Go to Supreme Court Opinion Go to Oral Argument Transcript

UNITED STATES OF AMERICA, PETITIONER, v. ALOYZAS BALSYS

No. 97-873

SUPREME COURT OF THE UNITED STATES

1997 U.S. Briefs 873; 1998 U.S. S. Ct. Briefs LEXIS 167

October Term, 1997

February 27, 1998

[*1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES

COUNSEL: SETH P. WAXMAN, Solicitor General, JOHN C. KEENEY, Acting Assistant Attorney General, MICHAEL R. DREEBEN, Deputy Solicitor General, BARBARA McDOWELL, Assistant to the Solicitor General, JOSEPH C. WYDERKO, Attorney, Department of Justice, Washington, D.C. 20530-0001 (202) 514-2217.

QUESTION PRESENTED

Whether a witness may invoke the Fifth Amendment privilege against compelled self-incrimination based solely on a fear of prosecution by a foreign country.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 119 F.3d 122. The opinion of the district [*6] court (Pet. App. 53a-80a) is reported at 918 F. Supp. 588.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1997. A petition for rehearing was denied on September 25, 1997. Pet. App. 51a-52a. The petition for a writ of certiorari was filed on November 24, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED: CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

In 1993, the Department of Justice issued an administrative subpoena requiring respondent Aloyzas Balsys, a resident alien born in Lithuania, to appear for a deposition to answer questions relating to his activities in Europe during World War II and his immigration to the United States. At his deposition, respondent invoked the Fifth Amendment privilege against compelled self-incrimination and refused to answer any questions about his wartime activities or his immigration to the United States. The district court granted [*7] the government's petition to enforce the subpoena. Pet. App. 53a-80a. The court of appeals vacated the district court's order and remanded for further proceedings. Id. at 1a-50a.

1. Respondent is a resident alien of Lithuanian nationality. On May 2, 1961, he submitted an application for an immigrant visa and alien registration at the American Consulate in Liverpool, England. On his application, he stated that he had served in the Lithuanian army between 1934 and 1940, and that he had lived in hiding in Plateliai, Lithuania, between 1940 and 1944. He swore under oath that the answers on his immigrant visa application were true and correct. Pet. App. 3a, 54a; Gov't C.A. Br. 3.

Based on those answers, respondent was granted an immigrant visa. On June 30, 1961, he immigrated to the United States from England pursuant to the Immigration and Nationality Act, 8 U.S.C. 1201. He currently resides in New York. Pet. App. 3a, 54a.

The Office of Special Investigations of the Department of Justice (OSI) is investigating whether respondent illegally obtained admission to the United States by concealing assistance in Nazi persecution during World War II. OSI suspects that [*8] respondent was neither living in Plateliai, Lithuania, nor in hiding between 1940 and 1945. Rather, OSI suspects that he was living in Vilnius, Lithuania, and was a member of the Lithuanian Security Police, known as "Saugumas," which persecuted Jews and other civilians in collaboration with the Nazi government of Germany. Pet. App. 3a; Gov't C.A. Br. 3-4. If respondent did assist the forces of Nazi Germany in persecuting persons because of their race, religion, national origin, or political opinion, he would be subject to deportation under 8 U.S.C. 1182(a)(3)(E) (Supp. II 1996) and 1227(a)(4)(D) (Supp. II 1996). He may also be subject to deportation under 8 U.S.C. 1182(a)(6)(C)(i) (Supp. II 1996) and 1227(a)(1)(A) (Supp. II 1996) for lying under oath on his immigrant visa application about his activities during World War II. See Pet. App. 3a.

In 1993, OSI issued an administrative subpoena requiring respondent to appear for a deposition and to produce documents relating to his activities in Europe between 1940 and 1945 and to his immigration to the United States in 1961. At his deposition, respondent refused to answer any questions concerning [*9] his wartime activities or his immigration to the United States. He claimed that he had a right not to do so based on the Fifth Amendment privilege against compelled self-incrimination. He did not contend that his responses to OSI's inquiries could incriminate him in any domestic prosecution. n1 Rather, he contended that those responses could subject him to prosecution in Lithuania, Israel, and Germany. Pet. App. 3a-4a, 55a, 57a; Gov't C.A. Br. 4-5. n2

n1 As the court of appeals recognized, "since a deportation proceeding is a civil action and not a criminal prosecution, [respondent] does not have a Fifth Amendment right to refuse to answer questions posed to him for fear that such information might be used to deport him." Pet. App. 8a (citation omitted).

n2 In 1992, Lithuania adopted a statute providing for the punishment of Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II. See Pet. App. 61a-62a & n.9. Israel imposes the death penalty on persons who "'during the period of the Nazi regime, in an enemy country,' committed crimes against Jewish people." See id. at 64a-65a & n.11. Germany has prosecuted persons suspected of crimes against Jews during World War II under its murder statute, although it is uncertain whether the statute may be applied to non-German citizens alleged to have committed murder outside Germany. See id. at 63a-64a

& n.10.
[*10]

The government filed a petition for enforcement of the subpoena pursuant to 8 U.S.C. 1225(a) (Supp. II 1996). The district court granted the petition and ordered respondent to testify. Pet. App. 4a-7a, 53a-80a. Although the court found that respondent "faces a 'real and substantial' danger of prosecution by Lithuania and Israel," id. at 70a, the court held that respondent could not invoke the Fifth Amendment privilege to avoid giving testimony that would incriminate him solely in a foreign prosecution, id. at 71a-78a.

2. The court of appeals vacated the district court's order enforcing the administrative subpoena and remanded the case for further proceedings. Pet. App. 1a-50a. The court held that a witness who has a real and substantial fear of prosecution in 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 criminal prosecution in this country. Id. at 2a, 40a. The court acknowledged that other circuits had reached a contrary conclusion. Id. at 10a-11a (citing United States v. (Under Seal) Araneta, 794 F.2d 920 (4th Cir.), cert. denied, 479 U.S. 924 (1986); [*11] In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970)). n3

n3 At the time of the decision below, a panel of the Eleventh Circuit had reached the same conclusion as the Second Circuit in this case. Subsequently, the en banc Eleventh Circuit reversed the panel, agreeing with the Fourth and Tenth Circuits. See United States v. Gecas, 120 F.3d 1419 (1997) (en banc), petition for cert. pending, No. 97-884.

The court of appeals initially concluded that "the language of the Fifth Amendment makes no distinction between self-incrimination in domestic and in foreign prosecutions." Pet. App. 8a. The court then turned to the question "whether allowing those who have reasonable fear of foreign prosecution to invoke the privilege "promotes or defeats [the] policies and purposes'" served by the privilege. Id. at 15a-16a (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 54 (1964)). n4 First, the court found that "permitting a witness to invoke the Fifth Amendment to avoid incriminating himself in a foreign criminal case works to protect the dignity and privacy of the individual every bit as much as allowing the [*12] privilege in cases where the fear is of domestic prosecution." Id. at 16a. Second, the court reasoned that "the systemic policies of American criminal justice that underlie the Fifth Amendment"--such as the "state-individual balance" in criminal trials--"are neither promoted nor inhibited by allowing the privilege to be invoked in cases of fear of foreign prosecution." Id. at 17a. Third, the court decided that allowing persons who fear foreign prosecution to invoke the privilege furthered the purpose of preventing government overreaching. Id. at 17a-22a. The court suggested that, given the "international collaboration in criminal prosecutions" in recent years, the government may have an incentive to use "abusive measures" to extract confessions for use in foreign prosecutions. Id. at 18a-21a. n5

n4 The United States did not challenge the district court's finding that respondent has a real and substantial danger of prosecution by Lithuania and Israel. Pet. App. 7a.

n5 The court also found "significant support" for its view in Murphy's "statement and acceptance of the English common law rule" that the privilege against compelled self-incrimination applied whether the witness was under a threat of domestic or foreign prosecution. Pet. App. 23a-25a (citing Murphy, 378 U.S. at 63).
[*13]

The court rejected the view of other circuit and district courts that domestic law enforcement would be seriously undermined if witnesses could invoke the Fifth Amendment privilege based solely on a fear of foreign prosecution. Pet. App. 26a-29a. The court acknowledged that allowing such witnesses to invoke the privilege "has costs for domestic law enforcement," because the United States cannot compel the witness's testimony by granting him immunity from foreign

prosecution, as it can from domestic prosecution. Id. at 27a. But the court found "the strength of this objection to be exaggerated" (ibid.) for several reasons: those cases in which a witness can establish a real and substantial fear of foreign prosecution "rarely occur" (id. at 29a); a witness could ordinarily invoke the privilege only with respect to foreign activities, whereas the principal focus of domestic law enforcement is on activities in the United States (id. at 31a); and the government could ask that adverse inferences be drawn against a witness in the domestic civil proceeding based on his refusal to testify (id. at 32a-33a). The court also suggested that Congress and the Executive Branch could "limit dramatically [*14] the domestic law enforcement costs of the interpretation of Fifth Amendment that we accept today by developing schemes that parallel domestic immunity statutes." Id. at 39a. n6

n6 The court also held that respondent had not waived the Fifth Amendment privilege by answering questions, under oath, concerning his World War II activities in his 1961 visa application. Pet. App. 40a-43a.

Judge Meskill concurred in the result. Pet. App. 49a-50a. He cautioned that "our decision today should not be interpreted as carte blanche for honoring a Fifth Amendment privilege against self-incrimination in all domestic proceedings where the recipient of the subpoena has a well-founded fear of foreign prosecution" because "other scenarios may call for a different result." Id. at 49a. In his view, "[the] decision should be limited to the facts before us and to OSI proceedings." Id. at 50a.

District Judge Block wrote a concurring opinion, which Judge Calabresi joined. Pet. App. 43a-48a. Judge Block "expressed [his] concern, triggered by Judge Meskill's concurrence in the result, that [the] decision today may be perceived as qualifying the privilege in cases involving a real and substantial [*15] fear of foreign prosecution based upon a case-by-case analysis of domestic law enforcement." Id. at 43a-44a. In his view, the application of the Fifth Amendment privilege to any witness who faces a real and substantial danger of foreign prosecution is "unqualified." Id. at 45a.

TITLE: BRIEF FOR THE UNITED STATES

SUMMARY OF ARGUMENT

The Self-Incrimination Clause of the Fifth Amendment does not permit a witness to withhold testimony based on his fear that the testimony could incriminate him in a foreign prosecution. The reach of the Fifth Amendment is textually limited to compelled testimony that could cause an individual to become a witness against himself in a "criminal case." That reference is naturally read, in context, to refer solely to domestic prosecutions. The Sixth Amendment extends a variety of procedural protections to the accused in "all criminal prosecutions." Given the nature of those protections--such as the right to counsel and the right to a jury of the State and district in which the crime was committed--the Sixth Amendment plainly applies only to criminal cases in this country. The Fifth Amendment's coverage is similarly limited to domestic criminal cases. Any suggestion that its provisions [*16] apply to the actions of foreign sovereigns is inconsistent with the Constitution's general lack of extraterritorial application. There is no indication that the Framers intended a different scope for the privilege against compelled self-incrimination.

This Court's decisions support that conclusion. Before extending the Self-Incrimination Clause to the States through the Fourteenth Amendment in Malloy v. Hogan, 378 U.S. 1 (1964), this Court generally held that a witness could not assert the Fifth Amendment privilege based on a fear of prosecution by a government other than the one compelling the testimony. Accordingly, a witness could not refuse to testify in a federal proceeding based on a fear of state prosecution. On the same day that it handed down Malloy, the Court rejected that view and permitted a witness's fear of prosecution in a different domestic jurisdiction to support a refusal to testify based on the Fifth Amendment. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). But it remains true under Murphy that, in order to justify a refusal to give self-incriminating testimony, a witness must fear prosecution by a government subject to the Fifth Amendment. [*17] That is a characteristic of all domestic, but no foreign, governments. Nothing in Murphy's analysis would justify extending the Fifth Amendment to protect against the use of compelled testimony in a foreign prosecution.

The purpose of the Self-Incrimination Clause likewise provides no justification for extending its reach to fears of foreign prosecution. The essential purpose of the Clause is to prevent the abuse of power that might occur if the federal government, or a State, could compel a witness to furnish its own prosecutors with the critical testimony needed to pursue criminal charges against him. Where the possibility of bringing a domestic prosecution based on a witness's testimony is eliminated, however--for example, by a grant of immunity--the perceived incentive for abuse disappears. The witness's testimony then may be compelled, even if the disclosures have other adverse legal or personal consequences for the witness. The same rule applies when there is no possibility of a domestic prosecution in the first place, but only the fear that an independent foreign government may use the compelled testimony in its own proceedings.

The expansion of the Self-Incrimination Clause [*18] to protect witnesses who fear only foreign prosecution would impair the federal government's ability to investigate and prosecute wrongdoing in a manner that the Framers could not have intended. They understood that governments could always overcome the privilege against compulsory self-incrimination by granting the witness immunity from prosecution. To be valid, however, the immunity must be coextensive with Fifth Amendment rights. The government cannot grant such immunity when the proceeding in which the witness fears incrimination would be brought by another country because the United States cannot control the actions of a foreign sovereign. Thus, if witnesses' fears of foreign prosecution can bar the government from compelling their testimony, the immunity statutes would be rendered ineffective as to such witnesses, and domestic law enforcement would be seriously hampered. In view of the increasingly international scope of crime, the loss of such evidence would unjustifiably injure vital national interests.

ARGUMENT

THE SELF-INCRIMINATION CLAUSE DOES NOT PERMIT A WITNESS TO WITHHOLD TESTIMONY BASED ON HIS FEAR THAT THE TESTIMONY COULD INCRIMINATE HIM IN A FOREIGN [*19] CRIMINAL PROSECUTION

The Self-Incrimination Clause of the Fifth Amendment provides that "no person * * * shall be compelled in any criminal case to be a witness against himself." The reference to "any criminal case" embraces any federal criminal prosecution, and, since this Court's ruling that the Self-Incrimination Clause is applicable to the States through the Fourteenth Amendment, see Malloy v. Hogan, 378 U.S. 1 (1964), it also embraces any state criminal prosecution. A witness may therefore assert the protection of the Fifth Amendment based on a fear of either state or federal criminal prosecution, regardless of which entity is seeking to compel the testimony. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). A foreign criminal prosecution, however, is not a "criminal case" within the meaning of the Self-Incrimination Clause. Accordingly, the Clause does not protect an individual against being compelled to give testimony that could incriminate him only in a foreign criminal prosecution.

A. The Fifth Amendment Privilege Is Textually Limited To Witnesses At Risk Of Domestic Prosecution

1. The phrase "any criminal case" in the Fifth Amendment [*20] derives meaning from its constitutional context. The Framers adopted the Bill of Rights in order "to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution." New York Times Co. v. United States, 403 U.S. 713, 716 (1971) (per curiam) (Black, J., concurring). The Framers did not seek to limit the powers of the States. Much less would they have sought to dictate the conduct of foreign governments. As Chief Justice Marshall explained, the Constitution's "limitations on power * * * are naturally, and, we think, necessarily, applicable to the government created by the instrument," and not to "distinct governments, framed by different persons and for different purposes." Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (holding Fifth Amendment's Just Compensation Clause inapplicable to the States). It is thus evident that the phrase "any criminal case," in context, was originally intended to refer only to a federal criminal case.

The Framers used similar terms elsewhere in the Bill of Rights to identify what could only have been domestic

proceedings. The Sixth Amendment, [*21] for example, provides that "in all criminal prosecutions," the accused has a right to "a speedy and public trial," to "an impartial jury of the State and district" where the crime occurred, to notice of the charges against him, to confront adverse witnesses and to compel the attendance of favorable ones, and to have the assistance of counsel. The reference to "all criminal prosecutions" in the Sixth Amendment clearly refers only to prosecutions in United States courts. The Sixth Amendment did not purport to govern the actions of state courts, let alone presume to dictate the rights to be accorded the accused in foreign courts. Indeed, if the Framers had intended the Sixth Amendment to apply abroad, the requirement that the jury be of "the State and district" where the crime occurred would be nonsensical. See also U.S. Const. Art III,§ 2, cl. 3 (requiring that "the Trial of all Crimes" be by jury "in the State where the said Crimes shall have been committed"). n7

> n7 We have set out the texts of the Fifth and Sixth Amendments in an appendix to this brief, at 1a. See also U.S. Const. Amend. VII (providing for the right to jury trial in "Suits at common law, where the value in controversy shall exceed twenty dollars," thus plainly referring only to suits brought in the federal courts).

[*22]

This Court has recognized that these and other provisions of the Constitution do not apply to foreign proceedings, notwithstanding that "none of them is limited by its express terms, territorially or as to persons." Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) (observing that the protections of the Bill of Rights do not extend to enemy aliens abroad); Neely v. Henkel, 180 U.S. 109, 122 (1901) ("the provisions of the Federal Constitution relating to the writ of habeas corpus, bills of attainder, ex post facto laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty, and property * * * have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country"); see Restatement (Third) of Foreign Relations Law § 433 cmt. a (1987) ("The Constitution and laws of the United States * * * do not govern foreign officials acting in their own countries.").

For those reasons, the reference to "any criminal case" in the Self-Incrimination Clause is most sensibly construed, consistent with the reference to "all criminal prosecutions" in the Sixth Amendment, as applying only to domestic [*23] criminal cases. Just as the Framers could not have intended to require foreign governments to provide jury trials in their courts, they could not have intended to prevent foreign governments from using compelled self-incriminating testimony in their prosecutions. As the Court has recognized in an analogous context, any such "extra-territorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment." Johnson, 339 U.S. at 784. But it did not.

This Court's decision in Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), does not justify a broader understanding of a "criminal case" for purposes of the Self-Incrimination Clause. Counselman permitted a witness to invoke the Fifth Amendment privilege to refuse to answer questions in a grand jury investigation. In so holding, the Court rejected an argument that, because a grand jury proceeding is not a "criminal prosecution" within the meaning of the Sixth Amendment, it cannot be a "criminal case" within the meaning of the Fifth Amendment. Id. at 562. The Court [*24] stated:

> A criminal prosecution under article 6 of the amendments, is much narrower than a "criminal case," under article 5 of the amendments. It is entirely consistent with the language of article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.

Id. at 563. While correctly holding that a grand jury witness may invoke Fifth Amendment rights, Counselman's analysis of that issue, like other aspects of that opinion, has not stood the test of time. Cf. Kastigar v. United States, 406 U.S. 441 (1972) (rejecting "transactional immunity" test articulated in Counselman in favor of a "use and derivative use" immunity test). n8

n8 Likewise, the ruling in Boyd v. United States, 116 U.S. 616, 634 (1886), that the Fifth Amendment may be triggered by "quasi-criminal" cases that are not otherwise criminal prosecutions within the meaning of the Sixth Amendment has been sharply limited, if not abandoned altogether, in later cases. See United States v. Ward, 448 U.S. 242, 253-255 (1980) (rejecting characterization of a penalty proceeding as "quasi-criminal" and noting that the Court "has declined * * * to give full scope to the reasoning and dicta in Boyd").

[*25]

Cases since Counselman have made clear that the Fifth Amendment privilege may be invoked in any type of proceeding, "civil or criminal, formal or informal, where the answers might incriminate [the witness] in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); accord Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977); Kastigar, 406 U.S. at 444. What is essential is that the testimony might incriminate the witness in a later criminal proceeding:

> The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.

McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (emphasis added).

In light of that principle, the conclusion that a grand jury witness may rely on the Self-Incrimination Clause does not depend on characterizing the grand jury proceedings as a "criminal case," as Counselman suggested. Rather, what the witness must show is that his testimony might be used in a later "criminal case." And [*26] properly understood, the phrases "criminal case" in the Fifth Amendment and "criminal prosecution" in the Sixth Amendment are synonymous. See Hudson v. United States, 118 S. Ct. 488, 500 (1997) (Souter, J., concurring in the result) ("There is obvious sense in employing common criteria to point up the criminal nature of a statute for purposes of both the Fifth and Sixth Amendments."). While those phrases encompass domestic criminal cases, a foreign proceeding of any variety does not constitute a "criminal case" or a "criminal prosecution" within the scope of the Fifth and Sixth Amendments.

2. There is no surviving record that, in drafting the Fifth Amendment, the Framers expressly discussed whether the phrase "any criminal case" in the Self-Incrimination Clause was intended to apply only to domestic, and not foreign, prosecutions. The history surrounding the adoption and ratification of the Clause is sparse. See United States v. Gecas, 120 F.3d 1419, 1435 (11th Cir. 1997) (en banc) (noting that the Clause "has virtually no legislative history"), petition for cert. pending, No. 97-884. Representative James Madison drafted the Clause, and introduced it in [*27] the First Congress, without the phrase "any criminal case." The phrase was added at the suggestion of Representative John Laurence on the ground that the Clause would otherwise be "in some degree contrary to laws passed." See Gecas, 120 F.3d at 1456; The Founders' Constitution 262 (P. Kurland ed., 1987); see also Eben Moglen, Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination, 92 Mich. L. Rev. 1086, 1123 (1994) (concluding that "the legislative history of the Fifth Amendment adds little to our understanding of the history of the privilege"). There is nothing to indicate that the Framers had foreign criminal prosecutions in mind.

Nor were the Framers operating against any settled understanding of the privilege against self-incrimination as it had developed in the common law of England and the American colonies. The privilege had not been not widely invoked by criminal defendants or witnesses as of that time. See John H. Langbein, The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 Mich. L. Rev. 1047, 1084-1085 (1994) (concluding that privilege was only rarely [*28] asserted in English prosecutions until the 19th century); Moglen, supra, 92 Mich. L. Rev. at 1087 (noting that "Americans gave far more rhetorical than practical respect" to the privilege during the 18th century). There were consequently few judicial decisions addressing the scope of the privilege. And no court in this country had addressed whether the privilege protected a witness from giving testimony that could incriminate him only in a prosecution brought by an independent sovereign. Randall D. Guynn, Note, The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in a Foreign Country's Court, 69 Va. L. Rev. 875,

894 (1983).

Two pre-constitutional English decisions did address self-incrimination claims involving a fear of prosecution in a separate court system. See Murphy, 378 U.S. at 58-59. But each case involved two judicial systems operating under the same sovereign. East India Co. v. Campbell, 1 Ves. Sen. 246, 27 Eng. Rep. 1010 (1749) (testimony could be withheld in English court based on fear of incrimination in a court sitting in India, which was then an English colony); Brownsville v. Edwards, 2 Ves. Sen. 243, 28 Eng. Rep. 157 (1750) [*29] (testimony could be withheld in a court of equity based on fear of incrimination in an ecclesiastical court). Those decisions do not support any suggestion that the Framers would have understood the Self-Incrimination Clause of the Fifth Amendment to protect witnesses based on fears of prosecution by an independent foreign government.

B. This Court's Decisions Support Limiting The Self-Incrimination Clause To Witnesses At Risk Of Domestic Prosecution

The conclusion that an individual may assert the Fifth Amendment to avoid incriminating himself only in a domestic "criminal case" finds support in decisions of this Court. Before this Court extended the Self-Incrimination Clause to the States through the Fourteenth Amendment in Malloy v. Hogan, supra, the Court generally held that a witness could not invoke the Fifth Amendment privilege based on a fear of prosecution in a jurisdiction other than the one compelling his testimony. Accordingly, a witness's fear of state prosecution did not justify his withholding testimony from a federal tribunal. Simultaneously with its decision in Malloy, the Court rejected that view and permitted inter-jurisdictional fears of prosecution [*30] to support a claim of the Fifth Amendment privilege. Murphy, supra, But it remains true under Murphy that, in order to justify a refusal to give self-incriminating testimony, a witness must fear prosecution in a jurisdiction subject to the Fifth Amendment. That is a characteristic that no foreign jurisdiction possesses.

1. This Court's treatment of witnesses who have refused to testify based on fears of prosecution in another jurisdiction has changed over time. The Court's first encounter with the issue occurred in United States v. Saline Bank, 26 U.S. (1 Pet.) 100 (1828). There, the government filed a bill of discovery in federal district court against stockholders of a Virginia bank, and the stockholders were allowed to avoid discovery that could have subjected them to prosecution under state law. In a brief opinion, which did not explicitly mention the Fifth Amendment, the Court stated that "the rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it." Id. at 104; see also Ballmann v. Fagin, 200 U.S. 186, 195-196 (1906) (following Saline Bank without [*31] analysis). In Murphy, this Court read Saline Bank as permitting the assertion of the Fifth Amendment privilege in federal court based on a fear of prosecution in state court. Murphy, 378 U.S. at 60, 68-69 & n.11. But Saline Bank itself neither cited the Fifth Amendment nor offered any explanation for why the Fifth Amendment would apply in that setting. n9

> n9 The Murphy Court supported its statement that Saline Bank rested on the Self-Incrimination Clause by noting the two 18th century English precedents discussed above, see p. 17, supra. Murphy, 378 U.S. at 69 (citing East Indian Co., supra; Brownsword, supra.) Those cases, however, lend no support to the view that Saline Bank rests on constitutional grounds; indeed, those English antecedents suggest a basis in equity jurisprudence for Saline Bank. See also Jack Kroner, Self Incrimination: The External Reach of the Privilege, 60 Colum. L. Rev. 816, 818 n.16 (1960) (Saline Bank has been explained "as an example of the abhorrence of forfeitures at equity"), citing John T. McNaughton, Self-Incrimination Under Foreign Law, 45 Va. L. Rev. 1299, 1305-1306 (1959). As for Ballmann, it involved disclosures that would have been incriminating under both federal and state law. 200 U.S. at 195-196.

[*32]

In a series of later cases--all preceding the extension of the Self-Incrimination Clause to the States--the Court held that a witness in a federal proceeding could not invoke the Fifth Amendment privilege based on a fear of state

prosecution. United States v. Murdock, 284 U.S. 141 (1931); Hale v. Henkel, 201 U.S. 43 (1906); cf. Brown v. Walker, 161 U.S. 591, 606 (1896) (dicta). The Court likewise held that a witness in a state proceeding could not invoke the Fifth Amendment privilege based on a fear of federal prosecution. Knapp v. Schweitzer, 357 U.S. 371 (1958); Feldman v. United States, 322 U.S. 487, 489-494 (1944); accord Mills v. Louisiana, 360 U.S. 230 (1959). All of those cases rested on the principle that "the privilege against testifying * * * pertains to a prosecution in the same jurisdiction." Feldman, 322 U.S. at 493; see also Hale, 201 U.S. at 69 ("the only danger [of self-incrimination] to be considered is one arising within the same jurisdiction and under the same sovereignty"). The Court reasoned that the Fifth Amendment privilege was intended by the Framers [*33] only "as a restraint upon compulsion of testimony by the newly organized Federal Government at which the Bill of Rights was directed, and not as a general declaration of policy against compelling testimony." Knapp, 357 U.S. at 379-380. Consequently, a witness could not refuse to testify based on a fear of prosecution by a jurisdiction that was not bound by the Fifth Amendment.

A number of state courts had similarly held, before Malloy, that the self-incrimination protections of their own constitutions did not protect an individual from being compelled to give testimony that could be used against him by the federal government, by another State, or by a foreign country. It was sufficient that the witness could not be prosecuted by the government compelling the testimony. See John T. McNaughton, Self-Incrimination Under Foreign Law, 45 Va. L. Rev. 1299, 1304-1305 (1959) (describing that as the "orthodox," although not unanimous, position among the state courts); see also, e.g., Republic of Greece v. Koukouras, 162 N.E. 345, 347 (Mass. 1928) (incrimination under foreign law); Dunham v. Ottinger, 154 N.E. 298, 302 (N.Y. 1926) (incrimination [*34] under federal law); State v. March, 46 N.C. 526, 527-528 (1854) (incrimination under law of another State). The Model Code of Evidence and the Uniform Rules of Evidence provided a privilege only for testimony that would implicate a witness in "a violation of the laws of this State." McNaughton, supra, 45 Va. L. Rev. at 1305 & nn. 45, 46 (quoting Model Code of Evidence Rule 202 (1942) and Unif. R. Evid. 24).

2. In Murphy, 378 U.S. at 77-78, the Court changed course and held that the Fifth Amendment "protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." Murphy did not hold that a fear of prosecution in any jurisdiction whatsoever could support the invocation of the Fifth Amendment privilege. Rather,

> reconsideration of the rule that the Fifth Amendment privilege does not protect a witness in one jurisdiction against being compelled to give testimony that could be used to convict him in another jurisdiction was made necessary by the decision in Malloy v. Hogan, in which the Court held the Fifth Amendment privilege applicable to the States through [*35] the Fourteenth Amendment.

Kastigar, 406 U.S. at 456 n.42 (citations omitted). The Court explained in Murphy that the purposes of the Self-Incrimination Clause would be "defeated" if "a 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." 378 U.S. at 55 (emphasis added; internal quotation marks omitted). Murphy thus ensures that a witness receives Fifth Amendment protections against the use of his compelled testimony in any criminal trial in this country, whether or not the "compelling" sovereign and the "using" sovereign are one and the same. The Court expressly limited its decision in Murphy to "jurisdictions within our federal structure," 378 U.S. at 77--that is, to jurisdictions that are bound by the Self-Incrimination Clause. Id. at 54; accord Kastigar, 406 U.S. at 456-457.

The potential for circumvention of the Self-Incrimination Clause that concerned the Court in Murphy does not exist when only the government compelling the testimony, and not the government using it, is [*36] bound by the Clause. Murphy guards against the danger that a witness could find himself at risk of self-incrimination in one jurisdiction bound by the Fifth Amendment (e.g., a State) after having been compelled to testify by another jurisdiction bound by the Fifth Amendment (e.g., the federal government). Two jurisdictions in this country, both bound by the Fifth Amendment, should not be able collectively to bypass that constitutional protection.

No such incongruous result occurs when the Fifth Amendment binds only the "compelling" sovereign, but not the "using" sovereign. The essential proscription of the Fifth Amendment bars the use of a witness's compelled testimony in his own criminal trial. "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (citations omitted). Because foreign governments are not precluded by the United States Constitution from making use of "compelled" testimony at trial, [*37] the United States does not circumvent the Constitution if it compels a witness to testify in a domestic proceeding notwithstanding his fear of foreign prosecution. Even if the compelled testimony is later used against the witness in a foreign prosecution, a constitutional violation cannot occur when the "using" sovereign is an independent foreign government. n10

n10 The United States cannot properly be deemed the "using" sovereign simply because it may, at some future time, provide evidence or similarly cooperate in a foreign prosecution of the witness. See Gecas, 120 F.3d at 1433-1434 (rejecting similar argument); Pet. App. 20a (discussing potential cooperation between United States and other countries with regard to suspected Nazi collaborators). This Court has recognized that such cooperation between the federal and state governments does not transform a state prosecution into a federal prosecution for purposes of the Double Jeopardy Clause. Bartkus v. Illinois, 359 U.S. 121, 122-124 (1959) (rejecting double jeopardy claim where federal officials turned over all evidence they had gathered in connection with federal prosecution of defendant for use in subsequent state prosecution of defendant); accord United States v. Figueroa-Soto, 938 F.2d 1015, 1018-1019 (9th Cir. 1991), cert. denied, 502 U.S. 1098 (1992); United States v. Paiz, 905 F.2d 1014, 1023-1024 (7th Cir. 1990), cert. denied, 499 U.S. 924 (1991); United States v. Russotti, 717 F.2d 27, 30-31 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984). No more demanding test should apply here, especially in light of the inability of the United States to control the actions of a foreign nation.

[*38]

3. The Court suggested in Murphy that its holding was consistent with "the settled 'English rule' regarding self-incrimination under foreign law." 378 U.S. at 63. Justice Harlan's concurring opinion in Murphy, subsequent legal scholarship, and developments in Great Britain itself suggest that English law was not at all "settled" in that regard. See Murphy, 378 U.S. at 81 n.1 (Harlan, J., concurring); Guynn, supra, 69 Va. L. Rev. at 893-894; Diego A. Rotsztain, Note, The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution, 96 Colum. L. Rev. 1940, 1945-1946, 1948-1949 (1996). Closely examined, the English cases do not support an assertion of the Fifth Amendment privilege based on a fear of foreign prosecution.

Murphy placed primary emphasis on two 19th century English cases that addressed whether a witness could refuse to testify in an English court based on a fear of prosecution in a foreign country. n11 The first of those cases held that witnesses could not be compelled to testify in such circumstances, explaining that the privilege "is confined to what may tend to subject a party to penalties by our own laws. [*39] " King of the Two Sicilies v. Willcox, 1 Sim. (N.S.) 301, 331, 61 Eng. Rep. 116, 128 (1851). The second was a civil proceeding brought in an English court by the United States against a former agent of the Confederacy, in which the United States sought testimony from the defendant that would have subjected his U.S. property to forfeiture. United States v. McRae, L.R.-3 Ch. App. 79 (1867). In upholding the defendant's refusal to testify, the Lord Chancellor acknowledged that King of the Two Sicilies was "most correctly decided," but opined that the general rule stated in that case was unduly broad. Id. at 85. The Lord Chancellor declined to apply the King of the Two Sicilies rule in McRae because the English courts did not have to speculate on whether the defendant's testimony would actually have adverse consequences for him abroad: No dispute existed as to the relevant United States law, and the United States already had the defendant's property "within [its] power." 3 Ch. App. at 85-87.

n11 Murphy also discussed two English cases that arose in the 18th century, but the Court appeared to place little weight on them. Murphy, 378 U.S. at 69 (citing East India Co., supra; Brownsword, supra). In any event, as discussed above (see p. 17, supra), those cases involve proceedings in two judicial systems operating under

the same sovereign. They therefore shed no light on the issue in this case.
[*40]

It is unclear what relevance the two 19th century English cases cited by the Court in Murphy might have to the construction of the Fifth Amendment. Those decisions came long after the ratification of the Bill of Rights, and they therefore cannot illuminate the Framers' intent. See Brown, 161 U.S. at 600 (recognizing that English cases applying the self-incrimination privilege are relevant to the extent that they reveal its "known and settled construction" at the time of ratification); see also United States v. Gaudin, 515 U.S. 506, 515-516 (1995).

In any event, the British commentators did not take the view that McRae settled the question whether the self-incrimination privilege could be invoked based on a fear of foreign prosecution. See Guynn, supra, 69 Va. L. Rev. at 893 & n.116 (quoting from treatises indicating that uncertainty over whether privilege protected against foreign incrimination persisted for "nearly a century" after McRae). Nor did the British Law Reform Committee. In 1967, the Committee recommended to Parliament that the privilege be limited by statute to evidence that could incriminate a witness in a domestic prosecution, explaining [*41] that "there are no recent authorities as to whether a person may claim privilege to refuse to answer questions or to produce documents that might incriminate him under foreign law and the two old authorities (King of the Two Sicilies$ v. Willcox . . . and U.S.A. v. McRae . . .) are not wholly consistent." Id. at 893-894 (quoting Law Reform Committee, Sixteenth Report, Cmd. 3472, No. 113, at 7 (1967)). Parliament adopted the proposed restriction on the self-incrimination privilege in 1968. Id. at 894 & n.118 (citing Civil Evidence Act, 1968, § 14). That history suggests that the Murphy Court overstated matters in concluding that United States v. McRae represented the "settled" and "authoritative" English rule. 378 U.S. at 67.

C. The Purposes Of The Self-Incrimination Clause Do Not Justify Its Extension To Fears Of Foreign Prosecution

The principal purpose of the Fifth Amendment privilege is to prevent "abuses [of] power" by our government. Ullman v. United States, 350 U.S. 422, 428 (1956). The Self-Incrimination Clause is designed to deny the federal government and, through the Fourteenth Amendment, the States the ability to extract incriminating [*42] admissions from an individual that those governments could then use to prosecute him.

> Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber--the inquistorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion. The Self-Incrimination Clause reflects "a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused."

Doe v. United States, 487 U.S. 201, 212 (1988) (citations and emphasis omitted) (quoting Ullmann, 350 U.S. at 427); see also Murphy, 378 U.S. at 55.

The purpose of preventing abuses of power by the prosecution in the compulsion of incriminating testimony is fully served if the Fifth Amendment privilege is limited to persons at risk [*43] of domestic prosecution. As the Court implicitly recognized in Kastigar, once the government agrees not to prosecute a witness based on his own statements, the potential for the sort of abuse of power that motivated the Self-Incrimination Clause disappears. See Kastigar, 406 U.S. at 446 (explaining that grants of immunity represent "a rationale accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify"). The witness's testimony may well have other adverse consequences, including the imposition of civil sanctions by the government itself. See United States v. Ward, 448 U.S. 242, 248-251 (1980) (civil penalty proceeding not a "criminal case" for purposes of the Self-Incrimination Clause); Brown, 161 U.S. at 596 (the privilege does not "protect witnesses against every possible

detriment which might happen to them from their testimony"). But those consequences are not thought likely to incite the abuses of power against which the Self-Incrimination Clause guards. The same is true when the government cannot prosecute the witness because his conduct would be a crime only in a foreign [*44] country. As one authority put it, "where the crime is a foreign crime, any motive to inflict brutality upon a person because of the incriminating nature of the disclosure--any 'conviction hunger' as such--is absent." 8 John H. Wigmore, Evidence, § 2258, at 345 (McNaughton rev. 1961) (quoted in Murphy, 378 U.S. at 56 n.5).

The court of appeals agreed that such "'conviction hunger' seems unlikely when the prosecution does not intend to eat." Pet. App. 18a. But the court nonetheless perceived some risk of abuse of power by the federal government because of its "significant stake in many foreign criminal cases." Id. at 19a. The court suggested that the government might "take abusive measures" to obtain evidence that could be turned over to a foreign government for its use in prosecuting the witness. Id. at 21a. The court's rational proves too much. It would apply even more strongly when the United States seeks self-incrimination testimony from a witness, under a grant of immunity, so that the United States itself may prosecute the witness's more culpable conspirators. The government's incentive to "take abusive measures "would, if anything, be greater where the testimony [*45] could be used in its own prosecution. But Kastigar perceived no potential in such circumstances for the sort of abuse that motivated the Self-Incrimination Clause.

The court of appeals also opined that limiting the Fifth Amendment privilege to persons subject to domestic prosecution would not adequately serve the values of "individual integrity and privacy." Pet. App. 15a-16a. As the Court has recognized, however, "the privilege has never been given the full scope which the values it helps to protect suggest." Schmerber v. California, 384 U.S. 757, 762 (1966). That is particularly so with respect to the values of "individual integrity and privacy." See Doe, 487 U.S. at 213 n.11 (finding no violation of the Self-Incrimination Clause "despite the impact upon the inviolability of the human personality"). The privilege does not protect an individual from being compelled to reveal the most intimate information about himself so long as the information does not implicate him in a crime. It does not protect an individual from being forced to provide samples of his voice, his handwriting, or his blood, even if that evidence is incriminating. Nor does it protect him [*46] from having to disclose secrets that could incriminate his parent, his child, or his closest friend. See, e.g., Schmerber, 384 U.S. at 760-765 (blood samples); Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961) (private retribution); Ullmann, 350 U.S. at 430-431 (loss of job and public opprobrium). Even when the testimony is self-incriminating, the government may compel the testimony, and thereby intrude on the individual's privacy, by obtaining a grant of immunity. Privacy concerns should carry no greater force in this context, where the witness resists testimony not because of a fear of domestic prosecution, but because of a fear of prosecution only in a foreign country.

The court of appeals acknowledged (Pet. App. 17a) that the other values served by the Self-Incrimination Clause--"an accusatorial system, a 'fair state-individual balance' in criminal trials, and trial evidence of the highest reliability"--are "of no real significance in cases of this sort" where, if any criminal prosecution occurs, it will take place in another country, under that country's laws and procedures. The United States cannot dictate the laws and procedures [*47] that other countries use in prosecuting crimes in their own courts. See Restatement (Third) of Foreign Relations Law, supra, at § 433 cmt. a.

D. The Extension Of The Self-Incrimination Clause To Fears Of Foreign Prosecution Would Have Serious Consequences For Domestic Law Enforcement

The extension of the Self-Incrimination Clause to fears of foreign prosecution would seriously hamper domestic proceedings. The federal government can grant a witness immunity from prosecution, both state and federal, and then can compel the witness to testify against himself. See Kastigar, 406 U.S. at 449 (rejecting Fifth Amendment challenge to 18 U.S.C. 6002, which provides witness with use and derivative use immunity in "any criminal case," because "the immunity granted under this statute is coextensive with the scope of the privilege"). But the federal government cannot grant a witness immunity from the use of his testimony in a foreign prosecution. Consequently, if a witness may assert the Fifth Amendment privilege based on a fear of foreign prosecution, the federal government has no means of compelling the witness to testify, regardless of how great [*48] the government's need for that testimony to investigate

past crimes, to apprehend and prosecute others involved in those crimes, and to deter future crimes. The government would thus be denied what this Court has described as "among the necessary and most important of the powers of * * * the Federal Government to assure the effective functioning of government in an ordered society." Id. at 444 (quoting Murphy, 378 U.S. at 93 (White, J., concurring)).

1. The Framers could not have intended the Self-Incrimination Clause to act as an absolute bar on the federal government's ability to exercise its important power to compel testimony. Historically, where the privilege against self-incrimination has been asserted, governments have been free to overcome it by providing the witness with immunity from prosecution. The Court has noted that immunity statutes "have historical roots deep in Anglo-American jurisprudence." Kastigar, 406 U.S. at 445. Indeed, "soon after the privilege against compulsory self-incrimination became firmly established in law, it was recognized that the privilege did not apply when immunity, or 'indemnity' in the English usage, [*49] had been granted." Id. at 445 n.13. The colonial legislatures of New York and Pennsylvania enacted immunity statutes in the 18th century, ibid., some years before the privilege against self-incrimination was written into the Constitution. And federal immunity statutes have existed since 1857. Ibid.

It is reasonable to conclude that the Framers intended the Self-Incrimination Clause to be no broader than the government's power to grant immunity. Indeed, in Lefkowitz v. Turley, 414 U.S. at 84, the Court stated that "accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused." See also Pillsbury Co. v. Conboy, 459 U.S. 248, 252 (1983)("It is settled that government must have the power to compel testimony to secure information necessary for effective law enforcement.") (internal quotation marks omitted). That principle presupposes that the States and the federal government have the means to grant immunity when they wish to procure needed testimony--a premise that would be hollow if a witness could still avoid [*50] giving that testimony based on a fear of prosecution abroad. If such fears could support a valid invocation of the privilege, "our own national sovereignty would be compromised," because "our system of criminal justice [would be] made to depend on the actions of foreign governments beyond our control." United States v. (Under Seal) Araneta, 794 F.2d 920, 926 (4th Cir.), cert. denied, 479 U.S. 924 (1986); accord Gecas, 120 F.3d at 1434. Those who had so recently struggled for independence from foreign control could not have intended such a result.

2. The Murphy Court's extension of the Fifth Amendment privilege within our system of "cooperative federalism," 378 U.S. at 56, did not limit the ability of either the federal government or the States to enforce their own laws. The States could continue to "secure information necessary for effective law enforcement" by compelling witnesses to testify under grants of immunity from state prosecution--even though the States were without the power to grant such witnesses immunity from federal prosecution--because the Court adopted an exclusionary rule prohibiting the federal government from [*51] making any use of the compelled testimony to prosecute the witness. Id. at 79. Nor did Murphy impede the federal government's ability to investigate violations of federal law, because it is settled that the federal government can grant federal witnesses the necessary immunity in state as well as federal prosecutions. Adams v. Maryland, 347 U.S. 179, 183 (1954).

The "accomodation" that the Court achieved in Murphy between the demands of the Fifth Amendment and "the interests of the State and Federal Governments in investigating and prosecuting crime," 378 U.S. at 79, could not be achieved if the Fifth Amendment privilege were extended to protect witnesses from foreign prosecution. Neither the federal government nor the States have the authority to grant a witness immunity from prosecution by a foreign government. Nor can any court in the United States exercise its supervisory power to adopt an exclusionary rule, as this Court did in Murphy, to prohibit foreign governments from using the compelled testimony of a witness granted immunity by the federal government or a State. The only apparent means of protecting the witness from foreign prosecution [*52] based on his self-incriminating testimony would be to prohibit the federal government and the States from compelling such testimony in the first place.

3. Any such prohibition would necessarily undermine the ability of the federal government and the States to enforce their criminal and, as here, civil laws. This Court has recognized that "many offenses are of such a character that the

only persons capable of giving useful testimony are those implicated in the crime." Kastigar, 406 U.S. at 446. The difficulties of developing alternative sources of evidence are compounded when the criminal activity crosses national borders. The only other witnesses to crucial events may reside abroad. A foreign government may be unwilling or unable to assist the United States in gaining access to witnesses or to other types of evidence. And when the events that the United States is investigating occurred many years ago case of individuals who are suspected of having obtained entry to this country illegally by concealing their collaboration with the forces of Nazi Germany--no other surviving witness may exist.

The question whether the Fifth Amendment privilege protects against compulsory [*53] self-incrimination in a foreign prosecution is of considerable importance to the federal government and the States. As a result of modern means of transportation and communication, criminals are operating internationally with ever greater frequency. The President has warned of the growing incidence of "international organized crime, drug trafficking, [and] terrorism" that cross national boundaries. President's Remarks to the United Nations General Assembly, 31 Weekly Comp. Pres. Doc. 1909, 1910 (Oct. 22, 1995); see also Remarks of Attorney General Janet Reno, 40 St. Louis U. L.J. 1009, 1009 (1996) (commenting on "the evergrowing threat of international crime"). And white-collar crimes, such as antitrust conspiracies and securities frauds, increasingly involve conduct or consequences in more than one country. See Ethan A. Nadelmann, The Role of the United States in the International Enforcement of Criminal Law, 31 Harv. Int'l L. J. 37, 38 (1990) (noting increasingly international character of, inter alia, "securities, tax, and commercial fraud"); Howard Adler Jr. & David J. Laing, The Explosion of International Criminal Antitrust Enforcement, Business Crimes [*54] Bulletin: Compliance and Litigation, March 1997, at 1, 1 (in early 1997, "more than 20 grand juries" in the United States were investigating "international cartel activities," which involved businesses and individuals "located in 20 countries on four continents").

4. Contrary to the view of the court of appeals (Pet. App. 29a-33a), the United States' interests are not adequately served by allowing a witness to assert the Fifth Amendment privilege only when his fear of foreign prosecution is "real and substantial." Cf. Zicarelli v. New Jersey Comm'n of Investigation, 406 U.S. 472 (1972) (declining to reach the question presented in this case because the witness lacked a real and substantial fear of prosecution abroad). The United States' interest in investigating and prosecuting a crime--and, as here, in deporting its perpetrators--is no less valid simply because a foreign power may also be interested in doing so. Indeed, when the harm caused by a transnational criminal scheme is widespread and substantial, multiple governments may have a legitimate interest in investigating and prosecuting various aspects of the scheme. n12 It is also possible that a rogue government [*55] may assert an interest in prosecuting a witness not for any legitimate reason, but merely to prevent the United States from compelling his testimony about terrorism or other activity inimical to our national interests. See United States v. Lileikis, 899 F. Supp. 802, 807 & n.9 (D. Mass. 1995) ("a renegade state [might] seek[] to protect the bosses of a drug cartel or the leaders of a terrorist organization by threatening the prosecution of lieutenants granted immunity as a means of compelling their testimony").

n12 The demise of the Bank of Credit and Commerce International (BCCI) in the late 1980s, for example, gave rise to criminal prosecutions and regulatory proceedings in multiple countries, including the United States, the United Kingdom, Luxembourg, the United Arab Emirates, and Hong Kong. See, e.g., BCCI Holdings v. Mahfouz, No.92-2763, 1993 WL 45221, at *2 (D.D.C. Feb. 12, 1993); United States v. BCCI Holdings, No. 91-0655, 1992 WL 100334, at *3 (D.D.C. Jan. 24, 1992); see also Sharon Walsh, Clifford Altman Settle BCCI Case, Washington Post (Feb. 4, 1998) at A1; Matthew Rose, BCCI's Biggest Borrower, Abbas Gokal, Is Convicted for His Part in Huge Fraud, Wall Street Journal (Apr. 4, 1997) at A6; Fines Are Raised in BCCI Case, New York Times (June 10, 1996) at D4; BCCI BCCI Updates, Wall Street Journal (Nov. 17, 1995) at A18.

[*56]

The "real and substantial fear of prosecution" standard, moreover, is not a workable one in the context of foreign prosecutions. It can be difficult for an American court to ascertain and analyze the law of a foreign country, especially when the language and the legal system are quite different from our own. It is even more difficult to assess the

probabilities of a foreign government's actually choosing to prosecute a particular individual who is currently outside its reach. And the court must conduct its analysis without knowing precisely what the witness's testimony might be. See Rotsztain, supra, 96 Colum. L. Rev. at 1966 (arguing that "no manageable threshold test exists--or can exist--to distinguish between valid and specious claims that a risk of [foreign] prosecutions exists"). The difficulty of ascertaining whether an individual is actually at risk of foreign prosecution thus provides further reason to construe the Self-Incrimination Clause, consistent with its text and purpose, as protecting only against a risk of domestic prosecution.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN, Solicitor [*57] General, JOHN C. KEENEY, Acting Assistant Attorney General, MICHAEL R. DREEBEN, Deputy Solicitor General, BARBARA MCDOWELL, Assistant to the Solicitor General, JOSEPH C. WYDERKO, Attorney

FEBRUARY 1998

APPENDIX

1. The Fifth Amendment to the United States Constitution provides:

> 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.

2. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained [*58] by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.