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*FIFTH AMENDMENT PRIVILEGE AGAINST  
SELF-INCRIMINATION: MAY IT BE EXTENDED IN  
CASES WHERE ONLY A FOREIGN PROSECUTION IS  
POSSIBLE?*

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**Abstract.** Several courts in the various circuits have considered whether the Fifth Amendment privilege against self-incrimination applies to fear of incrimination in foreign countries, and they have come to divergent conclusions. The United States Supreme Court granted certiorari in *United States v. Balsys*, and will decide the issue of whether a witness can invoke the Fifth Amendment privilege against self-incrimination in which only a foreign prosecution is possible.

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## **Fifth Amendment Privilege Against Self-Incrimination May Not Be Extended in Cases Where Only a Foreign Prosecution Is Possible**

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### **Summary**

Several courts in the various circuits have considered whether the Fifth Amendment privilege against self-incrimination applies to fear of incrimination in foreign countries, and they have come to divergent conclusions. The United States Supreme Court granted *certiorari* in *United States v. Balsys*, and on June 25, 1998, decided that a witness may not invoke the Fifth Amendment privilege against self-incrimination in which only a foreign prosecution is possible. This report will not be updated.

Aloyzas Balsys is a resident alien living in Woodhaven, New York. He was born on February 6, 1913, in Lithuania and entered the United States on June 30, 1961. In his 1961 immigration application, Mr. Balsys had stated that between 1934 and 1940, he served in the Lithuania army, and that between 1940 and 1944, he lived in Lithuania in hiding. The application included a declaration that Balsys understood that if he made any willfully false statement or concealed any material fact, and he entered the United States, he could be subject to criminal prosecution and/or deportation. The statute of limitations bars prosecution for a false declaration on the 1961 application, but there is no such limitation on deportation proceedings.<sup>1</sup> The Office of Special Investigations (“OSI”) of the Criminal Division of the Department of Justice later claimed to have found evidence that Mr. Balsys assisted the Nazi forces occupying Lithuania during World War II and that he persecuted the Jews and other civilians as a member of the Lithuanian Security Police. If so, Mr. Balsys would be eligible for deportation.<sup>2</sup>

<sup>1</sup> *United States v. Balsys*, 918 F. Supp. 588, 592 n5 (E.D.N.Y. 1996).

<sup>2</sup> *United States v. Balsys*, 119 F.3d 122 (2<sup>nd</sup> Cir. 1997).

In furtherance of its investigation of Balsys' wartime activities, OSI issued an administrative subpoena commanding Balsys to give testimony and to produce documents relating to his activities during the war and to his immigration to the United States. Balsys appeared at a deposition, and provided his name and address; he then asserted the Fifth Amendment privilege<sup>3</sup> and refused to answer all other questions.

The district court granted the government's motion for an order compelling compliance with the Department of Justice administrative subpoena, even though Mr. Balsys claimed that his answers could incriminate him in future prosecutions by Lithuanian and Israeli authorities.<sup>4</sup> Three other circuits have considered whether the Fifth Amendment privilege applies to fear of incrimination in foreign countries, and they have reached similar conclusions.<sup>5</sup>

Vacating and remanding the decision of the district court, the court of appeals said, "... that granting the privilege to those who fear foreign prosecution is consistent with the language of the Fifth Amendment, with its aims, and with the reasoning of the most relevant Supreme Court cases,"<sup>6</sup> and therefore held that the petitioner may invoke the privilege.<sup>7</sup>

In addition, the court of appeals concluded that inasmuch as the Balsys visa application process in 1961 and the present deportation investigation by OSI are separate proceedings, he did not waive the privilege by answering questions about his activities during World War II when he completed his visa application.<sup>8</sup>

The Supreme Court granted the petition for *certiorari* in *United States v. Balsys*, and on June 25, 1998, reversed the Court of Appeals and decided by a 7-2 vote that a witness may not invoke the Fifth Amendment privilege against compelled self-incrimination based solely on fear of prosecution by a foreign country.<sup>9</sup>

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<sup>3</sup> The Fifth Amendment provides in part: "No person ... shall be compelled in any criminal case to be a witness against himself ...." U. S. Const. amend. V.

<sup>4</sup> *United States v. Balsys*, 918 F. Supp. 588 (E.D.N.Y. 1996).

<sup>5</sup> See, e.g., *United States v. Gecas*, 120 F.3d 1419 (11<sup>th</sup> Cir. 1997) (*En Banc*), petition for cert. filed 66 U.S.L.W. 3399 (Nov. 24, 1997) (No. 97-884) (held that even a "real and substantial fear" of a foreign prosecution would not permit the privilege to be invoked against self-incrimination in a civil deportation hearing); *United States v. (Under Seal)*, 794 F.2d 920 (4<sup>th</sup> Cir. 1986) (held Fifth Amendment does not protect a witness facing a substantial risk of foreign prosecution from compelled self-incrimination); *In re Parker*, 411 F.2d 1067 (10<sup>th</sup> Cir. 1969), *vacated as moot sub nom., Parker v. United States*, 397 U.S. 96 (1970) (held Fifth Amendment does not protect against self-incrimination for acts made criminal by the laws of a foreign nation).

<sup>6</sup> *Balsys*, 119 F.3d at 139.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 140.

<sup>9</sup> 66 U.S.L.W. 4613 (U.S. June 30, 1998).

Although the Supreme Court had an opportunity to decide a similar issue in *Zicarelli v. New Jersey State Commission of Investigation*,<sup>10</sup> it instead held that there was not a “real and substantial” risk of foreign prosecution.<sup>11</sup> In another opportunity to decide the issue, the Court in *Murphy v. Waterfront Commission of New York Harbor*<sup>12</sup> decided that in the absence of immunity, federal authorities may not compel a witness to give testimony that might incriminate him another American jurisdiction.<sup>13</sup>

In *United States v. Gecas*,<sup>14</sup> the Eleventh Circuit held that even a “real and substantial fear” of a foreign prosecution would not permit the privilege to be invoked against self-incrimination in a civil deportation hearing.<sup>15</sup> In 1991, the OSI issued an administrative subpoena to Gecas, a resident alien with Lithuanian citizenship, directing him to testify and produce documents relating to his immigration to the United States and his activities during World War II. Although Gecas provided his name, current, and previous U.S. addresses, he refused to answer any of OSI’s questions regarding his alleged involvement in the wartime persecution of Jews, and instead invoked the Fifth Amendment.<sup>16</sup> The Eleventh Circuit reversed, deciding that the Fifth Amendment privilege protected against a real and substantial fear of foreign prosecution.<sup>17</sup> Before the case was heard on remand, however, the Eleventh Circuit vacated its opinion and, on

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<sup>10</sup> 406 U.S. 472 (1972).

<sup>11</sup> *Id.* at 478-80.

<sup>12</sup> 378 U.S. 52 (1964). In *Murphy*, the petitioners were subpoenaed to testify about a work stoppage at a New Jersey pier. *Id.* at 53. After refusing to testify on the grounds that their answers might tend to incriminate them, the petitioners were granted immunity from prosecution under New York and New Jersey state law. *Id.* at 53-54. However, because the immunity did not protect them from federal prosecution, they still refused to testify. *Id.* at 54. Civil and criminal contempt of court charges were brought against them and the civil contempt charges were subsequently upheld by the district court on the ground that a state may constitutionally compel witnesses to give testimony despite its potential to incriminate them under federal law. *Id.*

<sup>13</sup> *Id.* at 79-80.

<sup>14</sup> 120 F.3d 1419 (11<sup>th</sup> Cir. 1997) (*En Banc*), petition for *cert.* filed 66 U.S.L.W. 3399 (U.S. Dec. 9, 1997) (No. 97-884).

<sup>15</sup> *Id.* at 1457.

<sup>16</sup> *Id.* at 1423. Confronted with Gecas’ refusal to discuss his alleged participation in wartime crimes, the United States petitioned the district court for an order to enforce OSI’s subpoena. The district court granted the government’s petition and held that the Fifth Amendment privilege did not protect against even a real and substantial fear of foreign incrimination (*United States v. Gecas*, 830 F. Supp. 1403, 1406 [N.D. Fla. 1993]) because such an extension “would seriously erode domestic law enforcement” (830 F. Supp. at 1422).

<sup>17</sup> See *United States v. Gecas*, 50 F.3d 1549, 1551 (11<sup>th</sup> Cir. 1995). The circuit court remanded the case and instructed the district court to determine whether Gecas had waived his privilege against self-incrimination by signing his immigration papers under oath. See *id.* at 1567.

rehearing *en banc*,<sup>18</sup> affirmed the district court's order commanding Gecas to testify.<sup>19</sup> The Court of Appeals held that although "... Gecas faces a real and substantial risk of actually being convicted under foreign law based on the alleged conduct", the Fifth Amendment does not protect against this risk.<sup>20</sup>

The Supreme Court did not agree. Justice Souter, writing for the majority in *Balsys*, held that "... concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause"<sup>21</sup>. The constitutional amendment regarding the Self-Incrimination Clause states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."<sup>22</sup> The Court noted that a series of court decisions have extended the privilege of silence beyond criminal proceedings to civil and administrative proceedings as well.<sup>23</sup> However, it has never said whether "...in any criminal case..." means possible prosecution outside the United States.<sup>24</sup> "...[W]e are ... unable to dismiss the position of the United States in this case, that domestic law enforcement would suffer serious consequences if fear of foreign prosecution were recognized as sufficient to invoke the privilege."<sup>25</sup>

The Court further stated:

"Since the likely gain to the witness fearing foreign prosecution is thus uncertain, the countervailing uncertainty about the loss of testimony to the United States cannot be dismissed as comparatively unimportant. That some testimony will be lost is highly probable, since the United States will not be able to guarantee immunity if testimony is compelled (absent some sort of cooperative international arrangement that we cannot assume will occur). While the Court of Appeals is doubtless correct that the expected consequences of some foreign prosecutions may be so severe that a witness will refuse to testify no matter what, not every foreign prosecution may measure up so harshly as against the expectable domestic consequences of contempt for refusing to testify. We therefore must suppose that on *Balsys*'s view some evidence will in

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<sup>18</sup> See *United States v. Gecas*, 81 F.3d 1032, 1032 (11<sup>th</sup> Cir. 1996).

<sup>19</sup> *Id.* The Eleventh Circuit in *Gecas* tried to find a middle ground between two earlier decisions by constructing, based upon the prior decisions and the policies behind the privilege, a balancing test of the two goals which includes the protection of individual rights and protecting the goals of government in domestic law enforcement. 50 F.3d at 1561-62, 1562-65. However, on rehearing *en banc*, the Eleventh Circuit said that although Gecas faced a real and substantial risk of actually being convicted under foreign law, the Fifth Amendment does not protect against this risk. *Gecas*, 120 F.3d at 1422. The court appeared to base its conclusion on the purposes of the Fifth Amendment privilege, deciding finally that the "...Fifth Amendment's Self-Incrimination Clause was intended as a limitation on the investigative techniques of government, not as an individual right against the world." 120 F.3d at 1456.

<sup>20</sup> *Id.*

<sup>21</sup> *United States v. Balsys*, 66 U.S.L.W. 4613 (U.S. June 30, 1998).

<sup>22</sup> *Id.* at 4614.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 4621-22.

fact be lost to the domestic courts, and we are accordingly unable to dismiss the position of the United States in this case ....

In sum, the most we would feel able to conclude about the net result of the benefits and burdens that would follow from Balsys's view would be a Scotch verdict. If, then, precedent for the traditional view of the scope of the Clause were not dispositive of the issue before us, if extending the scope of the privilege were open to consideration, we still would not find that Balsys had shown that recognizing his claim would be a sound resolution of the competing interests involved."<sup>26</sup>

The Court expressed concern for the fact that to recognize the protection as Balsys requests, based solely upon the threat or fear of foreign prosecution, would be contrary to the scope of protection which the Self-Incrimination Clause recognizes. The Clause applies the principle that the "... privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."<sup>27</sup> Pursuant to this principle, federal and state jurisdiction are treated as one, and the exclusionary rule created by the Court prohibits the federal courts from using testimony compelled by state courts.<sup>28</sup> There is no extension of this analogy and cooperative balance regarding the self-incrimination principle to foreign courts, and consequently there is no basis for appealing to "... 'cooperative internationalism' by analogy to 'cooperative federalism'."<sup>29</sup> The Court noted that this does not preclude the recognition of cooperative conduct between the United States and foreign nations whereby a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause in the future but there is no presentation of facts giving rise to such a level of cooperative prosecution in this particular case.<sup>30</sup>

Justice Breyer, with whom Justice Ginsburg joined dissenting said:

"This Court has often found, for example, that the privilege recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth. 'At its core, the privilege reflects our fierce unwillingness to subject those suspected of crime to the cruel choice of self-accusation, perjury or contempt'.... The privilege can reflect this value, and help protect against this indignity—protection that can be overcome by other needs. ... And that value is no less at stake where a foreign, but not a domestic, prosecution is at issue."<sup>31</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Murphy*, 378 U.S. at 77-78.

<sup>28</sup> *Balsys*, 66 U.S.L.W. at 4620-21.

<sup>29</sup> *Id.* at 4621.

<sup>30</sup> *Id.* at 4622.

<sup>31</sup> *Id.* at 4626.

