1998

Tied Up by a Gordian Knot: United States v. Gecas's Rejection of the Privilege against Self-Incrimination in Cases of Foreign Prosecution

Daniel J. Lindsay

Comment

Tied Up by a "Gordian Knot": *United States v. Gecas*'s Rejection of the Privilege Against Self-Incrimination in Cases of Foreign Prosecution

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On August 2, 1962, Vytautas Gecas, a Lithuanian citizen, applied for a visa to enter the United States.[1] On his visa application he stated that he was a student in Lithuania during most of World War II, then later lived in a refugee camp in Germany from 1944 to 1947.[2] In 1991, the Justice Department's Office of Special Investigations (OSI), issued Gecas a subpoena to testify, claiming that Gecas served as a member of a Lithuanian armed police unit during World War II and persecuted persons because of their race, religion, and national origin.[3] In an interview before the OSI, Gecas invoked the Fifth Amendment's privilege against self-incrimination and refused to answer questions posed by the OSI investigators.[4]

In response, the United States petitioned the district court for an order to enforce the OSI's subpoena.[5] The district court granted the government's petition, despite finding that Gecas faced a real and substantial fear of foreign prosecution.[6] An

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1. *See* United States v. Gecas, 120 F.3d 1419, 1422 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3399 (U.S. Nov. 24, 1997) (No. 97-884).

2. *See id.*

3. *See id.* at 1423. The Attorney General created the OSI to detect and investigate individuals in the United States who assisted the Nazis during the war. *See id.* at 1423 n.3. If a court found that Gecas engaged in such conduct, he would become deportable under 8 U.S.C. § 1251(a)(4)(D). *See id.* at 1423.

4. *See id.*

5. *See id.*

6. *See* United States v. Gecas, 830 F. Supp. 1403, 1423 (N.D. Fla. 1993), *aff'd in part, rev'd in part*, 50 F.3d 1549 (11th Cir. 1995), *rev'd en banc*, 120

Eleventh Circuit panel reversed the district court's decision.[7] The Eleventh Circuit later granted a rehearing en banc and upheld the district court's decision.[8]

United States v. Gecas raises the question of whether a witness may invoke the Fifth Amendment's privilege against self-incrimination based on a real and substantial risk of prosecution in a foreign country. This issue is of great importance because any resolution must both define the scope of the privilege and account for its varying policy considerations. The Supreme Court has granted certiorari[9] on a case out of the Second Circuit presenting facts similar to *Gecas*.[10] How the Court decides the issue should help order the discussion on an issue that has divided courts and scholars.[11]

This Comment contends that the privilege against self-incrimination applies to witnesses who can show a real and substantial fear of foreign prosecution. Part I discusses the historical interpretations of the privilege, the Supreme Court's treatment of the privilege, and the lower court decisions examining the privilege. Part II outlines the holding and reasoning in *United States v. Gecas*. Part III critiques the *Gecas* decision and argues that the Eleventh Circuit's narrow interpretation of the privilege incorrectly assumed that the Fifth Amendment is only violated by the use of compelled testimony and in so doing misread Supreme Court precedent. This Comment concludes that the Supreme Court should consider the privilege's multiple policy rationales, acknowledge the close interaction between American and foreign law enforcement, and interpret the policy broadly to cover cases where there is potential for foreign prosecution.

F.3d 1419 (11th Cir. 1997).

7. United States v. Gecas, 50 F.3d 1549, 1567 (11th Cir. 1995).

8. United States v. Gecas, 120 F.3d 1419, 1422 (11th Cir. 1995).

9. United States v. Balsys, 118 S. Ct. 751 (1998).

10. United States v. Balsys, 119 F.3d 122 (2d Cir. 1997), *cert. granted*, 118 S. Ct. 751 (1998); *see also infra* notes 79-88 and accompanying text (discussing the Second Circuit's holding in *Balsys*, which involved a subpoena brought by the OSI to force a resident alien to testify in order to determine whether he lied on his immigration application).

11. *See* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857-58 (1995) (asserting that both courts and scholars have been unable to define the scope of the privilege).

I. THE SELF-INCRIMINATION CLAUSE AND FEAR OF FOREIGN PROSECUTION

A. HISTORY OF THE PRIVILEGE

Despite its prominent place in the Bill of Rights, the origin and meaning of the Fifth Amendment remain contested.[12] Recent scholars have called the Self-Incrimination Clause of the Fifth Amendment an "unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights."[13] The lack of legislative history accompanying the amendment has led to confusion among courts and disparate interpretations among scholars.[14]

The first notable inquiry into the Self-Incrimination Clause came from John Wigmore.[15] Wigmore argued that the common law in England adopted the privilege in the mid-1600s.[16] In the 1960s, Leonard Levy endorsed and expanded on Wigmore's interpretation.[17] Levy's interpretation soon became, and has remained until recently, the accepted wisdom on the Fifth Amendment. According to Levy, the privilege developed as a product of two competing systems of criminal procedure in England at the time—the common law and the crown's ecclesiastical courts.[18] Popular pro-

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12. The Fifth Amendment privilege against self-incrimination reads that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

13. Amar & Lettow, *supra* note 11, at 857.

14. *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 248-255 (1988) (describing the almost complete lack of legislative history accompanying the Fifth Amendment, either in the form of debate when it was first introduced or during the ratification process of the Bill of Rights); Arthur B. Laby, Note, *Fishing for Documents Overseas: The Supreme Court Upholds Broad Consent Directives Against the Claim of Self-Incrimination*, 70 B.U. L. REV. 311, 313-14 (1990) (citing eleven different values courts and commentators have said the Fifth Amendment protects); Christine L. Reimann, Note, *Fencing the Fifth Amendment in Our Own Backyard*, 7 PACE INT'L L. REV. 177, 178-79 (1995) (noting the differing interpretations of the origin of the privilege against self-incrimination).

15. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2250-2284 (John T. McNaughton ed., 1961).

16. *See id.* § 2250, at 289 (explaining the adoption of the privilege into the common law).

17. *See* LEVY, *supra* note 14, at 247-66; LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968).

18. *See* LEVY, *supra* note 14, at 260-61. Levy identified the inherited English common law system of criminal justice as the origin of the privilege against self-incrimination. *See id.* at 260. The origin of the privilege in England

test to the ecclesiastical courts' inquisitorial methods led Parliament to abolish the ecclesiastical courts, the Court of High Commission and the Star Chamber, in 1641 and to prohibit authorities from compelling confession or self-accusation.[19] Levy argues that the privilege against self-incrimination became closely associated with freedom of speech and religion, and by the eighteenth century, was "taken for granted."[20] As the major components of the English common law were adopted in America, the right against self-incrimination took hold.[21] Thus, according to Levy, it is no surprise that there was little or no debate when James Madison introduced what would become the Fifth Amendment.[22] Levy explains that the protection against self-incrimination had become so accepted by the end of eighteenth century America that "its constitutional expression had the mechanical quality of a ritualistic gesture in favor of a self-evident truth needing no explanation."[23]

Levy's interpretation of the Fifth Amendment privilege has come under attack in the past decade as a group of scholars has begun to reassess the historical origins of the privilege and its development in America.[24] One of these new interpretations argues that the privilege against self-incrimination actually originated in continental Europe in the form of Roman and canon law, then later developed in English common law.[25]

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represented a combination of religious, political, and social forces active during the sixteenth and seventeenth centuries. *See id.*

19. *See id.* at 262. Elizabeth I established the Court of High Commission to maintain religious uniformity under the Anglican church. *See id.* at 261. The courts actively prosecuted religious and political dissidents. *See id.* Despite the ban on the compulsion of testimony, the common law courts continued to use many of the same tactics to compel answers from suspects. *See id.* at 262. Levy asserts, however, that the idea of a protection against self-incrimination was "beginning to take hold of men's minds." *Id.* at 263.

20. *Id.* at 265.

21. *See id.*

22. *See id.* at 247, 258.

23. *Id.* at 258.

24. For example, R.H. Helmholz argues that Levy's work neglects the importance of the legal context in the development of the privilege, and instead focuses on "famous 'show trials.'" R.H. HELMHOLZ, *Introduction* to THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENTS, 1, 5 (1997). Additionally, Helmholz suggests that Levy's interpretation was a product of the McCarthy era. *See id.* According to Helmholz, Levy made a "strong argument for the vitality of the privilege as a basic civil liberty. That approach does not necessarily make for the most accurate history, however." *Id.*

25. *See* R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European IUS Commune*, 65 N.Y.U. L. REV. 962, 964 (1990). Helmholz queried, but did not fully explore, the impact his theory would have

Studies have built on these findings and have started to examine the practical implications of the privilege's historical origins.[26] In particular, commentators have focused on how the privilege evolved in criminal trials, and jury trials especially, and became a fixture of American criminal procedure.[27] How scholars ultimately reconcile these new findings with previously accepted interpretations will figure prominently into how courts approach Fifth Amendment cases, and in particular, how they assess the policies behind the privilege against self-incrimination.

B. THE SELF-INCRIMINATION CLAUSE IN THE SUPREME COURT

1. Application of the Privilege

Although the Self-Incrimination Clause had been in effect for more than one hundred years, it was not until 1892 that courts examined its constitutional basis. In *Counselman v. Hitchcock*,[28] the Supreme Court endorsed the Fifth Amendment's

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on the broader understanding of the Fifth Amendment: "Whether a more complete understanding of the privilege's origins has implications for today's controversies about the scope of the fifth amendment is possible, but by no means certain. The 'lessons' of legal history are often ambiguous, and so they prove in this instance." *Id.* at 990; *see also* M.R.T. Macnair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUD. 66, 67 (1990) (arguing that the privilege developed in English law from the "common family of European laws and particularly the canon law").

26. *See* HELMHOLZ, *supra* note 24, at 5 (stating that a more accurate history may be "relevant to present-day controversies"); *see also* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again"*, 74 N.C. L. REV. 1559, 1563 (1996) (critiquing Professor Amar's approach to Fifth Amendment reform); Helmholz, *supra* note 25, at 964-67 (outlining Leonard Levy's account of the origins of the privilege); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994) (arguing that the privilege originated "in the rise of adversary criminal procedure at the end of the eighteenth century"); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1086 (1994) (asserting that both John H. Wigmore and Leonard Levy trace the origin of the privilege to "the legacy of resistance to the prerogative justice of the Stuart monarchy during the second quarter of the seventeenth century").

27. *See* Langbein, *supra* note 26, at 1068-69 (arguing that the privilege is a product of the change in criminal procedure as counsel for defense started to appear at criminal trials); Moglen, *supra* note 26, at 1087 (challenging the assumptions that privilege greatly aided suspects at trial and that the fifth amendment was a "final acknowledgment[] of a long-accepted 'fundamental right'").

28. 142 U.S. 547 (1892), *overruled in part by* Kastigar v. United States, 406 U.S. 441 (1972).

protection against forcing a witness to give self-incriminating testimony.[29] Four years later, the Court narrowed the protection, holding that a witness could only invoke the privilege for specific reasons.[30] Testimony that might tend to "disgrace or expose him to unfavorable comment" did not by itself constitute legitimate grounds for the privilege.[31]

In addition to considering the constitutional basis of the privilege, the Supreme Court has also examined cases where a witness may invoke the privilege.[32] The language of the Fifth Amendment states no person "shall be compelled in any criminal case to be a witness against himself."[33] The Court clarified the language of the amendment and has consistently held that the privilege may be invoked in civil or criminal proceedings.[34] The key issue is not the nature of the case in which the privilege is invoked. Instead, the court must determine whether the testimony sought might "tend to subject to criminal responsibility him who gives it."[35]

Courts may refuse to apply the privilege against self-incrimination where statutes allow the court to authorize immunity for the witness in a subsequent criminal trial.[36] *Counselman*, the first case to consider an immunity statute, held that an immunity grant must provide "absolute immunity against future prosecution for the offense to which the question relates."[37] The immunity described by the Court came to be called transactional immunity because it barred prosecution for any transaction described in the witness's testimony.[38] The Court limited this interpretation in a 1964 case, *Murphy v. Waterfront Commission*,[39] holding that the courts only had to en-

29. *See id.* at 586; *see also* 8 Wigmore, *supra* note 15, § 2252, at 325-26 (describing *Counselman*).

30. *See* Brown v. Walker, 161 U.S. 591, 595-96 (1896).

31. *See id.* at 595, 598.

32. *See, e.g.*, McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (holding that the privilege applies to both civil and criminal proceedings).

33. U.S. CONST. amend. V.

34. *See McCarthy*, 266 U.S. at 40; *see also* Lefkowitz v. Turley, 414 U.S. 70, 84-85 (1973) (holding that a witness can be forced to testify if granted immunity sufficient to satisfy the privilege).

35. *McCarthy*, 266 U.S. at 40.

36. *See* Counselman v. Hitchcock, 142 U.S. 547, 586 (1892).

37. *Id.*

38. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.11(b), at 423 (2d ed. 1992).

39. 378 U.S. 52, 79 (1964).

sure that a witness's testimony and any fruits from that testimony could not be used in a criminal trial.[40] In a 1972 case, *Kastigar v. United States*,[41] the Court endorsed Congress's codification of *Murphy*, holding that immunity from use and derivative use of compelled testimony had the same effect as the privilege against self-incrimination.[42]

2. The Privilege in Cases of Foreign Prosecution

The Supreme Court has never squarely addressed the question of whether the Self-Incrimination Clause of the Fifth Amendment applies to a fear of foreign prosecution. For example, although *Zicarelli v. New Jersey State Commission of Investigation* raised the issue, the Court avoided the underlying constitutional question.[43] The case involved a witness who when subpoenaed by the New Jersey State Commission of Investigation invoked his privilege against self-incrimination and refused to answer questions concerning organized crime, racketeering, and political corruption in New Jersey.[44] Although the Commission granted him immunity pursuant to New Jersey law, he persisted, arguing that his testimony would subject him to prosecution in Canada, Venezuela, and the Dominican Republic.[45] The Court stated that the Fifth Amendment privilege "protects against real dangers, not remote and speculative possibilities" and found that the information sought would not subject the defendant to a real danger of foreign incrimination.[46] Lower courts have followed and expanded upon the "real and substantial" fear of foreign prosecution test articulated in *Zi-*

40. *See id.* at 79; *see also* Hoffman v. United States, 341 U.S. 479 (1951). The *Hoffman* court held that the defendant may invoke the privilege because the testimony would provide a "link in the chain of evidence needed to prosecute the claimant for a federal crime." *Id.* at 486.

41. 406 U.S. 441 (1972).

42. *See id.* at 453.

43. *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

44. *See id.* at 478-79.

45. *See id.* at 474.

46. *See id.* at 478. The burden of showing a real danger of foreign prosecution rests upon the defendant. *See generally* Scott Bovino, Comment, *A Systematic Approach to Privilege Against Self-Incrimination Claims When Foreign Prosecution Is Feared*, 60 U. CHI. L. REV. 903 (1993). Bovino argues that the practical effect of shifting the burden of persuasion to the defendant has been to force defendants to meet a higher standard in self-incrimination cases involving the potential of foreign prosecution than must be shown in cases involving potential self-incrimination in domestic courts. *See id.* at 909-19.

carelli.[47] Courts will consider such questions as whether there is an existing prosecution against the witness, the nature of the charges, the possibility of extradition, and the likelihood that testimony would be disclosed to a foreign government.[48] Most often the defendant is unable to show a real and substantial danger of foreign prosecution, and as a result, relatively few circuit courts have decided the underlying constitutional question.[49]

Although *Zicarelli* concerned the Self-Incrimination Clause and a fear of foreign prosecution, the Court's failure to address the constitutional issue has forced lower courts finding a real and substantial risk to analogize to previous Supreme Court cases. The Court's extension of the Fifth Amendment to all domestic courts in *Murphy v. Waterfront Commission* has proven most analogous to the constitutional question involving the Self-Incrimination Clause and a fear of foreign prosecution. In *Murphy*, two witnesses invoked the Fifth Amendment privilege at a hearing concerning an investigation into a labor dispute in New Jersey.[50] Although the witnesses were granted immunity under New York and New Jersey law, they refused to testify, arguing that their testimony might incriminate them under federal law, which the immunity grant did not cover.[51] The Court held that witnesses granted immunity under state law could not be prosecuted under federal law on the basis of compelled testimony.[52]

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47. *United States v. Flanagan*, 691 F.2d 116, 121 (2d Cir. 1982), first expanded on the *Zicarelli* test. Other jurisdictions have adopted the Second Circuit's approach. *See, e.g.*, United States v. (Under Seal) (Araneta), 794 F.2d 920, 923-24 (4th Cir. 1986) (quoting the *Flanagan* court's articulation of the factors relevant in determining whether a witness faces a cognizable danger of prosecution).

48. *See Flanagan*, 691 F.2d at 121.

49. *See, e.g., In re* Gilboe, 699 F.2d 71, 76 (2d Cir. 1983) (holding that a grant of immunity removed the danger of foreign prosecution); *In re* Baird, 668 F.2d 432, 433 (8th Cir. 1982) (holding that grand jury proceedings provided adequate secrecy to protect against a real and substantial risk of foreign prosecution). *See generally* Diego A. Rotsztain, Note, *The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution*, 96 COLUM. L. REV. 1940, 1959-71 (1996) (arguing that the "real and substantial" test is unworkable and leads courts to questionable conclusions).

50. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 53 (1964).

51. *See id.* at 53-54.

52. *See id.* at 79-80. The Supreme Court ruled on a second important Fifth Amendment case on the same day it decided *Murphy*: *Malloy v. Hogan*, 378 U.S. 1 (1964). *Malloy* involved a defendant's assertion of the privilege against self-incrimination in a Connecticut state proceeding. *See id.* at 3. The Court held that the Fifth Amendment applied to the states through the Four-

Murphy has become a central case in the debate over the Self-Incrimination Clause and the potential for foreign prosecution because it addressed the policy considerations underlying the privilege.[53] In language that has since become famous, Justice Goldberg described the privilege as reflecting "many of our fundamental values and most noble aspirations," including "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt."[54] In addition to discussing the privilege's protection against unjust methods of prosecution,[55] *Murphy* also emphasized that the Self-Incrimination Clause preserves an individual's right to be free from government intrusion.[56] The Court found that there was a real danger that both the policies and the purpose of the privilege would be defeated if a witness could be prosecuted in two different jurisdictions for the same offense.[57] Courts denying the privilege in cases of foreign prosecution have held that much of Goldberg's language is overbroad dicta.[58] Courts upholding the privilege have ruled that *Murphy* outlined the essential purpose and function of the privilege and should be followed.[59]

In addition to its discussion of the privilege's policy considerations, *Murphy* also examined the "English rule" regarding self-incrimination under foreign law.[60] The Court described two early English cases that applied the privilege before the adoption of the Constitution in the United States.[61] In both these cases, the English courts upheld the defendants' right to refuse to "discover" certain information that would subject them to prosecution in Indian and in English ecclesiastical courts.[62] *Murphy* overruled an earlier case, *United States v.*

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teenth Amendment. *See id.*

53. *See* 378 U.S. at 55-57.

54. *Id.* at 55.

55. *See id.*

56. *See id.*

57. *See id.* at 55-56.

58. *See infra* Part I.C (analyzing decisions that have downplayed *Murphy*'s precedential value).

59. *See infra* Part I.D (discussing cases that have relied on the Court's reasoning in *Murphy*).

60. *See* 378 U.S. at 58-63.

61. *See id.* at 58-59.

62. *See id.* The first case, from 1749, *East India Co. v. Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (1789), involved a defendant who refused to answer certain questions in an English court because he feared that he would then be subject to prosecution in India. *See id.* at 58. In the second case, de-

Murdock, which had held that the "English rule" on the privilege did not protect a witness against self-incrimination under foreign laws.[63] The *Murphy* court then examined English law and found that the "settled 'English rule' regarding self-incrimination under foreign law" protected against the disclosure of information that would subject the defendant to foreign prosecution.[64]

C. COURTS DENYING THE PRIVILEGE IN CASES OF FOREIGN PROSECUTION

Circuit courts are split on whether the Self-Incrimination Clause can be invoked where there is a risk of foreign prosecution.[65] The Fourth Circuit has most clearly articulated the reasons for denying the privilege against self-incrimination where the person fears foreign prosecution. The case concerned a daughter and son-in-law of former Philippine President Ferdinand Marcos, who refused to testify before a grand jury investigating corruption charges in the awarding of Philippine arms contracts.[66] The court first determined that the defendants faced pending charges in the Philippines that involved a question simi-

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cided one year later, *Brownsword v. Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (1790), the defendant refused to answer questions regarding her marital status because any admission on her part would have subjected her to prosecution in the ecclesiastical courts. *See id.* at 58-59.

63. *See* 378 U.S. at 70-72. *Murphy* found that *Murdock* had erroneously cited *King of Two Sicilies v. Willcox*, 1 Sim. (N. S.) 301, 61 Eng. Rep. 116, as representing the English rule on self-incrimination under foreign law. *See id.* at 60. *King of Two Sicilies* had been overruled by *United States v. McRae*, L. R., 3 Ch. App. 79 (1867). *See id.* at 61. In *McRae*, the United States sued for payment of money received by the defendant who had acted as an agent of the Confederate States during the Civil War. *See id.* The *McRae* court sustained the claim of privilege and found that the case did not differ from one in which the witness's testimony would be self-incriminating under domestic law. *See id.* at 62-63.

64. *See id.* at 61-63.

65. *See, e.g.*, United States v. Gecas, 120 F.3d 1419, 1457 (11th Cir. 1997) (denying the Fifth Amendment privilege to a suspected Nazi war criminal who feared prosecution in Israel, Germany, and Lithuania); United States v. (Under Seal) (Araneta), 794 F.2d 920, 923-26 (4th Cir. 1986) (denying the privilege to two Philippine citizens even though they had demonstrated a real and substantial risk of prosecution in their home country); *In re* Parker, 411 F.2d 1067 (10th Cir. 1969) (asserting that the Fifth Amendment should not be interpreted as applying to criminal acts in a foreign country). *But see* United States v. Balsys, 119 F.3d 122, 140 (2d Cir. 1997), *cert. granted*, 118 S. Ct. 751 (1998) (holding that the privilege against self-incrimination may be invoked where there is a real and substantial risk that the testimony will be used in foreign prosecution).

66. *See (Under Seal) (Araneta)*, 794 F.2d at 921-22.

lar to the American suit. Thus, there existed a real and substantial risk of foreign prosecution according to the Supreme Court's standard in *Zicarelli*.[67] Acknowledging the American interest in the prosecution of the case in the Philippines, the court determined that the district court's order limiting disclosure of grand jury testimony under Federal Rule of Criminal Procedure 6(e)[68] was not adequate to ensure that the defendants' testimony would not be disclosed to the Philippine government.[69]

The Fourth Circuit rejected the defendants' claim that they could invoke the Self-Incrimination Clause based on several related grounds.[70] The court noted that the Fifth Amendment does not affect or prohibit the use of compelled self-incriminatory evidence by foreign courts.[71] It held that the Self-Incrimination Clause only applies where both the sovereign compelling the testimony and the sovereign using the testimony are controlled by the Fifth Amendment.[72] The court interpreted the Self-Incrimination Clause both to protect individual dignity and to preserve the accusatorial nature of the American criminal justice system.[73] It asserted that its ruling would preserve those values, as well as those articulated by the Supreme Court in *Murphy*.[74] The court suggested that the primary pol-

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67. *See id.* at 923-24.

68. Rule 6(e) protects against the disclosure of grand jury testimony. *See* FED. R. CRIM. P. 6(e).

69. *See* 794 F.2d at 925. Courts have gone both ways on whether Rule 6(e) provides adequate protection to the witness. *See, e.g., In re* Baird, 668 F.2d 432, 433 (8th Cir. 1982) (holding that Rule 6(e) adequately protected a witness from prosecution in Canada on drug-related charges); *In re* Tierney, 465 F.2d 806, 811 (5th Cir. 1972) (finding that Rule 6(e)'s provision for secrecy removed the possibility of prosecution in Great Britain); *Parker*, 411 F.2d at 1069 (holding that Rule 6(e) is a sufficient guarantee against disclosure of testimony). *But see, e.g., (Under Seal) (Araneta)*, 794 F.2d at 925 (finding that "the Rule 6(e) order is not adequate to ensure that the testimony of the Aranetas will not be disclosed to the Philippine government"); United States v. Flanagan, 691 F.2d 116, 123 (2d Cir. 1982) (suggesting that there might be cases in which "grand jurors might consciously or inadvertently leak confidential information").

The Rule 6(e) protection against disclosure is particularly inadequate in many cases now in the courts involving deportation proceedings against resident aliens and citizens suspected of being Nazi collaborators during World War II. *See infra* note 81 (describing the OSI's activities and its broad powers to disclose evidence to foreign countries).

70. *See (Under Seal) (Araneta)*, 794 F.2d at 925-28.

71. *See id.* at 925.

72. *See id.* at 926.

73. *See id.*

74. *See id.* Although the court followed *Murphy*'s interpretation of the

icy consideration behind its decision was that "our own national sovereignty would be compromised if our system of criminal justice were made to depend on the actions of foreign government [sic] beyond our control."[75]

Other lower courts have also found that the privilege against self-incrimination does not protect witnesses fearing foreign prosecution.[76] One district court attempted to find a compromise between a strict denial or acceptance of the privilege by weighing the government's purpose and need for compelling the testimony against the witness's basis for claiming the privilege.[77] In that case, however, the defendant's interest did not outweigh the United States' "legitimate need" for the testimony.[78]

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meaning of the Fifth Amendment, it went to great lengths to distinguish *Murphy*. Noting that "[t]he [*Murphy*] Court's scholarship with respect to the English law in this regard has been attacked," the court in *(Under Seal) (Araneta)* concluded that the holding in *Murphy* did not hinge on the correctness of the Court's understanding of English law. *See id.* at 927. This interpretation allowed the Fourth Circuit to dismiss the precedential influence of *Murphy* and hold that the question of the applicability of the Fifth Amendment privilege in cases involving a fear of foreign prosecution remained open. *See id.*

75. *Id.* at 926. The court further stated, "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." *Id.*

76. *See, e.g.*, United States v. Lileikis, 899 F. Supp. 802, 809 (D. Mass. 1995) ("If a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest, the privilege must yield if the sole basis for claiming its protections is the fact that a resident of the United States faces the likelihood of a foreign prosecution."); Phoenix Assurance Co. of Can. v. Runck, 317 N.W.2d 402, 411 (N.D. 1982) ("The absence of any reference to any foreign law in whatever form is an indication that the fifth amendment was designed to apply only to the laws of the United States and was not intended to embrace foreign prosecution."). The court in *Phoenix* concluded that application of the privilege could not be carried outside the American, federal-state system, and suggested that the best resolution to this difficult question lay in multilateral treaties between countries. *See id.* at 411-13.

77. *See Lileikis*, 899 F. Supp at 808-09 (stating that "a court entreated to exercise its contempt power is obligated to examine the government's purpose and need in seeking to compel a witness's testimony").

78. *Id.* at 809. The court in *Lileikis* subscribed to the policy argument laid out in *(Under Seal) (Araneta)*, asserting that "[i]t would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness." *Id.* However, the court qualified this statement by saying the government "should not bend the Constitution solely to promote the foreign policy objectives of the executive branch, however laudable," by forcing a witness to testify in a proceeding "that does not have as its fundamental purpose the

D. COURTS RECOGNIZING THE PRIVILEGE IN CASES OF FOREIGN PROSECUTION

The Second Circuit and a number of district courts have held that the privilege against self-incrimination may be invoked where there is a real and substantial risk that the testimony would be used in foreign prosecution.[79] *United States v. Balsys*[80] presented the Second Circuit with facts very similar to the *Gecas* case. The United States government, through the OSI,[81] brought suit to enforce a subpoena issued against a resident alien to determine whether he lied on his immigration application regarding his activities during World War II.[82]

The Second Circuit first noted that there is nothing in the language of the Fifth Amendment to suggest that there should be a distinction between the application of the privilege in domestic or foreign settings.[83] Recognizing the controversial nature of the origins of the Fifth Amendment, the court relied on *Murphy*.[84] Based on *Murphy*, the court found that the Fifth Amendment "advances individual integrity and privacy, it protects against the state's pursuit of its goals by excessive means, and it promotes

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vindication of the domestic laws of the United States." *Id.*

79. *See, e.g.*, United States v. Balsys, 119 F.3d 122, 140 (2d Cir. 1997), *cert. granted*, 118 S. Ct. 751 (1998) (upholding the privilege); Moses v. Allard, 779 F. Supp. 857, 883 (E.D. Mich. 1991) (refusing in a domestic bankruptcy proceeding to force the testimony of a debtor who feared prosecution in Switzerland); *In re* Flanagan, 533 F. Supp. 957, 966 (E.D.N.Y. 1982) (holding that the privilege could be invoked because of a fear of foreign prosecution), *rev'd on other grounds*, 691 F.2d 116 (2d Cir. 1982); Mishima v. United States, 507 F. Supp. 131, 134-35 (D. Alaska 1981) (relying on the analysis of the English rule in *Murphy v. Waterfront Comm'n* to find that the privilege could be invoked by a defendant who feared prosecution in Japan).

80. 119 F.3d 140 (2d Cir. 1997).

81. The United States government created the OSI in 1979 to seek out and initiate removal proceedings against immigrants found guilty of persecuting people during World War II based on their race, religion, ethnic origin, or political views. *See* Frank J. Murray, *Nazi-Hunters Race the Grim Reaper for Aging Prey*, WASH. TIMES, Sept. 7, 1997, at A1. Since its formation, the OSI has brought cases against 103 alleged Nazi collaborators. *See id.* Of those, 60 citizens have been denaturalized and 48 have been deported. *See id.* The OSI currently has 17 cases in court and 281 active investigations underway. *See id.* The government has given the OSI broad powers to investigate these cases. As part of its mandate, the OSI is to "'[m]aintain liaison with foreign prosecution, investigation and intelligence offices'" and collect and share evidence with foreign governments in their prosecution of the cases. *Balsys*, 119 F.3d at 125 (citation omitted).

82. *See Balsys*, 119 F.3d at 124-25.

83. *See id.* at 126.

84. *See id.* at 129.

the systemic values of our method of criminal justice."[85] The court then held that allowing the privilege in the case of potential foreign prosecution did not interfere with these basic values.[86] It interpreted the Supreme Court's reading of the "English rule" concerning the privilege in *Murphy* to lend support to its holding.[87] Finally, the court rejected the notion that application of the privilege to the fear of foreign prosecution would hinder domestic law enforcement, asserting that these arguments had no constitutional basis.[88] Several district courts applying the privilege have seized on the specific language from *Murphy*, finding that the privilege represents multiple policy considerations such that a denial of the privilege in foreign prosecution would frustrate the Fifth Amendment's purpose.[89]

The lack of legislative history accompanying the Fifth Amendment,[90] the disagreement among scholars as to the meaning of the privilege against self-incrimination,[91] and the

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85. *Id.*

86. *See id.* at 130-31. The Second Circuit acknowledged that the risk of intrusive investigative techniques was minimized when the compelling jurisdiction did not intend to prosecute the witness. *See id.* at 130. It reasoned, though, that international collaboration in law enforcement had created a situation analogous to the cooperation between state and federal law enforcement officials in the United States, and pointed out that American governmental interests in compelling testimony are likely to be most pressing in cases where the witness faces the greatest risk of foreign prosecution. *See id.* at 130-31.

87. *See id.* at 133.

88. *See id.* at 134. The court quoted *In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972), which found that

> a constitutional privilege does not disappear, nor even lose its normal vitality, simply because its use may hinder law enforcement activities. That is a consequence of nearly all the protections of the Bill of Rights, and a consequence that was originally and ever since deemed justified by the need to protect individual rights.

119 F.3d at 134.

89. *See, e.g.*, United States v. Ragauskas, No. 94 C 2325, 1995 WL 86640, at *5 (N.D. Ill. Feb. 27, 1995) (holding that the Fifth Amendment not only protects against government conduct but is also a "personal right"); Moses v. Allard, 799 F. Supp. 857, 878 (E.D. Mich. 1991) (refusing to assign a single purpose to the privilege); United States v. Trucis, 89 F.R.D. 671, 673 (E.D. Pa. 1981) ("[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.").

90. *See supra* notes 14-23 and accompanying text (discussing the reasons behind the lack of legislative history).

91. *See supra* Part I.A (tracing the development of the competing interpretations of the Fifth Amendment).

lack of controlling precedent[92] all contribute to a wide split among courts on the issue of the privilege in the context of foreign prosecution. These factors, in addition to the increasingly transnational nature of legal disputes,[93] make this issue vital and situate *United States v. Gecas* at the center of an important and complicated legal debate.

II. *UNITED STATES V. GECAS*

In the face of split decisions between the circuit and district courts, the Eleventh Circuit squarely held in *United States v. Gecas* that the privilege against self-incrimination does not apply even where the defendant faces a real and substantial likelihood of prosecution in a foreign country.[94] Following the *Zicarelli* test[95] the court considered whether Gecas would be subject to prosecution in a foreign country.[96] The court found that if Gecas were forced to answer the questions, the information revealed would incriminate him under Israeli, German, and Lithuanian law.[97] Thus, based on the reach of the foreign laws, the likelihood that Gecas's testimony would be transferred to foreign countries, and the probability of deportation or extradition,[98] the court found that Gecas faced a "real, substantial, reasonable, and appreciable fear of foreign conviction."[99]

Upon finding that Gecas met the threshold question, the court turned to the underlying constitutional issue. The court determined that the applicability of the privilege to Gecas's case turned on whether his deportation proceeding qualified as a "criminal case" under the language of the Fifth Amend-

92. *See supra* text accompanying note 43 (noting that the Supreme Court did not address the constitutional question in *Zicarelli v. New Jersey State Commission of Investigation*).

93. *See supra* note 81 (describing how the OSI will likely generate other cases involving questions similar to those addressed here).

94. *See* United States v. Gecas, 120 F.3d 1419, 1457 (11th Cir. 1997).

95. *See supra* notes 47-48 and accompanying text (describing the expansion of *Zicarelli*'s threshold test).

96. *See Gecas*, 120 F.3d at 1424-27.

97. *See id.* at 1425. The court found that both Israel and Lithuania had laws relating specifically to the prosecution of Nazi collaborators and perpetrators of genocide. *See id.* at 1424-25.

98. The court described the aggressive role played by the Justice Department's OSI in pursuing the denaturalization and deportation of suspected Nazi war criminals. It noted that the "OSI exists to expel war criminals from the United States" and that it maintains contacts with foreign prosecutors in order to aid in the indictment of expelled war criminals. *Id.* at 1426.

99. *Id.* at 1427.

ment.[100] The court cited two Supreme Court cases, *Kastigar v. United States*[101] and *United States v. Verdugo-Urquidez*[102] to support its finding that the privilege only protects against the "infliction of criminal penalties."[103] Thus, a violation of the Self-Incrimination Clause can only occur at the witness's own criminal trial when the testimony is actually used, not during the compulsion of the testimony.[104] The *Gecas* court then held that neither the Fifth Amendment nor any other procedural protections afforded by the Constitution apply to judicial proceedings outside of the United States.[105] Foreign countries cannot violate the Fifth Amendment when they prosecute defendants based on compelled evidence produced in the United States.[106] Thus, the *Gecas* court reasoned that a proceeding only becomes a "criminal case" when there exists the possibility of conviction in a jurisdiction subject to the Fifth Amendment.[107]

To support its interpretation, the *Gecas* court dismissed *Murphy*'s discussion of the English cases, cited by *Murphy* to represent the "English rule" on the privilege against self-incrimination.[108] The *Gecas* court also rejected Gecas's alter-

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100. *See id.* The court noted that according to the Supreme Court's interpretation the privilege may be invoked when a witness faced a "legitimate possibility" of conviction in any proceeding. *See id.* at 1428. Thus, a deportation proceeding could qualify as a criminal case if there existed the threat of conviction. *See id.*

101. 406 U.S. 441 (1972). *Kastigar* held that grants of immunity must be coextensive with the scope of the privilege in order to compel testimony over a claim of the privilege. *See id.* at 453.

102. 494 U.S. 259 (1990). *Verdugo-Urquidez* examined whether the Fourth Amendment applies to the search by American authorities of the Mexican residence of a Mexican citizen and resident. It referred to the privilege against self-incrimination by briefly noting the difference in application between the Fourth and Fifth Amendment. *See id.* at 264.

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

104. *See id.*

105. *See id.* at 1430. The *Gecas* court returned to this point when it attempted to undermine the defendant's reliance on *Murphy v. Waterfront Commission*. *See id.* at 1431. Gecas had relied on *Murphy* in arguing that the critical question was whether the government compelling the testimony protects against self-incrimination. *See id.* The court ruled that *Murphy* could only be understood in the context of *Malloy v. Hogan*, decided on the same day as *Murphy*. *See id.* at 1431. The *Gecas* court argued that these cases together show that both the jurisdiction compelling the testimony and the jurisdiction using the testimony have to be bound by the privilege against self-incrimination. *See id.* at 1431-32.

106. *See id.* at 1430.

107. *See id.* at 1432-33.

108. *See id; supra* notes 60-64 and accompanying text (discussing the Eng-

native claim that the OSI's methods of prosecution and its close connections with the foreign governments transformed these governments into agents of the United States, thus making the United States both the compelling and the using sovereign.[109] The court further supported its decision by noting that if the privilege against self-incrimination were applied to foreign convictions, suspected criminals could easily subvert American law enforcement efforts.[110]

Relying on academic scholarship, the *Gecas* court ventured into a lengthy and detailed exposition on the history of the privilege against self-incrimination.[111] The court traced the origins of the privilege from medieval ecclesiastical and secular courts[112] to the advent of the first jury trials in the thirteenth century.[113] It then noted the formal establishment of the privilege in seventeenth century England[114] and discussed its adoption by the American colonies, then its inclusion in the Bill of

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lish cases cited in *Murphy v. Waterfront Commission*). The *Gecas* court distinguished the two English cases that predated the Constitution by interpreting that the cases stood for the principle that the privilege against self-incrimination applied in Indian and ecclesiastical courts because both fell within the English sovereignty. *See* 120 F.3d at 1432-33. Finally, it held that although *Murphy* clearly endorsed *McRae* as the English rule, Parliament overruled the case four years after *Murphy*. *See id.* at 1433. Thus, it held that "[w]e decline to rely on a foreign case that has been overruled." *Id.*

109. *See* 120 F.3d at 1433-34.

110. *See id.* at 1434. The court suggested possible problems if it were to allow the privilege. For example, if a person flying from another country were arrested in an American airport for smuggling drugs, that person could refuse to testify, even in exchange for immunity for information about a drug smuggling operation in the United States because that testimony could be used to prosecute that person in a foreign country. *See id.*

111. *See id.* at 1435-57. The court recognized the vast scope of the privilege's historical account by noting that this "undertaking will fill a few more pages of the federal reporter than we might otherwise wish, but we consider a full understanding of the privilege essential to the resolution of the important issue presented in this case." *Id.* at 1435. Indeed, the court's historical discussion alone occupied 22 pages of the Federal Reporter.

112. *See id.* at 1436-40.

113. *See id.* at 1440-41.

114. *See id.* at 1449. The court noted the influence of seventeenth-century English Puritans who protested against the secular and ecclesiastical courts' inquisitorial methods. The *Gecas* court acknowledged that these protesters described the courts' interrogatory methods as a violation of natural law, but characterized these claims as attempts to "interpose as many procedural objections as possible to their prosecution." *Id.* at 1448-49. By the mid-1600s century, several tracts condemning the courts' arbitrary exercise of power had become so widely read that in 1641, Parliament abolished the inquisitorial methods of the courts and instituted a statutory privilege against self-incrimination. *See id.* at 1450.

Rights by the Framers.[115] Based on this history, the *Gecas* court rejected Gecas's claim that the privilege was meant to protect individual privacy and dignity.[116] Instead, the court concluded that the purpose of the privilege was to limit the investigative techniques of an overreaching government.[117]

The dissent strongly criticized the majority opinion on several grounds.[118] It argued that denying the privilege to a witness who had a reasonable fear of foreign prosecution defeated the policies underlying the privilege.[119] The dissent also argued that the majority misinterpreted the Supreme Court cases on the privilege.[120] Finally, the dissent noted that the majority's

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115. *See id.* at 1456. The court believed that the colonists "viewed the privilege against self-incrimination as a bulwark against arbitrary and intrusive criminal investigations." *Id.* at 1457.

116. *See id.*

117. *See id.* at 1456. In a footnote, the court addressed the dissent's contention that the privilege espoused both personal liberty and a limit on government. The court found that the "individual dignity of criminal defendants is secured by limiting the nature of the federal government's prosecutorial techniques." *Id.* at 1457 n.36. The majority argued that the dissent created support for its opinion by "splitting this unified policy into separate policies, then finding the one which suits the occasion." *Id.*

118. *See id.* at 1458-83 (Birch, J., dissenting). The alignment of opinions demonstrates the contentious and difficult nature of this issue. Six judges found there to be no privilege. Of these, one judge concurred in a separate opinion. Among the five dissenting judges, one dissented with a separate opinion. In his separate dissenting opinion, Circuit Judge Carnes argued that the Department of Justice had been acting as an "'alter ego'" of foreign prosecutors in the *Gecas* case. As evidence, the judge offered a sealed opinion from the Ninth Circuit in a case similar to *Gecas*. *See id.* at 1484.

119. *See id.* at 1459. The dissent argued that *Murphy* explicitly identified two policies behind the privilege. *See id.* at 1460. The privilege was meant to ensure the integrity of the criminal justice system by placing limits on the prosecutor's techniques, and to protect the individual's privacy and freedom from cruelty. *See id.* The dissent also took issue with the majority's assertion that the privilege only protected against use of compelled testimony, not the actual compulsion. *See id.* at 1461. It argued that the "prohibition against use alone . . . does not promote, and in fact defeats, the rights-based rationale of the Fifth Amendment." *Id.*

120. *See id.* at 1461-64 (Birch, J., dissenting). The dissent examined Supreme Court cases interpreting the grant of immunity and asserted that these cases demonstrate that when a witness is granted use and derivative use immunity, the privilege against self-incrimination no longer applies. This means that the central issue is not whether the court using the compelled testimony is within the same jurisdiction, but whether the testimony can be used in any criminal prosecution of the witness. *See id.* at 1463. The dissent also interpreted *Murphy* and asserted that "only a strained reading of the Court's opinion and wholesale discounting of the reasoning embodied in it could lead one to reach the conclusion of the majority in this case." *Id.* at 1472.

historical account of the privilege was selective and contradicted by the Supreme Court's discussion of the subject.[121]

III. *GECAS*: A CLEAR, BUT UNSUPPORTED HOLDING

United States v. Gecas articulates a clear holding as to the application of the privilege against self-incrimination where the witness faces a substantial fear of foreign prosecution. Although the decision is a laudable attempt to analogize to Supreme Court precedent and to unify a diverse and complex historical literature, the court's approach is flawed in several respects. The *Gecas* court misreads the two components of the privilege and ignores the multiple rationales behind the privilege. Future courts should read the language of the Fifth Amendment broadly and apply the privilege in cases where there is a real and substantial fear of foreign prosecution.

A. LOCATING THE VIOLATION OF THE FIFTH AMENDMENT

The *Gecas* court's interpretation of a "criminal case" under the Fifth Amendment is central to its holding that the privilege cannot be invoked in the context of cases of potential foreign prosecution.[122] The court finds that, "[t]he actual violation, if any, occurs only at a witness's own criminal trial."[123] Because the criminal trial will occur in a foreign country not bound by the U.S. Constitution, there can be no violation of the Fifth Amendment. Thus, Gecas's claim is not a "criminal case."[124]

At first glance, the court's argument is convincing. Closer inspection reveals, however, that it rests on an unstable foundation. The key to the court's approach is the assertion that the privilege against self-incrimination is basically a tool to protect against the *use* of compelled evidence at trial. It acknowledges that in addition to a witness's right to invoke the

121. *See id.* at 1472-78. The dissent acknowledged that one of the primary rationales of the privilege was to protect against an overzealous prosecuting government, but it argued that a rights-based rationale is consistent and complements the structural rationale. *See id.* at 1472. To this end, the dissent asserted that the majority de-emphasized and ignored key elements of the privilege's history, which suggest that the privilege derived its origin from natural law. *See id.* at 1473. Finally, the dissent critiqued the majority opinion for its discussion of the practical considerations applying the privilege to cases involving potential criminal prosecution in a foreign country. *See id.* at 1478-82.

122. *See id.* at 1427.

123. *Id.* at 1428.

124. *Id.* at 1430-31.

privilege at trial, the witness can also invoke the privilege to prevent compulsion of self-incriminating testimony.[125] However, the court is quick to minimize the importance of the application of the privilege prior to testimony.[126] Calling this aspect of the privilege a "prophylactic rule," the court reiterates its basic assumption that "[t]he Self-Incrimination Clause protects against *conviction* based on self-incrimination; it does not protect against the mere compulsion of testimony by a court."[127] The *Gecas* court's argument fails because it denies the established and constitutionally authorized use of the privilege to protect against compulsion of self-incriminating evidence.

1. The Privilege's Protection Against Conviction: Making Dicta Bind

The court categorically dismisses Gecas's claim based on an unsupported citation to one Supreme Court case, *Kastigar v. United States*[128] and dicta from another, *United States v. Verdugo-Urquidez*.[129] The *Gecas* court cites *Kastigar* to show that the privilege only protects against the "actual 'infliction of criminal penalties on the witness.'"[130] The *Gecas* court both takes the *Kastigar* quote out of context and mischaracterizes its meaning. *Kastigar* did not narrow the reach of the privilege as *Gecas* suggests. It held that a grant of immunity must be coextensive with the scope of the privilege.[131] This means that an immunity grant must be broad enough to protect against compulsion of testimony that would *lead to* or could be *used* in a criminal trial. Implicit in its holding is the constitutional right to invoke the privilege to prevent against self-incriminating testimony. *Gecas* incorrectly characterizes testimony, which would create the possibility of conviction, as falling outside the reach of the privilege.

Although the Supreme Court has endorsed grants of immunity based on use and derivative use of the testimony, it has been careful not to circumscribe the privilege. In *Hoffman v. United States*,[132] the Court held that the defendant could not be

125. *See id.* at 1428-29.
126. *See id.* at 1429 n.13.
127. *Id.* (emphasis added).
128. *See id.* at 1428.
129. *See id.* at 1428, 1432.
130. *Id.* at 1428.
131. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972).
132. 341 U.S. 479, 488 (1951).

forced to answer questions because "it was not '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate."[133] Also, in *Lefkowitz v. Turley*, decided one year after *Kastigar*, the Supreme Court again clearly stated that in cases where the testimony may be self-incriminating, a grant of immunity will only satisfy the privilege if the witness is fully protected against the *use* of the testimony.[134] Aside from the isolated citation to *Kastigar*, nowhere has the Supreme Court conditioned the privilege upon the witness's conviction at trial.

The *Gecas* court supports its reading of *Kastigar* by citing an unrelated case, *United States v. Verdugo-Urquidez*.[135] *Gecas* argues that *Verdugo-Urquidez* stands for the proposition that privilege can only be violated at trial, not at the compulsion of the evidence:[136] However, *Verdugo-Urquidez* addressed the issue of whether the Fourth Amendment applies to American authorities' search and seizure of property belonging to a nonresident alien in a foreign country.[137] The Supreme Court discussed the privilege against self-incrimination only to demonstrate the difference in operation between the two amendments.[138] As the dissent in *Gecas* aptly noted, *Verdugo-Urquidez*'s mention of the privilege occurs in the three introductory sentences of the opinion.[139] The dissent argued that the discussion was "not only dicta, but also merely passing dicta that provides no useful analysis whatsoever."[140] Neither *Kastigar* nor *Verdugo-Urquidez* provide adequate support to dismiss outright the witness's right to the privilege where there is a danger of a foreign prosecution. By relying on these cases, *Gecas* focuses only on criminal conviction and fails to address the constitutional protection against the use of the testimony in a criminal trial and the potential violation that occurs at compulsion. Once the court establishes this narrow interpretation of the Self-Incrimination Clause, it can fall back on the argument

133. *Id.* at 488 (quoting Temple v. Commonwealth, 75 Va. 892, 898 (Va. 1881)).
134. *See* 414 U.S. 70, 78 (1973).
135. 494 U.S. 259, 259 (1990).
136. *See Gecas*, 120 F.3d at 1428.
137. *See* 494 U.S. at 259.
138. *See id.* at 264.
139. *See Gecas*, 120 F.3d at 1468 n.59 (Birch, J., dissenting).
140. *Id.* (Birch, J., dissenting).

that because Gecas's criminal conviction can only occur in a foreign country, beyond the jurisdiction of the United States, there can be no constitutional violation.

2. The Privilege's Dual Components: Before Testimony and During Trial

Not only does the *Gecas* court misread Supreme Court precedent on the application of the privilege beyond criminal cases, it ignores the constitutional basis of the protection against being forced to testify. The Supreme Court's consistent rulings on the proper scope of immunity statutes[141] and the early application of the privilege[142] undermine the *Gecas* court's argument.

Gecas notes the alternatives facing a court when a witness invokes the privilege: it may deny a motion to compel a witness to testify or exclude improperly compelled evidence.[143] To support its assertion that the exclusion of compelled testimony is the only necessary element of the privilege, the court describes the refusal to compel testimony as a "prophylactic rule."[144] The *Gecas* court mistakenly bases this analysis on the fact that if the witness is granted immunity, the court in a criminal case will be forced to "launder its case," excluding potentially incriminating testimony.[145] As the dissent notes, the description of this aspect of the privilege as prophylactic incorrectly analogizes to the Supreme Court's rulings on the Miranda warnings.[146]

The court's dismissal of the protection against compulsion is untenable because it denies repeated rulings by the Supreme Court that testimony cannot be compelled over a valid assertion of the privilege.[147] Beginning with *Counselman* and continuing through *Kastigar*, the Court has forced witnesses to testify only where the grant of immunity protects the witness from prosecution based on the use of the testimony and any evidence de-

141. *See supra* notes 29-42 and accompanying text.
142. *See supra* notes 26-27 and accompanying text.
143. *See Gecas*, 120 F.3d at 1428-29.
144. *Id.* at 1429.
145. *See id.*
146. *See id.* at 1464 (Birch, J., dissenting). The dissent argues that the Court recognized the Miranda warnings as prophylactic because they are not rights that are themselves protected by the Constitution. Instead, the warnings are meant to ensure that the right to the privilege is protected. *See id.*
147. *See supra* notes 29-31, 36-42 and accompanying text.

rived from it.[148] If the privilege were truly a prophylactic rule as *Gecas* suggests, what explains the Supreme Court's consistent rulings on immunity statutes? *Gecas* does not offer any resolution to the fundamental contradiction of what purpose the immunity statutes serve, if not to protect a Constitutional right. According to *Gecas*'s interpretation, a court faced with a witness invoking the privilege would never have to grant immunity. The court could simply force every witness to testify, no matter the content of the testimony or its possible use at a criminal trial. Alternatively, the court could mechanically grant immunity to the witness and not concern itself with the appropriateness of the grant, relative to the testimony. The only time a court need concern itself with the question of allowing compelled testimony is at the criminal trial, when, according to *Gecas*, the privilege is at stake. As tempting as the *Gecas* approach sounds, the Supreme Court has clearly held that the privilege protects against both the compulsion and introduction of self-incriminating evidence.[149] The privilege's protection against compulsion is not just an extension of the protection against use of compelled testimony, as *Gecas* seems to suggest—it is in itself, a constitutional right.

The importance of the privilege's protection against compulsion is further supported when the privilege is put in the context of its early American application. The debate over the proper scope of the privilege in modern criminal procedure has illuminated the privilege's early protection.[150] The thrust of the privilege in eighteenth century America focused on the privilege's protection before the testimony had been compelled from the witness.[151] As one scholar has put it, "courts did not compel testimony first, and ask what use if any could be made of it later. Rather, they insisted that the privilege holder use it or lose it."[152] The historical emphasis on the invocation of the privilege before the testimony is compelled, seriously weakens one of *Gecas*'s fundamental assumptions. Not only is the

148. *See supra* Part I.B.1.

149. *See supra* notes 36-42 and accompanying text.

150. *See supra* notes 24-27 and accompanying text.

151. *See* Dripps, *supra* note 26, at 1625-26 (analyzing the development of the privilege in early American law).

152. Dripps, *supra* note 26, at 1625. Professor Dripps cites early civil cases where the court upheld the witness's refusal to testify and Blackstone's influential law treatises, which constituted a "primary source of legal knowledge for the framers," to support his proposition that the witness had to invoke the privilege or lose it. *Id.* at 1625-26.

court's interpretation suspect with regard to the question of when a violation of the privilege occurs, but it is contradicted by consistent Supreme Court holdings and by the historical context of the privilege. Both these factors emphasize the privilege's protection against compulsion of testimony. Thus, these factors by themselves compel a broader interpretation of the privilege.

B. FINDING A WAY AROUND *MURPHY* AND HISTORY

The *Gecas* holding that the privilege cannot be asserted because there can be no Constitutional violation under foreign law is powerful because it rejects all Fifth Amendment claims involving questions of foreign prosecution. To support its holding, the court attempts to distinguish *Murphy v. Waterfront Commission*[153] and to read a single purpose into the history of the privilege.

1. Distinguishing English Law

To distinguish *Murphy*, the court first found that its holding could not be separated out of the context of another case, *Malloy v. Hogan*, which applied the privilege against self-incrimination to the states through the Due Process Clause of the Fourteenth Amendment.[154] Then the *Gecas* court found that the English cases cited by the Supreme Court either did not involve two strictly separate jurisdictions[155] or had been overruled by the English Parliament.[156]

The *Gecas* court makes much of the fact that the Supreme Court decided *Murphy* and *Malloy* on the same day. Instead of viewing the cases as treating two distinct, but related issues, *Gecas* treats *Murphy* as simply an amplified version of *Malloy*. According to *Gecas*, the Supreme Court "chose *Murphy* as a vehicle for unifying the meaning of the privilege against self-incrimination within the United States."[157] As support, the *Gecas* court notes citations by both *Murphy* and *Malloy* to each

153. 378 U.S. 52 (1964). See *supra* notes 50-64 and accompanying text for a discussion of *Murphy*.

154. *See supra* note 105.

155. *See supra* note 108 (describing the way *Gecas* distinguished the English cases).

156. *See supra* note 108 (citing the *Gecas* finding that because the English Parliament later overruled *United States v. McRae*, it did not constitute relevant precedent).

157. United States v. Gecas, 120 F.3d 1419, 1431 (11th Cir. 1997).

other.[158] The *Gecas* court argues that because of this connection between the cases, *Murphy* stands for the proposition that the Self-Incrimination Clause applies when the compelling and using courts are within the same jurisdiction.[159] Linking *Murphy* and *Malloy* is clever because its leads back to already-trod ground: Does a violation of the privilege against self-incrimination occur upon the compulsion or use of the testimony?[160] Although this approach supports the court's ruling on the inapplicability of the privilege to cases involving foreign prosecution, it fails to address *Murphy*'s holding.

The *Gecas* court further argues that *Murphy*'s citation of several English cases and its endorsement of the "English rule" is distinguishable and not binding.[161] *Gecas* attempts to distinguish the English cases, which concerned the applicability of the privilege to witnesses fearing prosecution in English ecclesiastical and Indian courts.[162] The *Gecas* court argued that because India was an English colony at the time and because the ecclesiastical court was also in England, the cases stand for the proposition that "different court systems operating under the same sovereign power must abide by the same procedural constraints."[163] *Gecas* also distinguished *United States v. McRae*,[164] one of the English cases cited by *Murphy*, to represent the English position on the privilege against self-incrimination under foreign law.[165] *McRae* held that where a witness is subject to foreign prosecution the privilege applies just as it would under English law.[166] *Gecas* dismissed *Murphy*'s citation of this case based on the fact Parliament overruled *McRae* four years after its decision, noting that "we decline to rely on a foreign case that has been overruled."[167]

The court's dismissal of *Murphy*'s citation to the English cases is suspect for several reasons. A Michigan district court faced with similar arguments as those made by the *Gecas* court

158. *See id.* at 1431-32.

159. *See id.* at 1432.

160. *See supra* Part III.A (analyzing *Gecas*'s argument concerning when a violation of the privilege against self-incrimination occurs).

161. *See Gecas*, 120 F.3d at 1433.

162. *See supra* note 62 (discussing the English cases cited by *Murphy*).

163. *Gecas*, 120 F.3d at 1433.

164. *See supra* note 63 (describing *Murphy*'s discussion of *McRae* and the earlier, overruled case, *King of Two Sicilies*).

165. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 61-63 (1964).

166. *See id.*

167. *Gecas*, 120 F.3d at 1433.

reviewed the English cases and found that the English courts viewed the ecclesiastical and Indian courts as "distinct and independent entities" and that the holdings from these cases "expanded the privilege to prosecutions conducted in non-domestic jurisdictions."[168] Secondly, and perhaps more importantly, both the Second Circuit[169] and the *Gecas* dissent make the point that it is less important whether *Murphy* accurately interpreted English law than it is how *Murphy* viewed these cases.[170] On this issue there is no question. *Murphy* overruled an early American case that it found had incorrectly stated English law and instead held that *McRae* represented the "settled 'English rule' regarding self-incrimination under foreign law."[171] *Gecas*'s reliance upon it skirts the central issue that the Supreme Court clearly suggested that a witness could invoke the privilege to protect against foreign prosecution based on the testimony.

2. Side-Stepping *Murphy*

Noticeably absent from the *Gecas* court's analysis is any discussion of *Murphy*'s often-cited language describing the policies and the history of the privilege against self-incrimination. This omission is exceptional because *Murphy* is the most relevant and binding authority on the privilege's policy.[172] The *Gecas* court's failure to examine this aspect of *Murphy* is also noteworthy because *Gecas*'s discussion of the history and the purpose of the privilege is otherwise so long and exhaustive.[173]

Murphy broadly and eloquently sketched the policies behind the privilege against self-incrimination.[174] Among courts considering application of the privilege in cases where a witness faces potential foreign prosecution, *Gecas* stands virtually alone in neglecting *Murphy*'s relevance in determining the privilege's rationale.[175] *Murphy*'s language is at the center of a

168. Moses v. Allard, 779 F. Supp. 857, 876 (E.D. Mich. 1991).

169. *See* United States v. Balsys, 119 F.3d 122, 133 n.7 (2d Cir. 1997), *cert. granted*, 118 S. Ct. 751 (1998).

170. *See Gecas*, 120 F.3d at 1469.

171. *Murphy*, 378 U.S. at 63.

172. *See supra* notes 53-57 and accompanying text.

173. *See supra* notes 111-115 and accompanying text.

174. *See supra* notes 53-57 and accompanying text.

175. Although the Second and Fourth Circuits came to different holdings, both acknowledged *Murphy*'s importance in determining the policies behind

debate over whether the privilege against self-incrimination protects against the government's potential abuse of a witness in extracting testimony, or whether the privilege ensures a personal right not to incriminate himself.

Influenced both by *Murphy* and by historical considerations, courts have generally avoided assigning a single, overriding policy to the privilege.[176] As the district court in *Moses v. Allard* stated, "the Fifth Amendment privilege is not easily reduced to a singular policy or purpose, but is ephemeral and eludes crisp summarization. That the privilege is not easily packaged into one clearly formed policy rationale is a testament to its profound relationship to many of our most cherished ideals."[177] *Murphy* also recognized the pitfalls of forcing the privilege into a neat category.[178] The *Murphy* court stated that "it will not do, therefore, to assign one isolated policy to the privilege."[179] Even the Fourth Circuit, which held that the privilege does not apply in cases of foreign prosecution, found that the privilege, "serves a dual purpose. It protects individual dignity and conscience, and it preserves the accusatorial nature of our system of criminal justice."[180]

Despite an impressive body of courts, from the Supreme Court to district courts, which have avoided pinpointing one policy rationale behind the privilege, the *Gecas* court insisted that the privilege was only intended as a limit on the investigative techniques of the government.[181] The Second Circuit, in a case very similar to *Gecas*, overruled the district court's singular interpretation of the privilege.[182] It suggested that rather than, "attempt to determine a single cardinal purpose of the Fifth Amendment and consider the question before us only in relation to that purpose, as the district court essentially did, we are bound to recognize the multiple values that the Supreme Court has found the privilege against self-incrimination

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the privilege. *See* United States v. Balsys, 119 F.3d 122, 129-130 (2d Cir. 1997), *cert. granted*, 118 S. Ct. 751 (1998); United States v. (Under Seal) (Araneta) 794 F.2d 920, 926 (4th Cir. 1986).

176. *See supra* note 89 and accompanying text.

177. Moses v. Allard, 779 F. Supp. 857, 873 (E.D. Mich. 1991).

178. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 56 n.5 (1964).

179. *Id.*

180. United States v. (Under Seal) (Araneta), 794 F.2d 920, 926 (4th Cir. 1986).

181. *See* United States v. Gecas, 120 F.3d 1419, 1456 (11th Cir. 1997).

182. *See* United States v. Balsys, 119 F.3d 122 (2d Cir. 1997), *cert. granted*, 118 S. Ct. 751 (1998).

to serve."[183] The *Gecas* court did almost exactly what the Second Circuit cautioned against: interpret the privilege according to a predetermined range of answers.

The reason *Gecas* excludes other possible rationales is that it first proceeds by categorically ruling that cases involving a potential foreign prosecution do not qualify as criminal cases under the Self-Incrimination Clause.[184] This holding compels the court to find that the privilege only protects against intrusive government investigations. A finding that the privilege also encompasses a personal right would be at odds with the court's bright-line rule about the reach of the privilege. Thus, the *Gecas* court did not need to consider *Murphy*'s analysis of the policy question; it had already found the answer.

3. Reading History One-Way

The court's lengthy section on the historical origins of the privilege is instructive in that it shows how narrowly the court limited the range of potential rationales it might find. Sweeping across centuries of diverse and complex history, the court summarizes the development of the privilege against self-incrimination with abandon.[185] The court's foray into history is remarkably ambitious. It notes that no other court has exhaustively examined the privilege's history with regard to self-incrimination under foreign law.[186] By piecing together the starts and fits that have characterized the privilege's development, the court arrives at early American criminal procedure and confidently states that the Framers did not include the privilege to protect an individual right, but to limit the government's power to use intrusive investigations to extract testimony.[187]

The noteworthy aspect of the court's historical analysis is not its conclusion, but its confidence in excluding other rationales represented by the privilege. The historical interpretation of the privilege among scholars is by no means settled.[188] A recent anthology on the privilege asserted that the Self-Incrimination Clause "continues to produce hotly contested cases in the courts,

183. *Id.* at 129.

184. *See Gecas*, 120 F.3d at 1427-31.

185. *See id.* at 1435-57.

186. *See id.* at 1435.

187. *See id.* at 1457.

188. *See supra* notes 13-27 and accompanying text (discussing the debate among scholars as to the meaning of the privilege).

a disputatious literature in the law reviews, and strong reactions—indignant, laudatory, and puzzled—among informed observers."[189] In all its citations to law treatises and law review articles, the court does not hint at the general consternation, readily acknowledged by scholars, about the meaning and scope of the privilege.

Gecas's historical discussion makes sense once it is put in context with the rest of the opinion. The court's entire argument is driven by the assumption that the privilege against self-incrimination can only be violated when the compelled testimony is used to convict the witness in a criminal prosecution.[190] And, because foreign countries are not subject to the U.S. Constitution, there cannot be a violation of the privilege when foreign prosecutions are involved.[191]

The court goes too far in trying to reduce the privilege to its essence. The interpretation of the privilege's history, currently in vogue among scholars, cannot be read as license for courts to impose a singular reading of the privilege, as *Gecas* seems to suggest. The history of the privilege is far too ambiguous[192] and case law is far too unsettled for such an approach.[193] Furthermore, it is not clear whether or how the privilege's origins should influence the Fifth Amendment's application to contemporary problems.[194]

The difficulty of determining the relevance of the privilege's history is compounded when the circumstances of the *Gecas* case are considered. By rejecting Gecas's agency argument,[195] it ignored important practical considerations. The OSI has been given broad powers by the Department of Justice to seek out and prosecute suspected Nazi collaborators.[196] Once an American court compels Gecas's testimony and orders his deportation, information gathered before and during the trial,

189. Helmholz, *supra* note 24, at 4 (noting the continued disagreement about the meaning of the privilege).

190. *See Gecas*, 120 F.3d at 1430.

191. *See id.*

192. *See supra* notes 13-27 and accompanying text.

193. *See supra* Parts I.C-D.

194. *See* Helmholz, *supra* note 25, at 990 (noting that it is not clear how an expanded understanding of the privilege's history should affect current controversies concerning the privilege's scope).

195. *See Gecas*, 120 F.3d at 1433-34.

196. *See supra* note 81.

including compelled testimony, will likely be shared with the foreign governments prosecuting Gecas.[197]

The Second Circuit correctly noted this danger and pointed out that the United States government will have the greatest interest in compelling testimony when the witness faces the greatest risk of foreign prosecution.[198] If, for example, journalists or historians or the OSI itself, discover that a high-profile American resident is alleged to have broken foreign laws, popular media and international diplomatic pressure will encourage prosecutors to extract the accused's testimony at all costs. The Eleventh Circuit's approach puts the person most in need of protection against self-incrimination outside the privilege's reach. Such a situation frustrates the privilege's dual purposes of protecting against an overreaching government and preserving individual dignity. Thus, while it purports to uncover the privilege's real purpose in its lengthy historical discussion, the court ignores considerations that can only be understood in the modern context.

The *Gecas* court's categorical denial of Fifth Amendment claims when there is a danger of foreign prosecution forces it to explain away contrary Supreme Court precedent and to construct a seamless historical account to support its holding. The compelling nature of the Supreme Court opinions in the immunity cases and the wide dispute regarding the privilege's policy and history make this an impossible task. The *Gecas* court attempts to construct an airtight box around the privilege and thereby exclude cases involving foreign law. However, precedent, history, and common sense tell us that the box is actually full of holes; Fifth Amendment cases involving consequences outside the United States must naturally creep in.

CONCLUSION

In 1979, the Department of Justice created the OSI for the purpose of seeking out persons suspected of collaborating with the Nazi government during World War II. Now, two decades later, the fruits of the OSI's efforts have crystallized a difficult and unresolved constitutional question: Does the Fifth Amendment privilege against self-incrimination apply where a witness faces criminal prosecution in a foreign country? *Gecas v. United States* held that the privilege does not apply because

197. *See supra* note 81.
198. *See supra* note 86.

it can be violated only upon the witness's conviction. And, when such a conviction occurs outside the United States and involves a non-citizen, there is no violation of the Constitution.

The *Gecas* court's approach is a laudable attempt to resolve this issue with a straightforward, categorical approach. However, its assumption that the privilege can only be violated upon the use of the compelled testimony contradicts Supreme Court cases upholding the protection against both compulsion and use of testimony. Furthermore, the *Gecas* court's singular interpretation of the privilege's policy and history ignores the multiple meanings the Self-Incrimination Clause has come to represent. The Supreme Court should acknowledge the privilege's indeterminate history and the increasingly international nature of law enforcement and interpret the privilege to cover cases in which there is the potential for foreign prosecution.