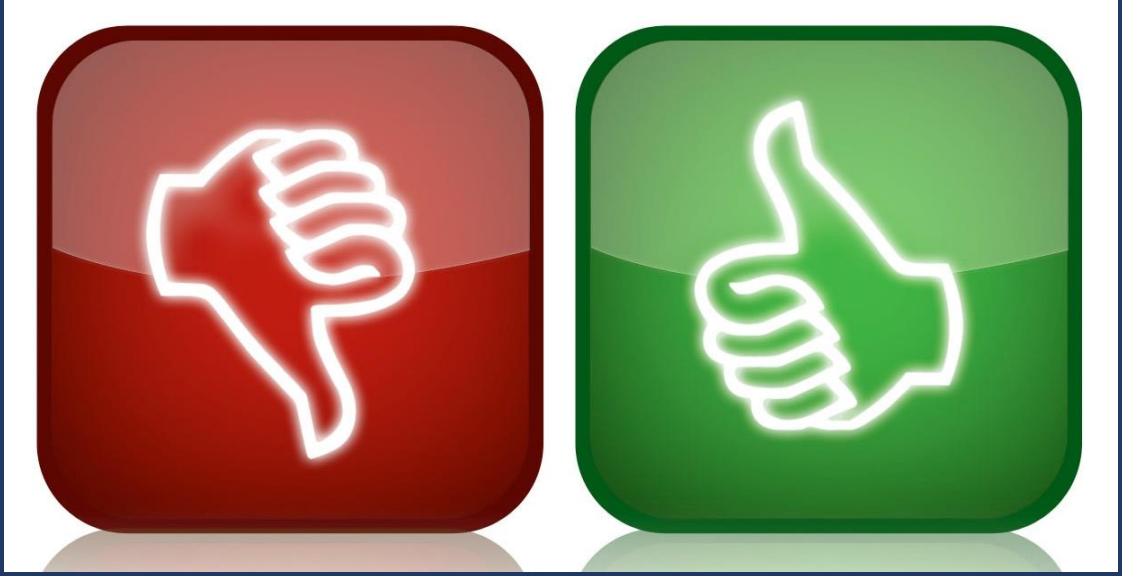
# Admit or Exclude? Evidence Challenges in Administrative Hearings



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# What determines whether the evidence offered at your hearings is admitted?

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The Federal Administrative Procedures sets out the deceptively simple standard that is allowed in most administrative hearings.

It provides for the admission of all evidence which is not

"irrelevant, immaterial, or unduly repetitious."

# In what sources of law do we find the rules which govern evidence admissibility in our hearings?

- State or federal constitutions
- Statutes (enacted by legislative bodies)
- Rules or regulations
- Appellate judicial decisions

Some of the most demanding rulings we must make on evidence admissibility involve objections to the admission of evidence on the ground that admitting the evidence would violate a constitutional right.

Objections made on these grounds are based on evidence rules regarding “privilege.”

# What do we mean by the law of privilege?

Privilege:

- freedom from the compulsion to give evidence
- right to prevent or bar evidence from other sources on grounds unrelated to the goal of ascertaining facts

Evidence determined to be *privileged* as a matter of law is evidence that is otherwise admissible but is excluded from a trial or hearing to protect other societal interests.

In the organic statutes of many agencies, the rules regarding privilege are the only evidence rules hearing officials are required to follow:

**"Agencies need not follow the rules of evidence observed by courts but shall observe the rules of privilege."**

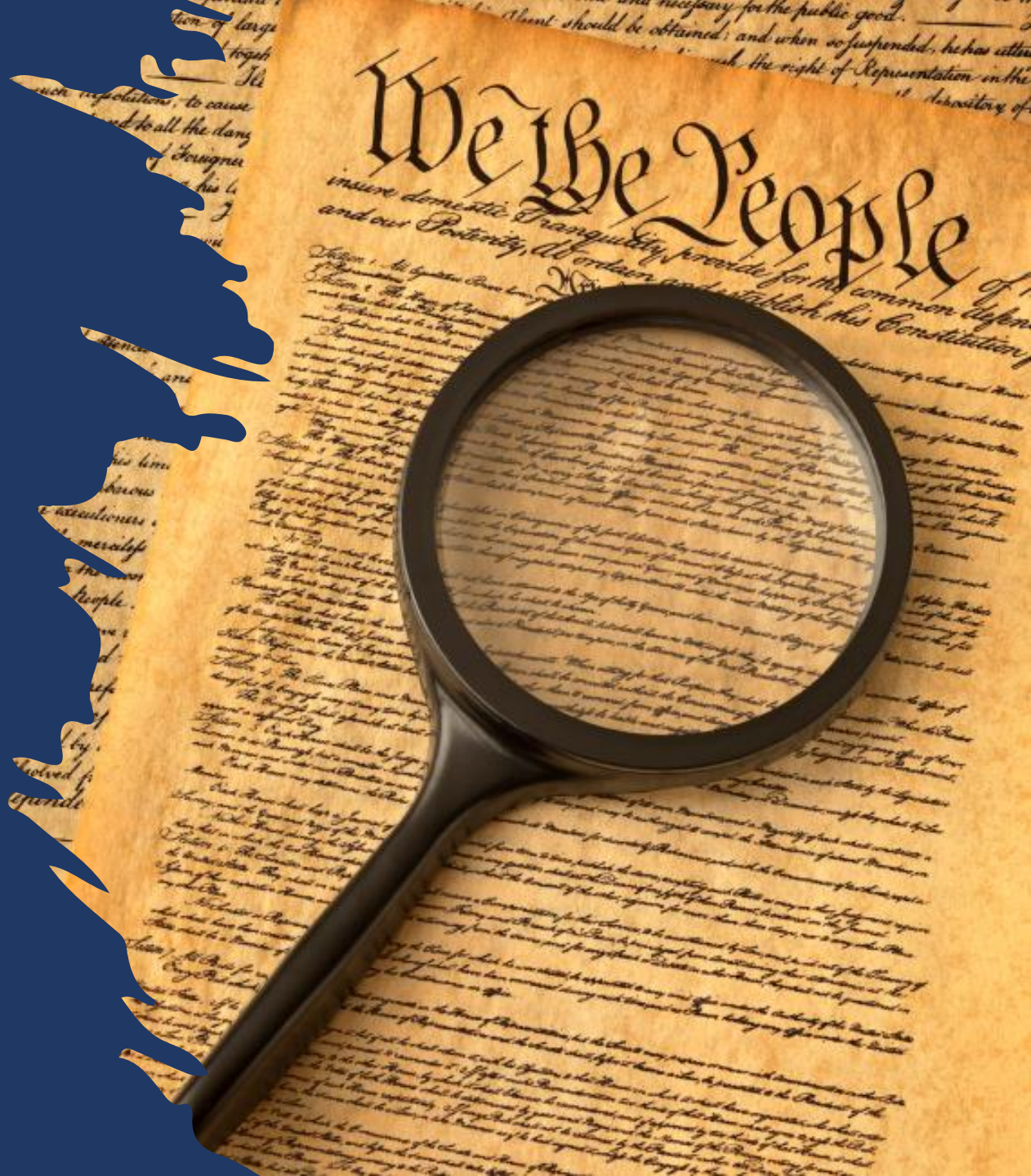
**"The strict Rules of Evidence, other than those regarding privilege, do not apply in administrative hearings under this chapter."**

If a party in your hearing challenges the admissibility of evidence on the ground that admitting the evidence violates one or more constitutional rights, they are asserting that the rule of privilege must apply to your hearings and that the rule bars the admission of the evidence.

Does this rule of privilege apply to your hearings?

Under what circumstances, if any, does it apply?

# Constitutional Privileges



# Privileges associated with the Bill of Rights that protect the rights of citizens:

| | |
|---|---|
| 4th Amendment | Right to be secure their person or property won't be searched or seized unreasonably. |
| 5th Amendment | Protects criminal defendants from having to testify if their testimony would incriminate them. |
| 6th Amendment | In all criminal prosecutions: speedy public trial, impartial jury, informed of allegations, confront witnesses, and present evidence, and have advice of counsel. |

# THE FOURTH AMENDMENT

OF THE UNITED STATES CONSTITUTION, RATIFIED DECEMBER 15, 1791

## *The right of the people to be secure*

# 4th Amendment

- Protects people from unreasonable searches and seizures by the government.
- Searches and seizures inside a home without a warrant are presumptively unreasonable: *Payton v. New York*, 445 U.S. 573 (1980)

# Warrantless searches may be lawful when:

- An officer is given consent to search.
  *Davis v. U.S.,* 328 U.S. 582 (1946)
- If the search is incident to a lawful arrest.
  *U.S. v. Robinson,* 414 U.S. 218 (1973)
- If the items are in plain view.
  *Maryland v. Macon,* 472 U.S. 463 (1985)
- If there is probably cause to search and exigent circumstances warranting the search.
  *Payton v. New York,* 445 U.S. 573 (1980)

# Administrative Hearing Exceptions to 4th Amendment Exclusions

- *United States v. Janis*, 428 U.S. 433 (1976) announced balancing test: probable deterrent effect of suppression to be balanced against need for the evidence.

- *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1052 (1984) expanded the *Janis* "balancing test" to the area of administrative law.

# Administrative Hearing Exceptions to 4th Amendment Exclusions

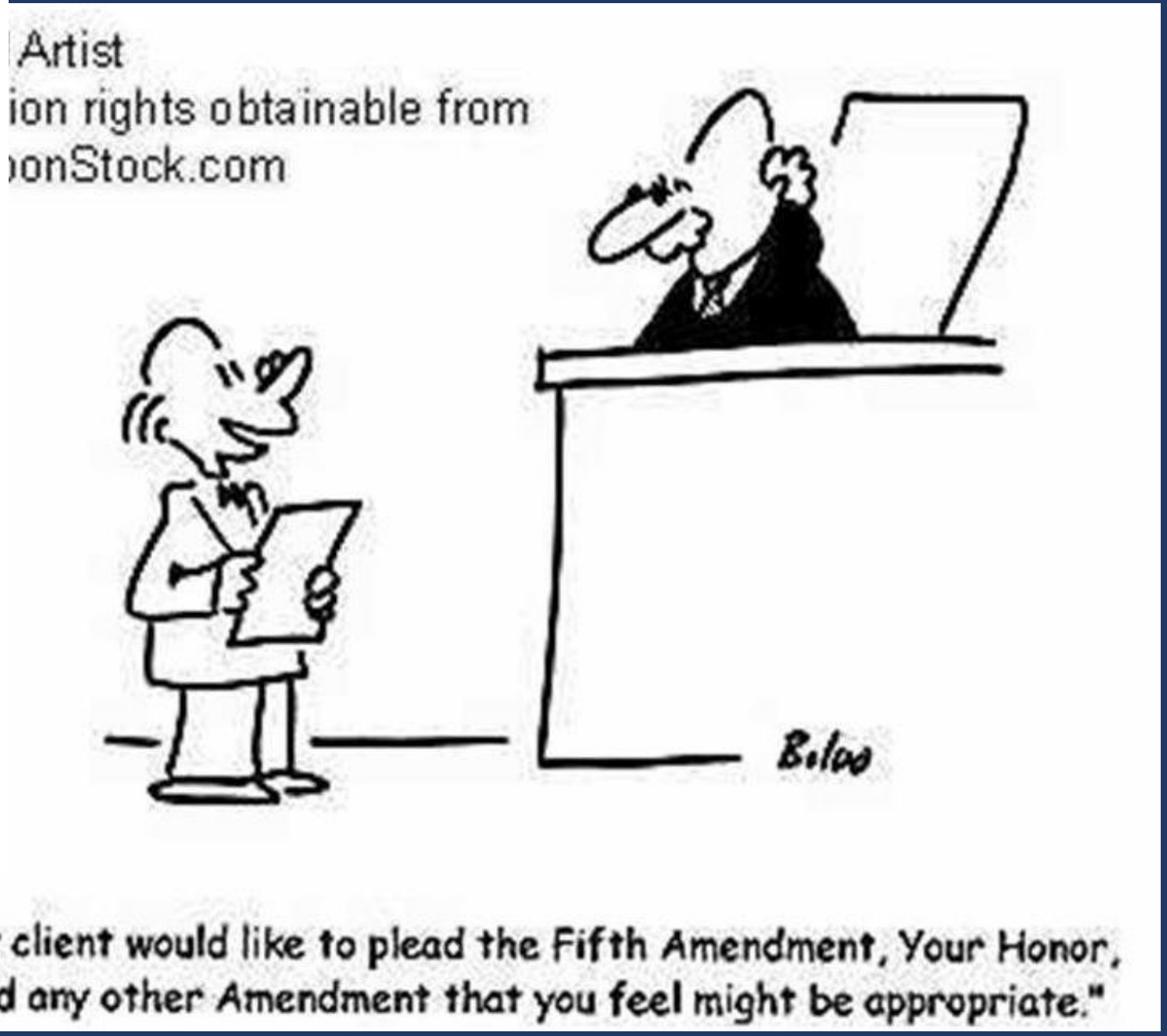
- Some states interpret *Lopez-Mendoza* to mean that the exclusionary rule has no application whatsoever to administrative proceedings.

- Other states allow admission of illegally-seized evidence in administrative hearings where the agency seeking to use the evidence did not employ the offending officer who made the illegal seizure.

# "Closely Regulated Business" Rule

- *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970): Liquor industry.
- *U.S. v. Biswell*, 406 U.S. 311 (1972): Firearms control.
- *Donovan v. Dewey*, 452 U.S. 594 (1981): Mine safety.
- *New York v. Burger*, 482 U.S. 691 (1987): Warrantless inspection may be needed to further regulatory scheme if there's a substantial government interest, but inspections must be regular and have a defined scope.

# 5TH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"My client would like to plead the Fifth Amendment, Your Honor, and any other Amendment that you feel might be appropriate."

# 5th Amendment

- Provides the right to a jury trial when charged with a crime
- Protects a person from being prosecuted more than once for the same offense and from being punished more than once for the same offense
- Protects against self-incrimination
- Provides the right to a fair trial
- Protects against the government taking private property without compensation

# 5th Amendment privilege against self-incrimination is limited to testimony, a communicative act, or writing.

The privilege doesn't protect a criminal defendant from

- Standing in a line-up to be identified by witnesses
- Speaking in a line-up for voice identification purposes
- Providing fingerprints
- Having photographs taken while in custody
- Forced handwriting samples to match handwriting
- Removal of a toupee, hat, or clothing for ID purposes
- Trying on clothing to see if it fits

# Sometimes a person against whom the administrative action is also charged with a crime based on the same event. Do Double Jeopardy protections apply?

No. Double Jeopardy protections would only apply if:

1. Sanction imposed by the agency was so punitive in nature that it transformed what was clearly intended as a civil remedy into a criminal penalty.
2. Must be “clearest proof” that sanctioning by the agency is so punitive in form and effective that it renders the action criminal despite the intent of the legislature for the action to be a civil.
3. Laws defining the violation and sanction must do so without inquiring into whether the violator *intended* to violate the law.

# What do I do if the party against whom the agency action is being taken wants to “plead the 5th” and refuses to testify in my hearing on constitutional grounds?

# What do I do if the party against whom the agency action is being taken wants to "plead the 5th" and refuses to testify in my hearing on constitutional grounds?

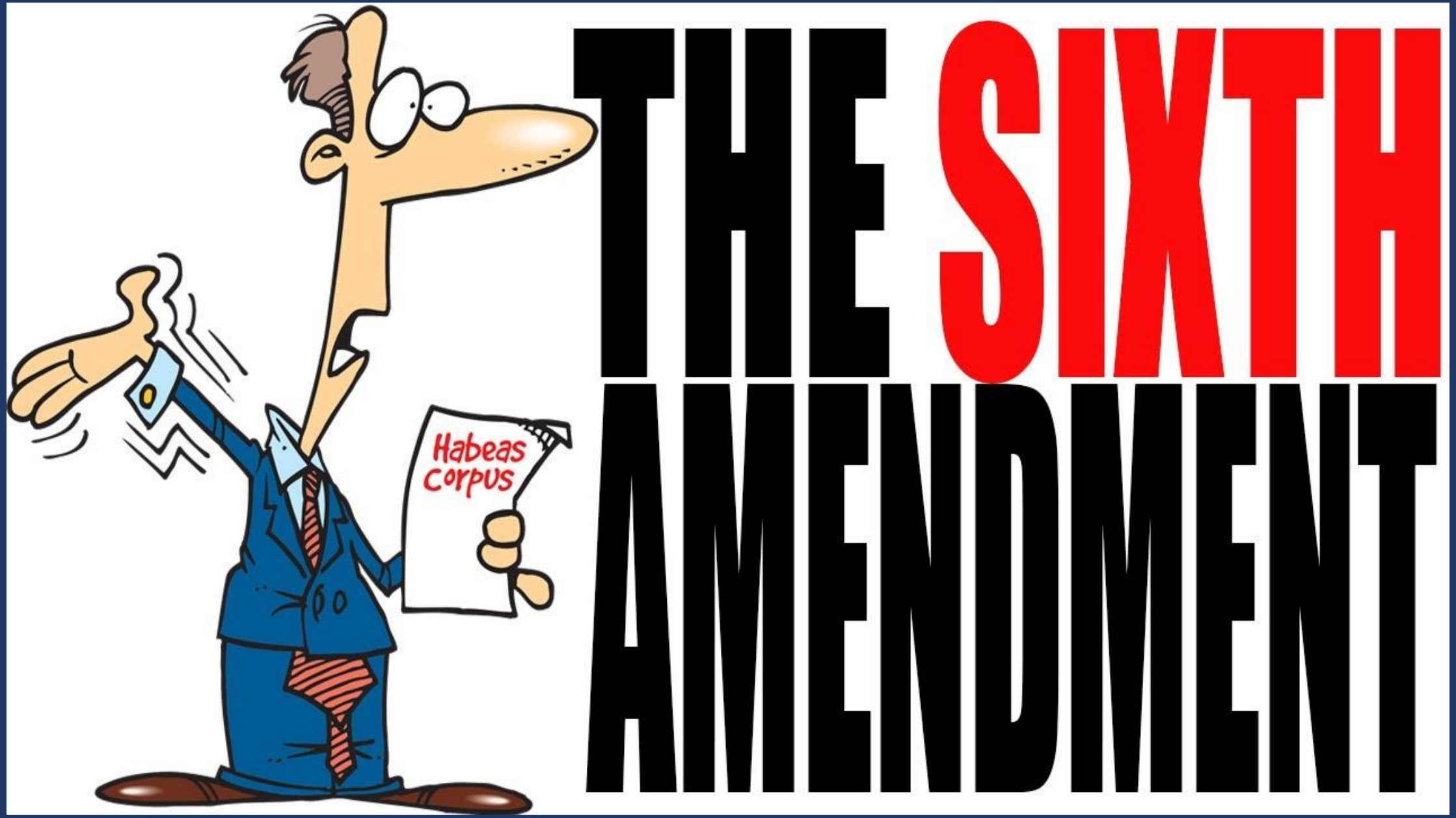
Explain to the party:
"You are not required to testify, but you need to know the consequence of your failure to testify. The law recognizes that a judge's decision in a criminal case is not to be influenced by a defendant's refusal to testify. However, the law says that a judge in a civil trial or an adjudicator in an administrative hearing can draw a negative inference if you decline to testify. That means that the civil judge or administrative adjudicator can infer from your refusal to testify that any testimony you might have given would have been unfavorable to your case."

# Case law that supports taking an adverse inference from failure to testify or present evidence.

- *Baxter v. Palmigiano*, 425 U.S. 308 (1976)
- *Szmaciarz v. California State Personnel Board*, 79 Cal.App.3d 904 (Cal. App. Div. 1, 1978)
- *Giampa v. Illinois Civil Service Commission*, 411 N.E.2d 1110 (Ill. App. Dist. 1, 1980)
- *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (U.S. App., 9th Circuit, 1995)
- *LiButti v. United States*, 178 F.3d 114, 117, 120 (2d Cir. 1999)

Sometimes we receive an objection to a document on the ground that the constitution guarantees citizens the right to confront the witnesses against them and, therefore, the declarant of the document must be present for the hearing.

Where did this complaint originate?




# THE SIXTH AMENDMENT

# 6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Petitioners in our hearings believe the “Confrontation Clause” of the 6th Amendment gives them the right to face-to-face cross-examination of any person presenting any sort of evidence that has the potential to be damaging to them.

How should we respond?

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How should we respond?

Sorry. Our hearings are civil, administrative proceedings, not criminal proceedings. The right of confrontation is binding only in criminal proceedings.

# *Peretti v. NTSB & FAA,* 999 F.2d 548 (10th Cir. 1993)

Commercial pilot Peretti deviated from acknowledged runway clearance violating FAA regulations. He “lost” his transport pilot certificate. His flight engineer was the chief witness against him at his administrative hearing in Colorado. She lived in South Carolina, was in an advanced stage of pregnancy, and was allowed to testify by phone.

# *Peretti v. NTSB & FAA,* 999 F.2d 548 (10th Cir. 1993)

Peretti appealed ALJ's decision to revoke his license on the ground that taking testimony by phone violated his 6th Amendment confrontation rights—he was denied the chance to cross-examine the flight engineer face-to-face.

The 10th Circuit held: "By its own unequivocal terms, the constitutional right of confrontation applies only '[i]n all criminal proceedings'."

# Admitting Hearsay

# Definition of hearsay for our hearings:

A statement made outside of our hearing that is offered as evidence to prove the truth of the matter asserted by the declarant of the statement at the time the statement was made.

The federal Administrative Procedures Act provides for liberal admission of evidence, including hearsay, as have most states.

Yet, we receive numerous objections to hearsay in our hearings and the implication is that the usefulness of hearsay is dubious, at best.

**Why?**

# Why is it implied that hearsay shouldn't be admitted?

- Attorneys do what is in the best interest of their client. If hearsay will hurt their case, they imply that it's suspect even when it's relevant, reliable, admissible.

- The Rules of Evidence which discourage hearsay admission were designed for lay juries—to prevent them from giving undue weight to hearsay.

Administrative adjudicators, unlike lay jurors, are trained to determine whether hearsay is reliable and can accurately assign weight to hearsay, when appropriate to do so.

## The first requirement for admission of hearsay is a “guarantee of trustworthiness.” Hearsay is trustworthy or reliable if:

The hearsay is of a type on which a reasonably prudent person would commonly rely in the conduct of their affairs.

Do we (responsible persons) actually rely on hearsay in our daily lives to determine important personal matters?

Can you provide an example?

# Questions?