St. John's Law Review

Volume 73
Number 2 *Volume 73, Spring 1999, Number 2*

Article 8

March 2012

United States v. Balsys: Denying a Suspected War Criminal the Privilege Against Self-Incrimination

Erin Kelly Regan

UNITED STATES V. BALSYS: DENYING A SUSPECTED WAR CRIMINAL THE PRIVILEGE AGAINST SELF-INCRIMINATION

When James Madison introduced the Bill of Rights[1] at the first meeting of the newly formed United States Congress,[2] he explained that the amendments were "intended to 'limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.' "[3] Accordingly, the Fifth Amendment[4] ensures certain individual rights by restricting the government's powers.[5] Although the Fifth Amendment's Self-

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[1] U.S. CONST. amends. I–X.

[2] *See* Wayne R. Gross, Note, *Erosion of the Fifth Amendment Through the Use of Defense Counsel as Witness*, 39 HASTINGS L.J. 927, 928 n.6 (1988) (stating "Madison . . . in accordance with the demands of the states which were otherwise reluctant to ratify the Constitution, introduced the amendments to the Constitution embodying the Bill of Rights as soon as the First Congress met") (citing C. WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 82–83 (1925)).

[3] Gross, *supra* note 2, at 928 (quoting 1 ANNALS OF CONG. 437 (Joseph Gales ed., 1789)); *see also* Williams v. Florida, 399 U.S. 78, 111–12 (1970) (stating "[t]he Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials") (Black, J., concurring in part and dissenting in part). For a general review of the history of the Bill of Rights, see Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261 (1989).

[4] The Fifth Amendment states:

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

U.S. CONST. amend. V.

[5] *See* Gross, *supra* note 2, at 929; *see also* Diego A. Rotsztain, Note, *The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution*, 96 COLUM. L. REV. 1940, 1959 (1996) (noting the Fifth Amendment has been inter-

Incrimination Clause appears straightforward in stating "[n]o person . . . shall be compelled in any criminal case to be a witness against himself,"[6] the clause has confounded commentators[7] and courts[8] alike. Specifically, two circuit courts recently split on the issue of whether the privilege[9] is available to a witness in a United States proceeding who fears his compelled testimony will incriminate him in a foreign prosecution.[10] In *United States v.*

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preted "as a right against governmental overreaching").

[6] U.S. CONST. amend. V.; *see also* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (stating the Fifth "Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings").

[7] *See, e.g.*, Akhil Reed Amar and Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857 (1995) (concluding "[t]he Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights").

[8] For example, there has been disagreement within the Supreme Court and the Eleventh Circuit regarding whether the self-incrimination clause provides protection to a witness facing prosecution by a sovereign other than the one compelling the testimony. *Compare* United States v. Balsys, 118 S. Ct. 2218, 2224–30 (1998) (reviewing the Supreme Court's precedent regarding the self-incrimination clause and concluding the "same sovereign" analysis is correct), *with id.* at 2237–42 (Breyer J., dissenting) (concluding the "same sovereign" rule had been abolished by the Court's precedent); *compare* United States v. Gecas, 120 F.3d 1419, 1457 (11th Cir. 1997) (supporting the same jurisdiction analysis), *with id.* at 1482 (Birch, J., dissenting) ("One can hardly believe that our Founders would have formulated a fundamental right which could be exercised on American soil under the American Constitution and which could not be abridged by an American government but which could be abridged for the benefit of a foreign government or monarch.") (quoting Moses v. Allard, 779 F. Supp. 857, 874 n.24 (E.D. Mich. 1991)).

[9] Throughout this Comment, the term "privilege" will refer to the privilege against self-incrimination.

[10] *Compare* United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997) (holding the privilege is not available to a witness facing fear of foreign prosecution) *with* United States v. Balsys, 119 F.3d 122 (2d Cir. 1997) (holding the privilege is available to a witness facing fear of foreign prosecution), *rev'd*, 118 S. Ct. 2218 (1998).

The situation in *Gecas* is remarkably similar to that in *Balsys*. Like Balsys, Gecas is a resident alien from Lithuania. *See Gecas*, 120 F.3d at 1422. Gecas was subpoenaed by the Office of Special Investigations regarding allegations that he "persecut[ed] . . . persons because of their race, religion, or political opinion during World War II." *Id.* If the allegations were true, Gecas would be deportable under 8 U.S.C. § 1251(a)(4)(D) (1994). *See id.* at 1422. Gecas invoked the privilege against self-incrimination and refused to testify after he provided his name and current address. *See id.* at 1423. An Eleventh Circuit panel originally reversed the district court's decision and held the privilege was applicable to Gecas. *See* United States v. Gecas, 50 F.3d 1549, 1567 (11th Cir. 1995), *aff'g in part and rev'd in part*, 830 F. Supp 1403 (N.D. Fla. 1993), *vacated*, 81 F.3d 1032 (11th Cir. 1996), *reh'g en banc*,

Balsys,[11] the United States Supreme Court resolved this question. The Supreme Court held that a resident alien with a "real and substantial"[12] fear of foreign prosecution could not invoke the privilege, because it was "beyond the scope of the Self-Incrimination Clause."[13]

Aloyzas Balsys is a resident alien who immigrated to the United States in 1961.[14] On his visa application, Balsys reported that he was a member of the Lithuanian army from 1934 through 1940 and that he had been "in hiding" in Lithuania from 1940 until 1944.[15] He swore that the information he provided was true.[16] The Office of Special Investigations (OSI)[17] suspected that Balsys had been involved in Nazi persecution during World War II,[18] which, if correct, would subject him to deportation.[19]

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120 F.3d 1419 (11th Cir. 1997). That decision was thereafter vacated. *See Gecas*, 120 F.3d 1419.

For a review of how the issue has divided the circuits and district courts, see Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1227–35 (1998); Daniel J. Lindsay, Comment, *Tied Up by a "Gordian Knot"*: United States v. Gecas's *Rejection of the Privilege Against Self-Incrimination in Cases of Foreign Prosecution*, 82 MINN. L. REV. 1297, 1306–11 (1998); Jonas Packer, Recent Development, United States v. Gecas: *Eroding the Protection of the Fifth Amendment's Self-Incrimination Clause*, 6 TUL. J. INT'L & COMP. L. 651, 654–59 (1998).

[11] 118 S. Ct. 2218 (1998).

[12] *Id.* at 2221; *see also infra* notes 121–27 and accompanying text (discussing factual requirement of real and substantial fear, a previously established prerequisite to implication of the constitutional question of law resolved in *Balsys*).

[13] *Balsys*, 118 S. Ct. at 2221.

[14] *See id.*

[15] *Id.*

[16] *See id.* "Balsys's visa application stated . . . : [']I understand that any willfully false or misleading statement or willful concealment of a material fact . . . may subject me to permanent exclusion from the United States and, if I am admitted to the United States, may subject me to criminal prosecution and/or deportation.[']" United States v. Balsys, 918 F. Supp. 588, 591 n.2 (E.D.N.Y. 1996), *vacated*, 119 F.3d 122 (2d Cir. 1997), *rev'd*, 118 S. Ct. 2218 (1998).

[17] Placed within the Civil Division of the United States Department of Justice, OSI was created by Attorney General Benjamin R. Civiletti in 1979 to investigate and, if necessary, deport suspected Nazi war criminals. *See* Order of the Attorney General, No. 851-79, Sept. 4, 1979; *infra note* 106 (outlining OSI's mandate).

[18] *See Balsys*, 118 S. Ct. at 2221.

[19] *See id.* Balsys would be deportable under the Immigration and Nationality Act, 8 U.S.C. §§ 1182 (a)(3)(E)(i), and 1251(a)(4)(D). *See Balsys*, 118 S. Ct. at 2221. Section 1182 (a)(3)(E)(i) states:

> Participation in Nazi persecutions[—]
> Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

Balsys answered his subpoena and appeared at a deposition to give testimony; he refused to answer any questions other than providing his name and address.[20] In response to OSI's questions regarding his wartime activities[21] Balsys claimed his answers

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(I) the Nazi government of Germany,
(II) any government in any area occupied by the military forces of the Nazi government of Germany,
(III) any government established with the assistance or cooperation of the Nazi government of Germany, or
(IV) any government which was an ally of the Nazi government of Germany,
ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(3)(E)(i) (1994 & Supp. 1998). Section 1251 (a)(4)(D) states: "Any alien described in clause (i) or (ii) of section 1182(a)(3)(E) of this title is deportable." Immigration and Nationality Act, 8 U.S.C. § 1251 (a)(4)(D) (1994) (current version at 8 U.S.C.A. § 1227 (a)(4)(D) (1994 & Supp. 1998)).

Balsys could also be deported for lying on his visa application under §§ 1182(a)(6)(C)(i) and 1227(a)(1)(A). *See Balsys*, 118 S. Ct. at 2221. Section 1182(a)(6)(C)(i) states: "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States . . . is inadmissible." Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(6)(c)(i) (1994 & Supp. 1998). Section 1227 (a)(1)(A) provides that aliens who were inadmissible at time of entry may be deported. See Immigration and Nationality Act, 8 U.S.C. § 1227 (a)(1)(A) (1994).

[20] *See Balsys*, 118 S. Ct. at 2221.

[21] OSI's questions to Balsys included the following:

Q: Where were you when the Soviets occupied Lithuania in June of 1940, Mr. Balsys?
Q: Mr. Balsys, what did you do during the Soviet occupation of Lithuania?
Q: Mr. Balsys, where were you in June of 1941 when the Germans occupied Lithuania?
Q: What did you do during the German occupation of Lithuania?
Q: When did you join the Villiaus Saugumas?
Q: Who is the commanding officer of the Villiaus Saugumas?
Q: While you served in the Saugumas, did you work in the Communist and Jews section?
Q: Were you responsible for the arrest and imprisonment of Jews?
Q: While you served in the Villiaus Saugumas, did you work in the Polish section?
Q: Were you responsible for the arrest and imprisonment of Poles?
Q: During the time that you served in the Villiaus Saugumas, did you work in the investigations section?
Q: Did you turn prisoners over to the Special Detachment?
Q: At the time you applied to immigrate to the United States, why didn't you tell the U.S. Vice Consul in Liverpool that you had served in the Villiaus Saugumas?
Q: Were you afraid if you told the truth you would not be allowed to immi-

could incriminate him under Lithuanian, Israeli, and German law and invoked the Fifth Amendment privilege against self-incrimination.[22] OSI petitioned the district court to enforce the subpoena.[23] The district court found that Balsys in fact faced a substantial fear of prosecution in Lithuania and Israel as a result of his testimony to the OSI,[24] however, it granted OSI's petition and ordered Balsys to testify.[25] Balsys appealed to the Second Circuit, which reversed the district court's order and held that "the Fifth Amendment privilege against self-incrimination may be invoked by a witness who possesses a real and substantial fear of foreign prosecution."[26] The Supreme Court granted certiorari to resolve the issue.[27]

The majority[28] in *Balsys* began by looking at the plain lan-

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grate to the U.S.?

United States v. Balsys, 918 F. Supp. 588, 592–93 n.7 (E.D.N.Y. 1996) (citations omitted). The Villiaus Saugumas, referred to in OSI's questions, is the Lithuanian name for the Nazi-sponsored Lithuanian Security Police. According to OSI Director Eli M. Rosenbaum, the group "played a key role in the annihilation of more than 50,000 Jews in Vilnius." News Release, *Justice Department Moves to Revoke U.S. Citizenship of Former Member of Nazi-Backed Lithuanian Security Police*, Dep't of Justice 96-582 (Dec. 10, 1996), *available in* 1996 WL 710513.

[22] *See Balsys*, 118 S. Ct. at 2221.

[23] *See id.* at 2221; *Balsys*, 918 F. Supp. at 591.

[24] *See Balsys*, 918 F. Supp. at 595–96.

[25] *See id.* at 600. The court reasoned that allowing "Balsys to invoke the privilege would unreasonably impinge on the government's ability to monitor and verify immigration and visa applications." *Id.* at 599. The court viewed Balsys's claim as an effort to "thwart" domestic law. *Id.* As a result it held "that the Fifth Amendment privilege cannot be asserted by a witness who fears prosecution under the criminal laws of a foreign sovereign." *Id.* at 600.

[26] United States v. Balsys, 119 F.3d 122, 140 (2d Cir. 1997). The court did "not find a significant difference in the harm to governmental interests from granting the privilege to those who fear foreign prosecutions, and to those who fear domestic prosecution, because the reasons for allowing the privilege are similar in both situations." *Id. See infra* notes 86–95 (discussing policy reasons for allowing the privilege).

[27] *See Balsys*, 118 S. Ct. at 2222. Two months after the Second Circuit decided *Balsys*, the Eleventh Circuit, on rehearing en banc, vacated a panel's earlier decision (in a case with facts very similar to *Balsys*) that the privilege was available to a resident alien facing foreign prosecution. *See* United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997); *supra* note 10 (regarding split between the Second and Eleventh Circuits). The question had come to the Supreme Court once before in *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972). It was unnecessary for the Court to reach the issue, however, because it found the witness's fear of foreign prosecution was "remote and speculative." *Id.* at 478. *See infra* notes 121–27 (discussing what the witness must demonstrate before the issue will be addressed).

[28] Justice Souter wrote the opinion for the majority and was joined by Chief

guage of the Self-Incrimination Clause and determined that the question before the Court turned on whether the foreign prosecution Balsys feared fell within the ambit of the Fifth Amendment's "any criminal case."[29] Balsys and his amici had argued for a broad interpretation of "any" to include a criminal case in Lithuania or Israel.[30] The majority, however, interpreted "any" in the context of the other Fifth Amendment protections.[31] The majority noted that the privilege is surrounded by "guarantees of grand jury proceedings, defense against double jeopardy, due process, and compensation for property taking,"[32] all of which are implicated only by action of the United States government.[33] According to the majority, therefore, the privilege protects a witness who reasonably fears "prosecution by the government whose power the Clause limits, but not otherwise."[34] From this contex-

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Justice Rehnquist and Justices Stevens, O'Connor, and Kennedy. Justices Scalia and Thomas only joined Parts I, II, and III of the opinion. *See Balsys*, 118 S. Ct. at 2221. Parts IV and V, which Justices Scalia and Thomas did not join, discuss the policies of the privilege and the possibility of extending it to foreign prosecutions when a witness can demonstrate "cooperative prosecution." *Id.* at 2236. Justice Stevens concurred in a separate opinion, which emphasized that the privilege protects witnesses facing prosecution in an "American tribunal." *Id.* (Stevens, J., concurring). Justice Ginsburg dissented in a separate opinion, in which she wrote "the Fifth Amendment privilege . . . prescribes a rule of conduct generally to be followed by our Nation's officialdom." *Id.* at 2237 (Ginsburg, J., dissenting). Justice Breyer dissented in a separate opinion, in which Justice Ginsburg joined. Breyer's dissent will be discussed throughout this Comment. *See Balsys*, 118 S. Ct. at 2221.

[29] U.S. CONST. amend. V. *See Balsys*, 118 S. Ct. at 2222. Earlier in its review, the majority concluded that Balsys, as a resident alien, is a "person" for purposes of the privilege. *See id.* "It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment." Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953). Balsys's status as a resident alien, therefore, was not pertinent to the resolution of the issue before the Court. Similarly, there was no dispute that OSI was seeking to "compel" Balsys's testimony. *Balsys*, 118 S. Ct. at 2222.

[30] *See Balsys*, 118 S. Ct. at 2222–23 (noting Balsys's distinction between the narrow language in the Sixth Amendment and the broader language of the Fifth Amendment). "According to its plain terms, the Self-Incrimination Clause bars the government from compelling a person to be a witness against himself in 'any criminal case,' not merely—as the government would have it—in any *domestic* criminal case." Brief for National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers as Amici Curiae in Support of Respondent at 3, United States v. Balsys, 118 S. Ct. 2218 (1998) (No. 97-873).

[31] *See Balsys*, 118 S. Ct. at 2223 (noting the "cardinal rule to construe provisions in context").

[32] *Id.*

[33] *See id.*

[34] *Id. But see* Amann, *supra* note 10, at 1243–44 (noting that the Supreme Court

tual reading, the Court found support for a "same-sovereign" interpretation of the privilege.[35] Thus, the privilege would be applicable only when the same government compelling testimony also threatened prosecution.

The majority proceeded by undertaking a comprehensive review of Supreme Court precedent regarding the privilege.[36] The Court analogized the issue at hand to the early distinction between federal and state courts and concluded that the holding in *United States v. Murdock*[37]—"that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law"[38]—offered the proper view. As further support for this conclusion, the majority offered an alternative rationale for *Murphy v. Waterfront Commission of New York Harbor*,[39] which the dissent relied on to reject a same sovereign rule. The Court in *Murphy* stated "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."[40] According to the *Balsys* dissent, this statement pre-

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in *United States v. Gonzales*, 117 S. Ct. 1032, 1035 (1997), "gave the term 'any' in a statute its broad literal meaning" and suggesting that the Court should do the same when it decides the *Balsys* case).

[35] *See Balsys*, 118 S. Ct. at 2223. "The currently received understanding of the Bill of Rights . . . was expressed early on [by] Chief Justice Marshall's opinion for the Court[:] . . . the Constitution's 'limitations on power . . . are naturally, and, we think, necessarily applicable to the government created by the instrument.' " *Id.* at 2223–24 (quoting Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. 243, 247 (1833)).

[36] *See Balsys*, 118 S. Ct. at 2224–30. For commentators' reviews of the precedent, see Amann, *supra* note 10, at 1206–16; Rotsztain, *supra* note 5, at 1944–50.

[37] 290 U.S. 389 (1933).

[38] *Id.* at 396.

[39] 378 U.S. 52, 79 (1964) (holding "the privilege against self-incrimination protects a state witness against federal prosecution").

[40] *Murphy*, 378 U.S. at 77–78. "[T]he *Murphy* opinion sensibly recognized that if a witness could not assert the privilege in such circumstances, the witness could be 'whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to each.' " *Balsys*, 118 S. Ct. at 2227 (quoting *Murphy*, 378 U.S. at 55). The whipsawing is possible because the government is given the option of offering the witness prosecutorial immunity in exchange for a waiver of the privilege. *See Balsys* 118 S. Ct. at 2227. In *Malloy v. Hogan*, 378 U.S. 1 (1964), decided the same day as *Murphy*, the Court applied the Fourteenth Amendment's due process requirement to the Fifth Amendment's privilege, so that the states and the federal government were equally bound by the privilege. *See Malloy*, 378 U.S. at 3. After *Malloy*, it would be improper to al-

cluded one government from forcing testimony that would lead to prosecution by another.[41] The majority, however, argued the proper rationale for *Murphy* was the same theory on which *Murdock* rested—"the principle that the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt."[42] Essentially, according to the majority, *Murphy* was based "on the understanding that the state and federal jurisdictions were as one."[43] This characterization of *Murphy* precluded the dissent's argument that *Murphy* had abolished the "same sovereign" rule.[44]

The majority reviewed the policies of the privilege as explained in *Murphy*[45] and acknowledged that some might be "broad enough to encompass foreign prosecutions and accordingly . . . support a more expansive theory of the privilege than the *Murdock* understanding would allow."[46] Further, the majority conceded that the principles enunciated in *Murphy* supported the argument that extending the privilege to Balsys's situation would serve "the purpose of preventing government overreaching, which on anyone's view lies at the core of the Clause's pur-

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low a federal prosecutor to grant a witness immunity that would not be broad enough to encompass possible state prosecution as well, or vice versa. *See Balsys*, 118 S. Ct. at 2227. *Murphy* prevented this "whipsawing," therefore, by holding a "state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Murphy*, 378 U.S. at 79.

[41] *See Balsys*, 118 S. Ct. at 2237–38 (Breyer, J., dissenting).

[42] *Id.* at 2227–28.

[43] *Id.* at 2228; *see also id.* at 2230 (asserting that the *Murphy* rationale, which was based on its interpretation of English common law and discarded by the *Balsys* majority, had previously been proven "fatally flawed").

[44] *Id.* at 2238 (Breyer, J., dissenting). "It is often reasonable for a federal witness to fear state prosecution, and vice versa. Indeed, where testimony may incriminate and immunity has not been granted, it is so reasonable, that one can say, as a matter of law, that the privilege applies, across jurisdictions . . . ." *Id.*

[45] *See id.* at 2231–34; *see also Murphy*, 378 U.S. at 55.

[46] *Balsys*, 118 S. Ct. at 2231. After acknowledging the possibility of an expanded privilege, the court summarily rejected it. ("The adoption of . . . such . . . theory would, however, necessarily rest on *Murphy*'s reading of pre-constitutional common-law cases as support for . . . the expansive view of the Framer's intent, which we and the commentators since *Murphy* have found to be unsupported."); *id; see also id.* at 2230 n.11 (outlining courts' and commentators' questioning of the English common law as understood in *Murphy*).

poses."[47] Moreover, in dicta, the Court gave credence to the theory of " 'cooperative internationalism,' "[48] which the Second Circuit and the dissent propounded and analogized to the " ' cooperative federalism' " relied on by *Murphy*.[49] In the final analysis, however, the majority concluded that neither *Murphy*[50] nor the reality of Balsys's situation[51] would support the extension of the privilege based on the theory of cooperative internationalism. Lastly, the majority noted that if the scope of the privilege was widened to encompass Balsys's claim, the resulting burden on domestic law enforcement efforts would be too great.[52]

The dissent[53] argued that, under Supreme Court precedent and the recognized principles supporting the privilege, the Self-Incrimination Clause must encompass prosecution by a foreign tribunal when fear of such prosecution is substantial.[54] The dissent relied on the fact that the Court's precedent[55] demonstrated that the "the words 'any criminal case' [do not] limit application of the Clause to only *federal* criminal cases."[56] Indeed, the dis-

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[47] *Balsys*, 118 S. Ct. at 2233.

[48] *Id.* at 2234–35 (discussing the possibility of two countries working so closely together in law enforcement that the fear of foreign prosecution becomes "tantamount to fear of a criminal case brought by the Government itself"); *see also infra* notes 96–120 and accompanying text (discussing international cooperation in fighting crime).

[49] *See id.* at 2234; *see also id.* at 2243 (Breyer, J., dissenting) ("Indeed the analogy to *Murphy*'s observation about 'cooperative federalism,' in which state and federal governments wage a 'united front against many types of criminal activity,' is a powerful one. That is because, in the 30 years since *Murphy*, the United States has dramatically increased its level of cooperation with foreign governments to combat crime.") (citations omitted); United States v. Balsys, 119 F.3d 122, 130 (2d Cir. 1997) (describing increased collaboration in international law enforcement).

[50] *See Balsys*, 118 S. Ct. at 2233 (noting "Balsys invests *Murphy*'s 'cooperative federalism' with a significance unsupported by that opinion").

[51] *See id.* at 2236 (stating OSI's mandate and cooperative agreements requiring the United States to share evidence extracted from Balsys with Lithuania and Israel does not rise to the level of "cooperative prosecution").

[52] *See id.* at 2235.

[53] The dissent this Comment discusses is the one filed by Justice Breyer and joined by Justice Ginsburg. *See id.* at 2237; *see also supra* note 28.

[54] *See Balsys*, 118 S. Ct. at 2237 (Breyer, J., dissenting).

[55] Like the majority, the dissent primarily discussed *Murdock* and *Murphy* and their competing interpretations of the applicability of the privilege. *See id.* at 2237–42 (Breyer, J., dissenting). The major disagreement between *Murdock* and *Murphy* is whether or not the English common law and early American cases embodied the "same sovereign" rule. *See id.* at 2239–40.

[56] *Id.* at 2237 (Breyer, J., dissenting) (citing Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 77–78 (1964)).

sent argued, the Court's decision in *Murphy* compelled a conclusion that "any criminal case"[57] must include situations where "compelled testimony [could be used] in any . . . cross-jurisdictional circumstance."[58] Moreover, the dissent forcefully defended its interpretation of *Murphy*[59]—the rejection of the same sovereign rule—and challenged the majority's reading of *Murphy*.[60] Further, the dissent argued that *Murphy*'s rule had not been rendered unworkable,[61] nor had the "related principles of law . . . changed so much 'as to have robbed the old rule of significant application or justification.' "[62]

The dissent also relied on the purposes of the privilege to solidify its belief that the privilege must be extended to include compelled foreign incrimination.[63] The privilege "recognizes the unseemliness . . . created when a person must convict himself out of his own mouth;"[64] protects personal privacy "by discouraging prosecution for crimes of thought;"[65] reflects a fear of and desire to defend against "governmental 'overreaching;' "[66] and pre-

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[57] U.S. CONST. amend. V.

[58] *Balsys*, 118 S. Ct. at 2238 (Breyer, J., dissenting).

[59] *See id.* at 2238–39 (Breyer, J., dissenting) (outlining six reasons why the dissent's rationale is correct). First, according to the dissent, "*Murphy* holds that the 'constitutional privilege' itself, not that privilege together with principles of federalism, 'protects . . . a federal witness against incrimination under state . . . law.' " *Id.* at 2238 (omissions in original). Second, *Murphy* rejected *Murdock* because it did not correctly interpret common law history. *See id.* at 2239; *see also id.* at 2241 (noting that the majority's challenge of *Murphy*'s historical interpretation of English common law does not demonstrate where *Murphy* was wrong and that "[a]t worst, *Murphy* represents one possible reading of a history that is itself unclear"). Third, the *Murphy* opinion demonstrated that the privilege protected witnesses "from compelled testimony in the face of a realistic threat of prosecution by *any* sovereign." *Id.* at 2239. Fourth, the *Murphy* Court's catalogue of the privilege's purposes lead to the same understanding. *See id.* Next, *Murphy* rejected as incomplete the commentators' arguments for the " 'same sovereign' " rule. *Id.* Finally, nothing in the *Murphy* opinion, according to the *Balsys* dissent, could lead one to the conclusion that its rule is "prophylactic." *Id.*

[60] *See id.* at 2238 (asking what basis the majority had for its chosen rationale); *id.* at 2240 ("Where is *Murphy*'s error?"); *id.* ("Again, where is *Murphy*'s error?").

[61] *See id.* at 2241 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992)).

[62] *Balsys*, 118 S. Ct. at 2241 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989)).

[63] *See Balsys*, 118 S. Ct. at 2242.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 2243.

serves the " 'preference for an accusatorial rather than an inquisitorial system of criminal justice.' "[67] According to the dissent, all of these purposes would be well served by allowing the privilege to be utilized by a witness fearing foreign prosecution.[68]

The dissent was particularly compelled by the prevention of governmental overreaching[69] because of the United States' role in the possible foreign prosecution of Balsys.[70] After considering the mandate of the OSI[71] and the United States' specific agreement with Lithuania to cooperate in the prosecution of war criminals,[72] the dissent found "that the possibility of governmental abuses in cases like this one—where the United States has an admittedly keen interest in the later, foreign prosecution—is not totally speculative."[73]

The dissent concluded its argument by rejecting two policy arguments for not extending the privilege.[74] The first concern, "that prosecution by a different sovereign seems not quite as unfair as prosecution by the same sovereign,"[75] was dismissed by

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[67] *Id.* (quoting Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964)).

[68] *See Balsys*, 118 S. Ct. at 2244 (Breyer, J., dissenting).

[69] *See id.* at 2243 (Breyer, J., dissenting) ("This concern with governmental 'overreaching' would appear implicated as much when the foreseen prosecution is by another country as when it is by another domestic jurisdiction.... That is because ... the United States has dramatically increased its level of cooperation with foreign governments to combat crime.").

[70] *See id.* (Breyer, J., dissenting). *See infra* notes 106–14 and accompanying text (discussing OSI's stake in Balsys's prosecution).

[71] *See Balsys*, 118 S. Ct. at 2243; *infra* note 106 (outlining OSI's mandate).

[72] *See Balsys*, 118 S. Ct. at 2243; *infra* notes 111–12 and accompanying text (describing the Memorandum of Understanding between the United States and Lithuania).

[73] *Balsys*, 118 S. Ct. at 2243 (Breyer, J., dissenting) (citing Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993)). Demjanjuk, an alleged Nazi war criminal, petitioned for habeas corpus relief. The Sixth Circuit initially affirmed the district court's denial of his petition. After an Israeli court acquitted him of his alleged crimes, however, the Sixth Circuit reopened the case and granted the relief. The court found that OSI attorneys had acted in "reckless disregard for the truth" in withholding or ignoring unfavorable evidence. *Demjanjuk*, 10 F.3d at 354; *see also* Peter Worthington, *U.S.-Style 'Justice' Not Wanted Here*, TORONTO SUN, Dec. 19, 1997, at 15 (asserting "OSI's prosecution of... Demjanjuk was more like persecution – as horrendous an example of abuse of process and justice as can be found in any democracy").

[74] *See Balsys*, 118 S. Ct. at 2244–45 (Breyer, J., dissenting).

[75] *Id.* at 2244.

the dissent because the issue of fairness is only one of "degree."[76] Additionally, advances in international travel and communications capabilities make cooperation among countries now as prevalent as cooperation between federal and state governments and among the states had been at the time *Murphy* abrogated the same sovereign rule.[77] The second concern, that application of the privilege to Balsys's situation would hamper domestic law enforcement efforts, was similarly dismissed.[78] Finding this concern "overstated,"[79] the dissent answered it in three steps. First, the privilege would be applicable to foreign prosecutions only when the witness could demonstrate a real and substantial threat of such prosecution.[80] Moreover, domestic law enforcement officials would be deprived of evidence concerning only the foreign crime as "the witness would not be entitled to claim a general silence."[81] In reality, the dissent argued, "the Government would lose little information."[82] Finally, where the evidence protected by the "foreign application" of the privilege was absolutely necessary, the dissent proposed the possibility of immunity whereby the government would make the possibility of foreign prosecution unlikely.[83] Thereby dismissing the concerns, the dissent concluded they "should not stand in the way of constitutional principle[s]."[84]

Considering the majority's reliance on the "same sovereign" rule, its conclusion proscribing application of the Self-Incrimination Clause based on a witness's fear of foreign prosecution is entirely rational. Still, the majority acknowledged the significant role of international cooperation in law enforcement,

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[76] *Id.*

[77] *See id.*

[78] *See id.*

[79] *Id.*

[80] *See id.*; *see also* United States v. Balsys, 119 F.3d 122, 135 (2d Cir. 1997) (pointing out that very few witnesses can demonstrate the required fear).

[81] *Balsys*, 118 S. Ct. at 2245 (Breyer, J., dissenting). The dissent added that in a civil proceeding, such as the deportation proceeding in Balsys's situation, the government could argue that a negative inference should be drawn from the witness's silence. *See id.*

[82] *Id.*

[83] *See id.* (Breyer, J., dissenting). "At worst, granting *de facto* 'immunity' in this type of case would mean more potentially deportable criminal aliens will remain in the United States, just as today's immunity means more potentially imprisonable citizens remain at liberty." *Id.*

[84] *Id.*

thereby giving credence to the dissent's proposal that the privilege should be extended to prevent government overreaching when the United States has a significant stake in the foreign prosecution. While providing a polite nod to "cooperative internationalism," the majority failed to adequately evaluate and account for the United States' unique interest in foreign prosecution of Balsys.

This Comment suggests that the dissent's analysis of the issue—analogizing international cooperation to cooperation between the separate federal and state governments—properly accounts for the fact that government overreaching could be prevented only by recognizing that the United States' interest in seeing Balsys prosecuted rose to the level of "cooperative prosecution."[85] This Comment reviews the policies of the privilege, the current collaboration with international law enforcement by the United States, and the suggestion that domestic law enforcement will not be unjustly hampered in the infrequent situations in which the question arises. This discussion demonstrates that a case-by-case analysis for extending the Self-Incrimination Clause to include foreign application is the proper approach.

I. PRINCIPLES SUPPORTING THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

"By the early sixteenth century, the courts and Church of England had devised a latin phrase, '*Nemo tenetur prodere se ipsum*,' or, in English, No one should be required to accuse himself."[86] Incorporation of this principle into the Constitution has been called "one of the great landmarks in man's struggle to make himself civilized."[87] Although there is little legislative history on the Self-Incrimination Clause,[88] courts[89] and commenta-

[85] *Id.* at 2236.

[86] Scott Michael Solkoff, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 NOVA L. REV. 1441, 1444 n.16 (1993) (citing ERWIN N. GRISWOLD, THE 5TH AMENDMENT TODAY 2 (1955)).

[87] GRISWOLD, *supra* note 86, at 7; *see also* Miranda v. Arizona, 384 U.S. 436, 457–58 (1966) (stating "one of our Nation's most cherished principles [is] that the individual may not be compelled to incriminate himself").

[88] *See Balsys*, 118 S. Ct. at 2223 n.5 (noting lack of legislative history); *see also* United States v. Balsys, 119 F.3d 122, 129 (2d Cir. 1997) ("The origins and history of the Fifth Amendment are complex and controversial.").

[89] *See* United States v. Gecas, 120 F.3d 1419, 1435–57 (11th Cir. 1997) (providing an extensive historical review of the privilege); Williams v. Florida, 399

tors[90] have attempted to shed light on its controversial purpose and origins. The historical purpose may be called into question, but both the majority and dissent in *Balsys* relied on the same catalogue of policies behind the privilege presented by the *Murphy* Court.[91] The Court in *Murphy* stated:

> The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a pri-

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U.S. 78, 112 (1970) (Black, J., concurring in part and dissenting in part). The privilege provides the accused the "absolute, unqualified right to compel the state to investigate its own case, find its own witnesses, prove its own facts. The defendant has a fundamental right to remain silent, in effect challenging the State at every point to: 'Prove it!' " *Id.* For the *Murphy* Court's description of the policies behind the privilege see *infra* note 92 and accompanying text.

[90] *See generally* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self Incrimination*, 92 MICH. L. REV. 1086 (1994). Moglen suggests the privilege was not final approval "of a long-accepted 'fundamental right,' [rather it was a reflection] of the contentious prerevolutionary constitutional debate, in which North American advocates made sweeping and often antiquarian legal claims protecting or expanding their power to resist Imperial control." *Id.* at 1087; *see also* Solkoff, *supra* note 86, at 1444–48 (tracing the history of the Fifth Amendment privilege from the English Star Chamber to its constitutionalization).

> To encapsulate, the privilege against self-incrimination protects us from a recurrence of Star Chamber inquisition; from subjecting ourselves to a Hobson's choice of perjury, contempt, or self-incrimination; from the excess of State power; from invasions upon our solitude and right to be let alone; and from an inherent distrust for self-deprecatory statements.

Id. at 1448 (citations omitted); *see also* Brett Alan Fausett, Note, *Expanding the Self-Incrimination Clause to Persons in Fear of Foreign Prosecution*, 20 VAND. J. TRANSNAT'L L. 699, 701–02 (1987) (explaining there are two theories behind the purpose of the privilege—a systematically-based theory and an individual rights-based theory—and suggesting the Framer's intent was to systematically prevent government persecution). For a historical survey of the privilege, see *id.* at 702–03.

[91] *See Balsys*, 118 S. Ct. at 2231–33; *id.* at 2242–44 (Breyer, J., dissenting) (both discussing *Murphy*'s catalog of policies).

> vate life, our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.[92]

The list reflects two related general principles—safeguarding individual freedoms and preventing governmental abuse.[93] The courts hearing Balsys's case found the second purpose provided more support to his claim.[94] In sum, it seems apparent that the purpose of protecting a witness from government overreaching is a policy on which everyone can agree.[95]

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[92] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (internal citations omitted).

[93] *See* Amann, *supra* note 10, at 1221. For a compelling argument about the appropriateness of the personal autonomy purpose, in a case with facts and circumstances very similar to *Balsys*, see *Gecas*, 120 F.3d at 1483 (Birch, J., dissenting).

> Government prosecutors seek potentially incriminating evidence from a thirty-year resident alien who is suspected of war crimes perpetrated by the Nazi regime during World War II. The atrocities to which they would link him epitomize the depths to which humankind can descend and exemplify an absolute denial of human dignity. Yet, if the lessons from that tragic episode in history are to teach us anything it must be that the sanctity of the individual citizen must be cherished and protected relative to the power of his government—even the majority in a democratic society.
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> . . . Unless we are blind and deaf to the legacy of the holocaust, we must understand that the Fifth Amendment's prohibition against the government's intrusion into the inner sanctum of the individual citizen is no mere 'prophylactic rule' . . . . Rather, it is a right that acknowledges and ordains the sanctity of the individual, insures his dignity and reaffirms the American concept of a government of laws, where the government is subservient to the governed.

Id.

[94] *See Balsys*, 118 S. Ct. at 2233 ("*Murphy*'s policy catalog would provide support . . . for Balsys's argument that application of the privilege in situations like his would promote the purpose of preventing government overreaching . . . ."); *see also Balsys*, 119 F.3d at 129 (noting that the three categories of purposes of the privilege include advancing individual integrity and privacy, protecting individuals against a state's pursuit of its goals through excessive means, and promoting systematic values in our criminal justice system); United States v. Balsys, 918 F. Supp. 588, 599 (E.D.N.Y. 1996) (concluding that a "fundamental purpose of the privilege is to protect individuals against governmental overreaching"). The courts recognized the first purpose—that of protecting an individual's autonomy—but were split on its applicability to Balsys's claim. *Compare Balsys*, 118 S. Ct. at 2232 (stating "what we find in practice is not the protection of personal testimonial inviolability"), *with id.* at 2242 (Breyer, J., dissenting) (discussing the privilege's protection of personal privacy) *and Balsys*, 119 F.3d at 130 (arguing "[p]ermitting a witness to invoke the Fifth Amendment to avoid incriminating himself in a foreign criminal case works to protect the dignity and privacy of the individual").

[95] *See Balsys*, 118 S. Ct. at 2233 (stating that preventing government overreaching is "at the core" of the privilege in "anyone's view"); *see also*, Rotsztain, *supra*

II. "COOPERATIVE INTERNATIONALISM:" AN EXAMPLE OF GOVERNMENTAL OVERREACHING

Once it is established that the privilege against self-incrimination protects against governmental abuse, the question becomes: What constitutes such abuse? The Self-Incrimination Clause provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."[96] Thus, Balsys would be entitled to invoke the privilege if the testimony he was being asked to give OSI would be used against him in "any criminal case" brought by the federal or a state government.[97] The majority acknowledged that a certain level of cooperation between the United States and a foreign sovereign in a foreign prosecution could entitle the witness fearing such prosecution to invoke the Fifth Amendment privilege.[98] It conceded that "an argument could be made that the Fifth Amendment should apply . . . [if] the division of labor between evidence-gatherer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself."[99]

The Court in *Murphy* had defined "cooperative federalism" as the "Federal and State Governments . . . waging a united front against many types of criminal activity."[100] Indeed, "the Court suggested that the purpose of avoiding governmental abuse was best served by preventing states and the federal government from compelling testimony that might incriminate the witness in a court of another jurisdiction."[101] Just as federal and

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note 5, at 1942–43 (asserting that the privilege should not extend to foreign prosecution but acknowledging the protection the privilege provides against governmental abuse).

[96] U.S. CONST. amend. V.

[97] *Balsys*, 118 S. Ct. at 2222 (stating if "Balsys could demonstrate that any testimony he might give in the deportation investigation could be used in a criminal proceeding against him brought by the Government of either the United States or one of the States, he would be entitled to invoke the privilege"). There was no question that OSI was seeking to " 'compel' " Balsys's testimony. *Id.*

[98] *See id.* at 2235 ("This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood.").

[99] *Id.* at 2235.

[100] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 56 (1964).

[101] United States v. Balsys, 119 F.3d 122, 130 (2d Cir. 1997); *see also Murphy*, 378 U.S. at 56.

state governments cooperate,[102] so too are the United States and foreign countries collaborating to fight international crime.[103] In urging that the privilege against self-incrimination be extended to apply to foreign criminal cases, the dissent analogized this "cooperative internationalism" to *Murphy*'s "cooperative federalism."[104]

Although the majority believed that "cooperative federalism" alone did not decide the *Murphy* case,[105] the issue of "cooperative internationalism" should have decided *Balsys*. OSI was created specifically to detect, investigate, and take legal action against alleged Nazi war criminals residing in the United States.[106] In

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[102] For a discussion of modern global, federal, and state cooperation, see Alfred C. Aman, Jr., *The Globalizating State: A Future-Oriented Prospective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769 (1998).

[103] *See New MLAT Treaties Increase DOJ's Reach*, DOJ ALERT, Apr. 18, 1994 (noting "success in . . . high-priority campaign by the Justice and State Departments . . . to sign legal treaties with foreign nations compelling the mutual production of criminal evidence"); ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT (1993) (describing cooperation between United States and foreign law enforcement agencies); Amann *supra* note 10, at 1261–72 (reviewing various mechanisms of international law enforcement collaboration and noting the United States is "spearhead[ing] informal global cooperation"); M. Cherif Bassiouni, *Policy Considerations on Inter-State Cooperation in Criminal Matters*, 4 PACE Y.B. INT'L L. 123, 130 (1992) (discussing increased cooperation among national and international police agencies); Bruce Zagaris, *International Criminal and Enforcement Cooperation in the Americas in the Wake of Integration*, 3 SW. J.L. & TRADE AM. 1 (1996) (describing enforcement mechanisms).

[104] United States v. Balsys, 118 S. Ct. 2218, 2243 (1998) (Breyer, J., dissenting).

[105] *See Balsys*, 118 S. Ct. at 2233.

[106] Order of the Atty. Gen. 851–79 (Sept. 4, 1979).

The Office of Special Investigations shall:

> Review pending and new allegations that individuals, who prior to and during World War II, under the supervision or in association with the Nazi government of Germany, its allies, and other affiliated governments, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion; Investigate as appropriate, each allegation to determine whether there is sufficient evidence to file a complaint to revoke citizenship, support a show cause order to deport, or seek an indictment or any other judicial process against any such individuals; Maintain liaison with foreign prosecution, investigation and intelligence offices; Use appropriate Government agency resources and personnel for investigations, guidance, information and analysis; and Direct and coordinate the investigation, prosecution, and any other legal actions instituted in these cases with the Immigration and Naturalization Service, the Federal Bureau of Investigation, the United States Attorneys Offices, and other relevant Federal agencies.

its nineteen-year history, OSI has investigated over 300 alleged war criminals and deported 48 such persons.[107] It is mandated by law to receive[108] *and share*[109] evidence with foreign countries in fulfillment of its mission. In fact, OSI's history of disclosing information to other interested countries led the district court to conclude that Balsys faced a substantial threat of foreign prosecution.[110] Specifically, the Memorandum of Understanding Between the United States Department of Justice and the Office of the Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals[111] states:

> [T]he United States . . . agree[s] to provide . . . legal assistance concerning the prosecution of persons suspected of having committed war crimes in World War II in Lithuania and who are now residents of the United States—to facilitate the interview of witnesses, the conduct of other necessary activities, the collection of documentary materials and other information relevant to these investigations.[112]

Further, both Lithuania and Israel, the two countries in which the district court found Balsys faced a substantial threat of prosecution, have explicit laws criminalizing war crimes and genocide activities.[113] Balsys could have incriminated himself

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Id. at 3–4.

[107] *See U.S. Orders Expulsion of Former Nazi Prison Officer*, AGENCE FRANCE PRESSE, Nov. 4, 1998.

[108] *See* Kathleen Kenna, *U.S. Nazi-Hunters Relentless, No Lead is Too Slim to be Followed up by Office of Special Investigations*, TORONTO STAR, Nov. 2, 1997, at A13 (reporting "Germany . . . allowed OSI access to a list of 3,300 SS soldiers and their dependents living in the United States").

[109] United States v. Balsys, 918 F. Supp. 588, 595–96 (E.D.N.Y. 1996) (noting "OSI has entered into an agreement to provide evidence that it has gathered on suspected Nazi collaborators to Lithuania" and it had "shared with Israel incriminating evidence that it gathered on suspected Nazi collaborator Ivan Demjanjuk").

[110] *See id.* at 593–97 (applying relevant factors to determine if Balsys's fear of foreign prosecution was "real and substantial"); *infra* notes 121–26 and accompanying text (discussing real and substantial fear requirement).

[111] Signed Aug. 3, 1992, U.S.-Lithuania [hereinafter Memorandum of Understanding] (*noted in Balsys*, 118 S. Ct. at 2243 *and Balsys*, 918 F. Supp. at 595).

[112] *Balsys*, 918 F. Supp. at 595 (quoting Memorandum of Understanding) (alterations in original).

[113] *See id.* (referring to Lithuania's "Law Concerning Responsibility for Genocide of the People of Lithuania," for which there is no statute of limitations, and Israel's "Nazis and Nazi Collaborators (Punishment) Law," which applies extraterritorially and imposes the death penalty). Although the Court did not mention it, it is worth noting that the United States has a statute criminalizing genocide. *See* 18 U.S.C. § 1091(a) (1994), which states:

under statutes of both nations in response to OSI's questions.[114]

In considering the possibility of "cooperative internationalism," the majority in *Balsys* admitted it might be persuaded if the collaborating countries had "enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if . . . the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries."[115] Likewise, the majority conceded the outcome could be different upon a showing that "one nation [was] the agent of the other."[116]

While the cooperation between OSI and the nations of Lithuania and Israel may not have reached the formal level prescribed by the Court, it appears as if all the required elements are present. The United States has an interest in seeing Balsys prosecuted.[117] There can be little doubt that OSI's primary pur-

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. . . Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—

(1) kills members of that group;

(2) causes serious bodily injury to members of that group;

(3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;

(4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;

(5) imposes measures intended to prevent births within the group; or

(6) transfers by force children of the group to another group;

or attempts to do so, shall be punished as provided in subsection (b).

Further, Balsys's alleged war-time activity was the basis of the deportation action under § 1182. *See supra* note 19 (outlining statutory basis for deporting Balsys).

[114] *See Balsys*, 918 F. Supp. at 594–95.

[115] *Balsys*, 118 S. Ct. at 2235.

[116] *Id.* The Court did not explain what would constitute an agency relationship. In *Gecas*, however, the Eleventh Circuit described actions that would *not* constitute agency. *See United States v. Gecas*, 120 F.3d 1419, 1434 (11th Cir. 1997). Guatemalan officers were not agents of the U.S. Drug Enforcement Agency when they stopped and searched a boat after a tip from a DEA agent. *See id.* (citing United States v. Behety, 32 F.3d 503, 511 (11th Cir. 1994)). Similarly, Mexican police were not agents of the United States when they arrested defendants after receiving information from American police officers. *Id.* (citing Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965)). The relationship between the United States and Lithuania and Israel clearly came closer to forming an agency relationship than the two examples provided by the court in *Gecas*.

[117] During the argument before the Supreme Court, the United States said it "[c]ertainly" had an interest in seeing Balsys "prosecuted elsewhere." Later in the

tended to Balsys.[120]

III. EXTENDING THE PRIVILEGE WOULD NOT SUBSTANTIALLY HARM U.S. INTERESTS

Before invoking the privilege, a witness must demonstrate that he is "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."[121] The district court considered whether Balsys faced current or possible future foreign prosecution; whether his testimony would have furthered such prosecution; and the possibility that the testimony would be shared with other governments.[122] It found that Balsys in fact faced a "real and substantial" fear of foreign prosecution.[123] Bal-

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[120] *See* United States v. Balsys, 119 F.3d 122, 132 (2d Cir. 1997).

[121] Marchetti v. United States, 390 U.S. 39, 53 (1968). *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478 (1972) (stating reasonable fear is based on the possibility prospect of penal liability that is real and substantial and not merely "remote and speculative possibilities").

[122] *See* United States v. Balsys, 918 F. Supp. 588, 592 (E.D.N.Y. 1996) (quoting *In re* Grand Jury Subpoena of Flanagan, 691 F.2d 116, 121 (2d Cir. 1982)).

[123] *Balsys*, 918 F. Supp. at 597. The court stated it would have to review relevant foreign statutes to determine if Balsys's fear of foreign prosecution was reasonable. *See id.* at 592–93. The court first examined Lithuania's criminal statute "punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II." *Id.* at 593. The statute is retroactive, does not have a statute of limitations, and provides for punishment as harsh as the death penalty. *See id.* at 593–94. Further, Lithuania formed a commission in 1992 to investigate crimes against its people during World War II. *See id.* at 594. The commission authorized the Lithuanian government to "enter into agreements with the United States, Israel and other states 'for judicial assistance in cases involving the investigation of crimes of genocide.' " *Id.* The court easily concluded that Balsys faced a true threat in Lithuania. *See id.* The court next reviewed the possibility of a prosecution in Germany. *See id.* Although Germany has a murder law and has prosecuted people suspected of "crimes against Jewish people under this statute," it was not clear to the court that Balsys, a non-German, could be prosecuted. *Id.* Third, the court looked at the threat facing Balsys from Israel. *See id.* Israel has a "Nazis and Nazi Collaborators (Punishment) Law, [which] applies extraterritorially and imposes the death penalty" in certain situations. *Id.* As a result, the court concluded Balsys could incriminate himself under Israeli law. *See id.* at 594–95.

Next the court had to determine the likelihood that the information gathered by OSI would be shared with Lithuania and Israel. *See id.* at 595. In light of OSI's mandate and the Memorandum of Understanding between Lithuania and the United States to share information about suspected war criminals, the court concluded the evidence would be shared with Lithuania. *See id.* at 595–96. Further, although OSI and Israel did not have a specific agreement, OSI has shared information about suspected war criminals with Israel in the past. *See id.* at 596 (referring to evidence gathered on Demjanjuk, whose case is discussed in *supra* note 73). The court concluded, therefore, that "OSI would in all probability disclose Balsys's testimony to Israel." *Id.*

sys was the exception, however.[124] In the past, most witnesses have been unable to pass the real and substantial fear test.[125] If the privilege were available to Balsys and those similarly situated, most witnesses still would not overcome the hurdle, and "the class of witnesses who are likely to be eligible for the privilege [would remain] . . . very limited."[126] Indeed, Balsys most likely overcame the hurdle primarily because of the particularly strong international collaboration against him.[127]

The majority in *Balsys* expressed concern regarding the effect on domestic law enforcement efforts if the privilege did include foreign prosecutions.[128] Yet, "a constitutional privilege does

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Finally, the court considered the possibility of Balsys being extradited from the United States to a country interested in prosecuting him, and found that "Balsys face[d] a 'real and substantial' danger of prosecution by Lithuania and Israel." *Id.* at 597. The court reasoned that Balsys was subject to deportation because of his alleged war crimes. *See id.* His deportation would be considered "*de facto* extradition." *Id.* at 596. Balsys's right to choose which country he would be sent to would be subject to the discretion of the Attorney General. *See id.* Even if the Attorney General approved a country other than Lithuania, that country could reject Balsys because of his suspected war-time activities. *See id.* Thus rejected, Balsys would be sent to the country in which he is a citizen—Lithuania. *See id.*

[124] *See* United States v. Balsys, 118 S. Ct. 2218, 2244 (1998) (Breyer, J., dissenting) (stating the " 'foreign application' of the privilege would matter only in a case where an individual could not be prosecuted domestically but the threat of foreign prosecution is substantial"); United States v. Balsys, 119 F.3d 122, 135 (2d Cir. 1997) (noting the issue of applying the privilege to foreign prosecutions seldom arises because of the difficulty of demonstrating a real and substantial fear of such prosecution).

[125] *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478 (1972) (stating that it was unnecessary to resolve the question of whether the privilege extends to fear of foreign prosecution because the witness did not face a real and substantial threat of such prosecution); *Balsys*, 119 F.3d at 135 (noting the relatively few instances in which witnesses have managed to prove the required threat of foreign prosecution and the numerous cases in which the witness is unable to meet the standard); *In re* Grand Jury Witness Gilboe, 699 F.2d 71,78 (2d Cir. 1983) (finding it unnecessary to resolve the privilege issue because the witness's "fear of foreign prosecution was at best speculative and remote"); *In re* Grand Jury Subpoena of Flanagan, 691 F.2d 116, 124 (2d Cir. 1982) (finding the same). *But see* Rotsztain, *supra* note 5, at 1966–68 (discussing the inadequacy of the substantial fear test and arguing that unfamiliarity and occasional inability to determine applicable foreign law produces unpredictable results).

[126] *Balsys*, 119 F.3d at 135 (noting that only aliens are deportable and not every witness is an alien).

[127] *See supra* note 123 (reviewing the district court's finding that Balsys faced a real and substantial fear and demonstrating that the fear was real because of OSI's overall mandate and the United States' particular agreement with Lithuania).

[128] *See supra* note 52 and accompanying text; *see also* Comment, *Fear of Foreign Prosecution and the Fifth Amendment*, 58 IOWA L. REV. 1304, 1304 (1973) (noting the Fifth Amendment had been criticized as "an impediment to effective law en-

not disappear, nor even lose its normal vitality, simply because its use may hinder law enforcement activities. That is a consequence . . . that was originally and ever since deemed justified by the need to protect individual rights."[129] In the rare case in which the requisite fear is demonstrated, permitting the witness to use the privilege would not substantially deter law enforcement efforts.[130] First, a witness is not allowed "to maintain a general silence."[131] Moreover, a witness is only entitled to invoke the privilege when his responses "would in themselves support a conviction [or] . . . furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime."[132] Perhaps most important for the United States' interests in Balsys's situation, "an adverse inference may be drawn in civil cases when a witness invokes the privilege."[133] As a deportation hearing is a civil matter, a resident alien who invokes the privilege "takes a chance that he will create a negative inference that may be used in conjunction with other evidence to deport him."[134] Thus, if Balsys were allowed to use the privilege in this situation, the govern-

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forcement").

[129] *In re* Cardassi, 351 F. Supp. 1080, 1086 (D. Conn. 1972).

[130] *See Balsys*, 119 F.3d at 136. "[P]ermitting the privilege in such cases need not hamper the legitimate goals of the United States to a significantly greater degree than does invocation of the privilege in the face of domestic prosecution . . . ." *Id.* at 124. A commentator recently suggested that the limitation of the privilege will probably not even produce the desired testimony. *See* Recent Case, *Criminal Procedure—Fifth Amendment—Eleventh Circuit Holds that the Privilege Against Self-Incrimination Does Not Apply to the Possibility of Foreign Prosecution*, 111 HARV. L. REV. 1128, 1132 (1998) (suggesting a witness facing foreign prosecution might choose to be in contempt of an American court rather than incriminate himself). *But see* United States v. Balsys, 918 F. Supp. 588, 599–600 (E.D.N.Y. 1996) ("A contrary decision by this Court would allow individuals attempting to immigrate to the United States to misrepresent their personal histories and other relevant information in order to gain access to this country, leaving the government without recourse and seriously eroding domestic law enforcement.").

[131] *Balsys*, 119 F.3d at 136; *see* United States v. Balsys, 118 S. Ct. 2218, 2245 (1998) (Breyer, J., dissenting) (noting that "the witness would not be entitled to claim a general silence").

[132] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[133] *Balsys*, 119 F.3d at 136; *see also Balsys*, 118 S. Ct. at 2245 (Breyer, J., dissenting) (highlighting same point). Both cases cite to *Baxter v. Palmigiano*, 425 U.S. 308 (1976), in which the Supreme Court stated "that the Fifth Amendment does not forbid adverse inferences against parties to *civil* actions when they refuse to testify in response to probative evidence offered against them." *Id.* at 318 (emphasis added). " 'This is so, even though, as in *Baxter*, the government is a party to the action and would benefit from the drawing of the inference.' " *Balsys*, 119 F.3d at 136 (citations omitted).

[134] *Balsys*, 119 F.3d at 136.

ment's purpose of deporting an alleged war criminal could still be served "as long as there was independent evidence to support the negative inferences beyond the invocation of the privilege against self-incrimination."[135] Further, nothing would prevent OSI from sharing its non-compelled testimony with foreign nations.

CONCLUSION

In holding that the Self-Incrimination Clause is not available to a witness fearing foreign prosecution, the Supreme Court disregarded the policies underlying the Fifth Amendment, the precedent interpreting the privilege, the practical realities of modern day international law enforcement, and exaggerated the domestic costs of extending the privilege in certain situations. Further, although the Court paid lip service to international cooperation in law enforcement, it refused to recognize the extensive role OSI would play in the foreign prosecution of Balsys. Moreover, domestic interests would not be intolerably harmed by extension of the privilege—Balsys could still be deported and OSI could still share its evidence with other nations. The privilege ought to be applied to prevent government abuse in the rare situations where the witness can demonstrate a real and substantial threat of foreign prosecution and that the United States will play a significant role in not only the investigation of the crime but also the prosecution of the case.

Erin Kelly Regan

[135] United States v. Stelmokas, 100 F.3d 302, 311 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1847 (1997). *Stelmokas* concerned a denaturalization proceeding against an alleged Nazi collaborator. *See id.* In fact, Balsys eventually chose to leave the United States and return to Lithuania "rather than testify about his World War II activities." *Suspected Collaborator With Nazis Leaves U.S.*, N.Y. TIMES, May 31, 1999, at A 10.