

# ADVISORY OPINION

## BEWARE: YOUR RIGHTS COULD BE CRIMES (PART I)

by Timothy Lynch

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Our government has acquired the power to coerce confessions from businesspeople. Unlike burglars and rapists, white-collar “criminals” must promptly confess their transgressions to the authorities. This ominous power grab is a prominent example of the constitutional havoc that is being wrought by the alphabet agencies of the modern regulatory state.

The Fifth Amendment to our Constitution provides, “nor shall [any person] be compelled in any criminal case to be a witness against himself.” In England, the privilege against self-incrimination meant that a witness could not be compelled to testify in court. But the American judiciary took the principle further, holding that the Fifth Amendment also shields individuals against the government’s investigatory processes.

In *Boyd v. United States* (1886), for example, the Supreme Court considered the constitutionality of a law that required defendants in civil forfeiture proceedings to produce invoices and receipts. If a defendant refused to produce the paperwork proving payment of import duties, the law would assume his guilt and assess penalties. The Court found that law inconsistent with both the Fourth and Fifth Amendments: “Any compulsory discovery by extorting the party’s oath, or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is contrary to the principles of a free government. . . . We have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be

a witness against himself.” Despite the fact that nearly 100 years had passed since the ratification of the Constitution, the Supreme Court continued to recognize that the core rationale of the Fifth Amendment guarantee was to keep the government from coercing suspects (who, after all, are presumed innocent) into any type of participation in the state’s investigation and prosecution of them. Because of that fundamental American principle, police and prosecutors must produce evidence of guilt by their own “independent labors.”

Since the New Deal, however, the Fifth Amendment privilege against self-incrimination has been losing ground to government. New Deal legislation required business firms to keep extensive records of their activities and to make such records available to government agents. Those laws were challenged, of course, but the Supreme Court sanctioned the new regime over the vigorous dissents of Justice Robert Jackson. Jackson recognized that the new reporting and record-keeping requirements were a flagrant attempt to short-circuit the Fifth Amendment. Indeed, Jackson sarcastically noted that the government could simplify law enforcement by requiring every citizen “to keep a diary that would show where he was at all times, with whom he was, and what he was up to.” Unfortunately, Jackson’s colleagues saw nothing wrong with the new prosecutorial power.

Businesspeople now work in a catch-22 environment. Executives at the Texas Eastman Chemical Company, for example, had to make a

tough decision when employees noticed an odd smell in the back stairwell of their Arkansas plant. Company officials could ignore the problem or check it out and possibly discover expensive regulatory infractions. If infractions were discovered, the company might trigger a legal obligation to notify government regulators.

Texas Eastman officials investigated the strange odor and discovered that their system that scrubs smokestack emissions was broken. Texas Eastman fixed the problem and reported the incident to the authorities. The government cited the company \$50,000 for “illegal emissions.”

The Texas Pipeline Company was fined when a bulldozer, owned and operated by a third party, inadvertently broke its pipeline, which resulted in an oil spill into a nearby waterway. As soon as the Texas Pipeline officials learned of the break in their pipeline, they notified the authorities and began cleanup operations. Instead of lauding the company for its “social responsibility,” the government levied a \$2,500 fine for an “illegal discharge.”

Such cases may tempt some businesspeople to avoid fines and jail sentences by choosing the path of nondisclosure and noncooperation. But that path is also fraught with danger. As unbelievable as it may seem, businesspeople do not have the right to “remain silent,” unlike, say, a murder suspect. Prosecutors promise to throw the book at any manager that fails to promptly confess regulatory infractions. “Taking the Fifth” is now a crime for white collar professionals.