INFORMATION EXCHANGE BETWEEN SECURITIES REGULATORS IN PARALLEL PROCEEDINGS AGAINST CROSS-BORDER MARKET MISCONDUCT

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Administrative proceedings in one country in advance of, or in parallel with, criminal proceedings in another country could undermine fundamental constitutional protections, such as the privilege against self-incrimination. These issues could arise in many cross-border cases because parallel investigations and exchange of information between multiple countries' securities regulators are the norm in the current global securities markets. The more administrative penalties are enhanced, the more likely they would be deemed quasi-criminal. The more a regulator exercises extraterritorial jurisdiction, the more likely it would conflict with other countries' regulators. This article, therefore, tries to show how cross-border information exchange by securities regulators could be hindered due to constitutional protections in one jurisdiction and provide solutions under the current cooperative framework.

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INTRODUCTION

Administrative proceedings in one country in advance of, or in parallel with, criminal proceedings in another country could have the possibility to undermine fundamental constitutional protections, such as the privilege against self-incrimination and the double jeopardy principle. In the United States, criminal and administrative parallel proceedings are generally allowed, but evidence obtained through the less demanding procedures usually allowed for administrative investigations may not be used in criminal proceedings. This is the case if the administrative investigations were conducted "solely" to obtain evidence for the criminal proceedings. Similar issues could arise in many cross-border cases because parallel investigations and exchange of information between multiple countries' securities regulators are the norm in the current global securities markets.

Assume that an investor residing in one country, where securities regulator X oversees the market, commits market manipulation or insider trading in another country where securities regulator Y oversees the market. Under the current primary cooperation framework among securities regulators, the Memorandum of Understanding ("MMoU"), Y will likely ask cooperation of X to obtain material documents and information regarding the investor. If an administrative investigation by X is conducted in parallel with a criminal investigation by Y, can Y use in its criminal proceedings or administrative "penalty" proceedings the documents and information provided by X without violating the constitutional protections in X's country?

For example, in 2014, the Japanese Securities regulator took an administrative enforcement action to seek an administrative monetary penalty payment order against a Hong Kong company that allegedly conducted market manipulation in Japan. In response, the company filed a lawsuit in Hong Kong against the Hong Kong regulator, claiming that the Hong Kong regulator unlawfully provided self-incriminatory evidence to the Japanese regulator for its use in administrative proceedings. Under Hong Kong law, the securities regulator may not provide self-incriminatory evidence to a foreign regulator to be used in criminal proceedings.

Although Japanese proceedings and its remedies are labeled as "administrative proceedings" and "administrative monetary penalties" under Japanese law, the investor argued that Japanese proceedings were equivalent to criminal proceedings because administrative monetary penalties should be construed as a "penalty" under Hong Kong law. This

case illustrates the overall questions dealt with in this article: How the assertion of privileges or protection associated with criminal proceedings in one country may impede the sharing of evidence and information with another country to be used in administrative proceedings.

Although many scholars have analyzed the SEC's enforcement topics such as the enhanced authority in, and the increasing use of, administrative proceedings, they have focused on domestic issues and have not viewed issues from an international perspective. Similarly, much has been discussed about issues such as the constitutionality of parallel proceedings and accompanying information exchange among U.S. regulators, but scholars have largely ignored issues related to cross-border information exchange between securities regulators. The more administrative penalties are enhanced, the more likely they would be deemed quasi-criminal. The more a regulator exercises extraterritorial jurisdiction, the more likely it would conflict with other countries' regulators. This article, therefore, tries to expand the scope of analysis to the international setting.

I will first examine two constitutional protections provided in criminal proceedings, namely protection against unreasonable searches and seizures and the privilege against self-incrimination under domestic laws of various jurisdictions to see whether such protections are universally available. I will then discuss whether the constitutional protections above prevent criminal regulators from obtaining information from administrative regulators under domestic laws of various jurisdictions. Finally, I will show how cross-border information exchange by securities regulators could be hindered due to constitutional protections in one jurisdiction, and I will also provide solutions.

I. PROTECTION OF INFORMATION IN CRIMINAL PROCEEDINGS UNDER DOMESTIC LAWS

In the United States, constitutional protections of defendants in federal criminal proceedings are found in the Fourth,[1] Fifth,[2] Sixth,[3] and Eighth[4] Amendments.[5] The Supreme Court in *Argersinger v. Hamlin*[6] enumerated the rights of defendants in criminal proceedings as follows:

> (1) [T]he right to a public trial, (2) the right of confrontation, (3) the right of compulsory process for obtaining witnesses in one's favor, (4) the right to a speedy trial, (5) the right to be informed of the nature and cause of the accusation, (6) the right to a jury trial when the possible sentence

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1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.

2. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
U.S. CONST. amend. V.

3. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
U.S. CONST. amend. VI.

4. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

5. The Fourteenth Amendment provides that no "[state shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Through the Fourteenth Amendment, many of the constitutional protections are applicable to state criminal prosecutions. *See* Johnathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalties Cases*, 56 CORNELL L. REV. 478, 478 (1974) (citing Pointer v. Texas, 380 U.S. 400 (1965)).

6. 407 U.S. 25 (1972).

> exceeds six months, and (7) the right to counsel if there is a possibility of incarceration.[7]

Other protections accorded to defendants in criminal proceedings include:

> (1) [T]he requirement that there be an official decision to prosecute made formally, explicitly, and with notice, (2) the right to have proof of guilt beyond a reasonable doubt, (3) the right to a trial before an impartial trier of fact, (4) limitations on unreasonable searches and seizures and the use of illegally obtained evidence, and (5) prohibitions against double jeopardy.[8]

Among these fundamental or constitutional protections, two types of fundamental protections, protection from unreasonable searches and seizures and the privilege against self-incrimination, may particularly impede cross-border information exchange between securities regulators. This section compares domestic laws of fourteen jurisdictions to show that most, if not all, member jurisdictions of the International Organization of Securities Commissions ("IOSCO") protect individuals against unreasonable searches and seizures and self-incrimination.

A. Protection Against Unreasonable Searches and Seizures

1. United States

There has been a widespread consensus about the basic meaning of each of the two clauses of the Fourth Amendment.[9]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

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7. *See* Charney, *supra* note 5, at 478–79 (summarizing enumerated protections) (internal citations omitted).

8. *Id.* at 479, n.13 (internal citations omitted).

9. Thomas Y. Davies, *Recovering the Original Fourth Amendment,* 98 MICH. L. REV. 547, 557 (1999).

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[10]

"The first clause has been understood to state a comprehensive principle–that the government shall not violate the 'right to be secure' by conducting 'unreasonable searches and seizures.'"[11]The Supreme Court has endorsed this understanding in numerous opinions, asserting, for example, that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials."[12]

"The second clause of the text, which starts with 'and no Warrants,' is commonly called 'the Warrant Clause.'"[13] It has been understood to serve the more specific purpose of regulating warrant authority.[14] "Its effect is to ban the use of a 'general warrant' . . . ([e.g.], ordering a search of 'suspected places'), which was also commonly applied to a warrant lacking a complaint under oath or an adequate showing of cause."[15] In response, Rule 41(b)(1) of the Federal Rules of Criminal Procedure requires that a magistrate judge or a judge of a state court issue a search warrant.[16] A magistrate or state judge "must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device."[17] It has been well established that "exigent circumstances," including the need to prevent the destruction of evidence, permit warrantless searches.[18]

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10. U.S. CONST. amend. IV.
11. Davies, *supra* note 9, at 557.
12. *Id.*; Delaware v. Prouse, 440 U.S. 648, 653–54 (1979).
13. Davies, *supra* note 9, at 558.
14. *Id.*
15. *Id.*
16. FED. R. CRIM. P. 41(b)(1).
17. FED. R. CRIM. P. 41(d)(1).
18. Kentucky v. King, 563 U.S. 452, 455 (2011); *see also generally* Stephen J. Kaczynski, *The Admissibility of Illegally Obtained Evidence: American and Foreign Approaches Compared*, 101 MIL. L. REV. 83, 101–02 (providing detailed analysis of exigent circumstances).

2. Comparison of Fourteen Countries

Today, the IOSCO's membership regulates more than 95% of the world's securities markets in more than 115 jurisdictions.[19] I could not find any comprehensive research that compares constitutional protections of all of the 115 jurisdictions. There is, however, one study published in 2007 that compiled a description of criminal procedures in twelve countries (Argentina, Canada, China, Egypt, France, Germany, Israel, Italy, Mexico, Russia, South Africa, and the United Kingdom).[20] Based on this study, I will compare laws regarding protection against unreasonable searches and seizures in fourteen countries consisting of the United States, the twelve countries listed above, and Japan as follows. Details of law of each country are provided in Appendix A.

Protection of individuals against unreasonable searches and seizures is almost universally provided for by requiring the police to obtain a search warrant except for limited circumstances. Among domestic laws of the fourteen countries, but for two (United Kingdom and France), constitutions of all countries explicitly protect the right of individuals in securing premises, communication, and privacy.[21] For example, Article 18 of the Argentine National Constitution provides that "dwellings, personal correspondence and private documents shall not be violated or trespassed, and a statute is to determine in what cases and under what circumstances their search and occupation shall be permitted."[22]

Although the United Kingdom does not have a written constitution, a number of rights under the European Convention on Human Rights ("ECHR") became part of English law and took effect in 2000 by virtue of the Human Rights Act 1998.[23] The Convention rights include the right

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19. IOSCO, FACT SHEET 2 (2019).

20. CRIMINAL PROCEDURE, A WORLDWIDE STUDY (Craig M. Bradley ed., 2d ed. 2007) [hereinafter WORLDWIDE STUDY].

21. Schlesinger observes that in civil law countries, the police's power to arrest the suspect or conduct searches and seizures without a judicial warrant is generally more limited than in the United States, but at least as a rule it is necessary at a very early stage of the investigation to involve the prosecutor and the court. Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361, 364–65 (1977).

22. Art. 18, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

23. David J. Feldman, *England and Wales*, *in* WORLDWIDE STUDY, *supra* note 20, at 149.

not to be arbitrarily deprived of liberty,[24] and the right to respect for private and family life, home, and correspondence.[25]

In France, there are only a few provisions of individual rights in the Constitution, such as the presumption of innocence, and most issues of criminal procedure are governed by detailed provisions of the Code of Criminal Procedure.[26] The preliminary article of the Code provides for two general principles applicable to all types of investigations: first, official investigation should be "fair," attempting to uncover evidence both favorable and unfavorable to the accused, avoiding the use of brutal or deceptive methods, and respecting human dignity; second, all investigatory steps must be thoroughly documented in writing.[27]

Although the constitutions of Canada and the United States use the term "reasonableness" as a standard of searches and seizures,[28] all fourteen countries' constitutions require a search warrant, either under the constitution (Germany, Japan, Mexico, and the United States) or under criminal procedure laws.[29] For example, Article 35 of the Japanese Constitution provides:

> The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place

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24. European Convention on Human Rights art. 5, § 1, Nov. 4, 1050, 213 U.N.T.S. 221 [hereinafter ECHR]

25. ECHR art. 8, § 1.

26. Richard S. Frase, *France*, *in* WORLDWIDE STUDY, *supra* note 20, at 205.

27. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [Criminal Procedure Code] art. 1-P, 30, 82, 100 (Fr.).

28. Even though the governing principles concerning search and seizure are similar between the United States and Canada, admissibility of evidence obtained though illegal search or seizure is different. *See* Lewis R. Katz, *Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the United States*, 3 CAN.-U.S. L.J. 103, 103–04 (1980). In the United States, the court would grant a motion to suppress illegally obtained evidence, and without other evidence, the prosecution would be forced to dismiss the criminal charges. *Id.* at 104 (citing Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961)). On the other hand, in Canada, the manner in which evidence is secured is largely irrelevant for the criminal trial, and the court may admit illegally seized documents. *See* Katz, *supra*, at 104. For a more comprehensive comparative study of admissibility of illegally obtained evidence abroad, *see* Kaczynski, *supra* note 18, at 130–65 (comparing admissibility in the United Kingdom, Canada and Australia).

29. *See generally* WORLDWIDE STUDY, *supra* note 20.

> to be searched and things to be seized, or except as provided by Article 33.[30]

In Egypt, the Code of Criminal Procedure forbids law enforcement officers to conduct warrantless searches of dwellings except in an emergency.[31]

Except for China, where the police may issue a search warrant, and thus in practice, the police have almost complete discretion to search and seize, all other countries require that a search warrant be issued by the prosecution or the judge.[32] For example, in Israel, the judge may issue a search warrant when the search is necessary to assure the presentation of an object for an investigation or trial and if the judge has reason to believe the location is used for the storage of a stolen item.[33]

In all countries examined, however, a search warrant may not be necessary if exceptional circumstances exist, including exigency and with the consent of the suspect. For example, in Italy, the police may conduct warrantless searches in "exigent circumstances" such as when someone is committing a crime or has escaped custody.[34]

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30. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 35, ¶ 1 (Japan).

31. Sadiq Reza, *Egypt*, *in* WORLDWIDE STUDY, *supra* note 20, at 120; Law No. 150 of 1950 (Civil Procedure Code) arts. 45, 91 (Egypt).

32. *See generally* WORLDWIDE STUDY, *supra* note 20, at 91, 93.

33. Rinat Kitai-Sangero, *Israel*, *in* WORLDWIDE STUDY, *supra* note 20, at 276; Criminal Procedure (Arrest and Search) Ordinance [New Version], 5729-1969, § 23 (Isr.).

34. Rachel A. Van Cleave, *Italy*, *in* WORLDWIDE STUDY, *supra* note 20, at 303, 305; C.p.p. art. 352 (It.).

How searches and seizures are restricted in each country discussed above can be summarized as below:

	Protected under Constitution?	"Reasonable" language?	Protected under Criminal Procedure?	Warrant Required?
Argentina	Yes		Yes	Yes
Canada	Yes	Yes	Yes	Yes
China	Yes		Yes	Yes
Egypt	Yes		Yes	Yes
France			Yes	Yes
Germany	Yes		Yes	Yes
Israel	Yes		Yes	Yes
Italy	Yes		Yes	Yes
Japan	Yes		Yes	Yes
Mexico	Yes		Yes	Yes
Russia	Yes		Yes	Yes
South Africa	Yes		Yes	Yes
United Kingdom			Yes	Yes
United States	Yes	Yes	Yes	Yes

B. Self-Incrimination Privilege

Similar to the comparative study on protection against unreasonable searches and seizures conducted in the previous section, I will compare laws regarding protection of the self-incrimination privilege in the same fourteen countries.

1. United States

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself,"[35] so, a person has the right to decline to provide any testimonial evidence that might tend to incriminate themselves. The privilege is "one of the great landmarks in man's struggle to make himself civilized' [and] reflects many of our fundamental values and most noble aspirations."[36] A person may refuse to answer, not only when she is the criminal defendant, but also "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . . [if she] reasonably believes" the testimony could be used against her in a later criminal case.[37]

There are two main categories of rationales for the privilege.[38] First, "systemic rationales" include both the encouragement of third-party witnesses to testify by removing the fear that they might incriminate themselves, as well as the maintenance of official integrity by removing temptation to employ short cuts to conviction.[39] Second, "individual rationales" include avoidance of cruelty and invasion of privacy and the inviolability of the human personality and dignity.[40]

Based on the Fifth Amendment, the Supreme Court in *Miranda* held that the police must announce to the criminally accused their rights of silence and appointed counsel before any custodial questioning can legally commence.[41] Today, the police typically provide the following "*Miranda* warning":

> (1) You have the right to remain silent. (2) Anything you say can and will be used against you in a court of law. (3) You have the right to an attorney. (4) If you cannot afford an attorney, one will be appointed for

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35. U.S. CONST. amend. V.

36. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citing E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955)).

37. Kastigar v. United States, 406 U.S. 441, 444–45 (1972).

38. David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1065–66 (1986).

39. *Id*.

40. *Id*. at 1066.

41. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

> you free of charge. Do you understand each of these rights I have read to you? Having these rights in mind, do you wish to speak to me?[42]

In addition to requiring these warnings, the Court held that the state bore the burden to demonstrate that the suspect's waiver of these constitutional rights was made "voluntarily, knowingly, and intelligently."[43]

2. Comparison of Fourteen Countries

Similar to my analysis regarding the protection against unreasonable searches and seizures in the previous section, I will compare laws regarding the privilege against self-incrimination in fourteen countries (Argentina, Canada, China, Egypt, France, Germany, Israel, Italy, Japan, Mexico, Russia, South Africa, and the United Kingdom, the United States). Details of the laws of each country are provided in Appendix B.

The privilege against self-incrimination is also almost universally provided for in the fourteen countries described above though how they are protected and whether it applies to a suspect who has yet to be formally charged differs by country. Of domestic laws of the fourteen countries, the constitutions of seven countries (Argentina, Canada, Japan, Mexico, Russia, South Africa, and the United States) explicitly provide for the self-incrimination privilege.[44] For example, Article 20(2) of the Mexican Constitution provides: "In every criminal trial the accused shall enjoy the following guarantees: He may not be forced to be a witness against himself; wherefore denial of access or other means tending to this end is strictly prohibited."[45]

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42. Richard A. Leo, *Criminal Law: The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 628 (1996).

43. *Miranda*, 384 U.S. 436, 444 (1966).

44. *See* Art. 18, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); Charter of Rights and Freedoms, § 11(c), Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c 11 (U.K.).; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 38, ¶ 1 (Japan); CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, CPEUM, art. 20(2), Diario Oficial de la Federación [DOF] 08-09-2019 (Mex.); KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 51 (Russ.); S. AFR. CONST., art. 35, 1996.; U.S. CONST. amend. V. *See also generally* WORLDWIDE STUDY, *supra* note 20.

45. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, CPEUM, art. 20(2), Diario Oficial de la Federación [DOF] 08-09-2019 (Mex.).

In five countries (China, France, German, Israel, and Italy), the code of criminal procedure, instead of the constitution, provides for the self-incrimination privilege. For example, in Italy, if a person not yet a suspect reveals incriminating evidence in the course of exchange with the police, the police must interrupt the person and warn him that an investigation may begin against him.[46] Statements made before this warning may not be used against the person.[47] The suspect must be warned of his right to remain silent.[48]

In Egypt, neither the Constitution nor the Code of Criminal Procedure explicitly provides defendants the self-incrimination privilege, but it is recognized and enforced in practice.[49] The Constitution provides that any statement proved to have been compelled by "physical or moral harm" or threat to such harm is "null and void."[50] The Code sets forth rules and limits on interrogating defendants during the investigative process and trial.[51] These provisions and court rulings "make it clear that defendants have no obligation to answer questions before trial or during it, [and] that a defendant's silence should not be considered evidence of guilt."[52]

In the United Kingdom, although there is no written constitution, common law recognizes the privilege.[53] "Parliament . . . passed legislation [to impose] obligation to disclose information to investigators in connection with terrorism, serious fraud, and money-laundering investigation."[54] Thereafter, the European Court of Human Rights held that the use in criminal proceedings of self-incriminating information obtained under threat of criminal penalties for non-disclosure breached the right to a fair trial under Article 6 of the European Convention of Human Rights.[55] Therefore, "[a]ll legislation providing penalties for non-

46. C.p.p. art. 63 (It.).
47. Van Cleave, *supra* note 34, at 324; Cass. Sez. I, La Placa, March 17, 2000.
48. C.p.p. art. 64(3) (It.).
49. Reza, *supra* note 31, at 125.
50. *Id.*; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 22 Sept. 1971, art. 42.
51. Reza, *supra* note 31, at 125.
52. *Id.*
53. *Id.* at 166.
54. *Id.* at 167.
55. Feldman, *supra* note 23, at 167; Saunders v. United Kingdom, 23 E.H.R.R. 313, 65 Eur. Ct. H.R. at 23 (1996).

disclosure has now been amended to bring it in line with the [decision above]."[56]

In all countries, defendants are protected by the self-incrimination privilege, although in China, the scope of the protection is not clear in practice. Moreover, in most countries, suspects are afforded similar protection against self-incrimination; however, in Argentina, the protection is narrower than that for the defendant.[57] In France, a suspect may not be advised that he has the right to remain silent until he first appears before a magistrate who decides whether to formally charge him.[58]

56. Feldman, *supra* note 23, at 167.

57. Alejandro D. Carrio & Aljandro M. Garro, *Argentina*, *in* WORLDWIDE STUDY, *supra* note 20, at 15; CÓD. PROC. PEN. art. 234 (Arg.).

58. In comparing the rights of criminal defendants between the United States and France, Tomlinson observes that individuals have fewer rights when confronted with investigatory authority in France than in the United States. Edward A. Tomlinson, *Comparative Criminal Justice Issues in the United States, West Germany, England, and France: Nonadversarial Justice: the French Experience*, 42 MD. L. REV. 131, 144 (1983). On the other hand, the rights of the French criminal defendant at trial may be more protected than in the United States because the court controls the disposition of the case and the defendant is not subject to pressure from the prosecution to forego his trial rights to secure lesser punishment. *Id.* at 194–95.

The self-incrimination privilege in each country discussed above can be summarized as below:

	Protected under Constitution?	Protected Otherwise?	Suspect Protected?	Defendant Protected?
Argentina	Yes		Yes	Yes
Canada	Yes		Yes	Yes
China		Yes	Yes	Yes
Egypt		Yes	Yes	Yes
France		Yes		Yes
Germany		Yes	Yes	Yes
Israel		Yes	Yes	Yes
Italy		Yes	Yes	Yes
Japan	Yes		Yes	Yes
Mexico	Yes		Yes	Yes
Russia	Yes		Yes	Yes
South Africa	Yes		Yes	Yes
United Kingdom		Yes	Yes	Yes
United States	Yes		Yes	Yes

There are some comparative studies focused on a few countries and the self-incrimination privilege. For example, in comparing the self-incrimination privilege afforded in the United States, France, and China, Michael Profit observes that "the United States' privilege has the broadest application."[59] In China, although a new provision of Criminal Procedure Law provides the privilege,[60] the privilege protects only those who are suspected of committing a crime.[61] In France, the privilege applies only to

59. Michael V. Profit, *Refusing to Be One's Own Witness: How the Privilege Against Self-Incrimination Differs in China, France, and the United States*, 8 ELON L. REV. 155, 163 (2016).

60. *See infra* Appendix B.3 (describing the new law).

61. Profit, *supra* note 59, at 160.

the "accused," meaning those who are already in custody.[62] In the United States, the Fifth Amendment protects any individuals from being forced to reveal information that could possibly result in a criminal proceeding against them.[63] This breadth may reflect the accusatorial nature of U.S. criminal justice system.[64]

Schlesinger also observes that in almost all civil law countries, no physical compulsion may be used to make the suspect talk, and the suspect, even before he becomes the defendant, has the right to remain silent.[65] Pieck also observes, "[a]ll continental West-European countries today recognize the accused's privilege against self-incrimination in one form or another."[66] Amann also states, "[a]mong those rights increasingly recognized as universal is the privilege against self-incrimination, or right to silence."[67]

The fact that many international treaties protect individuals against unreasonable searches and seizures and self-incrimination corroborates the universal acceptance of these protections.[68] Common to each agreement was a stated commitment to fair and equal treatment of individuals and to the protection of individual dignity.[69] For example, the Universal Declaration of Human Rights is the first instrument to enumerate individual rights related to criminal justice, including protection against arbitrary arrest, detention, or invasions of privacy.[70] Article 12 provides: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his

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62. *Id.* at 161–62.

63. U.S. CONST. amend. V; Profit, *supra* note 59 at 163.

64. Profit, *supra* note 59, at 163; *see also* Malloy v. Hogan, 378 U.S. 1, 7 (1964) ("[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay.").

65. Schlesinger, *supra* note 21, at 377.

66. Manfred Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585, 585 (1962).

67. Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1251 (1998).

68. *See* Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 824 (2000) (arguing that multilateral agreements protect fundamental individual rights in criminal procedure).

69. *Id.*

70. *Id.*; Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., pt.1, at 71, U.N. Doc. A/810 (1948).

honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[71]

Multiple regional human rights conventions have more detailed catalogue of such rights.[72] For example, article 8(2)(g) of American Convention protects "the right not to be compelled to be a witness against himself or to plead guilty."[73] The International Covenant on Civil and Political Rights ("ICCPR"), which was adapted by General Assembly of the United Nations in 1966, is often described as part of "an international Bill of Rights" and includes rights to personal liberty, dignity, and privacy.[74] "Article 14(3)(g) of the ICCPR provides: 'In the determination of any criminal charge against him, everyone shall be entitled . . . [n]ot to be compelled to testify against himself or to confess guilt.'"[75]

In the next section, I will examine whether and how the two constitutional protections—protection against unreasonable searches and seizures and self-incrimination—are afforded in domestic parallel proceedings between administrative and criminal regulators.

II. DOMESTIC LAW CONCERNING INFORMATION SHARING IN PARALLEL PROCEEDINGS BETWEEN ADMINISTRATIVE AND CRIMINAL REGULATORS

Domestic parallel criminal and administrative proceedings have been frequently used not only by U.S. federal regulators[76] but also regulators in

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71. *Id.* art. 12.

72. Amann, *supra* note 68, at 824. *See, e.g.*, African Charter on Human and Peoples' Rights, June 27, 1981, arts. 3-7, reprinted in 21 I.L.M. 59; American Convention on Human Rights, opened for signature Nov. 22, 1969, arts. 7–8, 11, 1144 U.N.T.S. 123, 147–48 (entered into force July 18, 1978).

73. African Charter, art 8(2)(g).

74. Amann, *supra* note 68, at 825; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Although ICCPR has the potential to lead the development of a global body of constitutional criminal procedure, it is not realized. Amann, *supra* note 68, at 825.

75. ICCPR art. 14(3)(g).

76. *See* JOHN S. SIFFERT & JED. S. RAKOFF, BUSINESS CRIME: CRIMINAL LIABILITY OF THE BUSINESS COMMUNITY, ¶ 2.01 (2017) (observing a growing trend of parallel proceedings); Frederick T. Davis, *International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe*, 31 AM. U. INT'L L. REV. 57, 64 (2016) (observing it is very common that the DOJ and the SEC simultaneously investigate the same conduct).

many jurisdictions.[77] Such parallel proceedings, however, may involve a risk of infringement of constitutional protection of the fundamental rights of individuals.

"[P]arallel proceedings can weaken a defendant's due process rights because the government, as simultaneous prosecutor and plaintiff, may benefit from the more generous discovery opportunities afforded by civil proceedings."[78] For example, under the Federal Rules of Criminal Procedure, a defendant may not be compelled to disclose materials "made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense" and statements made "to the defendant, or the defendant's attorney or agent, by: (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness."[79] On the other hand, under the Federal Rules of Civil Procedure, parties may discover "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[80]

Therefore, there is a risk that more liberal discovery in civil or administrative proceedings may be used to gather evidence for a pending criminal proceeding. In such a case, parallel proceedings can "put special pressure" on a defendant's self-incrimination privilege.[81] In addition, if

77. *See infra* Section II.B (describing domestic laws of six jurisdictions restricting use of self-incrimination statements in criminal proceedings). In addition, for example, in Germany, "[a]lthough multiple criminal investigations are not allowed, different government agencies may conduct investigations independently, for instance, the [German securities regulator] may lead an inquiry into activities of a bank while the public prosecutor investigates the employees of the same bank that acted in those transactions." *Germany* in GETTING THE DEAL THROUGH at 2. In Italy, "Unlawful conduct amounting to business crime can also be subject to administrative enforcement. In principle, this administrative enforcement runs in parallel (and in addition) to the criminal one, in a system where specific 'regulators' have the power to assess the relevant violations and to apply the related administrative sanctions." *Italy* in GETTING THE DEAL THROUGH at 1.

78. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1390 (1991); *see also* SIFFERT & RAKOFF, *supra* note 76, ¶ 2.01 (observing that the government may take advantage of liberal civil discovery rules and obtain evidence that would not have been otherwise available).

79. FED. R. CRIM. P. 16(b)(2). Rule 6(e) also generally prohibits the DOJ from sharing grand jury materials with the SEC. *Id.* 6(e)(2).

80. FED R. CIV. P. 26(b). In addition, as discussed below, the SEC may request any materials and information reasonably relevant to the case. *See supra* Section II.A.1.a.

81. Cheh, *supra* note 78, at 1389–90. Parallel proceedings can also "undercut a defendant's sixth amendment right to effective assistance of counsel" when counsel works

parallel proceedings end up in imposition of both criminal and civil penalties, it would also raise double jeopardy issues.

In this section, I will compare domestic laws in relation to the use of information obtained through an administrative investigation in subsequent criminal proceedings. U.S. rules generally allow the use if a securities investigation is "not solely" for criminal proceedings and distinguish "criminal" and "civil" penalties.[82] On the other hand, laws of some jurisdictions such as Canada and Hong Kong explicitly provide that self-incriminating statements obtained through administrative securities investigations may not be used in criminal proceedings.[83] The comparative study will illustrate the policy grounds and practical consideration between such differences.

A. United States

Constitutional protections in securities enforcement face challenges in the following three aspects. First, the SEC exercises a broad investigatory authority and uses powerful enforcement tools.[84] Second, the SEC may seek civil "penalties," which can be more punitive than criminal penalties, in both administrative and civil proceedings.[85] Third, in parallel proceedings between the DOJ and the SEC, the DOJ may obtain, and use in criminal proceedings, information obtained through the SEC's investigation.[86] Here, I will examine whether and how individual rights against unreasonable searches and seizures and self-incrimination are protected in those three aspects.

1. Constitutional Protections in SEC Enforcement

Here, I will focus on constitutional protections afforded in SEC enforcement. As described below, the SEC has a broad investigatory authority of investigation and powerful enforcement tools, so its

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vigorously to produce materials for the civil defense, which can hurt the defendant in the criminal case. *Id.* at 1391.

82. *See infra* II.A.
83. *See infra* II.B.2, II.B.3.
84. *See infra* II.A.1.
85. *See infra* II.A.2.
86. *See infra* II.A.3.

enforcement could infringe constitutional protections of targeted parties. The federal securities law requires regulated entities such as broker-dealers subject to inspection by the SEC to produce documents to the SEC upon request.[87] In an "informal investigation," the SEC "relies on voluntary cooperation to obtain documents and information from [non-regulated] persons and entities."[88] After an informal investigation turns into a "formal investigation" pursuant to an order from the Commission, the SEC may issue subpoenas to obtain documents and information.[89] Because of these broad powers, the SEC does not seem to rely on searches and seizures pursuant to an administrative search warrant.[90]

a. SEC's Subpoena Power

Many administrative agencies have been given the authority to issue administrative subpoenas, so individuals and businesses may resist a request for information as encroaching too far on their right to privacy.[91] The administrative subpoena can be used to coerce production of records and subpoena witnesses.[92]

The SEC has a broad authority to issue subpoenas.[93] For example, under section 19(c) of the Securities Act, "any member of the Commission

87. *E.g.*, 15 U.S.C. §§ 78q(a), (b) (2017), 17 C.F.R. §§ 240.17a-13, 17a-14 (2017).

88. THE SECURITIES ENFORCEMENT MANUAL 47, 82 (Michael J. Missal & Richard M. Philips eds., 2d ed. 2007) [hereinafter ENFORCEMENT MANUAL].

89. *Id.* at 82.

90. *See* Mark Rumond, *EFF to the SEC: Get a Warrant*, ELECTRONIC FRONTIER FOUNDATION (June 21, 2017) (observing that the SEC lacks the power to obtain a warrant by itself but can coordinate with the DOJ to obtain a warrant if there is a criminal component to an investigation).

91. *See* KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 528–530 (4th ed. 2004).

92. *See* Cudahy Packing Co. v. Holland, 315 U.S. 357, 363 (1942) ("[T]he subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business.").

93. Doyle points out that although administrative subpoenas are "not a traditional tool of criminal law investigation," they overlap in a few areas. Charles Doyle, *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments*, *in* NATIONAL SECURITY ISSUES 5 (Daniel D. Pegarkov ed. 2006). First, failure to comply with an administrative subpoena may result in criminal penalties. *Id*. Particularly in the context of administrative subpoenas involving intelligence matters, disclosure of the existence of the

or any officer or officers designated by it are empowered to . . . subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry."[94]

The Supreme Court ruled that an agency seeking to enforce compliance with a subpoena must show only "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [agency's] possession, and that the administrative steps required by the [federal statutes] have been followed."[95] If the agency makes its required showing, the opposing party may challenge the subpoena "on any appropriate ground."[96]

Common grounds for challenging the SEC's subpoena include allegations that the SEC's investigation is overbroad, burdensome, impracticable, or irrelevant, and claims of various privileges.[97] If challenged, the SEC does not have to show the likelihood of a securities violation,[98] but must show only that: (1) the inquiry is for a legitimate purpose and within the power authorized by the Congress; (2) the subpoena was issued in accordance with required administrative procedures; and (3) the documents or witness were not "plainly incompetent or irrelevant for any lawful purpose."[99]

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subpoena may lead to criminal penalties. *Id*. Second, because a violation of laws subject to administrative enforcement, such as securities regulation, oftentimes is subject to criminal enforcement, evidence collected pursuant to an administrative subpoena may unearth evidence for criminal prosecution. *Id*.

94. 15 U.S.C. § 77s(c) (2017); *see also* SEC, DIV. OF ENFORCEMENT, ENFORCEMENT MANUAL § 3.2.6 (2016) [hereinafter SEC MANUAL] ("The Commission or its designated officers may require the production of any records deemed relevant or material to the inquiry and may require their production from any place in the United States.").

95. United States v. Powell, 379 U.S. 48, 57–58 (1964); *but see* SEC v. Murray Dir. Affiliates, 426 F. Supp. 684, 686 (S.D.N.Y. 1976) (holding that the SEC may enforce compliance with subpoena even if the SEC has requested the same information from two other sources).

96. *Powell*, 379 U.S. at 58.

97. ENFORCEMENT MANUAL, *supra* note 88, at 108.

98. *Id.* (citing SEC v. Blackfoot Bituminous, Inc., 622 F.2d 512, 515 (10th Cir. 1980)).

99. ENFORCEMENT MANUAL, *supra* note 88, at 108–09 (citing Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943)); *see also* Okla. Press Pub. Co. v. Walling, 327

The courts have rarely refused to enforce a subpoena as unreasonably broad in scope.[100] For example, a subpoena was denied because it required "mass removal of business records."[101] A court refused to enforce an SEC subpoena based on information obtained by SEC staff members who pretended to be seeking general background on industry practices but in fact conducted an informal investigation for enforcement.[102] Thus, the SEC may not mislead a firm during an inspection either.

b. Fourth Amendment and Inspection Powers

The Fourth Amendment prohibits unreasonable search and seizure: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated."[103] The Supreme Court emphasized that protection against arbitrary invasion of privacy is "at the core of the Fourth Amendment."[104] Administrative searches are very common, and they may present challenges to the right to privacy under the Fourth Amendment.[105]

U.S. 186, 202, 209 (1946) (observing that the Fourth Amendment does not directly apply to subpoenas because they do not involve "actual searches and seizures" but ruling in analogy that probable cause required in warrant is satisfied in case of subpoenas if "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry"). Persaud, however, points out that as to the standard for reasonableness in issuing administrative subpoenas, the courts have not articulated a clear rational for the use of information collected by an administrative agency for a subsequent criminal proceeding. Shiv Narayan Persaud, *Parallel Investigations Between Administrative and Law Enforcement Agencies: A Question of Civil Liberties*, 39 DAYTON L. REV. 77, 99 (2013); *see also infra* Section II.A.3 (discussing the constitutionality of parallel criminal and administrative proceedings).

100. ENFORCEMENT MANUAL, *supra* note 88, at 30.

101. SEC v. Sange, 513 F.2d 188, 189 (7th Cir. 1975).

102. *See* SEC v. ESM Gov't Sec. Inc., 645 F.2d 310, 317 (5th Cir. 1981) (holding that "fraud, deceit or trickery is grounds for denying enforcement of an administrative subpoena").

103. U.S. CONST. amend. IV; *see also* Section II.A.2.b (discussing how the Fourth Amendment applies to civil penalty proceedings generally).

104. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

105. WARREN, *supra* note 91, at 527. Though some administrative officials have discretionary authority to arrest and detain a person, such administrative arrests and detentions have been rare. *Id*.

As a general rule, administrative officials must obtain a search warrant to forcibly inspect an individual or company without consent.[106] The Supreme Court, however, held that "[p]robable cause in the criminal law sense is not required" for an administrative search warrant.[107] "[P]robable cause justifying the issuance of [an administrative] search warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'"[108] The Supreme Court observed that: "A warrant . . . would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria."[109] In contrast, if a business is already closely supervised by a regulatory agency, it is reasonable to exempt such business from the search warrant requirement.[110]

The SEC has broad powers to conduct inspections and examinations of books and records required to be kept by regulated firms, such as broker-dealers, investment advisers, and investment companies.[111] The courts have held that administrative agencies' power to inspect and examine does not violate the Fourth Amendment as long as: (1) the inspection pertains

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106. *See, e.g.*, Camara v. Mun. Court, 387 U.S. 523, 528–29 (1967) ("[A] search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.").

107. Marshall v. Barlow's Inc., 436 U.S. 307, 320 (1978).

108. *Marshall*, 436 U.S. at 320–21 (citing *Camara*, 387 U.S. at 538).

109. *Id.*

110. *See, e.g.*, Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) ("[With respect to] the liquor industry long subject to close supervision and inspection . . . Congress has broad authority to fashion standards of reasonableness for searches and seizures."); New York v. Burger, 482 U.S. 691, 703–12 (1987) (finding that vehicle dismantlers were part of a closely regulated industry that carries a reduced expectation of privacy, thereby lessening the application of Fourth Amendment warrant and probable cause requirements); People v. Scott, 79 N.Y.2d 474, 501–502 (N.Y. 1992) (holding that warrantless search was unconstitutional if it was not supported by the exigency of hot pursuit or the existence of a business that was closely regulated); *Burger*, 482 U.S. at 719 (Brennan , J., dissenting) (arguing that vehicle-dismantling business is not closely regulated, and an administrative warrant therefore was required to search it).

111. ENFORCEMENT MANUAL, *supra* note 88, at 29. In 1975, statutes were amended to allow the SEC to examine *all* books and records kept by the regulated firms. *See also* WARREN, *supra* note 91, at 31.

to a regulated commercial business; (2) "the examination is relevant to the regulatory purposes"; (3) the "scope is clearly defined and limited"; and (4) the scope is known to the regulated businesses.[112] In particular, the Second Circuit upheld the SEC's power to inspect and examine the regulated entities, reasoning that legislative history indicates that the availability of records for inspection was necessary for effective regulation and such records were deemed "characteristic of quasi-public documents and their disclosure may be compelled without violating the Fourth Amendment."[113] The SEC takes the position that its inspection and examination authority is unlimited "except for the requirement that any such [inspection and] examination be 'reasonable.'"[114]

c. Self-Incrimination Privilege

The Supreme Court observed that "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating."[115] Rather, "[i]t is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him."[116] The term "witness," therefore, has generally been

112. ENFORCEMENT MANUAL, *supra* note 88, at 29 (citing Colonnade Catering Corp. v. United States, 410 F.2d 197, 202 (2d Cir. 1969) rev'd on other grounds, 397 U.S. 72 (1970)). Practitioners, however, find that these limitations are more "theoretical" and advise that the regulated firms should "do whatever is appropriate to demonstrate a 'low risk' profile." ENFORCEMENT MANUAL, *supra* note 88, at 29. They also find that it is appropriate to negotiate more reasonable bounds to an information request for which compliance is extremely difficult or impossible. *Id*. at 31.

113. SEC v. Olsen, 354 F.2d 166, 170 (2d Cir. 1965) (internal citation omitted).

114. *See* Lori Richards & John Walsh, *Compliance Inspections and Examinations by the Securities and Exchange Commission*, 52 BUS. L. 119, 129 (1996) (citing Exchange Act Release No. 16,278, 4 Fed. Sec. L. Rep. (CCH) P 26,152A, at 19,183 (Oct. 12, 1979)). The SEC may take disciplinary action against a regulated firm's refusal to make recodes available for inspection. *See In re* Hamon Capital Mgmt. Corp., 47 SEC 426 (Jan 8, 1981) (affirming suspension of the investment adviser registration).

115. Fisher v. United States, 425 U.S. 391, 408 (1976).

116. United States v. White, 322 U.S. 694, 698 (1944).

construed to mean a person providing testimonial evidence.[117] The privilege extends to a testimony that might "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[118]

Although the privilege is considered available throughout SEC investigations and enforcement actions as long as there is a reasonable basis for believing that an answer to question is incriminating,[119] the privilege cannot be asserted to preclude production of documents such as books and records that are required to be maintained by law.[120]

The privilege is available to individuals and sole proprietorships, but not to legal entities such as corporations and partnerships because it is a personal privilege solely for natural persons.[121] In *SEC v. Dunlop*,[122] the court ruled that the self-incrimination privilege applies to Dunlop in his "personal capacity" but not in his "business capacity" because Dunlop is the controlling person of the business entity.[123]

Even if the self-incrimination privilege applies in an SEC investigation, practitioners caution that invoking the privilege may substantially increase the risk of enforcement.[124] The SEC can infer from an assertion of the privilege that the asserting party willfully violated securities laws, and on such a basis can commence a proceeding to suspend or bar the asserting party from participating in the securities business.[125] No adverse inference can be drawn upon an assertion of the self-incrimination privilege in a

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117. *See* United States v. Hubbell, 530 U.S. 27, 34 (2000) ("The word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character.")

118. Hoffman v. United States, 341 U.S. 479, 486 (1951).

119. ENFORCEMENT MANUAL, *supra* note 88, at 93. However, whether the self-incrimination privilege is generally available in civil penalty proceedings is not clear. *See* Section II.A.2.b (discussing two Supreme Court cases, which seem inconsistent).

120. SEC v. Olsen, 354 F.2d 166, 168 (2d Cir. 1965) ("[T]he Fifth Amendment privilege cannot be invoked to withhold the records from the agency but can only be raised as a bar to a criminal prosecution if any is ever brought.").

121. United States v. White, 322 U.S. 694, 698 (1944) ("The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals."); ENFORCEMENT MANUAL, *supra* note 88, at 93.

122. 253 F.3d 768 (4th Cir. 2001).

123. *Id*. at 774–75.

124. ENFORCEMENT MANUAL, *supra* note 88, at 94.

125. *Id.* (citing SEC v. Muselia, 578 F. Supp. 425 429–30 (S.D.N.Y. 1984) (holding that the court could draw an adverse inference from defendants' refusal to testify because the proceeding was civil)).

criminal proceeding.[126] If the SEC imposes sanctions that are "inherently coercive" automatically only upon the assertion of the privilege, it is also arguably unconstitutional.[127] Practitioners, however, find that this argument will unlikely be successful in SEC enforcement because the adverse inference is unlikely to be the only evidence.[128]

2. Application to Civil Penalty Proceedings

In the United States, the growth of the administrative state and a desire to avoid the complication of criminal proceedings have contributed to the increasing use of civil penalties.[129] Although the SEC is a federal "administrative" agency, the SEC may seek civil "penalties" in either civil proceedings or administrative proceedings.[130] Civil penalties, however, can be more severely punitive than criminal sanctions.[131] If so, should constitutional protections be afforded in those "punitive" civil penalty proceedings? Here, I will explore how a "penalty" aspect of the remedy affects constitutional protections. My analysis is primarily based on U.S. law, but findings such as the rationale of, and problems caused by, civil penalty proceedings should be generally applicable to those jurisdictions that have civil or administrative penalty proceedings.

a. Line Between Criminal and Civil Proceedings

How to balance societal and individual rights has presented one of the toughest challenges to regulators.[132] Some have argued that the protection

126. Michell v. United States, 526 U.S. 314, 327-28 (1999) ("The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted.").

127. ENFORCEMENT MANUAL, *supra* note 88, at 95 n.187 (citing SEC v. Gilbert, 79 F.R.D. 683 (S.D.N.Y. 1978) (finding that an adverse inference that would not automatically cause a finding of liability is not unconstitutional)).

128. ENFORCEMENT MANUAL, *supra* note 88, at 95 n.187.

129. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1844 (1992).

130. ENFORCEMENT MANUAL, *supra* note 88, at 7–8.

131. *See id.* at 1797–98 (arguing that plaintiffs in civil cases sometimes seek "punitive" civil sanctions, which purpose is to punish wrongdoing).

132. WARREN, *supra* note 91, at 515.

of individual rights has not kept pace with the rapid expansion of administrative agencies.[133]

Some constitutional protections are explicitly limited to "any criminal case" or "all criminal prosecutions." For example, the Fifth Amendment provides that "[no person] shall be compelled in any *criminal case* to be a witness against himself."[134] The Sixth Amendment also provides that "[i]n *all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense."[135]

In contrast, some other constitutional protections are limited to "suits at common law" or civil proceedings. For example, the Seventh Amendment provides as follows: "In *suits at common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."[136]

Cheh, therefore, argues that the Constitution draws fundamental distinctions between criminal and civil proceedings.[137] She observes that because of such a distinction, the Constitution, statutes, and the common law separate criminal and civil proceedings by "employing different rules of procedure, burdens of proof, rules of discovery, investigatory practices, and modes of punishment."[138]

The line between criminal and civil cases, however, has not been clear under case law.[139] The Supreme Court has struggled to draw the line.[140] Cheh observes the dilemma in drawing the line as follows:

> If "criminal case" is defined too broadly, then the cumbersome baggage of criminal procedure will be carried into a wide range of government and private lawsuits. If it is defined too narrowly, then the values that

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133. *Id.* at 516.

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

135. U.S. CONST. amend. VI (emphasis added).

136. U.S. CONST. amend. VII (emphasis added).

137. Cheh, *supra* note 78, at 1325.

138. *Id*.

139. *Id*. at 1329–30 ("[A]ttempting to fit all cases neatly into one category or the other, though sometimes necessary and useful, can cause a good deal of mischief.").

140. *Id.* at 1330 ("[T]he Supreme Court sometimes has struggled to unravel its doctrine from the tangled embrace of dichotomy.").

> underlie various constitutional provisions will be sacrificed simply because they arise in a proceeding denominated as civil.[141]

b. Problem of Civil Penalty Proceedings

The legislature started adopting civil penalties rapidly during the middle of the twentieth century, and since then Congress has increased the size of civil penalties and made the imposition of them procedurally easier.[142] The main reason for the increasing use of civil penalties is the growth of the administrative state in which Congress has steadily increased both the number of administrative agencies and their powers to seek civil penalties.[143]

Imposition of civil penalties is cheaper and more efficient than imposition of criminal penalties because civil penalties are not constrained by criminal procedure.[144] The government has expanded "the arsenal of weapons available to reach antisocial behavior" by employing civil penalty proceedings.[145] The government's enforcement has become more efficient because civil penalty proceedings enable "speedy solutions that are unencumbered by the rigorous constitutional protections associated

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141. *Id*.

142. K. Mann, *supra* note 129, at 1844.

143. *Id*. at 1849–50. He observes that "[w]hen punitive civil sanctions were proposed in Congress, they were considered an alternative to criminal prosecution. Lawmakers thought criminal law was overly complex, oversensitive to political influence, and inefficient—an obstacle to effective law enforcement." *Id*. at 1853.

144. *Id*. at 1798. He argues that in many cases the motivation to introduce civil penalties has been to avoid criminal procedural protection. Coffee also observes that "procedural informality" of civil penalty proceedings benefit the prosecution. John C. Coffee Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Models – And What Can Be Done about It*, 101 YALE L.J. 1875, 1887 (1992). He argues that, compared to criminal proceedings, civil penalty proceedings have numerous advantages such as "informal rules of procedure and evidence . . . the ability to prove their cases simply by a preponderance of the evidence [and evasion of] the jury's ability to nullify an overly harsh law." *Id*. at 1887–88. Coffee concludes that "civil penalties, particularly when administratively imposed, could provide the means for evading constitutional safeguards." *Id*. at 1888.

145. Cheh, *supra* note 78, at 1329.

with criminal trials, such as proof beyond a reasonable doubt, trial by jury, and appointment of counsel."[146]

Civil penalties also protect society from both underenforcement and overenforcement.[147] As Mann argues, civil penalties prevent underenforcement by providing punitive sanctions for conduct that is not severe enough to justify criminal penalties, and prevent overenforcement by providing noncriminal sanctions for conduct that is so severe that it is unreasonable to impose only remedial sanctions.[148]

Because civil penalties are sometimes more severely punitive than criminal sanctions, they have replaced a significant part of criminal enforcement.[149] According to Mann, civil penalties form a "middleground" or "hybrid" jurisprudence in which the purpose is punishment but the procedure is primarily civil.[150] Mann summarizes the criminal and civil paradigms in his article. In criminal proceedings, wrong is defined as violation of public norms, admissibility of evidence is restrictive, the burden of proof is high, and the purpose is punishment.[151] On the other hand, in civil proceedings, wrong is defined as actual injury to private interests, admissibility of evidence is inclusive, the burden of proof is lower, and the purpose is restitution and compensation.[152] Mann argues that civil penalties mix the characteristics of the civil and criminal paradigms.[153] Mann's argument begs the question, how have U.S. courts applied constitutional protections in civil penalty proceedings?

c. Case Law in the United States

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146. *Id*. Note that legislators and prosecutors, however, have sometimes tried to devise various methods, such as changing the labels of the statutes, to circumvent the constitutional protections and escape the burdens of criminal proceedings. Charney, *supra* note 5, at 480. For example, the legislatures have changed many criminal sanctions to civil penalties. *Id*. at 481.

147. K. Mann, *supra* note 129, at 1865.

148. *Id*.

149. *Id*. at 1798.

150. *Id*. at 1799.

151. *Id*. at 1813.

152. *Id*. Cheh also observes that while criminal proceedings emphasize adjudication of guilt with strict constitutional protections for the accused, civil proceedings emphasize the rights and obligation of private parties. Cheh, *supra* note 78, at 42.

153. K. Mann, *supra* note 129, at 1813.

Fourth Amendment protections apply to noncriminal regulatory or administrative searches.[154] It is because "the fourth amendment's concern with invasions of privacy and arbitrary governmental intrusions can arise in both [the] criminal and noncriminal contexts."[155]

The express language of the Fifth Amendment provides that the self-incrimination privilege applies only to criminal cases.[156] The Supreme Court, however, has not confined the privilege to protecting a defendant in a criminal trial. For example, the privilege applies to proceedings leading to a criminal trial, such as grand jury proceedings[157] and in-custody interrogation.[158] Witness in a governmental civil proceeding can also invoke the self-incrimination privilege.[159]

Whether the self-incrimination privilege applies to defendants in civil penalty proceedings, however, is not clear. In *Boyd v. United States*,[160] the Supreme Court suggested the self-incrimination privilege applies to civil penalty proceedings. The Court found that "[because] suits for penalties and forfeitures**,** incurred by the law**,** . . . are of this *quasi*-criminal nature**,** . . . they are within the reason of the criminal proceedings for all purposes of the [F]ourth [A]mendment of the [C]onstitution, and [the self-incrimination privilege]."[161]

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154. Charney, *supra* note 5, at 490 (citing Boyd v. United States, 116 U.S. 616 (1886)); *see also* Camara v. Municipal Court of San Francisco, 387 U.S. 523, 540 (1967) (holding that Fourth Amendment requires a warrant for an administrative inspection of a personal residence); See v. Seattle, 387 U.S. 541, 542 (1967) (holding that *Camara* applies to business property).

155. Cheh, *supra* note 78, at 1371. The Fourth Amendment may also apply to a wrongful search or seizure conducted by a private party if a private citizen's actions are regarded as having acted as an "instrument" or agent of the state. Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971).

156. U.S. CONST. amend. V.

157. United States v. Mandujano, 425 U.S. 564, 572 (1977).

158. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

159. Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977); *see also* Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 94 (1964) (holding that witness can claim the self-incrimination privilege in any federal, state, or local proceeding for any civil, criminal, or administrative proceeding). Warren, however, argues that the self-incrimination privilege has been applied so narrowly that the protection in actuality is not as great as expected. WARREN, *supra* note 91, at 500.

160. 116 U.S. 616 (1886).

161. *Id*. at 634.

Applying the reasoning of *Boyd*, the Supreme Court in *Lees v. United States*[162] held that the defendant could not be compelled to be a witness against himself in an action to recover a penalty under the act prohibiting the importation of aliens because though in form a civil action, "[it] is unquestionably criminal in its nature."[163] In *United States v. Ward*, however, the Supreme Court held that the privilege did not apply to the government proceeding to impose a 500-dollar penalty against a person who spilled oil into the river.[164] The Court found that the proceeding was not "'so far criminal in [its] nature' as to trigger the Self-Incrimination Clause."[165]

Although "[t]he Court has not provided a clear or detailed justification for the conflicting results of *Ward* and *Boyd*",[166] Cheh argues that the following rule emerges by analyzing various Supreme Court cases:

> A person may invoke the privilege against self-incrimination in any civil proceeding where she is accused of having engaged in conduct that constitutes a crime or a public offense and in which she faces penalties

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162. 150 U.S. 476 (1893).

163. *Id*. at 480–83 (citing *Boyd*).

164. United States v. Ward, 448 U.S. 242, 246–47, 253–55 (1980).

165. *Id.* at 253–54 (alteration in original).

166. Cheh, *supra* note 78, at 1387. The Supreme Court has taken different approaches for different constitutional protections at different times. Charney criticizes the Supreme Court on the ground that "there is no unifying thread running through either the theories or the cases in which [constitutional protections] have been applied." Charney, *supra* note 5, at 491. Cheh argues that whether constitutional protections apply to civil and administrative proceedings should depend on whether protections are procedural or substantial. She argues that "strictly" procedures protections, such as the right to jury trial, the right to appoint counsel, and the due process requirements of proof beyond a reasonable doubt and the presumption of innocence, should be limited to criminal cases. Cheh, *supra* note 78, at 1331, 1369. On the other hand, she argues that substantial protections, such as protection against unreasonable searches and seizures, double jeopardy, and self-incrimination, should not be confined to criminal cases. *Id*. Mann argues that instead civil penalties as middleground sanctions should be accorded a hybrid procedural protection. K. Mann, *supra* note 129, at 1870. He argues that Congress and the Supreme Court, however, have used a "bipolar distinction" of criminal and civil cases when considering procedural protections in civil penalty proceedings. *Id*.

> traditionally associated with criminal punishment -- that is, fines or incarceration.[167]

Cheh argues that such a rule is consistent with *Ward* and *Boyd*, and the privilege would apply "to proceedings to exact statutory penalties which . . . are grossly disproportionate to the harms caused."[168]

3. Parallel Proceedings by DOJ and SEC

Parallel criminal proceedings by the DOJ and administrative or civil proceedings by the SEC are generally permissible. The Supreme Court has ruled that "the government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it does not act in bad faith."[169] The Court also suggested that government may be held to have acted in bad faith if it brings a civil action "solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution."[170]

In *SEC v. Dresser Industries, Inc.*, the appellant challenged the SEC for execution of a subpoena duces tecum on the ground that there was simultaneous criminal litigation by the DOJ.[171] The D.C. Circuit refused to bar the SEC subpoena, noting that:

> The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.[172]

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167. Cheh, *supra* note 78, at 1388 (citing, for example, United States v. United States Coin & Currency, 401 U.S. 715, 721–22 (1971) (holding that the fifth amendment protection applies when a forfeiture statute viewed in its entirety is "intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.")).

168. Cheh, *supra* note 78, at 1388.

169. United States v. Stringer, 535 F.3d 929, 936 (9th Cir. 2008).

170. *Id.* at 137. (citing United States v. Kordel, 397 U.S. 1, 11–12 (1970)).

171. 628 F.2d 1368, 1370 (D.C. Cir. 1980) (en banc).

172. *Id.* at 1374; *see also* SEC v. First Fin. Grp. of Tex., Inc., 659 F.2d 660 (5th Cir. 1981) ("The simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the different interests promoted by different regulatory provisions.").

The court, however, observed that "the strongest cases for deferring civil proceedings until after completion of criminal proceedings" included the following two cases.[173] First case is "where there is specific evidence of agency bad faith or malicious governmental tactics."[174] Second case is "[where the] noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery . . . , expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case."[175] The court also added that the deferral should not seriously injure the public interest.[176]

The Attorney General explains the DOJ policy regarding the parallel proceedings as follows:

> Department policy is that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law, whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, regulatory, and/or agency administrative parallel (simultaneous or successive) proceedings.[177]

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173. *Dresser Indus. Inc.*, 628 F.2d at 1375–76.

174. *Id.* at 1375.

175. *Id.* at 1376.

176. *Id.*

177. Memorandum from the Attorney General to All United States Attorneys, Director, Federal Bureau of Investigation, All Assistant United States Attorneys, All Litigating Divisions, and All Trial Attorneys (Jan. 30, 2012) (available at https://www.nsf.gov/oig/outreach/suspension_workshop/AG%20Holder%2001-30-2012%20Memorandum.pdf) [hereinafter Memorandum from the Attorney General]. The memo argued the legitimacy of parallel proceedings by relying on the cases such as *Stringer*, *Kordel*, and *Dresser*. *Id.*; *see also* United States v. Kordel, 397 U.S. 1, 10 (1970) ("It would stultify enforcement of federal law to require a government agency . . . invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the outcome of a criminal trial."); *Dresser Indus. Inc.*, 628 F.2d at 1374 ("In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence."); United States v. Stringer, 535 F.3d 929, 933 (9th Cir. 2008) ("There is nothing improper about the government undertaking simultaneous criminal and civil investigations.").

The memo emphasized the importance of coordination and information sharing because "[i]f the government does not consider and properly manage potential parallel matters, it may not be able to realize all of the remedies available to the United States."[178]

Many other federal agencies set similar internal policies encouraging the use of parallel criminal and civil proceedings.[179] A memo of the Environmental Protection Agency says that the parallel proceedings are appropriate "where the violations merit the deterrent and retributive effects of criminal enforcement, yet a civil action is also necessary to obtain an appropriate remedial result, and where the magnitude or range of the environmental violations and the available sanctions [support the parallel proceedings]."[180]

Similarly, Environment & Natural Resources Division of the DOJ stated in its policy that "[w]hen it appears that a parallel proceeding may be appropriate, civil and criminal attorneys should exchange information and evidence received from agencies as early as possible in the process, conduct joint investigations where appropriate, and consult together on an ongoing basis."[181] Further, the SEC's Enforcement Manual encourages its staff "to work cooperatively with criminal authorities, to share information, and to coordinate their investigations with parallel criminal investigations when appropriate."[182]

A former director of the SEC also noted regarding the parallel proceedings between the SEC and the DOJ as follows:

> [A]s long as we are making decisions for ourselves - independent of the criminal interest - and we do not use one another's investigative powers and processes to advantage the other's interest, then we are okay. This is because [courts] recognize that there are efficiencies to be achieved where the government is asking for information. But what the courts do

178. Memorandum from the Attorney General, *supra* note 177, at 2.

179. Patricia M. Sulzbach & Christopher B. Clare, *Navigating the Government's Use of Parallel Proceedings*, 41 LITIG. 23, 24 (2014).

180. Memorandum from Granta Y. Nakayama to Regional Administrators, Regional Counsel, Regional Enforcement Directors, and OECA Office Directors (Sept. 24, 2007) (available at https://www.epa.gov/sites/production/files/documents/parallel-proceedings-policy-09-24-07.pdf).

181. U.S. Dep't of Just., Environment & Natural Resources Division Directive 2008-02, Parallel Proceedings Policy at § III(2) (2008).

182. SEC MANUAL, *supra* note 94, § 5.2.1.

> not want to see us doing is blending our processes in a way that would work potential unfairness to the disadvantage of the people that we investigate.[183]

a. Communication between DOJ and SEC

The SEC has two processes for the referral of criminal cases to the DOJ: a formal process and an informal process. In a formal process, SEC staff prepares a criminal reference report for the Commission, which decides whether to refer the case to the DOJ.[184] The formal process, however, is rarely used.[185] In the informal process, SEC staff may discuss a nonpublic investigation with DOJ prosecutors with prior approval of a senior official of the Enforcement Division.[186] Upon a written request from the DOJ, the Enforcement Division of the SEC may share its investigative files with the DOJ.[187] SEC staff also often communicates with DOJ prosecutors informally, which may lead to a request for the investigative files.[188] It is also very common that the DOJ and the SEC simultaneously investigate a party on the same conduct.[189]

Parties subject to parallel criminal and administrative proceedings, however, may worry that information given to the SEC could be used by the DOJ in contravention of the constitutional protections. The SEC has a broad authority to issue subpoenas to call witnesses, take evidence, and require the production of documents,[190] and to conduct inspections and examinations of books and records required to be kept by regulated firms.[191] The self-incrimination privilege cannot be asserted to preclude

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183. *Panel: The SEC's Perspective*, 2013 COLUM. BUS. L. REV. 519, 525-26 (2013) (alterations in original).

184. 17 C.F.R. § 202.5(b) (2017).

185. ENFORCEMENT MANUAL, *supra* note 88, at 394.

186. 17 C.F.R § 203.2 (2017).

187. 17 C.F.R. § 200.30-4(a)(7) (2017).

188. ENFORCEMENT MANUAL, *supra* note 88, at 394. Practitioners observe that because of rare use of the formal process, there is a lack of consistency in case referrals to the DOJ, which in turn makes it more difficult to assess the likelihood of a criminal prosecution. *Id.*

189. Davis, *supra* note 76, at 64; *see also* ENFORCEMENT MANUAL, *supra* note 88, at 401 (observing that the parallel enforcement investigations are "the norm and can be challenging to defend").

190. *See supra* Section II.A.1.a (describing SEC's subpoena power).

191. *See supra* Section II.A.1.b (describing SEC's inspection powers).

production of documents such as books and records that are required to be maintained by law.[192]

Though due process challenges have rarely been successful, two recent cases suggest that the SEC and the DOJ may not work too closely to use each other's enforcement without proper notice to the target.[193]

b. Scrushy

In *United States v. Scrushy*, the district court held that the SEC and the DOJ improperly colluded and granted the defendant's motion to suppress testimony.[194] In that case, the SEC investigated a company called HealthSouth for false and omitted statements in its financial statements.[195] The SEC worked with the U.S. Attorney's Office ("USAO") in preparing for a deposition of Scrushy, HealthSouth's CEO, without notifying Scrushy that he was the target of a criminal investigation.[196] The SEC moved the place of the deposition from Georgia to Alabama upon request from the USAO.[197] During the deposition, the SEC did not ask certain questions upon USAO's request to conceal USAO's involvement but asked questions based on information given by the USAO.[198]

The federal district court in Alabama found that the SEC and the DOJ departed from the proper administration of justice because they

192. *See* ENFORCEMENT MANUAL *supra* note 88, at 108–09 (citing Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943)); *see also* Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 202, 209 (1946) (observing that the Fourth Amendment does not directly apply to subpoenas because they do not involve "actual searches and seizures" but ruling in analogy that probable cause required in warrant is satisfied in case of subpoenas if "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry."); *see also* Persaud, *supra* note 99, at 99. Persaud, however, points out that as to the standard for reasonableness in issuing administrative subpoenas, the courts have not articulated a clear rational for the use of information collected by an administrative agency for a subsequent criminal proceeding. *Id.*; *see also* Section II.A.3 (discussing the constitutionality of parallel criminal and administrative proceedings).

193. ENFORCEMENT MANUAL, *supra* note 88, at 402.

194. United States v. Scrushy, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005).

195. *Id.* at 1136–37.

196. *Id.*

197. *Id.* at 1136.

198. *Id.* at 1136–37.

"manipulated the simultaneous investigations for [their] own purposes."[199] The court emphasized that the SEC and the DOJ failed to notify Scrushy and his attorneys that Scrushy was the target of the criminal investigation, that the SEC staff in effect had been pulled into the criminal investigation, and that the deposition was moved to Alabama for criminal venue purposes.[200]

c. Stringer

In *United States v. Stringer*, the district court reached a similar conclusion, but the Ninth Circuit reversed.[201] In that case, the SEC commenced an investigation of former executives, including Stringer, of FLIR Systems, Inc. ("Defendants"), for securities fraud while the Oregon USAO had been conducting a criminal investigation of the Defendants.[202] The SEC, the USAO, and the Federal Bureau of Investigation met to discuss the investigations and decided to hold off criminal investigations so that the SEC could obtain statements from the Defendants.[203] The USAO closely cooperated with SEC's interview of the Defendant, having regular meetings and giving instructions on how to question the Defendants.[204] The SEC and the USAO, however, wanted to conceal the USAO's involvement.[205] In response to questions from Stringer's attorney about the USAO's involvement, the SEC staff answered that "it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned [i.e., the USAO]."[206] The SEC staff also attached Form 1662 to the subpoenas, containing the following language:

> Information you give may be used against you in any federal . . . civil or criminal proceeding brought by the Commission of any other agency.

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199. *Id*. at 1140.
200. *Id*. at 1139.
201. United States v. Stringer, 535 F.3d 929, 933 (9th Cir. 2008), *rev'g* 408 F. Supp. 2d 1083, 1088–89 (D. Or. 2006) (finding that the government's tactic violated defendants' due process and Fifth Amendment rights).
202. *Id.*
203. *Id.*
204. *Id.* at 934.
205. *Id.*
206. *Id.* at 935.

> You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment of the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty, or forfeiture.[207]

None of the Defendants invoked the privilege against self-incrimination during the depositions.[208]

The district court found that "the government engaged in deceit and trickery to keep the criminal investigation concealed" and granted the Defendants' motion to suppress statements made during the depositions.[209] The Ninth Circuit, however, reversed the decision, holding that "the government's conduct does not amount to a constitutional violation under either the Fourth or Fifth Amendments."[210] The Ninth Circuit reasoned that a standard form sent to the defendants, Form 1662, sufficiently disclosed that the information received by the SEC could be used for criminal proceedings.[211] The Ninth Circuit found that the government conduct did not amount to "deceit or an affirmative misrepresentation", and at most it was merely "a government decision not to conduct the criminal investigation openly."[212] The Ninth Circuit also noted that the fact that the SEC began its civil investigation before contacting the USAO tend to "negate any likelihood that the government began the civil investigation in bad faith, as, for example, in order to obtain evidence for a criminal prosecution."[213]

d. Other Cases

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207. *Id.* at 934–35.

208. *Id.* at 935.

209. United States v. Stringer, 408 F. Supp. 2d 1083, 1089, 1092, *rev'd*, 535 F.3d 929 (9th Cir. 2008).

210. *Stringer*, 535 F.3d at 932.

211. *Id.* at 934.

212. *Id.* at 932.

213. *Id.* at 939. The Ninth Circuit provided, as "a clear example of government bad faith", a case in which the U.S. Citizenship and Immigration Service interviewed the defendant to collect evidence for criminal false statements though it had already determined that the defendant was not eligible for citizenship. *Id.* at 939 (citing United States v. Carriles, 486 F. Supp. 2d 599, 619-20 (W.D. Tex. 2007)).

The government seems to be able to deceive a defendant if they do not lie, and in some cases, it seems the government may even lie.[214] For example, in one case, the U.S. Coast Guard told the captain of a ship that it conducts routine administrative examinations but concealed the truth that there was a parallel criminal investigation.[215] The captain filed a motion to suppress any statements he made during the inspection, claiming that he was deceived by the Coast Guard, but the federal district court in Alabama disagreed.[216] The court reasoned the Coast Guard did not deceive the captain because it actually performed the inspections and only remained silent about the criminal investigation, which did not amount to an affirmative misrepresentation.[217]

In another case, the government conducted wastewater testing and investigated a company books under search warrants.[218] The government then lied to the defendants that the testing was routine monitoring.[219] The defendants later tried to suppress the evidence, but the District Court denied the motion, reasoning that the defendants could not have done anything different even if they knew the true purpose of the testing because the testing was conducted under the search warrants.[220]

e. Practice and Criticism

As it stands, U.S. case law seems to allow the SEC and the DOJ to conduct parallel administrative and criminal investigations and exchange information in securities enforcement unless they do not act in bad faith.[221]

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214. *See* Sulzbach & Clare, *supra* note 179, at 25.

215. United States v. La Forgia, No. 12-0057-WS-C, 2012 U.S. Dist. LEXIS 71019 at *8 (S.D. Ala. May 21, 2012).

216. *Id*. at *14.

217. *Id*. at *16. The court further ruled that "the presence or absence of a nefarious motive is of no consequence to the analysis." *Id*. at *25. This ruling might be overstated because, for example, the Ninth Circuit in *Stringer* implied that the government may not begin a civil investigation in bad faith to obtain evidence for a criminal prosecution. *See Stringer*, 535 F.3d at 939; *see also* SEC v. Dresser Indus., 628 F.2d 1368, 1375–76 (D.C. Cir. 1980) (observing that "the strongest cases for deferring civil proceedings until after completion of criminal proceedings [includes] where there is specific evidence of agency bad faith or malicious governmental tactics.").

218. United States v. Rosenblum, No. 07-294 (JRT/FLN), 2007 U.S. Dist. LEXIS 96607 at *3–7 (D. Minn. Dec. 21, 2007).

219. *Id*. at *7, *13.

220. *Id*. at *23–24.

221. United States v. Kordel, 397 U.S. 1, 11 (1970).

The table below summarizes when the government's conduct would likely be construed as "acting in bad faith" under U.S. case law.

	SEC	DOJ
Likely Bad Faith	Conduct investigation solely to obtain evidence for DOJ.	Request SEC to conduct investigation solely to obtain evidence of DOJ.
	Lies that there is no pending criminal investigation.	Manipulate SEC's deposition by designating location and deciding what to ask or not to ask.
Unlikely Bad Faith	Closely cooperate with DOJ, having regular meetings and receiving instructions, but make its own decisions what to do.	Request SEC to conceal DOJ's involvement or pending criminal investigation.
	State that it is SEC's policy not to tell whether there is pending criminal investigation.	Hold off criminal investigation due to SEC's investigation.
	Warn that information may be used in criminal investigation using a standard form.	

In practice, both the DOJ and the SEC take note of *Stringer* and *Scrushy*. For example, Attorney General of the DOJ stated that "[d]epartment attorneys should be mindful of arguments like those raised in [*Stringer* and *Scrushy*] that civil, administrative, or regulatory proceedings are being used improperly to further a criminal investigation."[222]

The SEC also instructs its investigators to keep, among others, the following considerations in mind when conducting a parallel investigation: (1) the civil investigation should not be initiated to obtain evidence for a criminal prosecution; (2) "the staff should make its own independent decision about what documents to request . . . [and] what

222. Memorandum from the Attorney General, *supra* note 177, at n.1.

questions to ask"; and (3) if asked "whether there is a parallel criminal investigation, staff should direct . . . to the section of Form 1662 dealing with 'Routine Uses of Information,' and state that it is the general policy of the Commission not to comment on criminal investigations."[223] The SEC further notes that sharing information with criminal prosecutors is generally permissible even if the sharing is intended to, and does in fact, assist criminal investigations.[224]

In response to a question asking how far the SEC can go in recommending a course of action to the DOJ, a former director of the Division of Enforcement of the SEC stated that not telling defendants about pending criminal investigations might be unfair:

> The answer is not very far. And it implicates the *Stringer* and *Scrushy* line of cases where, in the context of a pending civil settlement, if the staff is aware that there is criminal interest in a particular defendant's conduct, then there is potential for unfairness to that defendant if the staff proceeds with recommending a settlement to the Commission, where the defendant does not know of that criminal interest. Because defendants would theoretically want to resolve their differences with the government all at the same time, and not resolve [those differences] with the SEC if they know that there is a criminal interest pending . . . . [I]n most instances the defendants that end up getting sued do not learn about the SEC's investigation until the day they are being arrested.[225]

The current practice of the SEC and the DOJ is subject to criticism by scholars and practitioners. For example, Persaud warns of the danger of parallel proceedings where criminal law enforcement could use administrative investigations to circumvent due process.[226] Persaud points out that there is still no clear guideline in the Administrative Procedure Act or case law as to the circumstances under which, and to what extent, administrative and criminal agencies could exchange information.[227]

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223. SEC MANUAL, *supra* note 94, § 5.2.1.

224. *Id.*

225. Symposium, *Panel: The SEC's Perspective*, 2013 COLUM. BUS. L. REV. 519, 524 (2013) (internal citations omitted).

226. Persaud, *supra* note 99, at 78.

227. *Id.* at 79; *see also* SIFFERT & RAKOFF, *supra* note 70, at ¶ 2.04(2)(a) ("[I]t also requires a case by case approach in order to measure good faith and whether the good faith

Persaud criticizes the courts' reasoning on the ground that there seems to be a presumption of good faith, and affected parties must provide clear evidence of bad faith, which involves a highly challenging task to prove "that the sole purpose of the administrative investigation action was to assist the parallel criminal proceeding."[228] He proposes that the judicial and legislative branches should redress the imbalance, particularly in relation to the privilege of self-incrimination and burden of proof, but he does not provide how they should redress the imbalance.[229]

Similarly, Sulzbach and Clare point out the risk that government agencies may use parallel investigations more aggressively and frequently.[230] They observe that *Stringer*[231] demonstrates how administrative or civil proceedings could be used as an excuse for a parallel criminal proceeding where prosecutors may obtain incriminating evidence, including "material unknowingly provided by a defendant that would otherwise be inaccessible."[232] They also argue that, under the analysis of *Stringer*, the government can cure violations of constitutional rights and "cleanse what otherwise might be considered deceitful government conduct," merely using a form with boilerplate language.[233]

Even though the judiciary has endorsed the government's potentially questionable tactics,[234] there would still be two remaining limits.[235] First, a civil or administrative investigation may not be a sham designed solely for a prosecutor to obtain evidence for a criminal proceeding.[236] Second, the agencies may be silent, refuse to answer, or provide ambiguous

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requirement was violated when a summons was issued solely for criminal investigatory purposes before criminal proceedings were instituted.").

228. Persaud, *supra* note 99, at 96.

229. *Id.* at 109.

230. Sulzbach & Clare, *supra* note 179, at 23.

231. United States v. Stringer, 535 F.3d 929, 933 (9th Cir. 2008) (holding that the SEC's standard form adequately warned the defendants that evidence could be used in criminal proceedings).

232. Sulzbach & Clare, *supra* note 179, at 24.

233. *Id.*

234. *See* Persaud, *supra* note 99, at 93 ("Yet the judicial branch, thus far, has been reluctant to interfere where the good faith standard has been met.").

235. Sulzbach & Clare, *supra* note 179, at 25, 27. Sulzbach recommends clients to seek stays in a civil or administrative proceeding so they can invoke the Fifth Amendment in a criminal case but later testify in the civil matter. *Id.* at 27.

236. *Id*. at 25.

answers, but not actually lie about a pending criminal investigation.[237] Sulzbach and Clare point out that even though one case seems to allow the government to lie, the case was exceptional because the government had a search warrant.[238]

I agree with the argument above that the parallel proceedings may pose a significant risk of infringing individuals' constitutional rights and may be unfair to the defendant who might have changed conduct if he had known that there was a pending criminal investigation. However, I do not believe the guideline under case law is unclear. As Sulzbach and Clare pointed out, and I summarized above, there is a clear line when the government conduct becomes "bad faith." Under the current U.S. case law, the criminal investigators may not use evidence collected through administrative investigations if the criminal investigators (1) use administrative investigations as a "sham" (i.e., using solely to obtain evidence for criminal proceedings); (2) let administrative investigators affirmatively lie or make misleading statement to conceal the existence of criminal investigations if asked whether there is a parallel criminal investigation; or (3) manipulate administrative investigations by deciding what to do and not to do.

B. Other Countries

As discussed above, the SEC needs a search warrant to forcibly inspect an individual or company, and the privilege against self-incrimination is available throughout SEC investigations as long as there is a reasonable basis for believing that an answer to the question is incriminating.[239] I, however, could not find any comprehensive research that compares how domestic laws of other jurisdictions protect constitutional rights in parallel proceedings. Therefore, I will compare administrative powers of securities regulators, including authority to impose substantial monetary penalties and the use of information in criminal proceedings in the United States with those in six jurisdictions, Australia, Canada, Hong Kong, Japan, Singapore and the United Kingdom.

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237. *Id*.; *see also* SIFFERT & RAKOFF, *supra* note 76, at ¶ 2.04(1)(a) ("When the subject of the investigation is deceived into believing that the proceeding is purely civil in nature, the evidence obtained by the government may be suppressed at the criminal proceeding on Fourth or Fifth Amendment grounds.").

238. Sulzbach & Clare, *supra* note 179, at 25.

239. *See supra* II.A.1.c.

1. Australia

An administrative securities regulator in Australia, the Australian Securities and Investment Commission ("ASIC") may refer a case to the Commonwealth Director of Public Prosecutions if it believes that it has "gathered sufficient evidence to support the view that a criminal offence has been committed."[240]

Section 35 of the Australian Securities and Investments Commission Act 2001 ("ASIC Act") provides that, if a person does not voluntarily produce a document, then the ASIC, with the assistance of the police, may conduct searches and seizures under a search warrant.[241] A magistrate may issue a search warrant if he is satisfied that there are reasonable grounds to suspect that there are documents on particular premises, whose production could not be required otherwise.[242]

The ASIC Act provides that "it is not a reasonable excuse for a person to refuse or fail: (a) to give information; or (b) to sign a record; or (c) to produce a book . . . [that it] might tend to incriminate the person or make the person liable to a penalty."[243] It further provides that if the person

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240. INFORMATION SHEET 151: ASIC'S APPROACH TO ENFORCEMENT, 5 (AUSTL. SEC. AND INFO. COMM'N).

241. *Australian Securities and Investments Commission Act 2001* (Cth) pt 3 div 3 ss 35 & 36 (Austl.) [hereinafter *ASIC Act*].

242. *Id.* s 36(1). Note that the standard is substantially similar to the one required for a criminal search warrant, which requires showing of reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises. *Crimes Act 1914* p 1AA d 2 s 3E(1) (Austl.).

243. *ASIC Act*, *supra* note 241, s 68(1). In Australia, the self-incrimination privilege is considered "testimonial in nature," and does not cover evidence that is "non-testimonial in nature," such as fingerprints and DNA samples. Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, in ALRC INTERIM REPORT 127 at p. 340–41 (2015) [hereinafter ALRC REPORT]. The ALRC Report quotes the following language from *Sorby v Commonwealth* (1983) 152 CLR 281:

The privilege prohibits the compulsion of the witness to give testimony, but it does not prohibit the giving of evidence, against the will of a witness, as to the condition of his body. For example, the witness may be required to provide a fingerprint, or to show his face or some other part of his body so that he may be identified.

Id. at 341. Whether documents are non-testimonial in nature is not clear, but the ASIC points out that "in three judgments of the High Court, documents have been referred to as 'in the nature of real evidence which speak for themselves', in contrast to testimonial evidence, with the inference that the privilege may be unnecessary with regard to

claims in advance that the statement or signing of a record might incriminate him, the evidence is not admissible against the person in a criminal proceeding or a proceeding to impose a penalty.[244]

ASIC may file a civil claim in court against persons who committed market misconduct to seek remedies including orders of disqualification, disgorgement, and monetary penalties up to $200,000.[245]

In Australia, it is not clear whether and how various evidentiary and procedural protections in criminal proceedings, such as the highest burden of proof of beyond reasonable doubt and the self-incrimination privilege, are accorded in civil penalty proceedings.[246] Lees observes that the hybrid nature of civil penalties makes it difficult to come up with a clear guideline because the civil character supports the expediency, and the quasi-criminal character supports greater judicial oversight.[247]

In 2002, the Australian Law Reform Commission recommended the enactment of the "Regulatory Contraventions Statute" to cover various aspects of the law and procedure governing civil penalty proceedings.[248] Lees, however, observes that the legislature has not implemented the recommendation and whether procedural protections apply in civil penalty proceedings has been decided by courts on an ad hoc case-by-case basis.[249] For example, a court held that a person should not be ordered to make a discovery in contravention of the "privilege against exposure to penalties," which is substantially similar to the self-incrimination privilege, when the Australian securities regulator sought a disqualification order against the person in a civil proceeding.[250] Similarly, a court held that the penalty

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documents." *Id.* The ALRC Report, however, notes that in those cases it was not necessary for the court to decide whether the privilege would cover documents. *Id.*

244. *ASIC Act*, *supra* note 241, s 68(3). Although the ASIC enters into a Memorandum of Understanding with the Commonwealth Director of Public Prosecutions regarding sharing of information, it is silent as to how to deal with self-incriminating evidence. *See* MEMORANDUM OF UNDERSTANDING (AUSTL. SEC. AND INFO. COMM'N AND DIR. OF PUB. PROSECUTIONS).

245. ASIC'S APPROACH TO ENFORCEMENT, *supra* note 240, at 5.

246. Matthew Lees, *Civil Penalties and Procedural Protections*, 87 AUSTL. L.J. 404, 405 (2013).

247. *Id.* at 424.

248. AUSTRALIAN LAW REFORM COMMISSION (ALRC), PRINCIPLED REGULATION: FEDERAL CIVIL AND ADMINISTRATIVE PENALTIES 263 (2002).

249. Lees, *supra* note 246, at 406.

250. *Id.* at 414 (citing *Rich v Austl Sec & Inv Comm'n* (2004) 220 CLR 129 (Austl.)).

privilege applies in a proceeding in which the Australian securities regulator sought a civil penalty.[251]

2. Canada

In Canada, provincial securities regulators will often collaborate with other law-enforcement agencies in criminal investigations.[252] Under Section 13(4) of the Ontario Securities Act, investigators of the Ontario Securities Commission may conduct searches and seizures under a search warrant.[253] A judge of the Ontario Court of Justice may issue a warrant if he is satisfied that "there are reasonable and probable grounds to believe that there may be in the building, receptacle, or place to be searched anything that may reasonably relate to the [investigation.]"[254]

Section 11(c) of the Charter provides: "Any person charged with an offence has the right . . . not to be compelled to be a witness in proceedings against that person in respect of the offence."[255] Section 11(c) "does not protect a witness compelled to give evidence in a securities regulatory investigation or an administrative proceeding because the individual is not 'charged with an offense.'"[256] Section 13 of the Charter, however, provides that such a witness "has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."[257]

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251. Lees, *supra* note 246, at 414–15 (citing *Austl Sec & Inv Comm'n v Mining Project Grp Ltd* (2007) 164 FCR 32 (Austl.)).

252. *Canada* in GETTING THE DEAL THROUGH at 1.

253. Ontario Securities Act, R.S.O. 1990, c. S.5, § 13(4) (Can.).

254. *Id.* § 13(5). Note that the standard is substantially similar to that required for criminal search warrant in Canada, which is to ask whether reasonable and probable grounds have been established that a crime has been committed and the search will reveal evidence of the offense. *See infra* Appendix A.2.

255. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 13 (U.K.).

256. Glen Jennings et al., *Preventing Self-Incrimination in Cross-Border Investigations*, LEXOLOGY (May 26, 2016), https://www.lexology.com/library/detail.aspx?g=50573336-55f8-4d3a-92f2-ee938950bdb5.

257. Canadian Charter of Rights and Freedoms, 1982, c 13 (U.K.).

The Ontario Securities Commission may impose two monetary sanctions: administrative penalties and disgorgement.[258] An administrative monetary penalty can be up to $1 million for each failure to comply, depending on the circumstances.[259] "Disgorgement orders require the respondent to pay the amount obtained as a result of the non-compliance with securities law."[260] The Ontario Securities Commission may "consider a respondent's ability to pay as a factor in imposing financial sanctions," but in practice, it imposes monetary sanctions irrespective of the availability of assets to deter others from contravening the Securities Act.[261]

In Canada, the rights guaranteed by Section 11 of the Charter are "available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted . . . to provide procedural safeguards in proceedings which may attract penal consequences even if not criminal in the strict sense."[262] The Supreme Court ruled that "[a] matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence."[263]

3. Hong Kong

A securities regulator in Hong Kong, the Securities and Futures Commission (the "SFC") has a wide range of enforcement powers, not

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258. OSC, *Sanctions by the Commission* (2019) http://www.osc.gov.on.ca/en/Proceedings_sanctions-commission_index.htm.

259. *Id.*

260. *Id.*

261. *Id.*

262. R. v. Wigglesworth, [1987] 2 S.C.R. 541, 542 (Can.).

263. *Id.* Although I could not find any case dealing with securities regulators' civil penalty proceedings, there is one case in which a tax court found that the rights guaranteed by section 11 of the Charter are available in a civil monetary penalty proceeding against a person who knowingly makes or participates in the making of a false statement on an income tax return. Amanda J. Stacey, *Tax Court of Canada Decides Third-Party Civil Penalty Assessments Come With Charter Protections*, SOCIAL IMPACT NEWSLETTER, Dec. 2012. The tax court found that the matter is penal in nature because the civil monetary penalties have a broad purpose of promoting public order and protecting the public at large. *Id.*

only regulatory and civil,[264] but also criminal.[265] Under Section 191 of the Securities and Futures Ordinance (the "SFO"), investigators of the SFC may conduct searches and seizures under a search warrant.[266] A magistrate may issue a search warrant if he is satisfied that there are reasonable grounds to suspect that there is, or there is likely to be, any record or document which may be required to be produced on premises specified in the information.[267]

Under Section 183 of the SFO, a person under investigation by the SFC must produce any record or document specified by the investigator and answer any question relating to the matters under investigation.[268] A person is not excused from complying with a requirement only on the ground that to do so might tend to incriminate the person, and a person who, without reasonable excuse, fails to comply with the requirement may be subject to a fine or imprisonment.[269] Any compelled statement, however, may not be admissible in evidence against the person in criminal proceedings in Hong Kong.[270]

The SFC may file a civil complaint against a person who committed market misconduct in the Market Misconduct Tribunal with the consent of the Secretary for Justice.[271] The Market Misconduct Tribunal may order the person to pay an amount equal to ill-gotten gains plus the costs and expenses reasonably incurred by the SFC.[272]

Section 65(1) of the Evidence Ordinance explicitly provides that the self-incrimination privilege is available "only as [it] regards criminal offences under the law of Hong Kong and penalties provided for by such

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264. Securities and Futures Commission, *Enforcement Philosophy* (Mar. 5, 2013) http://www.sfc.hk/web/EN/regulatory-functions/enforcement/enforcement-philosophy.html (H.K.)

265. Hong Kong Securities and Futures Ordinance, No. 5, (2002) O.H.K. § 388 (explaining the SFC can bring criminal proceedings in the Magistrate Court).

266. *Id.* § 191.

267. *Id.* Note that the standard is substantially similar to the one required for a criminal search warrant, which requires reasonable cause to believe that an offence has been or is about to be committed. Hong Kong Crimes Ordinance, (1972) Cap. 200, § 13 (H.K.).

268. Hong Kong Securities and Futures Ordinance, No. 5, (2002) O.H.K. § 183.

269. *Id.* § 184.

270. *Id.* § 187.

271. *Id.* § 252.

272. *Id.* § 257(1).

law."[273] The self-incrimination privilege, therefore, does not seem to be available in SFC proceedings to seek orders to pay disgorgement and the cost and expenses.

4. Japan

The Securities and Exchange Surveillance Commission ("JSESC") can conduct an administrative investigation to seek an administrative monetary penalty or file a criminal charge with the public prosecutor's office.[274] Under Article 177 of the Financial Instruments and Exchange Act ("FIEA"), on a voluntary basis, investigators of the JSESC may question or ask for the submission of documents from persons concerned with a case or witnesses, as well as enter into the premises of the person and inspect documents without a search warrant.[275] Although there is no statutory or case law specifically referring to the constitutionality of the power above, administrative warrantless searches are generally allowed,[276] and administrative interrogation under the tax law is considered not a compelling self-incriminatory statement.[277]

Japan takes a similar position to U.S. case law as to the use of information in criminal proceedings. In relation to an administrative tax investigation, the Supreme Court held that the power to conduct an interview and ask for the production of documents by administrative tax regulators may not be used solely for collecting evidence for a criminal proceeding.[278] The Supreme Court, however, noted that the mere possibility that the collected evidence may be used in a criminal proceeding at a later stage would not make the administrative investigation illegal.[279] Although there is no case on securities administrative investigations, the evidence collected by the JSESC may arguably be used

273. Hong Kong Evidence Ordinance, (1889) Cap. 8, § 65(1) (H.K.). Note that this provision is identical to section 14(1) of the Civil Evidence Act 1968 of the United Kingdom. Civil Evidence Act 1968, c. 64 (Eng.). *See infra* Section II.B.6.

274. JSESC, SECURITIES AND EXCHANGE SURVEILLANCE COMMISSION'S INITIATIVES—BUILDING ON A QUARTER-CENTURY OF ACHIEVEMENT 15, 16 (2017), https://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf.

275. Financial Instruments and Exchange Act, Law No. 25 of 1948, art. 177 (Japan).

276. YASUO HASEBE, CONSTITUTION 264–65 (3d ed. 2004).

277. *Id.* at 265.

278. Saiko Saibansho [Sup. Ct.] Jan. 20, 2004, 2003(A) no. 884 (Japan).

279. *Id.*

in later criminal proceedings if the purpose of such investigation is not solely to collect evidence for criminal proceedings.

The administrative monetary penalty proceeding under the Financial Instruments and Exchange Act ("FIEA") was introduced in 2004 as an administrative action to impose financial obligations on a violator for the purpose of deterring market misconduct.[280] Under the FIEA, the financial obligations are considered equivalent to economic benefits gained by market misconduct.[281] Pursuant to an amendment of the FEIA and relevant regulations in 2014 regarding the amount of administrative penalties, the administrative monetary penalty to be imposed on investment management business operators that engaged in market misconduct will be three times the amount of the investment management fee that such business operators receive or would have received for the month when the market misconduct occurred.[282]

5. Singapore

The Monetary Authority of Singapore ("MAS") is an administrative securities regulator. Under Section 164 of the Securities and Futures Act ("SFA"), the MAS may conduct searches and seizures under a search warrant.[283] A magistrate may issue a search warrant if, for example, he is satisfied that there are reasonable grounds to suspect that the production is required and production is not made voluntarily.[284]

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280. Memorandum from Working Group on Insider Trading Regulation on The Review of Insider Trading Regulation Following Recent Violations and Other Developments 8, (Dec. 25, 2012), https://www.fsa.go.jp/en/refer/councils/singie_kinyu/20121225/02.pdf [hereinafter *Working Group Memo*].

281. *Id.*

282. *See, e.g.*, Financial Instruments and Exchange Act, Law No. 25 of 1948, as amended, art. 175(1)(iii)(a); Article 1-21(2) of Cabinet Office Ordinance on Administrative Monetary Penalty Provided for in Chapter VI-II of the FIEA (examples of the new provisions added by the Amendments).

283. Securities and Futures Act Ch. 289 § 164 (Sing.).

284. *Id.* Note that the standard is substantially similar to the one required for a criminal search warrant, which requires showing of reason for the court to believe that a person would not otherwise produce the document or other thing. Criminal Justice Reform Act § 24(a) (Sing.).

Under Section 143 of the SFA, where the MAS considers that a person may have conducted market misconduct, the MAS may require the person to disclose the information that the person has about that matter.[285] The person is not excused from disclosing information on the ground that the disclosure of the information might tend to incriminate him, but if the person claims as such in advance, any statement may not be admissible in evidence against him in criminal proceedings.[286]

The MAS and the Commercial Affairs Department ("CAD") have conducted joint criminal and civil investigations since March 2015.[287] Previously the MAS would pursue civil penalty actions, and the CAD would pursue criminal investigations, but with the joint investigations, the MAS and the CAD now can both investigate all potential market misconduct and make a decision whether a case is subject to criminal or civil proceedings when investigations have concluded.[288]

Under the arrangement, the MAS and the CAD can consolidate their securities fraud investigative resources and expertise, such as the MAS's insights in supervising the financial sector and the CAD's investigative and enforcement functions.[289] Under this scheme, MAS officers are given the same criminal powers of investigation as CAD officers, including the ability to search premises and seize items.[290] Because under the Criminal Procedure Code the person examined by criminal investigators have the self-incrimination privilege,[291] MAS officers engaging in joint investigations will not have the power to compel self-incrimination statements.

The MAS may, with the consent of the Public Prosecutor, bring an action in a court against a person who conducted market misconduct to seek an order for a civil penalty of an amount equal to the greater of (1)

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285. Securities and Futures Act Ch. 289 § 143 (Sing.).

286. *Id.* § 145.

287. MONETARY AUTHORITY OF SINGAPORE, Capital Markets Enforcement 8 (Jan. 2016), https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Monographs-and-Information-Papers/MAS-Capital-Markets-Enforcement.pdf.

288. *Id.* at 8.

289. *Id.* at 9.

290. MONETARY AUTHORITY OF SINGAPORE, *MAS and CAD to Jointly Investigate Market Misconduct Offences*, (Mar. 17, 2015), https://www.mas.gov.sg/news/media-releases/2015/mas-and-cad-to-jointly-investigate-market-misconduct-offences.

291. Criminal Procedure Code § 22(2) (Sing.).

three times of the profit gained or loss avoided, or (2) $50,000 for a natural person or $100,000 for a corporation.[292]

6. United Kingdom

In the United Kingdom, the Financial Conduct Authority ("FCA") has a wide range of enforcement powers, not only regulatory and civil, but also criminal.[293] Investigator of the FCA may conduct searches and seizures under a search warrant.[294] A justice of peace may issue a search warrant if, for example, he is satisfied that there are reasonable grounds for believing that the subject did not voluntarily comply with the FCA's request and information or documents required are on the premises.[295]

The FCA can also require any person to attend an interview, provide information, and produce documents.[296] If the person is the subject of the investigation, the information sought need only be "relevant to the purposes of the investigation."[297] However, if the person in question is not "connected" with the person under investigation, the FCA must be satisfied that the information sought is "necessary or expedient for the purposes of the investigation."[298] Failure to comply with the FCA's order is "treated as a contempt of court . . . unless the individual can show that he had a reasonable excuse for his failure to comply."[299] The individual has no right to silence, but his compelled statement may not be used in any criminal proceedings in which he is the accused.[300]

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292. *Id.* §§ 232(1), (2). I could not find any law in Singapore on the question of whether the self-incrimination privilege applies to civil penalty proceedings.

293. FINANCIAL CONDUCT AUTHORITY, *Enforcement* (Apr. 22, 2016), https://www.fca.org.uk/about/enforcement.

294. Financial Services and Markets Act 2000, c. 8, § 176 (UK).

295. *Id.* § 176(1)(2). Note that the standard is substantially similar to the one required for a criminal search warrant, which is requires reasonable grounds for believing that, among others, an indictable offence has been committed, there is material on premises, which is likely to be of substantial value to the investigation, and the material is likely to be relevant evidence. *See infra* Appendix A.13.

296. Financial Services and Markets Act 2000, c.8, §§ 171–72 (UK).

297. *Id.* § 171.

298. *Id.* § 172.

299. Elly Proudlock & David Rundle, *FCA Powers Used at the Request of Overseas Regulators: A Practical Summary*, WILMERHALE UK, (Jan. 25, 2016).

300. Financial Services and Markets Act 2000, c.8, § 174(2) (UK).

The FCA may impose a fine based on two elements, "disgorgement of the benefit received as a result of the breach" and "a financial penalty reflecting the seriousness of the breach."[301] A fine is calculated based on the following five-step framework:

> (1) the removal of any financial benefit derived directly from the breach; (2) the determination of a figure which reflects the seriousness of the breach; (3) an adjustment made to the Step 2 figure to take account of any aggravating and mitigating circumstances; (4) an upwards adjustment made to the amount arrived at after Steps 2 and 3, where appropriate, to ensure that the penalty has an appropriate deterrent effect; and (5) if applicable, a settlement discount will be applied. This discount does not apply to disgorgement of any financial benefit derived directly from the breach.[302]

Section 14(1) of the Civil Evidence Act 1968 explicitly provides that the self-incrimination privilege is available only "as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law."[303] The self-incrimination privilege, therefore, does not seem to be available in FCA proceedings to impose a fine.

C. Summary

Here, I will compare and summarize the laws of seven jurisdictions to show to what extent and under what circumstances evidence obtained in administrative investigations may be used in subsequent criminal proceedings.

Of the seven jurisdictions described above, five jurisdictions (Australia, Canada, Hong Kong, Singapore, and the United Kingdom) require a search warrant by a judge for administrative securities regulators to conduct searches and seizures.[304] In those jurisdictions, the judge acts as a gatekeeper and will not issue a search warrant if he does not believe there is a reasonable basis for conducting searches and seizures, which is a standard substantially similar to the one required for a criminal search

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301. FINANCIAL CONDUCT AUTHORITY, DECISION PROCEDURE AND PENALTIES MANUAL, § 6.5.3 (2012)

302. *Id.* § 6.5A.

303. Civil Evidence Act 1968 § 14(1) (UK).

304. *See supra* Section II.B.

warrant.[305] In the United States, the SEC may require regulated persons to produce documents and issue subpoenas to obtain documents and information from non-regulated persons.[306] The SEC also conducts "informal" investigations in which the SEC requests production of documents and other information and conducts interviews on a voluntary basis.[307] In Japan, a search warrant is not required because administrative searches and seizures are only conducted on a voluntary basis with the consent of the persons subject to the investigation.[308]

In principle, there are three approaches to the problem of the use in criminal proceedings of self-incrimination evidence compelled by administrative regulators. First, in five jurisdictions (Australia, Canada, Hong Kong, Singapore, and the United Kingdom), the law puts the individual under an unlimited duty to disclose relevant information in administrative investigations, but prohibits the use of compelled evidence in criminal proceedings if it is self-incriminatory.[309] Second, in the United States, the self-incrimination privilege is considered available throughout SEC investigations and enforcement actions as long as there is a reasonable basis for believing that an answer is incriminating, although the privilege may not be invoked to refuse production of documents required to be kept by law.[310] In addition, the SEC may not share documents and information with the DOJ if the SEC or DOJ acts in bad faith, such as affirmatively lying about the existence of criminal proceedings or conducting an administrative interview solely to obtain evidence for criminal investigations.[311] Third, in Japan, the self-incrimination privilege is not available in administrative investigations because the investigations are conducted on a voluntary basis.[312] The securities regulators in Japan, however, may not share documents and information with criminal

305. *See supra* Section II.B.
306. *See supra* Section II.A.1.
307. *See supra* Section II.A.1.
308. *See supra* Section II.B.4. As the SEC does in informal investigations and the Japanese securities regulator conducts searches and seizures on a voluntary basis, regulators in other jurisdictions may rely on warrantless searches and seizures based on consent.
309. *See supra* Section II.B.
310. *See supra* Section II.A.1.
311. *See supra* Section II.A.3.
312. *See supra* Section II.B.4.

investigators if an administrative investigation is conducted solely for the purpose of obtaining evidence to be used in criminal proceedings.[313]

In contrast to the prohibition on the use of compelled self-incriminatory evidence in criminal proceedings provided in the laws of all jurisdictions, no jurisdiction has a law explicitly prohibiting the use in criminal proceedings of evidence "unreasonably" obtained by administrative investigators.[314] The difference exists probably because of three reasons. First, because the securities regulators may "reasonably" obtain documents and information either by just requesting production to regulated entities, asking consent to produce on a voluntary basis, or obtaining an administrative search warrant, the law does not need to provide for "unreasonable" searches and seizures. Second, there is sufficient ex-ante protection by the search warrant requirement, while there is less ex-ante protection against self-incriminatory statements that administrative regulators may have compelled. Administrative investigators are generally required to obtain a search warrant or consent of a person subject to the investigation. In contrast, although a person may refuse to answer a question on the grounds that his answer might incriminate him, the self-incrimination privilege can be often invoked only after the fact. Third, in five jurisdictions (Australia, Canada, Hong Kong, Singapore, and the United Kingdom), the requirement for the issuance of an administrative search warrant is substantially similar to the one required for a criminal search warrant[315], so there is no practical reason to have additional protection. In the United States and Japan, case law prohibits administrative investigators from conducting an administrative search solely for obtaining evidence to be used in criminal proceedings.[316] This difference between protections against unreasonable searches and seizures and self-incrimination also affects the law in connection with cross-border information exchange, as I will discuss in the next section.

In all six jurisdictions, but Hong Kong, securities regulators may seek civil or administrative monetary penalties, the amount of which are more than just disgorgement.[317] For example, in the United Kingdom, the FCA may impose a fine based on not only disgorgement but also a financial

313. *See supra* Section II.B.4.
314. *See supra* Sections II.A, II B.
315. *See supra* Section II.B.
316. *See supra* Sections II.A, II.B.4.
317. *See supra* Sections II.A, II.B.

penalty reflecting the seriousness of the breach.[318] In Hong Kong, the SFC may file a civil complaint with a court, but the remedy is limited to disgorgement and the costs and expenses.[319]

Law of the seven jurisdictions are divided on the question of whether the self-incrimination privilege is available in securities regulators' civil or administrative monetary penalty proceedings. In Australia and the United States, the self-incrimination privilege is available in civil penalty proceedings.[320] In contrast, in Hong Kong and the United Kingdom, the identical provisions of evidence statutes explicitly provide that the self-incrimination privilege is available only in criminal proceedings.[321] In Japan, there is no case or statutory law on the question because the securities regulator has no authority to compel self-incriminatory information.[322] Laws in Canada and Singapore are not clear on this question.

Finally, under what circumstances should evidence obtained in administrative investigations be admissible in subsequent criminal proceedings? Laws of Australia, Canada, Hong Kong, Singapore, and the United Kingdom have a bright-line rule under which compelled self-incriminating evidence by securities regulators is not admissible in criminal proceedings.[323] In contrast, in the United States and Japan, the courts will prohibit such use of evidence only if an administrative investigation is conducted solely for the purpose of obtaining evidence to be used in criminal proceedings or otherwise is used in bad faith by criminal authorities.[324] Both rules make sense because the rationale behind such inadmissibility is obviously to prevent criminal authorities from circumventing protections available in criminal proceedings by using an administrative investigation as a sham. At the same time, the rule should encourage timely communication, coordination, and cooperation between administrative and criminal authorities in good faith to conduct investigation efficiently and choose appropriate remedies depending on the circumstances to the extent that there is no infringement of constitutional protection available to the subject of investigation and no

318. *See supra* Section II.B.6.
319. *See supra* Section II.B.3.
320. *See supra* Sections II.A, II.B.1.
321. *See supra* Sections II.B.3, II.B.6.
322. *See supra* Section II.B.4.
323. *See supra* Section II.B.
324. *See supra* Sections II.A, II.B.4.

unfair burdening on the subject. The rule completely prohibiting the use of any evidence obtained through administrative investigations in criminal proceedings would also discourage securities regulators from utilizing or introducing administrative enforcement tools. In the next section, I will examine this issue in the international settings.

III. CROSS-BORDER INFORMATION EXCHANGE BETWEEN SECURITIES REGULATORS

Parallel proceedings between regulators of two countries are not unusual in cross-border cases today.[325] This section focuses on cases in which a securities regulator in one jurisdiction may be prevented from obtaining information from a securities regulator in another jurisdiction because of constitutional protections.

"Historically many of the SEC's [market misconduct] cases were simply the outgrowth of cases that were primarily domestic in nature."[326] Today, cases have increasingly involved significant overseas conduct, in many of which the jurisdictional nexus between the suspicious conduct and the U.S. market was not necessarily strong.[327] The SEC has been generally successful in forging cooperative relationships with many foreign regulators, whether in the context of parallel investigations or simply through the production of information and documents by foreign regulators.[328]However, because the SEC's administrative enforcement may involve the imposition of civil penalties,[329] it could be construed as "quasi-criminal" proceedings and prevent cross-border information exchange.

The introduction of administrative enforcement would allow securities regulators to have more flexibility and efficiency in their enforcement. Introduction of administrative enforcement, however, may also bring additional risks that require attention and cooperation among securities regulators. Because even if a sanction is labeled as "administrative" under domestic laws, it could hinder information exchange with regulators that

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325. Michael Feldberg, *U.S. Insider Trading Enforcement Goes Global*, HARVARD L. SCH. F. ON CORP. GOVERNANCE AND FIN REG. at 1 (May 26, 2013).

326. *See id.* at 1 (discussing the trend of insider trading cases).

327. *See id.*

328. *Id.* at 4.

329. ENFORCEMENT MANUAL, *supra* note 88, at 7–8.

construe it as a "quasi-criminal" sanction, even raising international double jeopardy concerns.

Recall the hypothetical case presented at the beginning of this article. There, we assumed that an investor residing in one country, where securities regulator X oversees the market, commits market manipulation or insider trading in another country where securities regulator Y oversees the market. Further, assume that Y may seek either administrative monetary penalties to make the investor disgorge ill-gotten gains or criminal penalties. Can Y use in its administrative "penalty" proceedings the documents and information that X collected through an administrative investigation when the similar use in X's country would violate the constitutional or statutory protections in X's country? Also, can Y use in its criminal proceedings the documents and information that X collected using methods that, if conducted by Y in Y's country, would violate constitutional protections in Y's country?

In this section, I will first examine how criminal authorities conduct cross-border information exchange, then compare domestic laws restricting cross-border information exchange between administrative regulators to highlight issues in the use of self-incriminating evidence, and finally propose solutions.

A. Between Criminal Authorities

1. Methods

There are generally three formal methods for a criminal investigator to obtain information from foreign jurisdictions: letters rogatory, treaty requests, and requests under executive agreements.[330] Letters rogatory are generally used "in the absence of a treaty or executive agreement."[331] "A letter rogatory is a request from a judge in [one country] to the judiciary of another country requesting the performance of an act," such as taking

330. *See* U.S. ATTORNEY'S MANUAL, CRIMINAL RESOURCE MANUAL § 274 [hereinafter ATTORNEY'S MANUAL]. There are also other methods such as ad hoc methods to secure assistance and subpoenas. *Id.*

331. *Id.* § 275.

depositions.[332] "Letters rogatory are customarily transmitted via the diplomatic channel," which may take a year or more.[333]

Criminal regulators often enter into treaties called Mutual Legal Assistance Treaties ("MLATs") to provide mutual assistance in criminal proceedings.[334] An MLAT is a powerful tool because, as a treaty, it has a binding authority, and it allows various types of assistance.[335] The DOJ maintains MLATs with a number of countries.[336] The SEC also may use it to obtain assistance in criminal investigation of securities violations, but it must ask the DOJ to assume the requesting process because the MLATs generally require that the request come through an official channel called a "Central Authority" (in case of the United States, the Attorney General or his/her designee).[337]

"Interim executive agreements of one form or another [may be] in force," but "[m]ost apply to investigations arising from illegal narcotics trafficking."[338] Some require the attorney general of a requesting country to certify to the attorney general of the requested country that specified records are required in connection with a pending investigation of criminal conduct that is covered by the agreement.[339]

2. Admissibility in the United States of Evidence Unconstitutionally Obtained in Foreign Countries

As discussed in Section I above, most countries have similar rules to protect individuals against unreasonable searches and seizures and self-incrimination, but there are slight differences in such rules. Therefore, evidence obtained by the requested country under its domestic law may

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332. *Id.*

333. *Id.*

334. Junsun Park, *Enforcement of Securities Law in the Global Marketplace: Cross-Border Cooperation in the Prosecution of Transnational Hedge Fund Fraud*, 39 BROOK. J. INT'L L. 231, 254 (2014).

335. *See, e.g.*, The Mutual Legal Assistance Treaty with Japan, Japan-U.S., S. TREATY DOC. NO. 108–12, Aug. 5, 2003 (stipulating that each contracting party shall, upon request by the other contracting party, provide mutual legal assistance in connection with investigations, prosecutions and other proceedings in criminal matters).

336. Park, *supra* note 334, at 254.

337. *Id.* at 255.

338. ATTORNEY'S MANUAL, *supra* note 330, § 277.

339. *Id.*

violate constitutional protections available in the requesting country. Here, I will examine U.S. case law on the admissibility of such evidence.

a. Unreasonable Searches and Seizures

U.S. courts will likely allow the use of evidence unconstitutionally seized in foreign countries. The Fourth Amendment ordinarily does not apply to foreign authorities enforcing their own laws in their own territory, even if American officials are present and cooperate in some degree.[340] Consequently, evidence obtained by foreign police officers from searches conducted in their own countries normally is admissible in U.S. courts, regardless of whether the search complies with the Fourth Amendment.[341]

There are, however, two exceptions: first, "if the conduct of the foreign officials during the search and seizure 'shocks the judicial conscience,' the evidence may be excluded;"[342] second, "the exclusionary rule may be invoked if American law enforcement officials substantially participated in the search or if the foreign officials conducting the search were actually acting as agents for their American counterparts."[343]

b. Self-Incrimination Privilege

340. United States v. Behety, 32 F.3d 503, 508–510 (11th Cir. 1994), cert. denied, 115 S. Ct. 2568 (1995) (holding that the Fourth Amendment does not apply to search of American ship by Guatemalan officials even though the search was conducted at American request and American officials observed and videotaped it); *see also* United States v. Getto, 729 F.3d 221, 224 (2d Cir. 2013) (holding that the Fourth Amendment does not apply to search by Israeli officials if there is no American control, direction, or an intent to evade the Constitution).

341. *Behety*, 32 F.3d at 510. In terms of relationship between states and federal investigations, "silver platter doctrine" allowed federal prosecutors to use evidence illegally gathered by state police. Elkins v. United States, 364 U.S. 206, 208 (1960). The Supreme Court, however, overturned the doctrine and held that evidence obtained by state officers during a search that, if conducted by federal officers, would have violated defendants' immunity from unreasonable search and seizure under the Fourth Amendment was inadmissible. *Id.* at 223 (1960); *see also* Virginia v. Moore, 553 U.S. 164, 176 (2008) (citing *Elkins* and criticizing the silver platter doctrine on the ground it imposed "more stringent limitations on federal officers than on state police acting independent of them.").

342. *Behety*, 32 F.3d at 510.

343. *Id.*

The Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony.[344] On the other hand, a U.S. witness may not assert the self-incrimination privilege if they could not demonstrate that testimony may be used in a criminal proceeding against the witness brought in the United States or one of the States, but only demonstrate that the witness feared the use in a criminal proceeding in a foreign country.[345]

When a witness has substantial exposure to a compelled testimony in a foreign sovereign, the government may not make use of the witness in criminal proceedings in the United States unless the government can prove that the witness' review of the compelled testimony did not shape, alter, or affect the government case.[346] In *United States v. Allen*, the defendants were charged with wire fraud in the United States but moved to suppress the testimony of a key witness, claiming that the witness' testimony was based on statements of defendants that were compelled by the U.K. Financial Conduct Authority ("FCA").[347] The FCA's interviews were compulsory but conducted on the condition that the testimony may not be used in criminal proceedings against the witness.[348] In *Kastigar v. United States*, the Supreme Court held that when the government compelled a self-incriminatory statement by conferring immunity, "the prosecution [has] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[349]

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344. United States v. Odeh, 552 F.3d 177, 200 (2d Cir. 2008); *see also* United States v. Yousef, 327 F.3d 56, 124, 145 (2d Cir. 2003) ("[T]he law is settled that statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary.").

345. *Balsys*, 524 U.S. 669, 669–72, (1998) (Holding that "concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause."). Some argue that the U.S. courts should apply self-incrimination privilege not only in the domestic, but also the international context. Amann, *supra* note 67, at 1202; *see also* Note, Neal Modi, *Toward an International Right Against Self-Incrimination: Expanding the Fifth Amendment's "Compelled" to Foreign Compulsion*, 103 VA. L. REV. 961, 969 (arguing that U.S. courts should protect foreign-compelled testimony from use and derivative use to uphold the Fifth Amendment policies).

346. United States v. Allen, 864 F.3d 63, 63–68 (2d Cir. 2017).

347. *Id.* at 63, 66–68.

348. *Id.* at 76.

349. 406 U.S. 441, 460 (1972).

Relying on *Kastigar*, the Southern District of New York denied the motion and convicted the defendants, finding sufficient evidence that the witness was not exposed to the compelled testimony.[350] The evidence included the facts that DOJ's investigation team gave a presentation to the FCA on the Fifth Amendment and related cases "in order to explain the importance of maintaining a 'wall' between the two countries' investigations," and the DOJ asked the FCA not to share any information obtained by compelled interviews.[351] On appeal, however, the Second Circuit reversed the judgment of conviction, finding that the government did not meet its burden because a key witness materially altered his testimony after being substantially exposed to defendants' compelled testimony.[352]

B. Domestic Law Restriction on International Information Exchange Between Administrative Regulators

This section will compare domestic laws of seven jurisdictions, which correspond to those compared in Section II (Domestic Information Exchange Between Administrative and Criminal Regulators), concerning cross-border information exchange between securities regulators to illustrate why a securities regulator may be prevented from obtaining information from a foreign securities regulator.

1. Overview

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention") establishes a procedure whereby each contracting state designates a "Central Authority" to receive and review incoming "Letters of Request" for taking evidence in that country.[353] Securities regulators today, however, rarely use the Convention

350. *Allen*, 160 F. Supp. 3d 684, 694–95 (S.D.N.Y. 2016), *rev'd*, 864 F.3d 63 (2d Cir. 2017).

351. *Id.*

352. *Allen*, 864 F.3d at 97.

353. Hague Conference on Private International Law Conference, Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. 2, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

as a tool to exchange information probably because the process is "unduly time consuming and expensive."[354]

The IOSCO has established high standards of cross-border enforcement cooperation through the MMoU and should continue to do so through enhancement of the MMoU. The success of international cooperation agreements depends on two factors: (1) the degree to which they are utilized and improved;[355] and (2) the degree to which domestic laws and courts support them.[356] For this reason, many countries have established provisions authorizing their securities regulators to provide cross-border assistance.[357] Some countries, however, try to restrict the use of self-incriminatory evidence in criminal proceedings in other countries.[358]

Under the MMoU, a securities regulator may request other securities regulators to provide information and documents under the following

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354. Société Nationale Industrielle Aérospatiale v. United States Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 542 (1987); *see also* Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, 57 L. & CONTEMP. PROBS. 77, 98 (1994) (arguing that the Convention needs to improve to ensure the speedy execution).

355. *See* Michael D. Mann & William P. Barry, *Developments in the Internationalization of Securities Enforcement*, 9 INT'L LAWYER 667, 696 (2005) (arguing that agreements are only statements of intent, so the practice of using them needs to be developed).

356. *See id.* at 687 (arguing that, even if there are bilateral or multilateral understandings among regulators, the ability to implement such understandings relies on whether regulators have the authority under the domestic laws).

357. *See* Securities Exchange Act § 21(a)(2) (2012) [hereinafter Exchange Act]; Federal Act on Stock Exchange and Securities Trading, Apr. 1, 2013, art. 38 (Switz.) [hereinafter Stock Exchange Act]; Federal Act on the Financial Market Supervision Act, June 22, 2007, art. 42 (Switz.) [hereinafter Financial Market Supervision Act]; Ontario Securities Act, R.S.O. 1990, c. S. 5 §§ 11(1)(b), 126, 143.10(1), 153 (Can.); Financial Services and Markets Act 2000, §§ 169, 354 (UK); Securities and Futures Ordinance, (2012) Cap. 571, §186 (H.K.); Financial Investment Services and Capital Markets Act [Civil Act], Act. No. 8635, art. 437, Aug. 3, 2007, *amended by* Act. No. 12383 (S. Kor.) [hereinafter Financial Investment Act].

358. As discussed later, no country explicitly restricts the use of evidence collected by unreasonable searches and seizures in criminal proceedings in other countries. *See infra* notes 364-66, 391 and accompanying text; KOKUSAI KYŌJO TŌ NI KANSURU HŌRITSU [Act on International Assistance in Investigation and Other Related Matters] (Japan).

procedure.[359] First, the requesting regulator must specify in writing, or orally in urgent circumstances, the facts underlying the investigation, the assistance sought, the relevant laws and regulations, and the use of non-public information and documents provided by the requested regulator.[360] Second, the requested regulator may refuse to assist for reasons including that the assistance would require the requested regulator to act in a manner that would violate its domestic law, that a criminal proceeding has already initiated in the jurisdiction of the requested regulator on the same facts and against the same person, and that the assistance would be against public interest or essential national interest.[361] Third, the requesting regulator must obtain the consent of the requested regulator if the requesting regulator uses information and documents furnished for any purpose other than those stated in the original request.[362]

2. United States

The SEC may provide information and documents to foreign regulators without any restriction of the use in criminal proceedings. Section 21(a)(2) of the Securities Exchange Act provides as follows:

> On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces.[363]

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359. IOSCO, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)*, https://www.iosco.org/about/?subsection=mmou.

360. Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, §§ 9, 10(a), May 2002, https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf [hereinafter MMoU].

361. *Id.* § 6(e). The provision that allows the requested regulator to refuse to assist if a criminal proceeding has already initiated in the jurisdiction of the requested regulator on the same facts and against the same person is in the MMoU probably because of international double jeopardy concerns. *Id.*

362. *Id.* § 10(b).

363. 15 U.S.C. § 78u(a)(2) (2017).

The SEC may, in its discretion, "conduct investigations . . . to collect information and evidence pertinent to the request for assistance."[364] It is not necessary that the conduct subject to the investigation would also constitute a violation of the laws of the United States.[365] "In deciding whether to provide such assistance, the [SEC] shall consider whether the requesting authority has agreed to provide reciprocal assistance . . . and [whether] compliance with the request would not prejudice the public interest of the United States."[366]

3. Australia

Upon request from foreign securities regulators, the Australian Securities and Investment Commission ("ASIC") may exercise compulsory powers to obtain "information, documents, or evidence" and transfer them to the foreign securities regulators under the Mutual Assistance in Business Regulation Act 1992 ("MABRA").[367] There are, however, some restrictions on such assistance under the MABRA, which

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364. *Id.*

365. *Id.*

366. *Id.* The SEC, therefore, may refuse a request for assistance if such assistance prejudices the public interest of the United States. In the absence of explicit statutory language, however, it would be difficult for a subject of the investigation to seek injunction preventing the SEC from providing assistance, claiming that such assistance would violate constitutional protection available in the United States.

367. Art. 6 of Mutual Assistance in Business Regulation Act 1992 provides as follows:

> 6. Making of requests
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> (1) A foreign regulator, for purposes relating to the administration or enforcement of a foreign business law, may request a Commonwealth regulator to arrange for: (a) the obtaining from a person of information, documents or evidence specified in the request or relating to a matter specified in the request; and (b) transmitting such information, evidence or copies of such documents to the foreign regulator.

Mutual Assistance in Business Regulation Act 1992 pt 2 div 6 (Austl.) [hereinafter *MABRA*]; Australian Securities & Investments Commission, *International Regulatory and Enforcement Cooperation*, https://asic.gov.au/about-asic/what-we-do/international-activities/international-regulatory-and-enforcement-cooperation/#main (explaining how ASIC cooperates with foreign regulators); AUSTRALIAN GOVERNMENT: THE TREASURY, MAKING TRANSPARENCY TRANSPARENT: AN AUSTRALIAN ASSESSMENT attachment I (1999) [hereinafter MAKING TRANSPARENCY TRANSPARENT].

may hinder international cooperation. A requesting country cannot use the "information or evidence" for criminal proceeding, or proceedings for the imposition of a penalty in the requesting country.[368] Before providing assistance to the requesting country, the ASIC must obtain an undertaking from the requesting country to that effect and inform the Minister, who decides whether to authorize the request.[369]

Article 14 of the MABRA also specifically refers to the self-incrimination privilege as follows: "The information or evidence, as the case may be, is not admissible in evidence against the person in: (a) a criminal proceeding; or (b) a proceeding for the imposition of a penalty; other than a proceeding in respect of the falsity of the information or evidence, as the case may be."[370] A proceeding "in respect of the falsity of the information or evidence" should mean a proceeding for perjury or contempt of court.[371]

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368. Article 6(2) of the MABRA requires as follows:

> 6. (2) The Commonwealth regulator must not take action under section 7 in relation to the request unless the Commonwealth regulator has received in writing from the foreign regulator: (a) an undertaking by the foreign regulator to the effect that information or evidence obtained from the person and provided to the foreign regulator under this Act: (i) will not be used for the purposes of criminal proceedings against the person or of proceedings against the person for the imposition of a penalty; and (ii) to the extent to which it is within the ability of the foreign regulator to ensure it, will not be used by any other person, authority or agency for the purposes of any such proceedings.

MABRA, *supra* note 367, pt 2 s 6 sub-div 2.

369. *Id.* pt 2 ss 6–8.

370. *Id.* pt 2 s 14. Art. 15 of the MABRA also allows a lawyer to refuse to provide information or documents under the "legal professional privilege" if "(a) under this Act, a person requires a lawyer to give information or produce a document; and (b) giving the information or producing the document would involve disclosing a privileged communication made by, on behalf of, or to the lawyer in his or her capacity as a lawyer." *Id.* at pt 2 s 15 sub-div 1. *See also* STEPHANIE WEE & GHASSAN KASSISIEH, THE STRATEGIC VIEW – BUSINESS CRIME: AUSTRALIA (2016), https://www.strategicview.co.uk/strategic-view/business-crime/the-strategic-view-business-crime-2016/australia (describing application of the privileges under the MABRA); MAKING TRANSPARENCY TRANSPARENT, *supra* note 367.

371. Section 128(7) of the Evidence Act 1995 provides that the self-incrimination privilege does not apply to a criminal proceeding "in respect of the falsity of the evidence."

The MABRA prohibits the use of "information and evidence" as evidence against the person who provided the information or evidence not only in criminal proceedings but also proceedings for the imposition of a "penalty." "Penalty" in Australia is defined very broadly. The Australian Law Reform Commission explains as follows:

> The term "penalty" is generally defined as a punishment, commonly in the form of the payment of a sum of money, although caselaw states that the word "is large enough to mean, is intended to mean, and does mean, any punishment, whether by imprisonment or otherwise." Traditionally a "penalty" has been defined as a punishment meted out under the criminal law. Modern [definition] involves the idea of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment. Caselaw also suggests the term "penalty" may be used to denote a civil debt or imposition owed to the Crown or the state, as opposed to a "fine", which denotes a criminal monetary penalty.[372]

The prohibition, therefore, may apply broadly to civil or administrative proceedings in other countries. For example, practitioners observe that the SEC cannot use the information and evidence obtained through the ASIC in SEC's civil and administrative proceedings to impose civil penalties.[373]

4. Canada

Practitioners point out that because of the difference in self-incrimination privilege between Canada and the United States, individuals with self-incriminating evidence who are subject to an examination request by a Canadian regulator have a risk that the compelled evidence may be shared with the DOJ without any notice.[374]

Ontario Securities Act ("OSA") provides the Ontario Securities Commission ("OSC") with the power to appoint persons to investigate

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This provision is construed to exclude a proceeding for perjury or contempt of court. AUSTRALIAN LAW REFORM COMMISSION, UNIFORM EVIDENCE LAW (2006) ¶ 15.136.

372. 2003 ALRC Rep. 95, at 69 (Austl.).

373. Michael Mann, et al., *International Agreements and Understandings for the Production of Information and Other Mutual Assistance*, 29 INT'L L. 780, 812 (1995).

374. Jennings, *supra* note 256, at 2.

securities matter in two aspects.[375] First, the OSC may investigate matters relating to "the due administration of Ontario securities law or the regulation of capital markets in Ontario" under section 11(1)(a) of the OSA.[376] Second, the OSC may assist foreign securities regulators in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction under Section 11(2)(b) of the OSA.[377]

The OSC's investigatory power includes the right to question a person and compel the production of documents.[378] The OSC also has the discretion to disclose compelled evidence to other regulatory bodies, including foreign regulators, without notice to the subject of the investigation if it deems "in the public interest."[379] The OSC is prohibited from disclosing the compelled evidence to criminal enforcement authorities in any country without the witness' consent, but it is not prohibited from sharing it with administrative regulators, such as the SEC.[380] Therefore, it is possible that the compelled evidence may be shared with the SEC, which in turn may share it with the DOJ, without the witness' consent or knowledge.[381]

In *A v. Ontario Securities Commission*, the applicant sought an order quashing a summons to witness issued by the OSC, arguing that there is a risk that his testimony may be used against him in criminal proceedings in the United States.[382] The Ontario Superior Court of Justice declined to quash the summons, reasoning that there is a sufficient safeguard for A's rights, including the court's potential intervention, and there is no evidence suggesting that the compelled testimony will be shared with U.S. criminal authority.[383] The court specifically pointed out that: "It would be surprising indeed, given the need for cross-border securities enforcement, if a U.S. Court did not pay attention to, let alone honour, a Canadian process

375. Securities Act, R.S.O. 1990, c S5. (Can.).
376. *Id.* § 11(1)(a).
377. *Id.* § 11(1)(b).
378. *Id.* §§ 11(3)–(4), 13(1).
379. *Id.* § 17(2.1).
380. *Id.* §§ 17(3), 17(7).
381. MMoU, *supra* note 360, §10(a), (b). Under the MMoU, however, the SEC has to specify the purpose for which information sought will be used. MMoU, *supra* note 360, §10(a). If the SEC, does not specify that information may be used in criminal proceedings, the SEC must obtain the consent of the requested authority. *Id.* § 10(b).
382. A v. Ontario Sec. Commission, [2006] 141 C.R.R. 2d, (Can. S.C.C.).
383. *Id.* ¶¶ 44–48.

designed to preserve [the self-incrimination privilege] in Canada."[384] The court further recommended that the OSC should establish an information wall by having separate investigation teams for Section 11(1)(a) investigation (i.e., the OSC's own investigation) and Section 11(1)(b) investigation (i.e., investigation to assist the SEC).[385]

Because there is a possibility that the evidence compelled by a Canadian securities regulator may be used by the DOJ without the witness's consent or knowing even if the securities regulator follows the Supreme Court's recommendation above, practitioners observe that there would be three options that the witness may take: "(1) refuse to cooperate and risk being held liable for contempt by the court, (2) cooperate and risk having the evidence used in U.S. criminal proceedings, and (3) cooperate while trying to negotiate additional protections and assurances," from the Canadian regulator.[386]

5. Hong Kong

In Hong Kong, securities regulators can obtain and use self-incriminatory evidence on condition that they will not use such evidence in criminal proceedings.[387] The Hong Kong Securities and Futures Commission (the "HKSFC") can assist foreign regulators under Section 186 of the Securities and Futures Ordinance (the "SFO"). Under Section 186, the HKSFC can assist a regulator outside Hong Kong that performs a function similar to those of the HKSFC.[388] When considering a request from a foreign regulator, the HKSFC must be satisfied that doing so is "in the interest of the investing public or in the public interest" or that "the assistance will enable or assist the recipient of the assistance to perform its or his functions."[389]

Section 181 of SFO authorize the HKSFC to require and compel disclosure of information about details of securities transactions.[390]

384. *Id.* ¶ 53.

385. *Id.* ¶ 61. Some practitioners doubt whether having separate teams will have a tangible difference Jennings, *supra* note 256, at 1.

386. *See* Jennings, *supra* note 256, at 1.

387. *See* Securities and Futures Ordinance, No. 5, (2002) O.H.K. § 186(6) (H.K.) (prohibiting the SFC from proving incriminating for use in criminal proceedings outside of Hong Kong).

388. *Id.* § 186(1).

389. *Id.* § 186(3).

390. *Id.* § 181.

Section 186(6), however, adds restriction under the self-incrimination privilege as follows:

> If a person is required— (a) to provide or make an explanation or statement as required by an authorized person . . . ; or (b) to give an explanation or further particulars as required by, or to give an answer to any question as raised by, an investigator . . . and the explanation or statement, the explanation or further particulars, or the answer (as the case may be) might tend to incriminate him and he so claims . . . the authorized person or investigator (as the case may be) shall not provide evidence of the requirement and the explanation or statement, the explanation or further particulars, or the question and answer (as the case may be) to an authority, regulatory organization or companies inspector outside Hong Kong for use in *criminal* proceedings against him.[391]

The provision prohibits the use only in criminal proceedings, but not in other proceedings to impose a penalty, unlike the restriction in Australia.[392] Therefore, the provision does not seem to prohibit the use in administrative monetary penalty proceedings.

A Hong Kong company, however, tried to suppress evidence that the HKSFC provided to the Japanese Securities and Exchange Surveillance Commission ("JSESC"), alleging that the HKSFC acted unconstitutionally because it provided self-incriminatory evidence to the JSESC for its use in administrative monetary penalty proceedings.[393] In this case, the JSESC found that the Hong Kong company conducted market manipulation and recommended the Prime Minister and the Commissioner of the Financial Services Agency to issue an administrative monetary penalty payment order.[394] During the investigation, the JSESC obtained information of the Hong Kong company through the HKSFC.[395] The Hong Kong company brought judicial review proceedings against the HKSFC in the Court of

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391. *Id*. (emphasis added).

392. *See supra* Section III.B.3 (describing the restriction of the use of "information and evidence" under the MABRA).

393. AA v. Sec. and Futures Commission, [2016] 4 H.K.C. 515, ¶ 49 (H.K.P.L.R.) (Initial decision) (deciding to commence the judicial review proceedings).

394. Press Release, SESC, Recommendation for Administrative Monetary Order for Manipulation by Areion Asset Management Company (Dec. 5, 2014).

395. *See* AA v. Sec. and Futures Commission, [2016] 4 H.K.C. 515, ¶ 49 (H.K.P.L.R.).

First Instance, claiming unconstitutionality of Section 181 of the SFO, which authorizes the HKSFC to share information with foreign regulators.[396]

The Hong Kong company argues that Section 181 is unconstitutional because, among others, it compels the production of potentially self-incriminatory information without supplying any protection against the use in criminal proceedings by foreign regulators.[397] Although its reasoning is not clear, the Hong Kong company apparently argues that Japanese administrative proceedings to impose administrative monetary penalty is a "criminal proceeding."[398] The court allowed the case to proceed, finding that there was a reasonably arguable case and the case had a realistic prospect of success.[399] Although the court held that the Japanese proceedings are "non-criminal and non-penal in character and properly categorized as administrative or regulatory proceedings,"[400] if the relevant provision or HKSFC's practice had been held unconstitutional, it would have greatly hindered administrative information exchange between Hong Kong and Japan.

6. Japan

Japanese law has broad restrictions on the use of information and documents in criminal proceedings. Section 189(4) of the Financial Instruments and Exchange Act ("FIEA") provides that "appropriate measures shall be taken to ensure that [materials provided] will not be used for *criminal procedures* conducted by a court or a judge in the foreign

396. *See id.* ¶ 57. Juridical review allows citizens to challenge decisions made by public authorities. Research Office, Legislative Council Secretariat, Administration of Justice and Legal Services Apr. 26, 2017. Applicants for judicial must first obtain "leave" from the court, which will be granted "if the case is reasonably arguable and has a realistic prospect of success." *Id*.

397. *See* AA v. Sec. and Futures Commission, [2016] 4 H.K.C. 515, ¶ 50 (H.K.P.L.R.) (noting that the Hong Kong company, however, does not argue that there were unreasonable searches and seizures).

398. *See id* ¶ 47.

399. *Id* ¶ 58.

400. AA & Anor v. Sec. and Futures Commission, [2019] 3 H.K.C. 187, ¶ 149 (H.K.P.L.R.).

state."[401] This provision serves two main purposes. First, it preserves a fundamental legal philosophy in Japan that strictly distinguish administrative proceedings and criminal proceedings.[402] Second, it prevents regulators from bypassing provisions of the Act on International Assistance in Investigation and Other Related Matters[403] that provide procedures required to follow in assisting the criminal investigation by foreign authorities.[404]

When Japan applied to the IOSCO to become a signatory of the MMoU, the screening committee of the IOSCO first thought that this provision might conflict with the MMoU.[405] Paragraph 10 (Permissible Uses of Information) of the MMoU provides as follows:

> (a) The Requesting Authority may use non-public information and non-public documents furnished in response to a request for assistance under this Memorandum of Understanding solely for . . . a purpose within the general framework of the use stated in the request for assistance, including . . . *assisting in a criminal prosecution*, or conducting any investigation for any general charge applicable to the violation of the provision specified in the request where such general charge pertains to a violation of the Laws and Regulations administered by the Requesting Authority.[406]

The screening committee argued that Section 189(4) of the FIEA would prevent Japanese securities regulators from assisting foreign authorities in a criminal prosecution.[407] Japan responded with three counter-arguments. First, if a foreign regulator needs assistance in a criminal prosecution, it can obtain evidence through the procedure under the Act on International

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401. KINYU SHŌHIN TORIHIKIHŌ [Financial Instruments and Exchange Act], Act No. 25 of 1948, art.189(4), translated in (http://www.japaneselawtranslatija.go.jp/) (emphasis added).

402. Akihiro Mizukawa, *IOSCO MMOU heno shomei ni tsuite* [*About Signing of IOSCO MMOU*], 274 GEKKAN SHIHON SHIJO [MONTHLY CAP. MKT. J.] 55, 60 (2008) (Japan).

403. KOKUSAI KYŌJO TŌ NI KANSURU HŌRITSU [Act on International Assistance in Investigation and Other Related Matters], Act No. 69 of 1980.

404. Mizukawa, *supra* note 402, at 60.

405. *Id*. at 61.

406. MMoU, *supra* note 360, § 10(a) (emphasis added).

407. Mizukawa, *supra* note 402, at 61.

Assistance in Investigation and Other Related Matters, not the FIEA.[408] Second, the main purpose of the MMoU is to provide a framework for cooperation between securities regulators, not between criminal authorities.[409] Other multilateral criminal cooperation frameworks, such as the Mutual Legal Assistance Treaty,[410] will not be used if the MMoU enables any type of criminal assistance.[411] Third, some existing signatories, such as Australia and New Zealand, have domestic laws prohibiting the use of self-incriminating evidence in a criminal prosecution.[412] The screening committee accepted these arguments and approved Japan as a new signatory in 2008.[413]

7. Singapore

A case in Singapore in 1998 also shows how a proceeding can affect international cooperation. Under Section 3(b) of the Evidence (Civil Proceedings in Other Jurisdictions) Act of Singapore, assistance to foreign authorities may be allowed only if the High Court of Singapore is satisfied that the evidence is to be "obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated."[414] Singaporean residents challenged SEC's request claiming that U.S. civil proceedings instituted by the SEC would be characterized as criminal in nature.[415]

Under case law, criminal proceedings include not only those for "prosecutions and sentences for crimes and misdemeanours" but also those "in favour of the State for the recovery of pecuniary benefits for any violation of statutes for the protection of its revenue."[416] Accordingly, the

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408. *Id.*

409. *Id.*

410. *See, e.g.*, Treaty on Mutual Legal Assistance in Criminal Matters, Japan-U.S., Aug. 6, 2003, S. TREATY DOC. NO. 108-12 (2003) (stipulating that each contracting party shall, upon request by the other contracting party, provide mutual legal assistance in connection with investigations, prosecutions and other proceedings in criminal matters).

411. Mizukawa, *supra* note 402, at 61.

412. *Id.*

413. *Id.*

414. Evidence (Civil Proceedings in Other Jurisdictions) Act § 3(b) (Act No. 18/1979) (Sing.).

415. SEC v. Ong Congqin Bobby & Anor [1998] 3 SLR(R) 19, 19 (Sing.).

416. *Id.* ¶ 11.

court found that civil penalties sought by the SEC were penal in nature because the money collected would go to the Treasury.[417] The court, however, held that assistance could be provided because an injunctive relief sought by the SEC would be civil in nature both under the Singapore and U.S. laws.[418]

In 2000, the Securities and Futures Act authorized the Monetary Authority of Singapore to assist foreign securities regulators.[419] The Act provides that, in relation to a request to the MAS by a foreign regulatory authority for assistance, "[a] person is not excused from making an oral statement . . . on the ground that the statement might tend to incriminate him," but such incriminating statement "may not be admissible in evidence against him in criminal proceedings" in foreign countries.[420]

8. United Kingdom

The Financial Conduct Authority ("FCA") has a broad discretion to assist its foreign counterparts and exercises that discretion liberally under Section 169 of the Financial Services and Markets Act ("FSMA").[421] In considering the exercise of its discretion, the FSA may take into account, among others, whether corresponding assistance would be given by the foreign state and whether it is appropriate in the public interest to provide the assistance sought.[422]

Although self-incriminatory evidence compelled by the FCA will be inadmissible in U.K. criminal proceedings,[423] the FSMA is silent on admissibility in criminal proceedings in foreign jurisdictions.[424] Given the risk, practitioners advise that "interviewees should request, in advance of

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417. *Id.* ¶ 13.

418. *Id.* ¶ 14-16.

419. *See* Securities and Futures Act § 170(1)(a) (Act No. 52/2001) (Sing.) (stating that the MAS may assist a foreign regulatory authority if "the request by the regulatory authority for assistance is received by the Authority on or after 6th March 2000.").

420. *Id.* § 172(6).

421. *See* Proudlock & Rundle, *supra* note 299; Financial Services and Markets Act 2000, c. 8, § 169 (UK).

422. *See* Financial Services and Markets Act § 169(4).

423. *See supra* Section II.B.6 (discussing inadmissibility in the United Kingdom).

424. For example, the DOJ tried to use the compelled statement obtained by the FCA in criminal proceedings in the United States. *See supra* Section III.A.2.b (discussing United States v. Allen, 864 F.3d 63 (2d Cir. 2017)).

the interview, that the FCA obtain an undertaking from the overseas regulator that any compelled information will not be used in any criminal proceedings."[425] Although "[t]here is no statutory requirement for the FCA to seek and obtain such an undertaking, . . . in practice they appear to be doing so in circumstances where the overseas regulator has criminal prosecution powers."[426] Practitioners also observe that "[t]he position is less clear-cut in relation to non-criminal proceedings initiated in the jurisdiction of the overseas."[427]

9. Summary

As described in Section II.C above, among seven jurisdictions (the United States, Australia, Canada, Hong Kong, Japan, Singapore, and the United Kingdom), five jurisdictions except for the United States where the SEC has a broad authority to obtain documents without a warrant and Japan where the administrative search is conducted on a voluntary basis, prohibit unreasonable searches and seizures by administrative securities regulators by requiring a search warrant issued by a judge.[428] I found, however, no law in the seven jurisdictions that restricts the use of evidence obtained by a requested regulator through "unreasonable searches and seizures" in criminal proceedings of the requesting regulator.[429] Because the securities regulators may "reasonably" obtain documents and information either by just requesting the production of regulated entities,

425. Proudlock & Rundle, *supra* note 299.

426. *Id.* They further argue that if the FCA failed to offer such a protection, the interviewee should have a "reasonable excuse" for not complying with the request to be interviewed. *Id.*

427. *Id.*

428. *See supra* Section II.C.

429. *See id.* Because those laws concern assistance to foreign regulators, they do provide for cases in which domestic regulators use evidence obtained by unreasonable searches and seizure conducted by foreign regulators. *Id.* Although those cases are probably out of scope of the MMoU, a U.S. case discussed in Section III.A.2.a informs what the rule should be. *See* United States v. Behety, 32 F.3d 503 (11th Cir. 1994), cert. denied, 115 S. Ct. 2568 (1995). In the United States, evidence obtained by foreign police officers from searches conducted in their own countries normally is admissible in U.S. courts, regardless of whether the search complies with the Fourth Amendment except if the conduct of the foreign officials during the search and seizure "shocks the judicial conscience," U.S. law enforcement officials substantially participated in the search, or the foreign officials conducting the search were actually acting as agents. *See id.*

asking consent to produce on a voluntary basis, or obtaining a search warrant, regulators do not need to resort to "unreasonable" searches and seizures.[430] In addition, domestic laws probably do not contemplate a situation where the requested regulator knowingly violates constitutional protections afforded in its jurisdiction by conducting unreasonable searches and seizures for the requesting foreign regulator. On the other hand, because many securities regulators can compel self-incriminatory statements, domestic laws need to prevent the use of such statements in foreign criminal proceedings, which is the main source of the problems described in the following section.

As for self-incriminating evidence, there are three approaches among the seven jurisdictions. First, in Australia, there is restriction of the use of self-incriminating evidence in not only criminal proceedings, but also any proceedings to impose a penalty by the requesting regulator.[431] Second, in four jurisdictions (Ontario, Hong Kong, Singapore, and Japan), there are restrictions on the use of self-incriminating evidence in criminal proceedings by the requesting regulator.[432] Ontario Securities Act requires consent of the witness for the securities regulator to disclose compelled evidence to foreign criminal enforcement authorities.[433] In the case of Japan, such restriction extends not only to self-incriminating evidence but to any evidence.[434] Note that the domestic laws of Australia, Hong Kong, and Singapore concerning the use of information obtained through administrative investigations by foreign criminal proceedings are similar to those concerning the use by domestic criminal proceedings.[435] Administrative investigators in these jurisdictions can compel self-incriminatory evidence, but such evidence may not be used in either domestic or foreign criminal proceedings (in case of Australia, it may not be used in proceedings to impose a penalty either).[436] Third, in two

430. *See supra* Section III.A.2.a.

431. *See supra* Section III.B.3.

432. *See supra* Sections III.B.4–7.

433. *See supra* Section III.B.4.

434. The complete ban on the use of information and documents tries to preserve a fundamental legal philosophy in Japan that strictly distinguish administrative proceedings and criminal proceedings and prevent regulators from bypassing provisions of another statute that provides procedures required to follow in assisting criminal investigation by foreign authorities. *See supra* notes 402-404 and accompanying text.

435. *See supra* Sections III.B.4, III.B.5, III.B.7.

436. *See supra* Sections III.B.3, III.B.5, III.B.7.

jurisdictions (the United States and the United Kingdom), there is no restriction in the use of self-incriminatory evidence in any proceedings by the requesting regulator.[437]

The lack of apparent restriction in the use of self-incriminatory evidence by foreign regulators makes sense in the United States where domestically the courts will decide whether an administrative investigation is conducted solely for the purpose of obtaining evidence to be used in criminal proceedings or otherwise is used in bad faith by criminal authorities.[438] As seen in Section II.B above, however, the law of the United Kingdom explicitly prohibits the use of self-incriminatory evidence in their domestic criminal proceedings, but there is no restriction in foreign proceedings.[439] This may give an opportunity for a regulator to circumvent its domestic constitutional protection against self-incrimination in bad faith by using administrative investigations in the United Kingdom as a sham,[440] but these countries may be relying on other regulators' good faith in preserving the self-incrimination privilege in the United Kingdom.[441]

C. Implications to Cross-Border Information Exchange

1. Problems

The different national approaches with respect to cross-border exchange of compelled self-incriminatory evidence between securities regulators, as summarized in the previous section, cause three problems.

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437. *See supra* Sections III.B.2, III.B.8.

438. The SEC may arguably refuse a request of a foreign regulator that tries to circumvent its domestic constitutional protection by using SEC's investigatory power as a sham, reasoning that compliance with the request would prejudice the public interest of the United States.

439. *See supra* Section II.B.6.

440. Under U.S. case law, however, such evidence would be inadmissible in the United States. *See supra* note 345 and accompanying text (discussing cases holding that the Fifth Amendment applies to foreign compelled statements).

441. *See supra* note 348 and accompanying text. As the Ontario Superior Court of Justice stated, "It would be surprising indeed, given the need for cross-border securities enforcement, if a U.S. Court did not pay attention to, let alone honour, a Canadian process designed to preserve [the self-incrimination privilege] in Canada." A v. Ont. Sec. Comm'n, [2006] O.J. No. 1768, ¶ 53 (Ont. Super. Ct. Just.).

First, securities regulators may not use any documents and information that the Japanese securities regulator obtained through administrative investigations in their criminal proceedings (although this problem is not what I try to solve under the MMoU).[442] Second, the assertion of self-incrimination privileges in one country may impede the sharing of evidence and information with another country for use in administrative proceedings in order to seek civil or administrative monetary penalty. Third, a securities regulator may circumvent the privilege afforded domestically by relying on compelled evidence obtained abroad.

Some securities regulators may want to introduce administrative penalties to have more flexibility and efficiency in their enforcement; other securities regulators that already have an option to initiate administrative proceedings may try to strengthen their deterrent effect by raising the upper limit of administrative monetary penalties as Japan has recently done.[443] These administrative enforcement tools will also fill regulatory gaps and avoid overdeterrence. However, even if such enforcement tools are labeled as "administrative" under their domestic laws, they could be construed as "quasi-criminal" in some other jurisdictions.[444]

As examined in Section II.B, in all six jurisdictions but Hong Kong, securities regulators may seek civil or administrative "monetary penalties," which are in addition to or more than the amount of disgorgement of illegal profits.[445] Laws of the seven jurisdictions are divided on the question of whether the self-incrimination privilege is available in securities regulators' civil or administrative monetary penalty proceedings in the domestic settings. Such a question might be more complicated in the international setting.[446] As seen above, at least the law of Australia clearly extends the protection of the self-incrimination

442. *See supra* Section III.B.6.

443. For example, the 2013 Amendment Act defined the administrative monetary penalty for insider trading committed as part of the asset management as three months' management fees. *See* Sadakazu Osaki, *Regulatory Reform in the Wake of Insider Trading Incidents Related to Public Offerings of New Shares,* NRI PAPERS, Nov. 1, 2013, No. 190, at 5.

444. *See*, *e.g.*, *supra* Section II.A.2.c.

445. *See supra* Section II.B.

446. *See supra* Section II.C.

privilege to "proceedings to impose a penalty."[447] Though the law of Hong Kong seems to restrict the use in "criminal" proceedings only, as the case described in Section III.B.5 shows, a court may interpret criminal proceedings as including administrative monetary penalty proceedings.[448] Similarly, the law of Singapore seems to restrict the use in "criminal" proceedings only, but in one case a court found that civil penalties sought by the SEC were penal in nature because the money collected would go to the Treasury.[449] The more administrative penalties are enhanced, the more likely they would be deemed quasi-criminal in cross-border cases.[450] Therefore, securities regulators that have "quasi-criminal" authority may face significant challenges in information exchange.

2. Policy Behind Different Approaches

Should protection of individuals against compelled self-incrimination extend to foreign criminal proceedings? The approach to extend the self-incrimination privilege to foreign proceedings, taken by Australia, Hong Kong, and Singapore,[451] is probably taken in order to protect their own citizens' constitutional rights in foreign proceedings and to prevent foreign criminal regulators from circumventing constitutional protections. The approach can also be supported by cosmopolitanism, which in general holds "the moral dignity and equality of all human beings as individuals, regardless of their culture, nationality, or citizenship."[452] In view of cosmopolitanism, the protection against the self-incrimination in one jurisdiction should extend not only to its resident in domestic proceedings, but also to foreign residents in foreign proceedings.[453] Universal acceptance of such protection corroborates this argument.[454] A rule

447. *See supra* Section II.B.1.

448. *See supra* Section III.B.5.

449. *See supra* Section III.B.7.

450. *See supra* Section III, ¶ 3.

451. *See supra* Sections III.B.3, III.B.5, III.B.7.

452. Rosemary Nagy, *Postapartheid Justice: Can Cosmopolitanism and Nation-Building Be Reconciled?*, 40 L. & SOC'Y REV. 623, 624 (2006).

453. *See id.*

454. *See supra* Section I (finding universal acceptance of the protection against unreasonable searches and seizures and self-incrimination); *see also* Amann, *supra* note 67, at 1202 (1998) (arguing that U.S. courts should apply self-incrimination privilege not only in the domestic, but also in the international context); Neal Modi, Note, *Toward an*

limiting the application of the protection within its jurisdiction will also invite securities regulators to circumvent the protections in many cases in which it would be difficult for the subject of the investigation to prove that the regulators acted in bad faith.

In contrast, the approach taken by the United States and the United Kingdom, which does not restrict the use of compelled self-incriminating evidence in foreign criminal proceedings,[455] can be supported by the statist view of international relations. According to this view, "nation-states are the ultimate source of legal or moral authority, and their integrity is guaranteed by principles of nonintervention and national self-determination."[456] The statists argue that the nation provides the best context in which rights and obligations are determined because co-nationals share historical, political, and territorial values.[457] They criticize cosmopolitanism on the grounds that a citizen of the world "is in fact a citizen of nowhere" and "the promotion of cosmopolitan universality is inevitably the imposition of somebody else's values."[458] The approach, however, may not necessarily reflect statism. As noted in the previous section, the United Kingdom may be relying on other regulators' good faith in preserving the self-incrimination privilege.[459] In the case of the United States, the statutory provision allowing the SEC to refuse a request for assistance if the assistance would "prejudice the public policy of the United States"[460] may reflect cosmopolitanism.

In the context of securities enforcement, while I believe the integrity of each regulator should be guaranteed by "principles of nonintervention and

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International Right Against Self-Incrimination: Expanding the Fifth Amendment's "Compelled" to Foreign Compulsion, 103 VA. L. REV. 961, 969 (2017) (arguing that U.S. courts should protect foreign-compelled testimony from use and derivative use to uphold the Fifth Amendment policies).

455. *See supra* Sections II.B.2, II.B.8.

456. Nagy, *supra* note 452, at 624.

457. *See id.*; *see also* Kok-Chor Tan, *Liberal Nationalism and Cosmopolitan Justice*, 5 ETHICAL THEORY & MORAL PRAC. 436–37 (2002) (arguing that common nationality provides a basis of self-identity and a crucial bond for a community of obligation).

458. Nagy, *supra* note 452, at 624; *see also* Robert Fine, *Taking the "Ism" out of Cosmopolitanism: An Essay in Reconstruction*, 6 EUR. J. SOC. THEORY 451, 452 (2003) (arguing that cosmopolitanism contradicts with guiding principle of international law that recognizes national sovereignty).

459. *See supra* Section III.B.9.

460. 15 U.S.C. § 78u(a)(2) (2012).

national self-determination" as the statists argue, each regulator should respect the policy behind national laws so to protect individuals "regardless of their culture, nationality, or citizenship" under cosmopolitanism.[461] The MMoU, therefore, should provide a workable solution to bridge the different national approaches. The solution should be based on the most restrictive rule concerning the use of compelled self-incriminatory evidence, such as the one in Australia,[462] because such a solution will not require any member jurisdiction to violate its domestic law.

I posed two questions. We assumed that an investor residing in one country, where securities regulator X oversees the market, commits market manipulation or insider trading in another country where securities regulator Y oversees the market. Can Y use in its administrative "penalty" proceedings the documents and information that X collected through an administrative investigation when the similar use in X's country would violate the constitutional or statutory protections in X's country? Also, can Y use in its criminal proceedings the documents and information that X collected using methods that, if conducted by Y in Y's country, would violate constitutional protections in Y's country?

The answer to the first question depends on the nature of Y's administrative proceeding. If the proceeding seeks only to disgorge ill-gotten gains, Y should be allowed to use the documents and information, because such proceeding is not its very nature a criminal proceeding nor a proceeding to bring a true penal consequence. The answer to the second question should be "no" under cosmopolitanism (and "yes" under statism), but I do not believe the MMoU is the place to give the answer to this question.

3. Current MMoU

Currently, the MMoU does not have any provision explicitly referring to the self-incrimination privilege.[463] However, Article 6(e) of the MMoU permits the requested authority to deny a request for assistance "where the request would require the Requested Authority to act in a manner that

461. Nagy, *supra* note 452, at 624.
462. *See supra* Section III.B.3.
463. *See generally* MMoU, *supra* note 360.

would violate domestic law."[464] Hong Kong, Singapore, and Australia have "domestic law" to prohibit foreign regulators from using compelled self-incriminatory evidence in criminal proceedings.[465] Therefore, securities regulators in jurisdictions that have similar laws may deny a request for self-incriminatory evidence to be used in "quasi-criminal" proceedings of the requesting regulator.

The IOSCO recognizes that the self-incrimination privilege may affect information exchange between securities regulators. The ISOCO observes that in some jurisdictions, a statement that has been compelled from a person may not be used against him in a criminal proceeding, and in other jurisdictions, have a corresponding privilege against self-incrimination that allows the person giving the statement to refuse to make a statement that could incriminate him.[466] The IOSCO, therefore, recommends that regulators should take the privilege into account when considering whether statements will be compelled, who will compel them, and how they will be used in a subsequent proceeding so that they can avoid inadvertently preventing a regulator from using a statement as evidence.[467] The current provisions of MMoU, however, do not provide any specific solution.[468]

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464. *Id.* § 6(e).

465. *See supra* Sections III.B.3, III.B.5, III.B.7.

466. IOSCO, THE BOARD OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, JOINT CROSS-BORDER INVESTIGATIONS AND RELATED PROCEEDINGS 17 (2014) (unpublished report) (on file with author) (hereinafter IOSCO REPORT).

467. *Id.*

468. *See generally* MMoU, *supra* note 360. The EMMoU, an enhanced version of the MMoU as described in Section II.C above, does not provide any solution to issue either, but added a new provision that states:

The assistance available under this Enhanced MMoU includes . . . [c]ompelling a Person's physical attendance to take or, where permissible, compel that Person's statement or testimony under oath, regarding the matters set forth in the request for assistance, in accordance with the rights and privileges afforded by the laws and regulations applicable in the jurisdiction of the Requested Authority.

IOSCO, Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (EMMoU) (2016), art. 3(2)(c), https://www.iosco.org/about/pdf/Text-of-the-EMMoU.pdf. In its FAQs to the EMMoU, the IOSCO responds as follows:

The EMMoU does not compromise the privilege against self-incrimination. Conscious of the protections that many jurisdictions place on the privilege against self-incrimination, the EMMoU only requires that a signatory have the power to compel the "attendance or

IV. SOLUTIONS

As described above, even if a securities regulator in one country intends to use, not in its criminal proceedings but in its "administrative proceedings," information and documents obtained through securities regulators in another country, such as Australia, Hong Kong and Singapore, the former requesting regulator will have to prove that its administrative proceedings are neither criminal proceedings nor proceedings to impose a penalty.[469] This will pose challenges for both the requesting and requested regulators. The MMoU, therefore, should provide guidance as to how to deal with this issue and a standard to decide the nature of the proceedings.

A. Ex-post Solutions

Even under the current framework as it applies to Australian law, which is most restrictive against the use of self-incriminatory evidence by foreign regulators, the requesting regulator has four solutions regardless of the nature of its proceedings.[470] First, when the self-incrimination privilege applies only to "information or evidence," but not to a "document" that covers the contents of the information or evidence, requesting regulators may seek such a document. For example, in Australia, the MABRA covers requests for "information, documents and evidence,"[471] but the restriction

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appearance" of an individual at a specified location for interview, not that the individual should have to answer the questions posed.

IOSCO, Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (EMMoU): Frequently Asked Questions, ¶ 15, https://www.iosco.org/about/pdf/EMMoU-Frequently-Asked-Questions.pdf.

469. *See supra* Section III.C.

470. *See supra* Section III.B.3.

471. *MABRA*, *supra* note 367, art. 5. For example, Article 5 explicitly provides that the object of the MABRA is "to enable Commonwealth regulators to render assistance to foreign regulators in their administration or enforcement of foreign business laws by obtaining from persons relevant information, documents and evidence and transmitting such information and evidence and copies of such documents to foreign regulators." *Id.*

of the use under Articles 6(2)(a) and 14 of the MABRA applies only to "information or evidence."[472]

Second, the requesting regulator may use "information or evidence" in criminal proceedings or proceedings to impose a penalty for any purpose other than using it as "evidence."[473] For example, the requesting regulator may use "information or evidence" as background information so that the requesting regulator can understand the case better, a basis for seeking other admissible evidence, or evidence against a third party.[474]

Third, the requesting regulator may use "information or evidence" as evidence in administrative or civil proceedings that do not seek penalties, but to seek other remedies such as injunction and administrative bar.[475] In this case, however, the requesting regulator may still be required to prove that such remedies are not construed as a "penalty" under applicable laws.[476]

Fourth, if the requesting regulator needs to use "information or evidence" as evidence in a criminal proceeding or a proceeding to impose a penalty, the requesting regulator can use a framework for assistance in criminal proceedings under mutual criminal assistance agreements such as the Mutual Assistance in Criminal Matters Act 1987 in Australia.[477] Such assistance in criminal proceedings, however, may be cumbersome and take time.

B. Proposed MMoU Provision

Although the four solutions above may work as ex-post solutions, securities regulators should benefit from having an ex-ante solution, which clarifies whether the exchange of self-incriminatory evidence is possible. Therefore, I propose three provisions to be added to the MMoU.

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472. *MABRA*, *supra* note 367, arts. 6, 14. In addition, the self-incrimination privilege may not apply to the document in Australia. *See supra* note 230 and accompanying text (explaining the self-incrimination privilege under Australian law).

473. *See*, *e.g.*, M. Mann, *supra* note 373, at 812 (describing permissible uses of information and evidence).

474. *See id.*

475. *See id.* (arguing that the SEC can use it in administrative proceedings but cannot seek a civil penalty).

476. *See supra* Section III.B.5 (describing a case in Hong Kong).

477. *See generally Mutual Assistance in Criminal Matters Act 1987* (Cth) pt II div 2 s 13 (Austl.). The Hague Evidence Convention may not work as a solution here because the Convention deals with evidence collection in civil or commercial matters.

First, the following provision recommends that when a securities regulator makes a request for information, the requesting securities regulator consult with another regulator to confirm whether there is any limitation on the use of the information received:

> A Requesting Authority will, as soon as practicable before making a request for assistance, consult with a potential Requested Authority to confirm (i) whether there is any limitation for the Requesting Authority to use information received in its criminal proceedings or proceedings to impose a penalty, and (ii) whether a proceeding of the Requesting Authority would likely be construed as criminal proceedings or proceedings to impose a penalty.

Second, the following provision clarifies a policy that a securities regulator who seeks information in good faith should be allowed to use information in its administrative or civil proceeding without implicating constitutional issues under the laws of the requested regulator. This provision is based on the most restrictive rule concerning the use of compelled self-incriminatory evidence, such as the one in Australia, so it should be acceptable to all member jurisdictions:

> Civil or administrative proceedings of the Requesting Authority to seek a monetary penalty, as long as the amount of which will not exceed a reasonable approximation of the financial benefit derived directly from the applicable violation of the Laws and Regulations of the Requesting Authority, will not be construed by the Requested Authority as criminal proceedings or proceedings to impose a penalty.

Third, the following provision clarifies the policy that a securities regulator should not circumvent the privilege afforded domestically by relying on compelled evidence obtained abroad. This provides not only an opportunity for securities regulators to take constitutional protections in other jurisdictions seriously, which should be supported by the cosmopolitanism, but also provides more credibility to the requesting regulator in its own jurisdiction that it acted on good faith:

> In making the request for assistance, the Requesting Authorities will represent to the Requested Authority that the Requesting Authority has no intent to use assistance by the Requested Authority to bypass the constitutional protections in the jurisdiction of the Requesting Authority.

These new provisions will best balance the interest of the requested securities regulator to protect fundamental rights of the residents of its jurisdiction and the interest of the requesting securities regulator to fully utilize assistance of the requested securities regulator.

APPENDIX A: UNREASONABLE SEARCHES AND SEIZURES

1. Argentina

Article 18 of the National Constitution provides that "dwellings, personal correspondence and private documents shall not be violated or trespassed, and a statute is to determine in what cases and under what circumstances their search and occupation shall be permitted."[478] This provision does not set a reasonable standard or any other similar guidance as to valid searches and seizures.[479]

The Code of Criminal Procedure provides for warrant requirements and other procedures. For example, Article 225 of the Code requires that searches in "private dwellings must be conducted in daylight hours" except in cases of emergency or with consent.[480] A judicial warrant is generally required to enter into a private dwelling except for "exigent circumstances, such as the police being in hot pursuit, or hearing voices asking for help from inside the house."[481] Article 234 also authorizes a court to seize any written communication sent by or addressed to the accused so long as such interception is deemed to be "useful for the determination whether a crime has been committed."[482]

2. Canada

Section 8 of the Canadian Charter of Rights and Freedoms (the "Charter"), a bill of rights included in the Constitution of Canada, provides: "Everyone has the right to be secure against unreasonable search

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478. Carrio & Garro, *supra* note 57, at 3, 11; Art. 18, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

479. *See* Carrio & Garro, *supra* note 57, at 11.

480. *Id*. at 12; CÓDIGO PROCESAL PENAL DE LA NACIÓN [CÓD. PROC. PEN.] art. 225 (Arg.).

481. Carrio & Garro, *supra* note 57, at 12; CÓD. PROC. PEN. art. 225 (Arg.).

482. Carrio & Garro, *supra* note 57, at 15; CÓD. PROC. PEN. art. 234 (Arg.).

or seizure."[483] The courts have defined searches and seizures to include "state actions that invade a reasonable expectation of privacy without the accused's consent."[484] For example, "the Supreme Court invalidated a Criminal Code provision [that] allowed audio taping of conversations on the basis of the consent of [only] one of the parties.[485]

Warrants are required to conduct invasions of the reasonable expectation of privacy.[486] Warrants "must be granted by a neutral and impartial official[,] . . . generally after reasonable and probable grounds have been established . . . that a crime has been committed and that the search will reveal evidence of the offense."[487] Warrantless searches can be authorized, for example, for searches "for firearms if there are reasonable grounds to believe that an offence with a firearm has been committed and that a warrant cannot be obtained."[488]

3. China

Article 37 of the Constitution "appears" to protect certain due process rights.[489] It provides:

> [F]reedom of the person of citizens of the People's Republic of China is inviolable. No citizens may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ. Unlawful detention or deprivation or restriction of citizens' freedom of the person by detention or other means is prohibited, and unlawful search of the person of citizens is prohibited.[490]

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483. Kent Roach, *Canada*, *in* WORLDWIDE STUDY, *supra* note 20, at 57, 66; Canadian Charter of Rights and Freedoms, § 8, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (UK).

484. Roach, *supra* note 483, at 66.

485. *Id*.

486. *Id*. at 67.

487. *Id*. at 67–68.

488. *Id*. at 69.

489. *See* Ira Belkin, *China*, *in* WORLDWIDE STUDY, *supra* note 20, at 91, 93; XIANFA art. 37 (1982) (China).

490. XIANFA art. 37 (1982) (China).

However, "because the Constitution is not self-executing, and because courts do not have the authority to invoke the Constitution in deciding cases, the rights purportedly protected by Article 37 exist on paper only."[491]

Under the Chinese Criminal Procedure Law, "police may conduct searches pursuant to warrants or in the event of an emergency, without a warrant."[492] The law, however, "does not set forth the procedure for obtaining a warrant," and the police, who have the complete authority over criminal investigations, issue search warrants.[493] Although searches must be conducted in the presence of the owner of the premises and a record must be kept of the circumstances of the search, "[t]here is no legal consequence regarding the admissibility of the evidence obtained" without following those procedures.[494]

4. Egypt

The Constitution forbids warrantless entry into homes, warrantless surveillance or other seizures of correspondence, and unjustified intrusion of citizens' "private life."[495] "The Code of Criminal Procedure and [the court's decision] elaborate these protections."[496]

The Code of Criminal Procedure forbids law enforcement officers from conducting warrantless searches of dwellings except in an emergency.[497] A search warrant can be issued by the court or the prosecution, but in practice, the prosecution issues warrants because it routinely exercises its investigative powers.[498] The Code provides that a warrant must be based on "(1) an accusation that a resident . . . committed or participated in a felony or misdemeanor, or (2) 'strong indicia' . . . that items related to the crime will be found."[499] The court decision additionally requires that

491. Belkin, *supra* note 489, at 93.
492. *Id*. at 100.
493. *Id*. at 100–01.
494. *Id*. at 101.
495. Reza, *supra* note 31, at 119–20; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, arts. 57–58.
496. Reza, *supra* note 31, at 120.
497. *Id*.; Act. No. 150 of 1950 (Criminal Procedure Code) arts. 45, 91 (Egypt).
498. Reza, *supra* note 31, at 120; Criminal Procedure Code, art. 91 (Egypt).
499. Reza, *supra* note 31, at 120; CCP art. 91.

warrants must be issued based on "seriousness and sufficiency of the investigation."[500]

Warrants to search homes of non-suspects and "for the seizure or surveillance of correspondence . . . must come from an examining magistrate or a judge."[501] The prosecution can review "contents of any seized or recorded correspondence only in the presence of the suspect, and any comments the suspect makes during [the] review [must] be recorded and kept with the correspondence."[502]

5. France

There are only a few provisions of individual rights in the French Constitution, such as the presumption of innocence, and most issues of criminal procedure are governed by detailed provisions of the Code of Criminal Procedure.[503] The preliminary article of CCP provides for two general principles applicable to all types of investigations: first, an official investigation should be "fair," attempting to uncover evidence both favorable and unfavorable to the accused, "avoiding the use of brutal or deceptive methods, and respecting human dignity. Second, all investigatory steps must be thoroughly documented, in writing."[504]

The police engaged in a "preliminary examination" that applies to any crime may conduct searches, enter premises, and seize evidence only if they receive the express handwritten consent of the person concerned.[505] "[C]ertain specialized law enforcement agents may receive permission" to conduct searches and seizures upon application to the judge, which is a procedure similar to the procedure for search warrants in the United States.[506] The examining magistrates have almost complete discretion to search any place and seize anything that he deems "useful to the manifestation of the truth."[507]

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500. Reza, *supra* note 31, at 120.
501. *Id.* at 121; Criminal Procedure Code, art. 95 (Egypt).
502. Reza, *supra* note 31, at 121; Criminal Procedure Code, arts. 97, 206 (Egypt).
503. Frase, *supra* note 26, at 205.
504. *Id.* at 206.
505. *Id.* at 207, 211; CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [Criminal Procedure Code] art. 76 (Fr.).
506. Frase, *supra* note 26, at 211.
507. *Id.*; C. PR. PÉN. art. 81 (Fr.).

6. Germany

The German Constitution contains some individual rights relevant to the criminal procedure, such as the right of privacy (Articles 1, 2), the inviolability of the home (Article 13), and the secrecy of the mail and of communications (Article 10).[508] German law, however, "generally accords very little protection to persons and buildings against searches."[509] Article 13 of Basic Law (Constitution) "allows searches if authorized by a judge or, if delay would jeopardize the effectiveness of the search, by other officers designated by law."[510]

"Judicial search orders must be in writing and must specify the [premises] to be searched [and] items expected to be found."[511] The Federal Constitutional Court held "that the requirement of specificity [came] from the constitutional principle that the state must not interfere more than necessary with the citizen's privacy."[512] In practice, the police often assume "danger in delay" to obtain search order by designated officers, but the Federal Constitutional Court criticized this practice and declared "that the police must document the reasons for the impossibility of obtaining a [judicial] warrant."[513]

7. Israel

The Basic Law: Human Dignity and Liberty (the "Basic Law"), enacted in 1992, provides for "the fundamental right[s] to personal freedom, which includes the right against detention, imprisonment[,] and extradition."[514] The Basic Law also provides that the individuals have the right "to be protected against a search of body, personal articles[,] and premises."[515] In response, the Criminal Procedure Ordinance requires a warrant for the

508. Thomas Weigend, *Germany*, *in* WORLDWIDE STUDY, *supra* note 20, at 243, 248–49; GRUNDEGESETZ [GG] [BASIC LAW] § 2, arts. 1, 2, 10, 13, *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf (Ger.).

509. Weigend, *supra* note 508, at 249.

510. *Id.*; GRUNDEGESETZ [GG] [BASIC LAW] § 2, art. 13.

511. Weigend, *supra* note 508, at 250; BVERFGE 44, 353, ¶ 20 (1977) (Ger.).

512. Weigend, *supra* note 508, at 250.

513. *Id.*

514. Kitai-Sangero, *supra* note 33, at 273; Basic Law: Human Dignity and Liberty, § 5 (1992) (Isr.).

515. Kitai-Sangero, *supra* note 33, at 276; Basic Law, § 7 (Isr.).

police to search a person's premises, except for limited circumstances such as when a police officer "has reasonable grounds to assume that a felony is being committed there" or the suspect consented.[516]

"A judge has very broad powers to issue a warrant to search premises."[517] The judge may issue a search warrant, for example, "if the search is necessary . . . to assure the presentation of an object" for an investigation or trial and "if the judge has reason to believe that the location is being used for the storage . . . of a stolen item."[518] In practice, "[j]udges tend to issue search warrants *ex parte*, almost automatically, without an extensive examination of the underlying facts."[519]

8. Italy

The Italian Constitution provides that "[t]here shall be no form of detention, inspection, or search of the person, nor any other restrictions whatsoever of personal liberty, except by decision, wherein the reasons are stated, by the judicial authorities, and only in cases and in the matter prescribed by law."[520] It also provides that in "exceptional cases of necessity and urgency, expressly provided for by law, the police may take provisional measures."[521] It, therefore, "declares in broad terms the sanctity of personal liberty[,] . . . yet expressly permits legislation to abrogate these protections in cases of necessity and urgency."[522]

The general rule is that search and seizures require a search warrant issued by a judge or a public prosecutor.[523] More than mere suspicion is necessary to issue a warrant because the Code of Criminal Procedure uses the term "'well-founded grounds' for believing that such relevant evidence may be discovered or the defendant may be found."[524] The Police,

516. Kitai-Sangero, *supra* note 33, at 276; Criminal Procedure Ordinance (Arrest and Search) (New Version), 5729–1969, § 25 (Isr.).
517. Kitai-Sangero, *supra* note 33, at 276.
518. *Id.*; Criminal Procedure Ordinance, § 23 (Isr.).
519. Kitai-Sangero, *supra* note 33, at 276.
520. Van Cleave, *supra* note 34, at 305; Art. 13(2) Costituzione [Cost.] (It.).
521. Art. 13(3) Costituzione [Cost.] (It.).
522. Van Cleave, *supra* note 34, at 305.
523. *Id.* at 313.
524. *Id.*; C.p.p. art 247(1) (It.).

however, may conduct warrantless searches in "exigent circumstances" such as when someone is committing a crime or has escaped custody.[525]

9. Japan

Article 31 of the Constitution provides: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."[526] It is interpreted to require not only that procedure is established by law, but also that the substance of the law must be reasonable and appropriate.[527] For example, seizure of personal property without prior notice violates article 31.[528]

Article 35 of the Constitution further provides:

> The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33.[529]

Search warrants must be "issued by a competent judicial officer" for each search or seizure.[530] The exception under Article 33 applies to warrantless searches and seizures reasonably accompanying an arrest.[531]

10. Mexico

Article 16 of the Mexican Constitution requires: "Every search warrant, which can only be issued by judicial authority, and which must be in writing, shall specify the place to be searched, the person or persons to be

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525. Van Cleave, *supra* note 34, at 315; C.p.p. art. 247(1) (It.).

526. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 31 (Japan).

527. KOJI SATO, JAPANESE CONSTITUTION 587 (3d ed. 1995).

528. Saiko Saibansho [Sup. Ct.] Nov. 11, 1962, 1955 (A) no. 2961, SAIKŌ SAIBANSH MINJI HANREISHŪ [MINSHŪ] (Japan).

529. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 35(1) (Japan).

530. *Id.* art. 35(2); KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 218, ¶ 1 (Japan).

531. Code of Criminal Procedure, art 220(3); NOBUYOSHI ASHIBE, JAPANESE CONSTITUTION 227 (3d ed. 2002).

seized, and the objects sought."[532] The party seeking a warrant "must provide presumptive evidence based on a factual foundation that the person or thing to be seized would be found in the place to be searched."[533]

Federal courts tend to interpret the requirements under Article 16 of the Constitution more loosely when the request for the warrant is related to a commercial establishment or the search concerns the property of a third party.[534] The police may also seize objects different from those listed in the search warrant if they are in plain-view or discovery of evidence can result from a general search conducted by the officers.[535]

11. Russia

The Russian Constitution contains a number of articles related to criminal procedure and civil liberties, including freedom and personal inviolability (Article 22), right to the privacy of correspondence, telephone conversations, mail, telegraph, and other communications (Article 23), and inviolability of the home (Article 25).[536]

The Criminal Procedure Code in 2002 replaced soviet style Criminal Procedure Code, which was adopted in 1960, "to establish a criminal justice system based on democratic principles" and not only to make law enforcement effective but also to safeguard civil liberties.[537] "In conformity with the constitutional guarantee of the inviolability of the home, the Code provides that a search of a dwelling and a body search of a person be carried out pursuant to a judicial warrant."[538] The grounds for

532. Miguel Sarré & Jan Perlin, *Mexico*, *in* WORLDWIDE STUDY, *supra* note 20, at 351, 357 n.22; Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014, art. 16 (Mex.).

533. Sarré & Perlin, *supra* note 532, at 357; Código Federal de Procedimientos Penales [CFPP], Diario Oficial de la Federación [DOF] 30-08-1934, últimas reformas DOF 09-06-2009, art. 63 (Mex.).

534. Sarré & Perlin, *supra* note 532, at 358.

535. *Id.*

536. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] arts. 22, 23, 25 (Russ.).

537. Catherine Newcombe, *Russia*, *in* WORLDWIDE STUDY, *supra* note 20, at 397, 397.

538. *Id.* at 425.

conducting a search must be based on "sufficient information to believe that there exist [items] relevant to a [crime]."[539]

The Code also requires that "a seizure may be carried out if it is necessary to seize certain objects and documents that are relevant to the criminal case and if the location and the person in possession of them are known."[540] "Seizures are carried out [generally] according to the same procedures as searches."[541]

12. South Africa

The current South African Constitution came into operation in 1997, and before that, "South Africa never had a Bill of Rights."[542] The new Constitution "not only represents a complete break with the *apartheid* era, but also replaces parliamentary sovereignty with a Constitution, which [as] the supreme law . . . can prevent a repetition of the legislative and executive excesses of the past."[543]

Section 14 of the Constitution provides: "Everyone has the right to privacy, which includes the right no tot have— (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."[544] Therefore, under the Criminal Procedures Act, "search and seizure without a warrant is only exceptionally permitted."[545] "A search warrant may be issued by a magistrate or justice of the peace who . . . has reasonable grounds for believing that" the item can be found.[546] A police officer may conduct searches and seizures without a warrant if the subject consents or "if he reasonably believes that the delay in obtaining the warrant would defeat the object of the search."[547]

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539. *Id.*
540. *Id.* at 428.
541. *Id.*
542. PJ Schwikkard & SE van der Merwe, *South Africa*, *in* WORLDWIDE STUDY, *supra* note 20, at 471, 471.
543. *Id.* at 471–72.
544. S. AFR. CONST., 1996, art. 14.
545. Schwikkard & van der Merwe, *supra* note 542, at 483.
546. *Id.*
547. *Id.* at 484.

13. United Kingdom

Because the United Kingdom does not have a written constitution, "there has in the past been no constitutional limitation on the power of Parliament to confer [the] police officers" power that may interfere with fundamental rights.[548] However, "a number of rights . . . under the European Convention on Human Rights (ECHR) became part of English law, and took effect [in] 2000 by virtue of the Human Rights Act 1998."[549] The Convention rights include the right not to be arbitrarily deprived of liberty,[550] and the right to respect for private and family life, home, and correspondence.[551] In addition, under common law, any entry by the police would be unlawful without the occupant's consent, without a warrant issued by a statutory power, or without "statutory power to enter without warrant."[552] Under the Police and Criminal Evidence Act of 1984 ("PACE"), a magistrate can issue a warrant to enter premises to search for evidence of a crime if there are reasonable grounds for believing that, among others, an indictable offence has been committed, there is material on premises, which is likely to be of substantial value to the investigation, and the material is likely to be relevant evidence.[553]

"At common law, a warrant could authorize entry to only one location and on only one occasion."[554] Under the Serious Organized Crime and Police Act of 2005, however, a warrant may "authorize multiple entries over a period of up to three months."[555] This may infringe upon "important protections against arbitrary entries and searches" by removing "the need for investigating officers to justify each entry to specific premises."[556] The PACE and the Human Rights Act 1998, however, still ensure that any use

548. Feldman, *supra* note 23, at 149.

549. *Id.*

550. European Convention on Human Rights, art. 5, Nov. 4, 1950, echr.coe.int/Documents/Convention_ENG.pdf.

551. *Id.* art. 8.

552. Feldman, *supra* note 23, at 158.

553. Police and Criminal Evidence Act 1984 v. 60 (Eng.), http://www.legislation.gov.uk/ukpga/1984/60/pdfs/ukpga19840060en.pdf; Feldman, *supra* note 23, at 158–59.

554. Feldman, *supra* note 23, at 159.

555. *Id.*

556. *Id.*

of the warrant is necessary in response to a pressing need and proportionate, as required by Article 8 of the ECHR.[557]

APPENDIX B: SELF-INCRIMINATION PRIVILEGE

1. Argentina

Article 18 of the National Constitution provides that "nobody shall be compelled to testify against himself."[558] This constitutional guarantee, however, operates differently before and after the formal charge in court.[559] The self-incrimination privilege "is relatively weak when the police seek statements, admissions, or confessions from a suspect," but "is more widely and generously applied once the suspect [appears] in court and charges are formally brought against him."[560]

The Supreme Court of Argentina has issued only one clear standard distinguishing "self-incriminating statements given to the police that ought to be excluded."[561] Extrajudicial confessions must be excluded "if the defendant is able to establish that those statements were extracted under coercion."[562] The defendants, however, are unable to meet the burden in most of the cases.[563]

Before the investigative magistrate begins judicial questioning, the defendant "must be fully advised of his rights," including the "right to remain silent and to have an attorney present."[564] In practice, most defendants voluntarily provide an explanation to avoid responsibility or mitigate eventual punishment because the same investigative magistrate will rule on whether the accused should face a trial.[565]

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557. *Id.*
558. Carrio & Garro, *supra* note 57, at 27.
559. *Id*.
560. *Id*.
561. *Id*. at 30.
562. *Id*.
563. *Id*.
564. *Id*. at 31.
565. *Id*.

2. Canada

Section 11(c) of the Charter provides: "Any person charged with an offence has the right . . . not to be compelled to be a witness in proceedings against that person in respect of the offence."[566] There is no constitutional obligation for criminal interrogators to inform detainees of their right to remain silent, but such a warning is customarily given to facilitate proof that statements were made voluntarily.[567] There is no distinction between the accused's rights to remain silent before and after formal charges in court.[568]

3. China

There is no right to remain silent during interrogation.[569] "Article 43 of the Criminal Procedure Code prohibits the use of torture and deception to obtain evidence [as follows:] 'it shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means.'"[570] Chinese law, however, "does not provide for the exclusion of evidence obtained illegally [nor] provide for a procedure to determine whether unlawful means were used."[571] In addition, there is no right to counsel although a "suspect may hire a lawyer . . . after the initial interrogation."[572] As a result, China suffers many incidents "of confessions obtained by coercion."[573]

In 2012, Congress enacted new amendments to the Criminal Procedure Code that include a privilege against self-incrimination.[574] Article 50 provides, "No person may be forced to prove his own guilt."[575] Before the

566. Charter of Rights and Freedoms, § 11(c), Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c 11 (U.K.).

567. Roach, *supra* note 483, at 77.

568. *Id*. at 78.

569. Belkin, *supra* note 489, at 101.

570. *Id*.

571. *Id.*

572. *Id*.

573. *Id*.

574. Profit, *supra* note 59, at 157.

575. *Id.*; Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by the

enactment of Article 50, Article 93 of the former Criminal Procedure Code provided that suspects had no right to remain silent and were obliged to answer questions relevant to the investigation.[576] Despite the new Code, due to the unprecise scope of Article 50 and the apparent continued enforcement of old Article 93, it is difficult to determine who is covered and when a person is covered.[577]

4. Egypt

"Neither the [Egyptian] Constitution nor the Code of Criminal Procedure explicitly provides defendants" the self-incrimination privilege, but it is recognized and enforced in practice.[578] The Egyptian Constitution provides "that any statement . . . proven to have been compelled by 'physical or moral harm' or threat to such harm is 'null and void.'"[579] The Code sets forth "rules and limits on interrogating defendants during the investigative process" and trial.[580] These provisions and court rulings "make it clear that defendants have no obligation to answer questions" before and during trial and "that a defendant's silence should not be considered evidence of guilt."[581]

While police officers are not ordinarily authorized to interrogate arrestees, the prosecution is authorized to interrogate arrestees to decide whether to formally charge or release arrestees.[582] Under the Judicial Directives, prosecutors may not promise a defendant anything or deceive a defendant to get him to confess.[583] A trial court may not "rely on any

Standing Comm. Nat'l People's Cong., July 1, 1979, amended Mar. 14, 2012, effective Jan. 1, 2013), art. 50 (China).

576. Profit, *supra* note 59, at 157. This policy heavily relied "upon Confucian principles, which place emphasis on protecting society . . . even at the expense of individual rights." *Id*.

577. *Id.* at 158.

578. Reza, *supra* note 31, at 125.

579. *Id.*; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 42, 11 Sept. 1971.

580. Reza, *supra* note 31, at 125.

581. *Id.*

582. *Id.* at 125–26.

583. *Id.* at 126.

statement . . . that is shown to have been made under compulsion or threat."[584]

5. France

When a person is put in investigatory detention, he must be advised of the rights to inform his family or employer, to be examined by a doctor, and to speak in private with an attorney.[585] There is no requirement, however, for providing a warning as to the right to silence, and in practice, such advice is rarely given.[586]

When a suspect first appears before a magistrate who decides whether to formally charge, he must be advised that he has the right to remain silent, or may choose to make a statement, or may consent to be questioned, except in exigent circumstances, in counsel's presence.[587] Although suspects cannot legally be compelled to speak or formally punished for refusing, in practice, suspects respond to most questions.[588]

6. Germany

Suspects who are investigated must be, at the beginning of an interrogation, informed of certain rights, including "that they are free . . . to make or not to make a statement with respect to the alleged offense."[589] "This information must be given [in] interrogation by a judge, a prosecutor, or a police officer."[590] The suspect, however, need not be informed that any statement made can be used against him.[591] In practice, "to avoid problems of proof, [the] police tend to have suspects sign a

584. Reza, *supra* note 31, at 127; Act. No. 150 of 1950 (Criminal Procedure Code) arts. 45, 91 (Egypt).

585. Frase, *supra* note 26, at 216; CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 63 (Fr.).

586. Frase, *supra* note 26, at 216.

587. *Id.* at 217; C. PR. PÉN, art. 116 (Fr.).

588. Frase, *supra* note 26, at 218.

589. Weigend, *supra* note 508, at 256; STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 136, ¶ 1, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

590. Weigend, *supra* note 508, at 256; StPO, § 163a, ¶¶ 3–4 (Ger.).

591. Weigend, *supra* note 508, at 256 n.76.

preformulated statement confirming that they have been advised of their rights."[592]

The Code of Criminal Procedure explicitly "prohibits attempts to influence a suspect's determination whether to make a statement by 'deception,'"[593] and any statement obtained as such is inadmissible.[594] "Tricks and fraudulent tactics of the police" to obtain a statement from suspects are also "generally discouraged by the courts."[595]

7. Israel

Although the Basic Law does not explicitly provides for the privilege against self-incrimination, "[t]he suspect is granted a right to remain silent" during the interrogation.[596] "[A] person being interrogated as a suspect [must be notified] of his right to remain silent regardless of whether . . . he is under arrest."[597] The Supreme Court, however, held that such an obligation to notify would not arise when the General Security Service conducts an interrogation to extract information "to prevent the commission of a future offense against national security."[598]

If a statement entails a confession, "the prosecution must prove beyond all reasonable doubt that the defendant's confession was given freely and voluntarily."[599] Criminal Procedure Law provides for the right of a defendant to refrain from testifying at his own trial.[600] In practice, however, most defendants testify at trial because of the possibility of viewing the silence of the defendant as support for the prosecution's evidence.[601]

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592. *Id.* at 257.
593. *Id.* at 258; StPO, § 136a, ¶ 1 (Ger.).
594. Weigend, *supra* note 508, at 258; StPO, § 136a, ¶ 3 (Ger.).
595. Weigend, *supra* note 508, at 258.
596. Kitai-Sangero, *supra* note 33, at 282.
597. *Id.* at 283.
598. *Id.*; Smirk v. State of Israel, 56(3) PD 529, 545–46 (1999) (Isr.).
599. Kitai-Sangero, *supra* note 33, at 283; Kandil v. Attorney General, 2 PD 810, 824–25 (1949) (Isr.).
600. Kitai-Sangero, *supra* note 33, at 283; Criminal Procedure Law [Consolidated Version], 5742–1982, § 161 (Isr.).
601. Kitai-Sangero, *supra* note 33, at 285.

8. Italy

Although the Code of Criminal Procedure "makes a clear distinction between a suspect and a defendant" with whom formal criminal proceedings have initiated by the prosecutor, it also "provides that a suspect is to have [substantially] the same rights and guarantees as a defendant."[602] If a person not yet a suspect reveals incriminating evidence in the course of exchange with the police, the police must interrupt the person and warn him that an investigation may begin against him.[603] "Statements made before this warning may not be used against the [person]."[604]

The suspect must be warned of his right to remain silent.[605] When a suspect makes "spontaneous" statements in the absence of counsel, these may not be used at trial, except for purposes of impeachment.[606] The Code also prohibits methods or techniques likely to violate a suspect's "freedom of self-determination" ability to remember and evaluate facts even if he consents to these methods.[607]

9. Japan

Article 38(1) of the Japanese Constitution provides for the self-incrimination privilege: "No person shall be compelled to testify against himself."[608] This provision is based on the Fifth Amendment of the U.S. Constitution.[609] Article 38(2) further provides: "Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence", and Article 38(3) provides: "No person shall be convicted or punished in cases where the only proof against him is his own confession."[610]

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602. Van Cleave, *supra* note 34, at 324; Codice di procedura penale [C.p.p.] [Criminal Procedure Code] arts. 61, 62 (It.).

603. C.p.p. art. 63(1) (It.).

604. Van Cleave, *supra* note 34, at 324; C.p.p. art. 63(1) (It.); Cass. Sez. I, La Placa, March 17, 2000.

605. C.p.p. art. 64(3) (It.).

606. *Id.* art. 350(7).

607. *Id.* arts. 64(2), 188.

608. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 38, ¶ 1 (Japan).

609. ASHIBE, supra note 463, at 230.

610. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 38, ¶¶ 2, 3 (Japan).

The Code of Criminal Procedure requires that the prosecutor and the police must notify the suspect that "[he] is not required to make a statement against [his] will."[611] This provision is said to be enacted, though not necessarily required by Article 38(1) of the Japanese Constitution, to achieve the purpose of Article 38(1).[612]

10. Mexico

Article 20(2) of the Constitution provides: "In every criminal trial the accused shall enjoy the following guarantees: He may not be forced to be a witness against himself; wherefore denial of access or other means tending to this end is strictly prohibited."[613] "The [Federal Code of Criminal Procedure] provides that a warning be given to the detainee upon their arrest or while [in] custody, which include the right to remain silent or to speak only in the presence of counsel."[614]

The police may not take formal statements from the suspect, but may take note of statements made by the suspect during the arrest or while in custody.[615] The Code, however, prohibits these statements to be considered confessions, so they have less weight than statements taken by the prosecutor.[616] "Only the prosecutor may question the suspect."[617] Confession by the defendant must be made voluntarily to be admissible.[618]

11. Russia

"In the post-communist era, the interrogation process has been plagued by corruption and abuse and thus frequently [criticized] by human rights

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611. *See* KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 198, ¶ 2. (Japan).

612. ISAO SATO, JAPANESE CONSTITUTION 593 (vol. 1, 1983).

613. Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diaro Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014, art. 20 ¶ 2 (Mex.).

614. Sarré & Perlin, *supra* note 532, at 364; Código Federal de Procedimientos Penales [CFPP], art. 128, Diario Oficial de la Federación [DOF] 30-08-1934, última refomras DOF 09-06-2009 (Mex.).

615. Sarré & Perlin, *supra* note 532, at 364.

616. *Id.*; CFPP art. 287 (Mex.).

617. Sarré & Perlin, *supra* note 532, at 366.

618. *Id.*; CFPP art. 287 (Mex.).

groups and international organizations."[619] The new Criminal Procedure Code enacted in 2002 attempted to address these deficiencies.[620]

The Russian Constitution guarantees both suspects and defendants the right not to incriminate themselves or their relatives.[621] "[T]he Code affords both persons the right to give explanations and testimony and the right to refuse to do so."[622] "If a suspect or [a defendant] decides to provide testimony, he must be warned that his testimony may be used as evidence even if he later recants it."[623] "[T]he pretrial testimony of a suspect or [a defendant] is automatically inadmissible if given in the absence of defense counsel . . . and not later confirmed by him in court."[624]

12. South Africa

Article 35 of the South African Constitution provides:

> Everyone who is arrested for allegedly committing an offense has the right— (a) to remain silent; (b) to be informed promptly— (i) of the right to remain silent; and (ii) of the consequences of not remaining silent; (c) not to be compelled to make any confession or admission that could be used in evidence against that person.[625]

As the combined effect of the South African Constitution, the Criminal Procedure Act, and the Judges' Rules, "whenever a person is arrested or detained[,] she must be promptly advised of her right," including to remain silent and the right to consult with a legal counsel.[626] "Evidence elicited during an interrogation that has not been preceded by the requisite warning will run the risk of exclusion."[627] Article 35(5) of the South African

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619. Newcombe, *supra* note 537, at 433.
620. *Id.*
621. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 51 (Russ.).
622. Newcombe, *supra* note 537, at 434; UGOLOVNO-PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [UPK RF] [Criminal Procedure Code] arts. 46(4)(2), 46(4)(3) (Russ.).
623. Newcombe, *supra* note 537, at 434; UPK RF arts. 46(4)(2), 47(4)(3) (Russ.).
624. Newcombe, *supra* note 537, at 434.
625. S. AFR. CONST., art. 35, 1996.
626. Schwikkard & van der Merwe, *supra* note 542, at 491.
627. *Id.* at 492.

Constitution requires exclusion if the admission of evidence would render the trial unfair or otherwise be detrimental to the administration of justice.[628]

13. United Kingdom

"At common law[,] there [is] no legal obligation to answer police questions."[629] Parliament, however, "passed legislation [to impose] obligations to disclose information to investigators in connection with terrorism, serious fraud, and money-laundering investigation."[630] Thereafter, the European Court of Human Rights held that the use in criminal proceedings "of self-incriminating information [obtained] under threat of criminal penalties for non-disclosure . . . breached the right to a fair trial under article 6 of the ECHR."[631] Therefore, "[a]ll legislation . . . providing penalties for non-disclosure has now been amended to bring it into line" with the decision above.[632]

When the police have "reasonable grounds to suspect that the interviewee has committed [a crime], they must [inform] him of his right to remain silent" and the fact that it may harm his defense later.[633] Evidence obtained by conduct "amounting to an impropriety undermining the fairness of the proceedings," such as evidence obtained by misleading the suspect's lawyer, can be excluded by the judge.[634]

628. *Id.*
629. Feldman, *supra* note 23, at 166.
630. *Id.* at 167.
631. *Id.*; Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, 331 (1996).
632. Feldman, *supra* note 23, at 167.
633. *Id.*
634. *Id.* at 170; R v. Mason [1987] 3 All ER 481 at 481 (Eng.).