

Taking the Fifth Too Often

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By what right do Enron bigwigs stonewall Congress? The 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.

The Fifth Amendment gives criminal defendants the right to refuse to testify at trial. Perhaps the most reasonable justification for this right is the need to protect innocent and truthful defendants from being made to appear guilty if forced to take the stand. They might well sweat, stutter or misspeak when pressured by crafty prosecutors, and be wrongly convicted.

To protect the core Fifth Amendment right, a person should also be allowed to "take the Fifth" outside his trial. Otherwise, prosecutors might simply be able to adjourn a trial, force the defendant to testify in some other setting, and then

offer the transcript and videotape to the criminal jury.

But sometimes a truth-seeking society needs to be able to compel a person to speak outside his trial -- in grand jury rooms, civil cases and legislative hearings, for example. One solution is to require the person to testify in these specific places, but then exclude this compelled testimony from any later prosecution brought against him. This way, he would never become a witness against himself "in a criminal case."

This rule would offer Congressional witnesses a narrow type of testimonial immunity. While the testimony itself would be excluded from the criminal trial, evidence that might be drawn indirectly from the testimony would be admissible at a later trial. This would allow prosecutors to use any reliable leads that the testimony might generate. Courts today allow government lawyers to force people to give voice samples and take breath tests for alcohol because these are not considered forms of self-incrimination prohibited by the Fifth Amendment. If prosecutors can compel defendants to provide these kinds of evidence, they should also be allowed to introduce reliable evidence that is found as a result of earlier immunized testimony.

This is exactly the rule that Congress enacted, and President Abraham Lincoln signed into law, in 1862. Two federal government clerks had embezzled bonds worth \$2 million and then confessed in a Congressional hearing. They went on to claim that they could never be prosecuted because Congress had required them to talk. Congress cured the problem with a statute obliging future Congressional witnesses to speak when so ordered. Anyone refusing to speak could be held in contempt, and anyone lying could be charged with perjury -- but all witnesses would be granted only narrow immunity, allowing later prosecutions based on leads generated in Congress. As one senator said at the time, restricted

immunity was "all that a rascal ought to have at the hands of justice." If Congressional testimony led investigators to find other reliable bits of evidence to convict, so much the better.

But in 1892, the Supreme Court declared this statute unconstitutional. A person obliged to testify before Congress could never be prosecuted for anything related to his testimony, the court ruled. In later cases, the court softened this rule -- a person forced to testify before Congress could be prosecuted so long as the testimony and all evidence found as a result of that testimony were excluded.

The Supreme Court has never explained where this ban on other evidence is to be found in the Fifth Amendment's words. Nor has the court explained how such a ban fits the general innocence-protecting idea that justifies the Fifth Amendment in the first place.

This longstanding reading of the Fifth Amendment has warped the separation of powers. When Congress needs facts to determine whether existing laws are working and how they might be fixed, it often meets a Fifth Amendment stone wall. Congress can find the truth only if it gives witnesses sweeping immunity that then hinders the executive branch's prosecutorial function.

Thus, when Congress sought to investigate the Iran-contra scandal in 1987, it had to grant immunity to Oliver North in ways that ultimately led judges to overturn Mr. North's criminal conviction in 1989 for obstructing justice and other federal crimes. Although the evidence introduced against Mr. North was reliable, prosecutors could not prove that witnesses against him were not affected by his nationally televised Congressional testimony.

After that fiasco, Congress became cautious in its conduct of important investigations. When Congress sought to investigate campaign-finance abuses and possible Chinese influence in American politics in 1997, it chose not to force

John Huang to tell all he knew; such compelled testimony would have shielded Mr. Huang from criminal prosecution. Current Fifth Amendment doctrine thus prevents the legislature from doing its job of oversight and law reform.

President Bush has urged strict construction of the Constitution, and the Fifth Amendment is a good place to start. Current case law ignores the Constitution's words, distorts constitutional structure and overprotects the guilty. But don't expect federal judges to alter this constitutional interpretation anytime soon. Enron executives are not the only ones who dislike confessing error.

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