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What In-House Corporate Counsel Should Know About the Fifth Amendment, Part I: The Basics

This two-part series tackles what corporate in-house should know about the Fifth Amendment. Part I reviews the legal fundamentals governing how the Fifth Amendment applies (and does not apply) during corporate criminal investigations.

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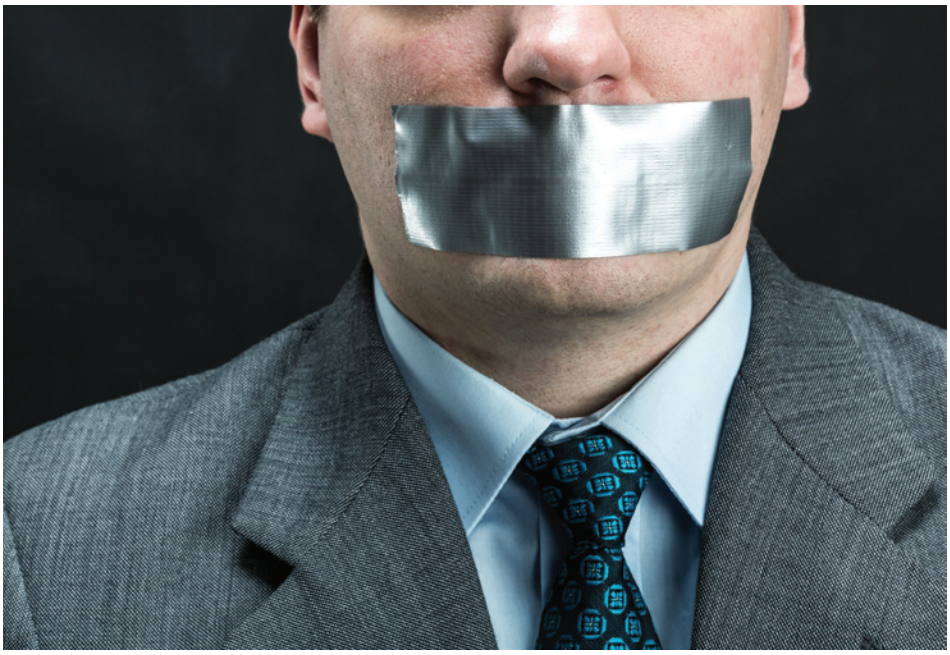

Fair enough, it may not be immediately obvious why corporate in-house counsel should care about Fifth Amendment jurisprudence. And yet, now in fact is an excellent time to take stock of the U.S. Constitution's right against self-incrimination, enshrined in the Fifth Amendment, which declares that *"[n]o person … shall be compelled in any criminal case to be a witness against himself."* Why is the timing for review so ripe? Because the Fifth Amendment's boundaries are being actively tested in ways that impact corporate criminal investigations, with practical consequences for in-house counsel.

- Can corporate employees "take the Fifth" to refuse to give law enforcement their phone passcode?
- Can former employees invoke the Fifth Amendment to refuse to turn over corporate records still in their possession?
- What potential Fifth Amendment violations lurk in cross-border cases, or when U.S. authorities pressure a company counsel on how to conduct its internal investigation?

These are just some of the questions percolating through U.S. courts, and unsurprisingly so. With rapid technological change in how people communicate and the increasingly multi-national nature of investigations, law enforcement strategies for investigating corporate crime have evolved—sparking increased litigation of Fifth Amendment issues. Indeed, in two recent, high-profile U.S. prosecutions relating to the LIBOR controversy, federal courts found Fifth Amendment violations—leading the U.S. Court of Appeals for the Second Circuit, in 2017, to dismiss the government's prosecution in *United States v. Allen*, and in May 2019, and prompting sharp criticism of the government by the chief judge of the U.S. District Court for the Southern District of New York, in *United States v. Connolly.* What this means is that the Fifth Amendment is on the minds of corporate crime prosecutors too.

This two-part series tackles what corporate in-house should know about the Fifth Amendment. Part I reviews the legal fundamentals governing how the Fifth Amendment applies (and does not apply) during corporate criminal investigations. Part II will then examine five cutting-edge Fifth Amendment questions that are percolating through U.S. courts and often dividing them.

Fundamentals

1. Corporations have no Fifth Amendment protection against self-incrimination.

The first thing to know is that the Fifth Amendment's right against self-incrimination applies only to *natural* persons. Corporations cannot "take the Fifth." As U.S. Supreme Court explained in its seminal 1988 decision in *Braswell v. United States*, under what's referred to as the "collective entity" doctrine, corporations are artificial creatures of the State; this means that while the State permits business operators to avail themselves of the benefits of the corporate form, in return the State reserves the right to inspect corporate books and records on demand. The size of the corporation is irrelevant. Even a one-person corporation cannot refuse a government subpoena for documents on Fifth Amendment grounds, notwithstanding that production will reveal criminal conduct by the corporation or its employees.

2. A corporation's current employees, officers and directors have no Fifth Amendment protection against producing *corporate records* in their possession.

Equally well established and yet seemingly less well-known is that "custodians" of corporate records also cannot invoke the Fifth Amendment to refuse to turn over corporate records they possess. Who is a "custodian"? At a minimum, that term includes each current employee, officer and director of the corporation (referred to collectively, hereafter, as "employees") who possesses corporate records. The legal rationale here is *agency*. Employees hold corporate records only in a representative capacity on behalf of the corporation, not a personal one, and therefore employees cannot withhold what the corporation is obligated to produce, even if self-incriminating. (As will be discussed in Part II, however, courts disagree on whether this agency rationale extends to *former* employees.)

In practical terms this means that, during investigations, the government need not limit itself to subpoenaing corporate records just from the corporation. The government can serve custodial subpoenas directly on employees (current and former) to compel the production of corporate records in their individual possession. Indeed, the service of custodial subpoenas appears to be on the rise, given the proliferation of work-related communications housed on electronic devices personally held by employees. In-house counsel can and should encourage employees to inform the corporation of their receipt of such subpoenas.

3. Corporate employees can invoke the Fifth Amendment to refuse to give testimony they reasonably fear could be self-incriminating.

Under U.S. law, corporate employees, like all other individuals, enjoy the Fifth Amendment right not to make compelled, self-incriminatory statements—about work matters or otherwise—that could be used against them in a future U.S. criminal proceeding. An individual must show three things to fall within the ambit of the privilege: (1) self-incrimination, (2) by way of a testimonial communication or act, through (3) government compulsion.

This right against self-incrimination has been liberally construed and extends well beyond the right not to testify at one's own criminal trial. A slew of Supreme Court and appellate cases establish that the right can be asserted in any proceeding—civil or criminal, administrative or judicial, investigatory or adjudicatory—by a party or a witness. It can be invoked by individuals who do not believe they did anything wrong, so long as they have a reasonable fear of criminal prosecution by U.S. authorities. (One limitation, however, enunciated in the Supreme Court's 1988 decision in *U.S. v. Balsys*, is that Fifth Amendment does not apply where the reasonable fear is only of prosecution by a *foreign* jurisdiction.)

Further, one's ability to "take the Fifth" is not limited to answers that would support a criminal conviction, but extends to any answers "which would furnish a link in the chain of evidence needed to prosecute" the individual of a crime (per the Supreme Court's 1951 ruling in *Hoffman v. U.S.*). Thus, even the corporate employee who is obligated to turn over corporate records in his possession cannot be compelled by the government to answer questions about those records. And, under what is known as the "act of production privilege" of the Fifth Amendment, the Supreme Court's 2000 decision in *U.S. v. Hubbell* held that an individual can refuse to turn over personal (i.e., non-corporate) records to the government if the very act of production would have a testimonial, incriminating aspect, such as by confirming the records' existence, location, and authenticity. Ultimately, it is for courts to decide whether an individual has properly invoked the Fifth, if the invocation is challenged.

To be clear, the Fifth Amendment deals only with *government*

compulsion. Employer compulsion is a separate matter. So long as a corporation is acting on its own behalf (and not behalf of the government), corporations can implement workplace policies requiring employees to cooperate fully during corporate investigations, at penalty of discipline for failing to cooperate, without violating the employees' Fifth Amendment rights. As a practical matter, such workplace rules can leave the employee who has potential criminal exposure between a rock and a hard place—*Do I abide by company policy and answer company counsel's questions, thereby heightening my risk of criminal prosecution? Or do I instead refuse to cooperate with my employer and risk job termination?*

4. Consequences of a Corporate Employee's Invocation of the Fifth.

So what happens when an employee who has been subpoenaed by the government for testimony invokes the Fifth? Let's briefly review the potential consequences for the employee, the corporation and the prosecutor.

First, an employee's "taking the Fifth" will require the corporation to consider how to respond (if at all) from an employment perspective. There is no state or federal law that prohibits private companies from firing employees who choose to take the Fifth (assuming the firing would not otherwise violate some state or federal law). Companies in the crosshairs of a criminal investigation typically do not look kindly on an employee who refuses to further efforts to cooperate with the government. Such an employee may thus find her employment terminated for noncooperation. However, these are fact-dependent situations that corporations should weigh with care.

For prosecutors, the employee's invocation of the Fifth Amendment presents a strategic choice: whether or not obtain a court-ordered grant of immunity. An immunity order allows the federal government to overcome the individual's invocation of the Fifth Amendment and compel the witness to testify, but *with immunity*—which, as set forth in the Supreme Court's 1972 decision in *Kastigar v. U.S.* and its progeny, means the government is prohibited from using that testimony, directly or indirectly, against that individual in a future criminal proceeding. State immunity procedures can differ from federal ones. But in practice, both federal and state prosecutors are loath to immunize the testimony of any individual believed to be a significant wrongdoer, given the hurdles immunity creates to subsequent prosecution. That said, immunity orders can be an effective tool for compelling statements from corporate employees who take the Fifth and are believed to have information important to the investigation but whom the government regards as having minimal culpability. (And for those corporate employees eventually charged with a crime, the fact of their prior invocation of the Fifth Amendment can never be used against them as proof of guilt or introduced as trial evidence.)

An important ramification for corporations is that an employee's invocation of the Fifth Amendment can lead to an *adverse inference* of wrongful conduct being drawn against the corporation in civil proceedings, particularly in federal court. Judges have broad discretion to permit such adverse inferences. While there is no hard and fast rule, courts generally will engage in a case-specific inquiry, evaluating whether drawing an adverse inference would be trustworthy under all the circumstances. Non-exhaustive criteria for that analysis (articulated by the Second Circuit's 1971 decision in *LiButti v. U.S.*) include: the nature of the relationship between the defendant and the employee, the extent of the defendant's control over the employee, the compatibility of the defendant and employee's interest in the outcome of the litigation, and the role of the employee in the litigation. An adverse inference against the company may be permitted even when a *former* employee invokes the Fifth Amendment in civil litigation. This is a thorny area for corporate litigants, in which an employee's desire to avoid criminal jeopardy by invoking the Fifth may run against the corporation's interest in avoiding the negative consequence of an adverse inference.

This concludes the fundamentals of what corporate in-house counsel should know about the Fifth Amendment. Part II of this article series will address cutting-edge Fifth Amendment issues relevant to corporate criminal investigations.

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Part II—Five Tricky and Trending Fifth Amendment Issues in Corporate Criminal Investigations

Part I of this article series explored the legal basics of how the Fifth Amendment applies in the corporate context. Now we'll explore five cutting-edge Fifth Amendment issues affecting corporate criminal investigations—triggered by technological change and the rise of cross-border investigations.

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- **Former versus current: Can former employees invoke the Fifth to refuse to turn over corporate records?**

As we explored in Part I, the law treats current corporate employees as "custodians" who cannot invoke the Fifth to refuse to turn over corporate records in their possession, even if incriminating. But what about *former* employees who still possess corporate records—can they invoke the Fifth?

The answer is that courts are split on this issue. The U.S. Court of Appeals for the D.C. Circuit and Eleventh Circuit have answered "no"—former employees cannot invoke the Fifth to withhold corporate records in their possession. In those courts' view (set forth in the D.C. Circuit's 1991 ruling in *In re Sealed Case (Government Records)*, authored by then-appellate court Judge Ruth Bader Ginsburg, and the Eleventh Circuit's 1992 decision in *In re Grand Jury Subpoena Dated November 12, 1991*), the agency rationale that applies to current employees applies to former ones, too. Once a corporate custodian, always a corporate custodian. Taking the opposite view, the Second Circuit has held (as per its 1999 decision *In re Three Grand Jury Subpoenas dated January 29, 1999*) that former employees *can* invoke the Fifth Amendment act of production privilege to resist producing corporate records, reasoning that once an individual leaves the company's employ, the agency relationship terminates and any corporate records are now held in an individual capacity. (The Second Circuit took care to suggest, however, that corporate employees who are personally served with custodial subpoenas for corporate records while still employed cannot end-run the subpoena by resigning and then invoking the Fifth.) Bottom line: until the U.S. Supreme Court takes up the issue, the Fifth Amendment rights of former corporate employees will vary geographically.

This unsettled issue can be strategically important to corporate employees who may choose to resign their employment and invoke the Fifth, rather than turn over incriminating corporate documents in their possession to the government. The issue also arises civilly when a corporation that has been wronged by a former executive or employee brings a civil replevin action for return of corporate documents taken without authorization.

- **Passcodes and biometrics: Can the government compel individuals to unlock their electronic devices?**

The Fifth Amendment implications of decryption orders are among the most important and unsettled now percolating through U.S. courts. Because today's smartphones and computers are all equipped with some form of encryption, even when agents obtain warrants to seize and search an electronic device, their ability to get into that device is far from assured. For example, FBI Director Christopher Wray has asserted that, in fiscal 2017, the FBI successfully decrypted less than half of the devices it had authorization to search. Federal and state prosecutors are thus routinely turning to courts for orders compelling individuals to decrypt their devices by divulging or entering the passcode, or requiring production of the device contents in unencrypted form, or by authorizing the compelled use of

the individual's biometric features, like facial recognition or a fingerprint, to unlock the device. Do such orders violate an individual's Fifth Amendment rights against self-incrimination?

The answer partly turns on whether a particular compelled act of decryption is "testimonial," so as to trigger Fifth Amendment rights. While the Supreme Court has yet to address the issue, the emerging view among many lower courts appears to be that compelling passcodes can be testimonial since uttering or writing down a passcode affirmatively draws on the contents on the individual's mind, but that that compelling biometric features to unlock a phone is not testimonial because holding a phone in front of someone's face or using their finger to unlock it does not draw on the person's mind. This distinction respects longtime precedent establishing that police can compel an individual's physical features, such as fingerprints, blood samples, handwriting and voice exemplars, or donning a shirt for a line-up, all without triggering Fifth Amendment concerns. But still other courts (including 2019 decisions from federal district judges in Ohio and California) insist that *all* forms of compelled decryption—by password, biometric, or otherwise—are "testimonial" and subject to Fifth Amendment protection, citing the vast quantities of information held on electronic devices to distinguish precedent.

But even that doesn't end the inquiry, because courts further consider whether compelled decryption, even if testimonial, is excluded from Fifth Amendment protection under the "foregone conclusion" doctrine. That doctrine, which grew out of a few sentences of the Supreme Court's 1976 decision in *Fisher v. United States*, deems an act of production to be outside of Fifth Amendment protection when the location, existence and authenticity of what's to be produced is already known with reasonable particularity to the government. Suffice it to say, how this doctrine applies in the decryption context is anything but a foregone conclusion. Courts have diverged over whether, for the doctrine to apply, the government must already know just that the individual possesses the device passcode (which is not hard to show), or, beyond that, what incriminating evidence lays hidden behind the encrypted wall (which is much harder to show). Two federal appeals courts, the Eleventh Circuit and Third Circuits, have addressed the issue to date, reaching differing conclusions. Likewise, state judges have split in multiple directions. In March 2019, for instance, a majority of Massachusetts' highest court ruled in *Commonwealth v. Jones* that the foregone conclusion exception applies to compelled decryption (and moots a Fifth Amendment challenge) so long as the government can prove the accused knows the device's passcode; a dissenting justice criticized that approach as "sounding the death knell for a constitutional protection against compelled self-incrimination in the digital age."

At bottom, existing authority concerning compelled decryption provides little uniform guidance. However, older technology (requiring manual entry of a passcode) may provide stronger Fifth Amendment protection to employees than more current facial recognition features.

- **Is a record "corporate" or "personal"—who decides?**

While the law establishes that "corporate" records, however incriminating, cannot be withheld from the government on Fifth Amendment grounds, determining what is a corporate record can be a fuzzy exercise. The more that business and personal communications are intermingled in an age of smartphones and "bring your own device to work" policies, the greater the potential fuzziness. Consider the corporate executive who has both a business and social relationship with a corporate client and who has now come under investigation for potentially criminal dealings with that client. Are the executive's WhatsApp messages with the client on his personal cellphone "corporate" or "personal" records? The executive will want to characterize those WhatsApp messages as "personal," especially if incriminating, to avoid compelled production; whereas the prosecutor will want to pierce overbroad invocations of the Fifth as to communications that in fact are work-related and thus likely "corporate." Meanwhile, the corporation will have its own interests in being able to access work-related communications housed on employee personal devices when necessary to defend corporate interests and fulfill legal obligations. So who decides?

The answer is that a court decides—but only when a dispute ripens into a motion to compel by the government, which rarely occurs. On such a motion, the court generally will review the records *in camera* (outside the eyeshot of the government) and apply a functional test to determine whether a record is

indeed "personal" (and properly subject to invocation of the Fifth Amendment act of production privilege) or "corporate" (and thus properly compelled by the government). The court's inquiry will consider the nature, purpose and use of the record, such as who created and had access to it, and whether it is work-related and in furtherance of the corporation's business. A "mixed" document containing both personal and corporate notations may be deemed corporate and ordered produced in its entirety or with redactions, in the court's discretion.

This is an area where corporate policies matter. Courts look to corporate policies and practices to aid their evaluation of whether records are personal or corporate. Take for example the 2015 case of *Securities & Exchange Commission v. Huang*, in which a federal court in the U.S. District Court for the Eastern District of Pennsylvania was asked to determine whether former corporate employees, charged with insider trading, could invoke the Fifth to refuse to turn over the passcodes to their work-issued cellphones (which they had returned to the company at the time of separation). No one disputed that the work phones themselves were corporate property. The court, however, found that the passcodes to those phones were personal records —citing to the company's policy and practice of instructing employees not to share passcodes to these devices with anyone—even the company. The court then upheld the individuals' invocation of the Fifth, finding that the personal passcodes could not be compelled by the government because they were testimonial and potentially incriminating. Bottom line: the corporation's policies were central to the court's determination of "corporate" versus "personal."

Because such issues rarely reach the court system, the corporation's policies (and employees' consent to them) are all the more important to determining the company's routine rights of access to work-related records in employees' possession. In-house counsel should review whether their corporation's policies and seek to strike an appropriate balance between respecting employee privacy rights and protecting corporate access needs to work-related communications.

• What potential Fifth Amendment issues lurk in cross-border investigations?

Corporations investigated by U.S. authorities often operate multinationally, meaning not only that will witnesses and evidence will be located abroad, but also that foreign law enforcement authorities may be simultaneously investigating. This rise of multinational investigations is testing the Fifth Amendment's reach as to corporate employees who work abroad but may face criminal charges in the United States.

This issue was front and center in the 2017 appeal of *United States v. Allen*—a criminal prosecution arising from investigations of the LIBOR rate-setting controversy—in which the Second Circuit vacated the convictions of two London bankers because of a Fifth Amendment violation. That case considered when testimony given by an individual involuntarily under the legal compulsion of a foreign power will taint criminal proceedings later brought against that individual in a U.S. court. The Second Circuit's ruling endorsed a broad reading of the Fifth Amendment, protective of the individual defendant.

In *Allen*, two London-based bank employees were subject to compelled interviews by United Kingdom (U.K.) authorities, in accordance with U.K. law. U.K. authorities (again, lawfully under U.K. law) then shared those bankers' statements with a third suspect (Robson). As it turned out, Robson later pleaded guilty in the United States, cooperated with the U.S. Department of Justice (DOJ), and testified at the U.S. criminal trial of the two, now-indicted bankers whose compelled statements Robson had earlier seen. This was the problem. The court found that by offering Robson's testimony at trial the government had violated the defendants' Fifth Amendment rights—because prosecutors could not prove that Robson's exposure to the defendants' compelled testimony back in the United States did not affect or shape the testimony Robson gave at trial against those defendants. The court dismissed the indictments outright.

Notably, the DOJ had tried to steer clear of a Fifth Amendment problem during its investigation by setting up a "wall" between its investigation and the U.K. investigation and by conducting separate interviews—efforts the court found insufficient to prevent the Fifth Amendment violation at issue. The ruling came as a blow to U.S. authorities, which argued that if Fifth Amendment protection were extended to this set of facts, then any foreign government could inadvertently or purposely "scuttle prosecutions in the United States by compelling testimony and

then making the testimony available to potential witnesses or the public." The court's response: "We do not presume to know exactly what this brave new world of international criminal enforcement will entail," but "the practical outcome of our holding today is that the risk of error in coordination [with foreign law enforcement] falls on the U.S. government (should it seek to prosecute foreign individuals), rather than on the subjects and targets of cross-border investigations." The DOJ's motion for rehearing was denied; review by the Supreme Court was not sought; and *Allen* remains binding precedent in the Second Circuit.

What is *Allen's* impact? For corporations with foreign-based operations, in-house counsel should expect that during any investigation involving both U.S. and foreign authorities, U.S. authorities will be on high alert to prevent a repeat of *Allen*. U.S. authorities may seek to persuade foreign governmental counterparts not to compel witness interviews, even if allowed under those nations' laws, but rather to conduct interviews on a voluntary basis only. A corporation that is cooperating with U.S. authorities can help with this de-confliction by keeping U.S. authorities apprised of foreign authorities' approaches of corporate witnesses involving use of compulsory process.

- **When will government pressure turn a corporation's internal investigation into an arm of the government—so as to implicate employee Fifth Amendment rights?**

A final, trending Fifth Amendment issue concerns the boundary line between government conduct and the conduct of a cooperating corporation—and specifically, when corporate action can be found to have been coerced by prosecutors so as to be fairly attributable to the government, raising Fifth Amendment concerns. Take for example the common corporate practice of requiring employees to submit for interviews by company counsel during internal investigations or else face discipline (including possible termination). Ordinarily, employee Fifth Amendment rights are not implicated by such corporate action because corporations have legitimate interests in investigating potential misconduct and the compulsion comes from the employer, not the government. However, if a court were to find that prosecutors *coerced* the corporation into conducting that employee interview, then the compulsion effectively is government compulsion, and the employee's statements can be deemed to have been obtained unconstitutionally.

This boundary line between corporate and state action is rarely deemed crossed—which is why the May 2019 decision (*United States v. Connelly*) by Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York has sparked such interest. *Connelly* is the first notable case since 2006 to find that the government had coerced a corporate actor during a criminal investigation, triggering constitutional violation of employee rights (the earlier 2006 case was *United States v. Stein*, decided by another district court judge and later affirmed on appeal). *Connelly* and *Stein* share some common threads. In both, the courts found that: the corporation faced a fatal threat of indictment such that corporate survival depended upon fully cooperating with and appeasing the government to avoid indictment, and the government directed the corporation's actions to a degree that vitiated the independence or voluntariness of corporate decision-making. Thus, in *Connelly*, an employee's compelled interview by company counsel, under threat of job loss, was deemed a Fifth Amendment violation where the government had "outsourced" the investigation to the company counsel and micro-managed through near-daily direction how and when the company employees would be interviewed. In *Stein*, defendants' statements to prosecutors violated the Fifth Amendment where the government was found to have coerced the company to pressure its employees to speak to the government by conditioning payment of legal fees upon the employees' appearance and cooperation.

The practical import of these cases is that high-pressure tactics by prosecutors in dealing with corporations during criminal investigations can come back to haunt them later. Prosecutors must take care not to turn a corporate actor into a state one. And corporations must be allowed to cooperate fully and meaningfully without surrendering their independent judgment over how to manage internal investigations and employee affairs.

—Scott Caravello, a Columbia University law student, contributed to this article.