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THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE FEAR OF FOREIGN PROSECUTION: AN ANALYSIS OF UNITED STATES V. BALSYS

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THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE FEAR OF FOREIGN PROSECUTION: AN ANALYSIS OF *UNITED STATES V. BALSYS*

I. INTRODUCTION

On June 25, 1998, the Supreme Court laid to rest an ongoing debate among the lower courts, which began some time in the late 1960's.[1] In *United States v. Balsys*,[2] the Supreme Court held that a witness with a real and substantial fear of prosecution by a foreign country may not assert the Fifth Amendment privilege against self-incrimination to avoid giving testimony in a domestic proceeding. The Court relied on the historical underpinnings of the self-incrimination clause and placed great emphasis on the pre-incorporation-era cases.[3]

In our global community where international cooperation reaches much further than the framers of the Constitution could have imagined, the Supreme Court's focus on pre-incorporation-clause cases is unsatisfactory. Alyozas Balsys faces a real and substantial fear of prosecution by a foreign government based on statements he is compelled to make at a hearing conducted by the Office of Special Investigations of the Criminal Division, Department of Justice ("OSI").[4] The Supreme Court should extend the Fifth Amendment privilege against self-incrimination to protect witnesses who are compelled to incriminate themselves with their own testimony.[5]

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1. *See, e.g., In re* Parker, 411 F.2D 1067 (10th Cir. 1969); *In re* Cardassi, 351 F.Supp 1080 (D. Conn. 1972); United States v. (Under Seal), 794 F.2d 920 (4th Cir. 1986); United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997); United States v. Balsys, 119 F.3d 122 (2d Cir. 1997), *rev'd*, 118 S.Ct. 2218 (1998).

2. 118 S.Ct. 2218 (1998).

3. *See id* at 2223-31. *See also* U.S. CONST. amend. V, which states in pertinent part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."

4. *See Balsys*, 118 S.Ct. at 2221. The United States Justice Department, Criminal Division created the OSI to seek out, denaturalize and deport individuals involved in Nazi war crimes during World War II. *See id* at 2221-22.

5. *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964). In *Murphy* the Court discussed two ideas: the essential and necessary role that the Fifth

Part II of this Comment discusses the development of the self-incrimination clause in the United States. This part considers the pre-incorporation era cases wherein the Court held that a witness in a federal court could not claim the privilege against self-incrimination based upon fear of prosecution in a state court.[6] This Comment also considers the post-incorporation-era when the Court changed its course and extended the self-incrimination clause to the states under the Fourteenth Amendment doctrine of incorporation[7] and protected witnesses in federal court who feared that their testimony would lead to prosecution in state court and vice versa.[8]

Part III of this Comment analyzes the extension of the privilege against self-incrimination to witnesses fearing foreign prosecution. This section includes a discussion of *United States v. Balsys*[9] and also explores the divergent decisions of the lower courts in addressing the issue of whether the self-incrimination clause should be extended to witnesses who fear foreign prosecution. While several courts refused to extend the privilege against self-incrimination to witnesses who feared foreign prosecution[10] some have chosen to extend the privilege.[11]

Part IV examines the role of the OSI in finding and deporting suspected Nazi war criminals. The OSI was created for the sole purpose of seeking out persons suspected of World War II war crimes and deporting them.[12] In light of this unique role of the OSI, the United States is compiling evidence for the criminal prosecution of witnesses such as Balsys and thereby aids in their prosecution in foreign countries.[13]

Part V discusses the policy issues at stake in allowing the privilege against self-incrimination in this context. The Supreme Court has identified strong policy interests against extending the privilege against self-

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Amendment privilege against self-incrimination plays in the fair balance between the individual and the state; and the fundamental values reflected by our unwillingness to force a suspect into self-accusation.

6. *See, e.g.*, Hale v. Henkel, 201 U.S. 43 (1906).

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

8. *See Murphy*, 378 U.S. 52.

9. *See Balsys*, 118 S.Ct. 2218.

10. *See, e.g., In re* Parker, 411 F.2d 1067 (10th Cir. 1969); United States v. Gecas, 120 F.3d 1419 (11th Cir.-1997).

11. *See, e.g., In re* Cardassi, 351 F. Supp. 1070 (D. Conn. 1972); United States v. Balsys, 119 F.3d 122 (2d Cir. 1997), *rev'd*, 118 S.Ct. 2218 (1998). The Second Circuit's decision in *United States v. Balsys* was overturned by the Supreme Court. *See Balsys*, 118 S.Ct. at 2236.

12. *See Balsys*, 118 S.Ct. at 2221.

13. *See* 5 U.S.C. § 552 (1995).

incrimination,[14] while both the dissent by Justice Breyer[15] and the Second Circuit[16] cited strong policy reasons in favor of extending the privilege to those with a real and substantial fear of foreign prosecution.

This comment concludes that the court should extend the privilege against self-incrimination to witnesses who face OSI hearings for possible Nazi war crimes, despite the fact that they fear prosecution only by a foreign government. The nature of the proceedings against the witness in an OSI hearing support this conclusion.[17] In effect, the OSI prepares the record for prosecution of the witness in a foreign country and then facilitates that prosecution by deporting the witness.[18] Such cooperation between the United States and the countries that prosecute Nazi war criminals makes it necessary, in the interest of justice, to avail such a witness of the privilege against self-incrimination.

II. HISTORY OF THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT

A. Pre-Incorporation Cases

The Fifth Amendment to the United States Constitution provides that "No person shall . . . be compelled in any criminal case to be a witness against himself."[19] While the Supreme Court always upheld its necessity,[20]

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14. *See Balsys*, 118 S.Ct. at 2234. The Supreme Court was skeptical about the standards that would govern a proceeding to allow a witness to claim a fear of foreign prosecution and seek the privilege against self-incrimination. *See id.* The Court saw many burdens arising out of international agreements and the ability of United States courts to make policies which affect the country's relationship to other nations as strong factors against allowing witnesses to seek the privilege in this context. *See id.*

15. *See id.* at 2244. Justice Breyer found that the policy reasons for extending the self-incrimination clause in a national context are also served in an international context: The witness who fears prosecution by a foreign nation has the same rights of dignity and privacy and the right to be protected from governmental overreaching. Therefore, there is no policy distinction between the witness who fears prosecution in the United States and the witness who fears prosecution in a foreign nation. *See id.*

16. *See Balsys*, 119 F.3d at 130–31. The Court of Appeals for the Second Circuit found that there was little difference between the harm to governmental interests arising granting the privilege to those who fear foreign prosecution and those who fear domestic prosecution, and in light of the lack of distinction between the two situations, the Court of Appeals held that the privilege should be extended in both circumstances. *See id.*

17. *See* 8 U.S.C. § 1182 (1995).

18. *See* § 1182.

19. U.S. CONST. amend. V.

20. *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547, (1892).

the scope and breath of the Fifth Amendment was often in question.[21] In *Brown v. Walker*[22] the Court narrowed the scope of the privilege against self-incrimination to apply only where the witness could show that his fear of conviction was real and substantial, rather than speculative or imaginary.[23]

In 1905, the Court continued to narrow the scope of the privilege by holding that the privilege against self-incrimination could not be invoked by a witness in a state court who had received state immunity but feared prosecution in federal court.[24] The Court viewed the granting of state court immunity as adequate to protect the rights of the witness.[25] The Court followed the reasoning of *Brown v. Walker*[26] and found that the witness faced only an unsubstantial and remote danger of prosecution in federal court based on his testimony in state court.[27] The court thus found it unnecessary for the state to provide immunity in both state and federal courts.[28]

Despite this limitation, the Supreme Court seemed to reverse itself one year later in *Ballman v. Fagin*.[29] In *Ballman*, the Court allowed a witness in federal court to assert the privilege against self-incrimination based solely on the fear of prosecution in state court.[30] But the holding in *Ballman* provided only the most narrow protection and contributed little in terms of precedential value.[31]

However, this broadening of the Fifth Amendment lasted only until the Court decided *Hale v. Henkel*.[32] The Court considered circumstances similar to *Ballman* and reversed its earlier holding, stating that a witness in a federal proceeding could not invoke the privilege against self-incrimination

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21. *See, e.g.*, Brown v. Walker, 161 U.S. 591 (1896); Jack v. Kansas, 199 U.S. 372 (1905); Hale v. Henkel, 201 U.S. 43 (1906); United States v. Murdock, 284 U.S. 141 (1931); Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964).

22. *Brown*, 161 U.S. 591.

23. *See id.* at 608 (quoting Queen v. Boyes, 1 Best & Smith 311, 121 Eng. Rep. 730 (Q.B. 1861)).

24. *See Jack*, 199 U.S. 372.

25. *See id.* at 382.

26. *See Brown*, 161 U.S. 591.

27. *See Jack*, 199 U.S. at 381-82.

28. *Id.*

29. 200 U.S. 186 (1906).

30. *See id.*

31. *See id.* The decision in *Ballman* rests on Justice's Holmes' claim that Ballman was exonerated from disclosures which would have exposed him to the penalties of the state law, but does not discuss the reasoning for this decision. *See id.* at 195.

32. 201 U.S. 43 (1906).

based solely on a fear of incrimination in state court.[33] The Court in *Henkel* found that fear of prosecution by a state court based on testimony given in a federal proceeding was too remote to trigger the privilege[34] and held that the only danger to consider was that arising within the same jurisdiction and under the same sovereignty.[35]

Finally, in *United States v. Murdock*,[36] the Supreme Court put to rest the controversy between *Henkel* and *Ballman*. The Court in *Murdock* introduced the "same sovereign" rule to American jurisprudence, holding that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to . . . the rules against compulsory self-incrimination."[37] Thus, an individual in a federal proceeding may be compelled to answer despite a real and substantial fear of self-incrimination in a state proceeding.[38]

B. Incorporation and the Self-Incrimination Clause

Murdock remained the final word on the scope of the Fifth Amendment self-incrimination clause for over thirty years, until the Court decided *Malloy v. Hogan*.[39] The Court in *Malloy* held that the Fifth Amendment applied to the States through the Fourteenth Amendment.[40]

While *Malloy* had no direct impact on the decision in *Murdock*, the principle that the self-incrimination clause was applicable to the states under

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33. *See id.*

34. *See id.* at 69.

35. *See id.*

36. 284 U.S. 141 (1933).

37. *Id.* at 149. The "same sovereign" rule has its roots in the English rule of evidence against compulsory self-incrimination. This English rule is the basis for the Fifth Amendment privilege against self-incrimination. The Court in *Murdock* held that the "same sovereign" rule, and thus the Fifth Amendment, only protected a witness against self-incrimination within the same jurisdiction and in the same sovereignty. *See id.*

38. *See id.*

39. 378 U.S. 1 (1964).

40. *See id.* and U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states in pertinent part, ". . . nor shall any State deprive any person of life, liberty or property, without due process of law." Through the doctrine of incorporation, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment required that certain amendments of the Constitution must be applied to the states. *See* United States v. Balsys, 118 S.Ct. 2218, 2224-25 (1998). Under the Fourteenth Amendment the states are bound not to deny citizens due process of law or equal protection. *See id.* The process of incorporation was slow: the Fourteenth Amendment was adopted in 1868, and yet clause-by-clause incorporation of the amendments was still occurring in 1964 when *Malloy v. Hogan* was decided. *See id.*

the Fourteenth Amendment made reconsideration of the rule stated in *Murdock* necessary.[41] The Court did so immediately in *Murphy v. Waterfront Commission*.[42] In *Murphy*, the Court considered a situation where a witness who had been granted immunity in state court wanted to invoke the self-incrimination clause based on fear of prosecution on federal charges.[43] In light of *Malloy, Murphy* held that it was necessary to extend the privilege in a situation where the witness could be "whipsawed into incriminating himself under both state and federal law even though the Constitutional privilege against self-incrimination is applicable to each."[44] *Murphy* rejected the Court's conclusion in *Murdock* that the Fifth Amendment mirrored the English rule of evidence against compulsory self-incrimination.[45] The *Murdock* Court then reasoned that because the English rule did not allow a witness in one jurisdiction to invoke the privilege for fear of prosecution in another jurisdiction, neither should the Fifth Amendment privilege.[46] *Murphy* stepped away from rigid adherence to the English rule and declared that the underlying purpose of the clause was the protection of personal privacy[47] and the idea that "the privilege recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth."[48] In *Balsys*, the Supreme Court's reliance upon *Murdock* in its refusal to extend the privilege against self-incrimination is misplaced because the *Murphy* decision damages the precidential value of *Murdock*.[49]

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41. *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

42. *See generally id.*

43. *See id.* at 53. *Murphy* also recognized that witnesses who have received immunity may be forced by the government to testify in a proceeding because the privilege against self-incrimination protects the witness from those statements being used against him in another jurisdiction. *See id.* at 77. Kastigar v. United States, 406 U.S. 441 (1972), expressly upheld the Government's right to exchange immunity for incrimination testimony. *See Kastigar*, 406 U.S. at 443.

44. *Murphy*, 378 U.S. at 55.

45. *See id.* at 78. The English rule against compulsory self-incrimination protects a witness in an English court from being compelled to give testimony which could be used to convict him. *See id* at 58. However, the privilege did not extend to compulsory incrimination in a court outside the English jurisdiction. *See id.* at 61.

46. *See Murdock*, 284 U.S. at 149.

47. *See Murphy*, 378 U.S. at 77.

48. *Id.* at 63.

49. *See Balsys*, 118 S.Ct. at 2228–30. The Supreme Court wrestled with the *Murphy* Court's rejection of the historical underpinnings of *Murdock*, but ultimately reconciled the two cases by supporting both the acceptance in *Murdock* of the "same sovereign" rule *and* the recognition in *Murphy* that state and federal courts became one sovereign after incorporation. *See id.*

III. EXTENSION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION TO WITNESSES FEARING FOREIGN PROSECUTION

A. United States v. Balsys

Alyozas Balsys resided in Woodhaven, New York, when the OSI subpoenaed him to provide testimony regarding his wartime activities between 1940 and 1944 and the circumstances surrounding his visa application and subsequent immigration from Lithuania to the United States.[50]

Balsys appeared at the hearing but refused to answer any questions, claiming his Fifth Amendment privilege against self-incrimination based upon a fear of prosecution by a foreign nation.[51] The OSI petitioned the District Court to enforce the subpoena.[52] The District Court found that Balsys faced a real and substantial fear of prosecution by the foreign governments of Lithuania and Israel, but refused to extend the privilege against self-incrimination, finding the privilege inapplicable to a claim based solely upon the possibility of prosecution by foreign countries.[53]

Balsys appealed to the Court of Appeals for the Second Circuit, which vacated the District Court's ruling.[54] The court held that a witness who faced a real and substantial danger of prosecution by a foreign government could invoke the privilege against self-incrimination to avoid giving testimony in a proceeding in the United States regardless of whether the witness faced a danger of domestic prosecution by either state or federal governments.[55] The Court of Appeals reasoned that the goals of the privilege against self-incrimination[56] were not changed when the witness faced a real and substantial fear of prosecution by a foreign government as

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50. *See id.* at 2221.

51. Balsys claimed fear of prosecution under the laws of Germany, Lithuania and Israel. *See id.*

52. *See id.*

53. *See* United States v. Balsys, 918 F.Supp 588 (E.D.N.Y. 1996). The District Court held that that Fifth Amendment does not operate extra-territorily and only serves to regulate the relationship between the federal and state governments, not the United States and foreign governments. Therefore, application of the privilege beyond the scope of the United States was not warranted. *See id.*

54. *See* United States v. Balsys, 119 F.3d 122, 124 (2d Cir. 1997), *rev'd*, 118 S.Ct. 2218 (1998).

55. *See id.* at 140.

56. The Court identified the goals of the privilege against self-incrimination as preserving individual dignity and privacy and protecting the individual from governmental overreaching. *See id.* at 129.

opposed to domestic prosecution.[57] The court also found that the burden placed on the government when the prosecuting authority was foreign was not significantly different than the burden placed on the government when the prosecuting authority was domestic.[58] In light of these similarities, the Court of Appeals held that there was no reason to refuse to extend the privilege against self-incrimination to a witness who feared foreign prosecution.[59]

The Supreme Court reversed the Second Circuit's ruling, holding that "concern with foreign prosecution is beyond the scope of the self-incrimination clause."[60] The Court began by analyzing the text of the Fifth Amendment.[61] Mr. Balsys claimed that the use of the word "any" in the self-incrimination clause lent textual support to his argument that the clause should apply to any criminal proceeding, whether foreign or domestic.[62] However, the Court concluded that Balsys had misread the intent of the text.[63] Instead, the Court held that the Fifth Amendment binds the federal government (and through incorporation binds the states) but it cannot be read to extend any further.[64]

The Court then discussed the long history behind the self-incrimination clause.[65] The Court discussed both the pre-incorporation-era cases and the post-incorporation-era cases.[66] The Court considered *United States v. Murdock*[67] and defended its analysis of the historical background of the self-incrimination clause.[68] The Court endorsed the holding of *Murdock*, which stated that the privilege against self-incrimination may not be invoked by a witness facing prosecution by a different sovereignty.[69]

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57. *See id.* at 131.
58. *See id.* at 130.
59. *See id.*
60. United States v. Balsys, 118 S.Ct. 2218, 2226 (1998).
61. *See id.* at 2222–23.
62. *See id.*
63. *See id.* at 2223.
64. *See id.* at 2223.
65. *See id.* at 2224–30.
66. *See id.*
67. *See id.* at 2224–26.
68. *See id.*
69. *See id.* The "same sovereign" rule as applied in the *Murdock* case simply means that a witness in a federal proceeding could not seek the privilege against self-incrimination based on fear of prosecution in a state court and vice versa. *See Murdock*, 290 U.S. at 149–50. State and federal governments were viewed as separate sovereigns in the *Murdock* era and the "same sovereign" rule arose from an English doctrine which discussed sovereignty in the traditional sense of two different nations. *See id.* This is the definition of sovereignty that the Supreme Court used in *Balsys*. *See Balsys*, 118 U.S. at 2238–41.

The Court discussed the radical change in the doctrine of the self-incrimination clause privilege created by *Malloy v. Hogan* and *Murphy v. Waterfront Commission.*[70] Although the holding in *Murphy* seems to reverse the holding in *Murdock,*[71] the Court sought a way to reconcile the two cases and rehabilitate *Murdock.*[72] The Court reasoned that *Murphy* simply recognized that the federal and state governments became one sovereignty once *Malloy* incorporated the Fifth Amendment into the Fourteenth Amendment, thus making the Fifth Amendment applicable to the states.[73] Without such a protection a witness could be "whipsawed" into giving testimony to incriminate himself in both state and federal court although the privilege exists in both.[74] However, the Court refused to recognize the other rationale upon which *Murphy* was founded, which rejected the historical background of *Murdock,*[75] and held that the privilege is grounded in the concept of personal privacy.[76]

The Court also rejected the policy considerations which would support extending the privilege to persons in Balsys's situation.[77] Finding that extending the privilege would involve the court in duties which were better suited to the executive and legislative branches, the Court concluded that the policy considerations were unpersuasive.[78] The Court thus disposed of Balsys's claim.[79]

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70. *See Balsys*, 118 S.Ct. at 2226–30.

71. *See id. Murdock* held that the self-incrimination clause did not apply to a federal witness who fears prosecution in state court. *See Murdock*, 284 U.S. at 149–50. On the other hand, *Murphy,* necessitated by the incorporation of the Fifth Amendment in *Malloy*, held that the privilege against self-incrimination could be invoked in such a situation. *See* Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964).

72. *See Balsys*, 118 S.Ct. at 2231.

73. *See id.*

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

75. *See Balsys*, 118 U.S. at 2231–35. *Murdock* was grounded in the belief that the English rule of privilege against self-incrimination did not extend to prosecutions beyond English sovereignty. *See Murdock*, 284 U.S. at 149. *Murdock* then goes on to apply this rule to the Fifth Amendment. *See id. Murphy* also reviews the English rule against self-incrimination, but finds *Murdock's* reliance on English history to be faulty. *See Murphy*, 378 U.S. at 78.

76. *See Murphy*, 378 U.S. at 67.

77. *See Balsys*, 118 S.Ct. at 2232–35. The policy considerations discussed by the Supreme Court were also addressed by the Second Circuit in *Balsys* when they chose to extend the privilege against self-incrimination to witnesses with a real and substantial fear of foreign prosecution. *See* United States v. Balsys, 119 F.3d 122 at 130–32 (2d Cir. 1997), *rev'd*, 118 S.Ct. 2218 (1998).

78. *See Balsys*, 118 S.Ct. at 2234.

79. The author has been unable to locate any additional information regarding Alyozas Balsys since this decision.

B. The Circuit Split on the Scope of the Self-Incrimination Clause

Balsys is not the first case to come before the Supreme Court on this issue. In *Zicarelli v. New Jersey State Commission of Investigation*,[80] the Court reviewed a case where the defendant sought to invoke the privilege against self-incrimination based on his fear of foreign prosecution. The Court declined to address the direct issue, but found instead that the defendant's fear of foreign prosecution was too remote to trigger protection of the privilege.[81] Because the issue was unresolved, the Circuits were left to decide the issue on their own.

In 1986, the Fourth Circuit was presented with the question of whether to extend the privilege against self-incrimination to a witness with a real and substantial fear of prosecution by the government of the Philippines in *United States v. (Under Seal)*.[82] The Fourth Circuit refused to extend the privilege because the Fifth Amendment would not prohibit the use of compelled testimony in the Philippines, there was no privilege for an immunized witness not to testify in a federal grand jury proceeding on the grounds of fear of incrimination in the Philippines.[83]

In a holding strikingly similar to that of the Supreme Court in *Balsys*, the Eleventh Circuit also refused to extend the privilege against self-incrimination in *United States v. Gecas*.[84] Vytautas Gecas was also summoned under an OSI subpoena to answer questions regarding his World War II activities and possible involvement in Nazi war crimes.[85] Gecas also refused to provide testimony and invoked the privilege against self-incrimination.[86] Although the factual scenarios are very similar, the results were very different: while the Second Circuit chose to extend the privilege against self-incrimination to Alyozas Balsys,[87] the Eleventh Circuit refused to extend the same privilege to Gecas.[88] The Eleventh Circuit found that the civil nature of the OSI proceeding, coupled with a lack of historical support for an extension of the privilege to witnesses facing foreign

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80. 406 U.S. 472 (1972).
81. *See id.* at 478-81.
82. 794 F.2d 920 (4th Cir. 1986).
83. *See id.* at 926.
84. 120 F.3d 1419 (11th Cir. 1997)
85. *See id.* at 1422-23.
86. *See id.*
87. *See* United States v. Balsys, 119 F.3d 122, 140 (2d Cir. 1997), *rev'd*, 118 S.Ct. 2218 (1998).
88. *See Gecas*, 120 F.3d at 1457.

prosecution, was ample support for their decision not to extend the privilege to Gecas.[89]

IV. COOPERATIVE INTERNATIONALISM AND THE ROLE OF THE OSI

The Supreme Court rejected any appeal to cooperative internationalism on Balsys's behalf to strengthen his argument for extending the scope of the self-incrimination clause.[90] This rejection is unsatisfying considering the complex relationships the United States forms with other countries. This is particularly so in light of the goals, objectives and role the OSI plays within those relationships.[91]

The atrocities of World War II gave rise to a series of international agreements to condemn the crime of genocide.[92] Further condemnation of war crimes received wide spread publicity through the Trials at Nuremberg.[93] In these treaties and the Nuremberg trials the United States and other nations of the world combined to make a pact to ferret out World War II war criminals and bring them to justice via a collaborative international effort.[94] Despite the collaboration of several nations with diverse views on what constitutes a "fair trial," the international community was able to come up with a unified agreement that the basic protections of due process would prevail.[95]

It is against this backdrop that the OSI must be examined. The United States Justice Department created the OSI to find suspected Nazi war criminals living in the United States.[96] Suspected individuals are

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89. *See id.*

90. Cooperative internationalism is defined by the Supreme Court in *Balsys* as the theory that nations have a greater incentive to work together to facilitate foreign prosecution because crime has become increasingly international. *See* United States v. Balsys, 118 S.Ct. 2218, 2233-34 (1998).

91. *See, e.g.*, Dianne Marie Aman, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1246 (1998).

92. *See, e.g.*, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; *See also* Aman, *supra* note 91, at 1248.

93. *See* Aman, *supra* note 91, at 1248.

94. *See id.* and accompanying notes.

95. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Charter, *supra* note 92, art. 16., 82 U.N.T.S. at 1550. The treaty guarantees the accused the right to indictment proceedings, the right to make a preliminary defense against the charges prior to trial, the right to conduct his own defense or have the assistance of counsel, the right to present evidence in his own defense and the right to cross-examine witnesses.

96. *See Balsys*, 118 S.Ct. 2218 at 2236.

investigated by the OSI and then subpoenaed to testify at an OSI hearing.[97] The witnesses are questioned about their activities during World War II and their representations on visa applications for immigration to the United States.[98] If the OSI finds that the witnesses lied on their visa applications and were involved in Nazi war crimes, they are then deported to their countries of origin.[99] The OSI is granted broad power in sharing information collected in these proceedings with the country of emigration.[100]

The OSI mandate allows the United States to prepare a record of the suspect's World War II activities and information regarding his application to the United States, using the testimony of the witness in the prosecution.[101] The Supreme Court has ruled that a deportation proceeding is a civil action, not a criminal prosecution, therefore, individuals called to a deportation proceeding to testify may not assert a Fifth Amendment privilege to refuse to answer questions because the information could be used for deportation.[102] Yet the Supreme Court allows this failure of justice to occur based on its belief that the conduct and involvement of the OSI in foreign prosecutions is not sufficiently close to say that the OSI and the prosecuting nation are working together as one sovereignty.[103]

The Supreme Court's broad conclusion fails to take into consideration the true nature of the OSI proceeding and ignores the level of involvement that the OSI has in bringing about foreign prosecutions. For example, the OSI is mandated by an agreement between, amongst others, the United

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97. *See* 8 U.S.C. § 1182 (1995).

98. *See* 8 U.S.C. § 1182.

99. *See* 8 U.S.C. § 1251(a)(4) (1995).

100. The OSI is required to "maintain liaison with foreign prosecution investigation and intelligence offices; use appropriate Government agency resources and personnel for investigations, guidance, information and analysis; and direct and co-ordinate the investigation, prosecution and any other legal activities instituted in these cases with the Immigration and Naturalization Services, the Federal Bureau of Investigation, the United States Attorneys Offices and other relevant Federal agencies." *See Balsys*, 118 S.Ct. at 2236.

101. The Court has held that "[a]t its core, the privilege reflects our fierce unwillingness to subject those suspected of crime to the cruel trilema of self-accusation, perjury or contempt." Pennsylvania v. Muniz, 495 U.S. 582, 596 (1990). The witness under suspicion of Nazi war crimes faced with an OSI subpoena is burdened by the same trilema. *See* United States v. Balsys, 119 F.3d 122, 130 (2d Cir. 1997), *rev'd*, 118 S.Ct. 2218 (1998). The witness can testify and face imminent prosecution by a foreign nation if he is deported from the United States. *See id.* The alternatives to the witness are only perjury or the refusal to answer which will place him in contempt of court. *See id.*

102. *See Balsys*, 119 F.3d at 127. *See also,* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984).

103. *See Balsys*, 118 S.Ct at 2233-34.

States and Lithuania (one of the countries wherein Balsys faces prosecution) to aid in the prosecution of Nazi war criminals.[104] Specifically, the agreement provides that the United States, through the OSI, will cooperate in the prosecution of persons who are alleged to have committed war crimes.[105] This entails locating witnesses who may have relevant information on war crimes and making those witnesses available to give testimony in accordance with the laws of Lithuania.[106] These details of the agreement reveal the deep intertwining between the OSI and the nation of Lithuania.[107] The OSI is obligated to create a record which will be used in Lithuania to try war criminals discovered in the United States.[108] In essence, the OSI hearing serves as the equivalent of an indictment of the suspected Nazi war criminal. Lithuania then employs this indictment in its prosecution after the OSI deports the suspect.[109]

Furthermore, the OSI also shares information gathered and testimony provided at its hearing with Israel.[110] While this agreement with Israel is less formal than the agreement with Lithuania, the result is the same.[111] The witness in the OSI hearing is still being forced to incriminate himself, despite the real and substantial threat of foreign prosecution.[112]

The Supreme Court's insistence that the OSI's involvement in aiding the prosecution of its witnesses in foreign countries is not enough to constitute "cooperative internationalism"[113] is exposed in light of the true nature of the OSI.[114] The OSI is intertwined with the government of Lithuania to bring about the identification, deportation and prosecution of Nazi war criminals.[115] It is this intertwining that should require the OSI to extend to the witness the privilege against self-incrimination. Without such protection, the witness is forced to indict himself in the OSI proceeding despite the fact the privilege would apply if he faced prosecution in New

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104. *See id.* at 2236.
105. *See id.*
106. *See id.*
107. *See id.*
108. *See id.*
109. *See id.*
110. *See id.*
111. *See id.*
112. *See id.*
113. The Court denied that the interconnection between the United States and countries like Israel and Lithuania gave the United States an incentive to use the OSI to gather information at OSI hearing to aid in the foreign prosecution of OSI witnesses. *See id.* at 2232–33.
114. *See id.* at 2236.
115. *See id.*

Jersey.[116] The situation is not different where the witness faces prosecution in a foreign country in such a tight relationship with the United States as to make the OSI hearing and the foreign prosecution one proceeding.[117] The Supreme Court left open the possibility that the privilege against self-incrimination could be extended to witnesses fearing foreign prosecution, yet it rejects the opportunity to do so in Balsys's case.[118]

V. POLICY CONSIDERATIONS SUPPORTING AN EXTENSION OF THE SELF-INCRIMINATION CLAUSE

Several policy considerations also support extending the privilege against self-incrimination to witnesses who fear prosecution by foreign governments.[119] The Supreme Court seems to find these policies unpersuasive based upon its faulty understanding of the law.[120] Upon closer examination, however, the Court's reluctance to recognize the policy considerations has less to do with their unpersuasiveness than it has to with the Court's unwillingness to extend the law in a new direction.[121]

The privilege against self-incrimination has three purposes: the advancement of individual integrity and privacy,[122] the protection of the individual from overreaching by the state in its pursuit of criminal prosecution,[123] and the promotion of the systematic values of the criminal justice system.[124] The first purpose is not diminished when a foreign

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116. *See id.* at 2237–45 (Breyer, J., dissenting).

117. *See* United States v. Balsys, 119 F.3d 122 at 130. (2nd Cir. 1997), *rev'd*, 118 S.Ct. 2218 (1998)

118. *See Balsys*, 118 S.Ct. at 2275.

119. *See Balsys*, 119 F.3d at 128.

120. *See Balsys*, 118 S.Ct. at 2274–75.

121. *See id.* at 2272–73. The Court defers this decision to the legislative and executive branches, hiding behind a false fear of complications arising out of the possible need for new treaties and agreements to implement this extension of the privilege. *See id.* Such a fear is unfounded. The Court need not find, nor does the witness request, that the privilege against self-incrimination be extended to him at both the OSI proceeding and the foreign prosecution. *See id.* at 2221. Balsys only requests that the protection of the self-incrimination clause in the OSI hearing conducted within the jurisdiction of the United States. *See id.*

122. *See Balsys*, 119 F.3d at 133.

123. *See id.*

124. *See id.* The values of the criminal justice system, such as the protection of a fair balance between the rights of the state and the rights of the accused, and the inherent value recognized in the right to an adversarial trial underlie the purposes Fifth Amendment privilege against self-incrimination. *See id.*

government seeks prosecution; the invasion of privacy and integrity is no less offensive when the government is foreign.[125]

The systematic policies of the criminal justice system that support the privilege are only advanced when the witness can trust that his real and substantial fear of prosecution will allow him to invoke the privilege.[126] Extending the privilege to witnesses who fear foreign prosecution will not adversely effect the use of the privilege within the United States.[127] Due to the highly publicized nature of all cases involving Nazi war criminals, extension of the privilege to such cases will lend credence to the United States' commitment to due process.[128]

The value of preventing government overreaching cannot be overstated.[129] In light of the interrelated nature of OSI proceedings and foreign prosecutions which follow, the OSI has incentives to resort to less-than-fair procedures to ensure witness testimony.[130] When the OSI subpoenas a witness to testify in a hearing for suspected Nazi war crimes, a great deal of work and investigation has already been expended.[131] The OSI has ferreted out a suspect who may have been living in the United States since the late 1940s or early 1950s.[132] The incentive to overreach in this situation is exactly the same as the incentive to overreach in any criminal case where a witness has been subpoenaed to testify. The privilege against self-incrimination should be extended in such a case for the same reason that it exists to protect against overreaching in any other criminal case.[133]

Furthermore, as a practical matter, the Court of Appeals for the Second Circuit found that a denial of the right against self-incrimination would have no effect on witness testimony in OSI proceedings.[134] The Court found that a witness probably would not respond to incriminating questions in an OSI hearing and take the punishment for contempt of court rather than facing prosecution and punishment in a foreign country.[135]

Such policy considerations lend significant weight to the argument that the privilege against self-incrimination should be extended. Therefore, the

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125. *See id.*
126. *See id.*
127. *See id.* at 135-36.
128. *See id.* at 131.
129. *See id.* at 130.
130. *See id.*
131. *See* 8 U.S.C. § 1182 (1995).
132. *See Balsys*, 118 S.Ct. at 2221.
133. *See Balsys*, 119 F.3d at 130.
134. *See id.* at 135-36.
135. *See id.*

policy considerations which underlie the Fifth Amendment privilege against self-incrimination must be carefully considered and weighed in each case where a witness faces a real and substantial fear of self-incrimination by a foreign government to determine whether the privilege and its purposes are unjustifiably undercut by compulsory testimony.[136]

VI. CONCLUSION

The Supreme Court has settled the division among the Circuits in deciding that the privilege against self-incrimination does not apply to witnesses who fear prosecution by foreign governments.[137] However, the Court's resolution of the matter is unsatisfactory.[138] The Court willfully refuses to recognize the power and involvement of the OSI in bringing about foreign prosecutions of witnesses who appear in OSI hearings.[139] It is this intertwining between the OSI and foreign governments which seek to prosecute Nazi war criminals that creates a situation wherein the witness is forced to incriminate himself in a United States proceeding to be prosecuted by his testimony in a foreign jurisdiction.[140] Therefore, the Supreme Court should reconsider its harsh position and extend to witnesses who seek the protection of the Constitution the privilege against self-incrimination when they fear real and substantial threats of foreign prosecution which are created by the United States government.

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136. *See generally Balsys*, 119 F.3d 122.

137. *See generally Balsys*, 118 S.Ct. 2218.

138. *See, e.g.*, Aman, *supra* note 91, at 1207.

139. *See Balsys*, 118 S.Ct. at 2234.

140. *See* Daniel J. Lindsey, *Tied Up by a "Gordian Knot": United States v. Gecas and the Rejection of the Privilege Against Self-Incrimination in Cases of Foreign Prosecution*, 82 MINN. L. REV. 1297, 1325-26 (1998).