In Re Flanagan: Grand Jury Secrecy and Fear of Foreign Incrimination

Sumner J. Koch

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.cornell.edu/cilj/vol17/iss2/4
**IN RE FLANAGAN: GRAND JURY SECRECY AND FEAR OF FOREIGN INCRIMINATION**

**INTRODUCTION**

In *In re Flanagan*, the United States Court of Appeals for the Second Circuit adopted the view that Federal Rule of Criminal Procedure 6(e)'s provisions for the secrecy of grand jury testimony do not

---

1. 691 F.2d 116 (2d Cir. 1982).
2. When *Flanagan* was decided, Fed. R. Crim. P. 6(e) read:

(e) RECORDING AND DISCLOSURE OF PROCEEDINGS.

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

(3) Exceptions.

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

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

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

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

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

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

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

**FED. R. CRIM. P. 6(e), 18 U.S.C. app. (1982).**

Fed. R. Crim. P. 6(e)(3), creating exceptions to the general rule of grand jury secrecy, was added in 1977, before *Flanagan*, but after several cases necessary to understanding the importance of *Flanagan*: Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972), see infra text accompanying notes 17-19; Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), see infra text accompanying notes 31-36; In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973), see infra text accompanying notes 55-57; In re
fully protect a witness from self-incrimination in a subsequent foreign criminal proceeding.\(^3\) In taking this position, the Second Circuit rejected contrary holdings by four other circuits.\(^4\)

Compelling a witness to give testimony that would lead to prosecution in a foreign tribunal may violate the fifth amendment privilege against self-incrimination.\(^5\) If the fifth amendment privilege does protect a witness from the risk of self-incrimination in a foreign prosecution, it would follow from the Second Circuit’s view of rule 6(e) that grand jury secrecy does not substitute for the privilege when there is a real and substantial risk of foreign prosecution. In such cases, the prosecution would be unable to compel a grand jury witness to testify by granting him immunity from prosecution. Neither rule 6(e) secrecy nor immunity would effectively protect the witness from foreign prosecution.

In *Flanagan*, despite a grant of immunity from prosecution in the United States, Martin Flanagan, an unindicted co-conspirator in an international gun-running case,\(^6\) refused to testify before a federal grand jury, claiming that his testimony would incriminate him and subject him to prosecution in the United Kingdom or Ireland.\(^7\) Flanagan argued that despite rule 6(e)’s requirement of secrecy in federal grand jury proceedings, other governments could discover his grand

---

3. In *Flanagan*, despite a grant of immunity from prosecution in the United States, Martin Flanagan, an unindicted co-conspirator in an international gun-running case, refused to testify before a federal grand jury, claiming that his testimony would incriminate him and subject him to prosecution in the United Kingdom or Ireland. Flanagan argued that despite rule 6(e)’s requirement of secrecy in federal grand jury proceedings, other governments could discover his grand

---


5. “No person shall . . . be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V.


7. 691 F.2d at 118-19.
GRAND JURY SECRECY

jury testimony and use it against him. While the court held that Flanagan faced no real and substantial danger of prosecution abroad,\(^8\) it agreed that rule 6(e) does not completely protect grand jury testimony from disclosure to foreign governments and thus does not eliminate the possibility of foreign prosecution based upon that testimony.\(^9\)

By recognizing rule 6(e) as inadequate, Flanagan raises the question of the applicability of the fifth amendment privilege against self-incrimination when there is potential danger of a foreign prosecution based on federal grand jury testimony. Courts in prior cases avoided the constitutional issue by holding that rule 6(e) adequately protects grand jury proceedings from disclosure to foreign governments.\(^10\) By rejecting this view, the Second Circuit has laid the foundation for a direct ruling on the applicability of the fifth amendment when the witness faces a substantial risk of prosecution abroad.

This Note addresses the issue the Flanagan court left open—whether the fifth amendment privilege against self-incrimination is available to a federal grand jury witness who is in danger of foreign criminal prosecution—and concludes that the privilege should be available to such a witness. Section I reviews the pre-Flanagan cases that held that rule 6(e) secrecy alone removes any serious risk of incrimination in a foreign prosecution. Section II compares the approach taken in these cases with the Flanagan analysis. This Note concludes that the Flanagan analysis is preferable, because it better reflects the basic aims of the constitutional privilege against self-incrimination.

I

BACKGROUND

A. THE FIFTH AMENDMENT AND FOREIGN INCrimINATION

With increasing frequency, witnesses before United States courts and grand juries have attempted to avoid testifying by invoking the fifth amendment privilege against self-incrimination, claiming that their testimony would subject them to prosecution in a foreign tribunal.\(^11\) When a witness is reluctant to testify for fear of incrimination


\(^9\) 691 F.2d at 122-24.

\(^10\) See supra note 4.

\(^11\) The first case in which a witness raised such a claim was In re Parker, 411 F.2d 1067 (10th Cir. 1969). Since then about a dozen such cases have arisen. See supra note 4, infra notes 92, 95.
in a domestic prosecution, the common prosecutorial practice is to grant the witness "use immunity" in exchange for his testimony.\textsuperscript{1} Under this practice the government receives necessary testimony, and the possibility of any future prosecution of the witness based upon this testimony is eliminated. When the prosecution grants use immunity, it can compel testimony without violating the witness' fifth amendment rights, because the testimony does not incriminate the witness. Use immunity replaces the fifth amendment privilege; their protections are coextensive.\textsuperscript{13} But a grant of immunity from prosecution in the United States does not protect against foreign prosecution. A court in the United States cannot compel a foreign tribunal to honor a domestic grant of immunity,\textsuperscript{14} and a grant of immunity in the United States does not bar extradition by the United States.\textsuperscript{15} Therefore, witnesses who fear incrimination abroad continue to claim the fifth amendment privilege even when granted immunity from domestic prosecution.\textsuperscript{16}

The Supreme Court faced this issue only once, in \textit{Zicarelli v. New Jersey State Commission of Investigation}.\textsuperscript{17} In \textit{Zicarelli} a witness before a state investigating commission refused to testify publicly, despite a grant of immunity, on the ground that his testimony would incriminate him abroad. The Court determined that the witness could answer truthfully all the questions he was asked without revealing information that would incriminate him abroad.\textsuperscript{18} Thus, the Court did not reach the question of whether a witness in danger of prosecution abroad is entitled to fifth amendment protection.\textsuperscript{19} Moreover, \textit{Zicarelli} involved testimony in a court, a public forum, not a grand

\begin{footnotes}
\item[12.] Kastigar \textit{v. United States}, 406 U.S. 441, 453, (1972), established that a court may constitutionally compel a witness who has been granted "use immunity"—permitting subsequent prosecution of the witness but prohibiting use of his testimony or evidence derived therefrom in the prosecution—to testify because use immunity provides protections coextensive with those the fifth amendment provides. See also Murphy \textit{v. Waterfront Comm'n}, 378 U.S. 52 (immunity employed to compel testimony must be binding in all jurisdictions in the U.S.). See infra text accompanying notes 31-36.
\item[13.] \textit{Kastigar}, 406 U.S. at 453.
\item[14.] "[N]o domestic government has the legal power to bar prosecution of [a witness] by a foreign country or to prevent the use against him in such a prosecution of testimony immunized from use against him in domestic criminal proceedings." \textit{Flanagan}, 691 F.2d at 121.
\item[16.] See, e.g., \textit{Flanagan}, 691 F.2d 116.
\item[17.] \textit{Id.} at 472 (1972).
\item[18.] \textit{Id.} at 480.
\item[19.] \textit{Id.} at 478-81.
\end{footnotes}
jury proceeding under rule 6(e)'s secrecy requirements. Several cases with similar facts also have not presented the fifth amendment issue, because the witness failed to show a real and substantial risk of prosecution abroad.20

Other cases in which witnesses have refused to testify for fear of foreign prosecution have arisen in the federal grand jury setting. The courts in all grand jury cases prior to Flanagan held that the secrecy that rule 6(e) requires for grand jury proceedings removes any risk that the testimony will be revealed to foreign authorities and so removes any real and substantial risk of prosecution abroad.21 Such a determination precludes consideration of the constitutional issue.

Two courts addressed the fifth amendment issue before Flanagan and reached conflicting conclusions. In In re Parker,22 the Tenth Circuit rejected a grand jury witness' assertion that her fifth amendment protections included avoidance of self-incrimination before a Canadian tribunal. The Tenth Circuit first rejected the claim on the basis that rule 6(e) rendered the testimony unavailable to Canadian authorities.23 As an alternative ground for its decision, the court stated that the fifth amendment "need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation."24 The Parker court is the only court that has expressed this view, and it cited no authority for it.25 Most other courts have followed Parker's first line of reasoning, that grand jury secrecy adequately protects the witness, 20. See, e.g., Fonseca v. Regan, 98 F.R.D. 694, 702 (E.D.N.Y. 1983); United States v. Maikovskis, No. M18-304 (S.D.N.Y. March 10, 1978); United States v. Yanagita, 552 F.2d 940, 946-47 (2d Cir. 1977). For cases in which district courts have found the fifth amendment applicable in public forums, see infra note 36.

21. See supra note 4; infra note 36.


23. Id. at 1069-70.

24. Id. at 1070.

25. The Tenth Circuit offered only cryptic reasoning in support of its position. The court rejected the argument that in Murphy v. Waterfront Comm'n, 378 U.S. 52, the Supreme Court implicitly extended the fifth amendment privilege to witnesses fearing foreign prosecution. 411 F.2d at 1070. The Murphy Court stated that the fifth amendment privilege derived from the English privilege against self-incrimination, which extends to such witnesses. See infra text accompanying notes 31-33. The Tenth Circuit argued that Murphy's reference to the English privilege "was simply by way of argumentative analogy . . . and carries no persuasion," 411 F.2d at 1070. Other courts have accepted the interpretation of Murphy that the Parker court rejected. See infra notes 33-36 and accompanying text. Two district courts have directly rejected the Parker court's rationale. See United States v. Trucis, 89 F.R.D. 671, 673 (E.D. Pa. 1981) (deposition in suit to revoke naturalization) ("[T]he privilege is not simply a limit on the activities of American courts and law enforcement authorities: it is a freedom conferred upon persons within the protection of American law."); In re Letters Rogatory from the 9th Crim. Div. Regional Ct., Mannheim, 448 F. Supp. 786, 790 (S.D. Fla. 1978) (sworn testimony to be taken in United States for use in German criminal proceeding; court must "assess its citizens' susceptibility to future prosecutions either foreign or domestic").
and have thus avoided the constitutional question.\textsuperscript{26}

In \textit{In re Cardassi}\textsuperscript{27} a district court held directly contrary to \textit{Parker}. The court first granted Cardassi, a federal grand jury witness, immunity from prosecution. But Cardassi still refused to testify, claiming that her answers would subject her to prosecution in Mexico. The court found that, unlike the witness in \textit{Zicarelli}, Cardassi would face a real and substantial risk of incrimination abroad if her testimony were to reach foreign officials.\textsuperscript{28} The court further found that rule 6(e) did not sufficiently protect her from foreign prosecution.\textsuperscript{29} The court held the fifth amendment applicable when a witness fears incrimination in a foreign country and that Cardassi had a right to refuse to testify.\textsuperscript{30}

The \textit{Cardassi} court based its holding on precedent that applied to that case only by analogy. The court relied on \textit{Murphy v. Waterfront Commission},\textsuperscript{31} in which the Supreme Court defined the scope of the fifth amendment privilege against self-incrimination in a domestic situation. The \textit{Murphy} Court held that a state's grant of immunity must preclude prosecution of the witness in federal court as well, and vice-versa.\textsuperscript{32} \textit{Murphy} thus extended the immunity beyond the jurisdiction where the witness is questioned to all other jurisdictions in the United States. The \textit{Murphy} Court found support for its holding in English law, from which the fifth amendment privilege against self-incrimination derived.\textsuperscript{33} The English privilege extended not only to those who feared incrimination in England, but also to those who feared incrimination in other countries. \textit{Murphy} cites the leading English case of \textit{United States v. McRae}\textsuperscript{34} as authority for this English rule.\textsuperscript{35} The \textit{Cardassi} court reasoned that \textit{Murphy}, by accepting the English construction of the privilege, "clearly makes the privilege a protection

\textsuperscript{26} See infra notes 50-64 and accompanying text.
\textsuperscript{27} 351 F. Supp. 1080 (D. Conn. 1972).
\textsuperscript{28} Id. at 1083-84.
\textsuperscript{29} Id. at 1082-83.
\textsuperscript{30} Id. at 1084-85.
\textsuperscript{31} 378 U.S. 52 (1964).
\textsuperscript{32} Id. at 77-79.
\textsuperscript{33} See Kastigar v. United States, 406 U.S. at 453. See supra note 12. The \textit{Murphy} decision also is based on policy grounds, see infra text accompanying notes 105-08, and federal precedent. See, e.g., United States v. Murdock, 284 U.S. 141 (1931) (federal government can compel testimony that might be incriminating under state law). The Court, however, distinguished \textit{Murdock} and asserted that it was returning to a view of the fifth amendment privilege that the Court had held in earlier cases. \textit{Murphy}, 378 U.S. at 59-60, 65, 70-77. See, e.g., Ballman v. Fagin, 200 U.S. 186 (1906) (defendants not bound to disclose matters in federal court that would expose them to criminal penalties in state court); United States v. Saline Bank of Va., 26 U.S. (1 Pet.) 100 (1828) (defendants not bound to disclose matters in federal court that would expose them to criminal penalties in state court).
\textsuperscript{34} 3 L.R.-Ch. App. 79 (1867).
\textsuperscript{35} 378 U.S. at 61-63.
against foreign prosecution.”

Two other district courts\(^{37}\) and legal commentators\(^{38}\) have responded favorably to the Cardassi rule. Flanagan has opened the door for its acceptance in the Second Circuit. Adoption of Cardassi and rejection of Parker would depend upon both a court’s finding that the fifth amendment protects against incrimination in a foreign tribunal\(^{39}\) and its concluding that the secrecy requirements of rule 6(e) are insufficient to protect the witness from foreign prosecution.

B. THE PROTECTION OF THE GRAND JURY SECRECY AND FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)

Like the Tenth Circuit in Parker, most federal courts consider the secrecy protections of rule 6(e) sufficient to preclude a witness from invoking the fifth amendment privilege against self-incrimination.\(^{40}\) Not until Cardassi was it recognized that rule 6(e) and grants of immunity together afford witnesses protections against self-incrimination that are coextensive with the constitutional privilege.\(^{41}\) The Cardassi court correctly noted that the combination of rule 6(e) and grants of immunity is effective only in purely domestic situations, because federal or state grants of immunity have no force in other countries.\(^{42}\)

The Cardassi court focused on the possibility of wrongful disclosure by government officials of a grand jury witness’ testimony.\(^{43}\) The immunity that can protect the witness from such wrongful disclosure by government officials is available only in the domestic context, where future prosecution of the witness always is subject to judicial control. The Cardassi court stated:

---

36. 351 F. Supp. at 1085. Two district courts have adopted Cardassi’s interpretation of Murphy and have extended the constitutional privilege to public, non-grand jury forums where a witness feared foreign prosecution. United States v. Trucis, 89 F.R.D. 671 (depositions in suit to revoke naturalization); Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981) (Coast Guard investigation of navigation accident). The privilege also was extended in In re Letters Rogatory from the 9th Crim. Div. Regional Ct., Mannheim, 448 F. Supp. 786, but without direct reliance on the Cardassi court’s reading of Murphy.


39. See supra notes 22-38 and accompanying text; infra notes 102-26 and accompanying text.

40. See supra notes 4, 23-26 and accompanying text.


42. Id. at 1083. See also supra notes 14-15 and accompanying text.

43. Id. at 1082-83.
The existence of this judicial control was what persuaded the [Supreme] Court in *Kastigar v. United States* that the self-incrimination privilege could be displaced by a grant of use-immunity. "A person accorded this immunity under 18 U.S.C. § 6002 and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities" . . . . Rule 6(e) provides no similar protection, yet it is the sole safeguard the Government can offer a witness who fears his compelled testimony may be used against him in foreign courts where the domestic judicial bar on use and derivative use of compelled testimony is unenforceable. 44

The court acknowledged that government officials who make such disclosures are subject to court-imposed disciplinary measures. 45 But the court reasoned that "such an after-the-fact sanction would provide no protection to the witness" from foreign prosecution. 46 Because American courts cannot prevent a foreign court from hearing a trial that is based on improper disclosures by American officials, the *Cardassi* court held rule 6(e) inadequate to replace the constitutional privilege against self-incrimination in that situation. 47 The *Cardassi* court, having found that the witness faced a real and substantial risk of prosecution abroad, 48 held that under the fifth amendment the witness could refuse to testify. 49

Except for the *Cardassi* and *Flanagan* courts, all other federal courts have adhered to the *Parker* position, that rule 6(e) alone protects the witness sufficiently from incrimination abroad. The Tenth Circuit reaffirmed its *Parker* ruling, 50 and the Fifth, 51 Eighth, 52 and Ninth 53 Circuits also adhere to *Parker*. These courts all have recognized the possibility of wrongful disclosure of grand jury testimony and the absence of post-disclosure safeguards. But they view the risks

44. Id. at 1083 (quoting *Kastigar*, 406 U.S. at 460). 18 U.S.C. § 6002 (1982) prohibits a witness who has received immunity from refusing to testify on the basis of self-incrimination and prohibits the use of the immunized testimony "in any criminal case" except for perjury or failing to comply with the order to testify.
45. Id. at 1082.
46. Id.
47. Id. at 1082-83.
48. Throughout its discussion of the witness' concern with foreign prosecution, the *Cardassi* court focused on the subjective reasonableness of this concern rather than the objective likelihood of disclosure and prosecution abroad.

[This] court must determine "from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend danger." But "if the fact of the witness being in danger be once made to appear, great latitude should be allowed him in judging for himself of the effect of any particular question." 351 F. Supp. at 1084 n.6 (quoting The Queen v. Boyes, 121 Eng. Rep. 730, 738 (1861)).
49. 351 F. Supp. at 1084-86.
51. United States v. Brunnait, 665 F.2d at 525-26; In re Postal, 559 F.2d at 236, United States v. Armstrong, 476 F.2d at 316; In re Tierney, 465 F.2d at 811.
52. In re Baird, 668 F.2d at 434.
53. In re Grand Jury Witness (Lemieux), 597 F.2d at 1168 (Hufstedler, J., specially concurring); In re Weir, 495 F.2d at 881.
of disclosure as so slight that they "do not rise above remote possibilities" and thus have no constitutional significance. In In re Tierney, for example, the Fifth Circuit conceded that a court may order disclosure of grand jury testimony. Nevertheless, the court maintained that in such situations the trial court can prevent public disclosure by using preliminary in camera hearings, or by otherwise restricting access to the testimony, even if that would destroy the prosecutor's case. In cases before the Fifth and Eighth Circuits, defendants have argued that rule 6(e), as amended in 1977, allows some to circumvent the general rule of grand jury secrecy. The rule permits disclosure of grand jury testimony without a court order to U.S. prosecutors for use in enforcing federal criminal law and to "such government personnel" as a federal prosecutor deems necessary to assist him in the performance of his duties. Again, the courts were not convinced of rule 6(e)'s inadequacy, reasoning that the 1977 amendment does not authorize disclosure to foreign officials without a court order. The Eighth Circuit also emphasized the trial court's discretion to deny a disclosure order when the testimony may incriminate the witness in a foreign country. More commonly, federal courts have avoided ruling on the adequacy of rule 6(e)'s secrecy protections by finding that a witness' testimony does not give rise to a real and substantial threat of foreign prosecution.

II
FLANAGAN AND SUBSEQUENT CASES

A. In re Flanagan

The district court opinion in Flanagan mirrors Cardassi in rea-
soning and result. The district court, citing Cardassi, held rule 6(e) insufficient to supplant Flanagan's fifth amendment privilege against self-incrimination. Judge McLaughlin ruled that there was an appreciable risk of disclosure of Flanagan's testimony to a foreign government despite the strictures of rule 6(e). Penalties for breach of secrecy, even if rigorously imposed, would provide no meaningful protection to Flanagan from foreign prosecution. The court determined that Flanagan faced a real and substantial risk of foreign prosecution based on his grand jury testimony. Hence, given the inadequacy of rule 6(e) and the finding that Flanagan was in danger of foreign incrimination, the court followed Cardassi and permitted him to assert his fifth amendment privilege.

The Second Circuit reversed, finding that Flanagan's fear of foreign prosecution was "remote and speculative rather than real, reasonable, or substantial." The prosecution could thus seek to compel Flanagan's immunized testimony, through a contempt proceeding to enforce its subpoena. The court reserved the constitutional question of the availability of the privilege to a witness with a well-founded fear of foreign prosecution, but it emphasized that rule 6(e) secrecy alone cannot remove any real or substantial risk of foreign prosecution.

The Second Circuit adopted the reasoning of the district court and of Cardassi in assessing the adequacy of grand jury secrecy. The Second Circuit's Flanagan decision also responds to other courts' criticism of the Cardassi decision. The Flanagan court first noted, as had the Cardassi court, that it is impossible to prevent completely the inadvertent or wrongful disclosure of grand jury proceedings. The Flanagan court recognized that the 1977 amendments to rule 6(e) increase the risk of unauthorized disclosure, because they allow the

66. Id.
67. Id.
68. Id.
69. Membership in the Irish Republican Army was the only criminal activity in Ireland and the United Kingdom that Flanagan's testimony would have revealed. Id. at 965 n.8.
70. Id. at 965-66.
71. Flanagan, 691 F.2d 116.
72. Id. at 121-22.
73. Id. at 124.
74. Id. at 122-24.
prosecutor to disclose grand jury proceedings to other government personnel to assist him in his work. The court then listed various situations in which a court might authorize disclosure. For example, grand jury testimony may be released to a criminal defendant if it is exculpatory, or if it is the grand jury testimony of a trial witness and relates to matters raised in direct examination. Courts have permitted disclosure of testimony relevant to a motion to quash an indictment, to a claim of double jeopardy, to a challenge to a search warrant, to a post-conviction proceeding, and even to private litigation. Given these possibilities of disclosure—and the lack of judicial protection if testimony is disclosed—the Flanagan court concluded that a factual inquiry is necessary in each case to assess a witness' claim of possible foreign prosecution.

The Second Circuit inquired into the risk of disclosure of Flanagan's grand jury testimony because, unlike the courts in Parker and its progeny, the Second Circuit did not believe that rule 6(e)'s secrecy requirements automatically provide the protection the fifth amendment requires.

Absent a law to the effect that a witness who gives testimony pursuant to a grant of immunity may not be extradited we are relegated to determining in each case whether the risk is sufficiently substantial to justify a real fear that the evidence might incriminate the witness in a foreign prosecution.

The Second Circuit concluded on the facts that there was no real and substantial risk of foreign prosecution, not that rule 6(e) secrecy makes foreign prosecution a remote risk—the Parker rationale. The critical distinction of the Flanagan approach is that in assessing the risk of foreign prosecution, the court assumed a serious possibility that the testimony would be disclosed. The court held against Flanagan,

77. Flanagan, 691 F.2d at 123 (citing Brady v. Maryland, 373 U.S. 83 (1963) (prosecutor's disclosure responsibilities))
79. Flanagan, 691 F.2d at 123 (citing United States v. Garcia, 420 F.2d 309 (2d Cir. 1970)).
80. Flanagan, 691 F.2d at 123 (citing United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969)).
81. Flanagan, 691 F.2d at 123 (citing United States v. Moten, 582 F.2d 654, 662 (2d Cir. 1978), on remand, 463 F. Supp. 49 (S.D.N.Y. 1979), aff'd, 620 F.2d 13 (2d Cir. 1980)).
84. Flanagan, 691 F.2d at 124.
85. Id.
86. Id. at 121-24.
87. Parker, 411 F.2d at 1069-70.
88. The court considered five factors in assessing Flanagan's claim:
but only after undertaking a detailed review of the testimony that he would probably give and the danger of prosecution in the event of disclosure, an approach well beyond a blanket rule based on an evaluation of the sufficiency of rule 6(e). This case-by-case approach opens the possibility of a direct holding in a future case on the applicability of the fifth amendment privilege against self-incrimination. If in a future case the Second Circuit finds that a grand jury witness would face a real and substantial risk of foreign prosecution, the applicability of the privilege will be directly in issue.

Judge Van Graafeiland's concurring opinion highlights the new approach taken by the majority. Agreeing that Flanagan faced no real and substantial risk of foreign prosecution, Judge Van Graafeiland took exception to the majority's reasoning that despite rule 6(e), a real and substantial risk of foreign prosecution could be shown in a future case. Instead, he maintained that if rule 6(e) is properly enforced, "the likelihood is that the tradition of grand jury secrecy . . . will not be cavalierly disregarded."  

**B. CASES AFTER FLANAGAN**

The Tenth Circuit explicitly rejected the Flanagan approach in *In re Nigro* and instead adhered to Parker's assessment of the adequacy of rule 6(e). The Nigro court discussed Flanagan's concern that the court in resolving the issue must then focus upon such questions as 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.  

691 F.2d at 121. Contrary to the district court's ruling, the Second Circuit ruled that in each of these areas Flanagan's claim was deficient. There was no "present or prospective" foreign prosecution awaiting Flanagan. *Id.* at 124. In marked contrast to the facts in *Cardassi*, the grand jury questions in Flanagan were limited to Flanagan's activities in the United States; this put Irish or British jurisdiction over any of his possible criminal activities in serious doubt. *Id.* at 122. Flanagan offered no evidence of any Irish or British law that would criminalize his activities in the United States, nor did he show that Ireland or the United Kingdom claimed any jurisdiction over these activities. *Id.* Flanagan offered no evidence to show that any extraditable crimes might be revealed by his testimony; the one activity clearly implicated that was criminal in Ireland and the United Kingdom—membership in the Irish Republican Army—was non-extraditable. *Id.*

89. If the Flanagan decision retreats from *Cardassi* at all, it is in adding steps that can be taken to minimize the risk of disclosure. The Flanagan court noted that the trial court could seal the transcript of the testimony to help prevent disclosure. *Id.* at 124. The court stated that the government had narrowed the risk of disclosure by its assurance that it would not reveal Flanagan's testimony to foreign officials, and that it "would, on the contrary, oppose any effort to extradite [Flanagan] to face foreign charges that might be derived from his testimony." *Id.*

90. *Id.* at 124-25. (Van Graafeiland, J., concurring).

91. *Id.* at 125.

GRAND JURY SECRECY

GRAND JURY SECRECY

The availability of the fifth amendment privilege to a grand jury witness who fears foreign prosecution is thus unlikely to arise in the Tenth Circuit because, as in Parker, the court views rule 6(e) as a sufficient safeguard against disclosure and subsequent incrimination.94

The Second Circuit followed its Flanagan approach in In re Gilboe.95 Gilboe, a grand jury witness with immunity, refused to answer questions regarding fraudulent activity in the international shipping industry, activity for which he had already been convicted and had received a twenty-year sentence in the United States. The Gilboe court followed Flanagan in stating that rule 6(e) secrecy alone does not provide adequate protection from foreign incrimination and in its inquiry into other factors affecting the substantiality of the witness' fears.96 The court emphasized that foreign prosecution was unlikely because Gilboe had a lengthy prison sentence to serve before he would be available for extradition and trial abroad.97 The slight chance of a grand jury leak, Gilboe's lengthy sentence, the absence of any "current or planned" prosecutions in other countries, and the "overwhelming independent evidence" of his guilt, was not enough to make Gilboe's risk of prosecution real and substantial.98 Thus, Gilboe, like Flanagan, did not present the issue of the fifth amendment's applicability to a witness whose fear of foreign prosecution is real and substantial.99

Gilboe may be read as a slight retreat from Flanagan. The Gilboe decision emphasizes that the measures available to a court to guard grand jury secrecy are substantial.100 Furthermore, Gilboe quotes Judge Van Graafeiland's concurrence in Flanagan to support the

93. 705 F.2d at 1228.
94. The Tenth Circuit may not have been satisfied completely by this rationale. Recognizing the witness' "hesitancy" to testify, the court recommended that the district court require an oath of secrecy from every grand jury participant, seal testimony transcripts, and review any requests for disclosure in camera, "zealously" guarding the witness' immunity. Id.
95. 699 F.2d 71 (2d Cir. 1983).
96. Id. at 75-78. See supra note 88.
97. Id. at 76-77.
98. Id. at 78.
99. See also Fonseca v. Regan, 98 F.R.D. 694 (E.D.N.Y. 1983). The witness in that case refused to answer interrogatories or appear for deposition, claiming that his responses could incriminate him abroad. The court compelled discovery, because it found no evidence that the prospect of foreign prosecution was real and substantial. Id. at 702. Since Fonseca was a civil case, the issue of grand jury secrecy did not arise, but the court followed "the test established in United States v. Flanagan" for evaluating the possibility of prosecution in a foreign country. Id.
100. 699 F.2d at 78.
proposition that disregard of the grand jury secrecy rule is unlikely if
courts stringently enforce it. Even if Gilboe restricts Flanagan, Gilboe still allows the possibility that a grand jury witness will be able
to show a real and substantial risk of prosecution abroad. The Second
Circuit, therefore, has maintained a position contrary to Parker and, if
presented with a witness in danger of foreign prosecution, would prob-
ably confront the issue of the applicability of the fifth amendment.

III
ANALYSIS

A. THE SUFFICIENCY OF GRAND JURY SECRECY UNDER RULE
6(e)

Flanagan and Parker do not differ in their interpretation of rule
6(e). The cases agree that under the rule there is a slight but ines-
capable risk of disclosure of grand jury testimony. The cases differ,
however, in their views of this risk of disclosure as a basis for a wit-
ness' risk of foreign prosecution. According to Parker, rule 6(e)'s
secrecy procedures make the risk of foreign prosecution so slight that
the witness' fear is insubstantial as a matter of law. Under the Flana-
gan approach, the court must evaluate the risk of foreign prosecution
in each case. If a grand jury witness shows that his testimony would
relate to criminal activity in a foreign country and that that country
has an interest in prosecuting the witness, a court following Flanagan
will conclude that the slight prospect of a breach of secrecy may
induce a reasonable fear of self-incrimination; a court following the
Parker rule would regard the same fear as unreasonable. Flanagan
arrives at this more lenient standard by emphasizing not only the pos-
sibility of disclosure but also, if disclosure occurs, the inadequacy of
other safeguards, primarily grants of immunity, in the international
context. Flanagan recognizes that although the risk of disclosure is
slight, the greater risk of harm in the event of disclosure calls for spe-
cial protections for the witness.

B. APPLICABILITY OF THE FIFTH AMENDMENT PRIVILEGE

Courts require witnesses who invoke the fifth amendment to show
that their fear of incrimination has an objective basis. The Flana-

101. Id.
(1968). See supra note 4. The Supreme Court has made clear that it always is necessary to
give the fifth amendment privilege a liberal application. To require a witness to give
detailed proof of how his testimony might incriminate him is to compel him to "surrender
the very protection which the privilege is designed to guarantee." Hoffman v. United
GRAND JURY SECRECY

gan rule, particularly as interpreted in Gilboe, incorporates this requirement. In order for a court to assess the applicability of the fifth amendment privilege, a witness must show that the fear of foreign prosecution is real and substantial. But it is not clear that it is constitutionally permissible for a court, in requiring some basis for the witness' claim, to compel the witness to assume a remote risk of disclosure to a foreign government. The Parker approach, which recognizes the risk of disclosure but finds it too insignificant to warrant constitutional consideration, imposes such a risk upon witnesses and thus may violate their fifth amendment rights.

The Supreme Court listed the policies underlying the fifth amendment privilege against self-incrimination in Murphy v. Waterfront Commission:

[1.] Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt;
[2.] our preference for an accusatorial system of justice . . . ;
[3.] our fear that self-incriminating statements will be elicited by inhumane treatment and abuses;
[4.] our sense of fair play, which dictates "a fair state-individual balance . . . ";
[5.] our respect for the inviolability of the human personality . . . ;
[6.] our distrust of self-deprecatory statements; and
[7.] our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

These purposes of the fifth amendment can be placed in two broad categories, protecting the witness and obtaining reliable testimony.

The fifth amendment privilege protects the witness and guards against false testimony, because it discourages "conviction-hungry" police and prosecutors from using threats and force to obtain confessions and convictions. This "conviction hunger" is of less concern to jury witness not required to answer questions regarding employment in the Communist Party, regardless of whether the answers would support conviction by themselves).

103. See supra note 8.
104. See supra text accompanying note 23.
106. Id. at 55.
107. Protecting the witness encompasses avoiding the "cruel trilemma" of self-accusation, perjury, and contempt; preference for an accusatorial system; abhorrence of inhumane treatment and abuses to elicit incriminating statements; and fair play and respect for the human personality. Id.
108. Obtaining reliable testimony encompasses distrust of self-deprecatory statements and the need to protect the innocent. Id.
when the witness has domestic immunity. The government cannot use the testimony to convict the witness, but it can seek information on the activities of others. Mistreatment of the witness is less likely, because the recalcitrant witness lacks his typical motivation, fear of future prosecution. Thus, the government's interest is to ensure reliable testimony rather than to receive self-incriminating evidence from the witness.\footnote{See McNaughton, supra note 109, at 1308-09. But see In re Federal Grand Jury Witness (Lemieux), 597 F.2d at 1168-69 (Hufstedler, J., specially concurring) (need for increased international cooperation in law enforcement). See also Right to Remain Silent, supra note 15, at 366.}

The privilege against self-incrimination protects the witness and guards against false testimony in a second way. The Murphy Court implied that it is a violation of a witness' rights to demand potentially self-incriminating testimony even without brutal interrogation methods. This is the "cruel trilemma"—forcing a witness to choose among perjury, contempt, and self-accusation.\footnote{Murphy, 378 U.S. at 55.}

It is significant that the Murphy Court listed this concern first, for it is central to the Court's holding that a witness' immunity is coterminous in federal and state courts.\footnote{Before Murphy, a major justification for the contrary rule—that a state's grant of immunity does not bind a federal court and vice-versa—was that the only purpose of the fifth amendment privilege was to prevent prosecutorial abuse. See McNaughton, supra note 109, at 1308-09.}

A grant of immunity frees the witness from "conviction hunger," but if he fears foreign prosecution, he may be subject to the "cruel trilemma" despite the grant of immunity. If a witness has a genuine fear of being prosecuted abroad on the basis of information that he furnished, the trilemma of perjury, contempt, and self-incrimination is just as real as if the witness feared domestic prosecution. Placing a witness in this situation does not serve the goal of efficient law enforcement. The witness may still have an incentive to answer falsely, although only someone actually involved in a crime would have an incentive to deny involvement and thus escape prosecution abroad; the innocent have no incentive to confess.\footnote{See Kroner, Self-Incrimination: The External Reach of the Privilege, 60 COLUM. L. REV. 816, 838 (1960); Right to Remain Silent, supra note 15, at 355-66.}

Because it is a violation of a witness' fifth amendment rights to require him to answer potentially self-incriminating questions, the Second Circuit's approach in Flanagan is preferable over the contrary Parker rule. The fifth amendment operates in two ways; it curbs brutality and other prosecutorial excesses, and it assuages the reasonable fears that witnesses harbor toward their questioners. That governmental misconduct is very unlikely is not sufficient protection for a witness if there are no further safeguards when such misconduct does
occur. Here the governmental misconduct feared is wrongful disclosure of a witness' testimony. A grant of immunity checks this fear by guaranteeing no future domestic prosecution. No similar guarantee is available to the witness who fears self-incrimination in a foreign tribunal. Although a court can reduce the risk of disclosure by exacting assurances of secrecy from the government, as recognized in Flanagan and Gilboe, such practices are not enough. A central premise of the fifth amendment privilege is that the individual cannot be forced to rely upon the promises of government officials to curb their wrongful conduct. As the Cardassi court stated, "the constitutional protection of the witness must rest on more than faith."

Inherent in the recognition of the inadequacy of grand jury secrecy is a strong argument that the fifth amendment privilege should be available to a witness who fears foreign prosecution. To compel testimony from a witness who reasonably fears that the testimony will incriminate him is to force him into a "cruel trilemma" whether he fears prosecution abroad or in another domestic jurisdiction. Murphy established that this not only invites unreliable testimony but also violates the witness' constitutional rights. Although the Supreme Court's holding in Murphy treats only the domestic scope of the privilege, the opinion acknowledges that the "cruel trilemma" faced by a witness is an equally compelling reason for applying the privilege when a witness fears foreign prosecution. The Murphy Court looked to the English rule in United States v. McRae, that the privilege applied to witnesses who feared incrimination abroad. Murphy then distinguished another English case, Willecox v. King of Two Sicilies, in which the court denied a witness the privilege on the grounds that it could not know as a matter of law the relevant foreign statutes and the witness would be subject to prosecution only if he were to travel to the foreign country voluntarily. The Murphy Court noted that neither of these reasons is relevant in the case of a witness in a domestic court who fears prosecution in another United States jurisdiction.

Neither rationale of King of Two Sicilies remains persuasive in an international setting under the Second Circuit's Flanagan approach.

114. 691 F.2d at 124.
115. 699 F.2d at 78.
117. This argument is an elaboration of the view expressed in United States v. Trucis, 89 F.R.D. 671. The court there stated that the privilege "is not simply a limit on the activities of American courts and law enforcement authorities: it is a freedom conferred upon persons within the protection of American law." Id. at 673.
118. 378 U.S. at 67.
119. 378 U.S. at 61-63 (citing United States v. McRae, 3 L.R.-Ch. App. 79 (1867)).
120. 61 Eng. Rep. 116 (1851).
121. 378 U.S. at 67.
The Flanagan test for determining a real and substantial risk of foreign prosecution requires a recalcitrant witness to show that a relevant foreign law exists, that it is applicable to the particular circumstances, and that it is likely to be enforced.\textsuperscript{122} The argument that to face foreign prosecution a witness would have to travel voluntarily to the country where he faces prosecution ignores the modern-day possibility of extradition.\textsuperscript{123} In Flanagan the government offered assurances that it would resist efforts to extradite the witness to face charges based upon his testimony,\textsuperscript{124} but in at least one case the government has refused to give such assurances.\textsuperscript{125} In either event, however, the witness "is not dependent for the preservation of his rights on the integrity and good faith of the prosecuting authorities."\textsuperscript{126} The fifth amendment privilege against incrimination must therefore be available to a grand jury witness with a real and substantial fear of foreign prosecution.

CONCLUSION

The approach taken in Flanagan—that rule 6(e) does not by itself adequately protect a grand jury witness from foreign incrimination—is preferable to the contrary holding of courts following the Parker rationale. If courts adhere to the Flanagan approach, they will be forced to confront the issue of whether the fifth amendment protects a witness who reasonably fears that his testimony will incriminate him in a foreign tribunal. This Note argues that the Constitution compels courts to permit assertion of the fifth amendment privilege against self-incrimination in a foreign prosecution.

Sumner J. Koch

\textsuperscript{122} See supra note 88.

\textsuperscript{123} A grant of immunity is not a defense to extradition from the United States. See supra note 15. Recalcitrant witnesses have also contended that being forced to incriminate themselves abroad impedes their constitutional right to travel. Flanagan also made this argument, but the court rejected it, noting his privilege against self-incrimination in Ireland and the United Kingdom. 691 F.2d at 124 & n.7. A constitutional right to international travel is ill-defined; in any event, it is considerably less strongly established than the right to domestic interstate travel. See Califano v. Aznaverian, 439 U.S. 170, 176-77 (1978). Analysis of the validity of witnesses' arguments based upon the right to international travel is beyond the scope of this Note.

\textsuperscript{124} 691 F.2d at 124.

\textsuperscript{125} United States v. Trucis, 89 F.R.D. at 673 n.4.

\textsuperscript{126} Kastigar v. United States, 406 U.S. at 460.