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Extending the Self-Incrimination Clause to Persons in Fear of Foreign Prosecution

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I. INTRODUCTION

The fifth amendment of the United States Constitution provides that no person shall be compelled to give self-incriminating testimony.[1] The words "no person" appear to make this privilege universally applicable. Courts, however, generally accept grants of immunity as satisfying this constitutional guarantee, because the guarantee of immunity is considered coextensive with the privilege against self-incrimination.[2] When a witness fears that his testimony may be used against him in a foreign proceeding, satisfying the standards of the fifth amendment becomes dif-

1. U.S. CONST. amend. V. The fifth amendment reads in part: "No person shall be compelled in any criminal case to be a witness against himself."

2. A grant of immunity is valid only if it is coextensive with the self-incrimination privilege. Counselman v. Hitchcock, 142 U.S. 547 (1892). In other words, a grant of immunity, sealing orders and other protective measures must provide the same amount of protection as would the fifth amendment.

ficult since domestic grants of immunity cannot shield a witness from foreign prosecution. Furthermore, although courts issue sealing orders to prevent the release of immune testimony, their effectiveness is questionable.

Domestic courts are reluctant to address the issue of whether the protections of the fifth amendment extend to persons refusing to testify because they fear foreign prosecution. Courts that favor gathering information over respecting individual rights tend to focus on sealing orders and other procedural protections, rather than on the right itself. Just as a grant of immunity must be coextensive with the privilege,[3] so must other protections. Thus, determining the scope of the privilege is necessary in order to understand whether other protections are adequate. In dispensing with cases that present this issue, most courts have failed to address the constitutional question. Addressing this question, however, is essential to understanding the adequacy of the courts' decisions.

This Note will examine the rationale, policies, and history behind the self-incrimination clause and will demonstrate the privilege's importance as an individual right and as a check on police power. Only by exploring the purposes and policies behind the privilege—an approach condoned by the Supreme Court[4]—is one able to formulate the best answer to whether the self-incrimination clause extends to persons in fear of foreign prosecution.[5] An understanding of what the privilege is supposed to protect will lead to a better understanding of the scope of this important constitutional guarantee. This Note will then focus on recent cases in which courts have substituted domestic grants of immunity and sealing orders, issued under the Federal Rules of Criminal Procedure, for fifth amendment protections. Courts and commentators have questioned the sufficiency of these substitutes, and this Note will discuss the problems presented and possible solutions.

While several circuits have confronted the constitutional question, the Supreme Court has consistently denied certiorari and has never directly addressed this issue. Because domestic grants of immunity cannot protect

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3. *Id.*

4. In Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964), Justice Goldberg addressed the similar question of whether "one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction." *Id.* at 54. To this difficult issue, he responded: "The answer to this question must depend, of course, on whether such an application of the privilege promotes or defeats its policies and purposes." *Id.*

5. This is not an attempt to discern "the framers' intent" but is instead a focus on the policies behind the privilege from the time it was first developed in 17th century England to present day constitutional interpretations.

against foreign prosecutions, the only reasonable solution in harmony with the objectives of the self-incrimination clause may be an official promise not to extradite the person to the foreign country. While giving full effect to the constitutional guarantee, this remedy might place a burden on United States foreign relations. This Note will suggest possible remedies to this dilemma.

II. THE POLICIES BEHIND THE SELF-INCRIMINATION CLAUSE

Two primary theories exist to explain the purpose behind the self-incrimination clause.[6] The first theory is that the privilege is systemically-based and was initially conceived as a device to prevent oppressive police tactics, torture, and otherwise aberrant government behavior. The second theory grounds the privilege on a principle of individual rights and holds that the government violates the right of privacy by forcing a person to divulge thoughts in a manner designed to incriminate that person. One leading commentator, after enumerating thirteen widely held rationales,[7] set forth these two theories:

> The significant purposes of the privilege . . . are two: The first is to remove the right to an answer in the hard cores of instances where compulsion might lead to inhumanity, the principal inhumanity being abusive tactics by a zealous questioner. The second is to comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself.[8]

How the courts view the policies behind the privilege largely may determine the issue at hand. If the court believes that the self-incrimination clause is systemically-based, then it may insulate a witness from the dangers of a foreign prosecution by issuing grants of immunity, sealing or-

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6. While there are a number of possible rationales, *see, e.g.*, *Murphy*, 378 U.S. at 55, (Justice Goldberg lists seven possibilities), commentators have grouped the rationales under two general headings. *See* Dolinko, *Is There A Rationale for the Privilege Against Self-incrimination?*, 33 UCLA L. REV. 1063, 1065 (1986) (Dolinko categorizes the rationales as "systemic" and "individual," but because the latter rationale arises out of the current preference for rights-based thinking among legal philosophers, this Note will refer to the "individual" rationale as "rights-based.").

7. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affectation, Raison d'Etre and Miscellaneous Implications*, 51 J. CRIM. L., CRIMINOLOGY AND POLICE SCI. 138, 142-150 (1960). McNaughton also noted that "almost as many purposes have been suggested as there are exceptions to the hearsay rule, or as there are uses for a screwdriver." *Id.* at 142.

8. McNaughton, *supra* note 7, at 150-151.

ders, and other government or court ordered protections, avoiding the need for the fifth amendment's additional protection. On the other hand, if the privilege is based on individual rights, then no amount of protection can insure that a court will respect a witness's privacy. Although the most logical possibility is that the rationale is predicated on both theories, an examination of each theory separately is the proper analytical starting point.

A. *The Systemic Rationale*

The Framers' intent in including the self-incrimination clause in the Bill of Rights was probably systemically-based. The history of the clause indicates that a fear of government persecution was a foremost concern. The first known instance in which an accused claimed the privilege occurred during the days of the ecclesiastical courts and the English Star Chamber. Initially limited in scope,[9] the privilege began to assume a more comprehensive, and also modern, interpretation in the famous trial of Lilburne before the Star Chamber in 1627.[10] In sixteenth century England the bishops had the authority to administer oaths to clergy and laymen suspected of having weak faith or ill morals. The purpose of the oaths was to allow these persons the opportunity to clear themselves,[11] and thus authorities deemed a refusal to speak or to take the oath as equivalent to a confession of guilt.[12] During the trial, Lilburne refused to swear an oath and be "ensnared by answering things concerning other men."[13] Lilburne claimed that no one could force him to incriminate himself and withstood floggings and beatings while making his statement against government oppression.

Just a few years after Lilburne's challenge, the government disbanded the Star Chamber and compensated Lilburne for his injuries. Thereafter, the privilege against self-incrimination began to assume an increasing importance in English law.[14] The privilege was also transmitted in turn

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9. Initially the privilege did not extend to persons under investigation in a proper proceeding. The privilege was applied to the inquisitorial method of the canon law, in which accusations could be made by rumor, as long as they were authenticated by at least two persons. *Id.* at 8.

10. *Id.*

11. For a more complete discussion, see Corwin, *The Supreme Court's Construction of the Self-incrimination Clause*, 29 MICH. L. REV. 1, 5-12 (1930).

12. *Id.* at 6.

13. *Id.* at 8.

14. *Id.* at 8-9. Some commentators have tried to distinguish this as the origin of the fifth amendment by claiming that in the days of the Star Chamber one was not incriminating one's self, but one was forced to accuse one's self. Friendly, *The Fifth Amendment*

to the United States. Justice Goldberg, reflecting a fear of police power, wrote that the United States has a societal preference for an accusatorial rather than an inquisitorial system of justice and a societal fear of inhuman and abusive treatment.[15] The abuses allowed by the English government possibly led to Griswold's famous quote that the fifth amendment privilege is "one of the great landmarks in man's struggle to make himself civilized."[16]

Whether or not the privilege originated from the abuses of the Star Chamber and ecclesiastical courts,[17] the privilege has since been understood partially as a means to forestall governmental oppression and tyranny.[18] The concern is that without the privilege governments would use oppressive police tactics, foregoing standard fact-finding and investigative procedures in favor of the "easier" method of torture, beatings, and grueling questioning.[19] While torture and other oppressive forms of police behavior are not common today, it is difficult to determine whether this is a result of the fifth amendment protections or some other cause. While commentators have suggested that other constitutional provisions exist to protect against this type of evil,[20] namely due process,[21] they recognize

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Tomorrow: The Case for Constitutional Change, 37 U. CIN. L. REV. 671, 677-78 (1968); LEVY, ORIGINS OF THE FIFTH AMENDMENT, THE RIGHT AGAINST SELF-INCRIMINATION 70 (1968).

15. *Murphy*, 378 U.S. at 55.

16. E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

17. Others have thought that the fifth amendment origin may have been based in 13th Century Hebrew law, and generally in the Halakhah, where the concern was to save man from his own destructive inclinations. *See* Garrity v. New Jersey, 385 U.S. 493, 497 n.5 (1967) (quoting Lamm, *The Fifth Amendment and its Equivalent in Jewish Law*, 17 DECALOGUE J. 1, 12 (1967)). This argument has been countered, however, by the conclusion that there is no proof that Talmudic references had any effect on the development of the privilege. LEVY, *supra* note 14, at 439-441.

18. *See, e.g.*, Dolinko, *supra* note 6, at 1077-87; McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 209 (1967); E. GRISWOLD, *supra* note 16, at 75 (1955); 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 2251, at 317 (J. McNaughton rev. ed. 1961).

19. One author noted that this shortcut method is based on laziness: "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 442 n.1 (1883).

20. Dolinko, *supra* note 6, at 1079.

21. Professor Dolinko cites a number of cases using due process to protect persons from government transgressions. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944) (interrogation without sleep); Malinski v. New York, 324 U.S. 401 (1945) (stripping the defendant and holding him incommunicado); Rogers v. Richmond, 365 U.S. 534 (1961) (threatening to arrest the defendant's ailing wife). *See also* Dolinko, *supra* note 6, at

the privilege as an important and indispensable part of our legal system.[22]

Scholars have suggested additional systemic rationales for the privilege. Many scholars who have looked at the issue consider the privilege as a preventive measure against harassment, as insurance that the government will bear the full burden of proving guilt,[23] and as a means to protect citizens from McCarthy-like inquisitions.[24] One commentator offered a more general theory of furthering the public's belief in the fairness of the criminal justice system.[25] Others attempt to base the privilege on evidentiary grounds claiming that compelled testimony is inherently untrustworthy because of the natural reluctance to incriminate oneself and the attractive alternative to commit perjury. Compelled testimony leads to the "cruel trilemma" of self-accusation, perjury or contempt.[26] Each theory points to a general belief about how our criminal justice system should work. While each theory may be countered,[27] the many suggested systemic causes attest to the importance of the privilege in this regard.

Common perceptions of the fifth amendment may also further societal protection. The privilege comforts those who fear that their ideas may incriminate them and psychologically restrains police officers and prosecutors. Officials who are aware of the privilege may act with less abandon knowing a check exists on their actions.[28]

B. *The Rights-Based Rationale*

Courts have interpreted the Constitution as conferring broad "fundamental rights" upon all individuals.[29] Thus, it is not surprising that

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1079 n.92.

22. *See id.* at 1064. *See also* McNaughton, *supra* note 7, at 153-54 (noting the impact that one firmly entrenched legal principle has on the entire system).

23. This was named as one of Justice Goldberg's rationales for the privilege in *Murphy*, 328 U.S. at 55.

24. Dolinko, *supra* note 6, at 1080. *See also Murphy*, 378 U.S. at 55.

25. Dolinko, *supra* note 6, at 1088.

26. *Murphy*, 378 U.S. at 55.

27. The focus of Dolinko's article is on disproving or discrediting each of the rationales put forward in support of the self-incrimination clause. While not all of the rationales are convincing, they each have merit and provide a thought-provoking analysis. *See* Dolinko, *supra* note 6, at 1070-1090 (arguments against systemic rationales).

28. Address by Professor Donald Hall, Conference on "The Fifth Amendment and Original Intent," sponsored by the Center for Judicial Studies (Feb. 12, 1987).

29. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (Constitution includes a fundamental right to have an abortion).

many recent works on the privilege attempt to base it on concepts of individual human rights.[30] Two theories arise from this human rights approach to explain the basis for the rights guaranteed by the self-incrimination clause. The first theory provides that compelled testimony is intolerably cruel and violates the common notion of what a human being should have to endure. The second theory holds that compelled testimony violates the individual's right to privacy.[31] Both of these theories rest on the idea that the individual, much like the state, is sovereign. Justice Fortas, drawing on John Locke's theory of government as a contract between the individual and the state, wrote that the sovereign individual does not yield to the sovereign state the power to compel evidence of guilt.[32] Justice Fortas considered the state and its citizens as equals, neither of whom could exert undue influence over the other. In one opinion, he compared the criminal trial to "equals meeting in battle" in which the sovereign state "has no right to compel the sovereign individual to surrender or impair his right of self-defense."[33] The sovereign individual is vested with all the rights and guarantees that the Constitution confers and from these inherent rights spring the cruelty and privacy theories.

The cruelty argument holds that compelled self-incrimination is intolerably cruel because it forces people to harm themselves.[34] But why is it "cruel" to compel testimony? Rather than focusing on the possible penal effects that may result from the incriminating testimony, the theory focuses on the act of speaking the incriminating words. Forcing a person into this awkward position is somehow cruel. Justice Goldberg articulated this notion stating that society has an "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt."[35] The cruelty apparently occurs when officials force someone to choose between these three alternatives, each a no-win situation.[36]

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30. Dolinko, *supra* note 6, at 1090. *See also* Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343 (1979); Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970).

31. Dolinko, *supra* note 6, at 1090.

32. Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B. ASS'N J. 91, 98-100 (1954).

33. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

34. *See* Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981). *See generally* Dolinko, *supra* note 6, at 1090-1107 (discussing the various cruelty arguments and responses to them).

35. *Murphy*, 378 U.S. at 55.

36. *See generally* Westen & Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response,"* 19 AM. CRIM. L. REV. 521

Silence is the only acceptable alternative.

Critics of this rationale argue that persons not testifying in a self-incriminating context often face similar dilemmas. For example, one who is subpoenaed to testify against gang or mafia members faces the alternatives of perjury or contempt, as well as fear of death or injury.[37] In such instances, the witness cannot rely on the protections of the fifth amendment. Thus, critics assert that because the privilege does not extend to these cases, its rationale cannot be predicated solely on cruelty.[38] The criticism fails, however, because it does not recognize the fact that by its very terms the fifth amendment cannot offer protection in these cases. The wording of the amendment applies only to self-incriminating testimony.[39] The fifth amendment cannot extend beyond its literal language.

The privacy rationale is equally compelling. In *Murphy v. Waterfront Commission of New York Harbor* Justice Goldberg made privacy an element to consider stating that the privilege is partly based on "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'."[40] Proponents of the theory argue that making a person reveal information that would prove incriminating under law is an unwarranted and unjustifiable intrusion into that individual's life. Commentators have based the need for the "private enclave" on the belief that the state should not have access to an individual's thoughts.[41] Furthermore, when the state seeks access to potentially incriminating information the necessity of protecting the "private enclave" is heightened. Another proposition is that the state has no interest in compelling testimony regarding matters of personal importance. For example, Judge Friendly noted that the privacy rationale may apply with even greater force when the incriminating offenses are crimes such as adultery and fornication and when the questioning centers on associations, ideas, and beliefs.[42]

(1982).

37. Dolinko, *supra* note 6, at 1094. Dolinko also notes the dilemma posed by a rape victim: either relive the experience while testifying and face humiliating cross-examination, or let the assailant go free. *Id.* For examples of these dilemmas see *id.* at 1094, n.165.

38. *Id.* at 1094-95.

39. U.S. CONST. amend. V. The fifth amendment reads in part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

40. *Murphy*, 378 U.S. at 55 (quoting U.S. v. Grunewald, 233 F.2d 556, 581-82 (2d. Cir. 1956) (Frank, J., dissenting)).

41. *See* Aranella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 41-42 (1982).

42. Friendly, *supra* note 14, at 689.

Proponents of the privacy argument conclude that individuals have a general "right to silence,"[43] although logically this argument leads to the "absurd conclusion that the state cannot compel evidence from anybody."[44] As with all constitutional rights, however, courts can conceivably set aside the "right to a private enclave" in favor of a compelling state interest.[45] When the state's interest is overriding, the possibility of granting immunity acts as an effective guard against prosecution. In cases of murder, rape, and other felonious conduct, Judge Friendly contends that the state interest in protecting society outweighs the individual's interest in privacy.[46] This does not mean, however, that the privilege should be done away with in felony cases; it only means that this particular rationale of a "right to a private enclave" fails when applied to felonies.

C. *How Should the Privilege Be Understood?*

The Supreme Court wrote that the privilege against self-incrimination "reflects many of our fundamental values and most noble aspirations."[47] The many purposes underlying the privilege prevents its ascription to any single rationale. Justice Harlan, reflecting this idea, once commented that "[t]he Constitution contains no formulae with which we can calculate the areas . . . to which the privilege should extend, and the Court has therefore been obliged to fashion for itself standards for the application of the privilege."[48] The Court, however, has been unable to establish any consistent framework in which to place the privilege. The privilege represents all things to all persons; it provides a check on the system, and it attempts to maintain integrity in judicial and governmental bodies. Yet the privilege is also viewed as an inviolable human right.

Recognition of *all* these underlying purposes is necessary in order to properly view the privilege. While the Court's opinion in *Murphy* certainly may offer guidance,[49] lower courts often manipulate the various

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43. Some commentators have argued that the right not to speak could actually be based on the first, and not the fifth amendment. McKay wrote: "If the right to speak and write without official restraint is guaranteed by the First Amendment, as all agree is the case, does it not follow that there is a parallel freedom not to speak and not to write?" McKay, *supra* note 18, at 212. This implies a right of silence, which also includes the specific right not to incriminate oneself. *Id.*

44. Friendly, *supra* note 14, at 690.

45. *See, e.g., Roe*, 410 U.S. at 155.

46. Friendly, *supra* note 14, at 690.

47. *Murphy*, 378 U.S. at 55.

48. Spevack v. Klein, 385 U.S. 511, 522 (1967) (Harlan, J., dissenting).

49. *Murphy*, 378 U.S. 52.

purposes of the privilege in order to suit their ends. Courts hoping to further law enforcement and uncover evidence minimize the importance of rights-based rationales.[50] Conversely, rights-based proponents tend to ignore the fact that the privilege provides a check on government oppression and has originally served predominantly practical purposes.[51] In *Murphy* the Court recognized, at least in passing, all of the major rationales put forward in defense of the privilege.[52] The *Murphy* decision, however, is deficient because the Court did not rely on any of these rationales in fashioning its opinion. The Court instead decided the case by reference to English cases and by incorporating the fifth amendment into the fourteenth amendment.[53]

Courts should recognize, as in *Murphy*, that the privilege serves varied purposes. But unlike *Murphy*, courts should rely on this background in making their decisions. In deciding whether the privilege applies when the person fears foreign prosecution, courts should consider whether the "cruel trilemma" is still present. A witness may be well aware that perjury and contempt pose attractive alternatives to the possibility of placing oneself in the prisons of a foreign country. While domestic grants of immunity may circumvent one's "privacy" and right not to speak, no parallel protection exists to prevent the use of incriminating testimony in a foreign court.

III. THE HISTORICAL APPROACH

The historic approach to the question of foreign prosecution involves establishing a series of litmus tests before reaching the constitutional question. A real and substantial fear of foreign prosecution and a realistic fear of disclosure of one's testimony are the two established tests that the person must satisfy before the courts will consider the constitutional question. Until recently, these tests have prevented the courts from even considering the constitutional question.[54]

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50. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433 (1974) (focusing on procedural safeguards favors the government).

51. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 83-83 (1977); HART, *Between Utility and Rights*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 198 (1983).

52. *Murphy*, 378 U.S. at 55.

53. *Id.*

54. *See* United States v. (Under Seal), 794 F.2d 920 (4th Cir. 1986)

A. *The Supreme Court's Position: Murphy v. Waterfront Commission of New York Harbor*

In *Murphy* the Supreme Court provided some insight into whether the self-incrimination clause extends to persons in fear of foreign prosecution.[55] In that case, the petitioners were subpoenaed to testify concerning a work stoppage at the Hoboken, New Jersey piers. The petitioners refused to testify on the ground that their answers would tend to incriminate them. Although both New Jersey and New York granted them immunity under state law,[56] the petitioners still refused to testify because they believed their testimony was incriminating under federal law as well.[57] Since the state grants of immunity did not extend to prosecution under federal law, petitioners feared that their testimony in state court would be used against them in a federal proceeding.[58] The New Jersey Supreme Court held that a state may constitutionally compel a witness to give testimony that might prove to be self-incriminating in a federal prosecution.[59]

The United States Supreme Court reversed.[60] In reaching its decision, the Court overturned a number of Supreme Court cases holding that a privilege granted in one jurisdiction does not extend to another jurisdiction.[61] The Court stated that the prior cases had not adequately considered certain critical factors and that subsequent decisions had further weakened these cases.[62] After discussing the privilege's policies, however,

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55. *Murphy*, 378 U.S. at 54.

56. The Waterfront Commission of New York Harbor was a multi-state organization. *Id.* at 53 n.2.

57. *Id.* at 53-54.

58. Prior to *Murphy* and its companion case, Malloy v. Hogan, 378 U.S. 1 (1964), the fifth amendment was not incorporated through the fourteenth amendment and did not apply to the states.

59. 378 U.S. at 54, *citing* the lower court case, Murphy v. Waterfront Comm'n, 39 N.J. 436, 452-58, 189 A.2d 36, 46-49 (1963).

60. *Murphy*, 378 U.S. 52.

61. *Id.* at 57. This rule had three facets: the federal government could compel a statement that would incriminate under state law, United States v. Murdock, 284 U.S. 141 (1931); a state can compel testimony that might incriminate under federal law, Knapp v. Schweitzer, 357 U.S. 371 (1958); and, testimony compelled by a state can be introduced as evidence in a federal court, Feldman v. United States, 322 U.S. 487 (1944).

62. The Court wrote: "Our review of the pertinent cases in this Court and of their English antecedents reveals that *Murdock* did not adequately consider the relevant authorities and has been significantly weakened by subsequent decisions of this Court, and, further, that the legal premises underlying *Feldman* and *Knapp* have since been rejected." *Murphy*, 378 U.S. at 57.

Justice Goldberg examined century-old English cases[63] with the hope that precedent could somehow reveal where past courts had gone astray. The Court was careful not to overrule the past cases on the ground that it had changed its interpretation of the Constitution; instead, the Court based its decision on the inability of prior courts to discern the "true" English rule regarding the applicability of the privilege to foreign jurisdictions.

The *Murphy* Court criticized *United States v. Murdock*,[64] which held that the federal government could compel a statement that would prove incriminating under state law, because in that case the Court failed to cite the correct English rule. Under the English rule, as stated in *Murdock*, a person may be compelled to disclose information which would incriminate that person under the laws of another country.[65] However, the *Murphy* Court found that the "true" English rule extended the privilege to those in fear of foreign prosecution.[66] The *Murdock* Court did not uncover the case that established the correct rule, and it was on this mistake that the *Murphy* Court based its decision to overrule.[67]

Although *Murphy* contains an excellent summary of the privilege's purposes and policies,[68] the Court chose to predicate its decision on the research mistakes of past courts. Regardless of the Court's rationale, however, its apparent support for the true English rule—that a person is protected in all jurisdictions—reveals its belief that the self-incrimination clause extends to protect persons in fear of foreign prosecution. A recent stay of a contempt order by then Chief Justice Burger supports this conclusion.[69]

B. *Real and Substantial Fear of Foreign Prosecution*

In *Murphy* the Supreme Court did not directly address the question of foreign prosecutions, and subsequent courts similarly have been reluctant

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63. *Id.* at 58-63.

64. 284 U.S. 141.

65. *Id.* at 149. This rule was contained in an 1851 English case, King of the Two Sicilies v. Willcox, 1 Sim. (N.S.) 301, 61 Eng. Rep. 116 (1851). The "true" rule, however, was not in this case, but in the a case which overruled it just sixteen years later. United States of America v. McRae, 3 L.R.-Ch. App. 79 (1867).

66. *Murphy*, 378 U.S. at 63. The Court wrote: "This decision [McRae], not King of the Two Sicilies, represents the settled 'English rule' regarding self-incrimination under foreign law." *See also* Heriz v. Riera, 11 Sim. 318, 59 Eng. Rep. 896 (1840).

67. *Murphy*, 378 U.S. at 57. *See also supra* note 61 and accompanying text.

68. The court cites seven distinct purposes behind the privilege and cites cases in support of each. *Murphy*, 378 U.S. at 55.

69. *See infra* notes 149-60 and accompanying text.

to do so. Instead, courts have established a series of hurdles which the person must pass before the court will reach the constitutional question. In *Zicarelli v. New Jersey State Commission of Investigation*[70] the United States Supreme Court held that a "real and substantial fear of foreign prosecution" must exist before a court may consider the fifth amendment question.[71] Asked to testify concerning organized crime, racketeering, and political corruption, the appellant Zicarelli invoked his fifth amendment privilege one hundred times during the course of the proceedings.[72] The state commissioner then granted him immunity[73] and compelled him to answer the questions. Zicarelli argued that the grant of immunity was not sufficient because he was still unprotected from foreign prosecutions. A number of magazine articles had labelled the appellant as the "foremost internationalist" in organized crime, and Mr. Zicarelli contended that this, as well as other factors,[74] created a real and substantial fear that he would face prosecution in Canada and the Dominican Republic.[75]

Zicarelli made a specific objection to only one of the one hundred queries directed to him. He felt that the question "In what geographical area do you have Cosa Nostra responsibilities?"[76] would incriminate him under foreign law. The Court determined that when reviewing a claim of privilege a court should focus on what a truthful answer might reveal[77] by considering the circumstances of the case in which the question is asked.[78] The Court found that because the prosecutor asked the question during the course of a domestic investigation, an answer with regard to foreign involvements would "volunteer information not sought."[79] Thus, because Zicarelli could have answered the question without incriminating himself under foreign law, the Court concluded that he had

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70. Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

71. *Id.* The real and substantial fear test was well established before Zicarelli. In fact, the privilege has never extended to fears that were remote or speculative. *See, e.g.*, Mason v. United States, 244 U.S. 362 (1917); Heike v. United States, 227 U.S. 131, 144 (1913); Brown v. Walker, 161 U.S. 591, 599-600 (1896).

72. *Zicarelli*, 406 U.S. at 474.

73. Pursuant to N.J. REV. STAT. 52:9M-17(a) (1970).

74. Mr. Zicarelli had a number of holdings in Venezuela which he felt might lead to foreign prosecution, but this assertion was summarily dismissed by the Court as too tenuous. *Zicarelli*, 406 U.S. at 479.

75. *Id.*

76. *Id.* at 480. The Cosa Nostra is a part of the Joseph Bonanno "family." *Id.* at 479 n.17.

77. *Id.* at 480, *citing* Hoffman v. United States, 341 U.S. 479, 486 (1951).

78. *Zicarelli*, 406 U.S. at 480.

79. *Id.* at 481.

no real fear of foreign prosecution.

Zicarelli established a hurdle upon which many subsequent cases have stumbled: the requirement of a real and substantial fear of foreign prosecution. Some commentators have suggested that *Zicarelli* announced a second requirement: that a witness establish that his or her testimony might actually prove incriminating under foreign law.[80] Courts, however, generally have not adopted this second requirement in succeeding cases.[81] Courts have employed the "real and substantial fear of prosecution" test in every subsequent decision and in doing so have kept many unnecessary cases out of the system.

Courts have interpreted a realistic fear of prosecution in a variety of ways. In deciding federal-state jurisdictional questions some courts have established a legal standard for proving "realistic fear." These courts have held that the mere possibility of prosecution removes a case from the realm of imagination and speculation, constituting a realistic fear of prosecution.[82] Although courts generally apply a higher standard for foreign courts, the standard is unclear.[83] For example, one court held that a real fear of foreign prosecution did not exist, even though the suspect was charged with smuggling narcotics from Canada and faced extradition based on a mutual cooperation treaty between the United States and Canada.[84] In *In re Grand Jury Subpoena of Flanagan* the Second Circuit established the most authoritative and frequently used test for determining whether a cognizable danger of foreign prosecution exists. This test consists of several factors a court should consider in deciding whether or not to allow a witness to invoke the privilege:

> whether there is an existing or potential foreign prosecution of him; what

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80. Feldman, *The Fifth Amendment, Self-Incrimination, and Foreign Prosecution: The Saga of the Ryuyo Maru*, 11 UCLA—ALASKA L. REV. 119, 133 (1982).

81. *See* United States v. (Under Seal), 794 F.2d at 923 ("*Zicarelli* teaches that a court should first determine that the witness confronts a 'real and substantial' risk of foreign prosecution." There is no mention of the second requirement.). *But see* United States v. Yanagita, 552 F.2d 940, 943 (2d Cir. 1977) (the court required that Yanagita meet two tests: first, that a real danger exists of disclosing incriminating information; and second, that a real and substantial fear exists that prosecution might actually ensue).

82. In re Samuelson, 763 F.2d 321 (8th Cir. 1985). *See also* In re Master Key Litigation, 507 F.2d 292, 293 (9th Cir. 1974) (privilege does not depend on likelihood, but on possibility of prosecution); Wehling v. Columbia Broadcasting System, 608 F.2d 1084, 1087 (5th Cir. 1979).

83. *Samuelson*, 763 F.2d at 324 n.4 (citing In re Baird, 668 F.2d 432 (8th Cir. 1982), *cert. denied*, 456 U.S. 982 (1982).

84. *Baird*, 668 F.2d 432. The treaty was the 1961 Multilateral Single Convention on Narcotic Drugs, 18 U.S.T. 1407, and its 1972 Amending Protocol, 26 U.S.T. 1439.

> 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.[85]

One factor that courts have found extremely persuasive is whether an investigation and prosecution is currently underway in a foreign country. In *United States v. (Under Seal)* the court began its discussion by noting that the Philippine government had already initiated a prosecution against the defendants.[86] Conversely, the absence of a foreign prosecution is also a critical factor. The lack of an ongoing or pending suit drastically diminishes the chance of a court finding a "real and substantial fear" of foreign prosecution.[87]

Courts confronted with this type of question consistently employ the *Zicarelli* test requiring a real and substantial fear of foreign prosecution. Although *Zicarelli* did not resolve the ultimate constitutional question,[88] the case nevertheless established a crucial hurdle and provides a manageable standard without attempting to address various constitutional remedies. By applying the *Zicarelli* test, only the most compelling cases reach the constitutional question[89] and baseless fifth amendment claims and attempts to circumvent grants of immunity are prevented.

C. *Realistic Fear of Disclosure*

Many court decisions have emphasized the existence of a realistic fear that testimony will be disclosed to the foreign government. In trying to establish fear of disclosure, defendants have proposed a variety of arguments ranging from a possibility of accidental disclosure[90] to fear that Soviet agents could be present in a courtroom.[91] The issue of disclosure is hotly contested concerning testimony before grand juries. In these instances, courts have faced the question of whether Federal Rule of Criminal Procedure 6(e)[92] adequately protects a witness from disclosure of his

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85. United States v. Flanagan, 691 F.2d 116, 121 (2d. Cir. 1982). *See also* United States v. Chevrier, 748 F.2d 100, 103 (2d Cir. 1984); United States v. Gilboe, 699 F.2d 71, 75 (2d Cir. 1983).

86. *Under Seal*, 794 F.2d at 924.

87. *See, e.g.*, United States v. Barstech, 643 F. Supp. 427, 429 (N.D.Ill. 1986); United States v. Joudis, 800 F.2d 159, 162 (7th Cir. 1986).

88. *Zicarelli*, 406 U.S. at 472.

89. *See Under Seal*, 794 F.2d 920; *infra* notes 113-48 and accompanying text.

90. *Under Seal*, 794 F.2d at 925.

91. *Joudis*, 800 F.2d at 162.

92. FED. R. CRIM. P. 6(e) provides in relevant part:

or her testimony to a foreign court.[93] That Rule purports to protect statements made before a grand jury from disclosure to outside parties.

Numerous exceptions allowing disclosure substantially erode the effectiveness of Rule 6(e)'s secrecy provisions. For example, section 6(e)(3)(A)(i) allows government attorneys to access grand jury materials without a court order. The Supreme Court strictly construes the exceptions by specifically stating that, absent a clear indication otherwise,

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(e) **Recording and Disclosure of Proceedings.**

(2) **General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) **Exceptions**

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel . . . as are deemed necessary . . . to enforce federal criminal law.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; [or]

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(6) **Sealed Records.** Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

93. *Compare* Nigro v. United States, 705 F.2d 1224, 1227 (10th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983); *Baird*, 668 F.2d 432; In re Tierney, 465 F.2d 806 (5th Cir. 1972) (Rule 6(e) adequately protects against likelihood of disclosure to a foreign government), *with Under Seal*, 794 F.2d at 925; *Chevrier*, 748 F.2d at 103-04; *Flanagan*, 691 F.2d at 123-24; United States v. Lemieux, 597 F.2d 1166, 1168-69 (9th Cir. 1979) (Hufstedler, J., concurring) (a sealing order is not conclusive with respect to possible disclosure to foreign governments).

breaches of secrecy are presumed unauthorized.[94] One judge has noted, however, that government attorneys could send transcripts of grand jury testimony to foreign countries upon request without first making an application to the court.[95] With such a possibility of foreign access to transcripts, a court may be unaware that the record of a witness's testimony is finding its way outside the United States.

Section 6(e)(3)(C)(i) allows court-ordered disclosure "preliminarily to or in connection with a judicial proceeding."[96] It is unclear whether the definition of a judicial proceeding under Rule 6(e) embraces the idea of judicial proceedings abroad.[97] The Eighth Circuit, addressing the issue in dicta, concluded that the definition includes judicial proceedings abroad. In reaching this conclusion, the court wrote that it "assume[d]," without deciding, that the phrase 'judicial proceeding' includes a criminal trial conducted in a foreign country."[98] Courts will not order disclosure under this section, however, without a showing of "particularized need."[99] Courts require this "need" to be satisfied by a three-part test establishing that: (1) absence of the material would lead to a possible injustice in another proceeding; (2) the need for the material outweighs the need for secrecy; and (3) the disclosure is limited to material necessary to avoid injustice.[100] Whether this test is applicable and could be satisfied in foreign proceedings is unclear.

Clearly, the United States has legitimate interests in making disclosure to foreign governments under either of the exceptions described above.[101] Reciprocal cooperation,[102] maintenance of foreign relations,[103] and savings of time and money by allowing other governments to prosecute our criminals[104] all constitute valid reasons to disclose information. Although

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94. United States v. Sells Eng'g, Inc., 463 U.S. 418, 424-25 (1983).

95. In re Cardassi, 351 F. Supp. 1080, 1082 (D.Conn. 1972).

96. *See supra* note 92.

97. *See Gilboe*, 699 F.2d at 78.

98. *Baird*, 668 F.2d at 434 n.3.

99. The particularized need requirement was first added in United States v. Procter & Gamble Co., 356 U.S. 677 (1958), and later revised in Douglas Oil Co. v. Petrol Stops N.W., 441 U.S. 211 (1979).

100. *Douglas Oil*, 441 U.S. at 222.

101. *See generally* Note, *Disclosure of Grand Jury Materials to Foreign Authorities Under Federal Rule of Criminal Procedure 6(e)*, 70 VA. L. REV. 1623, 1630-1633 (1984).

102. *Id.* at 1631.

103. *Id.* Denying requests for information could damage relations with foreign governments. *Id.* at 1632.

104. If federal authorities have granted immunity, or evidence is inadmissible in this country, or prosecution in a foreign country would better serve the interests of justice,

one judge has expressed concern that the disclosure could be made by an attorney for the government,[105] the Eighth Circuit has discounted this fear.[106] The more likely way for disclosure is through the "judicial proceeding" exception.[107] But does the United States have an interest in the "injustice" that might stem from a foreign government not having access to grand jury testimony? At least one commentator believes that a justifiable interest exists when the United States determines that the foreign government will conduct the adjudication with "fundamental fairness."[108]

Rule 6(e) does not provide an adequate answer to the question of disclosure. The rule has numerous exceptions, and once the information is disclosed no remedy exists to repair the damage. However, a section 1983 action certainly would be appropriate[109] as an after-the-fact damages remedy. If the situation satisfies the *Zicarelli* test, then it can satisfy the realistic fear of disclosure test in one of three ways: (1) if Rule 6(e) provides insufficient protection; (2) if the case goes beyond the grand jury stage to trial, when the rule will lose its effect; and (3) if disclosure is made in violation of the rule. The Supreme Court has never been presented with a case in which a person claimed the privilege at trial, where the procedural grand jury rule loses its effect. Such a fact pattern would present a much more compelling case.

IV. THE CONSTITUTIONAL QUESTION

The "real and substantial fear" test and the "realistic fear of disclosure" requirement have posed significant barriers that the person claiming the privilege must overcome before the courts will reach the constitutional question. Courts only recently have begun to reach the question of whether the self-incrimination clause extends the right to remain silent to persons in fear of foreign prosecution. Although a few courts have reached the constitutional question,[110] the most recent cases have been of particular interest because they involve the Marcos family. In *United*

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then every reason exists to disclose the testimony and allow a foreign sovereign to do work that the United States cannot. *Id.*

105. *See Lemieux*, 597 F.2d at 1168 (Hufstedler, J., concurring).

106. *Baird*, 668 F.2d at 433.

107. Although this is the more likely procedure for disclosure if normal channels are followed, with a number of individuals having access to transcripts, the potential for accidental disclosure is still an ever present possibility under the prior exception.

108. *See* Note, *supra* note 101, at 1637-47.

109. 42 U.S.C. § 1983 (1982).

110. *See, e.g.*, Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981); United States v. Trucis, 89 F.R.D. 671 (E.D. Pa. 1981); *Cardassi*, 351 F. Supp. 1080.

States v. (Under Seal)[111] the court provided an extensive analysis of the constitutional question based on a compelling fact scenario. Subsequently, in *Araneta v. United States* the petitioners applied for a stay of a contempt order to Chief Justice Burger.[112] The *Under Seal* opinion reached one conclusion, and Chief Justice Burger in *Araneta* hinted at another. The Supreme Court, however, denied certiorari and created a confused state of affairs.

A. *United States v. (Under Seal)*

A grand jury in the Eastern District of Virginia was investigating arms contracts with the Philippines and allegations of corruption when Gregorio and Irene Araneta fled to the United States.[113] About two months after their arrival, authorities served them with grand jury subpoenas and granted them immunity. In spite of these grants, the Aranetas, asserting their fifth amendment privilege, refused to testify.[114]

In its analysis, the court noted that the United States and the Republic of the Philippines are parties to an extradition treaty.[115] In addition, the court discussed an affidavit signed by the United States Under Secretary of State for Political Affairs clearly expressing "the extreme importance the United States attaches to favorable relations with the Philippines and declares that it is the policy of the United States to strengthen and broaden those relations."[116] The court also stated that the two governments had entered into a mutual legal assistance agreement just one week after concluding arguments in the case.[117] Each of these factors influenced the court's resolution of the fear of prosecution and the fear of disclosure issues and offered a greater understanding of the court's decision.

The facts indicated a strong possibility that the Aranetas could return to the Philippines and face prosecution. Although the United States was

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111. 794 F.2d 920 (4th Cir. 1986).

112. 107 S. Ct. 1 (1986) (Burger, C.J., acting as Circuit Justice).

113. *Under Seal*, 794 F.2d at 921. The defendants were the daughter and son-in-law of former Philippine President Ferdinand Marcos.

114. *Id.* at 922.

115. The treaty has not been ratified by the Senate.

116. *Under Seal*, 794 F.2d at 922 (taken from the Under Secretary's affidavit).

117. *Id.* "The accord commits the two signatories to share evidence in the legal investigations of specific corporations and individuals alleged to have provided kickbacks to obtain military and public works contracts. The two governments also have agreed to assist each other in arranging interviews with potential witnesses and locating additional evidence." *Id.*

not bound officially by the extradition treaty,[118] Senate approval of the treaty could impose an obligation to extradite the couple.[119] The court noted that it was not a "remote or speculative"[120] possibility that the United States might return the couple to the Philippines against their will, since their continued presence was wholly dependent on the discretionary authority of the Attorney General.[121] The established policy of the United States government was "to aid and assist the Aquino government in its pursuit of Philippine interests with respect to the Marcos regime."[122] Finally, the Aranetas stated that they "may voluntarily choose to return to their country at a future date."[123] The court found this set of facts particularly compelling. The national and international attention focused on the Marcos family, coupled with the importance of the new Aquino government, made cooperation a necessity for stable foreign relations. The court ultimately held that the Aranetas clearly met the *Zicarelli* test because most likely they would return, either voluntarily or involuntarily, to the Philippines and almost surely face prosecution.

The court next addressed the question of whether the protective order entered pursuant to Federal Rule of Criminal Procedure 6(e) reduced the possibility of disclosure "as to render inconsequential the risk that the Aranetas' grand jury testimony will be used against them in the Philippines."[124] Although the petitioners' testimony was available to only eight prosecutorial officials, the compelling facts of this case[125] led the court to recognize that the case might generate tensions that could lead to "inadvertent" disclosure.[126] In addition, the protective order did not prevent disclosure of evidence *derived* from a witness's testimony.[127] The Court also pointed out the most glaring deficiency in the rule: the protections only apply to grand jury testimony. The Court noted that

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118. *Id.* at 924.

119. *Id.*

120. *Id.* In *Zicarelli* the Court stated that in order to establish a real and substantial fear of foreign prosecution facts other than "remote and speculative" facts must be present.

121. *Id.* at 924.

122. *Id.*

123. *Id.*

124. *Id.*

125. The court stated: "This is not a simple case charging a garden variety of criminal conduct. Rather, this case involves a former head of state, whose alleged illicit gains are measurable only by the billions of dollars. *Id.* at 925.

126. *Id.*

127. *Id.*

"should the Aranetas testify before the grand jury, and should the grand jury return an indictment, the Aranetas could be called as witnesses at the ensuing trial."[128] No rule of secrecy exists at trial to prevent disclosure. Considering these factors, the court concluded that the order pursuant to Rule 6(e) did not obviate the need to determine the fifth amendment question.[129] In addition, the United States government was under extraordinary pressures that most likely would cause disclosure under either the government attorney or judicial proceeding exception.[130]

Addressing the constitutional question, the court first recognized the fact that petitioners could not use the fifth amendment before a Philippine court if the Philippines countenanced the use of testimony compelled by a grant of immunity.[131] The Philippines could ignore United States constitutional protections based on the widely accepted principle that a domestic provision of law, even constitutional law, is binding only on the enacting jurisdiction.[132] Thus, no guarantee existed that the Philippine government would honor the immunity that the United States gave to the Aranetas.

Forced to answer the constitutional question, the court made an analogy to the period of United States history when courts held that the fifth amendment was not applicable to the states.[133] When the self-incrimination clause applied only to federal prosecutions, the federal government could compel testimony that would incriminate a person under state law;[134] likewise, a state could compel testimony that would incriminate the individual under federal law.[135] From this history, the court concluded that "the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the fifth amendment from compelling self-incrimination."[136] Based on this conclusion, the court posited that the fifth amendment might have extraterritorial effect if the United States con-

128. *Id.*

129. *Id.* The court noted contrary authority, *Nigro*, 705 F.2d 1224, 1227; *Baird*, 668 F.2d 432; *Tierney*, 465 F.2d 806, but acknowledged that the facts at hand were far more compelling than the facts of those cases.

130. *See supra* notes 105-08 and accompanying text.

131. *Under Seal*, 794 F.2d at 925.

132. *Id.*

133. *Id.* This period lasted until 1964, when the Supreme Court incorporated the fifth amendment into the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964).

134. *See, e.g.*, United States v. Murdock, 284 U.S. 141 (1931).

135. *See, e.g.*, Knapp v. Schweitzer, 357 U.S. 371 (1958).

136. *Under Seal*, 794 F.2d at 926.

trolled or unduly influenced the foreign proceeding.[137] While this argument has some practical appeal,[138] it reduces the significance of the rights-based rationales that underlie the privilege.[139]

If it is unnecessarily cruel to force people into the trilemma of self-accusation, perjury, or contempt in a domestic proceeding,[140] it is no less cruel when the fear is of prosecution in a foreign court proceeding. In addition, the fear of self-incrimination, regardless of where the penal effects of that incrimination may occur, carries with it the accompanying trilemma. The reliability of the compelled testimony is also suspect because perjury becomes an attractive alternative.[141] If domestic self-incrimination invades a person's general right to "privacy,"[142] testimony that will prove incriminating in another country similarly will impinge upon this right. Courts[143] and commentators[144] have agreed that the cruel trilemma, decreased reliability, and the right of privacy are appropriate rationales behind the privilege. Nevertheless, the *Under Seal* court did not give them sufficient credence.

The court in *Under Seal* weighed the importance of individual freedoms against the necessity of government fact-finding, and the government interests prevailed. The court noted that it had done "everything in its power to relieve the pressure [posed by the cruel trilemma] by granting the Aranetas use and derivative use immunity"[145] and thus concluded it would have been intolerable to forego valuable, legitimate evidence because of possibilities beyond United States control (e.g., the foreign judicial process).[146] Contrary to the court's opinion, the government prosecutor could have afforded the Aranetas further protection by promising not to extradite the Aranetas.

If the courts and the government are concerned about protecting the constitutional rights of witnesses, then granting political asylum and re-

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137. *Id.* at 928. The court cited the following cases in support of its position: United States v. Emery, 591 F.2d 1266, 1267-68 (9th Cir. 1978); Lustig v. United States, 338 U.S. 74 (1949). *See also* 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 (1983).

138. *See* Note, *supra* note 137 (cited with approval in *Under Seal*, 794 F.2d at 926).

139. *See supra* notes 29-46 and accompanying text. Even if the United States has no influence over a foreign proceeding, a witness still faces the cruel trilemma.

140. *Murphy*, 378 U.S. at 55; see *supra* notes 32-39 and accompanying text.

141. *See supra* note 26 and accompanying text.

142. *Murphy*, 378 U.S. at 56; see *supra* notes 43-46 and accompanying text.

143. *See Murphy*, 378 U.S. at 55-56.

144. *See supra* note 34.

145. *Under Seal*, 794 F.2d at 926.

146. *Id.*

fusing to extradite are realistic alternatives to ineffective grants of immunity. Although Justice Goldberg established the "cruel trilemma" rationale almost twenty-five years ago,[147] it remains a valid purpose behind the privilege.[148] While these measures might conflict with foreign policy and could raise a political question by requiring violation of an extradition treaty, the executive branch should not have control over the way the judiciary shapes our constitutional guarantees.

B. *Araneta v. United States*

The Aranetas appealed to Chief Justice Burger, acting as Circuit Justice, to stay the lower court's contempt order for refusing to testify.[149] The Chief Justice, acting as a surrogate for the entire court,[150] could grant the stay only upon determining that three factors were present: a reasonable probability that four Justices would vote to grant certiorari; a fair prospect that a majority of the Justices would find the decision below clearly erroneous; and, a balancing of the equities in the applicants' favor.[151] In response to the second requirement, the Chief Justice concluded that a "fair prospect" existed that the Court would reverse the Fourth Circuit decision.[152] Although "fair prospect" is not a high standard, Chief Justice Burger noted the importance of the *Murphy* decision in deciding the constitutional question.[153]

Certain language in the *Murphy* decision supports an overruling of *Under Seal.* In *Murphy* the Court discussed several English cases, with apparent approval, which held that the privilege would prevent a court from compelling testimony from an individual that would be incriminating in a foreign country's court.[154] In the Court's opinion, the English cases[155] stood for the proposition that the privilege did "not protect wit-

147. *Murphy*, 378 U.S. at 55.

148. See *supra* notes 32-35 and accompanying text for a discussion of rights-based rationales.

149. *Araneta*, 107 S. Ct. 1.

150. Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., in chambers).

151. *Araneta*, 107 S. Ct. at 2. *See also* NCAA v. Board of Regents, 463 U.S. 1311, 1313 (1983) (White, J., in chambers); Gregory-Portland Indep. School Dist. v. United States, 448 U.S. 1342, 1342 (1980) (Rehnquist, J., in chambers).

152. *Araneta*, 107 S. Ct. at 2.

153. *Id.* For a discussion of *Murphy*, see *supra* notes 55-69 and accompanying text.

154. *Murphy*, 378 U.S. at 58-63. In *Murphy* the Court held that the privilege protects a witness against compelled disclosures in state court that could be used against him or her in federal court. The language examining the English cases is dicta.

155. United States of America v. McRae, 3 L.R.-Ch. App. 79 (1867); Brownsword

nesses against disclosing offenses in violation of the laws of another country."[156] Although there was some disagreement about the "true" English rule,[157] the Court concurred on a definition of the privilege that would support its application to extraterritorial claims.[158]

Justice Burger concluded his opinion by noting the necessity of the stay order, especially in light of the Court of Appeals' fear that the sealing order might provide an insufficient protection.[159] Because the Chief Justice was speaking for himself and only indirectly for the entire Court based on a "likelihood" of what the Court would conclude, the opinion has no precedential value beyond its use in determining stays of contempt orders. Courts, however, have cited this short opinion as authority for determining the constitutional question.[160] Because the Supreme Court has failed to address the issue directly, the conflict remains. The United States government has a vested foreign policy interest in making disclosures to foreign governments, yet the *Murphy* decision contains dicta that, if carried to its logical conclusion, would support the proposition that United States courts should recognize that the privilege has extraterritorial effect.

V. CONCLUSION

A Supreme Court decision resolving the apparent confusion on this constitutional question and providing clear guidelines and standards is required. In a stay proceeding similar to the *Araneta* opinion, Justice Stevens noted the existence of two questions presented for the Court's consideration: the constitutional question and "whether sealing orders adequately protect against disclosure for Fifth Amendment purposes."[161] Courts have failed to answer these questions for too long,[162] and their importance warrants attention.

The Supreme Court should not resolve the constitutional question without reference to the purposes behind the privilege. Grants of immunity and sealing orders do not adequately address the "cruel trilemma"

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v. Edwards, 28 Eng. Rep. 157 (1750); East India Co. v. Campbell, 27 Eng. Rep. 1010 (1749).

156. *Murphy*, 378 U.S. at 72 (quoting *McRae*, 3 L.R.-Ch. App. at 79).

157. 378 U.S. at 67-68.

158. *Id.* at 69.

159. *Aranèta*, 107 S. Ct. at 3.

160. *See, e.g., Joudis*, 800 F.2d at 161.

161. *Araneta*, 107 S. Ct. at 5 n.3.

162. The debate has been raging since the English cases cited in *Murphy* were decided almost 250 years ago, and has recently become a question of great interest with the Marcos family, *Under Seal*, and the Nazi war criminal Mikutaitis.

and the privacy rationales. While the United States certainly has an interest in cooperating with foreign governments in law enforcement, the government should not automatically approve requests for extradition. Just as a grant of immunity must be coextensive with the privilege,[163] other protections must also be coextensive. If the language in *Murphy* is carried to its logical conclusion, then the privilege will extend to protect persons in fear of foreign prosecution. If the scope of the fifth amendment extends the privilege to such persons, then courts must examine what protections would be coextensive with the privilege.

The only way to protect a witness who has subjected himself to possible foreign prosecution with compelled self-incriminating testimony is to insure that the witness never enters the jurisdiction of a foreign sovereign seeking to prosecute. In addition to granting full immunity from domestic prosecution, the United States could aid this goal by promising to make no attempts to extradite the witness. This approach allows the United States to gather needed information, while respecting the individual rights of the witness. Furthermore, the infrequency of these situations would indicate that such a rule would not pose significant problems to United States foreign policy. This approach would protect the rights guaranteed by the fifth amendment. If courts truly regard the fifth amendment as an inviolable human right, then there is no other alternative.

Bret Alan Fausett

163. *Counselman*, 142 U.S. 547.