

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. ALOYZAS BALSYS

CASE NO: No. 97-873

PLACE: Washington, D.C.

DATE: Monday, April 20, 1998

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**Supreme Court U.S.**

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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
UNITED STATES, :  
Petitioner :  
v. : No. 97-873  
ALOYZAS BALSYS :

- - - - -X  
Washington, D.C.  
Monday, April 20, 1998

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:03 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Petitioner.  
IVARS BERZINS, ESQ., Babylon, New York; on behalf of the  
Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 97-873, United States v. Balsys.

5 Mr. Dreeben.

6 ORAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE PETITIONER

8 MR. DREEBEN: Mr. Chief Justice, and may it  
9 please the Court:

10 The question in this case is whether the Fifth  
11 Amendment privilege against compelled self-incrimination  
12 may be invoked based on a fear of foreign prosecution.  
13 For three main reasons, we submit that it may not.

14 First, the prohibition against compelling a  
15 person to be a witness against himself applies only in a  
16 criminal case. By that phrase, the Framers meant a  
17 Federal criminal case. The Self-Incrimination Clause is  
18 one of a series of rights set forth in the Fifth and Sixth  
19 Amendments that are naturally read to govern criminal  
20 trials in this country, not foreign criminal cases.

21 Second, history teaches --

22 QUESTION: Mr. Dreeben, in the Arndstein case  
23 the Court extended the privilege outside of the scope of a  
24 criminal trial, didn't it?

25 MR. DREEBEN: That is correct, Mr. Chief

1 Justice, in this respect. The privilege may be claimed by  
2 a witness in any proceeding, regardless of whether the  
3 proceeding is civil, criminal, or administrative, so long  
4 as what the witness ultimately fears is incrimination in a  
5 criminal case.

6 The proper referent to determine whether the  
7 Self-Incrimination Clause may be invoked therefor is not  
8 the type of proceeding in which it is claimed in this  
9 country, but rather the type of proceeding in which the  
10 witness actually fears incrimination, and that point is  
11 borne out by the history of the clause.

12 QUESTION: Mr. Dreeben, before you proceed  
13 further, would you tell me why 18 U.S.C. 1001 isn't in  
14 this picture? It did involve a false statement to the  
15 United States, so why is it seemed to be conceded that  
16 there is no criminal case in the United States?

17 MR. DREEBEN: There could be, Justice Ginsburg,  
18 if these statements had been made within a period  
19 prosecutable under the statute of limitations, but the  
20 original statements that respondent made to gain entry to  
21 the United States were in 1963, and the general 5-year  
22 statute of limitations has long since run on any  
23 prosecution for false statements based on that event and,  
24 as a result, the witness is not in a position to claim a  
25 fear of domestic incrimination based on any contradiction

1 with his prior statements and I think it's conceded in  
2 this case that the only claim of self-incrimination is  
3 based on what a foreign power might do if it had custody  
4 over respondent and instituted a case. There is no claim  
5 in this case that there is a domestic fear of prosecution  
6 by either the State or the Federal Government based on the  
7 statements that he has made.

8 Now, the history of the Self-Incrimination  
9 Clause in this country points strongly to the conclusion  
10 that the words, any criminal case, in the Fifth Amendment  
11 refer only to a Federal criminal case. In the era before  
12 this Court extended the --

13 QUESTION: Wait. You just told us that that  
14 refers to the case in which he is asked to testify, not  
15 the case in which he would presumably incriminate himself,  
16 right?

17 MR. DREEBEN: I'm not sure, Justice Scalia,  
18 whether I was clear before, so let me try to make it  
19 clear.

20 QUESTION: All right.

21 MR. DREEBEN: The case in which the  
22 incrimination must take place --

23 QUESTION: Right.

24 MR. DREEBEN: -- must be a criminal case, by  
25 which the Fifth Amendment in our view means a Federal

1 criminal case.

2 The privilege can be claimed by a witness in any  
3 proceeding in which he is asked to give compelled  
4 testimony, not based on his concerns about what might  
5 happen to him in that proceeding, but based on concerns  
6 about what might happen to him in a criminal case down the  
7 road.

8 QUESTION: I understand, but I don't understand  
9 how you read the phrase, in any criminal case. No person  
10 shall be compelled in any criminal case to be a witness  
11 against himself.

12 Where is the compulsion? Is the compulsion in  
13 the case in which I am summoned --

14 MR. DREEBEN: Yes.

15 QUESTION: -- to testify?

16 MR. DREEBEN: Yes. The compulsion can be in the  
17 case in which you are compelled to give testimony under  
18 oath, as in this case, in our view, by a -- backed by the  
19 contempt powers of the court if you decline to give  
20 testimony, so the compulsion can occur in any proceeding.

21 QUESTION: All right.

22 MR. DREEBEN: But you need also to have  
23 incrimination. The two interlinked requirements of the  
24 clause are compulsion and incrimination, and the question  
25 here is whether the incrimination can be in a case not

1 brought in this country by the Federal Government or a  
2 State, but by a foreign Government. That is the question  
3 before the Court in this case.

4 QUESTION: And that's the implication in the  
5 latter part, to be a witness against himself, and a  
6 witness where is what we're debating.

7 MR. DREEBEN: That is exactly right. The  
8 question is whether it can be triggered based on  
9 prosecution abroad.

10 Now, if you look at the text of the Fifth and  
11 the Sixth Amendments together, which is the logical way to  
12 read them because they contain the essential criminal  
13 procedure proscriptions that are applicable in trials in  
14 this country, the Fifth Amendment seems almost inevitably  
15 to be limited to criminal cases brought by the Federal  
16 Government.

17 There can be no dispute that the original intent  
18 of the Framers of the Bill of Rights was to impose  
19 limitations only on the Federal Government, not on the  
20 States, and this Court consistently held, in the era  
21 before the Fourteenth Amendment was ratified and thereby  
22 made certain constitutional protections applicable to the  
23 States, that none of the provisions in the original Bill  
24 of Rights govern State proceedings and, as a result, State  
25 witnesses could not claim the protection of the Fifth

1 Amendment.

2 In that regime, in other words, State witnesses  
3 who feared incrimination by a State could not say that  
4 they feared incrimination in any criminal case, because  
5 State prosecutions were not deemed subsumed within the  
6 Fifth Amendment, and there are several textual references  
7 that make sense only if read that way.

8 The Sixth Amendment refers to all criminal  
9 prosecutions, yet it is quite clear that by that reference  
10 the Framers did not intend to refer to State criminal  
11 prosecutions, and far less sensible would it be to think  
12 that they were referring to foreign criminal prosecutions.  
13 The only criminal prosecutions that were originally  
14 subsumed by the Sixth Amendment were domestic criminal  
15 prosecutions.

16 QUESTION: But that goes to where the compulsion  
17 is, not to where the incrimination is, doesn't it?

18 MR. DREEBEN: No, Justice Scalia. I think what  
19 it goes to is by what did the Framers mean the words, any  
20 criminal case, to refer to?

21 Originally they only meant them to refer to a  
22 Federal criminal case and, as a result, this Court held  
23 that if a Federal witness was compelled to testify, he  
24 said, look, I don't have any concern that I'm going to be  
25 incriminated in a Federal criminal case, but I am worried

1 that in the State of Maryland I might be incriminated.

2 This Court held that is not a basis for  
3 declining to give testimony, because the criminal case in  
4 which you fear incrimination is not a Federal criminal  
5 case.

6 QUESTION: That was before the Murphy decision.

7 MR. DREEBEN: That is correct, Justice Ginsburg.

8 QUESTION: And why shouldn't it be that the  
9 concern is controlling the conduct of the Federal actor,  
10 whether a Federal agent, a police officer -- if the  
11 amendment is directed against the compulsion, the action  
12 that is prohibited is compelling the testimony, why should  
13 it matter where the criminal case is instead of who is  
14 doing the compelling?

15 MR. DREEBEN: Well, Justice Ginsburg, it always  
16 has mattered where the criminal case is, and once this  
17 Court held in Malloy v. Hogan that the Fifth Amendment  
18 applied equally to the States and to the Federal  
19 Government, this Court in the Murphy decision changed the  
20 former Federal rule and held that the Fifth Amendment may  
21 now be claimed whether the prosecution that is feared  
22 would occur in a State or in the Federal Government.

23 The theory behind that is that any jurisdiction  
24 that is bound by the Fifth Amendment should not be able to  
25 receive testimony that was compelled by another

1 jurisdiction, also bound by the Fifth Amendment, and use  
2 it to convict someone.

3 So under the Murphy decision two jurisdictions,  
4 each bound by the Fifth Amendment, cannot evade that  
5 constitutional guarantee by having one compel the  
6 testimony and the other one use it, but that is a value  
7 that primarily relates to the way we try criminal cases in  
8 this country.

9 Like the presumption of innocence and the  
10 requirement of proof beyond a reasonable doubt, the Fifth  
11 Amendment fits into a mosaic of rights that express the  
12 view that it is the Government that must prove the  
13 defendant's guilt without the assistance of compelling the  
14 defendant to incriminate himself out of his own mouth and  
15 thereby confess himself into a Federal or a State prison.

16 QUESTION: Is there anything in our cases which  
17 would allow the respondent to make the argument that there  
18 is an additional protection in the Fifth Amendment Self-  
19 Incrimination Clause that it is simply degrading or  
20 destructive of the dignity of the person to be required to  
21 answer and to confess a crime?

22 MR. DREEBEN: I think that that is one of the  
23 components that this Court has identified as a value  
24 underlying the Fifth Amendment, but it again relates  
25 primarily to a value about how we prosecute individuals in

1 this country. It says nothing about whether another  
2 country might choose to adopt a different criminal law  
3 system.

4 QUESTION: Well, but I'm not so sure, and do you  
5 get that out of Malloy or Murphy? Where do you get this  
6 interest in individual dignity or autonomy?

7 MR. DREEBEN: Well, to the extent that one  
8 identifies an interest in individual dignity or autonomy,  
9 it does not extend so far as to say the Government cannot  
10 exert compulsion. By granting immunity --

11 QUESTION: Of course, because you can have  
12 immunity.

13 MR. DREEBEN: That's correct. The Government  
14 has always had the countervailing ability to grant  
15 immunity and then to compel an individual to say anything  
16 about himself that he knows honestly, no matter how  
17 offensive it is to him personally, no matter whether it  
18 would subject him to personal humiliation or jeopardy of  
19 life. So long as it's not used against him, those  
20 words --

21 QUESTION: Which leads me to think that there is  
22 no freestanding interest in just individual dignity, that  
23 it's -- the only question is whether or not it can be used  
24 by the Government which is going to prosecute him.

25 MR. DREEBEN: I think that that is exactly

1 right, Justice Kennedy. It is not a freestanding  
2 interest. It's an interest that it is integrally  
3 interlinked with the potential for incrimination, and --

4 QUESTION: Mr. Dreeben, can the Federal  
5 Government compel testimony that would incriminate someone  
6 in a State proceeding by giving him immunity from the  
7 State prosecution?

8 MR. DREEBEN: Yes. It's settled that the  
9 Federal Government has the authority under the Supremacy  
10 Clause to declare that testimony that is compelled will  
11 not be used against an individual in a State proceeding.

12 QUESTION: In a State proceeding as well. What  
13 case --

14 QUESTION: What case settles that?

15 MR. DREEBEN: That I think is settled by the  
16 Kastigar decision, by the Murphy decision, by Brown v.  
17 Walker, and by Adams v. Maryland. I believe we cited all  
18 of these cases in our brief that specifically address the  
19 Federal Government's power to do that.

20 QUESTION: Mr. Dreeben, is it possible that the  
21 Federal Government, for example in this case the OSI,  
22 might want to cooperate with a foreign nation to see the  
23 individual prosecuted elsewhere and have a motive to --

24 MR. DREEBEN: Certainly --

25 QUESTION: -- secure the testimony to help the

1 foreign prosecution?

2 MR. DREEBEN: Well, I think in a case like this  
3 the Justice Department has dual interests.

4 There is a Federal law that provides for the  
5 deportation of an individual who lied to get into this  
6 country and who assisted the Nazis in persecuting Jews  
7 during World War II, and that is a distinct Federal  
8 interest that is being enforced by OSI.

9 It is also true that OSI regards it as a proper  
10 component of its mission to see to it that information  
11 that may be relevant to a foreign Government's  
12 consideration of prosecution is provided.

13 QUESTION: Well, should that make any difference  
14 in our concerns about this case, if it's that kind of a  
15 situation?

16 MR. DREEBEN: I don't think it should make any  
17 difference whatsoever, Justice O'Connor, because the  
18 underlying question here is not whether it would be fair  
19 in a United States prosecution to use this information.  
20 The question is whether the United States Constitution has  
21 something to say about the way foreign Governments conduct  
22 their prosecutions.

23 There is no country that I'm aware of that has a  
24 Fifth Amendment right, or a mirror image of the Fifth  
25 Amendment right that looks just like ours.

1 QUESTION: Do foreign countries scratch our  
2 backs, too? I mean, do we get people to testify before  
3 the courts of foreign countries that don't have Fifth  
4 Amendment protections, knowing that what they say can be  
5 used in a Federal criminal prosecution?

6 MR. DREEBEN: We don't, Justice Scalia. My  
7 understanding is that we provide sufficient information to  
8 the foreign Government and ask them to provide information  
9 to a witness when we are seeking testimony from overseas  
10 about applicable privileges.

11 Now, the traditional rule about how the  
12 privileges are supposed to be applied when countries  
13 cooperate in securing testimony is that the foreign  
14 country will take the testimony subject to any claim of  
15 privilege, and then the privilege is adjudicated in the  
16 home country where the privilege actually derives from,  
17 but it is not --

18 QUESTION: After the testimony is already taken.

19 MR. DREEBEN: Right, but it is not the --

20 QUESTION: After the cat is out of the bag.

21 MR. DREEBEN: That is true, Justice Ginsburg.  
22 It's not the policy of the United States Government to  
23 seek to -- that that happen in every case and, as a  
24 result, I'm not aware of instances where we did have a  
25 foreign Government act as our agent, compelling testimony

1 that would be prohibited if the United States were acting  
2 alone.

3 Obviously, that raises a somewhat separate  
4 question from the question here, which is whether the  
5 United States may use an agent or an intermediary to  
6 accomplish something that it cannot accomplish acting  
7 directly, but that is an entirely separate question from  
8 whether a witness in this country in a domestic U.S.  
9 proceeding may claim the Fifth Amendment based not on a  
10 fear of prosecution here, but by a fear of what might  
11 happen to him if he is -- finds himself in a foreign  
12 country and the testimony ends up there.

13 QUESTION: I take it, then, to your argument it  
14 makes no difference whether the foreign country is a  
15 country that has a comparable privilege, perhaps, or  
16 strata, or whether it's a country that's typical of a  
17 civil law system that would not?

18 MR. DREEBEN: It does make no difference,  
19 Justice Ginsburg, because again, I think that the  
20 fundamental concern of the Fifth Amendment and as applied  
21 to the States through the Fourteenth Amendment is how we  
22 conduct our criminal prosecutions here.

23 QUESTION: Why is that? That is, if -- I'm  
24 thinking only of the Fourteenth. I agree with you that,  
25 let's say hypothetically the Fifth is Federal. They're

1 talking about a Federal trial, but the Fourteenth uses the  
2 word liberty, and it protects a person's liberties.

3 So if there's a person in Ohio who would be  
4 deprived of a liberty by having his testimony taken and  
5 used in an Ohio proceeding, it would deprive that person  
6 of a liberty, so he must have a liberty not to have his  
7 testimony forced from him for Ohio. Why is it different  
8 from Lithuania?

9 MR. DREEBEN: It's --

10 QUESTION: I mean, the Fourteenth Amendment  
11 doesn't talk about what Ohio can do. The Fourteenth  
12 Amendment talks about the liberty that a person enjoys.

13 MR. DREEBEN: It's different because Ohio,  
14 unlike Lithuania, is bound by the Fifth Amendment  
15 privilege against compelled --

16 QUESTION: Where does it say that in the  
17 Constitution? I thought all that it says in the  
18 Constitution is that you cannot deprive a person of a  
19 liberty. It says no State shall deprive a person of a  
20 liberty. We're talking about a liberty. What's the  
21 liberty?

22 MR. DREEBEN: The liberty, I think, in your  
23 hypothetical is ultimately freedom from incarceration.  
24 The question is whether Ohio may use the information that  
25 Illinois has extracted for purposes of prosecution, and

1 this Court in the Murphy decision attempted to make sense  
2 out of our Federal system in which all jurisdictions are  
3 bound by the Fifth Amendment by saying that two  
4 jurisdictions who are equally bound by the Fifth Amendment  
5 cannot team up --

6 QUESTION: Mr. Dreeben, may I just interrupt?  
7 It isn't technically and strictly correct to say that the  
8 State is bound by the Fifth Amendment.

9 MR. DREEBEN: No.

10 QUESTION: It's bound by the Fourteenth  
11 Amendment --

12 MR. DREEBEN: That's correct.

13 QUESTION: -- which has a liberty protection  
14 which is somewhat comparable, or is comparable to the  
15 Fifth.

16 MR. DREEBEN: Well, I think --

17 QUESTION: But strictly speaking the State is  
18 not bound by the Fifth Amendment.

19 MR. DREEBEN: That is correct, strictly speaking  
20 it's not, but the Court in Malloy v. Hogan said, we are  
21 going to apply the Fifth Amendment to the States just as  
22 we apply it to the Federal Government.

23 QUESTION: And when we say just as we apply it  
24 to the Federal Government, there is no case, with  
25 reference to the Fourth Amendment search rules, the Fifth

1 Amendment self-incrimination or double jeopardy rules, or  
2 the jury trial rules in which the State protection is any  
3 greater or any less than is granted to -- under the  
4 Federal -- than is applicable to the Federal Government,  
5 is that not correct?

6 MR. DREEBEN: Once the Court has made the  
7 decision to extend the right in question to the States  
8 through the Fourteenth Amendment, that's correct.

9 QUESTION: They are coterminous in each case.

10 MR. DREEBEN: They're coextensive, and the  
11 fundamental premise of the Murphy decision is that we do  
12 have cooperative federalism in this country when it comes  
13 to law enforcement, and it makes very little sense to say  
14 that once the States are no longer free to compel  
15 testimony under the Federal Constitution, that they may  
16 then operate together and achieve results that they  
17 couldn't achieve --

18 QUESTION: Can I ask you about that, because I  
19 was just testing out the linguistic argument, that's why I  
20 was -- Justice Stevens made the point linguistically, but  
21 I have a practical question, which is why -- how  
22 specifically would extension of the protection that you  
23 oppose interfere with Government law enforcement efforts?

24 In particular, I'm thinking that it must be  
25 perhaps a fairly unusual case where, say, as here, the

1 statute of limitations has run, 5 years, so there's no  
2 risk of domestic protection.

3 I'm guessing that in most cases anybody who can  
4 assert a Fifth Amendment privilege in respect to a foreign  
5 country probably could here, too, so I'm interested in --  
6 I'm raising that so you'll respond to the real  
7 practicality, how would extension really interfere with  
8 law enforcement efforts?

9 MR. DREEBEN: The extension of the privilege to  
10 foreign prosecutions would seriously interfere with  
11 domestic investigations, because we cannot grant immunity  
12 from a fear of foreign prosecutions.

13 QUESTION: Why don't you just say to the person  
14 you wouldn't deport him?

15 MR. DREEBEN: That has not been considered by  
16 most courts an adequate answer to concerns about the Fifth  
17 Amendment. The Fifth Amendment is not -- does not stand  
18 as a guarantee that depends on whether later events bear  
19 it out.

20 QUESTION: But doesn't there have to be a  
21 realistic threat of prosecution, and if you say you're not  
22 going to deport him, then there's no realistic threat.

23 MR. DREEBEN: No, there may well be a realistic  
24 threat of prosecution because a foreign country may issue  
25 an extradition order to us, so we then have the discretion

1 to say, well, we're not going to comply with the terms of  
2 our extradition treaty, but we then have to answer to the  
3 world community for our decision not to do that.

4 In a case in which, for example, an act of  
5 terrorism occurs abroad that involves citizens of foreign  
6 States, we may apprehend some of them, bring them to this  
7 country, learn that they fear domestic prosecution, and  
8 issue an immunity order which would ordinarily require  
9 them to testify, but they may say no, I'm sorry, I'm not  
10 going to testify because I still fear prosecution abroad.

11 QUESTION: Well, isn't there considerable  
12 administrative difficulty in applying the rule sought by  
13 the respondent here? Courts in this country are going to  
14 have to analyze whether the fear is realistic or not and  
15 really familiarize themselves with a number of different  
16 kinds of foreign law.

17 MR. DREEBEN: There are a number of practical  
18 implementation questions, Chief Justice Rehnquist, as you  
19 raise.

20 In the jurisdictions where a claim like this  
21 could be raised, courts will have to go through, as they  
22 did in this case, several bodies of foreign law and try to  
23 make appraisal of the realistic ability of a foreign  
24 government to prosecute, and that stands quite a bit in  
25 contrast to the domestic regime in which, once the

1 privilege is raised, it stands as an absolute, except that  
2 the Government has immunity power, and the immunity power  
3 has always been viewed as essentially coextensive with the  
4 reach of the Fifth Amendment.

5 QUESTION: Outside of a witness who is a  
6 defendant in a criminal trial, you have to show that there  
7 is a likelihood of incrimination in the answer. You can't  
8 just say, I plead the Fifth Amendment, period, and  
9 automatically get off.

10 MR. DREEBEN: That is certainly true, but the  
11 way that the test is applied in the lower courts is not  
12 terribly demanding. Normally, if a witness can identify a  
13 body of law under which he contends it's conceivable that  
14 he might be incriminated, he's not required to go much  
15 further than that.

16 Courts don't typically take in camera testimony  
17 to determine whether the answers would really be  
18 incriminating, and they don't typically ask whether the  
19 State or Government prosecution that is feared is really  
20 likely to happen.

21 It's generally enough simply to assert that  
22 there is testimony that would incriminate the individual  
23 and to identify a law under which that might happen, and  
24 the Government's next step is ordinarily immunity if it  
25 wants the testimony.

1 But immunity orders aren't going to work in this  
2 context, because we rarely are going to be able to  
3 guarantee that the immunity order will actually be  
4 coextensive with the scope of the privilege and prevent  
5 the use of the testimony overseas and, as a result, we may  
6 well be in situations where we're investigating serious  
7 terrorist activity, or interstate -- international drug  
8 trafficking, money laundering, white collar crime, and we  
9 are helpless to attain our prosecutorial objectives  
10 because an immunity order simply doesn't work.

11 QUESTION: Suppose that in this case or a  
12 similar case there were three grounds for deportation,  
13 each of them fairly substantial, so that you're going --  
14 you know you're going to be able to deport this man  
15 anyway. If ground number 1 were lying on the application,  
16 could the Government say, we don't really need your  
17 testimony because we're going to be able to deport you  
18 anyway, but we want it in order to help Lithuania, or  
19 Israel, or some other foreign country? Would that be a  
20 legitimate basis for the Government to compel the  
21 testimony?

22 MR. DREEBEN: As long as the Government has a  
23 law that it's seeking to enforce in that circumstance, I  
24 don't see any reason why the Fifth Amendment question  
25 would change.

1           Now, it is conceivable that if the Court were to  
2 hold that the United States were somehow completely in  
3 control of a foreign prosecution so that some foreign  
4 Government's prosecution were really nothing but a sham, a  
5 cover under which the United States were really the  
6 prosecuting entity, then the analysis might be different.

7           This Court had suggested that there might be an  
8 exemption to the traditional dual sovereignty rule under  
9 the Double Jeopardy Clause, which allows the States and  
10 the Federal Government each to prosecute. If in a  
11 particular case a defendant could show that in reality the  
12 State prosecution was simply a cover for the Federal  
13 Government to take over and do it as a tool, the --

14           QUESTION: Well, the hypothetical I put is a  
15 little different. It's not that the foreign prosecution  
16 is a cover, but that the United States is very eager to  
17 assist the foreign prosecution. That makes no difference  
18 in your view?

19           MR. DREEBEN: I -- no, that makes no difference,  
20 because the ultimate constitutional question is whether  
21 the criminal case in which incrimination is feared is a  
22 criminal case within the meaning of the Fifth Amendment.

23           Our essential position is that no foreign  
24 criminal case fits within the language of the Fifth  
25 Amendment, construed in light of its history and its

1 policies and, as a result, it simply doesn't matter that  
2 the witness may say, I fear incrimination overseas because  
3 the United States may cooperate with a foreign government.

4 Now, again, the role of immunity statutes here,  
5 in our view, is key, because there has never been a time  
6 in this country in which a claim of the Fifth Amendment  
7 privilege could not be met by the Government seeking to  
8 get the testimony through granting immunity, but if this  
9 rule proposed by the respondent and accepted by the Second  
10 Circuit were adopted, it would mean that the United States  
11 would no longer be able to obtain needed testimony and it  
12 would put a witness who feared foreign prosecution in a  
13 better position than a witness who fears domestic  
14 prosecution.

15 QUESTION: Of course, the Constitution would  
16 have had the same meaning, I suppose, if the Congress had  
17 never passed any immunity statutes.

18 MR. DREEBEN: The Constitution would have, and  
19 it would have meant that immunity statutes would be  
20 permissible if a legislature wished to pass them.

21 The historical fact is that, as the Fifth  
22 Amendment right developed in the common law in England,  
23 simultaneously it was recognized that testimony could be  
24 compelled if immunity was granted and, in the colonies in  
25 this country which adopted precursors of the Fifth

1 Amendment privilege, immunity statutes were also enacted.

2 Now, the Federal Government didn't get into the  
3 business of enacting immunity statutes until about 1857,  
4 but I think that's largely explicable by the very small  
5 role of the Federal Government in prosecuting criminal  
6 cases in the early years of this Nation.

7 QUESTION: Yes, but the Second Circuit's  
8 suggestion was that the Congress could pass statutes in  
9 the extradition and deportation area that are analogous to  
10 the immunity statutes in the domestic area. It could  
11 thereby do just what the immunity statutes have done.

12 MR. DREEBEN: No.

13 QUESTION: Why not?

14 MR. DREEBEN: It would do far more --

15 QUESTION: Yes.

16 MR. DREEBEN: -- Justice Breyer, because an  
17 immunity statute in this country grants the witness  
18 freedom from having his words used against him or the  
19 fruits of those words used against him. It doesn't  
20 foreclose a prosecution altogether.

21 This Court in the Kastigar decision overruled  
22 the view that transactional immunity is required.

23 QUESTION: No, no, but I mean, why couldn't  
24 Congress -- what's wrong with the Second Circuit's  
25 suggestion?

1 MR. DREEBEN: Because the Second Circuit's  
2 suggestion in effect would grant transactional immunity.  
3 Not only would the witness be free from having his words  
4 used against him, he would be free from any prosecution  
5 altogether, because if the theory of the immunity statute  
6 that the Second Circuit posited is correct, that witness  
7 can never be sent to the foreign country where he might be  
8 prosecuted, and that grants the witness something far more  
9 than he would have in the United States, puts him in a  
10 much better position than a similarly situated U.S.  
11 witness would be, and thwarts the foreign country's  
12 interest in prosecuting if it could do it without the  
13 defendant's words at all.

14 It is also anomalous because the Second  
15 Circuit's holding would grant a witness greater protection  
16 than he might have in the country to which he ultimately  
17 goes if he faces prosecution. That country might not  
18 recognize a Fifth Amendment privilege in the same way or  
19 to the same extent as this country, and thus we have the  
20 anomaly that here the witness says, I don't want my words  
21 to be used against me because I fear prosecution in a  
22 foreign country, and then when he gets there that foreign  
23 country says, we'd now like your testimony.

24 There's no basis for using the Fifth Amendment  
25 to internationalize U.S. self-incrimination rules when

1 foreign countries themselves may treat the same issues  
2 quite differently.

3 I'd like to reserve the remainder of my time for  
4 rebuttal.

5 QUESTION: Very well, Mr. Dreeben.

6 Mr. Berzins, we'll hear from you.

7 ORAL ARGUMENT OF IVARS BERZINS

8 ON BEHALF OF THE RESPONDENT

9 MR. BERZINS: Mr. Chief Justice, may it please  
10 the Court:

11 What the Government advocates defeats the  
12 policies and purposes of the privilege, as this Court has  
13 repeatedly said in all the cases that followed Murphy.

14 The Government wants to extract from my client  
15 testimony that is designed to impose criminal penalties on  
16 him. They are trying to get him to testify without any  
17 grant of immunity, under naked compulsion, to extract out  
18 of him, out of his mouth the testimony that will inflict  
19 criminal penalties on him.

20 QUESTION: Mr. Berzins, could the United States  
21 constitutionally compel your client to do something which  
22 would be criminal under the law of another country? If it  
23 wanted to, could the United States pass a statute that  
24 says, if you do not do this you are committing a crime in  
25 the United States and will be put in jail, even though,

1 under the law of another country, if he did what the  
2 Federal statute says, he would be subject to criminal  
3 punishment?

4 MR. BERZINS: Yes, Your Honor, the United States  
5 could pass such a law.

6 QUESTION: Well, this is much less than that, it  
7 seems to me. Here, what the United States would be  
8 compelling would not automatically subject him to criminal  
9 punishment somewhere else. It would just allow in  
10 evidence somewhere else that might subject him to criminal  
11 punishment. It seems to me that the greater includes the  
12 lesser.

13 It's a very strange system in which we say we  
14 can compel you to do something that will enable a foreign  
15 country to send you to jail, but we cannot compel you to  
16 say something which might be used as part of a criminal  
17 prosecution in a foreign country that might send you to  
18 jail.

19 MR. BERZINS: That is quite so, Your Honor, but  
20 I invite you to consider the cruel trilemma that faces the  
21 claimant to the privilege. It is the cruel trilemma that  
22 I submit to you the Constitution prohibits.

23 QUESTION: Well, Mr. Berzins, you know, we're  
24 bound under stare decisis by the holding of the Murphy  
25 case. We're not bound to just accept every sentence in

1 the opinion.

2 MR. BERZINS: Your Honor, Mr. Chief Justice, I  
3 submit to you that the Self-Incrimination Clause prohibits  
4 compulsion, and that the Framers had in mind precisely the  
5 compulsion that is about to be visited upon my client.

6 QUESTION: No.

7 QUESTION: Well --

8 QUESTION: It prohibits compulsion which  
9 incriminates. That's the other half, and I think the  
10 Government -- you have to agree, don't you -- maybe you  
11 don't. Don't you agree that the Government is correct  
12 that you're asking, really, for a superprivilege, because  
13 the Government is powerless to grant immunity in this  
14 case, and we know of -- I know of no other case where the  
15 Federal Government is powerless to give an immunity when  
16 we have simply a State or a Federal prosecution under the  
17 Kastigar rule.

18 MR. BERZINS: Your Honor, I submit that the  
19 Government is not powerless to help itself if it really  
20 wants my client's testimony. They certainly have the  
21 means of getting -- either not deporting him or getting  
22 pardons or immunity from the States to which the  
23 Government wants to --

24 QUESTION: Well, but a U.S. citizen can't ask  
25 for immunity in a civil action, which is the immunity

1 you're suggesting that the Government must give your  
2 client.

3 MR. BERZINS: Your Honor, my client is not  
4 asking for immunity. My client is merely asking that he  
5 not be compelled to, out of his own mouth to admit to  
6 criminal -- to admit to acts that will inflict criminal  
7 penalties upon him.

8 QUESTION: You recognize, don't you, that if he  
9 does successfully plead self-incrimination, that could be  
10 used. His refusal to answer could be used against him in  
11 the deportation proceeding, so his risk of deportation is  
12 enhanced if he refuses to testify, is that not so?

13 MR. BERZINS: Yes, Your Honor, that is quite so.  
14 An inference can be drawn from his mere exercise of the  
15 privilege. The cases have so held.

16 QUESTION: I wanted -- your client is now 85  
17 years old, is that -- is that right?

18 MR. BERZINS: He's very old, Your Honor. My  
19 math fails me right now.

20 QUESTION: But he's still with us.

21 MR. BERZINS: Yes, Your Honor.

22 The Government claims that it has no effective  
23 way to grant immunity. I'd like to address that, if I  
24 may. It seems to me that the Government has the means to  
25 address foreign governments and it has the means to enter

1 into treaties and other arrangements that might be  
2 coextensive with the privilege, and also I submit to you  
3 that the compulsion is precisely what the Framers wanted  
4 to preclude by the very plain language of the amendment.

5 And the crux of this case, I submit to you, is  
6 on page 13 of the Government's reply brief where, in  
7 footnote 4, I believe, they very plainly admit -- and I  
8 certainly thank them for this admission -- that they do  
9 not have sufficient evidence to charge my client with  
10 anything, that they have to compel him to incriminate  
11 himself, that they have to compel him to confess before  
12 they can proceed.

13 Well, it seems to me that this is exactly what  
14 the Framers wanted to preclude.

15 QUESTION: Well, they're not proceeding in a  
16 criminal action against him and apparently there's no  
17 prospect of that in the United States, isn't that correct?

18 MR. BERZINS: Your Honor, the cruel trilemma --

19 QUESTION: Well, before we get back to the cruel  
20 trilemma, I mean, what's the answer to my question?  
21 The -- as I understand it they want to use this in a civil  
22 proceeding and so far as I can tell from anything you have  
23 said there is no prospect of a domestic criminal  
24 proceeding. Are those two points correct?

25 MR. BERZINS: Yes, Your Honor. There is no

1 prospect of a criminal proceeding in the United States,  
2 but I submit to you that it makes no difference where the  
3 criminal proceeding takes place. The compulsion doesn't  
4 become any different whether the compulsion takes place in  
5 California and the criminal trial takes place in Calcutta.

6 QUESTION: Well, you say it makes --

7 MR. BERZINS: It makes no difference to the  
8 claimant.

9 QUESTION: You say it makes no difference. I  
10 don't have Kastigar in front of me, but my recollection is  
11 that Kastigar explained Murphy as being the result of the  
12 decision in Malloy, so that the theory, if I understand  
13 the Kastigar explanation, was in effect that we will  
14 recognize the privilege in order, in effect, to guarantee  
15 enforcement of Fifth Amendment rights in any jurisdiction  
16 in which Fifth Amendment rights apply.

17 Originally they just applied with respect to  
18 Federal prosecutions. After Malloy they apply with  
19 respect to State prosecutions.

20 But the theory, as I understand it, after  
21 Kastigar remains that the enforcement was geared to  
22 preserving the right in a jurisdiction in which the Fifth  
23 Amendment applied and, if that's the case, then it seems  
24 to me we would have to modify the theory of the Fifth  
25 Amendment in order to recognize your position.

1 Am I wrong in my reading of Kastigar and in  
2 inferring the theory behind it that I just stated?

3 MR. BERZINS: No, Your Honor. The theory in  
4 Kastigar, though, should be read in the context of  
5 Kastigar, where there was no claim of a foreign criminal  
6 prosecution raised. It dealt with the State prosecution.

7 QUESTION: Well, that's right. I'm talking  
8 about Kastigar's explanation of Murphy in light of Malloy.  
9 Do you think that was an incorrect explanation, an  
10 incorrect reconciliation of our cases, where we had gone  
11 from a regime in which the, a State -- use in a State  
12 prosecution didn't count, to a regime after Malloy in  
13 which use in a State prosecution did count, and Kastigar  
14 explained it. Do you think that the explanation was  
15 correct?

16 MR. BERZINS: Yes, Your Honor, I do in the  
17 context in which it was given, but I submit to you that  
18 Murphy can stand independent of the application of the  
19 Fifth Amendment through the Fourteenth Amendment to the  
20 States.

21 QUESTION: But if it does, I guess, we've got to  
22 read criminal case in a very different way from the way we  
23 have read it before.

24 It's got to go -- a criminal case has gone from  
25 Federal criminal case to State criminal case and on your

1 theory it's got to go a step further, or we would have to  
2 adopt a compulsion theory, but that seems out of the  
3 question, because we routinely compel testimony if, in  
4 fact, the immunity can be granted. So it seems to me  
5 we've got to come up with a brand-new theory of what a  
6 criminal case is, and we're going to have to reject the  
7 prior explanation in order for the case to come out your  
8 way.

9 MR. BERZINS: Your Honor, I submit that the case  
10 could come out as I advocate it if the Court adopts the  
11 view that the personal liberties component as explained in  
12 Murphy is a very important one, and that it cannot be  
13 brushed aside merely because the infliction of criminal  
14 penalties will take place elsewhere.

15 The fear is here. The Article III compelling  
16 court is here. The claimant is here. All of this takes  
17 place in the United States. It is just a coincidence that  
18 the criminal penalties will be inflicted elsewhere.

19 QUESTION: Mr. Berzins, if the testimony were  
20 taken under seal would you have any -- would you still  
21 object?

22 MR. BERZINS: Your Honor, I would, and I would  
23 object for the reasons stated by the district court in  
24 this case as well as in the Gecas case and, as I recall,  
25 the reasons were the sealing order really cannot be made

1 coextensive with the privilege. That has been recognized  
2 as a very difficult prospect in light of all the newspaper  
3 articles we read about grand jury leaks, et cetera.

4 And even more concern to me is what would happen  
5 if there is a sealing order, my client gets deported  
6 overseas, and then the leaks come out overseas. Obviously  
7 there is no way that that situation can be remedied. It's  
8 too late.

9 QUESTION: But once your client is overseas -- I  
10 don't know what the Lithuanian legal system is, but most  
11 systems have at best a muted self-incrimination guarantee  
12 compared to ours, so once he's over there the likelihood  
13 his that his testimony could be compelled, is that not so?

14 MR. BERZINS: Yes, Your Honor, but I submit we  
15 ought not be concerned with what the procedural systems  
16 are that might compel it. I submit to you that we should  
17 be concerned with the compulsion here, not with what  
18 happens to the compulsion overseas. We cannot help the  
19 compulsion that may occur in some other country.

20 The Fifth Amendment does not, I submit, protect  
21 against other compulsions and other disabilities and other  
22 harms, only against infliction of criminal penalties, and  
23 that, I submit, is what ought to be guarded against, and I  
24 submit that is a liberty interest that should be  
25 recognized as a very important one.

1           As I submit, the Murphy court in its explanation  
2 highlighted it very prominently, and on that basis I ask  
3 you to recognize it when the obvious fear of infliction of  
4 criminal penalties is real.

5           Mr. Chief Justice raised the question about  
6 administrative difficulties. Thus far I do not believe  
7 administrative difficulties have been encountered in these  
8 cases, because the burden has always been upon the  
9 claimant to establish precisely what it is that he fears  
10 and what are the realistic chances of him winding up  
11 before a criminal court where the criminal penalties will  
12 be inflicted.

13           QUESTION: Was this tried as an issue of fact in  
14 the district court, Mr. Berzins?

15           MR. BERZINS: Mr. Chief Justice, that was  
16 extensively handled in the district court, and it was --  
17 in each case it is a claimant's burden and it's a heavy  
18 one under the Flanigan case in the Second Circuit. It's a  
19 whole litany of things that the claimant has to prove  
20 before he can have any chance of having the privilege  
21 recognized.

22           QUESTION: Well, if there is a whole litany of  
23 things, it seems to me that that would make for  
24 administrative difficulties.

25           MR. BERZINS: But I submit to you that the

1 difficulty is upon the claimant, not upon the courts.

2 QUESTION: Well, but the fact that it may be a  
3 hard row for the claimant to hoe doesn't mean that that  
4 fact shouldn't be taken into consideration, because it's  
5 also going to be something that the district court  
6 probably has to spend a fair amount of time on.

7 MR. BERZINS: Admittedly, the district court may  
8 have to spend some time on it, but it's up to the claimant  
9 to bring to the district court every last piece of  
10 evidence on which he relies and which will establish his  
11 claim as being a legitimate claim as distinguished from a  
12 fanciful or contrived claim, and that burden is upon the  
13 claimant, and once the claimant establishes it, I submit  
14 the privilege ought to be permitted to be invoked, because  
15 the alternative is the cruel trilemma to which I must  
16 again return and urge you to recognize it from the  
17 standpoint of the claimant.

18 It makes no difference to him where he will  
19 spend his time in jail. If the jail is overseas, or if  
20 the gallows are overseas, it's a criminal penalty from his  
21 point of view, and from his point of view the liberty  
22 interest is definitely infringed upon.

23 QUESTION: Well, if it makes no difference I  
24 suppose he can just refuse to answer, and then he can  
25 spend his time in jail here.

1           MR. BERZINS: Well, Your Honor, I think you hit  
2 the nail on the head.

3           (Laughter.)

4           MR. BERZINS: But that does not minimize the  
5 constitutional claim that we're advocating. We're  
6 advocating that this Court recognize the individual  
7 liberties component as it was so eloquently explained in  
8 Murphy, and I submit to you that individual liberties  
9 component, if it is recognized, as being a very important  
10 component of the privilege.

11          QUESTION: Well, calling it an individual  
12 liberty doesn't make it any -- doesn't change the wording  
13 of the Fifth Amendment, which is a privilege against self-  
14 incrimination, and I think -- you know, worldwide, as  
15 Justice Ginsburg has suggested, that is not a universal --  
16 universally valued as highly as it is in this country.

17          So to call it individual liberty I think is  
18 perhaps an overstatement. It's something that is in our  
19 Constitution. It's a guarantee that we enforce in our  
20 courts, but to call it a liberty doesn't change what the  
21 Constitution says.

22          MR. BERZINS: Yes, Mr. Chief Justice, that is  
23 so, but this Court has in a long line of cases since  
24 Murphy reiterated this liberty aspect and used very, very  
25 strong language in saying that the liberty aspect of the

1 privilege is important. It's not --

2 QUESTION: Of course, it's a liberty that he has  
3 while he's in this country. If as Justice Kennedy  
4 suggested, a case in which the Government has two grounds  
5 for deportation, one that doesn't incriminate him and one  
6 that does, and say he's silent about the one that does but  
7 he gets deported on the other ground and he gets sent to  
8 Lithuania, and if Lithuania doesn't recognize this  
9 liberty, he would there be forced to testify against  
10 himself, wouldn't he?

11 MR. BERZINS: That may very well come to pass,  
12 Your Honor, but nevertheless, while he is here, and while  
13 he is subject to an Article III court, that Article III  
14 court ought not compel him to convict himself out of his  
15 own mouth, not here in this country.

16 What happens in Lithuania, we can't control, but  
17 we can control --

18 QUESTION: Well, he hasn't convicted himself out  
19 of his own mouth in our courts because he hasn't violated  
20 any United States criminal statute. He has given  
21 testimony that may be useful abroad in a country that does  
22 not provide that particular liberty protection that we  
23 provide.

24 MR. BERZINS: That is quite so, but the  
25 incrimination, the testimony coming out of the claimant's

1 own mouth, that I submit violates the privilege, because  
2 he's being compelled here without a grant of immunity.  
3 Every case where immunity has been granted, and the  
4 claimant has been forced to testify, the fear of the  
5 criminal penalties has been eliminated.

6 But if the fear of the criminal penalties is not  
7 eliminated, I submit that the violation is there  
8 regardless of where the infliction takes place. It is  
9 the --

10 QUESTION: You do acknowledge that it is kind of  
11 a superprivilege that he would have because of the absence  
12 of the immunity, the absence of the United States' ability  
13 to give -- to immunize the testimony?

14 MR. BERZINS: Your Honor, characterizing it as a  
15 superprivilege, I don't want to join in that  
16 characterization. I would prefer to characterize it as  
17 giving full application to the privilege, not super. It's  
18 really not super.

19 He is not -- he is not -- the claimant is not  
20 being given anything that he shouldn't have, because if  
21 his fear is legitimate, if the criminal penalties are  
22 there, I really don't see that it is superprotection. I  
23 think it is the protection that the Framers had in mind.

24 QUESTION: The Government is saying that,  
25 imagine ordinary drug dealers who somehow get into this

1 country and if, in fact, it's a drug dealer from New York  
2 who's in Ohio, and Ohio wants to compel the testimony,  
3 Ohio can simply give use immunity, or -- and it's possible  
4 that -- and that person can't be prosecuted for what flows  
5 from that particular testimony.

6 But suppose the person, instead of coming from  
7 New York to Ohio, comes from some foreign country to Ohio,  
8 and now the Government is saying, well, we don't know what  
9 to do. I mean, we'll never be able to get this testimony.  
10 There's no way to deal with the foreign country.

11 The best we could ever do is not deport him, and  
12 if we don't deport him, that means he can never be  
13 prosecuted there for anything, though he might have been  
14 the worst murderer in this other country that anybody's  
15 ever seen.

16 Now, what's your response? Is there a response  
17 to that claim of the Government?

18 MR. BERZINS: Your Honor, my response is that  
19 obviously there will be cases where the Government will  
20 not be able to either grant immunity or get the foreign  
21 government to cooperate in granting a pardon, or issuing  
22 its own immunity, or whatever. There obviously will be  
23 cases, but I submit to you that those cases will be far  
24 and few, and they really ought not be what turns this  
25 issue.

1 QUESTION: Why will they be few and far between,  
2 given, let's say, current international criminal behaviors  
3 which, you know, are all over the place? Why won't it  
4 come up every day of the week?

5 MR. BERZINS: Well, Your Honor, I am -- I am  
6 really prefacing my answer based on the past. I have not  
7 seen that in the past it has arisen that often. Maybe in  
8 the future it will, but in the past, these claimants who  
9 have made claim to the privilege under similar  
10 circumstances, the majority of them have lost.

11 QUESTION: All right. So in your view the  
12 Government can compel your client's testimony provided it  
13 says what? A) We won't deport him. B) We will deport  
14 him but not to this particular country. C) We will get a  
15 promise from the foreign country that they won't use the  
16 testimony. D) We'll get a promise from the foreign  
17 country that they will pardon him.

18 All right. Any of those four would be  
19 sufficient, in your view?

20 MR. BERZINS: It seems to me that they would be  
21 if they are coextensive with what we would consider  
22 equivalent to immunity that can be granted here.

23 QUESTION: Mm-hmm. So then in your view there  
24 is no obstacle of a practical nature for the Government to  
25 getting any of those four things, or is there? What are

1 the natures of the obstacles?

2 MR. BERZINS: Your Honor, the obstacles will be  
3 practical and diplomatic, but I have a lot of faith in our  
4 Government. They can do miracles, and if they have to  
5 they will accomplish them here also.

6 QUESTION: I don't think you're going to rely on  
7 it being a miracle, because that would weaken your case  
8 considerably.

9 (Laughter.)

10 MR. BERZINS: Is there anything else that I can  
11 be of assistance to this Court with?

12 QUESTION: Apparently not, Mr. Berzins. Thank  
13 you.

14 MR. BERZINS: Thank you.

15 QUESTION: Mr. Dreeben, you have 2 minutes  
16 remaining.

17 MR. DREEBEN: Unless the Court has any  
18 questions, the Government waives rebuttal.

19 CHIEF JUSTICE REHNQUIST: The case is submitted.

20 (Whereupon, at 10:56 a.m., the case in the  
21 above-entitled matter was submitted.)  
22  
23  
24  
25

## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

UNITED STATES, Petitioner v. ALOYZAS BALSYS  
CASE NO: 97-873

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BY Don Mari Fedirko-----

(REPORTER)