

Legal Sidebar

The Fifth Amendment in Congressional Investigations

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Former National Security Advisor Michael Flynn recently [invoked](#) his Fifth Amendment privilege against self-incrimination in response to a subpoena issued by the Senate Select Committee on Intelligence for documents related to the Committee's ongoing investigation into possible Russian involvement in the 2016 election. As noted in this previous [Sidebar](#), this is neither the first, nor is it likely to be the last time that a witness in a congressional investigation invokes the Fifth Amendment as justification for not complying with a committee subpoena.

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 (“[relate\[s\] a factual assertion](#)”); (2) self-incriminating (any disclosures that tends to show guilt or that furnishes 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 questioning almost always qualifies as testimonial and compelled. Therefore, the central inquiry is typically whether the responsive testimony would be “incriminating.” The Supreme Court has taken a [broad view](#) of what constitutes incriminating testimony, holding that the privilege protects any statement “that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used.” Even a witness who denies any criminal wrongdoing can refuse to answer questions on the basis that he might be “[ensnared by ambiguous circumstances](#).”

The scope of the privilege differs significantly when, as in the case of Mr. Flynn, the committee is demanding that the witness produce documents. The Supreme Court has made [clear](#) that the mere fact that the *contents* of a document may be incriminating does not mean that the document is protected from disclosure under the Fifth Amendment. The Court has reasoned that there is no compulsion present when a document is voluntarily created. However, the Court has carved out a sizable exception to this general principle, [holding](#) that the *act* of producing the documents must be treated differently, as that is a compelled act that “may have testimonial aspects and an incriminating effect” because a witness would in fact be admitting that “the papers existed, were in his possession or control, and were authentic.”

This so-called “[act of production](#)” doctrine significantly muddies the waters when it comes to applying the Fifth Amendment to document requests. The Court has established no clear test to determine when compliance with a subpoena for documents is testimonial and incriminating, [holding](#) only that because the testimonial nature of an act of production does not lend itself to “categorical answers,” any resolution will “depend on the facts and circumstances of particular cases.” It would appear, however, that the degree to which a committee can show knowledge of the existence of the documents requested, and independently confirm that the witness is in possession of those documents, may significantly influence whether the privilege shields the witness from compliance with a subpoena. The Court has previously reasoned that where the existence and location of a document is a “[foregone conclusion](#),” the witness “adds little or nothing to the sum total of the government’s information by conceding that he in fact has the papers.” In such a scenario, the privilege against self-incrimination is not triggered [because](#) “[t]he question is not of testimony but of surrender.” To the [contrary](#), where a committee has “no prior knowledge of either the existence or the whereabouts” of the documents, the act of production will be testimonial in nature, and therefore potentially privileged.

Even when a committee is faced with a Fifth Amendment privilege assertion, there may still be ways for the committee to obtain the witness’s testimony. The committee may choose to reject the witness’s privilege assertion, essentially determining that the privilege does not apply to the type of testimony or documents sought from the witness, or, as in

the case of former Internal Revenue Service official [Lois Lerner](#), that the witness has waived her Fifth Amendment rights. After the committee has rejected the privilege, if the witness continues to refuse to comply with the subpoena the committee may choose to pursue [either](#) criminal contempt of Congress or attempt to enforce the subpoena in civil litigation. As a criminal charge, contempt is designed to be punitive in nature and, even when successful, does not guarantee that the committee will get access to the subpoenaed testimony or documents. To the contrary, a successful suit to enforce the subpoena would result in a court order directing the witness to produce the sought after testimony or documents. In either criminal contempt or civil enforcement, if the [court determines](#) that the witness's assertion of the privilege was proper, the legal action would likely fail.

Instead of rejecting a witness's Fifth Amendment assertion, a committee could instead seek an immunity order, thereby requiring the witness to testify. Under [federal law](#), a court order can be obtained from a U.S. district court following either a majority vote in the House or Senate or a 2/3 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, false statement, or contempt relating to the testimony. 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, a committee must carefully balance its need for the witness's testimony against the possibility that immunized testimony could jeopardize the success of future criminal prosecutions. The Senate Select Committee on Intelligence has [previously rejected](#) Mr. Flynn's requests for immunity.

Finally, a committee may attempt to obtain the documents in question from [another source](#).

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