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Seeking Refuge in the Fifth Amendment: The Applicability of the Privilege Against Self-Incrimination to Individuals who Risk Incrimination Outside the United States

Debra Ciardiello*

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Seeking Refuge in the Fifth Amendment: The Applicability of the Privilege Against Self-Incrimination to Individuals who Risk Incrimination Outside the United States

Debra Ciardiello

Abstract

This Note argues that the Fifth Amendment privilege prohibits the U.S. government from compelling individuals to offer testimony that would incriminate them in criminal proceedings outside the United States. Part I explores the development of the Fifth Amendment's privilege against self-incrimination. Part II discusses the conflicting positions that have emerged in lower courts concerning the Fifth Amendment's extraterritorial application. Part III argues that the Fifth Amendment protection regarding self-incrimination should apply to the risk of non-U.S. prosecution. This Note concludes that the principles reflected in the enactment of the Fifth Amendment and its treatment in both U.S. and English courts warrant the extraterritorial application of the self-incrimination privilege.

NOTES

SEEKING REFUGE IN THE FIFTH AMENDMENT: THE APPLICABILITY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION TO INDIVIDUALS WHO RISK INCRIMINATION OUTSIDE THE UNITED STATES.

INTRODUCTION

The Fifth Amendment of the U.S. Constitution prohibits federal and state governments from compelling individuals to testify if that testimony could be used against them in any domestic criminal prosecution.¹ To invoke the Fifth Amendment privilege against self-incrimination with success, claimants must demonstrate a real and substantial risk that the compelled testimony could be used against them in further prosecution.² Although the privilege against self-incrimination applies to individuals when their testimony may be used against them in domestic criminal prosecutions, a question still exists regarding the application of the privilege to individuals whose testimony may subject them to extraterritorial prosecutions.³

1. U.S. CONST. amend. V. The Fifth Amendment provides that [n]o 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.

Id. In *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964), the U.S. Supreme Court held that one jurisdiction in the U.S. federal system may not compel a witness to give testimony that might incriminate him under the laws of another jurisdiction. *Id.* at 77-78. The privilege against self-incrimination applies whether the testimony is compelled by the federal government and used by a state or compelled by a state and used by the federal government. *Id.* The Court also has held that the privilege against self-incrimination is protected by the Fourteenth Amendment against abridgement by the states. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

2. See *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 480-81 (1972) (holding that substantial fear of non-U.S. prosecution is necessary to present constitutional question); see also *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Mason v. United States*, 244 U.S. 362, 365-66 (1917); *Heike v. United States*, 227 U.S. 131, 144 (1913); *Brown v. Walker*, 161 U.S. 591, 599-600 (1896) (all holding that Fifth Amendment does not protect against remote or speculative possibilities of criminal prosecution).

3. See *Zicarelli*, 406 U.S. at 478 (stating that question concerning whether Fifth Amendment privilege may be invoked by individuals who fear prosecution outside United States remains open).

The U.S. Supreme Court has not addressed this issue, and the lower courts have reached conflicting results.⁴

In addressing the Fifth Amendment's application to individuals who risk prosecution outside the United States, lower courts differ with respect to the extraterritorial reach of the privilege against self-incrimination. Some lower courts have extended the privilege, stressing the history of the Fifth Amendment and its treatment in the courts.⁵ Other courts have refused to apply the privilege against self-incrimination extraterritorially on the ground that the extension of this privilege would frustrate law enforcement activities.⁶

4. See *id.* Compare *Moses v. Allard*, 779 F. Supp. 857, 882-83 (E.D. Mich. 1991) and *Mishima v. United States*, 507 F. Supp. 131, 135 (D. Alaska 1981) and *In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972) (all extending Fifth Amendment to protect against threat of non-U.S. prosecution) with *United States v. (Under Seal)*, 794 F.2d 920, 925 (4th Cir.), *cert. denied*, 479 U.S. 924 (1986) and *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970) and *Phoenix Assurance Co. of Can. v. Runck*, 317 N.W.2d 402, 413 (N.D.), *cert. denied*, 459 U.S. 862 (1982) (all holding Fifth Amendment privilege does not apply when risk of prosecution arises outside United States).

5. See, e.g., *Moses*, 779 F. Supp. at 882; *Cardassi*, 351 F. Supp. at 1086 (both holding that history, language, and policies of amendment demonstrate that amendment should extend to fear of non-U.S. prosecution). In *Moses*, the U.S. District Court for the Eastern District of Michigan held that a debtor, Ms. Moses, could refuse to answer questions in a bankruptcy proceeding regarding her assets in Switzerland. *Moses*, 779 F. Supp. at 882-83. The court held that the privilege against self-incrimination protected individuals from testifying when such testimony could be used against them in a foreign prosecution. *Id.* at 874. The court comprehensively examined the history, language, and policies of the Fifth Amendment and found that the Amendment should protect against the risk of prosecution outside the United States. *Id.* at 882-83. In *Cardassi*, a grand jury witness refused to testify despite having been granted immunity because she claimed that her testimony could be used against her in a criminal prosecution in Mexico. The court allowed Ms. Cardassi to invoke the privilege against self-incrimination to protect against the risk of foreign prosecution. *Cardassi*, 351 F. Supp. at 1086.

6. See, e.g., *Parker*, 411 F.2d at 1070; *Runck*, 317 N.W.2d at 412 (reasoning that extraterritorial extension would frustrate U.S. government's purpose for granting immunity). In *Parker*, the witness refused to answer all questions at a grand jury proceeding. The proceedings involved alleged violations of sabotage or destruction of war materials and war utilities. *Parker*, 411 F.2d at 1069. Although Ms. Parker was granted immunity from domestic prosecution, she refused to testify, invoking her Fifth Amendment privilege against self-incrimination on the ground that she risked prosecution in Canada. *Id.* The U.S. Court of Appeals for the Tenth Circuit refused to extend the privilege to the risk of foreign prosecution, reasoning that an extension of the amendment would allow it to protect against acts that are not considered criminal in the United States. *Id.* at 1070. In *Runck*, Phoenix Assurance Co. of Canada brought an action against Mr. Runck and others claiming insurance fraud as a result of a fire. *Runck*, 317 N.W.2d at 404-05. During discovery proceedings, the defend-

This Note argues that the Fifth Amendment privilege prohibits the U.S. government from compelling individuals to offer testimony that would incriminate them in criminal proceedings outside the United States. Part I explores the development of the Fifth Amendment's privilege against self-incrimination. Part II discusses the conflicting positions that have emerged in lower courts concerning the Fifth Amendment's extraterritorial application. Part III argues that the Fifth Amendment protection regarding self-incrimination should apply to the risk of non-U.S. prosecution. This Note concludes that the principles reflected in the enactment of the Fifth Amendment and its treatment in both U.S. and English courts warrant the extraterritorial application of the self-incrimination privilege.

I. *THE DEVELOPMENT OF THE FIFTH AMENDMENT PRIVILEGE*

In interpreting the scope of the privilege, many U.S. courts analyze the history and policies behind the development of the amendment.⁷ Individuals may invoke the Fifth Amendment privilege against self-incrimination only if they demonstrate a real and substantial risk of prosecution deriving from their testimony.⁸ Once such individuals have shown a substantial risk of prosecution, the Fifth Amendment allows them to refuse to provide self-incriminating testimony.⁹

A. *History of the Right Against Self-Incrimination*

The privilege against self-incrimination may have

ants each invoked their privilege against self-incrimination because they claimed that their answers to questions could subject them to criminal prosecution in Canada. *Id.* at 405. The court refused to extend the privilege's protection to the risk of foreign prosecution. *Id.* at 413. The court stated that extending the privilege would frustrate the government's ability to grant immunity and hinder the rationale supporting immunity statutes. *Id.* at 412.

7. See, e.g., *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55-57 (1964).

8. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972) (noting that individual must show substantial fear of non-U.S. prosecution in order to invoke protection of Fifth Amendment privilege); see *supra* note 2 and accompanying text (discussing cases holding that Fifth Amendment does not protect against remote or speculative possibilities of prosecution).

9. *Brown v. Walker*, 161 U.S. 591, 600 (1896).

originated in ancient Judaic law.¹⁰ Although it is unclear whether the privilege existed thousands of years prior to English common law, sparse references to a right similar to the privilege against self-incrimination appear in the Talmud.¹¹ In ancient Judaic law, the maxim that "a man cannot represent himself as guilty, or as a transgressor" was an essential part of criminal procedure in the Rabbinic courts.¹² Contrary to modern definition, this ancient Judaic rule supplied individuals with an extremely broad right that could not be waived or relinquished.¹³

Although the exact origin of the privilege against self-incrimination in ancient Judaic law is unclear, the privilege did exist in medieval England. The privilege against self-incrimination developed in the Middle Ages as a shield against inquisitorial proceedings by ecclesiastical courts and the English Star Chamber.¹⁴ During the sixteenth century, these courts often compelled accused individuals to swear to an oath *ex officio* that compelled them to give true answers to whatever questions they were asked.¹⁵ A refusal to answer questions or to swear to the oath was the equivalent of a guilty confession.¹⁶ These courts would compel an individual to swear to the oath *ex officio* without revealing to the individual the nature of the crime brought against him.¹⁷

10. LEONARD W. LEVY, *ORIGIN OF THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION* 433 (2d ed. 1986); Norman Lamm, *The Fifth Amendment and its Equivalent in Jewish Law*, 17 *DECALOGUE J.*, Jan.-Feb. 1967, at 1.

11. LEVY, *supra* note 10, at 433.

12. *Id.* at 434.

13. *Id.* The ancient Judaic rule prohibited an accused individual from confessing to a crime. *Id.* at 436-37. If an individual attempted to confess to a crime, that confession was not admissible against him. *Id.*

14. *Ullmann v. United States*, 350 U.S. 422, 446 (1956) (Douglas, J., dissenting), *overruled on other grounds by Kastigar v. United States*, 406 U.S. 441 (1972); *Quinn v. United States*, 349 U.S. 155, 161 (1955); ERWIN NATHANIEL GRISWOLD, *THE FIFTH AMENDMENT TODAY* 2-7 (1955); LEVY, *supra* note 10, at 29; JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* VIII, § 2250, at 289-90 (3d ed. 1940); see Kevin Urick, *The Right Against Compulsory Self-Incrimination in Early American Law*, 20 *COLUM. HUM. RTS. L. REV.* 107, 109 (1988); Bret Alan Fausett, Note, *Extending the Self-Incrimination Clause to Persons in Fear of Foreign Prosecution*, 20 *VAND. J. TRANSNAT'L L.* 699, 702 (1987).

15. LEVY, *supra* note 10, at 47.

16. *Id.*; WIGMORE, *supra* note 14, § 2250, at 273-76.

17. LEVY, *supra* note 10, at 47. During the Middle Ages, individuals who conducted ecclesiastical proceedings frequently used torture to make sure the accused would speak. GRISWOLD, *supra* note 14, at 2.

By the mid-seventeenth century, the oath *ex officio* was abolished in England and the privilege against self-incrimination was established.¹⁸ The privilege developed to protect individuals against persecution and torture by the government.¹⁹ In English common law, the privilege possessed an extremely broad scope.²⁰ It protected against all injurious as well as incriminating testimony by a witness or defendant, and an individual could invoke the privilege merely to avoid defamation of character.²¹

As the former American colonies developed toward the end of the seventeenth century, English common law influenced the development of law in America.²² The privilege

18. LEVY, *supra* note 10, at 313. The oath *ex officio* was abolished in 1637 during the trial of John Lilburne for treason before the Star Chamber. Trial of John Lilburne and John Wharton, 3 How. State Trials 1315, 1318 (1637); LEVY, *supra* note 10, at 304. John Lilburne refused to swear to the oath *ex officio* claiming that no one could compel him to incriminate himself. *Lilburne*, 3 How. State Trials at 1318; LEVY, *supra* note 10, at 274-77.

19. GRISWOLD, *supra* note 14, at 4; LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 14 (1959); R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 778-79 (1935); see *Ullmann v. United States*, 350 U.S. 422, 446 (1956) (Douglas, J., dissenting) (discussing English history that resulted in development of Fifth Amendment), *overruled on other grounds by Kastigar v. United States*, 406 U.S. 441 (1972).

20. LEVY, *supra* note 10, at 29; see *infra* note 229 and accompanying text (describing broad scope of privilege in English common law).

21. See *Ullmann*, 350 U.S. at 449 (Douglas, J., dissenting) (stating that “[t]his right of silence, this right of the accused to stand mute serves another high purpose [to protect individuals against infamy and disgrace]”); *Brown v. Walker*, 161 U.S. 591, 631 (1896) (Field, J., dissenting) (stating that aim of Fifth Amendment is to protect accused from all compulsory testimony “which would expose him to infamy and disgrace”); see also LEVY, *supra* note 10, at 427 (noting that “[t]he right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him”).

22. See LEVY, *supra* note 10, at 368. Professor Levy observes that as the colonies developed “the English common law was increasingly becoming American law . . . as [the colonies’] political and economic systems matured, their legal systems, most strikingly in the field of criminal procedure, began more and more to resemble that of England. . . the consequence was a greater familiarity with and respect for the right against self-incrimination.” *Id.*; see *Quinn v. United States*, 349 U.S. 155, 161-62 (1955). In *Quinn*, the Supreme Court stated that

[t]he privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history. As early as 1650, remembrance of the horror of Star Chamber proceedings a decade before had firmly established the privilege in the common law of England. Transplanted to this country as part of our legal heritage, it soon

against self-incrimination became permanently established in U.S. law when it was written, without debate, into the U.S. Bill of Rights.²³ The history of the privilege against self-incrimination indicates that its scope is not constrained by a restrictive definition.²⁴ The Fifth Amendment of the U.S. Constitution did not supersede or limit the common law privilege, although its wording may not have encompassed the privilege's entire historical meaning.²⁵

B. Purposes of the Fifth Amendment Privilege

The Fifth Amendment of the U.S. Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."²⁶ This privilege against self-incrimination prohibits the federal and state governments from compelling individuals to testify when such testimony could incriminate them.²⁷ It protects both witnesses and defendants throughout all stages of any public proceeding, including civil as well as criminal cases.²⁸

made its way into various state constitutions and ultimately in 1791 into the federal Bill of Rights To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose.

Id. (citations omitted); see *Gompers v. United States*, 233 U.S. 604, 610 (1914) (stating that "provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil").

23. See LEVY, *supra* note 10, at 430. Professor Levy notes that by 1776 the principle that no person shall be compelled to be a witness against himself had become deeply ingrained. *Id.*

24. See *id.* at 428 (stating that phrase "privilege against self-incrimination" stunts more expansive right not to give evidence against oneself); see also *Brown*, 161 U.S. at 631 (Field, J., dissenting) (noting that "[n]o phrases or words of any provision . . . in the Constitution, are to be qualified, limited, or frittered away and that . . . [a]ll are to be construed liberally [so] that they may have the widest and most ample effect").

25. See LEVY, *supra* note 10, at 428.

26. U.S. CONST. amend. V.

27. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), *overruled on other grounds* by *Kastigar v. United States*, 406 U.S. 441 (1972); *Moses v. Allard*, 779 F. Supp. 857, 872 (E.D. Mich. 1991).

28. *Counselman*, 142 U.S. at 563. The privilege serves as a protection to individuals in criminal proceedings at the time of arrest, indictment, and trial. *Id.* In addition, the Supreme Court recognized that the government would undermine the protection of the privilege by compelling individuals to testify in a civil proceeding when such testimony could be used against them in a criminal prosecution. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (holding that constitutional privilege against self-incrimination protects individuals from unwillingly testifying in civil proceedings

Many purposes support the self-incrimination privilege. One strong policy underlying the privilege concerns the desire to avoid the “cruel trilemma” of compelling an individual to choose among self-accusation, perjury, and contempt of court.²⁹ In addition, the privilege demonstrates a preference for an accusatorial rather than an inquisitorial system of criminal justice.³⁰ The development of the Fifth Amendment privilege illustrates the framers’ view that the determination of guilt or innocence as a consequence of fair procedure, in which indi-

when that testimony may be used against them in criminal prosecution); see R.D.G., 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, 877 (1983) (discussing application of privilege against self-incrimination to civil proceedings); see also Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977); Malloy v. Hogan, 378 U.S. 1, 11 (1964); Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1086 (5th Cir. 1979) (each noting that Fifth Amendment protects individual in civil cases if testimony may incriminate individual in criminal prosecution).

29. See *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964); see also *Pennsylvania v. Muniz*, 110 S. Ct. 2638 (1990). In *Muniz*, the Supreme Court discussed the policies supporting the privilege against self-incrimination in deciding whether an answer to a question that was asked of an individual during a custodial interrogation constituted testimonial evidence. *Id.* at 2641. The Court stated that

[a]t its core, the privilege reflects our fierce “unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury, or contempt,” that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury Because the privilege was designed primarily to prevent “a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality,” it is evident that a suspect is “compelled . . . to be a witness against himself” at least whenever he must face the modern-day analog of the historic trilemma—either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda*, the choices are analogous and hence raise similar concerns.

Id. at 2647-48 (citations omitted).

30. *Murphy*, 378 U.S. at 55. As Professor Levy observes, [b]y stating the principle [the privilege against self-incrimination] in the Bill of Rights, which was also a bill of restraints upon government, [the framers] were once again sounding the tocsin against the dangers of government oppression of the individual; and they were voicing their conviction that the right against self-incrimination was a legitimate defense possessed by every individual against government. Tough-minded revolutionists, the equal of any in history in the art of self-government, they were willing to risk lives and fortunes in support of their belief that government is but an instrument of man, its sovereignty held in subordination to his rights. . . . The Constitution with its amendments was an embodiment of their political morality, an ever-present reminder of their view that the citizen is the master of his government, not its subject.

LEVY, *supra* note 10, at 430-31.

viduals are not compelled to testify against themselves, was more important than punishing the guilty.³¹ The framers intended to protect the innocent by designing a political and legal system in which citizens are the masters of their government, not its subjects.³² The framers purposefully created a privilege that occasionally may be "a shelter to the guilty" because it is often "a protection to the innocent."³³ The privilege focuses mainly on the individual's right to be free from governmental abuse and excess.³⁴ It protects the accused from the risk of inhumane treatment and governmental abuse, supports the individual's right to be free from governmental interference, and protects the right of each individual to an enclave in which the individual may lead a private life.³⁵ The evaluation of these policies supporting the privilege has helped the courts to determine its scope.³⁶

31. See *Ullmann v. United States*, 350 U.S. 422, 427 (1956), *overruled on other grounds by Kastigar v. United States*, 406 U.S. 441 (1972). In *Ullmann*, the Court noted that "[the framers] made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Id.* (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)); see also *LEVY*, *supra* note 10, at 432 (stating that "[a]bove all, the Fifth Amendment reflected [the framers'] judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty").

32. *LEVY*, *supra* note 10, at 431.

33. *Quinn v. United States*, 349 U.S. 155, 161-62 (1955). The Supreme Court in *Quinn* stated that "the privilege . . . was generally regarded then, [in English common law], as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions." *Id.*

34. See *GRISWOLD*, *supra* note 14, at 3 (stating that Fifth Amendment privilege is closely connected with struggle to eliminate torture as government practice); see also *Moses v. Allard*, 779 F. Supp. 857, 873-74 (E.D. Mich. 1991) (stating that main policy behind Fifth Amendment is to protect against governmental abuse).

35. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (citations omitted).

36. See *id.* at 54 (stating that "[t]he answer to this question [regarding the extension of the privilege to the risk of any domestic prosecution] must depend, of course, on whether such an application of the privilege promotes or defeats its policies and purposes"). But see Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*, 37 U. CIN. L. REV. 671, 686-95 (1968). Judge Friendly analyzes and criticizes the policies supporting the privilege. He concludes that "on balance the privilege so much more often shelters the guilty and even harms the innocent." *Id.* at 687. Furthermore, in criticizing the argument that the Fifth Amendment protects the privacy of individuals, Judge Friendly states that it is impossible to square the privacy

C. *The Treatment of the Right Against Self-Incrimination in English Courts*

In formulating the laws of the United States, the framers of the Constitution adopted many aspects of English common law.³⁷ The framers relied on English common law in developing the right against self-incrimination, and the U.S. Supreme Court has analyzed English law to determine the scope of the privilege against self-incrimination.³⁸ English law concerning the extraterritorial application of the privilege has evolved over the years, though it appears that the English common law rule allowed the privilege to apply extraterritorially.³⁹

An important early English case dealing with the extraterritorial application of the privilege against self-incrimination is *East India Co. v. Campbell*.⁴⁰ In 1749, in *East India Co.*, the English Court of Exchequer allowed a defendant to refuse to testify regarding certain information that might have subjected him to punishment in India.⁴¹ The court unanimously held

interest purpose of the privilege with immunity statutes that require surrender of privacy. *Id.* at 689. He also states that the "cruel trilemma" argument may be somewhat diluted by the abandonment of any thought of using contempt to compel an answer. *Id.* at 695; see also STEPHEN SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 445-49 (4th ed. 1992) (discussing various policies supporting privilege and supplying critical analysis that questions effectiveness of these policies).

37. See, e.g., *Quinn*, 349 U.S. at 161; *Brown v. Walker*, 161 U.S. 591, 600 (1896); see *Urick*, *supra* note 14, at 116 (stating that "[t]he persons who promulgated the Fifth Amendment understood that the right against self-incrimination which the Fifth Amendment was to guarantee would assume the same attributes with which common law courts, in England and in America, had invested in that right").

38. See, e.g., *Quinn v. United States*, 349 U.S. 155, 161 (1955) (discussing history of Fifth Amendment and its development from English common law); *Brown*, 161 U.S. at 600 (stating that U.S. courts should evaluate English court decisions concerning scope of rights set out in first eight amendments because these rights evolved from English common law). Because the Fifth Amendment stems from English common law, the U.S. Supreme Court has analyzed English law regarding the scope of the Fifth Amendment. See, e.g., *Murphy*, 378 U.S. at 57; *United States v. Murdock*, 284 U.S. 141, 149 (1931), *overruled by* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964) (both using English cases to assess scope of self-incrimination privilege concerning domestic prosecutions); see also *Brown*, 161 U.S. at 608 (discussing English rule regarding defendant's failure to show real fear of subjection to laws of another sovereign).

39. Compare *United States v. McRae*, [1867] 3 L.R.-Ch. 79, 85 (Ch. App.) (holding that privilege against self-incrimination protected against risk of prosecution in jurisdictions outside of England) with Civil Evidence Act, 1968, § 14 (Eng.) (limiting privilege against self-incrimination to English domestic court proceedings).

40. 27 Eng. Rep. 1010 (Ex. 1749).

41. *Id.* at 1011.

that the right against self-incrimination protected the defendant from providing testimony when the defendant faced the risk that such testimony would be used against him in a prosecution in India.⁴²

In 1851, the Court of Chancery decided *King of the Two Sicilies v. Willcox*.⁴³ In *King of Two Sicilies*, the court held that the defendants could not refuse to testify in England despite their risk of criminal prosecution in Sicily.⁴⁴ The court denied the defendants' claim to the privilege against self-incrimination,

42. *Id.*

43. 61 Eng. Rep. 116 (Ch. 1851). At the time of the decision in *East India Co. v. Campbell*, two parallel sets of courts existed in England. H.G. HANBURY, ENGLISH COURTS OF LAW 105 (4th ed. 1967). One set of courts, the Courts of Chancery, were courts of equity. *Id.* The other set of courts, consisting of the courts of Common Pleas, Kings Bench, and Exchequer, administered the common law. *Id.* The Court of Exchequer, which decided *East India Co.*, also possessed some equitable jurisdiction. *Id.* at 82. It was described as "straddl[ing] the gulf between the common law courts and the courts of Chancery." *Id.* In 1842, however, the equitable jurisdiction of Exchequer courts was merged into that of the Chancery courts. *Id.* The Court of Chancery decided *King of Two Sicilies* after the equitable jurisdiction of these courts had been merged.

44. *King of Two Sicilies*, 61 Eng. Rep. at 116. *King of Two Sicilies* involved a situation which developed during the uprising against the Austrian-controlled Bourbon monarch Ferdinand the Second in Sicily. *Id.* Prior to 1860, Italy had never been a united nation. *Id.* at 118. During the revolution, when the republican government controlled the Kingdom of the Two Sicilies, the government sent the defendants, residents of Sicily, to England to purchase a steamship. *Id.* at 116. The money to purchase the steamship was supplied to the defendants by many thousands of Sicilians. *Id.* After Ferdinand the Second, the lawful sovereign of the Kingdom of Two Sicilies, re-established his authority, he sued the defendants claiming ownership of the steamship which was still berthed in the port of London. *Id.* In their answer to the plaintiff's complaint, the defendants admitted the possession of documents relating to matters in the complaint. *Id.* One defendant refused to produce the documents, claiming that they would expose him to criminal prosecution in his home country, Sicily. *Id.* at 117. The court held that the privilege against self-incrimination did not extend to the risk of prosecution in a foreign country. *Id.* at 128. Although the court stated that the privilege existed only by virtue of England's own municipal law, it stressed that a judge would be unable to know whether an act would be criminal in a foreign country. *Id.* The court reasoned that in such a situation, a judge is unable to assess the truth of the witness's alleged risk of prosecution in a foreign country. *Id.* As the court stated,

[t]he impossibility of knowing as matter of law, to what cases the objection, when resting on the danger of incurring penal consequences in a foreign country may extend, furnishes very strong and, to my mind, satisfactory evidence that the objection cannot be sustained. It is to be observed that, in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws, and wilfully go within the jurisdiction of the laws he has violated.

Id.

stressing the difficulty for an English judge of determining the likelihood of a criminal penalty in Sicily on the basis of testimony given in England.⁴⁵ The court reasoned that the defendants would face prosecution on the basis of their testimony only if they left the protection of England's laws and intentionally moved to the jurisdiction whose laws they had violated.⁴⁶

In 1867, the English Court of Appeal in Chancery in *United States v. McRae*⁴⁷ specifically overruled that part of *King of Two Sicilies* that related to the privilege against self-incrimination.⁴⁸ In *McRae*, the defendant refused to answer questions because the answers might have incriminated him in the United States where a criminal prosecution was pending against him.⁴⁹ Limiting *King of Two Sicilies* to its facts, the court extended the privilege against self-incrimination to individuals who feared prosecution outside England.⁵⁰ The Court of Appeal in Chancery held that *King of Two Sicilies* did not adequately assess the scope of the privilege but instead merely evaluated the defendant's risk of prosecution.⁵¹ To properly

45. *Id.*

46. *Id.*

47. [1867] 3 L.R.-Ch. 79 (Ch. App.). In *McRae*, the United States sued the defendant, a U.S. citizen, in England because the U.S. government sought an accounting and payment of money received by the defendant in England. *Id.* at 79. The defendant received this money as an agent for the government of the Confederate States of America during the American Civil War. *Id.* The defendant refused to answer questions contained in interrogatories, invoking his privilege against self-incrimination because his answers could have been used against him in a prosecution that was pending in the United States. *Id.* The United States had passed a law confiscating the property of all individuals who had acted as agents for the Confederate States, and had instituted proceedings against the defendant in the United States to recover property that belonged to the defendant in that country. *Id.*

48. *Id.* at 85; The Courts of Appeal in Chancery had intermediate appellate jurisdiction between the chancery courts and the House of Lords, the highest court in England. HANBURY, *supra* note 43, at 105.

49. *McRae*, 3 L.R.-Ch. at 83.

50. *Id.* at 85. The English rule set out in *McRae*, however, was restricted by Parliament in 1968 when it enacted a law which limited the privilege to domestic court proceedings. See Civil Evidence Act, 1968, § 14 (Eng.); see also, R.D.G., *supra* note 28, at 893-94 (discussing conflict in English courts with respect to extraterritorial application of privilege and resolution of conflict in Civil Evidence Act, 1968, § 14); Daniel J. Capra, *The Fifth Amendment and the Risk of Foreign Prosecution*, N.Y. L.J., Mar. 8, 1991, at 3 (noting that conflict in English courts regarding extraterritorial application of privilege against self-incrimination was not resolved until Parliament passed Civil Evidence Act, 1968, § 14).

51. *McRae*, 3 L.R.-Ch. at 84-85. The court in *McRae* stated that on the basis of the particular circumstances of the case in *King of Two Sicilies*, that case had been

determine the extraterritorial application of the privilege, *McRae* observed, it is the scope of the privilege, and not the adequacy of the risk of prosecution outside of England, that must be assessed.⁵²

D. *The Self-Incrimination Privilege in U.S. Jurisprudence*

1. Extension of the Privilege to All Domestic Prosecutions

The U.S. Supreme Court has addressed various aspects of the scope of the self-incrimination privilege.⁵³ In 1964, the Supreme Court held that the Fifth Amendment privilege against self-incrimination is protected by the Fourteenth Amendment against abridgement by the states.⁵⁴ The Court subsequently extended the privilege in *Murphy v. Waterfront*

correctly decided. *Id.* at 85. The *McRae* court noted that in *King of Two Sicilies* the defendants merely stated that production of the documents in question would expose them to prosecution in Sicily. *Id.* The defendants did not provide to the English court any information regarding the relevant foreign law on that subject. *Id.* Therefore, Lord Cranworth correctly found in *King of Two Sicilies* that the defendants did not show a real and substantial risk of prosecution in Sicily. *Id.* The court in *McRae* stated, however, that Lord Cranworth's judgment in *King of Two Sicilies* went beyond the particular case, by holding that the privilege against self-incrimination does not apply to the risk of foreign prosecution. *Id.* In *McRae*, the court held that the privilege against self-incrimination does protect individuals from testifying when they risk foreign prosecution. *Id.* at 87. As Lord Chelmsford stated, "I cannot distinguish the case in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law." *Id.*

52. *Id.* at 85.

53. See *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 480-81 (1972) (noting that substantial fear of non-U.S. prosecution is necessary to present constitutional question); *Kastigar v. United States*, 406 U.S. 441, 462 (1972) (holding that immunity from use of compelled testimony is coextensive with privilege against self-incrimination and suffices to supplant it); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 77 (1964) (holding that Fifth Amendment privilege protects individuals from fear of prosecution in any domestic jurisdiction regardless of whether testimony is compelled by state or federal government); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (holding that Fifth Amendment privilege was applicable to states); see also *Mason v. United States*, 244 U.S. 362, 365-66 (1917); *Heike v. United States*, 227 U.S. 131, 144 (1913); *Brown v. Walker*, 161 U.S. 591, 599-600 (1896) (all holding that Fifth Amendment does not protect against remote or speculative possibilities).

54. *Malloy*, 378 U.S. at 7. The *Malloy* Court held that both state and federal governments are "constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Id.* at 8.

Commission of New York Harbor.⁵⁵ In *Murphy*, the Court held that the Fifth Amendment prohibited the government from compelling individuals to testify if such testimony could be used subsequently against those individuals in either federal or state prosecutions.⁵⁶ Previously, individuals could invoke the self-incrimination privilege only when they feared prosecution in the same jurisdiction that compelled the testimony.⁵⁷ In expanding the scope of the Fifth Amendment privilege, *Murphy* analyzed various English court decisions that allowed the privilege to protect against the risk of foreign prosecution, as well as the policies supporting the privilege.⁵⁸

In *Murphy*, the Supreme Court stated that *McRae* represented the English rule regarding the extraterritorial scope of the privilege.⁵⁹ Endorsing *McRae*, the Court acknowledged the English rule that the privilege against self-incrimination should apply extraterritorially.⁶⁰ As noted earlier, *McRae* held that the reasoning of *King of Two Sicilies* related to the substantiality of the risk of prosecution as opposed to the scope of the privilege.⁶¹ As a result, in *Murphy*, the U.S. Supreme Court overruled its earlier decision in *United States v. Murdock*⁶² by adopt-

55. 378 U.S. 52, 77 (1964); see *supra* note 1 and accompanying text (discussing significance of *Murphy* decision).

56. *Murphy*, 378 U.S. at 77.

57. See *Knapp v. Schweitzer*, 357 U.S. 371, 378-79 (1958) (holding that state government could have compelled witness to testify although testimony may have incriminated that witness under federal law), *overruled by* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964); *Feldman v. United States*, 322 U.S. 487, 492 (1944) (holding that testimony compelled by state that might incriminate individual under federal law could be introduced into evidence in federal courts), *overruled by* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964); *United States v. Murdock*, 284 U.S. 141, 148-49 (1931) (holding that privilege did not protect against fear of prosecution under state law if federal government compelled testimony), *overruled by* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

58. See *Murphy*, 378 U.S. at 58-63. *Murphy* discussed the English court decisions of *East India Co.*, *King of Two Sicilies*, and *McRae* to show that the scope of the Fifth Amendment encompassed the fear of both federal and state prosecution, regardless of which court compelled the testimony. *Id.*

59. *Id.* at 63.

60. *Id.*

61. See *United States v. McRae*, [1867] 3 L.R.-Ch. 79, 84-87 (Ch. App.) (overruling part of *King of Two Sicilies* by holding that decision related to substantiality of fear of prosecution, not to scope of privilege).

62. 284 U.S. 141 (1931), *overruled by* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964). In *Murdock*, the Supreme Court allowed federal courts to compel testimony that might incriminate a witness under state law and relied on the English case of *King of Two Sicilies* as representing the English rule on the extraterri-

ing *McRae* and dismissing *King of Two Sicilies* as the representative English rule.⁶³ The *Murphy* Court also discussed the early English case of *East India Co. v. Campbell*,⁶⁴ which had allowed the defendants in England to refuse to testify due to the risk of incrimination in India.⁶⁵ *Murphy* concluded that because English cases supported an extraterritorial application of the privilege, the privilege should protect individuals from testifying in federal and state courts if they fear prosecution in any domestic jurisdiction.⁶⁶ Although the *Murphy* decision discussed the English rule with respect to the extraterritorial scope of the privilege, the question concerning the application of the Fifth Amendment to the risk of proceedings outside the United States was not present in *Murphy*.⁶⁷ The Court, therefore, did not discuss whether the Fifth Amendment protects individuals from testifying when their testimony may incriminate them in jurisdictions outside the United States.⁶⁸

In assessing the scope of the privilege, however, the *Murphy* Court did identify many important policies supporting the right against self-incrimination.⁶⁹ The Court stressed that the privilege protects individuals from governmental abuse and reflects U.S. reluctance to subject a person to the "cruel trilemma" of choosing among self-accusation, perjury, or contempt.⁷⁰ The Court found that extending the privilege to protect against the risk of incrimination in any domestic jurisdiction would promote these Fifth Amendment purposes.⁷¹ *Murphy* concluded that the historical treatment of the privilege, as well as its underlying purposes, warranted the extension of the

torial scope of the privilege against self-incrimination. *Id.* at 148. The *Murdock* Court stated that *King of Two Sicilies* did not allow an individual to claim the privilege when faced with the risk of foreign prosecution. In *Murphy*, however, the Supreme Court held that *Murdock's* reliance on *King of Two Sicilies* was inapposite. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 57 (1964). *Murphy* held that *McRae*, and not *King of Two Sicilies*, represented the English rule on the extraterritorial application of the privilege. *Id.* at 63.

63. *Murphy*, 378 U.S. at 57.

64. 27 Eng. Rep. 1010, 1011 (Ex. 1749).

65. *Murphy*, 378 U.S. at 58.

66. *Id.* at 77.

67. *See id.* at 53.

68. *See id.* at 77.

69. *See id.* at 55.

70. *Id.*

71. *Id.* at 54.

privilege to protect against the threat of any domestic prosecution.⁷²

2. The Supreme Court's Treatment of the Extraterritorial Reach of the Amendment

The Supreme Court considered, although it did not resolve, the question of the extraterritorial reach of the Fifth Amendment in *Zicarelli v. New Jersey State Commission of Investigation*.⁷³ The Court never resolved the constitutional question because it found that the defendant failed to show a real and substantial risk of a non-U.S. prosecution.⁷⁴ Failing to endorse or reject the extraterritorial application of the Fifth Amendment, the Supreme Court left the issue open for future resolution.⁷⁵

One way of addressing the scope of the Fifth Amendment is to consider the theories underlying the Constitution. The natural rights and social contract theories yield different implications for the application of constitutional protections to actions of the U.S. government outside the United States.⁷⁶ Ac-

72. *Id.* at 77.

73. 406 U.S. 472 (1972).

74. *Id.* at 480.

75. *Id.* at 481.

76. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (incorporating natural rights theory by stating that "all men . . . are endowed by their Creator with certain Unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness"); *Madison's Report on the Virginia Resolutions*, in 4 ELLIOT'S DEBATES 556 (Elliot ed. 1987) (criticizing Alien Act, James Madison states that "although aliens are not parties to the constitution, it does not follow that because aliens are not . . . parties to the constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no protection under it"). See generally CARL BECKER, THE DECLARATION OF INDEPENDENCE ch. 2 (1960) (comprehensively examining natural rights theory as embedded in Declaration of Independence and informing U.S. law); EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 9 (1928). Professor Corwin discusses the history and background of the natural law theory. See Roszell Dulany Hunter, IV, Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649, 651 (1986) (stating that framers of Constitution incorporated both natural rights and social contract theories).

But see *League v. DeYoung*, 52 U.S. (11 How.) 184, 202 (1850) (stating Constitution made by and for protection of people of United States); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) (Marshall, C.J.) (stating powers of U.S. government are granted by people for their benefit); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) (Jay, C.J.) (noting that Constitution is compact made by U.S. citizens to govern themselves in particular manner); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir.) (applying social contract theory and stating that non-resident aliens are not protected by U.S. Constitution), *cert. denied*, 364 U.S. 835 (1960).

According to the natural rights theory, certain universal principles inform U.S. constitutional law. As a result, constitutional principles and respect for certain natural rights govern all government activities, regardless of the location in which they occur.⁷⁷ The social contract theory, on the other hand, contends that the Constitution is a contract which only binds the action of the U.S. government with respect to U.S. citizens.⁷⁸ Accord-

77. See generally BECKER, *supra* note 76, ch. 2 (discussing development of natural rights theory and its important role in Declaration of Independence). See CORWIN, *supra* note 76, at 4-5. Professor Corwin, describing the theory of law embodied in the U.S. Constitution, states that

[t]here are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. . . . They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration. . . . Thus the *legality* of the Constitution, its *supremacy*, and its claim to be worshipped, alike find common standing ground on the belief in a law superior to the will of human governs.

Id.; see Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871, 875 (1989). Professor Lobel states that

[t]he state constitutions and declarations of rights explicitly recognized that all people have "certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity." Since the parties to the compact could not waive these rights, for their posterity, the government they would establish had to respect the rights of all people, irrespective of whether they were in some metaphysical sense parties to the compact.

Id. at 875-76; see also Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672, 1675 (1989) (stating that natural rights theory views that Constitution inherently constrains acts of U.S. officials, regardless of locale). For cases using this approach, see, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922) ("The Constitution of the United States is in force . . . wherever and whenever the sovereign power of that government is exerted."); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1544 (D.C. Cir. 1984) (en banc) ("All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.") (quoting *United States v. Lee*, 106 U.S. 196, 218 (1882)), *vacated as moot*, 471 U.S. 1113 (1985).

78. See CORWIN, *supra* note 76, at 61-62. In addition to discussing the development of the natural rights theory, Professor Corwin also discusses the evolution of the social compact or contract theory. *Id.* In discussing John Locke's *Second Treatise on Civil Government*, Professor Corwin states that

[t]he outstanding feature of Locke's treatment of natural laws is the almost complete dissolution which this concept undergoes through his handling into the natural rights of the individual. . . . The dissolving agency by which Locke brings this transformation about is the doctrine of the social compact, with its corollary notion of a state of nature.

ing to this contract, the people of the United States have a duty to support the government and the U.S. government has a duty to conduct its activities as established in the contract.⁷⁹ Although the natural rights theory may overly expand the application of the Constitution, the social contract theory may improperly limit the protection of the Constitution to U.S. citizens.⁸⁰

Courts and commentators have invoked these theories when assessing the extent of the Constitution's reach to protect aliens within and outside the United States, as well as the Constitution's authority to limit the activities of the U.S. government abroad.⁸¹ These theories, however, may also bear on whether it is acceptable for the U.S. government to compel testimony in the United States that will be used by a court outside the United States. As the history of the privilege against self-incrimination indicates, the privilege is grounded in the premise that all people have a natural right not to incriminate themselves.⁸²

Id. at 61. Professor Corwin notes, however, that Locke viewed "natural law [as approximating] to positive law from the first, while even after the establishment of government, popular interpretation of natural law is the ultimate test of validity of civil law." *Id.* at 67; see Hunter, *supra* note 76, at 652 (discussing social contract theories); Mary Lynn Nicholas, Comment, *United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment*, 14 FORDHAM INT'L L.J. 267, 270 (1990-1991).

79. CORWIN, *supra* note 76, at 86-88 (discussing social compact theory); Hunter, *supra* note 76, at 652.

80. See Nicholas, *supra* note 78, at 271 (stating that proponents of social contract theory criticize natural rights theory because it overly expands Constitution). Proponents of the social contract theory argue that allowing all people to possess natural rights that the government cannot violate would enable aliens injured by U.S. military operations to bring a cause of action against the U.S. government. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990) (discussing problems of judicially created cause of action).

81. See, e.g., *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (stating that United States is entirely creature of Constitution); *In re Ross*, 140 U.S. 453, 464 (1891) (holding that Constitution has no operation in another country); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1885) (holding that resident aliens were parties to Constitution and thus entitled to its protection); Hunter, *supra* note 76, at 676 (discussing framers' intent to have Constitution's protection apply to all individuals); Richard Ward, *Searching the World Over: Applying the Exclusionary Rule to Searches of Aliens by U.S. Agents*, 7 LAW & INEQUALITY 489, 501 (1989) (asserting that natural rights theory requires U.S. government to treat all people equally regardless of nationality).

82. See LEVY, *supra* note 10, at 431. Professor Levy, quoting Justice Abe Fortas, notes that the state

"has no right to compel the sovereign individual to surrender or impair his right of self-defense." The fundamental value reflected by the Fifth Amend-

3. Immunity May Replace the Right Against Self-Incrimination

Although the Supreme Court safeguards the values supporting the privilege against self-incrimination, the Court allows the government to compel testimony when the witness has received immunity.⁸³ The government may only grant immunity, however, if such immunity offers protections co-extensive with the scope of the Fifth Amendment.⁸⁴ If the immunity is not as comprehensive as the privilege's protection, a defendant may refuse to testify.⁸⁵

The Supreme Court has held that immunity from domes-

ment "is intangible, it is true; but so is liberty, and so is man's immortal soul. A man may be punished, even put to death, by the state; but . . . he should not be made to prostrate himself before its majesty. *Mea Culpa* belongs to a man and his God. It is a plea that cannot be exacted from free men by human authority."

Id.

83. *Kastigar v. United States*, 406 U.S. 441 (1972). In *Kastigar*, the Court confronted the issue of whether "use and derivative use" immunity adequately replaced the privilege against self-incrimination. *Id.* at 443. The defendants argued that transactional immunity was required to replace their right against self-incrimination. *Id.* at 442. "Use and derivative use" immunity protects the individual from the subsequent use of immunized testimony and evidence obtained by using such testimony against the individual in a criminal prosecution. JOHN KAPLAN ET. AL., *EVIDENCE* 597 (7th ed. 1992). Transactional immunity protects the witness from prosecution for those transactions about which the witness testified under immunity. *Id.* Thus, transactional immunity ensures individuals that the government will not prosecute them for any offenses that are revealed through their compelled testimony. *Id.* The Court in *Kastigar* held that transactional immunity would afford broader protection than the Fifth Amendment privilege and is therefore not constitutionally required. *Kastigar*, 406 U.S. at 453. The U.S. immunity statute provides for immunity whenever

a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002 (1988).

84. *Kastigar*, 406 U.S. at 462.

85. *Id.* at 449.

tic prosecution provides the same protection as the privilege because it ensures that the government will not subject the individual to criminal punishment as a result of the use of such testimony.⁸⁶ The Court finds that such immunity places the witness in substantially the same position as if the witness had claimed the Fifth Amendment privilege and, thus, adequately replaces the amendment's protection.⁸⁷ Many lower courts hold that immunity, however, cannot protect the individual from the risk of prosecution in a non-U.S. proceeding.⁸⁸

4. The Real Risk Requirement of the Self-Incrimination Privilege

Although the Fifth Amendment privilege grants a broad right against self-incrimination, individuals may only invoke the privilege once they have established a real and substantial fear of prosecution.⁸⁹ This fear must be realistic because remote and speculative possibilities do not merit the protection of the privilege.⁹⁰

In *In re Flanagan*,⁹¹ the U.S. Court of Appeals for the Second Circuit developed a five-part test to assess the validity of an individual's fear of prosecution.⁹² First, a court must con-

86. *Id.* In *Kastigar*, the Court stated that [t]he privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. [Immunity] . . . affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties.

Id.

87. *Id.* at 462.

88. *E.g.*, *In re Flanagan*, 691 F.2d 116, 120 (2d Cir. 1982).

89. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 481 (1972) (holding that Fifth Amendment question only exists when defendant shows real and substantial fear of non-U.S. prosecution).

90. *See supra* note 2 and accompanying text (discussing cases that held that Fifth Amendment does not protect against remote possibilities).

91. 691 F.2d 116 (2d Cir. 1982).

92. *Id.* The defendant in *Flanagan* was subpoenaed to testify before a grand jury regarding an alleged conspiracy to supply guns to the Irish Republican Army in Ireland. *Id.* at 118. When Mr. Flanagan invoked the Fifth Amendment privilege, the U.S. District Court for the Eastern District of New York granted him immunity. *In re Flanagan*, 533 F. Supp. 957 (E.D.N.Y.), *rev'd*, 691 F.2d 116 (2d Cir. 1982). Mr. Flanagan still refused to testify on the ground that immunity could not protect him from the use of his testimony by prosecutors in the United Kingdom. *Id.* at 962. The district court held that Mr. Flanagan had a real fear of foreign prosecution and that the Fifth Amendment protected him against this risk. *Id.* at 965. On appeal, the U.S.

sider whether the defendant faces an existing or potential non-U.S. prosecution.⁹³ Second, the court must ascertain the nature of the charges that could be filed against the defendant outside the United States.⁹⁴ Third, the court must evaluate whether the defendant's testimony would initiate or further such extraterritorial prosecution.⁹⁵ Fourth, the court must assess the possibility that any such charges would cause the defendant's extradition from the United States.⁹⁶ Finally, the court must determine the likelihood that the defendant's testimony would be disclosed to a government outside the United States.⁹⁷

According to the Second Circuit, courts should evaluate these five factors in light of several overall considerations. The defendant's apprehension must be founded on objective facts, not subjective speculation.⁹⁸ The defendant must make a "particularized showing" that her testimony may incriminate her outside the United States.⁹⁹ In addition, if an individual has received immunity from domestic punishment in exchange for testimony,¹⁰⁰ that individual must make a stronger showing of a real risk of non-U.S. prosecution.¹⁰¹ Many courts employ *Flanagan's* five-part test to ascertain the validity of the witness's risk of non-U.S. prosecution.¹⁰² Because the *Flanagan* test analyzes many factors to determine the substantiality of the risk of such prosecution, courts are able to determine the precise na-

Court of Appeals for the Second Circuit did not consider the Fifth Amendment issue. *Flanagan*, 691 F.2d at 124. However, it reversed the district court on the ground that Mr. Flanagan did not show a real fear of incrimination under non-U.S. law. *Id.* Because the Court found that Mr. Flanagan did not have a substantial fear of non-U.S. prosecution, he could not invoke his Fifth Amendment privilege. *Id.*

93. *Flanagan*, 691 F.2d at 121.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See 18 U.S.C. § 6002 (1988) (setting forth general requirements for granting of immunity).

101. *In re Flanagan*, 691 F.2d 116, 121 (2d Cir. 1982). The court held that the extensive scope of immunity narrows the risk of incrimination. *Id.*

102. See, e.g., *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1064-65 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990); *United States v. Joudis*, 800 F.2d 159, 162 (7th Cir. 1986); *In re President's Comm'n on Organized Crime*, 763 F.2d 1191, 1199 (11th Cir. 1985).

ture of the witness's claim.¹⁰³

In cases involving grand jury proceedings, however, some courts do not employ *Flanagan's* test, but instead rely on Federal Rule of Criminal Procedure 6(e) ("Rule 6(e)").¹⁰⁴ Rule 6(e) prohibits the disclosure of grand jury testimony except under certain circumstances.¹⁰⁵ Disclosure may be made only to a government attorney for use in the performance of duty, to government personnel aiding a government attorney in the performance of duty, when directed by a court, and when

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

104. FED. R. CRIM. P. 6(e) [hereinafter Rule 6(e)]. Rule 6(e) sets out the requirements of secrecy in grand jury proceedings. *Id.* Because this rule strictly limits the disclosure of grand jury testimony, it may adequately protect against the fear that non-U.S. governments will receive such testimony. See *In re Parker*, 411 F.2d 1067, 1069 (10th Cir. 1969) (holding that Rule 6(e) adequately protects against fear of prosecution outside United States), *vacated as moot*, 397 U.S. 96 (1970). Rule 6(e) provides in pertinent part that

any person to whom disclosure is made . . . 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. . . .

(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 by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty 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 preliminary 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;

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

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

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.

FED. R. CRIM. P. 6(e).

105. FED. R. CRIM. P. 6(e)(3) (setting forth exceptions to general rule of secrecy regarding disclosure of grand jury proceedings).

grounds exist to grant a motion to dismiss an indictment.¹⁰⁶

Because of the secrecy provided by Rule 6(e), courts frequently find in grand jury cases that individuals have failed to show a real and substantial risk of prosecution outside the United States and thus lose their right to remain silent.¹⁰⁷ Individuals often receive immunity to compel them to testify before a grand jury.¹⁰⁸ Some of these individuals, however, also claim to face prosecution outside the United States.¹⁰⁹ Because they risk prosecution outside the United States, many of these individuals attempt to invoke the self-incrimination privilege despite their immunity from U.S. prosecution.¹¹⁰

Courts that employ the Rule 6(e) argument find that witnesses claiming the privilege have sufficient protection from the threat of non-U.S. prosecution because the U.S. govern-

106. *See id.*

107. *See Nigro v. United States*, 705 F.2d 1224, 1228 (10th Cir. 1982) (holding that Rule 6(e) eliminates any real fear of non-U.S. prosecution, but protective measures are needed to ensure secrecy of grand jury testimony), *cert. denied*, 461 U.S. 927 (1983); *In re Baird*, 668 F.2d 432, 434 (8th Cir. 1982) (holding that secrecy requirements of grand jury testimony causes witness's risk of foreign prosecution to be remote and speculative); *United States v. Brummitt*, 665 F.2d 521, 525-26 (5th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982); *In re Tierney*, 465 F.2d 806, 810 (5th Cir. 1972); *In re Weir*, 377 F. Supp. 919, 924 (S.D. Cal.), *aff'd*, 495 F.2d 879 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974) (each holding that witnesses did not show real fear of non-U.S. prosecution because of secrecy requirements of grand jury testimony under Rule 6(e)); *see also* Moshe M. Sukenik, Note, *Testimony Incriminating Under the Laws of a Foreign Country—Is There a Right to Remain Silent?*, 11 N.Y.U. J. INT'L L. & POL. 359, 379 (1978) (stating that evaluating substantiality of individual's fear of non-U.S. prosecution has been addressed often in context of grand jury proceedings).

108. *See, e.g., In re Chevrier*, 748 F.2d 100 (2d Cir. 1984); *In re Flanagan*, 691 F.2d 116 (2d Cir. 1982); *Baird*, 668 F.2d at 432; *Tierney*, 465 F.2d at 808; *Parker*, 411 F.2d at 1069; *Weir*, 377 F. Supp. at 922; *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972) (all noting cases in which defendants were offered immunity in exchange for testifying before grand jury).

109. *Chevrier*, 748 F.2d at 101; *Flanagan*, 691 F.2d at 119; *Baird*, 668 F.2d at 433; *Tierney*, 465 F.2d at 811; *In re Parker*, 411 F.2d 1067 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970); *Weir*, 377 F. Supp. at 924; *Cardassi*, 351 F. Supp. at 1082 (each addressing cases in which defendants, despite grant of immunity, refused to testify before grand jury by invoking self-incrimination privilege, claiming fear of prosecution outside United States).

110. *See* Sukenik, *supra* note 107, at 379 (stating that question regarding sufficiency of individual's fear of prosecution outside United States often arises in grand jury proceedings); *see also Nigro*, 705 F.2d at 1228 (10th Cir. 1982); *Baird*, 668 F.2d at 433; *Brummitt*, 665 F.2d at 525; *Tierney*, 465 F.2d at 811; *Weir*, 377 F. Supp. at 922 (all concerning cases in which defendant claimed right against self-incrimination privilege, despite grant of immunity from domestic prosecution, because of alleged feared prosecution outside United States).

ment cannot violate grand jury secrecy under Rule 6(e) without a court order.¹¹¹ By ordering disclosure, courts would defeat the purpose of grand jury secrecy as well as the courts' promise of immunity.¹¹² Therefore, these courts assume that a district court that has granted a witness immunity will not subsequently order the disclosure of that witness's testimony.¹¹³

II. THE UNCERTAIN TREATMENT OF THE FIFTH AMENDMENT PRIVILEGE BY THE LOWER COURTS

Various lower courts disagree with respect to the application of the Fifth Amendment privilege to testimony that may be used against an individual in a prosecution outside the United States.¹¹⁴ Some lower courts have extended the privilege by holding that the policies supporting the Fifth Amendment and the history of judicial treatment of the privilege support its extraterritorial application.¹¹⁵ Other lower courts, in contrast, have refused to extend the privilege, stressing that an

111. *Baird*, 668 F.2d at 434; *Brummitt*, 665 F.2d at 525; *Tierney*, 465 F.2d at 810.

112. *E.g.*, *In re Tierney*, 465 F.2d 806, 810 (5th Cir. 1972); *see Parker*, 411 F.2d 1067 (holding that Rule 6(e)'s requirements eliminated fear of disclosure of testimony to non-U.S. governments).

113. *In re Baird*, 668 F.2d 432, 434 (8th Cir. 1982); *United States v. Brummitt*, 665 F.2d 521, 525 (5th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982); *Tierney*, 465 F.2d at 811. Despite the exceptions in Rule 6(e) that allow grand jury testimony to be disclosed under certain circumstances, the courts held that the rule adequately protected the witnesses against the fear of foreign prosecution. *Baird*, 668 F.2d at 434; *Brummitt*, 665 F.2d at 525; *Tierney*, 465 F.2d at 811. Other courts urge that additional protective measures should be employed to ensure the secrecy of grand jury testimony under Rule 6(e). *Nigro v. United States*, 705 F.2d 1224, 1228 (10th Cir. 1982) (holding that Rule 6(e) eliminates any real fear of non-U.S. prosecution, but protective measures were needed to ensure secrecy of grand jury testimony), *cert. denied*, 461 U.S. 927 (1983); *see United States v. Joudis*, 800 F.2d 159 (7th Cir. 1986) (holding that district court adequately protected defendant's Fifth Amendment privilege by requiring deposition put under seal).

114. *Compare Moses v. Allard*, 779 F. Supp. 857, 882-83 (E.D. Mich. 1991) and *Mishima v. United States*, 507 F. Supp. 131, 135 (D. Alaska 1981) and *In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972) (all extending Fifth Amendment to protect against threat of non-U.S. prosecution) with *United States v. (Under Seal)*, 794 F.2d 920, 925 (4th Cir. 1986), *cert. denied*, 479 U.S. 924 (1986) and *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970) and *Phoenix Assurance Co. of Can. v. Runck*, 317 N.W.2d 402, 413 (N.D.), *cert. denied*, 459 U.S. 862 (1982) (all holding Fifth Amendment privilege does not apply when risk of prosecution arises outside United States).

115. *Moses*, 779 F. Supp. at 872-73; *Mishima*, 507 F. Supp. at 135; *United States v. Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981); *United States v. Kowalchuk*, No. 77-

extraterritorial application may frustrate the government's ability to grant immunity.¹¹⁶

A. *Extension of the Privilege to the Risk of Non-U.S. Prosecution*

Several lower courts have extended the self-incrimination privilege to protect individuals from unwillingly providing testimony that might be used against them outside the United States.¹¹⁷ These courts stressed the fundamental values behind the Fifth Amendment privilege and looked to the Supreme Court's decision in *Murphy* to support their extraterritorial application of the right against self-incrimination.¹¹⁸ These courts state that the interests protected by the right against self-incrimination outweigh any potential burden that an extraterritorial application of the privilege would have on law enforcement practices.¹¹⁹

118 (E.D. Pa. Oct. 20, 1978) (LEXIS, Genfed library, Dist file); *Cardassi*, 351 F. Supp. at 1086.

116. See, e.g., *Runck*, 317 N.W.2d at 413.

117. *Moses*, 779 F. Supp. at 872-73; *Mishima*, 507 F. Supp. at 135; *Trucis*, 89 F.R.D. at 673; *Kowalchuk*, slip op.; *Cardassi*, 351 F. Supp. at 1086; see *supra* note 5 and accompanying text (discussing factual background of *Moses*).

In *Mishima*, five Japanese seamen refused to testify, claiming that their testimony could incriminate them under Japanese law. *Mishima*, 507 F. Supp. at 132. The court held that two of the defendants presented a real fear of Japanese prosecution and could invoke the Fifth Amendment privilege. *Id.* at 135. It stated that the rationale underlying the *Murphy* decision clearly applies to risk of non-U.S. prosecution. *Id.*

Cardassi, which was decided in 1972, has been followed frequently by several courts. See, e.g., *Trucis*, 89 F.R.D. at 673; *Kowalchuk*, slip op. (following reasoning of Judge Newman in *In re Cardassi*); *supra* note 5 and accompanying text (discussing background of *Cardassi*); see also *In re Letters Rogatory from 9th Criminal Div. Regional, Mannheim F.R.G.*, 448 F. Supp. 786 (S.D. Fla. 1978) (holding that Fifth Amendment protected against witness's fear of prosecution pending in West Germany).

The court in *Letters Rogatory* found a strong need to protect citizens from unjust infringements of their constitutional rights. *Id.* at 790; see *United States v. Kirsteins*, No. 87-CV-964, 1989 U.S. Dist. LEXIS 5183 (N.D.N.Y. May 10, 1989) (holding Fifth Amendment privilege in denaturalization proceeding protects against threat of non-U.S. prosecution); *Yves Farms, Inc. v. Rickett*, 659 F. Supp. 932, 940 (M.D. Ga. 1987) (holding that self incrimination privilege allowed plaintiff in civil action to refuse to answer questions that could incriminate him under non-U.S. law); *Kowalchuk*, slip op. (adopting *Cardassi's* reasoning that self-incrimination privilege applies to fear of prosecution outside United States).

118. *Moses*, 779 F. Supp. at 878; *Mishima*, 507 F. Supp. at 134-35; *Cardassi*, 351 F. Supp. at 1084.

119. See, e.g., *In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972) (stating that constitutional privileges do not disappear or lose vitality simply because they may hinder law enforcement activities).

In extending the privilege extraterritorially, many courts conclude that, because *Murphy* relied on the English cases extending the privilege extraterritorially, the Supreme Court recognized that the scope of the privilege should include the threat of non-U.S. prosecution.¹²⁰ According to these courts, nothing in *Murphy's* rationale demonstrates an intention to limit the Court's reasoning to the domestic state-federal context.¹²¹ As a result, these courts hold that the *Murphy* decision warrants the extension of the privilege to the threat of non-U.S. prosecution.¹²²

In extending the privilege against self-incrimination to protect against the risk of non-U.S. prosecution, the court in *Moses v. Allard* examined the underlying purposes of the privilege.¹²³ The Fifth Amendment privilege evolved from a belief in the fundamental unfairness of compelled self-incrimination.¹²⁴ *Moses* stressed that the policies behind the privilege consistently involve the fear of governmental abuse.¹²⁵ The court held that governmental abuse occurs by compelling individuals to testify against themselves, regardless of the location of the feared prosecution.¹²⁶ If the right against self-incrimination did not extend to the risk of non-U.S. prosecution, the policies underlying the privilege would be defeated.¹²⁷ *Moses*

120. See *Moses v. Allard*, 779 F. Supp. 857, 878 (E.D. Mich. 1991); *Mishima v. United States*, 507 F. Supp. 131, 134-35 (D. Ala. 1981); *United States v. Trucis*, 89 F.R.D. 671, 672 (E.D. Pa. 1981); *United States v. Kowalchuk*, No. 77-118 (E.D. Pa. Oct. 20, 1978) (LEXIS, Genfed library, Dist file); *Cardassi*, 351 F. Supp. at 1084 (all holding that *Murphy* rationale supports extension of privilege extraterritorially); see also *supra* note 1 and accompanying text (explaining background of *Murphy* decision).

121. *Moses*, 779 F. Supp. at 878.

122. *Id.*; *Mishima*, 507 F. Supp. at 135; *Trucis*, 89 F.R.D. at 672; *Kowalchuk*, slip op.; *Cardassi*, 351 F. Supp. at 1085. *Contra* Capra, *supra* note 50 (stating that discussion of English rule in *Murphy* was merely an argument for weakness of precedent).

123. *Moses*, 779 F. Supp. at 882 (holding that history, policies, and language of Fifth Amendment privilege support its extension to protect against threat of non-U.S. prosecution).

124. *Id.* at 871; see LEVY, *supra* note 10, at 432. The court in *Moses* stated that [i]t was th[e] persecution of the individual by the church that seemed to serve as the catalyst for the formation of the privilege. The privilege, then, sprang not from a specific right granted under law, but from a belief in the fundamental unfairness of a court's compelling a citizen to answer questions designed to accuse that citizen of a crime.

Moses, 779 F. Supp. at 871.

125. *Moses v. Allard*, 779 F. Supp. 857, 873-74 (E.D. Mich. 1991).

126. *Id.*

127. *Id.*

also found that the language of the amendment depicts the framers' intent to establish a criminal justice system based on fair procedures.¹²⁸ The court emphasized the framers' belief that creating a fair system in which individuals made no unwilling contribution to their convictions was more valuable than punishing the guilty.¹²⁹ Such a system must logically extend Fifth Amendment protections to the risk of prosecution outside the United States.¹³⁰

In *In re Trucis* and *In re Cardassi*, U.S. District Courts for the Eastern District of Pennsylvania and the District of Connecticut extended the privilege stressing that a basic purpose of the Fifth Amendment is to restrict the actions of the U.S. government. Therefore, these courts held that the Amendment should restrict these actions regardless of the location of the threatened prosecution.¹³¹ In *Trucis*, the court stated that although the right against self-incrimination focuses on limiting the activities of governmental entities, it also supplies a freedom for all people under the protection of U.S. law.¹³²

128. *Id.* at 874.

129. *Id.* Although the privilege protects individuals from becoming witnesses against themselves, limitations of the privilege do exist. As previously mentioned, the privilege does not protect against remote or speculative possibilities of prosecution. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). In addition, the privilege protects individuals only from being compelled to testify against themselves or providing evidence of a testimonial or communicative nature. *Schmerber v. California*, 384 U.S. 757, 761 (1966). It does not apply to evidence of acts that are noncommunicative in nature, even though such acts are compelled in order to obtain testimony of others. *Id.* at 764-65.

130. *Moses v. Allard*, 779 F. Supp. 857, 874 (E.D. Mich. 1991). *Moses* stated that [it] is this court's firm conviction that the Fifth Amendment, in both language and intent, was meant to inhere in the individual and to be available to the individual to protect against unlawful compulsion by any government, regardless of the fortuitous nature of the jurisdiction involved. The Court reaches this view, in great measure, by the very language of the Amendment itself. The entire focus of the language of the privilege, as set forth in the Amendment, is upon the individual and his fundamental right to be free from governmental overreaching and excess.

Id.

131. *United States v. Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981); *In re Cardassi*, 351 F. Supp. 1080, 1085 (D. Conn. 1972) (both holding that Fifth Amendment rights should not be limited by location of threatened prosecution).

132. *Trucis*, 89 F.R.D. at 673 (noting that self-incrimination privilege provides freedom for people under U.S. law and therefore should extend extraterritorially). The court adopted the reasoning of *Cardassi*, which held that *Murphy's* discussion of English cases warrants extension of the privilege to the fear of non-U.S. prosecution. *Id.*; see *Cardassi*, 351 F. Supp. at 1086.

The court in *Cardassi* noted that most protections in the Bill of Rights place potential burdens on law enforcement officials and that the desire to protect individual rights justifies this consequence.¹³³ Furthermore, *Cardassi* recognized that prosecutors could avoid this burden by framing their questions to avoid invoking the risk of incrimination.¹³⁴

B. Limiting the Privilege to Threats of Domestic Prosecution

Other lower courts hold that the privilege against self-incrimination should not extend to the risk of prosecution outside the United States.¹³⁵ Some courts that limit the privilege dismiss the significance of *Murphy's* reliance on the English cases.¹³⁶ In *In re Parker*,¹³⁷ the U.S. Court of Appeals for

133. *Cardassi*, 351 F. Supp. at 1086; see *Trucis*, 89 F.R.D. at 673 (stating that privilege does not only limit law enforcement activities but also confers freedom on individuals within United States).

134. *Cardassi*, 351 F. Supp. at 1086. In addition, a concurring opinion in the U.S. Court of Appeals for the Ninth Circuit case of *In re Lemieux* also stated that the self-incrimination privilege protects against non-U.S. prosecution. *In re Lemieux*, 597 F.2d 1166, 1167 (9th Cir. 1979) (Hufstedler, J., concurring). Although the majority opinion held that Rule 6(e) eliminated the witness's fear of non-U.S. prosecution, the concurring opinion by Judge Hufstedler addressed the constitutional issue. *Id.* The majority followed the holding of *In re Weir*. *Id.*; see *In re Weir*, 377 F. Supp. 919 (S.D. Cal.) (holding that Rule 6(e) disposes of any real fear of non-U.S. prosecution), *aff'd*, 495 F.2d 879 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974). Judge Hufstedler's concurrence stated that the privilege should extend to the threat of non-U.S. prosecution. *Lemieux*, 597 F.2d at 1169 (Hufstedler, J., concurring). She adopted the reasoning of the court in *Cardassi*. *Id.*; see *Cardassi*, 351 F. Supp. 1080. Judge Hufstedler stated that the immunity granted to the witness was not co-extensive with the Fifth Amendment privilege because the witness could be subjected to non-U.S. prosecution. *Lemieux*, 597 F.2d at 1169 (Hufstedler, J., concurring). Therefore, the court should not compel the witness to testify. *Id.* Judge Hufstedler also stated that Rule 6(e) did not sufficiently eliminate a witness's fear of incrimination in another country. *Id.* He concurred, however, because the court was under the compulsion of *In re Weir*, 495 F.2d 879 (9th Cir.), *cert. denied* 419 U.S. 1038 (1974).

135. See, e.g., *United States v. (Under Seal)*, 794 F.2d 920 (4th Cir.), *cert. denied*, 479 U.S. 924 (1986); *In re Parker*, 411 F.2d 1067 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970); *Phoenix Assurance Co. of Can. v. Runck*, 317 N.W. 2d 402 (N.D.) (holding that Fifth Amendment privilege against self-incrimination does not protect against threat of non-U.S. prosecution), *cert. denied*, 459 U.S. 862 (1982); see also R.D.G., *supra* note 28, at 876 (arguing that Fifth Amendment should not prohibit U.S. government from compelling testimony that non-U.S. prosecutors might use); Capra, *supra* note 50 (finding that Fifth Amendment does not protect witness from risk of non-U.S. prosecution).

136. See, e.g., *Parker*, 411 F.2d at 1070; *Runck*, 317 N.W. 2d at 411 (both dismissing significance of *Murphy's* reliance on English cases extending self-incrimination privilege extraterritorially); see also Capra, *supra* note 50.

137. 411 F.2d 1067 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970).

the Tenth Circuit stated that the Supreme Court employed English case law in *Murphy* only as an "argumentative analogy" to help interpret the scope of the privilege in a federal-state context.¹³⁸ Also, in *Phoenix Assurance Co. of Canada v. Runck*,¹³⁹ the Supreme Court of North Dakota dismissed the significance of the English cases on the basis of Justice Harlan's concurrence in *Murphy*.¹⁴⁰ The court in *Runck* interpreted Justice Harlan's concurrence as stating that some of the cases cited by the majority involved prosecution in English colonies and thus were not truly extraterritorial.¹⁴¹ The court opined that because these cases dealt with English colonies they did not represent a true extraterritorial application of the privilege. Therefore, the courts in *Parker* and *Runck* asserted that the English cases are not persuasive in determining the extraterritorial reach of the Fifth Amendment.¹⁴²

In limiting the protection of the privilege to the risk of domestic prosecution, the court in *Parker* stressed that the Fifth Amendment should not protect individuals from incriminating themselves for acts that are not crimes in the United States.¹⁴³ *Parker* held that allowing the Fifth Amendment to protect individuals against self-incrimination for an act that is not criminal in the United States would frustrate the purpose of the Fifth Amendment.¹⁴⁴ The *Parker* court also held that Rule 6(e) adequately prevents disclosure of the witness's testimony to non-

138. *See id.* at 1070.

139. 317 N.W.2d 402, 411 (N.D.), *cert. denied*, 459 U.S. 862 (1982).

140. *Id.* at 411.

141. *See* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 81 n.1 (1964) (Harlan, J., concurring) (stating that English cases decided before U.S. Constitution was drafted, which were cited by majority in *Murphy*, dealt with jurisdictions that were controlled by England at that time).

142. *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970); *Runck*, 317 N.W.2d at 411.

143. *See Parker*, 411 F.2d at 1070 (holding that unfairness would result if Fifth Amendment extended to fear of non-U.S. prosecution because it would protect against acts that may not be considered criminal in United States).

144. *Id.* In *Parker*, the court stated that

the ideology of some nations considers failure itself to be a crime and could provide punishment for the failure, apprehension, or admission of a traitorous saboteur acting for such a nation within the United States. In such a case the words "privilege against self-incrimination," engraved in our history and law as they are, may turn sour when triggered by the law of a foreign nation.

Id. (footnote omitted).

U.S. governments because it forbids disclosure of grand jury testimony except under certain circumstances.¹⁴⁵

The court in *Runck* refused to apply the privilege extraterritorially, reasoning that such an extension would frustrate the government's ability to compel testimony through grants of immunity.¹⁴⁶ In *Runck*, the court stated that non-U.S. law should not prevail over the needs of the U.S. government.¹⁴⁷ In addition, the court held that because the language of the amendment does not mention non-U.S. law, the framers did not intend it to apply to risk of non-U.S. prosecution.¹⁴⁸

In *United States v. (Under Seal)*,¹⁴⁹ the court limited the scope of the privilege to the risk of domestic prosecution, holding that the privilege against self-incrimination applies only when both the sovereign compelling the testimony and the sovereign using the testimony must abide by the Fifth Amendment.¹⁵⁰ Thus, *Under Seal* held that an individual may only invoke the privilege when this "dual sovereignty" exists.¹⁵¹ The court in *Under Seal* reasoned that the *Murphy* decision was simply a logical consequence of the Supreme Court's previous holding in *Malloy v. Hogan*.¹⁵² In *Malloy*, the Court

145. *See id.* at 1069.

146. *See Phoenix Assurance Co. of Can. v. Runck*, 317 N.W.2d 402, 412 (N.D.) (stating that extension of privilege extraterritorially will frustrate government practice of granting of immunity), *cert. denied*, 459 U.S. 862 (1982).

147. *Id.*

148. *See id.* (holding that language of Amendment supports limited scope of self-incrimination privilege).

149. 794 F.2d 920, 925 (4th Cir.), *cert. denied*, 479 U.S. 924 (1986).

150. *See id.* (holding that self-incrimination privilege only applies when both sovereign compelling testimony and sovereign using testimony are restricted by Fifth Amendment). In *Under Seal*, the witnesses feared prosecution in another country that was not governed by the Fifth Amendment. *Id.* Accordingly, the court held that the witnesses could not invoke the privilege in the United States. *Id.* at 928.

151. *Id.* at 926. The author of this Note uses the phrase "dual sovereignty" to describe the holding of some courts that the right against self-incrimination only applies where both the sovereign compelling the testimony and the sovereign using the testimony are constrained by the Fifth Amendment.

152. *See id.* at 927; *see also Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (holding that Fifth Amendment applies to states); *supra* note 1 and accompanying text (discussing *Malloy*). *United States v. (Under Seal)* involved the Aranetas' refusal to testify before a grand jury. *Under Seal*, 794 F.2d at 921. The Aranetas, Philippine citizens, were the daughter and son-in-law of Ferdinand E. Marcos, former president of the Philippines. *Id.* The court held that the secrecy of grand jury proceedings did not eliminate the Aranetas' fear of Philippine prosecution. *Id.* at 925. The court found, however, that the Fifth Amendment privilege did not protect against such fears. *Id.*

The defendants in this case later applied to the Supreme Court for an applica-

held that the Fifth Amendment applied to the states through the Fourteenth Amendment.¹⁵³ Once the Fifth Amendment applied to the states, the Supreme Court held in *Murphy* that the self-incrimination privilege protected against the threat of any domestic prosecution.¹⁵⁴ *Under Seal* held, therefore, that the right against self-incrimination does not apply when the U.S. government compels the testimony and a country not governed by the privilege uses the testimony.¹⁵⁵

III. THE FIFTH AMENDMENT SHOULD APPLY TO THE RISK OF EXTRATERRITORIAL PROSECUTION

The privilege against self-incrimination should protect individuals from unwillingly providing testimony that may be used against them in jurisdictions outside the United States. The policies and purposes behind the amendment will be defeated if the privilege does not extend to all real and substantial fears of prosecution, regardless of location.¹⁵⁶ Although grants of immunity adequately replace the privilege against self-incrimination when individuals risk domestic prosecution, immunity does not afford the same protection when individuals risk prosecution outside the United States.¹⁵⁷ Moreover,

tion to stay the district court's contempt order. See *Araneta v. United States*, 478 U.S. 1301 (1986) (Burger, C.J.) (granting defendants' application to stay district court's contempt order). Chief Justice Burger granted the stay, holding that it was reasonably probable that four justices would grant certiorari. Chief Justice Burger further stated that a majority of the court would most likely resolve the issue in favor of the defendants. He found that the dictum contained in *Murphy* warranted extending the privilege to the risk of non-U.S. prosecutions. The Supreme Court, however, subsequently denied certiorari. See *Araneta v. United States*, 479 U.S. 924 (1986) (denying *Araneta's* petition for certiorari with three justices voting to grant certiorari).

153. *Malloy*, 378 U.S. at 8.

154. See *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 78-79 (1964) (holding that one jurisdiction in U.S. federal system may not compel witness to give testimony which might incriminate that witness under laws of another domestic jurisdiction); *Malloy*, 378 U.S. at 8 (holding that privilege against self-incrimination is protected by Fourteenth Amendment against abridgement by states); see also *supra* note 1 (explaining relationship between *Murphy* and *Malloy* decisions).

155. *United States v (Under Seal)*, 794 F.2d 920, 925 (4th Cir.), cert. denied, 479 U.S. 924 (1986).

156. See *Murphy*, 378 U.S. at 55 (discussing policies behind privilege against self-incrimination and their application to protect individuals from risk of any domestic prosecution); *Moses v. Allard*, 779 F. Supp. 857, 874 (E.D. Mich. 1991) (holding that policies behind Fifth Amendment privilege would be defeated if it were limited to fear of domestic prosecution).

157. See *In re Cardassi*, 351 F. Supp. 1080, 1082 (D. Conn. 1972) (holding that

the secrecy requirements set out in Rule 6(e) do not sufficiently safeguard against the possible disclosure of grand jury testimony to nations other than the United States.¹⁵⁸ Therefore, an individual who faces prosecution in another country is subject to a risk of prosecution as strong as if that person faced domestic prosecution. Such an individual should receive full Fifth Amendment protection.

A. The Treatment of the Privilege in the Lower Courts Supports an Extraterritorial Extension of the Privilege

An analysis of lower court decisions that have addressed the Fifth Amendment's extraterritorial scope indicates that the privilege should protect individuals from the risk of prosecution outside the United States. The courts that extend the Fifth Amendment privilege extraterritorially correctly assess that the policies behind the privilege support such an extension.¹⁵⁹ In addition, these courts properly find that the possible burden such an extension would cause law enforcement activities does not warrant limiting the right against self-incrimination.¹⁶⁰ The courts that limit the privilege to domestic prosecutions misinterpret the language of the amendment as well as the reasoning of *Murphy*.¹⁶¹ Nor do these courts present persuasive reasons for stripping individuals of their right against self-incrimination.¹⁶²

judicial control that forbids use of compelled testimony after person is granted immunity is absent when person fears that testimony will be used in prosecution outside United States).

158. *Id.* at 1082-83.

159. See, e.g., *Moses*, 779 F. Supp. at 874; *United States v. Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981); see also *Fausett*, *supra* note 14, at 720-21 (stating that policy of cruel trilemma applies when individual faces risk of prosecution in foreign country).

160. See, e.g., *Cardassi*, 351 F. Supp. at 1086 (noting that frustration of law enforcement practices does not warrant limiting privilege against self-incrimination to risk of domestic prosecution).

161. See *United States v. (Under Seal)*, 794 F.2d 920, 926 (4th Cir.) (limiting privilege against self-incrimination to protect against risk of domestic prosecution), *cert. denied*, 479 U.S. 924 (1986); *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969) (same), *vacated as moot*, 397 U.S. 96 (1970); *Phoenix Assurance Co. of Can. v. Runck*, 317 N.W.2d 402, 413 (N.D.) (same), *cert. denied*, 459 U.S. 862 (1982).

162. See *Under Seal*, 794 F.2d at 925 (limiting Fifth Amendment privilege because privilege should only apply where government compelling testimony and government using testimony are both restrained by Fifth Amendment privilege); *Parker*, 411 F.2d at 1070 (limiting Fifth Amendment privilege because extension would permit Fifth Amendment to protect against acts that may not constitute crime in United

Frustration of law enforcement efforts does not constitute sufficient reason to limit the scope of the privilege to domestic prosecutions.¹⁶³ To invoke the privilege against self-incrimination successfully, a witness must satisfy the strong threshold requirement of proving a substantial risk of non-U.S. prosecution.¹⁶⁴ Due to this requirement, inconvenience to law enforcement officials will occur only where a witness clearly faces extradition to, and prosecution in, another country.¹⁶⁵ An individual's right against self-incrimination outweighs any potential burden to law enforcement officials.¹⁶⁶

In addition, the argument that extending the amendment would enable it to protect acts that are not U.S. crimes fails to support a limitation of the privilege to domestic prosecution.¹⁶⁷ This reasoning would support the application of the Fifth Amendment privilege to acts committed outside the United States that constitute crimes within the United States.¹⁶⁸ Although in some instances a conflict may exist be-

States); *Runck*, 317 N.W.2d at 411 (holding that silence of Fifth Amendment on subject of non-U.S. law shows framers' intent to limit scope of privilege).

163. See *In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972) (holding that burden to law enforcement officials does not outweigh rights protected by self-incrimination privilege).

164. See *supra* note 2 and accompanying text (discussing cases holding that Fifth Amendment does not protect against remote or speculative possibilities).

165. See *In re Flanagan*, 691 F.2d 116, 121 (2d Cir. 1982). According to the Second Circuit and other courts, individuals must face the possibility that the foreign charges may subject them to extradition in order to establish that a substantial risk of foreign prosecution exists. *Id.*; see also *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1064-65 (3rd Cir. 1988) (analyzing whether extradition to foreign country in which claimant of privilege risked prosecution was likely), *aff'd*, 493 U.S. 400 (1990); *United States v. Joudis*, 800 F.2d 159, 162 (7th Cir. 1986) (same); *United States v. (Under Seal)*, 794 F.2d 920, 923 (4th Cir. 1986) (same), *cert. denied*, 479 U.S. 924 (1986); *In re President's Comm'n on Organized Crime*, 763 F.2d 1191, 1198-99 (11th Cir. 1985) (same).

166. *Cardassi*, 351 F. Supp. at 1086 (holding that constitutional privilege does not disappear, nor lose its vitality, because its use may hinder law enforcement activities).

167. See *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969) (holding that an extension of the privilege to extraterritorial prosecutions would enable the privilege to protect against acts that are not criminal in the United States), *vacated as moot*, 397 U.S. 96 (1970).

168. See *United States v. Kowalchuk*, No. 77-118 (E.D. Pa. Oct. 20, 1978) (LEXIS, Genfed library, Dist file). The court in *Kowalchuk* criticized the *Parker* court's assertion that the privilege should not protect against non-U.S. crimes. It stated that [w]ith deference, I find this reasoning totally unpersuasive. At most, it would support a ruling limiting availability of the Fifth Amendment protec-

tween the criminal laws of the United States and the laws of other nations, this conflict does not justify a denial of the protection of the privilege in instances where no such conflict exists.¹⁶⁹

Moreover, individuals do not possess a real risk of non-U.S. prosecution unless they face the possibility of extradition from the United States.¹⁷⁰ Most U.S. extradition treaties only allow extradition if the crime is punishable under the laws of both signatories to the particular treaty.¹⁷¹ A person does not face the possibility of extradition, and thus does not possess a real risk of prosecution, unless the crime is punishable under both the laws of the United States and the laws of the country where prosecution is feared.¹⁷² Therefore, an extraterritorial extension of the Fifth Amendment privilege would not cause the privilege to protect against acts that do not constitute U.S. crimes.¹⁷³

In addition, the language of the Fifth Amendment, which states that a person shall not be forced to incriminate himself in "any criminal case" supports an extension of the privilege to

tion to the revelation of conduct which, if committed within the United States, would be criminal under our laws. Surely the fact that there may be a conflict between the criminal laws of this country and the criminal laws of the foreign country does not justify denial of the privilege against self-incrimination in cases where there is no such conflict.

Id. *Kowalchuk* concerned denaturalization cases in which the defendants refused to answer deposition questions. *Id.* The court held that the Fifth Amendment privilege protects against the fear of foreign prosecution. *Id.*

169. *Id.* (holding that conflict between penal laws of United States and other countries does not justify denial of protection of privilege against self-incrimination in situations where no such conflict exists).

170. *See supra* notes 91-97 and accompanying text (discussing *Flanagan* test that requires defendant to face possibility of extradition to a non-U.S. country in order to claim real fear of prosecution in that country).

171. *See, e.g.*, Extradition Treaty Between the United States of America and the United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059; Treaty on Extradition Between the United States of America and Canada, June 28, 1974-July 9, 1974, U.S.-Can., 27 U.S.T. 983; Extradition Treaty Between the United States of America and Australia, May 14, 1974, U.S.-Austl., 27 U.S.T. 957; Extradition Treaty Between the Government of United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972-Oct. 21, 1976, U.S.-U.K., 28 U.S.T. 227; Treaty on Extradition Between the United States of America and the Republic of Argentina, Jan. 21, 1972, U.S.-Arg., 23 U.S.T. 3501; *see also* Sukenik, *supra* note 107, at 369 (stating that U.S. extradition treaties require that extraditable crime be punishable under laws of both parties to treaty).

172. Sukenik, *supra* note 107, at 369.

173. *Id.* at 369-70.

the risk of extraterritorial prosecution.¹⁷⁴ Because the language of the amendment stresses that it applies to “any criminal case,” the framers cannot be said to have intended to limit its protection to merely domestic criminal cases. The text more reasonably suggests that the drafters instead intended the privilege to apply to any criminal case, regardless of its location.¹⁷⁵ The language chosen for the amendment suggests that the framers intended the amendment to encompass the broadest possible formulation of the privilege.¹⁷⁶

Furthermore, the privilege concerns an individual’s right to be free from compelled self-incrimination.¹⁷⁷ Thus, the main focus of the privilege should be on the jurisdiction that compels the testimony because, by compelling the testimony, that jurisdiction will violate the claimant’s rights.¹⁷⁸ The location and governmental policies of the sovereign using the testimony should be irrelevant. Contrary to *Under Seal’s* holding, therefore, the invocation of the right against self-incrimination should not depend on whether both the government compelling the testimony and the government using the testimony are constrained by the Fifth Amendment.¹⁷⁹

In addition, *Under Seal’s* “dual sovereignty” holding cre-

174. U.S. CONST. amend. V; see *Phoenix Assurance Co. of Can. v. Runck*, 317 N.W.2d 402, 411 (N.D.) (holding that Fifth Amendment is silent on subject of non-U.S. law and that therefore framers did not intend it to protect against fear of prosecution outside United States), *cert. denied*, 459 U.S. 862 (1982).

175. See *Moses v. Allard*, 779 F. Supp. 857, 874 (E.D. Mich. 1991) (holding that language of Fifth Amendment supports extension of self-incrimination privilege to fear of non-U.S. prosecution).

176. See *Quinn v. United States*, 349 U.S. 155, 162 (1955) (stating that “to apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose”); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (stating that Fifth Amendment privilege should be given liberal application); see also LEVY, *supra* note 10, at 42 (stating that language used in James Madison’s original proposal of Fifth Amendment “revealed an intent to incorporate into the Constitution the whole scope of the common law right”).

177. U.S. CONST. amend. V.

178. See *Moses*, 779 F. Supp. at 881 (holding that point of inquiry should be directed not to jurisdiction using compelled testimony but to governmental entity that would effect such compulsion); *In re Cardassi*, 351 F. Supp. 1080, 1085-86 (D. Conn. 1972) (stating that where compulsion of testimony or its use at trial is attempted by instrumentality of U.S. government, its actions must be limited by Fifth Amendment regardless of location of feared prosecution).

179. See *United States v. (Under Seal)*, 794 F.2d 920, 925 (4th Cir.), *cert. denied*, 479 U.S. 924 (1986).

ates a dichotomy between the treatment of claimants in civil and criminal proceedings.¹⁸⁰ In civil proceedings, witnesses may invoke their right against self-incrimination and refuse to answer questions when they fear that their answers may subject them to criminal prosecution.¹⁸¹ The “dual sovereignty” holding relies on the premise that the right against self-incrimination should only apply where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment.¹⁸² This reasoning does not apply in some civil actions where civil litigants refuse to answer questions because they fear prosecution outside the United States. As a result, the “dual sovereignty” holding fails to apply to most civil cases because a sovereign is not usually a party to a civil action.¹⁸³

In *Yves Farm, Inc. v. Rickett*, the “dual sovereignty” holding ironically enabled claimants in a civil proceeding to claim the privilege, while refusing the right to claimants in criminal proceedings.¹⁸⁴ *Yves Farm* found that the “dual sovereignty” holding does not apply to a civil case in which testimony is being compelled by private party defendants, and thus allowed private plaintiffs to refuse to answer questions due to risk of prosecution outside the United States.¹⁸⁵ In this jurisdiction,

180. See, e.g., *Yves Farm, Inc. v. Rickett*, 659 F. Supp. 932, 940 (M.D. Ga. 1987) (allowing Fifth Amendment privilege to protect civil plaintiff from fear of prosecution outside United States).

181. See *supra* note 28 and accompanying text (discussing application of privilege against self-incrimination to protect individuals in civil cases when their testimony could subject them to risk of criminal prosecution).

182. See *Under Seal*, 794 F.2d at 925.

183. See *Yves Farm*, 659 F. Supp. at 940.

184. See *id.* at 940.

185. See *id.* In *Yves Farm*, private defendants wished to compel the plaintiff, a French citizen, to answer certain questions during a deposition. *Id.* at 934. *Yves Farm* proves that *Under Seal*'s “dual sovereignty” holding does not apply to most civil cases. See *id.* at 940 (holding that *Under Seal*'s decision does not apply in this civil case where sovereign is not party to civil action); see also *United States v. (Under Seal)*, 794 F.2d 920, 925 (4th Cir.) (holding that right against self-incrimination only applies where sovereign compelling testimony and sovereign using testimony are both governed by Fifth Amendment), *cert. denied*, 479 U.S. 924 (1986). In *Yves Farm*, the U.S. District Court for the Middle District of Georgia was located within the jurisdiction of the U.S. Circuit Court of Appeals for the Fourth Circuit and therefore controlled by *Under Seal*. *Yves Farm* allowed a private plaintiff to refuse to testify on the grounds that the plaintiff feared prosecution outside the United States. *Yves Farm, Inc. v. Rickett*, 659 F. Supp. 932, 940 (M.D. Ga. 1987). The court refused to adopt *Under Seal*'s holding on the ground that *Under Seal* did not apply to civil cases. See *Under Seal*,

therefore, the “dual sovereignty” holding gives the Fifth Amendment a different scope in criminal cases than in some civil cases when a sovereign is not a party to the civil action.¹⁸⁶

The courts that extend the privilege extraterritorially correctly hold that the policies protected by the privilege warrant its application to the risk of non-U.S. prosecution. By limiting the privilege to domestic prosecution, some courts deny individuals under U.S. law their right not to testify against their own interests. The U.S. government should not strip individuals of their natural right not to be a witness against themselves merely because the threatened prosecution is abroad.

B. The Supreme Court's Treatment of the Privilege Supports the Extraterritorial Scope of the Privilege

The Supreme Court's treatment of the privilege also supports the extension of the privilege to include the risk of non-U.S. prosecution. In *Murphy*, the Supreme Court examined the Fifth Amendment's language, its underlying policies and its treatment by other courts. In analyzing whether the Fifth Amendment's scope encompassed the risk of any domestic prosecution, the Court stated that the answer depended on whether such an extension of the privilege promoted or defeated its policies and purposes.¹⁸⁷ *Murphy* held that the fundamental policies behind the Fifth Amendment would be defeated if a federal court could compel a witness to testify despite the risk of prosecution in a state court and vice versa.¹⁸⁸ The Court stated that such a result in particular would defeat the values of the Fifth Amendment in “our age of cooperative federalism,” in which federal and state governments work together to fight crime.¹⁸⁹

The principles enunciated by *Murphy* hold equally when an

794 F.2d at 925. The court in *Yves Farm* stated that the civil case of *Yves Farm* was crucially different from *Under Seal* because a sovereign did not compel the testimony. *Yves Farm*, 659 F. Supp. at 940. It could be argued, however, that a sovereign is compelling the testimony in civil cases due to the doctrine of state action. Civil litigants must move to have the court compel individuals to testify, and thus the subsequent action of the court could be considered state action.

186. See *Yves Farm*, 659 F. Supp. at 940.

187. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 54 (1964).

188. *Id.* at 77-78.

189. *Id.* at 55-56.

individual fears prosecution outside the United States.¹⁹⁰ Compelling witnesses to incriminate themselves under the laws of non-U.S. jurisdictions defeats most policies and purposes behind the Fifth Amendment.¹⁹¹ Because individuals must prove the possibility of extradition to the particular country in which they risk prosecution in order to claim the privilege, once a witness proves a real and substantial risk of such prosecution, that risk will prove equally as realistic and dangerous as any domestic prosecution.¹⁹² In addition, criminal activity has become increasingly international in nature.¹⁹³ Similar to the cooperative federalism stressed in *Murphy*, many countries now work together to battle international crime.¹⁹⁴

In addition, the courts that limit the privilege to the risk of domestic prosecution have misinterpreted the reasoning in *Murphy*.¹⁹⁵ These courts have held that the *Murphy* decision was simply a logical consequence of the Court's decision in *Malloy v. Hogan*,¹⁹⁶ which held that the Fifth Amendment privilege against self-incrimination is protected by the Fourteenth

190. *See id.* (discussing many policies that are protected by right against self-incrimination).

191. *See Moses v. Allard*, 779 F. Supp. 857, 874 (E.D. Mich. 1991) (stating that policies behind self-incrimination privilege warrant its extension to fear of prosecution outside United States); *see also* Michael Scanes, Comment, *Extending the Privilege Against Self-Incrimination to the Threat of Prosecution Under Foreign Law*, 35 *BAYLOR L. REV.* 141, 147 (1983) (stating that extension of privilege to protect against fear of non-U.S. prosecution furthers underlying policies of privilege).

192. *See supra* notes 91-97 and accompanying text (discussing *Flanagan's* five-part test which, if fulfilled, establishes that defendant realistically faces substantial fear of non-U.S. prosecution).

193. *See Moses*, 779 F. Supp. at 859 (stating that issue of extraterritorial application of privilege will be increasingly important as criminal activity takes on increasingly international character).

194. *See Sukenik, supra* note 107, at 366 (discussing plans of United States to work together with France and Mexico to battle international crime). The United States has entered into various agreements to develop cooperative practices to reduce illegal drug trafficking. *E.g.*, Narcotic Drugs: Additional Cooperative Arrangements to Curb Illegal Narcotics, April 8, 1981, U.S.-Mex., 33 U.S.T. 1757; Narcotic Drugs: Coordination of Action Against Illicit Traffic, Mar. 30, 1961, U.S.-Fr., 28 U.S.T. 8045; Multilateral Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407, amended by Protocol, 1972, 26 U.S.T. 1439 [hereinafter *Single Convention*].

195. *See, e.g.*, *Mishima v. United States*, 507 F. Supp. 131, 134 (D. Alaska 1981) (opining that *Murphy's* rationale was based not only on early English and United States cases but consisted of review of underlying policies of privilege).

196. 378 U.S. 1 (1964).

Amendment against abridgement by the states.¹⁹⁷ This argument, however, inaccurately represents the rationale in *Murphy*.¹⁹⁸ The Court in *Murphy* based its decision on the policies underlying the self-incrimination privilege.¹⁹⁹ It reviewed the historical treatment of the privilege in both U.S. and English courts to determine the proper scope of the Fifth Amendment.²⁰⁰ If the decision in *Murphy* was mandated by *Malloy*, the Court would not have needed to analyze thoroughly the amendment's scope in *Murphy*.²⁰¹

The natural rights and social contract theories may also support an extension of the privilege against self-incrimination to the risk of non-U.S. prosecution.²⁰² Courts frequently employ these theories to assess whether the Constitution limits the actions of the U.S. government when these actions occur abroad.²⁰³ These theories may also help to analyze whether

197. *Id.* at 7; see *supra* notes 152-55 and accompanying text (discussing lower courts' argument that *Murphy* decision was merely consequence of *Malloy* decision).

198. See *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 54 (stating that decision depended on whether this broad application of privilege against self-incrimination promotes or defeats its policies and purposes).

199. *Id.* at 55-57.

200. *Id.* at 58-77.

201. See *id.* at 54. Furthermore, in *Araneta v. United States*, Chief Justice Burger stated that

Murphy v. Waterfront Comm'n of New York Harbor contains dictum which, carried to its *logical conclusion*, would . . . support such an outcome. That case held only that the privilege against self-incrimination protects a witness against compelled disclosures in state court which could also be used against him in federal court or vice versa. However, the Court also discussed *with apparent approval* several English cases holding that the privilege protects a witness from disclosures which could be used against him in a foreign prosecution.

Araneta v. United States, 478 U.S. 1301, 1304 (1986) (emphasis added) (citations omitted). Thus, Chief Justice Burger's decision indicates his belief that *Murphy* approved the English rule that extended the privilege to the threat of non-U.S. prosecution. Contrary to the court's argument in *Parker*, *Murphy's* use of English cases was not "simply by way of argumentative analogy" to the federal-state context. See *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969) (opining that *Murphy's* discussion of English cases was simply by way of "argumentative analogy" to federal-state issue that was present in *Murphy*), *vacated as moot*, 397 U.S. 96 (1970). In addition, Chief Justice Burger's statements suggested his belief that *Murphy's* evaluation of the Amendment's scope warranted an extension of the privilege to the threat of non-U.S. prosecution.

202. See *supra* notes 76-80 and accompanying text (discussing social contract and natural rights theories).

203. See *supra* note 81 and accompanying text (discussing application of these theories to determine whether Constitution limits activities of government abroad).

the privilege against self-incrimination should extend to individuals who risk incrimination outside the United States.²⁰⁴

The natural rights theory holds that all government activities are bound by the "higher law" principles which inform the provisions of the Constitution.²⁰⁵ It states that individuals possess certain universal and unalienable rights that cannot be abridged by the government.²⁰⁶ The incorporation of the Bill of Rights into the Constitution illustrates the framers' intent to prohibit government infringement of certain unalienable

The Supreme Court has also invoked both the social contract and natural rights theories to determine the reach of the Constitution to protect aliens in and outside the United States. *See, e.g.,* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990) (holding that Fourth Amendment does not apply to search by U.S. agents of Mexican residence of Mexican citizen who was involuntarily present in United States); *Reid v. Covert*, 354 U.S. 1, 5 (1957) (holding that constitutional right to trial by jury applies to U.S. citizen who accompanied U.S. armed forces outside United States); *In re Ross*, 140 U.S. 453, 464 (1891) (holding that U.S. Constitution does not apply to U.S. citizens outside the United States); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (stating that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens").

204. *See supra* notes 76-80 and accompanying text.

205. *See* BECKER, *supra* note 76, at 26 (stating that natural law discovered by human reason "furnish[es] a reliable and immutable standard for testing the ideas, the conduct, and the institutions of men"); CORWIN, *supra* note 76, at 89. Professor Corwin, discussing why legislative sovereignty did not establish itself in the U.S. constitutional system, notes that

the reason is twofold. In the first place in the American *written Constitution*, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*. Once the binding force of higher law was transferred to this new basis, the notion of the sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a *sovereign* law-making body which is subordinate to another law-making body. But in the second place, even statutory form could hardly have saved the higher law as a *recourse for individuals* had it not been backed up by *judicial review*. Invested with statutory form and implemented by judicial review, higher law, as with renewed youth, entered upon one of the great periods of its history, and juristically the most fruitful one since the days of Justinian.

Id. at 89.

206. *See* DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (incorporating natural rights theory by stating that "all men . . . are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness"); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1544 (D.C. Cir. 1984) (en banc) (stating that U.S. government officials are creatures of law bound to obey law), *vacated on other grounds*, 471 U.S. 1113 (1985); Hunter, *supra* note 76, at 651 (stating that framers generally believed in natural law restraining governmental authority); *see also supra* note 77 and accompanying text (discussing natural rights theory).

rights.²⁰⁷ Because the natural rights theory considers all government actions to be constrained by constitutional principles, this theory supports the extension of the Fifth Amendment privilege to the risk of non-U.S. prosecution. By compelling individuals who risk foreign prosecution to testify, the U.S. government commits an act that infringes a natural right incorporated in the Fifth Amendment that applies regardless of the jurisdiction in which a prosecution may occur.²⁰⁸

The social contract theory views the Constitution as a contract between individuals of the United States and the U.S. government.²⁰⁹ According to this theory, only individuals who are parties to the contract have enforceable rights under it.²¹⁰ This theory, however, does not limit the Fifth Amendment's ability to protect U.S. citizens and certain aliens in the United States who risk non-U.S. prosecution. Most individuals who risk foreign prosecution and thus claim the protection of the privilege are U.S. citizens. These individuals, therefore, should be considered as parties to the social contract.²¹¹ Although the social contract theory may not determine whether the Fifth Amendment protects against extraterritorial prosecutions, this theory does not oppose such an extension.

Recently in *United States v. Verdugo-Urquidez*,²¹² although the

207. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 584 (1983) (noting that because Constitution as originally proposed lacked specific limitations on governmental encroachment, Anti-Federalists insisted on inclusion of Bill of Rights in Constitution).

208. See *In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972).

209. Hunter, *supra* note 76, at 652; Lobel, *supra* note 77, at 875.

210. See, e.g., *League v. DeYoung*, 52 U.S. (11 How.) 184, 202 (1850) (stating Constitution made by and for protection of people of United States); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) (Marshall, C.J.) (stating powers of U.S. government are granted by people for their benefit); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) (Jay, C.J.) (noting that Constitution is compact made by U.S. citizens to govern themselves in certain manner); see also Lobel, *supra* note 77, at 875 (stating social contract theory view that "[s]ince nonresident aliens are not parties to the 'contract' and have no obligations under it, they are not entitled to its protections").

211. See *League*, 52 U.S. at 202 ("The Constitution of the United States was made by, and for the protection of, the people of the United States."); *McCulloch*, 17 U.S. at 404-05 ("The government of the union, then . . . is, emphatically and truly, a government of the people. . . . In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir.) (stating that non-resident aliens are not protected by U.S. Constitution), *cert. denied*, 364 U.S. 835 (1960).

212. 494 U.S. 259, 274-75 (1990).

Supreme Court held that the Fourth Amendment does not apply extraterritorially, it noted that the occurrence of a constitutional violation operates differently in the Fourth Amendment than in the Fifth Amendment.²¹³ The Court stressed that because the Fifth Amendment privilege against self-incrimination is a fundamental trial right of criminal defendants, its constitutional violation occurs only at trial.²¹⁴ In contrast, a violation of the Fourth Amendment right against unreasonable searches and seizures occurs at the time of the unreasonable government intrusion.²¹⁵ Thus, in limiting the extraterritorial application of the Fourth Amendment, the Supreme Court looked at the location in which the constitutional violation occurred.²¹⁶ When individuals invoke the Fifth Amendment privilege in a U.S. domestic proceeding because they risk prosecution outside of the United States, the constitutional violation, unlike the situation present in *Verdugo-Urquidez*, occurs in the United States.²¹⁷ The Fifth Amendment thus should protect U.S. citizens and occupants of the United States from testifying in a U.S. court when they fear that such testimony could be used against them in another country.

C. The Framers of the Fifth Amendment Intended the Privilege Against Self-Incrimination to Apply Extraterritorially

An analysis of the framers' intent in developing the Bill of Rights demonstrates that the self-incrimination privilege should protect individuals in the United States against the risk of non-U.S. prosecution.²¹⁸ The privilege against self-incrimi-

213. *See id.* at 264 (stating that Fourth Amendment operates in different manner from Fifth Amendment).

214. *Id.*

215. *Id.*

216. *See id.* (stating that "for purposes of this case . . . if there were a constitutional violation, it occurred solely in Mexico").

217. *See id.* at 264 (stating the constitutional violation of privilege against self-incrimination occurs only at trial).

218. *See* LEVY, *supra* note 10, at 432 (stating that "[a]bove all, the Fifth Amendment reflected [the framers'] judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty"); *see also* *Ullmann v. United States*, 350 U.S. 422, 438 (1956) (stating that "[t]he privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic'"), *overruled on other grounds by* *Kastigar v. United States*, 406 U.S. 441 (1972); *Quinn v. United States*,

nation is an ancient and venerable right that has been recognized for centuries as an essential protection of the individual against abuse by the government.²¹⁹ In biblical times, as well as in medieval England, rights similar to the privilege against self-incrimination existed and provided individuals with broad protection against oppressive government conduct.²²⁰ This historical background, combined with the framers' belief that without fair and just procedures there could be no secure liberty, paved the way for the development of the Fifth Amendment to the U.S. Constitution.²²¹

The context in which the Constitution was drafted proves extremely relevant in evaluating the framers' intention in creating the privilege. The Bill of Rights was written immediately after the colonies fought a war to free themselves from control of a foreign sovereign.²²² Due to the political context in which the framers of the Constitution created the Fifth Amendment, it is unlikely that they would have established a right which the U.S. government must honor but which might be abridged by the U.S. government for the benefit of another country's government.²²³ Such a limited interpretation of the amendment

349 U.S. 155, 162 (1955) (noting that "[c]oequally with our other constitutional guarantees, the Self-Incrimination Clause 'must be accorded liberal construction in favor of the right it was intended to secure'"); *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954) (stating that framers of Constitution "made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused").

219. See *supra* notes 10-21 and accompanying text (discussing historical development of privilege against self-incrimination).

220. See *supra* notes 15-18 and accompanying text (discussing privilege's development because of abolishment of oppressive oath *ex officio*).

221. See LEVY, *supra* note 10, at 431 (stating that "[t]he framers understood that without fair and regularized procedures to protect the criminally accused, there could be no liberty").

222. See THOMAS A. BAILEY & DAVID M. KENNEDY, *THE AMERICAN PAGEANT* 127 (8th ed. 1987) (discussing impact that American Revolution had on social customs, political institutions, and ideas about society and government in newly formed United States). In *The American Pageant*, the authors note that "[t]he root causes of the Revolution may well have been the need to resist what the colonists feared to be the conspiracy of a corrupt British government to deprive them of their liberties." *Id.* at 106.

223. In *Moses v. Allard*, the court noted the historical context in which the Fifth Amendment was adopted. *Moses v. Allard*, 779 F. Supp. 857, 874 n.24 (E.D. Mich. 1991). The court in *Moses* observed that "one can hardly believe that our Founders would have formulated a fundamental right which could be exercised on American soil under the American Constitution and which could not be abridged by an Ameri-

would allow compulsion of a U.S. citizen's testimony which could be used in the prosecution of that individual in other countries.

Many of the policies protected by the Bill of Rights originated in English common law.²²⁴ It is likely that, at the time the Bill of Rights was adopted, English common law extended the self-incrimination privilege to protect against the risk of prosecution in other countries.²²⁵ The early English case of *East India Co. v. Campbell*²²⁶ allowed the self-incrimination privilege to apply to English defendants who risked prosecution in India.²²⁷ Although, at the time *East India Co.* was de-

can government but which could be abridged for the benefit of a foreign government or monarch." *Id.*

224. See *Brown v. Walker*, 161 U.S. 591, 600 (1896). In *Brown*, Justice Brown stated that

[a]s the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them. This is but another application of the familiar rule that, where one State adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the State from which they are taken.

Id.; see *McDonald v. Hovey*, 110 U.S. 619 (1884). In *McDonald*, the Court addressed an issue concerning the construction that should be given to the statute of limitations. The Supreme Court stated that when English statutes have been adopted into U.S. legislation, the known and settled construction of those statutes by courts of law are silently incorporated into the acts. *Id.* at 628; see *Twining v. New Jersey*, 211 U.S. 78, 119 (1908) (Harlan, J., dissenting) (quoting an author of constitutional law who wrote that "[w]hen the first Continental Congress of 1774 claimed to be entitled to the benefit . . . of the common law of England . . . they simply declared the basic principle of English law that English subjects going to a new and uninhabited country carry with them, as their birth right, the laws of England existing when the colonization takes place") (citations omitted).

225. See *East India Co. v. Campbell*, 27 Eng. Rep. 1010, 1011 (Ex. 1749).

226. *Id.*

227. *Id.* In *Moses v. Allard*, the creditors who were trying to compel the debtor, Ms. Moses, to testify, argued that the English case of *East India Co.* involved jurisdictions under the legislative sovereignty of the English laws. *Moses*, 779 F. Supp. at 876. The court in *Moses* found, by reviewing the court's opinion in *East India Co.*, that the English courts viewed the India courts and the English courts as two separate entities. *Id.* *Moses* therefore held that *East India*, which was decided before the U.S. Constitution was enacted, extended the privilege to the risk of prosecution in foreign jurisdictions. *Id.* But see *Phoenix Assurance Co. of Can. v. Runck*, 317 N.W.2d 402, 411 (N.D.) (dismissing significance of *Murphy's* reliance on English cases by stating that some English cases involved prosecution in English colonies), *cert. denied*, 459 U.S. 862 (1982). See also R.D.G., *supra* note 28, at 894 (arguing that English courts

cided, India was under the control of England, the language of the decision of *East India Co.* shows that the Indian courts and the English courts were viewed as separate entities.²²⁸ Thus, when the framers developed the Fifth Amendment, they likely incorporated the broad scope of the self-incrimination privilege that was adhered to in England.²²⁹

In a footnote in his concurring opinion in *Murphy*, Justice Harlan questioned the clarity of the English rule regarding the extraterritorial application of the privilege.²³⁰ He stated that *East India Co.* involved disclosures that would be incriminating under a separate system of laws operating within the same legislative sovereignty.²³¹ The English court's decision in *McRae*, however, did not involve the risk of prosecution in a jurisdiction within England's legislative sovereignty.²³² In addition, the rationale of the court in *East India Co.* shows that it based

had not decided case involving incrimination under laws of independent foreign sovereigns at time U.S. Constitution was created, therefore, amendment did not incorporate any rule concerning foreign incrimination); Capra, *supra* note 50 (stating that English cases involving independent sovereigns were decided more than 60 years after Fifth Amendment was adopted).

228. *East India Co.*, 27 Eng. Rep. at 1011. The court stated that "the rule is, that this court shall not oblige one to discover that, which, if he answers in the affirmative, will subject him to the punishment of a crime . . . and that he is punishable appears from the case of Omichund v. Baker [1 Atk 21], as a jurisdiction is erected in Calcutta for criminal facts; where he may be sent to government and tried, though not punishable here . . . for the government may send persons to answer for a crime wherever committed, that he may not involve his country." *Id.* (emphasis added); see *Moses v. Allard*, 779 F. Supp. 857, 876 (E.D. Mich. 1991) (stating that review of opinion of *East India Co.*, as well as another English court opinion suggests that English courts viewed trying bodies as two separate entities).

229. See *Quinn v. United States*, 349 U.S. 155, 161 (1955); *Brown v. Walker*, 161 U.S. 591, 600 (1896). In *Moses v. Allard*, the court stated that

[a]s adopted in English common law, [the right against self-incrimination] was a broad and fundamental protection of the individual against the abuses of a government. The right, as interpreted prior to the formation of our Constitution, provided for the extension of this fundamental privilege to foreign proceedings. It was this broad conception of the privilege that was adopted by the Founding Fathers.

Moses, 779 F. Supp. at 883; see LEVY, *supra* note 10, at 428 (stating that "[a]fter the adoption of the Fifth Amendment, the earliest state and federal cases were in accord with [the privilege's] previous history, which suggests that whatever the wording of the constitutional formulation, it did not supersede or even limit the common-law right").

230. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 81-82 n.1 (1964) (Harlan, J., concurring).

231. *Id.*

232. Justice Harlan also stated that the situation in *McRae*, where the U.S.

its decision on the privilege's ability to protect against the risk of incrimination in another country.²³³

Furthermore, most of the purposes underlying the privilege apply to the risk of prosecution outside the United States.²³⁴ The framers created the privilege in order to avoid subjecting an individual to the "cruel trilemma" of self-incrimination, perjury, or contempt.²³⁵ This "cruel trilemma" exists regardless of whether the defendant fears prosecution in the United States or outside its borders.²³⁶ The defendant who risks prosecution outside the United States is still compelled to choose among self-incrimination, perjury, or contempt.²³⁷ Moreover, the framers intended the privilege to focus on the individual's right to be free from inhumane treatment and abuse by the government.²³⁸ Compelling an individual to give self-incriminating testimony, regardless of the location of the prosecution, subjects an individual to unjust treatment by the government.²³⁹

D. Immunity Does Not Protect Against the Risk of Non-U.S. Prosecution

The Supreme Court allows grants of immunity to replace the right against self-incrimination, provided that the grant of immunity is coextensive with the protection of the Fifth Amendment.²⁴⁰ Immunity, however, does not consistently

wished to obtain answers in England that would incriminate the defendant in the United States is distinguishable from the facts in *Murphy*. *Id.*

233. See *East India Co. v. Campbell*, 27 Eng. Rep. 1010, 1011 (Ex. 1749) (stating that privilege against self-incrimination protects individuals who risk prosecution in India because government can send person to answer crime wherever committed although it may not involve that individual's country).

234. See *Sukenik*, *supra* note 107, at 373 (stating that analysis of underlying policies favors broad interpretation of privilege).

235. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964).

236. See *Moses v. Allard*, 779 F. Supp. 857, 874 (E.D. Mich. 1991) (opining that intent behind Fifth Amendment was that privilege protects individual against unlawful compulsion by any government, regardless of fortuitous nature of jurisdiction involved).

237. See *Murphy*, 378 U.S. at 55 (discussing importance and definition of "cruel trilemma").

238. *Id.*

239. *Moses*, 779 F. Supp. at 874.

240. *Kastigar v. United States*, 406 U.S. 441 (1972).

safeguard Fifth Amendment rights.²⁴¹ When a witness fears non-U.S. prosecution and is compelled to testify, the witness is in a much worse position than if the witness had remained silent.²⁴² In such a case, immunity does not afford the individual the same protection as the privilege against self-incrimination because immunity fails to assure that the testimony will not lead to criminal penalties.²⁴³

Once a witness has received immunity, the "derivative use" prohibition of the U.S. Statute on Immunity of Witnesses safeguards the use of this testimony by domestic authorities.²⁴⁴ This statute bars the U.S. government from using compelled testimony in any criminal case against a witness who receives immunity.²⁴⁵ U.S. courts can exclude compelled testimony acquired through the use of such testimony.²⁴⁶ This judicial control persuaded the U.S. Supreme Court to allow grants of immunity to replace the self-incrimination privilege when a defendant fears domestic prosecution.²⁴⁷ Such judicial control, however, is absent when a U.S. citizen fears prosecution outside the United States because the U.S. government has no power to regulate the use of testimony in such a prosecution.²⁴⁸

In *Kastigar v. United States*,²⁴⁹ the Supreme Court stated that immunity statutes must concentrate on elimination of the risk of prosecution.²⁵⁰ When a risk of prosecution exists

241. *See id.* at 449 (stating that immunity suffices to supplant Fifth Amendment privilege only when grant of immunity is coextensive with scope of privilege).

242. *See* Sukenik, *supra* note 107, at 382 (stating that secrecy of grand jury proceedings, without more, does not offer protection equivalent to witness's right to remain silent).

243. *See Kastigar*, 406 U.S. at 449 (holding that immunity ensures that testimony cannot lead to criminal penalties when individual fears domestic prosecution and thus affords same protection as privilege).

244. *See* 18 U.S.C. § 6002 (1988) (discussing requirements for immunity).

245. *See id.*

246. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

247. *In re Cardassi*, 351 F. Supp. 1080, 1082 (D. Conn. 1972); *see* Sukenik, *supra* note 107, at 382 (discussing ability of government to keep compelled testimony from being disclosed for use in subsequent cases).

248. *Cardassi*, 351 F. Supp. at 1082; Sukenik, *supra* note 107, at 382.

249. 406 U.S. 441 (1972).

250. *See id.* at 449; *Counselman v. Hitchcock*, 142 U.S. 547, 585 (1892) (holding that no statute that leaves party or witness subject to prosecution after party or witness answers incriminating question can have effect of supplanting privilege against self-incrimination), *overruled on other grounds by Kastigar v. United States*, 406 U.S. 441

outside the United States, the government cannot eliminate this risk through grants of immunity.²⁵¹ This limitation of immunity should not affect the Fifth Amendment's ability to protect individuals from unwillingly testifying when they fear that their testimony will incriminate them outside the United States. Although extension of the self-incrimination privilege extraterritorially may impede the government's ability to obtain testimony and may burden law enforcement officials, these results do not justify denying an individual the right against self-incrimination.²⁵² As the Court stated in *Reid v. Covert*,²⁵³ allowing the Bill of Rights to become inoperative because of expediency and inconvenience would undermine the Constitution as well as the basis of the U.S. government.²⁵⁴

Immunity was developed as a substitute for Fifth Amendment rights to aid governmental interests in obtaining testimony.²⁵⁵ Courts that limit the privilege to domestic prosecution reason that non-U.S. laws should not supersede the ability of the U.S. government to grant immunity.²⁵⁶ By limiting the scope of the Fifth Amendment privilege, however, these courts allow government interests to supersede individual rights.²⁵⁷ Although extension of the privilege to non-U.S. prosecutions may frustrate grants of immunity, limiting the privilege frustrates Fifth Amendment rights.²⁵⁸ Judicial protection of Fifth

(1972). Congress and the Supreme Court found that the conceptual basis of this language in *Counselman* permitted use and derivative use to be considered coextensive with the scope of the privilege. See *Kastigar*, 406 U.S. at 451-53.

251. *Sukenik*, *supra* note 107, at 384.

252. See *Reid v. Covert*, 354 U.S. 1 (1957) (noting that when United States acts against its citizens outside of United States, it can do so only in accordance with all limitations imposed by Constitution).

253. 354 U.S. 1 (1957).

254. See *id.* The Supreme Court in *Reid* stated that

[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.

Id. at 14.

255. *Kastigar v. United States*, 406 U.S. 441, 462 (1972).

256. See *Phoenix Assurance Co. of Can. v. Runck*, 317 N.W.2d 402, 412 (N.D.) (holding that privilege should not apply extraterritorially because such extension would frustrate U.S. government's ability to grant immunity), *cert. denied*, 459 U.S. 862 (1982).

257. See *id.*

258. See *Moses v. Allard*, 779 F. Supp. 857, 882 (E.D. Mich. 1991) (noting that

Amendment rights thus should be more expansive than the ability to grant immunity. The goal of immunity statutes is to provide substantially the same protection as the right against self-incrimination.²⁵⁹ Fifth Amendment rights should not vanish in instances where grants of immunity cannot fulfill this goal.

E. *Rule 6(e) Does Not Eliminate the Risk of Non-U.S. Prosecution*

Moreover, a close examination of Rule 6(e) reveals its inadequacy as a safeguard against possible self-incrimination.²⁶⁰ Although Rule 6(e) provides for the general secrecy of grand jury testimony, it contains a broad exception to this general rule.²⁶¹ Rule 6(e) permits the disclosure of testimony to a governmental agency without a court order to aid a prosecutor in the performance of official duties.²⁶² As criminal acts become more international in scope, nations increasingly cooperate to fight international crime.²⁶³ In compliance with certain international treaties, a U.S. prosecutor may have a duty to disclose information to non-U.S. officials.²⁶⁴ Thus, because of the

although extension of amendment may burden law enforcement officials, courts cannot abrogate right solely on that ground).

259. *Kastigar*, 406 U.S. at 460-63. Some commentators argue, however, that if use immunity cannot extend to prohibit a certain use of compelled testimony, then the Fifth Amendment should not prohibit such use. See Capra, *supra* note 50 ("[I]f use immunity is co-extensive with the privilege, it follows that there is no constitutional limitation on use of testimony beyond the scope of the immunity grant."). This argument, however, would cause the scope of the Fifth Amendment to be determined by the ability of the government to grant immunity in the particular situation.

260. See FED. R. CRIM. P. 6(e) (setting forth requirements for grand jury secrecy); see also *In re Flanagan*, 691 F.2d 116, 123 (2d Cir. 1982) (holding that Rule 6(e) does not guarantee that grand jury testimony will not be disclosed to governments outside United States).

261. See FED. R. CRIM. P. 6(e)(3) (setting forth exceptions to grand jury secrecy requirements); *supra* notes 104 and accompanying text (discussing requirements and exceptions to RULE 6(e) which governs secrecy of grand jury testimony).

262. FED. R. CRIM. P. 6(e)(3); see *supra* note 104 and accompanying text (discussing requirements for secrecy in grand jury proceedings). A prosecutor's duty is not limited to the matter under investigation by the grand jury. *In re Lemieux*, 597 F.2d 1166, 1168 (9th Cir. 1979) (Hufstедler, J., concurring). Rule 6(e) also allows disclosure to non-attorneys, without a court order, provided it will aid prosecutors in the performance of their duties. See FED. R. CRIM. P. 6(e)(3).

263. See *supra* note 194 and accompanying text (discussing cooperative efforts between nations in fighting international crime).

264. See FED. R. CRIM. P. 6(e)(3). In *In re Baird*, however, the U.S. Court of Appeals for the Eighth Circuit held that Rule 6(e) sufficiently protected against possible communication of grand jury testimony to law enforcement agents from a non-

prosecutorial aid exception, Rule 6(e) may not protect the witness from the performance of a government attorney's duty to disclose information to non-U.S. countries in compliance with such international treaties.²⁶⁵

The secrecy requirements of grand jury proceedings do not eliminate an individual's risk of non-U.S. prosecution. Courts cannot adequately protect the secrecy of grand jury testimony after an indictment has been returned.²⁶⁶ Courts must disclose grand jury testimony to defendants if that testimony contains exculpatory material.²⁶⁷ Courts also have allowed disclosure when grand jury testimony is relevant to a motion to dismiss an indictment or when it is relevant to a double jeopardy claim.²⁶⁸ The argument that Rule 6(e) eliminates the risk of non-U.S. prosecution also assumes that law enforcement agents will always adhere to the disclosure requirements of Rule 6(e).²⁶⁹

In *Flanagan*, the court held that Rule 6(e) did not eliminate the claimant's risk of non-U.S. prosecution because grand jury proceedings are not "leakproof."²⁷⁰ Grand jurors might knowingly or unknowingly disclose information.²⁷¹ *Flanagan* thus adopted a case-by-case evaluation of the claimant's risk of non-

U.S. country under the Single Convention. *In re Baird*, 668 F.2d 432 (8th Cir. 1982); see *supra* note 194 and accompanying text (citing Single Convention). The Single Convention is subject to the constitutional, legal and administrative systems of each of the parties. *Baird*, 668 F.2d at 433. Therefore, the court held that the Single Convention was governed by the requirements of Rule 6(e). *Id.*; see *supra* note 194 and accompanying text (citing Single Convention).

265. See FED. R. CRIM. P. 6(e); see also *supra* note 104 and accompanying text (setting forth requirements and exceptions of grand jury secrecy under Rule 6(e)).

266. See FED. R. CRIM. P. 6(e)(3) (setting forth exceptions to grand jury secrecy); see also *Lemieux*, 597 F.2d at 1168 (Hufstedler, J., concurring). In a concurring opinion in *Lemieux*, Judge Hufstedler stated that the assumption that disclosure cannot occur without violating Rule 6(e) is unsupported by the rule itself and is also unacceptably disingenuous. *Id.*

267. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring disclosure of grand jury minutes which contained exculpatory material).

268. See, e.g., *United States v. Garcia*, 420 F.2d 309 (2d Cir. 1970) (permitting disclosure of grand jury minutes that were relevant to motion to dismiss an indictment); *United States v. Hughes*, 413 F.2d 1244, 1257 (5th Cir. 1969) (allowing disclosure when grand jury minutes were relevant to double jeopardy claim), *vacated as moot*, *United States v. Gifford-Hill-American, Inc.*, 397 U.S. 93 (1970).

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

270. *In re Flanagan*, 691 F.2d 116, 123 (2d Cir. 1982).

271. *Id.*

U.S. prosecution with the aid of a five-factor test.²⁷² The *Flanagan* test may be applied in cases other than grand jury proceedings to determine if a claimant's fear is reasonable.²⁷³ This test evaluates the surrounding circumstances behind an individual's alleged risk of prosecution instead of relying solely on the good faith of the court, grand jurors, and law enforcement officials.²⁷⁴

Flanagan's five-part test adequately determines whether an individual faces a real risk of non-U.S. prosecution by evaluating all relevant circumstances.²⁷⁵ Therefore, instead of assuming the adequacy of Rule 6(e), courts should utilize the *Flanagan* test as a reliable way to evaluate the real risk requirement.²⁷⁶

CONCLUSION

The privilege against self-incrimination should protect U.S. citizens and aliens within the United States from testifying when faced with the risk of prosecution outside the United States. Courts should adhere to the purposes, intent, and history supporting the privilege by extending its protection to the threat of non-U.S. prosecution. In addition, U.S. courts should evaluate a witness's risk of non-U.S. prosecution on a case-by-case basis by employing the five-part test developed in *In re Flanagan*. By applying *Flanagan's* test, courts will be able to use a uniform standard for all cases while also considering the individual factors peculiar to each case.

*Debra Ciardiello**

272. See *supra* notes 91-97 and accompanying text (setting forth *Flanagan's* five-part test).

273. See *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1064-65 (3d Cir. 1988) (employing *Flanagan's* five-part test to evaluate defendants' fear of prosecution outside United States), *aff'd*, 493 U.S. 400 (1990); *United States v. Joudis*, 800 F.2d 159, 162 (7th Cir. 1986) (same); *In re President's Comm'n on Organized Crime*, 763 F.2d 1191, 1199 (11th Cir. 1985) (same).

274. See *Flanagan*, 691 F.2d at 121.

275. See *supra* notes 91-97 and accompanying text (discussing *Flanagan's* five-part test, which assesses all relevant circumstances).

276. See *supra* notes 91-97 and accompanying text (discussing *Flanagan's* test).

* J.D. Candidate, 1993, Fordham University.