Letters

Pass the Fifth

Congratulations on your article on the 5th Amendment ["Abolish the Fifth Amendment!" by Robert M. Kaus, December].

It is not necessary to abolish the amendment, however, merely to stick to its original meaning. An intelligent judiciary could do this without a constitutional amendment.

SIDNEY HOOK
Stanford, California

Kaus's article exposes well the flimsy rationale for the Fifth Amendment's constitutional protection of criminals. As an attorney, I frequently encounter sordid applications of this device. A case I recently tried in Houston illustrates this point. It involved possible civil and criminal violations of the antitrust laws. In a lawsuit on behalf of hundreds of thousands of purchasers of cardboard boxes who sought compensation for overcharges resulting from price-fixing activity, almost 180 executives who sold these boxes refused to answer questions concerning their actions by claiming that answers would tend to incriminate them.

WILLIAM H. WHITE
Houston, Texas

The framers of the Bill of Rights were capable of more subtle reasoning than Kaus gives them credit for. The principal protection offered by the prohibition of compulsory self-incrimination does not manifest itself when the innocent suspect is actually in the courtroom; it has more to do with the treatment of the witness before the trial.

By offering the defendant the option of refusing to testify, we can protect him from abusive and coercive police practices *before* the trial. If police know that the defendant can simply refuse to take the stand they are less likely to spend their time trying to influence his testimony.

TIM WELCH
Atlanta, Georgia

It may well be that a fair-minded and honest argument can be made for repeal of the self-incrimination clause of the Fifth Amendment. But Kaus's principal achievement is to show that he isn't the one to make it.

His most egregious error is to make the 1977 Supreme Court decision in the case of *Brewer v. Williams* the showpiece of his collection of horrors he says the amendment has caused. The problem with his example is that *Williams* wasn't a Fifth Amendment case at all.

When the Court held that the jury at Williams's trial shouldn't have heard about what he said and did during his trip with the police from Davenport to Des Moines, it relied on a different right and a different amendment. The Court found that the police had interfered with Williams's right to counsel under the *Sixth* Amendment. It expressly declined to base its decision on any violations of the Fifth Amendment *Miranda* rule. Instead, Williams's admission shouldn't have been introduced at the trial, the Court said, because "so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned."

I know for a fact Kaus understood that *Williams* was a Sixth Amendment case. While working on the article, he called me to see if I could help provide examples of outrages the courts have committed in the name of the Fifth Amendment. As we talked the *Williams* case came up, and he agreed that it didn't serve his purposes, since it involved the wrong amendment. Writing as he does in a town full of lawyers, how did he think he could get away with it?

WILLIAM J. MERTENS
Washington, D.C.

I read Robert Kaus's article with interest. It brings back memories of times when the Fifth Amendment has been a very important part of our legal and social structure.

I am greatly puzzled by the statement the author makes about me. He says I felt "compelled to defend" the Fifth Amendment against "right-wing critics," although I "later recanted." I know of no basis for the latter part of that statement. To the best of my knowledge I have never recanted about the Fifth Amendment, although there may be difficult questions about its interpretation and application.

To put it in a nutshell: I would not want to live in a country which did not have available what we call the privilege against self-incrimination in the Fifth Amendment. There are such countries, and they do not appeal to me.

ERWIN N. GRISWOLD
Washington, D.C.

The author replies:

I refuse to answer on the grounds that it might tend to incriminate me.

How would you feel if I gave that response to the charges posed by Mr. Mertens and Mr. Griswold? A little suspicious, perhaps? Good. That is the basic

point about the Fifth Amendment. In practice, it offers powerful protection to the guilty, and virtually no protection to the innocent. An innocent suspect does not need the Fifth—indeed, he will seek to answer as quickly as possible the accusations against him. I'll start with Mr. Griswold.

In a 1960 article, Griswold explained that his 1955 defenses of the Fifth Amendment "were made under some emotional pressure," and concluded: "Others have said, and I think they are right, that the privilege [against self-incrimination] protects the guilty more often than it does the innocent. It was a mistake, I now think, to undertake to defend the privilege on the ground that it is basically designed to protect those innocent of crime, at least in any numerical sense. It is enough to say that the privilege is available to protect those who are guilty only of heretical and unpopular beliefs."

Griswold thus admitted what his (and many other) McCarthy-era defenses of the Fifth Amendment had left unsaid—namely that there is a dramatic distinction between stopping a prosecution directed at "heretical and unpopular beliefs," and the use of the Fifth Amendment to protect those who are guilty of other, ordinary crimes like robbery and murder. Unfortunately, Griswold did not draw the logical conclusion that the use of the Fifth in the ordinary criminal case—where no McCarthyesque persecution is involved—is insupportable. Like many lawyers who have spent their lives expounding and defending the Constitution, he seems unwilling to imagine an alternative—in this instance a less sweeping constitutional provision that would protect the local Communist but not the local rapist.

So I was guilty, but only of exaggeration, when I said that Griswold "recanted." His 1960 retreat was not quite so dramatic—nor so sensible.

Mertens's charge raises a point that troubled many of my lawyer friends, but I stand behind the treatment of the *Williams* case in my article. *Williams* reversed the conviction of a child-killer who revealed to police the whereabouts of his victim's body while riding in a car from Davenport, Iowa, to Des Moines, where his attorney was waiting to see him. A detective obtained the tacit confession by delivering a speech appealing to Williams's religious beliefs. The Supreme Court said it was throwing out this evidence because Williams had not "waived" his right under the Sixth Amendment to have a lawyer present when he was "interrogated."

When I talked with Mr. Mertens, I knew that the majority had labeled *Williams* a "Sixth Amendment case," although whole forests have been laid waste as legal writers have tried to make sense out of the justices' approach. (*Williams* is one of those Burger Court decisions where you long for Woodward and Armstrong to tell you what was *really* going on.) At the time of our conversation, I also believed, as Mertens reports, that *Williams* was one outrage that couldn't be blamed on the Fifth Amendment.

But the more I read through the cases on police questioning, the more I became convinced that the overriding problem was a perverse judicial mentality regarding criminal confessions. These attitudes, as I tried to describe them, are rooted in the Fifth Amendment's mystical abhorrence of self-incrimination, but they find expression in both standard Fifth Amendment cases *and* in cases involving a suspect's "right to the presence of an attorney." The result, I argued, is that "judges have created a web of procedures that...seem to have as their hidden purpose the maximizing of the number of times when the Fifth Amendment will be employed by the guilty to frustrate the police. When a suspect is on the verge of confessing, the police must warn him not to. At all times, he is to be whisked as quickly as possible under the protective wing of a lawyer who will try to prevent him from opening his mouth."

I said that in the *Williams* case "these attitudes came together most vividly," and so they did. I didn't try to hide the fact that *Williams* was a "right to counsel" case. (I explicitly stated the Court declared that Williams's confession "should not have been admitted into evidence because the government had not met 'its heavy burden of showing a...waiver by Williams of his right to legal representation.'")

What I was trying to avoid was the lawyer's tendency to label cases as either "a Fifth Amendment case" or "a Sixth Amendment case" as if the two had nothing to do with each other. The existence of the Fifth Amendment has everything to do with what the Sixth Amendment's "right to counsel" means in practice. Specifically, the Fifth Amendment makes life easy for a suspect's counsel—all he has to do when he arrives at the police station is tell his client to shut up. There is no "down side" risk to giving this advice, since the Fifth Amendment also prohibits a jury from concluding that a suspect's failure to come forward immediately with an alibi is in any way suspicious. Not just the Sixth Amendment, but our whole system of police and defense strategy, is structured around these basic facts of Fifth Amendment life.

The *Williams* case remains a perfect illustration of how this system works. Williams initially surrendered to the Davenport police as part of a "deal" between them and his Des Moines attorney. The deal was that

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(continued)

Williams would surrender, but the police would not "interrogate" him until he had been driven to Des Moines to converse with the lawyer. Then, as summarized by Justice Thurgood Marshall, "the location of the body would be revealed to police....[Williams's lawyer] would learn it from his client and then he would lead police to the body. Williams would thereby be protected by the attorney-client privilege from incriminating himself by directly demonstrating his knowledge of the body's location."

Nice deal, huh? Justice Marshall (and here is the attitude I'm talking about) seemed to think it was a wonderful arrangement. All it would have done, after all, is prevent the most powerful piece of evidence of the killer's guilt from being used at trial ("protected by the attorney-client privilege") and force the police to delay from three to eight hours the search for an innocent young girl who might have still been alive but freezing to death in the winter night.

Why was Williams's lawyer able to extort this grotesque agreement, and why did it seem like a perfectly normal negotiation to the majority of the Supreme Court? Answer: not the Sixth Amendment, but the Fifth. The Fifth Amendment put Williams's lawyer in the driver's seat. He could, by advising his client to keep quiet, prevent the police from *ever* being told by Williams of the body's location—prevent them from even *asking* Williams about his possible relation to the crime. Under the circumstances, a delay of several hours may have been the best the police could get—though it is understandable that they tried to jump the gun and bend the agreement by appealing to Williams to confess during the long car ride.

The point is not, then, that the "Sixth Amendment" *Williams* case would have been decided differently if we didn't have the Fifth Amendment. The point is that cases like *Williams* would not happen in the first place. Imagine, if you will, a suspect who turns up at the police station and is given, instead of the familiar *Miranda* warnings ("you have the right to remain silent; you have a right to an attorney," etc.) a speech that goes something like this:

"We are allowed by law to ask you relevant questions in a reasonable manner. You have an absolute right to refuse to answer our questions, and under the Constitution no attempt may be made to coerce you into answering them. If any police officer abuses you, either physically or psychologically, you may sue him and recover damages that may total many thousands of dollars. In order to further insure that no such thing occurs, you are entitled to the presence of an attorney while we question you. But although you don't have to answer our inquiries, keep in mind that you may ultimately be called to testify at a trial or before a grand jury, and your failure to provide answers today may look suspicious at that later date."

I find it impossible to see how such a system would threaten a suspect in any way that should disturb us. What it would do, however, is make a defense attorney's life extremely difficult. No longer could he demand that the police stop questioning his client. He would not have the bargaining power to force elaborate "deals" to protect the suspect from the evidence. An attorney might even have to sit and watch while his client actually answered the relevant questions. (How would it look to a jury later on if the police asked Williams what he had been doing on the day of the crime and, after a huddle with his client, Williams's lawyer said, "We'd rather not talk about that one"?) Finally, the police wouldn't feel the need themselves to resort to ruses—like long car rides—as an excuse to isolate suspects from their lawyers. A lawyer could, if necessary, have been allowed to ride along with Williams, without fear that the lawyer could veto any questioning. And the police could appeal to Williams's conscience all they wanted. In short, *Williams* would have been a routine murder conviction, not a Supreme Court *cause celebre*.

I do not agree with Mr. Welch that such a system, freed from the unnecessary protections afforded the guilty by the Fifth Amendment, would encourage the police to abuse the innocent (or the guilty, for that matter). On the contrary, it is precisely because the police now "know that the defendant can simply refuse to take the stand" that they are likely to spend the time before trial trying to coerce a confession from him. The police abuses that *Miranda* was designed to prevent occurred, after all, under the Fifth Amendment regime, where every detective knew that the orderly processes of questioning under oath were useless for getting any information out of a defendant.

Finally, let me disagree with Mr. Hook. There seems no doubt that the "original meaning" of the Fifth Amendment was that an accused, unless he volunteers, should not be subject to questioning under oath at a criminal proceeding. My argument is that this is precisely what *should* happen. So I don't see how the change could be accomplished without either amending the Fifth Amendment or deliberately ignoring its unfortunate "original meaning." It is comforting to pretend that all of the problems in our constitution are the result of silly judicial perversions of the Founding Fathers' immutable wisdom. It just isn't true. The Fathers made some mistakes, and the Fifth Amendment is one of them.

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Tilting at windmills

If you want to understand the very essence of Washington, attend carefully to this story. It involves an old friend of mine who, from time to time, acts as a lobbyist for various clients, and a wise old congressional leader who knows practically everything there is to know about the city and its ways. My friend had sought the leader's help in the early stages of getting a bill passed for one of his richer clients. After the initial help was given, the ball began to roll so well that the bill was passed without any further contact between the leader and my friend. Then one day they ran into each other at a party. The leader said to my friend, "Why did you get that bill through so fast? Now your client pays you and that's that. You have to stretch these things out so your meter can keep running. Have a committee hearing in one session, get the bill out of committee in the next, and get it passed in a third. Don't spoil the client with quick success. It's not good for your pocketbook." . . .

The leader's advice was Washington speaking. Stretch it out. That is what makes your job last. That's how temporary government agencies live on and on. It is probably true in my friend's case that he not only cost himself money but also deprived his opposition lobbyists of income and the staffs of the House and Senate committees and the federal agencies involved of one of their excuses for being. . . .

I am reminded of another great Washington principle by the appointment of Fred Fielding as White House counsel. Fielding, you will recall, was John Dean's assistant in the good old days of Watergate. Dean describes how, when Fielding joined the office, Dean called him in and said:

"'Fred, I think we have to look at our office as a small law firm at the White House. We have to build our law practice like any other law firm. Our principal client, of course, is the president. But to convince the president that we're not just the only law office in town but the best, we've got to convince a lot of other people first. Haldeman, Ehrlichman, and the others who surround the president. Here's how we can do it.'

"Our conflict-of-interest duties were the key. The work was complicated and boring, but I had already sensed that it would produce new business. 'It seems that when you really get to know a man's personal financial situation,' [Dean] said, 'and then candidly discuss his job here to determine if he has any complaint, you can end up in his confidence if you play it right. And once you're in his confidence, he sends you business.'"

Dean puts the matter delicately. The truth is that the guy is scared of you. You know things about him he doesn't want everyone to know. So of course he sends his business to you. He wants to keep you happy.

There are earnest young lawyers in offices all over Washington thinking of ways to get business for themselves. A tactic more common than Dean's is to convince the client, whether he be a government or corporate official, that his problem has a legal aspect, whether it does or not. As soon as you get your hands on the problem, you of course make sure that it does have a legal aspect—in fact lots of them, enough to keep you busy for a long time. . . .

In recent years I have not been a great admirer of the work of Evans and Novak. But in January they wrote what is by far the most insightful article I've read about Ronald Reagan. Since it appeared only in the magazine section of a local