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# The Same-Sovereign Rule Resurrected: The Supreme Court Rejects the Invocation of the Fifth Amendment's Privilege against Self-Incrimination Based upon Fear of Foreign Prosecution in *United States v. Balsys*

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# THE SAME-SOVEREIGN RULE RESURRECTED: THE SUPREME COURT REJECTS THE INVOCATION OF THE FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION BASED UPON FEAR OF FOREIGN PROSECUTION IN *UNITED STATES V. BALSYS*

CARLIN METZGER*

## INTRODUCTION

Applying what many commentators thought to be an outdated theory,[1] the Supreme Court resurrected the "same-sovereign" rule[2] in *United States v. Balsys*,[3] its recent decision clarifying the scope of the Fifth Amendment's Privilege Against Self-Incrimination.[4] The case involved the Government's attempted compulsion of a resident alien to testify about potential misrepresentations on his application for a visa to the United States.[5] The witness, Aloyzas Balsys, refused to answer the questions, claiming the privilege against self-incrimination

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1. *See, e.g.*, Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1215 (1998) (noting that the same-sovereign rule "fell" with the Supreme Court's decision in *Murphy v. Waterfront Commission*).

2. *See infra* notes 22–29 and accompanying text.

3. 524 U.S. 666 (1998).

4. The text of the Fifth Amendment to the United States Constitution 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 offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

5. *Balsys*, 524 U.S. at 670.

based on his fear of criminal prosecution in Lithuania, Germany and Israel.[6] The government conceded that Balsys had a reasonable fear of prosecution in both Lithuania and Israel, but argued that the privilege against self-incrimination did not apply when the feared prosecution would be brought under the laws of a foreign nation.[7]

The case squarely raised the question of whether the Fifth Amendment privilege against self-incrimination could be invoked based solely on a real and substantial fear of foreign criminal prosecution.[8] The issue arose in several courts, and resulted in a split over whether the language, history, and underlying policies of the privilege justified extending the privilege to encompass "any" criminal prosecution.[9] The Supreme Court held that the Fifth Amendment only binds the government to which it applies; therefore, the privilege cannot be invoked based solely upon a fear of foreign prosecution.[10]

This Comment contends that despite the Court's revival of the same-sovereign rule, the privilege against self-incrimination extends to witnesses who can show a real and substantial fear of foreign criminal prosecution, direct aid by the United States to foreign prosecuting authorities, and a complementary system of criminal justice in the United States and the prosecuting state. Part I of this Comment explains the development of the privilege against self-incrimination. Part II details the factual and procedural history of *United States v. Balsys*, and examines the holding of the Supreme Court. Finally, Part III argues that future claims of privilege based on a fear of foreign prosecution can succeed under the same-sovereign approach as the levels of United States and foreign cooperative law enforcement efforts increase. The Comment concludes that courts should use the door left open by the Supreme Court when the cooperation between the United States and the foreign prosecuting authority is such that the United States can reasonably be deemed both the compelling and the using party.

6. *Id.*

7. *See* United States Supreme Court Official Transcript at 3, *United States v. Balsys*, 524 U.S. 666 (1998) (No. 97-873), 1998 WL 193482 at 3 [hereinafter *Balsys* Transcript].

8. *Balsys*, 524 U.S. at 672.

9. *Compare* United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997) (holding the privilege against self-incrimination inapplicable to fear of foreign prosecution), *with* United States v. Balsys, 119 F.3d 122, 124 (2d Cir. 1997) (holding that the privilege against self-incrimination may be invoked for fear of foreign prosecution), *rev'd*, 524 U.S. 666 (1998).

10. *Balsys*, 524 U.S. at 669.

## I. THE PRIVILEGE AGAINST SELF-INCRIMINATION

### A. *The Current Understanding of the Privilege*

As the law currently stands, an individual has a right to refuse to answer questions in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, if the information could be used against him in a criminal case in the United States.[11] The threshold question in any case is whether the individual claiming the privilege faces a real, substantial, and reasonable fear of conviction.[12] To sustain a claim of privilege, it must be evident from the implications of the question that an answer to the question or an explanation of why it cannot be answered might be incriminating.[13] Once it is determined that the privilege applies, it extends to answers that would support a conviction and also to answers that would furnish "a link in the chain of evidence needed to prosecute."[14]

The privilege against self-incrimination is not absolute. The government is permitted to offer the witness immunity from prosecution in exchange for compulsion of the witness's testimony.[15] This grant of immunity, however, must be at least coextensive with the scope of the privilege.[16] Moreover, once a defendant establishes that he has testified under a grant of immunity, the court will exclude evidence in subsequent criminal proceedings unless the government proves that the evidence it proposes to use comes from a legitimate source, independent of the compelled testimony.[17]

For centuries, the modern privilege against self-incrimination has been considered a fundamental right,[18] but its application has evolved

11. *See* Kastigar v. United States, 406 U.S. 441, 444 (1972).

12. *See Gecas*, 120 F.3d at 1424 (citing Brown v. Walker, 161 U.S. 591, 599 (1896)).

13. *See* Malloy v. Hogan, 378 U.S. 1, 11–12 (1964).

14. United States v. Balsys, 119 F.3d 122, 135 (2d Cir. 1997) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951), *rev'd*, 524 U.S. 666 (1998)).

15. *See generally Kastigar*, 406 U.S. at 446.

16. *See id.* at 442, 453. *Kastigar* presented the Court with the question of whether federal immunity statutes granting immunity to witnesses against any use or derivative use of information gained from their testimony were sufficient to satisfy the Fifth Amendment's demands. The witnesses' primary contention was that the scope of the immunity provided by the federal statute was not coextensive with the scope of the privilege and was therefore insufficient to compel their testimony. They claimed that "transactional immunity" was required in order to satisfy the true purposes behind the privilege. The Court held that the immunity granted to a witness must be at least coextensive with the scope of the privilege, but it was unnecessary to grant the witness full immunity from prosecution for the offense to which the compelled testimony relates.

17. *See id.* at 460.

18. *See* United States v. Gecas, 120 F.3d 1419, 1435–57 (11th Cir. 1997) (examining in depth the history of the privilege against self-incrimination).

significantly within the last fifty years.[19] For example, it is only in the last forty years that the privilege has been held applicable to the states.[20] This recent change is attributable, in large measure, to the shift in how we view our federal system of government.[21]

### *B. Murdock and the Same-Sovereign Rule*

Prior to the adoption of the Fourteenth Amendment and the subsequent incorporation of the rights guaranteed by the Bill of Rights into its due process provision,[22] the Fifth Amendment was held applicable only to the federal government.[23] This view of the federal system prevailed in *United States v. Murdock*,[24] where the Court held that a witness in a federal proceeding could not invoke the Fifth Amendment privilege against self-incrimination based upon fear of criminal prosecution in a state court.[25] *Murdock* involved an individual who was summoned by a revenue agent to disclose the recipients of certain money he had spent during the year.[26] He refused to answer on the ground that the disclosure would incriminate him under state law.[27] The Supreme Court rejected his claim, finding that the protection from prosecution under federal law offered by the federal government was sufficient to satisfy the demands of the Fifth Amendment.[28] Whether he might later be subject to prosecution under state law was of no consequence under the Fifth Amendment. The privilege was applicable only against the "same sovereign."[29]

Analogizing the federal system of the United States to the sovereign powers of separate nations, the Court noted that "[t]he English

19. *See infra* text accompanying notes 31–41. *See generally* Amann, *supra* note 1, at 1220.

20. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

21. *See infra* notes 31–50 and accompanying text.

22. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . . " U.S. CONST. amend. XIV, § 1. *See also* Amann, *supra* note 1, at 1216 (discussing the incorporation of the Bill of Rights into the due process provision of the Fourteenth Amendment).

23. *See Gecas*, 120 F.3d at 1431 (citing Twining v. New Jersey, 211 U.S. 78, 110 (1908)); *see also* United States v. Balsys, 524 U.S. 666, 674 (1998) (quoting Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), in which Justice Marshall wrote that the Constitution's "limitations on power . . . are naturally, and, we think, necessarily applicable to the government created by the instrument," and not to "distinct [state] governments, framed by different persons and for different purposes").

24. 284 U.S. 141 (1931).

25. *Id.* at 149.

26. *Id.* at 146.

27. *Id.*

28. *See id.* at 149.

29. *Id.*

rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country."[30] This conception of the English and our federal system, however, was soon called into question.[31] As the understanding of the Fourteenth Amendment shifted to encompass the rights guaranteed by the Bill of Rights,[32] and as increased cooperation between federal and state authorities became commonplace,[33] it became clear that the "same-sovereign" rule was in need of a re-evaluation.

### C. *The Incorporation of the Privilege: Malloy and Murphy*

The Court gradually overturned its prior cases holding inapplicable to the states some of the rights today considered to be our most basic and fundamental.[34] It was not until 1964 in *Malloy v. Hogan,* however, that the Court conclusively established the Fifth Amendment privilege against self-incrimination's applicability to both state and federal government.[35] The Court held that the privilege binds to the States through the Due Process Clause of the Fourteenth Amendment,[36] and that the privilege was to be governed by the same standards in both federal and state jurisdictions.[37]

In a case decided the same day as *Malloy*, the Court then re-evaluated the *Murdock* holding.[38] In *Murphy v. Waterfront Commission of N.Y. Harbor*,[39] the Court held that the privilege against self-incrimination protects a witness in one jurisdiction from being compelled to give testimony that could be used to convict him

30. *Id.* at 149 (citations omitted). As noted *infra*, Section I.C., this understanding of the "settled English rule" was later rejected by the Court in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), but has now been given new life by the Court in *United States v. Balsys*, 524 U.S. 666 (1998).

31. *See infra* note 33 and accompanying text.

32. *See infra* note 36 and accompanying text.

33. *See* Amann, *supra* note 1, at 1218.

34. *See id.* at 1216–17.

35. 378 U.S. 1 (1964).

36. *Id.* The Court stated that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Id.* at 8.

37. *See id.* at 10–11.

38. *See supra* text accompanying notes 21–31.

39. 378 U.S. 52 (1964).

in another jurisdiction of the United States.[40] The issue in *Murphy* was whether a witness in state court who had been granted immunity from state prosecution could be compelled to give testimony that might incriminate him in federal court.[41] The witnesses in *Murphy* were granted immunity from state prosecution, but refused to answer questions based on their fear of potential federal prosecution.[42] They were held in civil and criminal contempt, and the New Jersey Supreme Court affirmed the decision holding the witnesses in civil contempt.[43]

The Court disarmed the "whipsaw"[44] by holding that the Self-Incrimination Clause barred the federal government from using the witnesses' compelled state testimony or its fruits to obtain a federal conviction.[45] To reach this result, the Court found first that its decision in *Malloy* necessitated a revised understanding of the privilege against self-incrimination,[46] and, second, that the purposes and policies underlying the self-incrimination clause justified an extension.[47] The Fifth Amendment privilege now encompassed both federal and state authorities, and any gaps between the immunity conferred by state or federal immunity statutes were filled by a constitutionally mandated "exclusionary rule."[48]

The Court's re-evaluation of the privilege in *Murphy* and *Malloy* rested largely on a revised reading of English precedent and a refined understanding of the policies and purposes underlying the privilege.[49]

40. *Id.* at 77–78.

41. *Id.* at 53. Whether it was testimony compelled in a state court used in a federal court or vice versa does not matter, as the privilege applies equally in each jurisdiction after *Malloy*. *See id.* at 53 n.1.

42. *Id.* at 54

43. *Id.*

44. *See infra* note 46.

45. *See Murphy*, 378 U.S. at 79.

46. Once the Fifth Amendment was held applicable to the states, it became necessary to remedy the incongruity that a witness could potentially be granted immunity from prosecution by the compelling jurisdiction's use of his testimony, yet be subject to another jurisdiction's prosecution based on that very testimony despite the fact that the same privilege applied equally in both jurisdictions. The same-sovereign rule had previously drawn criticism for just this reason, because it permitted an individual to "be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each." *See* Amann, *supra* note 1, at 1214 (quoting Knapp v. Schweitzer, 357 U.S. 371, 385 (1958) (Black, J., dissenting)).

47. *See Murphy*, 378 U.S. at 55.

48. *See id.* at 79; *see also* United States v. Balsys, 524 U.S. 666, 682 (1998) (discussing the application of the exclusionary rule articulated in *Murphy*).

49. *See Murphy*, 378 U.S. at 55. The Court eloquently catalogued the policies behind the privilege in the following passage:

It reflects many of our fundamental values and most noble aspirations: our

Courts following *Murphy* have identified and distilled at least three broad policy justifications as critical to the Court's holding: the privilege "advances individual integrity and privacy, it protects against the state's pursuit of its goals by excessive means, and it promotes the systemic values of our method of criminal justice."[50] The broad language employed by the Court in *Murphy*, however, set the stage for a debate as to the scope of the privilege, which has now been resolved (for the time being) by *United States v. Balsys*.[51]

## II. *UNITED STATES V. BALSYS*

Aloyzas Balsys, a Lithuanian immigrant to the United States, was subpoenaed by the Office of Special Investigations of the Criminal Division of the United States Department of Justice ("OSI")[52] to testify about his activities during World War II and his immigration to the United States in 1961.[53] The OSI was created "to institute denaturalization and deportation proceedings against suspected Nazi war criminals," and was investigating whether Balsys lied on his visa application and had in fact participated in persecution by Nazis during World War II.[54] If so, he would be subject to deportation[55] for persecuting persons because of their race, religion, national origin, or political opinion[56] as well as for lying on his visa

> 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 load," our respect for the inviolability of the human personality and the right of each individual "to a private enclave where he may lead a private life," our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

*Id.* (citations omitted).

50. *See* United States v. Balsys, 119 F.3d 122, 129 (1997); *see also* United States v. Gecas, 120 F.3d 1419, 1472 (11th Cir. 1997) (Birch, J., dissenting); Amann, *supra* note 1, 1220–21.

51. 524 U.S. 666 (1998).

52. The Attorney General created the OSI to detect and investigate individuals in the United States who assisted the Nazis during the war and to expel these criminals from the United States. *Id.* at 670.

53. *Id.*

54. *Id.*

55. Balsys was a resident alien who could be subject to deportation. *See* United States v. Balsys, 119 F.3d 122, 136 (2d Cir. 1997) (citing 8 U.S.C. §§ 1251(a)(4)(D), 1253(h) (1997), and noting that "[r]esident aliens suspected of Nazi activities are particularly likely to be able to establish a real and substantial fear of foreign prosecution because deportation from the United States may not be optional").

56. *See id.* (citing 8 U.S.C. §§ 1182(a)(3)(E), 1251(a)(4)(D) (1997 & Supp. 2001) (current

application.[57] Balsys refused to answer questions relating to his application, and claimed a Fifth Amendment privilege against self-incrimination based on his fear of criminal prosecution in Lithuania, Germany and Israel.[58]

### A. *The District Court*

The United States, through the OSI, brought a suit to enforce the subpoena in the United States District Court for the Eastern District of New York.[59] The district court granted the government's motion for an order compelling Balsys's testimony despite finding that he faced a "real and substantial fear of prosecution in Lithuania and Israel."[60] The court found there was a high probability that Balsys's testimony would be disclosed to Israel and Lithuania, since part of OSI's mandate was to "[m]aintain liaison with foreign prosecution, investigation and intelligence offices."[61] Moreover, the court found that if he disclosed the information sought by OSI, he could be deported to these countries.[62] Nevertheless, the district court held that the privilege against self-incrimination could not be invoked based on Balsys's fear of foreign prosecution.[63]

### B. *The Court of Appeals*

The Second Circuit Court of Appeals reversed, holding that the privilege against self-incrimination is concerned with prosecution abroad as well as within the United States, and protects against the compulsion of testimony when there is a substantial risk that it will be used in a foreign prosecution.[64] Finding the language of the clause inconclusive,[65] the court examined the history and purposes

version at 8 U.S.C. § 1227(a)(4)(D)).

57. *See id.* (citing 8 U.S.C. §§ 1182(a)(6)(C)(i), 1251(a)(1)(A) (1997 & Supp. 2001) (current version at 8 U.S.C. § 1227(a)(4)(D))).

58. *Balsys*, 524 U.S. at 670.

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

60. *Id.* at 599. The district court found that Balsys faced a real and substantial fear of foreign prosecution based on Lithuania's statute punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II. *Balsys*, 119 F.3d at 125; *see also id.* (describing Israel's law imposing the death penalty for those who committed crimes against the Jewish people during the Nazi regime).

61. *Id.* (quoting Order of Att'y Gen. No. 851-79 (Sept. 4, 1979), 28 C.F.R. § 0.55(f) (1995)).

62. *Balsys*, 918 F. Supp. at 596.

63. *See id.* at 599.

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

65. *Cf.* 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

underlying the self-incrimination clause, placing substantial weight on the analysis of the Supreme Court in *Murphy*.[66] In particular, the court emphasized the similarities between the "cooperative federalism" relied upon by the Supreme Court in *Murphy* to justify an extension of the privilege, and the "cooperative internationalism" argued by Balsys.[67] The court then analyzed the costs and benefits of extending the privilege and concluded that any negative effect on domestic law enforcement was justified by the purposes and policies of the privilege that would be served by an extension of the privilege.[68]

### C. *The Supreme Court*

In an opinion by Justice Souter, the Supreme Court held that the privilege against self-incrimination does *not* apply to a witness fearing foreign prosecution.[69] The Court began by examining the language of the self-incrimination clause and focusing on the language of the clause in its Fifth Amendment context.[70] In context, the Court found that "any criminal case" referred only to any *domestic* criminal proceeding.[71] Finding an incongruity between its narrow reading of the plain language of the clause and the far-reaching policies and purposes espoused in *Murphy*,[72] the court was forced once again to reassess the origins of the privilege. The Court opted to reject *Murphy*'s historical analysis, and claimed that the *Murphy* decision should instead be read consistently with *Murdock*.[73] In rejecting

MINN. L. REV. 1287, 1299 (1998) (noting the lack of legislative history accompanying the Fifth Amendment and the corresponding confusion among courts and scholars as to its proper interpretation).

66. *Balsys*, 119 F.3d at 129.

67. The court of appeals found that the United States had a strong interest not only in obtaining Balsys's testimony, but also in its use abroad because of the OSI's stated mission. *Balsys*, 119 F.3d at 131. *See also* Amann, *supra* note 1 (arguing that increased cooperation among domestic and foreign police authorities parallels the increased cooperation between federal and state authorities relied upon by the Court in *Murphy* to extend the privilege to both federal and state jurisdictions).

68. *Balsys*, 119 F.3d at 139.

69. United States v. Balsys, 524 U.S. 666, 669 (1998).

70. *Id.* at 672–73. The dissent, on the other hand, focused instead on the facial breadth of the clause, "any criminal case," in contrast to the Sixth Amendment's limited language, which clearly applies only domestically. *See Balsys*, 524 U.S. at 705 (Breyer, J., dissenting).

71. *See id.* at 673.

72. *See supra* note 49 and accompanying text.

73. Indeed, the dissent claims that the majority's decision overrules *Murphy*. This is true at least in part, as the majority states that "to the extent that the *Murphy* majority went beyond its response to *Malloy* and undercut *Murdock's* rationale on historical grounds, its reasoning cannot be accepted now." *Balsys*, 524 U.S. at 688.

*Murphy's* historical analysis, the Court resurrected its reading of English precedent originally outlined in *Murdock*.[74]

While the values that support the privilege were not called into question, the Court certainly did not take the lofty language of *Murphy* at face value. The Court stated that the values articulated in *Murphy* were "lofty aspirations" rather than a practical weighing of policy concerns that must be undertaken in a true reconsideration of the Clause's scope.[75] Evaluating the personal privacy rationale, the Court found that far from an absolute preservation of personal testimonial inviolability as suggested by *Murphy*, the Fifth Amendment provides only a "conditional protection of testimonial privacy subject to basic limits recognized before the framing and refined through immunity doctrine in the intervening years."[76] In addition, while preventing governmental overreaching is also a significant policy rationale, it does not rise to the level of requiring recognition of the privilege based on a fear of foreign criminal prosecution.[77] In the end, the Court found that its decision in *Murphy* was simply a necessary consequence of the transformed federal structure of our government in conjunction with its decision in *Malloy*, and that the privilege binds state and federal governments alike.[78]

## III. THE DOOR LEFT OPEN

Despite the Court's rejection of Balsys's claim of privilege, the Court mentioned in dicta the possibility that the privilege might be recognized in the future.[79] This Comment argues that despite the Court's apparent rejection of any claim of privilege based on fear of foreign prosecution, future claimants can plausibly invoke the privilege under the newly re-adopted same-sovereign analysis.[80] Justice Souter left the door open to such an analysis, if only slightly,

74. *See supra* note 30 and accompanying text.

75. *Balsys*, 524 U.S. at 693 ("The privilege has never been given the full scope which the values that it helps to protect suggest.").

76. *Id.* at 692–93.

77. *See id.* at 693.

78. *Id.* at 694.

79. *See id.* at 698 ("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.").

80. Whether or not the Court's opinion in fact set forth a "test" is a matter for debate. One court has determined that there is not a test to be applied, and has rejected a claim of privilege under this. *See In re* Impounded, 178 F.3d 150 (3d Cir. 1999).

with his mention of the future possibility of extending the privilege.[81] A future claim of privilege can be successful if it can be shown that a witness has a substantial fear of foreign prosecution in a jurisdiction maintaining a criminal justice system substantively similar to the United States, and that the United States is providing direct aid to the prosecuting foreign sovereign. In other words, a future claim would have to prove that the United States is in reality both the compelling and using sovereign.

### *A. A Real and Substantial Fear of Foreign Prosecution*

Prior to addressing whether a claim of privilege should be permitted, the threshold question is whether the witness faces a real and substantial fear of foreign prosecution.[82] In making this determination, courts have generally considered several factors, including: whether there is an existing or potential foreign prosecution against the witness, whether prosecution would be initiated or furthered by the witness's testimony, or whether any such charges would entitle the foreign jurisdiction to have the witness extradited from the United States.[83] The same factors would remain relevant to any future claim of the privilege based on a fear of foreign prosecution.

Despite the Court's apparent uneasiness with requiring courts to wade through foreign law to make this determination,[84] in reality the burden would be slight. Courts have had little difficulty making this very determination in the past.[85] Moreover, as Balsys argued to the Supreme Court, the witness invoking the privilege would shoulder the burden of demonstrating the potential for self-incrimination specific to a law or a body of laws.[86] The Court's decision in *Balsys,* however,

81. The Court's opinion indicates that the privilege might be extended in the future if it can be shown that the United States and its allies had enacted substantially similar codes aimed at prosecuting offenses of international character, and 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. *See Balsys*, 524 U.S. at 698.

82. For example, see *In re* Impounded, where the defendant articulated the "test" found in *Balsys* as follows: the witness's fear of foreign prosecution is reasonable; the fear is based on a foreign criminal statute substantively similar to United States law; and the testimony is being taken with a purpose that it will be shared with a foreign government. 178 F.3d at 155.

83. *See, e.g.*, United States v. Flanagan, 691 F.2d 116, 121 (2d Cir. 1982).

84. *See Balsys* Transcript, *supra* note 7, at 36.

85. *See, e.g.*, United States v. Gecas, 120 F.3d 1419, 1425–26 (11th Cir. 1997); *see also*, United States v. Balsys, 119 F.3d 122, 124–26 (2d Cir. 1997), *rev'd*, 524 U.S. 666 (1998).

86. *See Balsys* Transcript, *supra* note 7, at 36. The burden of demonstrating a real and substantial fear of foreign prosecution is a difficult one to carry. *See Balsys*, 119 F.3d at 135 (stating that "[o]nly aliens may be deported"; citing 8 U.S.C. § 1227). Furthermore, extradition generally requires the existence of an authorizing treaty. *Id.* (citing United States v. Alvarez-

has rendered a witness' showing of a real and substantial fear of foreign prosecution moot, unless the witness can also make a plausible claim that both the compelling and the using authorities are, in effect, the same sovereign.

### *B. Direct and Purposeful United States Involvement*

In order to sustain a future claim of privilege, the United States must be so thoroughly involved in both the compulsion and use of the compelled testimony that deeming the proceedings to be brought by different sovereigns would be a mere formality. This characteristic was at the heart of the Court's decision in *Murphy*, where the Court recognized that a denial of the privilege within a system in which the federal and state authorities cooperate to achieve convictions and are bound by the same rules was simply formalistic.[87] Yet it is clear that the "same-sovereign" rule does not literally require that the compelling and using governments be identical.[88] The states and the federal government fit within the framework of the same-sovereign analysis at least in part because of the high level of cooperation between state and federal police authorities.[89] A similar level of cooperation on an international scale, therefore, would be necessary for a plausible claim of privilege to be made in future cases involving a fear of foreign prosecution.

Both commentators and courts have noted the dramatic increases in cooperation between police authorities across national boundaries.[90] In order to pass review, however, this cooperation must take the form of direct aid to the foreign prosecuting authorities. In *Balsys*, for example, the OSI was investigating the witness for suspected misrepresentation on his visa application.[91] One of the OSI's primary directives is to aid in the discovery and prosecution of

Machain, 504 U.S. 655, 664 (1992)). "Moreover, even if an extradition treaty exists linking the United States and the country in which a witness fears prosecution, the witness can be extradited to that country only for acts that would also be criminal in the United States." *Id.*

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

88. *See, e.g.*, *Murphy*, 378 U.S. at 56 (rejecting the treatment of state and federal government as entirely sovereign entities in light of a high level of cooperation and reciprocal application of the same privilege).

89. *See id.* at 56. ("[T]he Federal and State Governments are waging a united front against many types of criminal activity.").

90. *See* Amann, *supra* note 1, at 1203 ("Crime and criminals have become international."); *Balsys*, 119 F.3d at 131 ("International collaboration in criminal prosecutions has intensified admirably in recent years.").

91. *See supra* text accompanying notes 53–57.

Nazi war criminals internationally.[92] Nevertheless, the Supreme Court stated that merely providing information to a foreign nation is insufficient to justify an extension of the privilege.[93] The level of cooperation between the United States and foreign authorities, therefore, must rise to the level of direct and purposeful aid to the foreign sovereign in its prosecutorial efforts.[94]

### C. *A Complementary Criminal Justice System*

Perhaps the most important factor in the success or failure of a future claim is whether the foreign prosecution will take place in a nation employing a system of criminal justice complementary to that of the United States. This requirement has two components: a reciprocal application of the privilege against self-incrimination,[95] and a system of complementary substantive offenses.[96]

#### 1. Reciprocal Application of the Privilege

After the Court's decision in *Malloy v. Hogan*,[97] the same privilege against self-incrimination that bound the federal government applied equally to the states.[98] It is upon this basis that the Court in *Murphy* was able to find that the privilege invoked in one jurisdiction had to be respected in the other.[99] Similarly, a future claim of privilege based on a fear of foreign prosecution must demonstrate

92. *See supra* note 52 and accompanying text; *see also Balsys* Transcript, *supra* note 7, at 13 ("[The] OSI regards it is a proper component of its mission to see to it that information that may be relevant to a foreign Government's consideration of prosecution is provided.").

93. United States v. Balsys, 524 U.S. 666, 699 (1998) ("[T]he mere support of one nation for the prosecutorial efforts of another does not transform the prosecution of the one into the prosecution of the other."). *Cf.* United States v. Gecas, 120 F.3d 1419, 1433–35 (11th Cir. 1997). Gecas argued that the United States was both the compelling and the using sovereign, using the governments of Israel, Lithuania, and Germany as its agents to obtain a conviction based on his compelled testimony. The court disagreed, finding that providing information to another country was insufficient to make a sovereign government an "agent" of the United States.

94. The requirement of "purposeful" aid is intended to incorporate Justice Souter's language that the "United States was granting immunity from domestic prosecution *for the purpose of* obtaining evidence to be delivered to other nations as prosecutors. . . ." *See Balsys*, 524 U.S. at 698 (emphasis added).

95. *Id.* at 695. The Court predicated its denial of Balsys's privilege claim in large part on the notion that there is no parallel provision to the Fifth Amendment's Privilege Against Self-Incrimination, which binds both the United States and a foreign sovereign in the same manner that the Fifth Amendment binds both the federal and state governments. *See id.*

96. *Id.* at 699–700 (denying a claim of privilege based in part upon the absence of a system of complementary substantive offenses between the United States and the foreign prosecuting authorities).

97. 378 U.S. 1 (1964).

98. *See supra* text accompanying notes 35–51.

99. *See id.*

that the same or a similar privilege is applicable in both jurisdictions. In *Balsys*, the Court made clear its belief that there is nothing currently comparable to the Fifth Amendment privilege in any supranational agreement.[100] A claim of such an obligation, however, may not be as distant as the Court's language might suggest. Indeed, the Court's opinion notes that the United States, Lithuania, and Israel are all signatories to the International Covenant on Civil and Political Rights ("ICCPR"), an agreement that contains a provision similar to the privilege against self-incrimination.[101]

The opportunity to invoke the privilege against self-incrimination is not foreclosed. Significantly, the Court stated that "Balsys has made no claim under the Covenant," and it declined to address its applicability under the facts before it.[102] In order to comport with the same-sovereign theory adopted by the Court, a future claimant must demonstrate that the United States and the foreign sovereign are both bound by this increasingly recognized right.

### 2. Complementary Substantive Offenses

A future claimant will also have to establish that the United States and the foreign prosecuting nation have established similar criminal codes aimed at prosecuting offenses of an international character.[103] The Court did not offer much in the way of explanation for this requirement, but it does not, on its face, seem to be a difficult requirement to satisfy. States have modified their criminal provisions to deal with the increasingly international nature of criminal activity.[104] Moreover, the increase in international police collaboration has led to a convergence in the goals and policies of the disparate criminal systems.[105]

100. *See Balsys*, 524 U.S. at 695 n.16.

101. *Id.* (citing the *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967) [hereinafter *ICCPR*]). The *ICCPR* states that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . not to be compelled to testify against himself or to confess guilt." Amann, *supra* note 1, at 1253 (quoting *ICCPR* art. 14 (3)(g)).

102. *Balsys*, 524 U.S. at 695 n.16.

103. *See id.* at 698.

104. *See* Amann, *supra* note 1, at 1269–71.

105. *See, e.g., id.* at 1261.

### D. *Future Claims of Privilege Today*

In re *Impounded* demonstrates that the door for future claims of privilege has been left open.[106] The case involved the invocation of the privilege against self-incrimination by several employees of a corporation that was being prosecuted for potential violations of antitrust laws.[107] Despite being immunized from prosecution under domestic law, the witnesses refused to answer questions about activities related to foreign markets.[108] They argued that the internationalization of antitrust enforcement fell within the ambit of the "test" outlined in *Balsys*.[109] Although the court rejected the witnesses' arguments, their contentions provide a perfect example of the future claims that a witness may plausibly make within the "same-sovereign" framework outlined by the Supreme Court in *United States v. Balsys*.[110]

## CONCLUSION

The Supreme Court has clarified the scope of the Fifth Amendment privilege against self-incrimination. Resurrecting the "same-sovereign" rule of *Murdock*, the Court decided that a witness at a grand jury proceeding cannot invoke the privilege based upon fear of foreign criminal prosecution. This proclamation, however, was qualified by language indicating that future claims of privilege can, in fact, be made if worked into the "same-sovereign" framework. In light of the purposes and policies underlying the privilege, and the increasing internationalization of crime and law enforcement, future claimants of the privilege against self-incrimination should seize upon the words of the Court by invoking supranational agreements containing a right to remain silent, and by demonstrating the collaborative nature of the United States and foreign criminal prosecution.

106. 178 F.3d 150 (3d Cir. 1999).
107. *Id.* at 152.
108. *Id.*
109. *See id.*
110. 524 U.S. 666 (1998).