

Why the Public (and the President) Are Wrong About What It Means to Take the Fifth

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Winston & Strawn Litigation Partner Seth Farber co-authored “Why the Public (and the President) Are Wrong About What It Means to Take the Fifth,” published in the New York Law Journal. The article examines the history underlying the Fifth Amendment’s protection against self-incrimination, the guidance provided by the Supreme Court, and the basic reasons why it is wrong to equate “taking the Fifth” with a person’s guilt.

“The mob takes the Fifth,” Donald Trump said at an Iowa campaign rally in September 2016. “If you’re innocent, why are you taking the Fifth Amendment?”

Ross and Seth explain that the public, media, and the President, all have a basic misimpression about the history and purpose of the Fifth Amendment. As the Supreme Court has recognized, one of the basic functions of this amendment is to protect the innocent and invoking one’s Fifth Amendment right against self-incrimination says nothing about guilt; however, the perception remains that only guilty people invoke this amendment.

The article outlines the foundational principles of the Fifth Amendment in regard to the criminal justice system and outlines the historical origins and Supreme Court precedent of the amendment. This includes information on *Hoffman v. United States* and *Grunewald v. United States*. The Supreme Court has long understood that many misperceive the history and purpose of the privilege against self-incrimination. Nevertheless, the misperception that invocation indicates guilt continues and impacts decision-making in response to grand jury subpoenas.

Regarding the Fifth Amendment in practice, the authors explain that the decision to invoke the Fifth Amendment should not be based on misplaced stigma, but rather on a reasoned analysis of its application to a witness’s potential testimony.

There is nothing inconsistent in a person asserting their Fifth Amendment right against self-incrimination, while at the same time proclaiming innocence and presumption of guilt by anyone, demonstrates a profound misunderstanding of the privilege, and our criminal justice system.

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