United States v. Gecas: Eroding the Protection of the Fifth Amendment's Self-Incrimination Clause

Vytautas Gecas, a Lithuanian citizen, is a resident alien who has lived in the United States for thirty-four years.[1] Gecas was served with an administrative subpoena on July 25, 1991, by the Office of Special Investigations (OSI) of the United States Department of Justice.[2] The OSI acted upon evidence that Gecas served in the 12th Lithuanian Schutzmannschaft battalion, which engaged in wartime atrocities against Jewish individuals under the direction of Nazi forces between 1940 and 1945.[3] If found to have participated in this type of conduct, Gecas could be deported.[4] The OSI issued the administrative subpoena to Gecas for oral and written testimony concerning these and other allegations.[5] However, Gecas refused to answer any of the questions and invoked his Fifth Amendment privilege against self-incrimination that states that "[no] person . . . shall be compelled in any criminal case to be a witness against himself."[6] In response, the OSI successfully petitioned the U.S. District Court for the Northern District of Florida to issue an order to enforce the subpoena.[7] The court reasoned that the Fifth Amendment was not a "personal 'right' conferred upon persons within the protection of American law,"[8] and, therefore, did not protect a witness against fear of foreign prosecution.[9] Gecas appealed on grounds that his silence was protected by the constitutional privilege against self-incrimination.[10] As a consequence, the district court's holding was reversed by a three-judge

1. *See* United States v. Gecas, 120 F.3d 1419, 1422 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3399 (U.S. Nov. 24, 1997) (No. 97-884).
2. *See id.* at 1423. The Office of Special Investigations [hereinafter OSI] is assigned the responsibility for "detecting, investigating, and, where appropriate, taking legal action to deport . . . any individual who was admitted as an alien into . . . the United States and who had assisted the Nazis by persecuting any person because of race, religion, national origin, or political opinion."). *Id.* at 1423 n.3.
3. *See id.*
4. *See id.* (citing 8 U.S.C. § 1251(a)(4)(D) (1994)).
5. *See id.* at 1423 (citing 8 U.S.C. § 1225(a) (1994)).
6. *Id.* at 1422 (citing U.S. CONST. amend. V, cl. 2).
7. United States v. Gecas, 830 F. Supp. 1403, 1423 (N.D. Fla. 1993).
8. *Id.* at 1421 (citing United States v. Trucis, 89 F.R.D. 671, 673 (E.D. Pa. 1981)).
9. *See id.* at 1421-22. The court found that the overriding purpose of the privilege is to regulate the actions of the United States government, not necessarily to protect all individuals. *See id.* Furthermore, the court feared that the ability to invoke the privilege based on the witnesses' real and substantial apprehension of foreign prosecution inconsistent with United States law would erode domestic law enforcement without providing any benefit for our system of justice. *See id.*
10. *See Gecas*, 120 F.3d at 1422.

panel of the Eleventh Circuit.[11] The panel found that where the threshold requirement of a real and substantial fear of foreign prosecution is met, the privilege protects an individual's freedom from governmental overreaching and creates an individual right to remain silent where testimony may be adverse to penal interest.[12] The Eleventh Circuit granted rehearing en banc and reversed the prior panel decision.[13] The court reasoned that the protection conferred by the privilege against self-incrimination was only violated at the witness's own criminal trial.[14] The court further reasoned that the protection of the Fifth Amendment privilege was limited to domestic courts.[15] Therefore, the Court *held* in a six-to-five decision that the Fifth Amendment's self-incrimination clause did not extend to a witness, in a civil domestic proceeding, who had a real and substantial fear of foreign conviction. *United States v. Gecas*, 120 F.3d 1419, 1422 (11th Cir. 1997).

The self-incrimination clause of the Fifth Amendment to the United States Constitution has virtually no legislative history.[16] However, in *Brown v. Walker*, the Supreme Court established a threshold test, where in order to claim protection of the Fifth Amendment, the witness must show her fear of conviction is real and substantial rather than merely speculative.[17]

From its inception until 1964, the self-incrimination clause primarily applied to federal courts;[18] however, in two companion cases, *Malloy v. Hogan*[19] and *Murphy v. Waterfront Commission of New York Harbor*,[20] the Supreme Court extended the Fifth Amendment to apply to state proceedings. In *United States v. Saline Bank of Virginia*, the earliest Supreme Court case dealing with the scope of the Fifth Amendment privilege, Chief Justice Marshal found that, in the context of a discovery proceeding in a federal district court, a witness who would be exposed to

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11. *See* United States v. Gecas, 50 F.3d 1549, 1567 (11th Cir. 1995).
12. *See id.* at 1564-65.
13. *See Gecas*, 120 F.3d at 1422.
14. *See id.* at 1428 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).
15. *See id.* at 1430 (citing *Verdugo-Urquidez*, 494 U.S. at 269).
16. *See id.* at 1435. "The Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordion knot in the middle of our Bill of Rights. From the beginning it lacked an easily identifiable rationale . . . . Today, things are no better: the clause continues to confound and confuse." United States v. Balsys, 119 F.3d 122, 129 (2d Cir. 1997) (quoting Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L.R. 857, 857-58 (1995)).
17. *See* Brown v. Walker, 161 U.S. 591, 599 (1896). The Court stated that the "danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character. . . ." *Id.*
18. *See* Malloy v. Hogan, 378 U.S. 1 (1964).
19. *Id.* at 52.
20. Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964).

danger under a Virginia statute was protected under the Fifth Amendment from testifying.[21] In *Malloy*, the Supreme Court explicitly expanded the constitutional scope of the Fifth Amendment privilege to apply to the states through the Due Process Clause of the Fourteenth Amendment.[22] On the same day that *Malloy* was decided, the Supreme Court held in *Murphy v. Waterfront New York Harbor* 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."[23]

Because the Supreme Court has not yet defined the scope of the self-incrimination clause, the *Murphy* Court's dicta regarding the policy of the Fifth Amendment privilege has been the focal point for the numerous courts deciding whether these same policies warrant the protection when the fear of prosecution is in a foreign jurisdiction. The *Murphy* Court reasoned that:

> [the privilege] 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

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21. 1 Pet. 100, 104 (1828)).

22. *See Malloy*, 378 U.S. at 3. "We hold that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination, and that under the applicable federal standard, the Connecticut Supreme Court of Errors erred in holding that the privilege was not properly invoked." *Id.*

23. *Murphy*, 378 U.S. at 77-78. The Supreme Court has yet to clearly define the scope of the Fifth Amendment's self-incrimination clause. For example, the Supreme Court has not ruled on the issue of whether the self-incrimination clause applies between sovereigns, although it recently granted certiorari to address this issue. *See* United States v. Balsys, 119 F.3d 122 (2d Cir. 1997), *cert. granted*, 66 U.S.L.W. 3399 (U.S. Jan. 16, 1998) (No. 97-873). In *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1972), the constitutional question was not reached because the Court found that the petitioner did not face a real threat of foreign prosecution. *See id.* The Court stated that the person claiming the Fifth Amendment privilege "must show his fear of foreign conviction is real and substantial rather than merely speculative." *Id.* (citing *Brown*, 161 U.S. at 599 (1896)). Although the Court had other opportunities to determine the scope of the self-incrimination clause, it declined to do so. *See id.*

In *Araneta v. United States*, 478 U.S. 1301 (1986), *cert. denied*, 479 U.S. 924 (1986), Chief Justice Burger granted a stay of contempt order pending certiorari and stated that more likely than not the Court would find for the petitioners seeking the protection of the privilege for fear of foreign prosecution. *See id.* at 1304. Moreover, the Chief Justice stated that "*Murphy* . . . contains dictum which, carried to its logical conclusion, would support such an outcome." *Id.*

The same year, in *Mikutaitis v. United States*, Justice Stevens also stayed the enforcement of a contempt order where a witness before a grand jury feared his statements would incriminate him in the Soviet Union. 478 U.S. 1306, 1307 (1986), *stay vacated*, 479 U.S. 911 (1986). Justice Stevens based his decision on the fact that Chief Justice Burger granted a stay in *Araneta* and *Mikutaitis* addressed a similar question. *See id.* at 1308. However, since the Court denied certiorari in *Araneta*, 478 U.S. 1301 (1986), *cert. denied*, 479 U.S. 924 (1986), the stay was vacated in *Mikutaitis*, 478 U.S. at 1306, *stay vacated*, 479 U.S. 911 (1986).

> 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 whole load."[24]

Furthermore, the Court reasoned that in our age of cooperative federalism, where the federal and state governments are working in conjunction with each other to fight crime, the policies behind the Fifth Amendment privilege would be defeated if a witness could be "whipsawed" into incriminating himself in one jurisdiction while testifying in another.[25] In addressing the application of the Fifth Amendment privilege, the *Murphy* Court relied on three well-established English cases that upheld a similar right to refuse to testify where such testimony would be incriminating in a distinct jurisdiction.[26]

Entwined in the application of the Fifth Amendment privilege is the question as to what extent immunity can satisfy the constitutional requirement. In *Kastigar v. United States*, the Supreme Court held that "no statute which leaves the party or witness subject to prosecution after he answers the criminating question . . . can have the effect of supplanting the privilege conferred by the Constitution of the United States."[27] However, the Court found that "use" and "derivative-use" immunity provides sufficient protection to supplant the Fifth Amendment requirement.[28]

The circuits are split as to the application of the Fifth Amendment privilege between sovereigns. The Tenth Circuit held in *In re Parker*[29] that the Fifth Amendment did not protect against self-incrimination for acts made criminal by laws of a foreign nation.[30] Since the witness before the grand jury was granted full immunity before the courts of the United

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24. *Murphy*, 378 U.S. at 55 (citing 8 WIGMORE, EVIDENCE 317 (McNaughton rev., 1961)).

25. *See id.*

26. *See id.* at 58-63 (quoting East India Co. v. Campbell, 27 Eng. Rep. 1010 (1749) (a witness was allowed to invoke the privilege where his testimony could be used against him in another jurisdiction, an Indian court, even though he was not punishable in Great Britain); (quoting Brownsward v. Edwards, 28 Eng. Rep. 157 (1750) (where testimony that would incriminate the witness under ecclesiastical law of England was protected as "no one is bound to answer so as to subject himself to punishment"); (citing United States of America v. McRae, L.R., 3 Ch. App. 79, 83-84 (1867) (where the court established the settled English rule that witnesses facing the peril of incriminating themselves in a foreign jurisdiction are no different than those who faces this peril in England)).

27. Kastigar v. United States, 406 U.S. 441, 450-51 (1972).

28. *See id.* at 462 (citing 18 U.S.C. § 6002). "[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ." 18 U.S.C. § 6002.

29. 411 F.2d 1067 (10th Cir. 1969), *vacated as moot sub nom.* Parker v. United States, 397 U.S. 96 (1970).

30. *See id.* at 1070.

States, she could be ordered to testify because her testimony did not provide any danger of incrimination.[31] The court reasoned that the early English cases cited in *Murphy*, propounding the right to invoke the privilege between jurisdictions, were merely utilized to illustrate this country's state-federal relationship and had no further persuasion.[32] Moreover, the court relied on the policy argument that domestic investigations could be hampered by foreign laws that have no place in American jurisprudence.[33]

Similarly, in *United States v. (Under Seal)*, the Fourth Circuit held that the daughter and son-in-law of the former President of the Philippines, Ferdinand E. Marcos, could not succeed on a Fifth Amendment claim where their compelled testimony before the grand jury was protected by a grant of use and derivative-use immunity, and their only fear of prosecution was by a foreign sovereign.[34] The court opined that only when the Fifth Amendment applied to the states did it protect persons testifying in a federal court from incriminating themselves in a state court and vice-versa.[35] The court reasoned that the Fifth Amendment only extends its protection when the sovereign compelling the testimony and the sovereign using the testimony are both constrained by the Fifth Amendment.[36] Although the court noted that Fifth Amendment privilege "protects the individual dignity and conscience," the court focused on the second purpose of the privilege: to "preserve the accusatorial nature of our system of criminal justice."[37] In regard to the second purpose, the court rationalized that the privilege does not apply to prosecution by a foreign sovereign not similarly constrained, because "[c]omity among nations dictates that the United States not intrude into the law enforcement activities of other countries conducted abroad."[38] Moreover, the court reasoned, as did the Tenth Circuit in *In re Parker*, that constriction by foreign laws in gathering evidence would jeopardize the sovereignty of this country.[39] The court noted, albeit in dicta, that it was not deciding that the privilege could never apply; indeed, it might apply in

31. *See id.* at 1069.
32. *See id.* at 1070.
33. *See id.* "The ideology of some nations considers failure itself to be a crime and could provide punishment for the failure, apprehension, or admission of a traitorous saboteur acting for such a nation within the United States." *Id.*
34. *See* United States v. (Under Seal), 794 F.2d 920, 921 (4th Cir. 1986).
35. *See id.* at 926 (citing Malloy v. Hogan, 378 U.S. 1 (1964)).
36. *See id.*
37. *Id.*
38. *Id.*
39. *See id.*

a situation where our government participated "through a joint venture" with foreign law enforcement officials.[40]

In contrast, the Second Circuit held in *United States v. Balsys* that the privilege against self-incrimination protected a resident alien, suspected of being a member of the Lithuanian Security Police, from being compelled to testify before OSI officials in a deportation hearing, where there was a real and substantial risk that his testimony would be used against him in a foreign criminal prosecution in Lithuania, Germany, and Israel for war crimes against Jewish individuals and other civilians.[41] The court concluded that the Fifth Amendment privilege serves 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."[42] In reviewing the constitutional policy to protect the individual, the court found that the "cruel trilemma of self-accusation, perjury, or contempt" was a violation of the Fifth Amendment regardless of the entity or entities prosecuting the witness.[43] The court's discussion focused on the privilege's purpose to promote the systemic values of our method of criminal justice.[44] Directly contradicting the Fourth Circuit, the court found that the Fifth Amendment did, in fact, prevent a witness in federal court from being prosecuted in a state court before it applied to the states and, therefore, the foreign sovereign did not have to be constrained by the Fifth Amendment.[45] The *Balsys* court further reasoned that "cooperative federalism" described in *Murphy* as warranting protection was similar to today's "cooperative internationalism."[46]

The purpose of the OSI is to gather evidence against suspected Nazi collaborators like Balsys and exchange incriminating evidence with foreign countries; consequently, such collaboration was considered by the

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40. *See id.* at 928.

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

42. *Id.* at 129 (citing Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964)).

43. *See id.* at 130.

44. *See generally id.*

45. *See id.* at 133 n.6. The *Balsys* court found that the dicta in *Murphy* was contrary to the Fourth Circuit's reasoning that Murphy would not have held the privilege as being applicable between both federal and state jurisdictions if Malloy had not made the Fifth Amendment applicable to the states through the Fourteenth Amendment on the same day. *See id.*

46. *See id.* at 131. In *Murphy*, the court suggested that the purpose of avoiding governmental abuse was best served by preventing states and the federal government from compelling testimony that might incriminate the witness in a court of another jurisdiction. This is because there is frequently a "cooperative federalism" between the several states and the nation, as a result of which the federal and state governments wage a "united front against many types of criminal activity." *Id.* at 130 (quoting *Murphy*, 378 U.S. at 56).

Balsys court to be sufficient to create an incentive for governmental overreaching.[47] The court opined that the fact that the privilege has costs for domestic law is unimportant as such costs were foreseen and accepted by the drafters of the Bill of Rights.[48] Moreover, the court rationalized that those cases in which a "real and substantial fear" of foreign prosecution exists are extremely limited, and, therefore, the undermining of the American judicial system is an unrealistic fear.[49]

The Sixth Circuit addressed the issue of "cooperative internationalism" on facts similar to those of the noted case in the context of the *Brady* rule and prosecutorial misconduct.[50] The *Demanjanjuk* court re-opened an extradition hearing for the petitioner who was accused by the OSI of being the notorious "Ivan the Terrible," a Ukrainian guard at the Triblinka concentration camp.[51] Demanjanjuk was extradited to Israel and sentenced to death.[52] However, evidence surfaced exculpating Demanjanjuk, and he was released by the Israeli authorities.[53] The evidence was in the possession of the OSI attorneys working to extradite Demanjanjuk to Israel seven years earlier.[54] In re-opening the case, the court found that "the OSI attorneys acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly."[55] In fact, the court referred to evidence that political pressure might have played a role in the prosecution's failure to reveal the exculpating documents.[56]

District courts have also diverged on their interpretations of the Fifth Amendment privilege against self-incrimination. Like the circuits, the district courts are split as to whether the alleged limitation to domestic law enforcement should supersede the privilege. In *Moses v. Allard*,[57] a debtor who feared Swiss prosecution validly invoked the Fifth

47. *See id.* at 131 (citing United States v. Balsys, 918 F. Supp. 558, 595-97 (E.D.N.Y. 1996)).

48. *See id.* at 134 (citing *In re* Cardassi, 351 F. Supp. 1080, 1086 (D. Conn. 1972)).

49. *See id.* at 135-36. *But see* United States v. (Under Seal), 794 F.2d 926 (4th Cir. 1986); Parker v. United States, 397 U.S. 96 (1970).

50. *See* Demanjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

51. *See id.* at 339.

52. *See id.* at 340.

53. *See id.* at 342.

54. *See id.* at 350.

55. *Id.* at 354.

56. The trial attorney, George Parker, then in charge of the case, wrote in his 1980 memorandum that "the denaturalization case could not be dismissed because of factors 'largely political and obviously considerable.'" *Id.* Parker prepared a memo of the exculpating evidence and sent it to senior OSI officials. However, his memorandum was ignored, and he subsequently resigned from the Justice Department. *See id.* at 346.

57. 779 F. Supp. 857 (E.D. Mich. 1991).

Amendment privilege in a bankruptcy hearing.[58] The *Moses* court disagreed with the Fourth Circuit's line of reasoning and opined that the plain language of the privilege, "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself," indicated that by including the word "any" instead of "domestic," the framers clearly intended the privilege to protect the accused from incriminating himself in "any" case whether foreign or domestic.[59]

The *Moses* court relied on *Murphy* for the principle that the policy of the Fifth Amendment privilege, a fundamental right against self-incrimination, would be defeated if a witness could be "whipsawed" into incriminating himself in a foreign jurisdiction.[60] Furthermore, the *Moses* court reasoned that the "whipsaw" effect "did not end at our borders but [was] equally relevant when the prosecuting body was a foreign nation instead of a state."[61] As to the burden on law enforcement personnel, the court reasoned that the Bill of Rights was created to protect individual rights—even where they are a limit to law enforcement.[62] Moreover, the court stated that under the threshold test in *Zicarelli*, requiring a real and substantial fear of foreign prosecution, it is very difficult for the constitutional question to pass the "significant threshold requirement."[63]

Similarly, in the *United States v. Trucis*,[64] the government brought suit seeking revocation of Trucis's certificate of naturalization for allegedly concealing biographical facts showing that he persecuted Jewish civilians, which would have led to the denial of naturalization.[65] The *Trucis* court expressed that "[t]he privilege is not simply a limit on the activities of American courts and law enforcement authorities: it is a freedom conferred upon persons within the protection of American law."[66] The court held that it could not direct Trucis to give what may

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58. *See id.* at 859; *see, e.g.*, Yves Farms, Inc. v. Rickett, 659 F. Supp. 932, 940 (M.D. Ga. 1987) (holding foreign citizen was entitled to invoke the Fifth Amendment privilege against private-party defendants seeking testimony on a collateral issue); Mishima v. United States, 507 F. Supp. 131, 135 (D. Alaska 1981) (Japanese seamen who were involved with the grounding of a boat were allowed to invoke the privilege only in regard to specific questions that would tend to incriminate them in any Japanese prosecution).

59. *Id.* at 874. This echoes the sentiment expressed by Chief Justice Marshal in *Saline Bank*. *See* Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 59-60 (1964).

60. *See Moses*, 779 F. Supp. at 875 (citing *Murphy*, 378 U.S. at 54); *see also* United States v. Balsys, 119 F.3d 131 (2d Cir. 1997), *cert. granted*, 66 U.S.L.W. 3399 (U.S. Jan. 16, 1998) (No. 97-873).

61. *Id.*

62. *See id.* at 882.

63. *Id.*

64. 89 F.R.D. 671 (E.D. Pa. 1981).

65. *See id.* at 672 (citing 8 U.S.C. § 1451).

66. *Id.* at 673.

have been incriminating testimony where the possible foreign prosecution would be for crimes recognized as such in this country.[67]

On the contrary, in the *United States v. Lileikis*,[68] an OSI case seeking the testimony of a suspected Nazi, the court held that the government's need for the witness's testimony in order to protect fundamental domestic laws overrode the privilege in its application to foreign prosecution.[69] However, the court noted that

> a court of the United States should not bend the Constitution solely to promote the foreign policy objectives of the executive branch . . . by compelling the cooperation of a witness in a proceeding that does not have as its fundamental purpose the vindication of the domestic laws of the United States.[70]

Consequently, the court held that the United States' contingent purpose, to assist a foreign government in prosecuting the witness, was not sufficient grounds for Lileikis to invoke the privilege.[71]

In the noted case, the six-to-five majority began by reviewing the threshold test to satisfy the self-incrimination clause of the Fifth Amendment. The Court found, pursuant to *Zicarelli*,[72] that the elicited testimony could cause Gecas to incriminate himself under foreign law.[73] Specifically, the court found that both Israel and Lithuania had statutes punishing Nazi war criminals[74] and that the OSI has a primary function of expelling war criminals from the United States.[75] In substantiating the fear as being real and not merely speculative, the *Gecas* court relied on *Kalejs v. INS*,[76] in which the OSI had successfully deported a resident alien who subsequently stood trial for Nazi war crimes in Israel.[77] The *Gecas* court further emphasized that the OSI was required to "'[m]aintain liaison[s] with foreign prosecution, investigation and intelligence officers.'"[78] Therefore, the *Gecas* court concluded that Gecas faced a real

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67. *See id.*

68. 899 F. Supp. 802 (D. Mass. 1995).

69. *See id.* at 809; *see also* Phoenix Assurance Company of Canada v. Runck, 317 N.W.2d 402, 413 (N.D. 1982) (holding that the Fifth Amendment does not apply to foreign prosecution).

70. *See Lileikis*, 899 F. Supp. at 809.

71. *See id.*

72. United States v. Gecas, 120 F.3d 1424 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3399 (U.S. Nov. 24, 1997) (No. 97-884) (citing Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478 (1972)).

73. *See id.* at 1427.

74. *See id.* at 1424-25 (citing Nazis and Nazi Collaborators (Punishment) Law, S.H. 57(2) (1950); Genocide of the People of Lithuania art. 1 (1992)).

75. *See id.* at 1426 (citing 28 C.F.R. § 0.55(f) (1995)).

76. Kalejs v. INS, 10 F.3d 441 (7th Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994).

77. *See Gecas*, 120 F.3d at 1426 (citing *Kalejs*, 10 F.3d at 448).

78. *Id.*

danger that the information obtained in his interrogation would be transferred to any country interested in obtaining a conviction.[79]

The *Gecas* court then faced the difficult issue that has divided the circuits and that has been left unanswered by the Supreme Court: whether a real and substantial fear of foreign conviction is a valid basis for the invocation of the Fifth Amendment privilege against self-incrimination. First, the court found that that privilege only protects a witness from criminal penalties in a criminal trial.[80] As a threshold matter, the court determined that the plain language of the privilege provides no clear answer.[81] The court noted that a deportation hearing on its face was a civil hearing;[82] however, the court conceded that a witness facing a substantial chance of conviction in a current or subsequent "civil or criminal, administrative or judicial, investigatory or adjudicatory" proceeding may invoke the privilege.[83] In deciding whether a deportation proceeding can become a criminal trial for Fifth Amendment purposes,[84] the court quite cursorily found that the self-incrimination clause only protects a witness against "criminal penalties" derived from compelled self-incriminating testimony, not mere prosecution based on coerced admissions.[85]

Second, the *Gecas* court reasoned that there were two ways to enforce the privilege: either by refusing to force witnesses to testify against their own penal interests or by excluding compelled testimonial self-incrimination and its fruits from evidence.[86] The *Gecas* court considered the former protection as being merely prophylactic, a preliminary protection that was not guaranteed, because the constitutional violation did not occur until the witness was "convicted."[87] The *Gecas*

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79. *See id.*
80. *See id.* at 1428.
81. *See id.* at 1427.
82. *See id.* (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984)).
83. *Id.* at 1428 (quoting Kastigar v. United States, 406 U.S. 444 (1972)).
84. *See id.*
85. *See id.* (citing *Kastigar*, 406 U.S. at 453). "The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted." *Kastigar*, 406 U.S. at 453. Furthermore, the *Gecas* court briefly concluded that "the actual violation if any, occurs only at a witness's own criminal trial." *Id.* at 1428 (citing United States v. Verdugo-Urquidez, 494 U.S. 264 (1990)).
86. *See id.* at 1428-29.
87. The court primarily derived this concept from *Saline Bank of Virginia*, in which Chief Justice Marshall held that "'a party is not bound to make any discovery which would expose him to penalties,'" because, as construed by the *Gecas* court, the damaging information was hidden from the opposing party. *See id.* at 1429 (quoting *Saline Bank of Virginia*, 26 U.S. (1 Pet.) at 104). However, the court considers the hiding of evidence as merely a preventive measure and not required because the privilege only protects against conviction, not mere compulsion of testimony. *See Gecas*, 120 F.3d at 1429 n.13 (citing Brown v. Walker, 161 U.S. 600 (1896)).

court reasoned that a court considering a motion to compel testimony acts as a court of equity, "balancing the risk of a violation of the Self-Incrimination Clause against the Government's right to the evidence of every citizen."[88] It found that courts presiding over a "criminal trial" must exclude from evidence compelled testimonial self-incrimination and its fruits.[89] However, it stated that courts (presumably civil courts) can refuse to force witnesses to testify against their own penal interest but are not necessarily required to do so.[90] The *Gecas* court relied on *Kastigar* in reasoning that the Fifth Amendment protects against the infliction of criminal penalties "based on self-incrimination, not against mere prosecution."[91] Therefore, the court found that the right against self-incrimination in a domestic hearing is prophylactic, even if the information could possibly be used in a subsequent criminal trial because it would be the criminal judge's obligation to keep out this testimony and its fruits.[92]

Third, the *Gecas* court found that the Fifth Amendment does not apply to foreign court proceedings, and, therefore, Gecas did not fear criminal penalties from a court restrained by Fifth Amendment protections.[93] The court relied on Fourth Amendment cases propounding the concept that the Supreme Court has refused to apply the procedural protections of the Constitution to foreign citizens in foreign courts.[94] The court primarily focused on dicta from one of these cases, *United States v. Verdugo-Urquidez*, in reasoning that the Fifth Amendment never applies to foreign court proceedings involving foreign citizens.[95] The court rationalized that "[b]y necessary implication, the United States Constitution places no restraints at all on a *foreign* government's treatment of its *own* citizens who have allegedly committed crimes

88. *Id.* at 1429 (citing Mason v. United States, 244 U.S. 362, 364 (1917)).

89. *See id.* at 1428 (citing Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 79 (1964)).

90. *See id.* at 1429 (citing *Saline Bank of Virginia*, 26 U.S. (1 Pet.) at 104).

91. *Id.* at 1429-30 n.14 (citing Kastigar v. United States, 406 U.S. 453 (1972)).

92. *See id.* at 1429.

93. *See id.* at 1430 (citing United States v. Verdugo-Urquidez, 494 U.S. 269 (1990)).

94. *See id.* (citing United States v. Curtiss Wright Export Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.")); *cf.* Neely v. Henkel, 180 U.S. 109, 123 (1901) (an American citizen who commits a crime abroad is subject to foreign laws).

95. *See* United States v. Gecas, 120 F.3d 1430 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3399 (U.S. Nov. 24, 1997) (No. 97-884) (citing *Verdugo-Urquidez*, 494 U.S. at 269). The *Verdugo-Urquidez* court, in denying the application of Fourth Amendment protection against search and seizure by American authorities of a Mexican residence in Mexico, relied on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which held that war criminals arrested in foreign territory could not obtain a writ of habeas corpus in a U.S. federal court on the grounds that their Fifth Amendment rights were violated by the foreign courts.

abroad."[96] Therefore, the *Gecas* court found that Gecas faced no criminal proceeding in a court protected by the Fifth Amendment.[97] Furthermore, the court held that the foreign prosecution stemming from his deportation hearing testimony would not make his deportation hearing a criminal case; thus, the court could compel him to testify.[98]

Fourth, the court analyzed the *Murphy* decision as supporting the finding that the Fifth Amendment does not proscribe a noncriminal court from compelling incriminating testimony.[99] The *Gecas* court reasoned that since the Fifth Amendment applied to both federal and state courts, the *Murphy* court did not decide the issue of whether the violation occurred at "compulsion" or "use" of the testimony.[100] In addition, the *Gecas* court stated that the English cases relied on in *Murphy* did not support the notion that the privilege is applicable between sovereigns.[101] The court reasoned that *Campbell* dealt with incrimination that would occur within the same "legislative sovereignty."[102] Similarly, the court stated that *Brownsward* would have only subjected the defendant to prosecution in an ecclesiastical court under the same sovereign power as the criminal court.[103] Finally, the *Gecas* court determined that *McRae*, which did uphold this right between foreign courts, was overruled by Parliament.[104] Therefore, the *Gecas* court narrowly construed the *Murphy* decision as not applying when the fear of prosecution is in a foreign court.[105]

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96. *Gecas*, 120 F.3d at 1430.
97. *See id.* at 1431.
98. *See id.*

> A proceeding becomes a "criminal case" only when a witness faces conviction on the basis of his testimony in a jurisdiction subject to the Fifth Amendment of the United States Constitution . . . . [T]he United States Constitution does not prohibit foreign countries from trying and convicting their own citizens on the basis of self-incrimination, . . . therefore, Gecas does not face the kind of conviction proscribed by the Self-Incrimination Clause, and his deportation is not a "criminal case."

Id. at 1429-31.

99. *See id.* at 1431.
100. *See id.* at 1432 (quoting Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 57 n.6 (1964)):

> In every "whipsaw" case, either the "compelling" government or the "using" government is a State, and, until today, the States were not deemed fully bound by the privilege against self-incrimination. *Now that both governments are fully bound by the privilege*, the conceptual difficulty of pinpointing the alleged violation of the privilege on "compulsion" or "use" need no longer concern us.

101. *See id.* at 1432-33.
102. *See id.* at 1432 (citing *Murphy*, 378 U.S. at 82 n.1).
103. *See id.* at 1433 (citing Brownsward v. Edwards, 28 Eng. Rep. 157 (1750)).
104. *See id.* (citing Civil Evidence Act, 1968, ch. 64, § 14(1) (Eng.)).
105. *See id.* at 1431.

Fifth, the *Gecas* court reasoned that neither corroboration between the OSI and the foreign countries' law enforcement agencies nor extradition treaties warrant the finding that the United States is both the compelling and the using sovereign.[106] The court relied on cases in which intergovernmental cooperation in sharing information between law enforcement agencies led to an increased chance of prosecution in Latin America, but did not make the foreign government an agent of the United States.[107] It further relied on a Supreme Court holding that extradition does not ordinarily subject the requesting sovereign's legal regime to constitutional scrutiny in American courts.[108] Thereafter, Gecas failed to show that the United States was prosecuting him in a foreign country because the *Gecas* court found no agency relationship existed between the sovereigns.[109]

Finally, the court reinforced its rationale by considering the history behind the Fifth Amendment, as it has virtually no legislative underpinnings.[110] The court concluded that the framers intended to protect the "integrity of the common-law criminal trial against the adoption of inquisitional tactics by the federal government."[111] The court reasoned that, like our English predecessors protecting themselves from religious oppression and lack of protection from self-incrimination in ecclesiastical courts, the colonists were reacting to political oppression and wanted to limit the power of the government to establish tribunals that did not adhere to common law criminal procedure.[112] In doing so, the court rejected the argument that the privilege is an individual right as against the world.[113] Therefore, the court concluded that Gecas is not protected by the Fifth Amendment when he fears prosecution only by a foreign sovereign not subject to the United States Constitution.[114]

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106. *See id.* at 1433-34.

107. *See id.* at 1434 (citing United States v. Behety, 32 F.3d 503, 511 (11th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995) (holding that Guatemalan officials did not become agents of the United States when they stopped and searched the defendant's boat on a tip from a DEA agent); Birdsell v. United States, 346 F.2d 775, 782 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965) (holding that Mexican police were not acting as agents of the United States when "American police officers gave information leading to the arrest and search" of the defendants in Mexico)).

108. *See Gecas*, 120 F.3d at 1433 (citing Glucksman v. Henkel, 221 U.S. 508, 512 (1911)).

109. *See id.* at 1434.

110. *See id.* at 1435-54. The Court began by reviewing the privilege in medieval ecclesiastical procedure, then proceeded to discuss its use in medieval English courts, and continued through time leading up to the role of the privilege in colonial American criminal procedure. *See id.*

111. *Id.* at 1456.

112. *See id.* at 1454.

113. *See id.* at 1456.

114. *See id.* at 1457.

The dissent disagreed with every step of the court's reasoning in respect to the issue of whether the privilege against self-incrimination protects against prosecution in a foreign court.[115] First, the dissent reasoned that the Fifth Amendment protects not only the use but the compulsion of incriminating testimony.[116] As a threshold matter, the dissent opined that the individual-rights-based purpose of the privilege was not prophylactic and that the majority misused this term.[117] Moreover, in relying on the pivotal dicta in *Murphy*, the dissent noted:

> The fact that Gecas' fear is of foreign prosecution, not domestic prosecution, does not relieve the "cruel trilemma of self-accusation, perjury or contempt" or vindicate "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."[118]

In addressing the use of immunity by the compelling court, the dissent reasoned that *Kastigar* stands for the principle that court-granted immunity can remove the threat of prosecution in a domestic case; however, it does not suggest that a real and substantial fear of prosecution in a foreign court can be ignored by a domestic court.[119]

Second, the dissent reasoned that even if the only purpose of the Fifth Amendment privilege against self-incrimination was to "preserve the integrity of our criminal justice system by constraining overzealous prosecution," then it would have held that the privilege applies where our government is working in conjunction with other governments to prosecute a crime.[120] Moreover, the dissent stated, "[i]f the purpose of the Fifth Amendment, like that of the *Brady* rule, is to protect the integrity of the judicial system by restraining overzealous prosecution, then the Fifth Amendment must also apply in [the instant case]."[121]

The decision in *Gecas* is troublesome for a variety of reasons. The court misinterpreted jurisprudence in finding that the individual rights

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115. *See* United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997) (Birch, C.J., dissenting).

116. *See id.* at 1459 (citing Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964)).

117. *See id.* at 1461-62. The dissent looked to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436-37 (1966), which considered *Miranda* warnings to be prophylactic because they were not themselves rights protected by the Constitution. *Gecas*, 120 F.3d at 1462 (citing *Miranda*, 384 U.S. 436-37 (1966)).

118. *See id.* at 1461 (quoting *Murphy*, 378 U.S. at 55).

119. *See id.* at 1463-64 (citing Brown v. Walker, 161 U.S. 591 (1896); Kastigar v. United States, 406 U.S. 441 (1972)).

120. *See id.* at 1466 n.51 (citing United States v. Balsys, 119 F.3d 135 (2d Cir. 1997), *cert. granted*, 66 U.S.L.W. 3399 (U.S. Jan. 16, 1998) (No. 97-873)). The dissent further relied on *Demanjanjuk*, 10 F.3d 338, where the Sixth Circuit held that the *Brady* rule should apply in denaturalization and extradition hearings, including those of suspected Nazis like Gecas. *Id.*

121. *Gecas*, 120 F.3d at 1467 n.51.

purpose of the Fifth Amendment privilege was only prophylactic and, therefore, relied on faulty circular reasoning to conclude that the privilege only applied at the witness's criminal trial. Moreover, the court unconvincingly dismissed the argument that the United States was working in conjunction with foreign nations to prosecute Gecas. Furthermore, the decision to allow the executive branch to force self-incriminating testimony from any witness in a United States court without guaranteeing immunity is a serious retrenchment in the law.

First, the court erred in reaching the conclusion that the protection of the "individual rights purpose" of the privilege against self-incrimination was merely "prophylactic."[122] The court recognized that "a court faced with a government motion to compel incriminating testimony from a witness cannot order the witness to testify in reliance on a subsequent court's exclusion of the testimony."[123] Nevertheless, the *Gecas* court disregarded this rationale in interpreting *Kastigar* and the facts of the instant case.

The *Kastigar* court was deciding whether immunity provisions could supplant Fifth Amendment protection.[124] The *Kastigar* court stated that "[n]o statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."[125] Therefore, the compulsion of testimony is forbidden where it is not guaranteed to be omitted from subsequent criminal cases, thus contradicting the classification of the privilege as being prophylactic or preventative.[126]

Furthermore, when the *Kastigar* court found that the Fifth Amendment did not grant transactional immunity, it was in a domestic case where it could be assured that the testimony would not be used to incriminate the individual.[127] As applied to the fear of foreign prosecution, the United States cannot guarantee that testimony ordered pursuant to federal statute will not be leaked to a foreign prosecutor who in turn can use this information to prosecute the witness.[128]

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122. *See generally id.*
123. *Id.* at 1429 n.13 (citing Pillsbury Co. v. Conboy, 459 U.S. 248, 262 (1983)).
124. *See* Kastigar v. United States, 406 U.S. 453 (1972).
125. *Id.* at 450-51.
126. *See id.* at 453.
127. *See id.*
128. *See Cardassi*, 351 F. Supp. at 1082 ("The inability of American courts to use Rule 6(e) as an effective protection for this witness against foreign use of her compelled testimony is highlighted by comparison with the ability the courts do have to enforce within this country the derivative use prohibition of 18 U.S.C. § 6002."). *Id.*

Second, the *Gecas* court erroneously relied on *Verdugo-Urquidez* to support the finding that the Fifth Amendment only applies at the defendant's criminal trial.[129] The *Gecas* court merely relied on two sentences of dicta: "Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, *which is not at issue in this case*. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants."[130] The *Verdugo-Urquidez* court did not negate that a civil trial can become a "criminal case" for Fifth Amendment purposes if the defendant faces a substantial fear of prosecution.[131]

The *Gecas* court then inappropriately interpreted the holding from *INS v. Lopez-Mendoza*[132] to conclude that a deportation was only a civil hearing in the context of Fifth Amendment or even Fourth Amendment review.[133]

Ironically, the *Gecas* court addressed the issue of whether a deportation hearing can be deemed a criminal proceeding for Fifth Amendment purposes.[134] The court relied on the *Kastigar* court's finding that a witness facing a legitimate possibility of conviction in either the current or subsequent proceeding may invoke the privilege against self-incrimination "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory."[135] However, the *Gecas* court relied on *Kastigar* to find that the protection of testimony in a civil trial is prophylactic and that the privilege is not guaranteed in the proceeding civil trial if it will be protected in the subsequent criminal trial.[136] In denying the possibility that Gecas's civil deportation hearing could be considered a criminal trial for Fifth Amendment purposes, the *Gecas* court relied on the dicta in *Verdugo-Urquidez*.[137] However, *Kastigar*

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129. *See* United States v. Gecas, 120 F.3d 1468 n.59 (11th Cir. 1997) (Edmondson, C.J., dissenting) (citing United States v. Verdugo-Urquidez, 494 U.S. 264 (1990)).

130. *Id.* (quoting *Verdugo-Urquidez*, 494 U.S. at 264).

131. *See Kastigar*, 406 U.S. at 444.

132. 468 U.S. 1032 (1984).

133. *See Gecas*, 120 F.3d at 1427. The Supreme Court merely found that the Fourth Amendment did not apply to "the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers" in deportation hearings; the Court was not dealing with "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness." *Lopez-Mendoza*, 468 U.S. at 1050-51. Furthermore, the civil nature of the deportation hearing for Fourth Amendment review does not expressly or implicitly reject the notion that civil trials can become criminal trials for Fifth Amendment self-incrimination purposes.

134. *See Gecas*, 120 F.3d at 1428.

135. *Id.* (quoting *Kastigar*, 406 U.S. at 444).

136. *See id.*

137. *See id.*

refutes the rationale for which the *Gecas* court purports *Verdugo-Urquidez* stands: that the constitutional violation only occurs at the witness's subsequent criminal trial.[138]

Third, the *Gecas* court unconvincingly dismissed the argument that an agency relationship did not exist between the OSI and the foreign sovereigns who were seeking the prosecution of Gecas.[139] In relying on cases in which domestic law enforcement officials "tipped off" foreign law enforcement officials, reasonable people would likely agree that an agency relationship did not exist between sovereigns.[140] However, the facts of the instant case are distinct. In *Demanjanjuk*, the Sixth Circuit deemed an extradition hearing of a suspected Nazi as a criminal trial where the OSI sought a murder conviction that would be enforced in Israel.[141] Overwhelming evidence in *Demanjanjuk* indicated that the OSI attorneys were "conviction hungry" and pressured by United States political forces to extradite a man when they had evidence that would have exculpated him from the crime in question.[142] The *Demanjanjuk* court found the record

> [r]eplete with evidence that Allan Ryan [the director of OSI] was considering extradition of Nazi war criminals to Israel even before *Demjanjuk's* denaturalization become final. When that event occurred, the government did not deport Demjanjuk; instead, it sought his extradition for trial as Ivan the Terrible pursuant to Israel's request.[143]

The *Demanjanjuk* court found that not only was there a very real cooperation between the sovereigns, but that the "win at all cost" attitudes of the OSI attorneys contrasted sharply with those of the Israeli prosecutors.[144] Even several of those courts, finding the Fifth Amendment privilege inapplicable to certain specific situations relating to the fear of foreign prosecution, indicated that they would possibly allow the privilege to be enforced if the United States acted in conjunction with the foreign sovereign.[145]

Fourth, in addition to the *Gecas* court's inconsistent findings, the decision limiting the Fifth Amendment's scope, to only protect witnesses from incriminating themselves in domestic courts, is a significant retrenchment in the law. In *Araneta*, the former Chief Justice of the Supreme Court reasoned that the dicta in *Murphy* stood for the principle

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138. *See id.* at 1428.
139. *See id.* at 1434.
140. *See Moses*, 779 F. Supp. at 881.
141. *See Demanjanjuk*, 10 F.3d 338.
142. *See id.* at 354.
143. *Id.*
144. *See id.* at 355.
145. *See (Under Seal)*, 794 F.2d at 928; *Lileikis*, 899 F. Supp. at 809.

that the Fifth Amendment protected a witness from incriminating herself in a foreign court.[146] The *Murphy* court considered this protection a fundamental right,[147] while the Fourth Circuit in *(Under Seal)*, although denying protection to petitioners facing the fear of foreign prosecution, suggested that the protection might apply where the government participated "through a joint venture" with foreign law enforcement officials.[148] It seems clear that the case of a joint venture exists where the OSI works in conjunction with foreign countries in deporting or extraditing suspected Nazis to countries where they can be prosecuted.[149]

Moreover, the only other court that denied the Fifth Amendment privilege in the context of an OSI deportation hearing did so for the wrong reasons.[150] The *Lileikis* court reasoned that the government's need for the witness's testimony to protect fundamental domestic laws overrode the witness's privilege in protection from self-incrimination in a foreign court.[151] However, the test should not be a balancing test. The Bill of Rights should not be eroded simply because it might have a hampering effect on law enforcement officials.[152] Although not binding, the *Moses* court made a very simple yet resounding statement in favor of the protection in the instant case: the framers wrote that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself."[153] The court, therefore, observed that the framers did not specify a domestic, federal, or state forum, rather, they found the Fifth Amendment privilege to apply to "any" criminal case.[154] However, the *Gecas* court took great pains to limit this right to the United States. As reasoned by the *Moses* court, it is highly unlikely that the framers would have intended that English courts be allowed to use testimony protected in American courts from incriminating an American in an English court.[155] However, as the Eleventh Circuit failed to follow the Second Circuit in holding the principle extended to foreign criminal prosecution, it appears that the Supreme Court will have to resolve the division.

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146. *See Araneta*, 478 U.S. at 1304 (discussing *Murphy*, 378 U.S. at 58-63).
147. *See Murphy*, 378 U.S. at 54 (1964).
148. *See (Under Seal)*, 794 F.2d at 928.
149. *See, e.g.*, *Demanjanjuk*, 10 F.3d at 338.
150. *See Lileikis*, 899 F. Supp. at 809.
151. *See id.*
152. *See* New Jersey v. Potash, 440 U.S. 450, 458-59 (1979) (discussing that a *Miranda* violation may be balanced as to the issue of whether the statements were voluntary or coerced, but this "balancing argument" does not apply to the privilege against self-incrimination, because there is no question as to whether the testimony was coerced, rather, it is the essence of coerced testimony).
153. *Moses*, 779 F. Supp. at 874 (quoting U.S. CONST. amend. V).
154. *See id.*
155. *See id.* at 874 n.24.

The underlying issue, therefore, is whether the government, specifically the OSI, is required by the Constitution to take difficult, though not impossible, efforts to locate evidence showing Gecas was deportable and protect his alleged right against self-incrimination, or whether the court will allow the government to merely force the testimony out of the witness in what could be considered an "inquisitional" style testimony. As expressed by the Second Circuit in *Balsys*, even if the only purpose behind the privilege is to protect the integrity of our justice system, the courts must still limit the government's overreaching in the case of foreign prosecution.[156] The fact that the witness fears foreign rather than domestic prosecution does not decrease the motive of the government to aid in the foreign case;[157] rather, as demonstrated in *Demjanjuk*, there is often intense political pressure to both deport the witness and deliver incriminating evidence to a prosecuting sovereign.[158] However, the Eleventh Circuit allowed the government to elicit self-incriminating evidence by judicial force in a court of the United States and surpassed all previous cases in eroding the protection of the Fifth Amendment privilege by classifying it as a "prophylactic" right.[159]

If the courts construe the fundamental rights of individuals like Gecas as being outweighed by the illusory need to protect domestic law enforcement—as prodded by the government's motions to force self-incriminating testimony—they also place our individual rights in jeopardy. The Constitution is like a levee beside a powerful flow of political pressure. It is up to the Levee Board to see that the river does not diverge from its course. The Bill of Rights' protections of the individual burden governmental functions, yet this is the very burden that keeps our nation free. When McCarthy saw "red," so did the government. However, the freedom of political expression did not destroy our country; in fact, it was the "inquisitional" style hearings of that era that rocked the very foundations of freedom on which our nation stands. Similarly, the sovereignty of our nation will not be diminished by the limited class of cases that provide a witness protection from a foreign law in which she would not be protected from incriminating herself under a domestic law.[160] However, dismissing the fundamental right against self-

156. *See Balsys*, 119 F.3d at 132.
157. *See id.* at 131.
158. *See Demanjanjuk*, 10 F.3d at 354.
159. *See Gecas*, 120 F.3d at 1459 (Birch, C.J. dissenting).
160. *See Balsys*, 119 F.3d at 135; *Moses*, 779 F. Supp. at 881.

incrimination as merely "prophylactic" presents a serious retrenchment in the protection of our individual liberties.

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