# Taking the Fifth with You (or Not)

*Balsys v. United States*, 119 F.3d 122 (2d Cir. 1997), *cert. granted*, 66 U.S.L.W. 3399 (U.S. Jan. 16, 1998) (No. 97-873).

Danielle Gentin†

In 1961, Aloyzas Balsys entered the United States. Today, the government seeks to enforce an administrative subpoena issued by the Office of Special Investigations of the Department of Justice ("OSI") to determine whether Balsys lied on his immigration application regarding his activities during the Second World War.[1] Balsys refuses to comply, however, arguing that his Fifth Amendment right against self-incrimination[2] protects him from disclosing any compelled testimony that could potentially expose him to prosecution abroad.

## I

The Fifth Amendment privilege against self-incrimination should not extend to cases in which a witness has a real and substantial fear of foreign prosecution. This Case Note will set forth the context in which *Balsys* arose and the basis for the court's ruling. It will then suggest that the Second Circuit's decision in *Balsys* distorted the relationship between the federal government and the states before the Fifth Amendment was incorporated to the states through the Fourteenth Amendment, by erroneously attempting to argue that domestic prosecutions are akin to foreign proceedings. This Case Note will further argue that the court's holding in *Balsys* misconstrued the distinction between compulsion and use in Fifth Amendment theory and ignored significant policy rationales including

† B.A., Yale College, 1995; M.Phil., University of Cambridge, 1996; J.D. candidate, Yale Law School, 1999.

1. *See* Balsys v. United States, 119 F.3d 122 (2d Cir. 1997), *cert. granted,* 66 U.S.L.W. 3399 (U.S. Jan. 16, 1998) (No. 97-873).

2. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

the importance of comity.

In *Balsys*, the Second Circuit accepted the defendant's argument and held that he could invoke the privilege against self-incrimination because he faced a real and substantial fear that any compelled testimony regarding his alleged participation as a Nazi collaborator in Lithuania would expose him to prosecution in both Lithuania and Israel.[3] The court further held that Balsys did not waive his right to remain silent when he initiated immigration proceedings by voluntarily completing an American visa application.[4]

The court reasoned that the Fifth Amendment serves three purposes: advancement of an individual's integrity and privacy; protection against the state's pursuit of its goals by excessive means; and the promotion of systemic values in our method of criminal justice. It further concluded that the scope of the privilege was not confined to domestic prosecutions. In support of this contention, the court argued that the privilege achieves the same function at the same cost in both domestic and foreign prosecutions.

As in any Fifth Amendment case, the government could not compel potentially incriminating testimony against Balsys merely by asserting that without such testimony, the American deportation proceeding against him would be frustrated. Indeed, the Fifth Amendment and the Bill of Rights in its entirety often frustrate governmental objectives for the sake of individual liberties.[5] Thus, in a hypothetical situation where a murderer could only be convicted by his own admission, the murderer may claim his constitutional right to remain silent and thus avoid punishment.[6] Balsys's case, however, is significantly more complicated.

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3. The district court determined that Balsys had a real and substantial fear of prosecution in Lithuania and Israel. It also found that Balsys could potentially face prosecution in Germany. The court declined, however, to permit Balsys to invoke the privilege. *See* United States v. Balsys, 918 F. Supp. 588 (E.D.N.Y. 1996), *rev'd*, 119 F.3d 122 (2d Cir. 1997), *cert. granted*, 66 U.S.L.W. 3399 (U.S. Jan. 16, 1998) (No. 97-873).

4. The court reasoned that Balsys's action in filing out his visa application and the current proceeding against him constituted two separate proceedings because considerable time had passed and changes to the immigration law had been enacted in the intervening years. *See Balsys*, 119 F.3d at 139-40. *But see* United States v. Gecas, 120 F.3d 1419, 1458 n.4 (11th Cir. 1997) (Edmondson, J., concurring) ("The government has special rights and powers when it comes to protecting America's borders . . . .").

5. *See In re* Cardassi, 351 F. Supp. 1080, 1086 (D. Conn. 1972). Balsys, a resident alien, possesses the same Fifth Amendment rights as a citizen. *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).

6. *See Balsys*, 119 F.3d at 132. The Second Circuit's critique of *United States v. Lileikis*, 899 F. Supp. 802 (D. Mass. 1995), as encapsulating a theory of the Fifth Amendment that would render it invalid in domestic as well as foreign prosecutions, is well-founded, but it should be noted that the Second Circuit declined to quote the part of the opinion that cautioned:

> [A] court of the United States should not bend the Constitution solely to promote 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

## II

The government's case against Balsys is a civil action—not a criminal prosecution.[7] Balsys, therefore, cannot claim the privilege on the basis of the deportation proceeding against him. Furthermore, the United States does not intend to use any such testimony for the purposes of a domestic criminal prosecution. In short, Balsys's predicament does not fall within the well-defined confines of protection afforded by the Fifth Amendment. The crucial question is, therefore, whether fear of foreign prosecutions necessarily falls outside of such traditional boundaries.[8]

The United States Supreme Court has never determined the applicability of the privilege with respect to fear of foreign prosecutions because a witness seeking to invoke the privilege in a case of this sort must first prove a real and substantial fear[9] that such a prosecution is likely to oc-

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the vindication of the domestic laws of the United States.
*Lileikis*, 899 F. Supp. at 809.

7. For an analysis of this distinction, see *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

8. This question has resulted in conflicting decisions among the several circuit and district courts. *Compare Gecas*, 120 F.3d at 1419 (holding that a resident alien could not invoke the privilege against self-incrimination based on a real and substantial fear of prosecution in Israel, Germany, and Lithuania), United States v. Under Seal (Araneta), 794 F.2d 920, 925 (4th Cir. 1986) (holding that using compelled incriminating testimony in Philippines is not prohibited by the privilege), *In re* Parker, 411 F.2d 1067 (10th Cir. 1969), *vacated by* Parker v. United States, 397 U.S. 96 (1970) (denying invocation of privilege for fear of criminal proceeding in Canada where witness was granted immunity from federal and state prosecution), and *Lileikis*, 899 F. Supp. at 802 (holding that existing governmental interest in enforcing American law and a legitimate need for the witness's testimony on the part of the United States means the privilege must yield if the witness's sole claim is that he fears foreign prosecution), *with* United States v. Ragauskas, No. 94C2325, 1995 WL 86640, at *5 (N.D. Ill. 1995) (holding that the "privilege extends to reasonable fear of foreign prosecution"), Moses v. Allard, 779 F. Supp. 857 (E.D. Mich. 1991) (holding that the privilege may be invoked even if the threat of prosecution is foreign and finding that the focus in determining applicability of the privilege is based on compelling jurisdiction), Yves Farms, Inc. v. Rickett, 659 F. Supp. 932 (M.D. Ga. 1987) (allowing French plaintiff to invoke the privilege in order to avoid answering collateral questions potentially incriminating under French law), United States v. Trucis, 89 F.R.D. 671 (E.D. Pa. 1981) (holding that an alleged Nazi collaborator was entitled to invoke the Fifth Amendment privilege against self-incrimination with respect to those questions posing a real threat of incrimination relating to his participation in the persecution of unarmed Jewish civilians in Latvia), Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981) (permitting invocation of the privilege as protection against threat of prosecution in Japan only to the extent specific questions might tend to incriminate petitioners in Japan), *In re* Letters Rogatory From the 9th Criminal Div. Reg'l Court, Mannheim, FRG, 448 F. Supp. 786 (S.D. Fla. 1978) (permitting invocation on the grounds that a German prosecutor can be compelled to proceed with criminal proceedings despite intention not to do so and witness could face perjury charges in the United States), *and In re* Cardassi, 351 F. Supp. 1080 (D. Conn. 1972) (allowing invocation of the privilege against self-incrimination when a witness has a reasonable fear of foreign prosecution, despite a grant of use immunity).

9. In *United States v. Flanagan*, 691 F.2d 116 (2d Cir. 1982), the court stated:

> [T]he court, in resolving the issue must then focus upon such questions as whether there is an existing or potential foreign prosecution against him; what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a likelihood that his testimony given here would be disclosed to the foreign government.

cur. In *Zicarelli v. New Jersey State Commission of Investigation*,[10] the Court found that the defendant failed to establish the necessary fear and thus declined to reach the question of the Fifth Amendment's proper scope. The Second Circuit has similarly declined to reach the constitutional issue posed by fear of potential prosecution abroad.[11] The Supreme Court has stated, however, that because deportation is a civil proceeding, a defendant "might have been compelled by the legal process to testify" regarding an issue that is not an element of the crime with which he is charged.[12] The Second Circuit's unsubstantiated transformation of Balsys's action into a criminal proceeding therefore has considerable ramifications. While the landmark decision in *Kastigar v. United States*[13] provided limited support for the Circuit's reasoning, *Kastigar* established that the Clause only protects against conviction because "[t]he actual violation, if any, occurs only at *a witness's own criminal trial.*"[14] Thus, the fact that the jurisdictions potentially seeking to use Balsys's testimony are not subject to the Fifth Amendment cautions against permitting invocation for mere compulsion.[15]

In upholding Balsys's right to claim the privilege, the Second Circuit advanced its own theory of the scope of the Fifth Amendment. The court initially claimed that because the Fifth Amendment is equally applicable to citizens and resident aliens, both categories of people may assert the privilege to the same extent.[16] This finding clearly established that Balsys's status as a resident alien does not diminish his Fifth Amendment protection. This finding alone is of limited aid because there is no clear law defining a citizen's right to invoke the privilege for fear of a foreign prosecution. Yet the court argued that because "[t]he language of the Fifth Amendment makes no distinction between self-incrimination in domestic and foreign prosecutions . . . . The privilege would therefore seem to apply to Balsys."[17] A basic analytical problem with the Second

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*Id.* at 121.

10. 406 U.S. 472 (1972).

11. *See, e.g., In re* Grand Jury Witness Gilboe, 699 F.2d 71, 78 (2d Cir. 1983); *In re* Grand Jury Subpoena of Flanagan, 691 F.2d 116, 124 (2d Cir. 1982).

12. United States *ex. rel.* Bilokumsky v. Tod, 263 U.S. 149, 154-55 (1923).

13. 406 U.S. 441 (1972). The Second Circuit noted that *Kastigar*'s "language suggests that, regardless of the noncriminal character of a deportation proceeding, it might become a 'criminal case' under certain circumstances." *Gecas*, 120 F.3d at 1428.

14. *Gecas*, 120 F.3d at 1428.

15. *See Gecas*, 120 F.3d at 1429 n.13 ("The Self-Incrimination Clause protects against conviction based on self-incrimination; it does not protect against the mere compulsion of testimony by a court.").

16. *Balsys*, 119 F.3d at 126 (citing *Kastigar*, 406 U.S. at 444-45); *see also* Hoffman v. United States, 341 U.S. 479, 486 (1951) (permitting a witness to use the privilege only in response to questions that will in themselves support a conviction or furnish an incriminating link).

17. *Balsys*, 119 F.3d at 125. The Fourth Circuit took the contrary position stating: "By its terms, the Fifth Amendment does not purport to have effect in foreign countries; and ordinarily,

Circuit's reasoning is that analogizing from a negative inference[18]—the absence of an exclusion of foreign prosecutions from the Amendment—is not persuasive since the assumption upon which it is based is precisely the question to be determined: Does the Fifth Amendment apply to foreign prosecutions? The court's assertion loses even more force because aliens are not entitled to "Fifth Amendment rights outside the sovereign territory of the United States."[19]

## III

In *Balsys*, the court's reliance on a particular theory of the Fifth Amendment highlights the battleground among the various district and circuit opinions that have considered the question of foreign prosecution. The Fifth Amendment, it has been noted, is "an unsolved riddle of vast proportions, a Gordian knot right in the middle of our Bill of Rights."[20] Nonetheless, or perhaps because of this confusion, irreconcilable court opinions rely on a much-cited passage, in which the Supreme Court defined the purposes of the Fifth Amendment.[21]

Each side debating the proper purpose of the privilege accuses the other of picking and choosing among values that advance a particular policy. The Second Circuit, therefore, criticized the district court for relying heavily on the privilege's protection against governmental over-

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unless specifically stated otherwise, a provision of domestic law, statutory or constitutional, is deemed to apply only to the jurisdiction which enacts it." United States v. Under Seal (Araneta), 794 F.2d 920, 925 (4th Cir. 1986).

18. *Cf.* Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) (casting doubt on such an inference by saying that "extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment").

19. United States v. Verdugo-Urquidez, 494 U.S. 259, 269-70 (1990) (rejecting the contention that the Fourth Amendment is applicable wherever the United States Government is acting).

20. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause,* 93 MICH L. REV. 857, 857 (1995).

21. The purposes include:

> [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 inhuman 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 an by requiring the government in its contest with the individual to shoulder the load"; our respect for the inviolability of the human personality and 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."

Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964) (internal citations omitted). For a classic treatment of the history and purposes of the Amendment, see LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1986).

reaching[22] even though the lower court did acknowledge the Amendment's many values and purposes.[23] The task of establishing one true purpose to the Amendment, however, is futile and is contrary to the Supreme Court's holdings because the Court has acknowledged that the Amendment includes many purposes.[24]

*A. Federalism*

The primary argument regarding the significance of federalism to cases involving potential foreign prosecutions is most pointedly articulated in the various interpretations of the Supreme Court's ruling in *Murphy v. Waterside Commission.*[25] This case held that the constitutional privilege against self-incrimination protects state and federal witnesses against incrimination under both state and federal law.[26]

The Second Circuit in *Balsys* dismissed the significance attached to the fact that *Murphy* was decided on the same day the Court ruled on *Malloy v. Hogan,*[27] which extended the Fifth Amendment to the states. Yet the very first sentence of the *Murphy* Court's opinion is: "We have held today [in *Malloy*] that the Fifth Amendment privilege against-self incrimination fully must be deemed fully applicable to the States through the Fourteenth Amendment."[28] The Court further noted that the question posed concerns "whether one jurisdiction *within our federal structure* may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction."[29] The Second Circuit's claim that there is nothing in the words of the Amendment to exclude foreign

22. *See Balsys*, 119 F.3d at 129; *see also* Gecas v. United States, 120 F.3d 1419, 1478 (11th Cir. 1997) (Birch, J., dissenting) (arguing that it is improper to select a singular purpose in an attempt to resolve disputes concerning the privilege).

23. *See* Balsys v. United States, 918 F. Supp. 588, 598 (E.D.N.Y 1996). For an argument that protection against government overreaching is the fundamental purpose of the Fifth Amendment privilege against self-incrimination, see Diego A. Rotszain, Note, *The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution*, 96 COLUM. L. REV. 1940, 1942 (1996). *But see* Scott Bovino, Comment, *A Systematic Approach to Privilege Against Self-Incrimination Claims When Foreign Prosecution Is Feared*, 60 U. CHI. L. REV. 903 (1993).

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

25. 378 U.S. 52 (1964).

26. *Murphy* overruled *United States v. Murdock*, which had held: "The English rule of evidence against compulsory self-incrimination on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the law of another country." United States v. Murdock, 284 U.S. 141, 149 (1931).

27. 378 U.S. 1 (1964).

28. The forceful dissent in *Gecas*, a case almost identical to *Balsys*, is therefore considerably weakened in its reliance on *Murphy*'s relevance to cases outside the context of the United States. *See* United States v. Gecas, 120 F.3d 1419, 1465 (11th Cir. 1997) (Birch, J., dissenting).

29. *Malloy*, 378 U.S. 52, 53-54 (1964) (emphasis added).

> the party seeking the disclosure has the power to proceed for the forfeiture and the means of enforcing it.

This passage marks an important distinction between *McRae* and *Balsys*. In *McRae*, a nation that maintained a privilege against self-incrimination entered the English courts to pursue its remedy. In *Balsys*, none of the nations potentially interested in prosecuting Balsys possess an equivalent Fifth Amendment right, and none has sought relief in the courts of the United States. *McRae* is clearly distinguishable. There is also a question of whether we should stake the future of the Fifth Amendment on one 1867 English case subsequently rejected by Parliament.[36] The court in *In re Parker* answered this question by noting:

> [T]he Justice's reference [in Murphy] to such [early] cases was simply by way of argumentative analogy to this nation's state-federal relationship and carries no further persuasion. The fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation.[37]

The Second Circuit's opinion in *Balsys*, however, drew upon *Murphy*'s conception of cooperative federalism to propose that an analogous "cooperative internationalism"[38] necessitates invocation of the privilege when a real and substantial fear of a foreign prosecution exists. This reasoning stems from *United States v. Saline Bank of Virginia*[39] in which Chief Justice Marshall, in a bill in equity, stated that the "'rule clearly is, that a party is not bound to make any discovery which would expose him to penalties.'"[40] Applying *Saline* to cases involving foreign prosecutions, however, is not a necessary and logical extension of the privilege. While the Fifth Amendment did not yet apply to the states, both federal and state jurisdictions were ultimately subject to the same sovereignty rendering the case akin to the early English cases discussed in *Murphy*.[41] The Murphy Court also found that Saline was not in conflict with an English case finding that "the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty."[42] Furthermore,

36. *See* Civil Evidence Act, LAW REFORM COMMITTEE, SIXTEENTH REPORT, 1967, CMND. 3472, at 7; Rotszain *supra* note 23, at 1949 n.80.

37. *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969).

38. *Balsys*, 119 F.3d at 131.

39. 26 U.S. (1 Pet.) 100 (1828).

40. *Murphy*, 378 U.S. at 59-60 (quoting United States v. Saline Bank of Virginia, 26 U.S. (1 Pet.) at 102). The Court in *Murphy* cited *Saline* as precedent for the holding "the privilege against self-incrimination protects a witness in a federal court from being compelled to give testimony which could be used against him in state court." *Id.*

41. *See Murphy*, 378 U.S. at 58 (citing East India Co. v. Campbell, 27 Eng. Rep. 1010 (Ex. 1749); Brownsword v. Edwards, 28 Eng. Rep. 157 (Ch. 1750)); *cf.* Rotszain, *supra* note 23, at 1947.

42. *Murphy*, 378 U.S. at 66 (quoting Queen v. Boyes, 1 Best & S.311 (Q.B. 1861)).

prosecutions from its reach must also be tempered by the fact that the holding in *Murphy* is quite distinctly tied to the American federal system. A more reasonable view was articulated in *Araneta*, which read *Murphy* as a direct consequence of *Malloy*.[30]

Unlike *Araneta*, the Second Circuit interpreted *Murphy* with reference to the privilege's history in English law. The *Murphy* Court, however, explicitly stated that its earlier decision in *Murdock* was "erroneously cited as representing the settled 'English Rule' that a witness is not protected 'against disclosing offenses in violation of the laws of another country.'"[31] In its reexamination of English law, the Court concluded that *United States v. McRae*[32] constitutes the authoritative English rule. It is *McRae* and its passages as excerpted in the *Murphy* opinion that have been seized upon by courts that allow the use of privilege to protect against foreign prosecution.

*McRae* is an 1867 English Chancery Court opinion regarding a bill filed by the United States requesting an account of money received by an agent of the Confederacy and liable to forfeiture under an Act of Congress.[33] The *Murphy* Court quoted *McRae*'s concluding language as: "[u]nder these peculiar circumstances, I cannot distinguish the case in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law."[34] This excerpt, however, fails to place *McRae* in context and has perhaps contributed to undue reliance on the case.[35] The sentences following this passage state:

> The *United States* coming into our Courts must be subject to every rule of evidence which prevails in them, and amongst others, to that which protects a witness from exposing himself to penalties to his answer. And it appears to me that it would be most unjust not to extend this protection to a case where

30. "Only when the Fifth Amendment was held applicable to the states, *Malloy v. Hogan*, 378 U.S. 1 (1964), was the privilege held to protect a witness in state or federal court from incriminating himself under either federal or state law." United States v. Under Seal (Araneta) 794 F.2d 920, 926 (4th Cir. 1986). In *Araneta*, the daughter and son-in-law of former President Ferdinand Marcos of the Phillipines refused to answer questions before a grand jury despite a grant of immunity.

31. *Malloy*, 378 U.S. at 60. For criticism of the Court's dependence on English law, see Note, *Reach of the Fifth Amendment Privilege Against Self-Incrimination When Domestically Compelled Testimony May Be Used in a Foreign Country's Court*, 69 VA. L. REV. 875, 883 (1983); and Daniel J. Capra, *The Fifth Amendment and the Risk of Foreign Prosecutions*, N.Y.L.J., Mar. 8, 1991, at 3.

32. *See McRae*, L.R. 3 Ch. App. 79 (1867).

33. The Chancery Court distinguished *McRae* from the *King of Two Sicilies v. Wilcox*, 61 Eng. Rep. 116 (1851), which declined to extend the privilege to witnesses fearing foreign prosecutions, by finding that there was no difficulty in ascertaining the meaning of American law in *McRae* and that the defendant was already subject to proceedings in an American court. L.R. 3 Ch. App. at 87.

34. *McRae*, L.R. 3 Ch. App. at 87.

35. *See* Balsys v. United States, 119 F.3d 122, 133 n.7 (2d Cir. 1997).

*Saline* may serve as evidence that cooperative federalism took time to be constitutionalized and that the expansion of the privilege was securely within the bounds of the American system.

### *B. Use Versus Compulsion*

A further complication in *Balsys* is the distinction between compulsion and use in criminal procedure. A major point in denying witnesses the right to invoke the privilege is essentially a claim that the Fifth Amendment cannot afford protection if the jurisdiction, which would use the compelled testimony, is not subject to the Amendment's constraints. In a narrow sense the debate in the circuits is a dispute as to whether it is the compelled nature of the testimony or the fact of its use which is central to the applicability of the privilege. It was precisely this argument that respondents in *Araneta* set forward: "[T]heir right not to incriminate themselves has extra-territorial effect, i.e., . . . they have a right to refuse to testify in the United States if their testimony could be *used* to incriminate them under the laws of a foreign jurisdiction."[43] There, the court rejected this line of argument finding that the privilege is implicated only where both jurisdictions are constrained by the Fifth Amendment. It is not sufficient, therefore, that a compelling jurisdiction is subject to constraints of the privilege, rather it is incrimination in the jurisdiction pursuing criminal charges that is relevant. Therefore, if no Fifth Amendment exists abroad, no right may be invoked. To hold otherwise, as the Second Circuit did in *Balsys*, is to violate this symmetry. The court's attempt to restore this balance by proposing immunity statutes failed to provide adequate protections and overstepped the court's proper role.

### *C. Policy*

The Second Circuit claimed that the specter of cooperative internationalism raises possibilities of abuse requiring that witnesses be permitted to invoke the privilege. This fear of cooperative internationalism ignores the fact that the United States has a stake in every case in which it is a party. In substance, it is the mission of the OSI[44] that emerges as a source of contention in cases like *Balsys*.[45] The mandate of OSI does not,

43. United States v. Under Seal (Araneta), 794 F.2d 920, 923 (4th Cir. 1986) (emphasis added).

44. The OSI's mission is "to investigate and institute denaturalization and deportation proceedings against suspected Nazi war criminals." United States v. Balsys, 918 F. Supp. 588, 588 n.1 (E.D.N.Y. 1996). The OSI cooperates with foreign governments, such as Israel, that prosecute suspected Nazi war criminals by sharing information. *See* Order of the Attorney General No. 851-79, Sept. 4, 1979.

45. *See* United States v. Gecas, 120 F.3d 1419, 1480 n.127 (11th Cir. 1997) (Birch, J., dissenting) (discussing Demjanjuk v. Petrovsky, 10 F.3d 338, 339-40 (6th Cir. 1993)).

however, amount to a grant of unfettered power and it would be unreasonable to consider every action involving the OSI as necessarily abusive.[46]

The Second Circuit's criticism of the OSI was also connected to a concern that the true purpose of cases such as *Balsys* is not to further deportation proceedings, but to assist in initiating foreign prosecutions. This line of reasoning seems to insist that the primary objective of litigation must relate to the crime the government is actually trying to prosecute. The court does not offer any reasons why it is more important to protect Balsys from "secondary litigation" than why Al Capone should not have been tried for tax evasion since the government actually wanted to prosecute him for racketeering.[47] Any attempt to sort out primary from secondary motivations for prosecutions would be a messy and wasteful enterprise. Even if the United State's purpose in deporting someone like Balsys is secondary to its goal of seeing him prosecuted abroad, should it be barred from doing so because there is another government that may wield a bigger stick? There is no reason to believe that the United States has "no legitimate purpose of its own, even if it also has an intention to assist a foreign government."[48]

The *Balsys* court suggested that the problems the case presents may be eliminated by offers of immunity.[49] This reasoning failed to recognize that grants of immunity are only effective when each jurisdiction is subject to the Fifth Amendment. The Fifth Amendment is not applicable extra-territorially, but rather "serves to regulate the relationship between federal and state governments and their citizens."[50] Even if a foreign nation adopted a comparable Fifth Amendment there is no guarantee that its constitutional structure would provide the same protections as does the American judiciary. The fact that certain states may have adopted the Fifth Amendment into their own constitutions prior to the decisions in *Malloy* and *Murphy* was still insufficient to equate them with the powers

46. The Attorney General's order creating the OSI lists the department's mission as: reviewing pending and new allegations of Nazi collaborators; investigating allegations to determine whether action for deportation or revocation of citizenship would be appropriate; maintaining liaisons with foreign prosecution, investigation and intelligence officers; using appropriate government agency resources; and directing and coordinating investigating prosecution of such legal actions with the Immigration and Naturalization Service, the Federal Bureau of Investigations, the Unites States Attorneys Offices and any other appropriate federal agencies. *See* Order of the Attorney General No. 851-79, Sept. 4, 1979.

47. Of course, a further distinction is that the "secondary litigation" is not within the power of the United States government.

48. *Araneta*, 794 F.2d at 928.

49. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Court held that immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over a claim of the privilege.

50. United States v. Balsys, 918 F. Supp. 588, 599 (E.D.N.Y. 1996), *rev'd*, 119 F.3d 122 (2d Cir. 1997), *cert. granted*, 66 U.S.L.W. 3399 (U.S. Jan. 16, 1998) (No. 97-873).

of the national Amendment. The federal system cannot be replicated by attempting to forge grants of immunity with foreign nations.

A further difficulty with the Circuit's suggestions for legislative action is that it overlooks issues of comity. However sacred the rights established by the U.S. Constitution may be to the American system of justice, there is no legal justification to impose such rights across national borders. The Supreme Court has declined to apply American notions of due process to foreign courts pursuing criminal proceedings against American citizens who have committed crimes outside of the United States.[51] As the Court in *Araneta* took pains to point out:

> Just as comity among nations requires the United States to respect the law enforcement processes of other nations, our own national sovereignty would be compromised if our system of criminal justice were made to depend on the actions of foreign governments beyond our control. It would be intolerable to require the United States to forego evidence legitimately within its reach solely because a foreign power could deploy this evidence in a fashion not permitted within this country.[52]

The decision whether to allow invocation of the privilege for fear of foreign prosecutions, therefore, implicates the United States's role as a potential sanctuary for those who have violated foreign laws.[53] It would also create the perverse situation in which individuals "misrepresent their personal histories and other relevant information in order to gain access to this country, leaving the government without recourse and seriously eroding domestic law enforcement."[54] Finally, the Second Circuit commented that cases like *Balsys* rarely arise.[55] The alleged infrequency of such cases should not serve to avoid deciding the principle at issue. Furthermore, the issue in *Balsys* reaches beyond deportation and denaturalization proceedings to other common areas of litigation such as enforce-

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51. *See* Neely v. Henkel, 180 U.S. 109 (1901); *see also* Ahmad v. Wigen, 726 F. Supp. 389, 411 (E.D.N.Y. 1989).

52. *Araneta*, 794 F.2d at 926.

53. According to the court in *Gecas v. United States*, 120 F.3d 1419 (11th Cir. 1997), allowing defendants to invoke the privilege for fear of foreign convictions would substantially pervert the sovereignty of the United States by creating a safeharbor for all potential criminals who are subject to prosecutions in jurisdictions that do not have a privilege against self-incrimination. *See* Kulle v. United States, 825 F.2d 1188, 1191 (7th Cir. 1987) (holding that an alien was deportable on basis that he entered the country by fraudulently answering questions on his immigration form.); *see also* 8 U.S.C.A. §§ 1182(a)(3)(E), 1227(4)(D) (West 1998). Section 1182(a)(6)(C)(i) excludes from entry any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States by fraud, or by willfully misrepresenting a material fact.

54. *Balsys*, 918 F. Supp. at 599. This is distinct from a criticism of the Fifth Amendment in general. The witness is not merely invoking the privilege because his statements might incriminate him, rather he is specifically creating a situation in which he will invoke in order to shield the disclosure of potentially incrimination information. *See also* Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).

55. United States v. Balsys, 119 F.3d 122, 135 (2d Cir. 1997).

ment of drug trafficking laws and alien tort claims.

## CONCLUSION

The Fifth Amendment privilege against self-incrimination should not protect a witness who fears prosecution abroad. The relationship of the United States to foreign sovereigns is distinguishable from the workings of the American federal system both today and before the constitutional privilege was incorporated to the states through the Fourteenth Amendment. Furthermore, the privilege's significance emerges only in relation to its use in a criminal proceeding. Since the jurisdictions that potentially could prosecute Aloyzas Balsys are not subject to the constraints of the Fifth Amendment, there is no basis for restricting the United States government from pursuing charges regarding his immigration to this country. Sound policy and respect for comity further suggest the wisdom of confining the protection of the privilege against self-incrimination to domestic prosecutions.