

January 1995

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Recommended Citation

Christine L. Reimann, *Fencing the Fifth Amendment in Our Own Backyard*, 7 Pace Int'l L. Rev. 177 (1995)

DOI: <https://doi.org/10.58948/2331-3536.1300>

Available at: <https://digitalcommons.pace.edu/pilr/vol7/iss1/6>

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FENCING THE FIFTH AMENDMENT IN OUR OWN BACKYARD

I. INTRODUCTION

This note will discuss *United States v. Gecas*,¹ in which the respondent, Gecas, refused to answer certain questions regarding his immigration to the United States, his World War II activities in Lithuania and thereby pleaded the Fifth Amendment. Gecas based his right to remain silent on fear of future foreign prosecution.² Consequently, the Florida District Court had to determine whether fear of foreign prosecution is sufficient to invoke the protection of the Fifth Amendment.³

American courts have looked to English case law to guide them in dealing with the issue of a defendant's fear of prosecution, whether such prosecution would be in another court within the United States or in the court of another country.⁴ The result has been that American courts have formulated a two-part test.⁵ Initially, the claimant must demonstrate a reasonable danger of foreign prosecution resulting from being compelled to testify.⁶ Only if this showing is sufficient to satisfy the threshold question will a court entertain the issue of extending Fifth Amendment protection.⁷

The courts of the United States, which have addressed the Fifth Amendment question, have reached differing conclusions on the applicability of the Fifth Amendment to fear of prosecution in a foreign country. In a recent case, the United States

¹ 830 F. Supp. 1403 (N.D. Fla. 1993).

² *Id.* at 1405.

³ *Id.* at 1405-06.

⁴ See *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

⁵ *Gecas*, 830 F. Supp. at 1406-07 (citing *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478-79 (1972)). This test requires a claimant of the fifth amendment privilege to first satisfy a threshold inquiry before the court will consider whether to extend constitutional protection. *Id.*

⁶ *Gecas*, 830 F. Supp. at 1406-07.

⁷ *Id.* at 1413-14.

Supreme Court failed to offer a conclusive determination on this Fifth Amendment question by deciding the case on a sub-issue.⁸

There is very little United States case law with regard to the applicability of the Fifth Amendment for fear of prosecution in a foreign country.⁹ Therefore, it is necessary to analogize claims of the Fifth Amendment for fear of foreign prosecution to claims of the Fifth Amendment for fear of domestic prosecution. The resolution of the Fifth Amendment question is very important because with "increased international cooperation in crime fighting," it may be likely that more witnesses will plead the Fifth Amendment for fear of incrimination under the laws of a foreign nation.¹⁰ In *Gecas*, the Florida District Court for the Northern District of Florida was presented with an opportunity to broadly interpret the long-standing, cherished, constitutional right against self-incrimination, and extend the privilege to fear of prosecution in a foreign country. However, the *Gecas* Court failed to do so.¹¹

II. BACKGROUND

A. *Origin of the Fifth Amendment*

The Fifth Amendment¹² provides that "no person shall be compelled in any criminal case to be a witness against himself."¹³ There are differing views as to the origin of the privilege against self-incrimination. Legal scholars generally agree that the privilege began as a response to the ex officio or inquisitorial

⁸ *Zicarelli v. New Jersey State Comm'n of Harbor*, 406 U.S. 472 (1972). The court here was faced with the opportunity to decide the issue of whether the fifth amendment may be invoked where a witness fears a prosecution in a foreign country. *Id.*

⁹ *Gecas*, 830 F. Supp. at 1414.

¹⁰ See Moshe M. Sukenik, *Testimony Incriminating Under the Laws of a Foreign Country-Is There a Right to Remain Silent?* 11 N.Y.U. J. INT'L. L. & POL. 359 (1978).

¹¹ *Gecas*, 830 F. Supp. at 1406.

¹² U.S. CONST. amend. V.

¹³ MCCORMICK ON EVIDENCE § 114, at 118 (Edward Cleary ed., 2d ed. 1972) quoting Stefan A. Riesenfeld, *Law-Making and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103, 118 (1949). Stefan A. Riesenfeld traced the maxim "no man shall be compelled to accuse himself," to biblical history, specifically to a statement of Saint Chrysostomous in his commentary to Saint Paul's Epistle to the Hebrews." *Id.* The maxim is also found in earliest canonist writings as "I do not tell you to incriminate yourself publicly or to accuse yourself in front of others." *Id.* at 118.

oath introduced into the English Ecclesiastical Courts in the thirteenth century.¹⁴ As a result of active interrogation by the judge, including torture in some cases, a witness testifying under this oath¹⁵ had no choice but to disclose the entire matter under query.¹⁶

In the seventeenth century, the British Parliament passed a bill prohibiting the administration of the ex officio oath in the Courts of High Commission and Star Chamber.¹⁷ Similarly, in 1641, the ex officio oath was banned in the common law courts.¹⁸ The basis underlying this prohibition on the ex officio oath focused on the difficult and unfair choice that an individual was forced to make: securing his or her individual liberty or violating the ex officio oath, thereby incurring penal liability.¹⁹

B. *The Right Against Self-Incrimination in the American Colonies*

At the close of the seventeenth century, the privilege against self-incrimination was "unevenly established in America."²⁰ Evidence of recognition of the privilege in the colonies is not abundant due to scant trial records. However, in 1756, Geoffrey Gilbert published *Law of Evidence* in which he wrote that a confession must be voluntarily made because "our law will not force any man to accuse himself. . . ." ²¹ Several of the colonies followed English practice closely.²²

The English Courts expanded the right against self-incrimination to include the necessity of producing documents that could inculcate the accused.²³ Later, this right was extended to

¹⁴ *Id.* at 244.

¹⁵ LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968). The ex officio oath required the accused, "without having been formally charged with the accusation against him, . . . or the nature of the evidence against him, . . . to answer a series of interrogations whose purpose was to extract a confession." *Id.* at 368.

¹⁶ The oath extended to courts of the High Commission, Star Chamber and criminal trials. MCCORMICK ON EVIDENCE, *supra* note 13, § 114, at 245-46.

¹⁷ MCCORMICK ON EVIDENCE, *supra* note 13, § 114, at 246.

¹⁸ 8 WIGMORE ON EVIDENCE § 2175 at 291 (John T. McNaughton ed., 1961).

¹⁹ MCCORMICK ON EVIDENCE, *supra* note 13, § 114, at 247.

²⁰ LEVY, *supra* note 15, at 368.

²¹ LEVY, *supra* note 15, at 371-72.

²² For instance, permitting counsel to the felony defendant only at the discretion of the trial judge and usually on points of law only. LEVY, *supra* note 15, at 376.

²³ LEVY, *supra* note 15, at 390.

prohibit the use of general warrants to confiscate private papers.²⁴ In the 1790's, the opposition to general search warrants gave the privilege against self-incrimination added support, first in England, later in America.²⁵

In 1776, several states converted the common law right against self-incrimination to a constitutional right.²⁶ At this time, England and America differed little on the right against self-incrimination.²⁷ In sum, "[t]he ever-increasing professionalization of the bar, the growing familiarity with 'the liberty of the subject' and the English rights, and the protests against self-accusing all contributed to the respectability of the right against incriminating oneself."²⁸

C. *Policy Considerations Underlying the Fifth Amendment*

The privilege against self-incrimination promotes respect for and preserves the "dignity of the judicial system."²⁹ It encourages witnesses to testify free from the danger of possible future punishment.³⁰ In effect, "the privilege removes the incentive for perjury."³¹ More importantly, the privilege insures that those guilty of a crime are not "compelled to participate in the establishment of their own guilt."³²

Erwin Griswold characterized the privilege as follows: "The privilege against self-incrimination is one of the greatest landmark's in man's struggle to make himself civilized. . . [thus]. . . even the evil man is a human being."³³ Above all, the Fifth Amendment reflected the framers' judgment "that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the ac-

²⁴ LEVY, *supra* note 15, at 390.

²⁵ LEVY, *supra* note 15, at 390.

²⁶ LEVY, *supra* note 15, at 405.

²⁷ LEVY, *supra* note 15, at 404.

²⁸ LEVY, *supra* note 15, at 382.

²⁹ MCCORMICK ON EVIDENCE, *supra* note 13, at 252.

³⁰ MCCORMICK ON EVIDENCE, *supra* note 13, at 252.

³¹ MCCORMICK ON EVIDENCE, *supra* note 13, at 252.

³² MCCORMICK ON EVIDENCE, *supra* note 13, at 252.

³³ ERWIN GRISWOLD, *The Fifth Amendment Today*, 7-9 (1955). Even the worst possible criminal is entitled to the protection of his dignity and self-worth in a civilized society.

cused made no unwilling contribution to his conviction was more important than punishing the guilty."³⁴

D. *Background of Early English Cases*

The cases in England, arising before the ratification of the United States Constitution, show an intention by the English Courts to acknowledge fear of incrimination claims under other jurisdictions within England as well as under laws other than those of the English government.³⁵ It is from English case law that American Courts have developed the two part test set out above.³⁶ To reiterate, the first issue requires the proponent of the privilege to show a substantial fear of danger if forced to testify.³⁷ The second issue concerns the scope of the Fifth Amendment in a foreign jurisdiction which can include another state or a foreign country.³⁸ Some of these early English cases discuss both elements of the test, while others address only one.

In 1749, the Court of Exchequer in *East India v. Campbell*,³⁹ held that the defendant could invoke the privilege against self-incrimination where the disclosure of certain information might subject him to prosecution in the British colony of India.⁴⁰ The defendant claimed that if he disclosed how he obtained possession of certain goods, he would be subject to a foreign prosecution in India.⁴¹ The court stated the rule as follows: "this court shall not oblige one to discover that which, if he answers in the affirmative, will subject him to punishment of a crime, . . . and it appears that the defendant is punishable in Calcutta, although not punishable here."⁴² The Court of Ex-

³⁴ LEVY, *supra* note 15, at 432.

³⁵ Comment, *Fear of Foreign Prosecution and the Fifth Amendment*, 58 IOWA L. REV. 1304, 1307 (1973).

³⁶ See *supra* text accompanying notes 5-7.

³⁷ *Gecas*, 830 F. Supp. at 1406.

³⁸ *Id.*

³⁹ 27 Eng. Rep. 1010 (Ex. 1749).

⁴⁰ *Id.* The defendant, captain of the East India Company's ship, refused to answer questions as a witness in a criminal suit brought by the Attorney General in England on charges of fraudulent acquisition of goods found on defendant's ship. The goods found on the ship were taken from the Indians by violent and fraudulent means. *Id.*

⁴¹ The prosecution would be for stealing and/or a civil suit brought by the company for illicit trade in the scope of employment. *Id.*

⁴² *Id.* at 1011. It was of no consequence that if the witness answered in the negative, no harm would come to him, because according to the Court of Excheq-

chequer found that the defendant had a reasonable fear and could invoke the privilege to prevent future prosecution in India or another court within England.⁴³

One year later, the Court of Exchequer applied this rule in *Brownsword v. Edwards*,⁴⁴ and permitted the witness to invoke the right against self-incrimination for fear of future prosecution in another court in England. In *Edwards*, the witness declined to answer questions concerning a family estate matter because doing so could reveal that she married her dead sister's husband.⁴⁵ The court noted that to prohibit the plea of self-incrimination in this case, they would be affirming the condemned inquisitorial oath.⁴⁶ The Court of Exchequer reasoned that in order for the witness to answer the questions concerning the family estate, it was necessary for her to reveal her "incestuous marriage," which would lead to her prosecution.⁴⁷ According to the Court of Chancery, the rule against self-incrimination protected a witness from answering where doing so would subject the witness to prosecution in any court.⁴⁸ By upholding the privilege here, the Court of Exchequer broadly interpreted the right against self-incrimination by extending the privilege to protect against future prosecutions in another court.

In 1851, the English Court of Chancery decided another case concerning the applicability of the right against self-incrimination for fear of foreign prosecution.⁴⁹ In *King of Two Sicilies v. Willcox*, the Court of Chancery held that although the two defendants feared their answers might subject them to prosecution in Sicily, they could not invoke the right against

uer, the privilege was intended to protect against penalties in a foreign jurisdiction. *Id.*

⁴³ *Id.*

⁴⁴ 28 Eng. Rep. 157 (Ex. 1750).

⁴⁵ *Id.* As a result, she could be prosecuted in the ecclesiastical court for entering into "an incestuous marriage, contrary to law, subject to penalties and punishment." *Id.*

⁴⁶ *Id.* at 158.

⁴⁷ *Id.* Moreover, even if the witness received a pardon from the Court of Exchequer, which would prevent her from being prosecuted, the ecclesiastical court could still prosecute her, notwithstanding the pardon. *Id.*

⁴⁸ *Id.*

⁴⁹ *King of Two Sicilies v. Willcox*, 61 Eng. Rep. 116 (Ch. 1851). However, this court refused to allow the witness to invoke the privilege, indicating division on this particular issue among different jurisdictions at that time in England.

self-incrimination.⁵⁰ The two defendants were Italian nationals sent to Great Britain to act as agents of the revolutionary government in Sicily and purchase a steamship to be used in the revolution with money collected from war supporters.⁵¹ The defendants entered into a contract with an English ship company.⁵² When a contract dispute arose between the company and the revolutionary government, the Court of Chancery requested that the defendants hand over documents relating to the purchase of the steamship.⁵³ The two defendants refused, based on the fear that they would be subjected to punishment in Sicily under the new government for supporting and aiding the revolutionary government.⁵⁴ However, the court rejected this claim.⁵⁵ According to the Court of Chancery in 1851, the right against self-incrimination was akin to British municipal law and therefore had jurisdiction exclusively within British borders, only to those laws made penal by British law, and could not be applied to protect a defendant when he feared prosecution in another country.⁵⁶ Thus, the Court of Chancery deviated from the position taken by the Court of Exchequer a century earlier because this court found it impossible to determine the criminal implications in Italy for treason.⁵⁷

In 1861, the King's Bench division in England decided a case involving the right against self-incrimination and formulated the substantial danger part of the test used in *United States v. Gecas*. In *Queen v. Boyes*,⁵⁸ the court held the witness' refusal to testify for fear of impeachment by the House of Commons insufficient to invoke the privilege against self incrimination.⁵⁹ The court clearly stated that the privilege only applies

⁵⁰ *Id.*

⁵¹ *Id.* at 118.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 124.

⁵⁵ The Court based its decision on the impossibility of knowing, as a judge, the criminal implications of specific acts in a foreign nation, and therefore, the judge could not "form any judgment as to the force or truth of the objection of a witness when he declines to answer on such ground." *Id.* at 128.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 121 Eng. Rep. 730 (K.B. 1861).

⁵⁹ In *Boyes*, the proponent of the privilege, one of the persons who had knowledge of a bribery, was called to testify as a witness. *Id.*

when, after examining the circumstances of the case and the evidence compelled, the court determines that the witness has reasonable grounds to apprehend danger if forced to testify.⁶⁰ The King's Bench Division stated that "[t]he perceived danger must be real and appreciable, . . . not a danger of ordinary and unsubstantial character, . . . so improbable that no reasonable man would suffer it to influence his conduct."⁶¹ Applying this rule, the court found that the witness' fear of subsequent impeachment did not rise to the requisite level because the court granted him a pardon preventing future prosecution in England and, therefore, the witness could not invoke the privilege.⁶²

In 1867, the position taken by the Court of Chancery in *King of Two Sicilies*⁶³ was questioned in *United States v. McRae*.⁶⁴ *McRae* involved a United States' suit in an English court for an accounting and payment of moneys claimed by the defendant as a representative for the Confederacy during the Civil War.⁶⁵ The defendant asserted that a law had been passed in the United States allowing the confiscation of the property of all representatives for the Confederacy, like himself, and if compelled to answer, he would be subjected to this confiscation proceeding in the United States.⁶⁶ The court sustained the claim of the privilege against self-incrimination and distinguished *King of Two Sicilies* by specifically limiting its holding to the facts.⁶⁷ The Court of Chancery in *McRae*⁶⁸ stated that the judge in *Will-*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 730-31. Compare with *Brownsword v. Edwards*, 28 Eng. Rep. 157, 158 (1750) (where a pardon from any court could not prevent against a future prosecution in an ecclesiastical court for an incestuous marriage).

⁶³ 61 Eng. Rep. 116 (Ch. 1851).

⁶⁴ 3 Ch. App. 79 (L.R.-Ch. 1867).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *McRae*, 3 Ch. App. at 85.

⁶⁸ The court in *McRae* noted that *King of Two Sicilies* was distinguishable because those defendants had not shown that they would be subject to criminal prosecution in Sicily. In other words, the defendants in *King of Two Sicilies* failed to satisfy the substantial and real fear requirement set down by the court in *Boyes* in 1861. *Id.* at 87.

cox "went beyond the facts of the case and set down an unnecessarily broad proposition."⁶⁹

E. *American Case Law*

1. *Supreme Court*

The Supreme Court of the United States has yet to rule on the issue of whether the Fifth Amendment applies to fear of prosecution in a foreign country.⁷⁰ However, Supreme Court case law with regard to the Fifth Amendment in general, and with regard to the substantial fear element, is plentiful.

In 1828, the Supreme Court decided a case concerning fear of prosecution in another state. In *United States v. Saline Bank of Virginia*,⁷¹ the United States, seeking to recover bank deposits, filed a suit in equity against the cashier of the bank, and a number of its stockholders.⁷² The defendants refused to answer, arguing that their answers would subject them to penalties under a law prohibiting unincorporated banks.⁷³ In an unanimous opinion delivered by Chief Justice John Marshall, the Court decided in favor of the defendants, and held that the requested information in this case would expose the defendants to penalties.⁷⁴ Further, the Court expressly held that "[t]he rule clearly is, that a party is not bound to make any discovery which would expose him to penalties."⁷⁵ The exact meaning and extent of the Court's decision in *Saline* has been disputed.⁷⁶

⁶⁹ *Id.* According to the court in *McRae*, there were many cases where the judge could easily discover the foreign penalty, if any, and form a judgment on that basis. *Id.*

⁷⁰ *Gecas*, 830 F. Supp. at 1406-07.

⁷¹ 26 U.S. 100 (1828).

⁷² *Id.*

⁷³ *Id.* at 104

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Gecas*, 830 F. Supp. at 1415-16. The Florida District Court stated that the exact basis of the holding in *United States v. Saline Bank of Virginia*, 26 U.S. 100 (1828), is unclear because the opinion failed to refer to the fifth amendment. The opinion only refers to what the *Saline* Court labeled "the rule" and, according to the *Gecas* Court, this could mean the rule of the Chancery Courts dealing with the prohibition against forfeiture. However, in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 59-60 (1964), the Supreme Court categorized *Saline* as correctly interpreting the fifth amendment. Further, the Court stated that *Saline* "squarely holds that the privilege against self-incrimination protects a witness in a federal court

The Supreme Court decided the next significant case dealing with the Fifth Amendment in 1896. In *Brown v. Walker*,⁷⁷ the Court held that a federal immunity statute prevented prosecutions in either state or federal courts.⁷⁸ The defendant refused to answer questions pertaining to the transportation of coal on the ground that it could incriminate him under federal or state law.⁷⁹ The Court applied a federal immunity statute so that the defendant was protected from any subsequent prosecution regarding his testimony.⁸⁰ The Court held that such an immunity statute would serve to protect the witness equally as well as the Fifth Amendment.⁸¹

Brown is significant in many respects. First, the Court expanded the immunity statute to state prosecutions where on its face, the statute neglected to mention state application.⁸² Second, the Court discusses the importance of the Fifth Amendment, a maxim stole from our English brethren and translated it into American law as an "impregnable constitutional enactment."⁸³ Evidently, the Court stressed the value of the Fifth Amendment and its safeguarded place in American society. Finally, although the Court does not address the applicability of the privilege in a foreign context, in dictum, the Court does make reference to the English rule of substantial fear established in *Queen v. Boyes*.⁸⁴

Ten years later, the Supreme Court in *Ballman v. Fagin*,⁸⁵ upheld the plea of the Fifth Amendment where the witness refused to answer questions regarding his possession of a cash book ledger which he refused to produce in a federal grand jury

from being compelled to give testimony which could be used against him in a state court." *Id.* at 60.

⁷⁷ 161 U.S. 591 (1896).

⁷⁸ *Id.* at 606. The defendant, an auditor of a coal company, had been subpoenaed as a witness in a suit against certain officers of a company regarding violations of the Interstate Commerce Act. *Id.* at 592.

⁷⁹ *Id.*

⁸⁰ The immunity provision dealt with interstate commerce violations. *Id.* at 593.

⁸¹ *Id.* at 610.

⁸² *Id.* at 606.

⁸³ *Id.* at 597.

⁸⁴ *Id.* at 599. According to the Supreme Court in *Brown*, this rule means that "the idea against self-incrimination presupposes a legal detriment arising from the exposure." *Id.* at 600. See *supra* notes 55-60 and accompanying text.

⁸⁵ 200 U.S. 186 (1906).

proceeding.⁸⁶ The witness based his right to invoke the Fifth Amendment on his fear of state prosecutions already pending against him.⁸⁷ The Court relied on *United States v. Saline Bank*,⁸⁸ and accordingly, found the defendant absolved from testimony which would have exposed him to penalties under state law.⁸⁹

Two months later the Supreme Court decided *Hale v. Henkel*.⁹⁰ In *Hale*, the witness, despite having been granted immunity under a federal statute, refused to answer certain questions for fear of a state prosecution already pending.⁹¹ The Court held that the Fifth Amendment did not apply to the states, and in any event, the federal immunity statute protected the defendant.⁹² The Court erroneously cited *Queen v. Boyes*⁹³ as support for the proposition that the Fifth Amendment applied within the same jurisdiction.⁹⁴ Additionally, the Court stated that its decision was consistent with *United States v. Saline Bank*⁹⁵ because there, the federal government was simply administering the state law and, therefore, the Court in *Saline*

⁸⁶ *Id.* at 193.

⁸⁷ *Id.* at 195.

⁸⁸ 26 U.S. 100 (1828).

⁸⁹ *Ballman*, 200 U.S. at 195-96. The Court noted that the cash ledger could have disclosed defendant's dealings with the suspected parties and could lead to criminal charges. *Id.* at 196.

⁹⁰ 201 U.S. 43 (1906).

⁹¹ *Id.* at 44-46. The witness was the treasurer of the defendant tobacco company. The questions related to violations of the Sherman Act by the company. *Id.*

⁹² *Id.* at 68.

⁹³ 121 Eng. Rep. 730 (K.B. 1861).

⁹⁴ *Hale*, 201 U.S. at 68; *Queen v. Boyes*, 121 Eng. Rep. at 730. *Boyes* did not concern the scope of the fifth amendment issue, but rather enunciated the substantial fear test. The substantial fear test was confirmed in later United States Supreme Court cases. In *Mason v. United States*, 244 U.S. 362, 366 (1917), the Court required the witnesses to answer questions during a grand jury investigation on gambling because the witnesses failed to show real danger if compelled to testify. The Court cited *Boyes*, and held "the danger to be apprehended must be real and appreciable, . . . a remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice." See also *Heike v. United States*, 227 U.S. 131, 144 (1913) ("The constitutional protection against self-incrimination is confined to real danger and does not extend to remote possibilities out of the ordinary course of law.").

⁹⁵ 26 U.S. 100 (1828).

Bank did not rule on the applicability of the Fifth Amendment in another jurisdiction.⁹⁶

In 1931, the Supreme Court decided *United States v. Murdock*.⁹⁷ In *Murdock*, the defendant refused to answer the subpoena of a federal revenue officer concerning deductions made on his income taxes.⁹⁸ The witness refused to answer on the ground that to do so would incriminate him under state law and federal law on charges of tax evasion.⁹⁹ The Court held that the witness could not fear state prosecution where the crime was of a federal nature and, nonetheless, the witness had nothing to fear because he was protected from federal prosecution by an immunity statute.¹⁰⁰ The Supreme Court in *Murdock* concluded that the Fifth Amendment offered no protection in a federal proceeding for fear of incrimination under state laws or under the laws of another country.¹⁰¹

Following *Murdock*, the Supreme Court restored a broad interpretation of the Fifth Amendment.¹⁰² In *Blau v. United States*,¹⁰³ the witness was asked questions in front of a grand jury concerning her involvement in the Communist Party of Colorado.¹⁰⁴ The Court authorized the use of the privilege in *Blau* because answers to questions probed by the grand jury would have furnished a "link in the chain of evidence" needed in a prosecution of the defendant in federal court.¹⁰⁵ The Court allowed the defendant to invoke the privilege because the fear that criminal charges might be brought against her if she ad-

⁹⁶ *Hale*, 201 U.S. at 69.

⁹⁷ 284 U.S. 141 (1931).

⁹⁸ *Id.* at 146.

⁹⁹ *Id.* at 147.

¹⁰⁰ *Id.* at 149.

¹⁰¹ *Id.*

¹⁰² See *Hoffman v. United States*, 341 U.S. 479 (1951), where the petitioner refused to answer certain questions on his current contacts and connections with a fugitive witness, on the grounds that such testimony would incriminate him under federal law, the Court upheld the privilege. In doing so, the Court stated: "[the fifth amendment] must be accorded liberal construction in favor of the right it was intended to secure." *Id.* at 486. In addition, the Court in *United States v. White*, 322 U.S. 694, 698 (1944), stated that: "[t]he immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime."

¹⁰³ 340 U.S. 159 (1950).

¹⁰⁴ *Id.* at 159-60.

¹⁰⁵ *Id.* at 161. The Court sanctioned the use of the fifth amendment where compelled testimony could initiate or ensure a criminal prosecution.

mitted employment by the Communist Party was "more than a mere imaginary possibility" in light of the penalties under the Smith Act.¹⁰⁶ Thus, the Court reaffirmed the "real danger" test set out in *Queen v. Boyes*.¹⁰⁷

Finally, in the 1960's, the Supreme Court clarified the scope of the Fifth Amendment under American jurisdiction. In 1964, the Supreme Court decided the landmark case of *Murphy v. Waterfront Comm'n of New York*.¹⁰⁸ In *Murphy*, although granted state immunity, the defendants refused to testify on the ground that it would incriminate them under federal law.¹⁰⁹ Thus, the Court faced the same issue presented many times before: whether the Fifth Amendment protects against fear of prosecution in another jurisdiction within the United States.¹¹⁰

The Supreme Court in *Murphy* answered this issue affirmatively. Specifically, the Court held that the Fifth Amendment privilege against self-incrimination had no jurisdictional limitation under American law; it protected "a state witness against incrimination under federal law as well as state law, and a federal witness against incrimination under state as well as federal law."¹¹¹

Murphy is a momentous decision for numerous reasons. First, the *Murphy* Court affirmed that the privilege protects against, *inter alia*, "the cruel trilemma of self-accusation, perjury and contempt."¹¹² Second, the *Murphy* Court declared the rule, set out in *United States v. McRae*,¹¹³ as the "real English rule," and interpreted *McRae* as permitting a witness to invoke the privilege for fear of foreign prosecution.¹¹⁴ Third, the *Murphy* Court interpreted *United States v. Saline Bank of Virginia*,¹¹⁵ as sanctioning recourse to the Fifth Amendment where

¹⁰⁶ *Id.*

¹⁰⁷ 121 Eng. Rep. 730 (K.B. 1861).

¹⁰⁸ 378 U.S. 52 (1964).

¹⁰⁹ The witnesses here were subpoenaed to testify before the Waterfront Comm'n of New York Harbor relating to work stoppages. *Id.* at 53.

¹¹⁰ Aside from the two cases *United States v. Saline Bank of Virginia*, 26 U.S. 100 (1828) and *Ballman v. Fagin*, 200 U.S. 186 (1906), the Supreme Court never extended the privilege outside federal jurisdiction.

¹¹¹ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 78 (1964).

¹¹² *Id.* at 55.

¹¹³ 3 Ch. App. 79 (L.R.-Ch. 1867).

¹¹⁴ *Murphy*, 378 U.S. at 63.

¹¹⁵ 26 U.S. 100 (1828).

the defendant feared foreign prosecution,¹¹⁶ putting to rest the question that had previously been interpreted differently by the Supreme Court.¹¹⁷ Finally, the *Murphy* Court cited the substantial fear test from *Queen v. Boyes*,¹¹⁸ thereby mandating its use by the courts.

In 1972, the Supreme Court was presented with the question of the Fifth Amendment's applicability, only this time, in a foreign country. In *Zicarelli v. New Jersey State Comm'n of Investigation*,¹¹⁹ the Court found it unnecessary to reach the issue of whether an individual could assert the Fifth Amendment for fear of a prosecution in a foreign country because the Court found that the danger of such prosecution was remote.¹²⁰ The defendant refused to answer questions relating to secret crime organizations asserting that these answers could expose him to foreign prosecution in Venezuela.¹²¹

The Supreme Court in *Zicarelli* stated that the privilege protects against only "real dangers," not remote and speculative possibilities,¹²² akin to the standard set out by the King's Bench in *Queen v. Boyes*.¹²³ In *Zicarelli*,¹²⁴ the Court found that the defendant did not have a substantial danger of foreign prosecution in another country because the questions the defendant objected to focused only on activities in the New Jersey area, and did not encompass foreign involvements.¹²⁵ The Court concluded that because the defendant failed to satisfy the "real danger" test, it was unnecessary to reach the constitutional

¹¹⁶ *Murphy*, 378 U.S. at 60.

¹¹⁷ See *supra* text accompanying notes 61-66.

¹¹⁸ *Murphy*, 378 at 67-68.

¹¹⁹ 406 U.S. 472 (1972).

¹²⁰ *Id.* at 480. *Zicarelli* involved a defendant accused of organized crime and political corruption in New Jersey who was labeled by newspapers as a "foremost internationalist" in organized crime because of his alleged participation in unlawful endeavors in Canada and the Dominican Republic. *Id.* at 479.

¹²¹ *Id.* at 479-80.

¹²² *Id.* at 478.

¹²³ 121 Eng. Rep. 730 (K.B. 1861).

¹²⁴ *Zicarelli*, 406 U.S. at 480. When considering a fifth amendment claim, the appropriate task of the court is to focus on what a truthful answer might disclose. *Id.*

¹²⁵ *Id.* at 479.

question.¹²⁶ Therefore, the Supreme Court has not conclusively determined the scope of the Fifth Amendment.¹²⁷

2. Federal Court of Appeals

The few federal courts that have addressed the constitutional question at bar have not conclusively answered the question of extending the Fifth Amendment privilege. Two Courts of Appeal have expressly held that the privilege does not apply, while one found the witness' fear remote,¹²⁸ and others disposed of the case on other grounds. In *In Re Parker*,¹²⁹ the United States Court of Appeals for the Tenth Circuit held the defendant in contempt for refusing to answer questions for fear of prosecution in Canada.¹³⁰ The court based its holding on the remoteness of foreign prosecution and the adequacy of Federal Rule 6(e), which prevents disclosure of grand jury testimony.¹³¹ However, the Court of Appeals went further and simply concluded, without engaging in any analysis,¹³² that the Fifth Amendment does not apply to acts made criminal by a foreign nation.¹³³

In *United States v. Flanagan*,¹³⁴ the Court of Appeals for the Second Circuit denied the defendant the use of the Fifth Amendment after he refused to testify under a grant of immu-

¹²⁶ *Id.* at 478.

¹²⁷ *Gecas*, 830 F. Supp. at 1406-07.

¹²⁸ See *United States v. Yanagita*, 552 F.2d 940 (2d Cir. 1977); see also *United States v. Flanagan*, 691 F.2d 116 (2d Cir. 1982).

¹²⁹ 411 F.2d 1067 (10th Cir. 1969).

¹³⁰ The questions were concerning alleged violations of 18 U.S.C. § 2153 such as sabotage, and destruction of war materials. *Id.* at 1068.

¹³¹ Federal Rule 6(e) reads: "[A] juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed. R. Crim. P. 6(e). *Parker*, 411 F.2d at 1070.

¹³² *Gecas*, 830 F. Supp. at 1414.

¹³³ *Parker*, 411 F.2d at 1070. Other circuits have held that the grand jury secrecy rule eliminates the danger of foreign incrimination. E.g., *In Re Baird*, 668 F.2d 432 (8th Cir.); *cert. denied*, 456 U.S. 982 (1982); *U.S. v. Smith*, 628 F.2d 1260 (9th Cir. 1980); *In Re Brummit*, 613 F.2d. 62 (5th Cir.); *cert. denied*, 447 U.S. 907 (1980); *United States v. Lemieux*, 597 F.2d 1166 (9th Cir. 1979).

¹³⁴ 691 F.2d 116 (2d Cir. 1982).

nity before a federal grand jury.¹³⁵ The court enunciated specific factors to assess in determining the danger of foreign prosecution:

whether there is an existing or potential foreign prosecution of defendant, what foreign charges could be filed against him, whether prosecution of the individual would be initiated or furthered by his testimony, whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States, and whether there is a likelihood that his testimony given here would be disclosed to the foreign government.¹³⁶

The Second Circuit found that the danger of foreign prosecution was remote and speculative because the questions asked of the witness all involved activities within the United States and there were no pending or prospective prosecutions of the witness in England or Ireland.¹³⁷ The court concluded that in the absence of a specific showing of probable foreign prosecution where a grant of immunity has been extended to the witness, "the witness granted immunity could use the privilege as a virtual license to frustrate almost any criminal investigation having international consequences, however peripheral or tangential."¹³⁸

In 1986, a third federal court case, *United States v. Araneta*,¹³⁹ held that the Fifth Amendment did not apply to fear of a prosecution in the Philippines.¹⁴⁰ The United States Court of Appeals for the Fourth Circuit ordered the defendants, the daughter and son-in-law of Ferdinand Marcos, to testify on issues involving corruption in arms contracts with the Philippines.¹⁴¹ Although the court found the defendant's fear of a future prosecution in the Philippines real and substantial,¹⁴² it concluded that the privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony

¹³⁵ The defendant was a dual citizen of the United States and Great Britain. The questions were concerning the smuggling of guns and ammunition from the United States to Great Britain and Ireland. *Id.* at 117.

¹³⁶ *Id.* at 121.

¹³⁷ *Id.* at 122.

¹³⁸ *Id.* at 121.

¹³⁹ 794 F.2d 920 (4th Cir. 1986).

¹⁴⁰ *Id.* at 926.

¹⁴¹ *Id.* at 921.

¹⁴² *Id.* at 924.

are bound by the Fifth Amendment.¹⁴³ Since the Fifth Amendment would not impair the use of incriminating testimony in their court, the Fifth Amendment offered no protection to a witness fearing prosecution in the Philippines.¹⁴⁴

3. District Courts

Numerous district courts have addressed this constitutional question and have held the Fifth Amendment applicable for fear of foreign prosecution.¹⁴⁵ However, the Florida District Court for Northern District of Florida has not yet ruled on this issue.¹⁴⁶

In *United States v. Trucis*,¹⁴⁷ the Pennsylvania District Court permitted the witness to invoke the Fifth Amendment for failure to answer biographical questions regarding his immigration application.¹⁴⁸ The court concluded that the witness had a real fear of foreign prosecution for war crimes if he were deported out of the United States.¹⁴⁹ The court cited *Murphy v. New York Waterfront Comm'n*,¹⁵⁰ to support the proposition that English case law afforded protection beyond the questioning jurisdiction.¹⁵¹

Similarly, in *United States v. Edgars Inde*,¹⁵² the Minnesota District Court upheld the use of the Fifth Amendment where the witness refused to answer questions about his immigration application, and refused to produce documents attesting

¹⁴³ *Id.* at 926.

¹⁴⁴ *Id.* The Court of Appeals stressed the sovereignty of the two countries and the need to respect the independence of the laws of other nations. *Id.* at 926.

¹⁴⁵ *E.g.* *Mishima v. United States*, 507 F. Supp. 131 (D. Alaska 1981); *In re Cardissi*, 351 F. Supp. 1080 (D. Conn. 1972); *United States v. Kowalchuk*, Case No. 77-118 (E.D. Pa. Oct. 20, 1978).

¹⁴⁶ *Gecas*, 830 F. Supp. at 1406-07.

¹⁴⁷ 89 F.R.D. 671 (E.D. Pa. 1981).

¹⁴⁸ *Id.* at 672. The witness here is a naturalized citizen originally from Latvia. The questions asked focused on the possibility that the defendant knowingly concealed facts showing his participation in persecution of Jews during 1941-43. *Id.* at 672.

¹⁴⁹ *Id.* at 673.

¹⁵⁰ 378 U.S. 52 (1964).

¹⁵¹ *United States v. Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981).

¹⁵² No. 3-88-0570, 1989 U.S. Dist. LEXIS 18388, at *1 (D. Minn. Aug. 22, 1989).

to his biographical information.¹⁵³ In its opinion, the court first applied the "real danger" test set out in *Zicarelli v. New Jersey State Comm'n of Investigation*.¹⁵⁴ The witness easily satisfied this test because if the witness was denaturalized, he would be deported and may be prosecuted for war crimes in Israel, West Germany, or Russia based on the evidence against him.¹⁵⁵ The *Inde* Court held the Fifth Amendment applicable after distinguishing the relevant Circuit Court cases,¹⁵⁶ which held that the Fifth Amendment did not apply to fear of foreign prosecution. The *Inde* Court further reasoned that a federal court is not vested with the power to compel an American citizen to testify on matters which could subject him to a foreign prosecution.¹⁵⁷ It was against this background that the Florida District Court in *United States v. Gecas*,¹⁵⁸ had to decide whether the Fifth Amendment applied where the witness fears prosecution in a foreign sovereign.

III. *UNITED STATES v. GECAS*, 830 F. SUPP. 1403 (N.D. FLA., 1993).

A. *Facts*

In September 1991, the United States, through its Office of Special Investigations (hereinafter "OSI"),¹⁵⁹ commanded the respondent, a Lithuanian national residing in Florida, to give testimony and to produce documents concerning his immigra-

¹⁵³ *Id.* at *1-2. The government believed that the witness, *Inde*, assisted the Nazis in the persecution of Jews during the Nazi occupation of Latvia. *Id.*

¹⁵⁴ *Id.* at 5; see *supra* text at 5-8.

¹⁵⁵ *United States v. Inde*, No. 3-88-5070, 1989 U.S. Dist. LEXIS 18388, at *10 (D. Minn. Aug. 22, 1993).

¹⁵⁶ See *supra* text accompanying notes 133-49.

¹⁵⁷ *Inde*, 1989 U.S. Dist. LEXIS 18388, at *17. If so, the whole purpose of the fifth amendment would be undermined: the right to refuse to answer on the grounds that it would lead to prosecution.

¹⁵⁸ *Gecas*, 830 F. Supp. 1403.

¹⁵⁹ The Office of Special Investigations is a branch of the Criminal Division in the United States Department of Justice created by the Attorney General in 1979. OSI's chief responsibility is to investigate, and where proper, deport, denaturalize, or prosecute any naturalized citizen who assisted the Nazis by persecuting any person because of race, religion, political opinion, or natural origin. *Gecas*, 830 F. Supp. at 1405. Although the United States has no specific law for prosecuting former Nazis for crimes committed against non-Americans outside American soil, the OSI was created to aid investigations of these criminals. Stuart Taylor, *Steps to Deport Nazi Backers Cause Legal Concern*, N.Y. TIMES, May 19, 1983, at 17.

tion to the United States and his wartime activities¹⁶⁰ in Europe between 1941-1945.¹⁶¹ The respondent, Vytautas Gecas entered the United States on October 23, 1962 via the Immigration and Naturalization Act of 1952.¹⁶² Gecas stated on his application for an Immigrant Visa that during the years in question, he attended school in Lithuania.¹⁶³

Gecas refused to answer questions concerning bibliographical information, his associations with various organizations during the war, and his knowledge of the treatment of Jews in Lithuania after the Nazi occupation.¹⁶⁴ He based his refusal to respond to these questions on the Fifth Amendment.¹⁶⁵ Gecas based his right to remain silent on the fear of future foreign prosecution.¹⁶⁶

In opposition, the United States argued that fear of foreign prosecution is not sufficient to invoke the protection of the Fifth Amendment.¹⁶⁷ In the alternative, the United States argued that Gecas' fear of foreign prosecution was not real enough to

¹⁶⁰ See Ethan Bronner, *Some Fear Demanjuk Ruling Opens Door To Doubt; Nazi Hunters See Peril To Pursuit*, THE BOSTON GLOBE, Aug. 1, 1993, at 16. The Wiesenthal Center has commenced "Operation: Final Justice," a two year joint mission based in Vilnius, Lithuania, to locate Nazi sympathizers of Eastern European origin. Efraim Zuroff, a Jerusalem-based worldwide coordinator of Nazi research for the Center observed that the break-up of the Soviet Union has aided this search. "There are thousands of documents, lists of police chiefs and collaborators with dates and specifics and each case can lead to others." *Id.* see also *National Briefs*, THE Hous. CHRON., Aug. 27, 1993, at 10. "The Justice Department and the Ukrainian government formally agreed to cooperate in the investigation of Nazi war criminals. Like similar agreements signed during the last year by Latvia and Lithuania, it replaces an earlier accord signed by the United States and officials of the former Soviet Union." *Id.*

¹⁶¹ *Gecas*, 830 F. Supp. at 1405. After receiving certain records from the archives in the capitals of the former Soviet Union, OSI suspected that Gecas may have lied about his wartime activities. *Id.* at 1405-06.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1406. When Gecas and his attorney appeared in the District Court on September 12, 1991, the respondent stated his name and current, as well as immediate, past addresses, but the information sought included his date of birth, and his residence during the war. *Id.*

¹⁶⁵ *Id.* at 1406.

¹⁶⁶ *Id.* at 1405. Although the witness faced no risk of prosecution in the United States aside from deportation, Gecas argued that the answers to the previous questions accompanied with the requested documents would expose him to prosecution in Germany, Israel, Lithuania, and Belarus. *Id.* at 1408.

¹⁶⁷ *Id.* at 1406.

trigger the shield of the Fifth Amendment.¹⁶⁸ Consequently, the Florida District Court had to determine whether fear of foreign prosecution was sufficient to invoke the Fifth Amendment, and whether Gecas' fear of such foreign prosecution was real and substantial.¹⁶⁹

B. *Holding*

The *Gecas* Court noted that neither the Supreme Court nor the Eleventh Circuit had offered a conclusive determination on this Fifth Amendment question.¹⁷⁰ In addition, the Court recognized that of the few lower courts that have answered the Fifth Amendment question, none have provided a clear analysis.¹⁷¹ The court decided that Gecas' fear of prosecution in Germany, Israel, and Lithuania was substantial and real.¹⁷²

In addressing the constitutional question, the court in *Gecas*, carved out a narrower question: "whether the Fifth Amendment privilege is a personal 'right' designed to secure the

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1406.

¹⁷⁰ *Id.* at 1406-07.

¹⁷¹ *Id.* at 1414.

¹⁷² The court recognized that all three of these sovereigns have laws under which they could prosecute Gecas for war crimes. However, the court found his fear of prosecution in Belarus, (a former Soviet Republic) insubstantial because of the precarious status of what is currently the Soviet Union. *Id.* at 17. Israel's "Nazi and Nazi Collaborators" statute is as follows: A crime against the Jewish People means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

- "1) killing Jews;
- 2) causing serious bodily or mental harm to Jews;
- 3) placing Jews in living conditions calculated to bring about their physical destruction;
- 4) imposing measures intended to prevent birth among Jews;
- 5) forcibly transferring Jewish children to another national or religious group;
- 6) destroying or desecrating Jewish religious or cultural assets or values;
- 7) inciting to hatred of Jews."

In addition, Gecas could be prosecuted under Germany's murder statute which provides:

- "1) a murderer shall be punished by imprisonment for life.
- 2) a murderer is a person who kills another person from thirst for blood, satisfaction of his sexual desires, avarice or other base motives in a malicious or brutal manner or one dangerous to public safety or in order to permit the commission or concealment of another criminal act." Finally, Gecas could be prosecuted under a recently enacted statute making "[g]enocide, murder, torture, execution and deportation of Lithuanian people during the period of Nazi occupation a crime. *Id.* at 1409.

dignity of the individual against invasion by the government, or a restraint aimed at particular abuses of the government's power."¹⁷³ The court found the Fifth Amendment is intended to regulate the actions of the United States, rather than to bestow a personal right on all individuals.¹⁷⁴ Since the Fifth Amendment does not extend to foreign governments, witnesses cannot invoke it where their basis is fear of foreign prosecution.¹⁷⁵ Consequently, the court granted the United States' motion to enforce its subpoena compelling the witness to testify and produce the requested documents.¹⁷⁶

C. *The Court's Reasoning*

1. *Limited Scope of the Privilege*

The Florida District Court interpreted the Fifth Amendment as solely intended to regulate the actions of the United States Government, and not as a personal right bestowed upon American citizens.¹⁷⁷ The Fifth Amendment serves this regulatory function in two ways. First, it prevents inhumane treatment of any witnesses subpoenaed to testify.¹⁷⁸ Second, "it provides a fair state-individual balance by forcing the government to leave the individual alone until good cause is otherwise shown."¹⁷⁹

The *Gecas* Court, relying on the history of the right against self-incrimination in English case law, concluded that the Fifth Amendment is but an instrument to keep the federal as well as each state government from abusing its power.¹⁸⁰ The court further held that the Fifth Amendment evolved as it is today to protect against the procedural abuses created by the *ex officio*

¹⁷³ *Id.* at 1414-15.

¹⁷⁴ *Id.* at 1421-22.

¹⁷⁵ *Id.* at 1422.

¹⁷⁶ *Id.* at 1423.

¹⁷⁷ *Id.* at 1421-22.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* The *Gecas* Court recognized these purposes of the fifth amendment discussed by the Supreme Court in *Murphy*.

¹⁸⁰ This reliance on English case law focuses specifically on the development of the privilege to protest the condemned *ex officio* oath. *Id.* at 1422.

oath,¹⁸¹ and is an "improvement" to these condemned procedural abuses of the thirteenth century.¹⁸²

2. *Flooding the Gates*

The court in *Gecas* opined that if the Fifth Amendment applied in cases where an individual had fear of foreign prosecution, many could invoke the privilege. The court based this conclusion on the fact that almost every act is criminal somewhere in the world today.¹⁸³ The *Gecas* Court believed it would not be difficult for an individual to prove a realistic fear of prosecution in a foreign sovereign, especially with modern, widespread, international travel.¹⁸⁴

3. *Significance of Domestic Law Enforcement*

The Florida District Court refused to extend the privilege because the court feared that such an extension would "erode domestic law enforcement."¹⁸⁵ If the privilege were extended, the court compelling the testimony could not act without examining foreign law, in which case American law would be somewhat dependent on foreign law.¹⁸⁶

The court in *Gecas* relied on the holding in *United States v. Araneta*.¹⁸⁷ There, the Court of Appeals for the Fourth Circuit refused to extend the privilege primarily because such an expansion could conceivably lead to a situation where the United States would have no choice but to forego vital evidence and hinder an investigation because the foreign power could later use the evidence in a prosecution against the witness.¹⁸⁸ According to the court, if it were to expand the protection of the Fifth Amendment, our own sovereignty and laws would depend on the actions of foreign governments.¹⁸⁹ Presumably, if the court in *Gecas* were to permit the witness to invoke the Fifth

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 1422.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1422.

¹⁸⁶ *Id.* For example, such an extension could erode the granting of immunity in exchange for testimony. *Id.* at 1422.

¹⁸⁷ 794 F.2d 920 (4th Cir. 1986).

¹⁸⁸ *Id.* at 926.

¹⁸⁹ *Id.*

Amendment because Israel, Germany, or Lithuania could use the evidence against him in a subsequent criminal trial, the investigation concerning Gecas' visa application would be seriously impeded.

4. *Expansion of Fifth Amendment Undermines Policy of Fifth Amendment*

Ultimately, the Florida District Court refused to extend the Fifth Amendment because if it were extended to apply where a witness fears foreign prosecution, American procedures in enforcing the law would not be any more effective or humane.¹⁹⁰ The court declared in that situation, the purpose in invoking the privilege would be to give the witness an extra "benefit," rather than to enforce American domestic law.¹⁹¹ The *Gecas* Court reiterated that the sole purpose of the Fifth Amendment is to protect against abuses by American federal and state governments.¹⁹² The Fifth Amendment is unique to American jurisprudence and, therefore, it does not affect foreign governments.¹⁹³ Since the Fifth Amendment does not prohibit the use of compelled testimony in a foreign court, it cannot give the witness any privilege to refrain from testifying before a United States Court based on fear of foreign prosecution.¹⁹⁴

D. *Analysis of the Court's Decision*

1. *Fifth Amendment "Broadly" Interpreted*

The *Gecas* Court claims to construe the Fifth Amendment broadly. The court states that the privilege extends to testimony that would "furnish a link in the chain of evidence" needed to prosecute the witness for a crime.¹⁹⁵ The court also string cites numerous cases in which the privilege is given a broad interpretation but declines to discuss them further.¹⁹⁶ These cases are crucial to an historical understanding of the

¹⁹⁰ *Gecas*, 830 F. Supp at 1422-23.

¹⁹¹ *Id.* at 1422.

¹⁹² *Id.* at 1423.

¹⁹³ *Id.* at 1422.

¹⁹⁴ *Id.* at 1422-23.

¹⁹⁵ *Id.* at 1415.

¹⁹⁶ *Id.*

Fifth Amendment.¹⁹⁷ The Fifth Amendment has been interpreted broadly by the Supreme Court and it has been extended to protect: a witness in civil proceedings;¹⁹⁸ a state witness against incrimination under federal law as well as state law and vice versa;¹⁹⁹ resident aliens in the United States;²⁰⁰ and even to workers questioned about their job performance.²⁰¹ The Florida District Court concedes that these cases have interpreted the Fifth Amendment broadly, yet its decision fails to substantially incorporate them into its analysis.

By ultimately finding that the Fifth Amendment is not a personal right conferred upon persons within the protection of American law, the court undermines the history and broad interpretation of the Fifth Amendment with regard to American citizens.²⁰² The Fifth Amendment is a constitutional protection safeguarded by an individual in American society.²⁰³ The framers of the United States Constitution considered the Fifth Amendment so vital to American law that it was put into the Bill of Rights.²⁰⁴ By narrowly defining its scope, the Florida

¹⁹⁷ See *McCarthy v. Arndstein*, 266 U.S. 34 (1924), where the Court held that the fifth amendment applies in a civil proceeding as well as a criminal proceeding. "The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *Id.* at 40. See also *Wong Wing v. United States*, 163 U.S. 228 (1896), (resident aliens also enjoy the fifth amendment privilege).

¹⁹⁸ *McCarthy*, 266 U.S. 34, 40 (1924).

¹⁹⁹ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 77-78 (1964).

²⁰⁰ *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

²⁰¹ *Lefkowitz v. Turley*, 414 U.S. 70 (1973). Two architects refused to sign waivers of the fifth amendment when they were asked questions pertaining to their job performance before a grand jury investigating charges of conspiracy, larceny and bribery. "A witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Id.* at 77.

²⁰² See *Johnson v. Eisentrager*, 339 U.S. 763 (1950). (the Supreme Court refused to extend the fifth amendment privilege to enemy German aliens captured in China and tried by an American Military Commission in China for violations of the laws of war.). Indeed, the Court specifically stated that an alien resident's presence within the territorial jurisdiction enables the judiciary to act in affording the "alien" constitutional protection. *Id.* at 771.

²⁰³ See *United States v. Trucis*, 89 F.R.D. 671, 673 (D.Minn. 1981) ("The 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.").

²⁰⁴ *Sukenik*, *supra* note 10, at 359.

District Court does injustice to the purpose of the Fifth Amendment and the fundamental protection it provides.

2. *English Law Neglected*

The *Gecas*²⁰⁵ Court did not find English precedent persuasive even though the Supreme Court did in *Murphy v. New York Waterfront Comm'n.*²⁰⁶ The court relied on a recommendation of the British Law Reform Committee made to the British Parliament in 1967 that the privilege be limited to domestic incrimination.²⁰⁷ However, the Florida Court neglects the importance of Supreme Court's approval of the broad interpretation of the Fifth Amendment. The Supreme Court's decision in *Murphy* is the last word on this issue aside from *Zicarelli v. New Jersey State Comm'n of Investigation.*²⁰⁸

3. *Fifth Amendment Not Applicable in Foreign Nations*

In addition, the *Gecas* Court minimizes the importance of two Supreme Court cases when it states that except for the "unclear" exceptions of *United States v. Saline Bank of Virginia*²⁰⁹ and *Ballman v. Fagin*,²¹⁰ the Supreme Court has never sanctioned recourse to the Fifth Amendment where the witness feared prosecution by a sovereign state that was not itself bound by the Fifth Amendment.²¹¹ However, the Supreme Court consistently cites these cases with approval in subsequent decisions.²¹² It is incomprehensible that they should now be regarded as "ambiguous" and uncontrolling.

²⁰⁵ 830 F. Supp. 1403.

²⁰⁶ 478 U.S. at 77 ("[i]n light of the history, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English Courts and Chief Justice Marshall and Justice Holmes.").

²⁰⁷ *Gecas*, 830 F. Supp. at 1418. This recommendation was subsequently passed into law in Great Britain in 1968. *Id.*

²⁰⁸ In *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972), the Court did not find the witness' fear of foreign prosecution real or substantial, and therefore, did not reach the constitutional question. *Id.* at 478.

²⁰⁹ 26 U.S. 100 (1828).

²¹⁰ 200 U.S. 186 (1906).

²¹¹ *Gecas*, 830 F. Supp. at 1421-22.

²¹² See *Murphy*, 378 U.S. at 60.

4. *Flooding the Gates Unlikely*

The *Gecas* Court's fear that extending the privilege could lead to numerous pleas of the Fifth Amendment based on fear of foreign prosecution is premature. Historically, a witness could not invoke the Fifth Amendment on the sole basis that the desired testimony would incriminate himself. On the contrary, according to the Supreme Court in *Zicarelli*, a witness must show a tangible fear before invoking the Fifth Amendment.²¹³

The court erroneously contends that an individual could easily show a reasonable fear of foreign prosecution based on modern, widespread, international travel.²¹⁴ American courts, under the guidance of the Supreme Court, have always required a witness to show substantial fear, and a dubious fear of danger has never been sufficient to invoke the shield of the Fifth Amendment.²¹⁵ This substantial danger standard is not easily satisfied and is for the court to determine not from the witness' point of view, but from an objective, reasonable person standpoint.²¹⁶

5. *District Cases on Point Ignored*

The court in *Gecas* acknowledges similar district court cases that apply the Fifth Amendment based on fear of a foreign prosecution by string citing them.²¹⁷ Although not bound by these decisions, the court here failed to discuss their relevance. The *Gecas* Court relies heavily on the Courts of Appeals cases but only mentions, without discussing in detail, some state court cases with similar fact patterns that have dealt with this Fifth Amendment issue.

²¹³ 406 U.S. 472, 478 (1972).

²¹⁴ *Gecas*, 830 F. Supp. at 1422.

²¹⁵ See *U.S. v. Flanagan*, 691 F.2d 116, 121-22 (2d Cir. 1982) (the witness' fear of a foreign prosecution if compelled to testify remote and speculative, even though he was a dual citizen of the United States and Ireland and a member of the Irish Republican Army because the foreign countries, Northern Ireland and Ireland had not begun a prospective prosecution and the questions asked relate to activities solely in the United States); see *supra* text accompanying notes 138-42.

²¹⁶ *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (quoting *Rogers v. United States*, 340 U.S. 367 (1951)) ("The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified.").

²¹⁷ *Gecas*, 830 F. Supp. at 1414.

One such district court case is *United States v. Inde*.²¹⁸ *Inde* shares many similarities with the *Gecas* case.²¹⁹ In both cases, the respective courts considered the possibility that the witness covered up his wartime location and activities,²²⁰ which could lead to denaturalization, and ultimately, deportation.²²¹ Both of these individuals were of Eastern European origin and both were suspected of persecuting Jews during World War II.²²²

Both courts discussed federal case law. The Minnesota District Court carefully distinguished these cases.²²³ There, the Court noted that *Inde*'s refusal to testify could only interfere with his criminal investigation, not the criminal investigation of another.²²⁴ Therefore, in *United States v. Flanagan*,²²⁵ the grant of immunity, which would sufficiently protect the witness from future prosecution, coupled with the witness' insubstantial fear of foreign prosecution, erased the need for Fifth Amendment protection. In contrast, in *Inde*, the witness could not be protected in his own proceeding without the Fifth Amendment since he had a substantial fear of a foreign prosecution.²²⁶ Similarly, the defendant's refusal to testify in *Gecas*²²⁷ will not affect any other domestic criminal investigation, aside from his own.

Additionally, the *Inde* Court correctly distinguished the Federal Court of Appeals case *Araneta v. United States*.²²⁸

²¹⁸ No. 3-88-0570, 1989 U.S. Dist. LEXIS 18388 (D. Minn. Aug. 22, 1993).

²¹⁹ In *Inde*, the Minnesota District Court, as did the Florida District Court in *Gecas*, questioned the witness' immigration status.

²²⁰ *Gecas*, 830 F. Supp. at 1405; *Inde*, 1989 U.S. Dist. LEXIS 18388, at *1-2.

²²¹ See *United States v. Fedorenko*, 449 U.S. 490 (1981). For a court to denaturalize a citizen, "at the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible to maintain a visa." *Id.* at 509.

²²² *Gecas*, 830 F. Supp. at 1405; *Inde*, 1989 U.S. Dist. LEXIS 18388, at *1-2.

²²³ *Inde*, 1989 U.S. Dist. LEXIS 18388, at *7. For example, the Minnesota District Court noted that in *United States v. Flanagan*, 691 F.2d 116 (2d Cir. 1982), the witness, having been asked to testify against others, was granted immunity coextensive with the fifth amendment, and the Court of Appeals realized that invoking the fifth amendment in that situation would only "frustrate a criminal investigation having international consequences."

²²⁴ *Id.* at *9.

²²⁵ 691 F.2d 116 (2d Cir. 1982).

²²⁶ *Inde*, 1989 U.S. Dist. LEXIS 18388, at *9.

²²⁷ 830 F. Supp. at 1403.

²²⁸ 794 F. 2d 920 (4th Cir. 1986).

First, the witnesses in *Araneta* were citizens of the Philippines and were already involved in an investigation in that country.²²⁹ If the United States permitted the invocation of the Fifth Amendment, it would be interfering with an investigation concerning citizens of a foreign country.²³⁰ However, the court in *Inde* noted that the defendant was a naturalized citizen of the United States with all the correlative rights and privileges.²³¹ In this area, aliens are not granted the same rights and privileges as citizens.²³² The Minnesota District Court noted that refusing to interfere with a foreign government's investigation is very different from a "federal court using its judicial power to compel an American citizen to testify on matters which may well subject him to foreign prosecution."²³³ Similarly, Gecas is a naturalized American citizen with all the rights and privileges given to citizens. He is entitled to the protection of the Fifth Amendment while testifying on American soil, in an American Court, and in front of American Justice Officials. Gecas cannot, and should not be compared to citizens of the Philippines or U.S. citizens testifying in a domestic criminal investigation. *United States v. Gecas*²³⁴ should be examined in relation to those cases that are similarly situated, not those that are entirely distinct. In addition, the Florida District Court should have applied the Fifth Amendment to a United States citizen as the amendment has been applied throughout its history, broadly.

IV. CONCLUSION

In conclusion, the Florida District Court for the Northern District of Florida erroneously decided *United States v. Gecas* in light of the history and policy of the Fifth Amendment. The court neglects to address in detail, district court cases with facts

²²⁹ *Id.* at 1301.

²³⁰ *Inde*, 1989 U.S. Dist. LEXIS 11954, at *17

²³¹ *Id.*

²³² See *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The fifth amendment cannot apply extra-territorially (to aliens) for if "[s]uch extritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment." *Id.*

²³³ *Inde*, 1989 U.S. Dist. LEXIS 18388, at *17.

²³⁴ 830 F. Supp. 1403.

substantially similar to the facts in *United States v. Gecas*, and relies on arguments from federal court of appeals cases which are clearly distinguishable. Moreover, the court undermines the policy and the purpose of the Fifth Amendment by defining it solely as a limit on federal and state governmental power. Throughout history, as demonstrated by the origin of the Fifth Amendment as well as American case law, the Fifth Amendment has been interpreted to bestow a right on a United States citizen where the citizen shows a substantial danger of prosecution if forced to testify. The holding in *United States v. Gecas* denigrates the significance of the Fifth Amendment as a right protected under the United States Constitution.

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* The author wishes to dedicate this article to her family, Manfred, Marilyn, Susan and Jennifer Reimann.