

## **NOTE**

### TOWARD AN INTERNATIONAL RIGHT AGAINST SELF- INCRIMINATION: EXPANDING THE FIFTH AMENDMENT'S "COMPELLED" TO FOREIGN COMPULSION

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*Today, the United States is routinely involved in cross-border criminal investigations. Unlike just a few years ago, however, foreign nations have begun their own investigations as well, in many instances probing the same (mis)conduct as the United States. While a welcomed change to some, intersections between U.S. and foreign investigations have triggered novel constitutional issues for American actors. For the first time, this Note will discuss a question that arises from these intersections: is testimony independently compelled by a foreign sovereign, under threat of sanction, "compelled" under the Constitution's Fifth Amendment?*

*This Note argues that it is. To arrive at this conclusion, this Note first engages with the same-sovereign rule, a rule endorsed by the Supreme Court's recent venture into the extraterritoriality of the Fifth Amendment. Finding that the rule creates an interpretive tension with other terms in the Self-Incrimination Clause (the "Clause"), this Note suggests an alternative rule, one that achieves harmony among terms within the Clause. Following this interpretation, this Note argues that foreign compulsion triggers the Fifth Amendment, even when the United States is in no way involved in the compulsion.*

*After finding that foreign compulsion is "compelled," this Note moves on to decide how American courts should treat that testimony. While testimony compelled by U.S. authorities is owed use and derivative*

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*use immunity, this Note, upon noting the lack of absolute commitment to any one immunity standard in the Court's precedents, decides if a lesser immunity standard, such as use only immunity, is more fitting. Acknowledging the weighty concerns to the contrary, this Note concludes that foreign-compelled testimony is owed use and derivative use immunity, but with the caveat that the government may make nonevidentiary uses of foreign-compelled testimony.*

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#### INTRODUCTION

**I**N the mid-1990s, the Office of Special Investigation<sup>1</sup> (“OSI”) subpoenaed Aloyzas Balsys, a former Lithuanian military officer, to

<sup>1</sup>The Office of Special Investigation (“OSI”) no longer exists. In 2010, the OSI merged with the Domestic Security Section to form what is now known as the Human Rights and Special Prosecutions Section. See Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Assistant Attorney General Lanny A. Breuer Announces New Human Rights and Special Prosecutions Section in Criminal Division (Mar. 30, 2010), <https://www.justice.gov/opa/pr/assistant-attorney-general-lanny-breuer-announces-new-human-rights-and-special-prosecutions> [<https://perma.cc/XN9L-7CCH>]. While in existence, the OSI was responsible for detecting, denaturalizing, and deporting suspected Nazi officers who emigrated to the United States in the aftermath of World War II. See U.S. Holocaust

answer questions related to his activities during World War II.<sup>2</sup> Fearing his responses could be used against him in a foreign prosecution,<sup>3</sup> Balsys asserted the privilege against self-incrimination (the “privilege”).<sup>4</sup> The privilege, he contended, protected his words from use in “any criminal case,” whether domestic or foreign.<sup>5</sup> The OSI’s questions, he therefore argued, would have to go unanswered.

The U.S. Supreme Court disagreed. Relying on the same-sovereign rule,<sup>6</sup> the Court held that the privilege applies when the sovereign seeking to compel the witness is the same sovereign that would later use that testimony against him.<sup>7</sup> Alternatively, the Court added, the privilege applies when the compelling sovereign and the using sovereign, if not the same, are both bound by the Fifth Amendment.<sup>8</sup> Thus, since Balsys feared incrimination in a foreign nation, separate from the compelling authority and untouched by the Fifth Amendment, he could not assert the privilege.<sup>9</sup>

Critics attacked the decision. The logical extension of preceding case law, critics wrote, endorsed an extraterritorial breadth to the privilege.<sup>10</sup>

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Mem’l Museum, Office of Special Investigations, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007105> [<https://perma.cc/2V4K-PZAS>] (last visited Aug. 3, 2017).

<sup>2</sup> See *United States v. Balsys*, 524 U.S. 666, 670 (1998).

<sup>3</sup> *Id.* at 670–72.

<sup>4</sup> “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. Const. amend. V.

<sup>5</sup> *Balsys*, 524 U.S. at 670–72 (stating that if “Balsys could demonstrate that any testimony he might give in the [federal] deportation investigation could be used in a criminal proceeding against him brought by the Government of either the United States or one of the States, [then] he would be entitled to invoke the privilege”).

<sup>6</sup> *Id.* at 673–74.

<sup>7</sup> *Id.* at 672.

<sup>8</sup> *Id.* at 673–74.

<sup>9</sup> *Id.* (“[W]e read the Clause contextually as apparently [providing a witness with the right against compelled self-incrimination when reasonably fearing prosecution by the government whose power the Clause limits . . .].”).

<sup>10</sup> See Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 *UCLA L. Rev.* 1201, 1292–94 (1998); Daniel J. Steinbock, *The Fifth Amendment at Home and Abroad: A Comment on United States v. Balsys*, 31 *U. Tol. L. Rev.* 209, 224–25 (2000); Sara A. Leahy, Note, *United States v. Balsys: Foreign Prosecution and the Applicability of the Fifth Amendment Privilege Against Self-Incrimination*, 48 *DePaul L. Rev.* 987, 1036 (1999); Erin Kelly Regan, Comment, *United States v. Balsys: Denying a Suspected War Criminal the Privilege Against Self-Incrimination*, 73 *St. John’s L. Rev.* 589, 611 (1999); Steven J. Winger, Note, *Denying Fifth*

The use of “any criminal case” by the Self-Incrimination Clause (the “Clause”), they added, places no restriction on where that criminal case takes place.<sup>11</sup> Forcing Balsys to speak, even when he could show that his compelled words would be used against him in some future prosecution, would violate his privacy and dignity—two of the privilege’s core values.<sup>12</sup>

Each of these criticisms, however, overlooked an alarming implication of the decision. In narrowing the Clause’s application with the same-sovereign rule, the Court may have given U.S. prosecutors a free pass to use testimony compelled by a foreign nation in a U.S. prosecution. Indeed, because the Clause applies only when the Fifth Amendment restricts *both* the using sovereign and the compelling sovereign, testimony compelled by a foreign nation is beyond the Clause’s reach. American prosecutors, therefore, can whipsaw<sup>13</sup> foreign-compelled defendants in a U.S. criminal trial, using their foreign-compelled testimony against them.

This is a concern. As the United States’ appetite for cross-border criminal investigations grows<sup>14</sup> and its focus on culpable individuals

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Amendment Protections to Witnesses Facing Foreign Prosecutions: Self-Incrimination Discrimination?, 89 J. Crim. L. & Criminology 1095, 1109–10 (1999) (noting that pre-constitutional common law case law permitted a witness to invoke the privilege out of fear of a foreign prosecution).

<sup>11</sup> See Amann, *supra* note 10, at 1243–44.

<sup>12</sup> See *Balsys*, 524 U.S. at 690 (cataloguing “Policies of the Privilege”).

<sup>13</sup> A whipsaw (noun) is “a narrow two-person crosscut saw”; to whipsaw (verb) is “to defeat or best in two ways at once.” Whipsaw, *The American Heritage Dictionary of the English Language* (3d ed. 1992); see also *Knapp v. Schweitzer*, 357 U.S. 371, 385 (1958) (Black, J., dissenting) (“Indeed things have now reached the point . . . where a person can be *whipsawed* into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each.” (emphasis added)).

<sup>14</sup> See Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 Va. L. Rev. 1775, 1776–77 (2011) (noting that federal prosecutors have strongly targeted foreign corporations and individuals thereunder in enforcing the Foreign Corrupt Practices Act); Margaret K. Lewis, *When Foreign Is Criminal*, 55 Va. J. Int’l L. 625, 631–33 (2015) (recognizing and commenting on the growth in extraterritorial reach of U.S. criminal laws); Leslie R. Caldwell, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the Securities Enforcement Forum West Conference (May 12, 2016), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-securities-enforcement> [<https://perma.cc/8HRH-ATM8>] (“[W]e find that we are increasingly drawn into international investigations, sometimes involving many different countries.”).

swells,<sup>15</sup> intersections between U.S. and foreign investigations (whether criminal or civil) are sure to occur. Caught in the middle of these intersections, meanwhile, are individuals—targets<sup>16</sup> and subjects<sup>17</sup> of U.S. investigations located abroad and susceptible to the official compulsion powers of foreign nations. Not only are these individuals unable to assert the Fifth Amendment’s privilege before a foreign proceeding, but many also do not enjoy a privilege coextensive with the United States’ own privilege while abroad either.

For instance, some nations, including those that share a common legal heritage with the United States, do not allow witnesses, subpoenaed to testify under threat of sanction, to invoke silence, even when there is a real fear of the statement’s use in a future prosecution. In Canada, for example, although “a person has the right not to have any incriminating evidence that the person was compelled to give in one proceeding used against him or her in another proceeding, . . . a witness cannot refuse to answer a question on the grounds of self-incrimination . . . .”<sup>18</sup> Instead, the witness receives “full evidentiary immunity in return” for her words.<sup>19</sup> Moreover, at least one Canadian court, interpreting the Canadian Constitutional Charter, has implicitly suggested that Canadian civil regulators may compel a witness to give testimonial evidence in a Canadian investigation without needing to provide assurances that the compelled testimony will not be handed over to civil and criminal authorities in the United States.<sup>20</sup>

A similar dissonance exists between the United States’ and the United Kingdom’s privileges. In the United Kingdom, the Financial Conduct

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<sup>15</sup> Sari Horwitz, Justice Dept. to Focus on Individuals in Cases of Corporate Misconduct, *Wash. Post* (Sept. 10, 2015), [https://www.washingtonpost.com/world/national-security/justice-dept-to-focus-on-individuals-in-cases-of-corporate-misconduct/2015/09/10/c14b0ec0-57db-11e5-abe9-27d53f250b11\\_story.html](https://www.washingtonpost.com/world/national-security/justice-dept-to-focus-on-individuals-in-cases-of-corporate-misconduct/2015/09/10/c14b0ec0-57db-11e5-abe9-27d53f250b11_story.html) [https://perma.cc/GVK7-HZG3].

<sup>16</sup> “A ‘target’ is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” U.S. Dep’t of Justice, *United States Attorneys’ Manual (“USAM”)* § 9-11.151 (1997) (Advice of “Rights” of Grand Jury Witnesses).

<sup>17</sup> “A ‘subject’ of an investigation is a person whose conduct is within the scope of the grand jury’s investigation.” *Id.*

<sup>18</sup> *Catalyst Fund Gen. Partner I v. Hollinger Inc.* (2005), 79 O.R. 3d 70 (Can. Ont. C.A.), para. 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Beaudette v. Alberta* (Sec. Comm’n), 2016 ABCA 9 (Can.), paras. 43–57.

Authority (“FCA”), the country’s chief financial regulator, can compel a witness’s testimony under threat of sanction.<sup>21</sup> Any individual, compelled to speak before the FCA, however, is barred from refusing to speak.<sup>22</sup> In fact, a witness’s refusal to speak is punishable as a contempt of court, even if the testimony may expose him to criminal incrimination.<sup>23</sup>

Meanwhile, Australian authorities enforce the privilege on somewhat different terms. The breadth of immunity a witness receives turns on which state agency is compelling the witness. A witness before the Australian Securities and Investments Commission (“ASIC”), for example, can neither invoke silence nor have her words cloaked with use and derivative use immunity.<sup>24</sup> Instead, the ASIC only gives use immunity to persons who have made an oral statement or signing of a record to the ASIC under compulsion.<sup>25</sup> By contrast, under the Evidence Act 1995 (Cth), an Australian act that governs other proceedings not before the ASIC, natural persons may claim the privilege against self-incrimination “on the ground that the evidence may tend to prove that the witness [either]: (a) has committed an offense against or arising under an Australian law or a law of a foreign country; or (b) is liable to a civil penalty.”<sup>26</sup> In two major ways, Australia’s privilege is far broader

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<sup>21</sup> See Fin. Conduct Auth., FCA Competition Concurrency Guidance and Handbook Amendments: Feedback on CP15/01, Finalised Guidance and Rules, at para. 6.1 (July 2015), <https://www.fca.org.uk/publication/policy/ps15-18.pdf> [<https://perma.cc/NA8X-KV8W>].

<sup>22</sup> See *id.* at para. 6.2.

<sup>23</sup> *Id.* at para. 6.5; Financial Services and Markets Act 2000, c. 8, § 177 (UK) [hereinafter FSMA], <http://www.legislation.gov.uk/ukpga/2000/8/contents> [<https://perma.cc/7EYH-DLMZ>]. Under § 171 of the U.K. Financial Services and Markets Act 2000, the United Kingdom’s financial regulator (the Financial Conduct Authority) can compel testimony from a witness. See FSMA, *supra*, c. 8, § 171 (UK) (allowing the civil securities regulator to force an individual to talk, without the protection of silence).

<sup>24</sup> See Australian Securities and Investments Commission Act 2001 (Cth) ss 68, 76(1)(d); see also *X7 v Australian Crime Comm’n* (2013) 248 CLR 92, 111–12.

<sup>25</sup> See Australian Securities and Investments Commission Act 2001 (Cth) s 68.

<sup>26</sup> Evidence Act 1995 (Cth) s 128(1) (emphasis added); see also Thomas Middleton, The Privilege Against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege Under the Laws Governing ASIC, APRA, the ACCC and the ATO—Suggested Reforms, 2008 ABR LEXIS 18, at \*79–81 (Mar. 2008) (summarizing the distinctions in Australia’s application of a privilege against self-incrimination).

than the United States' privilege. It allows a witness to invoke silence both in fear of foreign incrimination<sup>27</sup> and in fear of civil penalty.<sup>28</sup>

Amidst these differences in peer nations' applications of a privilege against self-incrimination, an individual's inability to assert the Fifth Amendment privilege (and its right to silence) while abroad alongside the Supreme Court's endorsement of the same-sovereign rule creates a real danger that a witness's foreign-compelled testimony can be used against him in a U.S. criminal proceeding. This fear is only exacerbated by the fact that certain nations have condoned the exchange of compelled information to foreign authorities, including to the United States.<sup>29</sup>

Considering this international landscape, this Note asks whether testimony involuntarily given to a foreign nation, extracted under the threat of state sanction, is "compelled" under the Fifth Amendment and, if so, how that testimony should be treated in an American criminal case.

To be fair, this is not the first paper to explore the extraterritorial reach of the Fifth Amendment's Self-Incrimination Clause. Several articles have discussed whether U.S. prosecutors can use testimony coerced (though not compelled)<sup>30</sup> by foreign actors abroad.<sup>31</sup> Meanwhile,

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<sup>27</sup> Cf. *United States v. Balsys*, 524 U.S. 666, 669 (1998) (barring a witness, in the United States, from invoking the privilege when he fears incrimination under the laws of a foreign sovereign).

<sup>28</sup> Cf. *In re Gault*, 387 U.S. 1, 49 (1967).

<sup>29</sup> See *Beaudette v. Alberta* (Sec. Comm'n), 2016 ABCA 9 (Can.), paras. 47–55 (citing *R. v. Hape*, [2007] S.C.R. 292, para. 48 (Can.)) (dismissing the appellant's argument under § 7 of the Canadian Charter of Rights and Freedoms that American prosecutors' and American courts' possible refusal to confer use and derivative use immunity—the same immunity owed in Canadian criminal proceedings—to the appellant's Canadian-compelled testimony would violate his Charter rights); see also Jason Vukelj & Megan K. Vesely, *How the SEC May Receive Testimony Compelled in U.K., Canada*, N.Y. L.J. (Apr. 7, 2014), <http://www.newyorklawjournal.com/id=1202649563089/How-the-SEC-May-Receive-Testimony-Compelled-in-UK-Canada?slreturn=20170113111320> [https://perma.cc/J6ZR-F4ER] (noting that combined, Canada and the United Kingdom have 3,533 companies dually listed in their home nations and the United States and that, because these corporations and their employees are subject to regulation in *both* countries (the United States and Canada *or* the United Kingdom), they are particularly vulnerable to the transfer of compelled testimony between the United States and the foreign nations).

<sup>30</sup> There is an important distinction to be made between these two types of testimony. While coerced testimony typically involves the informal use of extractive methods the Court has found to be presumptively coercive, see Kate E. Bloch, *Fifth Amendment Compelled Statements: Modeling the Contours of Their Protected Scope*, 72 Wash. U. L.Q. 1603, 1616–18 (1994), compulsion offers a Hobson's choice to the witness—testify or face sanction,

other articles have analyzed the Fifth Amendment implications of joint investigations—investigations cooperatively undertaken by the United States and foreign nations.<sup>32</sup> Yet surprisingly, little has been written about whether testimony a foreign nation has independently compelled, pursuant to its own powers and under threat of state sanction, is available for use in a U.S. criminal case.<sup>33</sup>

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including possible criminal punishment. *Id.* As a general rule, U.S. prosecutors may offer testimony *coerced* by foreign agents in a foreign jurisdiction with two exceptions: (1) if the statement was, on its face, involuntary and the means used unconscionable, see *United States v. Karake*, 443 F. Supp. 2d 8, 89–90 (D.D.C. 2006), or (2) if the statement was the product of a “joint venture” between the United States and foreign agents, *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 199–200, 202–03 (2d Cir. 2008). Where these exceptions are met, the foreign-*coerced* testimony is inadmissible in a U.S. courtroom. See Vukelj & Vesely, *supra* note 29. These exceptions, however, are materially different from instances where a foreign state uses its power to subpoena, backed by threat of punishment, to *compel* an individual to speak.

<sup>31</sup> See, e.g., Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 Rutgers L. Rev. 647, 654–55 (2008) (arguing that U.S. courts may not be able to adequately address the issue of confessions coerced by foreign actors); Geoffrey S. Corn & Kevin Cieply, *The Admissibility of Confessions Compelled by Foreign Coercion: A Compelling Question of Values in an Era of Increasing International Criminal Cooperation*, 42 Pepp. L. Rev. 467, 471–72 (2015) (arguing that “a confession extracted by torture or cruel, inhuman, or degrading treatment should never be admitted into evidence in a U.S. criminal trial,” even if the confession is extracted by foreign actors); Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 830–33 (2013) (questioning whether *Colorado v. Connelly* should apply to confessions made to foreign officials because the Supreme Court has not addressed the issue and lower courts have avoided deciding the question); Julie Tanaka Siegel, Note, *Confessions in an International Age: Re-Examining Admissibility Through the Lens of Foreign Interrogations*, 115 Mich. L. Rev. 277, 290–92 (2016) (noting that even foreign-coerced testimony may be admissible in the United States).

<sup>32</sup> See Irvin B. Nathan & Christopher D. Man, *Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for American Constitutional Rights*, 42 Va. J. Int’l L. 821, 826–36 (2002); Gregory O. Tuttle, Note, “Cooperative Prosecution” and the Fifth Amendment Privilege Against Self-Incrimination, 85 N.Y.U. L. Rev. 1346, 1357–62 (2010); see also *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980) (“Under the joint venture doctrine, evidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused’s Fifth Amendment or *Miranda* rights, must be suppressed in a subsequent trial in the United States.”).

<sup>33</sup> For light treatment on the subject, see David Rundle, *Testing the 5th: Compelled Testimony from Foreign Gov’ts*, Law360 (Apr. 11, 2016, 10:36 AM), <https://www.law360.com/articles/782250/testing-the-5th-compelled-testimony-from-foreign-gov-ts> [<https://perma.cc/Q4XR-2SSL>]. The Supreme Court, as well as many circuits, have yet to address whether the Fifth Amendment covers compulsion by a foreign sovereign. That



Part I of this Note introduces readers to the privilege against self-incrimination, detailing when a U.S. witness may invoke the privilege, the implications of doing so, and how the state can purchase an individual's constitutionally protected testimony with immunity. From there, Part I explains the Supreme Court's reasoning in *United States v. Balsys*, the Court's most recent decision into the extraterritorial application of the Clause. After unfolding the reasoning in *Balsys*, Part I details how that opinion's reasoning may grant U.S. prosecutors the free use of foreign-compelled testimony in U.S. prosecutions.

Part II reevaluates that outcome. It argues that granting a U.S. prosecutor the unrestricted use of foreign-compelled testimony exposes a tension with other terms in the Clause. This tension undercuts the same-sovereign rule's ability to define the reach of the Clause when the compelled testimony is foreign and its use is domestic. To address this tension, Part II attempts to reconcile the same-sovereign rule with other terms of the Clause, namely the word "compelled." In doing so, Part II finds that a witness's inability to assert the privilege overseas in a proceeding in which she is formally compelled to speak does not render the Clause irrelevant. A foreign nation, therefore, can trigger the Clause by its decision to compel testimony, pursuant to its own powers, even when the United States is entirely uninvolved in the compulsion.

Having found foreign-compelled testimony to qualify as "compelled" under the Clause in Part II, Part III endeavors to discover the precise immunity (or exclusion) owed to foreign-compelled testimony. To begin, Part III comments on the Supreme Court's historic troubles in determining what immunity is necessary to supplant the privilege. Given this lack of commitment to any one immunity standard, this Part asks

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said, one case involving the use of foreign-compelled testimony in a U.S. criminal case has arrived in a U.S. court. See *United States v. Allen*, 160 F. Supp. 3d 684, 697–98 (S.D.N.Y. 2016) (noting that the alleged inclusion of foreign-compelled testimony in a U.S. federal trial may trigger *Kastigar v. United States*'s use and derivative use prohibition and finding that the government, by a preponderance of the evidence, met its burden under *Kastigar* in showing that the evidence it used in a federal trial was wholly independent of the compelled testimony). *United States v. Allen* was heard on appeal in the U.S. Court of Appeals for the Second Circuit on January 26, 2017. See William Gorta, 2nd Circ. Drills DOJ on Use of Compelled Libor Testimony, Law360 (Jan. 26, 2017, 8:03 PM), <https://www.law360.com/articles/885485/2nd-circ-drills-doj-on-use-of-compelled-libor-testimony> [https://perma.cc/7SF4-L5DN]. For a fuller discussion of *Allen*, see *infra* Part IV. *Allen* was decided on July 19, 2017. See *United States v. Allen*, 2017 WL 3040201, at \*27 (2d Cir. July 19, 2017) (overturning the district court's decision that the government had met its *Kastigar* burden).

whether foreign-compelled testimony, once within the United States, should receive use and derivative use immunity—a treatment identical to testimony formally compelled by U.S. authorities—or whether the testimony should receive a lesser protection, such as use only immunity. Ultimately, this Part concludes that, to best uphold the Fifth Amendment’s policies, American courts must cloak foreign-compelled testimony with use and derivative use immunity, but with the caveat that prosecutors can make nonevidentiary uses of that testimony.

I. THE PRIVILEGE AGAINST SELF-INCRIMINATION, *UNITED STATES V. BALSYS*, AND FOREIGN-COMPELLED TESTIMONY

*A. An Introduction to Immunity*

In the United States, an individual is not automatically entitled to assert his constitutional privilege against self-incrimination.<sup>34</sup> Instead, he may assert the privilege in any type of official proceeding (criminal, civil, administrative, legislative, or adjudicative) only if he reasonably believes<sup>35</sup> that the disclosure of information could expose him to criminal prosecution or penalty<sup>36</sup> in either a state or federal prosecution.<sup>37</sup> Where such a belief exists, the witness can vindicate his Fifth Amendment privilege by invoking silence.<sup>38</sup> This invocation is a precaution, a prophylactic to ensure that the prosecution cannot use any

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<sup>34</sup> See *Zicarelli v. N.J. State Comm’n of Investigation*, 406 U.S. 472, 478 (1972) (stating that the witness must face a real danger of conviction to invoke the privilege since the privilege does not protect against “remote and speculative possibilities”).

<sup>35</sup> A reasonable belief that disclosure exposes the witness to criminal consequences can exist when the witness’s answers would in themselves support a conviction but also when the answers would “furnish a link in the chain of evidence needed to prosecute” the witness. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). In practice, courts allow a speaker to assert the privilege as long as the risk of criminal penalty is not imaginary or totally improbable. See *Blau v. United States*, 340 U.S. 159, 161 (1950).

<sup>36</sup> What qualifies as criminal prosecution or penalty has also been disputed. Suffice it to say, the privilege is not available when the only danger is exposure to civil liability. See *In re Gault*, 387 U.S. 1, 49 (1967). Nor is the privilege available when the only danger is social opprobrium. See *Ullman v. United States*, 350 U.S. 422, 430–31 (1956).

<sup>37</sup> See *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (incorporating the Fifth Amendment’s privilege to the states).

<sup>38</sup> *Brown v. Walker*, 161 U.S. 591, 599 (1896).

potentially incriminating statements against him in the future.<sup>39</sup> In this sense, an invocation of silence is a conditional constitutional rule, not an absolute constitutional right.<sup>40</sup>

Underscoring this distinction is the fact that a violation of the privilege only occurs at trial,<sup>41</sup> a detail that creates space between when the privilege is relevant (at the time of invocation) and when a violation of the privilege may occur (at trial). This space, more importantly, enables the government to purchase an individual's testimony, protected by her invocation of silence, with immunity. Yet the immunity the state must offer a witness to purchase her constitutionally protected testimony is not absolute.<sup>42</sup> To receive a witness's constitutionally protected testimony today, the government must offer the witness use and derivative use immunity, otherwise known as *Kastigar* immunity.<sup>43</sup> This

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<sup>39</sup> See *United States v. Patane*, 542 U.S. 630, 639 (2004) (stating that *Miranda* established a prophylactic rule that “sweep[s] beyond the actual protections of the Self-Incrimination Clause”); *Michigan v. Tucker*, 417 U.S. 433, 440–41 (1974) (“[T]he natural concern which underlies . . . [Fifth Amendment] decisions is that an inability to protect the right at one stage . . . may make its invocation useless at a later stage.”).

<sup>40</sup> See *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (stating that *Miranda* established a constitutional rule, not a constitutional right).

<sup>41</sup> See *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion). There is a circuit split regarding when exactly a “criminal case” begins, with some circuits holding that certain pre-trial hearings qualify as part of the Fifth Amendment’s “criminal case.” Compare *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005) (“The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right.”); *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005) (“[The plaintiff] does not allege any trial action that violated his Fifth Amendment rights; thus, ipso facto, his claim fails on the [Chavez] plurality’s reasoning.”); *Renda v. King*, 347 F.3d 550, 552 (3d Cir. 2003) (“[A] plaintiff may not base a § 1983 claim on the mere fact that the police questioned her in custody without providing *Miranda* warnings when there is no claim that the plaintiff’s answers were used against her at trial.”), with *Vogt v. City of Hays*, 844 F.3d 1235, 1242 (10th Cir. 2017) (holding that the Fifth Amendment applies to all proceedings in a criminal prosecution); *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009) (holding that using coerced statements at trial is not necessary to claim a violation of Fifth Amendment rights); *Higazy v. Templeton*, 505 F.3d 161, 171 (2d Cir. 2007) (“[T]hat use or derivative use of a compelled statement at any criminal proceeding against the declarant violates that person’s Fifth Amendment rights; use of the statement at trial is not required.” (quoting *Weaver v. Brenner*, 40 F.3d 527 (2d Cir. 1994))); *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1027 (7th Cir. 2006) (same, but extending it to suppression hearings and arraignments).

<sup>42</sup> See *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

<sup>43</sup> *Id.*

type of immunity, codified in 18 U.S.C. § 6002,<sup>44</sup> prohibits the direct and indirect use of the witness's compelled, immunized statements against her in a future criminal trial. Plainly put, use and derivative use immunity seeks to treat the compelled witness as if she asserted silence.<sup>45</sup>

Granting use and derivative use immunity, though, does not foreclose a prosecution of the previously compelled individual.<sup>46</sup> If the government seeks to prosecute a previously compelled individual, it must “prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”<sup>47</sup> The government's failure to meet this burden suggests that the prosecution has somehow benefited from the defendant's prior compulsion, placing him in a worse position than he would be had he remained silent.<sup>48</sup> The consequences of the prosecution's failure to prove

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<sup>44</sup> 18 U.S.C. § 6002 (2012) reads:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—(1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

<sup>45</sup> See *Kastigar*, 406 U.S. at 453.

<sup>46</sup> *Id.* at 461 (“The statute, like the Fifth Amendment, grants neither pardon nor amnesty.”); see also *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 106 (1964) (White, J., concurring) (“The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates . . . . [I]t is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation.”).

<sup>47</sup> *Kastigar*, 406 U.S. at 460–62 (stating that the government bears “the heavy burden of proving that all the evidence it proposes to use was derived from legitimate independent sources” (emphasis added)). Yet despite this burden being heavy, the government need only make this showing by a preponderance of the evidence. *United States v. Nanni*, 59 F.3d 1425, 1431–32 (2d Cir. 1995); see also *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974) (holding that the government is not required to negate all abstract possibility of taint, but only needs to show by a preponderance that its evidence was derived from independent sources).

<sup>48</sup> This duty to show no connection to the compelled testimony is analogous to the Fourth Amendment's independent source doctrine. Under the independent source doctrine, if the

this duty turn on the necessity of the tainted evidence in the criminal case.<sup>49</sup> The inappropriate use of immunized evidence can result in a case's dismissal or a conviction's reversal.<sup>50</sup>

### B. United States v. Balsys

In *Balsys*, the Supreme Court found that a U.S. witness, Aloyzas Balsys, could not assert the privilege against self-incrimination unless the prosecution he feared was within the United States.<sup>51</sup> If “Balsys could demonstrate that any testimony he might give in the [federal] investigation could be used in a criminal proceeding against him brought by the Government of either the United States or one of the States,” the Court wrote, “[then] he would be entitled to invoke the privilege.”<sup>52</sup> Otherwise, the privilege could not protect Balsys.

The *Balsys* Court's holding turned on *Malloy v. Hogan*,<sup>53</sup> a 1964 case that incorporated the Fifth Amendment's privilege against self-incrimination to the states.<sup>54</sup> The Court noted that following *Malloy*, state and federal jurisdictions became the same sovereign for purposes

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government can successfully argue that the fruits of an unlawful search were later obtained from a source untainted by the initial illegality or would have derived from an untainted source, then the exclusionary rule does not apply. *Nix v. Williams*, 467 U.S. 431, 443–44 (1984) (citing *Kastigar*, 406 U.S. at 457, 458–59).

<sup>49</sup> See, e.g., *United States v. Mapes*, 59 M.J. 60, 71 (C.A.A.F. 2003).

<sup>50</sup> *United States v. Schmidgall*, 25 F.3d 1523, 1528–29 (11th Cir. 1994) (noting that dismissal of an indictment is not required when use of immunized testimony was harmless beyond a reasonable doubt). A trial court may dismiss a criminal prosecution on *Kastigar* grounds even before the trial starts if the government fails to show, by a preponderance of the evidence, that the evidence it proposes to use is independent of the immunized testimony. See *Kastigar*, 406 U.S. at 460–61. A trial court may also make this finding during or after the trial. See *id.* Circuits, however, are not uniform on when to hold a *Kastigar* hearing. Compare *United States v. Slough*, 677 F. Supp. 2d 112, 130 n.29 (D.C. Cir. 2009) (“The *Kastigar* hearing may be held ‘pre-trial, post-trial, mid-trial (as evidence is offered), or [through] some combination of these methods,’ although ‘[a] pre-trial hearing is the most common choice.’” (alteration in original) (quoting *United States v. North*, 910 F.2d 843, 872–73 (D.C. Cir. 1990))), with *United States v. Helmsley*, 941 F.2d 71, 80 (2d Cir. 1991) (pushing a *Kastigar* hearing to after trial to determine whether the government's evidence was from independent sources and to avoid disclosure of the government's case before trial); *United States v. Volpe*, 42 F. Supp. 2d 204, 219 (E.D.N.Y. 1999) (same).

<sup>51</sup> *Balsys*, 524 U.S. at 669, 671–72.

<sup>52</sup> *Id.* at 671–72.

<sup>53</sup> 378 U.S. 1 (1964).

<sup>54</sup> *Balsys*, 524 U.S. at 681.

of the privilege.<sup>55</sup> And so, unlike before, state witnesses could now invoke the privilege even when they feared the use of their compelled statements by federal authorities.<sup>56</sup> The same became true for federal witnesses after *Malloy*. They, too, could invoke the privilege even when they feared the use of their compelled statements by state authorities.<sup>57</sup> Thus, following *Malloy*, the privilege protected witnesses who were compelled to testify before *any* U.S. authority from *any* U.S. prosecution.

Decisive in *Balsys*, however, was the fact that there was “no analog of *Malloy*” extending the Fifth Amendment to foreign nations.<sup>58</sup> The absence of this analog returned the *Balsys* Court to a pre-*Malloy* “era when the States were not bound by the privilege” and where state and federal jurisdictions were, for purposes of the privilege, separate sovereigns.<sup>59</sup> Under this separate-sovereign rubric, testimony compelled in either a state or federal proceeding was admissible in a prosecution of the other.<sup>60</sup> Witnesses, in other words, could be whipsawed: forced to testify in one sovereign within the United States only to have that testimony used against them by another sovereign within the United States. This was true “even though there [was] a privilege against self-incrimination in the Constitution of each.”<sup>61</sup>

It was under this pre-*Malloy* framework that the Court denied *Balsys* the privilege’s protection. *Balsys*, analogous to a pre-*Malloy* federal witness fearing prosecution in a state to which the Fifth Amendment had yet to apply, could not assert the privilege in fear of a foreign nation’s

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<sup>55</sup> *Id.* at 680–81.

<sup>56</sup> *Murphy*, 378 U.S. at 76–78 (finding that immunity conferred by a speaker in a state proceeding must be respected by a federal jurisdiction given that the privilege applies equally to both federal and state jurisdictions), overruling *Knapp v. Schweitzer*, 357 U.S. 371, 378–80 (1958) (holding that a state can compel a witness to give testimony that might incriminate him under federal law).

<sup>57</sup> *Balsys*, 524 U.S. at 680 (citing *Murphy*, 378 U.S. at 77–78) (explaining that the constitutional privilege protected 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”).

<sup>58</sup> *Id.* at 695.

<sup>59</sup> *Id.*

<sup>60</sup> See *United States v. Murdock*, 290 U.S. 389, 396 (1933) (“[O]ne under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law.”).

<sup>61</sup> *Knapp*, 357 U.S. at 385 (Black, J., dissenting).

use of his testimony. And just like a state prosecutor in the pre-*Malloy* era, foreign prosecutors could freely use *Balsys*'s U.S.-compelled testimony against him in a prosecution of their own.

If this is the correct way to read *Balsys*, then the continued absence of an international analog to *Malloy* (extending the privilege to foreign nations) also means that pre-*Malloy* case law controls whether testimony compelled abroad is admissible in a criminal case within the United States. Interestingly, pre-*Malloy* case law placed *no* restrictions on a sovereign, burdened by the Self-Incrimination Clause, to inhibit it from freely using testimony compelled by a sovereign unburdened by the Clause.

In *Knapp v. Schweitzer*, decided six years before *Malloy*, the Supreme Court held that a state witness could not refuse to answer questions that could incriminate him in a federal court.<sup>62</sup> Because the Clause had yet to apply to the states, the *Knapp* witness's privilege only protected him from prosecution by the compelling authority. Therefore, the witness's responses before a state grand jury could be used by the federal government against him, despite the Clause's clear application to federal courts.<sup>63</sup> Writing for the majority in *Knapp*, Justice Frankfurter summarized the result by stating that "[i]f a person may, through immunized self-disclosure before a law-enforcing agency of the State, facilitate to some extent his amenability to federal process, or vice versa, [then] this too is a price to be paid for our federalism."<sup>64</sup>

If, with the reasoning from *Balsys* in mind, pre-*Malloy* case law controls whether a U.S. prosecutor can use foreign-compelled testimony in the United States, then the outcome for the foreign-compelled defendant, now facing trial in the United States, is alarming. The defendant is the functional equivalent of the state witness in *Knapp*. And like that witness, her previously compelled testimony is available for full use in a court to which the Clause unequivocally applies. Under the logic of *Knapp*, a U.S. prosecutor (state or federal) can whipsaw a

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<sup>62</sup> Id. at 374–75 (majority opinion).

<sup>63</sup> Id. at 380–81.

<sup>64</sup> Id.; see also *Feldman v. United States*, 322 U.S. 487, 492–93 (1944) (holding affirmatively that testimony compelled by a state could be introduced into evidence in the federal courts).

foreign-compelled defendant in a U.S. courtroom.<sup>65</sup> As Justice Frankfurter may have put it, this is the price to be paid for our international comity.<sup>66</sup>

## II. REEVALUATING THE SAME-SOVEREIGN RULE

But it is not altogether clear whether the same-sovereign rule, applied in an international milieu, controls when the compulsion is by a foreign nation. What follows then is a reevaluation of the same-sovereign rule, its ability to explain the outcome in *Balsys*, and its larger relevance to the privilege's application in a cross-border setting.

### A. *The Same-Sovereign Rule and the Privilege*

To many, *Murphy v. Waterfront Commission of New York Harbor* overruled the same-sovereign rule. In facts very similar to those in *Knapp v. Schweitzer*, the petitioners in *Murphy* refused a state subpoena to testify, despite immunity offers from state prosecutors, out of fear that

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<sup>65</sup> That a prosecutor can, even after *Malloy*, whipsaw a defendant with her compelled testimony is not without other support either. Courts have found that, because the privilege against self-incrimination is only a restraint against the state burdened by the Constitution, developed to protect an individual in what was thought to be an unequal contest with it, see Wayne R. LaFave et al., *Criminal Procedure* § 2.10(d) (5th ed. 2009), the privilege does not apply when a nonstate actor has forced an individual to speak, even in a compelled setting. For more, see *United States v. Solomon*, 509 F.2d 863, 870 (2d Cir. 1975) (finding that testimony compelled by the New York Stock Exchange (“NYSE”) did not trigger the Fifth Amendment because doing so would give a private entity the power to grant immunity “without any weighing of the need for the evidence against the undesirability of conferring any immunity which goes beyond the testimony or information itself,” which would be an intolerable result). A foreign nation may be analogous to a private entity within the United States. To the extent a U.S. court does not want to confer immunity-granting power to a private organization, the same can also be said of a foreign nation. Giving a foreign nation a choice over who receives immunity in the United States can be a similarly dangerous proposition. But unlike a private entity in (or outside) the United States, foreign nations can sanction an individual, with the force of the state, for refusing to speak, a detail that may distinguish it from private compulsion.

<sup>66</sup> International comity, a doctrine which asks a court to apply foreign law or limit its own jurisdiction or adjudication out of respect for a foreign sovereign, see Joel R. Paul, *The Transformation of International Comity*, 71 L. & Contemp. Probs. 19, 19–21 (2008), undoubtedly plays an important role here. If foreign nations possess the ability to use U.S.-compelled testimony in their own prosecutions, absent any evidence of joint cooperation, see *Balsys*, 524 U.S. at 698–99, then in the name of comity and reciprocity, U.S. prosecutors should be allowed to use foreign-compelled testimony freely in our courts as well.



their answers may incriminate them under federal, not state, law.<sup>67</sup> Finding no justification for their refusal, the petitioners were held in contempt by a New Jersey trial court.<sup>68</sup> Upholding these convictions, the New Jersey Supreme Court held that a state may compel a witness to give testimony that might be used in a federal prosecution against him.<sup>69</sup> In doing so, it paraphrased what was then correct law: immunity against prosecution is strictly a limitation on the immunity-granting jurisdiction. The same-sovereign rule supported the petitioners' contempt conviction.

But in *Murphy*, the U.S. Supreme Court finally disagreed with this rule.<sup>70</sup> On the same day the Court incorporated the Fifth Amendment to the states in *Malloy v. Hogan*,<sup>71</sup> the Court concluded in *Murphy* that holding the petitioners in contempt because of their refusal to testify out of fear of *federal* prosecution violated the Fifth Amendment.<sup>72</sup> A new era of state-federal cooperation in criminal investigations mandated that different jurisdictions *within* the United States reciprocally respect the privilege in order for the privilege to have any force.<sup>73</sup> “[T]here is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction,” the Court wrote.<sup>74</sup> Expanding the privilege in this way, the Court added, properly serviced the Fifth Amendment's values since “[m]ost, if not all, of [the privilege's] policies and purposes are defeated

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<sup>67</sup> *Murphy*, 378 U.S. at 53–54.

<sup>68</sup> *In re Application of the Waterfront Comm'n of N.Y. Harbor*, 189 A.2d 36, 39–40, 49 (N.J. 1963).

<sup>69</sup> *Id.* at 49; see also *Knapp*, 357 U.S. at 380 (holding that the Fifth Amendment privilege against self-incrimination applies only against the federal government); *Feldman*, 322 U.S. at 492–93 (finding that “[t]he Constitution prohibits an invasion of privacy only in proceedings over which the [federal] Government has control”).

<sup>70</sup> 378 U.S. at 77–78 (“We reject—as unsupported by history or policy—the deviation from that construction only recently adopted by this Court . . . . We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.”).

<sup>71</sup> 378 U.S. 1, 8–10 (1964).

<sup>72</sup> *Murphy*, 378 U.S. at 79–80.

<sup>73</sup> *Id.* at 91–92 (Harlan, J., concurring).

<sup>74</sup> *Id.* at 77 (majority opinion).

when a witness ‘can be whipsawed into incriminating himself under both state and federal law.’”<sup>75</sup>

This reasoning was not lost on the *Balsys* Court. Indeed, the majority acknowledged that “the *Murphy* Court expressed a comparatively ambitious conceptualization of personal privacy underlying the Clause,” one that could grant *Balsys* the protection he sought.<sup>76</sup> But such an expansive reading of *Murphy*—finding a witness’s testimonial privacy as the headline criterion in the privilege’s interpretation—was, to the Court, inaccurate.<sup>77</sup> The holding in *Murphy* was instead limited by the reach of *Malloy*, the *Balsys* Court wrote.<sup>78</sup> Because, after *Malloy*, state and federal jurisdictions became one sovereign under the privilege, a witness in either jurisdiction could assert the privilege whenever he feared incrimination in the other.<sup>79</sup> *Murphy*, therefore, did not upset the same-sovereign rule’s importance to the privilege; it merely expanded the scope of the sovereign.<sup>80</sup>

However valid the Court’s explanation of *Murphy* may have been, the same-sovereign rule’s two-pronged test—analyzing where the compulsion takes place *and* where the compelled testimony will be used—misunderstands the Clause. The rule fails to understand that the Clause’s sole focus is in its prohibition on the *use* of any involuntary testimony.<sup>81</sup> Where the same-sovereign rule begins to crumble, then, is

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<sup>75</sup> Id. at 55–56 (quoting *Knapp*, 357 U.S. at 385 (Black, J., dissenting)).

<sup>76</sup> *Balsys*, 524 U.S. at 684.

<sup>77</sup> Id. at 688.

<sup>78</sup> Id. at 680–82.

<sup>79</sup> Id. at 688 (citing 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, 893–95 (1983); Diego A. Rotsztain, Note, The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution, 96 Colum. L. Rev. 1940, 1944–46, 1949 & nn.79–81 (1996)) (“[T]o the extent that the *Murphy* majority went beyond its response to *Malloy* and undercut *Murdock*’s rationale on historical grounds, its reasoning cannot be accepted now. Long before today, indeed, *Murphy*’s history was shown to be fatally flawed.”).

<sup>80</sup> As one commentator put it, *Murphy* simply amended the Self-Incrimination Cause to read: “No government within the United States shall compel a person to be a witness against himself in the courts of any government within the United States.” Peter Westen, Self-Incrimination’s Covert Federalism, 11 Berkeley J. Crim. L. 1, 11 (2006).

<sup>81</sup> See *New York v. Quarles*, 467 U.S. 649, 665–68 (1984) (O’Connor, J., concurring in judgment in part and dissenting in part) (“Only the introduction of a defendant’s own testimony is proscribed by the Fifth Amendment’s mandate that no person ‘shall be

in the idea that a witness's ability to invoke silence at one stage is necessary to ensure that the witness's testimony will not be used against him at a later stage. That logic is no longer true.

It is well established that the government can compel a witness to testify at trial or before a grand jury, under pain of sanction, as long as the witness is not the accused in the criminal case in which she testifies.<sup>82</sup> Moreover, the Court permits the compulsion of incriminating testimony, even of persons who legitimately fear their statements' use in a future criminal prosecution against them, as long as those statements (and evidence derived therefrom) cannot be used against the speaker in any U.S. criminal case against him.<sup>83</sup> Despite a witness's desire not to testify, the government can compel testimony in these situations without violating the Constitution; indeed, doing so is a well-understood "part of our constitutional fabric."<sup>84</sup>

The error of the same-sovereign rule's two-pronged focus reveals itself upon a closer scrutiny of *Knapp*, the 1958 case that, as discussed before, permitted federal jurisdictions to use state-compelled testimony with no restrictions.<sup>85</sup> In *Knapp*, Justice Frankfurter wrote that

[t]he sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that *same* Government to convict a man out of his own mouth.<sup>86</sup>

The "security of an individual" under the privilege, Justice Frankfurter thought, was squarely secured by barring the act of compulsion itself.

Justice Frankfurter's logic, to be fair, was not incorrect for its time. When *Knapp* was decided, the Fifth Amendment was only "a restraint

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compelled in any criminal case to be a witness against himself.' That mandate does not protect an accused from being compelled to surrender *nontestimonial* evidence against himself.')

<sup>82</sup> *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984).

<sup>83</sup> *Balsys*, 524 U.S. at 671–72; *Kastigar v. United States*, 406 U.S. 441, 458 (1972).

<sup>84</sup> *Ullman v. United States*, 350 U.S. 422, 438 (1956) (citing *Shapiro v. United States*, 335 U.S. 1, 6 (1948)).

<sup>85</sup> 357 U.S. at 380.

<sup>86</sup> *Id.* (emphasis added).

upon compulsion of testimony by the . . . Federal Government at which the Bill of Rights was directed.”<sup>87</sup> The Fifth Amendment had yet to be incorporated to the states. It made sense, then, that the invocation of silence before a federal proceeding was the surest way to protect against the future *use* of compelled testimony by the federal government. The witness’s ability to assert silence co-aligned with the privilege’s prohibition on any *federal* use. Where silence could be asserted, the privilege would be vindicated. An unconstitutional use could never occur.

To Justice Frankfurter, however, allowing a state witness to assert the privilege because he feared *federal* incrimination would inappropriately expand the scope of the privilege beyond the Founders’ strictly federal intention. The privilege, he thought, was never meant to meddle into states’ own exercises of power, particularly their power to subpoena and compel a witness.<sup>88</sup> A state witness’s (in)ability to assert silence properly respected the privilege’s reach to the federal government.

Justice Frankfurter’s holding in *Knapp* may have also turned on the broad scope of immunity that accompanied the Fifth Amendment at the time. In 1958, when *Knapp* was decided, the Court had yet to overrule *Counselman v. Hitchcock*, the 1892 case which held that a witness compelled to testify must be granted transactional (or absolute) immunity from prosecution.<sup>89</sup> Transactional immunity is “absolute” in that the witness is completely immunized from any future prosecution related to the content of his testimony.<sup>90</sup> Had the Court expanded the privilege to the states—allowing state witnesses to assert a distinctly federal privilege—it would not only open the door for state-subpoenaed witnesses “to block . . . vitally important [state] proceedings,” such as state grand juries, on the basis of a feared federal prosecution, but also any federal criminal interest in the witness would be wholly washed

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<sup>87</sup> *Id.* at 379–80.

<sup>88</sup> *Id.*

<sup>89</sup> 142 U.S. 547, 586 (1892).

<sup>90</sup> See *Piccirillo v. New York*, 400 U.S. 548, 569 (1971) (Brennan, J., dissenting) (summarizing the holding of *Counselman* with emphasis on “relates”). By contrast, use immunity prevents the prosecutor from using a witness’s statements against her, while derivative immunity also bars the use of other evidence obtained from the statement. See *infra* Section III.B.

away.<sup>91</sup> Federal authorities would not be able to bring a case forward given the broad sweep of absolute immunity.

Use and derivative use immunity, however, replaced transactional immunity in *Kastigar v. United States*.<sup>92</sup> And with the arrival of use and derivative use immunity, the concern in *Knapp*—that a state witness could foreclose a future federal prosecution should the privilege’s absolute immunity apply—no longer held true. Following *Kastigar*, the compulsion by one sovereign (the state) could have a minimal impact on another sovereign (the federal government) as long as the latter could show that it had made no direct or indirect use of the testimony compelled by the former. Had *Knapp* been decided when use and derivative use immunity, as opposed to transactional immunity, was the minimum standard of immunity required under the Fifth Amendment, the outcome may have been very different. Use and derivative use immunity, in other words, may have placated the Court’s concern of absolute intersovereign immunity; no longer would permitting a state witness to assert the privilege in fear of federal incrimination incur an absolute cost to federal authorities.<sup>93</sup>

Thus, Justice Frankfurter’s reasoning in *Knapp* cannot withstand *Kastigar*. *Kastigar*’s use and derivative use immunity anticipates state compulsion, properly recognizing (unlike its predecessor) the appeal of the Clause’s use prohibition in a world where compulsion can occur by different, unrelated sovereigns. Use and derivative use immunity, in other words, understands that the witness’s failure to remain silent—whether before the jurisdiction intent on using the testimony *or* before another one—does not extinguish the Fifth Amendment’s protection.<sup>94</sup> It merely places a heavy burden on the jurisdiction prosecuting the previously compelled witness to prove their evidence’s independence from any compulsion.<sup>95</sup>

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<sup>91</sup> *Knapp*, 357 U.S. at 379.

<sup>92</sup> 406 U.S. at 460.

<sup>93</sup> See *infra* notes 153–56, 172–73 and accompanying text (noting that the change from transactional to use and derivative use immunity in *Murphy* and *Kastigar* was likely motivated by the burdens of intersovereign immunity).

<sup>94</sup> *Kastigar*, 406 U.S. at 460.

<sup>95</sup> *Id.* at 460–61.

Moreover, case law, from both before and after *Knapp*, illustrates the Court's (correct) focus on the Fifth Amendment's use prohibition, questioning Justice Frankfurter's suggestion in *Knapp* that a witness must invoke silence to preserve his Fifth Amendment right. In the pre-*Knapp* case, *Adams v. Maryland*, the petitioner, William Adams, had testified before a U.S. Senate Committee investigating crime.<sup>96</sup> During that proceeding, Adams, who did not invoke silence but instead cooperated with the Senate, admitted before the Senate that he ran an illegal gambling business in Maryland, a statement that was later used to convict him of a state crime in Maryland.<sup>97</sup> A federal statute at the time, however, provided "that no testimony given by a witness in congressional inquiries 'shall be used as evidence in any criminal proceeding against him in *any court*.'"<sup>98</sup> On appeal, Adams raised this federal statute, arguing that his Senate statement could not be used against him at a state criminal trial.<sup>99</sup> The State of Maryland, in reply, challenged the applicability of the federal statute in state courts.<sup>100</sup>

Eventually the case arrived at the Supreme Court, where the Court held that despite Adam's failure to claim his constitutional privilege before Congress, "no language of the Act [18 U.S.C. § 3486 (1952)] requires such a claim in order for a witness to feel secure that his testimony will not be used to convict him of crime."<sup>101</sup> The Fifth Amendment, the Court wrote, already protected the witness from the use of self-incriminating testimony he was compelled to give in *federal* courts, regardless of the witness's invocation of silence.<sup>102</sup> And since that was the case, Section 3486's language of "any court" would be meaningless had it not applied to state courts as well.<sup>103</sup> The statutory protection of Section 3486 had to be broader than the Fifth Amendment itself if it was to do any work.

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<sup>96</sup> 347 U.S. 179, 179 (1954).

<sup>97</sup> *Id.* at 179–80.

<sup>98</sup> *Id.* at 180 (emphasis added) (quoting 18 U.S.C. § 3486 (1952)).

<sup>99</sup> See *id.* (citing *Adams v. State*, 97 A.2d 281 (Md. 1953)).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 181.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

The fact that Section 3486 no longer represents the scope of immunity afforded to compelled witnesses today does not detract from the significance of *Adams*.<sup>104</sup> The holding in *Adams* is still good law. It forcefully emphasizes that the Fifth Amendment's use prohibition works on its own, unaffected by the presence or absence of a witness's invocation of silence.

That position has been reiterated by the Court in more recent memory, too. For instance, in *United States v. Verdugo-Urquidez*, the Court observed that "conduct by law enforcement officials prior to trial may ultimately impair [the privilege against self-incrimination], [but] a constitutional violation [of that right] occurs only at trial."<sup>105</sup> Likewise, in *Lefkowitz v. Turley*, the Supreme Court found a New York statute, which required a state contractor to either waive immunity "when called to testify concerning his contracts with the State" or pay a financial penalty, unconstitutional.<sup>106</sup> According to the Court, forcing a witness to choose between incrimination or employment, even in the absence of any immunity conferred on the witness or any invocation of silence by the witness, served as compulsion. That the witness may *not* have invoked silence is meaningless; an invocation of silence is not imperative to vindicate the privilege's protection.

The same-sovereign rule's nearsighted focus, concentrating on the witness's ability to invoke the privilege's silence to protect and preserve her right, reflects a bygone era when the Clause applied to one jurisdiction and where immunity was absolute. Today, the Clause's protection still applies, even absent an invocation of silence. This is no less true when the prosecuting jurisdiction is different than the compelling one.

### *B. Explaining the Same-Sovereign Rule in Balsys*

However incorrect the Court's holding in *Knapp* may have been, the Court did return to the pre-*Malloy* era in *Balsys*. Consequently, not only were cases like *Knapp* still good law, but the same-sovereign rule,

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<sup>104</sup> See 18 U.S.C. § 6005 (2012); see also *id.* § 3486 (explaining in the "Prior Provisions" section that the statute as it existed at the time of *Adams* has since been repealed).

<sup>105</sup> 494 U.S. 259, 264 (1990).

<sup>106</sup> 414 U.S. 70, 71, 82–84 (1973). The penalty included cancellation of existing contracts and disbarment from contracting with the State for five years. *Id.* at 70, 71.

applicable when the compelling sovereign and the prosecuting sovereign are different, would need to apply as well. Indeed, as discussed above, the same-sovereign rule dictated the outcome in *Balsys*: the sovereigns *Balsys* feared would use his testimony (foreign nations) were not the same sovereigns as the compelling sovereign (the United States), and, therefore, the privilege would not protect him.<sup>107</sup> But considering the pre-*Malloy* cases' inappropriate focus on both *where* the compulsion occurs and *where* the compelled testimony will be used, the same-sovereign rule is an overbroad, if not an incorrect, characterization of the privilege. It is a rule that may have achieved a constitutionally correct outcome in *Balsys* but fails to do so in the reverse—when the compulsion is foreign and that compelled testimony's use is domestic.

An alternative reading of *Balsys* suggests that its outcome was determined instead by a use-sovereign rule. That is, since the sovereign intent on using the compelled testimony in *Balsys* was *not* subject to the Clause, the privilege would not protect *Balsys*. Because asserting silence in an American proceeding would *not* protect the use prohibition central to the Clause, allowing *Balsys* to assert the privilege would vindicate no constitutional prerogative.<sup>108</sup> *Balsys*, in other words, is explained as much by the same-sovereign rule as it is by the fact that the statement's purported use would be abroad in a nation that has neither an obligation to follow the Clause nor a duty to recognize any immunity (coextensive with the privilege) agreed to within the United States.<sup>109</sup> Put differently, had the Court allowed *Balsys* to invoke the privilege, the Court would have imposed a heavy and unjustified cost on the federal government. It would require the government to make a one-sided bargain, asking it to purchase *Balsys*'s protected testimony with immunity even when there is no criminal case from which immunity could protect him.

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<sup>107</sup> See *supra* notes 52–59 and accompanying text.

<sup>108</sup> For support on this reading, see *Balsys*, 524 U.S. at 700–01 (Stevens, J., concurring) (“The primary office of the Clause at issue in this case is to afford protection to persons whose liberty has been placed in jeopardy in an American tribunal. The Court’s holding today will not have any adverse impact on the fairness of American criminal trials.”). Justice Stevens’s concurrence correctly implied that the same-sovereign rule would not necessarily work in the reverse. Where a defendant, facing trial *in* the United States, feared the use of compelled testimony, he thought, the case would be distinguishable from *Balsys*. *Id.*

<sup>109</sup> See Westen, *supra* note 80, at 2 (discussing how *Balsys* reaffirmed Court precedent that the Fifth Amendment privilege is only coextensive with the government’s ability to elicit testimony with immunity).



The soundness of this use-sovereign rule reveals itself in the *Balsys* opinion's joint-cooperation exception. This exception, articulated at the end of the majority's opinion, carved out space for a U.S.-subpoenaed witness to assert the privilege even when he does not fear prosecution by either the compelling sovereign or by a sovereign bound by the Clause.<sup>110</sup> Where U.S. officials seek to compel testimony to "obtain[] evidence to be delivered to other nations [in pursuit of the prosecution of] crime common to both countries," Justice Souter wrote for the Court, the witness compelled in the United States may be able to assert the privilege.<sup>111</sup> In this situation, "an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly 'foreign.'"<sup>112</sup>

To be fair, this exception does reaffirm the same-sovereign rule. If a witness in the United States can make a plausible claim that, given the United States' hand-over of compelled testimony to a foreign nation's prosecutor, both the compelling and using authorities are in effect the same, the witness's ability to invoke silence before a U.S. proceeding should follow. But, in another view, the joint-cooperation exception endorsed the use-sovereign rule. Now, because the United States is in effect "using" the compelled testimony in pursuit of the compelled witness's conviction abroad through its joint prosecution of the

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<sup>110</sup> *Balsys*, 524 U.S. at 698–99.

<sup>111</sup> *Id.* at 698.

<sup>112</sup> *Id.*; see also *Knapp*, 357 U.S. at 380 (indicating, in dicta, that "in a case of such collaboration between state and federal officers," the defendant may be able to successfully assert his privilege against possible federal use where the "State was used as an instrument of federal prosecution or investigation"). For academic literature on the joint-cooperation exception within *Balsys*, see Carlin Metzger, *The Same-Sovereign Rule Resurrected: The Supreme Court Rejects the Invocation of the Fifth Amendment's Privilege Against Self-Incrimination Based upon Fear of Foreign Prosecution in United States v. Balsys*, 77 *Chi.-Kent L. Rev.* 407, 418–19 (2001) (finding that a witness will need to prove direct and purposeful U.S. involvement for the witness to assert the privilege in fear of foreign incrimination); Scott Bovino, *Comment, A Systematic Approach to Privilege Against Self-Incrimination Claims when Foreign Prosecution Is Feared*, 60 *U. Chi. L. Rev.* 903, 910–19 (1993) (noting the additional burdens heaped onto witnesses who must prove that their U.S.-compelled testimony will be used in a foreign criminal case against them); Tuttle, *supra* note 32, at 1348 (noting that lower court interpretations of this carve-out impose such a high burden on witnesses that the exception (to the extent it is recognized) is essentially nonexistent, even for meritorious claims).

compelled witness in a foreign court, that witness can assert the privilege. The United States' use (albeit indirect) of the testimony is a violation of an (hypothetical) immunity agreement (conferring use and derivative use immunity) between the United States and the compelled witness—an immunity agreement that could have transpired in response to evidence of joint-cooperation between the United States and a foreign, prosecuting nation. This indirect use of the compelled testimony by the United States converts the foreign prosecution into a U.S. prosecution. Under the exception, the same-sovereign rule (at one time barring the privilege's application as in *Balsys*) becomes a use-sovereign rule (affording the witness the privilege).

The joint-cooperation exception, admittedly, involves whether a witness, *before* she testifies in a U.S. proceeding, can invoke silence. The exception does not address a slightly different scenario: whether a witness can still raise the exception (and succeed) *after* her ability to invoke silence in the U.S. proceeding has passed. Could a witness invoke the exception—seeking to bar her removal from the United States for instance—*after* the government has compelled her without immunity but *before* her removal to a foreign nation intent on prosecuting her?

Though the Court did not address this question, the answer should be a resounding “yes.” After all, if the Court understands a witness's invocation of silence as merely a prophylactic—intended, as in the case of the joint-cooperation exception, to prevent the transfer and use of compelled testimony between two cooperating nations—it would make little sense for the exception not to apply even *absent* the witness's invocation of silence. The exception, and more largely the Self-Incrimination Clause it vindicates, does not hinge on the fortuity of when certain joint-cooperation evidence becomes known to a compelled witness. Nor can it hinge on whether the witness asserted silence before, especially since the witness still retains her Fifth Amendment right not to have her own words *used* against her in an applicable criminal case.<sup>113</sup>

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<sup>113</sup> At least while she is in the United States. Unlike the remedy envisioned in the joint-cooperation exception itself (full invocation of silence before the U.S. proceeding), the compelled witness's words are now public and available. Thus, should the United States send the witness overseas before she contests the use of unimmunized but compelled testimony, the prosecuting foreign nation is under no obligation not to use that testimony. Ostensibly, the compelled witness would raise this issue while still in the United States

This counterfactual underscores a key point. The failure to invoke the privilege—whether because the witness was unable to do so under *Balsys* or because, at the time she was compelled, she could not point to joint-cooperation evidence to justify invoking silence or because the witness was compelled by a foreign nation abroad—does not *erase* the Fifth Amendment’s protection. Again, invoking silence is helpful but not necessary. And this is especially the case when the prosecution in which the individual fears incrimination is tantamount to (or is in fact) a U.S. criminal case.<sup>114</sup> There is little difference, therefore, between a court barring a witness’s removal to a foreign nation upon discovering new evidence of joint cooperation after the witness was compelled without invoking silence (and thus without immunity) and a U.S. court’s prohibition on the use of foreign-compelled testimony inside a U.S. criminal proceeding. In both, a bar on the access and/or use of the compelled testimony, whether by halting the witness’s removal abroad or by imposing a prohibition on foreign-compelled testimony’s use, is necessary to vindicate the Clause. The two scenarios, both focused on prohibiting the use of compelled testimony, are indistinguishable.

### C. *The Same-Sovereign Rule’s Larger Relevance*

At bottom, the same-sovereign rule is a product of the privilege’s unique construction. The uniqueness lies in the space between when the privilege is relevant (at the time of compulsion) and when the privilege applies (at some appropriate criminal trial). To be sure, there is a constitutional issue at both stages; an individual can raise a constitutional argument at either point.<sup>115</sup> But the rule, as *Balsys* demonstrated, does its work at the time of invocation, not after.<sup>116</sup> It is

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under a habeas petition, see 28 U.S.C. § 2241 (2012), or in a deportation or extradition hearing, and argue that removal from the United States would absolutely jeopardize her Fifth Amendment right, first implicated when she was formally compelled to speak by a U.S. authority without immunity and finalized when the foreign prosecutor (*vis-à-vis* the United States) uses her compelled testimony.

<sup>114</sup> *Malloy*, 378 U.S. at 11 (noting that the Fifth Amendment’s privilege applies to all U.S. criminal proceedings).

<sup>115</sup> Compare *Feldman v. United States*, 322 U.S. 487, 492–93 (1944) (raising the issue of state-compelled testimony’s use in a federal trial at that federal trial), with *Knapp*, 357 U.S. at 380 (raising the issue at the moment the witness was compelled to testify).

<sup>116</sup> *Balsys*, 524 U.S. at 696–98.

there where the rule balances the compelling sovereign's need for information against its expense, to both the using sovereign and the individual witness. At that juncture, the rule weighs the costs of immunity.

But for this reason, the same-sovereign rule cannot control *every* decision about the privilege's application. In fact, the same-sovereign rule can say nothing about instances where the compulsion has already occurred. Applying the rule to testimony already compelled improperly defines the scope of what is "compelled" by whether the witness could, at the time of compulsion, justifiably invoke silence in fear of a U.S. criminal case. The real issue, however, with testimony already extracted, such as foreign-compelled testimony, is whether that testimony is "compelled" under the Fifth Amendment. After all, if the testimony will be used in a U.S. criminal case, the intended use is undoubtedly in an applicable "criminal case."

In this, there is a larger point: applying the same-sovereign rule to determine the breadth of the entire Self-Incrimination Clause overlooks other portions of its text. The rule improperly restricts the definition of "compelled" to the definition of a "criminal case." This friction limits compelled testimony to only that testimony extracted by a sovereign bound by the Fifth Amendment, when in fact compulsion can occur anywhere and in each instance does violence to values the Fifth Amendment seeks to protect. Out of this tension arises a need to interpret "any criminal case" in harmony with "compelled." To reach this harmony, a use-sovereign rule should define the ambit of the privilege. A use-sovereign rule suggests the scope of the privilege is not at all dependent on where the actual compulsion takes place. Nor is the scope of the privilege defined by whether an individual could bargain for immunity at the time of her compulsion. Thus, insofar as the testimony is compelled under threat of state sanction, foreign nations can trigger the Clause by their independent decision to compel, under threat of sanction, even when the compelled witness could neither assert the privilege at his compelled interview nor bargain for immunity inside the United States *before* the foreign compulsion took place.<sup>117</sup>

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<sup>117</sup> Besides the Self-Incrimination Clause, the Supreme Court has also located a defendant's right not to have her own words used against her at trial in the Due Process Clauses of the Fifth and Fourteenth Amendments. See *Jackson v. Denno*, 378 U.S. 368, 376 (1964) ("It is now axiomatic that a defendant in a criminal case is deprived of due process of

*D. Compulsion*

Advancing this conclusion is the fact that foreign compulsion implicates the same values that underline the Fifth Amendment's privilege. There is no rationale, grounded in the privilege's values, for separating foreign compulsion from domestic compulsion. In *Murphy*, the Court summarized seven policies the privilege seeks to vindicate:

[1] [O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; [2] our preference for an accusatorial rather than inquisitorial system of criminal justice; [3] our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; [4] our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" [5] our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" [6] our distrust of self-deprecatory statements; and [7] our realization that the privilege . . . is often "a protection to the innocent."<sup>118</sup>

In listing these values, the Court emphasized that, when a federal or state authority can use a witness's own words secured by compulsion against her, "[m]ost, if not all, of these policies and purposes are defeated."<sup>119</sup> Indeed, where a prosecutor can use a defendant's compelled testimony against her, the defendant is subjected to the "cruel trilemma." She is asked to choose, whether before trial or at trial, between (1) testifying (or taking the stand) and incriminating herself, (2) testifying (or taking the stand) and perjuring herself, or (3) remaining silent where she can be held in contempt (or, when at trial, while the prosecutor makes use of

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law if his conviction is founded, in whole or in part, upon an involuntary confession . . . "); see also Siegel, *supra* note 31, at 287–90 (arguing that the Due Process Clause fails to adequately exclude foreign-coerced confessions given the Due Process Clause's mechanical focus on relevant state action, which is lacking in cases of *foreign-state* coercion).

<sup>118</sup> *Murphy*, 378 U.S. at 55 (citations omitted); see also 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2251 (John T. McNaughton rev., 1961) (discussing twelve policies that have been advanced as a justification for the privilege).

<sup>119</sup> *Murphy*, 378 U.S. at 55.

her compelled statement(s)).<sup>120</sup> Likewise, permitting prosecutors the free use of compelled testimony disturbs the sense of fair play in the defendant's contest against the government. Here, the government can overwhelm the factfinder and the defendant with the defendant's own words, easing its responsibility to "shoulder the entire load." Moreover, the use of a defendant's compelled testimony attacks her dignity and privacy, exposing her "private enclave" to the public.

The same is no less true when the compulsion is foreign. The defendant must face the "cruel trilemma," whether he is compelled to testify abroad or once at trial in the United States. He is confronted with the unsavory choice of (1) testifying and thus exposing his words to use, (2) remaining silent only to face sanction abroad for doing so, or (3) perjuring himself. The same concern about the fair state-individual balance exists as well. The prosecuting government's access to the compelled testimony eases its burden, undermining the adversarial and independent values behind the U.S. criminal justice system. And the defendant's dignity and privacy is not a lesser concern when the defendant is from overseas. An individual's dignity and privacy are

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<sup>120</sup> Andrew J. M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence*, 98 Va. L. Rev. 897, 900 (2012).

inviolable, universal values, a point which both the Supreme Court<sup>121</sup> and foreign cases have made clear.<sup>122</sup>

International norms, incorporated into international documents and conventions, support the same proposition. The International Covenant on Civil and Political Rights (the “ICCPR”) was ratified in 1966.<sup>123</sup> Presently, there are “74 signatories and 167 parties to the ICCPR,”<sup>124</sup> including the United States, which became a signatory on October 5,

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<sup>121</sup> In *Bram v. United States*, 168 U.S. 532, 540–41 (1897), the Court addressed whether the Fifth Amendment prevented the federal government from using a defendant’s *coerced* confession, extracted by a foreign nation, in a U.S. criminal prosecution. There, the Court made it unambiguously clear that “in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person ‘shall be compelled in any criminal case to be a witness against himself.’” *Id.* at 542. It is true that the Supreme Court in *Bram* found a Fifth Amendment violation when testimony was *coerced* by foreign police officers, but *Bram* did not address the distinction between coercion by foreign and domestic authorities nor did it address the distinction between coercion and official state compulsion. Since *Bram*, the Supreme Court has stressed the unimportance of its holding, finding that *Bram* “does not state the standard for determining the voluntariness of a confession.” *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991). Moreover, *Bram* located the right against use of coerced confessions in the Self-Incrimination Clause when today the prohibition on use of coerced testimony fits within the Due Process Clause. See *Colorado v. Connelly*, 479 U.S. 157, 163 (1986). The Due Process Clause, deciding the *voluntariness* of a statement, does not appropriately apply to compulsion or foreign compulsion, which is by definition involuntary.

<sup>122</sup> See *Pyneboard Proprietary Ltd v Trade Practices Comm’n* (1983) 152 CLR 328, 346 (Austl.) (“The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society’s acceptance of the inviolability of the human personality.”); *Heaney & McGuinness v. Ireland*, 2000-XII Eur. Ct. H.R. 421, 434 (stating that “the right to silence and the right not to incriminate oneself” are two separate privileges but are both “generally recognized international standards, which lie at the heart of the notion of a fair procedure under Article 6” of the European Convention).

<sup>123</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The United States ratified the ICCPR in 1992. See W. Michael Reisman, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 *Am. J. Int’l L.* 341, 348 (1995).

<sup>124</sup> Canadian Civil Liberties Ass’n, Summary: International Covenant on Civil and Political Rights (ICCPR) (Oct. 27, 2015), <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/> [<https://perma.cc/7DJV-NYT3>].

1977, and ratified the ICCPR on June 8, 1992.<sup>125</sup> And among other provisions, the ICCPR reads, “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . Not to be compelled to testify against himself or to confess guilt.”<sup>126</sup> Likewise, the European Court of Human Rights, despite the absence of a self-incrimination privilege in the European Convention on Human Rights, has twice recognized that a privilege against self-incrimination derives from Article 6 of the European Convention.<sup>127</sup>

Today, the international community has elevated the status of the individual. By doing so, it has found the involuntary extraction of testimony to be revolting to individuals’ dignity and privacy, even when nations hold divergent policies on *when* a nation can compel or *what* a nation can do with that testimony. This revulsion is exacerbated when that involuntary testimony is *used* against the compelled in a criminal prosecution against her. Such broad international acceptance, coupled with the Supreme Court’s own language, emphasizes why compulsion by a foreign nation is no different than compulsion by a state or federal authority.

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<sup>125</sup> International Covenant on Civil and Political Rights, United Nations Treaty Collection (Aug. 21, 2017, 5:00 AM), [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtsg_no=IV-4&chapter=4&clang=_en) [<https://perma.cc/5HVD-RNU3>].

<sup>126</sup> ICCPR, *supra* note 123, at art. 14-3(g).

<sup>127</sup> Article 6 regards a right to a fair trial. See *Saunders v. United Kingdom*, 1996-VI Eur. Ct. H.R. 2044, 2064 (“The right not to incriminate oneself . . . presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.”); *Murray v. United Kingdom*, 1996-I Eur. Ct. H.R. 30, 49 (stating that the privilege is cognizable, but a Northern Ireland court can still draw adverse inferences from the defendant’s silence); *Funke v. France*, 256 Eur. Ct. H.R. (ser. A) at 22 (1993) (recognizing a breach of the Article 6 right to “remain silent and not to contribute to incriminating himself”); see also Andrew Ashworth, *Self-Incrimination in European Human Rights Law—A Pregnant Pragmatism?*, 30 *Cardozo L. Rev.* 751, 751–56 (2008) (tracing the recognition of a privilege against self-incrimination in European human rights law); Mark Berger, *Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights*, 12 *Colum. J. Eur. L.* 339, 343 (2006) (discussing the incorporation of the right to remain silent in Article 6 of the European Convention on Human Rights).



*E. Cooperative Internationalism*

Accentuating foreign compulsion's threat to U.S. defendants is the global, interfederal network of law enforcement, a network not unlike the "cooperative federalism[,] . . . a united front [of the federal and state governments fighting] against many types of criminal activity[.]" that the Court cited to support its holding in *Murphy*.<sup>128</sup> Indeed, the global community has, for some decades now, fought cross-border crime with increasing fervor. Whether it involves broad international cooperation among nations fighting common criminal enemies, the creation of a world police force (INTERPOL), the increased willingness to extradite individuals to face trial in a foreign jurisdiction, or the inclination, with the aid of Mutual Legal Assistance Treaties ("MLAT" agreements), to share and transfer relevant evidence between sovereigns, international networks have become an engrained feature of the United States' criminal justice infrastructure.<sup>129</sup> In fact, among the eight priorities the Federal Bureau of Investigation has listed within its mission statement, at least four address transnational crime, and among the top four priorities, three possess an international focus.<sup>130</sup>

In truth, this should come with little shock. As borders become more permeable and criminal networks more complex, criminal activity spans nations, if not continents. In recognition of this phenomenon, a permanent forum for the adjudication of international crime now exists.<sup>131</sup> Special courts, in addition to the International Criminal Court, have arisen in response to particularly atrocious criminal behavior.<sup>132</sup> In

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<sup>128</sup> *Murphy*, 378 U.S. at 55–56.

<sup>129</sup> Cf. Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 Mich. L. Rev. 985, 986 (2007).

<sup>130</sup> These four priorities are: (1) "[p]rotect the United States from terrorist attack"; (2) "[p]rotect the United States against foreign intelligence operations and espionage"; (3) to "[p]rotect the United States against cyber-based attacks and high technology crimes"; and (4) to "[c]ombat transnational/national criminal organizations and enterprises." Fed. Bureau of Investigation, *About: Mission & Priorities*, <https://www.fbi.gov/about/mission> [<https://perma.cc/HE5B-3SHD>] (last visited Apr. 19, 2017).

<sup>131</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (creating the International Criminal Court).

<sup>132</sup> These courts have been created by the United Nations. The United Nations has been involved with several tribunals established to bring justice to victims of international crimes. Two present ad hoc tribunals include the United Nations Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). United

the background, there is a growing “harmonization” among nations regarding what qualifies as a criminal act.<sup>133</sup> With the help of special sections at the Department of Justice, foreign states have begun to adopt criminal statutes that closely mirror criminal statutes in the United States.<sup>134</sup> This, in turn, has greased nations’ crime-fighting initiatives, ensuring that substantive hurdles between nations are erased.<sup>135</sup>

The reality of international cooperation by law enforcement agencies is not new. A police force in Colombia may have more connections with the Drug Enforcement Agency in Miami than any other foreign agency. A banking investigation led by the U.S. Attorney’s Office in Manhattan may have investigative spokes all over the world. Computer crimes, given the interconnectedness of digital information, can span the world, implicating privacy, property, and regulatory interests in multiple nations simultaneously. The nature of these investigations, coupled with the potential for broad interfederal cooperation, is very similar (if not identical) to the state-federal cooperation cited in *Murphy* as a basis to expand the privilege domestically between state and federal

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Nations Criminal Tribunal for the Former Yugoslavia, About the ICTY, <http://www.icty.org/en/about> [<https://perma.cc/X8R3-NZ7B>] (last visited May 22, 2017); United Nations Mechanism for Int’l Criminal Tribunals, The ICTR in Brief, <http://unictr.unmict.org/en/tribunal> [<https://perma.cc/8EHU-FSGN>] (last visited May 22, 2017) (Legacy Website for the International Criminal Tribunal for Rwanda).

<sup>133</sup> See Ethan A. Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* 468–77 (1993) (noting that the “internationalization of U.S. law enforcement has proceeded in tandem with the internationalization and harmonization of foreign law enforcement systems”).

<sup>134</sup> See U.S. Dep’t of Justice, Office of Overseas Prosecutorial Development Assistance and Training (OPDAT), <http://www.justice.gov/criminal-opdat> [<https://perma.cc/5KVS-Q2HD>] (last visited Mar. 22, 2017). According to OPDAT’s website, OPDAT programs, started in 1991,

assisted host countries in their development of new Codes of Criminal Procedure to replace inquisitorial systems and Soviet-era laws; helped strengthen independent judiciaries; and improved prosecutorial capacity to combat high-priority criminal activity. OPDAT has since grown to become a global force in justice sector capacity building, with a heavy emphasis on combatting terrorism and transnational crime. . . . [T]hey assess host country criminal justice institutions and procedures; draft, review and comment on legislation and criminal enforcement policy; and provide technical assistance to host country prosecutors, judges, and other justice sector personnel working in the field.

Id.

<sup>135</sup> See *id.*

sovereigns.<sup>136</sup> In like manner, it is imperative that the interfederal cooperation does not go unnoticed. Freely allowing foreign-compelled testimony into a U.S. courtroom could mean that these networks become testimonial pipelines, transporting compelled testimony across the globe well before the witness (or his attorney) knows so. This not only risks undermining nations' commitment, recognized in the ICCPR and elsewhere, to a privilege against self-incrimination, but it also implicates the Fifth Amendment's own commitment to ensuring that a fair balance exists between the state and the individual defendant.

### III. DECIDING HOW TO TREAT FOREIGN-COMPELLED TESTIMONY

If foreign-compelled testimony is in fact "compelled" under the Fifth Amendment, what amount of exclusion should follow? Should prosecutors be barred from making any direct and indirect use of foreign-compelled testimony—just as they must in instances of U.S.-compelled testimony? Or should courts grant American prosecutors, in fear of ceding too much control to foreign nations, a more relaxed immunity standard, such as use only immunity?

An answer to these questions is difficult. Indeed, at the time the witness is compelled to speak, there is no bargained-for immunity between the United States and that witness. In many instances, the United States may be unaware of the compulsion. And in any event, the federal immunity statute only permits the government to grant an individual immunity *after* she refuses to testify "on the basis of [her] privilege" in a U.S. court, grand jury, or agency, or before Congress.<sup>137</sup> Absent any clear language to the contrary, the section is plainly not applicable to overseas proceedings.<sup>138</sup>

At the same time, there does not appear to be any clear constitutional mandate binding courts to use and derivative use immunity. Fifth Amendment immunity is a flexible concept, one that has sought to strike a sensible balance between the individual's Fifth Amendment protection and the state's interest in pursuing a (successful) criminal prosecution.

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<sup>136</sup> See Amann, *supra* note 10, at 1261–72 (highlighting all the ways interfederal law enforcement has become a reality).

<sup>137</sup> 18 U.S.C. § 6002 (2012).

<sup>138</sup> See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 US. 247, 255 (2010) (citing the presumption against extraterritoriality).

The Clause's history reveals as much. In that vein, this Part will first discuss how the Court arrived at use and derivative use immunity in the early 1970s. Upon noting the absence of any clear constitutional commitment to use and derivative use immunity—a fact underscored by variable interpretations of that immunity in lower federal courts since—this Part surveys how to sensibly treat foreign-compelled testimony, whether with or without use and derivative use immunity.

#### A. *The Evolution of Fifth Amendment Immunity*

The Supreme Court has not always found use and derivative use immunity to be coextensive with the Fifth Amendment's privilege. In fact, since the passage of the Bill of Rights, the Court has fluctuated among standards of immunity thought necessary to supplant the privilege.

*Counselman v. Hitchcock* was the first case to force the Court to consider the constitutional scope of the Fifth Amendment.<sup>139</sup> In *Counselman*, the Interstate Commerce Commission called a grand jury to question Charles Counselman, a grain dealer, about rate rebates.<sup>140</sup> Counselman, however, invoked his privilege against self-incrimination.<sup>141</sup> In response, the Commission granted him statutory use immunity,<sup>142</sup> which barred the use of Counselman's compelled testimony in any future *federal* prosecution.<sup>143</sup> Yet Counselman still refused to testify, with the Supreme Court ultimately protecting his decision. The use immunity statute, the Court held, was too narrow to supplant the privilege.<sup>144</sup> The statute could not "prevent the use of [Counselman's] testimony to search out other testimony to be used in

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<sup>139</sup> 142 U.S. 547, 562 (1892).

<sup>140</sup> *Id.* at 548–49.

<sup>141</sup> *Id.* at 549.

<sup>142</sup> *Id.* at 559–60.

<sup>143</sup> See Revised Statutes, pt. 1, § 860, 18 Stat. 163 (1878) ("No pleading of a party, nor any discovery or evidence obtained from a party or a witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party of witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.").

<sup>144</sup> *Counselman*, 142 U.S. at 564.

evidence against him.”<sup>145</sup> To be consonant with the Fifth Amendment, “a statutory enactment . . . must afford absolute immunity against [any] future prosecution for the offence to which the question relates.”<sup>146</sup>

Yet absent in *Counselman* was any doctrinal justification, grounded in either text or history, for why absolute immunity was required by the constitution. The Court instead spent considerable space discussing how state courts were split over the sufficiency of use immunity,<sup>147</sup> noting that some state courts, interpreting their own state’s privilege against self-incrimination, had held that use immunity struck the correct balance between the state and the witness,<sup>148</sup> while others had gone further, protecting any compelled witness from not only the state’s use of his testimony but also from any related prosecution.<sup>149</sup> In the end, the *Counselman* Court rested on “the liberal construction which must be placed upon constitutional provisions for the protection of personal rights.”<sup>150</sup> In doing so, the Court equated the United States’ and New York’s privileges (a subject shall not be “compelled in any criminal case to be a witness against himself”) with Massachusetts’s and New Hampshire’s privileges (a subject shall not be “compelled to accuse *or furnish evidence against himself*”), despite differences in their language and the apparent differences in scope between them.<sup>151</sup> This equation (or “reasonable construction,” according to the Court) meant that the Constitution’s Fifth Amendment would require transactional (or absolute) immunity.<sup>152</sup> The federal privilege would bar not only the

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 585–86; see Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (new federal immunity statute passed after *Counselman* intended to meet the broad language in *Counselman*).

<sup>147</sup> *Counselman*, 142 U.S. at 563–85.

<sup>148</sup> See *People ex rel. Hackley v. Kelly*, 24 N.Y. 74, 83 (N.Y. 1861) (“[N]either the law nor the Constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law.”).

<sup>149</sup> See *Emery’s Case*, 107 Mass. 172, 185 (Mass. 1871).

<sup>150</sup> *Counselman*, 142 U.S. at 584–85.

<sup>151</sup> *Id.* at 584 (emphasis added).

<sup>152</sup> See *Emery’s Case*, 107 Mass. at 185 (“It follows . . . that, so far as this statute requires a witness, who may be called, to answer questions and produce papers which may tend to criminate himself, and attempts to take from him the constitutional privilege in respect

compelled witness's testimony, but fruits of that testimony as well, including otherwise reliable physical fruits.

Some eighty years later, the Supreme Court in *Kastigar* overruled *Counselman*.<sup>153</sup> Noting that neither *Counselman* nor any intermediate cases involved a challenge to a use and derivative use immunity statute,<sup>154</sup> the Court went on to hold that use and derivative use immunity—a standard less burdensome than absolute immunity—was in fact coextensive with the Constitution's Self-Incrimination Clause.<sup>155</sup> To reach that decision, the Court, relying on *Murphy*'s suggestion that use and derivative use immunity is most appropriate in situations of intersovereign immunity, wrote:

Since the privilege is fully applicable and its scope is the same whether invoked in a state or federal jurisdiction, the *Murphy* conclusion that a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government demonstrates that immunity from use and derivative use is coextensive with the scope of the privilege.<sup>156</sup>

Dissenting, Justice Douglas objected to the majority's reliance on *Murphy*. The immunity standard from *Murphy*, cited to endorse the *Kastigar* holding, was, Justice Douglas noted, the product of federalism: “[T]o require transactional immunity between jurisdictions might ‘deprive a state of the right to prosecute a violation of its criminal law on the basis of another state’s grant of immunity[, a result which] would be gravely in derogation of its sovereignty . . . .’”<sup>157</sup> To Justice Douglas, *Murphy* and the hazard of interjurisdictional immunity said nothing about immunity contained within the same jurisdiction, the issue presented in *Kastigar*.<sup>158</sup>

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thereto, it must be entirely ineffectual for that purpose, unless it also relieves him from all liabilities . . . .”).

<sup>153</sup> *Kastigar*, 406 U.S. at 462.

<sup>154</sup> *Id.* at 452–53.

<sup>155</sup> *Id.* at 462.

<sup>156</sup> *Id.* at 458 (footnote omitted).

<sup>157</sup> *Id.* at 464 (Douglas, J., dissenting) (citations omitted).

<sup>158</sup> *Id.*; see also *Murphy*, 378 U.S. at 92–93 (White, J., concurring).

But notwithstanding Justice Douglas's rebuttal, the *Kastigar* Court likely arrived at use and derivative use immunity by analogizing to the exclusionary protection found in coerced-confession and Fourth Amendment case law. "The statutory proscription [under 18 U.S.C. § 6002]," the Court noted,

is analogous to the Fifth Amendment requirement in cases of coerced confessions . . . [for] [t]here can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where . . . testimony is compelled . . . when no such amnesty is required where the government . . . coerces a defendant into incriminating himself.<sup>159</sup>

This interpretation, the Court added, was consistent with the legislative history of the immunity statute contested in *Kastigar*.<sup>160</sup> Indeed, Congressman Richard Poff of Virginia, commenting in congressional hearings on the breadth of use and derivative use immunity under the proposed immunity statute, stated: "[T]he immunity . . . would be a use restriction, a use restriction similar to the exclusionary rule which is now applied against such things as involuntary confessions, evidence acquired from unlawful searches and seizures, [and] evidence acquired in violation of the *Miranda* warnings . . . ."<sup>161</sup>

In a key way, however, the adoption of an exclusionary rule for cases of immunized testimony is not fitting; it ignores a critical difference between the Fourth and Fifth Amendments. While the primary goal of the Fourth Amendment's exclusionary rule is to ensure that individuals' privacy is protected by deterring certain police conduct,<sup>162</sup> the chief

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<sup>159</sup> *Kastigar*, 406 U.S. at 461–62 (citation omitted).

<sup>160</sup> See *id.* at 452 n.36 (referring to the recommendation of the National Commission on Reform of Federal Criminal Laws, which served as the model for the immunity statute at issue in *Kastigar* (18 U.S.C. § 6002), and which envisioned use and derivative use immunity to afford the same protection required in cases of coerced confessions); see also *Pillsbury Co. v. Conboy*, 459 U.S. 248, 276–78 (1983) (Blackmun, J., concurring in judgment) (arguing that § 6002's prohibition against indirect and direct uses of compelled testimony reflected Congress's desire to merge the Fifth and Fourth Amendments' exclusionary rules into one).

<sup>161</sup> Federal Immunity of Witnesses Act, Hearings on H.R. 11157 and H.R. 12041 Before Subcomm. No. 3 of the H. Comm. on the Judiciary, 91st Cong. 30 (1969).

<sup>162</sup> See Bloch, *supra* note 30, at 1637–38 (explaining that the Fourth Amendment's fruit-of-the-poisonous-tree doctrine rests on a deterrence rationale); Steven Penney, *Theories of*

value of the Fifth Amendment is to protect an individual from becoming a witness against herself, shielding the use of her testimony in a future criminal case.<sup>163</sup> The elimination of Fifth Amendment evidence under the Fourth Amendment's exclusionary rule, then, may be an imprecise remedy. In some instances, it is far too expansive, barring the introduction of otherwise reliable derivative evidence against the defendant, evidence that may not be testimonial but physical in nature. As a result, the Court's adaptation of the Fourth Amendment's remedial rule to the Fifth Amendment may have failed to properly engage with the language of the Fifth Amendment. By doing so, Congress, followed by the Court's endorsement in *Kastigar*, elected to impose a far wider prohibition—barring use and derivative use—than may be constitutionally necessary.<sup>164</sup> After all, unlike the ambiguous scope of the Fourth Amendment and its exclusionary remedy, the Fifth Amendment, on its face, only applies to testimonial, not physical, evidence; evidence in which the compelled defendant is serving as a testifying “witness” against himself.<sup>165</sup>

In short, the *Kastigar* majority lacked any rationale for why use and derivative use immunity was *constitutionally* correct. It did not address why pre-*Counselman* interpretations of the privilege, which tolerated

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Confession Admissibility: A Historical View, 25 Am. J. Crim. L. 309, 360 (1998) (discussing the development of a police-methods rationale for making certain confessions inadmissible).

<sup>163</sup> Bloch, *supra* note 30, at 1636–37.

<sup>164</sup> See Akhil Reed Amar & Renée B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857, 858–59, 928 (1995) (arguing that the Fifth Amendment's Self-Incrimination Clause should only bar direct uses of a compelled witness's testimony, on the basis that the Fifth Amendment only means to exclude *unreliable* evidence which would exclude otherwise reliable derivative evidence).

<sup>165</sup> See Amar & Lettow, *supra* note 164, at 900 (The Self-Incrimination Clause's reference to “[w]itnesses [applies only to] those who take the stand and testify, or whose out-of-court depositions or affidavits are introduced at trial in front of the jury”). See also *United States v. Patane*, 542 U.S. 630, 639–40 (2004) (noting that the Fifth Amendment requires a “close-fit requirement” which limits the exclusion of otherwise reliable and trustworthy information even if obtained through a *Miranda* violation); *Schmerber v. California*, 384 U.S. 757, 760–61, 765 (1966) (forcing a witness to disclose his own mind or to speak his guilt qualifies as testimonial and is thus barred under the Fifth Amendment, but the compelled taking of physical evidence, such as blood, is not testimonial and thus is not controlled by the Fifth Amendment's Self-Incrimination Clause).



use only immunity, were improper.<sup>166</sup> Nor did the *Kastigar* Court grapple with the key difference between the Fourth and Fifth Amendments, deciding instead to treat all Fourth and Fifth Amendment claims alike.<sup>167</sup> Finding the Self-Incrimination Clause's evolution puzzling, one notable commentator has rather correctly remarked that "Fifth Amendment doctrine today is the unconvincing and half-hearted residue of an 1870s opinion from Massachusetts [*Emery's Case*] that explicitly relied on state constitutional phrasing that the Federal Fifth Amendment impliedly rejected."<sup>168</sup>

That *Kastigar* rested on a prudential ground appears especially accurate after reading Justice Marshall's dissenting opinion in that case. Justice Marshall did not contest, in any strict constitutional sense, the Court's arrival at use and derivative use immunity. Instead, he argued that use and derivative use immunity necessarily relied on the good faith of the prosecutor, a proposition that could not adequately protect the compelled defendant at trial:

The information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities. They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence.<sup>169</sup>

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<sup>166</sup> Certain members of the Court have since emphasized the use only prohibition within the Fifth Amendment, albeit in the context of *Miranda* warnings. See *New York v. Quarles*, 467 U.S. 649, 672 (1984) (O'Connor, J., concurring in judgment in part and dissenting in part) ("[W]here the accused proves only that the police failed to administer the *Miranda* warnings, exclusion of the statement itself is all that will and should be required.").

<sup>167</sup> The Court did emphasize that "a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim," since he would only need to show that he testified under a grant of immunity. *Kastigar*, 406 U.S. at 461.

<sup>168</sup> Amar & Lettow, *supra* note 164, at 916.

<sup>169</sup> *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting).

To Justice Marshall, what may be thought to be independently derived evidence may in fact be impermissibly compelled testimony, unwittingly incorporated into the prosecution's case in chief.<sup>170</sup> This risk, which could easily go unchecked, proved too costly for Justice Marshall; only absolute immunity could provide a defendant the appropriate protection.<sup>171</sup>

Justice Marshall, however, qualified his fear of good faith error, recognizing that his qualification may differ in a multi-jurisdictional case—a case unlike the one before the Court in *Kastigar*. Here Justice Marshall added that “[t]his case does not . . . involve the special considerations that come into play when the prosecuting government is different from the government that has compelled the testimony.”<sup>172</sup> In saying so, Justice Marshall hinted that one immunity standard may be acceptable in intrajurisdictional cases but another in instances of interjurisdictional cases. Justice Marshall's suggestion highlights that immunity, and the protection it affords, is the deliberate product of balancing the needs versus the costs of immunity, a balancing that is unique to each situation.<sup>173</sup>

Further complicating any coherent understanding of the privilege's immunity is the Court's odd and arguably confusing distinction in treatment between bargained-for immunity and non-bargained-for immunity. For example, the Court in *Lefkowitz v. Turley*, upon finding that a private contractor was compelled when he was forced to answer questions from a state agency or else face losing employment opportunities with the state,<sup>174</sup> struggled with determining the exact breadth of protection the Clause owed to that contractor. Interestingly, it noted that there may be a constitutionally important distinction between

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 468 n.\*.

<sup>173</sup> For more support of this position, see Peter Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 Am. Crim. L. Rev. 31, 37 (1982) (“[W]hen the Court confronts procedural contexts and state objectives not envisioned by the Constitution's framers, it must first identify which fifth amendment values are implicated and what state interests are at stake that might justify some impairment of these values.”); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 679 (1968) (arguing that an examination of the policies behind the privilege is essential in considering its scope).

<sup>174</sup> 414 U.S. 70, 82–83 (1973).

those who refuse to answer by citation to the Fifth Amendment and those who do not, even though in both instances the witness is compelled:

[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar v. United States*, 406 U.S. 441 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Bram v. United States*, [168 U.S. 532 (1897)]; *Boyd v. United States*, [116 U.S. 616 (1886)].<sup>175</sup>

The *Lefkowitz* Court's distinction between *Kastigar* and *Bram/Boyd* suggests a dissonance in the extent of protection between the two, even though in both the testimony was compelled. With use and derivative use immunity following whenever a witness rightfully refuses to answer on the basis of the privilege, *Bram* and *Boyd* fill in all other situations with a standard seemingly less onerous than *Kastigar*. Under these latter cases, the government cannot make direct evidentiary use of the compelled testimony but can *possibly* make certain derivative evidentiary use of the compelled testimony.<sup>176</sup>

#### *B. Use and Derivative Use Immunity Today*

Underscoring this lack of commitment to a consistent conception of immunity is lower courts' troubles in defining the exact breadth of use and derivative use immunity itself. Some courts, for instance, have adopted a rather strict interpretation, prohibiting nearly all out-of-courtroom uses of immunized testimony that may have a tangential impact on a trial.<sup>177</sup> In *United States v. North*, for example, the

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<sup>175</sup> *Id.* at 78 (parallel citations omitted).

<sup>176</sup> For more on the difficulty in defining the precise breadth of immunity or exclusion owed to testimony compelled but not secured under a formal-immunity agreement, see Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. Rev. 1309, 1314–21 (2001) (describing on what basis the exclusion of informally compelled statements, such as those in *Lefkowitz*, rests).

<sup>177</sup> See *United States v. Semkiw*, 712 F.2d 891, 894–95 (3d Cir. 1983) (finding that stipulations made at trial did not discharge the government's burden on the absence of taint and that the assigned trial attorney had "access" to compelled testimony did not help either);

government dropped charges against Lieutenant Colonel Oliver North after the U.S. Court of Appeals for the District of Columbia Circuit held that a government witness's exposure to North's congressional testimony—immunized by Congress<sup>178</sup> and thus protected by use and derivative use immunity—violated his Fifth Amendment right.<sup>179</sup> The court went on to write that any “use of immunized testimony by witnesses to refresh their memories, or otherwise focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements constitute[d]” an impermissible use.<sup>180</sup>

The Eighth Circuit has gone even further. In *United States v. McDaniel*, that court held that even when each piece of evidence at trial is independent of the defendant's immunized testimony, there can still be a breach of use and derivative use immunity when the lead prosecutor has read the defendant's immunized statements.<sup>181</sup> The testimony's “immeasurable subjective effect” on the trying prosecutor could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case.<sup>182</sup> To be consistent with *Kastigar*'s prescription, “[use and derivative use immunity] must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury.”<sup>183</sup>

Other circuits, however, have found that this interpretation goes too far. The First Circuit commented that the Eighth Circuit's approach “amounts to a *per se* rule that would in effect grant a defendant *transactional* immunity once it is shown that government attorneys or investigators involved . . . were exposed to the immunized testimony.”<sup>184</sup> *Kastigar*, the First Circuit argued, did not endorse transactional immunity but displaced it, fashioning in its place an immunity standard that “leave[s] the witness and the Federal Government in *substantially*

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*United States v. Carpenter*, 611 F. Supp. 768, 779–80 (N.D. Ga. 1985) (detailing the indirect uses made by the government which caused it to fail surpassing its burden to prove its evidence was wholly independent of any compelled testimony).

<sup>178</sup> See 18 U.S.C. § 6005 (2012).

<sup>179</sup> 910 F.2d 843, 860–62 (D.C. Cir. 1990).

<sup>180</sup> *Id.* at 860.

<sup>181</sup> 482 F.2d 305, 309–10 (8th Cir. 1973).

<sup>182</sup> *Id.* at 312.

<sup>183</sup> *Id.* at 311.

<sup>184</sup> *United States v. Serrano*, 870 F.2d 1, 17 (1st Cir. 1989) (first emphasis added).

the same position as if the witness had claimed his privilege in the absence of the grant of immunity.”<sup>185</sup> In line with its critique, the First Circuit endorsed a position already accepted by its peers in the Second and Eleventh Circuits: immunized testimony that may have tangentially influenced the prosecutor’s thought process in preparation for an indictment and/or trial does not violate use and derivative use immunity.<sup>186</sup>

Dividing circuits’ understanding of use and derivative use immunity today are nonevidentiary uses<sup>187</sup>—uses that involve “focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.”<sup>188</sup> Whether *Kastigar* immunity

<sup>185</sup> *Id.* (emphasis added) (quoting *Kastigar*, 406 U.S. at 458–59). Conferring use and derivative use immunity does not place the compelled speaker in the *exact same* position as if she refused to speak. The federal-immunity statute codifying use and derivative use immunity does permit a compelled witness’s prosecution for perjury or false swearing committed during the giving of her immunized testimony. See 18 U.S.C. § 6002 (2012); see also *United States v. Apfelbaum*, 445 U.S. 115, 126 (1980) (holding that neither the Fifth Amendment nor § 6002 precludes all use of defendant’s immunized testimony in a subsequent prosecution for making false statements). But see *New Jersey v. Portash*, 440 U.S. 450, 459–60 (1979) (“[A] person’s testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him.”).

<sup>186</sup> See *United States v. Cozzi*, 613 F.3d 725, 729 (7th Cir. 2010); *United States v. Helmsley*, 941 F.2d 71, 82 (2d Cir. 1991) (stating that the Fifth Amendment prohibits the use of immunized testimony in two situations, either “(1) where the immunized testimony has some evidentiary effect” in the compelled witness’s prosecution, or “(2) where there is a recognizable danger of official manipulation” subjecting the compelled, immunized “witness to a criminal prosecution”); *United States v. Mariani*, 851 F.2d 595, 600 (2d Cir. 1988) (“[W]e have held that the government must prove that it ‘relied solely’ on evidence from legitimate independent sources.”); *United States v. Byrd*, 765 F.2d 1524, 1529–30 (11th Cir. 1985) (holding that the government need only show, by a preponderance of the evidence, that the evidence used was derived from legitimate, independent sources).

<sup>187</sup> Compare Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 *Tex. L. Rev.* 351, 382 (1987) (arguing that if the government must prove that it made no use, including nonevidentiary uses, of a defendant’s compelled testimony, then courts return to transactional immunity), with Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 *Tex. L. Rev.* 791, 806–07, 833–34 (1978) (arguing that the dangers of nonevidentiary use justify the extension of transactional immunity to compelled witnesses).

<sup>188</sup> *McDaniel*, 482 F.2d at 311; see also *United States v. Mapes*, 59 M.J. 60, 69–71 (C.A.A.F. 2003) (finding that the prosecution’s use of the defendant’s immunized testimony to induce another witness to testify under immunity, which then implicated the defendant and was used to prosecute the defendant, constituted an impermissible use of the defendant’s original immunized testimony).

encompasses or excludes such uses is an open question, one that likely revolves around what the Court meant when it wrote that use and derivative use immunity should “leave[] the witness and the prosecutorial authorities in *substantially the same* position as if the witness had claimed the Fifth Amendment privilege.”<sup>189</sup> Whatever the answer, the issue emphasizes that there may not be a single, precise standard of immunity constitutionally required by the privilege. This lack of clarity, between evidentiary and nonevidentiary uses within use and derivative use immunity, leaves open the possibility of fashioning new permissible uses of compelled testimony under the Fifth Amendment, particularly in contexts not seen before by the Court.

### *C. Treatment*

In many ways, cloaking foreign-compelled testimony with use and derivative use immunity makes the most sense. Doing so comports with the breadth of the privilege, leaving the foreign-compelled witness (now the defendant) in a position substantially similar to the one she would be in had she remained silent. Moreover, doing so also fits within the broadest viewpoint articulated in *Lefkowitz*—that in the absence of any *ex ante*, bargained-for immunity, the immunity that should follow is the one that “supplant[s]” the privilege.<sup>190</sup>

In other respects, however, use and derivative use immunity goes too far. It legitimizes foreign compulsion, a proposition that may be difficult to accept when the foreign activity conflicts with U.S. interests. This is even more worrying when a foreign nation undertakes compulsion to purposefully stymie a U.S. criminal investigation, whether to protect its own interests, the witness’s interests, or both. Further, while use and derivative use immunity works sensibly when employed within a single nation, it may fail to adequately protect prosecutors’ interests in cross-border contexts. Unlike conflicting interests, as at issue in *Murphy*, between state and federal authorities, conflicting interests between foreign nations invites more difficulty. While a federal prosecutor, interested in prosecuting a witness soon-to-be-compelled by a state, may be able to assert successfully its authority over the state, barring the

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<sup>189</sup> *Kastigar*, 406 U.S. at 462 (emphasis added).

<sup>190</sup> *Lefkowitz*, 414 U.S. at 85.

witness's compulsion for instance, the same cannot always be said of relations between foreign nations.

Moreover, in practice, use and derivative use immunity would create difficult issues of proof, but-for causation, and layered counterfactuals, leading the prosecution down a wormhole of trying to prove the absolute independence of its own evidence, however strong and serious the merits of the underlying case are.<sup>191</sup> This is made more difficult in cross-border cases given that some, if not most, of the prosecution's evidence would come from overseas without a "courtesy of the defendant" label attached.<sup>192</sup> To make matters worse, U.S. prosecutors' mere communication with foreign investigators, seeking to gain knowledge about who has been compelled, may be too risky. Speaking with these investigators may be a sufficient taint, blemishing a U.S. prosecution's required independence, especially when the spoken-to investigators were the very interrogators who conducted a relevant witness's (or the defendant's) compelled interview. Indeed, it was this very friction—the tension arising from separate sovereigns' conflicting motivations about a witness—that guided the *Murphy* Court, and later the *Kastigar* Court, away from transactional immunity and toward use and derivative use immunity. This same friction, magnified on an international scale and overlaid with the differences amongst nations' privileges, should likewise drive the Court to something less than use and derivative use immunity.

In place of use and derivative use immunity, a U.S. court could offer use only immunity, which only prevents the prosecution from using the witness's *statements* against him but allows a prosecutor to use

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<sup>191</sup> See Note, *Self-Incrimination and the States: Restriking the Balance*, 73 *Yale L.J.* 1491, 1495 (1964) ("It would seem virtually impossible to discharge this burden of showing that testimony known to an investigator did not influence him in conducting a search for evidence upon which to base a prosecution. Any court faced with such facts will probably find, in most cases, that the prosecutor has failed to sustain that burden. Even in situations where a prosecutor was preparing or had commenced an investigation, it would be difficult to show that testimony about which he knew or should reasonably have known did not influence the direction taken by his investigation. And where no investigation had been undertaken before a witness testified, and investigation leading to prosecution was then commenced, the burden could not be realistically discharged. The resulting crippling limitation on the ability to prosecute could be more dangerous than a limitation on the ability to investigate.").

<sup>192</sup> Amar & Lettow, *supra* note 164, at 911.

derivative evidence obtained from those statements. Not only could use only immunity limit the consequences of foreign government's compulsion of a U.S. target, whether done to further a nation's legitimate interest or to purposefully stymie a U.S. criminal investigation, but it also could ease the prosecution's burden of proving the independence of its evidence in situations where doing so, given the nature of the evidence (testimonial) and its source (foreign), is difficult, if not impossible. Additionally, as discussed before, granting use only immunity may not be at odds with the Constitution. Use only immunity was an accepted pre-*Counselman* interpretation of the Clause, an interpretation which allowed the prosecution's use of derivative evidence at trial, particularly of the non-testimonial kind.<sup>193</sup> It also may be the interpretation necessary to strike a sensible balance between the government (which is obliged to follow some amount of exclusion of a witness's compelled testimony) and the witness (who is benefited by an event exogenous to the U.S. prosecutor). To follow the instruction from *Kastigar*, striking this balance with use only immunity may be closer to leaving the witness and prosecution "in substantially the same position" as if the witness had claimed the Fifth Amendment privilege than any other immunity alternative.<sup>194</sup> Underlining this proposition is the fact that some foreign nations, possibly including the nation that compelled the witness, recognize a privilege against self-incrimination that permits the derivative use of the compelled testimony.<sup>195</sup> The United States, under rationales that may not be entirely justified,<sup>196</sup> has expanded the privilege's protection well beyond what peer nations find appropriate,

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<sup>193</sup> See supra notes 139–52; see also *Doe v. United States*, 487 U.S. 201, 201 (1988) (forcing a witness to disclose his own mind or to speak his guilt qualifies as testimonial; the compelled taking of physical evidence does not); *Schmerber v. California*, 384 U.S. 757, 757 (1966) (same).

<sup>194</sup> *Kastigar*, 406 U.S. at 462.

<sup>195</sup> See *X7 v Australian Crime Comm'n* (2013) 248 CLR 92, 124 ("[T]he trial judge has a discretion in relation to the admissibility of such [derivative] evidence, and the court has a power to control any use of derivative evidence which amounts to an abuse of process."); see also Australian Law Reform Comm'n, *Privilege in Perspective*, Report No. 107 (2007), ch. 7, \*324 (noting that the Corporations Legislation Evidence Act of 1992 removed derivative use immunity given that it placed an excessive burden on the prosecution); Paul Sofronoff, *Derivative Use Immunity and the Investigation of Corporate Wrongdoing*, 10 QUT L.J. 122, 122 (1994) (outlining the various types of immunities offered under Australian law).

<sup>196</sup> See supra notes 169–71 and accompanying text.



despite these nations' like-minded commitment to the privilege's universal values.<sup>197</sup>

That said, a use only immunity standard produces a separate class of defendants in the United States, a distinction created by the fact that domestically compelled defendants are entitled to use and derivative use immunity. In this, there may be a Due Process claim (coupled with the claim of the improper use of involuntary testimony) that may force a court to deny use only immunity to foreign-compelled defendants. This conclusion is underscored by the fact that the privilege applies equally to defendants in the United States, whether they are present legally or illegally.<sup>198</sup> It may be necessary, therefore, for use and derivative use protection to follow foreign-compelled defendants as well.

That use and derivative use protection should follow foreign-compelled testimony should not, however, translate into transactional immunity—a real threat in complicated and overlapping cross-border investigations where maintaining the independence of the prosecution's evidence is difficult. Thus, it may be necessary that the inadvertent handling or exposure of a defendant's compelled testimony not make the prosecutor's heavy *Kastigar* burden all but impossible to overcome. Here, allowing the prosecution to make nonevidentiary uses of foreign-compelled testimony may be appropriate.<sup>199</sup> This, at the least, maintains a position between the defendant (i.e., the foreign-compelled witness) and the state that can allow a U.S. prosecutor to still bring forward prosecutions against legally culpable individuals. If anything, the

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<sup>197</sup> Another possible solution, worthy of a more detailed discussion elsewhere, is whether the United States should, in the interest of comity, afford the foreign-compelled witness the same breadth of immunity she would receive in the nation she was compelled in. For instance, if she were compelled to speak by the Australian Securities and Investments Commission and subsequently extradited to the United States to face federal criminal charges, prosecutors could make derivative uses of her testimony. This discussion would involve whether an Australian statute, for example, and its provisions could apply extraterritorially in a foreign proceeding. Cf. *Beaudette v. Alberta* (Sec. Comm'n), 2016 ABCA 9 (Can.), paras. 1–8, 22 (rejecting a claim that the provision of the Securities Act of 2000, which allows the Alberta Securities Commission to share compelled information with government enforcement agencies of other nations, violates the right to liberty guaranteed in the Canadian Charter of Rights and Freedoms, which recognizes freedom from compelled testimony in criminal proceedings).

<sup>198</sup> See *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 199–200 (2d Cir. 2008).

<sup>199</sup> See *supra* notes 174–86 and accompanying text.

fluctuation of immunity standards over time, reflecting the Court's desire to find a suitable balance across different contexts between the defendant, the compelling sovereign, and the prosecuting sovereign, supports this conclusion. Indeed, as some Justices have hinted, the type of immunity appropriate in single-sovereign investigations may be inappropriate in cases of intersovereign investigations.<sup>200</sup> By utilizing use and derivative use immunity, with permissible nonevidentiary uses therein,<sup>201</sup> this Note has merely endorsed and applied that reasoning.

#### IV. THINKING PROSPECTIVELY

On July 19, 2017, the U.S. Court of Appeals for the Second Circuit decided *United States v. Allen*—a case which brought to the fore the issue of how to treat foreign-compelled testimony in a U.S. courtroom.<sup>202</sup> In that decision, the Second Circuit held that testimony formally compelled, under threat of sanction, by a foreign nation is subject to the Fifth Amendment.<sup>203</sup> The use prohibition at the center of the Fifth Amendment's Self-Incrimination Clause makes no distinction from where the compelled testimony arrives, the Second Circuit implied.<sup>204</sup> U.S. prosecutors, the Second Circuit continued, are therefore barred from making any use or derivative use of testimony compelled by a foreign nation.<sup>205</sup> To overcome this burden, prosecutors cannot, as they did in the district court below, make self-serving statements to prove their case was not tainted by access to the defendant's compelled

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<sup>200</sup> See *supra* notes 169–73 and accompanying text (discussing Justice Marshall's suggestion that his opinion in *Kastigar* may have been different had the immunity at issue affected more than one sovereign).

<sup>201</sup> See *North*, 910 F.2d at 860–62 (noting the distinction between nonevidentiary and evidentiary uses, and suggesting that certain kinds of nonevidentiary uses are permitted under use and derivative use immunity).

<sup>202</sup> *United States v. Allen*, 2017 WL 3040201 (2d Cir. July 19, 2017).

<sup>203</sup> *Id.* at \*2–3.

<sup>204</sup> *Id.* at \*13 (“Thus, the Self-Incrimination Clause’s prohibition of the use of compelled testimony arises from the text of the Constitution itself, and directly addresses what happens in American courtrooms, in contrast to the exclusionary rules that are crafted as remedies to deter unconstitutional actions by officers in the field. Its protections therefore apply in American courtrooms even when the defendant’s testimony was compelled by foreign officials.” (footnote omitted)).

<sup>205</sup> *Id.* at \*19–24.

testimony.<sup>206</sup> Instead, they must present affirmative evidence that their case (in *Allen*, a witness's testimony at trial) was in no way shaped or altered by compelled testimony.<sup>207</sup>

The decision, however, stands for much more than its straightforward holding. The case exposes the challenges U.S. authorities will face as they enforce U.S. criminal law overseas. This is so even when the United States, as the Second Circuit noted, has made concerted efforts to coordinate with foreign authorities (in *Allen*, the U.K.'s Financial Conduct Authority) to avoid foreseeable *Kastigar* issues.<sup>208</sup> “[T]he risk of error in coordination [between separate nations now] falls on the U.S. government (should it seek to prosecute foreign individuals), rather than on the subjects and targets of cross-border investigations.”<sup>209</sup>

Yet, however correct the Second Circuit's decision was, the decision may have failed to address the full complexity of these cross-border cases. Despite placing the risk of error on U.S. prosecutors, the Second Circuit gave little weight to foreign nations' rules that require individuals have open access to compelled testimony. In *Allen*, U.K. law permitted the prosecution's key testifying witness (Paul Robson) to have access to case files in the civil proceeding against him—case files that included the defendant's compelled testimony.<sup>210</sup> U.S. authorities are in effect burdened by otherwise legitimate foreign rules, rules which foreign nations have reason to follow. The Second Circuit's lack of full appreciation for this competing fact may severely dampen future prosecutions of foreign defendants.<sup>211</sup>

Furthermore, the Second Circuit, despite expressing reservations in doing so,<sup>212</sup> accepted that *Kastigar* would apply, analyzing the government's use of the defendant's compelled testimony under the use and derivative use immunity standard. But as discussed in Part III above,

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<sup>206</sup> *Id.* at \*21.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at \*9.

<sup>209</sup> *Id.* at \*16.

<sup>210</sup> See FSMA, *supra* note 23, c. 8, §§ 385, 387, 388, 394 (UK).

<sup>211</sup> To be fair, the court did acknowledge that the compulsory interview conducted by the foreign authority was a legitimate exercise of its authority and that Robson was exposed to the testimony, but it did not give much weight to this serious fact. See *Allen*, 2017 WL 3040201, at \*9.

<sup>212</sup> *Id.* at \*19 n.121.

doing so may not be mandatory. The absence of a precise immunity expressed by the Clause means the scope of protection afforded by the Fifth Amendment turns on leaving the defendant in a position substantially similar to the position she would be in had she remained silent. The heavy burden that use and derivative use immunity represents, once applied between countries and not within the same country, may translate, in effect, to full transactional immunity for foreign-compelled targets. Such a broad sweep undermines the spirit of *Kastigar*, which was sure to stress that compulsion should not, on its own, automatically defeat the prosecution of a compelled defendant.

The Second Circuit, in opining on the consequence of its opinion, was wary to forecast “what this brave new world of international criminal enforcement will entail.”<sup>213</sup> Although it did not accept the burden of prescribing ways to resolve these issues, solutions do exist. For instance, if the United States is aware that a foreign sovereign is going to compel an individual, it may, with sufficient coordination, precede the interview, conducting a voluntary, noncompelled interview before the compelled interview.<sup>214</sup> In doing so, American prosecutors can develop the independence of their evidence—“canning” their evidence, as the Second Circuit has phrased it<sup>215</sup>—from any compelled interview and avoid any contamination, inadvertent or otherwise, from foreign investigators’ procedures or questioning.<sup>216</sup> Furthermore, U.S. prosecutors could, should it be impossible to go ahead of foreign-compelled interviews, request that foreign investigators employ taint teams of their own. For instance, investigators in the FCA could be prohibited from interacting with other investigators at the FCA who may be required not to be exposed to compelled testimony. Likewise, instructions for U.S. prosecutors to ask close-ended, as opposed to open-

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<sup>213</sup> *Id.* at \*19.

<sup>214</sup> See *United States v. Allen*, 160 F. Supp. 3d 684, 695 (S.D.N.Y. 2016). This type of arrangement was characterized by the government as a “day one/day two approach.” *Id.* at 695 (internal quotation marks omitted). Note also that prosecutors, as evident in the *Allen* case, testified under oath at the *Kastigar* hearing that they had made presentations to foreign sovereigns explaining the importance of the Fifth Amendment and the corresponding *Kastigar* issues. These sworn statements were sufficient to the trial court. *Id.* at 694–95.

<sup>215</sup> *Allen*, 2017 WL 3040201, at \*21.

<sup>216</sup> This is most relevant for possible prosecution witnesses, as opposed to targets, who are located overseas.

ended, questions may be a useful procedure to ensure that the compelled testimony, should it intersect with other parts of the investigation, does not do so disastrously. These procedures could be engrained in MLAT agreements between the United States and foreign nations, especially with those that regularly employ compulsion or initiate parallel criminal or civil investigations with the United States. Ultimately, the viability and success of these procedures will be a product of the political relationships between nations.

#### CONCLUSION

Today, more and more foreign conduct is falling within the ambit of American criminal law. As a result, the United States has expanded its criminal investigations overseas. Meanwhile, foreign nations have begun their own criminal and/or civil investigations and, on many occasions, are probing the same misconduct as the United States. This trend has created novel constitutional questions for U.S. actors, in part due to the broad(er) protections afforded to individuals under the U.S. Constitution and in part because foreign nations' rights and privileges are not coextensive with the United States' rights and privileges.<sup>217</sup> This is certainly the case with the Fifth Amendment's privilege against self-incrimination.

Defining constitutional rights in a transnational milieu is difficult, particularly for American courts. It requires courts to shift from weighing the opposing interests of the individual and the government (as it often does in purely domestic proceedings) toward additionally considering the interests of and consequences to foreign sovereigns.<sup>218</sup> Courts have historically shied away from doing this, in part because they believe either Congress or the Executive is more capable of making such judgments. But this deference should be weakened (or ignored) when core constitutional rights, owed to U.S. defendants, are implicated. The issue of foreign-compelled testimony is one such issue. Here, courts should, in light of the history surrounding the Self-Incrimination Clause,

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<sup>217</sup> See *supra* notes 18–29 and accompanying text (discussing the inability for witnesses to remain silent before certain foreign regulators and varying immunities that attach to compelled statements in investigations abroad).

<sup>218</sup> See George Rutherglen, *The Rights of Aliens Under the United States Constitution: At the Border and Beyond*, 57 *Va. J. Int'l L.* (forthcoming 2017) (on file with author).

strike a sensible balance between all three implicated parties: the individual defendant, the compelling nation, and the prosecuting nation. It should do so while also staying committed to the Constitution's text and meaning. To borrow ironically the Court's own words, this is a "heavy burden."<sup>219</sup>

This Note's objective, therefore, has been to arrive at an appropriate resolution amidst such a messy transnational setting. At first, this Note explored the glaring gap left in the Court's most recent application of the same-sovereign rule and doubted the logical extension of that rule to foreign-compelled testimony. In its place, this Note offered an alternative reading of the cases that seemingly supported the same-sovereign rule and, as a result, arrived at the use-sovereign rule, a rule that bars the *use* of any compelled testimony in any U.S. prosecution independent of that compelled testimony's source. In support of this rule, this Note argued that foreign-compelled testimony triggers the Fifth Amendment since testimony formally compelled abroad, under threat of sanction, is practically indistinguishable from testimony compelled within the United States. Thus, American prosecutors must respect foreign-compelled testimony.

But the hard labor of this Note did not reside in its critique of the same-sovereign rule. Consistent with the Court's pragmatic migration to use and derivative use immunity in *Murphy* and later in *Kastigar* and mindful of the need to properly balance the competing interests of all parties in cases involving foreign-compelled testimony, this Note endeavored to decide what immunity should attach to foreign-compelled testimony once within the United States. Ultimately, this Note concluded that use and derivative use immunity—the immunity given to similarly situated U.S.-compelled defendants—should control foreign-compelled testimony, albeit with one caveat: nonevidentiary uses of foreign-compelled testimony should be allowed. Adding this caveat simultaneously respects foreign nations' exercise of their compulsion powers, protects individual defendants from having their own words *directly* used against them at trial, and encourages U.S. prosecutors to bring meritorious cases forward, even if those cases may have had exposure to compulsion.

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<sup>219</sup> *Kastigar*, 406 U.S. at 461.

Not all nations may share the United States' aggressive spirit when it comes to crime. Sometimes, the United States may get in the way of foreign nations' own inquiries. Other times, the United States may be too aggressive, criminalizing conduct legally permissible in the foreign nation where it was committed. In other instances, the United States' meddling may be too costly, detrimentally affecting foreign nations' corporations and citizens. Extending use and derivative use immunity to foreign-compelled testimony gives a sword to these countries. Recognizing the broad immunity that accompanies foreign compulsion, foreign governments or targets intent on scuttling a U.S. criminal investigation can do so. All they need to do is compel and disclose those compelled statements, either publicly or to other witnesses. This, to be sure, is a weighty concern, but one that has always existed, whether between individual states within the United States, between federal and state authorities within the United States, or between separate sovereigns. This concern, therefore, should not overwhelm the United States' commitment to its values, particularly its commitment to ensuring that no involuntary testimony is used against its speaker in a criminal case.

In the end, this Note has found that, despite the *Balsys* Court's holding that the privilege does *not* apply extraterritorially, the privilege does (or should) work extraterritorially, granted in a slightly different way. Compulsion by a foreign nation, when conducted under threat of sanction, triggers a compelled witness's Fifth Amendment privilege against self-incrimination. And this is so even before he stands trial in the United States. This conclusion advances some form of an *international* privilege against self-incrimination, despite nations' inequivalent applications of that privilege. It is imperative, therefore, that the United States does not impede a migration toward an international privilege against self-incrimination with a constrained reading of its own privilege. Locating foreign-compelled testimony within the Fifth Amendment ensures that the United States can commit toward recognizing and respecting human and criminal rights. A mighty goal.