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BETWEEN A ROCK AND A HARD PLACE: ACCOMMODATING THE FIFTH AMENDMENT PRIVILEGE IN CIVIL FORFEITURE CASES

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INTRODUCTION

Civil asset forfeiture as a means to confiscate property used in connection with a crime or purchased with criminal proceeds has become a regular weapon in the federal prosecutor's arsenal.[1] Prosecutors apply the action in a wide variety of

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1. In its latest Annual Report, the Asset Forfeiture Program of the Justice Department explains the depth of the Government's commitment to pursuing asset forfeitures:

> The Department of Justice's Asset Forfeiture Program . . . is a nationwide law enforcement program that continues to be an effective and powerful weapon in the Department's fight against crime. More than two hundred forfeiture laws have been enacted to fight against organized crime, drug trafficking, money laundering, and other illegal activities. Thousands of federal prosecutors, investigators, property managers, and support staff are involved in the seizure and forfeiture process to achieve the Program's objectives. As part of the historical development, thousands of state and local law enforcement officials work cooperatively with their federal counterparts in the investigation and prosecution of criminal cases to strip criminals of their ill-gotten gains.

offenses but most often in drug cases.[2] The Supreme Court recently reaffirmed the constitutionality of the government practice of pursuing criminal charges while confiscating property through a separate civil forfeiture action based on the same offense.[3] The ability of the Government to pursue parallel civil forfeiture and criminal actions based on the same offense, however, creates a dilemma for property owners asserting their Fifth Amendment right against self-incrimination during civil discovery in the forfeiture action.[4]

To understand the dilemma, consider the following scenario. Imagine that "Joe," a drug dealer, owns a home that he purchased not with drug proceeds, but with the income from Joe's legitimate employment. If a government informant or undercover agent reports that Joe has used the home in connection with a drug offense, his use of the home to "facilitate" a drug offense makes the home subject to forfeiture.[5] This evidence alone suffices to support the filing of a civil

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1995-1996, U.S. DEPT OF JUSTICE ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE ASSET FORFEITURE, at 1.

2. The Department of Justice Asset Forfeiture Program states as its mission: "[T]he Program is committed to destroying criminal organizations by means of depriving drug traffickers, racketeers, and other criminal syndictes of their ill-gotten proceeds and instrumentalities of their trade...." *Id.* The emphasis on seizing drug-related assets is reflected in the number of assets seized by the Drug Enforcement Administration (DEA). In fiscal year 1995, the DEA seized a total of 13,869 items and completed a total of 7,061 administrative forfeitures, that is, without employing the judicial process. *See id.* at 3. Presumably, the United States Attorneys' Offices successfully handled by means of judicial forfeiture thousands more of the items seized by the DEA. The United States Attorneys' Offices successfully completed approximately 3,500 forfeiture cases in fiscal year 1995, a substantial percentage of which involved drug-related assets. *See id.* at 4. The government may administratively forfeit any property valued at $500,000 or less, unless the owner of the property challenges the forfeiture by properly filing a claim for the property. For discussions of administrative forfeitures, see JIMMY GURULE & SANDRA GUERRA, THE LAW OF ASSET FORFEITURE 209-227 (1998) (explaining the administrative forfeiture process).

3. *See* United States v. Ursery, 518 U.S. 267, 292 (1996) (holding that parallel civil forfeiture action and criminal action premised on same offense does not constitute a second punishment for the same offense under the Double Jeopardy Clause).

4. The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

5. The principal asset forfeiture provisions relating to drug offenses are found in 21 U.S.C. § 881. The provision that permits the forfeiture of real property reads: "All real property . . . in the whole of any lot or tract of land . . . which is used, or intended to be used . . . to commit, or to facilitate the commission of, a [controlled substance] violation [is subject to forfeiture]." Comprehensive Drug Abuse Prevention & Control Act of 1970, Pub. L. No. 98-473, § 306, 98 Stat. 1837, 2050 (codified at 21 U.S.C. § 881(a)(7) (1988)).

forfeiture action against the home. To prevent the forfeiture, Joe would file a claim for the property challenging the Government's evidence of forfeitability.

Further assume that Joe can show that the Government's allegations are wrong. Even if we assume that he may be guilty of some drug offense, he could testify that he did not use the home as the site of any of his drug dealings. If he testified about the actual location of the drug offense, however, Joe would waive his privilege not to reveal incriminating information. Thus, in order to defend his property he would, in effect, have to be the Government's star witness against himself in a subsequent criminal action. Since few would be willing to sacrifice their liberty to save their property, Joe will likely invoke the Fifth Amendment right to remain silent and refuse to provide responses to the Government's discovery requests.[6] If, instead, Joe felt free to testify in the forfeiture action without fear that his testimony would later be used against him, he could refute the Government's allegations regarding the use of the property, and he might avoid the loss of the home.

By invoking his Fifth Amendment privilege, Joe chooses not to participate in the discovery process. His invocation of the Fifth Amendment gives rise to the dilemma: what course should the court take to balance Joe's Fifth Amendment right and his right to defend his property against the Government's interests in seizing the home in order to deter illegal activity? Clearly, the Constitution gives Joe the right to remain silent, and the Supreme Court has said that the exercise of that right should not cause one "to suffer [a] penalty . . . for such silence."[7] If the court proceeds without Joe's testimony (assuming he has no other evidence besides his own testimony), the Government will almost automatically win.[8] Thus, Joe will have indeed paid a high price by invoking the privilege. On the other hand, the Government has an interest in going forward with a forfeiture

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6. The Federal Rules of Civil Procedure govern the procedure that must be followed in properly invoking the Fifth Amendment privilege. *See infra* notes 17-28 and accompanying text.

7. Malloy v. Hogan, 378 U.S. 1, 8 (1964); *see also* Spevack v. Klein, 385 U.S. 511, 515 (1967) (quoting Malloy).

8. *See infra* notes 103-04 and accompanying text (addressing the minimal burden of proof placed on Government as compared to the substantial burden of proof placed on claimants in civil forfeiture cases).

action when it has evidence that the defendant used the property for an illegal purpose. How can the court properly balance all of the parties' interests at once?

The answer may turn on the posture of the criminal investigation against Joe. There are two possibilities. First, the Government may pursue the forfeiture action and criminal charges at the same time. In such case, both the prosecution and the defense generally request a stay of discovery in the civil forfeiture action pending the resolution of the criminal case, and courts usually grant the stay.[9] The other possibility, however, arises when the Government has filed the civil forfeiture action without filing any criminal charges.[10] This second scenario poses the dilemma for the courts. If the civil case goes forward while the threat of criminal charges looms, Joe will have to remain silent in the civil forfeiture proceedings. Unable to defend his property, he will likely lose the home even though he actually did not use it illegally.

Moreover, civil forfeiture actions differ from most other civil actions in that they are brought by federal prosecutors, and they are based on the very same criminal activity that may be prosecuted in a separate criminal proceeding.[11] If the courts put forfeiture claimants in the position of choosing between self-incrimination and loss of property, claimants will almost always "choose" to forfeit the property. This creates an incentive for the Government to file civil forfeiture actions and to postpone the filing of criminal charges until the property has been forfeited

9. The Supreme Court has stated that a protective order postponing discovery until termination of the criminal action is the "appropriate remedy" in cases in which a party cannot respond to discovery requests without subjecting himself or herself to a "real and appreciable risk of self-incrimination." United States v. Kordel, 397 U.S. 1, 9-10 (1970).

10. There are many reasons why the prosecution might not file criminal charges at the same time as the forfeiture action. It is possible that the criminal investigation has not been completed with respect to other individuals involved with the claimant, and the Government is simply not prepared to file the charges. Alternatively, the Government may not have evidence of the property owner's involvement in the offense. The forfeiture laws permit the Government to seize property that was illegally used by someone other than the property owner. The burden then rests with the property owner to prove "innocent ownership."

Obviously, if all possible criminal charges are resolved prior to the filing of the civil action, then no Fifth Amendment concerns are presented.

11. Tax cases raise similar issues, as do regulatory cases such as "public welfare" offenses brought by the Government. *See infra* notes 98-101 and accompanying text.

if the circumstances so allow.[12] Claimants like Joe are rendered virtually defenseless against the forfeiture unless the courts find a remedy or an "accommodation" that balances the interests of both sides.

The Supreme Court has recognized that a claimant clearly has a legitimate privilege not to disclose relevant, self-incriminating information during the pre-trial discovery process.[13] The Court has not, however, established a clear procedure that protects both the property owner's Fifth Amendment rights and interest in the property. Indeed, most decisions permit the forfeiture action to proceed, and, if claimants like Joe fail to request an accommodation, courts even penalize the owner in various ways for invoking the privilege.[14] Although the outcome of such decisions can only be blamed on the failure of claimants to request an accommodation, imposing such penalties nonetheless undermines the basic protections of the Fifth Amendment privilege. On the other hand, a proper accommodation would also have to protect the Government's interest in confiscating allegedly forfeitable property. So, for example, simply dismissing the Government's forfeiture action would protect the property owner's rights but would not satisfy the Government's interests.

While providing a fair hearing to "drug dealers" faced with forfeiture may not be a compelling concern for many, good

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12. Of course, other factors will militate in favor of the prompt filing of criminal charges, such as the dangerousness of the individual or the possibility that the individual will abscond if informed of the Government's investigation. Considering the length of mandatory minimum sentences that apply to most federal drug offenses, it stands to reason that most individuals who learn of the Government's intent to prosecute them will try to flee capture. For discussions of the lengthy mandatory minimum sentences applicable in federal drug cases, see U. S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS (Aug. 1991); Marc Miller and Daniel J. Freed, *Editor's Observations: The Chasm Between the Judiciary and Congress Over Mandatory Minimum Sentences*, 6 FED. SENTENCING REP. 59 (1993).

Moreover, the Government's intentional use of civil discovery as a means of circumventing the criminal procedures for investigating crimes would be improper. *See* David A. Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 TUL. L. REV. 1389, 1426 (1997) (arguing in favor of rules restricting improper circumvention in tax cases); *accord Kordel*, 397 U.S. at 8-9 (finding Government's interrogatories not improper attempt to obtain information for use in criminal action).

13. *See* Kastigar v. United States, 406 U.S. 441, 444-45 (1972); *Kordel*, 397 U.S. at 13; McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

14. *See infra* notes 62-82 and accompanying text.

reasons exist for ensuring a fair process. Civil forfeiture can exact punishment that far exceeds that justified for the offense committed, and the protections of the Eighth Amendment's "excessive fines" clause offers virtually no protection.[15] Moreover, the forfeiture of a family home likely dislocates innocent third parties who have difficulty challenging the Government's action in their own right.[16]

This Article proposes that courts can accommodate the rights and interests of all parties in a civil forfeiture action by granting a one-year stay of discovery pending the filing of criminal charges. Once prosecutors file charges, a court can extend the stay pending the resolution of the criminal charges. If prosecutors do not file charges during the one-year period, the court should then request that the Government grant immunity to the claimant in order to accommodate the claimant's Fifth Amendment rights. Having given the Government ample time to commence criminal proceedings, there is no inequity in forcing the Government to choose between forfeiture and conviction. If the court does not grant immunity, there is no satisfactory way to protect the claimant's rights except by dismissal of the action. Under these circumstances, dismissing the action is the only equitable accommodation, and it is clearly within the court's discretion to do so. This proposal can be adopted either by Congress in the form of new procedural rules applicable in civil forfeiture cases or by the courts upon the request of claimants who invoke the Fifth Amendment.

Part I of the Article explains the dilemma created when a civil litigant invokes the Fifth Amendment privilege. It addresses the Supreme Court's jurisprudence on the Fifth Amendment and discusses the types of accommodations that courts have fashioned to remedy the dilemma. In Part II, the Article examines the situations in which defendants have invoked the privilege in civil forfeiture cases. This Part demonstrates the procedural oddities of civil forfeiture that exacerbate the dilemma as compared to other civil actions in which the privilege is invoked. It also addresses the various interests that courts should consider in fashioning remedies to the Fifth Amendment dilemma in parallel civil forfeiture and criminal

15. *See infra* notes 125-27 and accompanying text.
16. *See infra* note 124 and accompanying text.

cases. Part III sets forth the one-year stay proposal in greater detail. It also examines the variety of other possible accommodations that courts have used and demonstrates the inadequacy of each.

I. THE DILEMMA: INVOKING THE FIFTH AMENDMENT IN CIVIL CASES WHEN CRIMINAL CHARGES LOOM

The dilemma posed by the filing of civil charges against a person who may also be criminally prosecuted for the same underlying activity is not a new one. The courts have long exercised their authority to fashion various accommodations for the civil litigant's invocation of the Fifth Amendment. The following sections address the proper procedure for asserting the Fifth Amendment in civil discovery, the impact that the privilege has on the proceedings, and the various accommodations courts have fashioned to remedy the situation.

A. The Fifth Amendment Privilege in the Discovery Process

The Federal Rules of Civil Procedure require parties involved in a civil lawsuit to participate in pre-trial discovery.[17] The civil discovery rules require the parties in a civil forfeiture action to provide information about "any matter . . . which is relevant" to the allegations of criminal wrongdoing on the property.[18] The defendant may only avoid the compulsory discovery process by asserting a privilege.[19] As a general matter, parties may use one of three primary forms of discovery to obtain information during civil discovery: (1) a subpoena duces tecum may be issued requiring the production of documents; (2) a party can be required to respond to written interrogatories and requests for

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17. *See* FED. R. CIV. P. 26(b)(1).

18. *See id.* Federal Rule of Civil Procedure 26(b)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Id.*

19. The rules allow for discovery of "any matter, not privileged, which is relevant." *Id.*

admissions; and (3) witnesses can be subpoenaed to answer questions at an oral examination during a deposition.[20] In civil forfeiture cases, prosecutors may avail themselves of all three forms of discovery, depending on the need for information in the case.

Like any other civil litigant, a claimant in civil forfeiture can assert his or her Fifth Amendment right to remain silent in response to discovery requests that seek the claimant's own oral testimony or written responses.[21] For the privilege to apply, a claimant must demonstrate a "real and appreciable" threat of criminal liability to himself or herself.[22] The threat may not be "imaginary and unsubstantial."[23] On the other hand, 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."[24]

The court decides whether the witness's silence is justified and may require the witness to testify if "it clearly appears to the court that he is mistaken."[25] The Supreme Court in *Hoffman*

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20. The Federal Rules of Civil Procedure provide for the following discovery methods:
> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property . . . for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

See FED. R. CIV. P. 26(a)(5).

21. The Court has found that the Fifth Amendment does not protect a person's papers from the discovery process unless the act of producing them is itself incriminating. *See* Fisher v. United States, 425 U.S. 391 (1976) (outlining the "act-of-production" exception to the rule that the Government may, consistent with the Fifth Amendment, compel the production of documents).

22. In *Hoffman v. United States,* the Supreme Court explains that the courts should assess whether the threat of prosecution is real, but not by requiring the witness to reveal the information. 341 U.S. 479 (1951). Rather: "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question . . . or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 486-87.

23. Murphy v. Waterfront Comm'n, 378 U.S. 52, 61 n.7 (1964) (quoting English case of *The Queen v. Boyer*, 1 B. & S. 311, 330-31, which set forth the standard for asserting the privilege adopted in American law).

24. *Hoffman*, 341 U.S. at 486; *see also infra* note 29.

25. *Hoffman*, 341 U.S. at 486 (quoting Temple v. Commonwealth, 75 Va. 892, 899

v. United States[26] found that the witness need not "prove the hazard in the sense in which a claim is usually required to be established in court, [otherwise] he would be compelled to surrender the very protection which the privilege is designed to guarantee."[27] Instead, so long as it is "evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result," courts should sustain the privilege.[28]

The privilege not to answer questions calling for incriminating responses excuses an individual from participating in the discovery process to the extent that discovery requests would produce self-incriminating responses.[29] The privilege, thus, collides with the general principle of civil discovery that "the public . . . has a right to every man's evidence."[30] The liberal approach to discovery taken by the Federal Rules of Civil Procedure allows a great deal of information to be discovered by both sides.[31] Thus, a claimant's invocation of the Fifth Amendment in civil forfeiture impedes the Government's right to the free and open exchange of information contemplated by the Federal Rules.[32]

(1881)).

26. 341 U.S. 479 (1951).

27. *Id.* at 486.

28. *Id.* at 486-87.

29. The Supreme Court has held that the privilege "embraces those [responses] which would furnish a link in the chain of evidence needed to prosecute." Malloy v. Hogan, 378 U.S. 1, 11 (1964) (quoting *Hoffman*, 341 U.S. at 486-487). In *Malloy*, the party questioned properly invoked the privilege to not answer questions that might link him with others who were still engaged in criminal activity, thus, "furnish[ing] a link in a chain of evidence sufficient to connect [him] with a more recent crime" for which the statute of limitations had not run. *Id.* at 13. Answers to the questions posed might also be construed as a waiver of the Fifth Amendment with reference to his relationship to those persons. *See id.* at 13-14.

30. United States v. Bryan, 339 U.S. 323, 331 (1950); *see also* Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting *Bryan* in addressing psychotherapist and social worker privilege).

31. *See supra* note 18 and accompanying text (addressing the information that can be discovered under the Federal Rules of Civil Procedure).

32. As this Article will show, however, the dilemma is created by the Government's decision to file the civil forfeiture action before commencing criminal charges. *See infra* notes 105-07 and accompanying text. While there may be legitimate reasons for the decision, it is this decision nonetheless that gives rise to the Fifth Amendment dilemma.

The party's invocation also means that he or she cannot testify at trial in defense of the property. While the Fifth Amendment grants a party that privilege, the invocation of the privilege "has never been thought to be in itself a substitute for evidence," and a party is not relieved of the burden of adducing proof to defend the action.[33] If the party's only evidence available is the self-incriminating testimony shielded by the privilege, then an adverse judgment, summary judgment, or a directed verdict is appropriate.[34] In *Williams v. Florida*,[35] the Supreme Court explained that forcing a litigant to choose "between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination."[36] If a satisfactory accommodation for the privilege exists, however, such that the court can enable the invoking party to testify without fear of prosecution based on his or her testimony, then the court must accommodate the invocation of the privilege.[37]

In short, by invoking the Fifth Amendment, the claimant boldly asserts a privilege often characterized as a "shield" that protects the claimant against intrusions by the Government. At the same time, however, the claimant's decision to remain silent cripples his or her own defense. Raising the "shield" causes the "sword"—the claimant's affirmative defense—to be weakened, perhaps even destroyed.

In any case, the accommodation suggested in this Article protects both parties' interests.

33. United States v. Rylander, 460 U.S. 752, 758 (1983).

34. *See* United States v. 4003-4005 5th Ave., 55 F.3d 78, 83 (2d Cir. 1995) (citing WRIGHT, FEDERAL PRACTICE, § 2018, at 288).

35. 399 U.S. 78 (1970).

36. *Id.* at 84; *see also Rylander*, 460 U.S. at 758 ("We have squarely rejected the notion . . . that a possible failure of proof on an issue where the defendant had the burden of proof is a form of 'compulsion' which requires that the burden be shifted. . . .").

37. *See, e.g., 4003-4005 5th Ave.*, 55 F.3d at 83 (explaining that "upon a timely motion by the claimant, district courts should make special efforts to 'accommodate both the constitutional [privilege] against self-incrimination as well as the legislative intent behind the forfeiture provision' ") (quoting United States v. United States Currency, 626 F.2d 11, 15 (6th Cir. 1980)); United States v. 566 Hendrickson Blvd., 986 F.2d 990, 996 (6th Cir. 1993) (same).

B. Accommodating the Fifth Amendment Privilege

Clearly, a civil litigant can invoke the Fifth Amendment.[38] Less clear is what course the discovery process should take in such situations. Upon request, a trial court should try to accommodate the Fifth Amendment rights of a civil litigant.[39] Courts have identified two sources of authority for the power to fashion accommodations. First, a court may invoke its " 'inherent discretionary authority' to stay cases in order to manage its docket in the interest of justice and efficiency."[40] This inherent authority gives a court the discretion to fashion any type of remedy that the court deems "necessary."

The Supreme Court recently addressed the "inherent authority" of the courts "to protect their proceedings and judgments in the course of discharging their traditional responsibilities" in a civil forfeiture case.[41] In *Degen v. United States*,[42] the Court refused to apply the "fugitive disentitlement" doctrine under which courts had exercised their inherent authority to dismiss the claims of civil litigants who had fled the country as fugitives.[43] The Court "acknowledge[d] disquiet at the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored."[44] Nonetheless, the Court found the court-made rule striking the claims to be "arbitrary" and unnecessary. The Court wrote:

> There would be a measure of rough justice in saying [a fugitive] must take the bitter with the sweet, and participate in the District Court either for all purposes or none. But the justice would be too rough. A court's inherent power is

38. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (explaining that the Fifth Amendment permits an individual "not to answer official questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him").

39. *See supra* note 37.

40. *See* Digital Equip. Corp. v. Currie Enter., 142 F.R.D. 8, 11 (W.D. Mass. 1991) (citing Arden Way Assoc. v. Boosky, 660 F. Supp. 1494, 1496 (S.D.N.Y. 1987); Landis v. North Am. Co., 299 U.S. 248, 254-55 (1963)).

41. Degen v. United States, 517 U.S. 820, 823 (1996).

42. 517 U.S. 820 (1996).

43. *Id.* at 823.

44. *Id.* at 828.

> limited by the necessity giving rise to its exercise. There was no necessity to justify the rule of disentitlement in this case; to strike [the fugitive's] filings and grant judgment against him would be an excessive response to the concerns here advanced.[45]

One of the lessons of the *Degen* decision is that while the district courts do have broad inherent powers, those powers are not limitless, and they should not be used arbitrarily to deprive parties of their right to defend their property against attack.[46] *Degen* also underscores the importance of the right to defend one's property in civil forfeiture cases.

A second source of authority the courts have identified is found in Rule 26(c) of the Federal Rules of Civil Procedure. This provision permits courts to issue "protective orders" for "good cause shown" in order to protect "a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[47] The Rule lists eight types of protective orders that a court may issue.[48] This list gives the courts sufficient leeway to fashion almost any type of relief viewed as appropriate.[49] The usual accommodations either requested or provided in civil forfeiture actions include the use of a protective order to "seal" the record of the deposition or other discovery material, and staying the discovery until the statute of limitations has run or until the pending criminal litigation has been concluded.[50] The

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45. *Id.* at 829.
46. *See id.*
47. *See* FED. R. CIV. P. 26(c).
48. The Rule provides that a court may issue the following possible protective orders:
> (1) that the . . . discovery not be had; (2) that the . . . discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the . . . discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Id.

49. For example, the second type of protective order listed in Rule 26(c) permits the court to require that "discovery may be had only on specified terms and conditions." *Id.*
50. For a discussion of the inadequacy of the various accommodations employed by

court may also suggest that the Government offer use immunity to a claimant, but the court may not require the Government to do so as a condition of a protective order.[51] These accommodations are intended to eliminate the fear of self-incrimination that would otherwise exist. The court can rely on its inherent authority or Rule 26 to provide such accommodations of the Fifth Amendment privilege of a civil litigant.[52]

Courts have made clear that civil litigants must specifically request an accommodation by filing a motion under Rule 26;[53] the courts have no affirmative duty to take steps to protect a litigant's Fifth Amendment rights.[54] Thus, litigants bear the responsibility under this system for identifying and requesting the best accommodation. Even if the litigant does request an accommodation, however, the court has no duty to provide the accommodation requested under Rule 26(c).[55] Courts have broad

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courts in civil discovery, see *infra* notes 155-75 and accompanying text.

51. Granting immunity is an exercise of executive, not judicial, authority. *See infra* notes 143-54 and accompanying text.

52. Title 21 U.S.C. § 881(*i*) also provides for the right to request a stay of the civil forfeiture proceedings, but this right is given only to the prosecution. The fact that a stay under this provision is available only to the Government can create some confusion for claimants who may incorrectly believe they have no reciprocal right. What this provision of the civil drug forfeiture law accomplishes, however, is to grant the Government the right to stay the discovery in order to safeguard the secrecy of its criminal investigation. It can be argued that neither the inherent authority of courts nor Rule 26(c) give the Government that right. Since the Government chooses to bring the parallel proceedings, arguably the Government is in no position to argue under Rule 26(c) that a stay is needed to avoid "undue burden." Similarly, a court would be hard pressed to find that the "interests of justice and efficiency" require that the Government be permitted to bring a civil action only to request a stay of the discovery process. *See also infra* note 156 (suggesting that 21 U.S.C. § 881(*i*) should be amended to permit either party to request a stay of discovery in order to avoid the confusion of granting right only to prosecution).

53. *See* Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 223 (D. Kan. 1979) (holding letter raising privilege did not constitute proper motion for protective order staying taking of deposition under FED. R. CRIM. P. 26).

54. *See* Digital Equip. Corp. v. Currie Enter., 142 F.R.D. 8, 11 (W.D. Mass. 1991) (rejecting claimant's suggestion that trial court should have required Government to grant immunity or, alternatively, that the court should have granted a stay of the forfeiture case, because claimant failed to request either form of relief); United States v. $250,000 in U.S. Currency, 808 F.2d 895, 900-901 (1st Cir. 1987) (finding no violation of Fifth Amendment in failure to accommodate invocation of privilege because no accommodation requested).

55. In civil cases involving private parties, for example, courts have often denied requests for an accommodation for a "recalcitrant plaintiff who seeks to recover but at

discretion to fashion appropriate accommodations,[56] subject only to appeal for abuse of discretion.[57]

Arguably, the courts stand on different ground when they respond to requests for accommodations of constitutional rights, as opposed to those requests that seek Rule 26(c) protection from "embarrassment, oppression, or undue burden or expense."[58] In situations involving Fifth Amendment protection, courts may not be at liberty to deny requests for reasonable accommodations. Moreover, a court's authority under its inherent authority power or supervisory power may be broader than the authority granted under Rule 26(c). In *Shaffer v. United States*,[59] for example, the Fourth Circuit exercised its supervisory power to establish a procedure to stay civil proceedings in tax cases until the Government obtained a grant of use immunity for the witness or until the applicable statutes of limitations had run.[60] The court implied that staying discovery until the statute of limitations expires—which in effect immunizes the witness—is the appropriate response if the Government refuses to grant immunity because "the taxpayer is due effective protection of his Fifth Amendment privilege"[61]

On the other hand, litigants invoking the Fifth Amendment who fail to request accommodations will generally suffer affirmative penalties. To correct the perceived unfairness of requiring one party in a civil action to go to trial without the benefit of full discovery,[62] courts permit triers of fact to draw an

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the same time withholds on Fifth Amendment grounds information which might be material to the defense of the party sued." *Jones*, 466 F. Supp. at 225 (citing cases); *see also* Lyons v. Johnson, 415 F.2d 540, 542 (9th Cir. 1969); *accord* Brown v. Ames, 346 F. Supp. 1176, 1177 (D. Minn. 1972) (same, but granting stay of proceedings until after date when criminal proceedings expected to conclude).

56. *See Digital Equip. Corp.*, 142 F.R.D. at 11-12; FED. R. CIV. P. 26(C).

57. *See, e.g.*, United States v. U. S. Currency, 626 F.2d 11, 18 (6th Cir. 1980) (reversing dismissal and remanding for trial court to fashion an accommodation of Fifth Amendment privilege).

58. FED. R. CIV. P. 26(c).

59. 528 F.2d 920 (4th Cir. 1975).

60. *See id.* at 922.

61. *Id.*

62. One court explains the imbalance in this way:

> The scales of justice would hardly remain equal in . . . [cases in which one party invokes the Fifth Amendment and is excused from discovery practice] if a party can assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege . . . . If any prejudice is to come from such a situation, it must as

adverse inference from the other party's refusal to testify. The Supreme Court upheld this practice in *Baxter v. Palmigiano*[63] which involved a prison disciplinary hearing at which the prisoner invoked his right to remain silent.[64] Courts have applied this rule in civil forfeiture cases as well.[65]

Not all courts agree that the practice is constitutional in all contexts, however. Although not ruling on the constitutionality, the Second Circuit found that the use of adverse inference instructions in a civil forfeiture case involving a home when criminal charges are pending poses "a troubling question, given the severity of the deprivation at risk."[66]

Courts also may strike a claimant's affidavit in opposition to a summary judgment motion on the grounds that the person may not invoke the Fifth Amendment and at the same time submit denials to the allegations in an affidavit.[67] Claimants cannot have it both ways, shielding their testimony from scrutiny by invoking the Fifth Amendment while also offering denials of the facts the Government alleges. As the First Circuit explains, courts must strike such denials because to do otherwise would constitute "a positive invitation to mutilate the truth."[68]

On the other hand, an invoking party can still prevail in a civil lawsuit even if he or she does not testify by providing other

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a matter of basic fairness . . . be to the party asserting the claim . . . .
Lyons v. Johnson, 415 F.2d 540, 542 (9th Cir. 1969).

63. 425 U.S. 308 (1976).

64. *See id.* at 318; *see also* Campbell v. Gerrans, 592 F.2d 1054, 1058 (9th Cir. 1979) (suggesting court should have given adverse inference instruction rather than dismissing claim outright).

65. *See, e.g.*, United States v. Two Parcels of Real Property Located in Russell County, 92 F.3d 1123, 1129 (11th Cir. 1996); United States v. 900 Rio Vista Blvd., 803 F.2d 625, 629 n. 4 (11th Cir. 1986); *see generally* Comment, Shannon T. Noya, *Hoisted By Their Own Petard: Adverse Inferences in Civil Forfeiture*, 86 J. CRIM. L. & CRIMINOLOGY 493 (1996) (discussing adverse inferences).

66. United States v. 15 Black Ledge Drive, 897 F.2d 97, 103 (2d Cir. 1990); *see also* United States v. U.S. Currency, 626 F.2d 11, 16 (6th Cir. 1980) ("There may be occasions when the constitutional privilege totally precludes effectuation of the statutory forfeiture.").

67. *See* United States v. Parcels of Land, 903 F.2d 36, 42-44 (1st Cir. 1990); United States v. $61,433.04 in U.S. Currency and 1699 Bynwood Circle, 818 F. Supp. 135, 138 (E.D.N.C. 1993).

68. *Parcels of Land*, 903 F.2d at 43 (quoting Lawson v. Murray, 837 F.2d 653, 656 (4th Cir. 1988), in turn, quoting Brown v. United States, 356 U.S. 148, 156 (1958)).

evidence and other witness testimony.[69] A party cannot be precluded from offering other evidence simply because the party invokes the privilege with respect to his or her own testimony. In *Securities and Exchange Commission v. Graystone Nash, Inc.*,[70] the Third Circuit reversed a lower court decision precluding the defendants from offering other evidence.[71] The court found that the invocation of the privilege requires trial courts to "carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment."[72] Any accommodation a trial court provides must be "necessary" to balance those interests, and "[b]ecause the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side."[73] The court rejected the "severe remedy of barring defendants from presenting any evidence from third parties" as unnecessary.[74] Rather than "level the playing field," the preclusion order "tilted it strongly in favor of the [Government]."[75]

The failure to provide any evidence, however, may result in summary judgment for the Government unless it has failed to make a prima facie case of probable cause.[76] In *United States v. 566 Hendrickson*,[77] for example, the court granted the Government's motion for summary judgment.[78] The claimant had invoked the Fifth Amendment but, inexplicably, did not

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69. *See* City of Chicago v. Reliable Truck Parts Co., Inc., 822 F. Supp. 1288, 1293-94 (N.D. Ill. 1993) (holding defendants may rely on evidence other than privileged testimony and may not be precluded from offering evidence because of invocation of privilege).

70. 25 F.3d 187 (3rd Cir. 1994).

71. *See id.* at 194. *But see* S.E.C. v. Cymaticolor Corp., 106 F.R.D. 545, 549-50 (S.D.N.Y. 1985) (ordering total preclusion if party asserted privilege with regard to basis of his defenses and denials).

72. *Graystone Nash, Inc.*, 25 F.3d at 192.

73. *Id.*

74. *Id.* at 193. *See generally* Frances S. Fendler, *Waive The Fifth or Lose The Case: Total Preclusion Orders And The Civil Defendant's Dilemma*, 39 SYRACUSE L. REV. 1161 (1988) (arguing that total preclusion orders violate both the Fifth Amendment and the Due Process right to be heard).

75. *Graystone Nash, Inc.*, 25 F.3d at 193.

76. *See, e.g.*, United States v. 566 Hendrickson Blvd., 986 F.2d 990, 996-97 (6th Cir. 1993).

77. 986 F.2d 990 (6th Cir. 1993).

78. *See id.* at 999

seek any accommodation such as a stay of discovery or a grant of immunity, nor did the claimant show what his testimony would prove if offered or explain why other witnesses were not called.[79] If the claimant does request an accommodation of the privilege, however, it is error for a court to instead grant summary judgment in the Government's favor.[80]

Sometimes claimants who invoke the privilege but fail to seek an accommodation will change their mind about invoking the privilege when they realize that they will lose their property. Courts have rejected "eleventh hour" waivers of the Fifth Amendment privilege in these situations, however.[81] As the First Circuit said, "[a] defendant may not use the [F]ifth [A]mendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial."[82]

The courts may not, however, simply dismiss or strike a claim because of the invocation of the Fifth Amendment.[83] While the refusal to respond to legitimate discovery requests can result in sanctions imposed by the court, including the sanction of dismissal,[84] the proper invocation of the Fifth Amendment does

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79. *See id.* at 996. For a discussion of the reasons one frequently finds ineffective lawyering in civil forfeiture cases, see *infra* notes 162-75 and accompanying text.

80. *See* United States v. 4560 Kingsbury Rd., 16 F.3d 1222, 1222 (6th Cir. 1994).

81. *See, e.g.,* United States v. 4003-4005 5th Ave., 55 F.3d 78, 85 (2d Cir. 1995) ("[L]itigant's request to waive comes only at the 'eleventh hour' and appears to be part of a manipulative, 'cat-and-mouse approach' to the litigation . . . ."); United States v. Parcels of Land, 903 F.2d 42, 42-45 (1st Cir. 1990) (approving decisions to strike affidavit of party who had invoked Fifth Amendment privilege in forfeiture case and to reject last-minute waiver of privilege); United States v. Talco Contractors, Inc., 153 F.R.D. 501, 506 (W.D.N.Y. 1994) (addressing impermissibility of "eleventh hour" waivers).

82. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 577 (1st Cir. 1989).

83. *See, e.g.,* SEC v. Graystone Nash, Inc., 25 F.3d 187, 191 (3d Cir. 1994) (explaining that "dismissal of an action or entry of judgment as a sanction for a valid invocation of the privilege during discovery is improper"); United States v. One 1987 BMW 325, 985 F.2d 655, 657, 661-62 (1st Cir. 1993) (striking appellant's claim and rejecting claimant's requests for a stay pending outcome of criminal proceedings or, in the alternative, sealing the record); Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1087-89 (5th Cir. 1979) (holding district court erroneously ordered Wehling to answer questions at deposition or suffer dismissal; remanding to enter protective order staying discovery until expiration of statute of limitations on criminal charges); Campbell v. Gerrans, 592 F.2d 1054, 1058 (9th Cir. 1979) (dismissing action because of invocation of privilege makes assertion of privilege too "costly"). *But see* Lyons v. Johnson, 415 F.2d 540, 541-42 (9th Cir. 1969) (holding party's refusal to answer any questions in deposition on Fifth Amendment grounds justifies dismissal of that party's claim).

84. *See, e.g.,* United States v. 2204 Barbara Lane, 960 F.2d 126, 129-30 (11th Cir. 1992)

not constitute an abuse of the discovery process.[85] Nor should a court deem an invoking party's refusal to answer requests for admissions to be an admission.[86] In short, dismissal is a "remedy of last resort" that cannot be imposed as an automatic sanction against a claimant who has invoked the Fifth Amendment privilege.[87] Automatic dismissal would contravene the Fifth Amendment by making its invocation too "costly"[88] and would constitute an abuse of the court's discretion.[89] In sum, the courts have the authority to accommodate a civil litigant's assertion of the Fifth Amendment privilege if so requested. The failure to request an accommodation—which occurs in more cases than one might imagine—has prompted courts to give an adverse inference instruction to correct the perceived prejudice to the opposing party who is unable to obtain the privileged information. In the final analysis, whether a party invokes the privilege or not, the party must carry its burden of proof to prevail. Thus, an invoking party must put on other evidence to prevail.

II. SPECIAL ISSUES IN CIVIL FORFEITURE CASES

One might wonder whether the Fifth Amendment dilemma in civil forfeiture cases is any different from that in other types of civil cases. In fact, many of the same issues arise any time a civil litigant invokes the privilege. However, the forfeiture cases present issues that make the dilemma even more precarious for

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(granting summary judgment when claimant failed to respond to request for admissions, thus they were deemed admitted; Fifth Amendment not asserted even though criminal case still pending); United States v. $1,322,242.58, 938 F.2d 433, 439-41 (3d Cir. 1991) (dismissing claims as sanction for failure to respond to discovery requests and finding Fifth Amendment asserted in untimely manner after dismissal).

85. The courts have rejected "blanket" assertions of the Fifth Amendment and require claimants to respond to discovery requests individually. Thus, if claimants do not properly invoke the Fifth Amendment, the courts will treat them as simply having failed to respond to discovery requests. *See, e.g.*, North River Insurance Company v. Stefanou, 831 F.2d 484, 486 (4th Cir. 1987).

86. *See* Arizona v. Ott, 808 P.2d 305, 311-313 (Ariz. Ct. App. 1990) (finding requests for admissions under Arizona Rules of Civil Procedure should not be deemed as admitted if witness properly invokes Fifth Amendment privilege).

87. *Wehling*, 608 F.2d at 1087 n.6.

88. *Id.* at 1087 (citing Malloy v. Hogan, 378 U.S. 1 (1964)); *see also Campbell*, 592 F.2d at 1057-58.

89. *See Campbell*, 592 F.2d at 1058.

the litigants in this type of case than those in other cases. The closest analogies are those other civil cases that are brought by the Government rather than by a private individual or organization. Some examples include tax cases, regulatory cases involving health care fraud, and environmental cases.[90] The forfeiture cases present the dilemma in an even more poignant manner because of the unique procedural rules that put the claimant in a far worse position than defendants in other civil cases brought by the Government.

A. The "Quasi-Criminal Nature" of Civil Forfeiture Procedure

The dilemma posed by a party's invocation of the Fifth Amendment in a civil action is exacerbated in civil forfeiture cases because of the "quasi-criminal nature" of civil forfeiture. In the early case of *Boyd v. United States*,[91] the Supreme Court explicitly recognized this "quasi-criminal nature,"[92] but since

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90. For an article that examines the "procedural intersection" that occurs when the same parties are involved in both the civil and criminal actions involving the same underlying conduct, in other words, actions involving the Government against the same party, *see* Hyman, *supra* note 12. Professor Hyman's article focuses mainly on tax cases and considers the problem of civil litigants—either the Government or the defendant—using the civil discovery process to gain an advantage in the criminal action. *See id.*

91. 116 U.S. 616 (1985).

92. *See id at* 634. The Court explained:

> We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal . . . . If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one . . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment . . . and . . . of the Fifth Amendment [right against self-incrimination].

Id. at 633-34.

More recently, in *Austin v. United States*, the Court acknowledged that civil forfeitures have historically been viewed as exacting punishment and found that civil drug asset forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7), for conveyances and real property, serve primarily a punitive purpose. *See* 509 U.S. 602 (1993). Thus, the Court held that the Excessive Fines Clause of the Eighth Amendment should limit civil drug asset forfeitures. *See id.* at 622. The Court determined that the seizure of Austin's home

then has wavered between affirming the "civil" label of civil forfeiture action and acknowledging the quasi-criminal nature of the action.[93] Most recently, in *United States v. Ursery*,[94] the Supreme Court held that "[*i*]*n rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute punishment under the Double Jeopardy Clause."[95] The Court relied on its earlier decision in *United States v. One Assortment of 89 Firearms*.[96] In *89 Firearms*, the Court gave three reasons for finding civil forfeitures to be indeed "civil": (1) the fact that "actions in rem have traditionally been viewed as civil proceedings;" (2) the fact that forfeiture laws reach a broader range of conduct than their criminal analogues (in that property

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and legitimate business enterprise constituted punishment for a crime and therefore should be subject to the limitations of the Eighth Amendment's prohibition on "excessive fines." *See id.* The Court refused to reconsider the "civil" label attached to forfeiture actions, finding such a determination to be irrelevant to an excessive fines clause analysis. *See id.* at 610. The pivotal finding was instead that the drug asset forfeitures at issue in *Austin* serve primarily a punitive purpose. *Id.* at 620-21. The majority stated that the "dramatic variations in the value of conveyances and real property forfeitable under §§ 881 (a)(4) and (a)(7) undercut..." any argument that these constitute a form of liquidated damages. *Id.* at 621. Thus, while not declaring civil forfeiture to be "criminal" in fact, the Court did recognize that it imposes "punishment" for a crime. Similarly, on several occasions, the Court has applied other constitutional provisions to civil forfeiture. *See* United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (holding due process requires pre-seizure adversarial hearing in real property forfeiture cases); United States v. $8,850 in U.S. Currency, 461 U.S. 555, 556 (1983) (holding Fifth Amendment speedy trial guarantee applies to civil forfeiture); United States v. United States Coin & Currency, 401 U.S. 715, 722 (1971) (finding Fifth Amendment privilege against self-incrimination applies in civil forfeiture); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965) (applying Fourth Amendment exclusionary rule to state civil forfeiture).

93. *Compare* Dobbins's Distillery v. United States, 96 U.S. 395, 399 (1877) (stating civil forfeiture is civil because it "d[id] not involve the personal conviction of the wrong-doer for the offense charged... [and] the conviction of the wrong-doer [had to] be obtained, if at all, in another and wholly independent proceeding"), *and One 1958 Plymouth Sedan*, 380 U.S. at 700 (explaining that "[a] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense").

94. 518 U.S. 267 (1996).

95. *Id.* at 278. In so holding, the Court distinguished three of its prior decisions that the lower courts had interpreted as signaling that civil forfeiture should be viewed as punishment: Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994); Austin v. United States, 509 U.S. 602 (1993); and United States v. Halper, 490 U.S. 435 (1989).

96. 465 U.S. 354 (1984).

"intended" to be illegally used is forfeitable); and (3) the fact that civil forfeiture furthers remedial aims.[97]

Whatever its label, however, the civil forfeiture action has many of the traits of a criminal action. Federal prosecutors bring the actions on behalf of the Government, and criminal defense attorneys usually represent the property owners.[98]

Technically, the civil forfeiture action is an *in rem* action brought against the property based on the fiction that the property is "guilty" of facilitating an offense or having been purchased with criminal proceeds.[99] In reality, the Government is accusing the owner of either using or permitting the use of the property in relation to an offense, or purchasing it with the proceeds of an offense.[100] Thus, the action is premised on the

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97. *89 Firearms*, 465 U.S. at 364.

98. It is not possible to provide empirical evidence for the statement that criminal defense attorneys handle most civil forfeiture cases. Other evidence suggests that this is so. The Criminal Justice Act, which outlines the parameters of the role of appointed counsel in criminal cases, permits the appointed attorney to represent the client "at every stage of the proceedings . . . , including ancillary matters appropriate to the proceedings." 18 U.S.C. § 3006A(c). Thus, appointed counsel in criminal cases are authorized to represent their clients in handling their civil forfeiture cases as well. It also stands to reason that an individual would hire a criminal defense attorney when faced with a forfeiture action premised on the commission of a crime.

The intense interest of the National Association of Criminal Defense Lawyers in testifying in favor of a new law requiring the appointment of counsel for indigents in civil forfeiture cases is further evidence that criminal defense lawyers, and not attorneys with a primarily civil practice, handle civil forfeiture cases. *See* Statement of David B. Smith on behalf of National Association of Criminal Defense Lawyers before Committee on the Judiciary, U.S. House of Representatives, 1997 WL 316521 (F.D.C.H.).

99. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684-85 (1974). The Supreme Court first explained the *in rem* nature of the action in United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844). The Court stated that, "[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner." *Id.* at 233; *see also Calero-Toledo*, 416 U.S. at 680-684 (same).

The Court has re-affirmed the "guilty property" legal fiction on several occasions, including its recent decisions in *United States v. Ursery*, 518 U.S. 267, 275 (1996), and *Bennis v. Michigan*, 516 U.S. 412, 448 (1996).

100. The most commonly used forfeiture provisions are those applicable to drug offenses. Under 21 U.S.C. § 881(a)(7), the Government may obtain forfeiture of all real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a federal narcotics offense. Section (a)(6) provides for the forfeiture of drug proceeds. It provides for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . [and] all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation" of federal drug law. 21 U.S.C. § 881(a)(6)

commission of a criminal offense. In most respects, the action looks like a criminal case, but it is not a criminal case.[101] The parties and the basis for the action are both the same as in the criminal case, yet it is a "civil" action.

Second, although the forfeiture action is considered civil, it has procedural rules all its own that distinguish it from an ordinary civil case between private parties. Since the Government files the action *in rem*, against the property rather than the individual, the owner is not a "defendant." Rather, the owner files as an intervenor who has a claim to the property.[102] Whatever form the litigation may take, the fact remains that the owner/claimant stands in the same position as a defendant in a civil case. Unlike other civil cases, however, the rules regarding burdens of proof place the greater onus on the owner/claimant/"defendant." The Government's burden of proof is lower than that in other civil cases. The Government need only show "probable cause" to prevail in a forfeiture case,[103] whereas in the "general run of issues in civil cases," the plaintiff must produce evidence to prove its case "by a preponderance of [the] evidence."[104] In forfeiture actions, once the Government has met its meager probable cause evidentiary threshold, the burden shifts—and increases—requiring the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture. Thus, the forfeiture claimant faces a more compelling Fifth Amendment dilemma than other civil

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(1998). Section (a)(4) provides for the forfeiture of vehicles and other "conveyances." It makes the following subject to forfeiture: "all conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances]." A wide variety of other offenses, such as money laundering, customs and immigration violations, income tax violations, and illegal gambling, also trigger civil forfeiture. *See* GURULE & GUERRA, *supra* note 2, §§ 6-2 to 6-8.

101. Ordinarily, if it looks like a duck, walks like a duck, and quacks like a duck, then it is a duck. The Supreme Court in *Ursery*, however, insists that civil forfeiture is not a duck, that is, it is not "criminal." *See supra* notes 94-95 and accompanying text.

102. *See, e.g.*, United States v. One 1985 Mercedes, 917 F.2d 415, 419 (9th Cir. 1990) ("The owner-claimant is neither defendant nor plaintiff, but an intervenor who seeks to defend his or her right to the property against the government's claim.").

103. *See* GURULE & GUERRA, *supra* note 2, § 4-1(b), at 113-114 (discussing probable cause standard). "Probable cause' refers to 'reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." United States v. $4,255,000, 762 F.2d 895, 903 (11th Cir. 1985).

104. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 339, at 956 (3d ed. 1984).

claimants involved in a parallel criminal proceeding for three primary reasons: (1) the Government is the party bringing the civil action; (2) the Government is already involved in actively investigating the owner's criminality; and (3) the civil action is premised on exactly the same criminal offense that prompts the invocation of privilege.

First, the fact that the Government initiates the civil forfeiture action means that it has created the situation that predictably presents the Fifth Amendment dilemma.[105] Thus, courts should give less weight to the Government's interests in balancing them against those of the claimant because the Government has made a decision to file the forfeiture action without bringing criminal charges, hence, creating the dilemma. As the Second Circuit stated, "trial courts should not disregard the fact that the plaintiff in forfeiture actions is the Government, which controls parallel criminal proceedings in federal court and also possesses the power to grant some forms of immunity."[106] The Third Circuit has also taken note of this problem and suggests that "special consideration must be given to the plight of the party asserting the Fifth Amendment."[107]

Second, the Government can only bring a forfeiture action if it has gathered evidence that an individual has used the property to facilitate the commission of a crime or that the property represents the proceeds of crime earned by an individual.[108] Clearly, the Government has an active interest, and is likely to have an on-going investigation regarding the same alleged criminal activity that is the basis for the forfeiture action. In other civil cases, the threat of prosecution may be remote, and the nature of the crimes involved may not be known to anyone except the invoking party. In sum, the danger of self-incrimination is acute since prosecutors with a keen interest in bringing charges are present in the courtroom.

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105. *See generally* Hyman, *supra* note 12, at 1448-53 (suggesting that courts adopt a rule that restricts a litigant's ability to take advantage of the "procedural intersection"—such as differences in discovery rules—that exists when civil and criminal actions are filed against the same party for the same underlying conduct, as in tax cases).

106. United States v. 4003-4005 5th Ave., 55 F.3d 78, 83 (2d Cir. 1995).

107. SEC v. Graystone Nash, Inc., 25 F.3d 187, 194 (3d Cir. 1994).

108. *See supra* note 100.

Third, since the forfeiture action is premised on the proof of a criminal offense, it creates a Fifth Amendment dilemma in almost *every* case unless the criminal charges are concluded first. Other civil actions, for example breach of contract or employment discrimination, usually are not premised on the commission of acts that constitute crimes. Private parties bringing civil lawsuits may not have any reason to know that the persons they sue will invoke the Fifth Amendment, whereas the Government can foresee that a claimant will invoke the privilege. Discussing tax refund cases that raise problems similar to those in forfeiture cases, one court points out that there is "of course the danger that the [action] has been instituted to coerce the taxpayer to incriminate himself with respect to a potential criminal prosecution."[109] Although perhaps a remote possibility (since prosecutors have many reasons to file criminal charges before or concurrently with forfeiture actions),[110] the same danger exists in forfeiture cases. Since every forfeiture action brought before the filing of criminal charges has the potential to present the Fifth Amendment dilemma, Congress or the courts need to fashion an appropriate accommodation.

Moreover, the fact that the Government bears the minimal burden of proof of probable cause while the claimant bears the burden of proof by a preponderance of the evidence makes the need for the claimant to present evidence all the more important.[111] An unbalanced presentation of evidence virtually guarantees that the claimant will lose. As compared to defendants in other civil actions when the plaintiff has to prove his case by a preponderance of the evidence, the forfeiture claimant is worse off if the action goes forward without the claimant's testimony.

This discussion demonstrates the stark unfairness of imposing what effectively amounts to a penalty on a claimant for invoking the right to silence. When the Government has complete control over the filing of both civil and criminal actions, and the Government has chosen a course that

109. Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 225 (D. Kan. 1979).
110. *See supra* note 12 (discussing reasons prosecutors may file criminal charges first).
111. *See supra* notes 103-04 and accompanying text.

predictably creates the dilemma, the claimant should not be the party penalized.

B. The Importance of Accommodating the Privilege in Civil Forfeiture Cases

The current practices courts have employed when faced with forfeiture claimants who invoke their Fifth Amendment privilege—or who mistakenly fail to invoke it—leave much to be desired.[112] On the one hand, courts should fashion remedies that "are necessary to prevent [the Government] from being unduly prejudiced"[113] by the invocation. On the other hand, the remedy should not place an inordinate cost on a claimant asserting his or her constitutional right to silence. Since competing constitutional and procedural rights are at stake, courts should find a way to balance the interests of the parties.[114] Perhaps the courts misunderstand the values protected by the Fifth Amendment and, so, do not appreciate the importance of protecting those values. One may reasonably assume that a claimant who invokes the Fifth Amendment is guilty of the offenses the Government alleges in seeking forfeiture. Guilty people do not engender much sympathy as a general matter. Indeed, it is likely true that the claimant is guilty of some offense, but the offense may not be the offense that the Government alleges. Without the claimant's testimony, there is no way of knowing whether the offense the claimant may have committed makes the property forfeitable or not. In the hypothetical example of Joe the drug dealer, Joe may be guilty of *some* offense, but not necessarily an offense that makes the property forfeitable.[115] If he invokes the privilege, the trier of

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112. As one district court explains: "[T]he Court in a civil case may exercise its discretion so that a defendant need not find himself in the position in which the Kordel and Baxter Courts have said he constitutionally may be put." Brock v. Tolkow, 109 F.R.D. 116, 119 (E.D.N.Y. 1985) (referring to United States v. Kordel, 397 U.S. 1, 11 (1970) (finding compelled testimony not to violate Fifth Amendment where party did not invoke the privilege), and Baxter v. Palmigiano, 425 U.S. 308, 320 (1976) (permitting an adverse inference to be drawn from invocation of privilege in prison disciplinary hearing)).

113. SEC v. Graystone Nash, Inc., 25 F.3d 187, 194 (3d Cir. 1994).

114. *See, e.g.*, Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1088 (5th Cir. 1979) (applying balancing-of-interests approach); *Graystone Nash, Inc.*, 25 F.3d at 194 (same).

115. *See supra* note 5 and accompanying text.

fact will never hear the testimony he would have given had he felt free to do so. Moreover, speculation about the claimant's guilt or innocence should be beside the point as far as the courts are concerned. The temptation to permit the expeditious forfeiture of property belonging to "drug dealers" may lead courts to give short shrift to Fifth Amendment concerns. Such attitudes may have strong superficial appeal (particularly to those not schooled in the law), but they clearly overlook the very purpose of the Fifth Amendment privilege. As the Supreme Court explained in *Miranda v. Arizona:*

> [T]he privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values.... [T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,'... to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[116]

The Framers of the Constitution designed the Fifth Amendment precisely for the purpose of shielding individuals who may be guilty from the "cruel trilemma of self-accusation, perjury or contempt."[117] The privilege shows "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' "[118]

The innocent do not usually need such protection. As Justice Scalia has noted, "[a]n innocent person will not find himself in a similar quandry... [because] the innocent person lacks even a 'lemma.' "[119] A forfeiture claimant's invocation of the privilege

116. 384 U.S. 436, 460 (1966).

117. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

118. *Id.* (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 391 (1955)).

119. Brogan v. United States, 118 S. Ct. 805, 810 (1998) (quoting Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets,* 67 U. COLO. L. REV. 989, 1016 (1996)). *But see Murphy,* 378 U.S. at 55 ("[W]hile sometimes 'a shelter

may cause many people, including judges, to presume that the claimant is "hiding" inculpatory evidence. But protecting those suspected of crimes from the "cruel trilemma" is precisely what the Fifth Amendment contemplates. The Constitution places the entire burden of proving criminal cases on the Government and permits individuals to remain silent in the face of Government accusations.[120]

Courts are obliged to protect the constitutional rights of litigants in order to safeguard the values that underlie those constitutional protections. The Constitution gives all individuals the right not to speak and the invocation of this privilege does not give rise to a presumption of guilt as a matter of law. To penalize forfeiture claimants for their silence by confiscating their property—through a process that places the heavier burden on the claimant to disprove the Government's allegations[121]—in effect creates a presumption of guilt and makes the invocation of the Fifth Amendment too "costly."[122] The failure to accommodate the Fifth Amendment creates "an element of governmental taking of property without compensation or due process which is absent in the typical civil case."[123]

One may have little sympathy for a drug dealer who erroneously loses his home because he exercises his right to remain silent. Why should we care about fairness for drug dealers? One may also wonder how this situation is any different than any other civil case in which a defendant invokes the Fifth Amendment? In fact, good reasons exist for fashioning special rules for the "drug dealing" property owner who faces the civil forfeiture of property. For one thing, the confiscation of property, particularly family homes, exacts harsh punishment

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to the guilty,' is often 'a protection to the innocent.' ") (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)).

120. U.S. CONST. amend. V.

121. *See supra* notes 103-04 and accompanying text.

122. Griffin v. California, 380 U.S. 609, 614 (1965). The Supreme Court has noted the coercive nature of requiring a person to give incriminating testimony or suffer a forfeiture of property. United States v. Kordel, 397 U.S. 1, 14 (1970) ("The Court of Appeals was correct in stating that 'the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property.' ").

123. Jones v. B.C. Chistopher & Co., 466 F. Supp. 213, 225 (D. Kan. 1979).

on innocent family members who may live in the home.[124] Thus, measures taken to minimize erroneous decision making redound not only to the benefit of guilty property owners, but to others who may be innocent. The guilty party should, of course, face criminal punishment for drug offenses committed, notwithstanding the fact that the property is saved from forfeiture.

Another reason to minimize the risk of error in civil forfeiture is the fact that the process permits confiscation of property without (much) regard for the proportionality of the punishment to the offense. Imagine that Joe lives in a fancy home worth $1,000,000—again, purchased with legitimately earned income. Under the civil forfeiture laws, even a minor drug offense on the property makes the home subject to forfeiture.[125] The excessive fines clause of the Eighth Amendment prohibits disproportionate forfeitures, but the standard for disproportionality is such that the forfeiture of a million dollar home for a minor offense would pass muster.[126] Most courts have judged the question of proportionality by comparing the value of the property to the very high fines that may attend criminal conviction.[127] If we as a society have decided that patently disproportionate punishment of drug dealers is acceptable, at least we should ensure that we only exact such

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124. Elderly relatives and minor children will not have standing to contest the forfeiture since they are not usually the owners of the home. *See* Sandra Guerra, *Family Values? The Family as an Innocent Victim of Civil Drug Asset Forfeiture,* 81 CORNELL L. REV. 343, 382 (1996). Innocent spouses do have standing as co-owners of the property, but the test for innocence in forfeiture cases is such that they rarely prevail. *See id.* at 376-82.

125. 21 U.S.C. § 881(a)(7) (1988).

126. The Supreme Court determined that the Eighth Amendment's proscription against "excessive fines" applies to all forfeitures that have a punitive purpose. *See* United States v. Austin, 509 U.S. 602 (1993). The lower courts have developed various tests for applying the rule in *Austin,* but, generally, forfeitures will be upheld as not excessive if the value of the property is less than the maximum fine allowed under the criminal statute. GURULE & GUERRA, *supra* note 2, at 265-83 (1998) (discussing the decision in *Austin* and its progeny). Most drug offenses will be prosecuted under 21 U.S.C. § 841, particularly those that are less serious. Section 841 carries a statutory maximum fine of $2 million. Thus, the forfeiture of properties worth less than $2 million is found to be within the range of punishment that Congress has determined to be acceptable, and, in turn, not "excessive" for Eighth Amendment purposes. *Id.* § 11-3(c), at 281-82.

127. *Id.*

punishment when it is actually deserved, that is, when the property in fact has been illegally used.

One might wonder whether the failure to accommodate the privilege in civil forfeiture cases is unconstitutional in that it forces a claimant to choose between two constitutional rights—the right against self-incrimination and the right not to be deprived of property without due process of law.[128] If this were so, both the Fifth Amendment and the due process right to be heard would be violated. A constitutional challenge is unlikely to prevail since courts have neither totally precluded parties from participating in the action orders,[129] nor have they automatically granted summary judgment against the invoking party.[130] The use of either total preclusion or summary judgment in response to the proper invocation of the privilege would be unconstitutional. When a claimant loses his or her case because the invocation of the privilege prevents the claimant from testifying, this is viewed as a "failure of proof" for the invoking party, and the Supreme Court has held that this does not constitute the kind of "compulsion" prohibited by the Fifth Amendment.[131] The failure of proof situation is distinguished from that in which a court prohibits the party from putting on other evidence—as would be the case with a total preclusion order—and that in which the court automatically grants summary judgment because of the invocation.

On the other hand, as demonstrated above, the unfairness of non-accommodation is greater in civil forfeiture cases than other civil cases because claimants bear a heavier burden of proof and because the Government controls both the civil and

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128. *See, e.g.*, Fendler, *supra* note 74, at 1180-85 (arguing that total preclusion orders that prohibit a party invoking the Fifth Amendment to present other evidence violate the due process right to be heard and the Fifth Amendment).

129. United States v. Talco Contractors, Inc., 153 F.R.D. 501, 508 (W.D.N.Y. 1994).

130. The Eleventh Circuit has stated that the Fifth Amendment is violated when "the invocation of the privilege must result in an adverse judgment, not merely the loss of his 'most effective defense.' " United States v. Premises Located at Route 13, 946 F.2d 749, 756 (11th Cir. 1991) (quoting Pervis v. State Farm Fire & Cas. Co., 901 F.2d 944 (11th Cir. 1990)). Thus, the violation occurs only in cases of "automatic entry of summary judgment." *Id.*

131. United States v. Rylander, 460 U.S. 752, 758 (1983) (failure of proof as a result of invocation of privilege is not "compulsion"); *Talco Contractors*, 153 F.R.D. at 508 (finding no due process or Fifth Amendment violation for failure to dismiss civil action if invocation of privilege by defendant brings about failure of proof for defendant).

potential criminal proceedings—the Government creates the dilemma every time it arises. Fortunately, the dilemma created when the Government brings a civil forfeiture action before parallel criminal charges are concluded can be eliminated by fashioning a suitable remedy, as the next section discusses.

III. A PROPOSAL FOR ACCOMMODATING THE FIFTH AMENDMENT RIGHTS OF CIVIL FORFEITURE CLAIMANTS

No easy solution to the Fifth Amendment dilemma in civil forfeiture cases exists. Ideally, Congress should create new procedural rules to guide courts in handling these types of cases. Otherwise, courts can act within their discretion to fashion their own remedies to this dilemma.[132] The following sections outline a proposal for accommodating the forfeiture claimant's Fifth Amendment privilege. They also address the inadequacies of other approaches that courts have tried.

A. The Proposal: A One-Year Stay of Discovery Followed By Use Immunity or Dismissal

This Article proposes a two-part solution to the Fifth Amendment dilemma. First, courts should issue a one-year stay of the discovery proceedings to allow the Government ample time to complete its investigation and file criminal charges. Second, after the one-year time period expires, if the Government has filed criminal charges against the claimant, the court can enter a second stay of discovery pending the resolution of the criminal charges. If the Government has not filed criminal charges, the court should request that the Government grant use immunity to the claimant. If the Government refuses to grant use immunity, the court should dismiss the forfeiture action. This approach carefully balances the interests of both parties. The one-year stay protects the Government's interests because it gives the Government ample time to decide whether to file charges based on a thorough investigation. In the meantime, the claimant is not forced to choose between defending the property and incriminating him or herself. After the year expires, the dilemma is resolved either

132. *See supra* notes 38-52 and accompanying text.

by the Government's decision to grant immunity to the claimant, which permits the claimant to speak freely in defense of the property, or by the court's dismissal of the forfeiture action.

1. Staying the Discovery Proceedings for a Finite Period

It is clear that Federal Rule of Civil Procedure 26(c) and the courts' inherent authority give courts the discretion to stay discovery in a civil case for a finite period of time.[133] Indeed, courts have the authority to grant a stay for an indefinite time. The Supreme Court in *United States v. Kordel*[134] addressed the issuance of an indefinite stay in cases in which parallel criminal charges were already pending.[135] In such a case, the Court stated that "the appropriate remedy [to the Fifth Amendment dilemma] would be a protective order . . . postponing civil discovery until termination of the criminal action."[136] One district court decision explains the importance of granting a stay to resolve the Fifth Amendment dilemma:

> A stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter, . . . and is even more appropriate when both actions are brought by the government. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.[137]

The court in *Afro-Lecon, Inc. v. United States*[138] noted that the scope of criminal discovery is highly restricted as compared to civil discovery, and the use of parallel proceedings may create

133. *Id.*
134. 397 U.S. 1 (1970).
135. *Id.* at 10.
136. *Id.*
137. Brock v. Tolkaw, 109 F.R.D. 116, 119 (E.D.N.Y. 1985); *see also* Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1203 (Fed. Cir. 1987) (explaining that "the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter").
138. 820 F.2d 1198 (Fed. Cir. 1987).

an "irresistible temptation" to use the civil discovery process to one's advantage in the criminal case.[139] The postponement of civil proceedings not only protects a witness's Fifth Amendment rights, but also protects the integrity of the two separate processes by avoiding "improper interference with the criminal proceedings if they churn over the same evidentiary material."[140] Indeed, if granting a stay of discovery is the only adequate accommodation of a party's Fifth Amendment rights, a trial court may abuse its discretion if it fails to grant such a stay.[141]

If the courts are highly encouraged to stay the proceedings for whatever indefinite period of time it may take to resolve the criminal matter, then they unquestionably have it within their discretion to place some time limit on the duration of the stay. This Author chose the one-year time period somewhat arbitrarily, but took into account how much time the Government might reasonably need to complete what may be a complicated investigation. Coincidentally, the only district court decision that can be found to have granted a stay for a finite period also chose the one-year time period.[142] A one-year stay gives the Government ample time in which to determine whether or not to file criminal charges against an individual whom it has already accused of an offense in the civil forfeiture context. A longer or shorter time period may be appropriate in an individual case, depending on the circumstances surrounding the investigation. The Government might also request an extension if it is later determined that the time period is insufficient and it deems use immunity inappropriate.

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139. *See id.* at 1203; *see also* Hyman, *supra* note 12 (discussing intersection of civil and criminal tax cases). In fact, in *Afro-Lecon, Inc.*, the court disapproved of the prosecution's "abuse of discovery" in "utiliz[ing] the ploy of having a criminal investigator 'sit in' on and participate in a non-criminal conference or interview when criminal prosecution was . . . eminently predictable and without advising the 'target' of the investigator's role and purpose." *Afro-Lecon, Inc.*, 820 F.2d at 1204.

140. *Afro-Lecon, Inc.*, 820 F.2d at 1204 (quoting Peden v. United States, 512 F.2d 1099, 1103 (Ct. Cl. 1975)).

141. Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1089 (5th Cir. 1979); *see also Afro-Lecon, Inc.*, 820 F.2d at 1207.

142. United States v. A Certain Parcel of Land, 781 F. Supp. 830, 832-35 (D.N.H. 1992). The case involved the forfeiture of real property based on allegations of illegal gambling on the property.

2. Immunity Grants

If the Government does not indict the claimant within the one-year stay and if the parties wish to proceed with the forfeiture action, the court should request that the United States Attorney grant "use immunity" to the claimant. The federal immunity statute authorizes the Government to grant "use immunity," or what is colloquially called "use and fruits" immunity.[143] The statute provides that "no testimony or other information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."[144] The immunity granted under the statute bars the use of testimony in both state and federal prosecutions.[145] Such a grant of immunity balances both parties' interests since it "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a . . . grant of immunity."[146]

After the expiration of the proposed one-year stay in the discovery proceedings, a court would be permitted to suggest to

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143. *See* 18 U.S.C. §§ 6001-6005 (1988). *See generally* Robert M. Schoenhaus, Annotation, *Prosecutor's Power to Grant Prosecution Witness Immunity From Prosecution*, 4 A.L.R. 4TH (1998) (analyzing both state and federal decisions on prosecutorial power to immunize government witnesses).

144. 18 U.S.C. § 6002 (1988); *see also* Kastigar v. United States, 406 U.S. 441 (1972) (upholding constitutionality of immunity statute).

145. The Supreme Court in *Murphy v. Waterfront Commission* held that the Fifth Amendment requires that the privilege protect "a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 378 U.S. 52, 78 (1964). Thus, for a federal grant of immunity to eliminate the threat of prosecution it must bar the use and derivative use of any testimony in both federal and state courts. *See id.* States, of course, lack the authority to bar federal prosecutions since federal law is supreme to state law. The Supremacy Clause of Article VI of the Constitution reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. The Supreme Court's decision in *Murphy* resolves this issue by stating that federal courts should exercise their supervisory power to prohibit any testimony immunized by a State from being offered in federal courts. *See* 378 U.S. at 79.

146. *Murphy*, 378 U.S. at 79; *see also* Pillsbury Co. v. Conboy, 459 U.S. 248, 255 (1983).

the Government that it grant use immunity to the party invoking the Fifth Amendment. If the Government grants immunity so that the invoking party no longer has any reasonable fear of prosecution, the party then can participate fully in the discovery process without risk of self-incrimination. The Fourth Circuit, in its "supervisory capacity," established a procedure for civil tax refund cases in which the taxpayer invokes the Fifth Amendment privilege.[147] The court puts the onus on the Government to grant use immunity in any criminal proceedings related to the civil tax case if the Government wants to depose the taxpayer.[148]

The immunity statute does not permit a court either to confer immunity outside of the statute's specific parameters or to compel the Government to grant immunity.[149] Courts merely grant immunity orders upon the request of the United States Attorney. In this process, the courts play a limited role: "The court's role in granting the [immunity] order is merely to find the facts on which the order is predicated."[150] The courts' supervisory power does authorize them to dismiss an action if the Government fails to grant immunity in cases in which a grant of immunity is the only adequate accommodation available. In *United States v. U.S. Currency*,[151] the Sixth Circuit remanded a case, instructing the lower court to accommodate the privilege.[152] The court determined that if the only possible accommodation is a Government grant of immunity, and if immunity is not granted, the lower court may impose sanctions,

147. *See* Shaffer v. United States, 528 F.2d 920, 922 (4th Cir. 1975).

148. *See id.* The court also suggests that even if the Government does not grant immunity the court should grant a stay of the proceedings until the statutes of limitations have run. *See id.*

149. *See Pillsbury*, 459 U.S. at 261 ("No court has authority to immunize a witness. That responsibility . . . is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity."); United States v. Salerno, 937 F.2d 797, 807 (2d Cir. 1991) ("Immunity remains 'preeminently a function of the Executive Branch.'") (quoting United States v. Turkish, 623 F.2d 769, 776 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981)), *rev'd on other grounds*, 112 S. Ct. 2503 (1993)); *see also* United States v. Blumberg, 787 F. Supp. 67, 71 (S.D.N.Y. 1992).

150. *Pillsbury*, 459 U.S. at 254 n.11 (quoting H.R. REP. NO. 91-1549, at 43 (1970), H.R. REP. NO. 91-1188, at 13 (1970)).

151. 626 F.2d 11 (6th Cir. 1980).

152. *See id.* at 17.

including the sanction of dismissal.[153] In a similar ruling, the Fourth Circuit reversed a lower court's decision dismissing a taxpayer's action to recover taxes when the taxpayer asserted the Fifth Amendment during discovery. The court held that the trial court should urge the Government to grant use immunity, and, if immunity is not granted, should stay the proceedings until all applicable statutes of limitations have run.[154]

B. The Case for Adopting New Procedural Rules

In cases in which parallel civil and criminal actions are being litigated concurrently, courts generally accommodate Fifth Amendment concerns by granting a stay of the proceedings pending a final disposition of the criminal charges.[155] When only the civil action has been filed, courts are without guidance from Congress and have few clear instructions from appellate decisions. Indeed, many appellate decisions state that trial courts can fashion any sort of remedy the court thinks best and have even upheld accommodations that do not adequately accommodate the privilege.[156] Clearly, the courts' supervisory

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153. *See id.*; *see also* United States v. Talco Contractors, Inc., 153 F.R.D. 501, 507 (W.D.N.Y. 1994) (discussing the possibility of dismissal as a sanction but refusing to apply it in that case); *cf.* United States v. Angiulo, 897 F.2d 1169, 1192 (1st Cir. 1990) (holding that under "prosecutorial misconduct theory," court may grant immunity to defense witness if witness is subjected to Government intimidation tactics that cause witness to invoke Fifth Amendment privilege and withhold testimony that otherwise woud have been available to defendant).

154. *See* Shaffer v. United States, 528 F.2d 920, 922 (4th Cir. 1975); *see also* Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1088 n.115 (5th Cir. 1979).

155. At present, the drug forfeiture statute only permits the prosecution to request a stay of the proceedings. *See supra* note 52. Congress should amend the statute in order to clarify that either party—the Government or the defendant—may request a stay in the discovery in the forfeiture case until the final disposition of the criminal case. The new amendment gives the Government the right to obtain a stay that otherwise it could not obtain. The amendment should recognize a similar right for the defense. Like the Government, the defense may not want to disclose its evidence pertaining to the underlying drug charges during civil forfeiture discovery. Unlike the Government, the defense may not be guarding the information solely as a strategic matter, but also to protect the claimant from incriminating himself or herself. Section 881(i) should be amended to make this clear, but even absent an amendment, courts have recognized their broad discretion to fashion accommodations for valid privilege claims, including granting a defense motion to stay discovery. *See supra* notes 38-52. Thus, defense attorneys should request a stay of discovery in every case unless the claimant can defend the property adequately despite the invocation of the privilege.

156. *See, e.g.*, United States v. Parcels of Land, 903 F.2d 36, 44 (1st Cir. 1990) ("[S]o long as a district court attempts to accommodate a claimant's [F]ifth [A]mendment interests,

power is broad enough that the courts can adequately protect a claimant's rights, but the better approach would be for Congress to set forth a procedure to be followed in all cases. Prompted by concerns about the proper handling of parallel civil and criminal charges in forfeiture cases, Congress has previously amended the civil forfeiture law.[157] The Federal Rules of Civil Procedure also address the remedies that courts may apply to a variety of problems that arise in civil cases.[158] Incorporating accommodations for invocations of the Fifth Amendment into the rules has many advantages over piecemeal development by the courts. First, rule-bound accommodations obviously would make the practice more uniform. A court would have less discretion in fashioning whatever accommodation seemed best to that judge.[159] Second, incorporating a set of procedural rules for dealing with the Fifth Amendment dilemma in civil forfeiture cases would notify claimants of the steps they must take to preserve their claims. In more cases than one might expect, claimants fail to request that the court make any accommodation for the invocation of the Fifth Amendment.[160] At the same time, the claimants may present no other evidence to contradict the Government's claims. Since it does not take much evidence for the Government to meet its probable cause burden of proof, the Government can easily prevail on a motion for summary judgment. The courts have no choice but to grant the Government's motion for summary judgment when the

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the nature and extent of accommodation should be left primarily to that court's discretion.").

In *Parcels of Land,* the trial court had entered a protective order that prohibited the use of the claimant's deposition in the federal district of Massachusetts, but left open the possibility that the deposition could be used to prosecute him on state offenses. *See id.* The First Circuit rejected the claimant's argument that the court should have provided broader protection of the privilege, reasoning in part, "we are averse to second-guessing the court's actions on appeal in the absence of any indication that it abused its discretion." *Id.*

This accommodation falls short for two reasons. First, to adequately protect the claimant's Fifth Amendment rights, courts have to provide use immunity from both federal and state offenses. *See supra* note 145 and accompanying text. Second, the use of a protective order will not likely be effective in keeping the deposition from being used against him even in the federal district since the orders will usually yield to grand jury subpoenas. *See infra* notes 176-89 and accompanying text.

157. Title 21 U.S.C. § 881(*i*) was added in 1984; *see also supra* notes 52, 155.

158. *See supra* notes 47-48 and accompanying text.

159. *See supra* notes 47-49.

160. *See supra* notes 53-75 and accompanying text.

claimant presents no evidence and requests no other form of relief in order to allow him or her to testify. One claimant even went so far as to file a cross motion for summary judgment, thus inviting the district court to rule immediately on the Government's motion.[161]

These glaring errors by counsel in defending forfeiture actions may stem from the fact that most civil forfeiture cases are tried by attorneys who may practice only criminal law and who may not have a working knowledge of the Federal Rules of Civil Procedure or the civil forfeiture action.[162] The civil discovery practice differs in important respects on such matters as the correct method of invoking the privilege, the ramifications of the invocation of the privilege, and the restrictions on last-minute waivers. Moreover, counsel must request an accommodation for the privilege, otherwise the courts will not provide one and will instead permit the trier of fact to draw an adverse inference from the failure to testify. The ineptitude of defense counsel in representing civil forfeiture claimants—and the disastrous results for the claimants—is clearly apparent in some of the cases.

A typical example is *United States v. 4003-4005 5th Ave.*[163] in which counsel showed a complete lack of knowledge of the Federal Rules of Civil Procedure.[164] The claimant completely failed to respond to the Government's amended complaint or to answer the Government's interrogatories for nearly a year until ordered to do so.[165] (Perhaps counsel thought that the "right to remain silent" conferred the right not to respond to discovery requests.) The claimant then invoked the Fifth Amendment, but

161. United States v. 566 Hendrickson Blvd., 986 F.2d 990, 996 (6th Cir. 1993).

162. *See, e.g.,* United States v. 2204 Barbara Lane, 960 F.2d 126, 129 (11th Cir. 1992) (granting summary judgment to Government after claimant failed to respond to request for admissions and did not invoke privilege); United States v. $1,322,242.58, 938 F.2d 433, 439-40 (3d Cir. 1991) (granting forfeiture when claimant failed to respond to discovery requests, even after court ordered it; after dismissal entered improper blanket assertion of privilege); United States v. $250,000 in U.S. Currency, 808 F.2d 895, 900-01 (1st Cir. 1987) (granting forfeiture when claimant did not invoke privilege at trial and improperly raised blanket assertion of privilege on appeal); United States v. $61,433.04 U.S. Currency, 818 F. Supp. 135, 138 (E.D.N.C. 1993) (finding claimants could not both invoke privilege and file affidavit denying charges, thus, affidavit struck and summary judgment granted for Government).

163. 55 F.3d 78 (2d Cir. 1995).

164. *See id.*

165. *See id.* at 86.

did not request an accommodation of the privilege from the court, such as postponing the civil discovery process pending resolution of the criminal charges that had already been filed against the claimant.[166] (Perhaps counsel believed that the invocation of the Fifth Amendment would not negatively affect claimant's case, as might be true in a criminal case,[167] and counsel was surely not aware of the need to seek an accommodation.) Had counsel requested a stay of the discovery proceedings, the property might have been saved from forfeiture. After the criminal case was decided, the claimant could have participated fully in the discovery process and in defending the property from forfeiture.

When the claimant did not seek accommodation, the Government properly sought summary judgment.[168] Only then did the claimant realize that the property would be forfeited and sought to waive the privilege and provide answers to the interrogatories.[169] Both the trial and appellate courts rejected this "eleventh hour" waiver as an abuse of the discovery process.[170] (In a criminal trial, of course, a defendant may defer the decision about whether to testify until the "eleventh hour" and cannot be prevented from testifying.[171])

The errors may also be attributable to the fact that many parties have no choice but to proceed pro se because of a lack of funds to hire counsel.[172] The Sixth Amendment right to counsel

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166. *Id. See, e.g.,* Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1089 (5th Cir. 1979) (granting stay of civil discovery).

167. In federal and state prosecutions, neither the judge nor the opposing counsel may invite the jury to draw an adverse inference from a criminal defendant's exercise of his or her Fifth Amendment privilege not to take the stand. *See* Griffin v. California, 380 U.S. 609, 614-15 (1965).

168. *See* United States v. 4003-4005 5th Ave., 55 F.3d 78, 80 (2d Cir. 1995).

169. *See id.*

170. *See id.* For a discussion of last-minute waivers of the privilege, see *supra* notes 81-82 and accompanying text.

171. *See* Brooks v. Tennessee, 406 U.S. 605 (1972).

172. Many courts have required strict compliance with the rules regarding the proper filing of complaints, for example, even in cases involving *pro se* claimants. *See, e.g.,* United States v. 14301 Gateway Blvd. West, 123 F.3d 312, 313 (5th Cir. 1997) (upholding denial of claimant's request for extension of time to file); United States v. Three Parcels of Real Property, 43 F.3d 388, 391 (8th Cir. 1994) (striking claim not worded with specificity and not verified); United States v. $104,674, 17 F.3d 267, 268-69 (8th Cir. 1994) (upholding default judgment against *pro se* claimants whose papers did not comply with filing requirements found in Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims); United States v. Eng, 951 F.2d 461 (2d Cir. 1991) (standing denied

applies only in criminal cases,[173] so civil forfeiture claimants are not entitled to the appointment of counsel. The nature of the forfeiture action also means that attorneys will not be able to represent claimants on a contingent fee basis—success in forfeiture cases does not reap a damages award—making it more difficult to find an attorney for a person of modest means.[174] The Supreme Court in *Kordel* expressed special concern regarding the lack of counsel in civil cases involving Fifth Amendment issues because parties in such cases more than in others need guidance in understanding their rights and the ramifications of their decisions.[175]

C. The Inequity of Other Remedies and Reactions

At first glance, other types of accommodations that courts have employed may appear to offer satisfactory protection to the claimant asserting the privilege. In fact, however, they all fall woefully short of the mark. The two accommodations courts most frequently discuss are protective orders that "seal" the

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to claimant who filed order to show cause instead of verified claim). *But see* United States v. Various Computers & Computer Equip., 82 F.3d 582, 585 (3d Cir. 1996) (reversing lower court ruling dismissing claim for failure to include a verified statement in properly drafted claim).

173. *See* Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (holding that the Sixth Amendment requires appointed counsel for defendants charged with petty offenses punishable by incarceration); Douglas v. California, 372 U.S. 353, 358 (1963) (holding that the Equal Protection Clause requires appointed appellate counsel for the first appeal); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding that the Sixth Amendment grants an indigent the right to appointed counsel in all felony cases).

174. In *United States v. A Single Story Double Wide Trailer*, 727 F. Supp. 149, 155 (D. Del. 1989), a district court rejected the claim of a trailer home owner that his inability to find an attorney should be grounds for setting aside a default judgment. The court stated that this claim was "not easily verifiable by the court." *Id.* at 153. The court did, however, agree that "[e]xtreme difficulty in obtaining representation is a mitigating factor in the analysis." *Id.* at 153-54 (citation omitted). But in regards to this particular owner, the court found that his "repeated efforts to find an attorney," without more, constituted culpable negligence because he had not attempted to enter a *pro se* appearance or to explain his difficulty to opposing counsel or to the court. *Id.* at 154.

Congress is currently considering a bill to provide appointed counsel to indigent claimants in civil asset forfeiture cases. *See* 1998 H.R. 1965, § (3)(D) (Oct. 27, 1998).

175. *See* United States v. Kordel, 397 U.S. 1, 12 (1970); *see also* SEC v. Graystone Nash, Inc., 25 F.3d 187, 193 (1994) ("The decision to invoke or waive the Fifth Amendment is not always self-evident, and it requires serious considerations of the consequences. [Counseling] by a lawyer familiar with the ramifications of a particular case and the intricacies of the law in this area is highly desirable . . . .").

testimony of the claimant, and stays of the proceedings until the statutes of limitations for all possible criminal offenses expire.

1. Protective Orders

Federal Rule of Civil Procedure 26(c) permits courts to issue protective orders to further the purpose of the Rules, which is to "secure the just, speedy, and inexpensive determination"[176] of civil disputes. Courts have attempted to accommodate a forfeiture claimant's Fifth Amendment privilege by fashioning protective orders that limit the use of the claimant's testimony to the civil case at hand. Unfortunately, protective orders have proven quite unsuccessful in shielding an invoking party's testimony from later use in a parallel criminal proceeding.

The issue most often arises when prosecutors obtain a grand jury subpoena for the testimony that was put under seal by means of a district court's Rule 26(c) protective order. Most of the Circuit Courts that have considered whether a protective order shields a party's testimony from production have agreed that it does not. In other words, the protective order fails to provide the principle protection that the parties must have believed it would provide—protection from the later use of the testimony by the Government in a criminal prosecution.[177] In effect, rather than providing a shield for the parties' Fifth Amendment rights, it creates a trap for the unwary party who unintentionally waives the rights.[178]

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176. FED. R. CIV. P. 1; *see also In re* Grand Jury Subpoena, 836 F.2d 1468, 1472 (1988).

177. *See generally* Robert Heidt, *The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases,* 91 YALE L. J. 1062, 1095-1099 (1982) (discussing inadequacy of protective order to shield Fifth Amendment privilege); Marc Youngelson, Note, *The Use of 26(c) Protective Orders: "Pleading The Fifth" Without Suffering "Adverse Consequences,"* 1994 ANN. SURV. AM. L. 245 (1995) (examining problems raised by use of protective orders in discovery to encourage witnesses to testify despite the availability of Fifth Amendment privilege). Professor Heidt suggests that protective orders may provide three benefits: (1) lessening the chance that the incriminating response will be brought to the attention of the Government by a private attorney handling the civil matter; (2) "keeping the responses from the attention of other potential plaintiffs," thus limiting the increase in civil exposure that may result from waiving and responding; and (3) "reduc[ing] the possible collateral consequences of incriminating responses, such as damage to the potential invoker's reputation." Heidt, *supra,* at 1096-97.

178. The Second Circuit acknowledged this problem in *Martindell v. International Tel. & Tel. Corp.,* in which the court stated: "In the present case the deponents testified in reliance upon the Rule 26(c) protective order, absent which they may have refused to testify." 594 F.2d 291, 296 (2d Cir. 1979).

The Fourth Circuit, for example, balanced the grand jury's need to gather evidence against the "extent to which protective orders insure [sic] the efficient resolution of civil disputes."[179] The court determined that "the security given to the deponent's interest in avoiding self-incrimination by a civil protective order does not outweigh the substantial government interest" in investigating criminal offenses.[180] The court explained:

> At first blush, resolution of this case might appear to depend on balancing the deponents' right against self-incrimination as secured by the protective order and the grand jury's interest in effective investigation of crime. But this is not so, because the deponents' fifth amendment right against self-incrimination did not require, nor may it depend on, the shield of civil protective orders. Deponents were entitled to rely only on their own silence or a grant of immunity to protect their rights, otherwise they risked waiving those rights.[181]

A rule that would shield testimony covered by a protective order "might very well amount to an impermissible 'de facto' grant of immunity. . . ."[182] Moreover, the assertion of the privilege "may disrupt or thwart civil litigation and discovery" and "can impose severe burdens on civil litigants" seeking discovery by causing a "lack of direct access" to information.[183] Thus, the privilege may "prolong civil litigation and increase its costs."[184] With one exception,[185] every other Circuit Court that has considered the issue has agreed with the Fourth Circuit's per se rule permitting the enforceability of a grand jury subpoena despite the existence of an otherwise valid protective order.[186]

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179. *In re* Grand Jury Subpoena, 836 F.2d 1468, 1473 (4th Cir. 1988).
180. *Id.* at 1472.
181. *Id.* at 1471.
182. Andover Data Services v. Statistical Tabulating Corp., 876 F.2d 1080, 1084 (2d Cir. 1989) (quoting *In re Grand Jury Subpoena,* 836 F.2d at 1475). Except in limited circumstances, only the United States Attorney has the power to confer immunity. *See supra* notes 143-54 and accompanying text; *see also* Heidt, *supra* note 177, at 1100-02 (suggesting examples of judicial grants of immunity).
183. *In re* Grand Jury Subpoena, 836 F.2d at 1473.
184. *Id.*
185. Wilk v. American Med. Ass'n, 635 F.2d 1295 (7th Cir. 1980).
186. *See In re* Grand Jury Subpoena, 138 F.3d 442 (1st Cir. 1998); *Wilk*, 635 F.2d 1295; *In re* Grand Jury Subpoena Served on Meserve, Mumper & Hughes, 62 F.3d 1222 (9th Cir. 1995); *In re* Grand Jury Proceedings, 995 F.2d 1013, 1017-18 (11th Cir. 1993)

Only the Second Circuit found that courts should uphold Rule 26(c) protective orders in the face of grand jury subpoenas "absent a showing of improvidence in the grant of [the order] or some extraordinary circumstance or compelling need."[187] Even under this standard, protective orders are not immune from discovery by the prosecution by means of a grand jury subpoena, so long as the Government can show that either the order was improvidently granted or that some extraordinary circumstance or compelling need exists.[188] Thus, the courts have made it amply clear that parties may not rely on protective orders to shield their Fifth Amendment rights.

Arguably, a court seeking to accommodate a claimant's Fifth Amendment rights can rely instead on its inherent authority to fashion remedies to protect constitutional rights, rather than on its Rule 26(c) powers. A protective order granted under such a circumstance, if found to preclude the production of sealed testimony under a grand jury subpoena, probably would be viewed as a violation of separation of powers principles because it would constitute "an impermissible de facto grant of immunity."[189]

2. Stay Pending Lapse of Statute of Limitations

Several Circuit Courts of Appeal have embraced the approach of staying civil discovery until the applicable criminal statutes of limitation have lapsed. In forfeiture cases premised on drug offenses, as most are, a stay pending the expiration of the statute of limitations would hold the property in abeyance for five years from the date of the commission of the offense.[190] This

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(following Fourth Circuit's rule and rejecting Second Circuit's balancing approach); Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988).

187. Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979); *see also* Minpeco S.A. v. Conticommodity Services, Inc., 832 F.2d 739 (2d Cir. 1987) (same); *Andover Data Services,* 876 F.2d at 1084 (same); *In re* Grand Jury Subpoena Duces Tecum Dated April 19, 1991, 945 F.2d 1221 (2d Cir. 1991) (same).

188. *See Martindell,* 594 F.2d at 296.

189. *Andover Data Services,* 876 F.2d at 1084 (quoting *In re Grand Jury Subpoena,* 836 F.2d at 1475 (discussing Rule 26(c) protective orders)); *see supra* notes 143-54 and accompanying text (regarding grants of use immunity).

190. *See* 18 U.S.C. § 3282 (1998) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").

approach would apply only in cases in which the Government files a civil forfeiture action but fails to file criminal charges; otherwise, the court could simply stay discovery pending the outcome of the criminal action.[191] If claimants could request such a stay without risking self-incrimination in the process, it might serve to accommodate a claimant's Fifth Amendment rights.

As a practical matter, however, it may be difficult—if not impossible—for a claimant to apprise the court of the applicable offenses and the dates of their commission without running the risk of providing the "link in the chain of evidence needed to prosecute"[192] the claimant for those or other offenses. The few cases suggesting this approach apparently did not involve any ambiguity regarding the offenses committed and their dates of commission. For example, the Fifth Circuit's decision in *Wehling v. Columbia Broadcasting, Inc.*[193] found that the lower court should issue a protective order staying the civil discovery until the five-year statute of limitations (of which two years had already elapsed) had run.[194] In this case, the statute of limitations for the applicable offense was clear to all the parties.

Even aside from the danger of unintentional self-incrimination from disclosing the applicable offenses and their dates of commission, the "running of the clock" approach makes little sense when viewed in the proper context. In effect, the court would be providing immunity to a claimant, presumably

191. On the other hand, courts may not agree that a stay is appropriate unless the criminal charges are already pending. The district court for the Western District of New York rejected a request to stay discovery pending the lapse of statutes of limitations. United States v. Talco Contractors, 153 F.R.D. 501, 516-17 (W.D.N.Y. 1974). In *Talco Contractors,* the court found a stay inappropriate because no indictment had been returned and no known criminal investigation was underway. *See id. Talco Contractors* involved a civil tax action brought by the United States. Civil tax cases, like civil forfeiture cases, often require proof of the same conduct that would constitute a criminal offense. Thus, these cases also present the possibility of parallel proceedings. The Government had already conducted an investigation sufficient to prove the elements of the civil charge, and one would expect that a second "investigation" would not be needed in order to file criminal charges as well. The court nonetheless found that a temporary stay would not be appropriate unless the taxpayer could show, at a minimum, that an active criminal investigation were underway. *See id.*

192. Hoffman v. United States, 341 U.S. 479, 486 (1951).

193. 608 F.2d 1084 (5th Cir. 1979).

194. *See* id. at 1089; *see also* United States v. 4003-4005 Fifth Ave., Brooklyn, N.Y., 55 F.3d 78, 84 n.6 (2d Cir. 1995) (addressing possible accommodations and citing *Wehling*).

because the Government refuses to do the same at the time the stay is granted.[195] The Government's refusal to grant immunity puts the claimant in the position of having to wait for five years before being able to defend the title to his or her property. In the meantime, the property is held in limbo and cannot be sold or transferred by the claimant.[196] If an owner's residence is at stake, the Government will more than likely (but not necessarily) permit the owner to continue to occupy the property,[197] but vehicles and currency will be kept in the custody of the Government.[198] The long delay is brought about by the Government's decision to pursue the civil forfeiture action prior to filing criminal charges *and* without granting immunity to the claimant. Thus, in fairness the claimant should be granted a dismissal of the forfeiture action after the one-year stay rather than be required to wait an additional four years to begin defending the property.

CONCLUSION

Now that the Supreme Court's decision in *Ursery* has definitively affirmed the right of the Government to take advantage of the procedural benefits of civil forfeiture while also pursuing criminal charges in a separate proceeding, it is incumbent on courts to carefully consider the manner in which these two proceedings are brought. As long as the Government files criminal charges at some point during the pendency of the forfeiture action, the court in the forfeiture case can stay discovery pending resolution of the criminal case. If the

195. *See* Shaffer v. United States, 528 F.2d 920, 922 (4th Cir. 1975). The Fourth Circuit suggests this use of judicial stays as an alternative method of obtaining immunity for a party when the Government refuses to grant such immunity. *See id.*

196. The Supreme Court addressed the effect of seizure of real property pending resolution of a forfeiture claim in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 58 (1993). The Government may prevent sale of the property by filing a notice of *lis pendens* as authorized by state law. *See id.* For other property such as conveyances or currency, no pre-seizure hearing is required. *See id.*

197. The Government has a policy of permitting owners to retain possession of real property pending the outcome of the forfeiture case. It may evict, or seek other appropriate remedies, however, if it appears that an owner will destroy the property rather than lose it to forfeiture. *See id.*

198. The Government commences the forfeiture action by taking possession of the property and such property stays in the Government's possession pending the outcome of the forfeiture action. *See* GURULE & GUERRA, *supra* note 2, § 3-1(e), at 60-61.

Government brings the civil forfeiture first without also filing criminal charges, it puts property owners in a Fifth Amendment vise. Unless courts fashion an accommodation to protect their right to remain silent, property owners must either waive their Fifth Amendment rights, and thereby incriminate themselves in order to defend their property, or try to defend the action without the benefit of their testimony. In effect, they must hand the Government a sure conviction by providing a confession or effectively default in the forfeiture action.

The one-year stay of discovery this Article proposes has the effect of requiring the Government to proceed with criminal charges before the civil forfeiture or be required to choose between forfeiture and conviction. After the one-year period, if the Government has not filed criminal charges, the court puts the choice to the Government: grant immunity (and forgo prosecution) or lose the forfeiture case. This proposal protects a claimant's right against self-incrimination (and the right to defend one's property) without jeopardizing the Government's law enforcement interests.

Because of the unusual nature of the civil forfeiture action, none of the other accommodations used by courts in other civil cases adequately protects the civil forfeiture claimant. Every other accommodation has the effect of penalizing the claimant for invoking the Fifth Amendment, and the penalty often results in the loss of the property. In other words, unless courts follow the one-year stay approach, claimants will virtually always lose their property. In an era when legislatures eagerly seek ways to broaden the reach of civil forfeiture laws,[199] and when law enforcement has geared up to file forfeiture actions, the task falls to the courts to ensure that this powerful weapon is not abused.

There is simply no good reason not to accommodate a claimant's right to remain silent by following the one-year stay approach. Staying the discovery imparts no unfair advantage to forfeiture claimants; it simply allows them to testify in defense of their property—a right lost under every other accommodation courts have applied. Moreover, denying the one-year stay creates an incentive for prosecutors to file forfeiture actions

199. *See* GURULE & GUERRA, *supra* note 2, § 1-4, at 20-21 (discussing changes made in the reach of civil drug asset forfeiture law that have dramatically expanded its scope).

before filing criminal charges whenever possible in order to obtain the nearly automatic win that results from the Fifth Amendment dilemma. Thus, the failure to follow the one-year stay approach undermines the Fifth Amendment while creating an incentive for the Government to abuse its broad confiscation powers.