize Fifth . . . Amendment law . . ." *Id.* at 778–79. They rejected Mr. Martinez's Section 1983 claim by distinguishing between the Fifth Amendment's "core guarantee," applicable at a criminal trial, and the

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Dickerson, the petitioner trial, moved to suppress evidence on the ground that he was being interrogated. The Supreme Court, but the Fourth Circuit affirmed and reversed. The Fourth Circuit had not received § 3501, which allowed evidence if made volun-

recognized that Section 3501 was unconstitutional, the Court concluded that *Miranda* was valid. Although the prior decisions indicated that the warnings were unconstitutional (Tucker), it was the Fifth Amendment.

Miranda was short-lived. In the opinion earlier, the Court held that an officer whose interrogation was not *Miranda* compliant. Four justices dissented, claiming that necessary constitutional rights were taken in violation of the Fifth Amendment against him at trial. The Court held that the Fifth Amendment was violated as it occurs before the trial commences. The two dissenting justices argued about "expand[ing] the right of self-incrimination to the right of recognizing an action as a violation of *Miranda* would revoke the Fifth Amendment's protection between the Fifth Amendment and the criminal trial, and the

various decisions of the Court—including *Miranda v. Arizona*—constituting "extensions" of the core guarantee. *Id.* at 777, 778.

Finally, in *United States v. Patane*, 542 U.S. 630, 637 (2004), a divided Supreme Court decided that the failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's voluntary statements. The plurality, once again led by Justice Thomas, characterized the *Miranda* rule as prophylactic, employed to protect against violations of the Self-Incrimination Clause. The plurality reasoned that because *Miranda*'s prophylactic rule extended beyond the specific prohibition contained in the Fifth Amendment, the further exclusion of non-testimonial evidence gained from *Miranda*'s violation could not be justified by the values served by the Fifth Amendment. Thus, "[t]here is simply no need to extend (and therefore no justification for extending) the prophylactic rule of *Miranda* to this context." *Id.* at 643.

Regardless of how *Miranda v. Arizona* is characterized, it applies only if the suspect is subjected to custodial interrogation. In *Miranda*, the Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. For a number of reasons, this book does not address what constitutes "interrogation" for purposes of *Miranda*, but instead focuses attention on the meaning of "custody."

"Custody" is an objective determination, depending neither on the subjective views of the person being interrogated nor on the expectations of the police.

- *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) ("Two discrete inquiries are essential to the [custodial] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': [was] there a 'formal arrest or restraint on freedom

of movement' of the degree associated with a formal arrest.") (citations omitted).

- *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam) ("[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.").
- *Pennsylvania v. Bruder*, 488 U.S. 9, 11 (1988) (per curiam) (no custody during routine traffic stop during which officer administered sobriety test).
- *Oregon v. Mathiason*, 429 U.S. 492, 493–95 (1977) (per curiam) (*Miranda* warnings not required when parolee voluntarily submitted to questioning at the police station).

See also

- *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (holding that a child's age may properly be taken into consideration in determining whether a juvenile was in custody for purposes of *Miranda*).
- *Yarborough v. Alvarado*, 541 U.S. 652, 666–67 (2004) (juvenile was not in custody when he was brought to the police station for questioning by his parents, who remained in the lobby while he was questioned for two hours about a murder).

"Custody" is not limited to interrogations at the police station. Rather, *Miranda* warnings have been required in a variety of settings where the suspect has been deprived of his freedom of action in any significant way.

- *Maryland v. Shatzer*, 559 U.S. 98, 113 n.8 (2010) (Court assumed that "[w]hen a prisoner is removed from the general prison population and taken to separate location for questioning," he was in custody for *Miranda* purposes, despite holding that waiver of *Miranda* rights was valid and that prior invocation of counsel was no longer effective).

- *Estelle v. Smith*, 451 U.S. 454, 468–69 (1981) (*Miranda* applicable to a court-ordered psychiatric examination by court-appointed psychiatrist).
- *Mathis v. United States*, 391 U.S. 1, 2–3 (1968) (IRS agent's questioning of inmate serving a sentence on unrelated matters required *Miranda* warnings).
- *United States v. Cowen*, 674 F.3d 947, 957–58 (8th Cir. 2012) (suspect was in custody when handcuffed, patted down, questioned, and not told he was free to leave).
- *United States v. Cavazos*, 668 F.3d 190, 194 (5th Cir. 2012) (suspect was in custody at home when he was handcuffed, was guarded by armed agents at all times, and was not told he was free to leave).
- *United States v. Rogers*, 659 F.3d 74, 77–78 (1st Cir. 2011) (suspect was in custody, even at home, because military superior ordered him to go home and three police officers conducting a search there did not indicate he was free to leave).
- *United States v. Martinez*, 462 F.3d 903, 908 (8th Cir. 2006) (holding that a suspect who was frisked, handcuffed, and questioned, but not arrested, was in custody for *Miranda* purposes).
- *United States v. Hemphill*, No. 1:10-CR-053, 2010 WL 3366137 (S.D. Ohio Aug. 20, 2010) (parolee was in custody when he was handcuffed and led around his home by his parole officer with four police officers present).
- *But cf. Burlew v. Hedgpeth*, 448 F. App'x 663 (9th Cir. 2011) (reviewing cases from numerous circuits addressing whether a defendant was in custody where he was placed in a police car before being placed under arrest and deciding that state court finding that the suspect was not in custody at the point of being placed in the back of the squad car was not so unreasonable as to support habeas relief).

Neither probationers nor prison inmates are necessarily in custody for *Miranda* purposes, however.

- *Howes v. Fields*, 132 S. Ct. 1181, 1192–93 (2012) (a prisoner questioned in prison conference room by armed sheriff's deputies for five

to seven hours was not in custody when he was told several times he could end the questioning and return to his cell).

- *Minnesota v. Murphy*, 465 U.S. 420, 440 (1984) (because reporting to a probation officer does not involve a significant restraint on freedom, probationer required to meet with his probation officer to answer questions was not in custody for purposes of *Miranda*).
- *United States v. Stoterau*, 524 F.3d 988, 1004 (9th Cir. 2008) (*Miranda* warnings not required before polygraph exam administered to probationers).
- *People v. Elliot*, 494 Mich. 292, 833 N.W.2d 284 (2013) (a parolee meeting in jail library with his parole officer after being incarcerated for parole violation was not in custody for purposes of *Miranda*).

If a person in custody remains silent in response to questioning after receiving *Miranda* warnings, it is reasonably well established that such silence (after invocation of the right to remain silent) cannot be used against the person in a criminal trial for any purpose.

- *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) (substantive use of silence after receiving *Miranda* warnings violates due process).
- *Doyle v. Ohio*, 426 U.S. 610, 617–20 (1976) (due process violated by assuring suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial).
- *United States v. Rodriguez*, 260 F.3d 416, 421–22 (5th Cir. 2001) (prosecutor's closing, which urged jury to infer guilt from defendant's decision to remain silent after arrest and *Miranda* warnings, violated Fifth Amendment).
- *Thomas v. Indiana*, 910 F.2d 1413, 1416–17 (7th Cir. 1990) (defendant's silence after *Miranda* warnings could not be used as substantive evidence of sanity).
- *Moreno v. Borg*, No. 90-55231, 1990 WL 212649, at *4 (9th Cir. Dec. 18, 1990) (defendant's invocation of right to remain silent mid-interrogation could not be used as substantive evidence of guilt, even though he initially waived his *Miranda* rights).

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- *State v. Rogers*, 512 N.E.2d 581, 585, 32 Ohio St. 3d 70, 74 (1987) (ordering new trial when defendant's silence after receiving *Miranda* warnings was used for substantive purposes).

Indeed, the defendant's silence in the face of statements made by an alleged co-conspirator during custodial interrogation of both suspects was held, by at least one court, inadmissible against the defendant at trial.

- *United States v. Lafferty*, 503 F.3d 293, 305–07 (3d Cir. 2007) (trial court committed reversible error by admitting defendant's silence and defendant's failure to deny statements made by her alleged co-conspirator during joint custodial police interrogation of both suspects).

Despite *Miranda*'s clear protection of the right to remain silent during custodial interrogation, an improper comment at trial about a suspect's silence in response to *Miranda* warnings does not invariably result in a reversal of a conviction.

- *United States v. Lopez*, 500 F.3d 840, 843–45 (9th Cir. 2007) (eliciting testimony regarding defendant's pre- and post-*Miranda* silence violated defendant's Fifth Amendment rights, but was harmless error).
- *Fugate v. Head*, 261 F.3d 1206, 1223 (11th Cir. 2001) (because prosecutor's comment on defendant's invocation of *Miranda* rights were brief, comments did not violate Fifth Amendment).
- *United States v. Whitehead*, 200 F.3d 634, 639–40 (9th Cir. 2000) (prosecutor's comments that stressed defendant's guilt because of defendant's custodial silence violated Fifth Amendment, but were harmless error).
- *State v. Hernandez*, 159 P.3d 950, 966–67, 284 Kan. 74, 95–96 (2007) (prosecutor's comment that defendant had not given his version of events until trial violated defendant's constitutional rights but was harmless error).

- *Jones v. State*, 748 So. 2d 1012, 1021–22 (Fla. 1999) (police officer's comment on defendant's silence was error, though harmless).
- *But cf.*, *Coleman v. State*, 75 A.3d 916, 923, 434 Md. 320, 331–32 (2013) (petitioner received ineffective assistance of counsel, entitling him to a new trial, when his counsel failed to object to numerous instances at trial where the state brought into evidence that he had remained silent in the face of police questioning, after he was arrested and given *Miranda* warnings).

A harder question is whether a defendant's silence after being placed in custody, but before receiving his *Miranda* warnings, may be used as evidence of guilt. In 2013, the Supreme Court held in *Salinas v. Texas*, 133 S. Ct. 2174 (2013), that silence in the face of non-custodial questioning could be used as evidence of guilt, as we discuss in Chapter 5. Combined with the Court's decision in *Berghuis v. Thompkins*, 560 U.S. 370 (2010), that a defendant in custody must clearly and unambiguously assert his *Miranda* rights (a case we discuss in Chapter 8), remaining mute in response to being placed in custody may no longer be considered risk-free. Nonetheless, prior decisions holding that post-custody, pre-*Miranda* silence cannot be used as evidence of a defendant's guilt—*Combs v. Coyle*, 205 F.3d 269, 283 & n.9 (6th Cir. 2000); *United States v. Whitehead*, 200 F.3d 634, 637–39 (9th Cir. 2000); *United States v. Moore*, 104 F.3d 377, 384–90 (D.C. Cir. 1997)—appear to remain good law. See *Arizona v. Van Winkle*, 229 Ariz. 233, 236–38, 273 P.3d 1148, 1151–53 (2012) (agreeing with the Ninth and D.C. Circuits, but finding the error in commenting on post-custody, pre-*Miranda* silence to have been harmless); *People v. Tom*, 139 Cal. Rptr. 3d 71, 88 (Cal. Ct. App. 2012) (“join[ing] the federal circuits” to hold that the “government may not introduce evidence in its case-in-chief of a defendant's silence after arrest, but before *Miranda* warnings are administered, as substantive evidence of defendant's guilt.”) (citation omitted) (pending review by California Supreme Court). *But see* *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005) (holding that a defendant's post-arrest, pre-*Miranda* silence was admissible in government's case in chief); *United States*

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Miranda's exclusionary rule does not require that statements obtained in violation of its requirements be excluded from use in any proceeding or for all purposes. Rather, such statements may be admissible in proceedings other than a criminal trial.

- *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) (explaining that federal appellate courts have held that the "absence of *Miranda* warnings does not render an otherwise voluntary statement . . . inadmissible in a deportation case) (citations omitted).
- *United States v. Nichols*, 438 F.3d 437, 444 (4th Cir. 2006) (statements obtained in violation of *Miranda* can be used against defendant at sentencing, unless "actually coerced or otherwise involuntary").
- *United States v. Patterson*, 812 F.2d 1188, 1192–93 (9th Cir. 1987) (statement taken in violation of *Miranda* could be used in an affidavit to establish probable cause for the issuance of a search warrant).
- *Commonwealth v. Kates*, 305 A.2d 701, 711, 452 Pa. 102, 121 (1973) (statements taken in violation of *Miranda* are admissible during a probation revocation proceeding).

But see

- *State v. Smith*, 542 P.2d 1115, 1116–18, 112 Ariz. 416, 417–19 (1975) (en banc) (statements made by suspect in custody in response to police interrogation, without the benefit of *Miranda* warnings, were inadmissible in a probation revocation proceeding).

Importantly, statements secured in violation of *Miranda* are admissible for purposes of impeachment in a criminal trial.

- *Kansas v. Ventris*, 556 U.S. 586, 593 (2009) (prosecutor can offer statements elicited in violation of *Miranda* to impeach the testifying defendant's credibility).

- *Harris v. New York*, 401 U.S. 222, 224–26 (1971) (statements made in violation of *Miranda* may be used to impeach testimony that bears on the crime charged).

Some state courts disagree on the basis of their state constitution. See, e.g., *Alaska v. Batts*, 195 P.3d 144, 153–55 (Alaska Ct. App. 2008) (holding Alaska Rule of Evidence 412, which allowed the state to impeach a defendant's trial testimony with prior statements taken in violation of *Miranda*, to be unconstitutional under Alaska Constitution, when violation of *Miranda* was either intentional or egregious).

Further, pre-warning silence may generally be used to impeach a defendant's trial testimony.

- *Fletcher v. Weir*, 455 U.S. 603, 606–07 (1982) (per curiam) (impeachment use of post-arrest, pre-*Miranda* silence does not violate due process and states are allowed to determine the admission of such silence for impeachment under their rules of evidence).
- *Jenkins v. Anderson*, 447 U.S. 231, 237–39 (1980) (permitting prosecutor's reference to the defendant's pre-arrest silence for impeachment of defendant's testimony that he acted in self-defense).

Again, some state courts have fashioned different rules on the basis of their state constitutional self-incrimination clause.

- *Nelson v. State*, 691 P.2d 1056, 1059 (Alaska Ct. App. 1984) (“We, therefore, conclude that under Article 1, § 9 of the Alaska Constitution, a person who is under arrest for a crime cannot normally be impeached by the fact that he was silent following his arrest.”) (citation omitted).
- *People v. Jacobs*, 204 Cal. Rptr. 849, 856 (Cal. Ct. App. 1984) (“We hold that under the circumstances of this case questioning appellant on cross-examination about his silence occurring both during and following his arrest violated appellant's privilege against self-incrimination under California Constitution, article I, section 15.”).

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Even if police comply with all the requirements of *Miranda v. Arizona*, a statement given in a custodial setting is still inadmissible in a criminal case under the Due Process Clause of the Fifth or Fourteenth Amendment if it was involuntary.

- *Miranda v. Arizona*, 384 U.S. 436, 464 n.33 (1966) ("It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity.") (citations omitted).
- *Bram v. United States*, 168 U.S. 532, 542-43 (1897) ("But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . .").
- *Tankleff v. Senkowski*, 135 F.3d 235, 242 (2d Cir. 1998) (a defendant's claim that a confession is involuntary and that it was obtained in violation of *Miranda* are "interrelated, but analytically distinct").

Indeed, in *Corley v. United States*, 556 U.S. 303 (2009), the Supreme Court ruled that even voluntary confessions may be thrown out of court if suspects are not presented in court in a timely manner.

The Supreme Court has formulated the test for voluntariness in various ways. In *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991), the Court directed lower courts to consider whether defendant's will was "overborne in such a way as to render his confession the product of coercion." In *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961), the plurality said that to be admissible, the statement must be "the product of an essentially free and unconstrained choice by its maker," a formulation later approved in *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). Some form of police coercion is necessary to render a statement involuntary. *Colorado v. Connelly*, 479 U.S. 157, 164-67 (1986) (finding no due process violation where allegedly involuntary statement was not accompanied by police coercion). Involuntariness may be shown not only by physical coercion, *Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936) (whipping and hanging suspect from a tree), but by a variety of

more subtle types of psychological coercion, *Mincey v. Arizona*, 437 U.S. 385, 397–402 (1978) (hospital interview of seriously wounded suspect after police ignored requests to see attorney).

The admission of an involuntary confession at trial is subject to a constitutional harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279 (1991) (five justices agreed that error of admitting an involuntary confession into evidence was subject to the harmless error test of *Chapman v. California*, though five different justices held that the error was not harmless in the present case).

The circumstances in which courts have found statements to have been involuntary and, therefore, inadmissible in a prosecution against the defendant as a violation of due process are extremely varied. The following cases—from both federal and state courts—serve merely as examples.

- *Fulminante*, 499 U.S. at 286–88 (inmate's confession was coerced when he was interrogated by an undercover informant, who presented himself as an organized crime figure and offered to protect the inmate from "rough treatment" at the hands of his fellow inmates).
- *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968) (statements were involuntary where defendant was questioned for four hours during a 13-hour detention, requested counsel, and was given neither food nor medication for high blood pressure).
- *Gallegos v. Colorado*, 370 U.S. 49, 54–55 (1962) (written statement of 14-year-old obtained after five days of being held incommunicado was involuntary).
- *United States v. Swint*, 15 F.3d 286, 290 (3d Cir. 1994) (statements were involuntary when defendant came to the courthouse to give an informal, off-the-record interview, his attorney was not present, he was not given *Miranda* warnings, and the officers present were carrying clearly visible weapons).
- *United States v. Rogers*, 906 F.2d 189, 192 (5th Cir. 1990) (statements given in an interview conducted by federal agents under the auspices of the sheriff's department, which had previously promised defendant that he would not be prosecuted for a related crime, were involuntary).

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d statements to have prosecution against the defendant varied. The following are merely as examples.

Confession was coerced from informant, who pre-offered to protect the defendant (his fellow inmates). 68) (statements were made for four hours during which no food or drink was given neither food

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th Cir. 1990) (statements taken from agents under the threat of previously promised immunity for a related crime,

- *State v. Morton*, 186 P.3d 785, 799, 286 Kan. 632, 653 (2008) (when investigator affirmatively misrepresented the true nature of the interview to the defendant, the defendant's self-incriminatory statements were involuntary).
- *State v. Hoppe*, 661 N.W.2d 407, 418, 261 Wis. 2d 294, 316 (2003) (suppressing statements elicited by a five-hour interrogation while the defendant was in the hospital suffering from chronic, end-stage alcohol dependence and alcohol-related dementia).

Although the U.S. Supreme Court in *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) decided that absent "the crucial element of police overreaching . . . there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process," several states have held that police wrongdoing is not a necessary element of determining that a confession is involuntarily and inadmissible under the state constitution's due process clause.

- *State v. Kula*, 616 N.W.2d 313, 325, 260 Neb. 183, 201 (2000) (rejecting state's contention that court need not determine whether a confession was voluntary if it was made to a private person).
- *Commonwealth v. Cooper*, 899 S.W.2d 75 (Ky. 1995) (pressure of private investigators was not deemed sufficient in this case to justify suppression of confession, but court recognized common law rule that such pressure by private persons could justify suppression).
- *State v. Bowe*, 881 P.2d 538, 77 Haw. 51 (1994) (distinguishing *Connelly* and deciding that a private person's coercive conduct could make confession involuntary under state due process clause).

The admissibility of confessions taken by U.S. investigators from non-Americans abroad or taken by foreign police from Americans abroad are topics that have become more than a matter of academic interest during the "war on terror." Although the subject deserves a lengthy discussion, we simply cite here some of the cases a lawyer should consider when wading into this doctrinally difficult area.

- *In re Terrorist Bombings*, 552 F.3d 177, 198–202 (2d Cir. 2008) (concluding that the Fifth Amendment governs the admissibility in domestic courts of statements made to U.S. law enforcement agents by foreign nationals held in foreign custody, and proceeding on the assumption that *Miranda* generally applies to interrogations conducted by U.S. law enforcement agents abroad).
- *United States v. Abu Ali*, 528 F.3d 210, 227–28 (4th Cir. 2008) (a U.S. citizen's voluntary statements to foreign law enforcement officials without *Miranda* warnings are "generally admissible" if the foreign officials are not "(1) engaged in a joint venture with, or (2) acting as agents of, United States law enforcement officers.") (citations omitted).
- *United States v. Yousef*, 327 F.3d 56, 145–46 (2d Cir. 2003) (in holding that an alien's statements to foreign law enforcement officials without *Miranda* warnings were admissible, the court explained that "statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary" unless (1) "United States law enforcement agents actively participate in questioning conducted by foreign authorities" (known as the "joint venture doctrine"), or (2) the circumstances under which the statements were obtained "shock the judicial conscience.") (citations omitted).
- *United States v. Martindale*, 790 F.2d 1129, 1131–32 (4th Cir. 1986) (holding that a former State Department officer's statements to British law enforcement officials were "admissible absent proof of duress or of a willful attempt of American authorities to evade the strictures of *Miranda* or *Massiah* by employing the foreign authorities.") (citation omitted).
- *United States v. Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971) (in holding that a U.S. citizen's confession to Mexican police was admissible, the court explained: "When the interrogation is by the authorities of a foreign jurisdiction, the exclusionary rule has little or no effect upon the conduct of foreign police. Therefore, so long as the trustworthiness of the confession satisfies legal standards, the fact that the defendant was not given *Miranda* warnings before

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198–202 (2d Cir. 2008) governs the admissibility in law enforcement agents, and proceeding on the basis to interrogations conducted).

17–28 (4th Cir. 2008) (a law enforcement officer is generally admissible” if the officer is in a joint venture with, or acting in concert with, law enforcement officers.”)

45–46 (2d Cir. 2003) (foreign law enforcement officers were admissible, the statements by foreign police in the absence of voluntary” unless the officers actively participate in the proceedings” (known as the “fruits” doctrine under which statements are inadmissible if obtained by coercion of judicial conscience.”)

131–32 (4th Cir. 1986) (the government’s statements to British authorities in the absence of proof of duress or coercion to evade the strict requirements of the foreign authorities.”)

105 (9th Cir. 1971) (in the absence of Mexican police was not a voluntary interrogation is by the government’s custodial rule has little value. Therefore, so long as the statements satisfy legal standards, the statements are admissible and Miranda warnings before

questioning by foreign police will not, by itself, render his confession inadmissible.”) (citations omitted).

- *United States v. Clarke*, 611 F. Supp. 2d 12, 28–29 (D.D.C. 2009) (“It is by now well-established that the Fifth Amendment privilege against self-incrimination protects nonresident aliens facing a criminal trial in the United States even where the questioning by U.S. authorities takes place abroad. This proposition is based on the status of the privilege against self-incrimination as a ‘fundamental trial right,’ as to which a violation occurs not at the moment of custodial interrogation, but at the time a defendant’s statement is used against him at an American criminal proceeding.”) (citations omitted); *United States v. Straker*, 596 F. Supp. 2d 80, 90 (D.D.C. 2009) (same).
- *United States v. Bin Laden*, 132 F. Supp. 2d 168 (S.D.N.Y. 2001) (extending the Fifth Amendment privilege to foreign suspects interrogated abroad by American law enforcement personnel).

It is noteworthy that, in the recent cases involving statements taken by U.S. investigators from non-Americans abroad, the government conceded that the Fifth Amendment right against self-incrimination applied. *In re Terrorist Bombings*, 552 F.3d at 198; *Clarke*, 611 F. Supp. 2d at 29; *Straker*, 596 F. Supp. 2d at 90–91.

In an analogous context, it is worth noting that although the Fifth Amendment does not apply to Indian tribal court proceedings, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–57 (1978), the Indian Civil Rights Act of 1968 provides that “no Indian tribe in exercising powers of self-government shall . . . compel any person in any criminal case to be a witness against himself.” 25 U.S.C. § 1302(a)(4). Based on this provision, at least one state court has explained that defendants testifying in tribal proceedings “enjoy a federally imposed privilege against self-incrimination that is substantially coextensive with the fifth amendment privilege,” such that an Indian tribe “could not compel [a defendant’s] testimony without a grant of use and derivative use immunity sufficient to meet the dictates of the fifth amendment.” *Tracy v. Superior Court*, 810 P.2d 1030, 168 Ariz. 23, 41 (1991)

(citation omitted). In general, tribal police must give *Miranda*-like warnings during a custodial interrogation, and statements taken by tribal police in violation of *Miranda* are not admissible in a tribal, federal, or state prosecution.

- *Fort Peck Tribes v. Bighorn*, 1 Am. Tribal Law 121, 123 (Fort Peck Ct. App. 1997) (“[T]ribal police officers must upon arrest, and taking a person into custody, give that person notice of his Tribal Rights, which includes his right to protection against self-incrimination.”)
- *Lower Elwha Klallam Indian Tribe v. Bolstrom*, 19 Ind. L. Rep. 6026, 6027 (L. Elwha Ct. App. 1991) (the proper remedy for the tribal police’s failure to give *Miranda*-like warnings is exclusion of the defendants’ statements).
- *United States v. Medearis*, 775 F. Supp. 2d 1110, 1117 (D.S.D. 2011) (suppressing custodial statements that the defendant made to tribal police without receiving any *Miranda*-like warnings).

During Non-Custodial Police Interrogation

Self-incriminating statements made to law enforcement agents outside of custodial interrogation are presumed not to have resulted from coercion, thereby generally making such statements admissible against the defendant. In such circumstances, the defendant’s decision to speak is generally deemed voluntary as well.

- *Beckwith v. United States*, 425 U.S. 341, 346–48 (1976) (upholding denial of motion to suppress statements made during interview by IRS agents at defendant’s home).
- *United States v. Czichray*, 378 F.3d 822, 830 (8th Cir. 2004) (reversing order suppressing confession when defendant was interrogated in his home and, thus, not in custody).
- *United States v. Coleman*, 208 F.3d 786, 790–91 (9th Cir. 2000) (self-incriminating statements made by defendant in his apartment, five days after he was first arrested and released, were admissible against him at trial).

- *United States v. Erekson*, 70 F.3d 1153, 1157 (10th Cir. 1995) (self-incriminating statements made during voluntary appearance at IRS agent's office were admissible at trial).
- *State v. Evans*, 495 N.W.2d 760, 762–64 (Iowa 1993) (sustaining conviction when statements admitted against defendant at trial were obtained by police questioning that took place in defendant's home).

Courts are divided over whether a person's invocation of his right to remain silent (or mere silence in response to questions posed by law enforcement) in non-custodial settings can be used as substantive evidence of guilt. Some have said no.

- *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1047 (7th Cir. 2001) (prosecutor's reference to defendant's pre-arrest silence as substantive evidence of guilt violated Fifth Amendment).
- *United States v. Burson*, 952 F.2d 1196, 1200–01 (10th Cir. 1991) (IRS agent's testimony that defendant refused to respond to questions was an impermissible comment on defendant's right to remain silent, though the court ultimately deemed the error harmless).
- *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989) (prosecutor's use at trial of defendant's pre-arrest statement that he was not going to confess was reversible error).
- *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1015 (7th Cir. 1987) (prosecutor's reference to defendant's pre-arrest statement that he "didn't want to talk about it, he didn't want to make any statements" violated defendant's Fifth Amendment rights, though the error was harmless).
- *Commonwealth v. Molina*, 33 A.3d 51, 62 (Pa. Super. Ct. 2011) (holding that the state "cannot use a non-testifying defendant's pre-arrest silence" to support its claim of defendant's guilt and reversing the conviction upon determining that the error was not harmless).
- *State v. Cassavaugh*, 12 A.3d 1277, 1287, 161 N.H. 90, 101 (2010) (error for state to have introduced in its case in chief a recording and transcript of defendant's specific request to terminate the interview).

- *People v. Welsh*, 58 P.3d 1065, 1070–72 (Colo. App. 2002) (reversing first-degree murder conviction, when defendant's silence in the face of questions from paramedics and detectives about what happened when they found her lying on the floor of her home was commented on repeatedly by prosecutor in the government's case in chief).
- *Ex parte Marek*, 556 So. 2d 375, 380–81 (Ala. 1989) (abolishing the tacit admission rule in Alabama criminal trials, given that the underlying presumption of the rule—that a defendant's silence is prompted by his guilt—is inappropriately simple and inconsistent with a defendant's right to remain silent).

Other courts have disagreed.

- *United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007) (prosecutor may comment on defendant's pre-arrest failure to explain that he was illegally in the United States under duress).
- *United States v. Oplinger*, 150 F.3d 1061, 1066–67 (9th Cir. 1998) (holding that the prosecutor may use defendant's "pre-arrest, pre-Miranda silence as substantive evidence of guilt"), *overruled on other grounds* *United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (en banc).
- *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (prosecutor may comment upon defendant's pre-arrest silence).
- *United States v. Rivera*, 944 F.2d 1563, 1567, 1568 n.12 (11th Cir. 1991) (customs agent's testimony that the non-testifying defendant expressed no surprise and remained silent when customs agent searched his bag at airport raised no constitutional difficulty).
- *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (prosecutor may comment on pre-arrest silence).

In *Salinas v. Texas*, 133 S. Ct. 2174 (2013), the Supreme Court granted certiorari "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a non-custodial police

interview. But the ruling in the privilege used against length in

The question by the Supreme Cir. 2013 and remained used by the Circuit ruling silent. And by station at trial failure to courts for *Griffin v.* tor's conviction vacated to

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interview as part of its case in chief." *Id.* at 2179 (citations omitted). But the Court found it unnecessary to resolve the split of authority, ruling instead that Salinas failed to properly (unequivocally) invoke the privilege during the interview, thereby allowing his silence to be used against him for that reason. *Id.* We discuss this decision at greater length in Chapter 5.

The question left unanswered by *Salinas* was recently addressed by the Second Circuit in *United States v. Okatan*, 728 F.3d 111 (2d Cir. 2013). In that case, the fact that Okatan had demanded a lawyer and remained silent thereafter during a non-custodial interview was used by the prosecution at trial as evidence of his guilt. The Second Circuit reasoned that by requesting a lawyer and thereafter remaining silent, Okatan had effectively invoked his Fifth Amendment right. And by so doing, the prosecution may not comment on that assertion at trial for the same reason it cannot comment on a defendant's failure to testify: such comment would be "a penalty imposed by courts for exercising a constitutional privilege." *Id.* at 119 (quoting *Griffin v. California*, 380 U.S. at 614). The court found the prosecutor's comment not to be harmless beyond a reasonable doubt and vacated the conviction.

During Grand Jury Proceedings

For the federal government to initiate a serious criminal case, the Constitution requires the approval of a grand jury. U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."). Most state constitutions have similar provisions. The grand jury is empowered to issue subpoenas—either *ad testificandum*, calling for a witness to testify, or *duces tecum*, requiring the witness to produce documents or other tangible items. (The Fifth Amendment "act of production" privilege applicable to the compelled production of documents is addressed in Chapter 9.) The Supreme Court has repeatedly affirmed a person's right to invoke the Fifth Amendment privilege against self-incrimination in response to subpoenas issued by grand juries, at least as to subpoenas directed to them personally.

olo. App. 2002) (reversing defendant's silence in the presence of detectives about what was on the floor of her home after a search of the government's

(Ala. 1989) (abolishing the right to silence at trial, given that the defendant's silence is a simple and inconsistent

th Cir. 2007) (prosecution's failure to explain that defendant's silence was a failure to testify).

166–67 (9th Cir. 1998) (defendant's "pre-arrest, pre-arrest silence" (pre-arrest, pre-guilt"), *overruled on* 1135, 1136 (9th

(5th Cir. 1996) (prosecution's failure to explain that defendant's silence was a failure to testify).

, 1568 n.12 (11th Cir. 2000) (defendant's "pre-arrest, pre-arrest silence" (pre-arrest, pre-guilt"), *overruled on* 1135, 1136 (9th

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the Supreme Court has repeatedly affirmed a person's right to invoke the Fifth Amendment privilege against self-incrimination in response to subpoenas issued by grand juries, at least as to subpoenas directed to them personally.

- *United States v. Mandujano*, 425 U.S. 564, 575 (1976) (describing the process for adjudicating a grand jury witness's assertion of the privilege against self-incrimination).
- *United States v. Calandra*, 414 U.S. 338, 346 (1974) (stating that a grand jury may not force a witness to testify in violation of his Fifth Amendment rights).
- *Counselman v. Hitchcock*, 142 U.S. 547, 562–63 (1892) (finding that Fifth Amendment right against self-incrimination is a broader right than the right to counsel under the Sixth Amendment, and, thus, may be exercised in a larger number of settings).

Procedures for Invoking the Fifth Amendment

To claim the Fifth Amendment privilege in response to a grand jury subpoena, a witness must either appear before the grand jury and assert the privilege after each question calling for a potentially incriminating answer or move to quash the subpoena on the ground that responses to any question would be protected by the Fifth Amendment privilege. Simply refusing to honor a grand jury subpoena on the basis of the Fifth Amendment is unwarranted and may be grounds for contempt.

- *United States v. Mandujano*, 425 U.S. 564, 573 (1976) (plurality) (“The Fifth Amendment does not confer an absolute right to decline to respond in a grand jury inquiry . . .”).
- *In re Grand Jury Subpoenas Dated Dec. 7 & 8*, 40 F.3d 1096, 1104 (10th Cir. 1994) (police officer’s fear that grand jury may consider compelled internal affairs statement and return an indictment against him does not provide sufficient basis for blanket assertion of Fifth Amendment before grand jury).
- *A v. Dist. Court of Second Judicial Dist.*, 550 P.2d 315, 322–23, 191 Colo. 10, 19–20 (1976) (“A witness before a grand jury cannot assert his Fifth Amendment right against self-incrimination by a [b]lanket refusal to answer all questions put to him. When asked a specific question or series of questions, the answers to which he believes will tend to incriminate him, he may refuse to answer.”) (internal citations omitted).

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However, at least in federal grand jury investigations, witnesses who announce their intention to assert their Fifth Amendment rights in response to any question calling for a potentially incriminating answer (i.e., in a blanket fashion), may often be excused from having to appear.

- See U.S. Attorneys Manual § 9-11.154 (authorizing prosecutors to decide to withdraw a subpoena where the witness has indicated in advance that he intends to assert the privilege, but warning against doing so too readily).

Although at least one court decided that a person whom the prosecutor knows will assert a Fifth Amendment privilege could not be subpoenaed to appear under the circumstances of that case, *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964), the great weight of authority is to the contrary.

- *United States v. Wong*, 431 U.S. 174, 179 n.8 (1977) (“[T]here is no constitutional prohibition against summoning potential defendants to testify before a grand jury.”) (citation omitted).
- *United States v. Dionisio*, 410 U.S. 1, 10 n.8 (1973) (“The obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry.”) (citations omitted).
- *In re Doe & Roe Corp.*, 682 A.2d 753, 763, 294 N.J. Super. 108, 127–28 (1996) (requiring targets of an attorney general investigation to answer investigative interrogatories issued pursuant to New Jersey Racketeering Influenced and Corrupt Organizations Act (“RICO”) statute and to raise Fifth Amendment objections on a question-by-question basis).

Department of Justice internal guidelines recommend against compelling a target of a grand jury investigation to appear before the grand jury to assert his Fifth Amendment privilege, except in exceptional cases.

- U.S. Attorneys Manual § 9-11.150 (advising prosecutors to consider, among other factors, “whether the questions the prosecutor and the

grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege" in determining whether to subpoena a target).

Such internal guidelines or policies are not, however, enforceable against the Department of Justice.

- *United States v. Myers*, 123 F.3d 350, 358 (6th Cir. 1997) (despite being "troubled by the government's violations of the DOJ Manual," court refused to use its supervisory powers to suppress grand jury testimony when the government failed to comply with relevant DOJ manual provisions requiring warnings to grand jury targets and subjects).

See generally

- *United States v. Caceres*, 440 U.S. 741, 755-56 (1979) (while recognizing that federal agencies should follow their own procedures and guidelines when individual rights are affected, failure of IRS to follow rules regarding recording of conversation provided no basis to suppress evidence obtained).

Although the Supreme Court has not definitively resolved the question whether *Miranda*-type warnings must be given to a target of the grand jury investigation, the Court has hinted that warnings regarding the witness's rights under the Fifth Amendment are not required.

- *Minnesota v. Murphy*, 465 U.S. 420, 431 (1984) (in the course of ruling that *Miranda*-type warnings need not be given to a probationer being questioned by a probation officer, the Court noted that it has "never held that [warnings] must be given to grand jury witnesses.") (citation omitted).
- *United States v. Mandujano*, 425 U.S. 564, 579-80 (1976) (while finding it unnecessary to consider whether any warnings were required, the plurality remarked that "grand jury questioning[]

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take[s] place in a setting wholly different from custodial police interrogation.”).

The lower federal courts have generally recognized that even though it is the policy of the Department of Justice to append an “Advice of Rights” form to all grand jury subpoenas served on targets/subjects, U.S. Attorneys Manual § 9-11.151, advice regarding Fifth Amendment rights is not constitutionally required to be given to grand jury witnesses.

- *United States v. Quam*, 367 F.3d 1006, 1008 (8th Cir. 2004) (declining to fashion a rule that would require warnings regarding the right against self-incrimination to be given to witnesses testifying before a grand jury).
- *United States v. Gomez*, 237 F.3d 238, 242 (3d Cir. 2000) (where grand jury covered only topics witness could have reasonably believed would be covered in questioning and witness had adequate opportunity to consult an attorney before the grand jury, prosecutor did not have a constitutionally mandated obligation to inform the witness that he could remain silent and that anything he said could be used against him).
- *United States v. Goodwin*, 57 F.3d 815, 818 (9th Cir. 1995) (failure to provide the DOJ “Advice of Rights” form containing Fifth Amendment warnings did not, without more, establish a deprivation of defendant’s rights).
- *United States v. Russell*, 916 F. Supp. 2d 305, 310 (E.D.N.Y. 2013) (listing numerous cases in which courts have concluded that *Miranda*-like warnings are not required for targets or subjects subpoenaed to testify before grand juries).

Similarly, the Fifth Amendment does not require the suppression of grand jury testimony elicited without previously advising the witness that he is in fact the target of the grand jury investigation.

- *United States v. Washington*, 431 U.S. 181, 188 (1977) (“After being sworn, respondent was explicitly advised that he had a right to

remain silent and that any statements he did make could be used to convict him of crime. It is inconceivable that such a warning would fail to alert him to his right to refuse to answer any question which might incriminate him. This advice also eliminated any possible compulsion to self-incrimination which might otherwise exist.”).

However, a number of states have required either that grand jury witnesses be advised of their rights against compulsory self-incrimination or that targets be advised of their status.

- Ariz. R. Crim. P. 12.6 (“A person under investigation by the grand jury may be compelled to appear or may be permitted to appear before the grand jury upon the person’s written request. Such person shall be advised of the right to remain silent and the right to have counsel present to advise the person while he or she is giving testimony.”); *State v. Doolittle*, 746 P.2d 924, 929, 155 Ariz. 352, 357 (1987) (affirming suppression of evidence obtained in violation of defendant’s right to be informed of right against self-incrimination).
- Indiana Code Ann. § 35-34-2-5(b) (“If the subpoena is issued to a target, the subpoena shall also contain a statement informing the target that: (1) he is a subject of the grand jury investigation; (2) he has the right to consult with an attorney and to be assisted by an attorney under section 13 of this chapter; and (3) if he cannot afford an attorney, the court inpaneling [*sic*] the grand jury will appoint one for him, upon request”); *State ex rel. Pollard v. Criminal Court*, 329 N.E. 2d 573, 589, 263 Ind. 236, 259 (1975).
- *Commonwealth v. Woods*, 1 N.E.3d 762, 772, 466 Mass. 707, 719–20 (2014) (“[W]here, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness is either a ‘target’ or is likely to become one, the witness must be advised, before testifying, that (1) he or she may refuse to answer any question if a truthful answer would tend to incriminate the witness, and (2) anything that he or she does say may be used against the witness in a subsequent legal proceeding.”)

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- *State v. Cook*, 464 N.E.2d 577, 581, 11 Ohio App. 3d 237, 241 (1983) (holding that a grand jury witness who was potentially the focus of the investigation should have been warned of her Fifth Amendment privilege).
- *People ex rel. Gallagher v. Dist. Court*, 601 P.2d 1380, 1383, 198 Colo. 468, 471-72 (1979) (oral advisement of rights before the grand jury did not comply with statute requiring an advisement of rights for a suspect appearing before the grand jury).
- *State v. De Cola*, 164 A.2d 729, 732, 33 N.J. 335, 342 (1960) ("[A] person whose criminal liability is the object of a grand jury inquiry must be informed of his privilege to withhold evidence tending to his own incrimination").

And in several states, witnesses compelled to testify before a state grand jury are entitled to transactional immunity merely for testifying.

- Tenn. R. Crim. P. 6(j)6: "Immunity of Certain Witnesses from Prosecution. No witness shall be indicted for any offense in relation to which the district attorney general has compelled the witness to testify before the grand jury."
- N.Y. Crim. Proc. § 190.40.1: "Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him." N.Y. Crim. Proc. § 190.40.2: "A witness who gives evidence in a grand jury proceeding receives immunity unless" certain circumstances apply. See *People v. Chin*, 490 N.E.2d 505, 67 N.Y.2d 22, 33 n.4 (1986) (the statutory immunity that a grand jury witness receives is transactional rather than use immunity).

Absence of a Fifth Amendment Privilege in Response to Subpoena for Documents That Incriminate Others

The Fifth Amendment provides no basis for a person to object to a grand jury subpoena requiring the production of documents in the possession of a third party. In *Couch v. United States*, 409 U.S. 322 (1973), a person transferred her financial records, including bank statements,

canceled checks, and deposit slips, to her accountant. The IRS, which was investigating the person for tax fraud, served the accountant with an administrative summons. The taxpayer asserted her Fifth Amendment privilege to enjoin enforcement of the summons. The Supreme Court rejected the taxpayer's arguments, reasoning that the Fifth Amendment protects only against personal compulsion, and that the enforcement of the summons to her accountant did not compel the taxpayer to do anything. *Id.* at 329. Accordingly, courts have routinely overruled Fifth Amendment objections posed by parties to subpoenas for their records in the possession of third parties.

- *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984) (no Fifth Amendment violation when subpoena was issued to third party and target was not compelled to produce any materials).
- *Johnson v. United States*, 228 U.S. 457, 458 (1913) (Fifth Amendment privilege did not apply to books and records that had been transferred involuntarily by a bankrupt party to a trustee in bankruptcy).
- *United States v. Mickens*, 926 F.2d 1323, 1331 (2d Cir. 1991) (no Fifth Amendment violation with respect to customers when bank was required to report large cash transactions, because customers were not under compulsion).
- *In re Grand Jury Subpoena (Maltby)*, 800 F.2d 981, 984 (9th Cir. 1986) (former police chief cannot assert Fifth Amendment to prevent production of incriminating records in possession of his successor).
- *Ryerson v. IRS*, 371 F. Supp. 2d 1130, 1134 (D. Ariz. 2005) (taxpayer's motion to quash third-party subpoenas directed to Wells Fargo and Arizona Public Service Co. denied, as "[p]laintiff ha[d] no [Fifth Amendment] protectable interest in these 'third party' records.").
- *United States v. One Hundred & Four Thousand Seven Hundred and Sixty-Eight Dollars*, No. 97 CV 5257 (RJD), 1999 WL 684152, at *2-3 (E.D.N.Y. July 12, 1999) (although requiring claimant in forfeiture proceeding to produce her prior tax returns was protected by her Fifth Amendment privilege, she could be compelled to execute an authorization form allowing the IRS to release copies of her tax returns).

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It is also clear that a person may not shield documents from a grand jury subpoena by giving the documents to her lawyer. Although the lawyer may resist the production of documents given to her by the client for the purpose of obtaining legal advice on the basis of the attorney-client privilege, the fact that the client could assert a Fifth Amendment privilege as to the documents does not give the lawyer a right to resist production on the basis of the client's Fifth Amendment privilege.

- *Fisher v. United States*, 425 U.S. 391, 405 (1976) (explaining that the Fifth Amendment does not protect documents that a person has given to his attorney, because once the attorney has possession and the government demands production from the attorney, the threat of compulsion is removed from the witness).
- *In re Sealed Case*, 162 F.3d 670, 673-75 (1998) (D.C. Cir. 1998) (attorney for Monica Lewinsky was compelled to produce to grand jury documents and tangible objects given to him by his client).

Absence of Protection Against Grand Jury Considering Evidence Previously Obtained in Violation of the Fifth Amendment

Indictments returned by a grand jury that considers evidence previously obtained in violation of the privilege against self-incrimination are nevertheless normally valid.

- *United States v. Williams*, 504 U.S. 36, 49 (1992) (noting that "our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination is nevertheless valid.") (citations and internal quotation marks omitted).
- *United States v. Calandra*, 414 U.S. 338, 346 (1974) (*dicta* indicating that evidence obtained in violation of Fifth Amendment right against self-incrimination may be presented to grand jury).
- *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966) (defendant is not entitled to challenge an indictment on the ground that the grand jury heard evidence obtained in violation of the Fifth Amendment privilege against self-incrimination).

- *State v. Case*, 928 P.2d 1239, 1242 (Alaska 1996) (reinstating indictment that lower court had dismissed on grounds that grand jury considered evidence obtained in violation of the defendant's Fifth Amendment right against self-incrimination).

Indictments returned by a grand jury that considers testimony of the person indicted that had been compelled by a grant of immunity—which protects against use of such testimony in “any criminal case”—are, however, generally invalid. Only if the government can establish that the evidence relied upon by the grand jury was derived from independent, legitimate sources may an indictment survive the use of such “tainted” testimony.

- *United States v. Hubbell*, 530 U.S. 27, 45 (2000) (affirming decision dismissing an indictment obtained in part through evidence derived from act of producing documents compelled by order of immunity pursuant to 18 U.S.C. § 6003).
- *United States v. Palumbo*, 897 F.2d 245, 248–49 (7th Cir. 1990) (citing cases from Eighth, Ninth, and Eleventh Circuits reversing convictions where indictments were obtained on the basis, at least in part, of testimony given by the defendant under a grant of immunity).
- *Ohio v. Conrad*, 552 N.E.2d 214, 216, 50 Ohio St. 3d 1, 3–4 (1990) (dismissing indictment obtained by use of defendant's prior immunized testimony).

However, other courts have held that when the government violates an immunity order by using immunized testimony before a grand jury, the remedy is to suppress the tainted testimony at trial, not to dismiss the indictment.

- *United States v. Riveccio*, 919 F.2d 812, 816 (2d Cir. 1990) (affirming conviction where government used defendant's immunized testimony to secure his indictment, but did not use the immunized testimony at trial).

Immunity is addressed in greater detail in Chapter 10.

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During Pretrial Proceedings

In *Simmons v. United States*, 390 U.S. 377, 394 (1968), the Supreme Court held that “when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.” In that case, the defendant moved to suppress a suitcase containing incriminating materials that had been seized, he alleged, in violation of the Fourth Amendment. To establish his standing to contest the search and seizure, the defendant testified at the pretrial suppression hearing that he was the suitcase’s owner. At trial, the defendant’s pretrial hearing testimony was used against him. While acknowledging that the pretrial hearing testimony was not compelled, the Supreme Court was concerned that the defendant was required to surrender his Fifth Amendment right against self-incrimination in order to assert an arguably valid Fourth Amendment claim. Thus, the Court fashioned the exclusionary rule quoted earlier, prohibiting the use of such testimony in the government’s case in chief at trial.

The *Simmons* exclusionary rule has been extended to testimony given at certain other pretrial hearings.

- *United States v. Pavelko*, 992 F.2d 32, 34 (3d Cir. 1993) (Fifth Amendment violated by use at trial of financial affidavit prepared by defendant to obtain court-appointed counsel).
- *United States v. Garcia*, 721 F.2d 721, 723 (11th Cir. 1983) (defendant may testify at a pretrial double jeopardy hearing and disclose self-incriminating information “without fear that the evidence will be used against him at the ensuing trial”) (citation omitted).
- *United States v. Inmon*, 568 F.2d 326, 333 (3d Cir. 1977) (defendant could not be required, as the cost of litigating a valid Fifth Amendment double jeopardy claim, to waive the Fifth Amendment privilege against self-incrimination in a later trial).
- *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969) (testimony of the defendant in a hearing on an application to

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proceed *in forma pauperis* could not be used as evidence against him at trial).

- *Hayes v. State*, 581 So. 2d 121, 126 (Fla. 1991) (defendant may testify at a suppression hearing and not waive his Fifth Amendment privilege; collecting cases detailing a wide variety of situations in which *Simmons* applies).

See also

- *United States v. Weston*, 36 F. Supp. 2d 7, 13 (D.D.C. 1999) (“[T]he scope of the competency hearing shall be limited to determining whether the defendant is . . . mentally incompetent . . . [i]f any information is obtained beyond this limited scope that would be relevant to the defendant’s guilt and/or future death penalty phase, that information would be exclud[able]”) (citations omitted).
- *United States v. Salemme*, 985 F. Supp. 197, 198 (D. Mass. 1997) (for purposes of deciding whether defendant was eligible for court-appointed counsel, court first agreed to accept ex parte submission from the parties and, if a further adversary proceeding was necessary, to then provide defendant with immunity for his statements).
- *People v. Pokovich*, 141 P.3d 267, 276–77, 39 Cal. 4th 1240, 1253–54 (2006) (deciding that a testifying defendant may not be impeached at trial with statements made during a court-ordered examination to determine defendant’s mental competency to stand trial).
- *People v. Jablonski*, 126 P.3d 938, 957, 37 Cal. 4th 774, 802 (2006) (“[B]ecause a defendant may not invoke his right against compelled self-incrimination in a competency examination, neither the statements of [the defendant] to the psychiatrists appointed under section 1369 nor the fruits of such statements may be used in trial of the issue of [the defendant’s] guilt”) (citation and internal quotation marks omitted).
- *People v. Arcega*, 651 P.2d 338, 346–48, 32 Cal. 3d 504, 522–23 (1982) (establishing a rule under California law that statements

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- *People v. Coleman*, 533 P.2d 1024, 1042, 13 Cal. 3d 867, 889 (1975) (fashioning, under court's supervisory power, an exclusionary rule preventing government from using testimony of a probationer at a probation revocation hearing held before the disposition of criminal charges arising out of the alleged violation of the conditions of probation).

This form of judicially imposed immunity has, however, not been applied to testimony given in all pretrial proceedings, on the basis that the merits of the criminal case do not come into play at certain pretrial hearings.

- *Porretto v. Stalder*, 834 F.2d 461, 466 (5th Cir. 1987) (bail testimony voluntarily given by the defendant is admissible against him at trial).
- *United States v. Dohm*, 618 F.2d 1169, 1173-74 (5th Cir. 1980) (en banc) (no protection for statements made by defendant at bail hearing).

Although the Supreme Court has not specifically ruled on the issue, the prevailing case law favors allowing the testifying defendant to be impeached by his prior pretrial testimony, including prior testimony given to vindicate Fourth Amendment rights.

- *United States v. Salvucci*, 448 U.S. 83, 93-94 (1980) (reserving question of whether *Simmons* "use immunity" extends beyond the government's case in chief to the cross-examination of the defendant in the event he chooses to testify at trial).
- *Walder v. United States*, 347 U.S. 62, 65 (1954) (allowing prosecution to impeach a defendant's trial testimony that he had never possessed narcotics with evidence of his possession, which had been previously suppressed because it had been obtained in violation of the Fourth Amendment).

- *United States v. Jaswal*, 47 F.3d 539, 543 (2d Cir. 1995) (no error for government to use testimony from suppression hearing to impeach defendant's testimony at trial).
- *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1291 (9th Cir. 1994) ("[Defendant] elected to testify in his own defense at his trial. The Fifth Amendment protected him from the use of his suppression hearing testimony in the Government's case in chief to prove his guilt. It did not protect him from impeachment for testifying falsely.").
- *United States v. Quesada-Rosadal*, 685 F.2d 1281, 1283 (11th Cir. 1982) ("[T]he use of prior inconsistent statements given at a suppression hearing can be used to impeach a defendant's trial testimony, whether given during direct or cross-examination.") (citation omitted).
- *United States v. Vaughn*, No. 05-00482 OWW, 2008 WL 4104241, at *7-8 (E.D. Cal. Sept. 2, 2008) (holding that the defendant cannot complain that his choice to testify at the suppression hearing was used to impeach his inconsistent testimony at trial).
- *Bobb v. United States*, 758 A.2d 958, 964 (D.C. 2000) (no plain error for government to use pretrial hearing testimony to impeach defendant's credibility as trial witness).
- *State v. Schultz*, 448 N.W.2d 424, 427-32, 152 Wis. 2d 408, 415-29 (1989) (not per se impermissible to require a defendant to choose between asserting his right to suppress statements and asserting his right to remain silent, by allowing statements at suppression hearing to be used to impeach his testimony at trial).

During Trial

Fifth Amendment Rights of the Defendant

In accordance with the plain meaning of its words, the Fifth Amendment guarantees the criminal defendant an unqualified right to choose whether or not to testify at his or her trial. When a defendant chooses not to testify, the Fifth Amendment generally prohibits the prosecutor, the trial judge, or counsel for a co-defendant from making adverse comments about the defendant's decision. In *Griffin v. California*, 380 U.S.

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609, 613–14 (1965), the Supreme Court held that any inference of guilt to be drawn from the defendant's exercise of the Fifth Amendment at trial was tantamount to improper compulsion.

Although Justices Thomas and Scalia have long criticized the *Griffin* adverse inference rule, the Supreme Court seems unlikely to overrule it any time soon. In 1999, the *Griffin* rule was described as “an essential feature of [our] legal tradition” in *Mitchell v. United States*, 526 U.S. 314, 316, 330 (1999), where the Court extended *Griffin*'s prohibition of an adverse inference from silence to the sentencing decision. And in *Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013), only the dissenters in *Mitchell*, Justices Thomas and Scalia, took the opportunity to criticize *Griffin* as inconsistent with the text of the Self-Incrimination Clause (“*Griffin* is impossible to square with the text of Fifth Amendment . . . [A] defendant is not ‘compelled . . . to be a witness against himself’ simply because a jury has been told that it may draw an adverse inference from his silence.”) (citations omitted). The dissenters in *Salinas*—Justices Breyer, Sotomayor, Ginsburg, and Kagan—endorsed the *Griffin* decision in arguing that the prosecutor should not have been allowed to comment at trial on the defendant's silence in response to non-custodial police questioning. The three justices constituting the plurality in *Salinas*—Justices Alito and Kennedy and Chief Justice Roberts—took no position on the wisdom of *Griffin*.

Prosecutors' comments held to violate the defendant's Fifth Amendment right to remain silent have included the following:

- *Griffin v. California*, 380 U.S. 609, 611 (1965) (prosecutor's comment that defendant “has not seen fit to take the stand and deny or explain” violated the Fifth Amendment).
- *United States v. Hills*, 618 F.3d 619, 640 (7th Cir. 2010) (prosecutor's comments in closing arguments that “you don't really need to worry about that Fifth Amendment protection unless you're worried that you're [d]oing something illegal,” and that the defendants were “using the Fifth Amendment not as a shield to protect themselves from incrimination, but as a sword to prevent the IRS from getting

the information that they are entitled to,” violated non-testifying defendant’s Fifth Amendment rights).

- *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049–51 (7th Cir. 2005) (prosecutor’s comment, “[l]et the Defendant tell you,” violated defendant’s Fifth Amendment rights because jury could reasonably interpret it as suggestion that the jury should infer guilt from defendant’s silence).
- *United States v. Rodriguez*, 215 F.3d 110, 122 (1st Cir. 2000) (improper to suggest that the defendant could have contradicted a government witness).
- *United States v. Hardy*, 37 F.3d 753, 757 (1st Cir. 1994) (prosecutor’s comment that non-testifying defendants were “still running and hiding today” violated Fifth Amendment).

A comment on a non-testifying defendant’s demeanor during trial (or during custodial interrogation) may also constitute a violation of a defendant’s Fifth Amendment right not to testify.

- *United States v. Green*, 541 F.3d 176, 187 (3d Cir. 2008) (conviction reversed where prosecutor elicited testimony that defendant “widened his eyes, lowered his head and sighed” when shown videotape of narcotics transaction during custodial interrogation in which *Miranda* warnings were not given), *vacated on other grounds* 556 F.3d 151 (3d Cir. 2009).
- *United States v. Rivera*, 944 F.2d 1563, 1568–69 (11th Cir. 1991) (error for prosecutor to comment on defendant’s “deadpan” demeanor).
- *United States v. Schuler*, 813 F.2d 978, 981 (9th Cir. 1987) (“[P]rosecutorial comment on a defendant’s non-testimonial behavior may impinge on that defendant’s fifth amendment right not to testify.”).

The prohibition on commenting on the invocation of the right against self-incrimination at a criminal trial is not absolute. In *United States v. Robinson*, 485 U.S. 25 (1988), the Supreme Court considered a mail fraud case involving false insurance claims. The defense attorney suggested during closing argument that the government was not being fair because it

had not allowed him to tell his client's side of the story. In rebuttal, the prosecutor argued that the defendant had an adequate opportunity to explain his position when he gave a statement to the authorities, when he spoke to an insurance company investigator, and that he "could have taken the stand and explained it to you, anything he wanted to." *Id.* at 40 n.3. The Court distinguished *Griffin* and upheld the conviction, in effect recognizing a "fair response" exception to the *Griffin* rule.

Other courts have followed *Robinson*'s lead.

- *United States v. Ayewoh*, 627 F.3d 914, 924–26 (1st Cir. 2010) (where defendant's theory of the case was that "friend of a friend" was criminally responsible, prosecutor could say in fair response in closing "We still don't know who this friend of a friend is," and "[Y]ou haven't heard evidence of [the defendant calling the friend].").
- *Graham v. Dormire*, 212 F.3d 437, 439–40 (8th Cir. 2000) (prosecutor's comment that the jury could determine when the defendant needed to testify was a "fair response" to defense counsel's statement that defendant did not need to testify).
- *De La Riva v. Garcia*, 121 F.3d 715, 1997 WL 464653, at *1 (9th Cir. 1997) (trial court reasonably interpreted defense attorney's comments to suggest that defendant could not testify on his own behalf, thereby allowing prosecutor to make "fair response" that defendant could testify on his own behalf).
- *Commonwealth v. Trivigno*, 750 A.2d 243, 248–49, 561 Pa. 232, 243–44 (2000) (defense counsel's statement to jury that they could infer defendant's innocence from defendant's not guilty plea authorized prosecutor to inform jury of actual legal effect of a not guilty plea).
- *People v. Austin*, 28 Cal. Rptr. 2d 885, 895 (Cal. Ct. App. 1994) ("It must be remembered [that] the defendant's right to remain silent is a shield. It cannot be used as a sword to cut off the prosecution's 'fair response' to the evidence or argument of the defendant.") (citation omitted).

- *State v. Brecht*, 421 N.W.2d 96, 102–03, 143 Wis. 2d 297, 312–14 (1988) (state was allowed to elicit police officer’s testimony about defendant’s pre-*Miranda* silence on redirect, after defense counsel elicited facts about defendant’s pre-arrest conduct on cross-examination of police officer).

Additionally, a prosecutor’s adverse comments in violation of *Griffin v. California* may constitute harmless error. Thus, in *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court decided that the *Griffin* rule did not involve rights so basic to a fair trial that their violation can never be harmless. Rather, if the prosecutor can prove beyond a reasonable doubt that the jury would have returned a guilty verdict in any event, the conviction can be upheld. *Id.* at 24. While imposing a high bar, numerous cases uphold a defendant’s conviction despite a violation of the *Griffin* rule. A few representative cases include the following:

- *United States v. Hasting*, 461 U.S. 499, 512 (1983) (prosecutor’s comments regarding uncontradicted testimony constituted harmless error in the face of overwhelming evidence of guilt).
- *United States v. McMillan*, 600 F.3d 434, 452 (5th Cir. 2010) (prosecutor’s comment “not one of these defendants is stepping up” was harmless error, where court instructed jury to disregard and prosecutor explained to jury that he misspoke).
- *United States v. Rodriguez-Velez*, 597 F.3d 32, 45 (1st Cir. 2010) (where court issued instruction to disregard prosecutor’s comments and evidence of guilt was overwhelming, *Griffin* error was harmless).
- *United States v. Forrest*, 402 F.3d 678, 686 (6th Cir. 2005) (prosecutor’s comments regarding defendant’s failure to provide testimony to support his defense argument were harmless, where evidence of guilt was strong and comments were not extensive).
- *United States v. Barbour*, 393 F.3d 82, 90–91 (1st Cir. 2004) (prosecutor’s comments that might reasonably be interpreted as a comment on the defendant’s failure to testify, such as “[the conspirators] are the only people who laid it out for you” and “this [tape recorder] allowed you to listen to th[e] defendant,” did not

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omments in violation of *Griffin* error. Thus, in *Chapman v. California*, the Supreme Court decided that the *Griffin* error trial that their violation can be proven by the prosecutor can prove beyond a reasonable doubt a guilty verdict in any case. While imposing a high burden of proof, a conviction despite a violation of the Fifth Amendment cases include the following:

99, 512 (1983) (prosecutor's testimony constituted harmless error of guilt).

34, 452 (5th Cir. 2010) (prosecutor's argument that jury should infer guilt from defendant's silence after his arrest required reversal, when comments were linked directly to prosecutor's argument regarding the implausibility of the defense theory of the case).

7 F.3d 32, 45 (1st Cir. 2010) (prosecutor's comments regarding prosecutor's comments were harmless).

3, *Griffin* error was harmless). 686 (6th Cir. 2005) (prosecutor's failure to provide testimony was harmless, where evidence of guilt was not extensive).

82, 90-91 (1st Cir. 2004) (prosecutor's argument reasonably be interpreted as a statement to testify, such as "[the conviction] is out for you" and "this is the defendant," did not

likely affect the outcome of the trial and were mitigated by jury instructions).

- *People v. Brasure*, 175 P.3d 632, 647, 42 Cal. 4th 1037, 1060 (2008) (court's immediate and unequivocal direction to jury not to consider prosecutor's improper comment, combined with overwhelming evidence of guilt, rendered *Griffin* error harmless).

Extensive adverse comments, combined with evidence that could have supported acquittal, will support a finding of reversible constitutional error.

- *Anderson v. Nelson*, 390 U.S. 523, 525-27 (1968) (prosecutorial comments such as "I give him credit for not getting up on the stand and trying to tell you a lie," combined with questionable evidence of guilt, led to reversal of conviction under *Chapman*).
- *United States v. Rodriguez*, 260 F.3d 416, 421-23 (5th Cir. 2001) (prosecutor's argument that jury should infer guilt from defendant's silence after his arrest required reversal, when comments were linked directly to prosecutor's argument regarding the implausibility of the defense theory of the case).
- *People v. Guzman*, 80 Cal. App. 4th 1282, 1288-90 (2000) (*Griffin* error required reversal because prosecutor's comments on defendant's failure to testify were "relentless" and evidence of guilt was not overwhelming).

Comments by counsel for a co-defendant on a defendant's decision not to testify can also be improper, but they are often found to constitute harmless error.

Compare

- *De Luna v. United States*, 308 F.2d 140, 154-55 (5th Cir. 1962) (repetitious comments by defense counsel for co-defendant on defendant's failure to testify were too prejudicial to be cured by a no-inference jury instruction and thereby required new separate trials for both defendants).

with

- *United States v. Spencer*, 592 F.3d 866, 881 (8th Cir. 2010) (comment by counsel for co-defendant that he would not “hide behind the Fifth Amendment” did not violate *Griffin*, because a reasonable juror would not view this as a comment on defendant’s failure to testify).
- *United States v. Al-Muqsit*, 191 F.3d 928, 937 (8th Cir. 1999) (improper comment by counsel for co-defendant that he would have liked to cross-examine defendant, but was unable to do so because of defendant’s Fifth Amendment privilege, did not deny a fair trial).
- *United States v. Coleman*, 7 F.3d 1500, 1505–06 (10th Cir. 1993) (comment by counsel for co-defendant that defendant’s refusal to testify “sets him apart” violated Fifth Amendment, but was harmless error).

A criminal defendant who does not testify has a constitutional right to a cautionary jury instruction that no inference of guilt may be drawn from the choice not to testify.

- *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (“Just as adverse comment on a defendant’s silence ‘cuts down on the privilege by making its assertion costly,’ the failure to limit the jurors’ speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant’s failure to testify.”) (citation omitted).

But cf. White v. Woodall, __ S. Ct. __, No. 12-794, 2014 WL 1612424 (U.S. Apr. 23, 2014) (state court refusal to give “no adverse inference” instruction at the penalty phase is “not contrary to clearly established federal law” so as to entitle defendant to federal habeas relief).

Accordingly, where a trial judge improperly rejects a defendant's request for such a "no adverse inference" instruction, courts apply a constitutional harmless error analysis to determine whether reversal is appropriate.

- *United States v. Soto*, 519 F.3d 927, 930 (9th Cir. 2008) (agreeing with First Circuit and holding that failure to give a requested "no adverse inference" instruction requires reversal, unless harmless beyond a reasonable doubt).
- *Beathard v. Johnson*, 177 F.3d 340, 350 (5th Cir. 1999) (court's failure to deliver requested "no adverse inference" instruction may be harmless error).
- *United States v. Burgess*, 175 F.3d 1261, 1267–68 (11th Cir. 1999) (although holding that failure to give no-inference instruction was subject to harmless error analysis, court nonetheless reversed conviction because it was not convinced beyond a reasonable doubt that trial court's failure to give instruction did not contribute to the conviction).
- *United States v. Wagstaff*, No. 86-5585, 1987 WL 37826, at *2 (4th Cir. June 17, 1987) (conviction reversed when trial court rejected defendant's proffered "no adverse inference" instruction and gave one that "failed to tell the jury in plain, unequivocal language that it could not draw an adverse inference from the defendant's failure to take the stand.>").
- *State v. Mayes*, 63 S.W.3d 615, 638 (Mo. 2001) (failure to give requested "no adverse inference" instruction during death penalty phase not harmless and requires new trial on issue of punishment).
- *State v. Griffin*, 576 N.W.2d 594, 597 (Iowa 1998) (court's failure to give "no adverse inference" instruction was harmless beyond a reasonable doubt in light of overwhelming evidence of defendant's guilt).
- *Commonwealth v. McIntosh*, 646 S.W.2d 43, 44–45 (Ky. 1983) (court's failure to give "no adverse inference" instruction was harmless error due to "overwhelming" evidence of guilt).

A court may give a "no inference of guilt" instruction even though the defendant objects to the instruction for strategic reasons, such as



***BOOK 'EM DANNO: A ROUNDTABLE
DISCUSSION OF RECURRING FIFTH
AMENDMENT ISSUES IN CIVIL AND
CRIMINAL LITIGATION***

**George Mason American Inn Of Court
Presentation for Monday, September 22, 2014**

not wishing to emphasize the failure to testify. *Lakeside v. Oregon*, 435 U.S. 333, 340–41 (1978). The Supreme Court noted, however, that states are free to “forbid [their] trial judges from doing so as a matter of state law.” *Id.* at 340. Consequently, some state courts require adherence to a defendant’s wishes.

- *Commonwealth v. Garcia*, 888 A.2d 633, 634, 585 Pa. 160, 161 (2005) (in a multi-defendant action, a court must respect the request for a “no adverse inference” instruction by one defendant, even if another defendant waives his right to the instruction).

See also

- *Commonwealth v. Edwards*, 637 A.2d 259, 261, 535 Pa. 575, 579–80 (1993) (it is per se reversible error to give “no inference of guilt” instruction when defendant requests that it not be given).

Other courts have noted that the better practice is for trial judges to respect the tactical decisions of defense counsel, particularly where there are no conflicting wishes expressed by co-defendants.

- *United States v. Williams*, 521 F.2d 950, 955 n.11 (D.C. Cir. 1975) (“Although such a refusal to honor the wishes of defendant [to give a no-inference instruction] has not been held to be reversible error, we believe, as several courts have suggested, that the better practice, in cases where there are no conflicting wishes of codefendants, is for the trial judge to respect the tactical decisions of defense counsel.”) (internal citations omitted).
- *Commonwealth v. Rivera*, 805 N.E.2d 942, 953 n.9, 441 Mass. 358, 371 n.9 (2004) (“We remain of the view that judges should not give the instruction when asked not to do so. We are merely saying that it is not *per se* reversible error to do so.”).
- *State v. Thompson*, 430 N.W.2d 151, 153 (Minn. 1988) (“[A] trial judge ordinarily should obtain a criminal defendant’s permission before giving [the no adverse inference instruction].”).

Fifth Amendment Rights of the Trial Witness

A witness's Fifth Amendment right not to testify generally trumps a defendant's Sixth Amendment rights to compulsory process and to present a defense. Thus, most courts have denied attempts by the defendant to call to the stand a witness who intends to assert the Fifth Amendment privilege against self-incrimination.

- *United States v. Santiago*, 566 F.3d 65, 70 (1st Cir. 2009) (defendant has no right to compel a witness who will legitimately assert the Fifth Amendment to all questions to take the witness stand).
- *United States v. Branch*, 537 F.3d 328, 342 (4th Cir. 2008) (trial court did not abuse its discretion in refusing defendant's request to call a passenger in the car in which drugs were found to the stand to assert his Fifth Amendment privilege against self-incrimination).
- *United States v. Reed*, 173 F. App'x 184, 189 (3d Cir. 2006) ("We have held that a criminal defendant may not call a witness for the sole purpose of allowing the jury [to] hear the witness invoke his or her Fifth Amendment privilege This rule is well grounded as allowing a witness to testify for the purpose of invoking the Fifth Amendment would only invite the jury to make an improper inference.") (internal citations and quotation marks omitted).
- *United States v. Mabrook*, 301 F.3d 503, 507 (7th Cir. 2002) (defendant does not have a right to force a witness to appear before the jury simply to invoke a Fifth Amendment privilege).
- *United States v. Griffin*, 66 F.3d 68, 70 (5th Cir. 1995) ("Once a witness appears in court and refuses to testify, a defendant's compulsory process rights are exhausted.").
- *United States v. Harris*, 542 F.2d 1283, 1298 (7th Cir. 1976) ("The defendants have no right to have the jury draw inferences from the witnesses' exercise of [the Fifth Amendment].").
- *Bowles v. United States*, 439 F.2d 536, 541-42 (D.C. Cir. 1970) (en banc) (explaining that a witness's invocation of the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations, and that "the probative value of the event is almost entirely undercut by the absence of any requirement that

the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination.”) (citation omitted).

However, a few state courts grant trial judges the discretion to force a witness who will assert his or her privilege against self-incrimination to take the witness stand and to invoke the privilege in front of the jury.

- *Gray v. Maryland*, 796 A.2d 697, 702–14, 368 Md. 529, 537–59 (2002) (court has discretion to allow defendant to call non-testifying witness to the witness stand).
- *Porth v. State*, 868 P.2d 236, 240 (Wyo. 1994) (“We hold that the trial court has discretion to allow or disallow the defendant to call a witness to the stand who the court knows will invoke [the] Fifth Amendment privilege against self-incrimination in the presence of the jury.”) (citations omitted).

It is well settled that a witness who asserts the Fifth Amendment privilege against self-incrimination is “unavailable” under Federal Rule of Evidence 804(a). *See, e.g., United States v. Salerno*, 505 U.S. 317, 321 (1992); *United States v. Innamorati*, 996 F.2d 456, 474 (1st Cir. 1993). Thus, former testimony by the witness asserting the Fifth Amendment may, if certain conditions are met, be admissible for or against the defendant. *See* Fed. R. Evid. 804(b)(1) (excepting from hearsay rule “[t]estimony that: (A) was given as a witness . . . ; and (B) is now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination”).

The concern that the jury will infer a defendant’s guilt from a witness’s assertion of the Fifth Amendment privilege against self-incrimination applies equally to the government’s attempt to call witnesses to the stand at trial. Numerous courts have prevented the government from calling an alleged participant in the crime as a witness, knowing or suspecting that the witness will assert his Fifth Amendment privilege against self-incrimination, either as a violation of the defendant’s Sixth Amendment right to confront his accusers or as evidentiary violation.

- *United State v. Rivas-Macias*, 537 F.3d 1271, 1275 n.3 (10th Cir. 2008) (“Because a jury may not draw any legitimate inferences from a witness’ decision to exercise his Fifth Amendment privilege, we have repeatedly held that neither the prosecution nor the defense may call a witness to the stand simply to compel him to invoke the privilege against self-incrimination.”) (citations omitted).
- *Harmon v. McVicar*, 95 F.3d 620, 624 (7th Cir. 1996) (“[R]ever-sible error occurs only where the government intentionally forces the witness to invoke the privilege against self-incrimination with the result that an inference unfavorable to the accused is planted in the minds of the jurors.”) (citations omitted).
- *United States v. King*, 461 F.2d 53, 56 (8th Cir. 1972) (conviction reversed where prosecution questioned two witnesses who asserted their Fifth Amendment rights regarding the crime in question and the evidence against the defendant was not strong).
- *Robbins v. Small*, 371 F.2d 793, 795 (1st Cir. 1967) (when it became apparent that the government’s witness was going to assert his Fifth Amendment privilege regarding every question, prosecutor should have ceased questioning the witness).
- *Higgs v. Commonwealth*, 554 S.W.2d 74, 75 (Ky. 1977) (conviction reversed where witness’s invocation of her Fifth Amendment rights was unduly prejudicial to the defendant).
- *State v. Allen*, 224 N.W.2d 237, 240–41 (Iowa 1974) (reversing conviction where prosecutor questioned witness knowing that he would assert Fifth Amendment privilege).

The Supreme Court has rejected the suggestion that it is invariably reversible error for the prosecutor to require a witness to appear before the jury and exercise the Fifth Amendment privilege to some or all questions.

- *Frazier v. Cupp*, 394 U.S. 731, 733 (1969) (no violation of defendant’s confrontation rights for prosecutor to call the witness to the stand, knowing that the witness would assert his Fifth Amendment

privilege against self-incrimination, because witness's appearance lasted only two to three minutes).

- *Namet v. United States*, 373 U.S. 179, 189 (1963) (because the witness refused to testify to only a few questions and his refusals were only "cumulative support for an inference already well established by the non-privileged portion of the witnesses' testimony," there was no evidentiary error in prosecutor calling the witness to the stand).

During Post-Trial Proceedings

The Supreme Court has made it clear that convicted defendants may not be compelled to testify against themselves at sentencing hearings. In *Estelle v. Smith*, 451 U.S. 454, 462–63 (1981), the Court rejected the argument that incrimination is complete once guilt has been adjudicated and held the Fifth Amendment applicable to capital sentencing hearings. Because the defendant retains the privilege against self-incrimination through sentencing, the defendant's silence at trial or thereafter cannot be used as a basis for drawing an adverse inference in determining the facts or seriousness of the offense at sentencing. *Mitchell v. United States*, 526 U.S. 314, 326–27 (1999). Indeed, neither a defendant's guilty plea nor incriminating statements made at the plea colloquy waive the right to remain silent at sentencing. *Id.* at 316–17. We discuss "waiver" further in Chapter 8.

The Supreme Court in *Mitchell* left open the question whether a court may consider the defendant's refusal to speak at a sentencing hearing (or to a probation officer conducting a pre-sentence investigation for the court) to determine factors relevant to sentencing other than the nature of the crime of conviction. Thus, although the Fifth Amendment right generally applies at sentencing, many courts "have allowed sentencing courts to rely on, or draw inferences from, a defendant's exercise of his Fifth Amendment rights for purposes other than determining the facts of the offense of conviction." *Lee v. Crouse*, 451 F.3d 598, 605 n.3 (10th Cir. 2006) (citation omitted).

- *United States v. Kennedy*, 499 F.3d 547, 551–52 (6th Cir. 2007) (court could consider defendant's refusal to submit to post-trial

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psychosexual examination at sentencing, because inference drawn from refusal related solely to future dangerousness and not to facts regarding the seriousness of the offense of conviction).

- *United States v. Bolden*, 479 F.3d 455, 466 (6th Cir. 2007) (conditioning reduced sentence on willingness to disclose disposition of robbery proceeds does not violate Fifth Amendment).
- *United States v. Warren*, 338 F.3d 258, 264 (3d Cir. 2003) (the denial of a sentencing reduction for acceptance of responsibility based on a defendant's post-guilty plea silence constituted a "denied benefit rather than a penalty" and thus did not violate the defendant's Fifth Amendment rights).
- *United States v. Constantine*, 263 F.3d 1122, 1128–29 (10th Cir. 2001) (conditioning sentence reduction on defendant's willingness to discuss prior robberies did not violate Fifth Amendment).
- *State v. Burgess*, 943 A.2d 727, 758 (N.H. 2008) (citing federal circuit decisions since *Mitchell* holding that it is not a Fifth Amendment violation to deny a reduction of sentence under the acceptance of responsibility provision of the federal sentencing guidelines to a defendant who remains silent at sentencing).
- *State v. Blunt*, 71 P.3d 657, 662 & n.13, 118 Wash. App. 1, 10 (2003) (recognizing that "most courts have generally declined to extend *Mitchell* to prohibit inferences from silence in the context of sentence enhancements that do not involve factual details of the underlying crime" and collecting cases).

But cf. State v. Washington, 832 N.W.2d 650, 660–61 (Iowa 2013) (deciding that sentencing judge had violated defendant's Fifth Amendment right when he issued harsher sentence based on defendant's refusal to answer a question about whether he was on drugs the day of sentencing).

A defendant awaiting sentencing, who is called to testify as a witness at another person's trial, may invoke his Fifth Amendment privilege against compelled self-incrimination.

- *United States v. Londono*, 175 F. App'x 370, 372 (2d Cir. 2006) (defendant who had pled guilty, but had not yet been sentenced, could not be compelled to testify at a co-defendant's trial).
- *United States v. Stewart*, 129 F. App'x 758, 766–67 (4th Cir. 2005) (recognizing that *Mitchell v. United States* suggested that a defendant who awaits sentencing after having pled guilty may assert the privilege against self-incrimination if called as a witness in the trial of a co-defendant).
- *United States v. Hernandez*, 962 F.2d 1152, 1161 (5th Cir. 1992) (“[I]mpending sentencing may furnish grounds for a legitimate fear of incurring additional criminal liability from testifying, in which case the [Fifth Amendment] privilege should remain in effect.”) (citations omitted).
- *United States v. Lugg*, 892 F.2d 101, 102–03 (D.C. Cir. 1989) (agreeing with other circuits that convicted, but unsentenced, defendants retain their Fifth Amendment rights not to testify regarding incriminating matters that may affect their sentence).
- *United States v. Paris*, 827 F.2d 395, 399 (9th Cir. 1987) (“A convicted but unsentenced defendant retains his Fifth Amendment rights.”) (citations omitted).
- *United States v. Tindle*, 808 F.2d 319, 325 (4th Cir. 1986) (witness allowed to invoke his Fifth Amendment privilege at trial of co-defendant, when plea agreement “specifically provided that nothing in the agreement would be construed to protect [witness] in any way from prosecution for perjury”).

See also

- *United States v. Rivas-Macias*, 537 F.3d 1271, 1281 (10th Cir. 2008) (defendant's rights to compulsory process were not violated when co-defendant, who had not yet been sentenced, was not compelled to testify on defendant's behalf).

Many courts do not view sentencing as eliminating potential incrimination for the crime of conviction, at least where the opportunity for

appellate review and, therefore, a possible reversal of the conviction remains.

- *United States v. Kennedy*, 372 F.3d 686, 691 (4th Cir. 2004) (“We have held in no uncertain terms that a defendant’s right to invoke the Fifth Amendment as to events for which he has been convicted extends to the period during which the conviction is pending appeal.”) (citations omitted).
- *People v. Cantave*, 993 N.E.2d 1257, 21 N.Y.3d 374, 377 (2013) (court violated defendant’s Fifth Amendment privilege when it granted prosecutor’s request to cross-examine him about the underlying facts of a rape conviction that was on direct appeal).
- *Ellison v. State*, 528 A.2d 1271, 1278, 310 Md. 244, 258–59 (1987) (holding that Fifth Amendment and Article 22 of Maryland Declaration of Rights entitled convicted defendant to invoke privilege against self-incrimination during pendency of direct appeal and sentence review proceedings).
- *State v. Linscott*, 521 A.2d 701, 703–04 (Me. 1987) (finding that defendant had a Fifth Amendment right not to testify at another’s trial, when he had an appeal pending regarding the same set of circumstances).

However, where no appeals remain pending, the courts generally find that compelling the defendant to make incriminating admissions regarding the crime of conviction poses no Fifth Amendment problem, because there “is no more than a remote or speculative possibility” of incrimination.

- *Rice v. Mich. Parole Bd.*, No. 1:05-CV-549, 2005 WL 2297463, at *3–4 (W.D. Mich. Sept. 21, 2005) (no Fifth Amendment violation to require defendant whose appeals had been denied to admit information regarding crimes of which he had been convicted).
- *State v. Barone*, 986 P.2d 5, 20, 329 Or. 210, 232 (1999) (concluding that a witness does not possess a Fifth Amendment privilege against self-incrimination after his direct appeals have been exhausted, and

may not refuse to answer questions about the crime of conviction simply because he intends to attack the conviction through habeas corpus proceedings).

But cf. James v. State, 75 P.3d 1065, 1072 (Alaska Ct. App. 2003) (defendant had Fifth Amendment right not to admit guilt during mandated sex offender treatment program, because such admissions could still be used against him if he obtained post-conviction relief); *State ex rel. Henderson v. Fabian*, 735 N.W.2d 295, 310–11 (Minn. 2007) (holding that an inmate who had exhausted his right to direct appeal still had a Fifth Amendment privilege not to answer questions concerning his offense of conviction during a state-mandated sex offender treatment program because he testified at trial that he did not commit the offense, and making any admission to the contrary in the sex offender treatment program would have supported a conviction for perjury; the court did not reach the defendant's separate argument that because his conviction could have been overturned in his federal habeas proceeding, any admissions he might have made could have been used against him in a new trial).

A probationer's or parolee's right to exercise the Fifth Amendment privilege in connection with his probation/parole supervision is dependent on whether probation would be revoked upon its invocation. In *Minnesota v. Murphy*, 465 U.S. 420 (1984), the defendant was placed on probation for a sex-related crime and ordered to be truthful to his probation officer in all matters. As a result of admitting a past crime to his probation officer, the defendant was later convicted of murder. He challenged his conviction on the basis that his incriminating statement was impermissibly compelled and should not have been admitted into evidence in the subsequent prosecution. The Supreme Court explained that if a state "either expressly or by implication, asserts that the invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation," with the result that the "failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a [later] criminal prosecution. *Id.* at

435–37. However, the Court continued, a state may validly insist on answers to even incriminating questions to sensibly administer its probation system and may revoke probation for a refusal to answer so long as it does not use the compelled answers in a subsequent criminal prosecution. In Murphy's case, the Court said, there was no direct threat of revocation for remaining silent and, therefore, Murphy's failure to assert his privilege was not excused, and his statements were properly admitted in the ensuing prosecution.

Thus, a probationer or parolee's Fifth Amendment rights turn on the consequence of remaining silent in the face of questioning. If revocation follows from silence, the incriminating statements are deemed compelled and cannot be used in a subsequent prosecution. If revocation is not the consequence of silence, a probationer can be forced to speak and have his self-incriminating statements used against him in a criminal prosecution.

- *United States v. Ramos*, 685 F.3d 120, 128–29 (2d Cir. 2012) (upholding denial of motion to suppress incriminating statements made to parole officer in subsequent prosecution for making false statements, where Ramos was not explicitly or implicitly threatened with parole revocation for invoking his Fifth Amendment privilege and instead failed to invoke his right against self-incrimination).
- *United States v. Vreeland*, 684 F.3d 653, 660 (6th Cir. 2012) (conviction for making false statements upheld and no Fifth Amendment violation found where evidence established that Vreeland was neither explicitly nor implicitly threatened with revocation when speaking to his probation officer under general condition to be truthful).
- *United States v. Abbouchi*, 502 F.3d 850, 859 (9th Cir. 2007) (condition of supervised release that requires truthful answers to probation officer does not violate Fifth Amendment, where questions relate only to ongoing supervision).
- *United States v. Singleton*, No. 1:09-CR-546-RWS-GGB, 2010 WL 3723909, at *5 (N.D. Ga. May 10, 2010) (suppressing act of production evidence where penalty for remaining silent was found).

Most federal and many state courts have not been solicitous of probationers' claims that conditions of probation requiring them to submit to polygraph examinations automatically violated their Fifth Amendment privilege against self-incrimination.

- *United States v. Stoterau*, 524 F.3d 988, 1003–04 (9th Cir. 2008) (upholding a condition of supervised release that required the defendant to participate in a sex offender program that required polygraph testing).
- *United States v. Locke*, 482 F.3d 764, 767–68 (5th Cir. 2007) (mandatory polygraph testing condition of probation did not offend Fifth Amendment, where probationer was asked only questions that sought to ascertain whether he had violated probation and where answers could not serve as basis for future criminal prosecution).
- *United States v. Johnson*, 446 F.3d 272, 279–80 (2d Cir. 2006) (mandatory polygraph testing solely to ensure compliance with terms of supervised release did not violate probationer's Fifth Amendment rights; revocation of supervised release is not a criminal sanction).
- *United States v. Lee*, 315 F.3d 206, 212 (3d Cir. 2003) (Fifth Amendment right against self-incrimination not violated by polygraph condition of probation supervision, when probationer could end exam and was not required to answer incriminating questions).
- *Commonwealth v. Knoble*, 42 A.3d 976, 983, 615 Pa. 285, 296–97 (2012) (refusing to suppress incriminating statements made during mandatory polygraph examination, where probation would not have been automatically revoked for refusing to answer).

But cf. *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005) (holding, on unique set of facts, that polygraph conditions requiring full disclosure of past crimes violated the Fifth Amendment privilege).

Some state courts have been more solicitous of a probationer's Fifth Amendment rights.

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- *State v. Spaeth*, 819 N.W.2d 769, 343 Wis. 2d 220 (2012) (probationer compelled to answer truthfully on polygraph examination was entitled to use and derivative use immunity for his answers).
- *People v. Guatney*, 183 P.3d 620, 626 (Colo. App. 2007) (convicted sex offender could not have his parole revoked for refusing to participate in a sex offender treatment program, because he had an appeal pending and, if he admitted prior sexual misconduct in the treatment program, his statements could still be used against him), *overruled on other grounds* 214 P.3d 1049 (Colo. 2009).
- *State ex rel. Tate v. Schwarz*, 654 N.W.2d 438, 440, 257 Wis. 2d 40, 44 (2002) (state may compel a probationer whose appeal is pending to answer self-incriminating questions or suffer the consequences of revocation for refusing to do so, only if he is protected by a grant of immunity).
- *State v. Cate*, 683 A.2d 1010, 1019, 165 Vt. 404, 417 (1996) (court vacated a condition of probation requiring the defendant to acknowledge culpability for conduct for which he was convicted and ruled that courts should grant judicial use immunity to a probationer "that makes any statements required for successful completion of rehabilitative probation inadmissible against the probationer at a subsequent criminal proceeding.").

Distinguishing Non-Criminal from Criminal Proceedings

Because the words of the Fifth Amendment prohibit the use of compelled self-incriminating testimony only in criminal cases, assertions of the privilege in non-criminal settings are treated differently. For instance, although no adverse inference can be drawn against a criminal defendant from invocation of the Fifth Amendment in a criminal case or at sentencing, an adverse inference against a party who asserts the Fifth Amendment may be drawn by the fact-finder in a civil case. (We discuss the adverse inference in civil cases in Chapter 6.) Similarly, although a defendant cannot be compelled to take the witness stand in his own criminal trial, a party can be compelled by the opposing party to take the witness stand and either testify or assert the Fifth in a purely civil case, at least where the testimony is used only to impose civil sanctions.

However, it is not always easy to determine whether a proceeding is criminal or civil for the purpose of applying the Fifth Amendment. The Supreme Court has been deferential to Congress's definition of a proceeding as civil and remedial but recognizes that despite Congress's intention, a statute may contain sanctions so punitive as to turn a designated civil remedy into a criminal penalty. *See generally Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (setting forth a multifactor test to be used to determine if an act of Congress is "penal or regulatory in character" in cases where conclusive evidence of congressional intent is absent).

On the one hand, an ostensibly civil proceeding may involve sanctions sufficiently severe as to be considered criminal for purposes of the Fifth Amendment. For example, in *Boyd v. United States*, 116 U.S. 616, 633–34 (1886), the Supreme Court indicated that a proceeding involving the forfeiture of certain property based on the commission of a criminal offense was "quasi criminal" and "within . . . criminal proceedings for . . . that portion of the [F]ifth [A]mendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

On the other hand, in *Allen v. Illinois*, 478 U.S. 364, 374 (1986), the Supreme Court held in a 5–4 decision that proceedings under a state's Sexually Dangerous Persons Act were not criminal, despite the fact that proof beyond a reasonable doubt was required and the respondent risked incarceration in a maximum security institution. According to the five-member majority, a proceeding that appears criminal may sufficiently serve non-punitive interests to eliminate the need to apply self-incrimination prohibitions as they are applied in criminal cases. *Id.* at 369. *See also Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (Fifth Amendment Self-Incrimination Clause was not applicable in hearing to determine whether respondent was suffering from a mental abnormality and likely to engage in "predatory acts of sexual violence") (citation omitted).

Proceedings held to fall on the civil side of the imprecise line between criminal and civil proceedings for the purpose of the Fifth Amendment privilege against self-incrimination include the following:

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Deportation proceedings:

- *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038–39 (1984) (*Miranda* exclusionary rule not applicable to deportation proceedings).
- *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 157 (1923) (certain involuntary confessions are admissible in deportation hearings).
- *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (expulsion of non-citizens is a civil proceeding that does not require protections required by the Constitution in criminal cases).

Mental health involuntary commitment proceeding:

- *State v. Williams*, 930 N.E.2d 770, 777–78, 126 Ohio St. 3d 65, 72–73 (2010) (involuntary commitment for accused felon found permanently incompetent to stand trial is a civil proceeding for purposes of the Self-Incrimination Clause).
- *In re Beverly*, 342 So. 2d 481, 488–89 (Fla. 1977) (“The Fifth Amendment privilege is not designed to protect any disclosures which are made by a mental patient during a psychiatric examination and which will lead [o]nly to an assessment of his mental or emotional condition. The privilege has no application in commitment proceedings so long as the proceedings do not entangle him in any criminal prosecution.”) (citations omitted).
- *People ex rel. Keith v. Keith*, 231 N.E.2d 387, 390, 38 Ill. 2d 405, 410–11 (1967) (person to be committed to a psychiatric hospital may be called to testify in his own commitment hearing because the proceeding is civil rather than criminal, and testimony revealing a psychiatric condition requiring confinement does not bring it within the privilege).

Most proceedings involving the imposition of civil monetary penalties:

- *United States v. Ward*, 448 U.S. 242, 251 (1980) (statute imposing civil monetary penalty for failure to file oil spill report was not criminal for purpose of the Self-Incrimination Clause of the Fifth Amendment).

- *Duncan v. Norton*, 974 F. Supp. 1328, 1331 (D. Colo. 1997) (refusing to find that proceeding to impose civil money penalties necessarily violated defendant's Fifth Amendment rights, reasoning that so long as penalties are rationally related to the statute's remedial purposes, they do not constitute an impermissible criminal sanction that threatens defendant's Fifth Amendment protections).

Professional disciplinary proceedings:

- *Roach v. Nat'l Transp. Safety Bd.*, 804 F.2d 1147, 1153–54 (10th Cir. 1986) (finding that proceeding involving revocation of a pilot's license is civil, stating, "[r]evocation of a pilot certificate is not an affirmative disability or restraint, but merely revocation of a privilege conditioned on compliance with the safety regulations of the FAA. Revocation of a privilege voluntarily granted is characteristically free of the punitive criminal element.") (citation and internal quotation marks omitted).
- *In re Pressman*, 658 N.E.2d 156, 159, 421 Mass. 514, 518 (1995) (attorney may be disciplined solely on basis of testimony given under a federal grant of immunity, because disciplinary case is civil, not criminal).
- *In re Anonymous Attorneys*, 362 N.E.2d 592, 596–97, 41 N.Y.2d 506, 510 (1977) (immunity granted to attorneys before grand jury did not preclude use of their grand jury testimony at attorney disciplinary hearings).

Probation revocation proceeding:

- *Minnesota v. Murphy*, 465 U.S. 420, 441 (1984) (Marshall, J., dissenting) ("[B]ecause probation revocation proceedings are not criminal in nature, and because the Fifth-Amendment ban on compelled self-incrimination applies only to criminal proceedings, the possibility that a truthful answer to a question might result in the revocation of his probation does not accord the probationer a constitutional right to refuse to respond.") (citations omitted).
- *United States v. York*, 357 F.3d 14, 24 (1st Cir. 2004) ("[B]ecause revocation proceedings are not criminal proceedings, [a person on

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supervised release] will not be entitled to refuse to answer questions solely on the ground that his replies may lead to revocation of his supervised release") (citation omitted).

- *People v. Lindsey*, 771 N.E.2d 399, 406, 199 Ill. 2d 460, 467 (2002) (a probation revocation proceeding is a civil proceeding).

Proceedings found to constitute criminal proceedings or quasi-criminal proceedings for purposes of the Fifth Amendment include the following:

Juvenile delinquency commitment proceedings:

- *In re Gault*, 387 U.S. 1, 49 (1967) ("[P]roceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination.").

Certain civil forfeiture proceedings:

- *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993) (Self-Incrimination Clause, which is "limited to 'criminal cases,' has been applied in civil forfeiture proceedings, but only where the forfeiture statute has made the culpability of the owner relevant . . . or where the owner faced the possibility of subsequent criminal proceedings") (citations omitted).

Certain guardianship proceedings:

- *In re A.G.*, 785 N.Y.S.2d 313, 315, 6 Misc. 3d 447, 450 (2004) (in an Article 81 proceeding to appoint a guardian for an allegedly incapacitated person, the Fifth Amendment prevented the state from compelling the respondent to testify as a witness).

Assertions of the Fifth Amendment Right Against Self-Incrimination in Non-Criminal Proceedings

During Civil Cases

It has long been held that the Fifth Amendment privilege against self-incrimination may be invoked by parties (and witnesses) in civil proceedings. See *United States v. Saline Bank of Va.*, 26 U.S. 100, 104

(1828) ("The rule clearly is, that a party is not bound to make any discovery [in a civil case] which would expose him to penalties."). As long as the person can demonstrate that the testimony (or the act of producing documents) might incriminate the person in pending or future criminal proceedings, the invocation of the Fifth Amendment in civil proceedings is valid. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 263–64 (1983) (self-incriminating testimony given in a civil deposition may not be compelled over a valid assertion of the Fifth Amendment privilege, unless such testimony has been immunized). We consider the consequences of asserting the Fifth Amendment in a civil case in Chapter 6.

In a standard civil case filed and litigated pursuant to the Federal Rules of Civil Procedure (or its state counterparts), a party may assert the privilege against self-incrimination at any stage of the proceedings. Thus, a party may refuse to answer specific allegations in a civil complaint (or counterclaims and other claims for affirmative relief) on the basis of the Fifth Amendment and have the assertion treated as a denial.

- *Rogers v. Webster*, 776 F.2d 607, 609 (6th Cir. 1985) (approving treating claim of Fifth Amendment privilege in response to allegations in civil complaint as a denial).
- *de Antonio v. Solomon*, 42 F.R.D. 320, 322 (D. Mass. 1967) (court allowed defendant to assert Fifth Amendment privilege in his answer and treated it, and his subsequent invocations of the Fifth, as a denial).

Courts usually deny a party in a civil case the right to assert the Fifth Amendment in a blanket fashion and require the asserting party to parse the allegations and differentiate between allegations that require the invocation of the Fifth Amendment and allegations that do not.

- *United States v. Castro*, 129 F.3d 226, 229 (1st Cir. 1997) ("[t]he privilege cannot be invoked on a blanket basis" and the district court must conduct "a particularized inquiry" into each claim of privilege) (citations omitted).

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- *North River Ins. Co. v. Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987) (“[A] proper invocation of the [Fifth Amendment] privilege [does not] mean that a defendant is excused from the requirement to file a responsive pleading; he is obliged to answer those allegations that he can and to make a specific claim of the privilege as to the rest.”) (citation omitted).
- *In re Livent, Inc. Noteholders Secs. Litig.*, 151 F. Supp. 2d 371, 443–44 (S.D.N.Y. 2001) (granting plaintiff’s motion to strike defendant’s blanket Fifth Amendment answer, but allowing defendant to provide supplemental answer that parsed allegations individually).
- *Indus. Indem. Co. v. Niebling*, 844 F. Supp. 1374, 1378 (D. Ariz. 1994) (requiring the defendant to file an amended answer after defendant’s first answer contained only a blanket assertion of his Fifth Amendment right).

A party may refuse to answer questions posed in written discovery, such as interrogatories or requests for admission, on the basis of the Fifth Amendment.

- *United States v. Kordel*, 397 U.S. 1 (1970) (holding that a corporate vice president simultaneously prosecuted and sued by the Food and Drug Administration (FDA) in a civil enforcement action for the same events could have invoked his individual Fifth Amendment privilege against self-incrimination in response to FDA-propounded interrogatories).
- *Campbell v. Gerrans*, 592 F.2d 1054, 1057 (9th Cir. 1979) (upholding assertions of Fifth Amendment privilege against self-incrimination in response to interrogatories).
- *Gordon v. FDIC*, 427 F.2d 578, 581 (D.C. Cir. 1970) (reversing district court’s denial of defendant’s motion to strike the FDIC’s request for admission and mentioning that while Federal Rule of Civil Procedure 36 “prevents the use of a response as evidence in a criminal case,” court must determine on remand if defendant had basis to properly invoke privilege against self-incrimination).

- *Adelphia Commc'ns Corp. v. Rigas* (*In re Adelphia Commc'ns Corp.*), 317 B.R. 612, 623–24 (Bankr. S.D.N.Y. 2004) (“[A] civil litigant may legitimately use the Fifth Amendment to avoid having to answer inquiries during any phase of the discovery process.”).

As is the case in responding to factual allegations in pleadings, a party cannot generally refuse to answer all interrogatories or requests for admission, but must invoke the Fifth Amendment privilege only to the inquiries calling for self-incriminating answers and must be prepared to demonstrate how a response could constitute Fifth Amendment-protected information.

- *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) (party must offer an explanation of why interrogatories could be incriminating).
- *SEC v. Zimmerman*, 854 F. Supp. 896, 898 (N.D. Ga. 1993) (approving defendant’s specific claims of his Fifth Amendment privilege and denying government’s claim that defendant had improperly invoked a blanket privilege).
- *Guy v. Abdulla*, 58 F.R.D. 1, 2 (N.D. Ohio 1973) (defendant required to “make answers to interrogatories until there is a reasonable danger that continuing to answer will tend to incriminate him.”) (citations omitted).

There are cases in which courts have refused to accept an invocation of the Fifth Amendment in civil pleadings or discovery responses signed only by counsel—on the basis that the Fifth Amendment is a personal right. However, such personal verification should not be required in federal courts. Federal Rule of Civil Procedure 11 authorizes an attorney to sign pleadings for matters asserted in good faith, and there is no exception for pleadings asserting the Fifth Amendment.

- *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1019 n.10 (9th Cir. 2006) (recognizing circumstances in which an attorney’s invocation of the Fifth on behalf of a client would be appropriate).

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- *United States v. Johnson*, 752 F.2d 206, 210–11 (6th Cir. 1985) (recognizing *in dicta* that an attorney may assert a Fifth Amendment privilege on behalf of a client).

On the other hand, some defendants have successfully argued that they cannot be held to have waived their privilege against self-incrimination where their counsel signed a pleading containing potentially incriminating admissions.

- *ACLI Int'l Commodity Servs., Inc. v. Banque Populaire Suisse*, 110 F.R.D. 278, 287 (S.D.N.Y. 1986) (refusing to find that a party had waived the privilege against self-incrimination based upon averments contained in an answer that had not been verified by the party and instead had been signed only by counsel).

As discussed in Chapter 9, the act of producing documents may incriminate. Therefore, a party may assert the Fifth Amendment in response to a request for the production of documents in a civil case and, correspondingly, a non-party may assert the Fifth Amendment in response to a subpoena calling for the production of documents.

- *SEC v. Waltzer & Assocs.*, No. 96-6261, 1997 WL 561062, at *3 (2d Cir. Sept. 10, 1997) (overruling third party's objection to producing documents in response to SEC subpoena on basis that act of production was not sufficiently incriminating in this case).
- *de Antonio v. Solomon*, 42 F.R.D. 320, 323–24 (D. Mass. 1967) (granting deposition witness's motion to quash subpoena for production of her passport on the ground of the privilege against self-incrimination).

However, courts are reluctant to grant a motion to quash a subpoena directed to a third party in its entirety on the basis of a blanket Fifth Amendment assertion or to allow a blanket objection on the basis of the Fifth Amendment privilege to a request for documents to a party. Rather, a log justifying the assertion of the Fifth Amendment act of

production privilege for each document or category of documents is often required.

- *United States v. Grable*, 98 F.3d 251, 257 (6th Cir. 1996) (district court should individually review *in camera* any documents to which a summoned party raises a Fifth Amendment objection).
- *SEC v. Caramadre*, 717 F. Supp. 2d 217, 224 (D.R.I. 2010) (denying respondents' claim not to respond to SEC request for production of documents and requiring them to catalog any documents they hope to withhold on Fifth Amendment grounds in a privilege log).
- *United States v. Carlin*, No. 06-1906, 2006 WL 2619800, at *1 (E.D. Pa. Sept. 11, 2006) (endorsing use of a privilege log to establish application of Fifth Amendment).
- *Toler v. United States*, No. 2:01-MS-004, 2003 WL 21255039, at *6 (S.D. Ohio Apr. 29, 2003) (denying motion to quash IRS subpoena when party refused to produce privilege log).
- *United States v. Bell*, 217 F.R.D. 335, 337–38 (M.D. Pa. 2003) (utilizing *in camera* review to determine whether documents to be produced pursuant to government summons were subject to Fifth Amendment protection).
- *Starlight Int'l, Inc. v. Herlihy*, 181 F.R.D. 494, 498 (D. Kan. 1998) (rejecting defendant's blanket objection in response to all document requests and directing defendants to produce a privilege log).
- *In re Astor*, 62 A.D.3d 867, 870, 879 N.Y.S.2d 560, 564 (N.Y. App. Div. 2009) (proper procedure is for the party asserting that the Fifth Amendment protects the production of documents "to establish a factual predicate" by completing a privilege log).
- *Tona, Inc. v. Evans*, 590 A.2d 873, 876–77 (R.I. 1991) (requiring witness to provide sufficient factual basis for the invocation of the Fifth Amendment privilege as to each document request).

Because such a document-by-document description risks revealing Fifth Amendment-protected information, parties/witnesses should consider requesting the court to enter a protective order restricting access to the privilege log.

- *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 649 (C.D. Cal. 2005) (denying motion to compel production of privilege log where defendant argued “that the mere production of the log would violate his privilege against self-incrimination in light of the Government’s ongoing investigation of his actions”).

Indeed, where the demand for document production is broad and seeks to require the responding party to identify which documents might be responsive, instead of merely seeking the production of documents specifically identified in the demand for production, parties should consider requesting that no privilege log be required. In these cases, the creation of the privilege log itself admits both to the existence of the documents and the possession of the documents by the respondent, admissions that are protected by the Fifth Amendment, as we discuss in Chapter 9. As the Supreme Court reasoned in *United States v. Hubbell*, 530 U.S. 27, 41 (2000), “the collection and production of the materials demanded was tantamount to answering a series of interrogatories” that turns the creation of the privilege log into protected Fifth Amendment testimony. Thus, a judge may grant a motion to avoid creating a Fifth Amendment privilege log. *See, e.g.*, Report & Recommendations of Magistrate Judge at 11–17, *SEC v. Chin*, Civil Action No. 12-cv-01336-PAB-BNB (D. Colo. Nov. 29, 2012).

A party or a witness may refuse to respond to questions at a deposition on the basis of the Fifth Amendment privilege against self-incrimination.

- *Pillsbury Co. v. Conboy*, 459 U.S. 248, 263–64 (1983) (a deponent’s civil deposition testimony, which closely tracks his prior immunized testimony, may not be compelled over a valid claim of his Fifth Amendment right).
- *Andover Data Servs., Inc. v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1084–85 (2d Cir. 1989) (reversing district court order that sought to compel witness to testify in civil case by imposing protective order that prevented deposition testimony from being obtained by government, holding that a protective order did not

adequately protect the witness from potential use of testimony by the prosecution).

- *Anton v. Prospect Café Milano, Inc.*, 233 F.R.D. 216, 219–20 (D.D.C. 2006) (defendant who was under investigation had a legitimate fear of prosecution and could invoke his Fifth Amendment privilege during his deposition).
- *In re J.M.V., Inc.*, 90 B.R. 737, 741–42 (Bankr. E.D. Pa. 1988) (president of debtor corporation properly asserted Fifth Amendment at deposition taken by trustee).

Again, the deponent must generally appear and refuse to answer those specific questions posing a danger of incrimination and, if challenged, demonstrate to a court the reasonable basis for fearing incrimination from the answers.

- *United States v. Highgate*, 521 F.3d 590, 594 (6th Cir. 2008) (finding that the district court “erred by not inquiring into the legitimacy or scope of [a witness’s] claimed privilege,” where the witness made a blanket assertion of his privilege).
- *Nat’l Life Ins. Co. v. Hartford Accident & Indem. Co.*, 615 F.2d 595, 596 (3d Cir. 1980) (holding “that a witness in a civil proceeding may not invoke a blanket fifth amendment privilege prior to the propounding of questions.”).
- *Coushatta Tribe of La. v. Abramoff*, No. 07-1886, 2009 WL 2406303, at *3–5 (E.D. La. July 31, 2009) (finding witness had properly invoked his Fifth Amendment rights in a deposition concerning insurance coverage, even though he had been granted immunity by certain federal authorities and had pled guilty, when he was still subject to state prosecution and was awaiting sentencing).
- *United States v. Hansen*, 233 F.R.D. 665, 667–68 (S.D. Cal. 2005) (defendant cannot refuse to attend a deposition by invoking a blanket Fifth Amendment privilege).
- *Francis v. Wynn Las Vegas, LLC*, 262 P.3d 705, 709–10 (Nev. 2011) (upholding lower court’s grant of summary judgment against a defendant on all claims based on the defendant’s blanket and overbroad

assertion of the Fifth Amendment during his deposition, and warning that parties must first seek alternative means of protecting their client's rights against self-incrimination before using a broad-brush approach to assertions of the privilege).

Although *Griffin v. California*, 380 U.S. 609 (1965), determined it would be improper to call a criminal defendant to the stand or to comment on a defendant's refusal to testify, it is generally not improper in a civil case for a party to require the opposing party (or an adverse witness) to invoke the privilege against self-incrimination in front of the jury and to argue that an adverse inference should be drawn from that person's refusal to testify. Indeed, Federal Rule of Evidence 611(c) allows a party to call an adverse party/witness to the stand and to interrogate him or her through leading questions. The case law does not support a claim that the witness's intent to assert his Fifth Amendment right against self-incrimination justifies his not taking the stand and responding to examination.

- *FDIC v. Fid. & Deposit Co. of Md.*, 45 F.3d 969, 978 (5th Cir. 1995) ("[R]efus[ing] to adopt a rule that would categorically bar a party from calling, as a witness, a non-party who had no special relationship to the party, for the purpose of having that witness exercise his Fifth Amendment right.").
- *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1482 (8th Cir. 1987) (not improper for plaintiff to call defendant to stand for purposes of having him invoke his Fifth Amendment privilege).
- *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 522 (8th Cir. 1984) (In a civil case, "a party may call a witness to the stand even when that witness has made known an intention to invoke the Fifth Amendment.").
- *SEC v. MacElvain*, 417 F.2d 1134, 1137-38 (5th Cir. 1969) (witness's right against self-incrimination is not violated by forcing the witness to take the witness stand as an adverse witness in an enforcement action).

During Administrative Proceedings and Agency Investigations

The Supreme Court has applied the privilege against self-incrimination to administrative proceedings before both state and federal agencies. In *Murphy v. Waterfront Commissioner of New York Harbor*, 378 U.S. 52 (1964), for instance, a state administrative body propounded questions to a witness regarding certain labor activities. After the witness refused to answer on the basis of the Fifth Amendment privilege, the agency sought to hold the witness in contempt. The Supreme Court vacated the resulting contempt judgment, holding that the privilege against self-incrimination applied in the administrative proceeding. Other Supreme Court cases have upheld the assertion of the Fifth Amendment privilege in response to agency subpoenas or during administrative hearings.

- *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285–86 (1998) (applying Fifth Amendment to testimony before clemency board).
- *Garrity v. New Jersey*, 385 U.S. 493, 494–95 (1967) (applying Fifth Amendment to testimony before a state attorney general).
- *Petition for Groban*, 352 U.S. 330, 333 (1957) (deciding that the Fifth Amendment privilege is available in administrative investigations).
- *Smith v. United States*, 337 U.S. 137, 141–45 (1949) (applying Fifth Amendment to testimony before the federal Office of Price Administration).

The law regarding the assertion of the Fifth Amendment in administrative proceedings is similar to the law regarding assertions of the Fifth Amendment in civil litigation. For instance, a respondent may not assert a blanket privilege to avoid appearing at an administrative proceeding or to avoid responding to proper discovery in an administrative adjudicative hearing, at least not without suffering adverse consequences.

- *United States v. Drollinger*, 80 F.3d 389, 392 (9th Cir. 1996) (per curiam) (taxpayer confronted with a summons to appear for examination and to produce documents must present himself for questioning and elect to raise the Fifth Amendment on a question-by-question basis).

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- *United States v. Lazar*, No. 04-20017-DV, 2006 WL 3761803, at *9-11 (W.D. Tenn. Dec. 20, 2006) (denying Fifth Amendment challenge to federal health care fraud statute authorizing prosecutors to issue administrative subpoena seeking documents).
- *United States v. Garza*, No. 94A00011, 1994 WL 479265, at *10 (O.C.A.H.O. 1994) (in an administrative proceeding alleging respondent knowingly hired illegal aliens, judge required respondent to file statements supporting each Fifth Amendment-based objection to each request for admission and interrogatory, explaining how a response might have a tendency to incriminate her).
- *Joseph v. Neil Stephens Assocs., Inc.*, Comm. Fut. L. Rep. 22081, 1984 WL 932630 (Apr. 10, 1984) (Commission Order granting summary judgment on administrative complaint where respondents asserted Fifth Amendment privilege to all allegations).

During Legislative Proceedings

Numerous commentators have questioned whether the Fifth Amendment should apply in congressional hearings and investigations. For example, after Enron executives invoked the Fifth Amendment privilege in congressional hearings not to answer questions about the company's collapse, Yale constitutional law professor Akhil Reed Amar wrote that the privilege should not be available in congressional proceedings. Akhil Reed Amar, *Taking the Fifth Too Often*, N.Y. Times (Feb. 18, 2002), <http://www.nytimes.com/2002/02/18/opinion/taking-the-fifth-too-often.html>. Professor Amar argued that "[t]he Fifth Amendment prohibits a person from being compelled to be a witness against himself in any 'criminal case,' but a congressional hearing is hardly a criminal case." *Id.*

Professor Amar's position notwithstanding, it is well established that the Fifth Amendment applies to congressional proceedings. In the companion cases of *Quinn v. United States*, 349 U.S. 155, 162-64 (1955), *Emspak v. United States*, 349 U.S. 190, 202 (1955), and *Bart v. United States*, 349 U.S. 219, 221-22 (1955), each of which involved contempt prosecutions of labor leaders who refused to answer various questions posed by the House Un-American Activities Committee on the basis of the Fifth Amendment, the Supreme Court upheld

the right to assert the privilege in questioning before congressional committees. In *Quinn*, the Supreme Court addressed whether the Fifth Amendment applies to congressional proceedings, stating that "limitations on [Congress's] power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination." 349 U.S. at 161. The Court then held that because the congressional witness may have incriminated himself by answering the committee's questions about his alleged membership in the Communist Party, he "was entitled to claim the privilege." *Id.* at 162. A few years later, in *Watkins v. United States*, 354 U.S. 178, 188 (1957), the Supreme Court reiterated that the "Bill of Rights is applicable to [congressional] investigations as to all forms of governmental action," and that "[w]itnesses cannot be compelled to give evidence against themselves." The Court also pointed out that in *Quinn*, *Emspak*, and *Bart*, "the Government did not challenge [*sic*] in any way that the Fifth Amendment protection was available to the witness[es], and such a challenge could not have prevailed." *Id.* at 196.

Not only have the Supreme Court and lower courts allowed the Fifth Amendment privilege against self-incrimination to be asserted in congressional proceedings, but, since at least 1857, Congress has also passed immunity statutes protecting witnesses from the use of their incriminating testimony against them in criminal cases. The current immunity statute contains a provision for the granting of immunity for testimony before both Houses of Congress and their committees as follows.

- (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege

against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

- (1) in the case of a proceeding before or ancillary to either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;
- (2) in the case of a proceeding before or ancillary to a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and
- (3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

18 U.S.C. § 6005.

Both federal and state courts have long recognized the applicability of the Fifth Amendment privilege, or analogous state constitutional provisions, to state and local legislative inquiries, as well.

- *Raley v. Ohio*, 360 U.S. 423, 426–27 (1959) (recognizing the right to assert Fifth Amendment by witnesses appearing before Ohio Un-American Activities Commission).
- *Doyle v. Hofstader*, 177 N.E. 489, 496, 257 N.Y. 244, 263–64 (1931) (Cardozo, J.) (New York has recognized that the privilege against self-incrimination is applicable in legislative proceedings, despite its non-application in the British House of Commons).
- *In re Emery*, 107 Mass. 172, 185–86 (1871) (Massachusetts Declaration of Rights provision against compelled self-incrimination prevented prosecution of witness for refusing to give answers to legislative committee's questions regarding alleged bribery among state police).

We discuss the method of invoking the privilege against self-incrimination during legislative proceedings in Chapter 5 and the congressional remedies for seeking to hold the person invoking the privilege in contempt in Chapter 4.

During Responses to Government Regulatory Demands

In our highly regulated society, persons are required to file forms and to answer questions posed by government officials in numerous contexts. The remark of Justice Frankfurter in 1948, dissenting in *Shapiro v. United States*, 335 U.S. 1, 51 (1948), that “virtually every major public law enactment . . . has record-keeping provisions” is even more true today. Although the Fifth Amendment will rarely form a basis for refusing to file a form altogether or for refusing to answer all questions posed by the government for legitimate regulatory purposes, the assertion of the Fifth Amendment privilege against self-incrimination may be appropriate in response to government inquiries and demands in the same manner as in judicial proceedings, where the answer could be expected to constitute compelled self-incrimination.

For instance, while the requirement that citizens file annual tax returns does not itself violate the privilege against self-incrimination (even if all or part of the income was derived from criminal activity), *United States v. Sullivan*, 274 U.S. 259, 263–64 (1927), an objection based on the Fifth Amendment may be upheld to specific inquiries on a tax return.

- *Garner v. United States*, 424 U.S. 648, 660–61 (1976) (although the defendant could have asserted his Fifth Amendment privilege as to his occupation, having failed to do so, the tax return in which the defendant identified his occupation as a professional gambler was properly admitted into evidence).
- *Grosso v. United States*, 390 U.S. 62, 67 (1968) (reversing a conviction for willful failure to pay a wagering excise tax and willful failure to file with the IRS a form reporting wagering income because the “petitioner’s submission of an excise tax payment, and his replies to questions on the attendant [form], would directly and unavoidably have served to incriminate him.”).

There is a disagreement as to whether a taxpayer may refuse to disclose not only the source of his income, but also the amount, if the amount alone would be incriminatory.

Compare

- *United States v. Edwards*, 777 F.2d 644, 651 (11th Cir. 1985) (a taxpayer may decline to state the amount of his income in "the limited circumstances . . . when the amount alone might have incriminated him.").
- *United States v. Barnes*, 604 F.2d 121, 148 (2d Cir. 1979) ("[T]he right to make a [v]alid claim of privilege is available even as to amount of a taxpayer's income, as well as any other item on the return which could legitimately cause self-incrimination.").
- *United States v. Paepke*, 550 F.2d 385, 394 (7th Cir. 1977) (Tone, J., concurring) (stating that the defendant could "have declined to state even the amount of his income if that fact alone might have tended to incriminate him.") (citations omitted).

with

- *United States v. Shivers*, 788 F.2d 1046, 1049 (5th Cir. 1986) ("[T]he amount of a taxpayer's income is not privileged even though the source of income may be.") (quoting *United States v. Wade*, 585 F.2d 573, 574 (5th Cir. 1978)).
- *United States v. Pilcher*, 672 F.2d 875, 877 (11th Cir. 1982) ("Although the source of income might be privileged, the amount must be reported.") (citing *Wade*, 585 F.2d at 574).
- *United States v. Brown*, 600 F.2d 248, 252 (10th Cir. 1979) ("A careful reading of *Sullivan* and *Garner*, therefore, is that the self-incrimination privilege can be employed to protect the taxpayer from revealing the information as to an illegal source of income, but does not protect him from disclosing the amount of his income.") (citation omitted).

The Supreme Court does not apply a "liberal construction" to the Fifth Amendment to regulatory reporting enactments directed to the public at large. Instead, the Court has upheld many types of regulatory reporting statutes against Fifth Amendment challenges, despite the hazards the statutes pose for compelling self-incriminating disclosures.

In *California v. Byers*, 402 U.S. 424, 433–34 (1971), for instance, a divided Court sustained the constitutionality of a statute that required the driver of an automobile involved in an accident to stop and give his name and address. Four members of the Court determined that, because the purpose of the statute was to promote the satisfaction of civil liabilities resulting from automobile accidents and not criminal prosecutions, the possibility of incrimination was slight. The four dissenters, in two separate opinions, argued that while neither stopping nor providing identification were incriminating per se, compliance with the statute required drivers to disclose that they were the driver of an automobile involved in an accident, which disclosure could provide "a link in the chain of testimony" in a later prosecution. *Id.* at 459 (citation omitted). Justice Harlan, whose concurrence supplied the crucial fifth vote for upholding the statute, disagreed with the plurality's conclusion that the stop and identification requirement did not compel incrimination. However, he reasoned that because the government was pursuing legitimate regulatory interests rather than seeking to enforce a criminal law, it was permissible to apply a balancing test between the government's interest and the interest protected by the Fifth Amendment. Based on the balancing test, Justice Harlan reasoned that the mere possibility of incrimination was "insufficient to defeat the strong policies in favor of disclosure called for by the statutes like the one challenged here." *Id.* at 428.

Other Supreme Court decisions apply a similar reasoning.

- *Hibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 190–91 (2004) (Self-Incrimination Clause did not apply to Nevada's "stop and identify" statute, because there was not a sufficient showing of a reasonable fear of incrimination given the regulatory purposes

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involved for individuals to identify themselves when asked to do so by the police).

- *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 555–56 (1990) (mother who refused to produce child at demand of Department of Social Services, even though the production might incriminate her, “may not invoke the privilege . . . because production is required as part of a non-criminal regulatory regime.”).
- *Shapiro v. United States*, 335 U.S. 1, 32–33 (1948) (upholding statute that compelled potentially self-incriminating product pricing information be provided to the government because of the essentially non-criminal and regulatory purposes promoted).

On the other hand, where the government reporting requirement compelling a self-incriminating disclosure is “directed at a highly selective group inherently suspect of criminal activities,” the Supreme Court has struck such requirements as violative of the Fifth Amendment, on the theory that the purpose is simply to entrap individuals into making self-incriminatory admissions. *Byers*, 402 U.S. at 429.

- *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 78 (1965) (an order pursuant to a statute requiring registration by individual members of the Communist Party violated the Fifth Amendment, because any response to any of the form’s questions would involve the responding party in admitting to an element of a crime).
- *Marchetti v. United States*, 390 U.S. 39, 42 (1968) (striking down a gambling tax reporting statute as violative of the Fifth Amendment because the obligation to register and pay the occupational tax would necessarily compel a self-incriminating statement).
- *Haynes v. United States*, 390 U.S. 85, 101 (1968) (reversing a conviction for failing to register a firearm that was illegal to possess on the grounds that the Fifth Amendment protected such compelled self-incrimination).
- *Leary v. United States*, 395 U.S. 6, 29 (1969) (finding that plea of self-incrimination provided a complete defense to charge of non-compliance with transfer tax provisions of the Marihuana Tax Act).

See also

- *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 805 (1994) (affirming decision that Montana's efforts "to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution" barred by the Double Jeopardy Clause of the Fifth Amendment).

To determine which reporting requirements fall on the side of the line offending the Fifth Amendment right against self-incrimination and those that do not, the Supreme Court established a three-factor test in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965). This test requires courts to evaluate whether the reporting requirement (1) is aimed at "a highly selective group inherently suspect of criminal activit[y]"; (2) is "asserted in an essentially . . . regulatory area of inquiry"; and (3) "create[s] a substantial likelihood of prosecution." *See, e.g., United States v. Adair*, No. 88-1264, 1988 WL 114791, at *2 (6th Cir. Oct. 31, 1988) (citation omitted).

The lines drawn by the lower courts are illustrated by the following decisions:

- *United States v. Juvenile Male*, 670 F.3d 999, 1011 (9th Cir. 2012) (citing cases from other circuits, court rejects Fifth Amendment challenge to sex offender registration requirement on basis that having already pled guilty to the sex offense, the registration requirement did not incriminate).
- *United States v. Garcia-Cordero*, 610 F.3d 613, 615 (11th Cir. 2010) (ruling that an immigration law requiring all those transporting undocumented aliens into the United States to immediately report to immigration officials did not violate the privilege against self-incrimination).
- *Bionic Auto Parts & Sales Inc. v. Fahner*, 721 F.2d 1072, 1083 (7th Cir. 1983) (statute requiring auto parts dealers to keep records of serial numbers that were altered, defaced, or removed violated the Fifth Amendment rights of sole proprietors).

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- *In re Grand Jury Subpoena Duces Tecum*, 368 F. Supp. 2d 846, 856–57 (W.D. Tenn. 2005) (quashing grand jury subpoena requiring production of records pertaining to performers in sexually explicit films, on basis that statute requiring records to be kept of every model or performer, including his or her date of birth, was part of a criminal enforcement scheme directed at persons suspected of criminal activities involving child pornography).

The Supreme Court's jurisprudence upholding record-keeping statutes against Fifth Amendment challenges has led to the required records doctrine, a subject we discuss in Chapter 9.

CHAPTER 4

The Process for Determining the Validity of the Assertion

A claim that the Fifth Amendment protects the witness from responding to an inquiry is not generally sufficient—standing alone—to sustain the assertion. A court must make its own evaluation of the assertion. However, for a court to compel the witness to disclose the answer in support of a Fifth Amendment privilege claim, absent an order of immunity, would obviously defeat the privilege. Thus, to sustain the assertion or deny its validity, a court must determine whether the demand for testimony presents a sufficient danger of incrimination—without knowing what the answer will be.

The leading case providing guidance to courts for determining the validity of a Fifth Amendment assertion is *Hoffman v. United States*, 341 U.S. 479 (1951). In that case, the defendant was convicted of criminal contempt for refusing to obey a district court order requiring him to answer questions before a grand jury investigating frauds against the federal government. The Supreme Court reversed the defendant's conviction for contempt, holding that, under all of the circumstances, the defendant had a reasonable concern that answering the questions posed could incriminate him. In so ruling, the Court made clear that "[t]he witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself" and that it was for the district court to say if the witness had a valid basis to assert the Fifth Amendment. *Id.* at 486. However, the Court then went further and said:

To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Id. at 486–87.

The Court indicated that a judge must accept the witness's Fifth Amendment assertion unless it is "perfectly clear . . . that the witness is mistaken, and that the answer(s) cannot possibly have such tendency to incriminate." *Id.* at 488–89 (citations and internal quotation marks omitted). Thus, *Hoffman* demands substantial deference by the courts to the witness's assertion of the Fifth Amendment privilege.

In a grand jury proceeding, a witness's assertion of the Fifth Amendment privilege is challenged infrequently, for the criminal nature of the inquiry will often make the validity of the person's assertion self-evident. Similarly, in a criminal trial, the danger of incrimination will often be obvious, requiring the person invoking the privilege to make little, if any, independent demonstration of its validity. On the other hand, in settings where the potential incrimination is not self-evident, courts generally require the party asserting the privilege to bear the burden of going forward, and/or the burden of proof, to justify their Fifth Amendment assertion.

- *Estate of Fisher v. Comm'r*, 905 F.2d 645, 649–50 (2d Cir. 1990) (noting that while the burden of establishing the existence of the danger of self-incrimination lies with the witness, the witness is not required to prove the hazard of self-incrimination by a preponderance of the evidence, but need only show "a reasonable possibility that his own testimony will incriminate him").
- *In re Morganroth*, 718 F.2d 161, 169 (6th Cir. 1983) ("Where there is nothing suggestive of incrimination about the setting in which a seemingly innocent question is asked, the burden of establishing a foundation for the assertion of the privilege [but not the burden of proof] should lie with the witness making it.") (citations omitted).

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905 F.2d 645, 649–50 (2d Cir. 1990) n of establishing the existence of the ies with the witness, the witness is not of self-incrimination by a preponder- d only show "a reasonable possibility rminate him"). 161, 169 (6th Cir. 1983) ("Where of incrimination about the setting nt question is asked, the burden of r the assertion of the privilege [but uld lie with the witness making it.")

- *Baker v. Limber*, 647 F.2d 912, 917 (9th Cir. 1981) ("The trial court must make this determination from the facts as well as from his personal perception of the peculiarities of the case. If he decides that no threat of self-incrimination is evident, the defendant then bears the burden of showing the danger of incrimination.") (citations and internal quotation marks omitted).
- *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 262 F. Supp. 2d 302, 307, n.23 (S.D.N.Y. 2003) (if the incriminatory nature of the questions is not readily apparent from the setting, the witness bears the burden to show a credible basis for invoking the Fifth Amendment).
- *Jett v. State*, 498 S.E.2d 274, 276 (Ga. Ct. App. 1998) ("The burden is on the individual claiming the privilege to state the general reason for his refusal to answer and to specifically establish that a real danger of incrimination existed with respect to each question.") (citations and internal quotation marks omitted).
- *United States v. Dominguez*, No. 96C00027, 1997 WL 148816, at *2 (O.C.A.H.O. 1997) (in compelling witness to answer certain deposition questions in an administrative proceeding, the judge remarked, "[T]he party invoking the Fifth Amendment privilege against self-incrimination bears the burden of proof the privilege exists.") (citation omitted).

We consider here the processes used by the courts in various settings to determine the validity of a Fifth Amendment assertion.

Procedures for Determining the Validity of Fifth Amendment Assertions in Grand Jury Proceedings

When the prosecutor challenges a grand jury witness's assertion of the Fifth Amendment privilege, it is generally sufficient for counsel for the witness to explain to a judge how the dangers of self-incrimination are real rather than imaginary.

- *In re Grand Jury Subpoena to John Doe*, 41 F. Supp. 2d 616, 620 (W.D. Va. 1999) (holding that witness must do more than merely state that the answers would incriminate and applying a two-step inquiry "whether

the information is incriminating in nature” and, if so, “whether criminal prosecution is sufficiently a possibility” to determine the applicability of the Fifth Amendment privilege) (citation omitted).

To support the validity of the assertion, counsel must be allowed to present any facts that would tend to support the witness’s claim, regardless of whether the material satisfies the rules of evidence.

- *In re Atterbury*, 316 F.2d 106, 111 (6th Cir. 1963) (error not to allow defense to call government attorney as witness in order to demonstrate validity of Fifth Amendment assertion).
- *In re Portell*, 245 F.2d 183, 187 (7th Cir. 1957) (error not to receive newspaper clippings showing witness to be a companion of person under investigation in order to demonstrate valid privilege assertion).

See also

- Fed. R. Evid. 104(a): “[T]he court must decide any preliminary question about whether . . . a privilege exists In so deciding, the court is not bound by evidence rules”
- *Zicarelli v. N.J. State Comm’n of Investigation*, 406 U.S. 472, 478–79 (1972) (noting without criticism that “appellant introduced numerous newspaper and magazine articles bearing upon his self-incrimination claim.”).

Because of the secrecy attendant to all federal grand jury proceedings (and most state grand jury proceedings), the determination of the validity of the assertion of the Fifth Amendment must also be held in a non-public proceeding and, most often, *in camera*. Indeed, courts seem unwilling to allow a person asserting the Fifth Amendment privilege before the grand jury to refuse to submit to an *in camera* review for the purpose of deciding whether the invocation, if challenged, is valid.

- *United States v. Myers*, 593 F.3d 338, 348 & n.15 (4th Cir. 2010) (refusing to consider an appeal of a district court order directing

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38, 348 & n.15 (4th Cir. 2010)
a district court order directing

witness to produce missing items for *in camera* review, noting that
witness would not waive her Fifth Amendment privilege by turning
over items for *in camera* review by the court).

- *United States v. Drollinger*, 80 F.3d 389, 393 (9th Cir. 1996)
(remanding to permit district court to conduct an *in camera* hear-
ing regarding validity of taxpayer’s refusal to answer IRS questions
on the basis of the Fifth Amendment privilege).
- *In re Three Grand Jury Subpoenas*, 847 F.2d 1024, 1028–29 (2d
Cir. 1988) (requiring grand jury witness to produce a tape cassette
recording to the court for *in camera* inspection and upholding con-
tempt order where witness refused, reasoning that producing item
for *in camera* review was not incriminating).

If the court finds a grand jury witness’s invocation of the Fifth Amend-
ment privilege to be invalid and orders the witness to testify (or to
produce documents), at least one former justice of the Supreme Court
has suggested that the witness can comply and subsequently object at
trial to both the direct and the derivative use of any such testimony, on
the ground that he was compelled by the court order to reveal the self-
incriminating testimony.

- *Maness v. Meyers*, 419 U.S. 449, 474 (1975) (White, J., concurring)
(expressing his view that a witness is protected by a constitution-
ally imposed use immunity if, despite a Fifth Amendment objection,
he is required by a court order and threat of contempt to answer).

However, Justice White’s argument that subsequent suppression is an
adequate protection of a witness’s Fifth Amendment right was explic-
itly rejected by the majority of the Supreme Court in *Maness*. For the
majority, Chief Justice Burger stated:

In the present case the City Attorney argued that if petitioner’s cli-
ent produced the magazines he was amply protected because in any
ensuing criminal action he could always move to suppress. . . . Laying
to one side possible waiver problems that might arise if the witness

followed that course, we nevertheless cannot conclude that it would afford adequate protection. Without something more he would be compelled to surrender the very protection which the privilege is designed to guarantee.

Id. at 461–62 (citations and internal quotation marks omitted). Thus, to preserve the Fifth Amendment privilege claim, the grand jury witness must refuse to testify even after being ordered to do so, and appeal the ensuing order of contempt. As Chief Justice Burger recognized, only through pre-compliance appellate review is the witness able to test the validity of the privilege without “le[tt]ing] the cat out [of the bag.]” *Id.* at 463.

This was also the teaching of *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262 (1983). In that case, a former executive of a company under investigation for antitrust violations had been given full use and derivative use immunity in exchange for his grand jury testimony. Later, in a civil case pursuing the same antitrust violations, he was asked deposition questions that closely tracked his grand jury testimony. The executive invoked the Fifth Amendment and refused to answer. The U.S. Supreme Court held the trial court could not compel the executive to answer deposition questions over a valid assertion of the Fifth Amendment, “absent a duly authorized assurance of immunity at the time.” *Id.* at 257. The Court reasoned that a judge should not

at the time of the civil testimony, pre-determine the decision of the court in a subsequent criminal prosecution on the question whether the Government has met its burden of proving “that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.” Yet in holding [the witness] in contempt for his Fifth Amendment silence, the [trial court] essentially predicted that a court in any future criminal prosecution of [the witness] will be obligated to protect against evidentiary use of the deposition testimony petitioners seek. We do not think such a predictive judgment is enough.

Id. at 261 (citation omitted).

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Accordingly, an order holding a federal grand jury witness in con-
tempt for refusing to relinquish his Fifth Amendment refusal to testify
or to produce documents is immediately appealable pursuant to 28
U.S.C. § 1291.

- *In re Sequoia Auto Brokers Ltd.*, 827 F.2d 1281, 1283 (9th Cir. 1987)
(bankruptcy court’s contempt order against principal of debtor was
final and appealable because principal was non-party and because
contempt was based on the invocation of Fifth Amendment).
- *In re Special Fed. Grand Jury*, 819 F.2d 56, 57 (3d Cir. 1987)
(upholding appellate review of civil contempt issued against grand
jury witness who asserted Fifth Amendment right).
- *In re Witness Before Special Oct. 1981 Grand Jury*, 722 F.2d 349,
351–52 (7th Cir. 1983) (upholding jurisdiction to hear grand jury
witness’s appeal from order holding witness in civil contempt for
refusing to obey subpoenas for the production of documents on
Fifth Amendment grounds).

Of course, if the witness does not resist the court order and complies,
instead of continuing to assert his Fifth Amendment privilege and being
held in contempt, he may generally not appeal. *Cobbledick v. United
States*, 309 U.S. 323, 328 (1940). As the Supreme Court has explained:

the necessity for expedition in the administration of the criminal law
justifies putting one who seeks to resist the production of desired
information to a choice between compliance with a trial court’s order
to produce prior to any review of that order, and resistance to that
order with the concomitant possibility of an adjudication of contempt
if his claims are rejected on appeal.

United States v. Ryan, 402 U.S. 530, 533 (1971) (citations omitted).
See, e.g., *In re Grand Jury Subpoena*, 709 F.3d 1027, 1029 (10th Cir.
2013) (deciding that the Circuit Court lacks jurisdiction to consider
interlocutory appeal of Fifth Amendment privilege claim to documents
subpoenaed by grand jury when, after motion to quash was denied, the

witness complied with the court's order to produce rather than being held in contempt). The sole exception is when the person claiming privilege—including the Fifth Amendment privilege—is not the subpoenaed witness. See *Perlman v. United States*, 247 U.S. 7 (1918) (allowing an interlocutory appeal when an intervenor claims an interest in preventing a third party's disclosure of documents or testimony and the party subject to the subpoena is unwilling to risk contempt). The *Perlman* doctrine is, however, beyond the scope of this book.

*Procedures for Determining the Validity
of Fifth Amendment Assertions by Witnesses
(or Defendants) in a Criminal Trial*

Witnesses can often demonstrate that a truthful answer to any question they could possibly be asked during a criminal trial would be incriminating. Thus, trial witnesses, particularly if represented by counsel, will often make a motion not to be required to take the stand in order to invoke their Fifth Amendment privilege. The court may accept an out-of-court demonstration as to the validity of the witness's Fifth Amendment assertion.

- *United States v. Bates*, 552 F.3d 472, 475–76 (6th Cir. 2009) (court's acceptance of witness's blanket refusal to testify not in error when witness had reasonable cause to invoke Fifth Amendment).
- *Davis v. Straub*, 430 F.3d 281, 288–90 (6th Cir. 2005) (state court decision allowing a defense witness to invoke Fifth Amendment privilege and thereby avoid taking the witness stand did not involve an unreasonable application of law necessary to support habeas relief).
- *United States v. Mahasin*, 362 F.3d 1071, 1085–86 (8th Cir. 2004) (court did not abuse its discretion by not conducting further inquiry into the basis for a defense witness's assertion of the Fifth Amendment privilege against self-incrimination, when the government informed the court that the witness could be charged with a crime and the court was familiar with the witness's statement to the police and the evidence at trial).

order to produce rather than being on is when the person claiming privilege—is not the subpoenaed witness, 247 U.S. 7 (1918) (allowing an attorney claims an interest in preventing testimony and the party going to risk contempt). The *Perlman* type of this book.

Determining the Validity of Assertions by Witnesses in a Criminal Trial

to a truthful answer to any question in a criminal trial would be incriminating if represented by counsel, required to take the stand in order to assert privilege. The court may accept an assertion of the witness's Fifth

72, 475–76 (6th Cir. 2009) (court's refusal to testify not in error when invoke Fifth Amendment).

38–90 (6th Cir. 2005) (state court's refusal to invoke Fifth Amendment in asking the witness stand did not constitute error of law necessary to sup-

and 1071, 1085–86 (8th Cir. 2004) (court's refusal to conduct further inquiry into the witness's assertion of the Fifth Amendment privilege, when the government could be charged with a crime based on the witness's statement to the police

- *United States v. Tsui*, 646 F.2d 365, 367–68 (9th Cir. 1981) (district court did not abuse discretion by upholding a witness's blanket assertion of the Fifth Amendment, where the court could determine without question-by-question inquiry that witness's assertions were valid).

When determining whether a witness's assertion of the privilege against self-incrimination is valid, the proper procedure is to conduct a proceeding outside the presence of the jury.

- *United States v. Mathews*, 997 F.2d 848, 849 (11th Cir. 1993) (witness questioned outside the presence of the jury to determine whether his assertion of his Fifth Amendment privilege was valid).
- *United States v. Schaflander*, 719 F.2d 1024, 1026 (9th Cir. 1983) (“If such questioning [regarding Fifth Amendment rights] is to be done to satisfy the court of the defendant's understanding of his rights, it should be done outside the presence of the jury.”).
- *State v. Lashley*, 664 P.2d 1358, 1365, 233 Kan. 620, 626–27 (1983) (“[C]laims of privilege should be determined outside the presence of the jury, since undue weight may be given by a jury to a claim of privilege. If the court determines that the prior statement is admissible, then the jury should be told simply *that the witness is not available* before the prior testimony is read into the record.”).
- *Commonwealth v. Fisher*, 742 N.E.2d 61, 70, 433 Mass. 340, 350 (2001) (“[W]here there is some advance warning that a witness might refuse to testify, the trial judge should conduct a voir dire of the witness, outside the presence of the jury . . .”).
- *People v. Poma*, 294 N.W.2d 221, 222–23, 96 Mich. App. 726, 732 (1980) (court should conduct hearing outside presence of jury for determining whether witness “intimately related to the criminal episode at issue” will choose to assert self-incrimination privilege and, if so, court must not allow witness to be called to the witness stand).
- *See also Jackson v. Denno*, 378 U.S. 368, 400 (1964) (hearing on admissibility of confession must be heard outside presence of the jury).

- Fed. R. Evid. 104(c): "The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: . . . (3) justice so requires."

If the court rules that a trial witness may not assert the Fifth Amendment privilege, the witness must generally be held in contempt in order to obtain pre-compliance appellate review. As is the case for grand jury witnesses, an order holding a federal trial witness in contempt is immediately appealable under 28 U.S.C. § 1291.

- *In re Askin*, 47 F.3d 100, 102 (4th Cir. 1995) (considering an appeal of a civil contempt order issued against a witness in criminal trial who refused to testify based on Fifth Amendment privilege).
- *United States v. Johnson*, 736 F.2d 358, 359 n.1 (6th Cir. 1984) (order holding trial witness in civil contempt for refusing to testify on basis of Fifth Amendment privilege is immediately appealable under 28 U.S.C. § 1291 because the contempt was a final judgment as to the non-party witness).

By contrast, a criminal defendant may appeal only from his conviction or from an order holding him in criminal contempt.

- *United States v. Myers*, 593 F.3d 338, 344 n.9 (4th Cir. 2010) (refusing jurisdiction to hear an appeal from a district court order directing a criminal defendant to produce documents she asserted were protected from production by the Fifth Amendment privilege and noting that only criminal contempt orders are immediately appealable as against the defendant).

When a criminal defendant must take the stand and testify to properly present and preserve a Fifth Amendment-based objection to the admission of evidence is unclear. In *New Jersey v. Portash*, 440 U.S. 450, 464–65 (1979), the Supreme Court considered a case in which the defendant requested a ruling from the trial judge in advance of his taking the stand regarding whether his prior immunized grand

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jury testimony could be used to impeach him should he testify. The
trial judge ruled it could, a decision that the Supreme Court later
held was wrong. More importantly for purposes of this discussion,
the Supreme Court disagreed with the state's contention that Portash
did not properly preserve his Fifth Amendment objection by not tak-
ing the stand and testifying. Rather, the Court found nothing wrong
with the New Jersey court's "not requiring Portash to take the wit-
ness stand in order to raise his constitutional claim." *Id.* at 456. *See*
also Brooks v. Tennessee, 406 U.S. 605 (1972) (holding a statute
requiring a defendant to be his own first witness if he takes the stand
to have unconstitutionally penalized his right to remain silent and
approving the state court having adjudicated the claim, despite the
defendant having never testified).

However, in *Luce v. United States*, 469 U.S. 38, 43 (1984), the
Supreme Court held that a defendant must testify in order to preserve
for appeal a challenge to a ruling in limine involving impeachment with
prior convictions. The Court distinguished *Portash* and *Brooks* because
"[i]n those cases we reviewed Fifth Amendment challenges to state-court
rulings that operated to dissuade defendants from testifying. We did not
hold that a federal court's preliminary ruling on a question not reaching
constitutional dimensions—such as a decision under Rule 609(a)—is
reviewable on appeal." *Id.* at 42–43. Nevertheless, the decision in *Luce*
has led to disagreement as to when a defendant must take the stand to
preserve certain Fifth Amendment-based objections to trial evidence.

Compare

- *United States v. Wilson*, 307 F.3d 596, 598–601 (7th Cir. 2002) (the
defendant did not preserve his Fifth Amendment challenge to the
trial court's ruling that if he had introduced evidence regarding his
alleged associate, the prosecution could have introduced evidence
regarding his refusal to identify the associate to police, because the
defendant did not introduce the evidence regarding the associate
at trial).
- *United States v. Bond*, 87 F.3d 695, 700–01 (5th Cir. 1996) (holding
based on *Luce* that the defendant had to take the stand and testify

in order to appeal the trial court's in limine ruling that he would have waived his Fifth Amendment privilege by testifying).

- *People v. Boyd*, 682 N.W.2d 459, 460, 463–66, 470 Mich. 363, 365, 371–78 (2004) (extending *Luce* to require that a defendant testify to preserve for appellate review his challenge to a trial court's ruling in limine allowing evidence that he exercised his *Miranda* right to remain silent).

with

- *United States v. Chischilly*, 30 F.3d 1144, 1151 (9th Cir. 1994) (holding that the defendant could appeal the trial court's ruling that his confession was voluntary and could have been introduced by the prosecution to rebut his insanity defense even though the defendant did not present his insanity defense, and the prosecution did introduce his confession, at trial; the court found that *Luce* did "not apply" because "use of an involuntary confession would violate the Constitution," and "*Luce* . . . recognized that its rule dealt with a preliminary ruling 'not reaching constitutional dimensions'") (citations omitted).
- *United States ex rel. Adkins v. Greer*, 791 F.2d 590, 593–94 (7th Cir. 1986) (the defendant did not have to testify in order to preserve for appeal his Fifth Amendment challenge to the trial court's ruling that the prosecution could have introduced a statement that he made to a police officer if he had taken the stand and testified; the court distinguished *Luce* because the in limine ruling in *Luce* did not involve constitutional considerations).
- *State v. Brings Plenty*, 459 N.W.2d 390, 394 (S.D. 1990) ("*Luce* does not stand for the proposition that Fifth Amendment confession issues are waived if a defendant does not take the stand. The Court specifically distinguished its ruling from Fifth Amendment cases because it was dealing with impeachment with a felony conviction under Rule 609 of the Federal Rules of Evidence.") (citation omitted).

's in limine ruling that he would not assert the Fifth Amendment privilege by testifying).

60, 463–66, 470 Mich. 363, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

3d 1144, 1151 (9th Cir. 1994) (reversing district court ruling enforcing IRS summons and requiring district court to conduct *in camera* hearing to determine validity of Fifth Amendment assertion by taxpayer).

7th Cir. 1990) (error to deny taxpayer's request for an *in camera* review of his claimed Fifth Amendment privilege to IRS discovery requests).

7th Cir. 1990) (error to deny taxpayer's request for an *in camera* review of his claimed Fifth Amendment privilege to IRS discovery requests).

Procedures for Determining the Validity of Fifth Amendment Assertions in Non-Criminal Proceedings

Outside of grand jury and criminal proceedings, the demonstration required to sustain an invocation of the Fifth Amendment privilege also often involves an *in camera* or ex parte proceeding, as the party making the assertion will need to provide incriminating information to show that he has a valid Fifth Amendment claim.

- *United States v. Argomaniz*, 925 F.2d 1349, 1356 (11th Cir. 1991) (reversing district court ruling enforcing IRS summons and requiring district court to conduct *in camera* hearing to determine validity of Fifth Amendment assertion by taxpayer).
- *Estate of Fisher v. Comm'r*, 905 F.2d 645, 651 (2d Cir. 1990) (error to deny taxpayer's request for an *in camera* review of his claimed Fifth Amendment privilege to IRS discovery requests).
- *United States v. Duncan*, 704 F. Supp. 820, 822 (N.D. Ill. 1989) (requiring witness invoking his Fifth Amendment privilege to submit a memorandum *in camera* explaining why each response would be incriminatory).
- *In re Connelly*, 59 B.R. 421, 445 (Bankr. N.D. Ill. 1986) (debtor required to explain under oath *in camera* or by affidavit, either of which would become a sealed record, the underlying factual basis for his fear of incrimination).

But cf.

- *IRS v. Lanoie*, 403 F. App'x 328, 333–34 (10th Cir. 2010) (observing that an *in camera* inspection is not absolutely required and finding that the taxpayer did not establish a valid Fifth Amendment claim in a transcribed appearance before an IRS agent).

Although a party in a civil case is not normally allowed to appeal a discovery order until the case is concluded, a non-party witness may obtain immediate appellate review after being held in civil contempt.

- *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (stating generally that an “order finding a non-party witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action.”) (citations omitted).
- *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) (“The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt.”) (citations omitted).
- *Gen. Ins. Co. of Am. v. E. Consol. Utilities, Inc.*, 126 F.3d 215, 218 (3d Cir. 1997) (stating that an “order for contempt . . . against a nonparty . . . is immediately appealable.”) (citations omitted).
- *Peterson v. Douglas Cnty. Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir. 1992) (stating that an “order finding a nonparty witness in contempt of court is appealable even if final judgment has not been entered in the underlying action.”) (citation omitted).
- *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 877, 879 (D.C. Cir. 1981) (exercising jurisdiction over a nonparty deponent’s appeal of a civil contempt order that arose out of his refusal to answer deposition questions based on his Fifth Amendment privilege against self-incrimination).

Procedures for Determining the Validity of Fifth Amendment Assertions in Legislative Proceedings

A legislative body does not have a convenient procedure for determining the validity of a witness’s Fifth Amendment assertion. Any inquiry by a legislative committee into the basis for a witness’s fear of incrimination could force the witness to discuss the nature of the conduct in question and thereby waive his privilege. Thus, as the Supreme Court has implicitly recognized, “[i]f an objection to a question is made in any language that a [congressional] committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected . . . by the committee . . .” *Quinn v. United States*, 349 U.S. 155, 162–63 (1955).

The only way the U.S. Congress can challenge the validity of a witness’s Fifth Amendment assertion is to hold the witness in contempt and

ortion Rights Mobilization, Inc., 487
erally that an “order finding a non-
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rlying action.”) (citations omitted).
05, 107 (1936) (“The rule is settled
nection with an appeal from a final
a suit may not review upon appeal
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ol. Utilities, Inc., 126 F.3d 215, 218
“order for contempt . . . against a
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Trust Co., 967 F.2d 1186, 1188
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*ig the Validity of Fifth
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venient procedure for determining
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tes, 349 U.S. 155, 162–63 (1955).
challenge the validity of a wit-
old the witness in contempt and

litigate the issue in federal court. Congress has three options for hold-
ing a witness in contempt.

Congress’s first option is to hold the witness in criminal contempt
under 2 U.S.C. § 192, which provides that any witness subpoenaed by
Congress who “refuses to answer any question pertinent to the question
under inquiry shall be deemed guilty of a misdemeanor.” At the outset,
the committee conducting the investigation must “clearly apprise” the
witness that it “demands his answer notwithstanding” the Fifth Amend-
ment assertion; otherwise, “there can be no conviction under § 192
for refusal to answer that question.” *Quinn*, 349 U.S. at 166. To hold
the witness in criminal contempt, the chamber of Congress that issued
the subpoena must vote to enforce it and then refer the matter to the
Department of Justice for prosecution. *See* 2 U.S.C. § 194. While the
Department of Justice has a “duty” to bring the matter before a grand
jury, *id.*, “the Executive Branch has exclusive authority and absolute
discretion to decide whether to prosecute a case.” *United States v. Nixon*,
418 U.S. 683, 693 (1974). There have been several instances outside of
the Fifth Amendment context in which the Department of Justice has
not pursued charges against a witness whom Congress voted to hold in
criminal contempt (including the Department of Justice’s 2006 decision
not to seek an indictment against White House Counsel Harriet Miers
and White House Chief of Staff Joshua Bolten, and its 2012 decision
not to seek an indictment against Attorney General Eric Holder).

If a congressional witness is charged with criminal contempt, then the
validity of his Fifth Amendment assertion will be litigated in his criminal
trial. However, even if a court finds that the witness’s Fifth Amendment
assertion was not valid, it cannot order the witness to give up his privi-
lege and testify before Congress, because the consequences for criminal
contempt under 2 U.S.C. § 192 are a fine and/or imprisonment.

Congress’s second option is to hold the witness in civil contempt. This
process involves the House, Senate, or one of their committees filing a
civil lawsuit against the witness to compel a response. The Senate can file
such a lawsuit under 28 U.S.C. § 1365(a), which provides the U.S. Dis-
trict Court for the District of Columbia with subject matter jurisdiction
“over any civil action brought by the Senate or any authorized committee

or subcommittee of the Senate to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpoena . . .” Although no corresponding statute confers subject matter jurisdiction over a civil lawsuit filed by the House of Representatives or one of its committees to enforce a subpoena, the U.S. District Court for the District of Columbia has held that it has federal question jurisdiction under 28 U.S.C. § 1331 to decide such a lawsuit.

- Mem. & Op. at 28, *Comm. on Oversight and Gov’t Reform v. Holder*, ____ F. Supp. 2d ____, No. 1:12-cv-01332, 2013 WL 5428834, at *14 (D.D.C. Sept. 30, 2013) (holding that a civil lawsuit filed by the House Committee on Oversight and Government Reform to enforce a subpoena that it had issued to Attorney General Eric Holder “presents a federal question and that therefore, the court has jurisdiction under 28 U.S.C. § 1331.”).
- *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 64 (D.D.C. 2008) (“Both sides concede, and the Court agrees, that 28 U.S.C. § 1331 provides subject matter jurisdiction over this lawsuit. Because this dispute concerns an allegation that Ms. Miers and Mr. Bolten failed to comply with duly issued congressional subpoenas, and such subpoena power derives implicitly from Article I of the Constitution, this case arises under the Constitution for purposes of § 1331.”).

The remedy available to Congress in a civil contempt lawsuit is an order directing the witness to comply with the subpoena. *See* 28 U.S.C. § 1365(b) (“Upon application by the Senate or any authorized committee or subcommittee of the Senate, the district court shall issue an order to an entity or person refusing, or failing to comply with, or threatening to refuse or not to comply with, a subpoena . . . requiring such entity or person to comply forthwith.”); *Miers*, 558 F. Supp. 2d at 55 (“The Committee on the Judiciary . . . asks the Court to declare that former White House Counsel Harriet Miers must comply with a subpoena and appear before the Committee to testify. . .”). Accordingly, if a court considering such a lawsuit finds that a witness’s Fifth Amendment assertion

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Oversight and Gov't Reform v. No. 1:12-cv-01332, 2013 WL , 2013) (holding that a civil law-
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was not valid, then the witness must give up his privilege and testify before Congress or risk being held in contempt of court. See 28 U.S.C. § 1365(b) ("Any refusal or failure to obey a lawful order of the district court issued pursuant to this section may be held by such court to be a contempt thereof.").

Congress's third and final option is to use its inherent contempt power. Under this procedure, the witness asserting the Fifth Amendment privilege is tried before the chamber of Congress that issued the subpoena and, if the assertion is deemed invalid and the individual is convicted for refusing to testify, he can be detained at the Capitol (or possibly the District of Columbia jail) until he agrees to testify. See *Watkins v. United States*, 354 U.S. 178, 207 n.45 (1957) (noting the "historical procedure of summoning the recalcitrant witness before the bar of either House of Congress and ordering him held in custody until he agreed to testify."); *United States v. Fort*, 443 F.2d 670, 676 (D.C. Cir. 1971) (explaining that, when Congress relies on its "inherent powers of civil contempt," the witness is "committed to the Sergeant-at-Arms of the respective House until he was willing to 'purge' himself of his contempt by supplying the requested information.") (citations omitted). Because this inherent contempt power has not been used since 1935, it is unlikely that Congress would use the power today to challenge a witness's Fifth Amendment assertion. In the unlikely event that Congress uses its inherent contempt power, the witness could seek prompt judicial review by filing a petition for a writ of habeas corpus and put the validity of his Fifth Amendment assertion before a federal court. See *Fort*, 443 F.2d at 676 (confinement under Congress's inherent contempt power can "always be challenged by *habeas corpus*.") (citations omitted).

If Congress pursues any of these options and a federal court is faced with deciding the validity of the witness's Fifth Amendment assertion, the test set forth in *Hoffman* will presumably apply.

- *Emspak v. United States*, 349 U.S. 190, 198–99 (1955) (“‘To sustain the privilege,’ this Court has recently held, ‘it need only be evident from the implications of the question, in the setting

in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' [quoting *Hoffman*, 341 U.S. at 486-87.] . . . Applying this test to the instant case, we have no doubt that the eight questions concerning petitioner's alleged membership in the Communist Party fell within the scope of the privilege.").

- *Aiuppa v. United States*, 201 F.2d 287, 297 (6th Cir. 1952) (upholding a witness's Fifth Amendment assertion before a Senate committee investigating organized crime because it was "perfectly clear from a careful consideration of all the circumstances that the witness was not mistaken in thinking that answers to the questions asked him could possibly have a tendency to incriminate him.") (citation omitted).
- *Jackins v. United States*, 231 F.2d 405, 409-10 (9th Cir. 1956) (in upholding a witness's Fifth Amendment assertion before the House Committee on Un-American Activities, the court stated that "[w]hen a witness called before a committee or other hearing body, is told by his interrogators that he is suspected of wrongdoing, or of association with wrongdoers, those accusations are a part of the setting in which must be judged his right to claim the privilege against self-incrimination.").

If a witness is asserting the Fifth Amendment privilege at a congressional hearing, it may not be necessary for the witness to appear at the hearing to make the assertion. It is customary for counsel for the witness to inform the committee by letter that the witness will assert the Fifth Amendment and request that the witness be excused from appearing. While the committee often will insist that the witness appear at the hearing to assert the privilege, that course of action is discouraged. In D.C. Legal Ethics Opinion 31 (1977), the Legal Ethics Committee opined that it is unprofessional conduct for congressional committee lawyers to compel a witness to appear at a public hearing to assert the Fifth Amendment when the witness has notified the committee that he or she will invoke the privilege. In D.C. Legal Ethics

that a responsive answer to the question or why it cannot be answered might be dangerous disclosure could result.' [quoting *Hoffman*, ... Applying this test to the instant case, at the eight questions concerning petition-ship in the Communist Party fell within the ...").

; 201 F.2d 287, 297 (6th Cir. 1952) (uphold-ment assertion before a Senate committee crime because it was "perfectly clear from all the circumstances that the witness linking that answers to the questions asked a tendency to incriminate him.") (citation

231 F.2d 405, 409-10 (9th Cir. 1956) (in th Amendment assertion before the House an Activities, the court stated that "[w]hen committee or other hearing body, is told he is suspected of wrongdoing, or of asso-those accusations are a part of the setting his right to claim the privilege against

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Opinion 358 (2011), the Committee clarified that its 1977 opinion applies only where compelling the witness to appear at a public hearing to assert the privilege "serves no substantial purpose 'other than to embarrass, delay, or burden' the witness." (citations omitted).



6. *United States Attorneys' Manual*, Chapter 9-23.000, Witness Immunity.

9-23.000

WITNESS IMMUNITY

- [9-23.100](#) Witness Immunity—Generally
 - [9-23.110](#) Statutory Authority to Compel Testimony
 - [9-23.130](#) Approval by Assistant Attorney General to Compel Testimony
 - [9-23.140](#) Authority to Initiate Immunity Requests
 - [9-23.210](#) Decision to Request Immunity—The Public Interest
 - [9-23.211](#) Decision to Request Immunity—Close-Family Exception
 - [9-23.212](#) Decision to Request Immunity—Conviction Prior to Compulsion
 - [9-23.214](#) Granting Immunity to Compel Testimony on Behalf of a Defendant
 - [9-23.250](#) Immunity for the Act of Producing Records
 - [9-23.400](#) Authorization to Prosecute after Compulsion
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9-23.100 Witness Immunity—Generally

This chapter contains the Department's policy and procedures for seeking "use immunity" under Title 18 U.S.C. §§ 6001-6005. Sections 6001 to 6005 provide a mechanism by which the government may apply to the court for an order granting a witness limited immunity in all judicial, administrative, and congressional proceedings when the witness asserts his or her privilege against self-incrimination under the Fifth Amendment. (Section 6003 covers court and grand jury proceedings, Section 6004 covers administrative hearings, and Section 6005 covers congressional proceedings.)

See the [Criminal Resource Manual at 716](#) through [719](#), for an overview of the differences between the various types of immunity, including use immunity, derivative use immunity, transactional immunity and informal immunity.

NOTE: Although Title 21 of the United States Code contains similar immunity provisions to those contained in Title 18, the Department of Justice utilizes only those provisions contained in Title 18.

9-23.110 Statutory Authority to Compel Testimony

Section 6003 of Title 18, United States Code, empowers a United States Attorney, after obtaining the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General in the Department of Justice (DOJ), to seek a court order to compel testimony of a witness appearing in court proceedings or before the

(28 C.F.R. § 0.175), to seek a court order to compel testimony of a witness appearing in court proceedings or before the grand jury. Additional information regarding the approval process is set forth in [USAM 9-23.130](#), below, and the [Criminal Resource Manual at 720](#).

9-23.130 Approval by Assistant Attorney General to Compel Testimony

The Attorney General has designated the Assistant Attorneys General and Deputy Assistant Attorneys General of the Criminal, Antitrust, Civil, Civil Rights, Environmental and Natural Resources, and Tax Divisions to review (and approve or deny) requests for immunity (*viz.*, authorization to seek compulsion orders) in matters assigned to their respective divisions (28 C.F.R. Sec. 0.175), although this approval is still subject to Criminal Division clearance. This authority extends to requests for immunity from administrative agencies under 18 U.S.C. § 6004. This delegation also applies to the power of the Attorney General under 18 U.S.C. § 6005 to apply to the district court to defer the issuance of an order compelling the testimony of a witness in a congressional proceeding.

NOTE: All requests for immunity, including those whose subject matter is assigned to a Division other than the Criminal Division, must be submitted to the Criminal Division, and no approval may be granted unless the Criminal Division indicates that it has no objection to the proposed grant of immunity (28 C.F.R. Sec. 0.175).

Requests for authorization to seek to compel testimony should be processed as described in the [Criminal Resource Manual at 720](#), using the form contained in the [Criminal Resource Manual at 721](#).

Obtaining the Court Order	Criminal Resource Manual at 723
Expiration of Authority to Compel	Criminal Resource Manual at 724
Use of Immunized Testimony by Sentencing Court	Criminal Resource Manual at 725
Steps to Avoid Taint	Criminal Resource Manual at 726
Civil Contempt	Criminal Resource Manual at 727
Criminal Contempt	Criminal Resource Manual at 728

[cited in [USAM 9-23.110](#); [Criminal Resource Manual 721](#)]

9-23.140 Authority to Initiate Immunity Requests

Assistant United States Attorneys, with the approval of the United States Attorney or, in his or her absence, a supervisory Assistant United States Attorney, and Department attorneys, with the approval of an appropriate Assistant Attorney General or Deputy Assistant Attorney General of DOJ, may initiate requests to compel testimony under the use immunity statute.

9-23.210 Decision to Request Immunity—The Public Interest

Section 6003(b) of Title 18, United States Code, authorizes a United States Attorney to request immunity when, in his/her judgment, the testimony or other information that is expected to be obtained from the witness "may be necessary to the public interest." Some of the factors that should be weighed in making this judgment include:

- A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;

- A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;
- B. The value of the person's testimony or information to the investigation or prosecution;
- C. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;
- D. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history;
- E. The possibility of successfully prosecuting the person prior to compelling his or her testimony;
- F. The likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order.

These factors are not intended to be all-inclusive or to require a particular decision in a particular case. They are, however, representative of the kinds of factors that should be considered when deciding whether to seek immunity.

9-23.211 Decision to Request Immunity—Close-Family Exception

When determining whether to request immunity for a witness, consideration should be given to whether the witness is a close family relative of the person against whom the testimony is sought. A close family relative is a spouse, parent, child, grandparent, grandchild or sibling of the witness. Absent specific justification, the Department will ordinarily avoid seeking to compel the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing. Such specific justification exists, among other circumstances, where (i) the witness and the relative participated in a common business enterprise and the testimony to be elicited relates to that enterprise or its activities; (ii) the testimony to be elicited relates to illegal conduct in which there is reason to believe that both the witness and the relative were active participants; or (iii) testimony to be elicited relates to a crime involving overriding prosecutorial concerns.

9-23.212 Decision to Request Immunity—Conviction Prior to Compulsion

It is preferable as a matter of policy to punish offenders for their criminal conduct prior to compelling them to testify. While this is not feasible in all cases, a successful prosecution of the witness, or obtaining a plea of guilty to at least some of the charges against the witness, will avoid or mitigate arguments of co-defendants made to the court or jury that the witness "cut a deal" with the government to avoid the witness's own conviction and punishment.

9-23.214 Granting Immunity to Compel Testimony on Behalf of a Defendant

As a matter of policy, 18 U.S.C. § 6002 will not be used to compel the production of testimony or other information on behalf of a defendant except in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony or other information. This policy is not intended to preclude compelling a defense witness to testify if the prosecutor believes that to do so is necessary to a successful prosecution.

9-23.250 Immunity for the Act of Producing Records

The Supreme Court has interpreted the Fifth Amendment privilege against self-incrimination to include the act of producing business records of a sole proprietorship. *United States v. Doe*, 465 U.S. 605 (1984). The act of producing records concedes the existence and possession of the records called for by the subpoena as well as the respondent's belief that such records are those described in the subpoena. Requests for immunity for the limited purpose of obtaining records pursuant to *Doe* should clearly state this fact in the application.

The same letter of authority is issued by DOJ for the production of records as for testimony. See the [Criminal Resource Manual at 722](#) (Letter of Authority). Therefore, prosecutors should draft the court order to clearly limit the grant of immunity to the act of producing records pursuant to *Doe, supra*.

9-23.400 Authorization to Prosecute after Compulsion

After a person has testified or provided information pursuant to a compulsion order—except in the case of act-of-production immunity—an attorney for the government shall not initiate or recommend prosecution of the person for an offense or offenses first disclosed in, or closely related to, such testimony or information without the express written authorization of the Attorney General. Such requests for authorization should be sent to the Assistant Attorney General for the division that issued the letter of authority for requesting the original compulsion order.

The request to prosecute should indicate the circumstances justifying prosecution and the method by which the government will be able to establish that the evidence it will use against the witness will meet the government's burden under *Kastigar v. United States*, 406 U.S. 441 (1972).



7. *United States Attorneys' Manual, Criminal Resource Manual, Witness Immunity, §§ 716-728.*

716 Use Immunity, Transactional Immunity, Informal Immunity, Derivative Use

Congress enacted the use immunity provisions in 1970, replacing a myriad of specialized immunity statutes enacted over the years for specialized purposes, such as the Atomic Energy Act, the Cotton Research and Promotion Act, the Connally Hot Oil Act, and the Merchant Marine Act. The new statutory scheme (located at 18 U.S.C. § 6001-6005) provides a mechanism by which the government may apply to the court for an order granting a witness limited immunity in all judicial, administrative, and congressional proceedings. Section 6003 covers court and grand jury proceedings, § 6004 covers administrative hearings, and § 6005 covers congressional proceedings.

See Chapter 8 of the Federal Grand Jury Practice Manual for a more in depth discussion of immunity.

[cited in [USAM 9-23.100](#)]

717 Transactional Immunity Distinguished

Title 18 U.S.C. § 6002 provides use immunity instead of transactional immunity. The difference between transactional and use immunity is that transactional immunity protects the witness from prosecution for the offense or offenses involved, whereas use immunity only protects the witness against the government's use of his or her immunized testimony in a prosecution of the witness -- except in a subsequent prosecution for perjury or giving a false statement.

718 Derivative Use Immunity

The use immunity statute (18 U.S.C. § 6002) allows the government to prosecute the witness using evidence obtained independently of the witness's immunized testimony. Section 6002 provides:

[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

The Supreme Court upheld the statute in *Kastigar v. United States*, 406 U.S. 441 (1972). In so doing, the Court underscored the prohibition against the government's derivative use of immunized testimony in a prosecution of the witness. The Court reaffirmed the burden of proof that, under *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), must be borne by the government to establish that its evidence is based on independent, legitimate sources:

This burden of proof, which we affirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Kastigar, supra, at 460.

719 Informal Immunity Distinguished From Formal Immunity

Statutory immunity, also known as formal immunity, should be distinguished from informal immunity. The latter term, often referred to as "pocket immunity" or "letter immunity," is immunity conferred by agreement with the witness. For example, the government and a cooperating defendant or witness might enter into a plea agreement or a non-prosecution agreement if the defendant or witness agrees to cooperate. Testimony given under informal immunity is not compelled testimony, but is testimony pursuant to an agreement and thus voluntary. The principles of contract law apply in determining the scope of informal immunity. *United States v. Plummer*, 941 F.2d 799, 802 (9th Cir. 1991); *United States v. Britt*, 917 F.2d 353 (8th Cir. 1990), *cert. denied*, 498 U.S. 1090; *United States v. Camp*, 72 F.3d 759 (9th Cir. 1996) [replacing 58 F.3d 491 (9th Cir. 1996)]. Grants of informal immunity that do not expressly prohibit the government's derivative use of the witness's testimony will be construed to prohibit such derivative use. *Plummer, supra*. But a grant of informal immunity that expressly provides for derivative use of the testimony by the government will be upheld. *United States v. Lyons*, 670 F.2d 77, 80 (7th Cir. 1982), *cert. denied*, 457 U.S. 1136.

An important difference between statutory/formal immunity and informal immunity is that the latter is not binding upon the States. This follows from the fact that the local prosecutor representing the State is normally not a party to the agreement between the witness and the Federal prosecutor, and thus cannot be contractually bound by the Federal prosecutor's agreements.

[cited in [USAM 9-23.100](#)]

720 Authorization Procedure for Immunity Requests

All requests for immunity in matters assigned to the Criminal Division, and a copy of all such requests from other Divisions, shall be forwarded to the Office of Enforcement Operations using the Department's standard immunity request form. A copy of the form is set out in this [Manual at 721](#).

The Policy and Statutory Enforcement Unit of the Office of Enforcement Operations will forward the name of the witness to the litigating sections of the Criminal Division, the Federal Bureau of Investigation, and the Internal Revenue Service to determine whether granting immunity to the witness may conflict with prosecutorial interests in other proceedings. Should this review disclose a possible conflict or objection, the Policy and Statutory Enforcement Unit will hold the request in abeyance until the conflict or objection is resolved. Upon completion of its review, the Policy and Statutory Enforcement Unit will prepare a recommendation and a letter of authority to seek an order to compel the witness's testimony for the signature of the Assistant Attorney General of the Criminal Division. If the request is from another Division, the Policy and Statutory Enforcement Unit will prepare a memorandum from the Assistant Attorney General of the Criminal Division to the Assistant Attorney General of such other Division concurring in the request. A copy of the standard letter of authority is set out at in this [Manual at 722](#).

The Policy and Statutory Enforcement Unit will endeavor to process immunity requests within ten business days of their receipt. Requests should be e-mailed to PSEU@usdoj.gov. Attorneys for the Policy and Statutory Enforcement Unit may be reached at (202) 305-4023 to discuss issues relating to witness immunity.

When authorization to seek immunity is needed in less than ten business days, the reasons for seeking the expedited authorization should be included on the form submitted to the Policy and Statutory Enforcement Unit and, if authorization is needed in less than two working days, please call to Policy and Statutory Enforcement Unit prior to submission of the form.

Additional information regarding the steps to follow once authorization has been granted to seek to compel testimony is available in subsequent sections of this Manual:

Obtaining the Court Order	Criminal Resource Manual at 723
Expiration of Authority to Compel	Criminal Resource Manual at 724
Use of Immunized Testimony by Sentencing Court	Criminal Resource Manual at 725
Steps to Avoid Taint	Criminal Resource Manual at 726
Civil Contempt	Criminal Resource Manual at 727
Criminal Contempt	Criminal Resource Manual at 728

722 Letter of Authority

The Honorable

United States Attorney

DISTRICT

CITY, STATE ZIP CODE

Attention

NAME

Assistant United States Attorney

Dear MR./MS.:

Re: Grand Jury Investigation, *PROCEEDING*

Pursuant to the authority vested in me by 18 U.S.C. 6003(b) and 28 C.F.R. 0.175(a), I hereby approve your request for authority to apply to the United States District Court for the DISTRICT for an order pursuant to 18 U.S.C. 6002-6003 requiring WITNESS NAME to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

TYPED NAME OF AAG

Assistant Attorney General

723 Procedure Upon Receipt of Letter of Authority -- Obtaining the Court Order

Upon receiving a letter of authority to seek an order to compel testimony, the United States Attorney will prepare a written motion and order for submission to the court. The court's function in reviewing the government's request for immunity is ministerial. *In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *United States v. Frans*, 697 F.2d 188 (7th Cir. 1983), *cert. denied*, 464 U.S. 828 (1983). The letter of authority may be presented to the court *ex parte*.

[cited in [Criminal Resource Manual 720](#); [USAM 9-23.130](#)]

724 Expiration of Authority to Compel

The letter of authority specifically extends the authorization to compel the witness to testify to any ancillary proceeding. This is intended to cover the witness's testimony at a trial or trials following his or her immunized testimony before a grand jury, thus avoiding the necessity of a second application. Authority to compel a witness to testify before a grand jury must be renewed, however, if the witness has not testified within six months of the date of the letter of authority. A new application is necessary in order to ensure that the decision to grant the witness immunity is still in the public interest.

[cited in [Criminal Resource Manual 720](#); [USAM 9-23.130](#)]

725 Use of Immunized Testimony by Sentencing Court

If the witness for whom immunity has been authorized is awaiting sentencing, the prosecutor should ensure that the substance of the witness's compelled testimony is not disclosed to the sentencing judge unless the witness indicates that he or she does not object. This is intended to avoid a claim by the witness that his or her sentence was adversely influenced by the immunized testimony.

[cited in [Criminal Resource Manual 720](#); [USAM 9-23.130](#)]

726 Steps to Avoid Taint

Prosecution of a witness using evidence independent of his or her immunized testimony will require the government to meet its burden under *Kastigar, supra*, of proving that the evidence it intends to use is not tainted by the witness's immunized testimony. In order to ensure that the government will be able to meet this burden, prosecutors should take the following precautions in the case of a witness who may possibly be prosecuted for an offense about which the witness may be questioned during his/her compelled testimony:

1. Before the witness testifies, prepare for the file a signed and dated memorandum summarizing the existing evidence against the witness and the date(s) and source(s) of such evidence;
2. Ensure that the witness's immunized testimony is recorded verbatim and thereafter maintained in a secure location to which access is documented; and
3. Maintain a record of the date(s) and source(s) of any evidence relating to the witness obtained after the witness has testified pursuant to the immunity order.

[cited in [Criminal Resource Manual 720](#); [USAM 9-23.130](#)]

727 Civil Contempt

Should the witness refuse to testify pursuant to the immunity order, he or she can be held in civil contempt under the provisions of 28 U.S.C. 1826 and confined for the life of the court proceeding or the term of the grand jury, including extensions. CAVEAT - a witness may refuse to testify before a grand jury if his or her interrogation is based upon an illegal wiretap. *See Gelbard v. United States*, 408 U.S. 41 (1972).

[cited in [Criminal Resource Manual 720](#); [USAM 9-23.130](#)]

728 Criminal Contempt

An immunized witness who refuses to testify may also be held in criminal contempt. If appropriate, the court may invoke the criminal contempt provisions of 18 U.S.C. 401 or Rule 42 of the Federal Rules of Criminal Procedure. Under the former, the court may impose a fine of \$1,000 or imprisonment for not more than six months, but not both. Summary punishment under Rule 42(a) is limited to six months, whereas punishment for contempt under Rule 42(b)--which requires notice and a hearing--is unlimited.

[cited in [Criminal Resource Manual 720](#); [USAM 9-23.130](#)]