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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES v. BALSYS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 97–873. Argued April 20, 1998— Decided June 25, 1998

When the Office of Special Investigations of the Department of Justice’s Criminal Division (OSI) subpoenaed respondent Balsys, a resident alien, to testify about his wartime activities between 1940 and 1944 and his immigration to the United States, he claimed the Fifth Amendment privilege against self-incrimination, based on his fear of prosecution by a foreign nation. The Federal District Court granted OSI’s petition to enforce the subpoena, but the Second Circuit vacated the order, holding that a witness with a real and substantial fear of prosecution by a foreign country may assert the privilege to avoid giving testimony in a domestic proceeding, even if the witness has no valid fear of a criminal prosecution in this country.

Held: Concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause. Pp. 3–34.

(a) As a resident alien, Balsys is a “person” who, under that Clause, cannot “be compelled in any criminal case to be a witness against himself.” See *Kwong Hai Chew v. Colding*, 344 U. S. 590, 596. However, the question here is whether a criminal prosecution by a foreign government not subject to this country’s constitutional guarantees presents a “criminal case” for purposes of the privilege. Pp. 3–4.

(b) Balsys initially relies on the textual contrast between the Sixth Amendment, which clearly applies only to domestic criminal proceedings, and the Fifth, with its broader reference to “any criminal case,” to argue that “any criminal case” means exactly that, regardless of the prosecuting authority. But the argument overlooks the cardinal rule to construe provisions in context. See *King v. St. Vincent’s Hospital*, 502 U. S. 215, 221. Because none of the other provisions of the Fifth Amendment is implicated except by action of the

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government that it binds, it would have been strange to choose such associates for a Clause meant to take a broader view. Further, a more modest understanding, that “any criminal case” distinguishes the Fifth Amendment’s Self-Incrimination Clause from its Clause limiting grand jury indictments to “capital, or otherwise infamous crime[s],” provides an explanation for the text of the privilege. Indeed, there is no known clear common-law precedent or practice, contemporaneous with the framing, for looking to the possibility of foreign prosecution as a premise for claiming the privilege. Pp. 5–7.

(c) In the precursors of this case, the Court concluded that prosecution in a state jurisdiction not bound by the Self-Incrimination Clause is beyond the purview of the privilege. *United States v. Murdock*, 284 U. S. 141. *United States v. Saline Bank of Va.*, 1 Pet. 100, and *Ballmann v. Fagin*, 200 U. S. 186, distinguished. The Court’s precedent turned away from this proposition once, in *Malloy v. Hogan*, 378 U. S. 1, 3, it applied the Fourteenth Amendment due process incorporation to the Self-Incrimination Clause, so as to bind the States as well as the National Government by its terms. It immediately said, in *Murphy v. Waterfront Comm’n of N. Y. Harbor*, 378 U. S. 52, 57, that *Malloy* necessitated a reconsideration of *Murdock*’s rule. After *Malloy*, the Fifth Amendment limitation was no longer framed for one jurisdiction alone, each jurisdiction having instead become subject to the same privilege claim flowing from the same source. Since fear of prosecution in the one jurisdiction now implicated the very privilege binding upon the other, the *Murphy* opinion sensibly recognized that if a witness could not assert the privilege in such circumstances, the witness could be “whipsawed” into incriminating himself under both state and federal law, even though the privilege was applicable to each. Such whipsawing is possible because the privilege against self-incrimination can be exchanged by the government for an immunity to prosecutorial use of any compelled inculpatory testimony. *Kastigar v. United States*, 406 U. S. 441, 448–449. Such an exchange by the government is permissible only when it provides immunity as broad as the privilege. After *Malloy* had held the privilege binding on the state jurisdictions as well as the National Government, it would have been intolerable to allow a prosecutor in one or the other jurisdiction to eliminate the privilege by offering immunity less complete than the privilege’s dual jurisdictional reach. To the extent that the *Murphy* Court undercut *Murdock*’s rationale on historical grounds, its reasoning that English cases supported a more expansive reading of the Clause is flawed and cannot be accepted now. Pp. 7–21.

(d) *Murphy* discusses a catalog of “Policies of the Privilege,” which could suggest a concern broad enough to encompass foreign prosecu-

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tions. However, the adoption of such a revised theory would rest on *Murphy*'s treatment of English cases, which has been rejected as an indication of the Clause's meaning. Moreover, although *Murphy* catalogs aspirations furthered by the Clause, its discussion does not weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope. Contrary to Balsys's contention, general personal testimonial integrity or privacy is not a reliable guide to the Clause's scope of protection. Fifth Amendment tradition offers, in practice, a conditional protection of testimonial privacy. Since the judiciary could not recognize fear of foreign prosecution and at the same time preserve the Government's existing rights to seek testimony in exchange for immunity (because domestic courts could not enforce the immunity abroad), extending the privilege would change the balance of private and governmental interests that has been accepted for as long as there has been Fifth Amendment doctrine. Balsys also argues that *Murphy*'s policy catalog supports application of the privilege in order to prevent the Government from overreaching to facilitate foreign criminal prosecutions in a spirit of "cooperative internationalism." *Murphy* recognized "cooperative federalism"—the teamwork of state and national officials to fight interstate crime—but only to underscore the significance of the Court's holding that a federal court could no longer ignore fear of state prosecution when ruling on a privilege claim. Since in this case there is no counterpart to *Malloy*, imposing the Fifth Amendment beyond the National Government, there is no premise in *Murphy* for appealing to "cooperative internationalism" by analogy to "cooperative federalism." The analogy must, instead, be to the pre-*Murphy* era when the States were not bound by the privilege. Even if "cooperative federalism" and "cooperative internationalism" did support expanding the privilege's scope, Balsys has not shown that the likely costs and benefits justify such expansion. Cooperative conduct between the United States and foreign nations may one day develop to a point at which fear of foreign prosecution could be recognized under the Clause as traditionally understood, but Balsys has presented no interest rising to such a level of cooperative prosecution. Pp. 22–33.

119 F. 3d 122, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and KENNEDY, JJ., joined, and in which SCALIA, and THOMAS, JJ., joined as to Parts I, II, and III. STEVENS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined.