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# The Constitutional Consequences of Foreign-Compelled Testimony in Cross-Border Corporate Crimes & A Framework for Remaining Taint-Free, 52 UIC J. Marshall L. Rev. 95 (2018)

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# THE CONSTITUTIONAL CONSEQUENCES OF FOREIGN-COMPELLED TESTIMONY IN CROSS-BORDER CORPORATE CRIMES & A FRAMEWORK FOR REMAINING TAINT-FREE

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***Abstract***

Whether it be rigging interest rates for profit gain or contributing to anti-competition schemes, our world is plagued by financial scandal. Today, more and more collusive schemes are being conducted abroad, leaving American authorities with the heavy task of navigating complex cross-border probes. Finding evidence that corroborates fraudsters' criminal acts is hard enough within U.S. borders. To do the same in foreign territory calls for added considerations. What's standing in the way? Try: the United States Constitution. This Comment highlights the 2017 case of *United States v. Allen*, which held that the Fifth Amendment prohibits use of compelled testimony in criminal proceedings, even when a foreign sovereign compels testimony in accordance with foreign law. This Comment proceeds by outlining the arguments presented on appeal, and concludes by proposing prosecutorial strategies to adopt for purposes of avoiding foreign-compelled testimony and cross-border issues of taint.

# I. INTRODUCTION

"Everything is rigged," is how a Rolling Stone edition portrayed global financial corruption.[1] In 2008, New York federal officials began unraveling pieces of one of Wall Street's costliest scandals.[2] However, authorities soon learned that it was not just America's financial system that had been affected—it was the world's. The manipulation of a benchmark lending rate known as "LIBOR"[3] has shaken the U.S., the EU, and the UK in such a big way that it has called for considerable reform.[4] In addition, governmental authorities have come face-to-face with the complex challenges tied to trying cross-border corporate crime in the U.S.[5] One recent example involves the prosecution of two UK-based employees who contributed to the international LIBOR scheme.

LIBOR represents a figure that banks use to set interest rates.[6] The rate is so significant that any manipulation of it could "affect a pile of assets about 100 times the size of the United States federal budget."[7] Over the last several years, derivatives traders have convinced bank employees to manipulate LIBOR rates to benefit traders' financial positions.[8] One trader from Royal Bank of Scotland, for example, incentivized a LIBOR submitter to manipulate interest rates in exchange for the trader's lunch.[9]

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1. *See* Matt Taibbi, *Everything is Rigged: The Biggest Price-Fixing Scandal Ever*, ROLLING STONE (Apr. 25, 2013), www.rollingstone.com/politics/news/everything-is-rigged-the-biggest-financial-scandal-yet-20130425 (featuring price-fixing corruption at "name-brand too-big-to-fail banks". The article dubs the Illuminati "amateurs" compared to those involved in the global financial scam. According to MIT Professor Andrew Lo, what is now infamously known as the LIBOR scandal "[dwarfed] by orders of magnitude any financial scam in the history of markets").

2. *Tracking the Libor Scandal*, N.Y. TIMES (Mar. 23, 2016), www.nytimes.com/interactive/2015/04/23/business/dealbook/db-libor-timeline.html#/#time370_10900.

3. "LIBOR" stands for the London Interbank Offered Rate.

4. *See* James McBride et al., *Understanding the Libor Scandal*, COUNCIL ON FOREIGN REL. (Oct. 12, 2016), www.cfr.org/backgrounder/understanding-libor-scandal.

5. *See infra* Section II (explaining the evidentiary and constitutional challenges that the Department of Justice faced throughout the prosecution of two individuals whose collusive acts occurred abroad).

6. Mcbride et al., *supra* note 4. "LIBOR is a benchmark interest rate based on the rates at which banks lend unsecured funds to each other on the London interbank market." *Id.* This article also comments on the global effect that manipulating the rate has had on financial markets.

7. Taibbi, *supra* note 1. Taibbi highlights that the LIBOR scheme has led to a manipulation of $500 trillion plus in financial tools.

8. McBride et al., *supra* note 4.

9. *See* Taibbi, *supra* note 1 (recounting how a trader who worked for Barclays had "monkeyed with Libor submissions in exchange for a bottle of Bollinger champagne," and explaining that at times, it was even more pathetic than that. For instance, a Swiss franc trader asked a Libor submitter to adjust the rate to a certain number. When the Libor submitter asked what the change

Today's unfortunate reality consists of rigging interest rates "in exchange for day-old sushi."[10] It is hard to envision "an image that better captures the moral insanity of the modern financial-services sector."[11]

Though from a legal perspective, what is just as unfortunate are the prosecutorial shortcomings that government agencies face when securing criminal convictions for financial schemers like these.

In 2017, the Second Circuit Court of Appeals reversed the criminal convictions of two foreign nationals who allegedly contributed to the LIBOR scheme.[12] A key basis for the Second Circuit's reversal involved the Government's inability to prove that testimony compelled by a foreign sovereign had not materially been used against the defendants in the case.[13] The constitutional issues tested new limits of the Fifth Amendment's Self-Incrimination Clause in a cross-border context.

Regardless of one's agreement with its application to modern fact patterns,[14] the Fifth Amendment Self-Incrimination Clause (the "Clause") is and will always be a "fundamental . . . part of our constitutional fabric."[15] At its very core, the Clause protects individuals from being compelled to testify against themselves.[16] A more complicated inquiry involves determining what protection results when a foreign sovereign lawfully compels an individual to testify, and a prosecutor subsequently uses that testimony against the same individual in an American court.[17] The Second Circuit provided its answer to this exact hypothetical when it held that the Fifth Amendment prohibits use of compelled testimony in criminal proceedings, even when a *foreign* sovereign compels testimony in accordance with foreign law.[18]

*United States v. Allen* concerns parallel investigations between the United Kingdom's Financial Conduct Authority ("FCA") and the United States' Department of Justice ("DOJ") into foreign nationals whose alleged misconduct affected the financial markets of multiple countries.[19] What may sound like a unique probe was, however, just

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was worth, the trader replied, "I've got some sushi rolls from yesterday").

10. *Id.*

11. *Id.*

12. *See* United States v. Allen, 864 F.3d 63 (2d Cir. 2017).

13. *Id.* at 101.

14. *See* Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 245 (2004) (citing the inconsistency in the way the Self-Incrimination Clause has been interpreted by the law, lawyers, and academia alike).

15. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 56 n.5 (1964), *abrogated by* United States v. Balsys, 524 U.S. 666 (1998).

16. U.S. CONST. amend. V.

17. *See infra* Sections III-IV.

18. *Allen*, 864 F.3d at 68, 82 (emphasis added).

19. *See id.* at 71-72, 76-78.

another among a laundry list of complex cross-border investigations into corporate crime.[20] Indeed, enforcement agencies have seen a rise in collusive international acts by individuals like those involved in the LIBOR scheme.[21] In response, the DOJ has launched investigations in various countries, at times in tandem with those countries' investigatory agencies.[22] Unfortunately, these investigations are often complicated by the fact that incriminating individuals who work for large financial institutions requires sorting through "an avalanche of records," and perhaps most importantly, finding a key witness to corroborate that those paper records reveal criminal business activity.[23]

Acting Assistant Attorney General Kenneth A. Blanco previously admitted that, "[p]iercing the corporate veil . . . requires . . . [undertaking] a time-consuming and resource-intensive process."[24] At the same time, government agencies must remain compliant with foreign law—quite the hurdle to overcome when the majority of a long and convoluted investigation is conducted abroad, and the case is subsequently adjudicated before an American court.[25] Needless to say, U.S. prosecutors are required to keep

20. *See, e.g.*, Acting Assistant Att'y Gen. Kenneth A. Blanco, U.S. Dep't of Justice, Remarks at the American Bar Association National Institute on White Collar Crime (Mar. 10, 2017) (transcript available at www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national) (discussing multi-jurisdictional investigations and prosecutions by the U.S. Department of Justice's Criminal Division).

21. *See* Susan E. Brune & Erin C. Dougherty, *Representing Individuals in International Investigations*, 40 THE CHAMPION 38, 43 (Sept./Oct. 2016) www.brunelaw.com/publications/2016-10-20-representing-individuals-in-international-investigations/_res/id=Attachments/index=0/Brune_Representing_Individuals_Sept-Oct_2016.pdf (discussing, in particular, international investigations the DOJ has focused on in the context of the Foreign Corrupt Practices Act and concluding that "[i]nternational investigations promise to become more and more common"); *see also* Blanco, *supra* note 20 (acknowledging that "[i]t is clear . . . global investigations of corruption are on the rise . . . [i]t is no longer just us and a few other countries").

22. *See* Assistant Att'y Gen. Leslie R. Caldwell, U.S. Dep't of Justice, Remarks at American Bar Association's 30th Annual National Institute on White Collar Crime (Mar. 4, 2016) (transcript available at www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-bar-association-s-30th).

23. *See, e.g.*, Peter J. Henning, *Libor and London Whale Cases Show Hurdles with Foreign Defendants*, N.Y. TIMES (July 24, 2017), www.nytimes.com/2017/07/24/business/dealbook/fraud-prosecution-libor-london-whale-cases.html (explaining that international white collar criminal investigations are so-called "paper" cases, which require witnesses to solidify that what otherwise looks like everyday corporate acts are in fact criminal).

24. Blanco, *supra* note 20.

25. *See generally* Stuart Alford QC et al., *Second Circuit: Fifth Amendment Bars Testimony Compelled by Foreign Governments*, 2188 LATHAM & WATKINS WHITE COLLAR CRIM. DEF. & INVESTIGATIONS PRAC. 1, 4 (July 31, 2017), m.lw.com/thoughtLeadership/second-circuit-fifth-amendment-bars-testimony-compelled-by-foreign-governments (highlighting the attendant risks involved when investigating suspects alongside foreign agencies, and commenting on the

significant considerations in mind, including determining whether their prosecutorial actions will violate a defendant's right against self-incrimination.[26] These considerations translate into a heightened need for coordination among U.S. and foreign agencies.[27] Though in reality, even U.S. prosecutors who do their best to work collaboratively with foreign counterparts fall prey to a minefield of constitutional issues that have the potential to obliterate otherwise successful criminal convictions.[28]

Ultimately, *Allen* reaffirms the need to institute higher levels of precaution when prosecuting individuals who have previously given foreign-compelled testimony.[29] This Comment first seeks to dissect the unique Fifth Amendment issue presented in this case. Second, this Comment will weigh the constitutional arguments presented on appeal, while taking into consideration how the Second Circuit's ruling will affect future U.S. prosecutors facing similar evidentiary and constitutional issues. Last, this Comment will propose proactive prosecutorial tactics to take after conducting investigations alongside foreign agencies. The goal of this proposal is to help prosecutors navigate complex Fifth Amendment concerns in the international white collar criminal context.

## II. BACKGROUND

### *A. The Manipulation of LIBOR and the Resulting Parallel Investigation*

In 2012, the DOJ and FCA began investigating individuals involved in the manipulation of LIBOR.[30] LIBOR, also known as

steps the DOJ must take in cross-border cases to avoid certain procedural and constitutional issues).

26. Brune & Dougherty, *supra* note 21, at 39.

27. *See, e.g.*, Assistant Att'y Gen. Leslie R. Caldwell, U.S. Dep't of Justice, Remarks at American Bar Association's 30th Annual National Institute on White Collar Crime (Mar. 4, 2016) (transcript available at www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-bar-association-s-30th) (emphasizing that "[c]ollaboration is especially important when it comes to threats posed by international corruption").

28. *See* Bob Van Voris et al., *Libor Traders' Appeal Win Could Chill U.S. Cross-Border Cases*, BLOOMBERG (July 19, 2017, 3:24 PM), www.bloomberg.com/news/articles/2017-07-19/ex-rabobank-traders-libor-rigging-conviction-tossed-on-appeal (providing the following commentary from an attorney who represented a Barclays LIBOR trader: "[t]his ruling highlights the dangers of cross-border investigations and prosecutions where protections afforded by one country are not necessarily respected in a different jurisdiction").

29. Alford QC et al., *supra* note 25.

30. *See, e.g.*, McBride et al., *supra* note 4 (explaining the international LIBOR investigation that began in 2012 to uncover the global "plot by multiple banks – notably Deutsche Bank, Barclays, UBS, Rabobank, and the Royal Bank of Scotland – to manipulate these interest rates for profit sharing" dating back

"the world's most important number,"[31] is used by global financial markets as a reference rate.[32] In effect, LIBOR determines a range of financial instruments amounting to at least $450 trillion.[33] Everything from futures, options, swaps, student loans, credit cards, and mortgages that are traded via global exchanges incorporate the benchmark rate into their financial terms.[34] The figure is set by individuals who work for large, well-known banks abroad.[35] LIBOR is then integrated into the global "interest rate swap."[36]

Prior to LIBOR's manipulation, British Banker's Association ("BBA") established a panel of banks to administer LIBOR rates for certain foreign currencies.[37] One panel that BBA established was Rabobank, which was tasked with administering the LIBOR rates for the U.S. dollar and Japanese Yen.[38] Anthony Allen ("Allen"), a U.K. national and cash trader, worked at Rabobank at the time of the alleged manipulation.[39] As Head of Liquidity, Allen was responsible for overseeing USD LIBOR rates, along with cash traders Anthony Conti ("Conti") and Paul Robson ("Robson").[40] Robson was responsible for submitting LIBOR rates for Japanese Yen while Conti was responsible for submitting LIBOR rates for USD.[41] Derivatives traders who worked at Rabobank with Robson and Conti often asked them to submit rates that were either higher or lower than the number Conti and Robson initially planned to submit.[42] The LIBOR submissions were purportedly changed to benefit the bank along with the positions of the derivatives traders.[43]

By 2013, word of the financial scheme by individuals at Rabobank and other institutions had spread, and enforcement agencies from the DOJ and FCA began investigating Allen and

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to 2003).

31. *See Allen*, 864 F.3d at 69.

32. *Id.*

33. *Libor: What is it and Why Does it Matter?*, BBC NEWS (Aug. 3, 2015), www.bbc.com/news/business-19199683.

34. *See, e.g.*, *Replacing Libor: The Countdown Begins*, FORBES (Aug. 16, 2017, 2:23 PM), www.forbes.com/sites/tortoiseinvest/2017/08/16/replacing-libor-the-countdown-begins/#63aca9ed4e2b (indicating that "over $350 trillion dollars' worth of financial derivative contracts, mortgages, bonds and retail and commercial loans have their interest rates tied to LIBOR").

35. Chad Bray, *Convictions of 2 Former Traders in Libor Scandal Are Dismissed*, N.Y. TIMES (July 19, 2017), www.nytimes.com/2017/07/19/business/dealbook/convictions-of-2-former-traders-in-libor-scandal-are-dismissed.html.

36. *See Allen*, 864 F.3d at 71.

37. *Id.* at 69-70.

38. *Id.* at 70.

39. *Id.* at 72.

40. *Id.*; *see also* United States v. Allen, 160 F. Supp. 3d 684, 688 (S.D.N.Y. 2016), *rev'd*, 864 F.3d 63 (2d Cir. 2017).

41. *Allen*, 864 F.3d at 72.

42. *Id.*

43. *Id.*

Conti's alleged involvement.[44] In the U.K., the Financial Services and Markets Act of 2000 ("FSMA") allows the FCA to lawfully compel individuals to testify or face criminal sanction, including imprisonment.[45] These compelled statements can be used as leads for a case, but cannot be used directly against an individual in a subsequent proceeding.[46] The FCA compelled Allen and Conti to testify pursuant to their powers under the FSMA.[47] Thereafter, the FCA brought an enforcement action against Robson, the other cash trader who Allen supervised at Rabobank.[48] During that time, the FCA provided Robson with the evidence against him,[49] including transcripts of Allen and Conti's compelled testimony[50]—testimony that Robson did in fact review. Eventually, Robson was charged in the Southern District of New York with wire fraud for rigging JPY LIBOR rates.[51] Months later, Allen and Conti were also charged in the U.S. with conspiracy to commit bank and wire fraud along with various counts of wire fraud.[52]

## *B. The Use of Robson as a Key Witness*

After Robson's guilty verdict, he agreed to cooperate with the DOJ by revealing information about Rabobank employees who Robson believed were involved in the scheme.[53] The prosecutors used the testimony of two other cooperators and eight witnesses,[54]

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44. *See Id.* at 76-77 (describing the DOJ's investigation into the LIBOR scandal and the subsequent interviews conducted alongside the FCA).

45. Marc P. Berger & Yana Grishkan, *Second Circuit Rules Fifth Amendment Applicable to Statements Provided to Foreign Governments*, 49 SEC. REG. & L. REP. 1224 (BNA) (July 31, 2017); *see also* Sean Hecker & Karolos Seeger, *The Use of Foreign Compelled Testimony in Cross-Border Investigations – The Impact of the Second Circuit's Allen Decision, in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: BUSINESS CRIME 2018 at 9, 9 (Global Legal Group ed., 8th ed. 2017) (discussing Section 177 of the FSMA, which mandates that failure to testify can result in criminal sanction and discussing Section 174, which grants direct (but not derivative) use immunity to compelled interviewees).

46. Henning, *supra* note 23.

47. *Allen*, 864 F.3d at 76.

48. Hartley M.K. West et al., *Cross-Border Criminal Investigations Just Became More Complicated*, THE RECORDER (Sept. 7, 2017), www.therecorder.com/id=1202797452004/CrossBorder-Criminal-Investigations-Just-Became-More-Complicated.

49. *Id.*

50. *Allen*, 864 F.3d at 77.

51. *Id.*

52. *Id.* at 78.

53. *See* Jodi L. Avergun, *US Second Circuit Finds Testimony Compelled by UK Regulators to be Inadmissible in Criminal Proceedings*, NAT'L L. REV. (July 25, 2017), www.natlawreview.com/article/us-second-circuit-finds-testimony-compelled-uk-regulators-to-be-inadmissible (detailing the overall background of *Allen* and Robson's role as a cooperating witness).

54. *Allen*, 864 F.3d at 78.

but Robson was the only person who offered the grand jury key information that led to Allen and Conti's indictment.[55] Specifically, Robson gave FBI Special Agent Jeffrey Weeks information about Allen and Conti, which was used at trial.[56] Based on the information provided by Robson, Agent Weeks relayed to the jury that Allen requested "LIBOR submitters in London to consider the positions and the requests of Rabobank traders and adjust their submissions."[57] Agent Weeks also testified, again relying on what Robson had told him, that Robson was aware Conti had "considered his own positions as appropriate reason or justification for setting the rates" for USD submissions.[58] In effect, the material information Robson had shared with U.S. authorities led the jury to find Allen and Conti guilty.[59]

Defendants' counsel countered the guilty verdict, arguing that Robson's involvement as the DOJ's corroborating witness tainted the case.[60] A central evidentiary issue hinged on whether the DOJ's use of Robson to convict Allen and Conti (collectively, "Defendants") was unconstitutional when Robson had previously reviewed the Defendants' foreign-compelled statements.[61] Robson's recollection of Allen and Conti's roles in the scheme had undoubtedly been colored by his reading of the compelled testimony, which subsequently shaped what Robson told the DOJ.[62] Allen and Conti moved to suppress the evidence derived from Robson's testimony, or alternatively, to dismiss their indictment on *Kastigar* grounds.[63] Notably, the fact that the FCA lawfully compelled Allen and Conti to testify pursuant to a foreign government power later proved to be impertinent to the constitutional question.

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 100.

59. *See id.* (highlighting that Robson's corroborating statements to the DOJ "were not merely material. They were essential . . .") (internal quotation marks omitted).

60. *See* Opening Brief for Defendants-Appellants at 109-15, United States v. Allen, 864 F.3d 63 (2d Cir. 2017) (No. 16-898) [hereinafter Brief for Defendants].

61. Henning, *supra* note 23.

62. *Id.*; *see also Allen*, 864 F.3d at 68 (explaining that Robson had "closely reviewed [the compelled] testimony, annotating it and taking several pages of handwritten notes").

63. *See* Marc P. Berger & Justin Florence, *Cross-Border Investigations and the Fifth Amendment*, N.Y. L. J. (Nov. 13, 2015, 2:00 AM) www.law.com/newyorklawjournal/almID/1202742296879/CrossBorder-Investigations-and-the-Fifth-Amendment/ (discussing the investigation and explaining the court's analysis regarding Allen and Conti's *Kastigar* Motion).

## *C. The Scope of Immunity in Federal Practice & the Kastigar Burden*

There are several types of immunity that are conferred in federal practice. Transactional immunity is the most comprehensive as it provides immunity "for any transaction relating to the compelled testimony."[64] By contrast, derivative use immunity provides immunity from "the actual use of the compelled testimony and any evidence derived therefrom (fruits of the compelled testimony) in a prosecution against the immunized witness."[65] Derivative use may be granted by an informal agreement or formal order.[66]

The defense may raise evidentiary use issues in a Motion to Dismiss either before, during, or after a trial, in which case a "*Kastigar* hearing" will be held.[67] In *Kastigar v. United States*, the Supreme Court upheld 18 U.S.C. § 6002, the use immunity statute, ruling that the prosecution is barred from derivatively using immunized testimony.[68] "The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom".[69] The statute also offers defendants a comprehensive Fifth Amendment guarantee by prohibiting government use of compelled evidence either as an "investigatory lead" or as a basis for targeting a witness.[70] Significantly, *Kastigar* holds that the government maintains a "heavy burden" to establish that the prosecution has

64. GRAND JURY PRAC. § 10.01(2) (Law Journal Press 2018); *see also* Kastigar v. United States, 406 U.S. 441, 453 (1972) (explaining that transactional immunity "affords considerably broader protection than . . . the Fifth Amendment privilege").

65. GRAND JURY PRAC. § 10.01(2) (Law Journal Press 2018) (internal quotation marks omitted); *see also Allen*, 864 F.3d at 67 n.3 (discussing the distinction between direct and derivative use immunity).

66. GRAND JURY PRAC. § 10.01(1) (Law Journal Press 2018). It is also important to note that "[a]lthough the Supreme Court's thorough discussion of use immunity in *Kastigar* carefully distinguishes between use immunity and the broader derivative use immunity . . . the two now almost always arise together in federal courts; statutory immunity, requiring both use and derivative use immunity . . . is much more common than informal immunity." GRAND JURY PRAC. § 10.07(1) n.1 (Law Journal Press 2018) (citing United States v. Plummer, 941 F.2d 799, 804 (9th Cir. 1991) (internal citations omitted)).

67. David M. Nissman & Ed Hagen, *Non-evidentiary Use of Immunized Testimony—United States v. North*, *in* LAW OF CONFESSIONS § 3:8 (2d ed. 2018) at 1; *see Allen*, 160 F. Supp. 3d at 687 (noting that the Second Circuit's general practice is to wait to hold *Kastigar* hearings until after trial).

68. *Kastigar*, 406 U.S. at 460; *see also* U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL: CRIMINAL RESOURCE MANUAL § 718 (1997) www.justice.gov/usam/criminal-resource-manual-718-derivative-use-immunity.

69. *Kastigar*, 406 U.S. at 460.

70. *Id.*

independent knowledge of the facts.[71] Accordingly, evidence used against the witness must be retrieved from an independent source, rather than from the witness himself.[72]

In *Allen*, after the initial briefing and oral argument was heard, the lower court determined that a *Kastigar* hearing was necessary to decide whether the evidence presented was tainted.[73] The district court denied the presence of any *Kastigar* issues, finding that the DOJ sufficiently proved its evidence was derived from Robson's personal knowledge and experiences.[74] The court was satisfied that the evidence presented was independently derived after concluding that there was no overlap between Allen and Conti's foreign-compelled testimony and material portions of Robson's trial testimony.[75] Judge José A. Cabranes, writing for the appellate court felt quite the opposite. The resulting opinion has sparked a constitutional debate regarding the use of lawfully compelled testimony abroad, and the subsequent right to remain silent in American proceedings.[76]

## *D. Allen's Absolute Ban on Foreign-Compelled Testimony*

The Second Circuit Court of Appeals affirmatively held that the Fifth Amendment prohibits use of involuntary testimony given under legal compulsion by a foreign power.[77] To enumerate, *Allen* provides three key holdings: (i) the Fifth Amendment prohibits the use of foreign-compelled testimony against an individual in an American court; (ii) the DOJ failed to prove that Robson's recollection of the facts were significantly "different, and less incriminating, than the testimony" ultimately proffered; and, (iii) Allen and Conti's convictions could not be affirmed based on the DOJ's use of, and reliance upon, tainted testimony.[78] The Second

71. Nissman & Hagen, *supra* note 67, at 1 (quoting *Kastigar*, 406 U.S. at 461, but explaining that some courts, including the Fifth, Sixth, and Eleventh circuits view the burden as one of preponderance of the evidence); *see also* Nissman & Hagen, *supra* note 67, at 3 n.1 (citing U.S. v. Overmyer, 899 F.2d 457 (6th Cir. 1990), *cert. denied*, 498 U.S. 939 (1990); U.S. v. Williams, 817 F.2d 1136, 1138 (5th Cir. 1987); U.S. v. Hampton, 775 F.2d 1479, 1485 (11th Cir. 1985); and U.S. v. Byrd, 765 F.2d 1524, 1529 (11th Cir. 1985)).

72. *See Kastigar*, 406 U.S. at 460 (holding that defendants who raise claims under 18 U.S.C. § 6002 and who prove that they have previously been granted immunity will properly shift the "heavy burden" of proof to the government to establish that evidence was obtained from an independent source).

73. *Allen*, 160 F. Supp. 3d at 687.

74. *Id.* at 697; *Allen*, 864 F.3d at 79.

75. *Allen*, 160 F. Supp. 3d at 698.

76. *See* Van Voris et al., *supra* note 28 (suggesting that *Allen* is a significant setback that could undermine the feasibility of prosecuting cross-border corporate crime).

77. *Allen*, 864 F.3d at 101.

78. *Id.*

Circuit also affirmed the government's heavy burden of proof under *Kastigar* after following the D.C. Circuit's approach to reviewing testimony for taint.[79] While doing so, *Allen* incidentally offered suggestions as to what future prosecutors should do to overcome suspicion of taint in the presence of foreign-compelled disclosures.

*Allen* maintains that the significance of the timing of the Fifth Amendment violation supports why the origin of compulsion is irrelevant to the constitutional inquiry.[80] The opinion reiterated that the right against self-incrimination is not abused when an individual is forced to speak, but rather when the individual's compulsory statements are used to incriminate—regardless of whether testimony was compelled by a foreign power.[81] In effect, *Allen* significantly blurred the lines between domestic and foreign-compelled testimony, finding that the Self-Incrimination Clause protects against the use of compelled statements - period.[82] Accordingly, affording individuals an absolute trial right against self-incrimination means that even when a defendant secures immunity by a foreign sovereign not bound by the Fifth Amendment, the defendant's previously immunized statements shall also be treated as such in U.S. proceedings.[83] In support of this proposition, *Allen* touched on the distinct purposes of the Fourth Amendment's deterrent search and seizure right and the Fifth Amendment's Self-Incrimination Clause.[84]

By comparison, *Miranda* rights apply internationally when American authorities are involved; the same is not true of the Fifth Amendment.[85] A defendant's Fifth Amendment right is triggered inside a U.S. courtroom if, and when, compelled testimony is used.[86] To put it differently, the exclusionary rule travels with officers, wherever they might be, to inhibit unconstitutional police

79. *Id.*

80. *See generally id.* at 81-82.

81. *Id.* Judge Cabranes emphasized that the privilege against self-incrimination has always been an absolute "personal trial right of the accused in any American 'criminal case.'" *Id.* at 81.

82. *Allen*, 864 F.3d at 82.

83. *See id.* at 85 ("If our Constitution is to prohibit the use in American trials of confessions coerced or compelled by a foreign sovereign under *some* circumstances . . . it cannot be the case that compulsion by a foreign authority *ipso facto* ends the constitutional inquiry") (emphasis in original); *see also* Henning, *supra* note 23.

84. *Id.* at 81-82.

85. *See, e.g.*, In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177, 188-89 (2d Cir. 2008) [hereinafter *In re Terrorist Bombings*] (comparing the Fourth Amendment's extraterritorial application to the Fifth Amendment, and underscoring that the Fifth Amendment guarantees fairness and reliability to all defendants, regardless of one's status as a foreigner or an American citizen).

86. *See Allen*, 864 F.3d at 81 (emphasizing that regardless of what occurs before trial, "the right not to testify against oneself *at trial* is 'absolute'") (emphasis in original).

practices.[87] Contrarily, the Clause applies within the walls of U.S. courtrooms even in the case of foreign government compulsion, so long as the manner "does not shock the conscience or violate fundamental fairness."[88] As such, even when a foreign sovereign forces an individual to speak under the grant of immunity, the individual cannot be brought to the U.S. and materially tried on the basis of those compelled disclosures.[89]

*Allen*'s discussion of the Fourth and Fifth Amendments' distinct constitutional purposes guided the court toward its affirmation that the Clause is undoubtedly applicable in criminal proceedings that have transnational roots, but that are ultimately tried within U.S. borders.[90] Admittedly, making such a substantial proclamation may be overly simplistic when applied to future cross-border cases that present different factual scenarios than those in *Allen*.[91] Either way, the Second Circuit has banned government use of statements compelled by a foreign sovereign to incriminate an individual.[92] The next section analyzes the arguments presented on appeal and weighs those contentions against other relevant Fifth Amendment inquiries.

## III. ANALYSIS

*Allen* sternly warns U.S. prosecutors that the risks involved with conducting cross-border investigations fall heavily on prosecutors themselves, not on American courts, and not on foreign corporate targets the DOJ seeks to prosecute.[93] Consequently, the Second Circuit will likely remain unsympathetic toward the use of

87. *Id.*

88. *Id.* at 82.

89. *Id.* ("[i]n short, compelled testimony cannot be used to secure a conviction in an American court. This is so even when the testimony was compelled by a foreign government in full accordance with its own law").

90. *See id.* at 81 (explaining that the Fourth Amendment's exclusionary rule was created to deter police from using unconstitutional investigatory techniques to incriminate individuals, which ultimately has little "deterrent effect upon foreign police officers"); *see also id.* at 82 (distinguishing the Self-Incrimination Clause, which focuses on what occurs inside the courtroom, from the exclusionary rule, which focuses on unconstitutional events occurring outside of the courtroom. Ultimately, the Second Circuit underscored certain distinctions between the Fourth and Fifth Amendment to substantiate why the latter applies to involuntary statements procured by foreign sovereigns).

91. This Comment primarily focuses on *Allen* as an issue of first impression, and examines how issues of taint could be circumvented should courts follow the Second Circuit's ruling. For a critique of *Allen* and a comparison of the case to precedent along with suggestions for alternative holdings, *see* Jennifer Reich, *A New Hurdle to International Cooperation in Criminal Investigations: Whether Foreign Government-Compelled Testimony Implicates the Privilege Against Self-Incrimination*, 166 U. PA. L. REV. 789 (2018).

92. *Allen*, 864 F.3d at 82, 101.

93. *Id.* at 88 (reaffirming that it is the prosecution's job to proffer evidence that is within the confines of the Constitution).

contaminated evidence to convict individuals,[94] despite the court's acknowledgment that it is exceptionally hard to comply with foreign law when investigating corporate crime across our borders.[95] Either way, prosecutors must learn how to calculate the constitutional consequences of conducting cross-border investigations.[96] To do this, it is imperative to understand just what went wrong with the DOJ's case-in-chief both in the eyes of the Second Circuit and in sister circuits which choose to adopt similar standards of review of foreign-compelled testimony issues.

## *A. Deconstructing the Arguments on Appeal*

The DOJ presented a threshold argument on appeal, asserting that the Fifth Amendment is not implicated unless both the party compelling the defendant to speak and the party using the compelled testimony are dually bound by the Fifth Amendment.[97] Further, the DOJ definitively argued that Robson's testimony remained untainted, regardless of any exposure to Allen and Conti's immunized statements.[98] In the alternative, the DOJ argued that any Fifth Amendment violation was harmless, pleading that the same verdict would have been reached even without the use of Robson's allegedly tainted testimony.[99] This section analyzes the same-sovereign argument and the DOJ's contention regarding the admissibility of Robson's testimony.

The DOJ argued that the FCA's interviews of Allen and Conti did not warrant Fifth Amendment protection in the U.S. because the use of incriminating testimony the Clause forbids is limited, and therefore, does not protect defendants whose speech is compelled by

94. *See* Jody Godoy, *2nd Cir. Won't Revisit Use of Forced Testimony,* LAW360 (Nov. 9, 2017, 3:58 PM), www.law360.com/articles/980118/2nd-circ-won-t-revisit-use-of-forced-testimony (mentioning that the Second Circuit refused to reconsider *Allen*, forcing the Government to appeal to the Supreme Court or succumb to the newly imposed limitations on cross-border cases).

95. *See generally Allen*, 864 F.3d at 87-90 (touching on the consequences of *Allen*'s holding).

96. *See* Bruce M. Bettigole et al., *United States v. Allen and the Taint of Compelled Testimony in Cross-Border Enforcement Actions*, EVERSHEDS SUTHERLAND (July 25, 2017), us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/202026/Legal-Alert-United-States-v-Allen-and-the-Taint-of-Compelled-Testimony-in-Cross-Border-Enforcement-Actions (justifying the need for increased cooperation and coordination in cross-border cases at earlier stages of an investigation).

97. *See* Brief for the United States-Appellee at 117, United States v. Allen, 864 F.3d 63 (2d Cir. 2017) (No. 16-898) [hereinafter Brief for the United States] (arguing that "a violation of the Fifth Amendment prohibition against compelled self-incrimination requires compulsion by a sovereign bound by the Self-Incrimination Clause, namely a state government of the United States or the federal government").

98. *Id.*

99. *Id.* at 25, 140-41.

a foreign sovereign.[100] The DOJ further asserted that statements received by foreign governments via grants of immunity are not per say "compelled" within the meaning of the Fifth Amendment.[101] Under certain circumstances, the assertion that the Fifth Amendment is not absolute holds valid weight. For example, the privilege may not be invoked when a defendant does not reasonably fear his statements will be used to incriminate him.[102] As applied here, however, this reasoning proscribes too narrow of a reading and interpretation of the Self-Incrimination Clause.[103]

*Allen* properly reaffirmed that what matters for Fifth Amendment purposes is the point at which the constitutional abuse occurs,[104] and of course, whether the immunized testimony was materially used to establish a criminal conviction.[105] The right against self-incrimination is violated as soon as compelled statements are used against a defendant in a criminal proceeding; not when the defendant's speech is involuntarily elicited.[106] Accordingly, timing of compulsion (as the timing relates to the subsequent use and scope of immunized testimony) must carry greater analytical weight than source of compulsion. The latter serves as one factor to be considered in the constitutional inquiry, but nonetheless, holds little if any weight.

One of the Fifth Amendment's most important goals aims at limiting the prosecution's use of certain investigative tactics to incriminate an individual in America.[107] As applied to cross-border cases, the Fifth Amendment prohibits the prosecution from using foreign-compelled statements to secure convictions by way of a witness's tainted words, as opposed to independently collected

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100. *Id.* at 118 (citing *Balsys*, 524 U.S. at 669, 672-74).

101. *See id.* at 119 (arguing that the predicates needed to implicate the Fifth Amendment namely, compulsion and use of compelled testimony, were absent in *Allen* because the FCA is not bound by the Fifth Amendment).

102. *See* Gregory O. Tuttle, *"Cooperative Prosecution" and the Fifth Amendment Privilege Against Self-Incrimination*, 85 N.Y.U. L. REV. 1346, 1351-52 (2010) (indicating, properly, that the Self-Incrimination Clause does not offer defendants an unconditional privilege).

103. *See, e.g., Allen*, 864 F.3d at 85 (emphasizing that when "foreign authorities compel testimony they are acting in the quintessence of their sovereign authority, not in their capacity as a mere employer . . . thus their compulsion is cognizable by the Fifth Amendment").

104. *Id.* at 81.

105. *See id.* at 86 (inferring that the constitutional violation protects against the actual use of coerced statements, which supports why the same-sovereign principle has little if any force here).

106. *See* Brief for Defendants at 101 (citing Chavez v. Martinez, 538 U.S. 760, 767 (2003); *In re Terrorist Bombings*, 552 F.3d at 188; United States v. North, 920 F.2d 940, 948 (D.C. Cir. 1990) [hereinafter *North II*] ("[t]he presentation—'use'—of the testimony is precisely the proscribed act")).

107. *See, e.g.*, United States v. Gecas, 120 F.3d 1419, 1456 (11th Cir. 1997) (discussing the Fifth Amendment's common law aim at protecting against inquisitional government techniques).

testimony.[108] Accordingly, "[w]hether the government's use of compelled testimony occurs in the natural course of events or results from an unprecedented aberration is irrelevant to a citizen's Fifth Amendment right."[109] The same-sovereign principle overlooks the ideation that it is not so much who is doing the compelling, but rather whether the compelled testimony is illicitly used to obtain the conviction.[110]

In what *Allen* subsequently recanted as "[t]he less straightforward question" was the DOJ's alternative argument, which asserted that regardless of any Fifth Amendment violation, Robson's review of Defendants' compelled statements had no material effect on the information Robson provided the DOJ, or the testimony that he offered at trial.[111] To bolster this contention, the DOJ highlighted the measures it took to keep its investigation separate from the FCA.[112] The DOJ was of a strong belief that the investigatory wall it had built prevented any contamination of the evidence proffered.[113] In fact, the DOJ did take significant protective steps in the hopes of veering off the path toward taint, including discussing with the FCA the crucial need to isolate the evidence and obtaining completely different attorneys to assess the FCA depositions.[114] Nevertheless, the Second Circuit Court of Appeals was unconvinced.

The Second Circuit underscored that the prosecution's consequential *Kastigar* burden is not simply overcome when the prosecutor offers portions of testimony that it claims are distinct

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108. Berger & Florence, *supra* note 63 (citing Transcript of Oral Argument at 18:9-19, United States v. Allen, 864 F.3d 63 (2d Cir. 2017) (No. 16-898-cr); *see also* Transcript of Oral Argument at 31:9-11, United States v. Allen, 864 F.3d 63 (2d Cir. 2017) (No. 16-898-cr) (arguing further that "[i]t's not a question of whether . . . the Justice Department is to blame for this testimony. The issue is are they using it").

109. *See* United States v. North, 910 F.2d 843, 861 (D.C. Cir. 1990), *withdrawn & superseded in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990) [hereinafter *North I*] ("[T]he very purpose of the Fifth Amendment under these circumstances is to prevent the prosecutor from transmogrifying into the inquisitor, complete with that officer's most pernicious tool–the power of the state to force a person to incriminate himself").

110. *See Allen*, 864 F.3d at 86 (reasserting that the right against self-incrimination is a personal right invoked at trial, which is violated "at the time of use". Notably, *Allen* abandoned distinctions between statements deemed "involuntary" versus statements considered "compelled," holding that the Clause protects against the use of compelled statements, regardless of semantics. *Id.* at 82.).

111. *Allen*, 864 F.3d at 92; *see also* Brief for the United States, *supra* note 97, at 25, 140-41.

112. *See, e.g.*, *Allen*, 864 F.3d at 76 (this included a one and two-day procedure where the DOJ conducted its witness interviews before the FCA).

113. *See, e.g.*, Brief for the United States, *supra* note 97, at 110.

114. Memorandum in Opposition to Defendants' Motion to Dismiss Based on Kastigar at 2 n.1, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR).

from a defendant's compelled testimony; neither is that heavy burden overcome when a district court incorrectly lowers *Kastigar*'s bar by merely accepting the prosecution's counterargument at face value.[115] In application, the privilege applies to immunized testimony under 18 U.S.C. § 6002,[116] which seeks to insulate the right against self-incrimination by barring the prosecution "from using . . . compelled testimony in *any* respect"—be it directly or indirectly.[117] The use of previously compelled testimony under the "wholly independent" standard is also barred when the witness's memory of events is refreshed by a defendant's compelled testimony.[118] Moreover, testimony offered by a witness that is "shaped, altered, or affected" by exposure to compelled testimony must be excluded from evidence.[119] Some courts have invoked stricter standards than others. The D.C. Circuit, for example, is uninterested in considering the prosecution's knowledge regarding whether a defendant's testimony was previously immunized, and is instead solely concerned with whether such testimony was used.[120] All courts reviewing testimony for a possibility of taint should, however, analyze the likelihood that exposure to a defendant's foreign-immunized statements materially influenced the kind of evidence the witness provides the prosecution.[121]

In hindsight, the DOJ would have had to prepare for the *Kastigar* hearing quite differently considering the scrutiny its evidence received at the appellate level. When assessing these inquiries moving forward, it is important for white collar criminal prosecutors to note that even when witnesses offer a detailed remuneration of events from what the witness perceives to be their personal knowledge, this does not exclude the possibility that the witness's memory was neither refreshed nor influenced by immunized statements.[122] Prosecutors must be prepared to refute

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115. *Allen*, 864 F.3d at 93, 97.

116. *Kastigar*, 406 U.S. at 462.

117. U.S. v. Poindexter, 951 F.2d 369, 373 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992) (quoting *Kastigar*, 406 U.S. at 453) (emphasis in original).

118. *See North I*, 910 F.2d at 856 (qualifying "the use of immunized testimony by witnesses to refresh their memories, or otherwise . . . focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements" as evidentiary use. Impermissible use also encompasses witnesses who have reviewed or studied previously immunized testimony in preparation for trial. *Id.* Note that *Allen* did not decide this specific evidentiary issue, but the Second Circuit Court of Appeals agreed with the D.C. Circuit that at the very least, "the Government is required to prove that [the trial witness's] exposure to the compelled testimony did not shape, alter, or affect the information . . . provided and that the Government used." *Id.* at 93).

119. *Poindexter*, 951 F.2d at 373 (quoting *North I*, 910 F.2d at 863).

120. *North I*, 910 F.2d at 859 ("The prosecution's knowledge (or lack thereof) that the testimony was immunized is relevant to the question of prosecutorial good faith, *not* prosecutorial use") (emphasis added).

121. *See, e.g.*, *id.* at 861.

122. *Poindexter*, 951 F.2d at 374 ("That a witness proffers a more detailed

defense assertions which argue that refreshing a witness's recollection of events at trial led to tainted evidence. This requires a rather persuasive prosecutorial showing that evidence was independently derived and separately maintained, especially when a witness's personal recollection shows material correlation to immunized statements.[123]

Prosecutors must undeniably focus on the Second Circuit Court of Appeal's dissatisfaction with the district court's loose standard of review of the *Kastigar* issues. The appellate court was noticeably disappointed that the lower court had passively accepted Robson's assertion that his testimony remained uncontaminated as doing so unacceptably lowered the requirements under *Kastigar*.[124] Specifically, the DOJ's use of charts attempting to show distinctions between Robson and Defendants' testimony could not by itself be enough to overcome *Kastigar* concerns.[125] As previously stated by the D.C. circuit, when "a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure, the prosecution does not meet its burden merely by pointing to other statements of the same witness that were not themselves shown to be untainted."[126] As such, "bare, self-serving" and "conclusory denials" cannot carry the prosecution's weight when a witness's post-exposure testimony reveals substantial parallelism to a defendant's foreign-compelled testimony.[127]

In practice, the trial judge remains responsible for effectively pulling apart pieces of a witness's memory from the defendant's immunized statements; it is the prosecution's responsibility to show that by doing so, the trial judge will find no Fifth Amendment issues.[128] Prosecutors must be abundantly cautious when rebutting tainted testimony issues before, during, and after *Kastigar* hearings. As illustrated, relying on a witness's assertion that his testimony was unaffected by his review of compelled testimony is insufficient to defeat a defendant's Fifth Amendment constitutional safeguard.[129] A truly persuasive showing to the court of independently derived evidence is necessary to save the case.

In the end, *Allen* reminds judges and white collar criminal counsel that they must scrutinize the effect foreign-compelled

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account than, or a rebuttal of, the defendant's immunized testimony may demonstrate 'personal knowledge' in the evidentiary sense; but it simply does not rule out the possibility that the witness's memory was refreshed or influenced by the immunized testimony").

123. *See, e.g., id.* at 375.

124. *Allen*, 864 F.3d at 93.

125. *Id.* at 94, 96.

126. *Poindexter*, 951 F.2d at 376.

127. *Allen*, 864 F.3d at 94.

128. *See generally Poindexter*, 951 F.2d at 390 (Mikva, J., dissenting in part) (explaining the need for the trier of fact to determine presence or absence of taint after a full *Kastigar* hearing).

129. *See Allen*, 864 F.3d at 96, 101.

testimony could have on a defendant's fate. Prosecutors must accept that, "[t]he stern language of *Kastigar* does not become lenient because the compelled testimony is used to form and alter evidence in oblique ways exclusively, or at a slight distance from the chair of the immunized witness."[130] Judicial review of foreign-compelled testimony by appellate courts will undoubtedly continue to be a crucial step for prosecutors to overcome.[131]

## *B. Assessing the Fear of Allen as Precedent*

Looking prospectively, avoiding a future circuit split on foreign-compelled testimony issues would certainly help to avoid complicating the already complex cross-border investigation process.[132] However, any divergence in opinion would need to be based on more than just the fear that *Allen*, as precedent, will further complicate the cross-border incrimination process. The DOJ transparently expressed a fear that the Second Circuit's unwillingness to find merit in its arguments could considerably complicate future prosecutions of individuals like Allen and Conti. The DOJ was especially frightful of a scenario where a "hostile government bent on frustrating prosecution . . . would . . . compel a witness to testify and then publicize the . . . testimony, unilaterally putting the United States to its heavy *Kastigar* burden."[133] The Government's desire to limit protections afforded by the Fifth Amendment privilege are essentially based on a worry that a broader reading of the Clause would undermine the feasibility of trying future cross-border cases. Judge Cabranes remained unmoved by these concerns, indicating that the prosecution has always been required to work collaboratively with foreign counterparts.[134] In any event, this fear alone cannot override a

130. *See also North I*, 910 F.2d at 860 (highlighting "[t]he fact that the government violates the Fifth Amendment in a circuitous or haphazard fashion is cold comfort to the citizen who has been forced to incriminate himself by threat of imprisonment for contempt").

131. *See, e.g.*, Jocelyn Strauber et al., *United States v. Allen and Its Check on Compelled Testimony in Cross-Border Investigations*, BLOOMBERG BNA CRIM. L. REP. (Oct. 11, 2017) (identifying the procedural safeguards defendants will continue to receive post-*Allen*).

132. *See* West et al., *supra* note 48 (offering the following commentary: "[s]hould the Ninth Circuit (or others) separate from the Second Circuit on this issue, the resulting circuit split and uncertainty will only compound these challenges").

133. Brief for the United States, *supra* note 97, at 123 (expressing concern over hostile foreign governments destroying U.S. cases). Interestingly, a similar concern was raised by the dissent in *North II*. *See North II*, 920 F.2d at 945 (explaining the apparent fear that a hostile *witness* could purposefully expose "himself to . . . immunized [statements] in order to destroy the value of his testimony").

134. *See id.* at 87 (asserting that "we live in a world of nation-states in which our Government must be able to function effectively in the company of sovereign

defendant's fundamental right against self-incrimination.[135]

The D.C. Circuit has stated somewhat similarly that while "[t]here is great temptation . . . to focus on the institutional interests at stake . . . that is the wrong angle from which to view the . . . arguments."[136] However, in pushing the DOJ's fears aside, *Allen* left open the very real possibility that a foreign government could purposefully sabotage prosecutorial efforts in the U.S.[137] *Allen* also stopped short of addressing just how hard it is to investigate white collar crime when foreign authorities contemporaneously investigate the same suspects as U.S. authorities. Surely, the DOJ's angst that *Allen* will hamper cross-border investigations is valid considering the Second Circuit's holding puts an even heavier burden on prosecutors trying international white collar crime, and lessens the burden on attorneys defending them.[138] Not to mention, prosecutors face the added burden of anticipating which countries foreign witnesses are situated in,[139] which can put prosecutorial agents in the uncomfortable position of guessing which countries' laws they will need to comport with.[140] The other damaging prosecutorial realities are that, for one, it is not always easy to establish mutual collaboration with foreign authorities.[141] Additionally, some defendants may receive automatic protection from use of their forced statements even when foreign-compelled testimony is not saturated with the kind of taint that *Kastigar* bars.[142]

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nations.") (internal quotation marks omitted).

135. *See, e.g., id.* at 89 n.111 (citing Ullmann v. United States, 350 U.S. 422, 428 (1956) ("Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies.")).

136. *North I*, 910 F.2d at 959.

137. *See Allen*, 864 F.3d at 88 (indicating that "[t]his case raises no questions regarding the legitimacy or regularity of the procedures employed by the U.K. government or the U.K. government's investigation more generally," and that *Allen* "would not necessarily prevent prosecution in the United States" in an instance where foreign governments hypothetically sabotage U.S. prosecutions by immunizing a suspect and then publicizing the suspect's testimony. However, the Second Circuit Court of Appeals left it at that, choosing to withhold an explanation of what the court would do in such a situation).

138. Brief for the United States, *supra* note 97, at 123.

139. Strauber et al., *supra* note 131.

140. *See, e.g.*, *id.* (stating that "it may be difficult to determine in which jurisdiction a target should be prosecuted in the early stages of an investigation, before all relevant evidence has been developed and before it is clear which targets ultimately may . . . be available as witnesses").

141. *See id.* (explaining the challenges complicated by decisions like *Allen* and highlighting the need to work more collaboratively with foreign governments).

142. *See generally* Neal Modi, *Toward an International Right Against Self-Incrimination Expanding the Fifth Amendment's "Compelled" to Foreign Compulsion*, 103 VA. L. REV. 961, 1012 (2017) (evaluating *Allen* as a decision that overlooks the meaning of *Kastigar*, asserting that "[t]he heavy burden that use and derivative use immunity represents, once applied between countries

Moreover, as the DOJ points out, even when a foreign authority such as the FCA collaborates with U.S. prosecutors, foreign governments could still choose to put their investigatory goals above the DOJ's.[143] Foreign jurisdictions could purposefully sabotage U.S. cases by leaking compelled testimony to prevent any success prosecutors would have at *Kastigar* hearings, just as the DOJ fears.[144] The list of fears prosecutorial agents have may only grow as corporate crime becomes more complex and as future circuits adopt *Allen*'s ruling. In light of these concerns, the next section proposes proactive approaches to take when navigating foreign-compelled testimony issues.

## IV. PROPOSAL

The constitutional consequences that unraveled in *Allen* underscore the reality that use of tainted evidence, however slight, can be fatal to the prosecution's case. Prosecutors must *always* remember that they "[bear] the continuous and uninterrupted burden of persuasion."[145] Keeping this theme at the forefront of a litigation strategy is crucial in the cross-border context where factual circumstances are especially complex. While some courts have alluded to the ways in which prosecutors can avoid unconstitutional use issues, others have given explicit instructions

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and not within the same country, may translate, in effect, to full transactional immunity for foreign-compelled targets." Meaning that foreign defendants may receive full transactional immunity when *Kastigar* requires something less than that).

143. *See* Strauber et al., *supra* note 131 (assessing the challenges posed when investigatory authorities try to secure international cooperation, and stressing the fact that "[e]ven with such a commitment" to international cooperation "a foreign authority may be reluctant to forgo such techniques, potentially losing valuable evidence should a U.S. prosecution ultimately not be unviable, or should a foreign authority conclude that its own interests in prosecution outweigh" those of the U.S.).

144. *See Allen*, 864 F.3d at 87 (relaying the Government's fear that *Allen* could lead to intentional destruction of American prosecutorial efforts by foreign governments. The Second Circuit was ultimately unpersuaded by this concern, explaining that the Fifth Amendment right trumps any complications prosecutors have when securing witnesses and gathering incriminating evidence); *see also* Anthony Capozzolo, *Recent Public Disclosure of Sealed U.K. Testimony by DOJ Highlights Big Risks in Multi-Jurisdiction Prosecutions*, BLOOMBERG LAW (Oct. 4, 2017, 10:03 AM), news.bloomberglaw.com/white-collar-and-criminal-law/recent-public-disclosure-of-sealed-uk-testimony-by-doj-highlights-big-risks-in-multi-jurisdiction-prosecutions (emphasizing that "[o]ne can only imagine how less savory individuals in foreign jurisdictions might be willing to leak the press copies of compelled testimony to try to throw a wrench into a U.S. criminal prosecution. Such a leak, done early enough in the investigation, might be enough to make winning a *Kastigar* Hearing untenable, rendering a prosecution impossible." This demonstrates the kinds of costly consequences *Allen* could have on future parallel investigations and domestic criminal proceedings).

145. *North II*, 920 F.2d at 954.

on how to avoid taint. This proposal pulls relevant suggestions from precedent and federal grand jury practice guides, and incorporates them into a framework for avoiding foreign-compelled testimony issues. Ultimately, these points are aimed at guiding prosecutors toward a successful approach. However, defense attorneys should also take these into consideration when determining which Self-Incrimination and *Kastigar* claims to pursue.[146]

## *A. Phase I: Avoiding the Foreign-Compelled Testimony Trap During the Investigation and Discovery Stages*

Perhaps the most reassuring investigatory technique that prosecutors can use to avoid foreign-compelled testimony claims is to "can" testimony whenever feasible. It is rather telling that this investigatory technique was advocated in *North II*—a case that concerns relevant evidentiary issues in the cross-border context.[147] Canning testimony allows prosecutors to show courts that any evidence proffered was insulated from foreign-compelled statements.[148] Prosecutors should take serious measures to prerecord witness statements, and the earlier in the cross-border probe prosecutors can do this, the better. Ultimately, canning testimony will only help to bolster a prosecutor's claim that investigatory leads were not drawn from compelled statements.[149]

Another investigatory tactic that has been advocated is to draft memoranda including the evidence the prosecution has obtained, and to do so prior to the time an individual testifies under immunity.[150] Prosecutors should take this approach in the cross-border context, but do so at a much more detailed level. This requires drafting evidentiary source memoranda both in real-time as U.S. authorities conduct investigations abroad, and thereafter as

146. The following points are organized in accordance with when in the prosecutorial timeline they should be implemented. As a general matter, these suggestions are intended to focus on both the grand jury proceeding and the trial witness as Second Circuit precedent specifically requires that indictments procured by taint be dismissed. *See Allen*, 864 F.3d at 98 (referencing U.S. v. Nanni, 59 F.3d 1425, 1443 (2d Cir. 1995), U.S. v. Tantalo, 680 F.2d 903, 908-09 (2d Cir. 1982), and U.S. v. Hinton, 543 F.2d 1002 (2d Cir. 1976), *cert. denied sub nom*. Carter v. U.S., 429 U.S. 980 (1976)). Thus, where reference is made to trial witnesses, such reference shall also include grand jury witnesses.

147. *See North II*, 920 F.2d at 943.

148. Charles Tiefer, *Concurrent Congressional and Criminal Investigations: Lessons from History* at 5, www.judiciary.senate.gov/imo/media/doc/07-11-17%20Tiefer%20Testimony.pdf (last visited Feb. 15, 2019) (explaining "the 'canning' process" as one "by which testimony and evidence [is] put away 'in the can' prior to immunity, for prosecutors to show they had known of . . . evidence before the grant of use immunity").

149. *See, e.g.*, *id.* at 942.

150. Susan W. Brenner & Lori E. Shaw, *Federal Grand Jury: A Guide to Law and Practice*, 1 Fed. Grand Jury § 12:17 (2d ed.) at 1 [hereinafter Brenner & Shaw § 12:17].

the prosecution obtains additional evidence throughout the discovery stage. Prosecutors should keep track of the date, time, and source of the evidence, including any compelled evidence obtained by a foreign sovereign that the prosecution later learns of. These detailed track records can be employed later in the litigation stage to show U.S. courts considering *Kastigar* issues that any evidence collected while the defendant was under review by a foreign authority was legitimately, independently derived.

As the investigation develops, prosecutors must uncover what facts a cooperating witness claims to know, and more importantly remember, *before* any possible exposure to foreign-compelled testimony. The prosecution should always require the witness to write their pre-exposure testimony down. Memorialization of witness statements is just as important as the prosecution's memorialization of their evidentiary sources. Keeping independent records of testimony and a detailed remuneration of where, when, and how evidence was obtained will allow the prosecution to implement their own causal analysis to determine whether their evidence is sufficiently independent before insinuations of Fifth Amendment violations occur. By linking each piece of evidence to a time, place, and source, prosecutors can break the causal chain of evidentiary events that lead to unconstitutional use claims later down the prosecutorial pipeline.[151]

As the prosecution leaves the investigation and discovery phases and enters the pre-trial stage, it will become more and more essential to review the content of the witness's statements, and compare those to the defendant's foreign-compelled testimony. When a witness offers the prosecution new testimonial evidence, prosecutors should reinstitute this kind of comparison analysis to ensure that any evidentiary crosshairs remain legitimately independent of the defendant's compelled disclosures. This will serve as a prosecutorial checklist to ensure that the evidence does not contain unconstitutional fruits barred by *Kastigar*. The same kind of analysis should be implemented throughout trial and before *Kastigar* hearings.

## *B. Phase II: Tactics for the Pre-Trial Through Trial Stages*

The closer the prosecution gets to grand jury proceedings and trial, the greater the need to decide whether to use evidence obtained from a witness, or nix it entirely. At this point, if the witness has been exposed, even slightly, to previously immunized testimony, it is necessary for prosecutors to reassess the reliability of a witness's memory. This should involve discerning whether the

151. *See, e.g.*, *North II*, 920 F.2d at 946-47 (providing support for a casual analysis of taint).

witness can separate his memory from statements compelled by a foreign sovereign.[152] To effectively do that, prosecutors should require the witness to pull apart factual pieces that the witness claims to come from personal experience, thoughts, actions, and encounters with the defendant. Prosecutors should then assess whether material portions of the witness's statements correlate to foreign-compelled testimony. Prosecutors should only use witnesses that are affirmatively willing to testify under oath that the witness's recollection does not materially borrow from any review, whether directly or indirectly, of statements immunized abroad. Prosecutors specifically need to consult their witnesses for purposes of gauging how confident the witness is that his or her memory was not colored by any exposure to involuntary statements procured by a foreign government. Doing so will allow prosecutors to change evidentiary paths should witness stories collapse or otherwise show too substantial of an overlap.

### *C. Phase III: Dodging Taint at Trial and Appeal*

Prosecutors should ensure that they are prepared to overcome two significant hurdles during the trial and appeal stage. First, before trial and *Kastigar* hearings, prosecutors must ensure that the evidence it plans to use will survive a line-item review of the evidence for Fifth Amendment and *Kastigar* issues. *United States v. Slough*[153] offers insight into what a lower court must do when examining the evidence for taint. Specifically, the D.C. Circuit does not allow the evidence to be treated "as single lumps" and disallows the exclusion of evidence "in [its] entirety [if] at . . . most only some portion of the content was tainted".[154]

To determine overlap of compelled testimony, *Slough* indicates that a district court must sift through evidence line-by-line.[155] The

152. *See Allen*, 864 F.3d at 97 (illustrating one prosecutorial mistake the Second Circuit picked up on was Robson's repeated claims that he could not recall much, which "[established] that he lacked the ability 'to separate the wheat of [his] unspoiled memory from the chaff of [Defendants'] immunized testimony").

153. 641 F.3d 544 (D.C. Cir. 2011). *Slough* concerned several defendants who provided sworn written statements to the Department of State's Diplomatic Security Service after a car bomb exploded near a Baghdad compound. *Id.* at 547-48. The defendants were guaranteed that any evidence derived from their statements would not be used against them in a criminal case. *Id.* at 548. Very early after the incident occurred, news reports were published; those reports relied on an incident report by the State Department, which had in turn, purportedly relied on the sworn witness statements and interviews. *Id.* The government's most-relied-upon witnesses later conceded that they had seen and reviewed those news reports. *Id.* at 549.

154. *Id.* at 550.

155. *See* Wayne R. LaFave et al., 3 Crim. Proc. § 8.11(c) (4th ed.) (2018) at 7 n.51 (citing *Slough*, 641 F.3d at 551 "Where two independent sources of evidence, one tainted and one not, are possible antecedents of particular

line-item approach helps determine whether the evidentiary sources proffered are sufficiently independent, and thus, free of taint. On the flipside, as seen in *Allen*, prosecutors should understand that if a court decides *not* to scrutinize their evidence piece by piece, and subsequently determines that no taint exists, it is likely that the prosecution's evidence will be put through a much stricter review by an appellate court. During this process, the prosecution must always be able to point to material pieces of evidence that were independently derived. In so doing, the prosecution can effectively argue that any error in the way that the district court evaluated the evidence was harmless.

Second, prosecutors must avoid offering the court what *Allen* deems "generalized" and "self-serving" denials of taint.[156] The judiciary's questioning will involve prying into the witness's mind.[157] During this process, prosecutors should refrain from merely feeding the witness what the court wants to hear, or putting a witness on the stand that can only offer short, conclusory answers to the court's long and legitimate line of questioning.[158]

Avoiding merely conclusory answers will require prosecutors to think outside of the box before reaching the trial stage. For example, prosecutors will need to dig deeper when foreign-compelled testimony is involved to uncover: (i) the nature in which the witness was exposed to the defendant's immunized statements; (ii) the way in which the prosecution's witness reviewed said testimony; and (iii) the motivation behind the witness's corroboration. The witness's motivation is especially significant. Defense attorneys are sure to assert impermissible use claims under *Kastigar* when a witness's motive in cooperating is the mere result of the witness's review of (and inspiration by) immunized testimony.[159] Inevitably, prosecutors will be in a better position when they can point to facts that establish the "why" answers and explanations regarding how the evidence proffered was derived at a legitimate distance from foreign-compelled statements, or has not otherwise been shaped or altered by review of compelled testimony. Hypothetically, a witness that was only tangentially exposed to

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testimony, the tainted source's presence doesn't ipso facto establish taint."). The Second Circuit highlighted in both United States v. Biaggi, 909 F.2d 662, 689 (2d Cir. 1990) and United States v. Nanni, 59 F.3d 1425, 1432 (2d Cir. 1995) that the court must determine whether the government's motivating factor for securing a conviction would have been the same had the "motivating effect of the immunized testimony" been taken out of the picture. *See also Slough*, 641 F.3d at 552 ("To preserve . . . symmetry [of that net effect], obviously courts cannot bar the government from use of evidence that it would have obtained in the absence of the immunized statement").

156. *Allen*, 864 F.3d at 94, 96, 101.

157. *See, e.g.*, *id.* at 94 (evaluating Robson's memory and state of mind).

158. *See id.* at 101.

159. *North II*, 920 F.2d at 942 (citing United States v. Rinaldi, 808 F.2d 1579, 1584 n.7 (D.C. Cir. 1987)).

foreign-compelled testimony, and whose reason for cooperating are genuine in that they seek to tell the truth (as opposed to finding answers to unknown questions, and thus, saving themselves from adverse judicial consequences) will fare better for prosecutors during the litigation process.

## *D. Final Considerations for Escaping Taint*

*Kastigar* itself institutes a blanket ban on the use of compelled testimony, which was evident when the Supreme Court prohibited "using . . . compelled testimony in any respect."[160] However, lower courts have applied *Kastigar* differently.[161] As such, future courts may offer a divergence in opinion regarding illicit use of foreign-compelled testimony. Regardless, it is important for prosecutors to realize that the degree of preparation, and the way in which arguments should be presented differ depending on whether a witness directly reviews (therein fatally saturating themselves with taint), versus when a witness inadvertently becomes exposed to such testimony.

### *1. Overcoming the Non-Evidentiary Use Hurdle*

Categorically, there are three *Kastigar* claims that could be raised. Ranging from the least worrisome for the prosecution to the most are: direct use claims, indirect use claims, and non-evidentiary use claims.[162] The most complex misuse claims are those involving non-evidentiary use of a witness's immunized testimony.[163] The following may fall within the purview of non-evidentiary use: "focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."[164] Of note, not every court agrees that non-evidentiary use is barred by *Kastigar*, and to complicate matters further, the courts that do deem non-evidentiary use impermissible have not explained what the government must show to overcome such a claim.[165]

The prosecutors who do find themselves in this situation may have one persuading assertion to invoke. The right circumstances in a cross-border case may call for the prosecution to assert the inevitable discovery doctrine.[166] The doctrine is basically one of

160. *Kastigar*, 406 U.S. at 453.

161. Andrew V. Jezic et al., *Maryland Law of Confessions*, Md. Law of Confessions § 28:35 (2019 ed.).

162. *See* Susan W. Brenner & Lori E. Shaw, *Federal Grand Jury: A Guide to Law and Practice*, 1 Fed. Grand Jury § 12:16 (2d ed.) at 1.

163. *Id.*

164. *Id.* (internal quotation marks omitted).

165. *Id.* at 2.

166. *See* Brenner & Shaw § 12:17, *supra* note 150, at 2 (enumerating the

harmless error, proposing that if immunized testimony was used to find subsequent evidence against the immunized witness, the prosecution would have found the evidence either way. As the inevitably discovery doctrine relates to cases that cross U.S. borders, this assertion may require the prosecutors to show: (i) that the prosecution's investigation was distinct from any compelled investigatory techniques used by foreign sovereigns; and (ii) that the evidence would have been independently discovered had a permissible investigation been employed.[167] The best proactive approach to take, however, is to refrain from developing litigation tactics that are exclusively based on immunized statements obtained abroad.

### *2. Final Tactics to Employ: From Understanding a Court's Evaluation of Taint to Securing Better Cross-Border Collaboration*

Notably, *Allen* applied the legal standards instituted in a string of D.C. Circuit court cases.[168] One of those opinions justifies that "regardless of *how or by whom*" a witness is exposed to compelled disclosures, *Kastigar* is violated once the prosecution uses witness testimony that has been shaped by previously compelled testimony.[169] At a fundamental level, what the witness knows *before* exposure and what the witness adds to their testimony thereafter are vital evidentiary facts to uncover.[170] Regardless of which circuit prosecutors find themselves in, prosecutors should be prepared for a judicial focus on "the content and circumstances" to which unconstitutional use has allegedly occurred, and understand that a court will review the evidence for taint regardless of who was at fault for evidentiary contamination.[171]

In final consideration, it is worthy to reframe some of the evidentiary issues in *Allen*. To quantify, about 47% (twenty-seven out of fifty-eight) of the trial topics that Robson discussed included an antecedent in the testimony provided by Allen, and 31% (eighteen out of fifty-eight) included an antecedent in the testimony provided by Conti.[172] In the future, prosecutors should calculate the percentage to which witness testimony includes antecedents to foreign-compelled testimony. While the number in and of itself may not reveal much, if anything, a value less than the 47-31% range

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two-element test the prosecution must meet for proper assertion of the inevitable discovery doctrine under Nix v. Williams, 467 U.S. 431 (1984)).

167. *See e.g.*, *Williams*, 467 U.S. 431 (otherwise defining the test for the inevitable discovery doctrine).

168. *Allen*, 864 F.3d at 92 n.134. These cases include: *North I*, *North II Poindexter*, and *Slough*.

169. *North II*, 920 F.2d at 942 (emphasis in original).

170. *See id.* (discussing this issue in *Rinaldi*, 808 F.2d at 1583).

171. *Id.*

172. *Allen*, 864 F.3d at 94.

should provide prosecutors with insight regarding overlap. Of course, there will be some similarities between foreign-compelled testimony and trial testimony, even if the witness was never exposed to immunized statements. The reality is that the witness and defendant were likely working together to collude or within a close distance from each other—enough to have a recount of events that show a resemblance. It is worthy for prosecutors to establish this point at *Kastigar* hearings as doing so will further rebut defense arguments of taint.

Furthermore, a significant prosecutorial challenge that *Allen* accentuates is the need to institute multijurisdictional cooperation during each phase of a parallel investigation.[173] When foreign agencies simply refuse to collaborate with American authorities, prosecuting attorneys will need to take extra precaution to avoid future *Kastigar* issues.[174] In the context of parallel investigations, this also means that prosecutors facing noncompliance by foreign jurisdictions must determine whether convicting a corporate target located abroad will be successful, and in effect, worthy to pursue.

Similarly, it is imperative for prosecutors to work closely with counsel and risk management teams at corporations where the suspect's criminal activity occurred. Considering internal investigations at corporations have continued to increase, it is likely that a suspect who U.S. prosecutors wish to pin down is already being investigated by the suspect's employer.[175] As such, prosecutors should educate foreign corporations about the recently revised Yate's Memo, which no longer implements the "all or nothing approach," and instead provides cooperation credit to corporations that "identify individuals who were significantly involved in or caused the criminal conduct."[176]

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173. *See also* Strauber et al., *supra* note 131 (discussing the difficulties involved when securing mutual collaboration during early stages of cross-border investigations).

174. *See id.* (underscoring the hesitation foreign authorities may have about communicating with others. Foreign authorities could very well decide that the investigation is worth more on its own than with other agencies involved).

175. *See* Nyembo Mwarabu, *How to Conduct Cross-Border Investigations Without Losing It*, LEXOLOGY (Jan. 18, 2017), www.lexology.com/library/detail.aspx?g=e3766562-1f68-483e-af9a-42b5e28e27f2 (discussing how attorneys can adjust their investigative strategies to gain traction with companies' compliance programs).

176. *Quoting Yates Memo Revised – DOJ Steps Back from All-or-Nothing Approach to Corporate Cooperation Credit*, MCGUIREWOODS (Dec. 5, 2018) www.mcguirewoods.com/client-resources/Alerts/2018/12/yates-memo-revised-doj-steps-back?p=1 (internal quotation marks omitted); *see also* Office of the Deputy Att'y Gen., *Individual Accountability*, U.S. DEP'T OF J., www.justice.gov/dag/individual-accountability (referring to then-Deputy Attorney General Sally Q. Yates's Memorandum titled, "Individual Accountability for Corporate Wrongdoing," released in late 2015. The overall goal of the Yate's Memo is to bring more consistency to internal corporate investigations. The Memo also aims at incentivizing corporations and their employees to change future behaviors, reward individuals who assist with

Finally, prosecutors should strive to use taint teams with the goal of identifying evidentiary flags its witness's testimony presents along the way. After *Allen*, it is beneficial to implement taint teams at the start of the investigation through trial - as opposed to waiting to use them, or only using them, in preparation for *Kastigar* hearings. Taint teams must also keep certain timing and transparency issues in mind. For instance, a corporate target whose collusive acts occurred at a corporation that has a multijurisdictional presence will require taint teams to be aware of the possibility that previously compelled testimony could inadvertently be shared with employees in other foreign jurisdictions.[177] Such a scenario could lead to a trickle-down effect of taint that complicates segregating clean from tainted testimony later down the litigation process. In sum, taint teams must remain knowledgeable about where and by whom compelled testimony has traveled.

At the end of the day, prosecutors should remain hesitant about using witnesses who have been exposed to foreign-compelled testimony. There is no guarantee that doing so will produce a positive prosecutorial result. To reemphasize, it was not merely the use of Robson as a witness that became a central Fifth Amendment issue in *Allen*; it was the use of Robson's testimony, coupled with the fact that his testimony was materially different and far more incriminating post-exposure.[178] Prosecutors must exclude this kind of toxic testimonial evidence. Undoubtedly, courts following *Allen* will be on the lookout for prosecutors whose sole reason for convicting a cross-border suspect is motivated by the words its cooperating witness offers.

## V. CONCLUSION

As expressed in *Allen*, it will be hard to predict "exactly what this brave new world of international enforcement will entail," but all circuit courts should agree that "these developments abroad need not affect the fairness of our trials at home."[179] Post-*Allen*, prosecuting attorneys should consider enlightening foreign agencies about the consequences of the Second Circuit's ruling, and the corresponding Fifth Amendment privilege afforded to

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corporate investigations, and deter future corporate misconduct).

177. *See* Berger & Grishkan, *supra* note 45 (substantiating that "[c]orporations should . . . keep careful watch over any compelled testimony they may receive by way of disclosure in any jurisdiction in which they operate").

178. *See* Henning, *supra* note 23 (explaining that after Robson read Defendants' compelled testimony, he "changed the description of the roles of [Defendants] in setting Libor to reflect what [Defendants] said"). A similar issue occurred in *North II*, where a central witness provided a modified version of the events at trial after being exposed to immunized statements. *See North II*, 920 F.2d at 944.

179. *Allen*, 864 F.3d at 90.

defendants in American criminal proceedings.[180] Regardless of what kind of scenario prosecutors find themselves in, the probability of dodging the judiciary's analysis of taint altogether is high. If prosecutors play the right cards, that is. Prosecutors should consider incorporating the suggestions discussed herein as a proactive approach to avoiding future foreign-compelled testimony issues.

Whether it be rigging interest rates or undermining free-market competition, it "is corruption at the molecular level of the economy, Space Age stealing – and it's only just coming into view."[181] Prosecutors can no longer allow the collaboration of corporate criminals to be more deceitfully successful than the collaboration among U.S. prosecutors and foreign counterparts. Nor can future prosecutors afford to fight corporate crime with a blind eye toward the Constitution. Prosecutors must learn how to overcome the constitutional consequences of litigating cross-border corporate crime or allow corporate colluders to walk away free—with the rest of the world's rightfully earned profits.

180. *See* Berger & Grishkan, *supra* note 45 (offering additional ways to keep testimonial evidence free of contamination).

181. Taibbi, *supra* note 1.