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FIFTH AMENDMENT RIGHTS OF A RESIDENT ALIEN AFTER *BALSYS*

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I. INTRODUCTION

The Fifth Amendment of the Constitution was designed to provide people with safeguards against improper government intrusion.[1] One of those safeguards is provided in the Fifth Amendment's Self-Incrimination Clause which states that "[n]o person...shall be compelled in any criminal case to be a witness against himself."[2] This clause is designed to protect witnesses from providing evidence that they reasonably believe can be used against them in a future criminal prosecution.[3] This brings us to the problems that are discussed in this note. First, who can invoke this privilege? It is long understood that citizens of this country are protected by the Constitution, but are resident aliens protected as well? In addition, and most importantly, from where must the threat of future prosecution come? Must the threat of prosecution come from courts in the United States, or will a foreign court suffice?

Balsys started when the Office of Special Investigations of the Criminal Division of the United States Department of Justice (OSI) wanted to get testimony from Aloyzas Balsys relating to his activities

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1. U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; now shall private property be taken for public use, without just compensation.

2. *See id.*

3. Hoffman v. United States, 341 U.S. 441, 486 (1951) (The privilege may be used only if the witness "has a reasonable cause to apprehend danger from a direct answer."); *See also* Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472, 478 (1972).

during World War II.[4] After serving Balsys with an administrative subpoena, Balsys refused to answer questions relating to his activities in that time period and asserted his Fifth Amendment right against self-incrimination. Balsys based this assertion on his fear that he could be prosecuted by a foreign nation based on answers he might give.[5] The OSI decided to petition the Federal District Court for the Eastern District of New York.[6]

The district court concluded that even though Mr. Balsys did face a "real and substantial danger" of prosecution by other countries, he was not allowed to invoke the Fifth Amendment when it concerned answers given on his application for an entry visa.[7] The district court also stated that if Balsys was entitled to the protection of the Fifth Amendment, he waived such a privilege when he voluntarily responded to questions when he first applied for immigration.[8] The district court went on to say that Balsys also failed to prove that the documents the government requested were testimonial in nature as required by the Fifth Amendment.[9] Accordingly, the district court ruled in favor of the Government.

Balsys then appealed to the Court of Appeals for the Second Circuit which reversed the district court by ruling that the Fifth Amendment not only covered domestic prosecutions but foreign prosecutions as well.[10] They also ruled that Balsys did not waive his right to this privilege when he made voluntary statements during his application for a visa.[11]

Appealing from this decision, the Government went to the Supreme Court which overturned the decision of the court of appeals. In an opinion written by Justice Souter, the court decided that fear against foreign prosecution was beyond the scope of the Fifth Amendment and ruled in favor of the Government.[12] This is where we stand today.

II. FACTS OF THE CASE

Aloyzas Balsys was born in Ansieniai, Plateliai Province, Lithuania on February 6, 1913.[13] In 1961, he entered the United States under the Immigration and Nationality Act.[14] He received his immigrant visa and

4. United States v. Aloyzas Balsys, 118 S.Ct. 2218, 2220 (1998).
5. *See id.*
6. United States v. Aloyzas Balsys, 918 F.Supp. 588 (E.D.N.Y.1996).
7. *See id.* at 599-600.
8. *See id.* at 600.
9. *See id.* at 600.
10. United States v. Aloyzas Balsys, 119 F.3d 122 (2d. Cir. 1997).
11. *See id.* at 139-140.
12. United States v. Aloyzas Balsys, 118 S.Ct. 2218 (1998).
13. United States v. Aloyzas Balsys, 918 F.Supp. 588, 590 (E.D.N.Y. 1996).
14. Balsys, 118 S.Ct. at 2221; *See also* 8 U.S.C. § 1201.

alien registration number at the American Consulate in Liverpool, England.[15] He states in his application "that he had served in the Lithuanian army between 1934 and 1940, and had lived in hiding in... Lithuania between 1940 and 1944."[16] He swore that all the information he had given was true and signed a statement which warned that if any of the information he had given were untrue or misleading, he would be subject to a criminal prosecution and, possibly, deportation.[17]

The Office of Special Investigations (OSI), which was "created to institute denaturalization and deportation proceedings against suspected Nazi war criminals," was attempting to find out if Balsys was a collaborator in persecutions committed by the Nazis, which would contradict the information he had given in his application.[18] If the allegations against Balsys were true, then the OSI could have him deported for not only lying on his application but for his participation in the Nazi atrocities.[19]

After OSI issued a subpoena that required Balsys to appear at a deposition and testify, he showed up but failed to provide any information other than his name and address.[20] He stated that he was asserting his Fifth Amendment right against self-incrimination not for fear of domestic criminal prosecution, but for the fear of possible criminal prosecution by Lithuania, Israel or Germany.[21]

III. THE DISTRICT COURT

After Mr. Balsys refused to answer any questions or produce any documents that the OSI requested, the OSI went to the United States District Court for the Eastern District of New York seeking to enforce the administrative subpoena.[22] There, the government argued that Mr. Balsys had not proven a "real and substantial fear of foreign prosecution," that the Fifth Amendment was not applicable when the fear of prosecution that the claimant wishes to avoid is from a foreign power and, finally, that the defendant had waived any claim to Fifth Amendment protection when he voluntarily answered questions on his entrance visa.[23]

In its ruling, the district court disagreed with the government in that

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15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. "Such activity would subject him to deportation for persecuting persons because of their race, religion, national origin, or political opinion under §§ 1182(a)(3)(E), 1251(a)(4)(D) as well as for lying on his visa application under §§ 1182(a)(6)(C)(i), 1251(a)(1)(A)." *Id.*

20. Balsys, 118 S.Ct. at 2221.

21. *See id.*

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

23. *See id.* at 591.

the court believed Mr. Balsys did "in fact face a real and substantial danger of foreign prosecution."[24] However, unluckily for Balsys, the court found that given the facts of this case, the Fifth Amendment protection could not be extended to include fear of a possible foreign trial.[25] The court also agreed with the government that even if this fear was covered by the Fifth Amendment, Balsys waived that privilege when he voluntarily answered questions during his immigration in 1961.[26]

In reaching this decision, the court first examined the Fifth Amendment privilege against self-incrimination. They stated that the privilege not only covered statements that were strong enough to sustain a conviction, but also to statements that could lead to a conviction.[27] The court also stated the privilege covers both witnesses and defendants in both civil and criminal trials.[28]

For the test used to claim protection under this privilege, the court, quoting *Hoffman*, said the privilege may only be used if the witness "has reasonable cause to apprehend danger from a direct answer."[29] They further went on to define "reasonable fear [as] one based on a prospect of penal liability that is 'real and substantial' and not merely speculative."[30] With concern about Balsys not being a naturalized citizen, the court noted that the Fifth Amendment was applicable to resident aliens.[31]

After determining that the Fifth Amendment could be applied to Balsys if he met the burden, the court went on to examine the fear that he was claiming. The court stated that Balsys had no reason in the present case to fear domestic prosecution, nor was he trying to allege that there was a chance of domestic prosecution. Balsys' only concern was that he might face prosecution by another country. Accordingly, the court went on to examine whether or not Balsys could avoid answering the OSI's questions by using the Fifth Amendment's Self-Incrimination Clause

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24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.* (quoting Hoffman v. United States, 341 U.S. 1653, 1956 (1951), which stated that the privilege "not only extends to answers that would in themselves support a conviction under a... criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claim for a... crime.").

28. *Balsys*, 918 F. Supp. At 591 (citing Kastigar v. United States, 406 U.S. 441, 444-445 (1972).

29. *See id.* at 591 (quoting Hoffman, 341 U.S. at 486).

30. *See id.* at 591-592 (citing Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472, 478 (1972). *See also* Marchetti v. United States, 390 U.S. 39, 53 (1989) ("The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards or incrimination.").

31. *See id.* at 592 (citing Kwong Hai Chew v. Colding, 344 U.S. 590, 596 & n.5 (1953)).

when the fear of prosecution comes from a foreign government.[32]

The problem this court was having was that as of the date of this trial, neither the Supreme Court nor the Court of Appeals for the Second Circuit had decided this issue. In a Supreme Court case, the issue was presented but was not ruled on.[33] The high court did say, in dicta, that if the fear of a foreign prosecution was under the Fifth Amendment's protection, the witness could declare protection under the privilege only after proving that his answers would "incriminate him under foreign law and pose a substantial risk of foreign prosecution."[34]

Using this as a guideline, the district court followed the Second Circuit's decision in *Flanagan* to define the test to discern the validity of the witness's fear of foreign prosecution.[35] The *Flanagan* court laid out five factors that a court must weigh to determine if the fear of a foreign prosecution was a legitimate concern to the witness. They said a court should: 1) focus on questions such as whether there is an existing or potential foreign prosecution against him; 2) what foreign charges could be filed against him; 3) whether prosecution of them would initiated or furthered by his testimony; 4) whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and 5) whether there is a likelihood that his testimony given here would be disclosed to the foreign government."[36]

When applying these five factors to this case, the district court noted that there was no current foreign prosecution waiting for Mr. Balsys.[37] The defendant argued, however, that the testimony requested by the OSI would "incriminate him under the laws of Lithuania, Germany and Israel, thereby subjecting him to potential prosecution."[38]

The court went on to examine the laws in those countries with respect to crimes that Balsys could be punished for. The court noted that Lithuania had, in 1992, created a statute that punished Nazis and Nazi collaborators for crimes that were perpetrated against Lithuanians during World War II.[39] The possible sentence under this statute ranged from a minimum of five years imprisonment to a maximum of death.[40]

Likewise, Israel had a law to punish former Nazis and those that

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32. *See id.* at 592.

33. *See id.* at 592 (citing *Zicarelli*, 406 U.S. 472).

34. *Balsys*, 918 F. Supp. At 592 (citing *Zicarelli*, 406 U.S. at 480-481).

35. *See id.* at 592 (citing In re Grand Jury Subpoena of Flanagan, 691 F.2d 116 (2d. Cir.1982).

36. *See id.* at 592 (quoting *Flanagan*, 691 F.2d at 121).

37. *See id.*

38. *See id.*

39. *See id.* at 593. Lithuania's law used against Nazi and Nazi collaborator's, *supra* note 9.

40. *Balsys*, 918 F. Supp. At 593.

aided them.[41] Unlike the Lithuanian law, this law applied extraterritorially and carried with it a death sentence for anyone found guilty of crimes against Jewish people.[42]

The German murder statute, the court found, was a bit more ambiguous.[43] Although it has been used in the past to convict people who committed crime against Jewish people during World War II, it is not clear whether or not the statute may be used against citizens of other countries who committed crimes outside of Germany's jurisdiction.[44]

Thus, the court ruled that Balsys definitely could be prosecuted under the laws of Lithuania and Israel, but it was hesitant to agree that he stood a chance of being prosecuted in Germany. Accordingly, the court ruled that answers Balsys might give in the OSI's investigation could lead to the possibility that he could incriminate himself under the laws of Lithuania and Israel.

After determining that there was a chance of incrimination under a foreign law, the court under *Flanagan* had to contemplate the chance that the testimony Balsys could give would be given to the Lithuanian or Israeli governments. The court noted that the OSI was created "for the sole purpose of investigating and gathering evidence of alleged Nazi collaborators residing in the United States illegally, and taking legal action to denaturalize, deport or prosecute them."[45] The court also noted that the OSI had entered into an agreement with the Lithuanian government to provide any information to them on possible Nazi collaborators found in the United States.[46] After analyzing a Memorandum of Understanding between the two countries, it was clear that even though Lithuania might not be looking at Balsys, his testimony would be disclosed according to the terms of the Memorandum.[47]

Likewise, the court found that there was a considerable chance that the United States would disclose any information it found to Israel. Even

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41. *See id.* at 594 (citing Israel's "Nazi and Nazi Collaborators (Punishment) Law, 3710-1930).

42. *Balsys*, 918 F.Supp.at 594 at n.11.

43. *Balsys*, 918 F.Supp. at 594 (citing Germany's murder statute, [StGB] Article 211).

44. *See id.* Apparently the German murder statute has no statute of limitations which allows it to be used for cases from World War II.

45. *See id.* at 595.

46. *See id.*

47. *See id.* This agreement states, in part, that:

> ...[T]he United States Department of Justice agree[s] to provide... legal assistance concerning the prosecution of persons suspected of having committed war crimes in World War II in Lithuania and who are now residents of the United States—to facilitate the interview of witnesses, the conduct of other necessary activities, the collection of documentary materials and other information relevant to these investigations.

though there was no specific agreement as with Lithuania, the OSI's past clearly showed that it would pass along information to the Israelis.[48] This, along with OSI's duty to "maintain liaison with foreign prosecution, investigation and intelligence offices," clearly shows that any information discovered about Balsys clearly would have been passed along to Israel.[49]

The last part of the *Flanagan* test was the possibility that Balsys could be deported to one of the countries that could prosecute him. Balsys could be deported if it was found that he lied on his application for a visa.[50] Additionally, if it was discovered that Balsys was a Nazi collaborator, his deportation would be mandatory.[51]

The government tried to argue that Balsys could be sent to a country where he wished to be deported.[52] However, the court showed that there was a great risk of that country rejecting him, thereby sending him to the country where he is a citizen.[53] Thus, the court was convinced that under the factors in *Flanagan*, Balsys stood a "real and substantial" threat of prosecution in either Lithuania or Israel.[54]

After agreeing that Balsys did in fact stand a "real and substantial danger" of foreign prosecution, the Court had to decide whether or not it would apply the Fifth Amendment privilege to that fear. The district court noted that all of the courts of appeals that have examined the issue have reached different results, with some applying the privilege to the threat of foreign prosecution, while others did not.[55]

In support of the OSI, the court focused on a decision from the Fourth Circuit in *Araneta*, in which the court held that the Fifth Amendment privilege could not be claimed because the Fifth Amendment was not available in the foreign court.[56] To defend this ruling, the Fourth Circuit states that because "'[c]omity among nations dictates that the United States not intrude into the law enforcement activities of other countries conducted abroad,' the United States' own sovereignty would be compromised if it were required 'to forego evidence legitimately within its reach solely because a foreign power could deploy this evidence in a fashion not permitted within this country.'"[57]

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48. *Balsys*, 918 F.Supp. at 596. In the past, OSI had given information on another suspected Nazi collaborator, Ivan Demjanjuk. *Id.*

49. *See id.* at 595-596.

50. *See id.* at 596.

51. *See id. See* Linnas v. I.N.S., 790 F.2d 1024, 1029 & n.1 (2d. Cir.) ("The deportation of Nazi persecutors is required even though the deportee's life or freedom might be threatened as a result."), *cert. denied*, 479 U.S. 995 (1986).

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

53. *See id.* See 8 U.S.C. § 1253(a).

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

55. *See id.* at 597-598.

56. *See id.* at 597 (citing *Araneta*, 794. F.2d at 926).

57. *See id.* at 597 (quoting from *Araneta*, 794 F.2d at 926).

Contrary to the Fourth Circuit's holding, the district court noted that in the Eleventh Circuit the holding was the opposite. In a case with facts similar to Balsys, the Eleventh Circuit in *Gecas*, ruled that a defendant may claim the Fifth Amendment privilege when there is a serious threat of prosecution by a foreign country.[58] The *Gecas* court said that the Fifth Amendment privilege was not only designed to prevent government intrusion, but it was also an "individual's personal right; [and]... a matter of individual dignity."[59]

The district court noted that several other lower courts have dealt with this issue, again with there being a split as to what the rule should be. The court noted several district courts that agreed with Balsys' contention that he should be able to assert the Fifth Amendment privilege.[60] One of those even came from within the Second Circuit.[61]

However, the Court seemed to be persuaded more by a case from the District of Massachusetts.[62] That court decided that if there was a legitimate governmental purpose for the witness' testimony, then the Fifth Amendment privilege could not be used, as it would be a slap in the face of the sovereignty of the United States if the chance of prosecution in another country would keep this country from performing its own laws.[63] Yet the court did say that if the proceeding in which the testimony was to be given served no legitimate purpose, then the witness could use the privilege.[64]

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58. *See id.* at 597 (citing United States v. Gecas, 50 F.3d 1549 (11th Cir.1995). In Gecas, the defendant was an accused Nazi collaborator who refused to testify in an OSI deportation proceeding for fear that he could be prosecuted in Lithuania, Israel, or Germany.

59. *See id.* at 597-598 (quoting *Gecas*, 50 F.3d at 1564.

60. *See id.* at 598.

61. In re Cardissi, 351 F.Supp. 1080 (D.Conn.1972). However, the court in Balsys was not persuaded by the Cardissi Court's opinion and respectfully disagreed with it's finding. Balsys at 598-599.

62. United States v. Lileikis, 899 F.Supp. 802 (D.Mass.1995).

63. *Balsys*, 918 F.Supp. at 598 (quoting *Lileikis*, 899 F.Supp. 802 at 809:

> If a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest, the privilege must yield if the sole basis for claiming its protections is the fact that a resident of the United States faces the likelihood of a foreign prosecution. It would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness.)

64. *Balsys*, 918 F.Supp. at 598 (quoting *Lileikis*, 899 F.Supp. 802 at 809:

> On the other hand, I agree that a court of the United States should not bend the Constitution solely to promote the foreign policy objectives of the executive branch, however laudable, by compelling the cooperation of a witness in a proceeding that does not have as its fundamental purpose the vindi-

Accordingly, the district court in *Balsys* held that the Fifth Amendment cannot be applied when the fear is from a foreign country and is only designed to "regulate the relationship between federal and state governments and their citizens."[65] In this instance, the court states that since there was no chance of a domestic prosecution, there was no reason for the government to illicit statements from Balsys that could be used in a future domestic proceeding.[66]

The court believes that the "fundamental purpose of the privilege is to protect individuals from governmental overreaching."[67] But since the court feels that the government is not overreaching, to apply the privilege would, in effect, keep the government from doing its job. The court was afraid that [a] contrary decision would allow individuals attempting to immigrate to the United States to misrepresent their personal histories and other relevant information in order to gain access to this country. This would leave the government without recourse and seriously erode domestic law enforcement. Accordingly, the Court concludes that Respondent is not entitled to invoke the Fifth Amendment privilege against compelled self-incrimination.[68]

The district court also went on to agree with the government that when Balsys voluntarily answered questions when he applied for immigration, he waived any right to assert the Fifth Amendment privilege.[69] There was a question of whether or not the 1961 interview and the current request were two separate proceedings since "[s]tatements made at one proceeding... cannot constitute a waiver of the privilege at a separate proceeding."[70] However, the court decided that the 1961 interview was merely the beginning of the proceedings which remained open to the present time.[71] So even if Balsys was deemed able to assert the Fifth Amendment privilege, the district court said he had already waived his right to hide behind it.

IV. THE COURT OF APPEALS FOR THE SECOND CIRCUIT

After losing in the district court, Balsys sought an appeal with the Court of Appeals for the Second Circuit. In its decision, the court of ap-

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cation of the domestic laws of the United States.)

65. *Balsys*, 918 F.Supp. at 599. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950).

66. *Balsys*, 918 F.Supp. at 599.

67. *See id.*

68. *See id.* at 599-600.

69. *See id.* (citing Rogers v. United States, 340 U.S. 367, 371 (1951); United States v. St. Pierre, 132 F.2d 837, 840 (2nd Cir.1942).

70. *See id.* (citing United States v. Housand, 550 F.2d 818, 821 n. 3 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977).

71. *Balsys*, 918 F.Supp. at 600.

peals addressed only two issues: whether the Fifth Amendment privilege could be asserted by a witness when there was a "real and substantial risk" that testimony could be used against the witness in a foreign prosecution; and, whether Balsys waived his right to use the Fifth Amendment privilege by voluntarily answering questions in his 1961 application hearing.[72] Not agreeing with the district court's reasoning, the court of appeals reversed the lower court's holding on both issues.

When deciding whether or not the Fifth Amendment privilege can be asserted when the fear is a foreign criminal prosecution, the appeals court first looked to direct case law on the subject.[73] Noting the Supreme Court had declined to answer this issue, the appeals court started looking at the way in which other circuits had ruled.[74]

The appeals court notes that in the Fourth Circuit under *Araneta*, the court declined to allow a witness to assert the privilege.[75] Also, a similar holding has developed in the Tenth Circuit in *Parker*.[76] These two circuits aside, the appeals court seemed more convinced by the Eleventh Circuit's decision in *Gecas* which allowed a witness to assert the privilege.[77]

The facts of *Gecas* were notably similar to the facts of *Balsys*. In *Gecas*, the defendant invoked his right against self-incrimination at an OSI deposition. Gecas was an accused Nazi collaborator and feared that he could be charged in Lithuania. The court in that case thought that the Fifth Amendment had two purposes. The first, which the district court agrees with, is that the Fifth was designed to protect people from "overzealous prosecution."[78] It is the second purpose that the district court did not find: to "protect individual dignity."[79] The court in *Gecas* thought that by allowing the witness to assert the privilege, it would strike "the appropriate balance between these purposes and the important gov-

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72. United States v. Balsys, 119 F.3d 122, 124 (2nd Cir. 1997).

73. *See id.* at 126-129.

74. *See id.* at 126. The court of appeals noted that the Supreme Court had come close to deciding this issue in Zicarelli v. New Jersey State Comm. of Investigation, 406 U.S. 472 (1972), but since the risk was so small the Court declined to answer it. *Id.* In footnote 2, the court of appeals did note that in dictum in Araneta v. United States, 478 U.S. 1301, 1304 (1986), Chief Justice Burger noted that it seemed that the Court would rule in favor of the witness. *Balsys*, 119 F.3d at 127, n.2.

75. *Balsys*, 119 F.3d 127 (citing Araneta v. United States, 794 F.2d 920 (4th. Cir. 1986) ("The Fourth Circuit held that the Fifth Amendment does not protect a witness facing a substantial risk of foreign prosecution from compelled self-incrimination.")

76. In re Parker, 411 F.2d 1067 (10th Cir. 1969).

77. *Balsys*, 119 F.3d at 128 (citing United States v. Gecas, 50 F.3d 1549 (11th. Cir. 1995).

78. *Balsys*, 119 F.3d at 128 (citing United States v. Gecas, 50 F.3d 1549). *See Balsys*, 918 F. Supp. 588.

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

ernment interest in domestic law enforcement."[80]

The court of appeals also cited district courts that have ruled in favor of allowing resident aliens to assert the privilege, first citing those district courts within the Second Circuit.[81] The appeals court then went on to cite district courts in other circuits who have ruled this way.[82] In fact, the court of appeals only cites one case in which a district court has ruled against applying the privilege and that was the *Lileikis* decision that the District Court relied upon so heavily.[83]

Since the Supreme Court had yet to answer this issue, the appeals court looked at the Supreme Court's holding in *Murphy* which was "analogous" to the current dilemma.[84] The high court in *Murphy* looked at whether "one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction."[85] The court of appeals hypothesized that the *Murphy* decision aided in deciding the current issue in two ways.[86] First, by looking at the issue in regards to the purpose of the Fifth Amendment and, second, noting that the *Murphy* decision itself supports allowing Balsys to be able to assert the Fifth Amendment privilege.[87]

The court of appeals disagreed with the District Court "that the fundamental purpose of the privilege... is to protect individuals from government overreaching."[88] Although the district court did believe that the Fifth Amendment did have a "role in preserving an individual's privacy and dignity," they did not believe that this was a "fundamental purpose."[89] The district court felt that allowing Balsys to hide under the Fifth Amendment would "undermine" the core values that the it was designed to protect.[90] With this, the court of appeals disagreed.

The court of appeals admitted that there are a lot of different opinions concerning the purposes of the Fifth Amendment.[91] However, using the Supreme Court's opinion in *Murphy*, the court of appeals ascertained

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80. *Balsys*, 119 F.3d at 128 (citing United States v. Gecas, 50 F.3d at 1564-1565).

81. *Balsys*, 119 F.3d at 128 (citing In re Cardissi, 351 F.Supp. 1080, 1086 (D.Conn.1972). *See also* In re Flanagan, 533 F. Supp. 957 (E.D.N.Y.), *rev'd on other grounds*, 691 F.2d 116 (2d Cir. 1982).

82. *Balsys*, 119 F. 3d at 128 (citing *In re* Moses, 779 F.Supp. 857, 870 - 883 (E.D. Mich. 1991). *See also* Yves Farms, Inc. v. Rickett, 659 F.Supp. 932, 939-941 (M.D.Ga.1987).

83. *Balsys*, 119 F.3d at 128 (citing United States v. Lileikis, 899 F.Supp. 802, 809 (D. Mass. 1955).

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

85. *See id.* at 128-129 (quoting Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52,54 (1964).

86. *Balsys*, 119 F.3d at 128-129.

87. *Id.* at 129

88. *Balsys*, 119 F.3d at 129 (quoting *Balsys*, 918 F.Supp. 588, 598-599).

89. *Balsys*, 119 F.3d at 129 (quoting *Balsys*, 918 F.Supp. 588, 598-599).

90. *Balsys*, 119 F.3d at 129 (citing *Balsys*, 918 F.Supp. 588, 599).

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

that the Fifth Amendment has three purposes: "it advances individual integrity and privacy, it protects against the state's pursuit of its goals by excessive means, and it promotes the systemic values of our method of criminal justice."[92] The appeals court felt that by looking at all of these purposes, it would better ascertain the true meaning of the Fifth Amendment.[93]

In analyzing how asserting the Fifth Amendment privilege affects the values of dignity and privacy of an individual, the appeals court found no difference in allowing a witness to assert the privilege when the fear is from a foreign prosecution, as opposed to a domestic prosecution.[94] The appeals court believed that the "privilege protects the innocent and better ensures the reliability of the testimony... regardless of whether" the fear is foreign or domestic.[95] Just the same, the appeals court believed that the values and policies of the American criminal justice system "are neither promoted nor inhibited by allowing the privilege to be invoked in cases of fear of foreign prosecution."[96]

It was the last of the three stated purposes that gave the appeals court the most trouble. The district court did not believe that there was much of a reason for government overreaching because there was no fear of a possible domestic prosecution.[97] Although agreeing that the chance is less here, the appeals court believed that the district court "underestimated the danger that exists where the fear is of prosecution in foreign lands."[98]

The court of appeals first believes that the "government's interest in extracting admissions in aid of foreign prosecutions is more analogous to a domestic jurisdiction's interest in the criminal prosecution of a witness by another domestic jurisdiction than it is to the situation in which the

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92. *See id.* Citing *Murphy*, 378 U.S. at 55.

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

93. *Balsys*, 119 F.3d at 129. The court of appeals thought the district court had wrongly narrowed the Fifth Amendment to one "cardinal purpose." *Id.*

94. *See id.* at 130.

95. *See id.*

96. *See id.*

97. *See* discussion *infra* Part III;s*See also Balsys*, 918 F.Supp. at 599.

98. *Balsys*, 119 F.3d at 130.

'extracting' government has no interest in prosecution at all."[99] With the increase in cooperation in criminal prosecutions between nations having risen sharply, the appeals court believes that it is only natural that the United States will start to have an interest in foreign prosecutions much the same as the government has interests in domestic prosecutions.[100] Thus the best way to avoid this kind of government mistreatment, the court believes, is to allow "witnesses to avoid being compelled to answer questions posed by the government at home for fear of incriminating themselves abroad."[101]

Also, the court of appeals noted that cases where there was a real and substantial threat of foreign prosecution were highly correlated to cases in which the government would overreach its authority.[102] They state that "it would be odd indeed to suggest that the United States government does not care about foreign prosecutions and hence that allowing witnesses to invoke the privilege does not discourage governmental overreaching."[103] This is bolstered by a showing of the agreements made between the United States and other countries regarding war criminals.

The court of appeals also stated that the district court erred when it followed the holding from *Lileikis*. That holding said "as long as the United States has a legitimate need for a witness's testimony to further a governmental interest in enforcing domestic law, and there is no evidence of improper motivation, the privilege must yield."[104] The district court thought that since there was a real reason for wanting to question Balsys, and it could find no example of governmental overreaching, then Balsys should not be able to assert the privilege. However, the appeals court said that this holding "is contrary to both the purposes and the structure of the protection provided by the Fifth Amendment."[105]

The court of appeals stated that if this holding were allowed, then it would almost certainly apply to domestic prosecutions as well. The court noted that the government will frequently have the same opportunity and same temptations when a witness faces prosecution abroad as in cases involving fear of domestic prosecution. In both contexts, the Fifth Amendment inhibits the pursuit of government goals – in spite of their legitimacy and importance – in order to deny the government an inducement to use inappropriate methods to achieve those goals.[106]

Next the court of appeals looks to how the Supreme Court has interpreted the English common law dealing with the privilege against self-

99. *See id.*
100. *See id.* at 130-131.
101. *See id.* at 131.
102. *See id.*
103. *See id.*
104. *See id.* at 131-132 (quoting *Lileikis*, 899 F.Supp. at 809).
105. *Balsys*, 119 F.3d at 132.
106. *See id.*

incrimination. The appeals court first noted a case where the Supreme Court said that the privilege did not apply when the federal government needed testimony that could incriminate the witness under state law.[107] In that decision, the *Murdock* case, the Court based its holding on the understanding of the English common law on which the Fifth Amendment was based. The Supreme Court stated that the English rule "does not protect witnesses against disclosing offenses in violation of the laws of another country."[108]

This decision, however, was overturned thirty years later *by Murphy v. Waterfront Commission of New York Harbor.*[109] In that case, the Court held that the privilege does protect a witness from giving testimony that could incriminate him in another jurisdiction.[110] The *Murphy* court disagreed with the *Murdock* court's interpretation of English common law. It believed that another case, "which held that where a witness is under threat of foreign prosecution the privilege applies as much as where the witness is exposed to that threat under English law, reflected 'the settled 'English rule' regarding self-incrimination under foreign law.'"[111] Thus, the court of appeals believes that the Supreme Court's holding in *Murphy* agrees with their position that "a witness may invoke the Fifth Amendment out of fear of a foreign prosecution."[112]

The district court had believed that allowing Balsys to invoke the privilege would impede the government's ability to perform domestic law enforcement.[113] They reasoned that in domestic prosecution, the government could do its job because it could offer the witness immunity from prosecution in the other jurisdiction, thereby still being able to compel the testimony. However since the government cannot offer immunity from foreign prosecutions, they lose this ability to get the testimony that they need.[114] The Court of Appeals did not seem as convinced about the possible detriment to the government's ability to compel testimony and "conclude[d] that it does not justify denying those who fear foreign prosecution the right to use the privilege."[115] In fact, the court noted that the Bill of Rights was added to the Constitution knowing that it would effect the

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107. *Balsys*, 119 F.3d at 132 (citing U.S. v. Murdock, 284 U.S. 141 (1931)).

108. *Balsys*, 119 F.3d at 132 (quoting U.S. v. Murdock, 284 U.S. at 149).

109. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964).

110. *See id.*

111. *Balsys*, 119 F.3d at 132-133 (citing United States v. McRae, 3 L.R.Ch. 79 (Ch.App.1867).

112. *Balsys*, 119 F.3d at 133.

113. *See* discussion *infra* Part III.

114. *Balsys*, 119 F.3d at 134.

115. *See id.* (noting that "[t]he fact that allowing the privilege has costs for domestic law enforcement is not by itself a constitutional argument for disallowing the privilege.") *See* In re Cardissi, 352 F.Supp. at 1086.

ability of the government to enforce the law but it "is the duty of the courts to enforce constitutional protections despite their costs."[116]

However, the court did note that in deciding whether or not there was a constitutional right, "a court may consider the effect that such a finding will have on legitimate government needs."[117] When analyzing this, the court of appeals noted two problems and stated that allowing someone to invoke the privilege when the fear is from abroad would cause serious harm to the government's ability to perform legitimate domestic law enforcement. The first is that the situation that would cause this rarely occurs. They note that in only a "handful" of cases have the witnesses been able to prove that the fear was real and substantial.[118] In most cases, "the danger is 'remote and speculative' and, hence, insufficient to justify the application of the privilege."[119] Further, the court also states, that not only are the amount of cases that apply relatively small, but the class of people that would be effected is also rather minute.[120]

The court said that even if a real and substantial fear was established, allowing the invocation of the privilege would have a minimal effect on the government's ability to conduct domestic law enforcement.[121] The witness can only use the privilege when it will aid in incriminating him in a crime.[122] The court believes that since the United States is usually only concerned with domestic violations and what the witness fears is from foreign violations, then "the information sought by the United States will usually not fall within the scope of the silence that the Fifth Amendment allows to that witness."[123]

Another example of the rarity of this situation is that silence may be used in civil proceeding to draw an adverse inference.[124] Accordingly,

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116. *Balsys*, 119 F.3d at 134. *See* Feldman v. United States, 322 U.S. 487, 489 (1944).

117. *Balsys*, 119 F.3d at 134.

118. *See id.* at 135. *See Gecas*, 50 F.3d at 1556-62; *Araneta*, 794 F.2d at 923-25; United States v. Ragauskas, No. 94 C. 2325, 1995 WL 86640, at *3-4 (N.D.Ill.1995); *Moses*, 779 F.Supp. at 861-870; *Trucis*, 89 F.R.D. at 673; *Mishima*, 507 F.Supp. at 132-33; *Cardissi*, 351 F.Supp. at 1083-1084

119. *Balsys*, 119 F.3d at 135. *See, e.g.*, Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1064-65 (3d Cir.1988), *aff'd on other grounds*, 493 U.S. 400, 110 S.Ct. 701, (1990); United States v. Joudis, 800 F.2d 159, 163-64 (7th Cir.1986); In re President's Comm'n on Organized Crime, 763 F.2d 1191, 1198-1199 (11th Cir.1985); *Chevrier*, 748 F.2d at 104-105 (2d Cir.1984); *Gilboe*, 699 F.2d at 75-78; *Flanagan*, 691 F.2d at 121-124; *Nigro*, 705 F.2d at 1226-28; In re Baird, 668 F.2d 432, 434 (8th Cir.1982); United States v. Yanagita, 552 F.2d 940, 946-947 (2d Cir.1977); In re Tierney, 465 F.2d 806, 811-812 (5th Cir.1972).

120. *Balsys*, 119 F.3d at 135 (noting that only aliens may be deported and then, only if there is a treaty).

121. *See id.* at 135-136.

122. *See id.* at 136. *See* Hoffman v. United States, 341 U.S. 479 (1951).

123. *Balsys*, 119 F.3d at 136. *See* Cardissi, 351 F.Supp. at 1086.

124. *Balsys*, 119 F.3d at 136 (noting that in Baxter v. Palmigiano, 425 U.S. 308 (1976), the

since a deportation is a civil hearing, the government could use Balsys's silence to aid in the deportation. However his silence alone would not be enough to deport him.[125] "[I]f there is other evidence, the witness's silence may contribute to a decision to deport the alien."[126] In fact, other evidence is usually required anyway.[127] Thus, with the benefit of being able to draw inferences, the hazard to the government is even further reduced.

The second problem with saying that the government will be harmed by allowing Balsys to invoke this privilege comes from the fact that there will be situations, when allowing a person like Balsys to invoke the privilege will negatively affect the government's interest. But the court of appeals noted that there were ways around this "[f]or methods may exist by which the United States can constitutionally bypass the privilege either by eliminating the likelihood that the witness will be sent to the jurisdiction that would prosecute him, or by granting some form of constructive immunity to the witness."[128] The court noted that neither deportation nor extradition were "fixed practices."[129] In fact, both Congress and the executive branch have power to control both.[130] "It follows that Congress can pass laws regulating extradition and deportation in cases involving the privilege, just as it has enacted immunity statutes in the past to deal with fear of domestic prosecution."[131] Accordingly, "[b]oth Congress and the executive branch may thus be able to limit dramatically the domestic law enforcement costs of the interpretation of Fifth Amendment that we accept today by developing schemes that parallel domestic immunity statutes."[132]

Thus, in the end, the court of appeals decided that the negative effect on domestic enforcement efforts of allowing the privilege is of the same order when the witness fears foreign prosecution as when he fears domestic prosecution. In addition, the negative effect is not substantial enough to undermine the fact that granting the privilege to those who fear foreign prosecution is consistent with the language of the Fifth Amend-

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Supreme Court said that the Fifth Amendment "does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.* at 318.

125. *Balsys*, 119 F.3d at 136 (citing Superintendent v. Hill, 472 U.S. 445, 455 (1985)).

126. *Balsys*, 119 F.3d at 136 (relying on United States v. Stelmokas, 100 F.3d 302, 311 (3d Cir.1996)).

127. *Balsys*, 119 F.3d at 136 ("Finally, the witness's testimony may not be the only source of the information the government seeks.") *Id.*

128. *See id.* at 137.

129. *See id.* at 138.

130. *See id.*

131. *See id.*

132. *See id.* at 139.

ment, with its aims, and with the reasoning of the most relevant Supreme Court cases.[133]

In dealing with the issue of waiver, the court of appeals agreed that a witness may give up his right to the Fifth Amendment protection and this "waiver need not be knowing and voluntary."[134] However, this waiver does not apply in two separate proceedings.[135]

The district court had said that the proceeding in 1961 and the current OSI investigation were the same proceeding.[136] The court of appeals disagreed by saying that case law showed that the time differential proved that they were two separate proceedings.[137] But even if they were deemed to be one proceeding, the court of appeals said that Balsys could not have waived his Fifth Amendment right since, at the time of the interview in 1961, he had no Fifth Amendment rights since he had yet to enter the country.[138]

V. THE SUPREME COURT

A. The Majority's Decision

After losing at the appeals court level, the government appealed to the United States Supreme Court. In a decision written by Justice Souter, the Supreme Court overruled the Court of Appeals by holding that the fear of foreign prosecution is beyond the scope of the Fifth Amendment's self-incrimination clause.[139]

The Court agreed that the privilege applies to resident aliens, and had the fear been from a possible state or federal proceeding then Balsys would have been able to invoke it.[140] But the Court said that the issue in this case was "whether a criminal prosecution by a foreign government not subject to our constitutional guarantees presents a 'criminal case' for the purposes of the privilege against self-incrimination."[141]

The Court noted that Balsys relied on the textual difference between the Sixth Amendment, which only applies to domestic proceedings, and the Fifth Amendment which includes the much broader statement, "any criminal case."[142] This argument is further made in the amicus brief, in that "any criminal case" is argued to be just that, "regardless of the prose-

133. *Balsys*, 119 F.3d at 134.

134. *See id.*

135. *See id.*

136. *See* discussion *infra* Part III.

137. *Balsys*, 119 F.3d at 140.

138. *See id.*

139. United States v. Balsys, 118 S.Ct. 2218 (1998).

140. *See id.* at 2221. *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); *see also* Kastigar v. United States, 406 U.S. 441 (1972).

141. *Balsys*, 118 S.Ct. at 2222.

142. U.S. CONST. AMEND. V & VI.

cuting authority."[143] But the Court, applying the rule of noscitur a sociis, said that this "argument overlooks the cardinal rule to construe provisions in context."[144] The context of the Fifth Amendment seems to only refer to proceedings in a domestic context. Thus, the Court states that "[b]ecause none of these provisions is implicated except by action of the government that it binds, it would have been strange to choose such associates for a Clause meant to take a broader view, and it would be strange to find a sweep in the Clause now."[145]

The Court noted that even its own precedent seems to support this "so-called same-sovereign interpretation."[146] They quoted an early case written by Chief Justice Marshall that stated that "the Constitution's 'limitations on power... are naturally, and, we think, necessarily applicable to the government created by the instrument,' and not to 'distinct [state] governments, framed by different persons for different purposes."[147]

When looking at past cases, the Court noted that they all dealt with the "significance for the federal privilege of possible use of testimony in state prosecution."[148] In most of those cases, the Court's holding was in line with the idea of requiring the potential prosecution to be from the same jurisdiction. In another case deciding whether or not the federal privilege could be raised when the fear was from a state court, the Court held "that 'the possibility that information given by the witness might be used' by the other government is, as a matter of law, 'a danger so unsubstantial and remote' that it fails to trigger the right to invoke the privilege."[149]

The Court noted that this question was "definitely settled" in the case of *United States v. Murdock*.[150] In that case, the Court concluded "that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law."[151] The *Murdock* court

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143. *Balsys*, 118 S.Ct. at 2222-2223. *See* Brief for National Association of Criminal Defense Lawyers et al. As Amici Curiae 5.

144. *See id.* at 2223. *See* King V. St. Vincent's Hospital, 502 U.S. 215, 221 (1991).

145. *See id.* at 2223.

146. *See id.*

147. *See id.* at 2224 (quoting Barron ex. Rel. Tiernan v. Mayor of Baltimore, 7 Pet. 247, 8 L.Ed. 672 (1833)).

148. *Balsys*, 118 S.Ct. at 2224. *See* Brown v. Walker, 161 U.S. 591 (1896);*see also* Jack v. Kansas, 199 U.S. 372 ((1905).

149. United States v. Aloyzas Balsys, 118 S.Ct. 2218, 2224 (1998) (quoting Hale v. Henkel, 210 U.S. 43 (1906)).

150. United States v. Aloyzas Balsys, 118 S.Ct. at 2224 (1998) (citing U.S. v. Murdock, 284 U.S. 141 (1931)).

151. United States v. Aloyzas Balsys, 118 S.Ct. at 2224 (1998) (quoting U.S. v. Murdock, 284 U.S. 141, 396 (1931)).

stated that the English common law, on which the Fifth Amendment is based, "does not protect witnesses against disclosing offenses in violation of the laws of another country."[152]

The Court notes that some have "suggested that our precedent addressing fear of prosecution by a government other than the compelling authority fails to reflect the *Murdock* rule uniformly."[153] The Court first made note of the *Saline Bank* case where the defendants claimed that their answers would incriminate them under state law.[154] The Court, however, noted that this case was about a violation of a state law and the Federal Court was just fulfilling the state law.[155]

The next case was *Ballman v. Fagin*, where Ballman tried to assert the privilege in a federal proceeding based on his fear of incriminating himself under state law.[156] But again, this case was made special because the Court in that case ruled that Ballman faced not only a fear of state prosecution, but federal prosecution as well.[157] So both of these cases were able to comply with the holding that the fear had to come from the same jurisdiction. But these cases were "superseded by *Murdock* with its unequivocal holding that prosecution in a state jurisdiction not bound by the Clause is beyond the purview of the privilege."[158]

The Court next goes on to study how the rule in *Murphy* affected Balsys's claim. In 1964, the Court in *Murphy* overruled *Murdock* and held "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."[159] This case coincided with the decision in *Malloy v. Hogan*, "which applied the doctrine of the Fourteenth Amendment due process incorporation to the Self-Incrimination Clause, so as to bind the State as well as the National Government to recognize the privilege."[160]

When looking at *Murphy*, the Court noted that there were "two alternative rationales."[161] It is the first of these two perspectives that the majority

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152. United States v. Aloyzas Balsys, 118 S.Ct. at 2225 (1998) (citing U.S. v. Murdock, 284 U.S. 141, 149 (1931)). *See* King of Two Sicilies v. Wilcox, 7 State Trials (N.S.) 1050, 1068; *see also* Queen v. Boyes, 121 Eng. Rep. at 738.

153. *Balsys*, 118 S.Ct. at 2225.

154. United States v. Saline Bank of Va., 7 L.Ed. 69 (1828).

155. *Balsys*, 118 S.Ct. at 2225-2226.

156. United States v. Aloyzas Balsys, 118 S.Ct. at 2226 (1998) (citing Ballmann v. Fagin, 200 U.S. 186 (1906)).

157. *See id.*

158. *Balsys*, 118 S.Ct. at 2226.

159. United States v. Aloyzas Balsys, 118 S.Ct. 2218, 2226 (1998) (quoting Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 77-78 (1964)).

160. United States v. Aloyzas Balsys, 118 S.Ct. 2218, 2226-2227 (1998) (citing Malloy v. Hogan, 378 U.S. 1 (1964)).

161. *Balsys*, 118 S.Ct. at 2226.

not only agrees with, but says agrees with the holding in *Malloy*. The *Malloy* decision seemed to end the *Murdock* prohibition of only applying the privilege to one jurisdiction. "After Malloy, the Fifth Amendment limitation could no longer be seen as framed for one jurisdiction alone, each jurisdiction having instead become subject to the same claim of privilege flowing from one limitation."[162] The *Murphy* decision picked up on this, and stated "that if a witness could not assert the privilege [when they faced incrimination in another jurisdiction], the witness could be 'whipsawed into incriminating himself under both state and federal law even though the... privilege is applicable to each.'"[163] Since *Malloy* had made the privilege applicable to both the state and federal governments, "it would therefore 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."[164] After this rule, any immunity option that was to be given was binding on both the state and the federal jurisdictions.[165]

However, the Court noted that there was another possible rationale when looking at *Murphy* that was more in support of Balsys's claims. This view would give the Clause a much greater scope. As the Court notes, in order to accept this view, you have to reject the Court's earlier description of English common law as stated in *Murdock*. To do this, the *Murphy* court relied on two British cases in which it said that the privilege was invoked "based on the fear of prosecution in a foreign jurisdiction."[166] Yet, when looking at these two cases, the Court noted that "the judicial system to which the witness' fears related was subject to the same legislative sovereignty that had created the courts in which the privilege was claimed."[167] The Court went on to note that at the time of those two cases and for years after, English law was silent as to whether or not the privilege could be invoked when the fear was from a foreign

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162. *See id.* at 2227.

163. United States v. Aloyzas Balsys, 118 S.Ct. 2218, 2227 (1998) (quoting Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 55 (1964)).

164. *Balsys*, 118 S.Ct. at 2227. *See* Kastigar v. United States, 406 U.S. at 457, n. 42.

165. Note that Murphy still applied to the federal and state governments because of Malloy. Since there was not an analogous decision for foreign governments, the Court held that Murdock still applies in those cases. *Balsys*, 118 S.Ct. at 2227-2230.

166. United States v. Aloyzas Balsys, 118 S.Ct. 2218 (1998) (citing East India Co. v. Campbell, 27 Eng. Rep. 1010 (Ex. 1749)). (Defendant afraid of prosecution in Calcutta, then an English colony.) *See* Brownsword v. Edwards, 28 Eng. Rep. 157 (Ch. 1750) (Defendant feared prosecution by an English ecclesiastical court.)

167. United States v. Aloyzas Balsys, 118 S.Ct. 2218, 22-2229 (1998) (referring to East Aindia Co. v. Campbell, 27 Eng. Rep. 1010 (Ex. 1749) and Brownsword v. Edwards, 28 Eng. Rep. 157 (Ch. 1750)).

country.[168]

The English courts did, in *the King of the Two Sicilies v. Willcox*, "decline to allow the defendants to assert the privilege based on their fear of prosecution in Sicily."[169] This English decision was based on two points. One, was that the court believed that the privilege only referred to "matters that might be criminal under the laws of England," and the second was that they did not believe that the defendants would ever leave England and return to Sicily.[170]

However, the majority noted that the *Murphy* court thought the rule in the *King of the Two Sicilies* was "undermined by the subsequent case *of United States v. McRae*."[171] In *McRae*, although that court did not say the privilege could be used anytime there was a fear of foreign prosecution, it did note two distinctions. One distinction was that the "'presumed ignorance of the Judge as the foreign law' on which the *King of the Two Sicilies* rested has been 'completely removed by the admitted statements upon the pleadings."[172] The second "was that *McRae* presented the unusual circumstance that the party seeking to compel the testimony, the United States, was also the party that would prosecute any crime under its laws that might thereby be revealed."[173]

The majority in the present case does not believe that *McRae* supports a finding that the privilege should be invoked whenever the fear is from a foreign prosecution.[174] The majority believes the court in *Murphy* overreached its power when it overruled the *King of the Two Sicilies*.[175]

But the majority noted that even if *Murphy* did show a new development in English common law, it would not matter in interpreting the Fifth Amendment.[176] "The presumed influence of English law on the intentions of the Framers hardly invests the Framers with clairvoyance, and subsequent English developments are not attributable to the Framers by some rule of renvoi."[177] Accordingly, the majority states that "to the extent that the *Murphy* majority went beyond its response to *Malloy* and undercut *Murdock's* rationale on [unsound] historical grounds, its reasoning cannot be accepted now."[178]

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168. *Balsys*, 118 S.Ct at 2229. "[A]nd the Vice-Chancellor so stated in 1851." *Id.*

169. United States v. Aloyzas Balsys, 118 S.Ct. 2218, 2229 (1998) (citing King of Two Sicilies v. Willcox, 61 Eng. Rep. 116 (Ch. 1851)).

170. *Balsys*, 118 S.Ct. at 2229.

171. United States v. Aloyzas Balsys, 118 S.Ct. 2218, 2229 (1998) (citing United States v. McRae, 3 L.R. Ch. 79 (Ch.App.1867)).

172. *See id.* at 2229 (citing United States v. McRae, 3 L.R. Ch. 79 at 84 (Ch.App.1867)).

173. *See id.* at 2229 (citing United States v. McRae, 3 L.R. Ch. 79 at 87 (Ch.App.1867)).

174. *Balsys*, 118 S.Ct. at 2229.

175. *See id.*

176. *See id.* at 2230.

177. *See id.*

178. *See id.* The majority notes that the history in Murphy has long been criticized. *Id.* at

The majority then lists its three main disagreements with the dissent. First, the majority believes that when the Clause is read in context with the rest of the Fifth Amendment, it is obviously "limiting its principle to concern with prosecution by a sovereign that is itself bound by the Clause."[179] They do not believe that the language makes the Clause include those jurisdictions which are not bound by the Constitution.

Second, the majority relies "on the force of our precedent, notably

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note 11 which states:

> Murphy, 378 U.S., at 81, n. 1, 84 S.Ct., at 1619, n. 1 (Harlan, J., concurring in judgment) ("The English rule is not clear"); United States v. (Under Seal), 794 F.2d at 927 ("The Court's scholarship with respect to English law in this regard has been attacked, see Note, 69 Va. L.Rev. at 893-94, ... We do not enter the dispute at to whether Murphy represents a correct statement of the English rule at a particular time because we do not think that the Murphy holding depended upon the correctness of the Court's understanding of the state of English law and reliance thereon as the sole basis for decision. Rather, Murphy proceeds as a logical consequence to the holding in Malloy v. Hogan ... ") Note, Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution, 96 Colum. L.Rev.1940, 1944-1946, 1949, and nn. 79-81 (1996) ("The uncertainty of English law on [the question whether the privilege can be invoked based on fear of prosecution] casts doubt on the Supreme Court's holding in Murphy, which was based on the assertion that McRae presents the settled 'English rule' regarding self-incrimination under foreign law." Indeed, the Murphy Court's reliance on its ideas of the "true" English rule has been criticized by commentators and its reading of British law was essentially overruled by the British Parliament. Murphy's reliance on mistaken interpretation and application of English law weakens its precedential value. (footnotes omitted)); 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, 893-895 (1983) ("[T]he English rule argument has three fatal flaws. First, the so- called English rule, decided in 1867, never was the English rule despite overstatements by several American commentators and the Murphy Court. British commentators remained uncertain for nearly a century about the extent to which, if at all, their privilege protected against foreign incrimination.... Second, the English courts had not decided a case involving incrimination under the criminal laws of independent foreign sovereigns by the time our Constitution was framed. The only English cases involving independent sovereigns were decided more than sixty years later. Thus, even if the fifth amendment embodied the English common law at the time it was framed, the privilege did not incorporate any rule concerning foreign incrimination. Finally, even if the English rule protected against foreign incrimination, the Supreme Court in Zicarelli indicated that it had not formally adopted the rule in Murphy." (footnotes omitted)); Capra, The Fifth Amendment and the Risk of Foreign Prosecution, N.Y.L.J., Mar. 8, 1991, p. 3 ("[D]espite Justice Goldberg's assertions in Murphy, it is clear that there was never a 'true' or uniform English rule.... [T]o the extent that the English rule would be pertinent to the Fifth Amendment privilege, it would have had to exist at the time the Fifth Amendment was adopted. Yet, as even Justice Goldberg admitted in Murphy, the English cases involving independent sovereigns were decided more than 60 years after the Fifth Amendment was adopted"); see also Law Reform Committee, Sixteenth Report, 1967, Cmmd. 3472, & ¶ 11, p. 7 (explaining that English common law on the question is not "wholly consistent").
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> *Id.* at note 11

179. *Balsys*, 118 S.Ct. at 2231.

Murdock, as confirming this same sovereign principle, as adapted to reflect the post-*Malloy* requirement of immunity effective against both sovereigns subject to the one privilege under the National Constitution."[180] Other countries do not have to allow such immunities, since they are not bound by our Constitution. The dissent, as the majority notes, gives more weight to the language from *Saline Bank* as opposed to *Murdock*.

Last, with all of the noted inaccuracies, the majority does not agree with the *Murphy* court's description of the common law.[181] They also "read none of the common-law cases as authority inconsistent with our contextual reading of the Clause."[182]

The Court did note that there remained one more problem with the *Murphy* decision that had to be overcome in order to deny Balsys the right to assert the privilege. They noted that the majority in *Murphy* included a catalog of "Policies of the Privilege" which listed, what they believed to be, "many of our fundamental values and most noble aspirations."[183] As the majority in Balsys noted, most of these seem to point directly to domestic applications, but some "might suggest a concern broad enough to encompass foreign prosecution and accordingly to support a more expansive theory of the privilege than the *Murdock* understanding would allow."[184] However, to support this, one must believe the *Murphy* court's interpretation of the English common law cases which the majority in Balsys has rejected.[185] But, the Court states that when this interpretation of the common law is rejected, then the *Murdock* decision "must be seen as precedent at odds with Balsys' claim."[186]

Furthermore, as the Court noted, the *Murphy* court does not seem to realize all of the policy concerns that the aspirations in the catalog would

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180. *See id.*

181. *See id.*

182. *See id.*

183. *See id.* at 2232 (citing *Murphy*, 378 U.S., at 55:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self- incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; 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, our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent. (citations omitted) *Balsys*, at 2231.)

184. *Balsys*, 118 S.Ct. at 2231.

185. *See id.*

186. *See id.*

raise if the scope of the Clause were increased. Balsys wishes to include the "protection of personal inviolability and the privacy of a testimonial enclave" in the scope of the Clause.[187] But as the Court states, if "these values were reliable guides to the actual scope of protection under the Clause, they would be seen to demand a very high degree of protection indeed."[188] But the majority notes that "extending protection as Balsys requests would change the balance of private and governmental interests that have seemingly been accepted for as long as there has been Fifth Amendment doctrine."[189]

The Court also disagrees with Balsys's contention that the policy catalog in *Murphy* supports the prevention of governmental overreaching.[190] In order to believe this argument, one most subscribe to the theory of "cooperative internationalism" which is similar to the theory of "cooperative federalism" recognized in *Murphy*.[191] But since there is no counterpart to *Malloy* that imposes the Fifth Amendment to other sovereigns, then the Court states that "[a]ny analogy must, instead, be to the pre-*Murphy* era when the States were not bound by the privilege."[192]

But, the Court says, even if the theories of "cooperative federalism" and "cooperative internationalism" did advocate increasing the scope of the privilege, Balsys has not offered enough evidence to justify the increase. In fact, the Court states that "we are accordingly unable to dismiss the position of the United States in this case, that domestic law enforcement would suffer serious consequences if fear of foreign prosecution were recognized as sufficient."[193]

The Court goes on to say that one day, there might be the kind of international cooperation where a claim like Balsys' could be given the protection of the Self-Incrimination Clause.[194] But many things would have to occur, one of which being the enactment of substantially similar criminal codes."[195] But as the Court says, such speculation should be left for "another day."[196]

B. Justice Stevens' Concurring Opinion

In a short concurring opinion, Justice Stevens emphasized a few points. He does not believe that the protection extends to foreign courts.

187. *See id.* at 2232.
188. *See id.*
189. *See id.*
190. *Balsys*, 118 S.Ct. at 2233.
191. *See id.*
192. *See id.* at 2233-2234.
193. *See id.* at 2234-2235.
194. *See id.* at 2235.
195. *See id.*
196. *Balsys*, 118 S.Ct. at 2235.

He states that "[t]he 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."[197] He does not believe that the Bill of Rights was "intended to have any effect on the conduct of foreign proceedings."[198] In fact, he believes that if Balsys' view was accepted, then we would be giving the "power [to] foreign governments to impair the administration of justice in this country."[199]

C. Justice Ginsberg's Dissenting Opinion

Justice Ginsberg, in her short dissent, believes that the privilege against self-incrimination is a major step in the civilization of man.[200] In her opinion, the privilege defines a rule for how agents of the United States should act. It provides a guide on how they should conduct themselves, especially when receiving testimony.[201] She also believes that it applies to people who fear prosecutions that are either foreign or domestic.[202] But to Ginsburg it is more than a safeguard; it is an "expression of our view of civilized governmental conduct."[203]

D. Justice Breyer's Dissenting Opinion That Justice Ginsberg Joined.

In his dissent, Justice Breyer believes that Fifth Amendment privilege should be broad enough to cover the fear of foreign prosecutions. He begins his argument by attempting to show that the word "any" in the broad interpretation is more in line with "the view this Court has taken and should continue to take."[204] He points out that the majority based its decision on the idea that the *Murphy* court had incorrectly stated the precedent on this issue.[205] But Breyer disagrees and bases his dissent on the opinion that *Murphy* is the correct law in dealing with the privilege. Since *Murphy* abolished the "same sovereign" rule, then the privilege should be applied here.[206]

Breyer notes that if he is correct in his understanding of *Murphy*, then Balsys should be able to invoke the privilege.[207] He notes that not every threat from a foreign government is reasonable, but where it is,

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197. *See id.* at 2236

198. *See id.*

199. *See id.*

200. *Balsys*, 118 S.Ct. at 2236.

201. *See id.* at 2237.

202. *See id.*

203. *See id.* (citing E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7-9 (1955).

204. *Balsys*, 118 S.Ct. at 2237.

205. *See id. citing* Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964).

206. *Balsys*, 118 S.Ct. at 2237-2238.

207. *See id.* at 2238.

then the privilege should apply.[208]

The majority, he believes, say that *Murphy* "turns upon considerations of federalism – the need to consider 'state and federal jurisdictions... as one' for purposes of applying the privilege."[209] He notes that the majority reads the *Murphy* case as stating that the fear must come from the "same sovereign."[210] But in support of this, the majority points to two statements in *Murphy*.[211] "Since the first statement mentions only a reason for reconsidering *Murdock*, since the second offers support on either analysis, and since neither refers to any 'alternative rational[e]' for decision, the majority's evidence for its reinterpretation of *Murphy* seems rather skimpy."[212] (internal citations omitted)

Breyer then lists six reasons that, if one were to focus "on the basic nature and history of the underlying right," would reject the same sovereign rule from *Murdock*.[213] Thus, Breyer believes that the Court in *Mur-*

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208. *See id. See* Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972) (threat must be "real and substantial").

209. *Balsys*, 118 S.Ct. at 2238 (quoting *Balsys*, 118 S.Ct. at 2227-2228.

210. *See id.* at 2238.

211. *See id.* stating:

> In the first, Murphy said that Malloy v. Hogan, which incorporated the Fifth Amendment privilege as part of the Fourteenth Amendment's Due Process Clause, "necessitates a reconsideration" of United States v. Murdock, which had held that the Fifth Amendment protected an individual only from prosecutions by the Federal Government. In the second, Murphy mentioned, as one of many items of support for its analysis, that most Fifth Amendment policies are defeated "when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." (internal citations omitted)

212. *Balsys*, 118 S.Ct. at 2238.

213. *See id.* at 2238-2239 stating:

> First, Murphy holds that the "constitutional privilege" itself, not that privilege together with principles of federalism, "protects... a federal witness against incrimination under state... law. Second, it says explicitly that it "reject[s]" the Murdock rule, not because of considerations of federalism arising out of Malloy, but because it is "unsupported by history or policy" and represents a "deviation" from a "correct... construction" of the privilege in light of its "history, policies and purposes." Third, about half of the opinion consists of an effort to demonstrate that the privilege, as understood by the English courts and by American courts prior to Murdock, protected individuals from compelled testimony in the face of a realistic threat of prosecution by any sovereign, not simply by the same sovereign that compelled the testimony. Fourth, the rest of the Court's analysis consists of a discussion of the purposes of the privilege, which purposes, in the Court's view, lead to a similar conclusion. Fifth, the Court explicitly rejects the analysis of commentators who argued for a "same sovereign" rule on the ground that their understanding of the privilege's purposes was incomplete. Sixth, the Court nowhere describes its rationale in "silver platter" or similar terms that could lead one to conclude that its rule is prophylactic, enforcement-based, or rests upon any rationale other than that the privilege is not

phy intended for the privilege to apply to other sovereigns just as it does to the federal and state governments. "In other words, we must ask not, 'what did *Murphy* hold,' but 'was *Murphy* right?'"[214]

Breyer disagrees with the majority's opinion that the reasoning in *Murphy* was both "'fatally flawed' and legally [un]sound."[215] Breyer does not believe that the English common law "embodied a 'same sovereign' rule" like the majority and the court in Murdock do.[216] He believes that the true English rule as of the time of *Murdock*, insofar as any of these cases reveal that rule, was not a "same sovereign" rule, but a rule that the privilege did not apply to prosecutions by another sovereign where the danger of any such prosecution was speculative or insubstantial.[217]

Thus there was no error in the *Murphy* decision according to Breyer.

Breyer does not believe that the majority has listed any reason that would convince him to reject *Murphy* and bring back *Murdock*. He noted the majority's opinion that the historical basis of *Murphy* is flawed, but believes that even if that is true, "we would need something more to abandon *Murphy*, for it is the most recent, and thereby governing, precedent."[218]

But regardless of precedent, Breyer states that he "still disagree[s] with the Court's conclusion."[219] He agrees with the court of appeals that the Fifth Amendment has several purposes and, he believes, that all of these purposes support the conclusion of the court of appeals.[220] He states, "[t]he Court has often found, for example, that the privilege recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out his own mouth."[221] In Breyer's mind, these principles are "no less at stake" when the threat is from a foreign, rather than domestic prosecution.[222] He also points out that the privilege protects personal dignity by decreasing the chance of an overzealous government prosecution.[223]

Another one of the points of disagreement between Breyer and the

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limited to protection against prosecution by the same jurisdiction that compels the testimony. (internal citations omitted)

214. *See id.* at 2239.

215. *See id.* at 2228, 2229-2230.

216. *See id.* at 2239.

217. *See id. citing* Queen v. Boyes, 121 Eng. Rep. 730, 738 (Q.B.1861) ("[T]he danger to be apprehended must be real and appreciable... not a danger of an imaginary and unsubstantial character.")

218. *Balsys*, 118 S.Ct. at 2240-2241.

219. *See id.* at 2242.

220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.*

majority is that Breyer believes the court of appeals' theory of "cooperative internationalism."[224] He notes the drastic increase of cooperation between the United States and foreign governments to fight crime as well as improvements in transportation and communications that have made nations closer.[225] Thus with the large number of treaties, agreements and agencies created to foster this kind of cooperation, he believes "that the United States has a significant stake in the foreign prosecution at issue here."[226] So, to Breyer, this is analogous to the Murphy court's belief in cooperation between the federal and state governments.[227]

He also disagrees with the majority's policy reasons for not allowing Balsys to assert the privilege. One of the major reasons for this is that Breyer does not share in the majority's concern that allowing this privilege would give another country the right to "unreasonably interfere with the work of [United States] law enforcement."[228] He thinks that fear is "overstated."[229] First, he agrees with the court of appeals that the actual number of cases like Balsys' are rare.[230] Even if the government were kept from compelling testimony, the testimony desired is about a foreign crime, not a domestic one, so the United States' interest is small.[231] Also, since the witness' silence can be used in a civil case, the government would lose very little.[232] Even so, the United States still has the power to "take steps sufficient to make the threat of foreign prosecution insubstantial."[233] Accordingly in Breyer's view, to allow Balsys to assert the privilege would not only follow the fundamental principles of the Fifth Amendment, it follows Court precedent as well.

VI. ANALYSIS OF THE SUPREME COURT'S DECISION

When looking at the disagreements between the majority and the dissent, it seems that they mainly differ in how they interpret two cases – *Murphy* and *Murdock*.[234] Both sides make two rather compelling, and at times confusing arguments. But in the end, extending the scope of the

224. *Balsys*, 118 S.Ct. at 2243.

225. *See id.*

226. *See id.*

227. *See id.*

228. *See id.* at 2244.

229. *See id.*

230. *See id. See* discussion *infra* Part IV.

231. *Baysys*, 118 S.Ct. at 2244-2245.

232. *See id.* at 2245.

233. *See id.* The Government, Breyer believes, could promise not to deport, get the foreign nation to promise not to use the information, or decline a request for extradition. *Id.*

234. *See* discussion *infra* Part V; *see* Murphy, 378 U.S. 52 (1964); *see also* Murdock, 284 U.S. 141 (1931).

privilege to include the fear of foreign prosecution is beyond the scope of the Fifth Amendment.

A. Disagreement Over English Common Law

Perhaps one of the main disagreements between the two sides is their different opinions as to what exactly is the correct English common law on point. The majority believe that it is the analysis given in *Murdock*, whereas the dissent believes that it is from the later *Murphy* decision. On this point I have to agree with the majority. They make a much more in depth analysis of the relevant case law to show that the cases in *Murdock* prove that English common law recognized the "same-sovereign" rule.[235] They also illustrate how many others disagree with the historical interpretation of the common law in *Murphy*.[236]

The dissent, on the other hand, seems to rely on *Murphy* because it is the decision that is later in time. They believe that just as *Murphy* abolishes the "same sovereign" rule for the states and federal government, it should do the same for the United States government and foreign governments.[237] But this ignores the majority's opinion that the only reason that *Murphy* applies to the federal and state governments is because of the decision in *Malloy* that applied the Fourteenth Amendment to the states.[238] So, even though the historical analysis in *Murphy* is still incorrect, the privilege can still be applied equally in both the states and the federal government. The majority states that since there is no analogous rule that would apply the Fourteenth Amendment to foreign governments, then the "same-sovereign" precedent in *Murdock* is still alive when dealing with foreign governments.[239]

B. Difference Over Catalog Of "Policies Of The Privilege"

The dissent also puts heavy weight on the catalog of "Policies of the Privilege" in *Murphy*.[240] But, as the majority points out, this skips the problem of policy concerns that the catalog brings up.[241] Here, the majority makes the better argument.

First, as the majority states, in order to believe the catalog of policies, you would have to believe in the flawed history in *Murphy*. Second, the *Murphy* decision does not "weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope."[242] Balsys and the dissent believe that a general personal testimo-

235. *Balsys*, 118 S.Ct. at 2224-2230.
236. *See supra* note 177.
237. *Balsys*, 118 S.Ct. at 2224-2230.
238. *See id.* at 2227-2230.
239. *See id.* at 2230-2231.
240. *See supra* note 212.
241. *Balsys*, 118 S.Ct. at 2231-2235.
242. *See id.* at 2231.

nial privacy is created by the Fifth Amendment.[243] To follow these exactly would put an enormous strain on the system and destroy "the balance of private and governmental interests that has seemingly been accepted for as long as there has been Fifth Amendment doctrine."[244]

C. Cooperative Federalism And Cooperative Internationalism

The dissent wants to look at the discussion in *Murphy* about "cooperative federalism" and make it analogous to the international level.[245] The majority does not seem to put as much weight behind this argument.[246] In fact, the majority does not give it enough weight. With the rapid increase of both transportation and technology, countries are not as far apart as they were when Constitution and the common law were being created. But today, the fear of not understanding other countries' laws or the belief that it is difficult to find out what is happening in another country does not seem as great.

The dissent also makes the argument that if the executive branch or the Congress could make a law that would allow the government to have the power not to deport people like Balsys and offer that in the place of immunity.[247] But that statement does not make much sense. The government has entered into agreements with these countries, so to overlook these agreements and not deport these people would be wrong. The dissent seems to be saying that we can make deals with other countries, but we can always go back on them if necessary. This should not be allowed. Accordingly, even with the increase in technology making it easier to communicate with other countries, that is not enough to allow someone to assert the privilege.

D. Privilege Available Only To Government That Created It

These reasons are used to support the main reason that the majority ruled against Balsys. They believe that the privilege is available only to protect those from the government that created the privilege.[248] Even though the United States has close relationships with other countries, something that happens in another country should not affect how the criminal justice system in this country operates. Although the Framers could not have thought that communication would be the way it is today, they still could not have intended for the Constitution to apply in cases like this.

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243. *See id.* at 2242-2245.

244. *See id.* at 2232.

245. *See id.* at 2243-2244.

246. *See id.* at 2233-2237..

247. *Balsys*, 118 S.Ct. at 2245.

248. *Id.* at 2222-2226.

VII. CONCLUSION

In the end, the majority of the Supreme Court did not support Balsys's claims that he should be able to invoke the privilege. Although Justice Breyer in his dissent makes some valid points, they are just not strong enough. The Fifth Amendment privilege against self-incrimination can only, and should only, be used to protect people against the government that created it.