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## The (Un?)Constitutionality of Compelling Non-Immunized Testimony in Deceptive Trade Practices Investigations Conducted By the Attorney General of the State of Arkansas

Terrence Cain

University of Arkansas at Little Rock William H. Bowen School of Law, [txcain@ualr.edu](mailto:txcain@ualr.edu)

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THE (UN?)CONSTITUTIONALITY OF COMPELLING NON-  
IMMUNIZED TESTIMONY IN DECEPTIVE TRADE PRACTICES  
INVESTIGATIONS CONDUCTED BY THE ATTORNEY GENERAL OF  
THE STATE OF ARKANSAS

*Terrence Cain\**

I. AN OVERVIEW OF ARKANSAS'S PROHIBITION ON DECEPTIVE TRADE  
PRACTICES

On January 11, 1971, the Arkansas General Assembly convened for its sixty-eighth regular session.<sup>1</sup> During this session, the legislature determined that "the public health, welfare, and interest require[d] a strong and effective consumer protection program to protect the interests of both the consumer public and the legitimate business community."<sup>2</sup>

To accomplish this end, the legislature approved an act to prohibit deceptive trade practices, which the legislature defined as including, but not limited to the following:

- (a) Knowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval or certification of goods or services, or as to whether goods are original or new, or of a particular standard, quality, grade, style, or model.
- (b) Disparaging the goods, services, or business of another by [a] false or misleading representation of fact.
- (c) Advertising goods or services with [the] intent not to sell them as advertised.
- (d) [The] [r]efusal of a retailer to deliver to the customer purchasing any electronic or mechanical apparatus the record of warranty and statement of service availability [that] the manufacturer includes in the original carton or container of the product, or the refusal to make available, on request, information relating thereto.
- (e) The employment of "bait and switch" advertising, consisting of an attractive but insincere offer to sell a product or service [that] the seller in truth does not intend or desire to sell, evidenced by refusal to show or

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\* Associate Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law.

1. 1971 Ark. Acts, vol. 2, bk. 1, p. i. The session adjourned on April 19, 1971.

2. 1971 Ark. Acts, vol. 2, bk. 1, p. 257-58.

[disparagement] of the advertised product, requirement of tie-in sale or other undisclosed conditions precedent to the purchase, demonstrating a defective product, or other acts demonstrating an intent not to sell the advertised product or services.

(f) Knowingly failing to identify flood, water, fire, or accidentally damaged goods as to such damages.<sup>3</sup>

In addition to the foregoing, the act declared the following to be unlawful practices:

The act, use or employment by any person of any deception, fraud, or false pretense; or the concealment, suppression, or omission of any material fact with [the] intent that others rely upon such concealment, suppression or omission; in connection with the sale or advertisement of any goods or services . . . .<sup>4</sup>

Contriv[ing], prepar[ing], set[ting] up, propos[ing], or operat[ing] any pyramiding device.<sup>5</sup>

The act took effect on July 1, 1971,<sup>6</sup> and is commonly known as the Arkansas Deceptive Trade Practices Act (ADTPA) or the Deceptive Trade Practices Act (DTPA).<sup>7</sup>

The DTPA empowers the Attorney General of the State of Arkansas to conduct an investigation under the following circumstances: (1) when the

3. Act of July 1, 1971, No. 92, 1971 Ark. Acts 92 at sec. 6 (codified at ARK. CODE ANN. § 4-88-107 (Repl. 2011)).

4. *Id.* at sec. 4 (codified at ARK CODE ANN. § 4-88-108 (Repl. 2011)).

5. *Id.* at sec. 5 (codified at Ark Code Ann. § 4-88-109 (Repl. 2011)). The act defined a “pyramiding device” as:

any scheme for the disposal or distribution of property whereby a participant pays valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant.

*Id.*

6. *Id.* at sec. 15.

7. The legislature did not actually name the act. The phrase “Arkansas Deceptive Trade Practices Act” first appeared in a published judicial decision on March 11, 1991 in *Lemarco, Inc. v. Wood*, 305 Ark. 1, 2, 804 S.W.2d 724, 725 (1991). The phrases “Arkansas Deceptive Trade Practices Act” and the “Deceptive Trade Practices Act” likely derived from where the act is codified in the Arkansas Code Annotated, which is Title 4, Subtitle 7, Chapter 88, and is entitled “Deceptive Trade Practices.” Act 92 of 1971 is currently codified at Arkansas Code Annotated sections 4-88-101 through 4-88-109 and 4-88-111 through 4-88-115. Act 92 of 1971 did not, however, create sections 4-88-102, 4-88-114, or 4-88-115. 1971 Ark. Acts 92, at secs. 1–15. The General Assembly enacted section 4-88-102 in Act 1177 of 1991, sec. 3; it enacted section 4-88-114 in Act 587 of 1993, sec. 5; and it enacted section 4-88-115 in Act 910 of 1993, sec. 2.

Attorney General determines that an investigation should be made as to whether a person has engaged in, is engaging in, or shows an intent to engage in a deceptive trade practice; (2) when the Attorney General receives a request to enforce the DTPA from a consumer organization, a labor organization, a better business bureau, a chamber of commerce, or a state agency; and (3) when the Attorney General receives a written complaint from a consumer asserting a violation of Arkansas's prohibition on deceptive trade practices.<sup>8</sup>

In the course of conducting an investigation under the DTPA, the Attorney General is authorized to require the target of the investigation to “file a statement or [written report regarding] the facts and circumstances [of] the matter [being investigated.]”<sup>9</sup> and to “examine under oath or take the deposition of [the target of the investigation].”<sup>10</sup>

Evidence produced as a result of the target filing a statement or written report, or as a result of the target giving a deposition, can be used in a later judicial proceeding by the Attorney General or by any attorney designated by the Attorney General.<sup>11</sup>

If the Attorney General demands that a person file a statement, written report, or appear for a deposition and that person refuses or fails to do so, the Attorney General can file a petition in the circuit court of the county where the person resides or in the Circuit Court of Pulaski County and request an order to compel the person's compliance.<sup>12</sup> An order granting or denying the Attorney General's petition can be appealed to the Supreme Court of Arkansas.<sup>13</sup>

If the Attorney General's investigation leads him or her to conclude that the target of the investigation has engaged in, is engaging in, or shows an intent to engage in a deceptive trade practice, the Attorney General can file a civil enforcement action in the circuit court of the county where the target resides or in the Circuit Court of Pulaski County and ask that the court enter an order preventing the target from engaging in any deceptive trade practices.<sup>14</sup>

The court can order that restitution be paid to purchasers who suffer losses as a result of the use or employment of deceptive trade practices,<sup>15</sup> and the court can impose a monetary penalty of \$10,000 per violation

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8. ARK. CODE ANN. § 4-88-111(a) (Repl. 2011).

9. *Id.* § 4-88-111(a)(1).

10. *Id.* § 4-88-111(a)(2).

11. *Id.* § 4-88-111(c).

12. *Id.* § 4-88-112(a).

13. *Id.* § 4-88-112(d).

14. ARK. CODE ANN. § 4-88-113(a)(1) (Repl. 2011).

15. *Id.* § 4-88-113(a)(2)(A).

against the person or entity found to have violated the DTPA.<sup>16</sup> If the Attorney General asks the court to do so, it can suspend or forfeit the franchise, corporate charter, license, permit, or authorization to do business in the State of Arkansas of a violator of the DTPA.<sup>17</sup>

If the Attorney General prevails in a civil enforcement action under the DTPA, the losing party is required to pay the costs the Attorney General incurred in investigating the matter and prosecuting the civil enforcement action.<sup>18</sup> The losing party is also required to pay the Attorney General's attorneys' fees.<sup>19</sup> In addition to civil penalties, a person who is found to be a violator of the DTPA is also guilty of a Class A misdemeanor, which subjects that person to a fine of up to \$2,500 and a prison term of up to one year.<sup>20</sup>

## II. THE FIFTH AMENDMENT ISSUE

The Attorney General is authorized to enforce the DTPA, which includes the power to compel the target of a DTPA investigation to provide testimonial evidence that can be used against that person in a post-investigation criminal proceeding.<sup>21</sup> A violation of the DTPA is a crime,<sup>22</sup> yet, the Attorney General is not authorized to prosecute crimes.<sup>23</sup> This means that the Attorney General can compel the target of a DTPA investigation to provide testimony that can be used against that person in a subse-

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16. *Id.* § 4-88-113(a)(3).

17. *Id.* § 4-88-113(b).

18. *Id.* § 4-88-113(e).

19. *Id.* § 4-88-113(e).

20. ARK. CODE ANN. § 4-88-103 (a person who knowingly and willfully commits a violation of the DTPA is guilty of a Class A misdemeanor); ARK. CODE ANN. § 5-4-201(b)(1) (Supp. 2013) (a person convicted of a Class A misdemeanor may be required to pay a fine not exceeding \$2,500); ARK. CODE ANN. § 5-4-401(b)(1) (a person convicted of a Class A misdemeanor may be sentenced to a term of imprisonment not to exceed one year).

21. ARK. CODE ANN. §§ 4-88-104; 4-88-111; 4-88-113 (Repl. 2011).

22. *Id.* § 4-88-103.

23. ARK. CONST. amend. XXI, § 1 (“All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment by a grand jury or information *filed by the Prosecuting Attorney.*”) (emphasis added); ARK. CODE ANN. § 16-21-103 (Repl. 1999) (“Each *prosecuting attorney* shall commence and prosecute *all criminal actions* in which the *state* or any county in his district may be concerned.”) (emphasis added); ARK. CODE ANN. § 25-16-702 (Repl. 2002) (listing the duties of the Attorney General). Prosecuting attorneys have the discretion to delegate their authority to prosecute *state misdemeanor laws* to the city attorneys in whose municipality the misdemeanors occur. ARK. CODE ANN. § 16-21-115 (Supp. 2013) (emphasis added). The city attorneys, however, have to consent to the delegation of that authority. *Id.* Prosecuting attorneys cannot prosecute *city misdemeanor* cases or appeals to circuit court or to the Supreme Court of Arkansas or the Arkansas Court of Appeals unless they consent to do so. ARK. CODE ANN. § 16-21-150 (Repl. 1999).

quent criminal prosecution, which in turn raises the question of whether that authority violates the Fifth Amendment privilege against self-incrimination.

Because the Attorney General lacks the authority to prosecute criminal cases, that office likewise lacks the authority to grant a person immunity from a criminal prosecution.<sup>24</sup> Notwithstanding the Attorney General's inability to grant a person immunity from a criminal prosecution, the DTPA authorizes that office to compel a person to give self-incriminating testimony, and because a violation of the DTPA is a civil as well as a criminal offense, that testimony can be used in a criminal prosecution that comes on the heels of a civil enforcement action.<sup>25</sup>

This issue has not been addressed by the Supreme Court of Arkansas or the Arkansas Court of Appeals. This essay will now examine whether the Attorney General's authority to compel a person who is the target of a DTPA investigation to give non-immunized self-incriminating testimony violates the Fifth Amendment privilege against self-incrimination.

### III. ANALYSIS OF THE FIFTH AMENDMENT ISSUE

The Fifth Amendment to the Constitution of the United States of America states:

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*<sup>26</sup>

The Fifth Amendment protection against self-incrimination is binding on the states through the Due Process Clause of the Fourteenth Amendment.<sup>27</sup> Although the text of the Fifth Amendment mentions only criminal cases, the privilege to refuse to give self-incriminating testimony can be asserted in any proceeding, be it civil, criminal, administrative, judicial, investigatory, or adjudicatory, and it allows a witness to refuse to disclose any testimonial evidence that he reasonably believes might be used in a criminal prosecution or that might lead to other evidence that could be used

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24. ARK. CONST. amend. XXI, § 1; ARK. CODE ANN. § 25-16-702 (Repl. 2002).

25. ARK. CODE ANN. §§ 4-88-103, -104, -111, -113 (Repl. 2011).

26. U.S. CONST. amend V (emphasis added).

27. *Malloy v. Hogan*, 378 U.S. 1, 4-6 (1964).

in a criminal prosecution.<sup>28</sup> The privilege protects non-party witnesses and party witnesses alike.<sup>29</sup> In sum, a person may properly invoke the Fifth Amendment in any proceeding where any testimony he might give might be used against him in a later criminal proceeding.<sup>30</sup>

The privilege does not apply, however, in a proceeding where a person is assured that his testimony will not be used against him in a later criminal proceeding.<sup>31</sup> A witness can be compelled to give self-incriminating testimony in any proceeding if prior to giving the testimony, it has been immunized from use and derivative use<sup>32</sup> in a future criminal proceeding.<sup>33</sup> A witness must insist on an immunity agreement *before* being compelled to give incriminating testimony in a noncriminal case in order to preserve the Fifth Amendment right to prohibit the use of that compelled testimony in a subsequent criminal case.<sup>34</sup>

If a witness fails to assert his Fifth Amendment privilege when he is entitled to do so, he forfeits his right to bar the use of any self-incriminating evidence in a later criminal prosecution.<sup>35</sup> It is necessary, therefore, for a witness to assert his privilege before a criminal prosecution takes place in

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28. *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972). If a witness invokes his Fifth Amendment right in a civil case, the fact finder is allowed to draw an adverse inference against the witness. *Mitchell v. United States*, 526 U.S. 314, 328 (1999) (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 808, n.5 (1977); *Baxter v. Palmigiano*, 425 U.S. 308, 318, 319 (1976)). In a criminal case, however, the Fifth Amendment prohibits the drawing of an adverse inference against a witness who invokes his right to remain silent. *Baxter*, 425 U.S. 308, 318–19 (1976) (citing *Griffin v. California*, 380 U.S. 609, 612–15 (1965)). The privilege operates differently in civil cases than it does in criminal cases because the stakes are higher for a witness in a criminal case than they are in a civil case. *Baxter*, 425 U.S. at 318–19. In a criminal case, a witness stands to lose his life or liberty; not so in a civil case. *Id.*

29. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (citing *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924)).

30. *Id.*

31. *Id.* at 78 (citing *Kastigar*, 406 U.S. at 443–59).

32. “Use” or “derivative use” immunity bars the government from using compelled testimony and any evidence derived from that testimony against the witness. *Kastigar*, 406 U.S. at 443. Use or derivative use immunity does not prohibit a witness from being prosecuted in a later criminal proceeding if the government has independent evidence to convict the witness of a crime about which he testified. *United States v. Quatermain*, 467 F. Supp. 782, 787–88 (E.D. Pa. 1979). “Transactional” immunity, on the other hand, prevents the government from prosecuting a witness for any offense to which his compelled testimony relates. *Kastigar*, 406 U.S. at 443. Transactional immunity is broader than use immunity; in fact, transactional immunity includes within it, use immunity. *United States v. Pellon*, 475 F. Supp. 467, 478–79 (S.D.N.Y. 1979) (citing *Quatermain*, 467 F. Supp. at 788).

33. *Chavez v. Martinez*, 538 U.S. 760, 770–71 (2003) (citing *Maness v. Myers*, 419 U.S. 449, 461–62 (1975); *Kastigar*, 406 U.S. at 453).

34. *Chavez*, 538 U.S. at 771 (citing *Michigan v. Tucker*, 417 U.S. 433, 440–41 (1974)).

35. *Id.* (citing *Minnesota v. Murphy*, 465 U.S. 420, 440 (1984); *Garner v. United States*, 424 U.S. 648, 650 (1976); *United States v. Kordel*, 397 U.S. 1, 7 (1970)).

order to preserve the privilege.<sup>36</sup> This means that a witness must insist on, and be granted, immunity before he gives testimony if he wants to bar the government from using the testimony in a later criminal prosecution.<sup>37</sup>

As discussed above, the Attorney General has the authority to investigate alleged violations of the DTPA and to prosecute civil enforcement actions under the DTPA.<sup>38</sup> If the Attorney General prevails in a civil enforcement action, then the defendant is guilty of violating the DTPA, which in turn means the defendant is guilty of a criminal offense and subject to criminal prosecution.<sup>39</sup> The Attorney General, however, is not authorized to conduct that prosecution and lacks the authority to grant a person immunity from such a prosecution.<sup>40</sup> Despite not having the authority to prosecute a criminal case or the authority to grant immunity from a criminal prosecution, the Attorney General can compel the target of a DTPA investigation to give non-immunized self-incriminating testimony that could very well be used in a later criminal prosecution of that person.<sup>41</sup> The Fifth Amendment, however, disallows such a thing.<sup>42</sup>

Because the Attorney General cannot grant a person immunity from a criminal prosecution, and because the DTPA authorizes a criminal prosecution of a person found to have violated the DTPA, the Attorney General's authority to compel the target of a DTPA investigation to offer non-immunized testimonial evidence is unconstitutional.<sup>43</sup> The law is clearly established that the government can compel self-incriminating testimony only if the witness is granted immunity before giving the testimony.<sup>44</sup> Because the DTPA allows the Attorney General to compel non-immunized self-incriminating testimony in DTPA investigations, Arkansas law is contrary to well established Fifth Amendment jurisprudence.<sup>45</sup>

This issue, however, has not been decided by the Supreme Court of Arkansas or the Arkansas Court of Appeals. In order to put the thesis of this

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36. *Id.*

37. *Id.* at 771–72.

38. *See* ARK. CODE ANN. §§ 4-88-104, 4-88-111 (2011).

39. *Id.* § 4-88-103.

40. ARK. CONST. amend. XXI, § 1; ARK. CODE ANN. § 25-16-702 (Repl. 2002).

41. ARK. CODE ANN. §§ 4-88-111(a)(1)–(2), (c) (2011).

42. *Chavez v. Martinez*, 538 U.S. 760, 770–71 (2003) (citing *Maness v. Myers*, 419 U.S. 449, 461–62 (1975); *Kastigar v. United States*, 406 U.S. 441, 453 (1972)).

43. *See Michigan v. Tucker*, 417 U.S. 433, 441 (1974) (testimony obtained in civil suits, or before administrative or legislative committees can prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of those disclosures in a subsequent criminal proceeding).

44. *Lefkowitz v. Turley*, 414 U.S. 70, 77–78 (1973) (citing *Kastigar*, 406 U.S. at 443–59).

45. *See Chavez*, 538 U.S. at 770–71 (citing *Maness*, 419 U.S. at 461–62; *Kastigar*, 406 U.S. at 453).

essay to the test, the target of a DTPA investigation has to disobey a demand from the Attorney General to provide testimonial evidence, which will then cause the Attorney General to file a petition in the relevant circuit court asking for a court order compelling the non-compliant target to provide testimonial evidence.<sup>46</sup> Once such a petition is filed, the target will then need to file a motion for a declaratory judgment<sup>47</sup> that Arkansas Code Annotated sections 4-88-111(a)(1), (2), and 4-88-111(c) violate the Fifth Amendment right against self-incrimination.

No matter how the circuit court rules on the motion for a declaratory judgment, the losing party would almost certainly appeal the court's ruling to the Supreme Court of Arkansas, and that court will then provide Arkansas's answer to the question of whether the Attorney General's authority to compel non-immunized testimonial evidence from the target of a DTPA investigation violates the Fifth Amendment privilege against self-incrimination. That, however, might not be the end of the matter. Because this issue involves federal constitutional law, a decision by the Supreme Court of Arkansas on the issue can be presented to the Supreme Court of the United States in a petition for a writ of certiorari.<sup>48</sup>

On the other hand, if the Supreme Court of Arkansas decides that the Attorney General's authority to compel non-immunized testimonial evidence from the target of a DTPA investigation does not violate the Fifth Amendment privilege against self-incrimination, and the losing party does not seek review in the Supreme Court of the United States, if that party is then prosecuted, he will need to raise the Fifth Amendment issue in the criminal trial, and if he is convicted, then he will need to raise it again in the direct appeal of his conviction.

Of course, given that the Supreme Court of Arkansas will have already decided that the challenged practice does not violate the Fifth Amendment, the defendant will lose that issue on direct appeal. Once the decision on direct appeal is final, however, the defendant can present the Fifth Amendment question to a United States district court in a petition for a writ of habeas corpus.<sup>49</sup> The United States district court will then declare that the challenged practice violates the Fifth Amendment or that it does not. Either way, the losing side of that question can ask the district court to issue a certificate

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46. ARK. CODE ANN. § 4-88-112 (2011).

47. Arkansas's declaratory judgment procedure can be found at Arkansas Code Annotated, sections 16-111-101 through 16-111-111 (Supp. 2013).

48. See ARK. CODE ANN. § 4-88-111(a)(1)-(2), (c) (2011); SUP. CT. R. 10(c) (the Supreme Court can grant a petition for a writ of certiorari in a case where a state court decides an important question of federal law that has not been, but should be, settled by the Supreme Court, or decides an important federal question in a way that conflicts with relevant decisions of the Court).

49. 28 U.S.C. §§ 2244(d), 2254(a), (d)(1) (1996).

of appealability in order to present the question to the United States Court of Appeals for the Eighth Circuit.<sup>50</sup> The Eighth Circuit will then rule on the question, and the losing side of that argument can petition the Supreme Court of the United States to decide the question.<sup>51</sup>

#### IV. POSSIBLE CURES FOR THE FIFTH AMENDMENT PROBLEM

There are at least two ways to cure the Fifth Amendment self-incrimination problem implicated by the DTPA. One way is for the Arkansas General Assembly to repeal Arkansas Code Annotated section 4-88-103, which is the part of the DTPA that criminalizes deceptive trade practices. Repealing section 4-88-103 would remove the Fifth Amendment issue altogether because that would eliminate the prospect of a criminal prosecution following an admission or judicial finding that a person violated the DTPA. If there is no prospect of a criminal prosecution, the Fifth Amendment does not stand in the way of the Attorney General compelling a person to provide non-immunized self-incriminating testimony.<sup>52</sup>

There are sound reasons to repeal section 4-88-103. First, doing so will not undermine the enforcement of the DTPA because the absence of a criminal provision in the DTPA will not vitiate any of the Attorney General's enforcement prerogatives in any other part of the law. The Attorney General will still have the right to file a lawsuit and ask a court to stop a person from engaging in deceptive trade practices, make whole those who incurred a monetary loss as the result of deceptive trade practices, impose a fine of \$10,000 against a person found in violation of the DTPA, and terminate a person's ability to conduct business in the State of Arkansas because of violations of the DTPA.<sup>53</sup>

Second, the monetary civil penalties for violating the DTPA are substantially more severe than the monetary criminal penalties.<sup>54</sup> The monetary criminal penalty for violating the DTPA is a fine *of up to* \$2,500,<sup>55</sup> which

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50. 28 U.S.C. § 2253(c)(2) (1996); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

51. SUP. CT. R. 10(c) (the Supreme Court can grant a petition for a writ of certiorari in a case where a United States circuit court decides an important question of federal law that has not been, but should be, settled by the Supreme Court, or decides an important federal question in a way that conflicts with relevant decisions of the Court).

52. *See Kastigar v. United States*, 406 U.S. 441, 441 (1972) (the right against self-incrimination does not apply in a proceeding where a person is assured that his testimony will not be used against him in a later criminal proceeding).

53. ARK. CODE ANN. § 4-88-113(a)(1)–(3), (b).

54. *See id.* § 4-88-103 (a person who knowingly and willfully commits a violation of the DTPA is guilty of a Class A misdemeanor); *Id.* § 5-4-201(b)(1) (a person convicted of a Class A misdemeanor may be required to pay a fine not exceeding \$2,500).

55. *See id.* §§ 4-88-103, 5-4-201(b)(1).

means that a person found in violation of the DTPA could be convicted of a crime, yet not be required to pay a criminal fine at all. And even if a person received the maximum fine of \$2,500, that is only 25% of the \$10,000 maximum civil penalty that a court could assess in a civil enforcement proceeding under the DTPA.<sup>56</sup>

Third, the criminal provision of the DTPA has been in effect since July 1, 1971,<sup>57</sup> yet as of the writing of this essay,<sup>58</sup> there is not one reported decision of the Supreme Court of Arkansas, the Arkansas Court of Appeals, or any other court where a conviction under that provision is an issue, which means the law is probably not being used anyway. This is not to say that no one has been convicted of or pleaded guilty to a section 4-88-103 charge in the more than forty-three years since the law been in effect, but it certainly appears that way from the publicly available sources.

A second way to cure the Fifth Amendment self-incrimination problem implicated by the DTPA is for the Arkansas General Assembly to enact a statute that gives the Attorney General the authority to grant a person immunity from criminal prosecution.<sup>59</sup> There are at least two reasons, however, why this is a significantly more complicated solution than a repeal of section 4-88-103.

First, authorizing the Attorney General to grant a person immunity from criminal prosecution means that that office will also need the authority to prosecute criminal cases. Currently, the authority to prosecute criminal cases in Arkansas rests with its twenty-seven elected prosecuting attorneys,<sup>60</sup>

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56. *Id.* § 4-88-113(a)(3) (a court can assess a fine of up to \$10,000 per violation of the DTPA).

57. Act of July 1, 1971, No. 92, 1971 Ark. Act 92 at sec. 4 (codified at ARK. CODE ANN. § 4-88-103).

58. The author of this essay wrote it in late July 2014 and early August 2014.

59. The Office of Attorney General is a constitutional office, but the duties of the office are defined by the General Assembly. *See Newton Cnty. v. West*, 293 Ark. 461, 466, 739 S.W.2d 141, 144 (1987) (citing *Parker v. Murry*, 221 Ark. 554, 559, 254 S.W.2d 468, 471 (1953)).

60. ARK. CONST. amend. 21, § 1; ARK. CONST. amend 80, § 20. Arkansas's prosecuting attorneys are elected to four year terms from twenty-seven legislatively created judicial districts. ARK. CONST. amend 80, § 20; ARK. CODE ANN. § 16-13-901 (the First Judicial District, which consists of the counties of Cross, Lee, Monroe, Phillips, St. Francis, and Woodruff); ARK. CODE ANN. § 16-13-1001 (the Second Judicial District, which consists of the counties of Clay, Craighead, Crittenden, Greene, Mississippi, and Poinsett); ARK. CODE ANN. § 16-13-1101 (the Third Judicial District, which consists of the counties of Jackson, Lawrence, Randolph, and Sharp); ARK. CODE ANN. § 16-13-1201 (the Fourth Judicial District, which consists of the counties of Madison and Washington); ARK. CODE ANN. § 16-13-1301 (the Fifth Judicial District, which consists of the counties of Franklin, Johnson, and Pope); ARK. CODE ANN. § 16-13-1401 (the Sixth Judicial District, which consists of the counties of Pulaski and Perry); ARK. CODE ANN. § 16-13-3101(b) (the Seventh Judicial District, which consists of the counties of Grant and Hot Spring); ARK. CODE ANN. § 16-13-3201(a) (the Eighth Judicial District—North, which consists of the counties of Hempstead and Nevada); ARK. CODE ANN. §

and it is doubtful that any of those persons would readily cede any of their prerogatives or autonomy to another elected official.<sup>61</sup>

Second, authorizing the Attorney General to grant a person immunity from criminal prosecution would require amending the Constitution of the State of Arkansas because the Twenty-first Amendment of the State's charter vests the authority to prosecute criminal cases with prosecuting attorneys.<sup>62</sup> Amending the State's Constitution requires a majority vote in the State House of Representatives and the State Senate to present the proposed amendment to the voters, and a majority vote of the voters at the next general election following the votes in the House and the Senate.<sup>63</sup>

There are no doubt other reasons why empowering the Attorney General to grant a person immunity from criminal prosecution is fraught with procedural, political, and substantive challenges. If, however, one agrees that the DTPA as it is currently written poses serious Fifth Amendment problems, and one also agrees that it would be more prudent for the State to cure those problems before a constitutional challenge is filed in a court, repealing section 4-88-103 is the soundest course of action.

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16-13-3201(b) (the Eighth Judicial District–South, which consists of the counties of Lafayette and Miller); ARK. CODE ANN. § 16-13-1701(a) (the Ninth Judicial District–East, which consists of Clark County); ARK. CODE ANN. § 16-13-1701(b) (the Ninth Judicial District–West, which consists of the counties of Howard, Little River, Sevier, and Pike); ARK. CODE ANN. § 16-13-1801 (the Tenth Judicial District, which consists of the counties of Ashley, Bradley, Chicot, Desha, and Drew); ARK. CODE ANN. § 16-13-1901(a) (the Eleventh Judicial District–East, which consists of Arkansas County); ARK. CODE ANN. § 16-13-1901(b) (the Eleventh Judicial District–West, which consists of the counties of Jefferson and Lincoln); ARK. CODE ANN. § 16-13-2001 (the Twelfth Judicial District, which consists of Sebastian County); ARK. CODE ANN. § 16-13-2101 (the Thirteenth Judicial District, which consists of the counties of Calhoun, Cleveland, Columbia, Dallas, Ouachita, and Union); ARK. CODE ANN. § 16-13-2201 (the Fourteenth Judicial District, which consists of the counties of Baxter, Boone, Marion, and Newton); ARK. CODE ANN. § 16-13-2301 (the Fifteenth Judicial District, which consists of the counties of Conway, Logan, Scott, and Yell); ARK. CODE ANN. § 16-13-2401 (the Sixteenth Judicial District, which consists of the counties of Cleburne, Fulton, Independence, Izard, and Stone); ARK. CODE ANN. § 16-13-2501(a) (the Seventeenth Judicial District, which consists of the counties of Prairie and White); ARK. CODE ANN. § 16-13-2601(a) (the Eighteenth Judicial District–East, which consists of Garland County); ARK. CODE ANN. § 16-13-2601(b) (the Eighteenth Judicial District–West, which consists of the counties of Montgomery and Polk); ARK. CODE ANN. § 16-13-2701 (the Nineteenth Judicial District, which consists of the counties of Benton and Carroll); ARK. CODE ANN. § 16-13-2801 (the Twentieth Judicial District, which consists of the counties of Faulkner, Searcy, and Van Buren); ARK. CODE ANN. § 16-13-2901 (the Twenty-First Judicial District, which consists of Crawford County); ARK. CODE ANN. § 16-13-3101(a) (the Twenty-Second Judicial District, which consists of Saline County); ARK. CODE ANN. § 16-13-2501(b) (the Twenty-Third Judicial District, which consists of Lonoke County).

61. ARK. CONST. art. VI, § 3.

62. ARK. CONST. amend. 21, § 1.

63. ARK. CONST. art. XIX, § 22.

## V. CONCLUSION

The government can compel self-incriminating testimony only if the witness is granted immunity before giving the testimony.<sup>64</sup> Under the DTPA, the Attorney General can compel a person to give non-immunized self-incriminating testimony in DTPA investigations.<sup>65</sup> This is contrary to well established Fifth Amendment jurisprudence, and it is unconstitutional.<sup>66</sup> The State can and should cure this constitutional defect by repealing section 4-88-103. That, however, is unlikely to happen for a number of reasons.

First, someone reading this paper may very well conclude that its central premise is wrong, its legal analysis is wrong, or both. Second, repealing a statute that criminalizes deceptive trade practices may be unpopular in a state as politically conservative as Arkansas.<sup>67</sup> It could be difficult for a legislator to explain to his or her constituents that decriminalizing something as ominous sounding as “deceptive trade practices” is an exercise of good government. Third, more than forty years have passed since the General Assembly authorized the Attorney General to compel non-immunized self-incriminating testimony in DTPA investigations, and no reported case exists where the target of such an investigation has challenged the constitutionality of that authority. Moreover, there is no reported case where a person has

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64. *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973) (citing *Kastigar v. United States*, 406 U.S. 441, 443–59 (1972)).

65. ARK. CODE ANN. §§ 4-88-111(a)(1)-(2), 4-88-112.

66. *Chavez v. Martinez*, 538 U.S. 760, 770–71 (2003) (citing *Maness v. Myers*, 419 U.S. 449, 461–62 (1975); *Kastigar v. United States*, 406 U.S. 441, 453 (1972)).

67. The Republican nominee for President of the United States of America has won Arkansas’s six electoral votes in the last four consecutive elections, and in each election since 2000, the Republican nominee received a greater percentage of Arkansas’s popular vote than his predecessor. In 2000, George Walker Bush received 472,940 votes (51.31%), and Albert Gore, Jr. received 422,768 votes (45.86%). *2000 Presidential Election*, U.S. ELECTORAL C., [http://www.archives.gov/federal-register/electoral-college/2000/popular\\_vote.html](http://www.archives.gov/federal-register/electoral-college/2000/popular_vote.html) (last visited Sept. 29, 2014). In 2004, George Walker Bush received 572,770 votes (54.36%), and John Kerry received 468,631 votes (44.48%). *2004 Presidential Election*, U.S. ELECTORAL C., [http://www.archives.gov/federal-register/electoral-college/2004/popular\\_vote.html](http://www.archives.gov/federal-register/electoral-college/2004/popular_vote.html) (last visited Sept. 29, 2014). In 2008, John McCain received 638,017 votes (58.72%), and Barack Obama received 422,310 votes (38.86%). *2008 Presidential Election*, U.S. ELECTORAL C., <http://www.archives.gov/federal-register/electoral-college/2008/popular-vote.html> (last visited Sept. 29, 2014). In 2012, Willard Mitt Romney received 647,744 votes (60.57%), and Barack Obama received 394,049 votes (36.88%). *2012 Presidential Election*, U.S. ELECTORAL C., <http://www.archives.gov/federal-register/electoral-college/2012/popular-vote.html> (last visited Sept. 29, 2014). As of this writing, the 100 member Arkansas House of Representatives has 51 Republicans, 48 Democrats, and 1 member of the Green Party. *About the House*, ARK. HOUSE OF REPRESENTATIVES, [www.arkansashouse.org/about-the-house](http://www.arkansashouse.org/about-the-house) (last visited Sept. 29, 2014). The 35 member Arkansas Senate has 21 Republicans and 14 Democrats. *About the Arkansas Senate*, ARK. SENATE, [www.arkansas.gov/senate/senators.html](http://www.arkansas.gov/senate/senators.html) (last visited Sept. 29, 2014).

been prosecuted under section 4-88-103. One could therefore argue that section 4-88-103 has fallen into desuetude,<sup>68</sup> rendering legislative repeal unnecessary.

Notwithstanding the foregoing reasons for legislative inaction, section 4-88-103 should still be repealed. Persons elected to the General Assembly are not there to do only what is popular. If a state official is legislatively empowered to act in a way that is contrary to the Federal Constitution, the General Assembly should abrogate that power, even if doing so would not sit well with the populace. Also, courts rarely accept the argument that a criminal statute is unconstitutional because it has been infrequently enforced or not enforced at all, therefore, the General Assembly should not rely on the doctrine of desuetude to do its work for it.<sup>69</sup> Last, if someone mounted a constitutional challenge to section 4-88-103 and prevailed, the State could be liable for that person's costs and attorneys' fees.<sup>70</sup> If there is one thing that a legislator does not want to have to explain to his or her constituents, it is why the taxpayers had to pay the attorneys of a private party in a lawsuit that the state lost.

In sum, repealing section 4-88-103 would be an exercise of proactive and prudent government.

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68. The doctrine of desuetude says that a statute can be abrogated by reason of its long and continued non-use. *See* *United States v. Elliot*, 266 F. Supp. 318, 325 (S.D.N.Y. 1967); *See also* *State v. Legrand*, 129 Conn. App. 239, 272–75, 20 A.3d 52, 73–74 (2011).

69. *Comm. on Legal Ethics of the W. Va. State Bar v. Printz*, 187 W. Va. 182, 186–89, 416 S.E.2d 720, 724–27 (1992) (Desuetude is seldom used and is not a “judicial repeal provision that abrogates any criminal statute that has not been used in ‘X’ years.”). Ironically, the *Printz* Court found West Virginia Code section 61-5-19 (1923) void under the doctrine of desuetude. *Id.* at 189. The statute invalidated in *Printz* prohibited a person from making an offer not to prosecute a crime in exchange for the return of funds lost due to a crime. *Id.* at 186. No one had been prosecuted under § 61-5-19 since 1938 (fifty-four years at the time of *Printz*). *Id.* at 189.

70. 42 U.S.C. § 1988(b). This statute authorizes a court to award the prevailing party his costs and attorneys' fees in cases enforcing 42 U.S.C. § 1983, which is the statute used to litigate claims arising under the Federal Constitution.