

# The Fifth Amendment Privilege Against Self-Incrimination: Background and Selected Topics for Congress

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The Fifth Amendment to the U.S. Constitution [provides](#) that no person “shall be compelled in any criminal case to be a witness against himself.” Witnesses sometimes invoke this right, commonly referred to as the privilege against self-incrimination (or [compulsory](#) self-incrimination), in congressional hearings or depositions, as Dr. [Anthony Fauci](#) and Dr. [Kevin O’Connor](#) did in the 119th Congress, and as [Jeffrey Clark](#), [Roger Stone](#), and [Michael Flynn](#) did in the 117th Congress. A congressional witness’s invocation of the Fifth Amendment’s privilege against self-incrimination may raise questions about the scope of that right. This Legal Sidebar discusses the application of the privilege against self-incrimination in congressional hearings and reviews several frequently asked questions related to the scope of the privilege, including the effects of a pardon, whether blanket assertions of the privilege are allowed, whether the privilege extends to the crime of perjury, and the circumstances in which a witness waives his right to assert the privilege. Other CRS products discuss the Fifth Amendment’s application in [congressional](#) hearings in more detail.

## The Fifth Amendment’s Privilege Against Self-Incrimination

The privilege against self-incrimination may arise in a criminal case and “[whenever](#) there is a realistic possibility” that the privilege holder’s “answer to a question can be used in any way to convict him of a crime.” It has also been [interpreted](#) to protect the witness from compelled testimony that could be used against him in either federal or state criminal [proceedings](#). In practice, the [privilege](#) “protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” The privilege “[not only](#) extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.” These broad interpretations of the privilege’s applicability reflect the Supreme Court’s [view that](#) to “apply the privilege narrowly or begrudgingly” would “ignore its development and purpose.”

Still, the privilege is not absolute. The “[sole concern](#)” of the Fifth Amendment’s privilege against self-incrimination “is, as its name indicates, with the danger to a witness forced to give testimony leading to

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the infliction of penalties affixed to the criminal acts.” The privilege, therefore, **ceases** to exist when the reason for the privilege ceases. Thus, the Court has recognized, where a witness is in some form immunized from the “infliction of penalties affixed to the criminal acts,” whether by **pardon**, **statute**, or otherwise, the danger is **displaced**, and the witness may no longer invoke the privilege.

## Assertions of the Fifth Amendment in Congressional Investigations

As a general matter, witnesses may invoke the Fifth Amendment privilege during a congressional investigation with regard to testimony or documents that are (1) **testimonial** (i.e., that “relate a factual assertion or disclose information”); (2) **self-incriminating** (any disclosures that tend to show guilt or that furnish any “link in the chain of evidence” needed to prosecute); and (3) compelled (not voluntarily given). Oral testimony given pursuant to a subpoena and in response to committee questions likely **qualifies** as testimonial and compelled. Therefore, the central inquiry when a witness invokes his privilege against self-incrimination before Congress is typically whether the responsive testimony would be “incriminating.”

Although these standards are similar in many ways to the rules governing assertions of the Fifth Amendment in court proceedings or other venues, asserting the privilege in testimony before Congress may raise certain **unique** considerations. For one, **2 U.S.C. § 192** makes it unlawful and punishable by contempt of Congress to “refuse[] to answer any question pertinent to the question under inquiry” before either of the two chambers. Notwithstanding § 192’s prohibition, the Supreme Court has long **recognized** that the Fifth Amendment’s protections may **limit** Congress’s power of inquiry, in that “recipients of legislative subpoenas **retain** their constitutional rights throughout the course of [a congressional] investigation.” Where a committee accepts a witness’s assertion of the privilege, his refusal to answer lacks “the **requisite** criminal intent” to be convicted under § 192. If a witness is not “clearly **apprised** that the committee demands his answer notwithstanding” his Fifth Amendment assertion, there can be no conviction under the statute. Should the committee make a clear demand for an answer and the witness still refuses, his objections may be **sustained** in court if his assertion of the privilege meets the requisite standards discussed below.

Courts appear to give liberal consideration to assertions of the Fifth Amendment privilege before Congress. In *Quinn v. United States*, for example, the Supreme Court concluded that a conviction under § 192 could not stand owing to the witness’s inability to discern whether the investigating committee had accepted his assertion of his Fifth Amendment privilege or not. The Court **found** the witness could not have “determined with a reasonable degree of certainty that the committee demanded his answer despite his objection,” including in an **exchange** with the committee’s chairman in which the chairman did not explicitly demand the witness’s answer after the witness invoked the privilege, and the committee moved on to “a new line of inquiry.”

No “special **combination** of words” is required to invoke the privilege before a congressional committee. As long as it is “made in any **language** that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected.” In *Quinn*, the Supreme Court **reversed** the conviction of a witness who invoked his right against self-incrimination in refusing to answer questions posed to him by a congressional committee in the course of an **investigation** into “the question of Communist affiliation or association of certain members” of the union to which the witness belonged and “the **advisability** of tightening present security requirements in industrial plants working on certain Government contracts.” The committee **asked** the witness about his alleged membership in the Community Party, which he declined to answer by relying on the Fifth Amendment privilege, among other constitutional rights, already **invoked** by a previous witness in response to the same question. “[T]hat a witness expresses his intention [to invoke the privilege] in vague terms,” the Court **wrote**, “is immaterial so long as the claim is sufficiently definite to apprise the committee of his intention.”

*Quinn* also prescribed another [requirement](#) on Congress where it appears that a witness is invoking his privilege against self-incrimination: It is “incumbent on the committee either to accept the claim or to ask [the witness] whether he was in fact invoking the [Fifth Amendment] privilege.” Still, the Court [explained](#), just as in other settings, the privilege before Congress is not absolute, and Congress is not “defenseless at the hands of a scheming witness intent on deception.” For [example](#), where “a witness declines to answer a question because of constitutional objections and the language used is not free from doubt,” the questioning body may “inquire into the nature of the claim” before deciding whether to accept the invocation of the privilege. The witness [forfeits](#) his right to invoke the privilege if he “unequivocally and intelligently” waives it or if, in [response](#) to a committee’s request to explicitly state that he is invoking his Fifth Amendment privilege, he refuses to do so.

## Immunity

Instead of rejecting a witness’s Fifth Amendment assertion, a committee could seek an immunity order, thereby requiring the witness to testify. Under [federal law](#), a committee can seek a court order from a U.S. district court following either a majority vote in the House or Senate or a two-thirds affirmative vote in the committee conducting the investigation. At least [10 days](#) before applying for the order, the committee must notify the Attorney General of its intent. The district court is [required](#) to grant an immunity order when petitioned, although the Attorney General can [request](#) to delay the order for up to 20 days. Under such an order, a witness is [required](#) to testify; however, consistent with the Fifth Amendment’s protections, the compelled testimony and any evidence derived from that testimony may not be used against the witness “in any respect” in a subsequent criminal prosecution, except one for perjury, making false statements, or otherwise failing to comply with the order. While the witness may still be convicted of a crime based on other evidence “[wholly independent](#) of the compelled testimony,” the existence of immunized testimony can [make](#) such prosecutions [more challenging](#). Given this risk, prior to seeking such an order, a committee may wish to weigh its need for the witness’s testimony against the possibility that immunized testimony could jeopardize the success of future criminal prosecutions.

## Blanket Assertions

Courts have [held](#) that the assertion of the privilege against self-incrimination must be particularized. That is, so-called “blanket” invocations of the Fifth Amendment privilege—whereby a witness asserts the Fifth Amendment in response to every question, [regardless](#) of its substance or reflection on the witness’s potential culpability—typically do not insulate a witness from prosecution or inquiry by a court. If a privilege holder asserts such a blanket invocation, a court must make “a [particularized](#) inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded.” In “[unusual cases](#),” blanket assertions may be accepted, but only where a judge determines “there is a reasonable basis for believing a danger to the witness might exist in answering *any* relevant questions.”

## Effect of a Pardon

The Fifth Amendment privilege [exists](#) to protect the witness from providing self-incriminating testimony so long as, and only so long as, the danger of prosecution persists. As a result, [according](#) to at least one Supreme Court case, when a “witness has already received a pardon, he cannot longer set up his [Fifth Amendment] privilege, since he stands, with respect to such offense, as if it had never been committed.”

Still, the privilege, while perhaps unavailable to a witness for protection from prosecution for a crime for which he has already been pardoned, may survive in other contexts. For example, an individual who is pardoned for one federal crime and is later investigated or prosecuted for a different, unrelated federal crime for which he has not been pardoned retains the ability to invoke the privilege against compelled

incriminating testimony as it applies to that second crime, as he remains at risk of conviction. Moreover, the power of the President to pardon has long been [understood](#) to apply to federal crimes only, whereas the Fifth Amendment privilege [protects](#) its holder from being compelled to provide testimony that could incriminate him in a pending or possible [state](#) prosecution, even if he has been pardoned at the federal level for the same act. It therefore stands to reason that a federal pardon recipient may still assert the privilege if he remains at risk of state prosecution.

## Perjury

At least three federal circuits, the U.S. Courts of Appeals for the [Fifth](#), [Eighth](#), and [Ninth](#) Circuits (referenced further by their numbers), have held that the privilege against self-incrimination may not be asserted to protect oneself from a perjury charge arising out of testimony that has not yet been given. Put another way, [according](#) to the Eighth Circuit, “the Fifth Amendment’s protection against self-incrimination does not confer upon a witness the right to commit perjury.” The Fifth Circuit has [held](#) that one may not assert the privilege against self-incrimination “out of fear that he will be prosecuted for perjury for what he is about to say, although he may claim the privilege if his new testimony might suggest that he had perjured himself in testifying on the same subject at a prior proceeding.” In other words, a witness may not invoke the privilege to commit perjury without consequence, but he may invoke it to protect himself against a revelation that he had previously perjured himself. This understanding has been reiterated in [several cases](#) in the Fifth Circuit.

## Waiver

An individual may waive his Fifth Amendment rights against self-incrimination, whether intentionally or not, by testifying to incriminating facts. The Supreme Court has [held](#) that when a witness “elects to waive his privilege” by “disclos[ing] his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.” Put [another](#) way, once a witness testifies to something incriminating, he may not later invoke the privilege as to “further disclosures on the same subject.”

A witness who has [testified](#) but “has not actually admitted [in]criminating facts” may, however, “unquestionably stop short at any point, and determine that he will go no further in that direction.” A [witness](#) who “answer[s] questions exonerating himself in general terms from all connection with a criminal transaction, does not thereby waive his right to remain silent” when he is later asked to provide testimony that may “form another link in the chain of facts capable of being used to his peril.”

The standards for waiver of the Fifth Amendment privilege may also depend on the witness’s status as either a criminal defendant or an “[ordinary](#)” witness, “e.g., one before a grand jury or a congressional committee.” The [latter](#) “does not waive his immunity unless he fails to invoke it” when appropriate, or unless he waives it by giving “incriminating testimony.” Moreover, the latter may opt to [discontinue](#) his testimony on the basis of the privilege at any point, so long as he has not already disclosed the details sought of an incriminating act. A criminal [defendant](#), however, loses this ability if he “takes the witness stand and testifies,” for having “once cast aside the cloak of immunity, he may not resume it at will.”

In [sum](#), “where the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him.” Where a witness’s voluntary answer to a question *is* incriminating, however, he [loses](#) the right to invoke the Fifth Amendment privilege against disclosure when asked about “further details” of that previous incriminating disclosure.

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