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Sara A. Leahy

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Recommended Citation
Sara A. Leahy, United States v. Balsys: Foreign Prosecution and the Applicability of the Fifth Amendment Privilege against Self-Incrimination, 48 DePaul L. Rev. 987 (1999)
Available at: https://via.library.depaul.edu/law-review/vol48/iss4/8

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UNITED STATES v. BALSYS: FOREIGN PROSECUTION AND THE APPLICABILITY OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCrimINATION

INTRODUCTION

While more than fifty years has lapsed since the end of World War II and the downfall of Hitler's Nazi regime, the memories of that horrific period in history and of those people who collaborated in the goals of the Nazis remain alive for many. Many nations worldwide still have means available for punishing these criminals. Other nations have served as refuges for them, even if unknowingly. The United States is one country that became a home to many Nazi war criminals who wanted to escape punishment and begin a new life.

The United States has not enacted any criminal laws that specifically punish suspected war criminals. The United States, however, does have a policy of investigating and deporting them through the Department of Justice Office of Special Investigations ("OSI").1 Until the 1998 Supreme Court decision of United States v. Balsys,2 courts were divided as to whether these suspects have the constitutional right to invoke the Fifth Amendment privilege against self-incrimination in a domestic proceeding based upon a fear of a real and substantial likelihood of foreign prosecution. Until the Supreme Court held that the privilege does not extend extraterritorially, lower courts had very little guidance and were left to grapple with the scope of the privilege themselves, resulting in divergent approaches to this issue.3 In the

1. The Office of Special Investigations, established in 1979 by the Attorney General, is charged with the civil enforcement of United States immigration and citizenship laws against alleged participation in Nazi-sponsored persecution. See 8 U.S. Op. Off. Legal Counsel 220, 222, n.4 (1984); Att'y Gen. Order No. 851-79 (1979), 28 C.F.R. § 0.55(f) (1979). In other words, the OSI, as an arm of the Department of Justice, seeks out those who participated in crimes against humanity during World War II in order to deport them. See 8 U.S.C. § 1227(a)(4)(D) (West 1996) (describing that aliens who have engaged in assisting in Nazi persecutions are deportable). Since the United States Constitution prohibits ex post facto laws, Nazi war collaborators cannot be criminally prosecuted for their actions during World War II. U.S. Const. art. I, § 9, cl. 3. The United States does have available the civil remedies of deportation and, if applicable, denaturalization. See Att'y Gen. Order No. 851-79.
3. See, e.g., United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997). The majority held that the privilege against self-incrimination did not extend to witnesses who feared foreign prosecution while a large minority of dissenters concluded that the privilege should extend. Id; see United States v. Balsys, 119 F.3d 122 (2d Cir. 1997) (holding that the privilege does extend to witnesses
The summer of 1997, two appellate courts created a circuit split in cases with virtually parallel facts, which persuaded the Supreme Court to decide the issue. In the Eleventh Circuit case of *United States v. Ge-cas*, the court found that the defendant could not rely on the Fifth Amendment to withhold information from the OSI. Conversely, the Second Circuit in *United States v. Balsys* extended the Fifth Amendment privilege to the defendant.

This constitutional claim has been raised by witnesses in a variety of circumstances in which they feared prosecution in another country for incriminating testimony required in a United States proceeding. The lower courts have all struggled over various issues surrounding this constitutional question, including the degree of protection that immunity affords and whether the witness faces a "real and substantial fear" of prosecution under another sovereign's jurisdiction. The Supreme Court, which refused to extend constitutional protection to witnesses fearing foreign prosecution, has provided a clear rule for courts to follow.

Part I of this Note will focus on the development of the Fifth Amendment's privilege against self-incrimination by examining the development of the jurisprudence of self-incrimination which resulted in two opposite modes of analysis: one focusing on a limited "same jurisdiction rule" and the other focusing on a broader application of the privilege. It first will trace this development based on both English and American common law and will describe two Supreme Court decisions, each applying one of the two modes of analysis. Part I will also discuss the intended purposes and underlying policies of this privilege. Finally, Part I will address the history of the applicability of the

4. See Balsys, 118 S. Ct. at 2222 n.2.
5. 120 F.3d 1419.
6. Id. at 1422.
7. 119 F.3d 122.
8. Id. at 124.
9. United States v. Yanagita, 552 F.2d 940, 941 (2d Cir. 1977) (fearing testimony would subject witness to prosecution in Japan for conspiracy to assassinate the emperor); In re Tierney, 465 F.2d 806 (5th Cir. 1972) (refusing to testify in grand jury proceeding, despite grant of immunity, based on fear of prosecution in Great Britain); In re Parker, 411 F.2d 1067, 1069 (10th Cir. 1969) (refusing to testify based on fear that such testimony would serve as a link in the chain of evidence required to prosecute her for an extraditable Canadian crime).
10. See Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478-81 (1972) (applying the test for determining when a court must consider the applicability of the Fifth Amendment's self-incrimination clause without deciding the issue).
11. See infra Part I.
United States Constitution to resident aliens. Part II will detail the Supreme Court decision and rationale of United States v. Balsys, which ultimately concluded that the privilege against self-incrimination does not extend beyond the borders of the United States. Part III analyzes the Balsys decision. Specifically, it criticizes the Court's rationale for reasserting the "same jurisdiction rule," which the Supreme Court originally adopted in 1931, but later overturned in 1964. Part III next posits that the Court's treatment of the policies behind the Fifth Amendment is too simplistic an approach, offering instead that a broader reading of the Fifth Amendment is proper and that the privilege against self-incrimination ought to be extended to witnesses who fear foreign prosecution. Part III finally questions the Supreme Court's motivations in arriving at its conclusion, suggesting that the fact that the witness claiming the privilege was an alleged Nazi war criminal influenced its decision. Part IV describes the impact this decision will have on defendants who assert the privilege for fear of foreign prosecution, on the United States government and its law enforcement efforts, and on the courts that must now apply the new rule.

I. Background

The Fifth Amendment's clause against self-incrimination provides that: "[N]o person . . . shall be compelled in any criminal case to be a witness against himself." This clause has its roots in British common law, from which the framers of the United States Constitution adopted a general principal against self-incrimination. The framers left us with little insight, however, as to what constituted the purposes and rationales of this privilege. Largely, scholars must glean the framers' intent from the privilege's history, early applications, and sparse writings by the framers. This Part provides an overview of the English and American foundations on which the right is based by

13. See infra Part II.
14. See infra Part III.
17. See infra Part IV.
discussing its history as interpreted by two twentieth century Supreme Court decisions which serve as the basis for examining the scope of the privilege. This Part also details the main purposes and rationales of the privilege as widely agreed upon among scholars. Finally, this Part focuses on how the Fifth Amendment applies to resident aliens by examining case law, using the Supreme Court's test for determining whether invoking the privilege is justified.22

A. History of the Fifth Amendment Privilege Against Self-Incrimination

1. Early English Common Law and Its Translation into the American Constitution

Arguably, the privilege against self-incrimination extends back to the Medieval period, when the *ius commune*, a combination of Roman and canon law, governed the secular—as opposed to ecclesiastical—jurisprudence of the day.23 The *ius commune* was the immediate source of the Latin maxim, commonly invoked in the sixteenth century, *nemo tenetur prodere seipsum*, or "no one should be required to accuse himself."24 Also active at this time were the ecclesiastical courts, which had wide-ranging jurisdiction25 but did not subscribe to the Latin maxim.26 Instead, these courts forced suspects to submit to an *ex officio* oath, whereby they had to swear to answer truthfully all

23. R.H. Helmholz, *The Privilege and the ius Commune: The Middle Ages to the Seventeenth Century*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION*, supra note 19, at 17; see Griswold, *supra* note 21, at 2 (describing the privilege as extending back to the twelfth century during controversies between the king and bishops when the king sought to limit the jurisdiction of bishops solely to ecclesiastical matters); Levy, *supra* note 21, at 43-46 (noting differences between the secular and ecclesiastical courts that arose after the Norman conquest, during which time, ecclesiastical courts were known to summon people to answer to "reckless or unsupported charges"). *But see id.* at 433 (explaining that the Talmud of ancient Jewish law contains references to this right). Any analysis pertaining to ancient Jewish law, however, is beyond the scope of this note. See Langbein, *supra* note 21, at 1047-48 (asserting that the origins of the privilege against self-incrimination actually are found later, at the end of the eighteenth century with the rise of adversary criminal procedure and the grant to defendants of their own counsel, where prior criminal procedure disallowed defense counsel, thereby forcing defendants to provide their own defense).
24. Helmholz, *supra* note 23, at 17. Prior to this ideal, courts were based on secret interrogations, which required a "self-incriminatory oath" as well as torture, both of which were used solely to obtain a confession from the prisoner. Levy, *supra* note 21, at 6.
25. Their jurisdiction included matters pertaining to the spiritual and to the clergy, including sexual conduct, offenses against religion, sins of the flesh, and other types of immorality including drunkenness and disorderly conduct. Levy, *supra* note 21, at 44.
questions posed to them, often requiring at least some self-incriminating statements and not providing for a right of silence.\textsuperscript{27}

Thus, there was a tension between the \textit{ius commune} and the ecclesiastical courts. While still at its initial introduction in the sixteenth century, the \textit{nemo tenetur prodere seipsum} was simply an ideal that was not immediately reflective of current practice, but was used as a basis of challenge in the ecclesiastical courts.\textsuperscript{28} Eventually, this ideal became so entrenched in the jurisprudence of the day that it ultimately won out and became the common law of England.\textsuperscript{29}

England's common law heavily influenced the framers of the United States Constitution, who included a privilege against self-incrimination in the Fifth Amendment. Exactly how they intended this privilege to take effect, however, is not entirely clear and has been a subject of debate since the early days of this nation. Prior to the adop-

\textsuperscript{27} Id. It is interesting to note that the Star Chamber, which is commonly accepted as the body in which the right against self-incrimination was born, originated procedures much like the ecclesiastical courts. See \textit{LEVY}, supra note 21, at 49-50. The Star Chamber was the embodiment of the judicial body of the king's Council and consisted of clergy members as well as "doctors of civil law" or professional lawyers. \textit{Id}. This body acted under cloud of secrecy and required witnesses to take the oath. \textit{Id.} at 50-51. Typically, it did not inform the defendant of charges against him. \textit{Id.} at 51.

\textsuperscript{28} Helmholz, supra note 23, at 33; \textit{LEVY}, supra note 21, at 70. But see Henry J. Friendly, \textit{The Fifth Amendment Tomorrow: The Case for Constitutional Change}, 37 U. Cin. L. Rev. 671 (1968). Judge Friendly, interpreting \textit{LEVY}, supra note 21, noted that opposition to the oath may not have been specifically in order to further the proposition that one had a right not to answer any incriminating statements against oneself, thereby providing evidence for a conviction. Friendly, supra, at 677. Rather, the opposition may have been motivated by the fact that one taking the oath had not yet been specifically accused and thus was literally being made to provide the accusation against himself. \textit{Id}; see \textit{LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT?} 13 (1959) (arguing that opposition to the ex officio oath was not directed against the interrogation of a criminal witness, but against the interrogation of one who had not yet been charged).

\textsuperscript{29} \textit{GRISWOLD}, supra note 21, at 3. The true meaning of this maxim, in terms of the modern privilege against self-incrimination, has been the subject of some dispute, but Professor John H. Langbein of Yale University posited in a 1994 law review article that only with the grant of counsel to defendants in England in the eighteenth century did the defendant effectively have a right to "decline to speak to the charges against him." John H. Langbein, \textit{The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries, in THE PRIVILEGE AGAINST SELF-INFRINGEMENT}, supra note 19, at 96. In fact, it was not until the 1780s that defense counsel became commonly used. \textit{Id.} at 97. This is because prior to the right to counsel, "the typical defendant [was left] with little alternative but to conduct his own defense." \textit{Id.} at 95. Scholars have noted that 1637 marks the true beginning of the notion of a privilege against self-incrimination, see, e.g., \textit{GRISWOLD}, supra note 21, at 3, although under Langbein's theory, the privilege was not yet a recognized right. See Langbein, supra note 21, at 102-03. In that year, "Freeborn John" Lilburne came before the Star Chamber on charges of having imported heretical and seditious material and refused to take the ex officio oath. \textit{GRISWOLD}, supra note 21, at 3. The Council of the Star Chamber sentenced him to be whipped for this refusal. \textit{Id.} But in 1641, the House of Commons found this punishment illegal. \textit{Id.} Around this time, too, the ex officio oath was abolished. See \textit{LEVY}, supra note 21, at 271-82 for a more complete examination of the case surrounding Lilburne.
tion of the Fifth Amendment in 1791, a privilege against self-incrimination was generally recognized in the American colonies.\textsuperscript{30} In 1776, Virginia included the privilege in its Bill of Rights, and soon after several other states followed.\textsuperscript{31} Each state and the United States government modeled their self-incrimination clauses on the language of the Virginia constitution, which has been termed "the product of bad draftsmanship,"\textsuperscript{32} because its language appears to extend the right only to a criminal defendant at his or her trial.\textsuperscript{33} Courts applied this right, however, much more broadly than its language seems to allow; therefore, its language does not necessarily "reveal original intent or contemporaneous practice."\textsuperscript{34} It is well recognized that the legislative history pertaining to this clause is also virtually nonexistent. James Madison, who is recognized as the Father of the Constitution and the Bill of Rights,\textsuperscript{35} did not provide an explanation anywhere as to his intent regarding the self-incrimination clause,\textsuperscript{36} nor did debate occur about this clause at the First Congress. Despite a lack of evidence about the scope of this privilege, it was initially suggested in both state and federal cases that any constitutional formulation of the right did not supersede or limit the right at common law.\textsuperscript{37}

This early suggestion did not decide how far the common law right extended. American courts have been grappling with the scope of the privilege almost since its inception; the controversy centers around whether the right against self-incrimination applies only in the jurisdiction that compels the testimony, or whether the right applies in any jurisdiction that might make use of the compelled testimony. For guidance on the scope, the Supreme Court has looked to pre-constitutional and early constitutional English cases. Two Supreme Court interpretations of these cases have influenced the American courts' perception of the privilege's scope, each arriving at opposite interpretations. Those two cases are the 1931 case of \textit{United States v. Murdock}\textsuperscript{38} and the 1964 case of \textit{Murphy v. Waterfront Commission of New}

\begin{itemize}
\item \textsuperscript{30} Griswold, supra note 21, at 6-7.
\item \textsuperscript{31} Id. The eight states, including Virginia, providing a right against self-incrimination in their state constitutions were: Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire. \textit{Levy, supra} note 20, at 250-51.
\item \textsuperscript{32} \textit{Levy, supra} note 20, at 250.
\item \textsuperscript{33} Id. at 249.
\item \textsuperscript{34} Id. at 250.
\item \textsuperscript{35} See id. at 1.
\item \textsuperscript{36} Id. at 248.
\item \textsuperscript{37} Id. at 256 n.16 (citing \textit{inter alia}, State v. Bailly, 2 N.J. 396 (1807); Miller v. Crayon, 2 S.C.L. (2 Brev.) 108 (1806); \textit{Levy, supra} note 21, at 515-17 n.35).
\item \textsuperscript{38} 284 U.S. 141 (1931).
\end{itemize}
An examination of the early cases in question will serve to inform on the proper interpretation.

a. English Cases and Their Influence on American Law

In 1749, the Court of the Exchequer decided *East India Co. v. Campbell*, in which a defendant in an English court refused to testify based on his fear that his testimony could subject him to punishment in Calcutta, India. The court allowed the privilege against self-incrimination to protect the witness, for “this court shall not oblige one to discover that, which, if he answers in the affirmative, will subject him to the punishment of a crime; for it is not material, that, if he answers in the negative it will be no harm.” A year later, the court addressed a similar issue in *Brownsword v. Edwards*, in which the defendant refused to testify, claiming that her answers about a marriage would subject her to penalties in the ecclesiastical courts. The court granted her the right not to testify, finding that while her conduct did not subject her to punishment in that common law court, she could be punished in the ecclesiastical court. The court held that “[t]he general rule is, that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law of the land.”

About a century after *Brownsword*, the English Court of Chancery decided *King of the Two Sicilies v. Willcox*, in which natives of Sicily refused to testify because their testimony could subject them to prosecution in Sicily. The court denied their objection to testify, holding that the court was unable to know whether the witness’ testimony would subject them to penal consequences in a foreign country; thus it was unable to judge whether the objection was valid or not. Moreover, the court denied their objection based on the fact that the witnesses themselves would have to willfully return to Sicily for punishment to be imposed, which the witnesses were unlikely to do. Finally, in 1867, the English Court of Chancery Appeals decided

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41. Id. at 1010.
42. Id. at 1011.
43. 28 Eng. Rep. 157 (Ch. 1750).
44. Id. at 157.
45. Id. at 158.
46. Id.
47. 61 Eng. Rep. 116 (Ch. 1851).
48. Id. at 116-17.
49. Id. at 128.
50. Id.
United States v. McRae,\textsuperscript{51} in which the English defendant refused to testify, asserting that he would otherwise subject himself to penalties in the United States.\textsuperscript{52} The court granted the defendant the right not to provide testimony that could incriminate him in the United States.\textsuperscript{53} While acknowledging that the facts were similar to those of King of the Two Sicilies, the court distinguished McRae because the defendant clearly violated a law of the United States for which he could be prosecuted.\textsuperscript{54} Thus, after McRae, the rule in England appeared to allow for witnesses to claim a right against self-incrimination in one jurisdiction's courts only when those witnesses might subject themselves to punishment or prosecution in the courts of another jurisdiction.

b. Development of American Law

American cases addressing the scope of the Fifth Amendment right against self-incrimination have actually developed into two lines of interpretation.\textsuperscript{55} The first line of cases, which until recently appeared to have been overturned, has been termed the "same jurisdiction rule,"\textsuperscript{56} under which the privilege extends as far as the jurisdiction of the sovereign seeking the witness' testimony. The other line of cases supports the broader proposition that compelled testimony is prohibited if it could subject the witness to criminal penalties.\textsuperscript{57} In the latter line of cases, disputes arose over the extent to which the prohibition could be enforced, specifically whether it applied extraterritorially.

Until the 1964 landmark case of Murphy, the Supreme Court allowed compulsion of testimony in one jurisdiction when the witness feared criminal prosecution in another sovereign jurisdiction because the states and the federal government were considered independent sovereigns.\textsuperscript{58} In Brown v. Walker,\textsuperscript{59} the Court found that a witness who had been given immunity in federal court was bound to testify,

\begin{itemize}
\item \textsuperscript{51} 3 L.R.-Ch. 79 (1867).
\item \textsuperscript{52} Id. at 79.
\item \textsuperscript{53} Id. at 87.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} See Diane Marie Amann, A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context, 45 UCLA L. Rev. 1201, 1208 (1998) (discussing one line of cases in terms of a broad application of the privilege and the other line of cases in terms of the "same jurisdiction rule," where the privilege is limited as to the jurisdiction compelling the testimony).
\item \textsuperscript{56} See, e.g., id.
\item \textsuperscript{57} Id. at 1209.
\item \textsuperscript{58} See id. at 1208; Diego A. Rotsztain, The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution, 96 Colum. L. Rev. 1940, 1946-47 (1996).
\item \textsuperscript{59} 161 U.S. 591 (1896).
\end{itemize}
despite his unfounded fear of prosecution in state court. In *Jack v. Kansas*, a witness who had been provided state immunity, yet refused to testify for fear of federal prosecution, was prohibited from claiming the right against self-incrimination because the states had not yet become bound by the Fifth Amendment. The following year, the Court considered a federal witness who had invoked the Fifth Amendment right for fear of state prosecution in *Hale v. Henkel*. The Court declared that "the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty."

*Murdock* specifically addressed the application of the Fifth Amendment when the witness feared prosecution beyond the borders of the United States, noting that "[t]he English rule of evidence against compulsory self-incrimination . . . does not protect witnesses against disclosing offenses in violation of the laws of another country." The Court also described the same jurisdiction rule, stating that when the government compels a witness' testimony under complete immunity, it can rightfully compel that testimony because the immunity invokes the same protection as the privilege. Later cases relied on this rule and reaffirmed that witnesses in one jurisdiction could be compelled to testify, despite fears that they could incriminate themselves in another jurisdiction.

The second line of cases interprets the privilege against self-incrimination more liberally. In *United States v. Saline Bank*, the Court re-

60. *Id.* at 591. This opinion relied in part on an 1861 English case, *Queen v. Boyes*, 121 Eng. Rep. 730 (Q.B. 1861), which held that the privilege did not apply when the danger of incriminating oneself was not "real and appreciable," or when the danger was "of an imaginary and unsubstantial character." *Brown*, 161 U.S. at 608. "Such dangers it was never the object of the provision to obviate." *Id.*

61. 199 U.S. 372 (1905).

62. *Id.* The case of *Malloy v. Hogan* bound the states to the Fifth Amendment through the Fourteenth Amendment's Due Process Clause. 378 U.S. 1, 6 (1964).

63. 201 U.S. 43, 50 (1906).

64. *Id.* at 69.


66. *Id.*

67. See, e.g., *Feldman v. United States*, 322 U.S. 487 (1944), *overruled* by *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52 (1964) (emphasizing the distinct realms of the states and the federal government and holding that even if a jurisdiction wrongfully compelled testimony, another jurisdiction could appropriately use that testimony); see also *Knapp v. Schweitzer*, 357 U.S. 371 (1958), *overruled* by *Murphy*, 378 U.S. 52 (describing the Fifth Amendment's purpose as protection from the powers of the federal government rather than a restraint on compulsion of testimony, and emphasizing the federalist structure of the United States). *But cf. Knapp*, 357 U.S. at 385 (Black, J., dissenting) ("Indeed things have now reached the point, as the result of United States v. Murdock, Feldman, and the present case, where a person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each.").

68. 26 U.S. 100 (1828).
fused to allow the government to compel information from the witnesses, holding that "they ought not to be compelled to discover or set forth any matters, whereby they may impeach or accuse themselves of any offence or crime . . . ."69 In finding for the defendants, the Court stated that "[t]he rule clearly is, that a party is not bound to make any discovery which would expose him to penalties . . . ."70 While this case did not explicitly mention the Fifth Amendment, several decades later in Ballman v. Fagin,71 the Court relied on Saline Bank in concluding that the defendant could rightfully claim the privilege before a federal grand jury because he could incriminate himself under state law.72

In the 1964 landmark case of Murphy v. Waterfront Commission of New York Harbor,73 the Court clarified what the government argued was the "established rule" based on the decisions of Murdock, Knapp, and Feldman. The government argued that the constitutional privilege did not extend to a witness being compelled in one jurisdiction to provide information that could be used to prosecute that witness in another jurisdiction.74 The Court rejected this argument, holding that the Fifth Amendment privilege against self-incrimination extended to witnesses who feared prosecution in either state or federal proceedings, regardless of where the testimony was compelled.75 On the same day the Court decided Murphy, it held in Malloy v. Hogan76 that the Fifth Amendment privilege against self-incrimination applies equally to the states through the Fourteenth Amendment.77 That holding, Murphy explained, called for a reexamination of the "established rule."78 Murphy was based on two lines of reasoning. First, the poli-

69. Id. at 102.
70. Id. at 104.
71. 200 U.S. 186 (1906).
72. Id. at 195-96.
73. 378 U.S. 52 (1964).
74. Id. at 57. The witnesses in this case had been subpoenaed to testify before the New York Harbor Water Commission. Id. at 53. When they refused to disclose certain information based on the danger of incrimination, the state government granted them immunity from prosecution in both New York and New Jersey. Id. They persisted in refusing to testify to certain information, claiming the immunity did not extend to protection under federal law. Id. at 53-54. The New Jersey Supreme Court held that despite the possibility of use of their testimony by the federal government, the state did not violate the Constitution by compelling the witnesses to testify. Id.
75. Id. at 77-78.
76. 378 U.S. 1, 9 (1964).
77. Murphy, 378 U.S. at 53.
78. Id. at 57.
cies behind the privilege\textsuperscript{79} are defeated if a witness can experience a "whipsaw effect," whereby both the state and federal governments are bound by the constitutional privilege, and yet he or she can be incriminated in either jurisdiction.\textsuperscript{80} The Court noted that this whipsaw effect could be especially strong during this time of "cooperative federalism," whereby federal and state governments are working together to prosecute crime.\textsuperscript{81} Second, the Court based its conclusion on English and American case law.\textsuperscript{82} The Court reasoned that \textit{Murdock} was wrongly decided, in that neither its reasoning nor the authority on which it based its decision supported its conclusion.\textsuperscript{83} Thus, the Court overruled the decisions whose reasoning depended on \textit{Murdock}, including both \textit{Knapp} and \textit{Feldman}.\textsuperscript{84}

The settled rule about the application of the privilege against self-incrimination appeared to apply cross-jurisdictionally after \textit{Murphy} because states and the federal government each had their own law enforcement and court systems. The rule from \textit{Murphy}, that a witness cannot be compelled to testify in one jurisdiction if that testimony will incriminate the witness in another jurisdiction, has influenced both the courts and the witnesses who claim this right in cases of fear of foreign prosecution. They have argued that if the United States is the jurisdiction compelling the testimony and the Fifth Amendment applies across jurisdictions, then the right after \textit{Murphy} extends beyond United States borders.

\textsuperscript{79} \textit{Id.} at 55. The Court's discussion on this point provides a comprehensive and widely quoted catalog of the policies, which is useful to recount:

The privilege against self-incrimination "registers an important advance in the development of our liberty—one of the great landmarks in man's struggle to make himself civilized." It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of 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 contest with the individual to shoulder the entire load;" our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

\textit{Id.} (citations omitted).

\textsuperscript{80} \textit{Id.} at 55-56 (citing \textit{Knapp} v. Schweitzer, 357 U.S. 371, 385 (1958) (Black, J., dissenting)).

\textsuperscript{81} \textit{Id.} at 56.


\textsuperscript{83} \textit{Murphy}, 378 U.S. at 73.

\textsuperscript{84} \textit{See id.} at 74, 77.
B. Privilege Against Self-Incrimination: Purposes and Rationales

Judge Friendly found that an examination of the policies behind the privilege is essential in considering its scope because "the history of the privilege does not settle the policy of the privilege." Courts addressing the constitutional issue of whether fear of foreign prosecution justifies the invocation of the right against self-incrimination often discuss the policy behind this privilege. The Supreme Court, various courts of appeals, and scholars assert a variety of rationales, which often are simply placed into two categories. The first category addresses the privilege as an individual and personal right; the second identifies the privilege as a protection against governmental overreaching. Courts commonly identify both approaches but tend to prefer the merits of one over those of the other. Thus, a lack of cohesion or agreement exists among the circuits regarding which approach prevails. The approach a court takes regarding the justification of the privilege may be determinative as to whether or not it decides to extend the privilege to witnesses who fear foreign prosecution.

When colonists came to America, they brought with them the notion of nemo tenetur prodere seipsum, which immediately took root in the original states and ultimately in the Constitution through the

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85. Friendly, supra note 28, at 679 (quoting 8 J. WIGMORE, EVIDENCE § 2251 at 295 (McNaughton rev. 1961)).
87. See Murphy, 378 U.S. at 55 (offering a comprehensive list of rationales); Balsys, 119 F.3d at 129-30 (dividing the purposes into three categories of purposes: advancing the value of individual dignity and privacy; promoting the value of the American criminal justice system; and protecting against governmental overreaching); Araneta, 794 F.2d 920, 926 (4th Cir. 1986) (asserting the dual goals of the Self-Incrimination Clause as those of "protect[ing] individual dignity and conscience" and of "preserv[ing] the accusatorial nature of our system of criminal justice," based on the fundamental values listed by Justice Goldberg in Murphy). See generally GRISWOLD, supra note 21, at 7-10 (focusing on the privilege as a protection of the "dignity and intrinsic importance of the individual," and as "an expression of one of the fundamental decencies in the relation we have developed between government and man").
88. Prior to the recent Supreme Court decision of United States v. Balsys, 118 S. Ct. 2218 (1998), the two most recent examples exemplifying the disagreement in the courts of appeals were Gecas, 120 F.3d 1419 and Balsys, 119 F.3d 122. The former rejected the witness's contention that the main purpose of the privilege is to protect the privacy and dignity of individuals, and thus gives him a right against the world not to testify. Gecas, 120 F.3d at 1457. The latter rejected the notion that "a single cardinal purpose" exists for the Fifth Amendment and recognized each of the values, considering instead, whether extending the privilege to a case where a defendant fears foreign prosecution promotes or defeats the purposes. Balsys, 119 F.3d at 129.
89. See supra notes 23-27 and accompanying text.
Self-Incrimination Clause. Examining the Constitution’s history and the framers’ intent with regard to the Fifth Amendment reveals few clues about the rationale behind its inclusion in the Bill of Rights. Perhaps this is due to the fact that by the time it was incorporated into the Bill of Rights, it had become “a self-evident truth” that did not require an explanation. Despite the paucity of information explicitly lending itself to a discussion of the privilege against self-incrimination, the two rationales mentioned above emerged as justification for this clause.

1. **The Privilege as an Individual and Personal Right**

The ideals of personal dignity and privacy underlie many, if not all, protections in the Bill of Rights, at least to some extent. The Constitution’s framers were concerned with preventing the indignities suffered under the rule of the English monarchy in Great Britain, and based on this motive, they developed a Constitution that would secure individual liberties. The history of the right’s development reveals that it coincided with the abolition of torture as a means of compelling information about criminal activity. As the Supreme Court noted in *Ullmann v. United States*, the privilege against self-incrimination “registers an important advance in the development of our liberty—one of the great landmarks in man’s struggle to make himself civilized.” Justice Goldberg eloquently phrased the rationale in the *Murphy* opinion, stating:

[I]t reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; ... 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 contest with the individual to shoulder the entire load;” [and] our respect for the inviolability of the human personality and of the

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90. See supra notes 30-31 and accompanying text.
91. See supra notes 32-36 and accompanying text.
92. LEVY, supra note 21, at 430.
93. See id. at 431. As Levy noted, Chief Judge Magruder stated: “Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten to-day.” Id. The Framers recognized that liberty was not possible without means to protect the criminally accused and that tyranny comes about by using criminal law to destroy opposition. Id.
94. GRISWOLD, supra note 21, at 7.
95. 350 U.S. 422 (1956).
96. Id. at 426 (quoting GRISWOLD, supra note 21, at 7).
The privilege has been further justified according to the ideal that it is essentially and inherently cruel to compel an individual to expose his or her own guilt. To do so would lead the individual to a feeling of personal degradation. Reflected in this notion is the American ideal that the most valued qualities in a free society are based upon the sense of personal independence.

2. The Privilege as a Protection Against Governmental Overreaching

Colonists were determined to guard against a tyrannical government. With the memory of the English government’s tyranny still fresh in their minds, the Framers adopted the notion that it is sometimes better for a crime to go unpunished than for a criminal case to be tried based on the suspect’s own disclosure. The rationale behind this ideal is again expressed by Justice Goldberg in Murphy:

[the privilege against self-incrimination] reflects ... 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; ... and our realization that the privilege, while sometimes “a shelter to the guilty” is often “a protection to the innocent.”

As the first rationale has been described as “rights-based,” the second one has been termed a “systemic” rationale, whose “purpose is to en-
sure the integrity of our criminal justice system by imposing limits on the power of government as a prosecutor."\textsuperscript{105}

While these two rationales are accepted among authorities as distinct justifications or purposes, it is sometimes hard to separate them. The Bill of Rights exists both for the protection of the individual and as a "bill of restraints" on the government.\textsuperscript{106} As one Fifth Amendment scholar noted, the framers included this clause because "government is but an instrument of man, its sovereignty held in subordination to his rights . . . . [T]he citizen is the master of his government, not its subject."\textsuperscript{107}

3. Implications of the Underlying Rationales

Ultimately, the two purposes discussed above force the courts to use a balancing test. It is clear that in order for the Fifth Amendment privilege to maintain any meaning, courts must prohibit the government from both compelling and using the implicating statements. Only by prohibiting the government from \textit{compelling} self-incriminating statements will the individual's personal dignity and privacy be protected; only by prohibiting the \textit{use} of the compelled statements will the individual be protected against an overzealous government.

This dual protection is necessary because the prohibition against compulsion is not absolute. Domestically, the government can compel a witness to testify without overreaching its power or violating the Fifth Amendment by employing one of two instruments: immunity and a grand jury secrecy provision. The government often claims that these devices apply not only to domestic proceedings, but also to cases in which a defendant refuses to testify due to his fear of foreign prosecution.\textsuperscript{108} In cases within the United States jurisdiction, the use of immunity statutes and grand jury secrecy protects both the government's need to obtain testimony and the witness' constitutional right against self-incrimination. Historically, once the privilege against self-

\textsuperscript{105} United States v. Gecas, 120 F.3d 1419, 1460 (11th Cir. 1997) (Birch, J., dissenting).
\textsuperscript{106} Id. In his dissent, Judge Birch noted that the "systemic rationale, which essentially ensures that our system of criminal justice is fair, also serves the end of human dignity by protecting the individual from an overbearing government." Id. at 1460 n.14. On the other hand, "the rights-based rationale also guarantees that the system is fair . . . thereby garnering the trust and confidence of the governed—and thus furthering systemic ends." Id.
\textsuperscript{107} Levy, \textit{supra} note 21, at 31.
\textsuperscript{108} See, e.g., \textit{In re} President's Comm'n on Organized Crime, 763 F.2d 1191 (11th Cir. 1985); \textit{In re} Nigro, 705 F.2d 1224 (10th Cir. 1982); \textit{In re} Flanagan, 691 F.2d 116 (2d Cir. 1982); United States v. Brummitt, 665 F.2d 521 (5th Cir. 1981); \textit{In re} Cardassi, 351 F. Supp. 1080 (D. Conn. 1972).
incrimination became an established part of the law, it became inapplicable to witnesses when they were granted immunity.109

*Kastigar v. United States*110 addressed the compatibility of immunity statutes with the Fifth Amendment right and found that they provide coextensive protection.111 The Court held that if the government has granted a witness immunity from the use of the testimony and its fruits, it can compel testimony from that witness without violating Fifth Amendment principles.112 The government need not provide full transactional immunity.113 For the government not to violate the right against self-incrimination, the immunity must provide the witnesses only as much protection as the Fifth Amendment would; it need not provide more.114 Problems arise in cases where defendants' fear of foreign prosecution causes them to refuse to testify despite grants of immunity from the government since immunity from the United States government does not extend beyond its borders.115 Courts must then decide whether the defendants should be held in contempt.

111. *Id.* at 445-46. The most common statutes the government uses to grant immunity are 18 U.S.C. §§ 6002-6003.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—(1) a court or grand jury of the United States . . . and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination . . . .


(a) In the case of any individual who has been . . . called to testify . . . at any proceeding before . . . a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is . . . held shall issue . . . an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in § 6002 of this title.


112. *Kastigar*, 406 U.S. at 453. Use and derivative use immunity prohibits the government from using the compelled testimony to subsequently prosecute; evidence gleaned from other sources may be used to prosecute subsequently. *Id.*

113. Transactional immunity is immunity from prosecution for a particular transaction, and it grants much broader protection than use immunity, which does not prohibit prosecution for a crime if the government independently obtains evidence. *Id.; see Levy*, *supra* note 20, at 308-09.


115. *See, e.g.*, Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478 (1972); *Araneta*, 794 F.2d 920, 926 (4th Cir. 1986) (holding that the Fifth Amendment privilege only applies where both the compelling and the using sovereigns are bound by the Fifth Amendment); *In re Gilboe*, 699 F.2d 71, 74-75 (2d Cir. 1982) (failing to decide the applicability of the grant of immunity on a foreign sovereign because the witness did not reasonably fear foreign prosecution).
In addition, the government has often argued that witnesses can be compelled to testify before a grand jury without fear that their testimony will be revealed to a foreign country based on Federal Rule of Civil Procedure 6(e).\textsuperscript{116} This rule provides that grand jury testimony must remain secret, except in certain cases. Courts, however, often find that this "protection" is ineffective since there is no guarantee that the testimony will not be inadvertently disclosed. Many courts addressing this issue have found that 6(e) does not provide sufficient protection against prosecution in foreign criminal proceedings.\textsuperscript{117} Problems arise with the use of the immunity statutes and grand jury rule because foreign governments are not bound by the Constitution. The use of these tools domestically demonstrates a respect for the privilege as an individual right not to be criminally prosecuted based on one's own testimony, while recognizing the important interest of the government in compelling certain testimony.

C. Constitutional Concerns

I. United States Constitution Generally and its Application to Resident Aliens

It is well established that resident aliens of the United States may claim the protection of the United States Constitution.\textsuperscript{118} As the Supreme Court explained in Bridges v. Wixon,\textsuperscript{119} the United States Constitution extends no rights to aliens when they initially enter this country, and the government has the right to exclude them for any reason.

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\textsuperscript{116} In essence, the Federal Rules of Criminal Procedure provide that individuals involved in grand jury proceedings, including grand jurors, stenographers, attorneys for the government, or those to whom disclosure is made pursuant to the exceptions are subject to a general rule of secrecy. \textsc{FED. R. CRIM. P. 6(e)}. This rule provides for disclosure for attorneys for the government for use in the performance of the attorney's duty and certain government personnel who assist an attorney for the government. The disclosed information pursuant to the attorney's duty may only be used for the purpose of assisting the attorney for the government duty to enforce criminal law. \textit{Id.}

\textsuperscript{117} See, e.g., Araneta, 794 F.2d at 925 (holding that Rule 6(e) would not adequately protect witnesses from disclosure to the Philippine government); United States v. Flanagan, 691 F.2d 116, 123 (2d Cir. 1982) (determining that Rule 6(e) does not insure that grand jury testimony will not be disclosed to a foreign sovereign and thus does not provide sufficient protection to the witness claiming the fear); In re Cardassi, 351 F. Supp. 1080, 1082 (D. Conn. 1972) (finding that American courts using Rule 6(e) cannot sufficiently protect a witness from foreign use of her compelled testimony). \textit{But see In re Tierney, 465 F.2d 806, 811 (5th Cir. 1972)} (holding that because Rule 6(e) provides for secrecy of grand jury proceedings, there is no substantial risk of foreign prosecution); \textit{In re Parker, 411 F.2d 1067, 1069-70 (10th Cir. 1969)} (asserting that any evidence the witness would disclose to the grand jury would not be available to the Canadian government because of the application of Rule 6(e)).

\textsuperscript{118} See Bridges v. Wixon, 326 U.S. 135 (1945) (Murphy, J., concurring).

\textsuperscript{119} \textit{Id.}
reason. In other words, "the Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." Aliens, however, are fully vested with constitutional rights and protections once they have lawfully come into this country to reside. Included among these rights are the First Amendment, which allows aliens freedom of speech and of religion, as well as the Fifth Amendment, which gives them, inter alia, the right not to serve as witnesses against themselves if there is a potential for criminal prosecution. Ultimately, once aliens are lawfully in this country, the Constitution does not distinguish them from citizens.

A few years after Bridges, the Court affirmed this notion by reiterating that the Fifth Amendment protects aliens who are "lawful permanent resident[s]" of the United States and who are established there physically. If these conditions are not met, aliens can rightfully expect not to be deprived of life, liberty, or property without due process of law. Due process must be given even if the government later desires to expel or deport them, for they must be given the opportunity to be heard. Based on these assessments by the Court, it is evident that constitutional protections extend to permanent United States residents who lack citizenship.

2. Interpretation of the Fifth Amendment's Clause of the Privilege Against Self-Incrimination

As stated previously, the Self-Incrimination Clause provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." Problems arise, however, in discerning what constitutes a criminal proceeding, who is protected, and the proper scope of the privilege. For instance, an individual involved in a deportation proceeding, which is civil, could be deported based on testimony he or she provided. Logically, because deportation proceedings are of a civil nature, deportees would not be entitled to the same constitu-

120. Id. at 160 (citing Turner v. Williams, 194 U.S. 279 (1904)).
121. Id. at 161.
122. Id.
123. Id.
125. Id.
127. Id.; see U.S. CONST. amend. V, § 2.
129. Id. at 598.
tional protections guaranteed to criminal defendants. But as the Supreme Court held in *Kastigar*, the Fifth Amendment "protects against any disclosures, which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." 

On the other hand, the self-incrimination clause need not be approached so literally. The *Kastigar* Court held that a witness facing a legitimate possibility of conviction (in either the current or a subsequent proceeding) may invoke the privilege "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; . . . ." Thus, for purposes of the Self-Incrimination Clause, certain proceedings that are not criminal in nature may become "criminal cases" if the testimony sought in one proceeding potentially could subject the individual to criminal charges in a later proceeding, based on that earlier compelled testimony. This rule most certainly would apply to a deportee facing domestic criminal prosecution. Unfortunately, this does not resolve the issue of whether a deportation proceeding, in which the deportee fears potential foreign criminal prosecution, may assume a criminal nature for purposes of allowing the deportee to invoke the Fifth Amendment to protect him from that future criminal action.

3. How Courts Determine When Fear of Foreign Prosecution Justifies Invocation of Self-Incrimination Clause

The Supreme Court established a standard by which a witness can claim the privilege against self-incrimination. This privilege prohibits compulsion of his or her testimony if there is a real and substantial danger that such testimony will be used against the witness in a criminal prosecution. Application to a fear of foreign prosecution calls for an evaluation of two preliminary steps prior to addressing the constitutional issue. First, the court must determine whether the conduct about which the witness is being compelled to testify might form the

132. *Id.* at 1038-39.
134. *Id.* at 444.
135. *Id.*
137. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972). This standard was invoked in *Zicarelli*, but the Court found it unnecessary to address the constitutionality of the issue because the witness failed to demonstrate a "real and substantial fear" of prosecution in a foreign jurisdiction. *Id.* at 478-79.
basis of a criminal conviction under foreign law. Second, the court must determine whether the defendant's fear of foreign prosecution is real and substantial. Only after deciding that the fear is real and substantial does the court reach the issue of whether the Constitution allows one who fears foreign prosecution to invoke the Fifth Amendment right against self-incrimination.

If a court decides that a witness' conduct will not subject him or her to foreign criminal prosecution, then there is no constitutional issue to consider. For instance, if no criminal statute existed in a foreign country under which the witness could be prosecuted, then he or she would not be able to invoke the Fifth Amendment privilege. Rather, the witness would simply be involved in a civil proceeding with no possibility of criminal prosecution. On the other hand, if the court were to find that the crime is punishable in certain foreign countries to which the witness may be deported, then the court must consider the constitutionality of extending the Fifth Amendment protection.

The danger the witness fears must be real and substantial, for the Fifth Amendment privilege does not apply if the potential for prosecution and conviction is merely "remote and speculative." In deciding cases in which the defendant fears foreign prosecution, courts of appeals have been guided by Zicarelli, which called for the examination of several factors in determining whether the fear is real and substantial. In re Flanagan, which built upon Zicarelli, provides a helpful list of factors that courts consider in determining whether the

138. See In re President's Comm'n on Organized Crime, 763 F.2d 1191, 1198 (11th Cir. 1985) (addressing the application of the privilege to foreign proceedings and finding that the defendant must show first that the information sought through testimony would incriminate the defendant under foreign law and second that the fear is real and substantial rather than merely speculative).

139. See Brown v. Walker, 161 U.S. 591, 599 (1896) ("[A] witness' fear of conviction on the basis of his testimony must be reasonable, real, and appreciable"); Zicarelli, 406 U.S. at 478 (finding that the witness must face a "real danger" of conviction to invoke the privilege because the privilege does not protect against "remote and speculative possibilities").

140. See Zicarelli, 406 U.S. at 478; Araneta, 794 F.2d 920, 923 (4th Cir. 1986); In re Parker, 411 F.2d 1067 (10th Cir. 1969).

141. See, e.g., Zicarelli, 406 U.S. 472; In re Chevrier, 748 F.2d 100, 103 (2d Cir. 1984); United States v. Brummitt, 665 F.2d 521, 525-26 (5th Cir. 1981).

142. See supra notes 131-32 and accompanying text.

143. See Zicarelli, 406 U.S. at 478.

144. Id.; see In re President's Comm'n on Organized Crime, 763 F.2d 1191, 1199 (11th Cir. 1985) (finding possibility that a foreign country will seek extradition of the defendant with which United States authorities would comply so speculative a danger, as that described in Zicarelli, that the defendant was precluded from invoking the Fifth Amendment privilege).

145. See, e.g., United States v. Joudis, 800 F.2d 159, 161-62 (7th Cir. 1986); President's Comm'n on Organized Crime, 763 F.2d at 1199; In re Flanagan, 691 F.2d 116, 121 (2d Cir. 1982).

146. 691 F.2d 116.
witness' fear is real and substantial: (1) "whether there is an existing or potential foreign prosecution against him;"147 (2) "what foreign charges could be filed against him;"148 (3) "whether prosecution of them would be initiated or furthered by his testimony;"149 (4) "whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States;"150 and (5) "whether there is a likelihood that his testimony given here would be disclosed to the foreign government."151 These factors are considered once the witness has been granted immunity by the United States government but refuses to testify because the immunity protection extends only as far as American borders.

The constitutional issue is finally addressed after a court determines that the defendant's fear of foreign prosecution is real and substantial, based on the aforementioned factors.152 Courts infrequently address this question because a defendant's fear of prosecution rarely rises to the level of substantial.153 Prior to Balsys, the Supreme Court had addressed this specific issue only once before, in United States v. Zacarelli,154 where it determined that the defendant did not face a substantial risk of incrimination under foreign law.155 Thus, lower courts were largely left to their own devices.156

147. Id. at 121.
148. Id.
149. Id.
150. Id.
151. Id.; see In re President's Comm'n on Organized Crime, 763 F.2d 1191, 1199 (11th Cir. 1985) (providing a similar formulation of factors).
152. See, e.g., Araneta, 794 F.2d 920, 928 (4th Cir. 1986); United States v. Brummitt, 665 F.2d 521 (5th Cir. 1981); In re Parker, 411 F.2d 1067 (10th Cir. 1969); United States v. Ragauskas, No. 94 C 2325, 1995 WL 86640 (N.D. Ill. 1995).
153. See, e.g., In re Chevrier, 748 F.2d 100 (2d Cir. 1984); In re Flanagan, 691 F.2d 116 (2d Cir. 1982); In re Mishima, 507 F. Supp. 131 (D. Alaska 1981).
155. Id. at 479-80.
156. These lower courts have followed a variety of principles long expounded in Supreme Court decisions, which included analogizing to opinions that were decided according to the state-federal government distinction, such as Murphy; however, any guidance specifically applying to the privilege in cases of foreign prosecution has often called for interpreting English common law and early American cases, which is not uniform. Judge Carnes, in United States v. Gecas had urged the Supreme Court to decide this issue. 120 F.3d 1419, 1484 (11th Cir. 1997) (Carnes, J., dissenting). He noted that the arguments advanced by proponents on both sides of the issue are compelling, and circuit opinions have explored all possible arguments. Id. But, because of the issue's "fundamental importance" and the fact that it is gaining "quantitative importance" in light of the internationalization of crime as well as of law enforcement, the issue should no longer percolate in the circuits. Id.
II. **UNITED STATES V. BALSYS**

A. **Facts**

Aloyzas Balsys was an eighty-six-year-old resident alien of Lithuania who resided in Woodhaven, New York. He arrived in the United States on June 30, 1961, pursuant to his application for an immigrant visa and alien registration, which he filed on May 2, 1961, at the American Consulate in Liverpool, England. During the application process, Balsys was questioned about his activities and employment during World War II. He stated that he served as a "Sergeant-major instructor" for the Lithuanian army from 1934 through 1940. Additionally, he stated that between 1940 and 1944, he lived in hiding in Plateliai, Lithuania. Balsys swore under oath that the information he provided in his application was "true and complete." He also declared that if he made any "willfully false or misleading statement[s]" or concealed any material fact, he could subject himself to criminal prosecution in or deportation from the United States. Based on this declaration, the American consulate granted him an immigrant visa pursuant to the Immigration and Nationality Act of 1952.

The OSI had an interest in prosecuting residents suspected of being Nazi war criminals and suspected that Balsys illegally entered the United States. The OSI believed that he was not in hiding in Lithuania from 1940 to 1944, but rather had been a member of the Lithuanian Security Police, Saugumas, in Vilnius, Lithuania. The Saugumas were "responsible for arresting, detaining and turning over for execution Jews, those who aided Jews, suspected Communists, and other civilians . . . ." If Balsys had been a Saugumas member and

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159. Appellee's Brief at 3.
160. Id.
161. Id.
162. Id.
163. See Balsys, 918 F. Supp. at 588 n.2 (citing Respondent's Application for Immigrant Visa and Alien Registration, Exhibit D to the Government's Petition).
165. See supra note 1.
166. Balsys, 918 F. Supp. at 591.
168. Id.
assisted the Nazi forces in persecuting Jews and others, he could be eligible for deportation.\textsuperscript{169}

Pursuant to its investigation of Balsys' wartime activities, the director of the Department of Justice's OSI issued an administrative subpoena on October 14, 1993, directing Balsys to testify and produce documents concerning his activities during World War II and his immigration to the United States.\textsuperscript{170} At the government's deposition on November 16, 1993, the OSI questioned Balsys about his residence in Europe during the war, his association with the Lithuanian police and political groups, and any knowledge of or participation in the persecution of Jews and others during the Nazi occupation of Lithuania.\textsuperscript{171} While Balsys did appear at the deposition, he refused to provide any information beyond his name and address, asserting the Fifth Amendment privilege against self-incrimination based on his fear of prosecution in Lithuania, Israel, or Germany, each of which has a statute relating to the prosecution of Nazi war criminals.\textsuperscript{172} In addition, he refused to produce any documents except his alien registration card.\textsuperscript{173}

\textbf{B. Procedural History}

Subsequent to the deposition and Balsys' refusal to comply with the government's requests for information and documents, the government filed a petition in the District Court for the Eastern District of New York to enforce the subpoena.\textsuperscript{174} Balsys objected to the subpoena's enforcement because he maintained that he had a real and substantial fear of prosecution in Lithuania, Israel, and Germany.\textsuperscript{175}

\textsuperscript{169} The relevant statutes, under which Balsys would be subject to deportation, are 8 U.S.C. § 1182(a)(3)(E) and § 1251(a)(4)(D) for participating in the "persecution of any person because of race, religion, national origin, or political opinion." § 1182(a)(3)(E). In addition, the government argued that Balsys might be subject to deportation for lying on his immigration application, pursuant to 8 U.S.C. §§ 1182(a)(6)(c)(i) and 1251(a)(1)(A). \textit{See} Balsys, 119 F.3d at 124.

\textsuperscript{170} \textit{Balsys}, 119 F.3d at 125.

\textsuperscript{171} \textit{Id}.

\textsuperscript{172} \textit{Id.} at 124-25.

\textsuperscript{173} \textit{Id.} at 125.

\textsuperscript{174} \textit{Appellee's Brief} at 4, \textit{Balsys}, 119 F.3d 122 (No. 96-6144). Pursuant to the Immigration and Nationality Act of 1952, the Immigration and Naturalization Service is authorized to question aliens, issue subpoenas, and require document production concerning immigration proceedings. 8 U.S.C. § 1225(a) (1994).

The district court held that Balsys was not entitled to invoke the Fifth Amendment's privilege against self-incrimination despite the "real and substantial danger" of foreign prosecution in Lithuania and Israel. The court also concluded that regardless of the Fifth Amendment's application, Balsys had waived the privilege when he first applied for immigration and answered the questions for government officials. Thus, he was ordered to testify before the OSI. The court also ordered Balsys to produce the documents subpoenaed because he made no showing that they would be of a testimonial nature and would incriminate him merely by acknowledging possession of them.

Balsys appealed this decision based upon his right to invoke the Fifth Amendment, denying that he had waived the privilege in immigration procedures. On appeal, neither party challenged the finding that Balsys faced a real and substantial danger of foreign prosecution. The Court of Appeals for the Second Circuit vacated the order of the district court, finding that witnesses with a real and substantial fear of foreign prosecution have the right to invoke the protections of the privilege against self-incrimination. The court concluded that Balsys did not waive this right because during intervening periods of time, changes had occurred in immigration law and procedures and in the criminal laws of the United States, Lithuania, and Israel. The Supreme Court granted certiorari and decided the case on June 25, 1998.

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176. Id. at 591, 596.
177. The district court found that while the German murder statute has been used to prosecute persons suspected of crimes against Jewish people, it is unclear whether it applies to non-German citizens who allegedly committed such acts outside of German jurisdiction, and thus whether Balsys faced a real danger of prosecution in Germany. Balsys, 918 F. Supp. at 594. As with the Lithuanian statute, this one does not apply a statute of limitations. Id.
178. Id. at 600.
179. Id.
180. Id. (citing In re Grand Jury (Markowitz), 603 F.2d 469, 477 (3d Cir. 1979)).
181. Id.
182. Balsys, 119 F.3d at 126.
183. Id. at 124.
184. Id. at 140.
185. United States v. Balsys, 118 S. Ct. 2218 (1998). It is significant to note that less than two months after the Second Circuit handed down its decision, the Eleventh Circuit faced a virtually
C. The Majority Opinion

Justice Souter delivered the majority opinion, in which seven justices joined as to three parts of the opinion, and five justices joined the remaining two parts, which held that concern with foreign prosecution exceeds the scope of the Fifth Amendment’s privilege against self-incrimination. Neither party disputed that the government sought to “compel” Balsys to testify in a manner that would make him be a witness against himself. The parties also did not dispute that Balsys maintained a reasonable fear of criminal prosecution in Lithuania or Israel. Thus, the issue the Supreme Court faced was whether “any criminal case,” the language of the Fifth Amendment’s protection, applied to fear of criminal prosecution in a foreign jurisdiction.

1. Balsys’ Constitutional Rights

The majority first acknowledged that the government sought to compel testimony from Balsys, which might make him “a witness against himself,” which is conduct the Fifth Amendment was intended to protect in a criminal proceeding. The majority also noted that the privilege applied in any proceeding, civil or criminal, if the information sought could subsequently be used against the witness in a state or federal criminal proceeding. The Court accepted that Balsys’ fear of criminal prosecution was reasonable and then framed the issue as whether the scope of the privilege against fear of criminal prosecution extended to foreign jurisdictions.

2. The Same-Sovereign Rule of the Privilege Against Self-Incrimination: What “Any Criminal Case” Means

After discussing Balsys’ constitutional rights, the Court concluded that, in the context of the entire Fifth Amendment, the self-incrimination clause must be read to apply only to those governments bound by parallel case, when it heard United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997). In this six-to-five decision, the court refused to extend to Gecas the privilege against self-incrimination. Both the majority and dissent provided lengthy and compelling arguments. It is quite likely that this split in the circuits on two factually parallel cases influenced the Supreme Court’s decision to grant certiorari.

186. Balsys, 118 S. Ct. at 2221.
187. Id. at 2222.
188. Id.
189. Id.
190. U.S. CONST. amend. V.
191. Id., 118 S. Ct. at 2222.
192. Id. (citing Kastigar v. United States, 406 U.S. 441, 444-45 (1972); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924)).
193. Id.
the Fifth Amendment. Justice Souter first answered Balsys' argument, which focused on the facial language of the self-incrimination clause, "any criminal case." 194 The Court rejected his argument, which had contrasted the Sixth Amendment's clear application to domestic criminal proceedings with the apparently broader Fifth Amendment reference to any criminal proceeding. 195 Instead, the Court found that a proper reading of the privilege depends upon the "cardinal rule to construe provisions in context." 196 The other Fifth Amendment guarantees are implicated only upon action of the government bound by this amendment. 197 Thus, the Court reasoned that in context with these other guarantees, the framers would not have intended the self-incrimination clause to have a broader application. 198

The Court explained the modifier "any" as serving to contrast the self-incrimination clause with the grand jury clause, which limits itself to cases involving "capital or otherwise infamous crime[s]." 199 The Court found a contextual reading appropriate, based on the fact that there is "no helpful legislative history, and ... there was no different common law practice at the time of the Framing." 200 The Court concluded, therefore, that the privilege against self-incrimination may be invoked only when the witness reasonably feared prosecution by a jurisdiction whose power is limited by the clause, which is the idea of "same-sovereign jurisdiction." 201

a. Supreme Court Precedent of United States v. Murdock Upheld

The Court noted that the Bill of Rights was a limit on the power of the federal government only and not to individual state governments. 202 Prior to the Fourteenth Amendment incorporation, implication of the privilege when one feared state prosecution would have been "unlikely" and "improbable." 203 The Court then discussed the

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194. The full clause provides that "[N]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V (emphasis added).
195. Balsys, 118 S. Ct. at 2222.
196. Id. at 2223.
197. Id. The other Fifth Amendment provisions include the guarantees of a grand jury proceeding, of a defense against double jeopardy, of due process of law, and of just compensation for the taking of property. U.S. CONST. amend. V.
198. Balsys, 118 S. Ct. at 2223.
199. Id. (citing U.S. CONST. amend. V).
200. Id.
201. Id.
202. Id. at 2224 (quoting Chief Justice Marshall in Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833)).
203. Id.
“precursors” of Balsys, in which witnesses invoked the federal privilege based on a fear that their testimony could be used in a state proceeding.\textsuperscript{204} It noted that only a few early cases addressed this cross-jurisdictional application of the Fifth Amendment clause.\textsuperscript{205} The Court discussed that in each of those cases, the holdings were based on the fact that it was unlikely that the testimony would be used by the other jurisdiction.\textsuperscript{206}

The Court relied on United States v. Murdock,\textsuperscript{207} which held that a witness cannot refuse to testify in a federal proceeding based on the possibility that such testimony might incriminate the witness under state law.\textsuperscript{208} The Court cited Murdock's interpretation of the “English rule of evidence against compulsory self-incrimination,” on which the Fifth Amendment privilege is based.\textsuperscript{209} It stated that the English rule does not protect witnesses in one jurisdiction from the disclosure of offenses of another country's laws.\textsuperscript{210} In addition, it quoted Murdock for the proposition that a witness who receives absolute immunity against prosecution by the government compelling the testimony is afforded the same protection as if the witness had invoked the privilege against self-incrimination.\textsuperscript{211} The Court recognized that this opinion received support in Knapp v. Schweitzer,\textsuperscript{212} which held that a state is justified in compelling a witness to testify, despite the possibility that the testimony could incriminate the witness in a federal proceeding.\textsuperscript{213}

\textsuperscript{204} Balsys, 118 S. Ct. at 2224.

\textsuperscript{205} Id. at 2224-25. The Court cited Hale v. Henkel, 201 U.S. 43 (1906) (holding that “the possibility that information given by the witness might be used” by the other government is, as a matter of law, “a danger so unsubstantial and remote” that it fails to trigger the right to invoke the privilege); Jack v. Kansas, 199 U.S. 372 (1905) (imposing a contempt order on the witness, who invoked the privilege in a state proceeding based on a fear of federal prosecution, since the privilege applies only when prosecution is feared by the same jurisdiction in which the privilege is invoked, but finding that the witness had no reasonable fear of federal prosecution); and Brown v. Walker, 161 U.S. 591 (1896) (noting that in raising the privilege in a federal proceeding based on a fear of state prosecution was not necessary since the federal immunity protected the witness from state prosecution).

\textsuperscript{206} Balsys, 118 S. Ct. at 2224-25.

\textsuperscript{207} 284 U.S. 141 (1931).

\textsuperscript{208} Balsys, 118 S. Ct. at 2224.

\textsuperscript{209} Id. at 2224-25.

\textsuperscript{210} Id.

\textsuperscript{211} Id.

\textsuperscript{212} 357 U.S. 371 (1958).

\textsuperscript{213} Balsys, 118 S. Ct. at 2225 (citing Knapp, 357 U.S. 371, overruled by Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964)).
The Court next addressed the lack of uniformity among the circuits, as reflected in the two lines of cases: those supporting the "same jurisdiction" rule, including *Hale v. Henkel* and *Brown v. Walker* and those holding that the privilege applies in federal proceedings when the witnesses feared prosecution under a state law, including *United States v. Saline Bank* and *Ballmann v. Fagin*. The Court asserted that the latter line of cases was not inconsistent with *Murdock*. First, while *Saline Bank* held that "'a party is not bound to make any discovery which would expose him to penalties,'" the Court never discussed the Fifth Amendment. Moreover, while *Ballman* found that the witness may have been allowed the privilege's protection based on fear of state prosecution, it was overruled by *Hale v. Henkel* two months after it was decided. The Court essentially found that any inconsistency was ultimately superceded by *Murdock*.


The Court next examined the viability of *Murphy v. Waterfront Comm'n of New York Harbor*, which overruled *Murdock* by holding that witnesses in a state proceeding who had been granted state immunity could be compelled to testify, despite their fear of federal prosecution, because the privilege against self-incrimination barred the federal government from using the state testimony or its fruits in a federal prosecution. After *Murphy*, the Fifth Amendment guaran-

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214. Id.; see Respondent's Brief at 7, *Balsys*, 118 S. Ct. 2218 (No. 97-873), available in 1998 WL 139846 ("The earlier overruled decisions which refused to protect witnesses from testifying based upon the fear that their testimony would be used against them in another sovereign's prosecution were decided on obsolete grounds."); Amicus Brief at 16, *Balsys*, 118 S. Ct. 2218 (No. 97-873), available in 1998 WL 136442 (demonstrating that precedent actually reveals two lines of Supreme Court cases, one line prohibiting a federal court from compelling a witness to testify to potentially incriminating information under state law and the other line limiting the privilege to testimony that might incriminate the witness only in the same jurisdiction that was compelling the testimony).

215. *Balsys*, 118 S. Ct. at 2225; see Amann, supra note 55, at 1208-12 (contrasting the two lines of cases).

216. 201 U.S. 43 (1906).


218. 26 U.S. (1 Pet.) 100, 104 (1828).

219. 200 U.S. 186 (1906).

220. *Balsys*, 118 S. Ct. at 2225.

221. Id. (citation omitted).

222. Id. (citing *Ballman*, 200 U.S. at 195-96).

223. Id.


tee protected both state and federal witnesses against incrimination under both state and federal law. The Court asserted that *Murphy* was based on two alternative rationales but rejected one as "fatally flawed."  

(1) Rationale in Light of *Malloy v. Hogan*

The first rationale was that *Murphy* depended on the decision of *Malloy v. Hogan*, decided on the same day as *Murphy*. Because the Balsys Court found this rationale valid, it upheld *Murphy*. *Malloy* applied the Fourteenth Amendment's due process incorporation principle to extend the protections of the self-incrimination privilege, so that the states as well as the federal government were bound to the same Fifth Amendment guarantee. *Malloy* thereby guaranteed that the protections afforded on the federal level—"the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty"—were also secured against state invasion. The *Murphy* Court found that *Malloy* "necessitate[d] a reconsideration" of the *Murdock* rule since more than one jurisdiction was now subject to the self-incrimination privilege. After *Murphy*, a witness could no longer be "whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to each." The Court also noted that the government had an option to exchange the self-incrimination privilege for an equally broad grant of immunity against using any of the compelled testimony. Based on this principle, *Murphy* held that unless the federal government provided federal immunity for testimony compelled by a state at least as broad as the privilege allowed, the federal government would be prohibited from making use of the compelled testimony and its fruits.

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226. Id. (citing *Murphy*, 378 U.S. at 77-78).
227. Id. at 2226-30.
229. *Balsys*, 118 S. Ct. at 2226.
230. Id. at 2226-27.
231. Id. at 2227 (citing *Malloy*, 378 U.S. at 8).
232. Id. (quoting *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 57 (1964)).
233. Id.
234. Id. (quoting *Murphy*, 378 U.S. at 55). The Court explained that the whipsaw effect "was possible owing to a feature unique to the guarantee against self-incrimination among the several Fifth Amendment privileges." Id. That is, the privilege allows the government to compel a witness to testify, as long as it grants immunity against the use of the incriminating testimony. Id.
235. *Balsys*, 118 S. Ct. at 2227 (citing *Kastigar v. United States*, 406 U.S. 441, 448-49 (1972)).
236. Id. This decision of *Murphy* was necessary, in order to protect the witness from being "whipsawed into incriminating himself under both state and federal law even though the consti-
The Court concluded that Malloy showed that Murphy and Murdock, despite their different results, shared the same understanding of the clause against self-incrimination.\(^{237}\) The Court explained that after Murphy, the immunity option would be viable only if the state and federal jurisdictions acted as one, whereby a “federally mandated exclusionary rule fill[ed] the space between the limits of state immunity statutes and the scope of the privilege.”\(^{238}\) When Murphy’s principles are understood in light of their relation to Murdock, Balsys’ claim and the Murphy decision could not be reconciled.\(^ {239}\)

(2) Rationale According to English Common Law

The Court found flaws in the second rationale, which allowed for a more expansive reading based on Murphy’s interpretation of English common law understanding of the privilege.\(^ {240}\) The Court described Murphy, which rejected the Murdock analysis, as “[h]aving removed what it saw as an unjustified, historically derived limitation on the privilege, [it instead] expressed a comparatively ambitious conceptualization of personal privacy underlying the Clause . . . .”\(^ {241}\) The Court traced Murphy’s rationale first by examining its use of two pre-constitutional English cases, East India Co. v. Campbell\(^ {242}\) and Brownsword v. Edwards\(^ {243}\) as support of its position that Murdock’s interpretation of precedent was erroneous.\(^ {244}\) This Court, however, refused to adopt Murphy’s interpretation of these cases, noting that the jurisdiction in which the witness feared prosecution was “subject to the same legislative sovereignty that had created the courts in which the privilege was applicable to each.” \(^{7}\) Id. (citing Murphy, 378 U.S. at 55).

\(^{237}\) Id.

\(^{238}\) Id. at 2228.

\(^{239}\) Id.

\(^{240}\) Id. at 2224.

\(^{241}\) Balsys, 118 S. Ct. at 2228.

\(^{242}\) 27 Eng. Rep. 1010 (Ex. 1749). In this case, the Court of the Exchequer extended the privilege to the defendant based on the potential that he could be prosecuted in an English colony, Calcutta. Balsys, 118 S. Ct. at 2228 (citing East India Co., 27 Eng. Rep. at 1011). It stated that it would “not oblige one to discover that, which, if he answers in the affirmative, will subject him to the punishment of a crime.” Id. (quoting East India Co., 27 Eng. Rep. at 1011); see supra notes 35-37 and accompanying text.

\(^{243}\) 28 Eng. Rep. 157 (Ch. 1750). In response to the witness invoking the privilege in the Court of Chancery on the ground that her testimony might subject her to prosecution in the Ecclesiastical court, the court stated that the general rule “is that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law of the land.” Balsys, 118 S. Ct. at 2228 (quoting Brownsword, 28 Eng. Rep. at 158); see supra notes 38-41 and accompanying text.

\(^{244}\) Balsys, 118 S. Ct. at 2228.
claimed."245 It also noted that English courts were silent regarding the application of the privilege against self-incrimination to foreign prosecutions even after the adoption of the Fifth Amendment.246

Next Murphy recognized that Murdock erred by invoking King of the Two Sicilies247 for the proposition that it supported "this Court's prior view of English law."248 In King of the Two Sicilies, the court denied the privilege based first on the belief that "the privilege speaks only to matters that might be criminal under the laws of England" and on the "unlikelihood that the defendants would ever leave England and be subject to Sicilian prosecution."249 This rule in Murdock was undermined by a subsequent English case, United States v. McRae,250 in which the court allowed the witness in England, who feared incrimination under the law of the United States, to invoke the privilege.251 Murphy thus interpreted McRae as overruling King of the Two Sicilies,252 which accounts for its broader interpretation of the privilege.

The Balsys Court rejected Murphy's interpretation of English common-law history. It acknowledged that McRae, while perhaps correctly decided in the given circumstances, did not support the general rule that the privilege applied whenever a witness feared foreign prosecution by a party not then before the court.253 In addition, it found that Murphy's holding that McRae overruled King of the Two Sicilies was too broad.254 Moreover, the Court noted that even if Murphy's holding had been correct, it would not have been relevant to the Fifth Amendment discussion. This is because the framer's intent in applying post-constitutional English cases was uncertain, and McRae as-

245. Id. at 2228-29.
246. Id. at 2229. The Court quoted King of the Two Sicilies v. Willcox, 61 Eng. Rep. 116, 128 (Ch. 1851), which noted that there is an "absence of all authority on the point," in an opinion rejecting the witnesses' claim of privilege based on fear of foreign prosecution. Id. It is important to point out, however, that the opinion, in fact, rejected the witnesses' claim of privilege based on the fact that (a) it was impossible for a court to know, as a matter of law, what cases would subject the witnesses to prosecution by a foreign sovereign, and (b) for the witnesses to be prosecuted by the foreign sovereign, they would need to willfully bring themselves within the jurisdiction of that sovereign. Id. Thus, any lack of authority on the privilege's application in this situation is not the reasoning for this decision. Rather the rationale is based on the court not wanting to speculate as to other countries' laws and as to the acts of the witnesses.
248. Balsys, 118 S. Ct. at 2229.
249. Id. (citing King of the Two Sicilies, 61 Eng. Rep. at 128); see supra notes 47-50 and accompanying text.
250. 3 L.R.-Ch. 79 (1867).
251. Balsys, 118 S. Ct. at 2229 (citing Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 61 (1964)).
252. See id.
253. Id.
254. Id.
serted no clear disagreement with *King of the Two Sicilies*.\textsuperscript{255} For these reasons, *Murphy* did not rely on any clear authority when it overruled the historical analysis of *Murdock*.\textsuperscript{256} The Court summarized its response to *Murphy* by asserting that to the extent that its holding "went beyond its response to *Malloy* and undercut *Murdock*'s rationale on historical grounds, its reasoning cannot be accepted now. . . . *Murphy*'s history was shown to be fatally flawed."\textsuperscript{257}

c. Disagreements with Dissent

The majority disagreed with the dissenting Justices on three points. First, it reasserted its position that the scope of the privilege against self-incrimination must be limited to its context, and must not be expanded according to its "facial breadth," as the dissent would hold.\textsuperscript{258} Second, it found that precedent, particularly *Murdock*, supported the same-sovereign principle. According to the majority, the dissent placed less weight on *Murdock* and more on the language of *Saline Bank*.\textsuperscript{259} Finally, the majority disagreed with the dissent’s reliance on *Murphy*'s historical analysis, asserting that *Murdock*'s interpretation of precedent as correct.\textsuperscript{260}

3. Policy Rationales of the Privilege

The Court next discussed the policy rationales of the privilege against self-incrimination, focusing on the catalog of policies listed in *Murphy*.\textsuperscript{261} Ultimately, it found that the policies did not support extending the privilege beyond its application to domestic prosecutions. According to the Court, an extension of the privilege was unwarranted based on the "highly general statements of policy" from *Murphy*.\textsuperscript{262}

a. Limited Personal Right Policy

The first policy the Court examined, which Balsys offered as a justification for extending the privilege to cases involving fear of foreign prosecution, was that he had the right to protection based on "the inviolability of the human personality and . . . the right of each indi-
individual to a private enclave where he may lead a private life.” 263 The Court rejected this personal right as a policy because accepting it would require the Court to believe that individuals have an unfettered right to be protected from any governmental intrusion through “involuntary interrogation.” 264 The Fifth Amendment does not actually extend such protection where the government provides immunity as broad as the protections granted by the Fifth Amendment, although it can compel self-incriminating testimony without any recognition of personal violation. 265 The actual protection afforded is “a conditional protection of testimonial privacy.” 266 To extend the protection Balsys sought would “threaten a significant change in the scope of traditional domestic protection.” 267

b. Flawed Analogy between “Cooperative Federalism” and “Cooperative Internationalism”

The second general policy the Court addressed was that the privilege was necessary to protect individuals from governmental overreaching. 268 The Court stated that Balsys’ premise rested on the idea of “cooperative internationalism,” specifically that governments were cooperating in criminal prosecutions today more than ever. 269 This, in turn, created an incentive for the United States government to overreach its power since it has a “significant interest in seeing individuals convicted abroad for their crimes.” 270 Balsys’ argument invoked reasoning from Murphy, which discussed “cooperative federalism,” through which federal and state officials cooperate in criminal prosecutions. 271 The Court found that Murphy’s idea of “cooperative federalism” makes sense only in light of Malloy, which requires that both states and the federal government be subject to the Fifth Amendment. 272 Under these circumstances, it would have been “unjustifiably formalistic for a federal court to ignore fear of state prosecution when ruling on a privilege claim,” especially where the states and fed-

263. Id. at 2232 (quoting Murphy v. Waterfront Comm’n of N.Y. Harbor, 378 U.S. 52, 61 (1964)).
264. Id.
265. Id.
266. Id.
267. Id.
268. Balsys, 118 S. Ct. at 2233.
269. Id.
270. Id.
271. Id. (citing Murphy, v. Waterfront Comm’n of N.Y. Harbor, 378 U.S. 52, 56 (1964)).
272. Id. The Court essentially noted that protection against the “whipsaw effect” results from the application of the privilege to state prosecutions, which is especially necessary during this age of “cooperative federalism.” Id. (quoting Murphy, 378 U.S. at 55-56).
eral government commonly work together to fight criminal activity, such that a witness would be particularly susceptible to the “whipsaw” effect.\footnote{273}

Because the Fifth Amendment only extends to the United States borders, Balsys’ appeal to “cooperative internationalism” based on analogy to \textit{Murphy’s} “cooperative federalism” is misplaced.\footnote{274} The Court commented that even if \textit{Murphy} provided sufficient authority for adopting this analogy, extension of the privilege would still depend on an analysis of the gains and losses of extending the privilege, in which case, Balsys would still fail because he did not show that extending him the protection would produce a justifiable benefit.\footnote{275} The Court reviewed the court of appeals’ discussion of this evaluation.\footnote{276} Of significance to the majority, the court of appeals noted that the United States could “limit the occasions on which a reasonable fear of foreign prosecution could be shown” through statute and treaty modifications.\footnote{277} In response, the Court noted that it did not want to premise a finding on the assumption that the federal government, which constitutionally has discretion over foreign relations,\footnote{278} would adopt certain policies in order to achieve the goals of the Court.\footnote{279} Secondly, the court of appeals noted that a witness’ refusal to testify could be used as evidence in a civil proceeding, such as deportation. Thus, extending the privilege as Balsys wanted would not necessarily be a cost to the United States government.\footnote{280} The Court questioned whether the assumption about a witness’ silence would allow the privi-

\footnotetext{273}{\textit{Id.}}
\footnotetext{274}{To interpret the majority’s reasoning: Because the Fifth Amendment reaches only to the United States borders and not beyond, no foreign sovereign is bound by the Fifth Amendment’s privilege against self-incrimination. Consequently, a witness cannot be whipsawed into revealing self-incriminating information in one jurisdiction while being subjected to prosecution in another, because the whipsaw rationale only applies to jurisdictions bound by the privilege. Because foreign sovereigns are not so bound, the whipsaw argument is irrelevant, despite any cooperation among such sovereigns.}
\footnotetext{275}{\textit{Balsys,} 118 S. Ct. at 2234.}
\footnotetext{276}{The Court of Appeals for the Second Circuit, which concluded that an extension of the privilege was justified on the fact that any costs for doing so were negligible, examined four elements that this majority discussed on which to evaluate gains and losses. \textit{Id.} The Court of Appeals concluded that domestic proceedings would be little affected by expansion; that witnesses fearing foreign prosecution might be likely to choose contempt sanctions over facing consequences of foreign prosecution; that the Executive branch could take measures to limit the circumstances under which reasonable fear of foreign prosecution would be acknowledged; and that refusal to testify may be used as evidence in a civil deportation proceeding. \textit{Id; see United States v. Balsys,} 119 F.3d 122, 135-39, 142 (2d Cir. 1997).}
\footnotetext{277}{\textit{Balsys,} 118 S. Ct. at 2234.}
\footnotetext{278}{U.S. CONSTR. art. II, § 2, cl. 2.}
\footnotetext{279}{\textit{Balsys,} 118 S. Ct. at 2234.}
\footnotetext{280}{\textit{Id.}}
The Court concluded that in the event the privilege were extended, the loss of testimony to the United States was of greater concern than the uncertain gain to the witness who feared foreign prosecution.  

4. **Circumstances Required for Extension of Privilege for Fear of Foreign Prosecution**

The court left open a small possibility that a time may come when the Fifth Amendment's privilege against self-incrimination may extend to fear of foreign prosecution under certain conditions. In essence, the prosecution feared must be "as much on behalf of the United States as on the prosecuting nation, so that the division of labor between evidence gatherer and prosecutor made one nation the agent of the other." The Court, however, held that those conditions did not exist in Balsys' case; any interest in prosecution between the United States government and the governments of Lithuania and Israel, "does not rise to the level of cooperative prosecution."

D. **The Concurrence**

Justice Stevens wrote a concurring opinion to emphasize certain points. He reiterated that the self-incrimination clause must be read in context of all Fifth Amendment guarantees. He noted that the main purpose of the Fifth Amendment clause at issue is to "afford protection to persons whose liberty has been placed in jeopardy in an American tribunal." In addition, he stated his belief that the Bill of Rights was not intended to have any effect on conduct abroad. To give a clause of the Bill of Rights effect beyond United States borders would instill foreign governments with a degree of power over the domestic administration of justice, which would be to the detriment of the United States.

\[281. \text{Id.}\]
\[282. \text{Id. at } 2235.\]
\[283. \text{Id.}\]
\[284. \text{Id.}\]
\[285. \text{Balsys, 118 S. Ct. at 2236.}\]
\[286. \text{Id.}\]
\[287. \text{Id.}; \text{see U.S. Const. amend. V.}\]
\[288. \text{Id.}\]
\[289. \text{Id. Justice Stevens offered an example that a foreign citizen could thwart domestic law enforcement if that individual's own country enacted a law making it a crime for that citizen to testify in an American proceeding against another citizen of that country. Id.}\]
E. Justice Ginsburg’s Dissenting Opinion

Justice Ginsburg’s dissent focused on the historical bases of the privilege, which was “linked . . . with the abolition of torture” and which served as a means to “make [man] civilized.” As she stated, “the Fifth Amendment privilege against self-incrimination prescribes a rule of conduct generally to be followed by our Nation’s officialdom.” United States interrogators should respect this clause, regardless of where the feared prosecution resides.

F. Justice Breyer’s Dissenting Opinion

Justice Breyer, joined by Justice Ginsburg, also dissented. He focused on the precedent of Murphy as well as the principles underlying the Fifth Amendment privilege to conclude that the phrase “any criminal case” encompasses protection based on the fear of foreign prosecutions.

1. Language of the Fifth Amendment and an Understanding of Precedent

Justice Breyer began by noting the majority’s departure from precedent in light of the scope of the word “any.” Murphy, he contended, laid out the current and appropriate understanding of that word. Murphy stands for the proposition that courts, both federal and state, are prohibited from compelling witnesses to provide evidence that may be used against them if they reasonably fear criminal prosecution. This understanding requires the abolition of the “same-sovereign rule.” Murphy directs that if testimony may incriminate and no immunity has been granted, then the privilege must apply “across jurisdictions,” to either state or federal prosecutions. Understood in this way, the only difference between Murphy and Balsys is that the reasonableness of a threat of prosecution abroad may also be questioned. Justice Breyer contended that Murphy’s understanding of the privilege applied when fear of prosecution abroad was reasonable.

Justice Breyer first attacked the majority’s view that Murphy rested on the same-sovereign principle that Murdock recognized. Specifi-
cally, the majority saw *Murphy* as standing for the principle "that the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt." Justice Breyer underscored the words "from which," believing that through these words, the majority misinterpreted *Murphy*, which in fact stands for the principle that "courts may not in fairness compel a witness who reasonably fears prosecution to furnish testimony that may be used to prove his guilt."  

Justice Breyer noted the majority's reliance on two statements from *Murphy*: first, that *Malloy* required a reconsideration of *Murdock*, and second, that most Fifth Amendment policies are defeated through the "whipsaw effect," which can result when the protection does not span state and federal jurisdictions. According to Justice Breyer, these two statements provided little evidence that a reinterpretation of *Murphy* was necessary. Justice Breyer then provided what he believed was a more plausible rationale of *Murphy*, which rejected *Murdock*'s "same-sovereign" rule based upon the nature and history of the underlying right. Thus, *Murphy* requires the privilege to protect a witness from being compelled to testify when that testimony could be used in a subsequent criminal prosecution by another sovereign.

Justice Breyer disagreed with the majority's conclusion that *Murphy*'s reasoning was "fatally flawed," and "legally unsound." *Murphy* noted that *Malloy* called for a reconsideration of *Murdock*, but *Murphy* rejected the same-sovereign rule based on history and purposes of the privilege. Justice Breyer believed that *Murphy* rationalized overturning *Murdock* better than the majority rationalized overturning *Murphy*.

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298. Id.
299. Id.
300. Id.
301. Id.
302. Id. Justice Breyer cited six reasons why *Murphy* supports his interpretation of that case as against the majority's: (1) *Murphy* did not depend on the principles of federalism; (2) it explicitly rejected *Murdock*, not because of federalism concerns but because of history, policies and purposes of the privilege; (3) *Murphy* devoted much of the opinion to examining the privilege as understood in both English and American courts prior to *Murdock*, neither of which subscribed to the same-sovereign rule; (4) the purposes of the privilege do not support the same-sovereign rule; (5) *Murphy* rejected commentators arguing for the *Murdock* rule because they had an incomplete understanding of the privilege's purposes; and (6) *Murphy* nowhere suggested that the privilege was premised on anything other than not being limited to the same-jurisdiction rule. *Id.* at 2238-39.

Justice Breyer asserted that English law did not embody a “same-sovereign” rule. Rather, the actual English rule was that the privilege was inapplicable only if the danger of prosecution by another sovereign was “speculative or insubstantial.” Secondly, Justice Breyer asserted that American cases prior to Murdock did not require a “same sovereign” rule. Rather, the rule as set forth in Saline Bank, is that “a party is not bound to make any discovery which would expose him to penalties.” Even dicta, which appeared to narrow the application of the privilege to the same jurisdiction as that seeking discovery, was attributed to a “misunderstood” English rule.

Justice Breyer stressed that the majority made no clear showing that the historical interpretations which Murphy made were wrong. Uncertainty surrounding early applications of the privilege was an insufficient basis for abandoning one set of reasoning for another. Moreover, the broad language of the clause allowed for the interpretation of Murphy, especially considering the lack of legislative history. In short, Justice Breyer concluded that Murphy should govern.

2. Fifth Amendment Policies

Justice Breyer believed that the privilege applies whenever the threat of foreign prosecution is “real and substantial.” He used four basic purposes of the Fifth Amendment’s protection against self-incrimination to support his position that Balsys is entitled to protection. First, he recognized that self-incrimination insults human dignity by subjecting a witness to the “cruel [choice] of self-accusation, per-
jury or contempt." Next, he observed the importance of personal privacy that is preserved by the self-incrimination clause. Third, he noted that the privilege guards against governmental overreaching, which is a danger as much when the feared prosecution is by another sovereign as when it is domestic. Balsys’ analogy regarding “cooperative internationalism” to Murphy’s rationale of “cooperative federalism” was powerful, particularly since the degree of international cooperation in criminal investigations had greatly increased since Murphy. The United States had a significant stake in Balsys and others like him being prosecuted; therefore, those witnesses needed the Fifth Amendment’s privilege in order to prevent the federal government from overreaching its authority. Justice Breyer also explained that the privilege against self-incrimination reflected the American government’s preference for an accusatorial over an inquisitorial system. The American criminal justice system grants protection both during investigations and the trial phase. In Balsys’ case, the criminal investigation would be built in the United States, yet prosecuted in another country. Thus, denying Balsys’ Fifth Amendment protection would be a denial of a constitutional right, whether or not the Bill of Rights was meant to impact foreign cases.

Justice Breyer then responded to the two potential reasons that the majority did not act in accordance with the purposes of the Fifth Amendment privilege. First, he addressed a reason premised on fairness, rejecting as determinative any suggestion that the compulsion and use by the same sovereign is less fair than compulsion by one government and use by another. He reasoned that fairness is merely a matter of degree; international cooperation today is possibly as great as was cooperation between the federal government and states or among the states fifty years ago. Concern with “inherent

314. Id. (quoting Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990)).
315. Id. He stressed the fact that the privilege “discourag[es] prosecution for crimes of thought,” such as where witnesses in English history were forced to reveal incriminating thoughts or else commit perjury. Id. (quoting Muniz, 496 U.S. at 595-96). While such a concern is not as important when we have protection of thoughts under the First Amendment, such a fact does not sufficiently justify failing to extend protection for foreign prosecutions. Id.
316. Id. at 2243.
317. Id.
318. Balsys, 118 S. Ct. at 2243.
319. Id. (citing Murphy v. Waterfront Comm’n of N.Y. Harbor, 378 U.S. 52, 55 (1964)).
320. Id. at 2244 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).
321. Id.
322. Id.
323. Id.
324. Justice Breyer, with this argument, seems to analogize the relationship of the United States to other countries with that of the federal government to the states. He noted that where
indignity and cruelty to the individual” in self-incriminatory compulsion are more of a concern than is fairness.\textsuperscript{325}

Second, Justice Breyer posited that fear of extending the privilege when a witness is in danger of foreign prosecution would interfere unreasonably with law enforcement efforts is “overstated.”\textsuperscript{326} The application of this privilege would not arise too often because the witness has a high burden of showing a “real and substantial fear” of foreign prosecution.\textsuperscript{327} Even with such a showing, the witness is not entitled to be generally silent; rather, the witness may only claim protection against compelled testimony relating to the potential foreign prosecution.\textsuperscript{328} Occasionally, the government may determine that the testimony is necessary. In these cases, it may offer “de facto ‘immunity,’” such as a promise that the United States would not deport the witness or that it would not deport him or her to the country in which prosecution is feared.\textsuperscript{329} While Justice Breyer recognized potential difficulties in providing such “immunity,” he asserted that it would not create any greater obstacles than those that accompany ordinary immunity.\textsuperscript{330}

### III. Analysis

The Supreme Court has finally provided some much-needed guidance to lower courts on this issue. In \textit{Balsys}, the United States government has attempted to compel the defendant to provide self-incriminating information in a domestic civil deportation proceeding. His refusal to cooperate rested on his belief that because of his real and substantial fear of criminal prosecution by a foreign sovereign, he could not be compelled to provide self-incriminating testimony. This

\begin{itemize}
  \item compulsion by one government overlaps with use by another sovereign, such that if the fairness argument is pursued and the idea of “cooperative internationalism” is forwarded, the compelling government and the using government are not far removed from one another. \textit{Balsys}, 118 S. Ct. at 2244. In such a situation, it seems that the extension of the privilege against self-incrimination is warranted.
  \item \textsuperscript{325} \textit{Id.}
  \item \textsuperscript{326} \textit{Id.}
  \item \textsuperscript{327} \textit{Id.} (citing \textit{Zicarelli v. New Jersey State Comm’n of Investigation}, 406 U.S. 472 (1972) for the controlling test of “real and substantial fear”).
  \item \textsuperscript{328} \textit{Id.} at 2244-45. Justice Breyer also noted that in a civil proceeding, the government may draw an adverse inference from the witness’ silence and may also support that inference with evidence from non-privileged sources. \textit{Id.}
  \item \textsuperscript{329} \textit{Id.} at 2245.
  \item \textsuperscript{330} \textit{Balsys}, 118 S. Ct. at 2245. Some problems he noted that the government might encounter are that domestic law might need a change or an agreement with a foreign government might require adjustment. \textit{Id.} The worst scenario he foresaw would be that more “potentially deportable” aliens remain in the United States, much like ordinary immunity allows certain citizens to remain free, where they would otherwise be sent to prison. \textit{Id.}
\end{itemize}
Part will demonstrate that Balsys' proposition has the force of the language and the history of the Constitution behind it. It next will argue that the "settled rule of England," on which both Balsys and Murdock relied, is unclear. Therefore, these cases do not persuasively support the Supreme Court's holding. Instead these English cases support the Second Circuit's rationale for extending to privilege to Balsys. It follows that the Supreme Court erred in its decision not to extend the Fifth Amendment privilege against self-incrimination to Balsys.

A. The Scope of the Self-Incrimination Clause is Not Limited to the Context of the Fifth Amendment

Any analysis of the scope the Fifth Amendment clause protecting against self-incrimination must begin with an examination of the language of the clause itself. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The majority in Balsys asserted that this clause can be read only within the context of the rest of the Fifth Amendment, and that to interpret its meaning otherwise is to "overlook[] the cardinal rule to construe provisions in context." This contextual rule, the Court posited, requires an interpretation that the privilege in question applies only when the witness fears prosecution from a jurisdiction limited by the Fifth Amendment Clause. According to the majority's argument, since foreign jurisdictions are not bound by the United States Constitution, a witness cannot invoke the privilege against self-incrimination against a foreign sovereign. As this discussion will demonstrate, a reading of "any criminal case" does not require an analysis based on its context within the other Fifth Amendment clauses. Rather, a proper interpretation requires an analysis based on the historical context of the privilege and the policies that support it.

The majority explained that:

In the Fifth Amendment context, the Clause in question occurs in the company of guarantees of grand jury proceedings, defense against double jeopardy, due process, and compensation for property taking. Because none of these provisions is implicated except by action of the government that it binds, it would have been strange to choose such associates for a Clause meant to take a broader view, and it would be strange to find such a sweep in the Clause now.

Id.
1. Historical Roots of the Privilege Against Self-Incrimination

Part I of this Note discussed the history of the Fifth Amendment's self-incrimination clause and explained that the framers provided future generations with few records from which they could glean what the amendment's scope should be.\(^{333}\) This has led to conflicting interpretations. The majority in Balsys acknowledged this, admitting that there was no legislative history about the framers' intent. Based in part on a lack of such information, the Court concluded that the clause must be read in context.\(^{334}\) The absence of such history, however, seems to require looking beyond the context of the clause to determine precisely why the framers included it. The Court was unconvincing when it stated that a contextual reading was required because it offered no rationale other than the sparse legislative history and that no different common law practice existed at the time.\(^{335}\) Extensive evaluations of the history behind the self-incrimination clause have been completed, and while none provide a definitive look into the minds of the framers, neither do they indicate that the clause must be read within the context of the rest of the Fifth Amendment. It would do the clause a disservice to force it into such a context given the amount of attribution scholars have paid this issue.

The Court indicated that only a few early cases addressed the problem of a witness in one jurisdiction fearing prosecution in another jurisdiction before Malloy extended the right equally to the states and federal government. This is because in cases such as Brown v. Walker,\(^{336}\) Jack v. Kansas,\(^{337}\) and Hale v. Henkel,\(^{338}\) the witnesses who invoked the privilege were denied it either because of an immunity statute or because their fears of prosecution by the other jurisdiction were unreasonable.\(^{339}\) The Court presented those three cases as sup-

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\(^{333}\) See supra notes 30-36 and accompanying text.

\(^{334}\) See Balsys, 118 S. Ct. at 2223.

\(^{335}\) Id.

\(^{336}\) 161 U.S. 591 (1896) (holding that a federal witness could not invoke the privilege based on fear of state prosecution because a grant of immunity under a federal immunity statute protected him from state prosecution).

\(^{337}\) 199 U.S. 372 (1905) (affirming a sentence for contempt where the witness, while having been granted immunity from state prosecution, refused to testify in a state proceeding based on fear of federal prosecution, despite the fact that the witness's fear of federal prosecution was unreasonable).

\(^{338}\) 201 U.S. 43 (1906) (refusing to extend the privilege to a federal witness, who had been granted immunity from federal prosecution, based on the "general proposition that 'the possibility that information given by the witness might be used' by the other government is, as a matter of law, 'a danger so unsubstantial and remote' that it fails to trigger the right to invoke the privilege").

\(^{339}\) See Balsys, 118 S. Ct. at 2224.
port for the proposition that the Murdock rule must prevail. From 
Hale, for example, the Court used dicta, which said that "[t]he 
question has been fully considered in England, and the conclusion 
reached by the courts . . . [is] that the only danger to be considered is one 
arising within the same jurisdiction and under the same sover-
eignty."340 Such a statement is unpersuasive precedent for urging the 
adoption of the same jurisdiction rule because it addressed an issue 
beyond the scope of the question then before the Court. Based on 
these cases, however, the Court in United States v. Murdock341 claimed 
that the issue was "definitely settled."342 Thus, Balsys concluded that 
it had to reaffirm Murdock's same-jurisdiction rule.343

Conversely, the Court in Murphy unequivocally found that the 
same-sovereign rule was no longer good law.344 The Murphy Court 
acknowledged that Malloy required a reexamination of the same sov-
eign rule; however, it only did so while simultaneously examining 
earlier Supreme Court cases345 and English common law.346 If Mur-

340. Id. (quoting Hale v. Henkel, 201 U.S. 43, 69 (1906)).
341. 284 U.S. 141 (1931).
342. Id. at 149 (citing for support Queen v. Boyes, 121 Eng. Rep. 730 (Q.B. 1861) and King of 
the Two Sicilies v. Willcox, 61 Eng. Rep. 116 (Ch. 1851)).
344. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 57 (1964) (finding that 
"[o]ur review of the pertinent cases in this Court and of their English antecedents reveals that 
Murdock did not adequately consider the relevant authorities and has been significantly weak-
ened by subsequent decisions of this Court").
345. Murphy found support in Brown v. Walker, 161 U.S. 591 (1896); Jack v. Kansas, 199 U.S. 
372 (1905); and Ballmann v. Fagin, 200 U.S. 186 (1906). While Murdock found Hale v. Henkel 
to have overturned Ballmann, Murphy asserted that "the critical constitutional issue—whether the 
Fifth Amendment protects a federal witness from incriminating himself under state law—was 
not briefed or argued in Hale v. Henkel." Murphy, 378 U.S. at 66. Moreover, Murphy claimed, 
Hale could have rightly been decided on authority of Brown. Id.
346. The Court cited East India Co. v. Campbell, 27 Eng. Rep. 1010 (Ex. 1749) and Brown-
sword v. Edwards, 28 Eng. Rep. 157 (Ch. 1750) for the proposition that an English common law 
court cannot compel testimony from a witness who might provide incriminating testimony in 
another jurisdiction, whether it be in a foreign country or in an ecclesiastical court. See Murphy, 
378 U.S. at 58-59. The Court cited United States v. Saline Bank for the proposition that the self-
incrimination privilege applies across jurisdictions. Murphy, 378 U.S. at 59-60. Finally, it noted 
that United States v. McRae, 3 Ch. App. 79 (1867) explicitly overruled an English case on which 
Murdock relied, King of the Two Sicilies v. Willcox, a case that Murphy denied as representing 
the settled English rule. Murphy, 378 U.S. at 61. While King of the Two Sicilies and McRae are 
both post-constitutional English cases, whose persuasive value is thus questionable, the fact that 
Murdock relied on the former in rendering its opinion gives weight to the latter. In King of the 
Two Sicilies, the holding, which rejected an extension of the privilege to a witness fearing foreign 
prosecution, did not decide the constitutional question since it was questionable whether the 
 witnesses in fact would have been criminally prosecuted based on their testimony. See United 
States v. McRae, 3 L.R.-Ch. App. 79, 87 (1867). McRae, however, held that the case before it, 
where a defendant, sued by the United States in an English court and refused to testify because 
he could subject himself to penalties in the United States, could not be distinguished "in prin-
ciple from one where a witness is protected from answering any question which has a tendency to
phy was premised solely on extending the Fifth Amendment privilege to the states, the opinion would have been very short. Instead, the Murphy Court considered the history and policies of the privilege at great length. While the length of an opinion is not dispositive of its findings, this demonstrates an acceptance of precedent, which further indicates that the Malloy holding did not dictate the conclusion in Murphy. The majority’s conclusion that Murphy necessarily requires a reaffirmation of the same-jurisdiction rule is not well-explained. The majority reasoned that under Murphy, a witness who asserts the privilege against self-incrimination is protected in both state and federal proceedings, whether the protection is granted through the privilege itself or by reason of immunity and the exclusionary rule. Based on this reasoning, the court concluded that because the effect of the same-jurisdiction rule is the same, the state and federal jurisdictions are treated as one, and thus that Murphy did not in fact reject the same-jurisdiction rule.

This reasoning is incomplete. While the lines between federal and state jurisdictions may have become blurred in the years since Murphy, they have not disappeared. Under a same-jurisdiction point of view, the sovereign compelling the testimony and the sovereign using the testimony are the same. The United States federal structure, however, has not been eliminated. Despite the fact that the Fifth Amendment applies to both jurisdictions, Murphy still allows the testimony to be compelled in one jurisdiction and used in another. For instance, if one jurisdiction compels testimony without a grant of immunity, the other jurisdiction would not be precluded from using that testimony.

As stated above, the majority concluded that the same-jurisdiction rule must apply, in part because “there was no different common law practice at that time.” However, this conclusion is based on one interpretation of precedent that is questionable. The fact that Murphy interpreted the common law practice one way, and the Balsys Court interpreted it another way, does not conclusively establish that there was no other practice at common law. Rather, it merely demonstrates expose him to forfeiture for a breach of our own municipal law.” Id. It is interesting to note that Murdock did not mention this latter case in its opinion.

347. The dissent in Balsys noted that:

[w]here testimony may incriminate and immunity has not been granted, it is so reasonable, that one can say, as a matter of law, that the privilege applies across jurisdictions, to the entire class of cases involving federal witnesses who fear state prosecutions and also to the entire class of cases involving state witnesses who fear federal prosecutions. Balsys, 118 S. Ct. at 2238 (Breyer, J., dissenting).
disagreement over common law. The majority’s conclusive statement does not enhance its credibility in the face of such disagreement.\textsuperscript{348}

**B. Policy Rationales for the Privilege Against Self-Incrimination**

The Court in *Balsys* also questioned the policies behind the privilege.\textsuperscript{349} As discussed in Part I, the privilege against self-incrimination reflects two rationales: first, promoting individual dignity and privacy, and second, protecting against governmental overreaching.\textsuperscript{350} Justice Goldberg, author of the *Murphy* opinion, provided a comprehensive catalog of the policies behind the privilege, based on case law and scholarly works.\textsuperscript{351} While the *Balsys* majority cautioned against relying too heavily on this list, the policies it outlined are commonly regarded as the purpose for the Fifth Amendment privilege.

1. **Rights Personal to the Individual**

The *Balsys* Court first suggested that the privilege against self-incrimination was not intended to protect rights of the individual to the degree that Balsys asserted.\textsuperscript{352} The Court’s treatment of this issue, however, is quite cursory. The Supreme Court has asserted that the Fifth Amendment privilege encompasses a variety of rights, as *Murphy* indicated. Of the entire list of policy rationales in *Murphy*, the Court chose to give particular weight to one—the notion that protection arises from “the inviolability of the human personality and... the right of each individual to a private enclave where he may lead a private life.”\textsuperscript{353}

According to the Court, this policy suggests that the government has no right to tread on an individual’s privacy. The Court pointed out that this is simply not true.\textsuperscript{354} Even under *Murphy*, the government can compel a person to testify, provided it grants the individual immunity. What this policy stands for is that “the freedom from un-

\textsuperscript{348} Not only has there been disagreement in the Supreme Court at various times in its history, but scholars and commentators have also disagreed about the implications of the precedent cited. See, e.g., Amann, supra note 55, at 1215 (discussing *Murphy* abolishing the same-sovereign rule); Rotsztain, supra note 58, at 1949-50 (discussing the uncertainty of English law and which cases represent the “English rule”).

\textsuperscript{349} *Balsys*, 118 S. Ct. at 2231 (quoting *Murphy* v. Waterfront Comm’n of N.Y. Harbor, 378 U.S. 52, 55 (1964)).

\textsuperscript{350} See *Araneta*, 794 F.2d 920, 926 (4th Cir. 1986) (“The privilege against compulsory self-incrimination serves a dual purpose. It protects individual dignity and conscience, and it preserves the accusatorial nature of our system of justice.”).

\textsuperscript{351} See supra note 79.

\textsuperscript{352} *Balsys*, 118 S. Ct. at 2232.

\textsuperscript{353} Id. (quoting *Murphy*, 378 U.S. at 55).

\textsuperscript{354} Id.
Conscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty (secured) . . . only after years of struggle.'

By discounting the privilege as an individual right, the Balsys Court distorts what the Murphy Court attempted to accomplish by listing a catalog of policies. The list of policies should serve as a basis to instruct courts as to the scope of the privilege rather than as an absolute restriction on the government's actions. For example, the policy of protection of the individual based on the inviolability of the human personality is a value to which the government should aspire and which it should not unnecessarily violate. Compelling testimony with a grant of immunity seems to satisfy the government's needs of attaining certain information, while simultaneously protecting the individual's privacy by allowing him or her to avoid sanctions based on that testimony.

### 2. Prevention Against Governmental Overreaching

The Court admitted that the second general purpose of the privilege—to prevent governmental overreaching—would better justify an extension of the privilege against self-incrimination to cases involving fear of foreign prosecution. One of Balsys' contentions was that a "cooperative internationalism," similar to Murphy's "cooperative federalism" has developed whereby the United States government has an incentive to facilitate criminal prosecutions abroad. The Court rejected this assertion, indicating that this analogy overstates Murphy's reliance on cooperative federalism. Even if this analogy were plausible, extending the privilege still is not warranted because while the witness might gain in the United States from her silence, she could still be prosecuted for her silence in a foreign jurisdiction that does not recognize such a privilege. The majority weighed the likely benefits to the witness against the losses to the United States and found that extending the privilege would thwart domestic law enforcement.

The Court should not be balancing inherent constitutional rights against any consequence to the government. These rights should

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356. Balsys, 118 S. Ct. at 2233.
357. Id.
358. Id.
359. Id. at 2235.
360. Some cases have permitted balancing government interests against constitutional rights. See Araneta, 794 F.2d 920, 926 (4th Cir. 1986) ("[O]ur own national sovereignty would be com-
only be limited based on legislative action amending the Constitution. Any discussion of the consequences of extending the Fifth Amendment right to cases involving fear of foreign prosecution should happen only after it has been determined that the constitutional right exists. Such discussion ought not serve as a basis for denying the privilege.

A discussion of what the United States would lose by extending the privilege is unwarranted too because even domestically, any time the courts or the government grants the Fifth Amendment privilege, the government suffers consequences of not attaining testimony or other information. The privilege in and of itself, by allowing an individual either not to provide certain information, or to be protected from the use of the testimony, forces the government to lose some evidence.361

The assertion that no analogy to "cooperative internationalism" is plausible is inaccurate. In reality, Murphy's discussion of "cooperative federalism" is well-placed. According to Professor Diane Amann, when the Fourteenth Amendment was being used to extend the guaranteed constitutional rights to the states, cooperation between state and federal law enforcement officers was growing.362 This cooperation did not exist before because criminal enforcement had been largely the province of the states.363

Similar cooperation exists at the international level. Sovereign nations have become increasingly cooperative with one another.364 Reciprocity between the United States and foreign jurisdictions has

promised if our system of criminal justice were made to depend on the actions of foreign government [sic beyond our control]."). The Court has denied a restriction on the Constitution solely so as to act impedement to law enforcement efforts. See, e.g., Miranda v. Arizona, 384 U.S. 436, 479 (1966) (responding to an argument that "society's need for interrogation outweighs the privilege [against self-incrimination]" and holding that an individual's constitutional rights as against the power of the government "cannot be abridged"). See Amicus Brief for Respondent at 22, Balsys, 118 S. Ct. 2218 (No. 97-873).

361. In fact, some scholars and jurists have questioned the continued viability and desirability of this right domestically, believing that it is not necessary in order to preserve the integrity of our criminal justice system. In particular, one critic of this right was Judge Henry Friendly, who suggested that at one time it was a necessary tool for preserving the system's integrity, but with changing times, it acts more as a hindrance to law enforcement efforts and prevents the trier of fact from learning the truth of a matter. Friendly, supra note 28, at 672. He felt that the privilege has been pushed to lengths beyond that supported by any rationale. Id; see R. H. Helmholz et al., Introduction to THE PRIVILEGE AGAINST SELF-INCRIMINATION 1, 2-4 (1997).


363. Id. Professor Amann noted that before such cooperation was recognized there was an assumption that the law enforcement efforts in the states and federal government were governed as distinct, sovereign entities. Id. Some of the cooperative efforts included federal agencies training state police, offering forensic help, and assisting in the gathering of evidence. Id. at 1219.

364. Id. at 1245.
increased, just as it did between the federal and state governments when *Murphy* was decided. For instance, the cooperative unit for economic integration of the North America, the North American Free Trade Agreement ("NAFTA"), has provided for strengthening criminal protection in the fields of intellectual property, the environment, and labor. This level of cooperation will likely increase in the future.

Arising from this international cooperation is the danger that one state will begin acting on behalf of another, somewhat like an agent. Judge Carnes, who dissented in *United States v. Gecas*, which did not extend the privilege to fear of foreign prosecution, recognized this danger and demonstrated that the United States government has admitted to taking part in such a "cooperative" relationship. Judge Carnes pointed to a statement from the Department of Justice that "this case [*Gecas*] is less about efforts to determine whether Gecas should be deported than it is about efforts to assist foreign countries in prosecuting him." The United States Department of Justice, in a brief submitted to a circuit court on a related matter, described the active assistance the United States had provided to Israel and Lithuania's criminal investigations of Gecas by sharing information and evidence. As Judge Carnes explained, "the United States in *Gecas* was clearly the alter ego of Israel and Lithuania."

This situation demonstrates the problem a witness can face in the United States when he or she might face foreign prosecution. The United States was so connected to the potentially prosecuting countries, one could argue that in addition to pursuing its own goals of ridding this country of Nazi war criminals, it was also working on behalf of foreign countries by helping them achieve their goals. By not extending the privilege and by compelling the witness to testify, Gecas faced the same "whipsaw effect" that *Murphy* warned against when it

365. Id.
367. Some recent results of the enforcement cooperation include a bilateral narcotics agreement; conventions on the recovery and return of stolen cultural property, stolen vehicles, and aircraft; and the increasingly active role by Mexico in regional criminal and narcotics policy. *Id.*
368. United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997).
369. *Id.*
370. *Id.* It should be recalled that the facts of *Gecas* are virtually the same as those of the current case, *Balsys*, where the witness faced deportation from the United States and refused to testify in a deportation proceeding based on his fear of prosecution in Lithuania or Israel.
371. *Id.*
372. *Id.*
extended the privilege cross-jurisdictionally. The United States, acting on behalf of another sovereign, was able to completely ignore the constitutional rights of the witness, and ultimately to overreach its power. This is the very reason identified by Balsys for having the privilege against self-incrimination.

The above lends support to the fact that the privilege against self-incrimination should be extended in situations when the witness fears foreign prosecution. The Court has acknowledged that certain circumstances might justify extending the privilege. As the majority noted, if “the prosecution [by a foreign country] was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence-gather and prosecutor made one nation the agent of the other,” then it would consider extending the privilege to witnesses in these situations because “that prosecution was not fairly characterized as distinctly ‘foreign.’” Given the undeniable interest the United States has in seeing witnesses like Balsys brought to justice, a strong argument exists that the United States has cooperated with other nations to an extent that would render the prosecution insufficiently “foreign.”

The Balsys majority is unpersuasive in holding that the Fifth Amendment right against self-incrimination should not extend to witnesses who potentially face foreign prosecution. It is likely that the Court was influenced by the circumstances of this case, namely that Balsys was suspected of horrific crimes under the Nazi regime. The Court, however, cannot base a policy decision on the facts of a single case.

IV. IMPACT

Balsys answers a question that has long plagued the courts. Unfortunately, it does so by narrowing the reach of the Constitution, despite the fact that the policies behind the privilege support its expansion to fear against foreign prosecution. In addition, the history of the privilege reveals a lack of agreement among scholars. Moreover, one cannot ignore the fact that international relations have dramatically changed in the past two decades, rendering the contact between the United States and other sovereigns analogous to the contact between the states and federal government at the time of Murphy.

373. United States v. Balsys, 118 S. Ct. 2218, 2233 (1998) (“Murphy’s policy catalog would provide support . . . for Balsys’ argument that application of the privilege [against self-incrimination] in situations like his would promote the purpose of preventing governmental overreaching, which on anyone's view lies at the core of the Clause’s purposes.”).
374. Id. at 2235.
A. Potential Expansion of the Privilege

Despite its unequivocal denial of extending the reach of the privilege against self-incrimination to cases involving the fear of foreign prosecution, the Court acknowledged that it may be persuaded to entertain this argument again under certain circumstances. Particularly, such a claim may be allowed if:

the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between the evidence-gatherer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself.\(^{375}\)

The Court must be mindful that international cooperation has dramatically increased in recent years and is not likely to diminish as crime becomes more and more international. As sovereign nations become increasingly cooperative in criminal prosecutions,\(^{376}\) and as they come to greater agreement about human rights,\(^{377}\) the extension of the privilege to fear of foreign prosecution may occur.

B. Impact of Balsys on Courts and on Witnesses

Until the Court determines that there is cooperation between the United States and the foreign sovereigns, witnesses cannot invoke the constitutional privilege despite a real and substantial danger of foreign prosecution. This rule removes a burden on the courts. Prior to Balsys, lower courts passed on the constitutional issue only after examining the likelihood of foreign prosecution.\(^{378}\) This examination often

\(^{375}\) Id. More specifically, the Court might entertain a claim for an extension of the privilege under two conditions. First the witness must show that “the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character . . . .” Id. Second, the witness must show that “the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries . . . .” Id.

\(^{376}\) International crime has dramatically increased largely due to technological advancements, particularly with the advent of the Internet. See Amann, supra note 55, at 1261. In addition, there are greater concerns about traditional transnational crime such as smuggling and money laundering. Id. Because of greater opportunity for international crime, greater incentives exist for the international community to cooperate in law enforcement. In fact, as one scholar noted, there is “an unprecedented effort at cooperation among members of the world’s law enforcement community.” Id.

\(^{377}\) Scholarship anticipates that traditional state values and greater considerations for human values will continue evolving. Louis Henken, International Law: Politics and Values 284 (1995). As Louis Henken commented, “[t]he need is to promote in every state a culture of respect for individual freedom, autonomy and other human rights, and to overcome cultural resistances . . . . One can state with substantial confidence that systemic attention to human values will continue to increase.” Id.

\(^{378}\) See Zicarelli v. New Jersey State Comm’n of Investigation, 406 U.S. 472 (1972); Araneta, 794 F.2d 920 (4th Cir. 1986); In re Parker, 411 F.2d 1067 (10th Cir. 1969).
called for an interpretation of foreign laws and the likelihood that a
government would utilize those laws against the particular witness
from whom testimony was sought. In most cases, the lower courts did
not reach the constitutional question because the fear of most wit-
nesses was too remote. Now, however, because there is a prohibi-
tion against raising a defense based on fear of foreign prosecution, any
evaluation of laws of foreign countries is unnecessary. Even if the
witness faces a real and substantial fear, there is no constitutional pro-
tection against the government compelling testimony.

Before Balsys, the burden a witness bore to prove a real and sub-
stantial danger of foreign prosecution was heavy, as evidenced by the
number of witnesses who were denied the privilege because the dan-
ger of foreign prosecution was too remote. Even if the Balsys Court
had arrived at the opposite conclusion, the witnesses would be re-
quired to maintain the same burden. Arguably, with the internation-
alization of criminal prosecutions, the burden might have been
reduced. On the other hand, with the growing emphasis on human
rights and the creation of laws consistent with a focus on the value of
the individual, there may come a day when an international privilege
against self-incrimination is recognized.

Until then, individuals facing compulsion from the government will
be subjected to the "cruel trilemma of self-accusation, perjury or con-
tempt," against which Justice Goldberg in Murphy warned. The
witness will be required to testify truthfully, but this could serve as a
basis for deportation to a country that could use the testimony to
prosecute him under its laws. Alternatively, the witness might choose
to perjure himself. He could also refuse to testify, but the court would
respond by imposing a contempt order, either in the form of money
sanctions or prison. This final option is undesirable on two levels.
First, if Balsys were to continue on a course of noncompliance with
subpoena orders, opting for orders of contempt instead, the govern-
ment will not come any closer to forcing him to leave the United
States. Second, the cost of imprisonment will be borne by taxpayers,
who are not likely to support a policy that keeps "undesirable" resi-
dents in the United States at their expense.

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379. See, e.g., In re President's Comm'n on Organized Crime, 763 F.2d 1191 (11th Cir. 1985);
In re Nigro, 705 F.2d 1224 (10th Cir. 1982); United States v. Brummitt, 665 F.2d 521 (5th Cir.
1981); United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977).

C. The Impact on Alleged Nazi War Criminals

How this case will ultimately affect Balsys and other alleged Nazi war collaborators is uncertain. Recent reports indicate that Lithuania is casting a "blind eye" on Nazi war atrocities. Since 1992, the United States has revoked citizenship status to at least six elderly Lithuanians accused of serious crimes during World War II. All returned to Lithuania, and none have been prosecuted, despite Lithuania's promise to prosecute such criminals "consistently and conscientiously." In fact, these suspects have been living quiet lives, some being allowed to die peacefully of old age. In addition, Lithuania has failed to extradite other accused criminals that the United States has had trouble deporting. Presumably, one of these alleged criminals is Balsys. The finding that Balsys faces a real and substantial possibility of prosecution, therefore, is questionable.

CONCLUSION

Clearly, allowing Nazi war criminals to take refuge in the United States is not in this country's best interest. But neither is the rule set forth in Balsys. Balsys will allow the government to overreach its authority and work on behalf of foreign nations who seek prosecution of individuals residing in the United States. Although the Introduction to this Note framed the issue in terms of the specific facts of Balsys, which arguably made it difficult for the Supreme Court justices to remain objective, the outcome will not only affect cases in which the

381. See Richard C. Paddock, Lithuania's Blind Eye to Nazi Past, L.A. TIMES, Jan. 4, 1998, at A1. It is interesting to note that enthusiasm for prosecuting alleged World War II criminals has been losing steam worldwide, as certain countries have withdrawn resources from prosecuting them. As the Washington Times reported in 1997, Israel has only tried two Nazi era criminals since World War II, one of whom was hanged, Adolf Eichmann, the other who was freed after being sentenced to death, Ivan Demjanjuk. Frank J. Murray, Fifth Amendment Protection Extends Only to the U.S. Border, WASH. TIMES, Sept. 7, 1997, at A4, available in LEXIS, News Library, Wtime File. Lithuania has tried no one since the collapse of the Soviet Union in 1991. Id. The Canadian Federal Court recently refused to denaturalize an alleged Nazi collaborator, a finding that is said to "seriously endanger...[the] remaining denaturalization cases that date back to the same period." Kirk Makin, Federal Court Throws Out Case Against Nazi Suspect, GLOBE & MAIL, Dec. 22, 1998, at A4, available in 1998 WL 21754050. A 1995 article, reviewing two books about prosecutions of Nazi war criminals, noted that the "British and the Australians...have concluded that the cost of searching for witnesses and documentation as evidence against suspected war criminals is prohibitive. They excused themselves from further action arguing that today...it is already too late to seek justice." Alexander Zvielli, A Race Against Time, JERUSALEM POST, Jan. 6, 1995, available in 1995 WL 7550107.
383. Id.
384. Id. (quoting Lithuanian leaders).
385. Id.
386. Id.
witness is a suspected Nazi war collaborator. Rather, the cases in which a witness claims fear of foreign prosecution could be limitless. This Supreme Court holding should not end the discussion about the scope of the Fifth Amendment privilege against self-incrimination. Instead, it should serve as a means to thoroughly analyze the purposes of the privilege.

Sara A. Leahy