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# Casenotes: Constitutional Criminal Procedure — Self-Incrimination — Court May Compel Witnesses to Testify before a Grand Jury Who Are Immune from Prosecution in the United States, but Amenable to Prosecution in a Foreign Jurisdiction. United States v. Under Seal, 794 F.2d 920 (4th Cir.), cert. denied, 107 S. Ct. 331 (1986)

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CONSTITUTIONAL CRIMINAL PROCEDURE — SELF-INCRIMINATION — COURT MAY COMPEL WITNESSES TO TESTIFY BEFORE A GRAND JURY WHO ARE IMMUNE FROM PROSECUTION IN THE UNITED STATES, BUT AMENABLE TO PROSECUTION IN A FOREIGN JURISDICTION. *United States v. Under Seal*, 794 F.2d 920 (4th Cir.), *cert. denied*, 107 S. Ct. 331 (1986).

Irene and Gregorio Araneta, the daughter and son-in-law of Ferdinand E. Marcos, former President of the Philippines, were lawfully present in the United States under advanced parole status.[1] A grand jury, while investigating possible corruption involving arms contracts with the Philippines, subpoenaed the Aranetas to testify[2] and granted them immunity from prosecution in the United States.[3] The Aranetas refused, however, to testify before the grand jury because they alleged that a real and substantial risk existed[4] that their testimony could be used to incriminate them in the Philippines.[5] Subsequently, the district court held the Aranetas in contempt for refusing to comply with the subpoena.[6] The United States Court of Appeals for the Fourth Circuit affirmed the contempt order and refused to extend the fifth amendment privilege against self-incrimination to the Aranetas even though their testimony could be used in a foreign prosecution.[7]

The fifth amendment provides, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[8] This right prohibits a court from compelling a person's testimony if it may be used against him in a domestic criminal proceeding by either federal or state

1. United States v. Under Seal, 794 F.2d 920, 922 (4th Cir.), *cert. denied*, 107 S. Ct. 331 (1986). Advanced parole status was granted pursuant to 8 U.S.C. § 1182(d)(5) (1982). This statute empowers the Attorney General to admit aliens temporarily into the United States in the event of an emergency or for reasons considered to be strictly in the public interest. Parole is not regarded as an admission of the alien and when the purposes of the parole have been served, the alien shall return to the custody from which he was paroled. *Id.* n.2.
2. *Under Seal*, 794 F.2d at 927.
3. The immunity grant supersedes their fifth amendment privilege against self-incrimination in the United States. *Id.* at 923. Immunity from prosecution may be granted to a witness in exchange for testimony under state or federal statutes. Protection from prosecution must be commensurate with the fifth amendment privilege, but the protection need not be any greater. Therefore, a person is constitutionally guaranteed protection only from prosecution based on the use and derivative use of his testimony, and not from prosecution for everything arising from the illegal transaction which his testimony concerns. *See* Kastigar v. United States, 406 U.S. 441, 459-62 (1972).
4. The factors which created a real and substantial risk of foreign prosecution were an extradition treaty between the United States and the Philippines was awaiting Senate approval, and the expressed American policy to aid and assist the Aquino government in its pursuit of Philippine interests regarding the Marcos regime. *Under Seal*, 794 F.2d at 923-24.
5. Shortly after their arrival, the Solicitor General of the Philippines charged the Aranetas with conspiracy, violations of the Anti-Graft and Corrupt Practices Act and violations of Articles 210-221 of the Philippines Penal Code. *Id.* at 922.
6. *Id.* at 921.
7. *Id.* at 928.
8. U.S. CONST. amend. V.

officials.[9] This privilege against self-incrimination may be superseded by a grant of immunity made pursuant to an immunity statute.[10] A grant of immunity protects the individual from self-incrimination within the scope of the fifth amendment privilege, and thus, enables a court to compel testimony without violating the privilege.[11]

Prior to a trial, the grand jury may compel a witness to testify pursuant to its investigative role in the criminal justice process.[12] The witness may invoke his fifth amendment privilege before the grand jury, when the compelled testimony causes a real and substantial threat of criminal liability.[13] When the testimony may be necessary to the public interest, the prosecutor may obtain a court order granting immunity.[14] The grant of immunity forces the witness to either testify or face contempt sanctions.[15]

The constitutional prohibition contained in the fifth amendment did not at first apply to the states,[16] and the Supreme Court, in applying the privilege against self-incrimination, treated the federal government and the states as independent sovereigns for purposes of this fifth amendment privilege.[17] For example, the fifth amendment protection did not prohibit the federal government from compelling testimony, through a grant of immunity, that would incriminate a witness under state law.[18] Furthermore, the privilege did not protect testimony compelled on the state level that would incriminate under federal law.[19]

The Court, however, extended the fifth amendment privilege against

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9. *See* Note, *The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in a Foreign Country's Court*, 69 VA. L. REV. 875, 882 (1983) [hereinafter Note, *Reach of the Fifth Amendment*].
10. In 1892, the Supreme Court, in Counselman v. Hitchcock, 142 U.S. 547 (1892), considered for the first time a constitutional challenge to an immunity statute. The Court held that an immunity statute, in order to satisfy the requirements of the fifth amendment, must provide either absolute immunity or transactional immunity against future prosecution for an offense. In Kastigar v. United States, 406 U.S. 441 (1972), the Court narrowed the effect of the *Counselman* holding by concluding that transactional immunity afforded a broader protection than the fifth amendment privilege required, and that use and derivative use immunity would provide protection commensurate with the fifth amendment privilege.
11. C. MCCORMICK, MCCORMICK ON EVIDENCE § 143 (3d ed. 1984); *see also* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 23.3(f) (1985) (in addition to the grand jury, a trial court may grant immunity to a defense witness during a criminal trial).
12. W. LAFAVE & J. ISRAEL, *supra* note 11, § 8.1. The grand jury decides whether to issue an indictment by reviewing the government's evidence, and, in effect, screening the prosecutor's decision to charge.
13. *Id.* § 8.10.
14. *Id.* § 8.11(c).
15. *Id.*
16. *See* Note, *Reach of the Fifth Amendment*, *supra* note 9, at 879.
17. This is also known as the "two sovereignties rule." *See* Grant, *Federalism and Self-Incrimination*, 5 UCLA L. REV. 1 (1958).
18. *See* United States v. Murdock, 284 U.S. 141 (1931); Hale v. Henkel, 201 U.S. 43 (1906); Jack v. Kansas, 199 U.S. 372 (1905).
19. Knapp v. Schweitzer, 357 U.S. 371 (1958).

self-incrimination to the states through the fourteenth amendment.[20] Later, in *Murphy v. Waterfront Commission*,[21] the Court held that the fifth amendment privilege protects a state witness from prosecution under federal and state law if the compelled testimony or its fruits could be used in any manner by federal officials in connection with a criminal prosecution against him.[22] The Court also indicated, in dicta, that the privilege would protect a federal witness from prosecution under federal or state law[23] and that the privilege against self-incrimination may protect a witness facing prosecution from a foreign sovereign.[24] In reaching this conclusion, the Court relied on the English rule that protects a witness from answering questions about acts that are cognizable in a foreign jurisdiction.[25]

After *Murphy*, the Court in *Zicarelli v. New Jersey State Commission of Investigation*[26] was faced with the issue of whether the fifth amendment precludes the compulsion of testimony from a witness who risks foreign prosecution. The Court outlined the framework of analysis to be used in deciding whether to extend the privilege to witnesses facing foreign prosecution.[27] First, a court must determine whether the witness faces a real and substantial risk of foreign prosecution as opposed to only a remote and speculative danger of such prosecution.[28] If the risk is real and substantial, the court must address the constitutional issue.[29] Because the Court found that the witness did not face a real and substantial

20. Malloy v. Hogan, 378 U.S. 1 (1964).
21. 378 U.S. 52 (1964).
22. *Id.* at 77-79; *see also* Note, *Reach of the Fifth Amendment*, *supra* note 9, at 882 ("Thus the *Murphy* Court erased the fifth amendment line between state and federal criminal prosecutions.").
23. *Malloy*, 378 U.S. at 78.
24. *Id.* at 63.
25. *Id.* English courts had recognized before the United States Constitution was adopted that the privilege against self-incrimination protects a witness from being compelled to testify if such testimony could be used against him in another jurisdiction. *Id.* at 58 (citing East India Co. v. Campbell, 27 Eng. Rep. 1010 (1749)); *see also* Brownsword v. Edwards, 28 Eng. Rep. 157 (1750) (recognizing the right against self-incrimination). An earlier English opinion, cited as the settled English rule in United States v. Murdock, 284 U.S. 141 (1931), refused to apply the self-incrimination privilege to a former Sicilian revolutionary who feared foreign incrimination. Two Sicilies v. Willcox, 61 Eng. Rep. 116 (1851). United States v. McRae, 3 L.R. — Ch. App. 79 (1867), however, overruled *Willcox*. Because of the close connection between the English and American right against self-incrimination, and the absence of definite American authority on the subject, the English rule has been an important guide in interpreting the scope of the fifth amendment privilege. Comment, *Fear of Foreign Prosecution and the Fifth Amendment*, 58 IOWA L. REV. 1304, 1307 (1973) [hereinafter Comment, *Fear of Foreign Prosecution*].
26. 406 U.S. 472 (1972). The holding in *Zicarelli* is based on the test set forth in Hoffman v. United States, 341 U.S. 479 (1951). Under the *Hoffman* test, the privilege prohibited compelling any testimony that would "furnish [even] a link in the chain of evidence needed to prosecute . . . ." *Id.* at 486.
27. *Id.* at 480-81.
28. *Id.* at 478.
29. *Id.*

risk of foreign prosecution, the Court was not confronted with the constitutional issue.[30]

In *In re Cardassi*,[31] the court considered whether a witness who was granted immunity may successfully invoke the fifth amendment privilege based upon the fear of foreign prosecution.[32] The government argued that strict judicial controls against disclosure of testimony given at a grand jury hearing provided by Federal Rule of Criminal Procedure 6(e) (the secrecy rule) alleviates the need for the fifth amendment protection.[33] Using the *Zicarelli* framework of analysis, the *Cardassi* court determined that the witness's fear of foreign prosecution was reasonable, and thus proceeded to address the constitutional issue left open in *Zicarelli*.[34] The court acknowledged that while the secrecy rule limits the danger of foreign prosecution, the rule has faults and exceptions that allow disclosure.[35] Therefore, the court concluded that the privilege against self-incrimination protects an immunized witness in American courts from self-incrimination in foreign jurisdictions when a court determines that the witness' fear of foreign prosecution is reasonable.[36] The court noted that preservation of the fifth amendment privilege is consistent with the English rule,[37] which it interpreted as protecting a witness

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30. *Id.* at 480-81.
31. 351 F. Supp. 1080 (D. Conn. 1972).
32. *Id.* at 1083.
33. *Id.* at 1082.
34. *Id.* at 1084.
35. *Id.* at 1082-83. Exceptions to the grand jury secrecy rule include:

> (A) Disclosure otherwise prohibited by this rule . . . may be made to
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> (i) an attorney for the government for use in the performance of such attorney's duty; and
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> (ii) such government personnel as are deemed necessary . . . to assist an attorney for the government in the performance of such attorney's duty . . . .
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> * * *
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> (C) Disclosure otherwise prohibited . . . may also be made —
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> (i) when so directed by a court preliminarily to or in connection with the judicial proceeding; or
>
> (ii) when permitted by a court at the request of the defendant . . . .
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> FED. R. CRIM. P. 6(c)(3).

Rule 6(e) of the Federal Rules of Criminal Procedure gives judges broad discretion over the disclosure of grand jury records. Because the secrecy rule does not usually apply after the grand jury has been dismissed, courts are more liberal in allowing the secrecy to be breached. Government attorneys have access to the transcripts. Because the transcripts are often used to impeach, attack credibility, or refresh memory, the testimony often becomes part of the public record and is available to all. Furthermore, the secrecy rule does not cover any physical evidence uncovered directly or indirectly due to the grand jury testimony. Additionally, 18 U.S.C. § 3333 (1970) permits reports to a grand jury to become part of the public record if so desired by a majority of the grand jurors.

36. *In re* Cardassi, 351 F. Supp. 1080, 1084-86 (D. Conn. 1972).
37. The court relied on Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), as having formally adopted the English rule. *Cardassi* at 1084-86. The English rule, as stated in United States v. McRae, 3 L.R. Ch. App. 79 (1867) has been interpreted by some courts as authority for extending the fifth amendment to foreign prosecutions.

against testifying if such testimony could lead to foreign incrimination.[38]

Other courts that have considered whether the fifth amendment applies to foreign prosecutions have reached different results.[39] For example, in *Phoenix Assurance Co. of Canada v. Runck*,[40] the court flatly rejected the English rule and refused to extend the fifth amendment privilege.[41] The court noted that because the United States Constitution was written before the English decided any foreign incrimination cases, the English rule would not have had any influence over the framers of the Constitution.[42] Furthermore, the court also indicated that the fifth amendment governs only domestic affairs because constitutional protections apply only to those governments ruled by the United States Constitution unless expressly stated otherwise.[43] The court stated that "if the privilege were to apply to foreign prosecution it would frustrate the effective use of granting immunity in exchange for testimony."[44] Lastly, the court implied that extending the privilege would unduly burden domestic courts with questions of foreign law which they are unqualified to answer.[45]

*United States v. Flanagan*[46] represents a compromise between the opposing views on the extension of the fifth amendment to foreign prosecutions.[47] The *Flanagan* court recognized, as did the *Cardassi* court, that because the secrecy rule does not always eliminate the risk of a foreign prosecution, the right to refuse to testify should be granted in some

38. *Cardassi*, 351 F. Supp. 1080. *Accord In re* Flanagan, 533 F. Supp. 957, 965 (E.D.N.Y.), *rev'd on other grounds*, 691 F.2d 116 (2d Cir. 1982); Mishima v. United States, 507 F. Supp. 131, 135 (D. Alaska 1981); *In re* Letters Rogatory, 448 F. Supp. 786 (S.D. Fla. 1978).

39. Phoenix Assurance Co. v. Runck, 317 N.W.2d 402 (N.D.), *cert. denied*, 459 U.S. 862 (1982); *In re* Flanagan, 533 F. Supp. 957 (E.D.N.Y.), *rev'd on other grounds*, 691 F.2d 116 (2d Cir. 1982); *In re* Cardassi, 351 F. Supp. 1080 (D. Conn. 1972).

40. 317 N.W.2d 402 (N.D.), *cert. denied*, 459 U.S. 862 (1982).

41. *Phoenix Assurance Co.*, 317 N.W.2d at 413 (defendants feared prosecution for insurance fraud in Canada).

42. *Id.* at 411; *see also* Note, *Reach of the Fifth Amendment*, *supra* note 9, at 894.

43. *Phoenix Assurance Co.* at 411; *accord In re* Parker, 411 F.2d 1067 (10th Cir. 1969), *vacated and remanded as moot sub nom.*, Parker v. United States, 397 U.S. 96 (1970); *see also* Rosado v. Civiletti, 621 F.2d 1179, 1189 (2d Cir. 1980) ("the Bill of Rights . . . does not and cannot protect our citizens from the acts of a foreign sovereign committed within its territory"), *cert. denied*, 449 U.S. 856 (1980). Because the fifth amendment does not prohibit foreign sovereigns from using domestically compelled testimony in their own courts, neither the federal government nor the states would violate the privilege by compelling testimony that foreign sovereigns might use independently. *See* Note, *Reach of the Fifth Amendment*, *supra* note 9, at 895.

44. *Phoenix Assurance Co.*, 317 N.W.2d at 412.

45. *Id.* at 411.

46. 691 F.2d 116 (2d Cir. 1982).

47. *Compare Phoenix Assurance Co.*, 317 N.W.2d 402 (fifth amendment does not apply to foreign prosecutions) *with In re* Cardassi, 351 F. Supp. 1080 (D. Conn. 1972) (fifth amendment applies to foreign prosecutions where witness shows a "reasonable" risk of foreign prosecution).

situations.[48] In order to use the privilege against self-incrimination, however, the court required that claimants show a "real and substantial" risk of foreign prosecution,[49] as opposed to a mere "reasonable" risk proposed in *Cardassi*.[50] The court implied that if the reasonable standard in *Cardassi* were the standard, the fifth amendment would become a license to frustrate most criminal investigations having any international consequences.[51] Thus, the real and substantial standard in *Flanagan* represents a balance between two policies: 1) that individuals should not be compelled to incriminate themselves, and 2) that the public has a right to every person's evidence.[52]

In *United States v. Under Seal*,[53] the court applied the *Zicarelli* analysis and determined that the Aranetas faced a real and substantial risk of prosecution in the Philippines.[54] Because of the wide public interest generated by the case,[55] the court then reasoned that the protective order and grant of immunity did not adequately reduce the possibility of inadvertant disclosure so as to render inconsequential the risk that the Aranetas' grand jury testimony would be used against them in the Philippines.[56] The court determined, therefore, that it was required to address

48. United States v. Flanagan, 691 F.2d 116, 123 (2d Cir. 1982).
49. *Id.* at 124 (standard must be applied on a case-by-case basis).
50. *Cardassi*, 351 F. Supp. at 1084-86.
51. *Flanagan*, 691 F.2d at 121, 124. While avoiding formally addressing the constitutional issue because this "greater-than-ordinary" standard was not met, the court appeared to assume the fifth amendment would protect a witness against foreign incrimination. The court also noted that the danger of grand jury leaks must be measured on a case-by-case basis. *Id.* at 124.
52. *Id.* at 121.
53. 794 F.2d 920 (4th Cir.), *cert. denied*, 107 S. Ct. 331 (1986).
54. The factors used in determining the existence of a cognizable danger of foreign prosecution of an individual include:

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

*Id.* at 923-24 (citing United States v. Flanagan, 691 F.2d 116, 121 (2d Cir. 1982)). The Philippine government had begun a prosecution against the Aranetas on charges related to the grand jury investigation. Although the Aranetas were at that time, in the United States, they could have voluntarily or involuntarily returned to the Philippines. First, an extradition treaty between the United States and the Philippines was awaiting Senate approval. Secondly, the Aranetas' continued stay in the United States was wholly within the discretion of the Attorney General who could have revoked this right at any time. Overlying both of these factors was the expressed policy of the United States to aid and assist the Aquino government in its pursuit of the Philippine interests regarding the Marcos regime.
55. *Under Seal*, 794 F.2d at 925. The allegations against the Marcos family and the importance of the Philippine-American relations gave rise to an unusual degree of public interest.
56. Pursuant to FED. R. CRIM. P. 6(e), the order sealed the notes and records of the Aranetas' testimony and allowed release only upon court order. Access to testimony was limited to eight federal prosecutorial officials who were ordered not to

the constitutional issue of whether to extend the fifth amendment privilege against self-incrimination to witnesses at risk of foreign prosecution.[57]

The *Under Seal* court concluded that the fifth amendment privilege should apply only when both the sovereign compelling the testimony and the sovereign potentially using the testimony are restrained by the privilege against self-incrimination.[58] In reaching this conclusion, the court analogized to cases that involved the extension of the fifth amendment to prosecutions under state law, both before and after the fifth amendment was held applicable to the states.[59] In addition, the court considered the policy reasons supporting the right against self-incrimination, and found that non-extension of the fifth amendment would not imperil these values.[60] The court reasoned that if the United States was prevented from using evidence legitimately within its possession merely because another sovereign could use the evidence in a way not permitted under American laws, then "our own national sovereignty would be compromised if our system of criminal justice were made to depend on the actions of foreign government [sic] beyond our control."[61]

The court, in reaching its conclusion, also relied on a line of cases holding that the fifth amendment protects a witness against only such uses of his compelled testimony specifically proscribed by the fifth amendment, which does not prohibit the use of testimony in foreign prosecutions.[62] Furthermore, the court rejected the argument that *Murphy* provides authority in favor of extending the fifth amendment to foreign

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disclose any portion to another person or any foreign government. The government must keep specific records of all releases. The order required punishment for any violation to be contempt of court. *Under Seal*, 794 F.2d at 924-25. The court also found the order inadequate because it only protected against disclosure of testimony, not evidence derived from such testimony. *Id.* at 925. The court also recognized the possibility that inadvertent disclosure could have occurred. *Id.* If the Aranetas testified before the grand jury, they eventually could have been called as witnesses at trial.

57. *Id.* at 925.

58. *Id.* at 926.

59. *Id.*; *see also supra* notes 17-19 and accompanying text.

60. *Under Seal* 794 F.2d at 926. The court described the values and aspirations underlying the fifth amendment as follows:

> Our unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its context with the individual to shoulder the entire load.'

*Id.* (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations omitted)).

61. *Id.* at 926.

62. *Id.* at 927 (citing Piemonte v. United States, 367 U.S. 556, 559-61 (1961); Brown v. Walker, 161 U.S. 591, 597-98 (1896); Ryan v. Comm'r, 568 F.2d 531, 541-42 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *In re* Daley, 549 F.2d 469 (7th Cir.),

prosecutions.[63] The *Under Seal* court reasoned that the Supreme Court's dicta in *Murphy* was partially based on a questionable interpretation of the English rule; furthermore, the dicta conflicts with the current English law.[64] In conclusion, the *Under Seal* court rejected the reasoning used to support the dicta in *Murphy* and refused to extend the fifth amendment right against self-incrimination to foreign prosecutions.[65]

The holding in *Under Seal* represents a well-reasoned and justified position,[66] however, the court may have viewed the fifth amendment too narrowly.[67] The court failed to address the policy implications of its holding and alternative methods of resolving this issue of whether to extend the fifth amendment to foreign prosecutions. Fear of foreign incrimination may force witnesses to choose among perjury, self-accusation or contempt.[68] Furthermore, the *Under Seal* holding conflicts somewhat with the desire embodied in the fifth amendment, to protect human dig-

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*cert. denied*, 434 U.S. 829 (1977); Childs v. McCord, 420 F. Supp. 428 (D. Md. 1976), *aff'd*, 556 F.2d 1178 (4th Cir. 1977)).

63. *Under Seal*, 794 F.2d at 927. *Murphy*, in dicta, had noted that the fifth amendment may apply to foreign prosecutions. *Murphy*, 378 U.S. at 62-63.

64. *Under Seal*, 794 F.2d at 927. The Civil Evidence Act reads in pertinent part:

> The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offense or for the recovery of a penalty . . . shall apply only as regards criminal offenses under the law of any part of the United Kingdom and penalties provided for by such law.

Civil Evidence Act, 1968 § 14 (quoted in Note, *Reach of the Fifth Amendment*, *supra* note 9, at 894 n.118). Furthermore, the court in *Under Seal* recognized that the Supreme Court has never held that the fifth amendment applies to foreign prosecutions. *Under Seal*, 794 F.2d at 927; *see also Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 481 (1972).

65. *Under Seal*, 794 F.2d at 927.

66. *Under Seal* aligns itself with the Tenth Circuit's decision in *In re* Parker, 411 F.2d 1067 (10th Cir. 1969), *vacated sub nom.* Parker v. United States, 397 U.S. 96 (1970). The Tenth Circuit is the only other circuit that has addressed this issue. The only state court to address this issue reached the same conclusion. Phoenix Assurance Co. v. Runck, 317 N.W.2d 402 (N.D.), *cert. denied*, 459 U.S. 862 (1982). *Under Seal* is also supported by Kastigar v. United States, 406 U.S. 441 (1972) which advocated broad power to compel testimony. Three district court decisions support the opposite position, yet those decisions have never been followed in their respective circuits. *See* Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981) (9th Cir.); United States v. Trucis, 89 F.R.D. 671 (E.D. Pa. 1981) (3rd Cir.); *In re* Cardassi, 351 F. Supp. 1080 (D. Conn. 1972) (2nd Cir.).

67. The protection of the fifth amendment may be weakened or even disappear under the *Under Seal* type analysis, especially due to international cooperation in crime prevention. *See* Comment, *Fear of Foreign Prosection*, *supra* note 25, at 1322. Furthermore, such a severe erosion of the fifth amendment would create an illusory immunity which conflicts with the American legal tradition of due process. *See* Note, *The Fifth Amendment Does Not Protect Federal Grand Jury Witnesses from Being Compelled to Give Testimony Which Would Incriminate Them in a Foreign Jurisdiction*, 8 TEX. INT'L L.J. 262, 270 (1973) [hereinafter Note, *The Fifth Amendment Does Not Protect*].

68. Note, *Testimony Incriminating Under the Laws of a Foreign Country — Is There a Right to Remain Silent?*, 11 N.Y.U. J. INT'L L. & POL. 359, 365-66 (1978).

nity, which should prevent the sovereign from compelling someone to aid in the establishment of his own guilt.[69] Forcing a witness in fear of foreign incrimination to give testimony that would incriminate himself under the laws of a foreign jurisdiction, however, conflicts with this American legal tradition of due process.[70]

On the other hand, if the court had decided to extend the privilege, its holding could have unnecessarily tied the hands of the United States government and law enforcement officers, thereby denying American investigating officials access to evidence legitimately within their reach.[71] Moreover, American officials could lose their power to trade immunity in American courts for needed testimony because American courts cannot depend upon foreign sovereigns to honor the United States' grants of immunity.[72] Such a result could induce sophisticated criminals to create foreign contracts or other associations in order to avoid testifying forever in the United States.[73] In addition, extension would unduly burden American courts with questions of foreign law that they are not qualified to handle.[74] This burden could have a crippling effect on our criminal justice system.[75]

Although the *Under Seal* approach is better reasoned and justified than the view represented by *Cardassi*, the *Flanagan* compromise approach[76] is better suited to balance the interests of the United States as well as those of the witness fearing foreign prosecution. The *Flanagan* compromise approach[77] would afford some protection to a witness facing foreign prosecution, while at the same time promote the policy that the public has a right to every person's evidence.[78] This middle alternative requires a witness to show a greater-than-ordinary risk of foreign prosecution before a court would apply the fifth amendment privilege to a foreign prosecution.[79] Each witness would be evaluated based on the facts of his particular case.[80] There would be a presumption against extending the privilege, and the witness would have the burden of proving more than just a reasonable risk of foreign prosecution.[81] This approach avoids the inadequacy of a *per se* rule regarding extension of the right

69. *Id.* at 366-67.
70. *See* Note, *The Fifth Amendment Does Not Protect*, *supra* note 67, at 270.
71. *Reach of the Fifth Amendment*, *supra* note 9, at 876.
72. *Id.*
73. *Id.*
74. *Id.* at 897.
75. *Id.*
76. *Flanagan*, 691 F.2d at 124..
77. *See supra* notes 48-54 and accompanying text; *see also In re* Gilboe, 699 F.2d 71 (2d Cir. 1983) (relying on the *Flanagan* compromise approach). *Flanagan* has been attacked by one source which claims that it "establishes a standardless compromise test that will lead to confusion and uncertainty and that [it] conflicts with [precedent]." *See* Note, *Reach of the Fifth Amendment*, *supra* note 9, at 898.
78. Note, *Reach of the Fifth Amendment*, *supra* note 9 at 890.
79. *See supra* notes 46-52 and accompanying text.
80. *Id.*
81. *See supra* note 53 and accompanying text.

against self-incrimination to foreign prosecutions. The *Flanagan* approach is a test that deserves consideration when the Supreme Court is ultimately faced with this issue.

The *Under Seal* decision represents a well-reasoned position which finds some support in the United States Constitution, case law, and policy. The court, however, should have been more thorough in addressing the other approaches to this constitutional issue as well as the ramifictions of its holding. The *Flanagan* compromise approach strikes the appropriate balance between a witness fearing foreign prosecution and society's interest in compelling essential testimony by requiring the witness to demonstrate a greater-than-ordinary risk of foreign prosecution before a court would invoke the fifth amendment privilege. Courts addressing this issue in the future should evaluate *Flanagan's* compromise approach before deciding this important national issue.

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