Case Note: Allen and Conti

AUGUST 2, 2017

This case, from the U.S. Federal Appeals Court, considers the applicability of the Fifth Amendment's privilege against self-incrimination in relation to testimony compelled by a foreign government, on the present facts the UK's Financial Conduct Authority. It will therefore no doubt influence how the DOJ operates and interacts with UK investigatory authorities in the future.

The U.S. Court of Appeals for the Second Circuit, in a decision published on 19 July[1], reversed the convictions of Anthony Allen and Anthony Conti. Allen and Conti ("the Defendants") had previously been tried and convicted before the District Court (Southern District of New York) for wire fraud and related conspiracy offences, concerning the alleged manipulation of LIBOR. The appeal focused on the defendants' claim that their privilege against self-incrimination under the Fifth Amendment had been violated. It was argued that the testimony of Paul Robson, a key witness in the case, had been tainted by statements the Defendants had made in compelled interviews with the UK's Financial Conduct Authority ("FCA"). The FCA had disclosed the transcripts of the Defendant's interviews to Robson, pursuant to the regulatory proceedings against him. Robson had reviewed the transcripts prior to cooperating with the DOJ.

In reversing the District Court's decision, the Appeals Court held that the Government had failed to prove (as required under the *Kastigar* doctrine[2]) that Robson's evidence had been derived from a source wholly independent of the compelled testimony. In addition, the Appeals Court addressed a more fundamental issue which the District Court had previously declined to consider: whether the Fifth Amendment is even engaged by testimony compelled by a foreign government. Given the increasing prevalence of cross-border investigations this question was evidently important to resolve. The Appeals Court concluded that the protection offered by the Fifth Amendment applied to the use of all compelled testimony, irrespective of whether it had been obtained by a foreign Government. This blog piece summarises both elements of the Appeal Court's decision.

Application of the Fifth Amendment to foreign compelled testimony

In a previous blog post we analysed the competing arguments raised on behalf of the Government and the Defendants, before the District Court, on whether the Fifth Amendment applied to foreign compelled testimony. We concluded that it was difficult to reconcile the Government's position with Federal Appellate authority. The Appeals Court decision is not therefore overly surprising.

The decision emphasizes that the Self-Incrimination Clause—which enshrines a right not to testify against oneself—provides a personal trial right to an accused in any US criminal case. A violation of the Clause therefore occurs only when the statement is *used* at trial, not at the point of its compulsion. In short, "*compelled testimony cannot be used to secure a conviction in an American Court*".[3]

The Appeals Court rejected a policy argument raised by the Government in support of adopting a restrictive scope of the Fifth Amendment's application. The Government suggested that foreign authorities could frustrate US prosecutions by publicizing compelled testimony, thereby submitting the US Government to the burden raised by *Kastigar*. The Appeals Court dismissed these concerns. Negligent publication, the Court held, seemed increasingly unlikely given the trend towards closer and earlier coordination between U.S. and foreign agencies. The tide of 'international criminal enforcement', the Court reasoned, bolstered the argument for having the Fifth Amendment apply to foreign compelled testimony:

> *"If as a consequence of joint investigations with foreign nations we are to hale foreign men and women in to the courts of the United States to fend for their liberty we should not do so while denying them the full protection of a "trial right" we regard as "fundamental" and "absolute"".*[4]

The Appeal Court's decision appears to resolve this issue unequivocally and will presumably inhibit recent attempts made by the DOJ to rely on foreign compelled testimony. In June, the DOJ requested the District Court for Northern California grant a subpoena for the production of a transcript of testimony compelled by the UK's Financial Reporting Council ("FRC").[5] Following the Allen and Conti decision it is hard to see how the FRC evidence could be deemed admissible, and therefore satisfy the preconditions for being the object of a subpoena.

Application of the Kastigar doctrine

Under *Kastigar*, where an individual is compelled to testify he is protected by use and derivative use immunity: neither his testimony, nor any evidence derived (directly or indirectly) from it, can be used as evidence against him in criminal proceedings. The prohibition on use is total. The testimony cannot, for example, be used as a basis to commence an investigatory enquiry. *Kastigar* also espouses a test by which the protection is enforced: the Government bears the burden of proving that all the evidence it proposes to rely upon was derived from legitimate sources, wholly independent from the compelled testimony. The burden is significant and must be proved by a preponderance of the evidence (in UK terms on the balance of probability).

In the present case, the Appeal Court reversed the District Court's conclusion that the Government had met its Kastigar burden. It emphasized that the presence of evidence which corroborated Robson's account was insufficient to meet the applicable standard.[6] Instead the Government was required to prove that Robson's exposure to the compelled testimony had not shaped, altered or affected the information he had provided and which the Government had used. Such an analysis could be conducted effectively where a witness' testimony is memorialized (or "canned") prior to their exposure to any compelled statements.[7]

Here, Robson had himself provided testimony to the FCA prior to exposure. Far from assisting the Government, a comparative analysis of Robson's accounts (his compelled statement to the FCA and his trial testimony) revealed marked discrepancies. Furthermore, the level of material exposure appeared substantial, the Government accepted that many of the topics discussed by Robson in his testimony also featured in the Defendants' compelled statements. Notwithstanding this Robson had not claimed, at any stage during his testimony, that he could 'segregate the effects of his exposure'.[8] These findings, and other aspects of Robson's evidence, undermined any suggestion that Robson's exposure to the Defendants' compelled statements had not shaped, altered or affected his own testimony. The Appeal Court held that generalized and self-serving denials of any taint was an inadequate basis on which the Government could satisfy its burden under *Kastigar*.[9]

It remains to be seen how often foreign compelled testimony will give rise to a *Kastigar* motion in US criminal proceedings. This decision of the Appeals Court makes it more incumbent on US Federal agencies to interact closely with foreign governments and to coordinate cross-border investigations at their outset. Where a *Kastigar* claim can be foreseen the US prosecuting authority will need to consider how it can protect against potential witnesses being exposed to the compelled testimony of a suspect / defendant. Where a risk of exposure still exists, for example through the imminent publication of compelled testimony, the authority will need to move quickly in order to memorialize a witness' account.

David Rundle is a senior associate in WilmerHale's London office. He has been called to the Bar of England and Wales and has been admitted to the New York Bar. He previously worked in the Enforcement Division of the Financial Conduct Authority.

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[1] www.pbwt.com/content/uploads/2017/07/USA-v-Allen.pdf

[2] *Kastigar v. United States*, 406 U.S. 441 (1972)

[3] See pages 35-38 of the decision.

[4] See pages 54-5 of the decision.

[5] See Global Investigations Review, 19 June 2017- '*DOJ pursues ex-Autonomy director's compelled testimony*'.

[6] See pages 60-1 of the decision.

[7] See pages 61-2 of the decision.

[8] This formulation was taken from the case of *Poindexter*, 951 F.2d at 376.

[9] See page 63 and 70 of the decision.