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The Fifth Amendment Privilege Against Self-Incrimination: A New Risk to Witnesses Facing Foreign Prosecution. United States v. (Under Seal) (Areneta), 794 F.2d 920 (1986)

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CASE COMMENTS

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION: A NEW RISK TO WITNESSES FACING FOREIGN PROSECUTION

United States v. (Under Seal) (Areneta), 794 F.2d 920 (4th Cir.), *cert. denied*, 107 S. Ct. 331 (1986)

In *United States v. (Under Seal) (Araneta)*,[1] the United States Court of Appeals for the Fourth Circuit narrowly interpreted the fifth amendment privilege against self-incrimination, holding that the privilege does not extend to a grand jury witness who has received United States immunity but faces a threat of foreign prosecution.[2]

The appellants, Irene and Gregorio Araneta, are the daughter and son-in-law of the former President of the Philippines, Ferdinand E. Marcos.[3] A federal grand jury subpoenaed the appellants to testify as to their knowledge concerning illegal arms contracts with the Philippines. The appellants moved to quash the subpoena, claiming a fifth amendment privilege against self-incrimination.[4] The government subsequently granted the appellants immunity from prosecution under United States law and the district court ordered the appellants to testify.[5] The appellants sought to overturn the district court's ruling, claiming that they

1. 794 F.2d 920 (4th Cir.), *cert. denied*, 107 S. Ct. 331 (1986).

2. *Id.* at 926.

3. *Id.* at 921. The Arenetas are Philippine citizens temporarily residing in the United States under advanced parole status. The United States and Philippines had entered into a treaty, pending in the Senate at the time of the decision, that provided for the appellants' extradition. The two countries have agreements providing for the exchange of evidence and for cooperation regarding the investigation of alleged corruption involving Philippine assets. *Id.*

4. *Id.* at 922. *See infra* notes 8-21 and accompanying text discussing the fifth amendment privilege.

5. *Id.* Compelling an individual to testify does not violate the fifth amendment if the individual receives sufficient immunity from prosecution. *See infra* notes 8-17 and accompanying text. Immunity derives from 18 U.S.C. §§ 6002 & 6003 (1982).

The court provided a restrictive order under FED. R. CRIM. P. 6(e) (1982). Rule 6(e) protects the secrecy of grand jury proceedings by disallowing disclosure of the content of such proceedings. Courts are in sharp disagreement as to whether a Rule 6(e) order provides conclusive assurance of non-disclosure to supplant the risk of self-incrimination. *Compare* In re Nigro, 705 F.2d 1224, 1227 (10th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983); In Re Baird, 668 F.2d 432 (8th Cir. 1982); In Re Tierney, 465 F.2d 806 (5th Cir. 1972) (holding that secrecy order will eliminate the risk of prosecution and defeat claims based on the fifth amendment privilege) *with* In re Flanagan, 691 F.2d 116, 123-24 (2d Cir. 1982); In re Grand Jury Witness, 597 F.2d 1166, 1168-69 (9th Cir. 1979) (contra).

continue to face criminal prosecution in the Philippines.[6] The Fourth Circuit affirmed and held: The fifth amendment does not prevent a court from compelling a witness to give possibly self-incriminating testimony if the witness faces only a risk of foreign prosecution.[7]

The fifth amendment to the United States Constitution requires that "no person . . . shall be compelled in any criminal case to be a witness against himself."[8] This constitutional privilege against self-incrimination is not absolute.[9] If the government removes the possibility of self-incrimination through a grant of immunity, the court can compel the witness to testify.[10] Prior to 1964, both state and federal courts could compel testimony if a witness was granted immunity from prosecution under the laws within the court's jurisdiction. The compelled testimony could be used to incriminate the witness under the laws of the other sovereign.[11]

In two 1964 decisions the Supreme Court resolved this dilemma. In *Malloy v. Hogan,*[12] the Court held that the fifth amendment applies to the states by reason of the fourteenth amendment.[13] Concurrently, the Court held in *Murphy v. Waterfront Commission of New York Harbor,*[14] that the fifth amendment protects both a state witness from self-incrimination under federal law and a federal witness from self-incrimination under state law.[15] The Court prohibited the use in any subsequent prosecution of evidence obtained from testimony compelled after a grant of immunity.[16] To displace an individual's constitutionally protected right

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See generally Note, *Extending the Privilege Against Self-Incrimination to the Threat of Prosecution Under Foreign Law*, 35 BAYLOR L. REV. 141, 144 (1983).

6. 794 F.2d at 922. The Arenetas face charges under the Anti-Graft and Corrupt Practices Act and Articles 210-221 of the Philippines Penal Code.

7. *Id.* at 926.

8. U.S. CONST. amend. V.

9. For a discussion of the limitations on the privilege against self-incriminations, see Note, *supra* note 5, at 144; MCCORMICK, EVIDENCE 121 (3d ed. 1984).

10. *See* Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

11. *See* United States v. Murdock, 284 U.S. 141 (1931) (the federal court can compel testimony that would incriminate the witness in a state court).

12. 378 U.S. 1 (1964).

13. *Id.* at 12. The Court held that the privilege, if properly invoked in a state proceeding, was governed by federal standards.

14. 378 U.S. 52 (1964).

15. *Id.* at 77-78. The Court rejected the approach previously taken in *Murphy*. *See supra* note 11 and accompanying text. Rather, the court adopted the interpretation of the privilege given by English courts and the earlier Court decision in Ballman v. Fagin, 200 U.S. 186 (1906).

16. 378 U.S. at 79. Government prosecutors can charge a witness previously granted immunity. In the event of a prosecution, however, "the prosecutor is saddled with the heavy burden of

to withhold self-incriminating testimony, therefore, a witness must receive immunity equal to the risk of criminal prosecution.[17]

The fifth amendment privilege applies only to witnesses subject to more than a remote possibility of criminal prosecution from the compelled testimony.[18] A witness seeking to withhold testimony based on a risk of foreign prosecution must meet a higher threshold standard. The witness must show a "real and substantial" threat of foreign prosecution.[19] In *Zicarelli v. New Jersey State Commission of Investigation,*[20] the Supreme Court affirmed the propriety of this threshold standard. The Court, however, expressly declined to address the scope of the underlying constitutional protection.[21]

Lower courts have disagreed whether the fifth amendment prohibits courts from compelling testimony when a risk of foreign prosecution exists. In *In re Cardassi,*[22] the District Court for the District of Connecticut held that the fifth amendment does protect a witness facing foreign prosecution.[23] The court noted that in the United States, government attempts to compel testimony or to use compelled testimony at trial are

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proving that his evidence was not derived directly or indirectly from the witness' testimony." In re Grand Jury Subpoena of Flanagan, 691 F.2d 116, 121 (2d Cir. 1982).

17. Kastigar v. United States, 406 U.S. 441, 460 (1972). In *Kastigar*, the Court found that absolute immunity was not necessary to satisfy the fifth amendment. The Court explained that the privilege only protects against compelled incriminating testimony, and ordinary use immunity effectively eliminates the possibility of incrimination. *Id.* at 443. *See also Flanagan*, 691 F.2d at 119 (use immunity is "coexistensive with the privilege" rendering a fifth amendment claim unsupportable). *See generally* United States v. Flanagan: *Guidelines for Determining Real Risk of Foreign Prosecution*, 10 BROOKLYN J. INT'L. L. 219, 222-23 (1984).

18. *See* Hoffman v. United States, 341 U.S. 479, 489 (1951).

19. *See* Zicarella v. New Jersey State Comm. of Investigation, 406 U.S. 472, 478 (1972); Flanagan, 691 F.2d at 124; United States v. Yanagita, 552 F.2d 940, 947 (2d Cir. 1977). The threshold test grew out of a sense of frustration and unwillingness to extend the privilege in a way that would preclude a coexistensive grant of immunity and therefore require a fresh look at the fifth amendment mandate. *See generally* Note, *The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in a Foreign Country's Court*, 69 VA. L. REV. 875, 889-93 (19—).

In *Flanagan* the court identified several factors pertinent to the threshold determination. The factors included:

> [W]hether there is an existing or potential foreign prosecution of him; what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a likelihood that his testimony given here would be disclosed to the foreign government.

691 F.2d at 121.

20. 406 U.S. 472 (1972).

21. *Id.* at 481.

22. 351 F. Supp. 1080 (D. Conn. 1972).

23. *Id.* at 1085-86. In *Cardassi*, the witness was granted immunity to allow her to testify before

limited by the fifth amendment.[24] Because the fifth amendment does not constrain a foreign government's use of testimony, the court ruled that a witness can claim the privilege "at the point when the testimony is sought to be judicially compelled."[25]

Similarly, in *In Re Grand Jury Subpoena of Flanagan*,[26] the District Court for the Eastern District of New York had concluded that the fifth amendment extends to a witness facing only a risk of foreign prosecution.[27] On appeal, the Second Circuit did not address the constitutional issue, ruling that the witness had not satisfied the threshold test.[28] The court, however, did not expressly denounce the district court's "reasoned opinion."[29]

In *Phoenix Assurance Co. of Canada v. Runck*,[30] the North Dakota Supreme Court held that the fifth amendment privilege does not extend to extraterritorial incrimination.[31] The court stated that the absence of foreign reference in the language of the fifth amendment indicates that it was designed to apply only to United States' laws.[32] The court also noted that the practical difficulty courts would face in interpreting foreign laws could frustrate the practice of exchanging immunity for infor-

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a grand jury proceeding. After receiving immunity, the witness continued to refuse to testify claiming that she feared foreign prosecution. *Id.* at 1081.

24. *Id.* at 1085. In arguing for the testimony, the government relied on extradition cases in which the individual sought to prevent extradition arguing that he may be forced to testify against himself in the foreign jurisdiction in violation of the fifth amendment. *Id.* The court distinguished these cases on two grounds. First, in the extradition cases the judicial branch is merely declining to interfere with an executive power. Second, in the extradition cases there is no basis for testing the foreign governments' actions against the fifth amendment. *Id.* In contrast, the court noted that under the facts of the case, the actions of government are constrained by the fifth amendment. *Id.*

25. *Id.* at 1086.

26. 691 F.2d 116 (2d Cir. 1982).

27. *Id.* at 119. In *Flanagan* the witness refused to testify to a grand jury after a grant of United States immunity, claiming that the immunity would not protect him from prosecution in Ireland or Great Britain. He argued, therefore, that the immunity was not coextensive with the privilege. *Id.* at 118-19. The district court ruled that the witness did face a substantial risk of foreign prosecution, and concluded that the fifth amendment protects against this risk. *Id.*

28. *Id.* at 121-24. The Second Circuit noted that there was no prosecution pending, no effort had been made to extradite the witness, and all questions related to conduct in the United States. *Id.* at 122. The court identified several factors relevant to determine whether the threshold test is satisfied. *See supra* note 19.

29. *Id.* at 119. Because the court decided that a risk of foreign prosecution did not exist, the court stated that it need not address the constitutional issue. *Id.* at 124.

30. 317 N.W.2d 402 (N.D. 1982).

31. *Id.* at 413. In *Runck*, a defendant in a civil suit for insurance fraud refused to answer in discovery proceedings because he faced the threat of arson prosecution in Canada. *Id.* at 404-05.

32. *Id.* at 411.

mation.[33] In conclusion, the court stated that until treaties are enacted, "the fifth amendment privilege cannot be asserted by a witness on the grounds of possible foreign prosecution."[34]

In *United States v. (Under Seal) (Areneta)*,[35] the Fourth Circuit agreed with the *Runck* result. The court concluded that the defendants did face a substantial risk of foreign prosecution[36] and proceeded to examine the fifth amendment privilege. The court noted the absence of foreign references in the language of the fifth amendment and positted that the fifth amendment never can restrain foreign law.[37] The court then analogized to the state of the law before *Mallory* and *Murphy* and concluded that the fifth amendment privilege applies only when both the sovereign compelling the testimony and the sovereign threatening to use the testimony are subject to the constitution.[38] The court thus limited the fifth amendment protection against self-incrimination to witnesses facing a threat of criminal prosecution within the United States. The court found that its holding would not imperil the purposes underlying the fifth amendment privilege—protecting individual dignity and conscience, and preserving the accusatorial nature of the criminal justice system.[39]

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33. *Id.* The court stated that:

> Realistically . . . the officials of this nation or states cannot be expected to know the various penal provisions written or unwritten of the numerous nations. (However, in this case we have been furnished the Canadian law.) This in itself can lead to endless insoluble problems and could effectively prevent either the federal government or the state government from successfully employing the grant of immunity and the concomitant requirement to testify.

Id. The court did not, however, address the purposes behind the fifth amendment in reaching its decision.

34. *Id.* at 413.

35. 794 F.2d 920 (4th Cir.), *cert. denied,* 107 S. Ct. 331 (1986).

36. *Id.* at 924-25. The court applied the factors enumerated in *Flanagan*. *See supra* note 19. The court noted the notoriety of the appellants and the corresponding insufficiency of the Rule 6(e) secrecy order, that actual indictments had issued against the appellants, the possibility that the appellants will lose their discretionary parole status in the United States and face extradition, and the current active United States role in assisting the new Philippine government in recovering allegedly stolen assets. *Id.*

37. *Id.* at 925.

38. *Id.* at 926. Prior to the Supreme Court's decisions in *Malloy* and *Murphy*, the sovereign compelling the testimony and the sovereign wishing to use the testimony were not both subject to the fifth amendment prohibition against compelled self-incrimination. *See supra* notes 11-17 and accompanying text. The court noted that the same situation exists under the facts of this case.

39. 794 F.2d at 926. The Supreme Court in *Murphy* had enumerated the purposes of the privilege as:

> [O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by

By analogizing to pre-1964 case law, the Fourth Circuit recreates an evil that the Supreme Court corrected in *Malloy* and *Murphy*. Before 1964, if an individual received immunity under federal law, for example, and was forced to testify, the witness often opened himself to criminal prosecution under state law.[40] The Supreme Court effectively remedied this injustice by disallowing the subsequent use of compelled testimony unless the grant of immunity extends to all United States jurisdictions[41]—a corrective measure unavailable in cases of foreign prosecution.

The *Areneta* court also fails to adequately explain why the fifth amendment only protects against self-incrimination when the sovereign compelling the testimony and the sovereign seeking to use the testimony are subject to the constitution.[42] That the United States cannot force a foreign government to respect its immunity law presents a stronger argument in favor of respecting an individual's interest in withholding the incriminating information. The court's analysis suggests that when the United States' immunity laws cannot arise, the constitutional privilege does not exist. Yet when a party raises a fifth amendment claim in a civil case, where immunity plays no role, the courts must sacrifice the information and uphold the fifth amendment protection.[43]

Although the court reiterates the purposes of the fifth amendment privilege, the court's holding implicitly values the available information more. The court's argument that it "would be intolerable to require the United States to forego evidence *legitimately within its reach* solely because a foreign power could deploy this evidence,"[44] merely begs the question by assuming the legitimacy that is the very question for the court to deliberate and decide. If the court balances the competing interests, at a minimum the fifth amendment's purposes deserve more than the court's cursory treatment.

The court errs in assuming that the accusatorial nature of our criminal

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inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."

378 U.S. at 55 (citing 8 WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961)).

40. *See supra* notes 10-11 and accompanying text.

41. *See supra* notes 12-17 and accompanying text.

42. *See supra* note 38 and accompanying text.

43. *See* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); 8 WIGMORE, EVIDENCE § 2252 (McNaughton rev. 1961). The fifth amendment only prohibits compelled self-incrimination in criminal prosecutions. *See supra* note 8 and accompanying text.

44. 794 F.2d at 926 (emphasis added).

justice system will not suffer as a result of the court's decision.[45] On the contrary, this decision allows and even encourages searching inquiry into actions that may form the basis of a subsequent accusation by a foreign government—a result inconsistent with an accusatorial criminal justice system. In addition, the court virtually disregards the fifth amendment policy of protecting individual dignity and conscience by tersely averring that the grant of immunity was a generous act of the United States in favor of the Areneta's dignity and self-interest. As a result of the court's decision, if a witness faces foreign prosecution, a grant of United States immunity becomes an offensive weapon, carving away a witness' interest in self-preservation.

The real flaw in the court's analysis lies in its misplaced emphasis on the forbidden *use* of compelled testimony. Only when a restriction on government's use of compelled testimony completely removes the possibility of incrimination can the court satisfy the Constitution in compelling the testimony. In other words, only if the second door—immunity from incrimination—is secure can a court open the first door—compelling testimony. Knowing that the second door is open mandates that the court tightly secure the first. United States courts control the *compulsion* of testimony. The fifth amendment mandate does not disappear because foreign countries do not observe our immunity laws.[46]

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45. *See supra* note 39 and accompanying text.

46. 794 F.2d at 926. The court stated, "With regard to insulating the individual from the moral hazards of self-incrimination, perjury or contempt, the United States has done everything in its power to relieve the pressure by granting the Aranetas use and derivative use immunity." *Id.*