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Second Circuit Overturns Convictions of Two Former Rabobank Employees Prosecuted for LIBOR Manipulation

In the First Appellate Decision Nationwide Arising Out of the LIBOR Criminal Investigation, the Second Circuit Holds the Fifth Amendment Prohibits the Use in U.S. Criminal Proceedings of Testimony Compelled by Non-U.S. Governments

SUMMARY

On July 19, 2017, in *United States v. Allen*, the U.S. Court of Appeals for the Second Circuit reversed the fraud convictions of two defendants relating to their attempts to manipulate the London Interbank Offered Rate (LIBOR). Investigating authorities in the United Kingdom previously had compelled the defendants—Anthony Allen and Anthony Conti—to testify about their role in manipulating LIBOR and disclosed their compelled testimony to a third person under investigation—Paul Robson—who later testified against Allen and Conti at their trial. On appeal, the Second Circuit held that, in U.S. criminal proceedings, the Fifth Amendment prohibits prosecutors from using, even derivatively, testimony compelled by non-U.S. governments. Because the Second Circuit panel found that the government failed to prove that the compelled testimony did not affect Robson’s testimony against Allen and Conti, the panel unanimously reversed their convictions and dismissed the indictment against them.

BACKGROUND

The Fifth Amendment to the U.S. Constitution states, “No person . . . shall be compelled in any criminal case to be a witness against himself.” As the U.S. government has increasingly sought to prosecute both U.S. and non-U.S. citizens for conduct that occurred abroad, federal courts have been forced to determine in what circumstances the Fifth Amendment applies in prosecutions with international scope.

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Anthony Allen and Anthony Conti, citizens and residents of the United Kingdom, were both employees in the London office of Rabobank during the 2000s. In the course of investigating Rabobank's alleged participation in a conspiracy to manipulate LIBOR, the U.K.'s Financial Conduct Authority (FCA) interviewed Allen, Conti, and one of their co-workers, Paul Robson. Under U.K. law, such interviews are compelled—anyone refusing can be imprisoned—and witnesses are given “direct use,” but not “derivative use” immunity (that is, the government would not be able to use the interview statements directly against the witness in a subsequent prosecution, but would be allowed to use information derived from the statements). Following its normal procedures, the FCA provided Robson with the transcripts of Allen's and Conti's testimony, which he reviewed.

U.S. government authorities conducted their own simultaneous investigation of LIBOR manipulation. Recognizing the potential risks related to the FCA's use of compulsory interviews, U.S. government authorities “took care to conduct their interviews wholly independently of the FCA's interviews and their fruits.” This included a “wall” between the U.S. and U.K. investigations and procedures in which U.S. officials interviewed witnesses (including Conti, Allen, and Robson) before the FCA conducted its own interviews.

In 2014, a grand jury indicted Allen and Conti on charges of wire fraud and conspiracy to commit wire fraud and bank fraud. Robson pleaded guilty and entered into a cooperation agreement with the Department of Justice. Robson did not himself testify in the grand jury, but information he provided to the government was provided to the grand jury through the testimony of a government investigator. Robson did testify against Allen and Conti in an October 2015 trial in the U.S. District Court for the Southern District of New York. Before the district court, Allen and Conti sought to dismiss the indictment or suppress Robson's testimony on Fifth Amendment grounds, arguing that Robson's testimony was tainted by his review of the testimony that Allen and Conti had been compelled to give to the FCA. The district court refused to exclude the evidence. Allen and Conti were convicted at trial and sentenced to two years' and one year and a day's imprisonment, respectively.

THE SECOND CIRCUIT'S DECISION

In a unanimous opinion authored by Judge José Cabranes, the Second Circuit reversed the convictions of Allen and Conti. Relying on past Second Circuit cases that held that “in order to be admitted in our courts, inculpatory statements obtained overseas by foreign officials must have been made voluntarily,” and stressing that “[w]hatever may occur prior to trial, the right not to testify against oneself at trial is absolute,” the court held that “compelled testimony cannot be used to secure a conviction in an American court . . . even when the testimony was compelled by a foreign government in full accordance with its own law.”

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The court rejected the government's argument that, for Fifth Amendment purposes, non-U.S. governments are akin to private employers, who may question employees under threat of discharge without Fifth Amendment consequence. The court reasoned that private employers and non-U.S. governments are not on the same footing because "when foreign authorities compel testimony they are acting in the quintessence of their sovereign authority, not in their capacity as a mere employer, and thus their compulsion is cognizable by the Fifth Amendment (when testimony so compelled is used in a U.S. trial)." The court also dismissed the government's argument that other authorities in non-U.S. jurisdictions could obstruct (inadvertently or intentionally) U.S. prosecutions by compelling and releasing a defendant's testimony. The court reasoned that the U.S. government already faces such risks within the United States, as the U.S. government does not control the granting or handling of witness immunity by state governments. The court also noted that, in the present case, the government was plainly aware from the outset of the need for close coordination with the U.K. authorities and admonished 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."

The court specifically recognized that "cross-border prosecutions have become more common." While the court did "not presume to know exactly what this brave new world of international criminal enforcement will entail," it was "certain that these developments abroad need not affect the fairness of our trials at home." Nor should the "consequence of joint investigations with foreign nations" be that non-U.S. citizens are made to "fend for their liberty" in American courts without "the full protection of a 'trial right' we regard as 'fundamental' and 'absolute.'"

Based on those principles, the court found that Allen's and Conti's rights were violated by the introduction of Robson's testimony at trial. The court applied the rule in *Kastigar v. United States* that "[w]hen a witness has been compelled to testify relating to matters for which he is later prosecuted, the government bears 'the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.'" The Second Circuit found that the government had not met this burden, and had failed to prove that Robson's testimony was derived independently of Allen's and Conti's compelled testimony. As such, the court reversed the conviction and dismissed the indictment against Allen and Conti.

IMPLICATIONS

The Second Circuit's opinion highlights the complexities that can emerge in cross-border investigations. In particular, investigations that implicate allegations of "large scale economic crime conspiracies . . . frequently rely on evidence provided by witnesses who live in foreign countries." In such cases, "intimate cooperation and coordination will be needed between U.S. prosecutors and foreign authorities . . . [in] the securing of witness testimony." This concern is particularly acute in circumstances in which the

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protections available to defendants in the United States may be different from those available in other jurisdictions.

As a practical matter, in circumstances in which the U.S. government is investigating activities in non-U.S. jurisdictions that routinely compel testimony without granting both direct use and derivative use immunity (that is, both immunity from the use of the compelled testimony, as well as immunity from the use of evidence *derived* from the testimony), U.S. prosecutors will need to be careful to rely on testimony gathered directly by U.S. authorities, without the foreign government's participation, or ensure that testimony gathered by non-U.S. governments was voluntary and not coerced.

The Second Circuit's decision creates the potential for a clash of competing investigative priorities between the U.S. Department of Justice and non-U.S. law enforcement agencies, such as the FCA and the U.K.'s Serious Fraud Office. The result may be that DOJ and foreign prosecutors decide earlier in the course of cross-border investigations which jurisdiction's investigation should take precedence. For example, the DOJ may wish to minimize *Kastigar* risk by attempting to convince non-U.S. law enforcement agencies early in an investigation not to conduct compelled interviews, either entirely or until after the DOJ has conducted its own fact-gathering. In the event that U.S. and non-U.S. agencies do not reach an agreement on coordination, companies could find themselves caught in the middle. Any disagreement between the agencies has the potential to impact the timing and the method of a company's own internal investigation, as well as any cooperation credit that a company may hope to receive. Companies thus should remain attuned to competing interests of law enforcement agencies in different jurisdictions and, in appropriate circumstances, do their best to facilitate a coordinated investigative approach between those agencies.

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