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In re *Impounded*: When Will the Right Against Self-Incrimination Protect Witnesses from Foreign Prosecution?

I. Introduction

Though many think that their constitutional rights are inviolate, the Supreme Court has held in at least one case that certain rights do not apply to United States citizens on United States soil. In 1998, the Supreme Court decided that a man who immigrated to the United States nearly forty years ago should have no constitutional protection under the Fifth Amendment right to silence because he did not face criminal prosecution in this country. Because he could not invoke his right to silence, the man was required to testify about his activities during World War II in an extradition hearing. Should the constitutionally guaranteed right against self-incrimination protect United States citizens from foreign prosecution? In *United States v. Balsys*,[1] the Supreme Court concluded that it should not. While some people applaud the *Balsys* decision for its application to seventy- and eighty-year-old suspected (but not convicted) Nazi war criminals,[2] the decision also applies to ordinary American citizens. Because of the *Balsys* decision, federal or state governments can force any citizen to provide testimony in a United States court that could be used against him or her in a foreign jurisdiction.

Statutes providing for immunity allow the government to force a witness to testify by promising that the government will not use a witness's words against him or her in any future prosecution. Immunity, however, only bans the government from using the witness's testimony in criminal prosecution. Mr. Balsys faced the possibility, however, that his testimony, forced by a grant of immunity, could still be used against him in a foreign criminal prosecution. With the current trend toward increased cooperation between nations in law enforcement and criminal prosecution, knowingly allowing the use

1. 524 U.S. 666 (1998).

2. *See generally* Stacy Belisle, Note, United States v. Balsys*: The United States Supreme Court Takes a Stand to Maintain the Fifth Amendment's Integrity*, 77 U. DET. MERCY L. REV. 341 (2000).

of, or actively sharing, immunized witness testimony with foreign nations who plan on prosecuting the witness in a criminal court makes a mockery of the Fifth Amendment.

The likelihood of the *Balsys* decision remaining the final word on this issue is very slim. In a recent case, In re *Impounded*,[3] immunized witnesses before a New Jersey grand jury claimed that the *Balsys* decision created a test for recognizing when the Fifth Amendment right against self-incrimination could be invoked for fear of criminal prosecution in a foreign country. While the New Jersey court could immunize the witnesses from prosecution in the United States, granting such immunity would not have protected the witnesses from prosecution in a foreign country. The Court of Appeals for the Third Circuit held that *Balsys* did not create a test, or, even if *Balsys* did create a test, the witnesses did not prove all of the test's necessary elements. While the facts underlying In re *Impounded* did not support the witnesses' argument for an exception to *Balsys*, an exception should be found to protect witnesses who are forced to testify, have a real fear of foreign prosecution, and whose testimony is made available to foreign authorities as a result of actions by the United States government. The rights contained in the Constitution must be protected to guarantee the purposes for which they were given—to protect individuals from governmental abuses of power.

This Note describes the *Balsys* exception test, examines the elements of the test to determine when the exception applies, and suggests some refinements. Part II of this Note will examine the historical background that serves as a foundation to the *Balsys* decision, including early Supreme Court cases discussing the applicability of Fifth Amendment rights in state and federal courts. Part III will examine the Third Circuit decision in In re *Impounded* and the arguments made by that court against the application of the *Balsys* exception. Part IV will argue that the Supreme Court did, in fact, create an exception to the general rule that witnesses fearing foreign prosecution cannot invoke Fifth Amendment privileges in its *Balsys* decision and will suggest the appropriate factors to be considered in future attempts to invoke the *Balsys* exception. Finally, Part V will conclude that the witnesses in In re *Impounded* did not adequately demonstrate the factors required to invoke the *Balsys* exception; ho-

3. 178 F.3d 150 (3d Cir. 1999).

however, that "another day"[4] will come when the facts will be ripe for the extension of constitutional protection to those who face foreign criminal prosecution. With increasing cooperation between foreign countries, how long will it take the Supreme Court to successfully apply the *Balsys* exception test? It is not a question of "if" but "when."

II. HISTORICAL BACKGROUND AND THE *BALSYS* DECISION

Less than a hundred years ago, the Supreme Court struggled to decide whether a person's incriminating testimony given in a state court could be used as evidence to convict in a federal court. At first the Court determined that the Constitution could not prohibit the use of immunized testimony obtained in a state court from being used in a federal court.[5] Thirty-two years later, however, the Court reversed its *United States v. Murdock* decision in *Murphy v. Waterfront Commission*.[6] In *Murphy,* the Court held that the Fifth Amendment protects witnesses against the use of their self-incriminating state court testimony in federal court. In the *Balsys* opinion, the Court reviewed *Murdock* and *Murphy* and found that the *Murdock* arguments, although overturned by *Murphy*, provided the logic necessary to justify its decision to force Mr. Balsys to testify, even though his words could, and probably would,[7] be used against him in a foreign criminal prosecution.

To show how the Supreme Court evolved between its *Murdock* and *Balsys* decisions*,* this section provides the background leading up to the various cases that guide the Court's current self-incrimination jurisprudence. A brief introduction to the Self-Incrimination Clause and the statutory grant of immunity shows the tension between the rights of the people to protect themselves and the desire of the state to prosecute crime. Next, a discussion of the *Murdock* holding illustrates how the seed for the *Balsys* decision was planted. Third, because of changes in criminal prosecution techniques and the increasing collusion between state and federal police forces, several cases

4. *Balsys*, 524 U.S. at 699.

5. *See generally* United States v. Murdock, 284 U.S. 141 (1931); Feldman v. United States, 322 U.S. 487 (1944); Knapp v. Schweitzer, 357 U.S. 371 (1958).

6. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

7. The government did not challenge the reasonableness of Balsys' fear, which means the fear was probably justified. *See Balsys*, 524 U.S. at 672.

weakened *Murdock* and brought about the *Murphy* decision. Fourth, this section quickly reviews certain Supreme Court cases involving the fear of foreign prosecution that led to the *Balsys* decision. Finally, this section discusses the *Balsys* decision and examines the possible exception test language written by Justice Souter.

A. Development of Fifth Amendment Jurisprudence: Self-Incrimination and Immunity

The Fifth Amendment of the United States Constitution contains the Self-Incrimination Clause. This clause states that no person "shall be compelled in any criminal case to be a witness against himself."[8] Until 1964, the Fifth Amendment could only protect a witness in federal court from being forced to give self-incriminating testimony that could be used against him in a later federal prosecution.[9] Because prosecutors needed to elicit testimony from uncooperative witnesses, courts allowed grants of immunization. The Supreme Court has held that a prosecutor can choose whether to exchange immunity for the testimony, but, once immunity has been given the prosecution can compel or force the witness to give testimony despite the witness's objection.[10] Because the government can compel a witness to testify by offering immunity, witnesses forced to testify in the United States can have that testimony used against them in a foreign jurisdiction. Despite this possibility, the Supreme Court has not allowed a witness to seek protection under the Fifth Amendment in these cases. Instead, the *Balsys* decision allows federal prosecutors to coerce witness testimony without taking into consideration the real consequences to the witness, leaving the witness no refuge from foreign prosecution.

B. United States v. Murdock *and the Self-Incrimination Clause*

In *United States v. Murdock,*[11] the Supreme Court specifically held that a federal court could compel a witness to testify, even when the Fifth Amendment right against self-incrimination has been invoked. The Supreme Court in *Murdock* faced the question of

8. U.S. CONST. amend. V.

9. *See generally* United States v. Murdock, 284 U.S. 141 (1931); Feldman v. United States, 322 U.S. 487 (1944); Knapp v. Schweitzer, 357 U.S. 371 (1958).

10. *See* Kastigar v. United States, 406 U.S. 441 (1972).

11. 284 U.S. 141 (1931).

whether a witness in federal court could invoke the Fifth Amendment for fear of prosecution in a state court. Mr. Murdock was indicted for refusing to answer questions posed to him by an agent of the Internal Revenue Bureau regarding deductions on his individual federal income tax returns for 1927 and 1928.[12] Explaining his refusal, Murdock claimed that the information requested "would have compelled him to become a witness against himself in violation of the Fifth Amendment,"[13] incriminating himself under state law.[14] The Supreme Court determined that, since "the investigation was under federal law in respect of federal matters," it should "not be prevented by matters depending upon state law."[15] In other words, a federal court could compel Murdock to testify even though that testimony could later be used against him in a state criminal prosecution.

Creating the distinction between federal and state matters, the Court relied upon "[t]he English rule of evidence against compulsory self-incrimination,"[16] which the Court concluded "does not protect witnesses against disclosing offenses in violation of the laws of another country."[17] The Supreme Court cited several English cases[18] as examples of the English rule that a witness could not refuse to testify for fear of foreign prosecution because the other jurisdiction could not reach him. The *Murdock* Court argued that since fed-

12. *See id.* at 146.

13. *Id.* at 147.

14. *See id.* at 148. In reality, Murdock's testimony would have only subjected him to prosecution under federal law not state law, but, as the Court noted, "This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him." *Id.* at 149. In addition, the Court also noted that the Fifth Amendment does not protect a witness compelled to give testimony by a state statute who might face federal prosecution. "[T]he lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute." *Id.*

15. *Id.* at 149.

16. *Id.*

17. *Id.*

18. King of the Two Sicilies v. Wilcox, 7 St. Tr. (N.S.) 1050, 61 Eng. Rep. 116 (V.C. 1851) (holding that defendants could not resist discovery of information that might lead to prosecution under the laws of Sicily because it would be impossible, if such a precedent was created, to determine whether a particular case might subject a defendant to prosecution in a foreign country and because the witnesses would have to enter the jurisdiction of the foreign country to become subject to that prosecution); Queen v. Boyes, 1 B. & S. 311, 74 Rev. Rep. 571 (1861) (holding that the witness's fear of being impeached by Parliament was too unfounded to warrant consideration).

eral and state courts have separate and distinct jurisdictions—like foreign countries—the possible repercussions in one should not excuse a witness from giving testimony in another. Therefore, a federal court could only grant immunity from prosecution in federal court and not from state prosecution.

C. Changes Led to Murphy v. Waterfront Commission

Though the Court intended *Murdock* to definitively address the issue, changing circumstances required a clarification of the scope of the holding. As better methods of communication and transportation developed during the first half of the twentieth century, the commission and also the prosecution of crimes adapted to these improving technologies. It became much easier for criminals to flee from state to state or to commit crimes across states. As crime took on an interstate nature, state agencies began to work more closely with each other and with federal agencies to prosecute crimes. Collusion between state and federal agencies made determining whether prosecutorial action was taken on behalf of state or federal officers more difficult. These changing prosecutorial methods led to the Court's decision to overturn *Murdock* in *Murphy.*

1. Some important cases leading up to Murphy

As the challengers of the *Murdock* decision became more numerous, the Supreme Court gradually eroded the foundation supporting its holding. In *Feldman v. United States*,[19] the Court dealt with the issue of "whether the Fifth Amendment prohibited the admission against Feldman upon his trial in a federal court of the earlier testimony given by him in the state courts."[20] Relying on *Murdock*, the Court held that "[t]he immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction."[21] According to Justice Black's dissent, the Court wanted to limit the Fifth Amendment "to the narrowest plausible limits."[22] Therefore, the majority found that, even though Mr. Feldman had received immunity for his testimony, immunity granted

19. 322 U.S. 487 (1944).
20. *Id*. at 489.
21. *Id*. at 493.
22. *Id*. at 496 (Black, J., dissenting).

by the state could not protect him from federal prosecution.[23] Justice Black also noted in his dissent that "[a]ncient evils historically associated with the possession of unqualified power to impose criminal punishment on individuals have a dangerous habit of reappearing when tried safeguards are removed."[24] Unfortunately, Justice Black's comment proved all too prophetic.

Nearly a decade later, the Court's resolution to uphold *Murdock* was again attacked. In *Knapp v. Schweitzer*,[25] a New York grand jury witness was held in contempt of court for refusing to testify, despite an immunity grant, because he feared federal prosecution after learning that the local United States Attorney had announced an intent to cooperate with the state district attorney. The Court feared that Knapp's challenge could "lead to the contention that when Congress enacts a statute carrying criminal sanctions it has as a practical matter withdrawn from the States their traditional power to investigate in aid of prosecuting conventional state crimes, some facts of which may be entangled in a federal offense."[26] As a result, the Court held that the Self-Incrimination Clause is "not . . . a general declaration of policy against compelling testimony."[27] However, the Court did mention that "[i]f a federal officer should be a party to the compulsion of testimony by state agencies, the protection of the Fifth Amendment would come into play."[28] As federal officers became more involved in the apprehension and prosecution of criminals by state officials, this passing mention became more important.

In a situation involving the opposite application—where a state used the compelled testimony of a witness before a congressional committee—the Supreme Court took a different approach. Despite a federal statute protecting the witness's testimony from use "in any criminal proceeding . . . in any court,"[29] the state tried to argue that the statute had been waived or that it did not apply to state courts.[30] To this the Court responded, "[A] witness does not need any statute to protect him from the use of self-incriminating testimony he is

23. *See id.*
24. *Id.* at 502.
25. 357 U.S. 371 (1958).
26. *Id.* at 374–75.
27. *Id.* at 380.
28. *Id.*
29. 18 U.S.C. § 3486 (1954) (repealed 1970).
30. *See* Adams v. Maryland, 347 U.S. 179, 180 (1954).

compelled to give over his objection. The Fifth Amendment takes care of that without a statute."[31] In a later case, the Court interpreted that statement to "suggest[ ] that any testimony elicited under threat of contempt by a government to whom the constitutional privilege against self-incrimination is applicable . . . may not constitutionally be admitted into evidence against him in any criminal trial conducted by a government to whom the privilege is also applicable."[32] As the later interpretation shows, this holding seriously undermined the *Murdock* decision.

2. The Murphy *decision and incorporation of the Fifth Amendment*

Having allowed these decisions to undermine the *Murdock* holding's reliance on the separate sovereignty of state and federal courts,[33] the Supreme Court addressed the self-incrimination issues again in two major decisions decided on the same day. In *Malloy v. Hogan,*[34] the Supreme Court finally held that the Self-Incrimination Clause applied to state actions by incorporation through the Fourteenth Amendment.[35] Reviewing a Connecticut court's decision to hold a probationer in contempt for refusing to answer questions that might incriminate him under state law, the Court held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."[36] This decision established a constitutional requirement

31. *Id*. at 181.

32. Murphy v. Waterfront Comm'n, 378 U.S. 52, 75–76 (1964).

33. *See supra* Part II.C.1.

34. 378 U.S. 1 (1964).

35. Prior to *Malloy*, several Supreme Court decisions determined that many rights contained in the Bill of Rights applied to the states by incorporation through the Fourteenth Amendment. These cases include *Mapp v. Ohio,* 367 U.S. 643 (1961), and *Gideon v. Wainwright*, 372 U.S. 335 (1963). These and other cases did not reflect a change in the understanding of the Fifth Amendment in particular but a change in the Supreme Court's understanding of Due Process, the Fourteenth Amendment, and their application to state laws. *Mapp v. Ohio* required that states exclude evidence obtained through unreasonable searches and seizures in violation of the Fourth Amendment. *See* 367 U.S. at 655. Previous to this ruling, the exclusionary rule of the Fourth Amendment did not apply to the actions of state police officers. *See id*. at 654. In *Gideon v. Wainwright*, the Supreme Court held that suspects in state court had an enforceable Sixth Amendment right to counsel. *See* 372 U.S. at 339. These and other decisions showed how the guarantees of the Bill of Rights could be incorporated through the Fourteenth Amendment to allow Congress to protect individuals against state action.

36. *Malloy*, 378 U.S. at 6.

that "[g]overnments, state and federal, . . . establish guilt by evidence independently and freely secured,"[37] not by coerced self-incriminating testimony.[38] As a result of this holding, state prosecutors could no longer use compelled testimony of any kind to prosecute a suspect because Fifth Amendment privileges protected all witnesses in state courts. Now that the states had to abide by the Self-Incrimination Clause, the *Murdock* decision needed another look.

In the second case decided that same day, *Murphy v. Waterfront Commission,*[39] the Supreme Court reversed its holding in *Murdock*. Even though they had been "granted immunity from prosecution under the laws of New Jersey and New York,"[40] the petitioners in *Murphy* claimed that they would face prosecution in federal court if they answered questions put to them in a state court investigation.[41] The Court decided to review this case, in part, due to the development of "'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity."[42] The Supreme Court determined that the *Murdock* opinion "did not adequately consider the relevant authorities,"[43] particularly the English cases describing the English rule against compulsory self-incrimination, and that, on review of these cases, subsequent scholarly developments showed the Court's prior reasoning to be flawed.[44] The relevant authorities used this time by the Supreme Court included two British cases decided prior to the ratification of the Constitution.[45] Considering this new information, the Court recognized that the *Murdock* decision rested on a flawed understanding of English precedent. "[T]here is no continuing legal vitality to,

37. *Id.* at 8.
38. *See id.*
39. 378 U.S. 52 (1964).
40. *Id.* at 53–54.
41. *See id.*
42. *Id.* at 56.
43. *Id.* at 57.
44. *See id.*
45. *See id.* at 58–59. In *East India Co. v. Campbell*, 1 Ves. Sen. 246, 27 Eng. Rep. 1010 (Ex. 1749), the witness claimed that his testimony before an English court might subject him to punishment in India. The court allowed the protection of the privilege against self-incrimination because compelling testimony would subject him to punishment of a crime in India. In the second British case, *Brownsword v. Edwards*, 2 Ves. Sen. 244, 28 Eng. Rep. 157 (Ch. 1750), a woman feared that her answers would subject her to prosecution in ecclesiastical court. In this case, the court held that the general rule protects a person from incriminating himself even if the punishment would be under a different set of laws.

or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction."[46] By reviewing all the cases making up the English Rule and looking at a subsequent English case,[47] the Supreme Court determined that *Murdock* had been incorrectly decided. Under its "new" understanding of the English Rule, the *Murphy* Court ruled that a person testifying in a state court, whose testimony could be used for prosecutory purposes in a federal jurisdiction, could invoke the Fifth Amendment since a person facing "a real danger of prosecution in a foreign country" could do the same.[48] In reaching this decision, the Supreme Court thought it had settled all questions regarding immunity from prosecution and the Self-Incrimination Clause. However, it became apparent that the last word had yet to be said.

D. The Supreme Court and Certain Foreign Prosecution Cases

As a result of increasingly close relations with foreign nations, the question concerning the invocation of Fifth Amendment rights to protect a witness from compelled self-incrimination once again became an issue. Prior to the *Balsys* decision, the Supreme Court had only heard two other cases concerning fear of foreign prosecution and the Fifth Amendment.[49] One case was vacated and remanded with instructions to dismiss because the question was moot.[50] As a

46. *Murphy*, 378 U.S. at 77.

47. The other new case was *United States of America v. McRae*, 3 L.R.-Ch. 79 (Ch. App. 1867), which held that a defendant in England could refuse to answer questions put to him because his answers would incriminate him under United States law.

48. *Murphy*, 378 U.S. at 67.

49. There is a case considered by the Supreme Court over one hundred years ago where a defendant's words incriminated himself in prosecution in the United States after his confession was improperly obtained in Canada, a reversal of the *Balsys* and In re *Impounded* situations. In *Bram v. United States*, the Supreme Court determined that the confession elicited by a Canadian detective was improperly admitted as evidence because it was improperly obtained. *See* 168 U.S. 532, 565 (1897). The argument, however, did not focus on the foreign origin of the evidence. Instead, the Court determined that the statement was not voluntarily made according to the Court's contemporary, now discredited, understanding of the Fifth Amendment. *See id*. Therefore, *Bram* cannot be used to support a proposition that the Supreme Court had given Fifth Amendment rights to witnesses facing foreign prosecution. *See, e.g.*, Steven J. Winger, Note, *Denying Fifth Amendment Protections to Witnesses Facing Foreign Prosecutions: Self-Incrimination Discrimination?*, 89 J. CRIM. L. & CRIMINOLOGY 1095, 1099 (1999).

50. *See* Parker v. United States, 397 U.S. 96 (1970). Parker was held in contempt of court for failing to provide immunized testimony before a grand jury. *See In re* Parker, 411

result, the Court never addressed the issue. In the other case, *Zicarelli v. New Jersey State Commission of Investigation*,[51] the Court considered a witness's refusal to testify in an organized crime investigation for fear that his testimony could be used against him in prosecutions in Canada, the Dominican Republic, and Venezuela.[52] Because the Fifth Amendment only protects against "real dangers"[53] and because the defendant, according to the Court, did not face any real danger that his testimony would lead to foreign prosecution, the Court ruled that the Fifth Amendment privilege could not be invoked.[54] The Court did note in closing that "[s]hould the Commission inquire into matters that might incriminate [the witness] under foreign law and pose a substantial risk of foreign prosecution . . . then a constitutional question will be squarely presented."[55] Though the decision went against the witness because there was no real threat of foreign prosecution, this statement clearly shows that the Court could conceive of a situation when a witness, facing a real risk of foreign prosecution, might properly invoke Fifth Amendment protection against self-incrimination.

E. Balsys *and the Self-Incrimination Clause: Supreme Court Addresses the Foreign Prosecution Issue*

By addressing the issue of foreign prosecution and the Fifth Amendment in *Balsys*, the Supreme Court attempted to end any confusion concerning the constitutionality of compelling testimony from a witness facing the threat of foreign prosecution.[56] Aloyzas Balsys entered the United States in 1961 "on an immigrant visa and alien

F.2d 1067, 1068 (10th Cir. 1969). She claimed that her answers could lead to prosecution in Canada. *See id.* at 1069. The Supreme Court found the issue to be moot, probably because the grand jury had ceased to function. *See id.* at 1068 ("[I]t is clear that 'once the grand jury ceases to function, the rationale for civil contempt vanishes' and she must be released." (citation omitted)).

51. 406 U.S. 472 (1972).

52. *See id.* at 478–79. To prove his claim, the witness pointed to several newspaper and magazine articles which "labeled appellant the 'foremost internationalist' in organized crime." *Id.* at 479.

53. As opposed to remote and speculative possibilities. *Id.* at 478; *see, e.g.*, Mason v. United States, 244 U.S. 362 (1917); Heike v. United States, 227 U.S. 131 (1913); Brown v. Walker, 161 U.S. 591 (1896).

54. *See Zicarelli*, 406 U.S. at 480–81.

55. *Id.* at 481.

56. United States v. Balsys, 524 U.S. 666, 698 (1998).

registration issued at the American Consulate in Liverpool."[57] In 1979, the Office of Special Investigations of the Criminal Division of the United States Department of Justice ("OSI") was formed to denaturalize and deport suspected Nazi war criminals.[58] While conducting an investigation into allegations against him, OSI subpoenaed Balsys to find out whether when he entered this country he lied on his visa application about participation in Nazi persecutions during World War II.[59] Balsys appeared pursuant to the subpoena issued by OSI, but he refused to answer questions, claiming that his answers could be used against him in criminal prosecutions in Lithuania, Israel, and Germany. The OSI petitioned the district court to enforce the subpoena, arguing that Balsys could not invoke his Fifth Amendment privilege against compelled self-incrimination because the Fifth Amendment did not apply to prosecutions under foreign laws.[60] The district court agreed with the OSI and ordered Balsys to testify. On appeal, the Second Circuit held "that a witness with a real and substantial fear of prosecution by a foreign country may assert the Fifth Amendment privilege to avoid giving testimony in a domestic proceeding, even if the witness has no valid fear of a criminal prosecution in this country."[61] Because the circuit court's decision created a circuit split between the Second and Eleventh Circuits, the Supreme Court granted certiorari.[62]

Before the Supreme Court, Balsys argued that the Fifth Amendment should be interpreted broadly. "The Self-Incrimination Clause of the Fifth Amendment provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'"[63] Balsys argued that the word "any" was broad enough to include criminal prosecutions in foreign countries.[64] The Supreme Court noted that the Constitution controls government actions only in the

57. *Id.* at 669.

58. *See id.* at 670, 699 n.18; United States v. Gecas, 120 F.3d 1419, 1423 n.3 (11th Cir. 1997); 28 C.F.R. § 0.55(f) (1995); Belisle, *supra* note 1, at 349.

59. *See Balsys*, 524 U.S. at 670.

60. *See id.*

61. *Id.* at 670–71.

62. *See id.* at 671. The split occurred between *United States v. Balsys*, 119 F.3d 122 (2d Cir. 1997) and *United States v. Gecas*, 120 F.3d 1419 (11th Cir. 1997), which held that a witness could not invoke the Fifth Amendment privilege in the face of possible foreign prosecution.

63. *Balsys*, 524 U.S. at 671 (quoting U.S. CONST. amend. V).

64. *See id.* at 672.

United States.[65] Because the Constitution cannot guarantee rights outside of the United States, the Fifth Amendment cannot be relied upon to protect a person from self-incrimination because of possible foreign criminal prosecution.[66] To explain this determination, the Court used the same-sovereign interpretation used in *Murdock*, to explain that the Fifth Amendment should not protect a witness fearing foreign prosecution.

Though *Murphy* overturned *Murdock*, the Supreme Court rejected the legal reasoning of *Murphy* in deciding *Balsys* and instead used the analysis in *Murdock*. Because Balsys's arguments relied heavily on the reasoning used to decide *Murphy*, especially the English cases, the Supreme Court carefully examined the logic of the *Murphy* decision but ultimately rejected it. The majority noted that "*Murphy* is a case invested with two alternative rationales."[67] The *Murphy* Court's interpretation of the English cases supported one rationale—that the Fifth Amendment protected witnesses fearing criminal prosecution in foreign jurisdictions.[68] The other rationale rested on the decision issued the very same day in *Malloy*—that irrespective of where such statements were made neither state nor federal governments can prosecute a suspect using coerced self-incriminating statements made by the suspect in a prior judicial proceeding.[69] "Since there is no helpful legislative history"[70] to explain the framers' intentions regarding the Self-Incrimination Clause, the *Balsys* Court, like the *Murphy* Court, looked to the common law practice as it existed in England at the time of the framing.[71] While the *Murphy* court found the English cases helpful to explain the logic for granting Fifth Amendment privileges to a witness whose testimony "might then be used to convict him of a crime against another such jurisdiction,"[72] the *Balsys* Court did not find the cases as helpful.[73] In

65. *See id*. at 689.

66. *See id*. at 671.

67. *Id*. at 680.

68. *See id*. at 683.

69. *See id*. at 680–81.

70. *Id*. at 674.

71. *Id*.

72. Murphy v. Waterfront Comm'n, 378 U.S. 52, 53 (1964).

73. The *Balsys* Court looked at four cases that the *Murphy* decision relied on and that were claimed to represent "the settled 'English rule' regarding self-incrimination under foreign law." *Murphy*, 378 U.S. at 63. *East India Co. v. Campbell*, 1 Ves. Sen. 246, 27 Eng. Rep. 1010 (Ex. 1749), was a case decided by the Court of Exchequer. In this case, a defendant re-

Balsys, the majority found that the first two cases relied on in *Murphy* represented the same-sovereign doctrine because the courts of India and the ecclesiastical courts at the time of those decisions fell under the auspices of one sovereign.[74] The *Balsys* Court dismissed the other two cases because they were decided long after the Fifth Amendment had been adopted.[75] In addition, they did "not . . . support a general application of the privilege in any case in which a witness fears prosecution under foreign law by a party not before the court."[76]

Because the *Balsys* Court found that *Murphy* misapplied the English cases, it ruled that the first *Murphy* rationale—that the Fifth Amendment protected witnesses fearing criminal prosecution in foreign jurisdictions—could not be relied on.[77] Because *Murphy's* other rationale—that coerced statements may be used by any prosecutor because the Fifth Amendment applies to both state and federal actions—resulted from the *Malloy* decision to incorporate the Fifth Amendment, the Court determined that "to the extent that the *Murphy* majority went beyond its response to *Malloy* . . . its reasoning cannot be accepted."[78] Therefore, the *Balsys* Court concluded that *Murphy* could not be used to justify invoking the Fifth Amendment for fear of foreign prosecution. Instead, the Court "rel[ied] on the force of [its] precedent, notably *Murdock*, as confirming this

fused to provide information in an English court because the information could have been used against him in the courts of India. The court held that he did not have to provide the information. In *Brownsword v. Edwards*, 2 Ves. Sen. 244, 28 Eng. Rep. 157 (Ch. 1750), a woman refused to provide information about her marital status because the information could be used against her in an ecclesiastical court. The Lord Chancellor held that the woman should not be forced to provide the information because it would subject her to punishment in the other jurisdiction. These two cases were decided before the adoption of the United States Constitution. Two other cases decided after the adoption of the Constitution but which the *Murphy* court thought helped explain the English rule and the common law understanding of it in the United States were also examined. In *King of the Two Sicilies v. Willcox*, 7 St. Tr. (N.S.) 1050, 61 Eng. Rep. 116 (V.C. 1851), the English Court of Chancery denied defendants' claim of privilege for fear of prosecution under the laws of Sicily. The court focused on the impossibility of consistent application and the risk that the defendants would avail themselves of the foreign jurisdiction to face prosecution. To counter this case, the *Murphy* court brought up the case of *United States v. McRae*, 3 L.R.-Ch. 79 (Ch. App. 1867). In this case, the Court of Chancery Appeal allowed the defendant to claim the privilege against self-incrimination because he faced prosecution in the United States.

74. *See* United States v. Balsys, 524 U.S. 666, 684–85 (1998).

75. *See id.* at 687.

76. *Id.*

77. *See id.* at 683–88.

78. *Id.* at 688.

same-sovereign principle,"[79] that the Fifth Amendment can only be applied to the extent of the reach of the Constitution.[80] The Court relied on an overruled case to establish the limitations of the Fifth Amendment protections against self-incrimination. As a result, *Balsys* completely eliminated the ability of a witness to invoke the Fifth Amendment by claiming his testimony will subject him to prosecution in foreign countries, whether that fear is real and substantial or not.[81]

In addition to these findings, the Supreme Court decided that, even before a foreign tribunal, Balsys could not invoke protections from self-incrimination because the right is "at best an emerging principle of international law."[82] Looking to international documents, the Court found that "[t]here is indeed nothing comparable to the Fifth Amendment privilege in any supranational prohibition against compelled self-incrimination derived from any source."[83] The Court noted in passing an argument that as a signatory to the International Covenant on Civil and Political Rights, which contains a privilege similar to the Fifth Amendment right against self-incrimination, the United States could not compel Balsys's testimony.[84] However, because Balsys did not make this argument, the Court refused to consider this issue.[85] By making these observations, the majority opinion left open the possibility that as the privilege against self-incrimination becomes more recognized and accepted in international documents and by foreign nations the ability of a wit-

79. *Id.* at 689.

80. *See id.*

81. It is interesting to note that after his appeals were denied by the Supreme Court Aloyzas Balsys voluntarily left the United States for Lithuania, refusing to be forced to testify against himself. *See* William C. Mann, *Suspect in War Crimes Flees US Was Denied Shield of 5th Amendment*, BOSTON GLOBE, May 31, 1999, at A3. Immediately after his departure, the Simon Wiesenthal Center, "an Israeli center that tracks Nazi war criminals[,] lashed out at Lithuania" for not prosecuting Balsys, claiming that he and seven other suspected Nazi war criminals who have "returned to Lithuania from the United States to escape legal action . . . were the beneficiaries of the benign neglect of the Lithuanian police and judiciary." *Israeli Center Slams Lithuania For Harboring Nazi War Criminals*, AGENCE FRANCE-PRESSE, May 31, 1999, *available in* 1999 WL 2613356.

82. *Balsys*, 524 U.S. at 695 n.16 (quoting Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1259 (1998)).

83. *Id.* at 695 n.16

84. *See id.*

85. *See id.*

ness to rely on the Fifth Amendment protections will be strengthened.

Justice Souter, writing for the majority, noted that cooperative conduct between the United States and foreign countries might become so collusive that fear of foreign prosecution could justify reliance on the Fifth Amendment.[86]

> If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign." The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that 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.[87]

The Court noted that Balsys' situation did not amount to "a cooperative prosecution" and that the Fifth Amendment privilege will not lose its meaning by not being extended to Balsys.[88] From this dicta, it seems that if the United States and another nation enact similar criminal legislation and the United States conducts the investigation to aid the foreign nation's prosecution, then a witness can invoke the Fifth Amendment to protect her from testifying. This language creates the test upon which the appellants in In re *Impounded* relied.

III. IN RE *IMPOUNDED* AND THE *BALSYS* TEST

A. The Facts

The question in In re *Impounded* is whether fear of foreign prosecution under the *Balsys* exception test triggers the Fifth Amendment privilege. The appellants in In re *Impounded* received subpoenas to testify before a special grand jury that was investigating

86. *See id.* at 698.
87. *Id.* at 698–99.
88. *Id.* at 699.

"possible price-fixing or other anticompetitive agreements among manufacturers and distributors in the artificial sausage casings industry."[89] As employees of a targeted corporation, the appellants received subpoenas and immunity orders to compel their testimony. Each appellant appeared before the grand jury and stated that he would answer questions concerning business dealings within the United States but refused to answer questions regarding activities "occurr[ing] in the United States and relat[ing] to foreign markets or occurr[ing] outside the United States."[90] The appellants claimed that the immunity grant insufficiently protected them from foreign prosecution.[91] When the government initiated contempt penalties, the appellants claimed that the United States government had contacts with foreign governments and was sharing information "for the purpose of foreign prosecutions."[92]

In order to obtain further proof of a joint prosecution, appellants requested a hearing where they could question government witnesses. To answer this request, the government provided affidavits, which stated that the witnesses' testimony would be used only for grand jury purposes and would not be delivered to foreign countries.[93] Because the appellants asserted that the government was holding information back, the district court held more hearings "that focused on the nature and extent of appellants' asserted Fifth Amendment rights."[94] After these hearings, the trial court ruled that the testimony would only be used for prosecution in the United States and denied the appellants' motion to compel more information because they had not raised a genuine issue of material fact.[95] After the grand jury investigation continued, the appellants again made requests for an evidentiary hearing and disclosure on the grounds that new evidence, which surfaced in the grand jury investigation, increased the need for explanation.[96] Again, the court denied the motion because the evidence provided by appellants was "'imma-

89. *In re* Impounded, 178 F.3d 150, 152 (3d Cir. 1999). The grand jury was specifically looking for violations of the Sherman Act, 15 U.S.C. § 1 (1997). *See id.*

90. In re *Impounded*, 178 F.3d at 152.

91. *See id.*

92. *Id.* at 153.

93. *See id.*

94. *Id.*

95. *See id.*

96. *See id.*

terial and inadequate.'"[97] Because the court found that "*Balsys* did not provide a basis for appellants' claims of Fifth Amendment privilege,"[98] it held the appellants in contempt.[99]

Appellants claimed that their Fifth Amendment privilege should be upheld because of the Supreme Court's holding in *Balsys*.[100] Even though the Court in *Balsys* held that fear of foreign prosecution was beyond the scope of the Fifth Amendment, Justice Souter intimated in the majority decision that under certain circumstances the Fifth Amendment might be invoked to protect a person from providing self-incriminating testimony.[101] The appellants claimed this language created a test and that their situation met the qualifications of the test. According to the appellants, the test contained the following elements: "1) [that] the witness's fear of foreign prosecution is reasonable; 2) [that] the fear is based on a foreign criminal statute substantively similar to United States law; and 3) [that] the testimony is being taken with a purpose that it will be shared with a foreign government."[102] At a hearing before the district court, the appellants argued that they should be able to invoke their Fifth Amendment privilege because their situation met the elements of the test.[103]

B. The Reasoning

To support their argument, the appellants attempted to show that the grand jury investigation was "an instance of cooperative international antitrust enforcement."[104] Evidence included selections from speeches given by officials from the Antitrust Division of the United States Department of Justice ("Antitrust Division") on the international efforts to enforce antitrust laws and attempts to work with other nations to share evidence and information on antitrust investigations. The appellants brought out evidence concerning cooperation with the Canadian government in two prior criminal antitrust investigations.[105] In addition, the appellants indicated that Argentina,

97. *Id.*
98. *Id.*
99. *See id.*
100. 524 U.S. 666 (1998).
101. *See id.* at 698–99.
102. In re *Impounded*, 178 F.3d at 155.
103. *See id.* at 152.
104. *Id.*
105. *See id.*

Canada, Chile, Ireland, France, Japan, Korea, Norway, Spain, Taiwan, Thailand, and the Philippines all had enacted criminal penalties for antitrust violations. They also argued that Mutual Legal Assistance Treaties[106] ("MLATS") and the International Antitrust Enforcement Assistance Act[107] could be used to share information obtained by the grand jury with foreign governments.[108]

In addition to the evidence showing the increased internationalization of antitrust investigations, the appellants argued that specific acts occurred in their case showing that other countries were seeking their testimony. As proof of joint prosecution, the appellants pointed out that they had been asked by the grand jury about contacts in Canada and Germany. They also noted that efforts had been made by the Antitrust Division to collect documents in Canada, Spain, the United Kingdom, Germany, Mexico, France, and other nations.[109] The Antitrust Division had attempted to interview Mexican and German nationals to get information for the grand jury investigation, and one of appellants' counsel had actually been contacted by Canadian authorities.[110] Appellants felt that all these facts pointed to a joint prosecution where the appellants would be compelled to give testimony in the United States but face prosecution in foreign countries.[111]

On appeal before the Third Circuit, appellants recognized that the *Balsys* opinion already discussed at length the issue regarding the Fifth Amendment and foreign prosecution. However, they argued that Justice Souter outlined a "test" for exceptions to the *Balsys* rule and that the facts of their case met the requirements of the test.[112]

106. According to information available at Balsys' appeal, the United States has signed such treaties with at least 20 individual countries. *See Balsys*, 524 U.S at 715 (Breyer, J., dissenting). Many are limited to drug trafficking and terrorism. Others are broad and cover many different areas of illegal activity. Assistance includes such things as obtaining testimony or statements, providing documents and records, serving documents, locating and identifying people, executing searches and seizures, immobilizing and forfeiting assets, and any other assistance requested by the other country. *See* Treaty with Australia on Mutual Assistance in Criminal Matters, Apr. 30, 1997, U.S.-Austl., art. 1, S. TREATY DOC. NO. 105-27 (1997).

107. 15 U.S.C. § 6201. This Act allows the Attorney General to assist foreign prosecutors by providing information regarding suspected violators of foreign antitrust laws or by assisting in enforcing those laws.

108. *See* In re *Impounded*, 178 F.3d at 152.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.* at 154.

They claimed that they had a reasonable fear of foreign prosecution, that their fear was based on criminal statutes in several foreign countries, and that their testimony would be shared with these foreign countries.[113] They argued that the investigation was a joint international prosecution and that these facts met the *Balsys* test.[114]

After listening to appellants' arguments, the circuit court "remain[ed] unconvinced that *Balsys* necessarily establishes a 'test,' let alone the test [appellants] urge."[115] The circuit court rejected this argument because the language quoted from *Balsys* is couched in conditional, nonprescriptive language. The Third Circuit also pointed out that the Supreme Court wrote the "test" language used by the appellants as dicta; it was meant to be used "for another day"[116] not as a test that courts could readily apply.[117] It also concluded that even if the circuit court decided that the *Balsys* language created a test it would not support the appellants' argument because their arguments were insufficient.[118] Either way, the court determined that the defendants could not invoke their Fifth Amendment right to silence.

After looking at the actions of the government in *Balsys*, the Third Circuit felt the facts showed that the actions in this case and the actions in *Balsys* were similar. In *Balsys*, the United States and Lithuania had agreed to cooperate in the prosecution of war crimes.[119] This agreement included "mutual legal assistance concerning the prosecution of persons suspected of having committed war crimes"[120] and assistance in locating witnesses and making witnesses available.[121] The OSI, which sought the testimony from *Balsys*, was "to act as a liaison with foreign prosecution offices and to use re-

113. *See id.* at 152, 154.

114. *See id.*

115. *Id.* at 155.

116. United States v. Balsys, 524 U.S. 666, 699 (1998).

117. The decision in *Balsys* came out just over eight months before the arguments for In re *Impounded* occurred before the Third Circuit. Because the *Balsys* decision was so recent, the circuit court may have avoided challenging the decision so soon.

118. *In re* Impounded, 178 F.3d 150, 155 (3d Cir. 1999).

119. *See Balsys*, 524 U.S. at 699.

120. *Id.* at 699 n.19 (quoting 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, Aug. 3, 1992, *reprinted in* App. in No. 96-6144 (CA2), 396-97); *see also* In re *Impounded*, 178 F.3d at 155.

121. *See id.*

sources for investigations, guidance, information, and analysis, and to direct and coordinate prosecutions."[122] Though the United States government worked closely with the Lithuanian government, the *Balsys* majority did not see this cooperative effort as enough "cooperative prosecution" to justify Balsys' claim.[123] Since *Balsys* did not qualify for the exception, then, said the Third Circuit, assertions made by the appellants should not qualify now. Appellants claimed that gathering of evidence in foreign countries, questioning foreign nationals about antitrust actions in their country, and the possibility of criminal prosecution in other countries for antitrust activities exhibit characteristics of "cooperative prosecution."[124] Looking at those countries that had passed criminal laws against antitrust activities the court determined that the possibility of prosecution was inconsequential. The court pointed out that most of these nations "have never had a successful criminal antitrust investigation or have never utilized the criminal antitrust provisions, or enforce antitrust violations through administrative proceedings."[125] This information, the court argued, shows that only a possibility of prosecution exists; no imminent prosecution faces the witnesses.[126] Therefore, the Third Circuit held that the Fifth Amendment does not now apply.[127]

The court also focused on whether the witnesses faced a real and substantial fear of foreign prosecution.[128] While the district court judge had noted the reasonableness of the witness's fear of foreign prosecution,[129] the circuit court determined that the language was vague and did not properly assess the meaning of "real and substantial fear of prosecution."[130] The standard, according to the Third Circuit, for examining a question of real and substantial fear of

122. In re *Impounded*, 178 F.3d at 155–56 (citation omitted); *see also Balsys*, 524 U.S. at 699 n.18.

123. *See* In re *Impounded*, 178 F.3d at 156.

124. *See id.*

125. *Id.*

126. *See id.*

127. However, even this court recognized that different facts could lead to a different conclusion. The court stated that "[t]he authorities that appellants cite, either in their own particular case or in terms of trends in Antitrust Division policies, may indicate that such a case might present itself to us at some point in the future." *Id.*

128. *See id.*

129. *See id.*

130. *See id* at 156–57.

foreign prosecution comes from a Second Circuit decision.[131] In re *Flanagan*[132] created a test with the following factors:

> [(1)] whether there is an existing or potential foreign prosecution of [a witness]; [(2)] what foreign charges could be filed against [that witness]; [(3)] whether prosecution . . . would be initiated or furthered by . . . testimony; [(4)] whether any such charges would entitle the foreign jurisdiction to have [an individual] extradited from the United States; and [(5)] whether there is a likelihood that [any] testimony given here would be disclosed to the foreign government.[133]

Looking at the *Flanagan* factors, the court found that the witnesses did not meet their burden of proof. First, the court found that the witnesses had not shown an appropriate nexus and a high likelihood of actual prosecution as required in a host of other cases.[134] Additionally, the criminal antitrust laws of the foreign countries were not applied in a way to strike fear in the appellants. The court held that any assertion that a prosecution may be possible does not necessarily require a finding that an existing or prospective prosecution exists.[135] Finally, the court decided that the appellants did not meet the fourth *Flanagan* factor because the existence of extradition treaties with foreign countries does not require a finding that such treaties will be used and that the appellants have a real and substantial fear of prosecution.[136] Because appellants were unable to prove these

131. *See id.* at 157. The case is In re *Flanagan*, 691 F.2d 116 (2d Cir. 1982).

132. 691 F.2d 116 (2d Cir. 1982).

133. *Id.* at 121.

134. *See id.*; *In re* Impounded, 178 F.3d 150, 157 (3d Cir. 1999) ("*See United States v. Gecas*, 120 F.3d 1419, 1425–26 (11th Cir. 1997) (potential war crimes prosecution as a result of imminent expulsion from United States created real and substantial fear of foreign prosecution); *United States v. Under Seal*, 794 F.2d 920, 924–25 (4th Cir. 1986) (existing prosecution and possibility of extradition created a real and substantial fear of prosecution); *Moses v. Allard*, 779 F. Supp. 857, 863–69 (E.D. Mich. 1991) (criminal investigation pending in Switzerland, nexus existed between information requested in proceeding and pending prosecution, and witness faced possibility of extradition, so real and substantial fear of prosecution); *Mishima v. United States*, 507 F. Supp. 131, 132–33 (D. Ala. 1981) (where conduct was criminalized under Japanese law, and cases had been referred to a Japanese prosecutor, witnesses had demonstrated real and substantial fear of prosecution, where as witnesses whose cases had not been referred to a prosecutor had not demonstrated such a fear); *In re Cardassi*, 351 F. Supp. 1080, 1083–84 (D. Conn. 1972) (questions witness refused to answer concerned events in Mexico, potential acts were incriminating under Mexican law, and Mexican authorities had expressed an interest in the case)").

135. *See* In re *Impounded*, 178 F.3d at 158.

136. *See id.*

Flanagan factors, the Third Circuit determined that the appellants had not shown a real and substantial fear of foreign prosecution.

Because the appellants did not prove real and substantial fear of foreign prosecution and the district court did not abuse its discretion, the circuit court upheld the district court's determination that the appellants could not invoke their Fifth Amendment right to silence despite the *Balsys* exception.

IV. ANALYSIS FOR "ANOTHER DAY"

In In re *Impounded*, the Third Circuit attempted to address whether the language in the *Balsys* decision created a test for exceptions and how to apply that test. This Note argues that the Supreme Court clearly discussed an exception in *Balsys,* describing a situation in which a witness could invoke the Fifth Amendment privilege against self-incrimination for fear of foreign criminal prosecution. However, some argue that an exception to *Balsys* should not be allowed because courts cannot easily apply the elements of the test. When *Murdock* was decided, few thought the Fifth Amendment should be used by witnesses in state courts; however, as time and technology changed, the need to re-explore *Murdock* led to *Murphy's* holding that the Self-Incrimination Clause barred the use of compelled testimony in any criminal proceeding. Just as time brought about the overruling of *Murdock,* time will bring about the overruling of *Balsys*, as is shown by the conditional language used by Justice Souter.

Though some people will be unwilling to accept the idea that *Balsys* will eventually be overruled, the symmetry between *Murdock* and *Balsys* will likely be followed by a similar symmetry between *Murphy* and a future Supreme Court case. The *Balsys* decision even hints that this situation is destined to occur. The analysis employed in that future case may not mirror that of *Murphy*, but the result will be the same. The Fifth Amendment should be able to protect United States citizens from all abuses of power by the United States government. The sooner the Supreme Court recognizes that "international cooperatism" has developed to such an extent that United States actions are providing testimonial fodder for foreign criminal prosecutions, the sooner the Constitution can again provide the protections guaranteed to all United States citizens.

To support this argument, this section will establish that time and the development of "international cooperatism" will bring about

the changes that will cause *Balsys* to be reconsidered. Justice Souter's language suggests a test governing when this will occur. Developments in international cooperation and the foundation of an International Criminal Court show that the test factors will exist much sooner than some may think.[137] Second, this section will examine the factors that the Court should take into account, including the elements of the *Balsys* exception test. It will also examine the existence of comparable privileges in supranational or other documents providing the appropriate limits for applying the Fifth Amendment to foreign prosecution. Developing the limits along these lines should offset the concerns raised by those who oppose applying the Fifth Amendment to protect any witness that fears foreign prosecution and will show why there really is a need for allowing exceptions to or a review of the *Balsys* decision. With increasing cooperation between foreign countries and increased use of a similar right to silence in foreign jurisdictions, courts should be able to protect United States citizens from allowing the United States government to abuse its power and compel testimony that would subject these citizens to foreign prosecution.

A. History and Its Own Language Sow the Seeds of Balsys*'s Downfall*

1. Will history repeat itself?

Just as time and technology changed to allow for the development of "cooperative federalism"[138] during the first half of the twentieth century, technology and time have changed to bolster the development of "cooperative internationalism." *Murdock* established a standard that a witness could not use the Self-Incrimination Clause to refuse to provide immunized testimony because of a fear of prosecution for state crimes. The likelihood that state and federal criminal issues would overlap enough for testimony to be shared seemed very

137. Rome Statute of the International Criminal Court, U.N Doc. A/Conf.183/9* (July 12, 1999) *also available at* <http://www.un.org/law/icc/statute/romefra.htm>. Once the Rome Statute has been adopted and ratified by enough nations, the International Criminal Court will "have . . . power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be complimentary to national criminal jurisdictions." *Id.* art. 1. The International Criminal Court has not yet been established because it has only been ratified by twenty-one countries of the sixty necessary for creation. *See* Ratification Status (visited Sept. 22, 2000) <http://www.un.org/law/icc/statute/status.htm>.

138. Murphy v. Waterfront Comm'n, 378 U.S. 52, 56 (1964).

unlikely.[139] Over time, and as more and more instances occurred where state courts tried to use compelled testimony against federal witnesses in state prosecutions and federal courts tried to use compelled testimony against state witnesses in federal prosecutions, the Court had to address the issue anew.[140] In the end, *Murdock* was overturned because the Court recognized that Fifth Amendment privileges should protect all United States citizens whose testimony could be used against them in *any* criminal prosecution—federal or state. The fact was that federal agents cooperated so closely with state officers in prosecuting alleged criminals that the *Murdock* distinction between state and federal actions had become a meaningless distinction, and the Court used the English Rule to justify its conclusion.

Like *Murdock*, *Balsys* attempts to establish the rule that the Fifth Amendment cannot protect a witness who fears that his testimony might be used against him in foreign prosecutions. The Court determined that it could afford to sacrifice the constitutionally guaranteed rights of United States citizens because "domestic law enforcement would suffer serious consequences if fear of foreign prosecution were recognized as sufficient to invoke the privilege."[141] However, it was admitted that "[b]ecause crime, like legitimate trade, is increasingly international, a corresponding degree of international cooperation is coming to characterize the enterprise of criminal prosecution."[142] The *Balsys* Court realized that methods of criminal prosecution increasingly involve cooperative action, and Justice Souter's language in the decision shows that even as they decided this issue the Justices could foresee future changes affecting the logic of their decision. Just as subsequent cases attacked and weakened the arguments made in *Murdock*, In re *Impounded* evidences that subsequent cases will attack and undermine the arguments made in *Balsys*.

139. "The investigation was under federal law in respect of federal matters. . . . Investigations for federal purposes may not be prevented by matters depending upon state law." United States v. Murdock, 284 U.S. 141, 149 (1931). At the time, there was a clearer distinction between federal and state matters than there is today.

140. *See supra* Part II.B–C.

141. United States v. Balsys, 524 U.S. 666, 698 (1998).

142. *Id*. at 693–94.

2. Is there really a test?

The Third Circuit questioned whether the language in *Balsys* created a test. The court reasoned that because the *Balsys* language contained conditional language (i.e., "could be said," "could be argued")[143] the Supreme Court did not intend to create a test.[144] To the Third Circuit, the words described only a hypothetical situation not containing any applicable rules that a court could discern; rather it was just a possibility that would have to be decided another day.

It is clear that the language in *Balsys* set forth certain factors that would push the Court to the point where the Self-Incrimination Clause would protect a witness facing foreign prosecution. The Court wrote in *Balsys* that

> [i]f it could be said that the United States and its allies had enacted substantially similar codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecutions for the purpose of obtaining evidence to be delivered to other nations as prosecution of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign."[145]

A straight reading of this language leads directly to the conclusion that the Supreme Court, by including this specific language, created a list of facts that would overcome their final decision in *Balsys*. The Court prefaced this language by stating, "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."[146] Using this language, the Court indicated that developing closer relations with other countries would justify a witness's invocation of the Fifth Amendment privileges. By following this language with a list of factors that would indicate when the appropriate point had been reached, the Court articulated a test allowing other courts to find exceptions to the *Balsys* decision.

143. *In re* Impounded, 178 F.3d 150, 155 (3d Cir. 1999).
144. *See id.*
145. *Balsys*, 524 U.S. at 698.
146. *Id.*

3. Arguments against application of the Balsys *exception test*

Some commentators fear that allowing an exception to *Balsys* will create too much confusion in the courts. In particular, they argue that requiring judges to determine whether a witness has a "real and substantial" fear of foreign prosecution asks courts to do something they are "ill-suited" to do.[147] To support this argument, critics claim that United States courts do not understand foreign laws or know how to appropriately apply them; that witnesses would abuse the system by relying on foreign laws to avoid being compelled to testify; or that foreign governments would create laws in order to protect their nationals from being compelled to testify in the United States.[148] Critics also argue that granting Fifth Amendment protections to witnesses fearing foreign prosecution would be an inappropriate extension of the Constitution. Because the factors of the *Balsys* exception test address these issues, the Fifth Amendment should be allowed to protect United States citizens from being forced to give incriminating testimony by United States courts.

One argument against an exception to *Balsys* relies on an assumption that United States judges do not know and would be unable to apply foreign law.[149] While United States judges daily use and apply state and federal laws, to which they have easy access, some argue that using and applying foreign law would place too heavy a burden on these judges because of their lack of experience with foreign laws. This argument has no basis in reality because United States judges already deal frequently with foreign laws. Courts often confront cases where foreign parties and even United States parties argue that foreign law should control. "It is settled that the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court."[150] When the court is required to apply foreign law, "the rules of the foreign law and their interpretation are simply questions of fact, and the conclu-

147. Anthony L. Osterlund, Comment, *Showdown at the Constitutional Corral: Self-Incrimination v. Potential Foreign Prosecution*, 67 U. CIN. L. REV. 615, 628–29 (1999).

148. *See id.* at 628–36.

149. *See id.* at 628–29.

150. Hoffman v. Goberman, 420 F.2d 423, 427 (3d Cir. 1970) (citing Burt v. Isthmus Dev. Co., 218 F.2d 353, 357 (5th Cir. 1955)).

sion is as reviewable as any other fact issue."[151] Additionally, as will later be discussed, the *Balsys* exception would place the burden on the witness to identify and explain the foreign laws upon which he bases his fear of prosecution.[152]

Because the *Balsys* exception test looks at a witness's fear of foreign prosecution, some argue that witnesses will abuse the right or that foreign governments will protect their nationals. These arguments assume that people who might potentially be compelled to testify in United States courts (like criminals involved in international drug trafficking) would increase their contacts with a variety of countries.[153] By increasing their contacts, they increase the complexity of any case brought against them to compel them to testify because they could rely on multiple foreign laws to substantiate their fear of foreign prosecution. Another variation of this argument assumes that foreign countries will enact laws to keep their nationals from testifying in United States courts. For example, a country could make it a capital crime to testify before a United States tribunal or court. Any national from that country from whom a United States prosecutor seeks to compel testimony could point to that law to show a fear of foreign prosecution. To become subject to foreign prosecution, a witness must give testimony and then become subject to the jurisdiction of the foreign court by willingly entering that country or being extradited. The *Balsys* exception test would take into account whether the witness will become subject to the foreign jurisdiction and whether the fear of foreign prosecution is real and substantial.[154]

Relying heavily on the territorial reach of the Constitution, opponents of extending Fifth Amendment privileges to witnesses who fear foreign prosecution argue that an exception to *Balsys* will inappropriately expand the reach of the Constitution.[155] The Fifth Amendment was adopted to protect witnesses from government abuse—from the government forcing a witness to face "the 'cruel trilemma' of self-accusation, perjury, and contempt."[156] By compelling a witness to give self-incriminating testimony that can be used in foreign prosecutions, the United States government forces the cruel

151. *Burt*, 218 F.2d at 357.

152. *See infra* Part IV.B.

153. *See* Osterlund, *supra* note 147, at 631–33.

154. *See infra* Part IV.B.

155. *See* Winger, *supra* note 49, at 1132–33.

156. *Id.* at 1133.

trilemma on an international scale.[157] If such testimony is used against the witness by a prosecutor in another country, the United States government would arguably be violating the witness's constitutional rights by compelling self-incriminating testimony. The Constitution should protect the rights of the people from abuses of government, especially when the government can benefit at the expense of an individual's freedom.

B. How and When the Fifth Amendment Will Protect United States Citizens

1. What are the elements to consider in foreign prosecution situations?

In the dicta of *Balsys*, Justice Souter identified several factors that courts should consider when determining whether the Fifth Amendment should protect witnesses fearing foreign prosecution.[158] Justice Souter indicated that courts should consider at least three factors: "the witness's fear of foreign prosecution,"[159] whether that fear "is based on a foreign criminal statute substantively similar to United States law,"[160] and whether the purpose of taking the testimony is to share it with a foreign government.[161] Using this language, the appellants in In re *Impounded* made a valiant effort to convince the court that they met the three factors, but they were unable to do so.[162] While the appellants argued for a reasonable fear of foreign prosecution standard, the Third Circuit used a real and substantial fear standard because the Supreme Court noted in *Zicarelli* that the Self Incrimination Clause protects only against real threats, "not remote and speculative possibilities."[163]

In addition, the Supreme Court will probably look to see if the self-incrimination privilege exists in the foreign country or in supranational documents. One of the Court's concerns in *Balsys* was that other countries would not recognize the privilege.[164] Even if a wit-

157. *See id.* at 1133–37.
158. *See supra* Part IV.A.
159. *See In re* Impounded, 178 F.3d 150, 155 (3d Cir. 1999).
160. *Id.*
161. *See id.*
162. *See* United States v. Balsys, 524 U.S. 666, 698–99 (1998).
163. Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478 (1972).
164. *See Balsys*, 524 U.S. at 695.

ness were allowed to invoke the Fifth Amendment in the United States, the inference of guilt could likely be used against the witness during a criminal prosecution in the foreign country. Increasingly, though, more countries are beginning to recognize a right to silence. "Although the privilege against self-incrimination . . . may not yet be described as customary international law, an international right to silence is emerging among those 'generally recognized international standards which lie at the heart of the notion of fair procedure.'"[165] The Draft Statutes of the International Criminal Court serve as an example. These statutes include a "right to remain silent without such silence being a consideration in the determination of guilt or innocence"[166] and states that a person shall "not be compelled to testify or to confess guilt."[167] As the recognition of the right to silence grows in other countries and international tribunals, the likelihood that the Supreme Court will recognize the right to invoke the Fifth Amendment when facing foreign prosecution increases because the ability to achieve the benefits of that right will have increased.

2. Determining real and substantial fear: In re Flanagan[168] *and other cases*

When the Supreme Court does find the right circumstances to apply the *Balsys* exception test, it will need to determine how to apply the elements of the test, especially to determine real and substantial fear. In In re *Impounded*, the Third Circuit noted that "the standard for real and substantial fear of foreign prosecution is set forth in the Second Circuit's decision of In re *Flanagan*."[169] The In re *Flanagan* court considered five factors to determine whether a witness had a real and substantial fear of foreign prosecution.[170] Other

165. Diane Marie Amann, *Application of Fifth Amendment to U.S. Constitution in International Context—Fear of Foreign Prosecution as Ground for Invoking Privilege Against Self-Incrimination—Relevance of Growing International Law Enforcement Cooperation—Role of U.S. Judiciary in Foreign Relations*, 92 AM. J. INT'L L. 759, 763 (1998) (quoting Murray v. United Kingdom, 22 Eur. H.R. Rep. 29(30), 60(49), para. 45 (1996)).

166. United Nations International Law Commission: Report of the Working Group on a Draft Statute for an International Criminal Court, July 16, 1993, 33 I.L.M. 253, 272 (1994).

167. *Id.*

168. 691 F.2d 116 (2d Cir. 1982).

169. *In re* Impounded, 178 F.3d 150, 157 (3d Cir. 1999) (citation to *Flanagan* omitted, the Third Circuit formally adopted the *Flanagan* test in Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988)).

170. *See supra* notes 130–31 and accompanying text.

circuits have adopted similar standards.[171] By using the factors discussed in these cases to make determinations of a real and substantial fear of foreign prosecution, courts can reasonably apply the *Balsys* exception test.

In *Balsys*, the Supreme Court simply conceded that a real and substantial fear of foreign prosecution existed and did not try to examine the issue. Under the *Balsys* exception test, the witness would have to show that a substantially similar criminal law exists in a foreign country. Then she would have to show a real and substantial fear of prosecution under that law. Some reasons given against allowing a witness to use the Fifth Amendment focus on the inability of domestic courts to appropriately identify and apply foreign law.[172] Because the witness must identify the law under which she might be prosecuted, identifying and applying the law will be greatly simplified. The *Flanagan* factors that show a real and substantial fear of foreign prosecution also consider the identification of the potential charges to be made.

When the Supreme Court considered the problem of foreign prosecution in *Zicarelli*, it also pointed out that the foreign law would be an important consideration. Because the testimony in *Zicarelli* did not place the witness in any real danger of foreign prosecution, the Court did not look into the matter.[173] Had it been an issue, the Court would have considered the question whether the testimony would incriminate a witness under the law of a foreign country, thereby subjecting her to criminal prosecution. Because the Supreme Court would have taken the law into consideration, courts should use the Flanagan factors to determine if a real and substantial fear exists.

The question of whether an existing or potential prosecution exists will be a very important consideration in determining whether a witness can invoke the Fifth Amendment. The In re *Impounded* appellants claimed that their testimony could be used in Argentina, Canada, Chile, Ireland, France, Japan, Korea, Norway, Spain, Tai-

171. In *United States v. Gecas*, 120 F.3d 1419, 1425 (11th Cir. 1997), the Eleventh Circuit identified three of the same five factors that *Flanagan* used: the likelihood that testimony would be shared with or disclosed to a foreign country, the existence of or potential for a foreign prosecution, and the possibility of extradition.

172. *See, e.g.*, Osterlund, *supra* note 147, at 627.

173. *See* Zicarelli v. New Jersey Comm'n of Investigation, 406 U.S. 472, 480 (1972).

wan, Thailand, and the Philippines.[174] To qualify under the *Balsys* test, the appellants should have shown that

> there is an existing or potential foreign prosecution . . . ; what foreign charges could be filed against [them]; [that] prosecution of [the charges] would be initiated or furthered by [their] testimony; [that] any such charges would entitle the foreign jurisdiction to have [them] extradited from the United States; and [that] there is a likelihood that [their] testimony . . . would be disclosed to the foreign government.[175]

According to the Third Circuit, the In re *Impounded* appellants did not meet this burden. It noted, as the *Flanagan* court did, that these factors are construed narrowly.[176] Though future witnesses will find their task difficult, it will not be impossible. Because of the growing international cooperation between the United States and foreign countries in the prosecution of crimes, the Supreme Court will be faced with more and more questions regarding the *Balsys* exception. While the In re *Impounded* appellants may not have reached the necessary requirements to bring about change, the increase in international cooperation nearly guarantees that someone will.

3. When will the conditions be right?

The increasing amount of cooperation between the United States and foreign countries mirrors the increasing cooperation between federal and state governments, which led to the *Murphy* decision.[177] Not only are nations cooperating more, but the notion of a privilege against self-incrimination is also gaining increasing acceptance throughout the world.[178] The rules of procedure and evidence for the International Criminal Court provide for the protection of certain self-incriminating testimony.[179]

174. *See* In re *Impounded*, 178 F.3d at 152.

175. *In re* Flanagan, 691 F.2d 116, 121 (2d Cir. 1982).

176. *See* In re *Impounded*, 178 F.3d at 157; In re *Flanagan*, 691 F.2d at 121.

177. *See* Sara A. Leahy, Note, United States v. Balsys*: Foreign Prosecution and the Applicability of the Fifth Amendment Privilege Against Self-Incrimination*, 48 DEPAUL L. REV. 987, 1033–34 (1999) (citing Diane Marie Amann, *supra* note 82, at 1208).

178. *See id.* at 1036.

179. *See* Report on the Preparatory Commission for the International Criminal Court Addendum Finalized Draft Text of the Rules of Procedure and Evidence, Rule 74 Self Incrimination by a Witness, PCNICC/2000/INF/3/Add.1 (July 12, 2000), *also available at* <http://www.un.org/law/icc/statute/rules/english/add1e.pdf>.

While the world increasingly recognizes a right against self-incrimination, countries are also increasingly entering into agreements to cooperate in prosecuting criminals. In recent years, the United States has entered into a number of agreements with other countries (often called Mutual Legal Assistance Treaties or MLATS) to cooperate with criminal prosecution.[180] For example, the United States has entered into anti-competition treaties with the European Union establishing "cooperative procedures to achieve the most effective and efficient enforcement of competition law . . . where the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities."[181] In 1991, this agreement merely regarded trade in steel. Now it applies to all forms of trade.[182] The United States recently held hearings to ratify ten new MLATS. These new treaties were introduced as being "similar to thirty-six bilateral MLATS that have entered into force with countries throughout the world."[183] The number of MLATS is obviously increasing and expanding the obligations of the United States to cooperate with foreign nations in investigating and prosecuting crimes. It is interesting to note that "[a]lthough MLATS are specifically intended to be used in criminal matters, the Securities and Exchange Commission has used them to investigate securities violations punishable by criminal sanctions."[184] Even MLATS are considered in today's fast-paced world to be "cumbersome weapons."[185]

A quicker form of international cooperation, Memorandums of Understanding ("MOUS"), is becoming the agreement of choice among information and evidence gatherers. MOUS are "regulator-

180. In the last ten years, the United States has entered into at least thirteen MLATS. These countries include Austria, Australia, Great Britain, South Korea, Russia, and Poland.

181. Agreement Between The Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 3–4, 1998, art. 1, § 2(b), State Dept. No. 98-106 (entered into force June 4, 1998).

182. *See generally id*. This agreement is not specifically limited to the steel trade but to the broad "enforcement of competition law." *Id*. § 2(b).

183. *Hearing before the Senate Foreign Relations Comm*. (statement of Samuel M. Witten, Assistant Legal Adviser for Law Enforcement and Intelligence, United States Department of State) *available in* 2000 WL 238322478.

184. John K. Carroll & Herbert S. Washer, *Globalization Comes to Law Enforcement*, N.Y.L.J., July 10, 2000, at 9.

185. *Id*.

to-regulator agreements [that] typically provide for broad cooperation in response to specific requests, and often establish designated channels for consultation on matters of mutual interest."[186] Because they can be modified without formal amendment (unlike MLATS) and use broad and flexible language, MOUS are becoming more popular with United States regulators and prosecutors.[187] MOUS entered into between United States and foreign agencies have allowed the sharing of information[188] which has "resulted in criminal and civil proceedings" both in the United States and abroad.[189] Not just governments, but also agencies within governments are entering into agreements with each other to gather and share information with the goal of prosecuting offenders.

The formation of an International Criminal Court ("ICC") will also intensify international cooperation in prosecuting criminals.[190] Citizens from countries who become members of the ICC will become subject to the jurisdiction of a transnational court that can investigate and prosecute crimes at its own initiative.

Because the United States is increasing its cooperation with other nations to prosecute criminals, courts should recognize that compelling witness testimony converts them into agents of foreign governments. When these are the circumstances, denying United States citizens their Fifth Amendment rights encourages abuses of power that the Bill of Rights sought to enjoin.

As the nations of the world become more co-dependant, the possibility of foreign prosecution increases and the possibility of the United States abusing an individual's rights because the prosecution is "foreign" increases. When a United States court knows that the information compelled from a witness will be used against him in a

186. *Id.*

187. "In 1996, the SEC made 230 requests for assistance to foreign regulators and received, in return, approximately 340 requests from abroad. In 1999, the SEC made 338 requests to foreign regulators and responded to 550 requests from abroad." *Id.*

188. The MOU between the SEC and the German Bundesaufsichtsamt calls for the parties "to (a) provide access to information in the files of the requested country, (b) take statements of persons, (c) obtain information and documents from persons, and (d) conduct compliance inspections or examinations of investment businesses, securities processing businesses, and securities markets." *Id.*

189. *Id.*

190. *See generally* United Nations International Law Commission: Report of the Working Group on a Draft Statute for an International Criminal Court, 33. I.L.M. 253 (1994) (discussing the jurisdiction, format, and procedures of the International Criminal Court).

foreign prosecution, *Balsys* suggests that at that point the United States has become an agent of the foreign court and the Fifth Amendment should apply. When United States courts can no longer claim ignorance that testimony compelled from United States citizens in United States courts is used in foreign prosecutions, *Balsys* should be overturned. As the United States increasingly cooperates with foreign countries in investigating and prosecuting crimes, the ability of courts to ignore the rights of United States citizens to Fifth Amendment self-incrimination protection will decrease. The *Balsys* court recognized that in the future the United States might be acting as the agent of a foreign country. As In re *Impounded* shows, that future is probably closer than the Supreme Court expected.

V. CONCLUSION

If the Constitution cannot protect United States citizens from being forced to give testimony in United States courts subjecting that person to foreign prosecution, what other Constitutional rights will courts require United States citizens forego because of internationalization? Can police ignore other rights against illegal searches and seizures because only foreign governments will use the evidence collected by them? The logical extension of the same-sovereign argument used by the *Balsys* court could justify unconstitutional actions by United States agents on United States citizens because the ultimate user of the information is not the United States government but some other nation. That such abuses cannot be allowed should be self-evident. *Balsys* sowed the seeds for its own destruction by describing the conditions for its overthrow. Many people disagree with the outcome of *Balsys*.[191] In re *Impounded* shows that more challenges will come to attack the *Balsys* decision and to argue that there should be Fifth Amendment protection for all United States citizens, even if they face foreign prosecution. Decided just ten months after the *Balsys* decision, the Third Circuit's decision in In re *Impounded* shows that circumstances have not yet ripened enough for "another day" to dawn. However, it is inevitable that the time will come.

191. *See generally* Amann, *supra* note 165; *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 122, 172 (1998); Winger, *supra* note 49; Leahy, *supra* note 177; Erin Kelly Regan, Comment, *United States v. Balsys: Denying a Suspected War Criminal the Privilege Against Self-Incrimination*, 73 ST. JOHN'S L. REV. 589 (1999); *but see* Osterlund, *supra* note 147.

The *Balsys* Court left open the possibility that a witness fearing foreign prosecution could invoke her Fifth Amendment privilege of silence. That situation will exist when witnesses can show that the law of the foreign country was substantially similar to United States criminal law, that the witness has a real and substantial fear of prosecution, and that the testimony sought for will be used by that foreign government. With the United States signing more and more MLATS and with the increasing internationalization of criminal prosecutions, the time will soon be ripe for a change. Despite the In re *Impounded* holding, other challenges will come attacking *Balsys* and requesting courts to hold that the Constitution protects witnesses fearing foreign prosecution who meet the *Balsys* exception test. Justice Souter wrote the exception test to be applied on "another day."[192] "Another day" is closer than many might think.

R. Christopher Preston

192. United States v. Balsys, 524 U.S. 666, 699 (1998).