UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE, Defendant.	Civil No. 95-0133 RCL/JMF

DEFENDANT'S MEMORANDUM TO THE COURT
CONCERNING DEPONENT JOHN HUANG

In this Freedom of Information Act case seeking documents from the Department of Commerce, by Order dated April 9, 1999, the Court ordered the deposition of former Department of Commerce employee John Huang to continue on April 13, 1999; the deposition previously had been suspended until further notice on October 30, 1996. At the deposition on April 13, 1999, Mr. Huang refused to answer certain questions posed by plaintiff's attorney, asserting his 5th Amendment privilege not to answer questions that may tend to incriminate him. Plaintiff argued that the privilege did not apply to the types of questions being posed, and that, even if it could apply, Mr. Huang had waived assertion of the privilege by testifying at the October 1996 deposition.

This Court has ordered briefs on the question of whether his prior deposition testimony waives Mr. Huang's assertion of the Fifth Amendment privilege. Defendant Department of Commerce, of course, could not assert this privilege on Mr. Huang's behalf, nor did it attempt to do so. Furthermore, the Department of Commerce has no position, nor it is required to have one in this

FOIA litigation, on whether Mr. Huang correctly asserted the 5th Amendment privilege. This issue must be addressed by those asserting the privilege and those seeking to overcome it.

Nonetheless, because the Court has requested briefs on this issue, the United States Attorney's Office for the District of Columbia, on behalf of itself, offers the following opinion concerning the Court's review of a claim of Fifth Amendment privilege and plaintiff's argument that Mr. Huang's prior deposition testimony waives the privilege.

The Fifth Amendment guarantees that no person can be compelled to testify against himself or herself, and this constitutional provision "must be accorded liberal construction in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486 (1951). The Supreme Court has held, however, that an individual claiming Fifth Amendment protection does not establish the existence of the privilege solely by raising the claim. Rather, the Court must decide whether the claim has been properly asserted and require the witness to answer if the claim is not justified. Id.; Rogers v. United States, 340 U.S. 367 (1951); Securities and Exchange Comm. v. Parkersburg Wireless Limited Liability Co., 156 F.R.D. 529, 535 (D.D.C. 1994). Fifth Amendment protection is limited to instances "where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman, 341 U.S. at 486. "If, however, the danger of self-incrimination is not apparent, the burden is on the claimant to prove the danger exists."

Securities and Exchange Comm., 156 F.R.D. at 535.

The Fifth Amendment privilege is considered waived if it is not invoked at the time the danger of incrimination occurs. Minnesota v. Murphy, 465 U.S. 420, 427 (1984); Rogers, 340 U.S. at 371; United States v. Murdock, 284 U.S. 141, 148 (1931). However, the fact that an individual has testified regarding a particular subject matter without claiming a Fifth Amendment privilege does not mean that he or she is precluded from asserting a Fifth Amendment privilege with respect to additional questions on the same subject matter.

The key to this issue is whether answering the additional questions could incriminate the witness when the original testimony given did not, or whether the answers would further incriminate the witness beyond any incrimination occurring from the volunteered testimony. Securities and Exchange Comm., 156 F.R.D. at 535. "If the additional information merely provides detail to an already potentially damaging statement," and no further incrimination can occur, a Fifth Amendment privilege claim cannot be sustained. Id. If, however, the witness were asked "questions that go beyond his previous disclosure," and the witness would face "new real dangers" by answering such questions, the Fifth Amendment privilege may be properly invoked. Ellis v. United States, 416 F.2d 791, 803 (D.C. Cir. 1969). Moreover, the passage of time between the testimony previously given and the testimony at issue must be considered. As this circuit stated in Ellis, "[i]t may be that in some situations the

passage of time, and change in purpose of an investigation, may open up new real dangers." Id., 416 F.2d at 803.

The Court of Appeals in United States v. Perkins, 138 F.3d 421 (D.C. Cir. 1998), faced an issue similar to the one before this Court. In that case a witness testified at trial and then wrote a letter after the trial recanting his testimony and alleging witness tampering by the prosecutors. At the new trial, the witness refused to testify and invoked the Fifth Amendment privilege. The defendants who had been convicted in the first trial argued that the witness had waived his right to assert the Fifth Amendment privilege by testifying at the first trial and by writing the post-trial letter. The District Court disagreed, and that decision was upheld on appeal.

This Circuit held that:

> Because Hartwell never disclosed at [the first] trial that the testimony he was offering might be false, any post-trial testimony indicating that it was -- even a simple acknowledgment that he wrote a recantation letter -- posed 'a "real danger" of further crimination.' His trial testimony therefore cannot be construed as a waiver of the privilege he later invoked.

Id., 138 F.3d at 425.[1]

Similarly here, the fact that Mr. Huang testified at a prior deposition does not automatically waive his right to claim the

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[1] The Court also noted that when a witness is asked a question, the answer to which could show that he had committed perjury in prior testimony, "his refusal to answer is permissible almost by definition of self-incrimination." Perkins, 138 F.3d at 425. Consequently, Mr. Huang's assertion of the Fifth Amendment in response to plaintiff's question regarding whether Mr. Huang had testified truthfully in his prior deposition clearly was properly upheld by the Court.

Fifth Amendment privilege with respect to a subsequent deposition on the same or new subject areas. Rather, as the Supreme Court stated in Rogers:

> [T]he Court was required to determine, as it must whenever the privilege is claimed, whether the question presented a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures. As to each question to which the claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further crimination.

Id. 340 U.S. at 442 (emphasis added).

Based on the foregoing, it is the position of the U.S. Attorney's Office for the District of Columbia that prior deposition testimony does not automatically waive a Fifth Amendment privilege claim with respect to questions concerning the subject matters addressed in the prior testimony. Rather, the Court must address the waiver issue on a question-by-question basis, taking into account the exact substance of the prior testimony, and any change in circumstances during the two and a half year time period since Mr. Huang's last deposition that may give rise to the real danger of incrimination not previously present, or to the real danger of further inorimination. The Court's analysis in this regard, however, must be guided by the well established principle that the Fifth Amendment privilege "is generally construed broadly and must be sustained when it is 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer . . . might be dangerous because injurious disclosure could result.'"

Securities and Exchange Comm., 156 F.R.D. at 535, quoting Steinbrecher v. C.I.R., 712 F.2d 195, 198 (5th Cir. 1983).

Respectfully submitted,

WILMA A. LEWIS, D.C. BAR #358637
United States Attorney
District of Columbia

MARK E. NAGLE, D.C. BAR #416364
Assistant United States Attorney

MARINA UTGOFF BRASWELL, D.C. BAR #416587
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that the accompanying Defendant's Memorandum to the Court was served upon plaintiff by facsimile and by depositing a copy of it in the U.S. mail, first class postage prepaid, addressed to:

Larry Klayman, Esq.
Judicial Watch, Inc.
501 School Street, S.W.
Suite 725
Washington, D.C. 20024

and upon private counsel for John Huang, in the same manner, addressed to:

John C. Keeney, Jr., Esq.
Ty Cobb, Esq.
Hogan & Hartson, L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004-1109

on this 14th day of April, 1999.

MARINA UTGOFF BRASWELL, D.C. Bar #416587
Assistant United States Attorney
Judiciary Center Building -- Rm. 10-413
555 4th Street, N.W.
Washington, D.C. 20001
(202) 514-7226