Spring 1999

Denying Fifth Amendment Protections to Witnesses Facing Foreign Prosecutions: Self-Incrimination Discrimination

Steven J. Winger

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Steven J. Winger, Denying Fifth Amendment Protections to Witnesses Facing Foreign Prosecutions: Self-Incrimination Discrimination, 89 J. Crim. L. & Criminology 1095 (1998-1999)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

DENYING FIFTH AMENDMENT PROTECTIONS TO WITNESSES FACING FOREIGN PROSECUTIONS: SELF- INCRIMINATION DISCRIMINATION?

United States v. Balsys, 118 S. Ct. 2218 (1998).

I. INTRODUCTION

In *United States v. Balsys*,¹ the Supreme Court held that a witness could not invoke the Fifth Amendment privilege against compelled self-incrimination during a Department of Justice inquiry into his activities during World War II when he reasonably feared that his testimony would incriminate him under the laws of a foreign country.²

By a seven to two vote, the Court held that the Fifth Amendment privilege against self-incrimination applied only when either the sovereign seeking to compel the witness's testimony was the same sovereign that would use the testimony against the witness, or when the compelling and the using sovereigns were both bound by the Fifth Amendment.³ In so holding, the majority interpreted this "same sovereign" rule as being consistent with the relevant precedents, most notably with *Murphy v. Waterfront Commission*.⁴

This Note argues that the majority misread *Murphy* and other precedents, and that its holding fails to recognize some of the essential policies and purposes behind the privilege. As *Murphy* noted, the privilege seeks, among other things, to prevent the government from abusing its power in seeking to build a case against a defendant, and from forcing a witness into the "cruel trilemma" of having to choose between self-

¹ 118 S. Ct. 2218 (1998).

² *Id.* at 2235-36.

³ *Id.* at 2223-26.

⁴ 378 U.S. 52 (1964).

incrimination, perjury, and contempt.⁵ Neither of these policy goals were served by refusing to allow Balsys to invoke the privilege. The United States government has a strong incentive to abuse its power in building a case against defendants like Balsys due to its extensive cooperation with foreign governments in the prosecution of war criminals.⁶ In addition, a witness faces the "cruel trilemma" at the moment that he is forced to choose between perjury, self-incrimination, and contempt, regardless of where his prosecution will ultimately take place.⁷ Therefore, the policies behind the Fifth Amendment privilege suggest that the majority erred in not allowing Balsys to invoke the privilege.

The majority contends that allowing Balsys to invoke the privilege would disrupt the balance between governmental and private interests which is achieved when the government is allowed to exchange a witness's right to silence with a grant of immunity.⁸ Such an exchange would be impossible when a witness faces foreign prosecution, since the United States cannot enforce its grant of domestic immunity abroad.⁹

However, this Note argues that the United States could overcome this problem in many cases by granting a kind of constructive immunity to witnesses who fear foreign prosecution. The United States could do this by taking certain steps to ensure that neither the testimony nor its fruits can be used against the witness in a foreign prosecution.¹⁰ In addition, this Note argues that where the United States government cannot grant a witness such constructive immunity, it lacks the authority under the Constitution to compel the witness's testimony.

⁵ *Id.* at 54.

⁶ *See, e.g., Balsys*, 118 S. Ct. at 2242-43 (Breyer, J., dissenting).

⁷ *See, e.g., United States v. Balsys*, 119 F.3d 122, 129 (2nd Cir. 1997).

⁸ *Balsys*, 118 S. Ct. at 2232.

⁹ *Id.*

¹⁰ *See, e.g., id.* at 2245 (Breyer, J., dissenting).

II. BACKGROUND

A. EARLY INTERPRETATION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment to the Constitution reads, in relevant part: "no person . . . shall be compelled in any criminal case to be a witness against himself. . . ."¹¹ There is virtually no legislative history of the Amendment, so in order to determine whether the privilege against self-incrimination protects a witness from providing testimony which might be used against him in a foreign prosecution, we must turn to judicial interpretation of the Amendment.

1. *Applying the Privilege in the Interfederal Context*

Before *United States v. Balsys*,¹² the Supreme Court had never directly addressed the question of the applicability of the Fifth Amendment privilege to cases involving fear of foreign prosecution. Over the past two centuries, however, it has addressed an analogous issue: whether "one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another [such] jurisdiction."¹³

The Court first addressed this issue in *United States v. Saline Bank of Virginia*.¹⁴ In *Saline Bank*, the federal government, seeking to recover certain bank deposits, brought suit in federal court against the bank and a number of its stockholders.¹⁵ The Court held that the defendants could refuse to answer questions posed to them by the United States in federal court, "where the defendants claimed that their responses would result in incrimination under the laws of Virginia."¹⁶ The Court noted that "the rule clearly is, that a party is not bound to make any discov-

¹¹ U.S. CONST. amend. V.

¹² 118 S. Ct. 2218 (1998).

¹³ *Murphy v. Waterfront Commission*, 378 U.S. 52, 54 (1964).

¹⁴ *United States v. Saline Bank of Virginia*, 26 U.S. 100, 104 (1828).

¹⁵ *Id.* at 100.

¹⁶ *Balsys*, 118 S. Ct. at 2225 (citing *Saline Bank*, 26 U.S. at 104).

ery which would expose him to penalties, and this case falls within it."¹⁷

There has been considerable controversy over the exact meaning and scope of the *Saline Bank* holding. At various times, the Supreme Court has noted that *Saline Bank* was concerned strictly with the interpretation and administration of a self-incrimination clause in a Virginia statute, and did not mention the Fifth Amendment.¹⁸ At other times, however, the Court has interpreted *Saline Bank* more broadly, reading it as applying the Fifth Amendment privilege against self-incrimination to bar the compulsion of a witness's testimony by one jurisdiction in the federal structure, when the testimony sought would incriminate the witness in another such jurisdiction.¹⁹

In *Ballmann v. Fagin*, the Court adopted the latter, more broad reading of *Saline Bank*, holding that a witness could not be compelled to provide testimony in a federal criminal investigation which would incriminate him under state or federal law.²⁰ *Ballmann* involved a federal grand jury investigation into the criminal liability of a national bank employee for the disappearance of cash from the bank vaults.²¹ When the grand jury ordered the employee to produce a certain cash book or to answer questions designed to prove his possession or control of the cash book, he refused to do so on the ground that either would incriminate him in an Ohio state proceeding which had already been brought against him.²² Citing *Saline Bank*, the Court held that the employee could not lawfully be compelled to produce the incriminating cash book or to acknowledge his possession of it, as he "was exonerated from disclosures which would have exposed him to the penalties of the state law."²³ The Court noted that the information contained in the cash book might be in-

¹⁷ *Saline Bank*, 26 U.S. at 104.

¹⁸ See, e.g., *United States v. Balsys*, 118 S. Ct. 2218, 2225 (1998); *Hale v. Henkel*, 201 U.S. 43, 69 (1906).

¹⁹ See, e.g., *Murphy v. Waterfront Commission*, 378 U.S. 52, 58 (1964); *Ballmann v. Fagin*, 200 U.S. 186, 195 (1906).

²⁰ *Ballmann*, 200 U.S. at 195.

²¹ *Id.* at 186.

²² *Id.* at 193.

²³ *Id.* at 195.

criminating under federal law as well.²⁴ However, the employee did not raise this possibility in his invocation of the privilege against self-incrimination, and it was not the exclusive (or, arguably, even the primary) focus of the Court's holding.²⁵ The Court held that whether he was motivated to withhold his cash book for fear of federal or state prosecution, "we are of the opinion that Ballmann could not be required to produce his cash book if he set up that it would tend to incriminate him."²⁶

In *Bram v. United States*,²⁷ the Court addressed the question of whether the Fifth Amendment prevented the federal government from using a witness's self-incriminating testimony against him in a federal prosecution when the testimony was compelled by foreign authorities.²⁸ In *Bram*, the defendant was accused of murdering several people on the high seas. He was interrogated by Canadian authorities in Nova Scotia, who coerced his confession by stripping him of his clothes and telling him that he had already been implicated by a shipmate, and that it would be better for him to testify truthfully regarding his participation in the crime.²⁹ The Court held that, under the circumstances, the defendant's confession was non-voluntary and improperly coerced, and that the Fifth Amendment therefore prevented the federal government from using the confession as evidence against the defendant.³⁰ In reaching its holding, the Court focused upon the effect of the coercion on the voluntariness of the defendant's confession,³¹ and not upon the jurisdiction wherein the coercion occurred.

²⁴ It may have revealed that the employee was an abettor of the thief, which would make him guilty of a misdemeanor under then existing federal law. *Id.*

²⁵ The Court speculated that "not impossibly Ballmann took this aspect of the matter for granted, as one which could be perceived by the Court without his disagreeably emphasizing his own fears." *Id.*

²⁶ *Id.*

²⁷ 168 U.S. 532 (1897).

²⁸ *Id.* at 537.

²⁹ *Id.* at 539.

³⁰ *Id.* at 565.

³¹ *Id.* at 561-65.

2. Immunity Statutes

In the late nineteenth century, the Court established that the federal government may compel a witness to give self-incriminating testimony, notwithstanding the Fifth Amendment privilege, if it grants the witness an immunity from criminal prosecution based upon his testimony that is co-extensive with the protections guaranteed by the privilege.³² In *Counselman v. Hitchcock*,³³ a federal grand jury called a corporate officer to testify regarding his company's alleged violation of federal laws governing interstate commerce.³⁴ A federal statute then in existence provided, in relevant part, that:

no pleading of a party, nor any discovery or evidence obtained from a party by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . .³⁵

The corporate officer refused to testify despite the existence of the immunity statute, however, claiming that the statute would not guarantee him the full range of protection against self-incrimination granted by the Fifth Amendment.³⁶ The Court ruled that an immunity statute can replace the Fifth Amendment privilege only if it provides a protection that has the "same extent in scope and effect" as the privilege itself, by providing a "complete protection from all of the perils against which the constitutional prohibition was designed to guard."³⁷ The Court concluded that in order to achieve this, an immunity statute must provide "absolute immunity against future prosecu-

³² *Brown v. Walker*, 161 U.S. 591, 608 (1896).

³³ 142 U.S. 547 (1892).

³⁴ *Id.* at 547-48.

³⁵ *Id.* at 560.

³⁶ *Id.* at 559.

³⁷ *Id.* at 585-86. A grant of transactional immunity by the government in exchange for a witness's testimony makes it impossible for the government to prosecute the defendant for any transaction, matter, or thing relating to his testimony. In other words, upon granting a witness transactional immunity, the government cannot prosecute the witness for any crimes revealed through his testimony, even if it subsequently obtained incriminating evidence from a wholly independent source.

tion for the offense to which the [compelled testimony] relates."³⁸ Reasoning that the statute in question would allow the witness to be prosecuted for the offense to which his testimony related, and that it would not prevent federal authorities from using his compelled testimony to gain knowledge of "sources of information which might supply other means of convicting [him]," the Court ruled that the statute was not co-extensive with the Fifth Amendment privilege.³⁹ The Court therefore held that the railroad officer could refuse to testify.⁴⁰

In *Brown v. Walker*,⁴¹ the Court upheld the federal government's right to compel a witness's testimony pursuant to an immunity statute that was co-extensive with the Fifth Amendment protection against self-incrimination.⁴² The federal immunity statute in question, which was devised in response to *Counselman*, granted the witness full transactional immunity from prosecution for the offense to which his testimony pertained.⁴³ On facts virtually identical to those in *Counselman*, the Court held by a five to four margin that the immunity statute in question provided the full range of protection guaranteed by the Fifth Amendment, and that the witness could be compelled to testify under such a grant of immunity.⁴⁴ The Court reasoned that the Fifth Amendment privilege existed strictly to protect a witness "against being compelled to furnish evidence to convict him of a criminal charge," and that such protection is fully achieved when the witness receives a pardon for the offense or a guarantee that his testimony cannot be used in a criminal prosecution against him.⁴⁵ The Court also addressed the argu-

³⁸ *Id.* at 586.

³⁹ *Id.*

⁴⁰ *Id.* at 585-86.

⁴¹ 161 U.S. 591 (1896).

⁴² *Id.* at 608-09.

⁴³ *Id.* at 609.

⁴⁴ *Id.* at 608.

⁴⁵ *Id.* at 597-98. The Court eventually retreated from the strong claim that only full transactional immunity could replace the Fifth Amendment protection. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Court held that use and derivative use immunity would suffice. *Id.* at 458-59. In addition, the *Kastigar* Court articulated the policy rationale for allowing the government to exchange immunity for the right to compel otherwise privileged testimony, stating that immunity statutes:

ment that the federal immunity statute would not provide the same degree of protection as would the Fifth Amendment, as it would leave the witness open to state prosecution based upon his testimony.⁴⁶ The Court stated that given the supremacy of federal law over state law, the transactional immunity guaranteed by the federal statute should extend to all courts in the land.⁴⁷ However, the Court concluded that even if prosecution in a state court were a possibility, such a possibility was too remote and insubstantial a danger to be recognized by the privilege.⁴⁸

B. DEVELOPMENT OF THE SAME SOVEREIGN RULE

1. *Early Doctrine*

In the early to mid-twentieth century, the Court began to depart from the conclusion it had reached in *Saline Bank* and *Ballmann* regarding the application of the privilege against self-incrimination between state and federal jurisdictions. In a series of cases, the Court either held or suggested that the privilege protected a defendant from compelled self-incrimination only when the sovereign seeking to compel his testimony was the same sovereign seeking to prosecute him based upon his testimony. The first such case was *Jack v. Kansas*,⁴⁹ decided some six weeks before *Ballmann*. The defendant in *Jack* was a coal mine operator charged with engaging in a price-fixing scheme under a Kansas anti-trust statute.⁵⁰ The statute in question granted a defendant full immunity from state prosecution in exchange for the State's right to compel the defendant's self-

seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime.

Id. at 445.

⁴⁶ *Brown v. Walker*, 161 U.S. 591, 608 (1896).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 199 U.S. 372 (1905).

⁵⁰ *Id.* at 373.

incriminating testimony.⁵¹ When the State sought to compel the defendant's testimony, the defendant refused to testify, claiming that the statutory grant of immunity was not broad enough to prevent his compelled testimony from being used against him in a federal anti-trust prosecution.⁵² The Court held that the State could compel the defendant's testimony, as the danger of federal prosecution based upon the compelled testimony was "unsubstantial and remote."⁵³ The Court stated that it perceived the privilege against self-incrimination as applying "to a prosecution in the same jurisdiction, and when [legal immunity from such prosecution] is fully given it is enough."⁵⁴

Following similar reasoning, four subsequent Supreme Court cases held that the Fifth Amendment privilege against self-incrimination applied only when the threat of future prosecution based upon compelled testimony came from the same jurisdiction or sovereignty which was seeking to compel the testimony.⁵⁵ First, in *Hale v. Henkel*,⁵⁶ when a federal grand jury sought to compel a witness's testimony, the witness invoked the privilege on the ground that the applicable federal immunity statute did not protect him from prosecution in the New York state courts.⁵⁷ The district court held the witness in contempt for refusing to testify.⁵⁸ Based in part upon a questionable application of *Brown* and *Jack*, the Court affirmed the district court's ruling and held that the failure to protect against state prosecution did not invalidate a federal immunity statute and therefore did not limit the federal government's power to compel the witness's testimony.⁵⁹

⁵¹ *Id.* at 382.

⁵² *Id.* at 374.

⁵³ *Id.* at 382 (following *Brown v. Walker*, 161 U.S. 591, 606 (1896)).

⁵⁴ *Id.*

⁵⁵ *Hale v. Henkel*, 201 U.S. 43, 69 (1906); *United States v. Murdock*, 284 U.S. 141, 148 (1931); *Feldman v. United States*, 322 U.S. 487, 492 (1944); *Knapp v. Schweitzer*, 357 U.S. 371, 379 (1958).

⁵⁶ *Hale*, 201 U.S. at 43.

⁵⁷ *Id.* at 66-69.

⁵⁸ *Id.*

⁵⁹ *Id.* at 69.

In *United States v. Murdock*,⁶⁰ the Court reaffirmed the "same sovereign" rule which it had announced in *Hale*.⁶¹ In *Murdock*, the defendant invoked the Fifth Amendment privilege in a federal Internal Revenue Bureau examination because he feared that his testimony might incriminate him under state law.⁶² The Court held that the defendant could not refuse to testify based upon his fear of state prosecution.⁶³

The Court pointed to two lines of cases as precedent for its holding. First, the court cited two English common law cases, decided after the adoption of the American Constitution, as establishing that "the English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country."⁶⁴ Second, the Court stated that it had already held that the validity of federal immunity statutes did not depend upon their conferring a grant of immunity from state prosecution, and that the validity of state immunity statutes did not depend upon their conferring a grant of immunity from federal prosecution.⁶⁵ The court concluded that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."⁶⁶

In a pair of decisions written by Justice Frankfurter, the Court continued to uphold this "same sovereign" rule, recasting it as a necessary consequence of the fundamental principles of federalism.⁶⁷ First, in *Feldman v. United States*,⁶⁸ the Court applied the same sovereign analysis in its consideration of a novel issue: whether a defendant's testimony could be used against him in a

⁶⁰ 284 U.S. 141 (1931).

⁶¹ *Id.* at 149.

⁶² *Id.* at 148.

⁶³ *Id.* at 149.

⁶⁴ *Id.* (citing *King of the Two Sicilies v. Willcox*, 61 Eng. Rep. 116, 128 (1851)).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Knapp v. Schweitzer*, 357 U.S. 371, 375-81 (1957); *Feldman v. United States*, 322 U.S. 487, 490-93 (1944).

⁶⁸ 322 U.S. 487 (1944).

federal prosecution when the testimony had been compelled in a state proceeding under a grant of immunity from state prosecution.⁶⁹ The Court answered in the affirmative, upholding a federal conviction for mail fraud which was based in part on self-incriminating testimony supplied by the defendant during supplemental proceedings in a New York state court pursuant to a state grant of immunity.⁷⁰ The Court ruled that the immunity from prosecution, like the privilege against testifying which it supplants, pertains only to a prosecution in the same jurisdiction.⁷¹ Reasoning that the Bill of Rights was meant solely to limit the powers of the federal government and was not applicable to the states,⁷² and that "the Constitution prohibits an invasion of privacy only in proceedings over which the [federal] Government has control,"⁷³ the Court ruled that federal prosecutors could make use of evidence or testimony which had been obtained by state authorities in violation of the principles established by the Bill of Rights, so long as the federal authorities did not participate in the offending extraction of that evidence or testimony.⁷⁴ The Court saw this rule as a direct consequence of the basic principles of federalism: state immunity statutes could not limit or constrain federal prosecutions, and federal immunity statutes could not limit or constrain state prosecutions, as "the distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system."⁷⁵

In *Knapp v. Schweitzer*,⁷⁶ the Court extended the implications of the same sovereign rule even further. In *Knapp*, the Court upheld a conviction holding a defendant in contempt for refusing to testify against himself before a state grand jury after receiving a grant of immunity from state prosecution.⁷⁷ The defendant had argued that the state grant of immunity would

⁶⁹ *Id.* at 488.

⁷⁰ *Id.* at 492-94.

⁷¹ *Id.* at 493.

⁷² *Id.* at 490 (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 246 (1828)).

⁷³ *Id.* at 492.

⁷⁴ *Id.*

⁷⁵ *Id.* at 490.

⁷⁶ 357 U.S. 371 (1958).

⁷⁷ *Id.* at 381.

not protect him from federal prosecution, and that a federal prosecuting attorney had already announced his intention of cooperating with state officials in the prosecution of the crime at issue.⁷⁸ The Court held that the Fifth Amendment did not protect the defendant from testifying in the state proceeding, despite his reasonable fear of subsequent federal prosecution.⁷⁹ In reaching its holding, the court stated that

[t]he sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth.⁸⁰

The *Knapp* Court reasserted the federalist principles that had informed its decision in *Feldman*.⁸¹ The Court noted, however, that “the Federal Government may not take advantage of this recognition of the States’ autonomy in order to evade the Bill of Rights.”⁸² For example, the Court stated that if a federal officer were “a party to the compulsion of testimony by state agencies,” then the Fifth Amendment would apply to bar the use of the compelled testimony in a federal proceeding.⁸³ In addition, the Court implied that under certain circumstances a defendant might be able to invoke his Fifth Amendment right not to testify in a state proceeding if the collaboration between state and federal prosecuting authorities rose to such a level that the state was used as an agent of federal prosecution or investigation.⁸⁴ However, the court declined to explore this issue further or to develop a bright-line rule, as the record in the case before it did not contain evidence of anything approaching that degree of cooperation between state and federal authorities.⁸⁵

⁷⁸ *Id.* at 373.

⁷⁹ *Id.* at 380-81.

⁸⁰ *Id.* at 380.

⁸¹ *Id.* at 379-81.

⁸² *Id.* at 380.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

2. Current Doctrine

The Court called the foundations of *Feldman* and *Knapp* into question when it decided *Malloy v. Hogan*,⁸⁶ in which it held that the Fifth Amendment's privilege against self-incrimination was protected by the Fourteenth Amendment against abridgment by the states.⁸⁷ In *Malloy*, the Court stated that the shift to the federal standard in state cases "reflects [the] recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay."⁸⁸ The Court held that the privilege against self-incrimination was an essential principle of free government and not merely a rule of evidence which was motivated and justified by expediency,⁸⁹ noting that "the freedom from conviction based upon coerced confessions" perpetuated "principles of humanity and civil liberty."⁹⁰

In *Murphy v. Waterfront Commission*,⁹¹ the Court returned to the question presented in *Hale*, *Murdock*, and *Knapp*; namely, whether one jurisdiction within the federal structure may compel a witness, whom it has immunized against prosecution under its laws, to give testimony which might then be used to convict him of a crime in another such jurisdiction.⁹² The Court rejected the same sovereign rule announced in the earlier cases, and ruled that the Fifth Amendment protected a witness from federal prosecution on the basis of self-incriminating testimony compelled in a state proceeding, thereby overruling *Feldman*.⁹³ Therefore, because this exclusionary rule eliminated the possibility of self-incrimination in another jurisdiction by guaranteeing immunity in both state and federal courts, the court ruled that a witness could be compelled to testify against himself in a state proceeding under a grant of immunity.⁹⁴

⁸⁶ 378 U.S. 1 (1964).

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* at 7.

⁸⁹ *Id.* at 9.

⁹⁰ *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643, 656-57 (1966)).

⁹¹ 378 U.S. 52 (1964). *Murphy* was decided on the same day as *Malloy*.

⁹² *Id.* at 53.

⁹³ *Id.* at 79.

⁹⁴ *Id.*

In reaching its holding, the *Murphy* Court examined the policies and purposes of the Fifth Amendment.⁹⁵ The Court identified the following seven basic policies—or fundamental values and aspirations—advanced by the Fifth Amendment:

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 . . . is often "a protection to the innocent."⁹⁶

The Court concluded that "most, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each."⁹⁷ Therefore, as *Malloy* had held the Fifth Amendment applicable against the states, the *Murphy* Court announced that it was necessary to reconsider the same sovereign rule established in *Murdock* and its progeny, which would allow such "whipsaw" convictions.⁹⁸

However, the *Murphy* Court did not see its rejection of the same sovereign rule merely as a necessary consequence of *Malloy*; rather, it attacked the pre-*Malloy* same sovereign cases on independent grounds.⁹⁹ Specifically, the Court asserted that the same sovereign approach advocated in *Hale*, *Murdock*, *Feldman*, and *Knapp* was inconsistent with the basic policies of the Fifth

⁹⁵ *Id.* The Court stated that the answer to the question presented "depends upon" whether allowing the compulsion of testimony in one jurisdiction within our federal structure which could incriminate the witness in another such jurisdiction "promotes or defeats the fifth amendment's policies and purposes." *Id.* at 54.

⁹⁶ *Id.* at 55 (citations omitted).

⁹⁷ *Id.* (citing *Knapp v. Schweitzer*, 357 U.S. 371 (Black, J., dissenting)).

⁹⁸ *Id.* at 75-76.

⁹⁹ *Id.* at 67-68.

Amendment privilege against self-incrimination and was unsupported by precedent.¹⁰⁰ The *Murphy* Court argued that both English common law cases and earlier Supreme Court cases established that the Fifth Amendment extended its protection against self-incrimination to witnesses whose testimony would incriminate them in another jurisdiction.¹⁰¹

With respect to the English cases, the Court discussed two pre-Constitutional cases,¹⁰² and two cases decided after the framing of the Constitution.¹⁰³ In *East India Co. v. Campbell*, the defendant refused to provide certain information in a proceeding in an English court on the ground that it might subject him to punishment in the courts of India.¹⁰⁴ The English court held that the privilege against self-incrimination protected the defendant from giving the testimony, citing to the broad principle that "this court shall not oblige one to discover that which . . . will subject him to the punishment of a crime."¹⁰⁵ Similarly, in *Brownsword v. Edwards*, the defendant refused to reveal whether she was lawfully married to a certain man, on the ground that if she admitted to the marriage she would be confessing to an act which, although legal under the English common law, would render her liable to prosecution in an ecclesiastical court.¹⁰⁶ The court allowed her to refuse to testify about her marriage, reasoning 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."¹⁰⁷

In *King of the Two Sicilies v. Willcox*, the defendants resisted discovery of certain information in an English court which might subject them to prosecution under the laws of Sicily.¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *East India v. Campbell*, 27 Eng. Rep. 1010 (1749); *Brownsword v. Edwards*, 28 Eng. Rep. 157 (Ch. 1750).

¹⁰³ *King of the Two Sicilies v. Willcox*, 61 Eng. Rep. 116 (Ch. 1851); *United States v. McCrae*, L.R. 3 Ch. App. 79 (1867). See also note 64, *supra*, and accompanying text.

¹⁰⁴ *Murphy*, 378 U.S. at 56.

¹⁰⁵ *East India*, 27 Eng. Rep. at 1011.

¹⁰⁶ *Brownsword*, 28 Eng. Rep. at 157-58.

¹⁰⁷ *Id.* at 158.

¹⁰⁸ *King of the Two Sicilies*, 61 Eng. Rep. at 117.

The court denied their assertion of privilege, reasoning that it was impossible for the court to tell from the record whether the testimony would in fact tend to subject the defendants to prosecution under Sicilian law, and that the possibility of such prosecution wholly depended upon the defendant's voluntary return to Sicily.¹⁰⁹ *The King of the Two Sicilies* court stated that

the rule [against self-incrimination] . . . is one which exists merely by virtue of our own municipal law, and must, I think, have reference exclusively to matters penal by that law: to matters as to which, if disclosed, the Judge would be able to say, as a matter of law, whether it could or could not entail penal consequences.¹¹⁰

However, *United States v. McCrae* called into question the sweep of this statement.¹¹¹ In that case, the United States sued in an English court for an accounting and the payment of moneys allegedly received by the defendant as an agent of the Confederate States during the Civil War.¹¹² The defendant refused to answer questions on the ground that to do so would subject him to penalties under the laws of the United States.¹¹³ The United States relied on *King of the Two Sicilies*, arguing that the privilege against self-incrimination applied only where "a person might expose himself to the peril of a penal proceeding in this country (England)."¹¹⁴ The Lord Chancellor sustained the defendant's claim of privilege and distinguished the case from *King of the Two Sicilies* on the grounds that, in *McCrae*, the possibility of incrimination under foreign law was far better established, and that the *McCrae* defendant would have been involuntarily subject to such incrimination.¹¹⁵ The *McCrae* Chancellor limited *King of the Two Sicilies* to its facts, and rejected the *King of the Two Sicilies* court's "unnecessarily broad"

¹⁰⁹ *Id.* at 128.

¹¹⁰ *Id.* (internal quotations omitted).

¹¹¹ *United States v. McCrae*, L.R. 3 Ch. App. 79 (1867).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 83-84.

¹¹⁵ *Id.* at 84-87. As a resident of the United States, he would not have to choose to return voluntarily to a distant jurisdiction in order to face prosecution, as did the defendants in *King of the Two Sicilies*. *Id.*

statement which had implied a same sovereign interpretation of the rule against self-incrimination.¹¹⁶

In *Murphy*, the Court read these English cases as firmly establishing that the rule against self-incrimination was meant to apply when a defendant fears prosecution in a jurisdiction separate from the jurisdiction seeking to compel his testimony, and as firmly rejecting the same sovereign rule announced in *Murdock* and its progeny.¹¹⁷ The Court noted that *King of the Two Sicilies* was the only English case to suggest the same sovereign rule, and that *McCrae* had limited that case to its particular facts.¹¹⁸ In addition, the *Murphy* Court concluded that to the extent that *King of the Two Sicilies* was intended to stand broadly for a same sovereign rule regarding self-incrimination, it was overruled by *McCrae*.¹¹⁹

The *Murphy* Court also argued that the early Supreme Court cases addressing the issue of the application of the Fifth Amendment privilege to cases involving fear of prosecution in another jurisdiction eschewed the same sovereign rule as convincingly as did the English cases.¹²⁰ The Court interpreted *Saline Bank*¹²¹ as a Fifth Amendment case which "squarely" held that the privilege applied when a federal court sought to compel testimony which could incriminate the witness in a state court.¹²² The *Murphy* Court further stated that this rule was reaffirmed in *Ballmann*,¹²³ and it distinguished *Jack* as a Fourteenth Amendment case whose holding did not depend upon Fifth Amendment issues.¹²⁴ The Court rejected the *Hale* and *Murdock* readings of the English and early American precedents (on which *Feldman* and *Knapp* relied), and concluded that the great weight of precedential authority, both English and American, supported the extension of the privilege against self-

¹¹⁶ *Id.*

¹¹⁷ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 77-78 (1964).

¹¹⁸ *Id.* at 62.

¹¹⁹ *Id.* at 62-63.

¹²⁰ *Id.* at 59-60.

¹²¹ See *supra* notes 14-17 and accompanying text.

¹²² *Murphy*, 378 U.S. at 60.

¹²³ *Id.* at 65.

¹²⁴ *Id.* at 64-65.

incrimination to defendants who fear that their compelled testimony will be used against them in another jurisdiction within the federal structure.¹²⁵ The Court concluded that "the authorities relied on by the Court in *Hale v. Henkel* provided no support for the conclusion that under the Fifth Amendment the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty."¹²⁶

C. DIVISION IN THE CIRCUIT COURTS

While no Supreme Court case before *Balsys* had addressed the question of whether the Fifth Amendment protection against self-incrimination extended to a witness who fears that testimony he provided in a domestic proceeding will be used against him in a foreign criminal proceeding, federal appellate courts did address this question.¹²⁷ These courts came to different conclusions.

In *United States v. (UNDER SEAL)(Araneta)*,¹²⁸ the Fourth Circuit held that the Fifth Amendment does not protect a witness facing a substantial risk of foreign prosecution from compelled self-incrimination.¹²⁹ In reaching its holding, the court reasoned that "the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination," and not when the sovereign using the testimony is a foreign government which is not bound by the Amendment.¹³⁰ In support of this conclusion, the court pointed to several Supreme Court cases which had been decided before the Fifth Amendment had been incorporated against the states.¹³¹ In those cases, the Court had held that the

¹²⁵ *Id.* at 65-77.

¹²⁶ *Id.* at 68.

¹²⁷ See, e.g., *Balsys v. United States*, 119 F.3d 122 (2nd Cir. 1997); *United States v. Gecas*, 50 F.3d 1549 (11th Cir. 1995); *United States v. (Under Seal)(Araneta)*, 794 F.2d 920 (4th Cir. 1986); *In re Parker*, 411 F.2d 1067 (10th Cir. 1969), *vacated as moot sub nom.*, *Parker v. United States*, 397 U.S. 96 (1970).

¹²⁸ 794 F.2d 920 (4th Cir. 1986).

¹²⁹ *Id.* at 926.

¹³⁰ *Id.*

¹³¹ *Id.*

Fifth Amendment did not forbid the federal government from compelling testimony that would incriminate a witness under state law or forbid a state government from compelling testimony that would incriminate a witness under federal law.¹³² The Fourth Circuit reasoned that, since it was "only when the Fifth Amendment was held applicable to the states [that] the privilege [was] held to protect a witness in state or federal court from incriminating himself under either federal or state law,"¹³³ the amendment only protected a witness from self-incrimination when both the compelling sovereign and the using sovereign were bound by the amendment, and not when the using sovereign was a foreign country not bound by the amendment.¹³⁴

In *In re Parker*,¹³⁵ the Tenth Circuit reached a similar conclusion. The court held that the Fifth Amendment does not protect against self-incrimination for acts made criminal by the laws of a foreign nation.¹³⁶ The court contended that a contrary holding could result in unpalatable consequences, as it would render domestic investigations subservient to the whim of foreign criminal law.¹³⁷ For example, a foreign country might declare it a crime for one of its foreign agents to fail in a mission of sabotage or to confess his crimes to American investigators. The court reasoned that allowing the privilege to shield the testimony of such foreign criminals would thwart important law enforcement endeavors and subvert the purposes of the Fifth Amendment.¹³⁸

In *United States v. Gecas*,¹³⁹ however, the Eleventh Circuit held that the Fifth Amendment privilege against self-incrimination protected a witness from giving testimony in a domestic civil proceeding when there was a real and substantial possibility that the testimony could be used against him in a for-

¹³² *Id.*

¹³³ *Id.* (citations omitted).

¹³⁴ *Id.*

¹³⁵ 411 F.2d 1067 (10th Cir. 1969), *vacated as moot sub nom.* *Parker v. United States*, 397 U.S. 96 (1970).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ 50 F.3d 1549 (11th Cir. 1995).

eign criminal prosecution.¹⁴⁰ Defendant Gecas invoked the privilege during a deposition that was part of a Justice Department investigation into whether Gecas, a resident alien, had lied on his visa application in 1962 concerning his activities in Lithuania during World War II.¹⁴¹ The court stated that the Fifth Amendment was intended, among other things, to prevent the indignity that occurs when a witness is forced to incriminate himself "out of his own mouth" and to safeguard against the abuses which can result from overzealous prosecution.¹⁴² The court noted that both policies were advanced when the privilege was extended to cases involving a reasonable fear of self-incrimination under foreign law, as it would prevent a resident alien from incriminating himself "out of his own mouth" in a foreign court, and it would safeguard against the potentially abusive tactics of overzealous domestic prosecutors who are actively cooperating with foreign authorities in their efforts to bring war criminals to justice.¹⁴³

III. FACTS AND PROCEDURAL HISTORY

Aloyzas Balsys was a resident alien who was born in Lithuania and immigrated to the United States in 1961.¹⁴⁴ On his immigration application, "Balsys stated that he had served in the Lithuanian army between 1934 and 1940, and that he had lived in hiding in Plateliai, Lithuania, between 1940 and 1944."¹⁴⁵ He swore under oath that the answers on his immigrant visa application were true and correct.¹⁴⁶ Based on those answers, Balsys was granted an immigrant visa,¹⁴⁷ and he immigrated to the United States from England on June 30, 1961.¹⁴⁸

¹⁴⁰ *Id.* at 1565.

¹⁴¹ *Id.* at 1552-53.

¹⁴² *Id.* at 1564-66.

¹⁴³ *Id.* The Second Circuit came to a similar conclusion in *United States v. Balsys*, 119 F.3d 122 (2nd Cir. 1997), *rev'd*, 118 S.Ct. 2218 (1998). See *infra* notes 165-90.

¹⁴⁴ *United States v. Balsys*, 918 F. Supp. 588, 590 (E.D.N.Y. 1996).

¹⁴⁵ Petitioner's Brief, at 2, *United States v. Balsys*, 118 S. Ct. 2218 (1998) (No. 97-873).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

The Office of Special Investigations (OSI) is a division of the Department of Justice created in 1979 to investigate and institute denaturalization and deportation proceedings against suspected Nazi war criminals.¹⁴⁹ The OSI began investigating Balsys when it came to suspect that he had deliberately lied on his immigration application in order to conceal his assistance in the Nazi persecution of Lithuanian citizens during World War II.¹⁵⁰ Specifically, the OSI suspected that Balsys was neither living in Plateliei nor in hiding between 1940 and 1944. Rather, it suspected that he was living in Vilnius, Lithuania during that period as a member of the Lithuanian Security Police, which persecuted Jews and other civilians in collaboration with the Nazi government of Germany.¹⁵¹ If the OSI could prove that Balsys assisted in the persecution of persons because of their race, religion, national origin, or political affiliation, he would be subject to deportation.¹⁵² He would also be subject to deportation if the OSI could show that he lied about his activities during World War II under oath on his immigrant visa application.¹⁵³

As part of its investigation into Balsys' wartime activities, the OSI issued an administrative subpoena ordering Balsys to testify and to produce documents "relating to his immigration to the United States, and to his activities in Europe between 1940 and 1945."¹⁵⁴ Balsys appeared at a deposition and provided his name and address, but claimed the Fifth Amendment privilege against self-incrimination as to all other questions.¹⁵⁵ He also refused to produce the subpoenaed documents, with the exception of his alien registration card.¹⁵⁶

¹⁴⁹ *United States v. Balsys*, 918 F. Supp. 588, 590 n.1 (E.D.N.Y. 1996).

¹⁵⁰ Petitioner's Brief at 3, *United States v. Balsys*, 118 S. Ct. 2218 (1998) (No. 97-873).

¹⁵¹ *Id.* at 30.

¹⁵² See 8 U.S.C. § 1182 (a)(3)(E) (Supp. II 1996), § 1227 (a)(4)(D) (Supp. II 1996).

¹⁵³ See 8 U.S.C. § 1182 (a)(6)(C)(I) (Supp. II 1996) and § 1227 (a)(1)(A) (Supp. II 1996).

¹⁵⁴ *Balsys*, 918 F. Supp. at 591.

¹⁵⁵ *Id.* at 591.

¹⁵⁶ *Id.*

In refusing to testify and to produce the requested documents, Balsys contended that he was "entitled to the privilege afforded by the Fifth Amendment based on his fear that answering the government's questions could subject him to prosecution by the governments of Lithuania, Germany, and Israel."¹⁵⁷ In response, the government filed a petition for the enforcement of the subpoena.¹⁵⁸ The government argued, *inter alia*, that the Fifth Amendment privilege is not applicable when a claimant fears prosecution by a foreign government.¹⁵⁹

The district court granted the government's petition and ordered Balsys to testify.¹⁶⁰ The court stated that "the Fifth Amendment is not applicable extraterritorially," and that "it serves strictly to regulate the relationship between federal and state governments and their citizens."¹⁶¹ In addition, the court found that the primary purpose of the amendment is to prevent domestic governments from abusing their power by eliciting self-incriminating testimony in an inhumane fashion.¹⁶² Reasoning that the incentive for such governmental abuses (or "over-reaching") disappears when the prosecution is to take place in another country, and that the application of the privilege to cases involving foreign prosecutions might thwart legitimate and important domestic law enforcement efforts,¹⁶³ the court ruled that allowing Balsys to invoke the Fifth Amendment privilege would not advance the policies served by the amendment.¹⁶⁴

The Second Circuit reversed, vacating the district court's order compelling Balsys to testify.¹⁶⁵ Citing *Murphy v. Waterfront Commission*,¹⁶⁶ the court identified the following three general

¹⁵⁷ *Id.*

¹⁵⁸ Petitioners Brief at 7, *United States v. Balsys*, 118 S. Ct. 2218 (1998) (No. 97-873).

¹⁵⁹ *Id.*

¹⁶⁰ *Balsys*, 918 F. Supp. at 600.

¹⁶¹ *Id.* at 599.

¹⁶² *Id.*

¹⁶³ *Id.* The court included efforts to monitor and verify immigration and visa applications among these legitimate efforts. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Balsys v. United States*, 119 F.3d 122, 140 (2nd Cir. 1997).

¹⁶⁶ 378 U.S. 52 (1964). See *supra* notes 91-126 and accompanying text.

categories of purposes served by the Fifth Amendment: advancing individual integrity and privacy; protecting against the state's pursuit of its goals by excessive means; and promoting the systemic values of the American method of criminal justice.¹⁶⁷ The court concluded that the first two of these purposes would be well served by permitting *Balsys* to withhold his testimony based upon his fear of foreign prosecution.¹⁶⁸

With respect to the purpose of advancing individual integrity and privacy, the court cited two Supreme Court cases which recognized that the Fifth Amendment serves to prevent a witness from facing the "cruel trilemma" of self-accusation, perjury, or contempt.¹⁶⁹ The court noted that this trilemma is "no less cruel nor any less imposed by a government within the United States merely because the testimony is ultimately used by a foreign nation."¹⁷⁰ Similarly, the court stated that the "threat to the human personality and privacy" is no less serious "simply because the compulsion serves the purposes of a foreign government."¹⁷¹ Finally, the court noted that "the privilege . . . better ensures the reliability" of compelled testimony regardless of whether the witness fears foreign or domestic prosecution, "since self-incriminating statements are no more reliable in either case."¹⁷²

With respect to the purpose of preventing governmental overreaching, the court concluded that the danger of such overreaching can be substantial under certain circumstances even though the prosecuting authority is a foreign government, and that the district court had underestimated the possibility of such overreaching occurring in this case.¹⁷³ The court noted that "international collaboration in criminal prosecutions has intensified . . . in recent years," and that the United States is currently waging a "united front" with foreign countries in the

¹⁶⁷ *Balsys*, 119 F.3d at 129.

¹⁶⁸ *Id.* at 129-40.

¹⁶⁹ *Id.* at 130 (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 595-97 (1990); *South Dakota v. Neville*, 459 U.S. 553, 561-64 (1983)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

prosecution of several crimes.¹⁷⁴ This "cooperative internationalism" results in the United States having a "significant stake in many foreign criminal cases."¹⁷⁵ Indeed, the Second Circuit stressed that the *Balsys* record revealed that the United States had a particularly "substantial interest in the success of Balsys' foreign prosecution"¹⁷⁶ for several reasons. First, the OSI was created to investigate and deport Nazi war criminals for foreign crimes.¹⁷⁷ Second, the United States "has entered into an agreement to provide evidence that it has gathered on suspected Nazi collaborators to Lithuania."¹⁷⁸ Finally, the United States Government "has exchanged incriminating evidence on suspected Nazi collaborators with Israel on past occasions."¹⁷⁹ Given this clear interest on the part of the federal government in foreign prosecutions like the one faced by Balsys, the court concluded that "permitting the privilege in such cases will help curb any tendency by the United States to take abusive measures just as it does in cases in which domestic prosecution is feared."¹⁸⁰

Moreover, the Second Circuit rejected the district court's argument that applying the privilege in cases like the instant case would have a seriously detrimental effect on important domestic law enforcement initiatives.¹⁸¹ Courts that have opposed the application of the Fifth Amendment privilege to cases involving a witness's fear of foreign prosecution have stressed the inability of the United States to secure the witness's testimony through a grant of immunity from prosecution, as the United States does not have the power to guarantee that the testimony will not be used against the witness in a foreign prosecution.¹⁸² Such courts have often argued that this situation creates a serious threat to domestic law enforcement (and to American

¹⁷⁴ *Id.* at 130-31.

¹⁷⁵ *Id.* at 131.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (citing *Balsys v. United States*, 918 F. Supp. 588, 595-97 (E.D.N.Y. 1996)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 133-36.

¹⁸² *Id.* at 134.

sovereignty in general) which is not present in cases where a witness invokes the privilege in a domestic proceeding.¹⁸³ However, the Second Circuit concluded that such fears were exaggerated for four main reasons. First, "the circumstances giving rise to the application of the privilege in cases involving foreign prosecutions rarely occur."¹⁸⁴ In order to invoke the privilege, a witness must establish that he faces a "real and substantial" threat of foreign prosecution, and to do this he must show that he would likely "be forced to enter a country disposed to prosecute him."¹⁸⁵ Such cases are rare. Second, testimony sought by the United States for the purposes of domestic law enforcement will likely be limited to an alien's domestic activities, and will not relate to the foreign activities for which he will most likely face prosecution abroad.¹⁸⁶ If this is so, it follows that in most cases in which a witness asserts the privilege for fear of incrimination abroad, the United States will retain unencumbered access to the testimony which it seeks for domestic law enforcement purposes. Third, "since an adverse inference may be drawn in civil cases when a witness invokes the privilege," that very invocation might aid the government's case as effectively as would the testimony sought.¹⁸⁷ For example, if the Government seeks information from a suspected Nazi collaborator in a deportation proceeding, its ability to deport the witness is not necessarily diminished by the witness's assertion of the privilege because it may draw an adverse inference from the witness' silence, and it may use this adverse inference—along with whatever other evidence it may have against him—as grounds to deport him. Therefore, the Government will frequently be able to deport the witness even without obtaining his testimony. Fi-

¹⁸³ See, e.g., *United States v. Lileikis*, 899 F. Supp. 802, 809 (D. Mass. 1995) (stating that if the United States has a legitimate need for a witness's testimony, "[i]t would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness.").

¹⁸⁴ *Balsys*, 119 F.3d at 135.

¹⁸⁵ *Id.* (quoting *United States v. Gecas*, 50 F.3d 1549, 1560 (11th Cir. 1995)). For example, via deportation or extradition. *Id.*

¹⁸⁶ *Id.* at 135-36.

¹⁸⁷ *Id.* at 136.

nally, if the United States government vitally needs to compel a witness's testimony despite his real and substantial fear of foreign prosecution, it may enact provisions or treaties which parallel domestic immunity statutes.¹⁸⁸ All the United States need do in such cases is either to "eliminate the likelihood that the witness will be sent to the jurisdiction that would prosecute him," or to "grant [the witness] some form of constructive immunity."¹⁸⁹ The United States could accomplish this by promising not to deport or extradite the witness in exchange for receiving his testimony.¹⁹⁰

The United States Supreme Court granted certiorari to resolve the division among the circuits on the question of whether a witness's real and substantial fear of a foreign prosecution would allow him to invoke his Fifth Amendment privilege against self-incrimination.¹⁹¹

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

Writing for the Court, Justice Souter¹⁹² held that concern with foreign prosecution is beyond the scope of the Fifth Amendment's privilege against self-incrimination.¹⁹³ The Court based its decision on two principal claims. First, it argued that the text of the self-incrimination clause, when read in its proper context, was meant to provide a witness with the privilege against compelled self-incrimination when the witness reasonably fears prosecution by the same government whose power the clause limits—not by any government whatsoever. Second, the Court found that relevant precedents require this so called "same-sovereign" interpretation of the scope of the self-incrimination clause.

¹⁸⁸ *Id.* at 136-39.

¹⁸⁹ *Id.* at 137.

¹⁹⁰ *Id.* at 136.

¹⁹¹ *United States v. Balsys*, 118 S. Ct. 751 (1998).

¹⁹² Chief Justice Rehnquist, and Justices Stevens, O'Connor, and Kennedy joined in the opinion. Justices Scalia and Thomas joined parts I, II, and III of the opinion.

¹⁹³ *United States v. Balsys*, 118 S. Ct. 2218, 2236 (1998).

The Court began its analysis with a consideration of the text of the Fifth Amendment.¹⁹⁴ Noting that Constitutional provisions must be construed in context,¹⁹⁵ the Court looked at the entire text of the Fifth Amendment, and did not limit itself to a consideration of the self-incrimination clause. The Court noted that the self-incrimination clause occurs in the company of provisions which are implicated only by actions of the government bound by the clause, such as "guarantees of grand jury proceedings, defense against double jeopardy, due process, and compensation for property taking."¹⁹⁶ Given this, the Court reasoned that "it would have been strange to choose such associates for a Clause meant to take a broader view."¹⁹⁷ In addition, the Court noted that the clause's expansive language¹⁹⁸ can be interpreted as distinguishing the scope of the privilege against self-incrimination from that of the right to a grand jury indictment.¹⁹⁹ The Court concluded that the phrase "no person . . . shall be compelled in any criminal case to be a witness against himself" need not, and indeed should not, be read as "taking the further step of defining the relevant prosecutorial jurisdiction internationally."²⁰⁰ The Court found an international interpretation of the clause's reach particularly unpersuasive given that the Bill of Rights was originally instituted to curtail and restrict the general powers granted to the various branches

¹⁹⁴ The Fifth Amendment reads:

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

U.S. CONST., amend. V.

¹⁹⁵ *Balsys*, 118 S. Ct. at 2223 (citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)).

¹⁹⁶ *Id.* at 2223.

¹⁹⁷ *Id.*

¹⁹⁸ The clause purports to apply to "any" criminal case. See *supra* note 194.

¹⁹⁹ *Balsys*, 118 S. Ct. at 2223. The right to a grand jury indictment is expressly limited to "capital or otherwise infamous crimes." See *supra* note 194.

²⁰⁰ *Balsys*, 118 S. Ct. at 2223.

of the federal government in the original Constitutional articles, and was not meant to apply to any other government.²⁰¹

The Court next examined its precedents. The Court held that its precedents established that the Fifth Amendment privilege against self-incrimination could be invoked only when the threat of prosecution comes from the same sovereign which sought to compel the incriminating testimony.²⁰² While no Supreme Court case had addressed the issue in the context of the threat of foreign prosecution, some cases had addressed the analogous issue of the potential use of compelled federal testimony in a state prosecution.²⁰³ The Court cited several of these cases as ordaining the so-called "same sovereign" rule.²⁰⁴

The Court cited *United States v. Murdock*²⁰⁵ for the proposition that "one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law."²⁰⁶ In *Murdock*, the Court stated that the English rule of evidence against self-incrimination, which was the historical basis for the Fifth Amendment privilege, "[did] not protect witnesses against disclosing offenses in violation of the laws of another country."²⁰⁷ Applying this reasoning, the *Murdock* Court concluded that the Fifth Amendment mandated only that a witness be given "full and complete immunity against prosecution by the government compelling the witness to answer."²⁰⁸

²⁰¹ *Id.* at 2223-24 (citing *New York Times Co. v. United States*, 403 U.S. 713, 716 (1971)). The Court also cited *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) which held that the Constitution's "limitations on power . . . are naturally, and, we think, necessarily applicable to the government created by the instrument" and not to "distinct [state] governments, framed by different persons and for different purposes."

²⁰² *Balsys*, 118 S. Ct. at 2224.

²⁰³ *Id.* at 2224-25.

²⁰⁴ *Id.* (citing *Hale v. Henkel*, 201 U.S. 43, 69 (1906) and *United States v. Murdock*, 290 U.S. 389, 396 (1931)) (other citations omitted.) See also *supra* notes 56-66 and accompanying text.

²⁰⁵ 290 U.S. 389, 396 (1933).

²⁰⁶ *Balsys*, 118 S. Ct. at 2224 (quoting *Murdock*, 290 U.S. at 396.)

²⁰⁷ *Id.* at 2224-25, (citing *U.S. v. Murdock*, 284 U.S. 141, 149 (1931)).

²⁰⁸ *Id.* at 2225. Thus, in *Murdock* the Court held that the witness was entitled to immunity from prosecution by the federal government and not the state government. *Id.*

In *Balsys*, the Court interpreted *Murphy v. Waterfront Commission* as being consistent with the same sovereign rule articulated in *Murdock*. The Court acknowledged that *Murphy* was "invested with two alternative rationales,"²⁰⁹ one of which can be read as rejecting the same sovereign rule.²¹⁰ However, the Court found that *Murphy*'s essential holding did not contradict the rule.²¹¹ The Court read *Murphy* as re-defining the bounds of federal and state sovereignty in light of the incorporation of the Fifth Amendment privilege against self-incrimination against the states.²¹² The Court concluded that *Murphy* should be read as holding that the government may grant a defendant full immunity from government prosecution in exchange for his testimony so long as this grant of immunity is as broad as the privilege against self-incrimination itself.²¹³ Therefore, since the Fifth Amendment privilege binds both state and federal prosecutions, a defendant offering self-incriminating testimony pursuant to a grant of immunity must be immune from prosecution in both state and federal jurisdictions.²¹⁴ The jurisdiction originally granting immunity is irrelevant, since both jurisdictions are bound by the privilege. The Court argued that *Murphy* actually stands for the proposition that, after *Malloy v. Hogan*,²¹⁵ state and federal jurisdictions must be treated as one jurisdiction or sovereignty when considering the application of the Fifth Amendment's privilege against self-incrimination.²¹⁶

Although the *Balsys* Court acknowledged that *Murphy* contained a "competing rationale" which supported the claim that the privilege against self-incrimination applied in cases wherein the threat of prosecution came from a foreign country,²¹⁷ it re-

²⁰⁹ *Id.* at 2226.

²¹⁰ *Id.* at 2228-30.

²¹¹ *Id.* at 2227-28.

²¹² *Id.* at 2226-28.

²¹³ *Id.* at 2227.

²¹⁴ *Id.* at 2227-28.

²¹⁵ 378 U.S. 1 (1964). *Malloy* held the Fifth Amendment applicable to the states (see *supra* notes 86-90 and accompanying text.)

²¹⁶ *Balsys*, 118 S. Ct. at 2227-28.

²¹⁷ *Id.* at 2228.

jected this rationale.²¹⁸ In *Murphy*, the Court had stated that the privilege against self-incrimination reflected a constitutional policy protecting personal privacy.²¹⁹ In *Balsys*, the Court rejected *Murphy*'s interpretation of English common law precedent²²⁰ as inconsistent with its previous understanding,²²¹ and argued that the privacy argument derived from *Murphy* was overly expansive and ambitious.²²²

For example, the Court argued that the privilege cannot be based upon a conception of any "inviolable" right to privacy because the privilege may be exchanged for immunity and because the law recognizes no such privilege when there is no threat of criminal prosecution.²²³ The Court stated that "what we find in practice is not the protection of personal testimonial inviolability, but a conditional protection of testimonial privacy subject to the basic limits recognized before the framing and refined through the immunity doctrine in the intervening years."²²⁴ The Court characterized this "conditional" protection as a time-honored strategy designed to strike a balance between private and governmental interests.²²⁵ Moreover, protecting the "inviolability" of a witness's testimony when the witness reasonably fears foreign prosecution would upset this balance of interests, because in such cases the government cannot guarantee

²¹⁸ *Id.* at 2230.

²¹⁹ See *supra* note 97 and accompanying text.

²²⁰ For *Murphy*'s interpretation of the English common law precedent, see *supra* notes 102-19 and accompanying text.

²²¹ *Balsys*, 118 S. Ct. at 2227-30. First, the *Balsys* Court noted that neither *Campbell* nor *Brownsword* disturbed the same sovereign rule, as in each case "the judicial system to which the witness's fears related was subject to the same legislative sovereignty that had created the courts in which the privilege was claimed" (i.e., a British colonial court, and a British ecclesiastical court, respectively.) *Balsys*, 118 S. Ct. at 2228-29. Moreover, the *Balsys* court limited *McCrae* to its facts, and argued that in any event it was irrelevant to the question at hand, as it was decided some sixty years after the drafting of the Constitution. *Id.* at 2229-30.

²²² The Court noted that certain limitations on the privilege have traditionally been recognized. For example, when the Government is willing to grant a witness immunity from prosecution in exchange for his testimony, the privilege grants no further protection of testimonial privacy. *Id.* at 2232.

²²³ *Id.* at 2232-33.

²²⁴ *Id.* at 2232.

²²⁵ *Id.*

the witness immunity from prosecution in exchange for his testimony, and is therefore powerless to bargain for the witness's testimony.²²⁶

Moreover, the Court rejected the argument that allowing the privilege against self-incrimination to extend to cases involving a fear of foreign prosecution (or at least to cases whose facts parallel those in *Balsys*) would further its undisputed policy goal of preventing government "overreaching."²²⁷ The Court acknowledged that an important goal behind the privilege is to prevent a government which is eager to prosecute a defendant from resorting to abusive coercion in order to compel the defendant to provide self-incriminating testimony that would aid in his prosecution. *Balsys* argued that because the United States government now collaborates extensively with foreign governments in bringing war criminals to justice, it has a significant interest in seeing such individuals convicted abroad for their crimes, and such an incentive had traditionally required application of the privilege in the context of domestic prosecutions.²²⁸ *Balsys* cited *Murphy*'s concern with "cooperative federalism"²²⁹ in this context, and argued that the current system of "cooperative internationalism" in the war crimes context raises the very same concerns.²³⁰

The Court rejected this reasoning, noting that the *Murphy* court's concern with "cooperative federalism" was motivated solely by *Malloy*'s application of the Fifth Amendment to the states, and not by any general concerns about government overreaching.²³¹ *Murphy* concluded that, because *Malloy* held the states and the federal government to the same law regarding self-incrimination, "it would be unjustifiably formalistic for a federal court to ignore fear of [a] state prosecution when ruling

²²⁶ *Id.*

²²⁷ *Id.* at 2233-34.

²²⁸ *Id.*

²²⁹ The term "cooperative federalism" refers to the collaboration of state and federal authorities in prosecutions. See *Murphy v. Waterfront Commission*, 378 U.S. 52, 55-56 (1964).

²³⁰ *Balsys*, 118 S. Ct. at 2233.

²³¹ *Id.*

on a privilege claim."²³² In *Balsys*, the Court contended that, because the Fifth Amendment is not imposed beyond domestic governments, the invocation of *Murphy's* "cooperative federalism" concerns was inapposite.²³³

However, the Court conceded that cooperative conduct between the United States and a foreign nation could conceivably rise to a level which would justify a witness's invoking the privilege in a domestic proceeding when he reasonably feared foreign prosecution.²³⁴ The Court hypothesized a situation wherein the United States and its allies had "enacted substantially similar criminal codes aimed at prosecuting offenses of international character," and the United States government granted 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."²³⁵ In such a case, the prosecution would not be truly foreign, but would be brought in large part by the same sovereign that was seeking to compel the witness's testimony.²³⁶ However, the Court insisted that *Balsys* was not such a case, as a mere interest in a foreign prosecution "does not rise to the level of cooperative prosecution."²³⁷

B. JUSTICE STEVENS'S CONCURRENCE

In his brief concurring opinion, Justice Stevens stressed an unpalatable consequence of *Balsys's* interpretation of the self-incrimination clause, asserting that such an interpretation would "confer power on foreign governments to impair the administration of justice in this country."²³⁸ For example, "a law enacted by a foreign power making it a crime for one of its citizens to testify in an American proceeding against another citizen of that country would immunize those citizens from being compelled to provide such testimony in an American court," as doing so could subject them to criminal prosecution in their na-

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 2235.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 2235-36.

²³⁸ *Id.* at 2236 (Stevens, J., concurring).

tive country.²³⁹ In addition, Justice Stevens contended that the primary purpose of the self-incrimination clause . . . is to protect persons "whose liberty has been placed in jeopardy in an American tribunal," and that the *Balsys* holding will not adversely affect the fairness of any such American criminal trial.²⁴⁰

C. JUSTICE GINSBURG'S DISSENT

Justice Ginsburg dissented, emphasizing that the privilege against self-incrimination embodies principles of "fundamental decency" and expresses "our view of civilized government conduct."²⁴¹ As such, the privilege should "command the respect of United States interrogators, whether the prosecution reasonably feared by the examinee is domestic or foreign."²⁴² In other words, Justice Ginsburg argued that, even though the Fifth Amendment's self-incrimination clause binds only American authorities, American interrogators are included among those authorities, and thus the clause could be properly invoked to prevent OSI interrogators from compelling *Balsys*' testimony.²⁴³

D. JUSTICE BREYER'S DISSENT

Justice Breyer dissented,²⁴⁴ taking issue with the majority's interpretation of *Murphy*. Justice Breyer argued that *Murphy* had explicitly rejected the same sovereign rule articulated by *Murdock* and reasserted by the majority,²⁴⁵ and that *Murphy*'s rejection of the *Murdock* holding was based on a fundamentally different understanding of the basic policies advanced by the self-incrimination clause, and not, as the majority would have it, on a new concept of federal-state "sovereignty" in light of *Malloy*.²⁴⁶ In its analysis of the English common-law precedents, *Murphy* had sought to establish that the self-incrimination clause

²³⁹ *Id.* (Stevens, J., concurring).

²⁴⁰ *Id.* (Stevens, J., concurring).

²⁴¹ *Id.* at 2237 (Ginsburg, J., dissenting) (citing E. GRISWOLD, *THE FIFTH AMENDMENT TODAY*, 8, 9 (1955)).

²⁴² *Id.* (Ginsburg, J., dissenting).

²⁴³ *Id.* (Ginsburg, J., dissenting).

²⁴⁴ Justice Ginsburg joined in Justice Breyer's dissent.

²⁴⁵ *Id.* at 2237-39 (Breyer, J., dissenting).

²⁴⁶ *Id.* at 2239 (Breyer, J., dissenting).

was meant to protect individuals against having their own testimony used against them in *any* prosecution, regardless of whether the prosecution was undertaken by the same sovereign seeking to compel the testimony or by a foreign sovereign.²⁴⁷ Justice Breyer contended that this interpretation of the English precedents was at least as sound as the interpretation offered by the *Murdock* Court and by the majority.²⁴⁸ In addition, since *Murphy* remains good law, the burden was on the majority to refute *Murphy's* interpretation.²⁴⁹ Justice Breyer asserted that the majority had failed to carry this burden, and that Balsys therefore could not be compelled to testify against himself.²⁵⁰

In addition, Justice Breyer claimed that holding the privilege against self-incrimination applicable in Balsys' case would further several important policies underlying the self-incrimination clause.²⁵¹ For example, it would help to prevent government overreaching and would reinforce the preference for an accusatorial rather than an inquisitorial system of criminal justice.²⁵²

With respect to these policy goals, Justice Breyer stated that the extensive cooperation between the United States and foreign governments concerning the foreign prosecution of war criminals²⁵³ raises overreaching concerns just as powerful as those prevailing in the domestic arena.²⁵⁴ He also noted that the Court has ruled that "the Fifth Amendment affords individuals protection during the investigation, as well as the trial, of a crime,"²⁵⁵ and that the value of such protection would stand diminished if a defendant were not allowed to invoke the privilege

²⁴⁷ *Id.* at 2239-40 (Breyer, J., dissenting).

²⁴⁸ *Id.* at 2241 (Breyer, J., dissenting).

²⁴⁹ *Id.* at 2239 (Breyer, J., dissenting).

²⁵⁰ *Id.* at 2239, 2242 (Breyer, J., dissenting).

²⁵¹ *Id.* at 2242 (Breyer, J., dissenting).

²⁵² *Id.* at 2243-44 (Breyer, J., dissenting).

²⁵³ Evidence of the American concern with such prosecution includes Congress's passage of deportation laws and the creation of federal agencies like the OSI, whose mandate is to assist in foreign prosecutorial efforts. *Id.* at 2243 (Breyer, J., dissenting).

²⁵⁴ *Id.* (Breyer, J., dissenting).

²⁵⁵ *Id.* at 2244 (Breyer, J., dissenting) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

against self-incrimination while the United States built a case against him, simply because his prosecution would ultimately be brought by a foreign government.²⁵⁶

V. ANALYSIS

United States v. Balsys was wrongly decided. In developing its "same sovereign" interpretation of the Fifth Amendment's privilege against self-incrimination, the *Balsys* majority misread the controlling precedents, *Murphy v. Waterfront Commission*²⁵⁷ in particular, and failed to give sufficient emphasis to some essential policies advanced by the privilege.²⁵⁸

A. THE MAJORITY MISREAD *MURPHY* AND OTHER PRECEDENTS

The *Balsys* majority claimed that *Murphy*'s essential holding was consistent with *United States v. Murdock*²⁵⁹ and its progeny, in that *Murphy* had simply applied a version of the same sovereign rule to new circumstances.²⁶⁰ Specifically, the *Balsys* majority asserted that, as *Malloy v. Hogan*²⁶¹ had incorporated the Fifth Amendment against the states, both the federal and the state governments were for the first time bound by the privilege, and therefore they could no longer be considered "separate sovereigns" for purposes of the application of the privilege.²⁶² Thus, it was no longer appropriate to allow one sovereign within the federal structure to compel testimony that could be used against the defendant by the other sovereign.²⁶³ However, the *Balsys* majority contended that this result did not overrule the same sovereign rationale of *Murdock* and its progeny.²⁶⁴ The *Balsys* majority read *Murphy* not as a rejection of the claim that the privilege can only be invoked when the sovereign seeking to compel the testimony is the same sovereign which will use the

²⁵⁶ *Id.* (Breyer, J. dissenting).

²⁵⁷ 378 U.S. 52 (1964).

²⁵⁸ See *infra* notes 289-300 and accompanying text.

²⁵⁹ 284 U.S. 141 (1931).

²⁶⁰ *Balsys*, 118 S. Ct. at 2226-28.

²⁶¹ 378 U.S. 1 (1964). See *supra* notes 86-90 and accompanying text.

²⁶² *Balsys*, 118 S. Ct. at 2227-28.

²⁶³ *Id.*

²⁶⁴ *Id.*

testimony, but rather as a recognition that the federal and state governments can no longer be treated as separate sovereigns.²⁶⁵ In sum, the *Balsys* majority read the *Murphy* holding as essentially nothing more than a necessary consequence of *Malloy*. While the *Balsys* Court did recognize a "competing rationale" in *Murphy* (which based the holding on a reading of precedent that was inconsistent with *Murdock* and its progeny and on a consideration of the historical policies undergirding the privilege), the Court de-emphasized the importance of this "alternative rationale" to the *Murphy* holding.²⁶⁶

Contrary to the majority's reading, however, *Murphy* was not simply a necessary consequence of *Malloy*. Rather, its "alternative rationale" was central to its holding, and it stands as an independent rejection of the same sovereign rule. In *Murphy*, the Court explicitly announced the centrality of its policy analysis to its holding.²⁶⁷ Near the beginning of its opinion, after raising the question of whether one jurisdiction within our federal structure may compel a witness to give testimony which might incriminate him under the laws of another such jurisdiction, the Court stated that "[t]he answer to this question must depend, of course, on whether such an application of the privilege promotes or defeats its policies and purposes."²⁶⁸ It then analyzed the historical purposes of the privilege and of Supreme Court precedent.²⁶⁹ This analysis led the Court to conclude that one jurisdiction within our federal structure could not compel a witness to give testimony which might incriminate him in another such jurisdiction.²⁷⁰ In addition, *Murphy* took great pains to show that *Murdock* and its progeny had misread both the relevant precedents—including the English cases,²⁷¹ *United States v.*

²⁶⁵ *Id.* at 2227-28.

²⁶⁶ *Id.* at 2228.

²⁶⁷ *Murphy*, 378 U.S. at 54.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 55-77.

²⁷⁰ *Id.* at 77.

²⁷¹ *United States v. McCrae*, L.R., 3 Ch. App. 79 (1867); *Brownsword v. Edwards*, 28 Eng. Rep. 157 (Ch. 1750); *East India Company v. Campbell*, 27 Eng. Rep. 1010 (Ex. 1749). See *supra* notes 102-19 and accompanying text.

Saline Bank of Virginia,²⁷² and *Ballmann v. Fagin*²⁷³—and the historical purposes of the privilege.²⁷⁴ Given that *Murphy* opened with a declaration of the centrality of the policy/precedent analysis, and devoted some two-thirds of its opinion to that analysis (a substantial portion of which sharply criticized *Murdock* and its progeny), it is difficult to justify the claims that *Murphy* was merely a necessary consequence of *Malloy* and that its policy and precedent analyses were mere “alternative rationales” which were not essential to its holding. Indeed, if such an interpretation were accurate, one should wonder why the *Murphy* Court bothered to criticize *Murdock*’s rationale in the first place, rather than simply stating that *Murdock* was once good law but that it is no longer so in light of *Malloy*.

Moreover, the *Balsys* majority misread other Supreme Court precedents. Contrary to the majority’s interpretation, *Saline Bank* and *Ballmann* support the view that a sovereign bound by the Fifth Amendment cannot compel testimony which can be used by another sovereign which *is not bound by the Amendment*. *Ballmann* and *Saline Bank* were decided before *Malloy* had incorporated the Fifth Amendment against the states. Therefore, at the time of those decisions, state governments were not bound by the Fifth Amendment. Nevertheless, in each case, the Court held that a witness’s testimony could not be compelled in a federal proceeding when there was a reasonable possibility that it could be used against him in a state proceeding.²⁷⁵ Such decisions cannot be explained on a “same sovereign” reading; they can only be explained by some broader policy rationale.²⁷⁶ The majority attempted to explain this away by claiming that the *Ballmann* holding was “equivocal” in that it recognized that the witness might be subject to incrimination in both state and federal courts, and therefore its true rationale for applying the

²⁷² 26 U.S. 100 (1828). See *supra* notes 120-22 and accompanying text.

²⁷³ 200 U.S. 186 (1906). See *supra* notes 123-26 and accompanying text.

²⁷⁴ *Murphy*, 378 U.S. at 57-77.

²⁷⁵ *Ballman*, 200 U.S. at 195-96; *Saline Bank*, 26 U.S. at 104.

²⁷⁶ One possible policy rationale that might explain these holdings is the avoidance of forcing a witness into the “cruel trilemma” of self-accusation, perjury, and contempt. See *supra* notes 169-70 and accompanying text, and *infra* notes 289-97 and accompanying text.

privilege might have been a desire to protect the witness from prosecution by the federal sovereign which was seeking to compel his testimony.²⁷⁷ However, the *Ballmann* Court explicitly stated that the privilege would protect the witness from testifying "[o]ne way or the other," that is, whether he would face prosecution by federal *or* state authorities.²⁷⁸ Moreover, the majority's attempt to explain away *Saline Bank* is equally unsatisfying. The majority disregarded *Saline Bank* as inapposite, arguing that it might have involved the interpretation of a state statute prohibiting self-incrimination, rather than an interpretation of the Fifth Amendment.²⁷⁹ However, several subsequent Supreme Court cases relied upon the chancery rule against self-incrimination cited by *Saline Bank* in determining the scope of the Fifth Amendment privilege,²⁸⁰ and *Murphy* read *Saline Bank* as construing the scope of the Amendment.²⁸¹

In addition, the majority's same sovereign interpretation of the privilege cannot be reconciled with at least one other precedent which neither the majority nor the *Murphy* Court had considered. *Bram v. United States*²⁸² held that testimony which was compelled in a coercive manner by a foreign sovereign could not be used against a defendant in an American (federal) proceeding.²⁸³ *Bram* cannot be explained with reference to the same sovereign rule, for that rule would establish that the using sovereign is free to use the testimony so long as it did not participate in the compulsion of the testimony.²⁸⁴ The *Bram* decision must therefore turn on the application of some broader policy, such as an effort to preserve a defendant's dignitary right

²⁷⁷ *United States v. Balsys*, 118 S. Ct. 2218, 2226 (1998).

²⁷⁸ *Ballmann*, 200 U.S. at 195-96.

²⁷⁹ *Balsys*, 118 S. Ct. at 2225-26.

²⁸⁰ See *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892); *Boyd v. United States*, 116 U.S. 616, 631 (1886); see also Diane M. Amman, *A Whipsaw Cuts Both Ways; the Privilege Against Self-incrimination in an International Context*, 45 UCLA L. REV. 1201, 1209 n.40 (1998).

²⁸¹ *Murphy*, 378 U.S. 52, 69.

²⁸² 168 U.S. 532 (1897).

²⁸³ *Id.* at 565.

²⁸⁴ This is precisely the conclusion that the Court reached in *Feldman v. United States*, 322 U.S. 487, 492 (1944) when applying the same sovereign rule to similar facts.

not to be coerced into incriminating himself—regardless of which sovereign does the coercing—or an endeavor to preserve the truth and accuracy of a defendant's confessions. The majority's same sovereign interpretation of the Fifth Amendment advances neither of these policies.²⁸⁵

B. THE MAJORITY'S INTERPRETATION FAILS TO PROMOTE IMPORTANT POLICIES UNDERLYING THE PRIVILEGE AGAINST SELF-INCRIMINATION

In adopting the same sovereign rule, the *Balsys* majority interpreted the Fifth Amendment privilege against self-incrimination extremely narrowly. It found that the privilege provides only a limited protection for a defendant's dignitary right to privacy, rather than the more broad protections discussed in *Murphy*.²⁸⁶ And, while it conceded that the Fifth Amendment prevents the government from abusing its power while attempting to coerce a defendant's confession, it contended that the Amendment's reach was rather narrow and limited in this context.²⁸⁷ For the majority, the Fifth Amendment prohibits the government not from forcing the individual to incriminate himself in general, but only from compelling him to give testimony which might be used against him by the compelling sovereign itself or by another sovereign that is bound by the privilege.²⁸⁸ Such a reading does not promote some of the central purposes of the privilege, at least one of which can be seen as *both* a personal dignitary right *and* as a check on government.

One such purpose is to protect the individual from facing the "cruel trilemma" of self-accusation, perjury, and contempt.²⁸⁹ The Supreme Court has repeatedly recognized that the Fifth Amendment privilege prohibits the government from putting

²⁸⁵ See *infra* notes 289-97 and accompanying text.

²⁸⁶ *Balsys*, 118 S. Ct. at 2232. "[W]hat we find in practice is not the protection of personal testimonial inviolability, but a conditional protection of testimonial privacy subject to basic limits recognized before the framing [footnote omitted] and refined through the immunity doctrine in the intervening years." *Id.*

²⁸⁷ *Id.* at 2232-33.

²⁸⁸ *Id.*

²⁸⁹ See, e.g., *Pennsylvania v. Muniz*, 496 U.S. 582, 595-97 (1990); *South Dakota v. Neville*, 459 U.S. 553, 561-64 (1983); *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

the witness in a position whereby he must choose to either incriminate himself "by his own mouth," lie (and face perjury charges), or refuse to testify (and face contempt charges).²⁹⁰ Thus, it can be argued that the privilege serves as *both* a check on government abuse of power, *and* as a protector of a personal dignitary right. It checks government abuses by prohibiting the state from using its considerable power to attempt to coerce desired testimony out of a witness. It protects a personal dignitary right by guaranteeing that an individual will not be forced to participate in his own conviction by providing self-incriminating testimony, under threat of criminal sanction for refusal to do so. These policies are undermined whenever the state forces a witness to choose between furnishing evidence against himself or facing criminal sanctions for either refusing to do so or for lying. Moreover, a Fifth Amendment violation occurs whenever the government *puts the witness in this position*, regardless of the eventual use made of the testimony.²⁹¹ The prohibited governmental abuse of power and the violation of the witness's dignitary right occurs at the *moment of attempted compulsion*, and not at the moment that the compelled testimony is actually used against the witness in a criminal proceeding.

The Court's view fails to recognize this central purpose of the Fifth Amendment. By adopting the same sovereign view, the Court reads the privilege as guaranteeing only that the government bound by the privilege will not compel testimony from a witness if the testimony could be used against the witness by another sovereign bound by the privilege.²⁹² Under this view, a

²⁹⁰ See *Muniz*, 496 U.S. at 595-97; *Neville*, 459 U.S. at 561-64. But see Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1016-17 (1996) (arguing that since only the guilty will experience the compulsion to testify as a "cruel trilemma," forcing a defendant to testify about his own alleged involvement in a crime is a violation of the Fifth Amendment only if we believe that the Amendment is designed to reduce the probability of punishing the guilty); David Dolinko, *Is There a Rationale for the Privilege Against Self-incrimination?*, 33 UCLA L. REV. 1063, 1093-1095 (1986) (arguing that compelled self-incrimination is no more "cruel" than are other, legally permitted acts of compelling a witness's testimony).

²⁹¹ See *United States v. Balsys*, 119 F.3d 122, 130 (2nd Cir. 1997). "[The cruel] trilemma is no less cruel nor any less imposed by a government within the United States merely because the testimony is ultimately used by a foreign nation." *Id.*

²⁹² *United States v. Balsys*, 118 S. Ct. 2218, 2232-33 (1998).

government bound by the privilege may compel a witness's testimony so long as neither it, nor another government bound by the privilege, can use the testimony against the witness. This view is inadequate for two reasons. First, it fails to recognize that the Fifth Amendment violation occurs *at the moment that the witness faces* the "cruel trilemma."²⁹³ Second, it fails to appreciate that the witness faces the trilemma whenever he must choose between self-incrimination, perjury, and contempt, regardless of where his eventual prosecution will occur. As such, the *Balsys* rule neither protects the individual's dignitary right not to have to choose between participating in his own conviction or facing a sanction, nor prevents the government from abusing its power.

The majority declined to locate such wide-ranging purposes in the Fifth Amendment, preferring to characterize the Amendment mainly as a device whose primary purpose is to check a rather narrow range of domestic governmental abuses.²⁹⁴ The majority rejected the argument that the privilege was intended to safeguard global dignitary rights.²⁹⁵ It argued that the Fifth Amendment jurisprudence does not support the argument that the Amendment was meant to protect an inviolable enclave of privacy because it has always allowed the compulsion of testimony when a grant of immunity was made; that is, it has always allowed the government to trade the individual's right to remain silent for a grant of immunity.²⁹⁶ However, the individual right advanced by the amendment is not a right to testimonial privacy per se, but rather a right not to be subjected to the "cruel trilemma," or a right not to face the choice between conviction by one's silence or by one's own words. This

²⁹³ See generally *Pennsylvania v. Muniz*, 496 U.S. 582, 595-97 (1990); *South Dakota v. Neville*, 459 U.S. 553, 561-64 (1983). But see Randall D. Guynn, Note, *The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in a Foreign Country's Court*, 69 VA. L. REV. 875, 876-77 (1983) (arguing that the Fifth Amendment privilege is limited by the requirement that it applies only when a Constitutionally proscribed use of the compelled testimony would likely follow, and that use by a foreign government is not a Constitutionally proscribed use).

²⁹⁴ *Balsys*, 118 S. Ct. at 2232-33.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

right is advanced by a grant of immunity that is truly coextensive with the privilege; such a grant of immunity effectively removes one horn of the "trilemma" by insuring that the accused cannot be convicted based upon his testimony. Therefore, pointing to the practice of exchanging testimony for immunity is not an argument against the claim that the essential purpose of the Amendment is to protect a fundamental dignitary right.²⁹⁷

In addition, while the majority acknowledged that a central purpose of the Fifth Amendment is to protect against governmental abuses in extracting self-incriminating testimony, its adherence to the same sovereign rule led it to disregard the serious potential for such abuses in the context of current international law enforcement efforts.²⁹⁸ In particular, the majority sets the bar too high in determining when "cooperative internationalism" becomes a Fifth Amendment concern. The majority's rather formalistic adherence to the "same sovereign" rule leads it to conclude that cooperative internationalism can only raise Fifth Amendment concerns when the cooperation is so extensive that the federal government becomes a bona fide co-prosecutor of the defendant (that is, when the United States and a foreign sovereign share substantially similar criminal codes and collaborate extensively in enforcing those laws.)²⁹⁹ However, as the Second Circuit noted, the current level of cooperation between the United States and foreign governments, while perhaps falling short of the majority's rather extreme standard, raises legitimate Fifth Amendment concerns.³⁰⁰ The United States currently has a strong interest in assisting the

²⁹⁷ Moreover, while the majority is right to note that the privacy of a witness's testimony is not "inviolable" under Fifth Amendment jurisprudence, there arguably remains an important sense in which the Amendment protects an "inviolable" privacy right. It is not a personal right to testimonial privacy per se that is "inviolable;" rather, it is a right having to do with the state-individual relation that is "inviolable." The right of the witness to withhold the testimony may be exchanged for immunity; however, the right not to be put in the "cruel trilemma" cannot be exchanged for anything. In other words, the state can permissibly compel testimony (via a grant of immunity), but it cannot permissibly compel *self-incriminating* testimony.

²⁹⁸ *Balsys*, 118 S. Ct. at 2234-35.

²⁹⁹ *Id.* at 2235.

³⁰⁰ *United States v. Balsys*, 119 F.3d 122, 130-31 (2nd Cir. 1997). See also Amman, *supra* note 279, at 1275-76.

prosecutorial efforts of many foreign countries, and as such, it has a strong incentive to abuse its power by coercing a witness's testimony. It is precisely this sort of "prosecution hunger"—along with its tendency to motivate coercive abuses—that the privilege seeks to hold in check.

C. ALLOWING A WITNESS TO INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION WHEN HE HAS A REASONABLE FEAR OF FOREIGN PROSECUTION WOULD NOT UPSET THE STATE-INDIVIDUAL BALANCE.

The *Balsys* majority asserted that allowing *Balsys* to invoke the privilege for fear of foreign prosecution would upset the balance between the interests of the government and those of the individual which the Fifth Amendment jurisprudence seeks to preserve.³⁰¹ In *Kastigar v. United States*³⁰² the Court noted that courts have long allowed the government to exchange the privilege for a grant of immunity which provides the witness with protections that are fully co-extensive with those guaranteed by the privilege, and that such a practice preserves the important balance between state and individual interests.³⁰³ The *Balsys* majority contended that allowing *Balsys* to claim the privilege would upset the state-individual balance by making it impossible for the government to trade immunity for important testimony, as it could not guarantee use and derivative use immunity in a foreign court.³⁰⁴ This does not protect the government's interest in obtaining testimony, and opens the door for abuses of the system by both foreign criminals and foreign governments in ways that would be an affront to United States sovereignty.³⁰⁵

However, there are pragmatic alternatives to domestic immunity statutes in the international context. For example, the United States government could grant "constructive immunity" by keeping compelled testimony under seal, by refusing to provide certified copies of the testimony to the prosecuting foreign

³⁰¹ *Balsys*, 118 S. Ct. at 2232.

³⁰² 406 U.S. 441 (1972).

³⁰³ *Id.* at 445-47.

³⁰⁴ *Balsys*, 118 S. Ct. at 2232.

³⁰⁵ *Id.* at 2236 (Stevens, J., concurring); see also Gynn, *supra* note 293 at 898-900 (1983).

government, by obtaining a promise from the foreign government not to use the compelled testimony, or by declining to extradite the witness to the foreign country seeking to prosecute him.³⁰⁶

Moreover, neither *Kastigar* nor any other Supreme Court case holds that a witness's privilege against self-incrimination depends upon the government's ability to obtain his testimony via a grant of immunity. *Kastigar* stated that immunity statutes have traditionally been upheld to protect government interests in obtaining important testimony, and that they are an effort to balance state and individual interests.³⁰⁷ However, it requires an additional leap of logic to claim that if such immunity cannot be granted, then the government interest prevails and the individual can be compelled to testify. No case has upheld the government's right to compel self-incriminating testimony from a defendant in the absence of a grant of immunity that is truly co-extensive with the right granted to the individual under the amendment. Moreover, no case has held that the government's interest in obtaining the testimony outweighs the individual's interest in not being forced to participate in his own prosecution by providing self-incriminating testimony.³⁰⁸ The Fifth Amendment jurisprudence does not rule that the Constitutional privilege against self-incrimination must bend to practical considerations. The *Balsys* majority simply assumes all of these premises, but one might equally well assume that *Kastigar* and other precedents stand for the proposition that if the government does not have the power to grant an immunity from future prosecution that is co-extensive with the privilege granted by the amendment, then it does not have the Constitutional authority to compel the witness's testimony.

None of this is meant to suggest that the government can never compel the testimony of someone who reasonably fears

³⁰⁶ See, e.g., *Balsys*, 118 S. Ct. at 2245 (Breyer, J., dissenting).

³⁰⁷ *Kastigar*, 406 U.S. at 445-47.

³⁰⁸ *Kastigar* says only that allowing states to compel testimony under a proper immunity grant is a good balance because it allows the government to get the testimony while simultaneously safeguarding the individual right as effectively as would his silence; such grants of immunity take away the very threat that the Fifth Amendment was designed to eliminate. *Id.* at 458-59.

self-incrimination in a foreign country. On the contrary, it can do so if, following *Kastigar*, it can somehow grant the equivalent of use and derivative use immunity. Nor must the government prevent the foreign prosecution from occurring or, for that matter, prevent the defendant's extradition to the foreign country seeking to prosecute him. It must only seek to insure, if it does compel his testimony, that neither the testimony nor its fruits are used in the foreign prosecution.

Another important point bears mentioning. The Supreme Court has recognized that another purpose of the privilege is to secure the reliability of testimony and thereby to promote effective law enforcement.³⁰⁹ Failing to extend the privilege to cases involving a legitimate fear of foreign prosecution would undercut this goal as well. Witnesses facing foreign prosecution for serious offenses might often opt to remain silent and face contempt charges or to perjure themselves rather than provide accurate testimony which would incriminate them abroad. This seems particularly likely if the United States will deport or extradite the defendant, as in *Balsys's* case.

VI. CONCLUSION

In *United States v. Balsys*,³¹⁰ the majority misinterpreted *Murphy v. Waterfront Commission*³¹¹ and, without clearly overruling it, re-introduced an interpretation of the self-incrimination clause that *Murphy* had explicitly rejected. *Murphy* did not see its holding as merely a necessary consequence of *Malloy* which was consistent with the "same sovereign" interpretation of the privilege. Rather, the *Murphy* decision was premised primarily upon a recognition of certain historical purposes underlying the privilege, and upon an analysis of precedent which explicitly rejected the same sovereign interpretation. A proper reading of *Murphy* and of other precedents favors the view that the protections against self-incrimination embodied in the Fifth Amendment were

³⁰⁹ See, e.g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (noting "our distrust of self-deprecatory statements").

³¹⁰ 118 S. Ct. 2218 (1998).

³¹¹ 378 U.S. 52 (1964).

meant to apply to cases wherein the threat of prosecution comes from a foreign jurisdiction.

In refusing to allow *Balsys* to invoke the privilege, the Court failed to implement some essential policies behind the privilege. Most notably, the Court's holding fails to recognize that a central purpose behind the amendment is preventing the government from using its power to place a witness into the "cruel trilemma" of self-accusation, perjury, or contempt. This policy seeks both to prevent governmental abuses and to protect the dignitary rights of the individual. By rigidly adhering to the "same sovereign" view, the Court was forced to interpret the privilege in an unduly narrow manner which was unresponsive to both the governmental and the personal applications of the privilege.

The Court claimed that allowing *Balsys* to invoke the privilege would upset the balance between governmental and private interests which is preserved by allowing the government to exchange a witness's right to silence with a grant of immunity. However, Fifth Amendment jurisprudence does not support the claim that when such immunity cannot be granted, the witness's privilege must yield to the government's interest in obtaining his testimony. In addition, some workable, practical equivalents to domestic immunity statutes might be developed which would eliminate the problem and preserve the government-individual balance.

Steven J. Winger