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A Constitutional Check on Cross-Border Enforcement Tactics: Takeaways from the Second Circuit's Decision in *United States v. Allen*

Today's global investigations frequently involve the cooperation of many government agencies in multiple countries. On July 18, 2017, the U.S. Court of Appeals for the Second Circuit handed down a decision creating a major obstacle for the U.S. Department of Justice in pursuing criminal cases that were jointly investigated by cross-border authorities.

In *United States v. Allen*,[1] the Second Circuit overturned the convictions of Anthony Allen and Anthony Conti, two former Rabobank employees charged with manipulating the London Interbank Offered Rate ("LIBOR"), finding the case improperly relied on compelled testimony that violated the defendants' Fifth Amendment protection from self-incrimination under the U.S. Constitution. In the first ever criminal appeal related to LIBOR manipulation to reach any Court of Appeals, a three-judge panel of the Second Circuit stated that, under the Fifth Amendment, compelled testimony could never be used to secure a conviction in an American court. The panel continued, "This is so even when the testimony was compelled by a foreign government in full accordance with its own law."[2]

During an investigation by the U.K.'s Financial Conduct Authority ("FCA"), the FCA compelled the former Rabobank employees to talk or face imprisonment under British law. Paul Robson, a cooperating witness in DOJ's criminal prosecution, reviewed Allen's and Conti's FCA statements prior to providing his own key testimony before a U.S. grand jury and at trial against Allen and Conti. Allen and Conti were then convicted in the U.S. District Court for the Southern District of New York for wire fraud and conspiracy to commit wire fraud and bank fraud, in a trial before Judge Jed S. Rakoff.

Under Section 165 of the U.K. Financial Services and Markets Act of 2000, the FCA has the power to compel testimony or the production of documents from witnesses.[3] Failure to comply with a compelled information request is punishable by up to two years' imprisonment.[4] The Second Circuit found that the FCA's compulsion of testimony from Allen and Conti by threat of imprisonment made their statements involuntary, akin to statements obtained by "physical coercion."[5] Because cooperator Robson reviewed these involuntary statements, and because prosecutors could not show that the

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statements did not taint Robson's testimony, the subsequent convictions violated the defendants' Fifth Amendment right against self-incrimination.

These issues are governed by the seminal case of *Kastigar v. United States*,[6] in which the petitioner challenged the constitutionality of 18 U.S.C. §§ 6002-6003, which permits the DOJ to compel testimony in exchange for use and derivative use immunity.[7] In *Kastigar*, the Supreme Court upheld the immunity statute but placed an affirmative duty on U.S. prosecutors to prove that any evidence used against an immunized witness is "derived from a legitimate source wholly independent of the compelled testimony."[8] In *Allen*, the Second Circuit found that the government failed to meet its *Kastigar* burden "to prove, at a minimum, that the witness's review of the compelled testimony did not shape, alter, or affect the evidence used by the government."[9] Indeed, the court noted that Robson's recollection of the events at issue *before* exposure to Allen's and Conti's compelled statements to the FCA was "significantly different, and less incriminating" than Robson's subsequent testimony.[10]

The use of Robson's testimony, tainted by this exposure, therefore ran afoul of the Fifth Amendment.[11] The freedom from self-incrimination guaranteed by the Fifth Amendment provides that an individual may not be compelled to provide testimony against him or herself.[12] This right "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[13]

The *Allen* court concluded: "To be clear, we do not purport to prescribe what the U.K. authorities (or any foreign authority) may do in their witness interviews or their criminal trials. We merely hold that the Self-Incrimination Clause [of the Fifth Amendment] prohibits the use and derivative use of compelled testimony in an American criminal case against the defendant who provided that testimony."[14]

Takeaways

The Fifth Amendment implications of compelled testimony in cross-border investigations have been surfacing for some time.[15] Thus, *Allen's* holding is a well-timed constitutional check on the tactics utilized in such investigations. Even the Second Circuit judges in *Allen* acknowledged the increase in cross-border enforcement efforts as of late, specifically in the rise of non-prosecution and deferred prosecution agreements following DOJ investigations into U.S. tax evasion at Swiss banks, Foreign Corrupt Practices Act cases, and foreign exchange rate manipulation.[16] The court emphasized that "these developments abroad need not affect the fairness of our trials at home,"[17] rather, "the practical outcome of our holding today is that the risk of error in coordination falls on the U.S. Government (should it seek to prosecute foreign individuals), rather than on the subjects and targets of cross-border investigations."[18] This burden on DOJ will not go unnoticed by defendants and their counsel. Indeed, lawyers representing clients in cross-border criminal investigations should immediately challenge the domestic use of any statements that were compelled—even lawfully so—in a foreign jurisdiction.

Lawyers who represent defendants against the U.S. DOJ in cross-border criminal investigations will likely spot this issue at an early stage. But lawyers who want to preserve their clients' ability to *cooperate* in a DOJ investigation should attempt (if possible) to shield their clients from reviewing testimony taken in compelled interviews that may now render their own derivative testimony useless at trial and diminish what potential cooperation credit may be available. Of course, if the foreign jurisdiction insists on such review as part of its solicitation of cooperation from the individual, that individual and counsel will face a decision as to which sovereign it most needs cooperation credit from.

The DOJ is, of course, not without options when it comes to procuring evidence abroad in cross-border criminal investigations. For example, DOJ can rely on Mutual Legal Assistance Treaties,[19] letters rogatory,[20] and most importantly, informal pressure to cooperate and provide evidence located in another country *voluntarily*.

As the legal landscape surrounding cross-border enforcement continues to evolve, lawyers should bring in local counsel to assist with navigating questions like the one at issue in *Allen*.

Although defendants subject to cross-border investigations will undoubtedly applaud this decision, it is worth noting that its reach is thus far limited to the Second Circuit. Nevertheless, several other Courts of Appeal have at least acknowledged that compulsion by a foreign government implicates Fifth Amendment concerns,[21] and shrewd defense counsel will mind the takeaways from *Allen* when representing clients in any U.S. criminal proceeding.

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[1] No. 16-898 (2d Cir. July 19, 2017).
[2] *Id.* at 38.
[3] FSMA §165, et seq.
[4] *Id.*
[5] *Allen*, at 40.
[6] 406 U.S. 441 (1972).
[7] *Id.* at 442.
[8] *Id.* at 460.
[9] *Allen*, at 80.
[10] *Id.*
[11] *Id.*
[12] The Fifth Amendment states in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *See* U.S. CONST. amend. V.
[13] *Kastigar*, at 444-45.
[14] *Allen*, at 80.
[15] *See* William F. Johnson, *Fifth Amendment Issues in Parallel International Investigations*, N.Y.L.J. (Sept. 6, 2012).
[16] *Allen*, at 52 n.112.
[17] *Id.* at 54.
[18] *Id.* at 49.
[19] Mutual Legal Assistance Treaties ("MLATs") are legally binding commitments of two states to assist each other through their own domestic legal mechanisms to obtain evidence to support criminal investigations or prosecutions in the requesting country.
[20] A letter rogatory is the customary method of obtaining assistance—such as evidence collection—from abroad in the absence of a treaty or executive agreement. *See* U.S. Dep't of Justice, United States Attorneys' Criminal Resource Manual, Section 275.
[21] *See United States v. Abu Ali*, 528 F.3d 210, 232 (4th Cir. 2008) ("When Miranda warnings are unnecessary, as in the case of an interrogation by foreign officials, we assess the voluntariness of a defendant's statements by asking whether the confession is the product of an essentially free and unconstrained choice by its maker. If it is, it may be used against him." (citation and internal quotation marks omitted) (emphasis added)); *Brulay v. United States*, 383 F.2d 345, 349 n.5 (9th Cir. 1967) ("[I]f the statement is not voluntarily given, whether given to a United States or foreign officer[ ]—the defendant has been compelled to be a witness against himself when the statement is admitted."); *United States v. Mundt*, 508 F.2d 904, 906 (10th Cir. 1974) (analyzing admissibility in terms of "voluntariness"); *Kilday v. United States*, 481 F.2d 655, 656 (5th Cir. 1973) (finding no evidence of coercion by foreign sovereign and therefore ruling statements admissible).