

SECOND CIRCUIT REVIEW

Expert Analysis

Fifth Amendment Prohibits Testimony Compelled by Foreign Sovereign

Can a defendant's testimony that was compelled by a foreign government be admitted at trial in the United States? In *United States v. Allen*,—F.3d—, 2017 WL 3040201 (2d Cir. July 19, 2017), the U.S. Court of Appeals for the Second Circuit ruled that the Fifth Amendment bars the use of testimony by a criminal defendant that was compelled by a foreign power in the defendant's U.S. criminal trial and reversed the judgments of conviction against the defendants. In *Allen*, the panel wrestled with the modern world's reliance on foreign governments to help investigate and develop cases but declined to allow the government's investigatory needs to out-

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weigh defendants' constitutional rights.

Background and Lower Court

Allen concerned alleged manipulation of London Interbank Offered Rates (LIBOR), a metric that is central to many complex financial transactions. LIBOR is calculated each day for each of the world's major currencies by the British Bankers Association, which relies on figures submitted by a panel of banks reflecting the interest rates at which they may borrow money from other banks. In 2013, the Financial Conduct Authority (FCA), a British enforcement agency, began a regulatory investigation of one panel bank, Rabobank, for its

LIBOR submission practices. Rabobank submitted rates for the U.S. Dollar (USD) LIBOR and Japanese Yen (JPY) LIBOR. Anthony Allen and Anthony Conti, two Rabobank employees involved in submitting Rabobank's daily rate to LIBOR, were interviewed by the FCA during its investigation. Their failure to comply with interview requests could have resulted in imprison-

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ment. The FCA later initiated an action against Paul Robson, one of Allen's and Conti's co-workers, who was involved in Rabobank's JPY LIBOR submission process. Following the agency's ordinary practice, the FCA sent Robson the transcripts of Allen's and Conti's

compelled interviews, which Robson read and annotated in preparation for a later meeting with the FCA. Soon thereafter, however, the FCA dropped its case against Robson in favor of allowing the Fraud Section of the U.S. Department of Justice to criminally prosecute him. After being indicted for wire fraud and entering into a plea agreement, Robson became a significant source of information for the DOJ to build its case against Allen and Conti.

In October 2014, Allen and Conti were indicted for conspiracy to commit wire fraud and bank fraud, and wire fraud. The government alleged that Allen and Conti helped Rabobank derivative traders who entered into interest rate swap agreements and were reliant upon the LIBOR being higher or lower on particular dates. Allen and Conti, the government alleged, were influenced by requests from derivative traders when making their LIBOR submissions and failed to make honest estimates of the bank's borrowing rates. The government offered evidence demonstrating requests for accommodations, such as an email that Conti received from a derivative trader, which said: "GONNA NEED A FRICKIN HIGH 6 MTH FIX TOMORROW IF OK WITH YOU... 5.42?" That day, the Rabobank submission for the USD LIBOR was 5.42. In support of the DOJ's position, Robson testified that he, too, accommodated the derivative

traders while working on JPY LIBOR submissions.

Prior to the trial, Allen and Conti moved to dismiss their indictment or suppress Robson's testimony and all evidence derived from his testimony pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972). Under *Kastigar*, an individual can be compelled to testify for "use and derivative use" immunity, but the government bears the burden of demonstrating that the evidence presented at trial derives from a "wholly independent" source from the compelled testimony.

Defendants contended that the government failed to uphold this burden. The district court declined to address Allen's and Conti's *Kastigar* challenge until after the trial, and the jury returned a guilty verdict against both defendants on all counts. Following the trial, the district court denied defendants' motion, holding that, while *Kastigar* applies to testimony compelled by foreign law enforcement, Robson's review of defendants' interview compelled by the FCA did not taint his testimony because an independent source existed for Robson's evidence. Without citing a specific standard, the district court appeared satisfied by Robson's own assertion that his testimony was not tainted when he reviewed Allen's and Conti's compelled testimony, and evidence presented by

the DOJ that corroborated Robson's testimony.

Second Circuit

On appeal, the Second Circuit reversed defendants' convictions and dismissed their indictments. *Id.* *2. In a decision written by Judge José Cabranes and joined by Judges Rosemary Pooler and Gerald Lynch, the Second Circuit concluded that the government violated Allen's and Conti's Fifth Amendment rights when Robson, who had reviewed their compelled statements, was permitted to testify at their trial. Moreover, the panel determined that the DOJ could not meet its burden under *Kastigar*.

The panel explained that the Fifth Amendment's right against self-incrimination and the Fourteenth Amendment's Due Process Clause prohibit the use of involuntary confessions at trial. Because the question here involved confessions obtained by foreign law enforcement, the Fifth Amendment's Self-Incrimination Clause and the Supreme Court's decision in *Bram v. United States* were implicated.

In *Bram*, 168 U.S. 532 (1897), the court considered whether a confession obtained involuntarily by Canadian law enforcement violated the Fifth Amendment's Self-Incrimination Clause. In that case, the defendant discussed his involvement in several homicides with the Canadian authorities while

unrepresented by counsel, and the Canadian officer to whom he had confessed later testified about the interrogation at the defendant's trial. *Id.* at 538. The court ruled that, under the circumstances, the defendant had been involuntarily influenced into giving a statement, and therefore the trial court erred in admitting the confession. *Id.* at 565. The *Bram* court's conclusion that a confession compelled by foreign law enforcement was inadmissible at trial became essential to the Second Circuit's holding in *Allen*.

Writing for the panel, Judge Cabranes reasoned that *Allen*, because it involves an involuntary confession, is controlled by the Fifth Amendment's requirement that no criminal defendants "shall be compelled in any criminal case to be a witness against himself." Cabranes was careful to distinguish between the Fourth Amendment's exclusionary rule, which is intended to deter U.S. law enforcement constitutional violations during search and seizures, and the Fifth Amendment, which would have little ability to deter foreign police officers' behavior while investigating potential crimes.

The court explained that the Fifth Amendment's Self-Incrimination Clause is grounded in the language of the Constitution, and has no basis in deterring illegal conduct. Moreover, the court reasoned that because the ultimate constitutional violation by law enforcement occurs

when the compelled statements are used at trial, such statements could not be admitted at trial regardless of their origin. In light of these particular characteristics, the panel determined that the Fifth Amendment's protections apply when the defendant's testimony was compelled lawfully "pursuant to foreign legal process."

In so holding, the panel acknowledged the government's concerns that foreign governments could "inadvertently or negligently obstruct" U.S. criminal prosecutions, but explained that the risk of error when the government coordinates its efforts with foreign authorities should not fall on the subjects of its investigations. In the same vein, Cabranes declined to entertain the government's argument that this holding could enable hostile foreign governments to interfere with U.S. prosecutions. The panel left open the door for that future circumstance, noting that this holding "would not necessarily prevent [that] prosecution in the United States." The court was more troubled with the increasing number of cross-border prosecutions occurring between the United States and foreign authorities, which require close governmental coordination and careful monitoring of the impact they might have on "the fairness of our trials at home."

The Second Circuit then turned to the crucial *Kastigar* question. Judge

Cabranes determined that the district court "impermissibly lowered the bar" for the government and, reviewing Robson's testimony at the *Kastigar* hearing, determined that Robson's "bare, self-serving denials" on whether his testimony was tainted by defendants' compelled testimony could not satisfy the rigors of *Kastigar*. The panel concluded that the use of Robson's testimony both at trial and in the grand jury was not harmless, and accordingly dismissed the government's indictment against Allen and Conti.

Conclusion

The Second Circuit's decision in *Allen* raises critical questions regarding the government's ability to use evidence at trial in an era marked by an increasing number of coordinated, cross-border prosecutions. As the panel indicated, the federal government increasingly depends on foreign sovereigns to build cases, but a defendant's constitutional rights cannot be compromised by the government's incantation that it is "pursuing justice." As Judge Cabranes intimated, the Second Circuit will likely need to address the limits of the *Allen* holding and whether the government may properly admit testimony compelled by hostile foreign governments under the Fifth Amendment.