



National Border Patrol Council

Legal Division Advisory

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COMPELLED STATEMENTS / CRITICAL INCIDENTS

This NBPC Legal Division Advisory is being put out due to possible misunderstandings regarding an agent's rights when that agent is involved in an agent involved shooting, critical incident or use of force incident. It has been reported that agents have been told by investigators that they are "required" to give a statement regarding such incidents and in the past, some have gone so far as to threaten agents and their representatives with arrest for impeding their investigations because the agent declines to give a statement or wants to talk with their representative before giving a statement. Unfortunately, there are some managers who are equally misinformed and have repeated the same position – telling agents that they are required to give statements to local law enforcement regarding such incidents.

The law is well settled. An agent involved in an incident has absolutely no obligation to provide a statement to law enforcement officials outside the Agency. This has been the law for nearly fifty (50) years, yet this issue seems to resurface every couple of years when we encounter a new group of local law enforcement officials or managers who are ignorant of the law or simply think that their demands override an agent's constitutional rights.

The Fifth Amendment to the Constitution makes clear that, when questioned by law enforcement, people do not have to give a statement and have the absolute right to remain silent.

In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the United States Supreme Court addressed the issue of law enforcement officers being compelled to give statements as part of a criminal investigation. In that case, the Court recognized that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." Unfortunately, that is exactly what some local law enforcement officials and managers are trying to do – to threaten agents and tell them that their Constitutional rights do not apply because you are a law enforcement officer. These bullying tactics are illegal and violate an agent's civil rights.

The only time an agent can be compelled to waive their Fifth Amendment privilege is as part of an *administrative* investigation conducted by the Agency, not as part of any *criminal* investigation.

State and local agencies and most federal agencies, including the FBI, do **NOT** have the legal authority to conduct *administrative* investigations of our agents. If a state, local or other non-CBP investigator is attempting to obtain a statement from one of our agents it is almost certainly part of a *criminal* investigation.

Only the Agency can compel an agent to answer questions as part of an administrative investigation. When the Agency orders an agent to answer questions as part of an administrative investigation, under threat of insubordination, neither the agent's answer nor any evidence gained as a result of the agent's answer may be used against the agent in any criminal proceeding. This is the issue the Supreme Court addressed in *Garrity* nearly fifty (50) years ago. The law has not changed. You do not give up your rights because you put on the badge and gun and go "10-8." You are entitled to the very same Constitutional rights that you took the oath to uphold and protect.

The NBPC Legal Division is staffed by 7 Attorneys who specialize in protecting the rights and interests of Border Patrol Agents